COMMISSION OF INQUIRY INTO THE CAMP STREET PRISON DISTURBANCES AND SUBSEQUENT DEATHS (PRISONCOM)
SECRETARIAT
Ministry of the Presidency
Public Service Commission Boardroom
Georgetown
Republic of Guyana

DOCUMENT BRIEF OF THE GUYANA PRISON SERVICE

MAY 06, 2016

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[FROM THE COURT OF APPEAL, ENGLAND]

BROWNE *v.* DUNN

1893, *November* 28

Defamation – Privilege – Solicitor and Client – Retainer – Malice – Practice – Evidence – Cross-examination of Witness – Point not raised at Trial argued on Appeal.

If a solicitor reasonably believes that his services may be required by a possible client who does afterwards retain him, all communications passing between the solicitor and the client, leading up to the retainer and relevant to it, and having that, and nothing else, in view are privileged.

If the retainer is a genuine proceeding, the fact that the solicitor is not well disposed to the person said to be defamed is not evidence of malice.

Per Lord Bowen: Whether, when a professional relation is created between a solicitor and a client, and communications pass between the solicitor and the client with reference to the prosecution of a third person, or with reference to proceedings being taken against him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, provided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. *Quare.*

If in the course of a case it is intended to suggest that a witness is not speaking the truth upon a particular point, his attention must be directed to the fact by cross-examination showing that that imputation is intended to be made, so that he may have an opportunity of making any explanation which is open to him, unless it be otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of his story or (*per* Lord Morris) the story is of an incredible and romancing character.

If one party at a trial deliberately elects to fight one question on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence.

Martin v Great Northern Railway[1] approved.

APPEAL from the judgment of the Court of Appeal ordering that a verdict for the plaintiff be set aside and that judgment be entered for the defendant.

The action was brought by the appellant against the respondent, who is a solicitor, for a libel contained in the following document, which the respondent had drawn up by his clerk and had

[1] 16 C.B. 179; 24 L.J.C.P 209; 3 W.R. 477.

exhibited to the persons who signed it, for the purpose of obtaining their authority to take proceedings against he plaintiff:–

> "TO MR. CECIL W. DUNN,
>
> "The Vale, Hampstead.
>
> "We, the undersigned residents in the Vale of Health, Hampstead, N.W., hereby authorize and request yon to appear before the magistrates sitting at the Hampstead Police Court on Wednesday, the 5th day of August, 1891, and apply, on our behalf, respectively, in whatever way may seem proper and best, against James Loxham Browne, of Woodbine Cottage, The Vale, Hampstead, for a summons and order *that the said James Loxham Browne, for the reason that he has continuously for many months past, both by acts and words, seriously annoyed us, and each of us, and other residents in the Vale aforesaid, whereby he has endeavoured to provoke a breach or breaches of the public peace or whereby a breach or breaches of the public peace has been in danger of being committed.* That the said James Loxham Browne be bound over for such time as the said magistrates shall think fit, to keep the peace, or for such other order as the said magistrates shall deem proper to make."

The document was dated 4 August, 1891, and was signed by the following persons: Samuel Hoch, S. Jones, E. Cooke, George McComhie, Thomas Henderson, William Schröder, Benjn. Paine, R. Henderson, H. King.

At the time this document was made the defendant and plaintiff were not on friendly terms, and the defendant knew that two summonses were to be heard the next morning before the local magistrates, one taken out by the plaintiff against Paine, one of the above signatories, for assault, the second taken out also by the plaintiff against Mrs. Hoch, the wife of another signatory, for abusive language. On the morning appointed for the hearing of these summonses, and before the hearing, the defendant mentioned his application to the magistrates, but, at their request, postponed it until the summonses had been heard, and, on the hearing of a cross-summons by Paine, the plaintiff was bound over to keep the peace.

The plaintiff subsequently discovered the document and brought, or threatened, actions of libel against all the parties to it.

At the hearing of the action against the defendant, which was tried before Mathew, J., it appeared that S. Jones and E. Cooke were a mother and daughter living together, and that Mrs. Jones, the mother, had died before the trial. Mrs. Cooke gave evidence for the plaintiff. All the rest of the signatories, except H. King, who was not called, gave evidence for the defendant.

At the trial, in the language of Lord HERSCHELL, the case made on behalf of the plaintiff appears unquestioningly to have been this, that the whole thing was a sham, that Mr. Dunn did not draw up this document having information that people had this ground of complaint, and would desire to retain him as solicitor; but that it was a gratuitous affair, and merely carried out, without any honest or legitimate object, for the purpose of annoyance and injury to Mr. Browne.

The rest of the signatories who were called gave evidence which showed that they really had employed the defendant. McComhie and Hoch, whose evidence is set out in Lord HALSBURY'S judgment, were not cross-examined as to the merits of the various quarrels they had had with the plaintiff. The only evidence as to King was that he had signed the document.

The jury found a verdict for the plaintiff, and assessed the damages at 20*l*.

The defendant appealed. The Court of Appeal set aside the verdict and entered judgment for the defendant. From this judgment the plaintiff now appealed.

Willis, Q.C. and *Blake Odgers, Q.C.* (*Lincoln Reed* with them) for the plaintiff, in support of the appeal, urged that the document was really a sham, that it was not couched in ordinary language, and contained much that was unnecessary, and on this point they particularly complained of the words printed in italics in this report.

That the document was not privileged, because the fact that each person to whom it was shown signed it eventually was immaterial. Even supposing that all the persons signing knew what the document was, and desired thereby to retain the defendant to apply on their behalf for a summons against the plaintiff, that was not a

circumstance rendering the publication privileged, as the relation of solicitor and client must exist at the moment of publication between the publisher and the person to whom the publication is made.

The unnecessary words were inserted maliciously.

Murphy, Q.C., and *Hugh Fraser*, for the respondents, were not called upon.

LORD HERSCHELL, L.C.: [after reading the document, stated the facts from which it arose, and said that it was hopeless for the appellant to contend, with regard, to the six signatories who had given evidence for the defendant, that the document was not perfectly genuine, drawn up in a perfectly legitimate way, and really intended by the parties to be what it appeared on the face of it to be. On this subject his Lordship added:]

These witnesses all of them depose to having suffered from such annoyances; they further depose to having consulted the defendant on the subject, and to having given him instructions which resulted in their signing this document; and when they were called there was no suggestion made to them in cross-examination that that was not the case. Their evidence was taken; to some of them it was said, "I have no questions to ask;" in the case of others their cross-examination was on a point quite beside the evidence to which I have just called attention.

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but

is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.

It seems to me, therefore, that it must certainly be taken that these witnesses, whether they were exaggerating somewhat Mr. Browne's acts towards them or not (that is immaterial), were telling the truth when they said, "We did bring before Mr. Dunn the fact that we had these causes of complaint;" – that at all events was the impression which they produced on his mind; – "we did consult him about them, we did want him to act for us, and we did sign this document because we wanted him to act for us."

Now, my Lords, as regards all these persons, except the three whom I will deal with presently, the case is all one way. Having regard to the conduct of the case, it was not open to the learned counsel to ask the jury to disbelieve all their stories, and to come to the conclusion that nothing of the kind had passed. If that is so, there is an end of the case so far as it rests upon the whole of this transaction being a sham, and we start with this, that, as regards all these persons except three, it was a genuine transaction, because their solicitor was really asked to act by people who really felt themselves aggrieved.

Now my Lords, how is it possible to dispute that a communication of that sort was privileged. It seems to me, further, that there

is no evidence of malice, because malice means making use of the occasion for some indirect purpose, that the transaction was not genuine, and was not really directed to that to which it appeared to be directed.

Now it has been ingeniously argued that, as regards these persons, this document was shown to them before they signed it, and therefore before they retained Mr. Dunn; that at that time he was not acting as their solicitor, and that therefore, although it was shown to them with a view to his acting, and although it resulted in their retaining him to act, yet there was a publication before any such relation existed between them. My Lords, of course that would not be true as regards the first signatory, and I refer to that because, as I threw out in the course of the argument, I am by no means prepared to adopt the view that was suggested and was said to extend even to the case of a shorthand writer, that a person to whom another communication by word of mouth defamatory matter, and who wrote it down and merely handed it back to the person who made the communication, would by so doing publish the defamatory matter. I am not prepared, as at present advised, to lay down such a proposition.

But then it is said, as regards all except the first signatory (and no doubt with more plausibility in their case), that the document was shown signed already by certain people and that when so shown at that moment there was publication, and at that moment there could be no privilege. Now, my Lords, I will assume that showing it under those circumstances was sufficient publication; but I cannot for a moment accede to the argument that the occasion was not a privileged one. I do not think that it was a point taken at the trial, because, as I say, the only point taken at the trial, as far as I can see, was that the whole thing was a sham; but it seems to me that when communications pass between a solicitor and those who he reasonably believes will desire to retain him, and to whom he makes a communication in relation to that, and who do retain him, the whole of those communications leading up to the retainer and relevant to it, and having that and nothing else in view, are privileged communications, that the whole occasion is throughout privileged. There is no authority, so far as I know, to

the contrary, and it seems to me that to lay down any other doctrine would be very gravely contrary to the public interest. Therefore, my Lords, as regards this transaction the occasion appears to me to have been very clearly privileged, and I can see no evidence of malice. If the occasion was privileged in the sense to which I have alluded, and if the transaction was a genuine one, and what passed between people who were really desirous of retaining a solicitor, and that solicitor was retained, it seems to me that the fact that that solicitor was not particularly friendly in his disposition towards the person against whom proceedings were to be taken does not take away the privilege or make the action a malicious action on his part in the eye of the law.

Then it was said that the language of the document may be so extravagant and so much in excess of the necessities of the occasion that that of itself is evidence of malice. My Lords, I should not for a moment dispute that proposition; but in the present case I do not see anything in this document which was not strictly relevant to the purpose and object of the document. It may be that there were some unnecessary words in it, that a shorter form might have sufficed to serve the purpose; but the fact that the document is more full in its terms than is necessary would not in itself be any indication of malice, unless you come to the conclusion that the words are put in such a way, or have such an effect, as to point to the conclusion that they were not put in for a legitimate purpose, but were put in with the object of defaming the plaintiff. I can see no evidence of that kind here.

Now, my Lords, I for my own part conceive that when once that conclusion is arrived at there is an end of the case; because I do not think that any separate case was made at the trial as regards showing the document to Mrs. Cook, Mrs. Jones or Mr. King. Nevertheless, that point having been made here, I will deal with it and will sat a few words upon it. As regards Mr. King, I will dismiss it at once; I see nothing in the point as regards Mr. King. All that we know with respect to Mr. King is that on the morning of the trial, or rather of the proposed application to the magistrates, Mr. King signed this document at Court. There is no suggestion that his reason for signing it was not that he was anxious to retain Mr. Dunn. There is no evidence that he had never

previously made any complaints or that he had not been a person who to Mr Dunn's knowledge would be likely to sign such a document, because he had represented himself as an aggrieved person. Having no evidence of that, we must take the document and the signature; and I cannot see the slightest ground for supposing that Mr. King's position is in the least different from that of the other signatories.

As regards Mrs. Cook and Mrs. Jones, we have certain facts proved by Mrs. Cook. Mrs. Cook's case, as stated in her evidence, is that she did not know what was in this document at all, that she never read it, that something was said to her about Mr. Browne, but that as to the terms of the document and as to her assenting to them she did not assent to them because she did not read them. As regards Mrs. Cook's case, I confess that the dilemma seems to be complete. If she read this document and signed it, she has not even herself said that she did not mean what she signed. Her only case is that she did not read it. If she signed it, she must be taken to have understood it, and to have meant what she said. If she did not read it, then there was no publication. Therefore it seems to me that, as regards her case, there is this absolute dilemma: either it was not published to her, or if it was published to her, she is in exactly the same position as the other signatories, and she is not a person who can be regarded as a stranger to the entire transaction, because she herself admits that she had brought it home to Mr. Dunn's mind, not that she had been annoyed – she will not use that word – but that she had been at least worried, because she had informed the neighbours that Mr. Browne had been in the habit of haunting her house, and she thought that it might prejudice her if her lodgers came to know of it. Therefore it is natural, as it seems to me, and in no way improper, that Mr. Dunn having had that communication from her, and finding that other people thought that the nuisance had grown too intolerable to be submitted to, he should go to see Mrs. Cook to ascertain whether she also would desire to put the matter into his hands, and to have the same steps taken. In that view of the case, as regards Mrs. Cook, it seems to me that there is either no publication, or that her case is the same as that

of the other signatories with whom I have already dealt. And so as regards Mrs. Jones. We do not know the circumstances under which Mrs. Jones signed. She was the mother of Mrs. Cook, and living in the same house she would be certain to go and talk to her daughter about it; and, if she was confined to the house, she was at least as likely as any other inmate of the house to be annoyed. Under those circumstances she signs this document, and I say that she must be taken to have intended Mr. Dunn to act for her. What passed in relation to her signing the document was strictly confined to matter relevant to the question of her employing him, as others had employed him, to act for her on account of Mr. Browne's proceedings.

Therefore, my Lords, I cannot see anything here to entitle the plaintiff to rest his case upon the transactions with Mr. King, Mrs. Cook, and Mrs. Jones, unless it be a fact which would eat away the whole foundation for his case by showing that there was no publication.

Under the circumstances, I submit to your Lordships that the judgment appealed from ought to be affirmed and the appeal dismissed.

Lord HALSBURY: My Lords, I am entirely of the same opinion. [His Lordship then referred to a misdirection by the learned Judge at the trial, which does not call for report, and continued:]

My Lords, I cannot but think that this case, although the amount involved is small, raises very important questions indeed. Amongst other questions, I think it raises a question as to the conduct of the trial itself, and the position in which people are placed, when, apart altogether from the actual issues raised by the written pleadings, the conduct of the parties has been such as to leave one or more questions to the jury, and those questions being determined, they come afterwards and strive to raise totally different questions, because, upon the evidence, it might have been open to the parties to raise those other questions.

My Lords, it is one of the most familiar principles in the conduct of causes at Nisi Prius, that if you take one thing as the question to be determined by the jury, and apply yourself to that one thing, no Court would afterwards permit you to raise any other question. It

would be intolerable, and it would lead to incessant litigation, if the rule were otherwise. I think *Dr. Blake Odgers* has, with great candour, produced the authority of *Martin v. Great Northern Railway*[2], which lays down what appears to me to be a very wholesome and sensible rule, namely, that you cannot take advantage afterwards of what was open to you on the pleadings, and what was open to you upon the evidence, if you have deliberately elected to fight another questions, and have fought it, and have been beaten upon it.

My Lords, so far as regards the conduct of the trial, it appears to me that nothing could be stronger than what the learned Judge himself said at the very commencement of his remarks in the presence of learned counsel, who, if it was not accurate, were bound then and there to intervene and say so. The learned Judge says at the commencement of his summing up, after he had introduced the facts to the jury: "We have to deal with the law in this matter, and the case is fairly put by *Mr. Willis* in the only way in which he could out it. He cannot ask you to treat this as a libel, unless you are satisfied that the whole thing was a sham got up by the defendant for the mere purpose of disparaging the character of the plaintiff." My Lords, after that statement by the learned Judge, which is at the commencement of his summing up, the learned counsel, not intervening at all, but allowing the learned Judge to leave that as the one question to the jury, it appears to me that it is absolutely hopeless, in any other Court, afterwards to attempt to raise any other question than that which the learned counsel deliberately elected to allow the learned Judge at all events to leave to the jury as the only one which was to be put to them.

My Lords, with regards to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not

[2](1855) 16 CB 179; 139 ER 724.

one question has been directed either to their credit or to the accuracy of the facts they have deposed to. In this case I must say it would be an outrageous thing if I were asked to disbelieve what Mr. Hoch says, and what Mr. McCombie says, after the conduct of the learned counsel when they were examined at the trial. Mr. George McCombie is called and asked: "(Q.) Did you give him any instructions? – (A.) I said, could nothing be done to prevent Mr. Browne annoying us as he was every night? (Q.) Did you receive advice from him as to what could be done ? – (A.) Yes. (Q.) Will you look at this document? Is that your signature? – (A.) (Looking at the document.) Yes, sir. (Q.) Was that document brought to you by Mr. Dunn? – (A.) I went round to his house. (Q.) There you saw the document. Did you read it? – (A.) I did. (Q.) And signed it? – (A.) Yes, I signed it. (*Mr. Willis*.) I have nothing to ask you." My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

My Lords, the same course was pursued with regard to Hoch. He says: "Ever since the year 1888 he has constantly annoyed and insulted me, but only when there were no witnesses by – when I have been walking quietly out. He has sneered, grunted, sputtered, and occasionally burst into a brutal guffaw. That has been going on until the time when he was bound over to keep the peace, when it ceased. But since that time he has tried to resume these performances, only for a whole years and more I have persistently avoided meeting him, and so I have not given him any opportunity of insulting me. (Q.) Did you give instructions to Mr. Dunn to act for you. – (A.) On that account. (Q.) That was before the month of August, 1891? – (A.) I forget the date. (*Mr. Willis*) I have nothing to ask you, sir." Therefore, here are two witnesses, who may be taken as examples of others, as to both of whom it cannot be denied that, if their evidence is true, they went to Mr. Dunn and

gave him instructions, and that the retainer was drawn up for the purpose of embodying the authority to Mr. Dunn to act. Under those circumstances what question of fact remains? What is there now for the jury after that? If *Mr. Willis* admits before the jury – as I say, by the absence of cross-examination, he does admit – that these statements are true, what is there for the jury? It is impossible, as it seems to me, therefore, to dispute for a moment that, in the manner in which this cause was conducted, that absolutely concluded the question. [His Lordship then expressed concurrence with the Lord Chancellor's view as to the signatories who had not been called.]

Now, with all the materials before us, what has been suggested as otherwise than proved by these facts? As I have already said, the conduct of the cause seems to me to amount practically to an admission that there was, I will not call it a retainer, but an employment, of Mr. Dunn; I will not use any technical phrase, because I think *Mr. Willis*, rightly enough, abandoned any argument derived from any particular force in the word "retainer," and used the word "employment." I think there was an employment, because those witnesses, if they speak truly, did employ Mr. Dunn to do the thing he did, and he did nothing but what he was employed to do, and if so, then, as *Mr. Willis* very candidly admitted yesterday, if he was really employed, there was an end of the case. That was the question on which the whole case turned at the trial, and if your Lordships be sending it to be tried again with the direction to the Judge that he must not, upon this evidence (for that is the test which we must apply, not upon any new evidence, but upon this evidence), leave the question of malice to the jury. I am of the opinion that, if he did that, he would do wrong. That there was actual employment was admitted at the trial, because the learned counsel for the plaintiff refused to cross-examine the witnesses, who proved that which, if proved and correctly stated, did amount to employment.

Therefore, my Lords, I entirely concur in the motion that this appeal be dismissed.

Lord MORRIS: My Lords, I entirely concur with the judgment of

the Lord Chancellor and of my noble and learned friend opposite. There are only one or two points upon which I should like to offer a few observations.

In the first place, it appears to me that the learned Judge put the real question to the jury as to whether this alleged employment of Mr. Dunn was a real and *bona fide* employment, or an unreal and sham employment in order to enable him maliciously to libel the plaintiff. That appears to me to have been the point which was put by the learned Judge, and it appears to me to have been the point upon which the whole trial went, and upon which the trial properly went, because, when one publication is proved that goes to the root of the entire controversy: the question was, was the employment a real one? If so, Mr. Dunn was privileged. If it was an unreal one, he had no privilege – the whole thing was a sham and he was acting maliciously.

My Lords, there is another point upon which I would wish to guard myself, namely, with respect to laying down and hard-and-fast rule as regards cross-examining a witness as a necessary preliminary to impeaching his credit. In this case, I am clearly of the opinion that the witnesses, having given their testimony, and not having been cross-examined, having deposed to a state of facts which is quite reconcilable with the rest of the case, and with the fact of the retainer having been given, it was impossible for the plaintiff to ask the jury at the trial, and it is impossible for him to ask any legal tribunal, to say that these witnesses are not to be credited. But I can quite understand a case in which a story told by a witness may have been of so incredible and romancing a character that the most effective cross-examination would be to ask him to leave the box. I therefore wish it to be understood that I would not concur in ruling that it was necessary, in order to impeach a witness's credit, that you should take him through the story which he had told, giving him notice by the questions that you impeached his credit.

Lord BOWEN: [His Lordship agreed that the case made at the trial seemed to have been that there had been no genuine employment of the defendant, and that the document was a sham concocted for the purposes of malice; that the verdict, if supported, could only be supported on that ground: but that, on the evidence of six of the

signatories, taken in conjunction with the evidence of Mrs. Cooke, it was impossible to deny that there had been a real and genuine employment of the defendant; and that on the issue so presented to the jury judgment must be entered for the defendant. His Lordship added:] And I think, as the Lord Chancellor and my noble and learned friends who have preceded me have said, that it would be *pessimi exempli*, and contrary to all one's experience at Nisi Prius, and contrary to the best interests of justice, if a plaintiff, who had obtained a verdict from a jury upon one issue which he had presented to them, were allowed to sustain it by fishing out various causes of action, which he had not presented to the jury, and upon which their verdict was not asked for, and upon which damages unquestionably were not given. [His Lordship added that, although this was enough to end the case, he would consider the reasons which it was urged might sustain a verdict, though not the one given by the jury. He expressed concurrence with the Lord Chancellor as to the signatories who had not given evidence for the defendant, and continued:] I myself have no doubt at all, in the absence of authority, that if a solicitor has reason to believe that his services may be required by a possible client who does afterwards retain him, what passes between the solicitor and the client on the subject of the retainer, and relevant to the retainer, is covered by professional privilege.

Then it is said that there is some evidence of malice which would oust that privilege, if the privilege exists. With reference to that I have only two observations to make. The first is, that I entirely concur with what the noble and learned Lords who have preceded me have said. I can find no scintilla of evidence which would justify a jury in finding malice so as to oust that privilege.

My Lords, there is another and more serious point, a point of law, which I desire to keep open so far as my opinion is concerned. I very much doubt whether, when a professional relation is created between a solicitor and client, and communications pass between the solicitor and the client with reference to the prosecution of him, the fact that the solicitor is animated by malice in what he says of the third person would render him liable to an action, pro-

-vided he does not say anything which is outside what is relevant to the communications which he is making as solicitor to his client. I very much doubt whether malice destroys that kind of privilege unless it is shown that what passed was not germane to the occasion. But it is not necessary to decide that point, for it does not arise here. I only desire to keep it open in case it should arise in some other case.

Ordered, that the judgment appealed from be affirmed and the appeal dismissed with costs.

Solicitors: *White & De Buriatte*, for the Appellant.
Newson & Dunn, for the Respondent

Case Name:

R. v. Aziga

Between
Her Majesty the Queen, Respondent, and
Johnson Aziga, Applicant

[2008] O.J. No. 3052

Court File No. 07/1122

Ontario Superior Court of Justice

T.R. Lofchik J.

Heard: June 18-20 and July 2, 3, 22 and 23, 2008.
Judgment: August 5, 2008.

(62 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against cruel and unusual punishment -- Application by Aziga for a determination that the conditions of his pre-trial detention violated his right to be free from cruel and unusual punishment dismissed -- Aziga's medical isolation was necessary to protect others -- Also, Aziga received appropriate medical care and remained in reasonable health -- Furthermore, the staff of the correctional facility consistently attempted to facilitate Aziga's trial preparation -- Therefore, Aziga failed to establish that his detention conditions were so excessive as to constitute cruel and unusual treatment or punishment -- Canadian Charter of Rights and Freedoms, 1982, s. 12.

Criminal law -- Prison administration -- Conditions and treatment -- Application by Aziga for a determination that the conditions of his pre-trial detention violated his right to be free from cruel and unusual punishment dismissed -- Aziga's medical isolation was necessary to protect others -- Also, Aziga received appropriate medical care and remained in reasonable health -- Furthermore, the staff of the correctional facility consistently attempted to facilitate Aziga's trial preparation -- Therefore, Aziga failed to establish that his detention conditions were so excessive as to constitute cruel and unusual treatment or punishment -- Canadian Charter of Rights and Freedoms, 1982, s. 12.

Application by Aziga for a determination that the conditions of his pre-trial detention violated his right to be free from cruel and unusual punishment. Aziga was charged with two counts of first degree murder and 11 counts of aggravated sexual assault after having unprotected sex with several women

without disclosing his HIV-positive status. Aziga was placed in custody in a maximum security provincial remand facility to await his trial. During his admission process, Aziga formally requested protective custody and expressly acknowledged that certain benefits and privileges normally available to the general population would potentially not be available to him. Subsequently, Aziga was placed in protective custody and remained there by his own choice. After two altercations in which Aziga intentionally bit another inmate, he was placed in close confinement. Aziga took the position that the conditions of his detention and a lack of proper medical treatment constituted a violation of his rights under section 12 of the Charter.

HELD: Application dismissed. While Aziga's altercations were not disproportionately excessive, his medical isolation was a necessary precaution in order to protect others. Also, the altercations and issues arose from interpersonal conflicts rather than any stigmatization resulting from his HIV status. In addition, Aziga received reasonable and appropriate medical care and remained in reasonable health. Furthermore, the staff of the correctional facility consistently attempted to facilitate Aziga's access to disclosure and his trial preparation. Therefore, Aziga failed to establish that his detention conditions were so excessive as to constitute cruel and unusual treatment or punishment.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 12

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 522

Counsel:

Timothy K. Power and Karen A. Shea, for the Respondent.

Michael T. Doi, for Attorney General of Ontario.

Jinan Kubursi, for Ministry of Community Safety and Correctional Services.

Davies Bagambiire and Selwyn **Pieters,** for the Applicant.

REASONS FOR JUDGMENT

1 **T.R. LOFCHIK J.**:-- The Applicant Johnson Aziga is charged with two counts of first degree murder in connection with the deaths of two women who died of AIDS related complications after allegedly having unprotected sex with him. He also stands charged with 11 counts of aggravated sexual assault after allegedly failing to disclose his HIV positive status to his sexual partners, of whom 7 became HIV positive. The offences involved a total of 11 named complainants and are alleged to have been committed between June 1, 2000 and August 30, 2003.

2 On or about August 30, 2003, the Applicant was arrested and placed in custody at Hamilton-Wentworth Detention Centre, a maximum security provincial remand facility operated by the Ministry of Community Safety and Correctional Services of Ontario, where he is currently detained and awaiting his criminal trial.

3 In this application the Applicant is asserting that the conditions of his pre-trial detention violate his right to be free from cruel and unusual treatment and punishment, contrary to Section 12 of the

Canadian Charter of Rights and Freedoms (the "Charter"). More specifically the Applicant asserts a violation under Section 12 rights based on conditions of detention and lack of proper medical treatment.

4 The Applicant has raised a litany of complainants relating to his detention at the Hamilton-Wentworth Detention Centre. Basically they related to his treatment at the Detention Centre and the healthcare he has received.

5 He has alleged lengthy periods of segregation confinement and alleges that he has been stigmatized by both other inmates and staff as a result of his HIV status and the charges which he faces.

6 The medical issues relate to having been double celled with an inmate the accused alleges had full blown AIDS, missed medical appointments, lack of proper vitamins, missed medication and care recently given with respect to a skin rash from which the accused suffered.

FACTS

7 The Hamilton-Wentworth Detention Centre is a maximum security provincial detention centre located in the City of Hamilton. The institution provides custody for up to 402 adult males. Most inmates are housed in "double bunked" cells (i.e. rooms each featuring two bunks mounted on the wall, a toilet and sink unit and a window to the outside with each room having dimensions of approximately 8 feet by 10 feet). There are also dormitory units (i.e. featuring 12 bunks and several dining table type configurations in a open concept setting with a shower and washroom area), the segregation unit (i.e. featuring 12 "single bunked" cells), and a special needs unit (i.e. featuring 10 single bunked special needs cells).

8 The Applicant has spent the majority of his time as a remanded inmate (i.e. a person in custody awaiting the disposition of his criminal charges) at the Hamilton-Wentworth Detention Centre since his admission to custody on August 16, 2003. Since his criminal charges are before this court in Hamilton, an operational decision was made to primarily house the Applicant at the Hamilton-Wentworth Detention Centre to facilitate his access to court and to counsel. As well, the Applicant resided in the Hamilton community prior to his admission to custody.

9 Upon his admission to the Hamilton-Wentworth Detention Centre on August 31, 2003 the Applicant made request for a protective custody placement because of the nature and seriousness of his criminal charges that placed him at risk if housed in the general population.

10 During the admission process, the Applicant signed a "protective custody decision" form to formally request a protective custody placement within the institution, and on the form expressly acknowledged his understanding that: "(A) some benefits, privileges and programs normally given to general population inmates may not be available to me for practical reasons, the details of which have been explained to me; (B) present and future classification decisions may be affected by my protective custody placement; and (C) my protective custody placement may be reviewed at a later date".

11 Aside the Applicant's initial request for protective custody, and his subsequent statements affirming his desire to continue to be housed in a protective custody unit, Deputy Superintendent Beecroft a Senior Corrections Official at the Hamilton-Wentworth Detention Centre, testified that the Applicant's placement in protective custody was appropriate from a corrections management perspective given the nature and seriousness of his criminal charges, the sexual nature of the alleged offences (that can often lead to issues with being accepted by other inmates in the general population) and the media coverage of his case.

12 In the result the Applicant was assigned to protective custody which remains his current inmate classification at the Hamilton-Wentworth Detention Centre. Generally protective custody units share the same basic physical layout and daily routine as a general population unit (i.e. protective custody inmates generally congregate in a central room during the day and at night return to their adjoining cells where they are bunked, usually with two inmates assigned to each cell). Access to the day rooms and the degree to which inmates associate with their peers depends on the circumstances of each particular unit at any given time.

13 Within several days of his admission and placement in a protective custody unit at the Hamilton-Wentworth Detention Centre (indicated as unit 3B on his housing location history), the Applicant was reassigned to a "special living unit" (unit 2B on his housing location history) to better ensure his ongoing safety after operational concerns arose with respect to his placement in the protective custody unit. The decision to transfer the Applicant was justified as a measure to best ensure his safety. At the time and subsequently in January 2004 and thereafter, the 2B Special Living Unit housed inmates in protective custody who, for various reasons, had experienced difficulty functioning in the regular protective custody unit. For that reason, 2B inmates did not access the day room as an integrated unit, but instead were allowed the day room for shorter periods of time throughout the day in small numbers based on operational assessment by the correctional staff. This structured routine offered a more stable and controlled environment to better protect the Applicant.

14 In or around September 2005, the Applicant was transferred briefly to Brantford jail. This transfer was intended to place him a different institution where he would be less likely to be known by other inmates and therefore better able to integrate himself in a safer and less restrictive environment. After a brief period of approximately one month, the Applicant returned to Hamilton-Wentworth Detention Centre.

15 In or around January 2006 the Applicant was transferred to Elgin-Middlesex Detention Centre for several months, again for the purpose of placing him in a different inmate community with less media coverage of his criminal matter. It was hoped that the Applicant would have a lower profile and therefore have a better opportunity to integrate himself within the normal protective custody inmate population at Elgin-Middlesex Detention Centre.

16 On September 5, 2006, the Applicant returned to Hamilton-Wentworth Detention Centre and was placed in the segregation unit (unit 2A on his housing location history) for approximately one week before being transferred to a protective custody unit (unit 3C on his housing location history) where he has remained since that time.

17 While it is open to the Applicant to ask to be removed from protective custody and to be placed in the general population, he potentially faces a greater risk of injury if he does so. To date the Applicant has elected to remain in protective custody.

18 The Applicant has never applied to the Superior Court of Justice for judicial interim release pursuant to Section 522 of the Criminal Code of Canada.

19 From time to time, the Applicant was single housed (i.e. without a cell mate) in a protective custody cell. On occasion this occurred when it was operationally determined that no other compatible inmates could share the cell with him. As such, the Applicant was not assigned a cell mate for safety reasons. In other instances, correctional staff accommodated the Applicant's request for a single cell (e.g. for privacy in order to review court materials).

20 The Applicant has focused on two physical altercations in asserting his Section 12 Charter challenge to his conditions of detention. In both incidents, the Applicant intentionally and purposely bit another inmate. On both occasions, concern was expressed with respect to the possibility of an HIV transmission to other inmates.

21 It was argued on behalf of the Applicant, that even though he was not the aggressor in both of these altercations, he was disciplined by way of close confinement as a result of his involvement in the altercation. This was explained by detention centre officials as necessary in order to maintain a zero tolerance policy with respect to physical altercations in the institution so that it is common for both participants in any altercation to be disciplined. This reflects an operational safety policy that is intended to promote a non-violent environment and protect inmates and staff within the institution.

22 On December 26, 2007, following the second altercation where the Applicant bit another inmate a healthcare unit physician ordered the Applicant to be medically isolated and placed in close confinement. The physician advised operational staff in writing that the Applicant was medically isolated and not permitted out in the day area with other inmates. Dr. Grewal, a physician at the Detention Centre testified that this medical isolation was a necessary and appropriate public health measure to protect others and avoid the spread of HIV. It was Dr. Grewal's evidence that the Applicant's practice of biting others constituted "a new - let's say weapon or way of hurting people".

23 In these proceedings, the Applicant made further reference to several other altercations with other inmates for which he was sanctioned after admitting to inmate misconduct during the institution's investigation and adjudication process for each incident.

24 On several occasions, the Applicant was sanctioned with periods of close confinement after findings were made that he had committed inmate misconduct. He served these periods of close confinement in a special living unit. Although inmates on close confinement are generally confined to their cells for most of the day (apart from periods for fresh air, lunch, showers, using the telephone and abbreviated day room time, cumulatively encompassing approximately one hour), they are able to converse with their unit peers and thereby interact with them throughout the day and retain their privileges and personal belongings.

25 On April 23, 2004, the Applicant was sanctioned with 10 days of segregation and loss of all privileges for being in possession of a weapon (i.e. a sharpened piece of plastic or "shank"). He served only an abbreviated 8 day period in the segregation unit and then returned to his special living unit on full day room privileges. He served his period of segregation in unit 2A which features an isolated and rigid restructured inmate environment in a separate part of the institution. Inmates placed in segregation lose privileges such as access to personal property, which is not the case for close confinement. For this reason time spent in segregation is viewed as being "very, very different" from close confinement time in a living unit.

26 So far as his medical condition is concerned, on August 31, 2003, the Applicant advised the healthcare unit staff of the Hamilton-Wentworth Detention Centre during his admission health assessment that he had been living with HIV since 1996. He advised that he felt well and was HIV asymptomatic.

27 At the time of his admission to custody on August 31, 2003, the Applicant reportedly refused to take a medication to treat his HIV. Approximately 17 months later, on or about January 28, 2005 he agreed to begin taking antiretroviral ("ARV") medications to treat his HIV and instructed Dr. Grewal to commence a course of therapy. ARV therapy does not provide a cure but extends life expectancy

and quality of life and also restores and preserves the immune system, and helps those living with HIV to resist other infections and stay well much longer than they otherwise would without treatment.

28 Dr. Grewal testified that by delaying his ARV therapy, the Applicant may have compromised his treatment outcome.

29 To date, the Applicant continues to remain asymptomatic of HIV, and is in reasonable overall health. He has remained medically stable throughout the course of his detention. He does not at present have any critical or acute medical concerns.

LAW

30 The Applicant bears the general onus to establish an infringement of the Charter. In bringing the challenge, he bears both the burden of proof on the evidence and the ultimate burden of persuasion with respect to the alleged Charter infringement.

Andrews v. Law Society of B.C., [1989] 1 S.C.R. 143 at 153 and 178.

R. v. Kutynec (1991), 7 O.R. (3d) 277 (C.A.) at 283.

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429 at para. 66.

31 Section 12 of the Charter provides: "everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

32 The threshold for breach of Section 12 of the Charter is high and the Applicant's onus of proving a Section 12 violation is a rigorous one. Treatment will be "cruel and unusual" in the sense contemplated under Section 12 of the Charter only if it is grossly disproportionate. It will not be enough if treatment was merely disproportionate or excessive. Instead the question is whether the prescribed treatment is "so excessive as to outrage our standards of decency."

Charkaoui v. Canada (C.I.), [2007] 1 S.C.R. 350, 2007 SCC 9 at paras. 95-96.

R. v. Smith, [1987] 1 S.C.R. 1045 at paras. 53-54.

R. v. Wiles, [2005] 3 S.C.R. 895 at para. 4.

R. v. Morrisey, [2000] 2 S.C.R. 90 at para. 26.

33 The Supreme Court of Canada has recognized that the detention context of a correctional facility is crucial in considering the nature and extent of an inmates Charter interests, and has held that these interests are necessarily informed by the inmate's institutional setting.

Weatherall v. Canada (Attorney General), [1993] 2 S.C.R. 872 at 877.

Solosky v. R., [1980] 1 S.C.R. 821 at 838-839.

34 It is recognized that the courts ought to be extremely careful not to unnecessarily interfere with the administration of detention facilities such as the Hamilton-Wentworth Detention Centre where the Applicant is currently held. Unless there has been a manifest violation of a constitutionally guaran-

teed right, prevailing jurisprudence indicates that it is not generally open to the courts to question or second guess the judgment of institutional officials. Prison administrators should be accorded a wide range of deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security.

> *Maltbey v. Saskatchewan (A.G.),* [1982] S.J. No. 871 (Q.B.) at paras. 20 and 41; appeal denied (1984), 10 D.L.R. (4th) 745 (Sask. CA).
>
> *Almrei v. Canada (A.G.),* [2003] O.J. No. 5198 (S.C.J.) at para. 18.

35 The weight of authority reveals that courts have been very reluctant to intervene in the administration of correctional and detention facilities when conditions of detention are challenged under the Charter. Although conditions of detention may have caused an individual hardship, they have not been found to meet the stringent threshold required for a violation of Section 12 of the Charter in the following cases:

> *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.) at 333-336, aff'd [1989] 1 S.C.R. 296, when it was held that long-term segregation does not constitute cruel and unusual punishment.
>
> > "I think it fair to say that the same tests applicable with respect to punishment are applicable with respect to treatment.
> >
> > The question then comes down to whether or not the continued confinement of an appellant of the appellant in administrative or protective segregation at Kingston Penitentiary is treatment that is so excessive as to outrage standards of decency.
> >
> > I think most right thinking people would agree that segregation from the general population in a prison is in the circumstances specified in the regulations necessary and acceptable."
> >
> > > *Soenen v. Edmonton Remand Centre,* [1983] A.J. No. 709 (Q.B.) paras. 27, 29-41 - prison policies and conditions do not constitute cruel and unusual punishment.
> > >
> > > *Everingham v. Ontario* (1993), 100 D.L.R. (4th) 199 (Gen. Div.) - opening of mail by correctional officials not a violation of the inmates Charter rights.
> > >
> > > *Olson v. Canada,* (1990), 39 F.T.R. 77 (T.D.) - restriction on phone calls not a violation of inmates Charter rights.
> > >
> > > *McArthur v. Regina Correction Centre* (1990), 56 C.C.C. (3d) 151 (Q.B.) at 154-157 - involuntary segregation not a Section 12 Charter violation.

R. v. Chan, [2005] A.J. No. 1118 (Q.B.) at para. 205 - time in remand not violating Section 12 of the Charter.

R. v. Sanchez, [1996] O.J. No. 7 (C.A.) - conditions of detention not violating Section 12 of the Charter.

36 It is crucial for the Applicant to support his challenge with a proper evidentiary record which is necessary and essential to a proper consideration of a Charter issue. Charter decisions should not be and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill considered opinions. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

McKay v. Manitoba, [1989] 2 S.C.R. 357 at paras. 8 and 9.

37 In balancing a private interest in solicitor client privilege and "the public interest in maintaining the security of a penal institution "that scale must come down in favour of the public safety interest. The opening of solicitor client mail and even reading if necessary is an acceptable limitation on this privilege if the interference is "no greater than is essential to the maintenance of security and rehabilitation of the inmate."

Canada v. Solosky, [1980] 1 S.C.R. 821 at 840.

38 The opening of an inmate's solicitor client mail for security reasons in the corrections context does not violate an inmate's Section 12 Charter rights.

Everingham v. Ontario (1993), 100 D.L.R. (4th) 199 (Gen. Div.).

Henry v. Canada, [1987] F.C.J. No. 307 (F.C.T.D.).

ANALYSIS

39 Some inmates who request and who require protection from other inmates may be assessed as being unsuitable for placement within the general population at the Hamilton-Wentworth Detention Centre. In those instances, the inmate is assigned a protective custody classification and housed with other inmates with similar needs in a protective custody unit that features a higher level of monitoring and supervision which affords a higher level of safety.

40 Since September 12, 2006 when the Applicant was placed in the 3C housing unit, Operational Manager Serpa regularly observed and interacted with the Applicant. Based on this, and drawing on his 30 years of corrections experience Mr. Serpa found that the Applicant was generally well integrated in the unit. He also determined that the various altercations between the applicant and the other inmates (i.e. those raised by the Applicant in these court proceedings) simply were not related to any stigmatization over his HIV status but instead were the result of interpersonal conflicts and behavioural issues that normally arise between inmates. Having regard to the duration of the Applicant's remand custody, Mr. Serpa testified that his altercations with others were "not disproportionately excessive". I accept this assessment of the Applicant's situation.

41 I find that given his HIV positive status, the Applicant's decision to intentionally and purposely bite another inmate in at least two altercations gave rise to a medical risk of HIV transmission. The rationale for medical isolation was explained to the Applicant by correctional staff around the time

the order was made and did not entail a loss of privileges for the Applicant apart from the aspect of being confined to his cell. On January 11, 2008 a healthcare unit physician assessed the Applicant for the purpose of reviewing his earlier medical isolation order. During his medical assessment the Applicant failed to provide an assurance that he would not bite again. Instead he confirmed that he was a biting risk and thereby posed a risk of HIV transmission. In the circumstances the medical isolation order was maintained and the Applicant continued to be placed in close confinement. In Dr. Grewal's professional opinion the clinical decision to maintain the Applicant's medical isolation was a reasonable and necessary precaution to protect others and I agree with this assessment.

42 Ultimately upon medical staff being satisfied that the Applicant no longer posed a biting risk, he was directed to be removed from medical close confinement.

43 As previously mentioned, the Applicant admitted each of the inmate misconduct incidents for which he was sanctioned. Notably, the Applicant did not avail himself of the opportunity to review or otherwise make formal objection to the inmate misconduct findings or sanctions despite being aware of the avenues of legal recourse to do so.

44 I am satisfied that the various altercations or issues between the Applicant or other inmates did not result from any stigmatization due to his HIV status either by correctional staff or inmates but instead resulted from interpersonal conflicts that can generally arise between inmates. The Applicant is now generally well integrated in his living unit and no recent incidents have occurred.

45 I am satisfied through the evidence of Dr. Grewal that the Applicant has received extensive medical care and treatment throughout his incarceration at the Hamilton-Wentworth Detention Centre. The Applicant regularly availed himself of medical services that are available to inmates and has shown a clear ability and aptitude to access medical care services. The Applicant has been provided with reasonable and appropriate medical care and treatment. I accept Dr. Grewal's evidence that the Applicant has received reasonable and appropriate medical care during his stay at the institutional that is comparable, if not better in some respects, to the medical care that is generally available to the community at large.

46 The Applicant has not led any medical expert evidence whatsoever in connection with the several healthcare related matters raised in bringing his Section 12 Charter challenge.

47 I am satisfied that the Applicant's health was not compromised because he shared his cell with inmate S.J. (or any other inmate) with HIV/AIDS. I accept the evidence that it is medically improbable that the Applicant's health could ever have been compromised simply because he shared his cell with S.J. It should be noted that while it is not clear from his affidavit, the Applicant shared the cell with the inmate S.J. for one night only. I accept Dr. Grewal's evidence that the inmate S.J. did not require any special accommodation for medical reasons at the time.

48 The Applicant makes some particular assertions in relation to the manner in which documents subject to solicitor client privilege have been handled by institution staff. The Ministry has a policy addressing the handling and management of disclosure material received by inmates which provides that inmates shall be permitted to examine disclosure matters in a manner that is controlled but that provides full and private access to these materials. I am satisfied that institution staff have made efforts to accommodate the Applicant's request with respect to accessing his disclosure and accessing his counsel.

49 The Applicant makes a non-particularized assertion that his doctor patient confidentially was breached by the manner in which correctional staff provided his escort to a specialist medical appointment. Given that the Applicant remains in custody when attending any medical appointments outside the institution, correctional officers must accompany him to any medical appointments for the purpose of maintaining his custody in accordance with Ministry policy.

50 I am satisfied that correctional staff have made efforts to address requests that the Applicant has made to facilitate access to counsel, to make phone calls, and photocopy documents. I have in the course of these proceedings directed that given his impending trial, the Applicant be single celled whenever possible and given as much access as possible to his materials and to his counsel with a view to preparation for trial. I understand that my directions are being followed.

51 As set out above, in certain instances the Applicant was found to have committed (and/or admitted to) an act of inmate misconduct for which he was sanctioned with of close confinement. Incidents for which the Applicant was found guilty of misconduct and sanctioned for his misbehaviour cannot possibly form the basis of a Section 12 Charter challenge. This hearing is not an appropriate forum for the Applicant to seek to overturn any earlier inmate disciplinary findings given the Ministry statutory review process for inmate misconduct matters which the Applicant has not followed.

52 In respect of the Applicant's time spent in close custody detention as a sanction for inmate misconduct, the courts generally have rejected the suggestion that this form of detention per se violates Section 12 of the Charter. The judiciary has been reluctant to second guess administrative decisions made by institutional officials of this nature, which reflect their special knowledge and expertise with matters relating to institutional safety and security.

McArthur v. Regina Regional Centre (1990), 56 C.C.C. (3d) 151.

R. v. Olson (1987), 62 O.R. (2d) 321 (C.A.) at 333-336.

53 Similarly, the decision by a physician at the institution to place the Applicant in close confinement for medical isolation purposes (i.e. to contain the risk of HIV transmission) after he bit another inmate during an altercation on December 24, 2007 warrants strong judicial deference given the physician's expertise in dealing with medical and public health issues in the institutional setting.

54 Based on the evidence before me I am satisfied that the concerns expressed by the Applicant with respect to his health and medical care received during his detention have little merit.

55 I am satisfied as a result of the evidence of Dr. Grewal in these proceedings that the Applicant has received reasonable and appropriate medical care and treatment that has been comparable, if not better in some respects to medical care that is generally available to the community at large. The Applicant has remained in reasonable health throughout his detention and continues to be medically stable. Accordingly, I find that the medical care and treatment provided to the Applicant cannot constitute a violation of Section 12 of the Charter.

56 It has been argued on behalf of the Applicant that he has a right to a single cell in order to review his disclosure material that, he has been denied access to his legal documents and some "legal research" was lost. Hamilton-Wentworth Detention Centre has a current capacity of 402 inmates housed primarily in double bunked cells and dormitories. The evidence indicates that approximately 70 percent of these inmates are in remand awaiting trial. All inmates awaiting trial have the same right to review documentary disclosure. I am satisfied that it is impossible for each inmate to have private

room or cell to do this. Nevertheless, efforts have been consistently made to allow the Applicant to access his disclosure material and I understand that pursuant to my direction he will be single celled whenever possible in order to facilitate preparation for trial.

57 The Applicant has failed to demonstrate any breach of Section 12 of the Charter with regard to his solicitor client relationship. On the contrary, evidence shows that the Hamilton-Wentworth Centre staff have consistently attempted to assist the Applicant and facilitate his access to disclosure and preparation for trial. Even though some legal research may have be "lost", I would not consider an inadvertent misplacing of documents when attempting to assist an inmate to constitute grossly excessive treatment resulting in a Section 12 Charter violation.

58 In several instances the Applicant is seeking to support his Section 12 Charter claim by relying in part on events that occurred several years ago and now being asserted, it would appear, for the first time. As a result the ability of the authorities to respond to these allegations has been prejudiced and, as well, in most instances whatever behaviour occurred has been corrected or has ceased so that at the current time it cannot form a basis for a Section 12 Charter challenge.

59 Throughout his affidavit sworn May 24, 2008, the Applicant makes bald assertions that his conditions of detention constitute cruel and unusual punishment without providing admissible evidence for these aspects of his challenge that could even remotely support a claim under Section 12 of the Charter. Many of his allegations are simply accusatory in nature and are devoid of particulars as to effectively be incapable of meaningful understanding or response. His affidavit also expresses controversial opinions that are highly speculative or contentious and seemingly unconnected to any specific evidence that is capable of properly establishing or corroborating the allegation being made. Accordingly the Applicant lacks a proper or sufficient evidentiary record to support his Section 12 challenge.

60 I am satisfied that on the evidence before the court, the Applicant has simply failed to show that the detention conditions under which he is being held are so excessive as to constitute cruel and usual treatment or punishment.

61 Detention facilities are not nice places for nice people. They are institutions for confinement of people either charged with or convicted of crimes. The Applicant is not being "punished" but simply suffering from what appear to be the inevitable inconveniences of the operation and administration of a large detention centre. His situation may not be comfortable and it may be considerably aggravated by the length of his stay but I have found in an earlier application that the delay in this case was not caused by an infringement of the Applicant's constitutional rights.

62 When all the evidence is considered either individually or cumulatively it cannot be said to "outrage" the standards of decency in the community consciousness. Accordingly this application fails to meet the test for a Section 12 Charter violation. The application is dismissed.

T.R. LOFCHIK J.

cp/e/qlaxs/qlclg/qlbdp/qljxl

2010 ONCJ 396
Ontario Court of Justice

R. v. Taylor

2010 CarswellOnt 6584, 2010 ONCJ 396, [2010] O.J. No. 3794, 90 W.C.B. (2d) 84

Her Majesty the Queen and Bryan Taylor

Melvyn Green J.

Heard: June 1 - July 29, 2010
Judgment: September 2, 2010
Docket: None given.

Counsel: E. Evans, for Crown
S. Pieters, for Defendant

Subject: Criminal; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Criminal law

VI Offences
VI.10 Assault
VI.10.d Assault with intent to resist or prevent arrest

Criminal law

VI Offences
VI.10 Assault
VI.10.f Common assault
VI.10.f.i Elements
VI.10.f.i.F Miscellaneous

Evidence

XVI Opinion
XVI.5 Opinion evidence in particular matters
XVI.5.b Identification
XVI.5.b.v Miscellaneous

Headnote

Criminal law --- Offences — Assault — Common assault — Elements — Miscellaneous

2010 ONCJ 396, 2010 CarswellOnt 6584, [2010] O.J. No. 3794, 90 W.C.B. (2d) 84

Identity of accused — While C was working security at bar, patron punched him in head — C grabbed his assailant for couple of seconds in order to look at him — Melee erupted and other security guards pushed patrons out of bar onto sidewalk — Approximately 40 minutes after C was punched, police arrived and intercepted group of patrons across street from bar — Accused was arrested and C identified him to police as his assailant — Accused was charged with assault — Accused acquitted — There was reasonable doubt as to accuracy of C's identification of accused — Crown rightly eschewed any reliance on C's courtroom identification given factors bearing on its integrity — These factors included that accused was only black person in courtroom and that C admitted he would not have been able to identify accused had he seen him on street — C's allegedly continuous observation of his assailant until point when accused was arrested did not confirm reliability of his identification — C was honest witness — However, there were two problematic junctures with respect to C's observational continuity — First was whether man C grabbed was his assailant — Second, assuming that C did grab his assailant, was whether C continuously eyeballed him for following 40 minutes — Reasons for doubt included that scene at time of assault was chaotic, that C witnessed later events at night from across crowded street, that accused was significantly taller than assailant described by C, and that C did not identify accused to police until after his arrest.

Evidence --- Opinion — Opinion evidence in particular matters — Identification — Miscellaneous

Eyewitness identification of accused by complainant — While C was working security at bar, patron punched him in head — C grabbed his assailant for couple of seconds in order to look at him — Melee erupted and other security guards pushed patrons out of bar onto sidewalk — Approximately 40 minutes after C was punched, police arrived and intercepted group of patrons across street from bar — Accused was arrested and C identified him to police as his assailant — Accused was charged with assault — Accused acquitted — There was reasonable doubt as to accuracy of C's identification of accused — Crown rightly eschewed any reliance on C's courtroom identification given factors bearing on its integrity — These factors included that accused was only black person in courtroom and that C admitted he would not have been able to identify accused had he seen him on street — C's allegedly continuous observation of his assailant until point when accused was arrested did not confirm reliability of his identification — C was honest witness — However, there were two problematic junctures with respect to C's observational continuity — First was whether man C grabbed was his assailant — Second, assuming that C did grab his assailant, was whether C continuously eyeballed him for following 40 minutes — Reasons for doubt included that scene at time of assault was chaotic, that C witnessed later events at night from across crowded street, that accused was significantly taller than assailant described by C, and that C did not identify accused to police until after his arrest.

Criminal law --- Offences — Assault — Assault with intent to resist or prevent arrest

Cellphone video contraverting officers' accounts of accused's resistance.

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s. 265(1) "assault" (a) — considered

s. 270(1)(b) — considered

Words and phrases considered

resist or prevent

[T]here is little or no reported jurisprudence respecting [s. 270(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46] which, in its entirety, reads: "Every one commits an offence who assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person". The words "resist" and "prevent" are framed disjunctively. Accordingly, the provision may well give rise to two separate offences, one of assault with the intent to resist arrest and a second of assault with the intent to prevent arrest. . . . Even if s. 270(1)(b) does not admit to this construction and, instead, describes two alternative modes of committing the same offence, it must be borne in mind that in charging the defendant the Crown has particularized the offending conduct as that of "preventing" — rather than "resisting" — a lawful arrest. These two words — "resist" and "prevent" — convey different meanings (indeed, reputable thesauruses do not advance one word as a synonym for the other: *Concise Oxford Thesaurus*, 2nd Ed., Oxford University Press, 2002; *Roget A to Z*, Harper Collins, 1994; *Canadian Thesaurus*, Fitzheney & Whiteside, 2002) and the distinction between the two may on occasion be of forensic significance. For example, it is possible for someone to assault another with an intention to resist his arrest without concurrently intending to prevent that same arrest. The converse, although theoretically possible, seems far less conceivable.

TRIAL of accused charged with assault and assault with intent to prevent arrest.

***Melvyn Green J.*:**

A. Introduction

1 The 2009 Much Music Video Awards (MMVA) ceremony was held in Toronto on June 21st of that year. A number of after-parties followed. One was at Cobra, a club on King Street in downtown Toronto. A fracas occurred in the foyer area at about 4am the following morning. Bryan Taylor, the defendant, is alleged to have punched a security guard, Victor Cid, in the course of the commotion. Sometime later he was intercepted by the police across the street from the club and, according to several police and civilian witnesses, actively resisted his apprehension. In the result, he is charged with assaulting Cid

and, in addition, with assaulting one of the officers, PC Manpreet Kharbar, with intent to prevent his lawful arrest. As the defendant was on probation on June 22nd he is also charged with non-compliance with his probation order by failing to keep the peace and be of good behaviour, a compulsory term of the order.

2 The defendant did not testify but concedes through counsel that he was subject to a probation order at the time of the alleged assaults. Two witnesses, Athanasios ("Tommy") Theodorakapoulos and Omar Grant, testified on behalf of the defence. Kharbar and two further officers (Cst. Christopher Meuleman and Sgt. Peter Wehby), were called by the Crown, as were the complainant Cid and a second security guard, Damian Porter. Grant recorded the defendant's confrontation with the police on his cellphone camera, and this videotape assumes an important role in the evidentiary landscape of this trial.

3 Contrary to the evidence of the Crown witnesses, the defendant's position, in brief, is that he did not strike or otherwise assault the complainant Cid, and although arrested by the police he never assaulted PC Kharbar or otherwise actively resisted the police efforts to arrest him. Accordingly, he cannot have violated the particularized probation condition as he at no time failed to keep the peace or be of good behaviour. The defence, then, is a denial of the *actus reus respecting* all offences and, as such, starkly focuses the necessary judicial inquiry on the credibility of the various witnesses and, as regards the alleged initial assault, the reliability of Cid's identification of the defendant as his assailant.

4 No burden rests on the defendant in regard to the issues in contest. Ultimately, it is the Crown alone who bears the onus, on a standard of proof beyond reasonable doubt, of establishing that the defendant committed the essential elements of each of the alleged assaults.

B. Evidence

(a) Overview

5 The defendant attended the after-party at Cobra about midnight with his friend. Omar Grant. They were part, if loosely, of a group or entourage associated with "J.B.", a musician who had been nominated for an MMVA award. Others in this grouping included Tommy, two of his friends and a man described as J.B.'s manager. They all went downstairs to the dance-floor level of the club where they spent the next few hours.

6 Shortly before 4am members of this group variously made their way upstairs to the ground-level foyer or lobby of the club which opens onto King Street. One of the patrons (likely J.B.) got into a fracas with one or more of the bouncers on his way out of the club. The complainant, Victor Cid, was working at the front desk in the foyer area at the time. He says the defendant sucker-punched him on the left side of his head during this disturbance. The defence evidence contradicts this allegation.

7 The defendant and Grant left Cobra and crossed King Street. Coincidentally, dozens of police officers were in the vicinity in response to a shooting incident at a nearby club. Some of these officers were alerted to the disturbance at Cobra and, according to their evidence, sought to apprehend the defendant when he was pointed out as the perpetrator of the assault on Cid. They approached the defendant, held him against a wall, and then took him to the ground where he was cuffed and then removed from the scene. No firearm or other weapon was found on the defendant. Much — but not all — of the defendant's physical exchange with the police was captured on Grant's cellphone video.

8 Many persons gathered to watch the confrontation. Some members of the crowd threw debris in the direction of the officers. In response, at least one officer drew a Taser and a second pepper-sprayed the spectators in an effort at crowd control.

9 A summary of additional salient evidence of the witnesses, in the order in which they testified, follows.

(b) Crown Witnesses

1. The Complainant Cid's Account

10 Although currently an elementary school teacher, at the time of the incident the complainant, Victor Cid, was a 30-year old student who worked security at downtown bars, as he had for the previous five or so years. He was assigned to the front desk in the foyer area at Cobra on June 21, 2009, collecting tickets as the patrons arrived.

11 One of the club's patrons, a black male, was ejected by other bouncers at around 4am. The man had a beer in one hand and a glass in the other. He was resisting his removal in the midst of a departing crowd of patrons and a couple of security guards. Cid was focused on the man being ejected. He was trying to remove the glass from the man's hand when he was suddenly punched in his left temple by a man standing in front of him and a little to his left. The blow startled Cid. He had, he said, a peripheral view of the punch and he had not seen the man who punched him until the blow landed. He did not know whether the man used his left or right hand, nor could he say what part of his hand the man used. Cid grabbed the top of the man he believed responsible for the punch and held on to him for "a couple of seconds"; he wanted to get a good look at him so could identify him in future.

12 Cid described the man who punched him as male black, wearing a baggy white top, baggy blue jeans and big white running shoes. Cid stands five foot eight and a half, and the man he held was a "slim and tall guy" who he estimated was younger and a "little bit taller" than himself. Cid did not describe the man's hair length, its style or his facial hair, if any. Nor did he mention any jewellery or other sartorial accessories or, for that matter, any distinguishing features.

13 Cid had never previously seen this man. In court, he identified the defendant as the man who punched him. Asked by Crown counsel if he could identify the man's face, Cid answered "no". Seeking to "clarify" that answer, he added:

> When you just asked me that question, if I just saw him on the street walking by, I wouldn't recognize him, but in this setting, because I know that he was the one involved, and we are sitting in court, yes, I do recognize him.

Cid is white and the defendant is black. There were no other black persons in the courtroom at the time Cid identified the defendant as his assailant other than the defendant's lawyer and a uniformed courtroom security officer. There were also no persons other than the defendant in the prisoners' box.

14 Cid said a melee erupted after the punch. He backed off and let his larger colleagues — "the big guys" — push the defendant and other troublemakers out the front door and onto the King Street sidewalk. Cid testified he kept his eye on the man he grabbed "for the entire time" and "never" lost sight of him. This man, who Cid dock-identified as the defendant, was yelling and screaming and kicking other security personnel on the sidewalk outside the club, as were a number of other patrons who had been pushed onto the street. At one point, according to Cid, the man he identified as the defendant said, "You guys don't search. How do you know we're not packing?" Cid thought the defendant was intimating that he was carrying a firearm.

15 Cid testified that some police officers arrived within five to seven minutes after he was punched. He did not know who summoned the police, but insisted he had no communication with any of them prior to the defendant's arrest. He closely watched the defendant who walked into an alley across the street with three or four others as the police appeared. Cid observed several officers intercept the group a few steps into the alley and return the defendant to King Street within a couple of seconds. One or two officers forcefully held him "up hard" against a wall on King Street while he squirmed and, according to Cid, struggled to escape. Meantime, various persons in the crowd were taking photos with their cellphones, throwing rocks at the police and shouting "police brutality", leading one of the officers to take out a shotgun and point it skyward.

16 Cid first spoke with the police after the defendant had been securely apprehended. This was "not even a minute" after the defendant was pressed against the wall. Cid approached an officer, pointed to the defendant in police custody across the street and said something like, "See that guy. He punched me and I'd like to do something about it". He then provided a statement to the officer. Cid testified he was "100% sure" the defendant was the man who punched him. Cid also maintained that he had his "eye on [the defendant] the whole time". Given the defendant's assaultive behaviour, Cid expressed surprise that he had lingered in the area long enough to be confronted by the police, adding that he himself "wouldn't have".

17 Due to a technical malfunction, Grant's cellphone video of the defendant's exchange with the police was not played during Cid's testimony.

2. Porter's Account

18 Damian Porter was an experienced security guard who was employed in this capacity at Cobra on the night of June 21st to 22nd. He was cashing-out at the downstairs bar when he received a radio call at about 3:35am alerting him to a problem at the upstairs front door. About eight to ten members of the security staff were trying to remove a group of patrons by the time he reached the foyer area. Cid, says Porter, was one of a number of bouncers who formed a "wall of security". There was some pushing and shoving in the patio area at the front of the club and he heard some patrons say they weren't searched coming into the club and uttering veiled threats such as "I've marked your face". Porter did not identify the defendant as one of the patrons vocalizing these remarks.

19 A number of those involved in the altercation crossed King Street as six to ten uniformed police officers approached. Some, Porter said, were being aggressive and one, who he did not identify, pushed an officer in his upper body with both his hands as he was confronted by the police. The pusher was then subdued by the police who took him to the ground and cuffed him from behind. The only struggle Porter observed was after the man was on the ground when he resisted being cuffed. Porter says the arrestee was one of the men security was trying to eject from the club. He described him as a dark-skinned man of about five foot ten inches. He was wearing a white shirt with a multi-coloured print, blue jeans and brown Timberland or Wallabies shoes. Porter says he got a good look at the man's face from across the street and identified him in court as the defendant. Again, other than the witness himself, defence counsel and a uniformed court officer, the defendant was the only black man in the court during this dock-identification. He was also the only person in the prisoners' box. In his initial police statement Porter had described the arrestee's height as six foot one inch; on viewing the standing defendant in the courtroom he said he was "just over six feet". (To be clear: that the defendant was the man arrested by the police is not at issue. There were no other arrests flowing from the 4am incident at Cobra.)

20 Porter did not see any rocks being thrown. He did see a police officer produce a shotgun and hold it diagonally across his chest with the barrel pointed skyward.

21 Porter was shown the cellphone video taken by Grant. He said he recognized the man being arrested by the police in the video as the defendant. He agreed that he could not see the defendant resisting or struggling with the police in the video but explained that the straggling he witnessed occurred between the images of the defendant with his hands raised and the images of him being cuffed on the ground and that this portion of the video was incompletely videotaped or blurry. He also noted that the defendant's shoes were white and that he was mistaken when he initially described them to the police as brown. The shotgun-bearing officer does not, he said, appear in the video.

3. PC Moulmein's Account

22 PC Christopher Meuleman was one of a number of officers who responded to the reports of a fracas at Cobra. He was alerted to the problem at about 4:35am. Meuleman was one of many police officers who had been at a nearby club, the Century Room, for hours while responding to a gun call. As he walked along King Street to Cobra he was approached by persons who identified themselves as members of the Cobra bar staff. They advised him that they had been threatened by patrons who said they were going to return with firearms. Later, after the defendant's arrest, he took a statement from Victor Cid. Meuleman did not know if Cid was one of the staff who approached him on King Street to report the threats.

231 Meuleman testified there were a couple of hundred people in front of Cobra when he arrived with Sgt. Wehby, and PCs Kharbar and Ogg. Wehby directed Meuleman towards a group of four or five black males near an alleyway across the street who were "possibly involved" in an earlier fight. One was a lighter skinned, goateed man wearing a white baseball cap with a red Blue Jays insignia and a white jacket. A second was tall and skinny and wore a white t-shirt. The group began to disperse as the police approached them. The first man was field-searched. The second, and a shorter man wearing a black baseball hat, quickly walked away, ignoring instructions to stop. The police detained and separated these two to investigate the allegations. As they did so a crowd gathered and swore and yelled at the police.

24 Meuleman dealt with the shorter man. Wehby, meanwhile, put the taller man, the defendant, against a wall. Meuleman had his back to Wehby and was focused on the crowd. However, he heard a commotion and, in his peripheral vision, saw the defendant taken to the ground where he struggled with the officers. Although he had only a fleeting view, he said the

defendant was trying to plant his hands on the ground rather than obeying commands to put them behind his back so he could be cuffed.

25 Meuleman said that pebbles were being thrown at the police as the defendant was arrested. He had no recall, however, of any officer producing a shotgun or otherwise drawing a firearm. Although he did not see who took the defendant to the ground, on being shown Grant's cellphone video he identified Kharbar as the responsible officer. He also identified Wehby as the officer who held the defendant against the wall as he pointed a Taser at the hostile crowd. Meuleman agreed that he did not see the defendant struggling in the "unjumbled" portion of the video.

4. Det. Wehby's Account

26 Det. Peter Wehby was one of approximately 50 officers who attended at the Century Room following reports of a gun being fired. Two guns were subsequently located during searches of approximately 150 Century Room patrons. Wehby (then a sergeant) and a few other officers walked over to Cobra when, at about 4:35am, they learned of a fight at that venue. A man who identified himself as a Cobra employee approached Wehby and told him he had been assaulted by a man who said he was going to get a gun. Wehby could not recall the man's name or his appearance, or even if he was black or white. The employee pointed to a man in a white shirt across the street who was standing with two others, identifying him as his assailant. Concerned that an additional gunman had escaped from the Century Room, Wehby decided to investigate these men.

27 One of the men across the street was a six foot three black male who weighed about 180 pounds. He was slim, wore a white shirt and blue jeans and fit the description provided by the employee. The second man looked Spanish, stood five foot eight and weighed about 200 pounds. He too wore blue jeans and a white top. The third man was a six foot black man who weighed about 180 pounds. He wore a green shirt, blue jeans and a black leather ball cap. All three men walked away as the police crossed King Street. They also ignored police calls to stop. Wehby walked directly in front of the first man (the defendant, who he identified in court), put his hands on his chest and said, "Stop". The defendant appeared agitated and started yelling. He tried to push past Wehby who told him he was under arrest for assault on the Cobra employee.

28 Pebbles were being thrown in the direction of the police by the gathering crowd and someone was videotaping the events. Wehby did not know if the defendant had a gun and wanted to take control of the situation. He forcefully put the defendant face-first against the wall, holding him there with his hand against the back of his neck. As the crowd moved closer Wehby drew his Taser. He did not see any firearms drawn by the police attending Cobra that evening.

29J The defendant did not actively resist at first but Wehby soon felt him pushing back as the crowd grew more agitated. Wehby was concerned for officer and public safety. He wanted to get the defendant on the ground as quickly as possible in case he was carrying a firearm. Once on the ground, the defendant started to resist by trying to pull away, struggling and failing to put his hands behind his back in the face of police commands; however, he was "not", said Wehby, "fighting me". To ensure the defendant did not get away, Wehby called for the assistance of his nearby officers. PC Kharbar responded. They cuffed the defendant within seconds and escorted him to a scout car where he was arrested for assault and assault with intent to resist arrest. Later Wehby learned that Kharbar had injured his hand during the defendant's apprehension. Wehby testified that he did not see how this happened.

30 Wehby described the cellphone video as "accurately" portraying his description of the occurrence and capturing the volatility of the situation. The defendant's non-compliance, he said, was not clear on the video.

5. PC Kharbar's Account

31 PC Manpreet Kharbar was among the officers who responded to the gun call at the Century Room. Sgt. Wehby detailed him, along with other officers, to Cobra to investigate a matter. A man who identified himself as a bouncer at that club approached the officers as they walked to Cobra. Kharbar described the man as white and of medium build, but he did not know his name. The man pointed to a group of about five men across the street who he said had punched him and another bouncer and threatened to return with guns.

32 The five men were then walking west on the south side of King, across the street from Cobra. Kharbar could describe

three of the men. The first was a heavy-set male mulatto wearing a white hat and jacket and blue jeans. He swayed as though he was holding something in the hand inside his pocket. The second man was a dark-skinned male black with short hair. He stood about five foot eleven and wore a green t-shirt and blue jeans. The third person of interest was also a black man. He was about six foot one and slim, and he too wore a white jacket and blue jeans.

33 Kharbar approached the five men and asked them to stop. They ignored him, turned and began walking east. Two of the men eventually followed Kharbar's commands and he field-searched the first of them. The second man — described as a six foot to six foot one inch tall, short-haired black man wearing a white t-shirt and blue jeans — paced back and forth cursing at the police. As he finished the searching the first man Kharbar heard a commotion and saw the second man — who he identified as the defendant — try and push past by Wehby. Kharbar was not sure if this man was one of those he had earlier described.

34 Kharbar ran to assist Wehby who was struggling with the defendant as they faced each other. Kharbar could not recall the defendant ever having raised his arms. Wehby was simultaneously trying to control the crowd by pointing his Taser in their direction. Kharbar shoved several pedestrians aside as he moved to Wehby's side. The two officers repeatedly told the defendant to stop resisting as they both struggled to ground him. He was "wrestling" with Kharbar and they both fell to the ground. Kharbar felt sharp pains in his hand as it hit the pavement and he later learned he had broken his hand.

35 The defendant continued to actively resist the police while on the ground by refusing to place his arms behind his back so the police could cuff him. Kharbar testified he finally gained control after landing five to eight "distracting" blows and punches to the defendant's face and body. Meantime, some members of the crowd were shouting and throwing stones at the officers. Finally, the defendant was cuffed, escorted to a police vehicle and transported from the scene.

36 Kharbar recognized the events recorded in the video. While the defendant's hands are clearly raised in the early phase of the video, Kharbar claimed he did not see this at the time. He agreed that there was no apparent active resistance by the defendant in the portions of the confrontation captured on the videotape.

(c) Defence Witnesses

1. Theodorakopoulos' Account

37 Athanasios "Tommy" Theodorakopoulos, an aspiring musician, was 29 at the time of the trial. He is a white man of Greek descent with a Mediterranean complexion. He attended the MMVA ceremony on June 21, 2009 as his manager, J.B., was nominated for an award. He then attended the after-party at Cobra along with six others, including two of his Greek friends, J.B, the defendant and two other black men. He arrived at Cobra between 11:30pm on the 21st and lam on the 22nd of June and spend most of the next four or five hours at the downstairs part of the club. Between 4 and 5am he said goodnight to his friends downstairs and went up to the foyer area with his two Greek buddies where, in his words, he "mingled with the ladies" for the next half hour or so. There was a sudden rush and commotion and he saw a couple of security guards drag J.B. upstairs and take him out of the club. He testified that J.B. was not holding anything in his hands and that he did not see any of the bar staff dealing with anyone bearing a glass or bottle. Tommy intervened by trying to push off the bouncers.

38 A number of patrons were pushed out of Cobra and onto King Street by the security staff. A large crowd had gathered and Tommy had trouble finding his two friends. While searching for them he clearly saw the defendant pressed to a building's wall by the police with his hands in the air as though he was being arrested. He could not say whether this was on the same side of King Street as Cobra or across the street. The police then threw the defendant to the ground and one of them, a man he described as looking East Indian, bent down and punched the defendant. The defendant, he said, was not struggling with or resisting any of the police officers. Tommy finally located his two friends and left before the defendant was placed in a police car.

39 Tommy had known the defendant for more than ten years and described him as a friend. He testified he was "tipsy" rather than drunk by the time of the incident on June 22nd. He was not, he said, stopped or questioned by the police that evening. He was wearing a black t-shirt, black pants with blue Velcro straps, a black Blue Jays hat and black Air Force Ones. J.B. was wearing a shiny "Miami Vice"-type suit. One of Tommy's Greek friends wore a blue or white Adidas jacket. He could not recall the defendant's attire.

2. Grant's Account

40 Omar Grant is 28. His only conviction is for fairing to comply with the conditions of a recogntеance in 2006 or 2007. He had known the defendant for more than 13 years. They grew up together. While he considered the defendant a close friend he said he would not lie for him.

41 Grant picked up the defendant at his home on June 21st and drove to the MMVA ceremony, arriving about 9pm. After the show he and the defendant followed J.B.'s entourage — including his road manager (Show Stevens), "Tommy" (the previous defence witness) and two other white guys — to the after-party at Cobra, arriving close to midnight. Grant did not drink before the after-party; since he was driving, he only nursed one alcoholic drink through the rest of the evening.

42 Grant was wearing blue jeans and a blue and silver t-shirt on June 22nd. The defendant, he recalled, wore a red hat, a white shirt and white sneakers. J.B. was dressed in a suit.

43 Grant, the defendant and the J.B. crew were on the basement dance-floor level for two to three hours. He walked upstairs to leave between 3:45 and 4am. The defendant was about an arm's length in front of Grant, and Tommy and his friends about 30 feet in front of the defendant. There were many other patrons in the immediate vicinity. As he reached the top of the stairs he could see an altercation in the foyer area: J.B. and his manager were involved in a "commotion" with several security guards. In direct examination, Grant testified that Tommy pulled one of the security guards off J.B. In cross-examination, he explained that Tommy appeared to know one of the bouncers and his intervention somewhat relaxed the situation. In any event, the skirmish soon spilled outside the club. According to Grant, neither he nor the defendant — who, he said, was always within his close and immediate sight in the lobby or foyer area — played any part in the fracas. Although he knows J.B., Grant insisted that nether he nor the defendant were friends of his or, indeed, that their relationship was so close that either would physically intervene to defend J.B. were he involved in an altercation.

44 Grant and the defendant then walked towards Grant's car which was parked in a lot down an alleyway directly across the street from Cobra. Police officers were grabbing and searching persons on the street and Grant was concerned by their aggressiveness. He pulled out his Blackberry cellphone, activated the video function and began recording the events just as a black officer grabbed the defendant and pushed him against a wall. The defendant's hands were in the air and he faced the wall with the officer behind him. A white police officer approached Grant and punched or grabbed at him, causing the camera to fly into the air. Grant caught the camera and continued shooting, although he missed recording brief portions of the events as a result of this and, later, other officers' approaches or interference.

45 Grant's recall, before being shown the video, was that the black officer transferred his control of the defendant to an Indian officer as he, the black officer, went after another pedestrian. The defendant, Grant said, was slammed to the ground and punched by the Indian officer. The black officer then kicked the defendant. That same officer had something in his hand during the ruckus; Grant was not sure if it was a club, a gun, mace or a Taser. Meantime, some police officers sprayed mace at persons in the encircling crowd.

46 (Although none of the police witnesses mentioned it in their testimony, Crown counsel ultimately conceded that pepper spray was used during the course of the disturbance. Grant's testimony stretched over two days. After the first, the notes of a further attending officer — PC Astolfo — were obtained by the Crown and disclosed to the defence. They were introduced for the truth of their contents, on consent, at the conclusion of the defence case. These notes refer to members of the crowd showering the officers with debris. Astofo's notes then read: "Pepper spray a cloud towards group (40 people). No one in contact directly with spray but cloud effective in keeping crowd at bay".)

47 Although Grant's camera was damaged, the video was stored on a memory stick which he passed to a girlfriend of the defendant within a week of the incident so she could give it to the defendant's lawyer. Grant testified he had never seen the contents of the video prior to it being screened for him in court near the conclusion of his direct examination. He corrected his earlier "mistaken" testimony on watching the video, noting that the black officer who initially detained the defendant against the wall also took him to the ground; the Indian officer's participation, he said, began only after the defendant was already on the ground. He noted the points where he observed a punch thrown at the defendant by the Indian officer while the defendant was lying on the pavement and the spraying of mace by another officer across the top of a police vehicle. He did

not, he said, see any police officer fall on the ground. In essence, Grant testified that the defendant never actively resisted the police and that the video confirmed his recall in this regard. He could not remember any rocks or pebbles being thrown at the police.

(d) The Cellphone Videotape

48 The Grant videotape lasts just under two and a half minutes. Given that it is shot on a cellphone camera at night, it is hardly surprising that the video quality — the resolution in particular — is poor. While no counsel or witness has suggested that the exhibit is anything other that a continuous video documentation of the events that ensued during the approximately 148 seconds of recording, there are occasions, lasting several seconds each, when the camera is focused other than on the defendant. There are also some equally brief periods when blurring or hyper-illumination obscures the image. Grant testified that these interruptions coincide with, in the first instance, an officer's attempt to interfere with his recording and, later, Grant's own efforts to evade further impeding of his documentation. This, on several reviews, appears to be a reasonable explanation for these lapses in consistent focus. Grant similarly explained the zoom-like quality of certain passages as reflecting his retreats and advances as he responded to various officers' interference, rather then his manipulation of a zoom function on his cellphone. This, too, appears a reasonable explanation for the changes in focal length.

49 By way of overview, it need be said that the images — particularly at the front end of the videotape — convey a sense of frantic urgency. The police — about six to ten officers — appear extremely wary, if not palpably anxious, which is hardly surprising given the unseen crescent of hostile pedestrians around them. The audio track consists chiefly of Grant's voice loudly repeating "I'm recording" and "He's not resisting", the latter mantra sometimes thinly echoed by a chorus of onlookers. The defendant is wearing a plain white long-sleeved shirt, dark pants and white sneakers. A medallion is suspended from a waist-long chain that hangs from his neck. This last detail is consistent with Grant's evidence that he was allowed to retrieve the defendant's chain before he was taken away by the police and, as well, with the word "chain" on the audio-track in the final sequences of the video.

50 The videotape begins with an image of the defendant with his arms raised and his hands (and perhaps his head) pressed against the ledge of a wall in front of him while an officer, identified by all the police witnesses as Sgt. Wehby, holds the back of his neck with his left hand. Nothing done by the defendant in these initial moments suggests anything other than compliance. Wehby lifts his right hand and shines a light (described, again by the police witnesses, as the illumination device at the end of a Taser) towards Grant. At that point, about four seconds in, there is the sound of an impact and the images are reduced to indecipherable lines of light and abstract patches of colour for the next seven seconds. (This, according to Grant, coincides with the camera being knocked from his hand by one of the officers.) The next focused image is of a white officer backing away from Grant, his left arm extended toward the camera and his right hand raised in a fist-like position as he or another officer brusquely shouts "Stay there" at Grant.

51 At about the 20 second mark the defendant is recorded being taken to the ground by a small phalanx of officers. His arms appear to be held by several of them as his back is lowered to the street. No one else — in particular, no other officer — is on the ground. This brief image of the defendant is interrupted by a further six or seven seconds of abstract flashes of light. The camera only briefly returns to the defendant before being obscured by a passing police car at about the 32 second point. An officer appears to lean over the roof of the police vehicle and point something in Grant's general direction. (Grant identified this image as the occasion when mace is released; the image is at least consistent with this interpretation of the event and no other construction has been advanced.) A few seconds later the defendant is videotaped being turned onto his front as his arms are pulled behind him. The defendant's head (which is facing the camera) is planted in the pavement and his right arm is raised behind his back as a kneeling officer (likely Kharbar) attaches a cuff to his right hand. The defendant's left arm is behind his back and a second officer (likely Wehby) is bending over him on that side. Other than the kneeling officer applying the cuffs, no policeman is on the ground. The cuffing of the defendant takes mere seconds.

52 Once cuffed, the defendant is turned onto his back by the police and assisted to a semi-vertical sitting position about 85 seconds in. He then raises himself to his feet and is escorted, without force, by a single officer to a curb-side police car. Again, the defendant seems completely acquiescent, not even appearing to utter a word of protest or complaint. He is briefly field-searched at about the two-minute mark while bent over the hood of the scout. He is then taken to the rear door of the vehicle at which point the videography concludes.

53 At no time during the visually intelligible and unobscured portions of the videotape (which, to be clear, is the majority of its contents) does the defendant exhibit any behaviour that can fairly be described as assaultive or actively resistant of police efforts to arrest him.

C. Analysis

(a) Introduction

54 The issues before me focus directly and almost exclusively on the physical conduct of the defendant. First, did the defendant punch the complainant Victor Cid? Second hand irrespective of whether he struck Cid, did he intentionally apply force to PC Kharbar to prevent his arrest? If the answer to the first question is 'yes' he guilty of assault. If the answer to the second question is 'yes' he is guilty of assault with intent to prevent his arrest. If the answer to either question is 'yes' the defendant is also guilty of failing to comply with that condition of his probation order compelling him to keep the peace and be of good behaviour. Framed in this manner, and in view of the conflicting testimony pertaining to the defendant's conduct on June 22nd, an appropriate legal analysis must address the credibility of the various witnesses in an effort to resolve each of the critical evidentiary disputes. This analysis, of course, is governed by settled legal principles which, in the end, are anchored in the presumption of innocence.

55 The two assault charges both require contextual assessments of the credibility of the complainants and other Crown witnesses and, where necessary, those of the defence witnesses. I say "where necessary" because in some criminal trials the evidence of the Crown witnesses alone may fall short of establishing proof to the requisite standard of the offences alleged. Indeed, this is the inevitable effect of cases where no defence evidence is tendered yet an acquittal results. I appreciate, of course, that witnesses called by the defence sometimes supplement the inculpatory force of the Crown's case, but that situation does not materially obtain here.

56 As I have just suggested, a credibility analysis must first focus on the evidence of the two complainants, Victor Cid and PC Kharbar. In the end, each is the only Crown witness to the assaults to which they each testify. No one but Cid testified that the defendant punched him. There is some confirmation, although not from an independent source, that he was indeed punched (for example, some facial bruising Cid reports), but it does not help to identify the defendant as the person who threw the punch. Similarly, Kharbar's evidence that he fell to the ground while struggling with the defendant rests solely on his testimony; neither of the two officers in Kharbar's immediate vicinity testified to observing his fall or the events that directly precipitated it. Nor is there any independent evidence confirming that Kharbar's injury (again self-reported) was consistent with the trauma caused by a fall as opposed, for one example, to the many blows he said he later landed on the defendant.

57 Unlike many cases requiring the resolution of conflicting testimony, the defendant is here not part of that exercise. Taylor did not testify. Had he, and assuming his evidence amounted to denials of the alleged assaults, the appropriate analysis would be governed by the three-pronged formulation directed by the Supreme Court in *R. v. W. (D.)* (1991), 63 C.C.C. (3d) 397 (S.C.C.). The first two *W. (D.)* prongs have no application here as they address the effect to be given the testimony of a defendant where, at minimum, it leaves a trier of fact with a reasonable doubt. As the Court of Appeal observed in *R. v. Newton* [2006 CarswellOnt 1535 (Ont. C.A.)], 2006 CanLII 7733, at para. 5, the *W. (D.)* directives apply where "the issue ... is how to apply the burden of proof to the totality of the evidence *when an accused testifies*" (emphasis added). However, the third *W. (D.)* tine is a helpful reminder of the general principles governing proof in criminal trials. Even if a trial judge is not left in doubt by a defendant's evidence, he is still, as said in *W. (D.)*, required to decide "whether, on the basis of the evidence [he does] accept, [he is] convinced beyond a reasonable doubt by that evidence of the guilt of the accused". Put simply by the Supreme Court in *R. v. S. (J.H.)* (2008), 231 C.C.C. (3d) 302 (S.C.C.), at para 9, even where a defendant's evidence is entirely rejected (or, as here, simply absent) the lesson of *W. (D.)* is that "the burden never shifts from the Crown to prove every element of the offence beyond a reasonable doubt".

58 "Credibility" is an omnibus shorthand for a broad range of factors bearing on an assessment of the testimonial trustworthiness of witnesses. It has two generally distinct aspects or dimensions: honesty (sometimes, if confusingly, itself called "credibility") and reliability. The first, honesty, speaks to a witness' sincerity, candour and truthfulness in the witness box. The second, reliability, refers to a complex admixture of cognitive psychological, developmental, cultural, temporal and environmental factors that impact on the accuracy of a witness' perception, memory and, ultimately, testimonial recitation.

The evidence of even an honest witness may still be of dubious reliability.

59 All of this has been said many times before, including by Doherty J.A. for the Court of Appeal in *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at 205:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is honest witness, may, however, still be unreliable.

60 Depending on the circumstances, some portions of a witness' testimony may be more credible or worthy of belief than other portions. Accordingly, I can, with good reason, accept all, some or none of any witness' evidence: see *R. v. M. (R.E.)*, [2008] 3 S.C.R. 3 (S.C.C.), at para. 65.

(b) The Simple Assault Allegation

61 As I have already noted, only a single witness, Victor Cid, testified to the assault he says he suffered. Accepting, as I do, that Cid was assaulted, the central remaining question is whether the evidence pertaining to this assault satisfies me beyond reasonable doubt that the man he identified as his assailant was in fact the defendant. The only directly contrary evidence emenates from Grant whose evidence, says Crown counsel, is utterly unworthy of belief. Tactically, of course, the Crown has no alternative but to advance this position if it is to maintain any prospect of conviction: I have no legal option but to find the defendant "not guilty" if I accept Grant's exculpatory account or am left in doubt by it.

62 The nature of the identification in this case requires me to alert myself to the risks associated with this species of evidence. Eyewitness identification evidence, particularly of cross-cultural or cross-racial strangers in, as here, heated situations with limited windows of observation, are notoriously suspect. As said by the Court of Appeal in *R. v. Hanemaayer*, 2008 ONCA 580 (Ont. C.A.), at para. 29, "Mistaken eyewitness identification is the overwhelming factor leading to wrongful convictions". Eyewitness identification evidence — even standing alone and even where, as here, bottomed on the testimony of a single witness — can ground a legally and factually unassailable finding of guilt. However, appellate courts have repeatedly cautioned jurists of the need for special caution in assessing such evidence: see, e.g., *R. v. Quercia* (1990), 60 C.C.C. (3d) 380 (Ont. C.A.); *R. v. Trochym* (2007), 216 C.C.C. (3d) 225 (S.C.C.); *R. v. Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.); *R. v. Spatola*, [1970] 3 O.R. 74 (Ont. C.A.); *R. v. Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Tat* (1997), 117 C.C.C. (3d) 481 (Ont. C.A.); and *R. v. A. (F.)*, [2004] O.J. No. 1119 (Ont. C.A.).

63 Eyewitness identification is particularly dubious where, as here, it includes dock-identification (the pointing out in court of the defendant as the alleged perpetrator) or, in a worst-case scenario, where positive identification occurs for the first time in a courtroom setting. (See, e.g., *R. v. A. (F.)* (2004), 183 C.C.C. (3d) 518 (Ont. C.A.) and *R. v. Tebo* (2003), 175 C.C.C. (3d) 116 (Ont. C.A.). Given the circumstances surrounding Cid's dock-identification of the defendant, and given Cid's own explanation of the factors bearing on the integrity of this identification, as quoted earlier, Crown counsel rightly eschews any reliance on the witness' courtroom identification of the defendant. Her, theory, instead, is that Cid's initial and careful inspection of his assailant and his uninterrupted observation of that man until the point when the man — unquestionably the defendant — is arrested by the police confirms the reliability of his identification. In other words, the continuity of Cid's observation, coupled with his honesty, affords adequate proof of the defendant's commission of the assault.

64 This thesis is facially attractive. I agree with Crown counsel that Cid is an honest witness in the sense that he tried to sincerely recount the events as best he could recall them. He was even-tempered, consistent and, to my mind, forthright. He displayed no indicia of bias. I am especially impressed with the qualifications he volunteered with respect to his dock-identification of the defendant. In short, I have little concern with Cid's testimonial veracity.

65 I do, however, have concerns about the reliability of his evidence. Cid insistence that he was "100% sure" that the defendant was the man who punched him calls to mind the "comments" of the Court of Appeal in *Hanemaayer*, *supra*, at para. 21, in relation to the crucial identification evidence of the eyewitness in that case:

> We now know that the homeowner was mistaken. No fault can be attributed to her. She honestly believed that she had identified the right person. What happened in this case is consistent with much of what is known about mistaken identification evidence and, in particular, that honest but mistaken witnesses make convincing witnesses. Even the appellant, who knew he was innocent, was convinced that the trier of fact would believe her. The research shows, however, that there is a very weak relationship between the witness confidence level and the accuracy of the identification.

66 In the end, and with all due respect, I am not persuaded to the requisite standard of proof that the Crown theory of observational continuity adequately compensates for the evidentiary frailties that attach to Cid's identification. I say this for the following reasons:

- The events at issue occurred nearly a year before Cid testified. He could not recall if he had made any notes of the incident and, even if he had, he did not keep them.

- The scene during which the assault occurred was chaotic, emotionally charged and crowded with persons milling about or leaving the club.

- The man who threw the punch was a complete stranger to Cid. Not only had he never seen him before that evening, he never saw him before he felt the force of the punch to his temple.

- Likewise, the defendant was complete stranger to Cid.

- The man who punched Cid was not directly in his line of vision but, rather, somewhat off to one side. The blow was entirely unanticipated. And Cid's attention at the time was focused on the man holding the glass in one of his hands.

- Cid claims he grabbed the man who punched him and held him, in his own estimation, for "a couple of seconds" — an extremely brief window of acute observation by any measure.

- Despite Cid's description of their face-to-face confrontation, he could not recall the fabric of the top worn by the man he grabbed, and wondered whether it was a sweater. (Others' descriptions of the defendant's attire and the videotape establish to my satisfaction that the defendant wore a white shirt.)

- Cid, I find, was mistaken about the height of the man he grabbed. He testified that the man was only a little taller than his own five foot eight and half inches. This is significantly different from the defendant's height of between six foot one and six foot three, as consistent with my own observations and, more importantly, as described by police witnesses (whose evidence I accept in this regard) and Porter when he was afforded the opportunity to estimate the standing defendant's height in court.

- The defendant wore a long chain and medallion on top of his shirt, as conspicuously displayed in the videotape. Despite Cid's claim that he grabbed and held his assailant's top, and despite proffering a description of the defendant, he did not mention that the man bore any jewellery, let alone an ornament as ostentatious as that worn by the defendant.

- As is clear from the evidence of various witnesses, including the police, the defendant was not the only one of the young men across King Street from Cobra who sported a white top — be it a shirt, jacket or t-shirt — when the police arrived.

- Cid's evidence, which I accept, is that he did not identify the defendant to any police officer as his assailant until after the defendant was arrested. Put otherwise, Cid identified the man in police custody — the only man who was arrested

outside Cobra that evening. While not quite a "show-up", this sequencing bears sufficient similarities to that discredited procedure to further erode confidence in the reliability of his eyewitness identification: see *R. v. Smierciak* (1946), 87 C.C.C. 175 (Ont. C.A.).

• Cid's claim to have continually observed the defendant depends on his capacity to witness events at night from across the width of a crowded and clearly tumultuous King Street.

• While several other witnesses (including police officers and Porter) testified that the man arrested by the police pushed his way by one of the officers across the street, Cid, who claimed to have never lost sight of the defendant, failed to mention this confrontation.

• Cid testified that the altercation in the foyer or lobby area occurred at about 4am. (On Porter's evidence, the assault must have transpired sometime earlier as he was alerted to the fracas, on his evidence, at about 3:35am and immediately responded.) Cid says the police arrived some five to seven minutes after he was punched, so that his continuous observation of the defendant between the occasions of his assault and the defendant's arrest would, using Cid's timeline, be in the neighbourhood of only ten minutes. However, the two officers who testified as to the timing of their involvement both said they were first informed of the disturbance at Cobra at 4:35am, and then walked over to that club from their vigil at the Century Room. Accepting the police evidence in this regard, which I do, it is patent that Cid sorely underestimated the period between the punch he described and the arrival of the police: indeed, it was much closer to 40 minutes than the five to seven he attributes to this interregnum. Translated, the reliability of Cid's evidence as to duration of his eagle-eyeing of the defendant appears, to me, to be highly questionable as does, perforce, his claim to uninterrupted observation.

• Cid, like Porter, testified that an officer brandished a shotgun during the street disturbance. The police (whose evidence in this regard is consistent with the cellphone videotape and which I accept) deny that any firearm was drawn during the altercation.

• Although of only marginal relevance, it is of some interest that Cid himself testified that were he the man who punched him he would not have hung around the vicinity of the club, as did, of course, the defendant.

67 Viewed more conceptually, there are two problematic junctures respecting Cid's identification of the defendant. Framed as questions, the first is whether — given the congestion and chaos occurring in the foyer area as the patrons departed — the man Cid grabbed was in fact the same man who had punched him? And secondly, and assuming that the man who threw the punch and man he grabbed were indeed the same person, did Cid continuously eyeball that man for the following 40 or so minutes? While no single factor is determinative, the constellation of concerns I have listed leave me with a reasonable doubt as to the accuracy of Cid's identification. In these circumstance, an assessment of Omar Grant's veracity and the reliability of his evidence contradicting that tendered through Cid is superfluous. Irrespective of my determination in these regards the result would be the same: a finding, which I make, that the defendant is not guilty of the charge of assaulting Victor Cid.

(c) The Assault Prevent Arrest Allegation

1. Section 270(1)(b)

68 The defendant is charged with assaulting "Manpreet Kharbar with intent to prevent the lawful arrest of himself", an offence set out in s. 270(1)(b) of the Criminal Code. An "assault", as defined in s. 265(a) of the Code, occurs when a person "without the consent of another person ... applies force intentionally to that other person, directly or indirectly". Accordingly, to secure a conviction on this count the Crown must establish beyond a reasonable doubt not only that the defendant intentionally applied force to PC Kharbar but, in addition, that he did so with the intention of "preventing" his own arrest. Put otherwise, establishing the requisite mental element of the offence requires proof of a double intentionality. Further (and atypically for prosecutions arising from similar fact patterns), the offence charged is not one of assaulting a peace officer in the execution of his duty or of "resisting" a lawful arrest. Further still, no offence lies unless Kharbar — and not any other person — is proved the victim of the assault, if so found.

69 While the section numbers have changed, the language of what is now s. 270(1)(b) has remained unaltered for more than 50 years. (See, for instance, s. 232(1)(b), as then numbered, of the 1953-54 major revision to the Criminal Code: A.E. Popple, Ed., *Snow's Criminal Code of Canada*, 6th Ed., Carswell, 1955.) Despite its textual longevity there is little or no reported jurisprudence respecting the provision which, in its entirety, reads: "Every one commits an offence who assaults a person with intent to resist or prevent the lawful arrest or detention of himself or another person". The words "resist" and "prevent" are framed disjunctively. Accordingly, the provision may well give rise to two separate offences, one of assault with the intent to resist arrest and a second of assault with the intent to prevent arrest. At least some similarly worded provisions have been construed in this manner. For example, s. 177 of the Code, which criminalizes "everyone who ... loiters or prowls at night...", is generally recognized as creating two offences, one of loitering and the second of prowling: *R. v. Dillon*, [1964] 3 C.C.C. 205 (Alta. C.A.) and *R. v. Cloutier* (1991), 66 C.C.C. (3d) 149 (Que. C.A.). Even if s. 270(1)(b) does not admit to this construction and, instead, describes two alternative modes of committing the same offence, it must be borne in mind that in charging the defendant the Crown has particularized the offending conduct as that of "preventing" — rather than "resisting" — a lawful arrest. These two words — "resist" and "prevent" — convey different meanings (indeed, reputable thesauruses do not advance one word as a synonym for the other: *Concise Oxford Thesaurus*, 2nd Ed., Oxford University Press, 2002; *Roget A to Z*, Harper Collins, 1994; *Canadian Thesaurus*, Fitzheney & Whiteside, 2002) and the distinction between the two may on occasion be of forensic significance. For example, it is possible for someone to assault another with an intention to resist his arrest without concurrently intending to prevent that same arrest. The converse, although theoretically possible, seems far less conceivable.

2. The Alleged "Assault"

70 The core issue is whether the conduct of the defendant amounts to an assault — the intentional infliction of force on another person without their consent. The latter requirement — that of an absence of consent — is of no moment in this case; no one can seriously contend that the police officers — and, in particular, PC Kharbar — consented to having physical force applied to them by the defendant.

71 But did the defendant intentionally apply force to Kharbar? No witness says he struck, kicked or pushed him. But did he struggle with or actively resist Kharbar in a manner that can fairly be said to amount to an assault? The police, of course, say he did, as do Cid and Porter who were watching from across a crowded street. The two defence witnesses swear otherwise. The first of these latter two, Tommy theodorakopoulos, is, frankly, not a very reliable witness. He had consumed a substantial amount of alcohol and, on his own admission, was at least "tipsy". His sense of time was vague, elastic and, I find, frequently distorted. He could not find his two friends when they left the club and was preoccupied with trying to locate them. He could not recall whether the defendant's confrontation with the police occurred on the same side of King Street as Cobra or, as was the consistent evidence of every other witness, across the street. He left the scene before the end of the altercation. I cannot, in short, rely on Theodorakppoulos' averment that the defendant neither struggled with or resisted any of the police officers.

72 Omar Grant's account of the circumstances surrounding the defendant's arrest raises a different concern. He testified that his optic on these events was in essence that of the cellphone camera he was holding. While his interpretation or explanation of various ambiguous images in the videotape are helpful, his narrative ultimately adds very little to the raw footage. Further, Grant himself, on viewing the videotape, caught certain "mistakes" in his prior testimony that call into question his unaided memory of the incident. In my view, the videotape affords a more compelling and reliable record of the defendant's arrest than does Grant's gloss on these events.

73 The three police officers uniformly speak of the defendant's failure to comply with their demands and of his struggling with them as they endeavoured to assert control and cuff him. However, each of the officers (and Porter) agreed on watching the videotape that they did not see any of the active resistance they had described. Nor do I. While the tape suffers unfortunate interruptions and other sequences are obscured, in the end it serves as an unimpeachable record of those parte of the defendant's altercation with the police that are captured and, as such, a reliable means of assessing the accuracy of the police accounts of those portions of the events that have been digitally preserved.

74 Curiously, of the three police witnesses only Kharbar testified to having been somehow grounded and injuring his hand in the process. Despite their immediate proximity, neither Meuleman or Wehby saw Kharbar fall, nor does either afford

any explanation for the injury Kharbar suffered. The videotape is equally unsupportive of Kharbar's account. The cellphone camera records the defendant as he is brought to ground. But directly contrary to Kharbar's recall, there is no videotape evidence of the officer "falling" to the pavement along with the defendant. Indeed, the defendant, as video-recorded, does not "fall" to the pavement: he is forcefully taken to the ground by the combined efforts of several officers, Kharbar among them.

75 Kharbar's erroneous recall is not limited to this single incident. He testified that the defendant and Wehby were facing each other when he rushed to Wehby's side and that he had no recall of the defendant ever having raised his arms. Kharbar's evidence is directly contradicted by the videotape and, not incidentally, by Sgt. Wehby. Further, while Kharbar may well have punched the defendant when he was on the ground, his account of raining multiple blows is not confirmed by the video images of that portion of the defendant's apprehension.

76 The officers' accounts of the defendant's "active resistance", "noncompliance" and "struggling" are also contraverted, or at least rendered suspect, by the cellphone videotape. As all of the officers testified, this misbehaviour is simply not apparent in the digital recording. Crown counsel suggest that these omissions result from Grant deliberately averting the camera whenever the defendant engaged in such misconduct or because, by some unhappy coincidence, each occurrence of his struggling and resistance occurred during an obstructed or indecipherable portion of the videotape. I cannot accept either of these explanations for the absence of any documentary record of the defendant applying force to any of the officers. The notion that Grant could somehow intuit each occasion when the defendant was about to physically defy the officers is most improbable. And the theory of repeated coincidences strains credulity. I agree, of course, that the videotape is not a complete record of the two-and-a-half-minute's worth of events following Wehby's initial containment of defendant. However, it seems to me that the best measure of the defendant's unrecorded conduct is his recorded conduct. And in this regard, the defendant's behaviour is consistent: when restrained against the wall, during his very brief cuffing on the ground, and when subsequently escorted to the police vehicle the defendant — as recorded on the videotape — appears uniformly compliant.

77 Any physical force exerted against the officers once the defendant was placed against the wall by Wehby appears to have been reactive only. Accordingly, I have at least a doubt whether any intentional force was ever applied by the defendant to any of the officers and, in particular, to the named complainant, PC Kharbar.

3. "Resist" v. "Prevent"

78 In the alternative, even if the defendant's physical contact with the officers was intentional, I simply cannot infer beyond reasonable doubt that his intent in doing so was to "prevent" (as particularized) his arrest rather than merely resist it. None of the officers testified that the defendant struck or kicked them, bolted or otherwise tried to escape, nor do they say the defendant uttered any words that evinced the latter intention. Meuleman's account amounts to no more than an allegation of the defendant's non-compliance with police commands. Wehby speaks of resistance and struggling, but concedes that the defendant was not fighting him. And Kharbar, other than his entirely unconfirmed account of wrestling with the defendant as they both fell to the ground, has little further pejorative to say about the defendant other than that he resisted the police by refusing to proffer his hands for cuffing. At highest, the police testimony consistently characterizes the offensive conduct by the defendant as resistance to rather than prevention of his arrest. While I am not persuaded that the defendant's behaviour constituted an assault (and certainly not one directed at Kharbar), even were I to accept the police evidence in this regard I would still not be convinced to the requisite standard that the impugned conduct reflected an intent to prevent his arrest.

(d) The Fail to Comply Charge

79 Apart from the assaults, the defendant is charged with failing to comply with a probation order by failing to keep the peace and be of good behaviour. The factual foundation for the defendant's non-compliance with this condition of a sentencing court's order is his commission of one or both of the assaults alleged to have occurred on June 22, 2009. As I find the defendant not guilty of both of these charges, the fail to comply prosecution must suffer an identical fate.

D. Conclusion

80 In the result, I find the defendant not guilty of all three charges.

Accused acquitted.

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Article

Contesting Expertise in Prison Law

Lisa Kerr[a1]

Prisons present a special context for the interpretation of constitutional rights, where prisoner complaints are pitched against the justifications of prison administrators. In the United States, the history of prisoner rights can be told as a story of the ebb and flow of judicial willingness to defer to the expertise-infused claims of prison administrators. Deference is ostensibly justified by a judicial worry that prison administrators possess specialized knowledge and navigate unique risks, beyond the purview of courts. In recent years, expansive judicial deference in the face of "correctional expertise" has eroded the scope and viability of prisoners' rights, serving to restore elements of the historical category of "civil death" to the legal conception of the American prisoner. In Canada too, courts have often articulated standards of extreme deference to prison administrators, both before and after the advent of the *Charter of Eights and Freedoms*, and notwithstanding that the *Charter* places a burden on government to justify any infringement of rights. Kecently, however, two cases from the Supreme Court of British Columbia mark a break from excessive deference and signify the (late) arrival of a *Charter-based* prison jurisprudence. In each case, prisoner success depended on expert evidence that challenged the assertions and presumed expertise of institutional defendants. In order to prove a rights infringement and avoid justification under section 1, the evidence must illuminate and specify the effects of penal techniques and policies on both prisoners and third parties. The litigation must interrogate the internal penal world, including presumptions about the workings of prisoner society and conceptions of risk management.

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***45** "And it is terror, of course, that traditionally drives us into the arms of the experts."
Adam Phillips, *Terrors and Experts*[1]

Introduction

In adjudicating rights claims brought by prisoners, there are unique pressures on courts to refrain from close scrutiny. The structure of a prisoner lawsuit is that an incarcerated person complains about the nature of his treatment while held in state custody. The court is asked to review the content of prison law or the conduct of prison administrators that led to the treatment. From the outset and throughout the litigation, the defendant wears a cloak of expertise, typically attempting to justify the impugned law or conduct by pointing to the security concerns and limited resources that constrain the prison

context. Judges are at risk of yielding uncritically in the face of their own corresponding lack of "correctional expertise". The prospect of excessive judicial deference to the claims of prison administrators poses a chronic threat to the scope and viability of prisoners' rights.

The United States experience provides a valuable illustration of what is at stake. In recent years, what appears to be judicial unwillingness to scrutinize the claims of administrators in prisoner litigation has sharply curtailed prisoners' rights in that legal system. American plaintiffs have a difficult time rebutting judicial deference to the claims of institutional defendants, particularly at the level of the Unites States Supreme Court. As Sharon Dolovich has shown, the "imperative of restraint--aka deference--has emerged as the strongest theme of the Court's prisoners' rights jurisprudence."[2] Deference is offered even when a defendant's claims rest on unproven assumptions as to what is required or effective in prison settings. The good judgment of the putative expert is presumed but not tested.

Such weak modes of constitutional review for prisoners may be understood as part and parcel of the unique American penal state:[3] marked by features such as the persistence of the American death penalty[4] and an extraordinary range of collateral consequences that follow silently from ***46** conviction.[5] One historian suggests that these features are part of "a long, deep strain in American legal and moral culture" that convicts are "unfit to share in the full fruits and protections of citizenship [and] that the convict ought rightly to be fully or partially civilly dead."[6] As this article describes, both American and Canadian law has been long marked by this same history--a notion of prisoners as lacking full or ordinary legal status. The *Charter of Rights'and Freedoms*[7] prescribes a different route, but *post-Charter* prisoner law has not consistently taken it.

Prisoner claims grounded in the *Charter* constitute a relatively young jurisprudential field.[8] In one of the few leading cases, the Supreme Court of Canada makes clear that prisoners are not to be excluded from the ordinary constitutional analysis that applies to rights infringements by the government. At the core of that holding was the question of the empirical burden on government to justify a rights infringement. In *Sauve v. Canada (Chief Electoral Officer)*,[9] a majority of the Court rejected an argument, advanced by the government, that legislation directing prisoner disenfranchisement should be upheld because it is connected to legitimate penological goals and is thus constitutionally permissible.[10] Significantly, the case turned on the character and quality of the evidence, where non-state experts appeared on both sides of the case. The government relied largely on evidence from political philosophers, who testified that the loss of political rights for those convicted of federal offences accords with particular theories of democracy.[11] The majority opinion found that evidence ***47** to be unpersuasive and also rejected the government's claim that denying prisoners the vote sends an expressive message about the sacred character of political participation.[12] The majority held that a voting ban is "more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them."[13] The majority concluded that the government's "vague and symbolic objectives" were insufficient to legitimize a law that stripped prisoners of fundamental rights.[14]

The reasoning in *Sauve* seems to make clear that prisoner rights cannot be infringed without a justification grounded in evidence. For this reason, the *Sauve* holding is commonly upheld as a symbol of Canada's commitment to prisoner rights, particularly as England and much of the United States do not permit prisoner voting.[15] There are, however, several reasons why a victory in *Sauvé* might be considered low-hanging fruit, rather than a symbol of a deep jurisprudential commitment to prisoners' rights. First, the right is occasional: the practical effect of the majority opinion is only that prison administrators must allow infrequent access to a polling station. Protection of the right entails minimal resources and requires little administrative attention. Second, and most significantly for this article, the case concerned legislation rather than a policy or decision of a prison administrator, and that legislation covered a topic unrelated to prison management. No prison administrator appeared to defend the voting ban on the basis of plausible assertions about security dynamics and ***48** the mechanics of sound penal administration. The expert evidence in *Sauve* did not suggest that imprisonment is incompatible with the retention of the right to vote explicitly protected in section 3 of the *Charter*. Rather, much of the evidence was theoretical, controversial, and unrelated to the daily demands of prison operations.[16]

Cases where prisoners seek to vindicate a right that potentially interferes with the preferences of prison administrators in their daily operations will be more controversial than the *Sauve* context. In these cases, the institutional defendant charged with operating the facility begins the proceedings as de facto expert. These are also the cases where, unlike matters of political philosophy, judges are less likely to have their own expertise and intuitions to draw from. This article emphasizes the necessity of expert evidence to contest the deference that will otherwise be offered to prison administrators in cases where rights are adjacent to operational imperatives. Apart from that practical claim, the related normative claim is, quite simply, that prisoners should receive the same level of constitutional protection as other litigants. The state should be put to the usual burdens of justifying an infringement, rather than benefiting from undue deference to the unquestioned expertise of prison officials. This is what is required so as to fully transition to a *Charter-based* penal law. Completion of this transition is likely to hinge on particular litigation approaches. Two recent cases from the Supreme Court of British Columbia serve as models,

marking a new mode in the litigation of prisoner claims under Canadian constitutional law and a new level of judicial scrutiny in response.[17]

This article has two main aims. The first is theoretical and historical, and aims to show something general about the structure of prisoner litigation. Prisons have a stark advantage at the outset of a complaint, due to an element of Foucauldian power/knowledge imbalance that is more extreme than in other contexts of judicial review of government action. Indeed, ***49** for the bulk of prison history, courts refused entirely to adjudicate internal prison conditions. A lineage of judicial reticence is still apparent in both American and Canadian law; it forms part of the "buried structures of legal thought" that remain in this legal field.[18] At times, this judicial reticence can be traced to a frank prejudice against offenders. In modern times, however, courts take a more tactful approach by purporting to defer to executive functions. Courts now use the language of limited judicial capacity and lack of expertise in a way that covertly resurrects the civilly dead prisoner. Rather than seeing the emergence of prisoner law as an "overthrow of a firm judicial principle"[19]--namely, the principle that prisons are beyond the jurisdiction of courts--we might see that modern penal law has instead altered judicial vocabulary and inspired new techniques of deference. Under new language and governing concepts, courts often still' avoid close scrutiny of the task being performed by prison administrators; preferring to tread lightly near the rough work of punishment.[20]

Perhaps courts would rather not scrutinize the grim project of the management and control of deprived bodies. Perhaps they are swayed by the risks of interference alluded to by those charged with administering state custody. As the psychoanalyst Adam Phillips puts it in the text cited in the epigraph to this article: "The expert constructs the terror, and then the terror makes the expert."[21] Whatever the cause, the powers exercised by prison officers demand careful oversight. The prison is a punitive context where key decisions are made not by elected public figures or legal advisors but by low-level officials who are not well-positioned to interpret and honour constitutional norms. These standard facts of imprisonment should inform the task of judicial review.[22] Review of prisoner claims must be ratcheted up to ordinary constitutional standards.

***50** The second aim of this article is connected to the first but is more practical, and it is to emphasize the necessity and particular function of expert evidence for the prisoner plaintiff, so as to mediate instinctive judicial deference. Specific strategies can assist plaintiffs' counsel to reduce the interpretive lenience and relaxed scrutiny that courts tend to offer (whether properly or not) to the claims of prison administrators. The task is important but not easy. In defending a claim, the institutional defendant can rely on extensive evidence, often gathered over the course of many years, from institutional psychologists and correctional staff, as to the basis and justification of its actions with respect to the plaintiff prisoner and with respect to its policies more generally. Plaintiff's counsel, by contrast, will rarely have the benefit of an independent, reliable evidentiary record over the time period most relevant to the case, and the individual plaintiff will not be able to speak personally to the legitimacy of penological techniques as a general matter.[23] At this relatively young moment in prisoners' rights litigation under the *Charter*, it is a key moment to emphasize how the issue of expertise affects judicial deference to the prison, and to examine the range of sources of expert evidence on issues important to the development of penal law.

The plan for the article is as follows. Part I sets out some background on the emergence of rights-based prison law in the United States and Canada, which helps to contextualize the current state of the jurisprudence. Part II describes patterns of judicial deference to prison administrators in Canada, both before and after the *Charter*, showing that penal law, particularly as it is understood in lower courts, has been slow to adapt to modes of legal analysis established under the *Charter*. Part III turns to the trajectory of American prisoner litigation, and illustrates how expertise and deference have been at the core of both the expansion and contraction of prison jurisprudence. This is an important history for a Canadian audience, given how the politics and implications of that process may be relevant to legal development in Canada--we can decide to either copy or avoid--and given structural similarities in rights litigation in each country.[24] In the final section, Part IV, this article considers the current ***51** prospects of prisoner litigation under the *Charter*. This part considers three cases that serve as indicators of new paths in prisoner jurisprudence, marked by the penetration of social scientific and medical knowledge into legal analysis and judicial approaches that treat the prison as an ordinary domain of government action.

I. Early Signs of Prisoner Rights

Evidentiary issues were legally irrelevant for much of the history of modern prison law, as courts simply excluded the internal conditions of penal institutions from the scope of judicial review. A blanket judicial refusal to intervene in matters of prison administration persisted into the mid-twentieth century in both the United States and Canada. As a result of the "hands off doctrine, United States prisoners who complained about the quality of prison conditions or administration, or who requested that the constitutional rights of community members be granted to them as well, were denied legal standing to pursue a claim.[25] In Canada, courts guided by British doctrine[26] similarly reasoned that they had little authority to intervene in

matters of prison administration.[27]

***52** The notion that prisoners retain some constitutional rights, and that the judiciary should properly enforce those rights, emerged in both the United States and Canada in the second half of the twentieth century. A period of intense constitutional litigation, from approximately 1965 to 1975, served to dismantle some of the worst excesses and deficiencies in American prisons. During this period, courts developed techniques to gain information and assess the quality of prison conditions. Central to the thesis of this article is the fact that the accrual of operational expertise proved essential to reform, as American courts could not intervene until they had expanded their institutional capacity. Judges acquired staffs and appointed qualified special masters who could oversee the implementation of court orders and report back to the overseeing judge.[28] Since the 1980s, however, the scope and impact of prisoner litigation has significantly diminished in the United States, due partly to a legislative backlash and accompanied by the return of hands-off judicial deference to the preferences of prison administrators.

In Canada, the landscape of prisoners' rights was altered first by the extension of administrative law concepts and then by the arrival of the *Charter*. Relatively few prisoner *Charter* cases have been litigated, due to the *Charter's* young age, a relatively small prisoner population, and the structural impediments that prevent individuals who live in inaccessible facilities and who are largely poor from accessing the courts. The *Charter* did, however, bring about a legal and culture shift that served to generate the passage of the *Corrections and Conditional Release Act*.[29] The CCRA is Canada's first comprehensive penal code, designed to specify *Charter* ***53** equality and process rights in the penal context.[30] The paucity of prisoners' rights litigation under the *Charter* is partly due to the fact that the CCRA has been considered largely CTiarter-compliant. By contrast, in many American states, there is little formal legislation governing prisons, as prison administrators are simply assigned a large swath of discretionary power to operate their institutions. In Canada, under the CCRA, advocacy for prisoners has tended to mean insisting on adherence to the existing legal regime, rather than pushing for the articulation of new rights. For this reason, much prisoner litigation has been highly individualized and limited in scope.

The key *Charter* issues have been about what the CCRA failed to include, such as the voting rights case.[31] While the adequacy of the CCRA itself is less often challenged, notable exceptions arise; for example, the prisoner grievance system.[32] Litigation that challenges CCRA-compliant practices, like administrative segregation and lack of access to safe injection equipment, discussed in Part IV of this article, are thus novel, emerging sites of contestation to the CCRA itself. There are also important *Charter*-based challenges emanating from the provincial jails, no doubt due to the fact that provincial penal codes have never been properly updated in the *Charter* age, and due to poor conditions in provincial facilities. Like the American litigation that began to demand constitutional reform in the 1970s, provincial claims, along with challenges to the CCRA itself, seek a novel remedial scope, and promise to rely on a wide range of expert material in order to make out both the constitutional violation and the basis for expansive relief.

Building on these stages in the development of prison law, this article argues that constitutional analysis of prisoner claims must be brought into more consistent alignment with ordinary *Charter* standards. There are no automatic rules of deference in a *Charter*-based review of government ***54** law or conduct, and the United States jurisprudential tendency in that regard, explored further below, should be rejected. Under *Charter* analysis, the right is presumed to prevail, unless infringement is justified under section l.[33] Jacob Weinrib argues that the section 1 framework is normative, in that it represents a "doctrinal solution to a moral problem that arises in modern constitutional states."[34] The idea is that once constitutional rights are conceived of and interpreted as incidents of the "overarching duty of government to respect, protect, and fulfill human dignity," then a doctrinal test is required so as to resolve moments when incidents of this duty might come into conflict.[35] Prisoners must have access to this same moral mechanism of modern constitutionalism, rather than being subject to judicial deference that preempts or negates the standard. The questions that animate section 1 point to the salience of certain empirical factors. Canadian courts now regularly require robust evidence--typically expert evidence--to assess whether the infringement is "demonstrably justified in a free and democratic society."[36] To fully deploy this reality in the field of prisoner rights would entail a full break from a notion of civil death for prisoners, and a rejection of United States-style reticence to sustain access to constitutional review for prisoners.

As just one introductory example of how prevailing forms of Canadian constitutional review have not always been applied in the context of prisoner claims, Debra Parkes has observed a judicial tendency to "consider issues of government justification for limiting rights at the stage of deciding whether there has been an infringement of the right itself, rather than at the subsequent section 1 stage."[37] Parkes cites *Fieldhouse v. Canada*,[38] where the British Columbia Court of Appeal held that a random urinalysis policy did not breach sections 7 or 8 of the *Charter*. Both the trial and appellate courts considered the government's justifications and ***55** objectives at the front end of deciding whether a right had been infringed. With this

approach, the courts avoid the section 1 analysis, which, as Parkes points out, "requires more than a good objective; it requires, among other things, that the measure chosen to achieve the objective only minimally impair *Charter* rights."[39] This article explores additional examples and considers possibilities for ensuring ordinary levels of *Charter* scrutiny for prisoners.

The question of whether rights are Dworkin's "trumps"[40] or whether they are subject to judicial balancing and contextual interpretation is often considered to be the main difference between United States and Canadian constitutional law. The conventional story is that the United States is marked by a stronger conception of individual rights.[41] In the Canadian context, so the story goes, rights are not trumps. The structure of *Charter* adjudication means that rights are significant protections to be interpreted in context, a context that includes the text of the *Charter* and the separation of powers central to Canadian political design. These debates are newly relevant for prisoners--a right has been the furthest thing from a trump in the traditional forms of law accessible to prisoners. For much of the history of the modern prison, nuanced questions about the priority and interpretation of rights were not pursued, as courts simply refused judicial review on matters related to the internal conditions of penal institutions. It is critical to observe that we still find traces of the old ways, from a time when prisoners' rights was a strange and unenforceable legal category. That traces remain is not surprising: there is a deep structure to judicial deference to penal institutions. A shift to a *Charter-based* penal law is not yet complete, but the mechanisms by which it could happen are becoming increasingly clear.

***56 II. Canadian Judicial "Hands Off": Persistence into the Charter Age**

In prison law, as in any other area of law, the question of reviewability precedes the question of evidentiary standards. The notion that the powers of prison administrators should be subject to judicial scrutiny arrived in advance of the *Charter*, in a 1980 administrative law decision where Justice Dickson held that "the rule of law must run within penitentiary walls" and that prison disciplinary boards must abide by a common law duty to act fairly.[42] Four years later, the Federal Court of Appeal in *Howard v. Stony Mountain Institution*[43] interpreted section 7 of the *Charter*, which protects a right not to be deprived of the right to liberty "except in accordance with the principles of fundamental justice,"[44] to hold that where prison disciplinary proceedings could result in loss of earned remission days, prisoners are, in most cases, entitled to access to legal counsel.[45]

The facts in *Howard* reveal the tensions in the air as the Canadian legal system shifted to the *Charter* age. The case arose after an officer presiding over a prison disciplinary court denied a request for legal counsel, retained by the prisoner, to be present at a hearing. The officer remarked that section 7 does not create "a new wave of rights" and that the officer was entitled to exercise his discretion and conclude that a fair hearing was possible without counsel.[46] The prisoner was found guilty of various disciplinary offences and sanctioned with a loss of seventy days of earned remission. The three-judge panel in *Howard* did not find that section 7 protects an absolute right to counsel in all prison disciplinary proceedings, but did decide that the loss of remission days triggered section 7 rights in this case. Most significantly, all three judges affirmed that the presiding officer did not have final authority to adjudicate the right. In separate concurring reasons, Justice MacGuigan observed:

> What s. 7 requires is that an inmate be allowed counsel when to deny his request would infringe his right to fundamental justice. The existence of the right admittedly depends on the facts. But the right, when it exists, is not discretionary, in the sense that the presiding officer has a discretion to disallow it. The presiding officer's authority ***57** cannot, in my view, prevent a reviewing court from looking at the facts and substituting its own view.[47]

This passage from Justice MacGuigan affirms that discretionary penal decisions are subject to *Charter* review, along with the principles of administrative fairness articulated in the 1980 *Martineau* decision. By articulating these legal concepts, the courts affirmed the notion of access to judicial review and *Charter* rights in Canadian prison law.

Notably for the thesis of this article, the *Howard* court's treatment of penal expertise was central to its decision, but here the fact of inherent state expertise did not end the analysis. Justice MacGuigan admitted that it would be an "ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order," but he continued the analysis, reasoning that "not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes."[48] While on-the-spot segregation might be justified in an emergency situation, disciplinary court and revocation of earned remission lacks such a temporal imperative. In sum, a promise to hold prison officials to legal standards requires testing their assertions as to what is necessary and thus legitimate in the prison context. Justice MacGuigan found that the refusal to allow counsel at disciplinary court was a matter of "mere convenience" rather than necessity.[49]

The introduction of legality and judicial review into penal decisions provoked more resistance in other cases. There are several instances of under-reasoned judicial deference to prison administrators in the case law-- particularly at the trial court

level--even after the advent of the *Charter*. Such cases reveal a historic and lingering habit of offering substantial deference to the taken-for-granted expertise of prison administrators. In the 1982 case of *Maltby v. Saskatchewan (AG)*,[50] a trial judge struggled to articulate the standards that would apply to a claim of "cruel and unusual punishment" under section 12 of the *Charter*. The court admitted, at the outset, that "[t]he duty to confront and resolve constitutional questions regardless of their complexity and magnitude is the very essence of judicial responsibility."[51] The judge noted that courts "cannot simply abdicate their function out of misplaced deference to some sort of hands off doctrine."[52] However, unaided by higher court interpretations of ***58** the *Charter's* section 1 at this time, the court suggested that the purpose of section 1 is to justify *all* rights infringements in the detention context. The claim was that incarceration entails "reasonable limitations" on rights previously enjoyed, and thus any infringement of the rights of prisoners would be justified under section l.[53] As discussed below, later cases make clear that section 1 contains a much more rigorous standard, for both prisoners and other categories of claimants.

The court in *Maltby* also took the peculiar step of looking to American doctrine to buttress a deferential approach to prison administrators defending against prisoner claims. The judge cited a leading 1974 California case that set out the following propositions:

> Prison officials and administrators should be accorded wide ranging deference in the adoption and execution of policies and practices that in their judgments are needed to preserve internal order and discipline and to maintain institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. ... The unguided substitution of judicial judgment for that of the expert prison administrators ... would to my mind be inappropriate.[54]

There are several strange features to this formula of deference to "professional expertise." First, this Saskatchewan trial judge cites, with little explanation or justification, American cases for propositions of Canadian law. The unexplained extra-jurisdictional citation suggests a struggle to thoughtfully interrogate what Canadian legal order--particularly the new *Charter* order, distinct in many ways from the United States *Bill of Rights*-- requires for judicial review of Canadian prison conditions. In addition, the review formula that is transported from American law implies ***59** that judges cannot analyze the facts of prison cases while keeping in mind the challenges of prison administration. Yet judges are constantly asked to review the conduct and policies of government actors with appropriate attention to operational context. Moreover, the judge does not have to impose "unguided substitution" but could, rather, form a view based on evidence. The doctrine articulated in *Maltby* reveals both a classic judicial instinct to avoid adjudicating prisoner claims, and shows the corresponding presumption that the decisions of prison officials are invariably driven by legitimate professional judgments, rather than, say, indifference or stereotypes. The approach also confirms the necessity of introducing external sources of knowledge that could enable the court to be properly guided in its assessment.

This standard from *Maltby* continues to be cited and utilized in order to justify extreme standards of judicial deference, notwithstanding its dubious status as a *Charter* authority. In the 2011 Ontario case of *R. v. Farrell*,[55] a pretrial detainee brought a broad complaint about conditions of confinement, founded on section 12 of the *Charter*, as a *habeas corpus* application. In its opinion, the court cited the above paragraph from *Maltby*, adding the general notion that "[a] person in custody simply does not possess the full range of freedoms of an un-incarcerated individual" and that the "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions."[56] There is little reference in *Farrell* to the evidence or authorities behind these assertions. One of the complaints at the heart of the application in *Farrell* was the lack of winter clothing provided to prisoners for outdoor exercise in Ottawa. On this issue, the court simply concludes:

> In connection with having to exercise in a yard without warm clothing in the winter, I agree that it is not feasible for hygiene and logistics to equip inmates with hats, mitts and boots to meet winter's harshest conditions.[57]

Yet there is no evidence cited in the decision, nor additional reasoning, to explain how "hygiene and logistics" serve, exactly, to make the provision of winter clothing "not feasible."

In its startling conclusion, the *Farrell* court asserts that *habeas corpus* and the standards for punishment under section 12 of the *Charter* are not available for complaints relating to "fresh air, medical treatment, meals, the right to call and receive calls from a lawyer, and available counseling." ***60** [58] The court refers to these items as "trivial issues" that should instead be addressed through grievance procedures in the institution.[59] The court also seems to think that these matters could *never* violate the section 12 protection against "cruel and unusual punishment."[60] While there is little doubt that the logic behind

this judgment would not be sustained if competently appealed, it serves as an illustration of a judicial attitude that continues to pervade at least some contemporary prisoner cases, and how that attitude can presume that prisoner deprivations are generally justified. Moreover, given the barriers of both bringing prisoner complaints and pursuing appeals, this lower court denial of the constitutional relevance of prison conditions merits attention and critique.

Another peculiar conception of rights in the prison context appeared in a recent Ontario decision concerning a prisoner complaint about harsh conditions in long-term segregation. The reviewing court in *R. v. Aziga*[61] made several general statements that are unsupported by the text and structure of the *Charter*. The trial judge noted that the application lacked a sufficient evidentiary basis for adjudication of a *Charter* claim[62]--which was fair enough--but the court went on to make exaggerated assertions about the standards of review to be applied to the decisions and practices of prison administrators. The judge stated that courts must be "extremely careful not to unnecessarily interfere with the administration of detention facilities."[63] He asserted further that prisoners must show a "*manifest violation* of a constitutionally guaranteed right," or else "it is not generally ***61** open to the courts to question or second guess the judgment of institutional officials."[64] The court suggested that judges have been "very reluctant to intervene" when "conditions of detention are challenged under the *Charter*."[65]

The complaint in *Aziga* may have been properly dismissed on the basis of the minimal evidence filed in that particular case. However, the doctrinal assertions in the opinion are not a principled or accurate reading of *Charter* requirements. The idea that courts cannot "question" the judgment of institutional officials does not accord with *Charter-era*. ideals of government constrained by entrenched rights. Further, there is no good authority for a unique standard of "manifest violation" required to vindicate prisoner claims. The notion that the *Charter* only protects prisoners from a "manifest violation" of guaranteed rights is unsupported by the plain language of the *Charter* and the principles articulated by the Supreme Court in *Sauve*. If the conditions of long-term segregation violate, for example, sections 7 and 12 of the *Charter*, the only remaining question is whether the violation can be "saved" under section 1. Finally, to "question" prison administrators does not mean that their difficult working context will not be properly weighed and considered, as section 1 doctrine invariably entails.

Where prisoners can show that rights have been infringed, Canadian courts must simply proceed to analysis of whether the government can justify the infringement under section 1. The *Oakes* test affirms the presumptive importance of rights, and makes clear that limitations are acceptable only where government meets a demanding test of justification. Sujit Choudhry explains that the proportionality principle at the heart of section 1 has come to entail careful evidentiary assessment.[66] As Choudhry argues, the *Oakes* doctrine "made *empirics* central to every stage" of the analysis, with the result that the "central debate in many section 1 cases is the quality of the evidentiary record."[67] Courts regularly require social science evidence to assess whether the infringement is "demonstrably justified in a free and democratic society."[68] There is no principled ***62** reason why prisoner claims should not be similarly treated, with the burden on the state to justify any infringement.

Moving up to the Supreme Court of Canada level, a different judicial move appeared in a 1990 opinion where serious aspects of prison administration were excluded from *Charter* coverage. In *R. u. Shubley*,[69] a majority of the Court held that penalties such as solitary confinement, with a restricted diet and loss of earned remission days, are not a "true penal consequence" so as to attract *Charter* criminal procedure protections.[70] The effect of the holding was that a prisoner could be punished twice for the same conduct: once by prison administrators, and again by an ordinary criminal court. The premise of the majority holding is that internal prison discipline is not a system designed to punish, but to "maintain order in the prison."[71] In the following passage, Justice McLachlin (as she then was) seems to think that because the prison treats these events informally, this determines the question of impact on the prisoner:

> The internal disciplinary proceedings to which the appellant was subject lack the essential characteristics of a proceeding on a public, criminal offence. Their purpose is not to mete out criminal punishment, but to maintain order in the prison. In keeping with that purpose, the proceedings are conducted informally, swiftly and in private. No courts are involved.[72]

The deference in *Shubley* serves to exempt punitive aspects of prison administration from *Charter* protection, by characterizing such punitive techniques as simply part and parcel of benign administrative processes. According to this peculiar logic, the more casual the treatment of the right by the prison regime, the less duty there will be on courts to intervene. Justice McLachlin approached the issue not as a matter of a right held by a prisoner, but by acceding to the framing of the case advanced by the prison administrator. The prison argued that the formal purpose of internal discipline is simply administrative. Justice McLachlin accepted that the consequences imposed on the prisoner are "confined" to the "manner in which the inmate serves his time," rather than "redressing wrongs done to society at large."[73] Justice McLachlin even suggests that the proceedings ***63** occur "in private"--a strange and telling way of describing decisions made inside coercive public institutions. Justice Cory, in dissent with Justice Wilson, warns that the holding ultimately means that "once convicted

an inmate has forfeited all rights" and can "no longer question the validity of any supplementary form of punishment."[74] The dissenting opinion emphasizes that time in solitary confinement has substantial effects, and is not simply an alternative mode in which a prisoner may serve his sentence. The reasoning of the majority restores a dimension of civil death following incarceration. The majority judgment seems to reveal a wish for the prison to be akin to a "private" place, beyond the reach of law, where the interests of prisoners can be easily subordinated to managerial preferences.

Debra Parkes has criticized the court in *Shubley* for failing to understand how additional prison time and the deprivations of solitary confinement raise serious prisoner interests. Parkes explains the outcome by noting that "[t]he *Shubley* majority shows a substantial degree of deference to the Ontario government's characterization of the internal discipline process as informal, summary, and therefore, non-criminal."[75] Along similar lines, Allan Manson notes that the majority's decision "not to inquire more carefully into the factors of imprisonment does not do justice to the expanded function of the judiciary in the post-Charter era."[76] *Shubley* is a rare instance of reluctance at the level of the Supreme Court of Canada to apply the *Charter* to the penal context.[77]

The cases briefly canvassed in this section reveal that, in some respects, the *Charter's* arrival did not create a sharp moment of rupture in the development of penal law. First, enhancements to prison law arrived before the *Charter*, in the *Martineau* administrative law decision and through various Parliamentary endeavours.[78] Second, *post-Charter* cases, typically in lower-level courts, have articulated standards of deference to prison administrators that do not accord with *Charter* principles and which are rarely offered to other government actors. This is a peculiar ***64** impulse, given that the prison context may be the least likely place for constitutional compliance to occur, since it is an isolated and difficult environment where authority is exercised on a politically powerless population, amid limited resources and government actors who receive less training than police officers. Part **III** traces the treatment of these issues in American law, which provides further support for a claim that prisoner rights have not simply expanded in the modern age of human rights and constitutionalism. In the United States, deference to the presumed expertise of prison administrators has been at the heart of recent decades marked by judicial withdrawal from prison oversight.

III. American Judicial Review: Intervention and Retreat

In the middle of the twentieth century, United States federal courts began to articulate and apply constitutional standards to both federal and state prison systems. Particularly in the 1960s, American courts began to disavow a historical "hands off' doctrine, which held that matters of prison conditions and administration were exempt from judicial review and constitutional law. Over the subsequent twenty years, the federal judiciary decided many cases that recognized individual prisoner rights, and, at times, granted extraordinary remedies that subjected entire state prison systems to oversight and intervention on matters of infrastructure, conditions, and basic policies.[79]

While there was no official constitutional change to explain these developments, the emergence of prisoner law in the United States was connected to the Civil Rights Movement and the reforms initiated by the Warren Court. Prisoners were able to latch on to the radical extensions of citizenship rights and democratization that characterized legal change in that period.[80] The prisoners' rights movement had roots in a long history of efforts to reform the prison, but, as James Jacobs points out, after the ***65** 1960s the arguments for reform began to be sourced in the Constitution, rather than in the language of religious or utilitarian values.[81] Once the reform period arrived, it operated intensely. In their detailed study of this period, Malcolm Feeley and Edward Rubin remark that "the entire conditions-of-confinement doctrine was articulated in little more than a decade, after 175 years of judicial silence on its subject matter."[82]

The accrual of judicial expertise regarding prison conditions proved essential to the reform process, so as to mediate the structural imbalance in both knowledge and authority between the prisoner plaintiff and the institutional defendant. The early cases gave rise to evidence about the qualitative features and actual effects of imprisonment, heard in United States federal courts for the first time. Neutral experts emerged in the form of court-appointed receivers and special masters, who would collect data, oversee the implementation of court orders, and report back to federal judges as to progress made and the need for specific further reforms.[83] These mechanisms for providing expert advice to courts about the adequacy of particular prison systems are still in use in the United States today, and affirm the deep connection this article points to between judicial enforcement of rights and mechanisms for judicial education regarding penal institutions.[84]

The first intensive wave of reform did not last long. There was soon a sense that the courts had gone far enough. In 1980, James Jacobs observed ***66** that "the luster of the prisoners' right movement seems to be fading."[85] The larger society had shifted to the "culture of control" caused by high levels of crime, and had experienced the social and political transformations associated with the policies of mass incarceration.[86] Whatever the causes, a shift in judicial attitude and political atmosphere began to constrain prisoner litigation in the United States. Feeley and Rubin point to cases decided between 1979 and 1991 as the key indicators of change.[87] At the legislative level, the 1996 Prison Litigation Reform Act, aimed at curtailing prisoner

litigation and limiting the scope of judicial intervention in prison administration even for constitutional claims, was the culmination of the new atmosphere.[88] Prisoner litigation remains a useful tool for knowledge production, negotiation, and, at times, judicial remedies.[89] But the benefits and drawbacks of litigation must be unpacked one ***67** case study at a time, with attention to the entire litigation context and actual effects within penal institutions.[90]

At the doctrinal level, the cases reveal how the notion of rights articulated by the United States Supreme Court in the 1970s is different in tone and substance from that applied today. One example is the line of decisions concerning the First Amendment right to free expression, which shows how patterns of judicial deference and notions of correctional expertise shaped the progression from *Procunier v. Martinez*,[91] decided in 1974, to *Beard v. Banks*,[92] decided in 2006.

In *Martinez*, the United States Supreme Court invalidated California Department of Corrections regulations that permitted extensive censorship of prisoner mail. The impugned regulations included a ban on any prisoner letters that "unduly complain[ed]", "magnify[ied] grievances", or "express[ed] inflammatory political, racial, religious or other views or beliefs."[93] While United States courts had previously deferred entirely to the decisions and rules of prison officials, in this case the court affirmed that when a prison regulation or practice offends a fundamental constitutional guarantee, "federal courts will discharge their duty to protect constitutional rights."[94] Along with articulating this fundamental principle of constitutional jurisdiction over prisons, the *Martinez* Court found that the California regulations on prisoner correspondence impaired expression rights protected under the First Amendment. The Court reasoned that corrections officials had to show a "substantial governmental interest" in order to validate the regulation.[95] The specific regulation then had to be shown to be "necessary or essential to the protection" of the government ***68** interest.[96] The California regulations, with their broad and ambiguous constraints on prisoner speech, failed the test.

Within a few years, however, doctrinal ambiguity about the standard of review was seized upon by the 1987 decision in *Turner v. Safley*,[97] which indicated that prisoners are to receive a very low level of judicial scrutiny for a constitutional claim, even one implicating a fundamental right. To survive review, the regulation needed only to satisfy four factors, the main one of which is whether the regulation is "reasonably related to legitimate penological objectives."[98] Sharon Dolovich has a sharp critique of the *Turner* test, arguing that it allows prison officials to violate constitutional rights "if they can show that doing so facilitates the running of the prison."[99] Part of the problem is that the "penological objective"--a purpose that can justify infringement of a right--is often simply asserted by the prison authority, and accepted on little evidentiary proof. Consequently, ensuring the security of the institution has been regularly asserted, to great success and with little empirical testing, by institutional defendants in the years following *Turner*.[100]

The 2003 case of *Overton v. Bazetta*[101] exemplifies how application of the *Turner* standard fosters heightened judicial deference in a later generation of cases, where deference is deployed so as to defeat prisoner claims regardless of whether evidentiary standards are satisfied by the state. In *Overton*, a majority of the United States Supreme Court upheld extensive limits on the ability of prisoners to receive visits from outside the prison. The regulations included a ban on parents receiving visits from natural-born children where parental rights had been terminated for any reason, and a complete ban on visits for prisoners with a substance abuse violation in the previous two years. Given the importance of visiting to prisoners, and the fact that the parental rights of prisoners can be comparatively easily terminated under American law, these were severe ***69** limits. In upholding the restrictions, the majority simply asserted that the regulations "promote internal security, perhaps the most legitimate penological goal."[102] The majority also found that the regulations protect children, by reducing the number of children at visits and allowing guards to better supervise them. With respect to the withdrawal of visitation from inmates with two substance abuse violations, the majority concluded: "Withdrawing visitation privileges is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."[103]

Despite the empirical issues at the heart of this holding, such as whether it was too difficult for guards to safely supervise a larger number of visiting children, the majority in *Overton* did not cite or elaborate on any evidentiary sources for its claims, and did not cite the findings of the courts below, each of which found the regulations to be invalid. The majority justified its approach in the name of granting due deference to prison administrators.[104] *Overton* suggests that prison administrators are to receive deference regardless of the content or the quality of their professional judgment, which echoes the doctrine asserted by some Canadian judges discussed above. This standard of adjudication has led many United States commentators to cite the return of the "slaves of the state" approach or of keeping judicial hands off the field of prison administration.[105]

Judicial deference to the unquestioned expertise of administrators reached new rhetorical heights in the 2006 plurality opinion of Justice Breyer in *Beard*. This case involved prisoners housed in highly restrictive conditions at Pennsylvania's Long Term Segregation Unit (LTSU). At the LTSU, all prisoners were confined to cells for twenty-three hours a day, with no access to commissary goods or phone calls, and a single immediate family visitor once per month. Confined almost

constantly to cells, they nevertheless had no access to television or radio. The basis of the legal ***70** complaint was quite restrained given the circumstances. Prisoners assigned to Level 2 (the most restrictive level of LTSU) had no access to newspapers, magazines, or personal photographs. The Level 2 prisoners were held in total isolation, often for months at a time, and were denied access to the most basic forms of human communication. The constitutional claim was that the restriction violated the First Amendment's protection of free expression, and that it was not justified because the restriction bore no relation to a legitimate penological objective.

At issue before the Supreme Court was whether the complaint could be dismissed by way of summary judgment; that is, whether the case raised a triable issue. At such an early stage of litigation, the record consisted only of the deposition of a deputy superintendent at the prison, and various prison policy manuals and related documents. Despite the early stage of the case and the very low threshold required to show a triable issue, Justice Breyer, in a 6-2 plurality opinion, directed the summary dismissal of the complaint on the basis that "the prison officials have set forth adequate legal support for the policy."[106] While the court noted that it must draw all inferences in favour of the claimant at the pretrial stage, it held (citing *Overton* and *Turner*) that it must "distinguish between evidence of disputed facts and disputed matters of professional judgment."[107] In the latter circumstance, Justice Breyer reasoned, courts are to accord deference to the views of prison authorities.

The deference Justice Breyer offered did not turn on any evidentiary support for the claims of the prison authorities. In the pretrial proceedings in *Beard*, the prison authority asserted in its materials that it was depriving LTSU Level 2 inmates of newspapers, magazines, and personal photographs mainly in order to motivate better behaviour, and also to minimize property in cells and ensure prison safety. The prison stated that deprivation, especially for those who have already been deprived of almost all privileges, was a legitimate technique as an "[incentive] for inmate growth."[108] The only evidence adduced to justify these techniques consisted of the statements of the prison administrator. The Third Circuit Court of Appeals (the court below) noted that there was no other evidence to suggest the necessity of the measures, nor was there any evidence to confirm the state's theory of behavioural incentives. The Third Circuit found that the Department of Corrections' deprivation theory of behaviour modification had no basis in real human psychology, and that it had not been shown that the restrictions were implemented in a way that could effectively ***71** modify behaviour, given the deleterious effects on prisoners living with such deprivations.

Justice Breyer rejected the evidentiary concerns of the Third Circuit as follows:

> The court's statements and conclusions ... offer too little deference to the judgment of prison officials about such matters. The court [below] offered no apparent deference to the deputy prison superintendent's professional judgment that the Policy deprived "particularly difficult" inmates of a last remaining privilege and that doing so created a significant behavioral incentive.[109]

Justice Breyer's opinion in *Beard* is remarkable for its articulation of a legal rule: So long as the subject matter of a case concerns the judgment of prison administrators, then in almost no circumstance will the prisoner succeed. The case indicates that, so long as the factual dispute in a case concerns how the prison should operate, dismissal even in advance of trial is justified. It follows that the case substantially effaces the notions that, first, constitutional rights survive imprisonment, and second, that courts must interpret and balance rights infringements in the prison context, such as by analyzing whether a rights infringement is "necessary or essential" (from *Martinez*) or "proportionate" (from *Oakes*) to a governmental interest. Justice Breyer purports to use a standard of "reasonable relation" to a "legitimate penological objective", but his application of that standard suggests the barest minimum of judicial review.[110]

Like the Third Circuit below, the dissenting justices in *Beard* pointed to the lack of evidentiary support to justify the prison's policy. Justice Stevens, in dissent, chronicled the lack of evidence to suggest that the state's theory of behaviour modification had any basis in human psychology, or the notion that the rule had a rehabilitative effect specifically in the LTSU. Justice Stevens noted further that this concept of rehabilitation has no limiting principle:

> [T]f sufficient, it would provide a "rational basis" for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior.[111]

In addition, Justice Stevens found that there were multiple other reasons why an inmate would be motivated to rehabilitate out of LTSU, and that the lack of access to a single newspaper was an invasion of the ***72** "sphere of intellect and spirit" which the First Amendment protects.[112] Justice Stevens concluded that a full trial was necessary in order to form a definitive judgment as to whether the challenged regulation was "reasonably related" to the prison's valid interest in security and

rehabilitation, in accordance with the *Turner* standard.

Justice Ginsburg echoed these concerns in a separate dissent, noting that the defendant relied entirely on the deposition of the prison's own deputy superintendent, whose evidence was simply:

> [O]bviously we are attempting to do the best we can to modify the inmate's behavior so that eventually he can become a more productive citizen. ... [Newspapers and photographs] are some of the items that we feel are legitimate as incentives for inmate growth.[113]

Justice Ginsburg concluded that these statements are not sufficient to show that the challenged regulation is reasonably related to inmate rehabilitation.[114] Justice Ginsburg concluded that the plurality's reasoning means that it is sufficient for a prison defendant to say "in our professional judgment the restriction is warranted" in order to avoid even the burden of a trial.[115] Justice Ginsburg's analysis reveals the structural similarity between the plurality's approach and the era of civil death for prisoners, the only difference being that prisoners can now access the courts and, at least briefly, assert a right in a language cognizable to the courts. But so long as the prison points to its own professional judgment, then the scope of the right is diminished so significantly that it does little good to bear it.

Cases like *Overton* and *Beard* have led Sharon Dolovich to argue that United States prison law wholly lacks principled and consistent doctrines of judicial deference.[116] Dolovich has mapped three particular forms of deference that have been deployed in recent years at the Supreme Court ***73** level, each of which works in important ways to deny prisoner claims, all while maintaining a narrative of judicial oversight. The first form is *doctrine-constructing*, where deference is written right in to constitutional standards, such as standards that require high levels of proof in order to make out a violation.[117] The second predominant form of deference is *procedural rule-revising*, where decisions are made in ways that transform ordinary matters of legal process into rules that are more defendant-friendly, such as by adjusting evidentiary burdens in favour of the state.[118] The third form of deference is *situation-re framing*, where the court recasts a procedural or factual history in a way that enhances the state's position and disregards the lived experiences of prisoners.[119] Dolovich admits that, in the cases she considers, difficult practical consequences would have followed the granting of relief to prisoners. But the point is that the Court does not acknowledge that side of things. Rather, the reasoning simply pretends that the stipulated outcome is required, "reasoning in ways that not only favor defendants but also seem willfully to deny the lived experience ***74** of prisoners--even when the nature of that experience is the gravamen of the legal complaint."[120]

The plea for a transparent deference doctrine has not yet inspired change in United States courts. For now, courts tend to yield to the unchallenged expertise of prison administrators. There are many possible explanations, including, perhaps, a reluctance to encounter the complex and distressing reality of life inside penal institutions. The point here is to see that modern United States courts--rather than using the ancient tools of denying legal standing or flatly rejecting the idea of law-governed prisons-- deploy notions of expertise and deference as a means of bypassing prisoner claims. The United States cases demonstrate that judicial protection of prisoners' constitutional rights is unfeasible unless courts require professional penal judgments and objectives to be supported by evidence. For Canadian law to complete the shift to the *Charter* era, courts must shift the burden to prisons to prove their empirical assertions about the purposes, necessity, and effects of penal techniques that impair rights.

IV. Transitioning to a Rights-Based Paradigm

Transition to a *Charter-based* penal law requires that judges appreciate the structural imbalance in expertise at the outset of a case, and not aggravate that imbalance by relaxing scrutiny of the penal context. Plaintiffs' counsel can foster a better balance by adducing evidence that contextualizes the assertions of prison defendants. Prisons do not need to be viewed as mysterious places by courts, nor as places where necessarily amateur outside intervention could trigger unknown dangers. Former prison administrators, and administrators from other jurisdictions, can give testimony to illuminate internal dynamics. Psychologists can conduct individual assessments and speak to the impacts of particular penal regimes. The independent reports of prison monitors can inform awareness of systemic issues.[121] Prison sociologists and ethnographers can illuminate the internal prison world and the variable modes of prison administration.[122]

***75** As one illustration, the work of British criminologist Alison Liebling is grounded on a thesis that the quality of imprisonment can be reliably measured and analyzed. Liebling uses diagnostic tools to capture what she calls the "moral quality" of a given institution, along the dimensions of relationships, regimes, social structures, meaning and overall quality of life.[123] Liebling is able to measure and elaborate on important factors that are difficult to quantify, such as "how material goods are *delivered*, how staff *approach* prisoners, how managers treat *staff*, and how life is *lived*, through talk, encounter, or

transaction."[124] While Liebling's concept of "moral quality" speaks to aspects of prison life that likely extend beyond that which should or can be regulated by law, we can see within her work a number of legally relevant dimensions. Lawyers must now learn how to translate problems in the complex world of prisons into cognizable legal claims. For instance, the "prison effects" literature[125] identifies the factors relevant to rates of prisoner suicide,[126] the impact of imprisonment on the elderly,[127] and the multiple negative effects of overcrowding on safety, health, and psychological integrity.[128] Viable *Charter* claims could be organized around each of these empirical sites.

***76** Other marginalized litigants have successfully deployed empirical research to support their litigation efforts in the *Charter* era. The question of evidence has, in fact, been the critical dimension for claimants who experience chronic marginalization and popular resentment. This is at least partially because the evidentiary record is the means by which counsel can insist that constitutional adjudication not mirror conjecture and stereotyping from the wider culture. In response to these strategies, Canadian judges have extended the privilege of adjudication on the basis of *facts* rather than *stereotypes*, to groups such as sex workers[129] and injection drug users.[130] Each of these cases involved a voluminous trial record, with experts testifying from the fields of epidemiology, medicine, sociology, and criminology. The analysis undertaken by the Supreme Court in *Sauve* is an indication of the extension of that privilege of sound evidentiary standards to prisoners as well. Counsel for prisoner claimants should continue to focus on the issue of expert evidence, notwithstanding the difficulties of doing so, and should be aware that there is an extraordinary range of expertise and literature that could bear upon future *Charter* claims.

The following three case studies illuminate how that might be done on contemporary topics that are of vital importance to prisoners. The first example stems from a decided case that deals with the use of long-term segregation on prisoners. In that case, success depended on the ability of the plaintiff to adduce an evidentiary record that contextualized the effects and necessity of the prison's specific style of segregation or solitary confinement.[131] The second example is also a decided case, dealing with ***77** the abrupt cancellation of a program that enabled mothers to keep their babies with them in prison. The plaintiffs' resounding victory--resulting in the reinstatement of the program and a decision that was not appealed by the government--rested on voluminous evidence on the benefits of the program, for both mother and child, and a dearth of evidence on potential downsides. Finally, the third example concerns the ability of prisoners to access harm-reducing measures that are available to injection drug users outside of prison. A case on this issue has been filed but not yet adjudicated. Early indications suggest the record will be rich with epidemiological evidence on disease transmission in the prison context, along with comparative evidence from prison systems that have safely implemented harm reduction programs.

A. Solitary Confinement Bacon v. Surrey Pretrial Services Centre

There is a *pre-Charter* history of judicial intervention into solitary confinement which arose out of the extreme conditions and prisoner isolation found in the British Columbia Penitentiary in the 1970s.[132] In *R. v. McCann*,[133] after a trial rich with expert testimony, the Federal Court declared these conditions to be cruel and unusual punishment within the meaning of section 2(b) of the *Bill of Rights*. The *McCann* litigation was part of an early wave of prison legality in Canada. The case was a formal ***78** victory, but Michael Jackson--who was counsel on the case--has detailed the difficulties of seeing the judgment implemented.[134]

In the *Charter* age, an early challenge to solitary confinement came from notorious serial killer Clifford Olson, who brought the case *pro se* and filed no expert opinion material. In its 1987 decision, the Supreme Court of Canada upheld the Ontario Court of Appeal's finding that "segregation to a prison within a prison is not per se cruel and unusual treatment."[135] The opinion of Justice Brooke confirmed the test for section 12 of the *Charter* from *R. v. Smith*:[136] "[W]hether the punishment prescribed is so excessive as to outrage standards of decency," such that "the effect of that punishment [is] grossly disproportionate to what would have been appropriate."[137] Justice Brooke concluded that, on the facts of the case, segregation was required to protect Olson, given that the prison community despised him. The court accepted that segregation could, theoretically, become so excessive that it would outrage standards of decency. In Olson's case, however: "He is continually observed and his health is protected. There does not appear to be any adequate alternative."[138] Olson did not adduce any evidence on the effects of segregation nor any evidence as to alternatives to long-term isolation.[139]

***79** In 2010, the Supreme Court of British Columbia considered a very different record in a Charier-based challenge to prisoner segregation in *Bacon*. A pretrial detainee was confined to a cell in a provincial facility for twenty-three hours a day, with no visits permitted except with his lawyer and parents, no other social contact, and limited access to exercise. As in *Olson*, the jail justified the segregation on the basis of the prisoner's need for protection: Bacon faced multiple gang-related

homicide charges. The jail argued that release to general population could result in the prisoner's assault or murder due to the nature of his crimes and his criminal associations, and further that separation was required to protect the integrity of the criminal prosecution being brought against Bacon. The justifications offered by the jail merited serious consideration--on the facts presented from the perspective of the jail and its central concerns, it seemed sensible to keep Bacon isolated, for both his own protection and to prevent any interference in the trial of the charges against him.

In a move that compelled the court to examine a further set of issues, Bacon's counsel filed an expert opinion from psychologist Craig Haney, a leading expert on prison conditions and the mental health effects of segregation. The trial judge, Justice McEwan, found Haney to be a qualified expert, given his thirty-five years of experience studying the psychological effects of living and working in institutional environments:

> He has toured prisons in the United States, Canada, Cuba, England, Hungary and Russia and has performed a study of prison conditions in Mexico. He has written extensively in the field of crime and punishment and has published numerous articles on prison life, including solitary confinement. ... I certainly accept that Professor Haney is qualified, by virtue of his experience, to offer opinion evidence on prison conditions, and to assist the Court in placing the treatment the petitioner has received in context.[140]

Justice McEwan cited large portions of Haney's affidavit, which described how Bacon had often been housed in "very harsh and truly severe" conditions, equivalent to those imposed in "supermax" facilities in the United States.[141] Bacon's unit housed mentally ill prisoners, and staff advised that these distressed prisoners regularly threw feces and bodily fluids. Bacon ate all of his meals in an eighty-square-foot cell, within a few feet of his toilet. He had no access to programs or organized activities. He remained in his cell nearly every hour of every day. Contact with anyone ***80** other than his parents was reduced to mail correspondence, which Haney noted as more restrictive than most American policies. Bacon's mandatory one hour outside of his cell came, quite unnecessarily, at random times, without warning or ability to plan for it. His outdoor time entailed time spent in a different concrete courtyard with no exercise equipment or other people. Haney observed that the structural and procedural modifications required for long-term housing of isolated prisoners had not been built into the facility, and, finally, that staff lacked training with respect to the psychological effects of long-term isolation, with "no procedure in place whereby the mental health status of each prisoner is checked routinely, frequently, and carefully."[142]

The jail argued that Haney's evidence described an American practice rather than the conditions in which he found Bacon. Justice McEwan rejected the argument, and accepted Haney's evidence that the "physical conditions under which the petitioner has been held compare ... to some of the worst conditions-in the United States and elsewhere. Such conditions have been condemned by the international community."[143] Justice McEwan further found:

> The petitioner is kept in physical circumstances that have been condemned internationally. He is locked down 23 hours per day and kept in the conditions Professor Haney described as "horrendous". These conditions would be deplorable in any civilized society, and are certainly unworthy of ours. They reflect a distressing level of neglect. On top of this, the petitioner is only allowed out at random times. He is denied almost all human contact. His treatment by the administration and the guards is highly arbitrary and further accentuates his powerlessness.[144]

In his conclusion that these dimensions of Bacon's treatment violated section 12 of the *Charter*, Justice McEwan acknowledged the holding in *Olson* to the effect that segregation is not, per se, cruel and unusual treatment.[145] However, Justice McEwan also referred to the 2001 holding in *United States v. Burns*,[146] where the Supreme Court of Canada insisted that the government obtain assurances, before granting extradition, that the death penalty will not be sought. The *Burns* court noted that the contemporary American death penalty involves over a decade of post-conviction legal review, during which time the condemned person is held ***81** in the most restrictive conditions known in the prison system.[147] These dynamics generate a form of mental suffering known as "death row phenomenon", which the court found violates the *Charter*.[148] The *Burns* opinion thus makes psychological pain a relevant harm to be considered in a section 12 analysis. Justice McEwan used the *Burns* decision to find that the test of whether punishment is "so excessive as to outrage standards of decency" now includes the perspective of psychological expertise as to the actual effects of an impugned punishment regime.[149]

This subtle shift moves section 12 from a purely moral and abstract concept to a more grounded, empirical approach. The prison's justifications for the segregation--sensible at first look--must then be considered in the light of the specific qualitative features of the confinement, and the effects of those features on the individual prisoner. Haney's evidence described a range of qualitative conditions and factors that can combine in the prison setting to create a certain pitch of severity; even if separation were justified, the evidence raised serious doubt about whether this particular mode of separation was necessary. Due to this record, Justice McEwan was able to think comparatively and to locate the conditions at Surrey Pretrial in a larger context. While Haney's evidence did not prove the existence of "cruel and unusual punishment" in any

strict causal sense, the evidence assisted Justice McEwan in interpreting the social meaning of the solitary range at Surrey Pretrial and to consider that meaning in light of a general constitutional standard.[150]

***82** The court stopped short of striking down the enabling legislation, noting that the formal law had been so "seriously misinterpreted, misapplied or ignored" that the question of its constitutionality could not be meaningfully addressed.[151] Justice McEwan did not interfere unduly in the jail administration: he refused the petitioner's request for a transfer and to be placed in general population, saying that the court could not "take responsibility for the assessment of the risks actually posed by and to the petitioner, or for the specific allocation of resources available to the administration of the institution."[152] The Court noted, however, that there were multiple constitutional breaches, and that the jail officials had "seriously lost sight of their responsibility to the judicial branch of government."[153] The Court found that the prisoner could remain segregated, but held that he must not be kept in "separate confinement" without being offered "privileges" equivalent to a general population prisoner.[154]

In sum, Justice McEwan's finding was that the physical separation of the prisoner might be justified, but that the particular features of segregation at Surrey Pretrial extended far beyond what was necessary to achieve separation. Justice McEwan directed immediate compliance with law, policy, and the court order, and he retained jurisdiction for purposes of ongoing supervision. The remedial aspects of the decision make clear that it is possible for a court to analyze and appreciate the correctional context, and to grant orders that reconcile individual rights with penal realities and the limits of the judicial role.[155]

***83** In *obiter* remarks, Justice McEwan noted that there is a growing sense internationally, as well as in Canada, that locking a person down for twenty-three hours per day is an inappropriate way to treat any human being. He pointed to *Sauve* to argue that judicial reluctance to condemn solitary confinement outright is "not entirely characteristic of the approach taken by the courts to inmates' rights in other contexts."[156] When it came to the voting ban, the Supreme Court struck down a practice that it found was "more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them."[157] Justice McEwan found administrative segregation to be indistinguishable from the voting analysis on these grounds: like the prisoner voting ban, segregation is likely to erode respect for the rule of law and be counterproductive to the goals of deterrence and rehabilitation. That perspective becomes clear once the details of the conditions and the psychological effects of the stigma and social deprivation of penal segregation are described.

A future legal challenge to the federal administrative segregation regime will likely take precisely this approach.[158] In a sense, what is needed is a return to the past, but with new constitutional remedies. In the *McCann* case, extensive evidence was called from multiple psychological experts, who made clear that the effects of extreme isolation did not serve legitimate penological purposes, and that other means of separating prisoners from the general prison society would be less destructive. Prior to *Bacon*, the *McCann* case was the only case in Canadian history in which the conditions of segregation were found to constitute cruel and unusual punishment or treatment. It seems that a return to the *McCann* mode of litigation will be essential so as to challenge contemporary solitary confinement. ***84** But the goal now is a *Charter* remedy that will strike the provisions of the CCRA that allow indefinite isolation but lack proper controls. The evidentiary foundations of a legal challenge will also be enriched by advances in medical knowledge, and the development of international norms regarding the effects of isolation.

B. Mother-Baby Programs: Inglis v. British Columbia (Minister of Public Safety)

The 2013 case of *Inglis v. British Columbia (Minister of Public Safety)* stands as one of the most significant prisoner rights cases in Canadian history. The case involved multiple *Charter* provisions, multiple expert witnesses, interveners at the trial level, and a decision that effectively requires all provincial jails in the province to facilitate an option for infants to remain with their incarcerated mothers. The plaintiffs in *Inglis* were former inmates of Alouette Correctional Centre for Women and their children. The litigation arose from a decision to cancel a program, in place since 1973, which permitted mothers to have their babies with them while they served sentences of provincial incarceration.[159] The Supreme Court of British Columbia ruled that the provincial government's decision to close the program was unconstitutional and violated the plaintiffs' equality rights, as well as their rights to security of the person. The trial judge, Justice Ross, found that the decision to end the program was not made with due consideration of the best interests of children or the constitutional rights of mothers, nor was the cancellation due to any legitimate fears about potential harm. In fact, the evidence showed that the program was beneficial to mothers, babies, and the prison environment as a whole.

The *Inglis* case turned partly on the question of why Alouette cancelled the program in 2007. The provincial defendant

asserted, in its pleadings and through multiple witnesses and the arguments of counsel, that the program was cancelled because of a concern about the safety of the infants.[160] But central to the ruling was the fact that the prison conducted no evaluation of the risks and benefits of the program before cancellation. ***85** [161] Indeed, there was in fact a record of successful operation of the program and others like it.[162] So while the structure of the case was a classic setting for judicial deference to be offered to prison administrators--in that it concerned risk assessment, resource allocation, and daily penal operations-- the lack of evidence supporting risk could not counter the extensive evidence indicating the benefits of the program.

In terms of benefits, a considerable body of expert evidence was placed before the court, which enlarged the scope of the analysis. Most notably, research in developmental psychology was brought to bear upon the jail's proffered justification that it was better for infants to be kept out of the prison context and thus away from their birth mothers. The opinion noted the following themes in the evidence:
(a) rooming in is considered best practice for mothers and babies in the post-partum period and is associated with health and social benefits for both mothers and babies;

(b) breastfeeding is associated with important health and psychosocial benefits for both infants and mothers;

(c) one of the most important developmental tasks of infancy is the formation of attachment by the infant to a primary caregiver, usually but not necessarily the mother. Secure attachment is important to the infant's psychological and social functioning. Interference with attachment puts the infant at risk for developmental deficits and future psychological and social difficulties; and
***86** (d) the importance of individualized decision-making with respect to the best interests of the child.[163]
Witnesses who recommended the program included a nurse within federal corrections;[164] a PhD in sociology and health education with relevant research;[165] and a physician with a background in obstetrics and addiction.[166] Expert testimony came from a psychologist with extensive experience in corrections;[167] the prison physician at Alouette during the pendency of the program;[168] and a law professor who advised that similar programs were available in modern prisons across the world, including the United States, Europe, Australia, and New Zealand.[169] Even experts retained by the government agreed on the central proposition of the plaintiff's case: that it benefits an infant to be breastfed and to form a secure attachment with the parent. One government witness, clinical and forensic psychologist Dr. Elterman, did not recommend against the program but said only that the question of whether these benefits outweigh risks must be assessed on a case-by-case basis.[170] Other government witnesses were criticized for lacking prison experience,[171] and for presuming that Alouette had no separate unit for the program, which was not in fact true.[172] Finally, while one expert for the government reviewed prison logs and concluded that Alouette was a "stressful household," Justice Ross noted that stressful factors--"a baby crying, a pregnant mother feeling stressed, a mother who is tired because her baby has been crying, or a colicky baby"--are not uncommon outside of the prison context.[173]

***87** Even the key decision maker who cancelled the program, Brent Merchant, did not disagree with evidence he had reviewed about the benefits to those in the program and the broader community:

> Mr. Merchant agreed that ... there are both social and medical benefits to keeping mothers and babies together, for both the parent and the child. He agreed that there is scientific and medical evidence supporting the importance of forming attachment by the child to the primary caregiver, normally the mother, relating to the development of the infant's brain and the infant's ability to relate to the world. He agreed that inadequate attachment has been identified to be at the root of many psychosocial problems that, contribute to criminal behaviour. He agreed that there are psychological benefits for the mother and that a mother baby program could help the mother develop parenting skills.[174]

In terms of the legal analysis of this highly consistent evidence, the *Inglis* court said that the "starting point" is the principle that an incarcerated person retains all of her civil rights, other than those expressly or impliedly taken from her by law.[175]The citation for that principle predates the *Charter*, though Justice Ross properly brings it to bear in her section 7 analysis. The early authority is the 1980 decision of *R. v. Solosky*,[176] which concerned the right of prisoners to correspond, freely and in confidence, with their lawyers. In *Solosky*, Justice Dickson introduced important principles for the review of decisions taken in the prison context. He noted that courts have a balancing role to play in ensuring that any interference with the rights of prisoners by institutional authorities is for a valid correctional goal, and that such interference must be the least restrictive means available, "no greater than is essential to the maintenance of security and the rehabilitation of the inmate."[177] These principles are now captured by section 7's protection of liberty and security of the person, as well as in the principles of fundamental justice and section 1 doctrine. The principle of retained rights requires asking an empirical question, namely what rights are compatible with incarceration, and delivering upon their protection. Justice Ross, informed by a significant

evidentiary record, found that the program was clearly compatible, given that it had been working for decades in both the province and the federal system.[178]

***88** Justice Ross concludes that, in deciding to cancel the program, "the state acted on the basis not of reasonable apprehension of harm but from the imposition of an impossible standard--a guarantee of safety."[179] Merchant adopted this standard notwithstanding that he acknowledged that such a guarantee could never be met within Corrections, and that it was not a standard they applied in any other situation.[180] The court accepted that Corrections is entitled to be proactive in responding to a reasonable apprehension of harm, but found that "no investigation was undertaken at the time to determine whether there was such an apprehension."[181] Given the lack of internal evaluation, the jail lacked internally sourced expertise sufficient to defeat the forms of expertise advanced by the plaintiffs. The serious effects of the cancellation engaged both the equality and the security of the prison rights of the plaintiffs, and could not be justified under section 1 due to any legitimate state objective such as fears about potential risks of continuing the program.

Justice Ross noted that the evidence did indicate some possibility of harm to infants, but she contextualized that possibility by noting that there was a risk of harm to infants in virtually any environment, including foster care as well as with relatives in the community. In this sense, Justice Ross did not allow the prison to be an entity sealed off from ordinary society, but considered it as just one institutional space on the spectrum of environments that a child, and particularly a child of an incarcerated person, may come to experience. By broadening the spectrum of risk to consider facts beyond prison walls, the prison defendant lost its most reliable litigation trump card. Justice Ross applied family law concepts, spurred by evidence in developmental psychology on the benefits of mother-infant attachment. The defendant argued that family law is not applicable to the jail context and that it was not obliged to consider or to attempt to maximize the best interests of the children.[182] Justice Ross rejected the notion that the jail was responsible only for the positive content of corrections law. Rather, Corrections was responsible for applying the multiple sources of domestic and international law, all of which make clear that the best interests of the child apply to state actions.[183] Justice ***89** Ross rejected the compartmentalization of the punishment context and the law that applies there.

The court's approach in *Inglis* contains many indicators of a shift to a *Charter-based* penal law. The promise of the holding is enhanced by the fact that, unlike *Sauve*, the case involved matters central to daily penal operations and questions of risk management. Notably, the provincial government elected not to appeal the decisions in either *Bacon* or *Inglis*, which serves as some indication of the soundness of the evidence and reasoning along with the educative function of the trial process. Both cases, along with the *pre-Charter McCann* case, are emblematic of litigation that illuminates the qualitative experiences of punishment, and specifies the range of alternatives to a rights infringement. The result has been to wrestle prisoner law away from deferential modes that conceive of the task of penal administration as an expert realm with which judges ought not interfere.

C. Harm Reduction

A final example of a new mode of prisoner litigation has not yet been adjudicated. On September 25, 2012, the Canadian HIV/AIDS Legal Net-work and four co-applicants filed a lawsuit arguing that the failure to make sterile injection equipment available in federal penitentiaries violates sections 7 and 15 of the *Charter*.[184] The individual plaintiff, Steven Simons, had been incarcerated at Warkworth Institution from 1998 to 2010. His pleadings state that he acquired hepatitis C virus (HCV) when a fellow prisoner borrowed his drug injection equipment without his knowledge. The pleadings seek an order "directing the Correctional Service of Canada, and its Commissioner and the Minister of Public Safety, to ensure the implementation of sterile needle and syringe programs in all federal penitentiaries, in accordance with professionally accepted standards."[185]

The case emanates from a voluminous literature indicating that the rate of HCV in Canadian prisons is over twenty times higher than the rate in the community,[186] and that injection drug use is prevalent in prison. ***90** [187] Prisoners who tattoo or inject drugs face a scarcity of sterile syringes, and may resort to using non-sterile injecting equipment.[188] The Canadian prison system has made a modest acknowledgement of the risk of HIV and HCV transmission in prison by making bleach available to prisoners,[189] though there are difficulties associated with correct use, particularly where injection is likely to be clandestine and rushed.[190] The lawsuit is likely to turn on the record established by expert evidence. Epidemiologists will establish medical literature indicating how disease is transmitted in the prison context; penologists will speak to the viability of providing clean needles in prison, drawing on comparative evidence from other jurisdictions.[191]

The law is on the side of the plaintiffs. Prison law and policy indicates that prisoners are entitled to "essential health care" equivalent to that in the community.[192] As of 2001, there were over 200 needle and syringe programs in the country, which enjoy support across levels of government.[193] In addition, in *PHS*, the Supreme Court held that harm-reducing measures, such

as supervised injection, can be characterized as medical treatment, and that a governmental decision to prohibit access to such measures violates section 7 of the *Charter*.[194] It follows that both the legislation and the relevant jurisprudence support an argument that prisoners ought to be able to access these measures.[195] The determinative analysis should take place under section 1, and should be shaped by whether penological experts can explain to the court how such measures could be accessed ***91** safely, in a fashion sufficient to rebut deference that the court will offer to the strong preference of prison administrators to refuse access to equipment that entails the use of prison contraband.[196]

Again, this is the thorny context where the rights claim is adjacent to central concerns of prison administration. Bound to follow *Sauve*, a Canadian court is unlikely to dismiss the claim on the basis of a vague theory of penological legitimacy, or an unsubstantiated notion of rehabilitative ideals: the peculiar standards of deference articulated in older Canadian case law from lower courts, as well as in current American case law, are unlikely to pervade a contemporary opinion. Further, if the court follows the reasoning in *Bacon*, the claim will not be dismissed purely on the basis of the prison having limited resources.[197] But these points aside, the plaintiffs' final success will hinge on their ability to explain to the court how prisons can be safely run in the midst of easily available hygienic injection equipment for drug users. The plaintiffs' experts are likely to specify how such measures could be accessed while ensuring the safety--and perhaps even improving the safety--of correctional staff and other prisoners. The institutional defendant will have to somehow counter that evidence to meet its burden under section 1.

Conclusion

A 1956 essay by *Brown v. Board of Education* lawyer Jack Greenberg contains a simple statement that raises many practical difficulties. Pointing out that "moral judgments are generated by awareness of facts," Greenberg argues that constitutional interpretation should consider "all relevant knowledge."[198] In the case of prisoner litigation, the category of relevant knowledge must encompass the many complex dimensions associated with administering what Erving Goffman called the "total institution." ***92** [199] A place where insiders live, work, sleep, and play with a large number of similarly situated people, the total institution gives rise to a profoundly broad regulatory task and the need for vast zones of flexible discretion. The project of bringing prison empirics to bear upon the interpretation of relevant legal standards is monumental and has scarcely begun.[200] But this is what it means to have a *Charter-based* law for prisoners, and to finally implement the basic principle of modern prison law from *Solosky:* that prisoners are to retain all rights except those that are incompatible with incarceration.

As Dolovich admits for the American context, some measure of judicial deference is appropriate in the prison law context, as courts are far removed from the "hothouse of a carceral environment."[201] Prisoner claims might be properly interpreted in light of the endemic administrative difficulties of operating resource-limited facilities filled with individuals who often bring complex personal histories to the facility and who are coping with significant deprivations. Yet, just as due deference is called for, there is also a clear imperative for careful external review and putting government to the burden of justification, given the pervasive risk of hidden abuse and neglect.exercised on a powerless population. For much of prison history, prisoners were subject to the unreviewable preferences of guards and administrators. Even after the *Charter*, Canadian courts have occasionally articulated doctrinal standards that fall short of jurisprudential approaches developed in other areas of constitutional law.

Canada's practices of state punishment are distinct in many ways from the American model, as is the character of Canadian judicial review. But the case law discussed in Part II indicates that Canadian courts are not immune to overly deferential instincts when it comes to dealing with ***93** the administration of complex and punitive institutions with which judges may have little knowledge or expertise, and when it comes to interpreting and protecting the rights of little-favoured citizens. To borrow from Dolovich's deference map, the decision in *Shubley* could be considered an example of *situation-reframing:* where severe modes of confinement are recharacterized as benign administrative techniques. The *Farrell* court might make use *of procedural rule-revising:* suggesting that the appropriate place for constitutional claims is the internal grievance system, rather than the courts. *Aziga* might be an example of *doctrine-constructing* deference: where the court writes deference right into a standard of "manifest violation" that applies in no other area of constitutional law.

Rights are not trumps for prisoners under the *Charter*, but neither should they be fully compromised by these excessively deferential judicial moves, or by the mere fact of countervailing administrative preferences. Judicial attention to the prison must be informed by the best knowledge available as to how prisons can and should work. The 2010 Supreme Court of British Columbia decision in *Bacon* shows that courts can contextualize prisoner *Charter* claims by assessing expert evidence as to the bodily and psychological effects of particular modes of imprisonment, and weighing those effects against the

strategies and claims of prison administrators. By contrast, the United States Supreme Court in *Beard* held that where a case centres around the "professional judgment" of prison managers, a plaintiff held in conditions of extraordinary deprivation cannot even advance a claim sufficient to survive a summary motion to strike. There are complex and multifaceted explanations for the differences in these cases, decided in two distinct nations.[202] The cases from both countries make clear that deference and expertise are intertwined in a fashion that determines the scope and viability of prison law.

A *Charter* challenge to administrative segregation or lack of access to harm reduction services for drug users asks a potentially tougher set of questions than those present in *Sauve*, where the right to vote in federal elections required, only, access to a polling station every few years, and did not interfere with the core and daily practices of prison security. Administrative segregation, for example, is a practice far more integral to the daily administration of prisons, which explains in part why it has ***94** been retained despite decades of serious criticism.[203] Similarly, access to hygienic injection equipment is a policy that is robustly supported from a public health perspective, but that threatens the control ethos that defines prison management. *Charter* challenges to these practices will ask courts to strike down legislation or enjoin the delivery of a significant new program, rather than granting a narrow, individualized remedy. The evidence required to justify such remedies must be suitably robust and systemic. The *Inglis* case presents the best model to date, both in terms of the approaches taken by counsel and the court's level of rigor in conceptualizing the right and adjudicating its infringement.

In *Sauvé*, the Supreme Court of Canada indicated that it would not simply defer to "[v]ague and symbolic objectives" advanced but not proven by the prison authority.[204] In this way, the Court refused the approach taken by Justice Breyer in *Beard* where, as Justice Ginsburg lamented, it sufficed for the prison to say, "in our professional judgment the restriction is warranted."[205] The new wave of Canadian cases is pressing courts to consider whether prison authorities must deliver state punishment in accordance with a world of expert knowledge as to the effects of particular practices and the range of alternatives. Both judges and counsel must recognize that there is a structural imbalance in expertise at the outset of a prison case. Courts must be shown that while a prison is charged with the difficult task of confining deprived adults, this is a reason to address rights claims carefully and expansively, rather than a reason to retreat.

Footnotes

a1 JSD Candidate and Trudeau Scholar at New York University, Faculty of Law. For the central ideas explored here, thanks is due to generous teaching and mentoring from Sharon Dolovich, particularly during her visit to New York University in 2012-2013. Thanks also to Eric Adams, Efrat Arbel, Benjamin Berger, Emma Cunliffe, David Garland, Anna Lund, Debra Parkes, Don Stuart and Jacob Weinrib for valuable comments on drafts of this article. Thanks finally to an anonymous reviewer who made important suggestions and to the excellent editors at the *McGill Law Journal*.

1 (Cambridge, Mass: Harvard University Press, 1996) at xii.

2 Sharon Dolovich, "Forms of Deference in Prison Law" (2012) 24:4 Fed Sent'g Rep 245 at 245.

3 See generally David Garland, "Penality and the Penal State" (2013) 51:3 Criminology 475.

4 See generally David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Cambridge, Mass: Belknap, 2010).

5 See e.g. Michael Pinard, "Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity" (2010) 85 NYUL Rev 457; Jeremy Travis, "Invisible Punishment: An Instrument of Social Exclusion" in Marc Mauer & Meda Chesney-Lind, eds, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (New York: New Press, 2002) 15; Nora V Demleitner, "U.S. Felon Disenfranchisement: Parting Ways with Western Europe" in Alec Ewald and Brandon Rottinghaus, eds, *Criminal Disenfranchisement in an International Perspective* (New York: Cambridge University Press, 2009) 79.

6 Rebecca McLennan, "The Convict's Two Lives: Civil and Natural Death in the American Prison" in David Garland, Randall

McGowen & Michael Meranze, eds, *America's Death Penalty: Between Past and Present* (New York: New York University Press, 2011) 191 at 211-12.

7 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, ell [*Charter*].

8 Three *Charter* provisions are highly significant in the prison context: the protection of residual liberty and security of the person (section 7), equality (section 15), and the prohibition of cruel and unusual punishment (section 12).

9 2002 SCC 68, [2002] 3 SCR 519, rev'g [1996] 1 FC 857, 132 DLR (4th) 136 [*Sauvel*.

10 ibid at para 25.

11 The plaintiffs also relied on "considerable academic and theoretical evidence," but the trial judge found their evidence to be "less lofty" and "more tangible, particularly in relation to Canadian penology, social justice, and prisons" (*Sauve v Canada (Chief Electoral Officer)*, [1996] 1 FC 857 at 866, 132 DLR (4th) 136, rev'd 2002 SCC 68, [2002] 3 SCR 519).

12 This theory emerged from the evidence of American punishment philosopher Jean Hampton, who testified that the loss of political rights for those convicted of federal offences accords with an expressive theory of retribution. See Jean Hampton, "The Moral Education Theory of Punishment" (1984) 13:3 Phil & Publ Aff 208. As the Hampton example reveals, the *Sauve* case is a fascinating instance where philosophers appear on both sides of a lawsuit, but where both the trial judge and the majority of the Supreme Court of Canada express real doubt about the relevance of these fields to the empirical questions at the heart of *Charter* analysis.

13 *Sauvé*, supra note 9 at para 58.

14 *Ibid* at para 22.

15 Debra Parkes is more wary, pointing out that "the *Sauvé* decision represents a departure from the usual judicial approach to prisoners' rights claims, an approach that gives those rights little meaningful content" ("Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts" in Christopher Mele & Teresa A Miller, eds, *Civil Penalties, Social Consequences* (New York: Routledge, 2005) 237 at 238). For another hesitant account, Efrat Arbel stresses that the normative principles articulated in *Sauve* are subordinated in the daily administration of corrections. See Efrat Arbel, "Contesting Unmodulated Deprivation: *Sauve v Canada* and the Normative Limits of Punishment", 3:2 Can J Human Rights [forthcoming in 2014].

16 As Justice Gonthier observed in dissent, there was "copious expert testimony in the nature of legal and political philosophy," but "very limited social scientific evidence, e.g. in the field of criminology, that seeks to establish the practical or empirical consequences of maintaining or lifting the ban on prisoner voting" (*Sauve*, supra note 9 at para 101). While the majority thought this meant that the rights infringement was not adequately justified, Justice Gonthier thought this meant that deference to Parliament was warranted and that the legislation should be upheld. He noted that the issues in the case rest on "philosophical, political and social considerations which are not capable of 'scientific proof" (*ibid* at para 67). The difference between Justice Gonthier and the majority--as to what is required to justify a rights infringement--is a central issue for the project of generating a Charter-based penal law.

17 See below (Part IV) *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805, [2010] BCWLD 8074 [*Bacon]; Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309, 237 ACWS (3d) 380 [*Inglis*].

[18] McLennan, *supra* note 6 at 194.

[19] Michael Mandel, "The Legalization of Prison Discipline in Canada" (1986) 26 Crim & Soc Just 79 at 79.

[20] For discussion of how this dynamic also appears in the private law of prisoner claims, see Adelina Iftene, Lynne Hanson & Allan Manson, "Tort Claims and Canadian Prisoners" (2014) 39:2 Queen's LJ 655.

[21] *Supra* note 1 at 14.

[22] See Richard H Fallon, Jr, *Implementing the Constitution* (Cambridge, Mass: Harvard University Press, 2001) at 41 (pointing out that pragmatic considerations regularly affect judicial interpretation of constitutional standards). In the context of prison cases, courts might consider that while the decisions of prison officials are "in principle subject to democratic control and correction," that this is the type of setting where "the actual prospect of democratic intervention is often small" (*ibid* at 9). Courts might consider these institutional realities as they approach the task of adjudicating the rare prisoner claims that arrive at trial.

[23] In addition, as Debra Parkes notes in her comprehensive study of prisoner claims brought under the *Charter*, there are often barriers to retaining experts specializing in the conditions or effects of imprisonment. As Parkes observes, psychologists and psychiatrists regularly refuse to testify against the Correctional Service of Canada, for fear that they will jeopardize service delivery contracts or research access to institutions. See Debra Parkes, "A Prisoners' *Charter?* Reflections on Prisoner Litigation under the *Canadian Charter of Rights and Freedoms"* (2007) 40:2 UBC L Rev 629 at 668, n 161.

[24] In terms of textual similarities, the Eighth Amendment of the *Bill of Rights* (US Const amend VIII) ("[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted") bears a strong resemblance to section 12 of the *Charter* ("[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment"). The *Charter* has distinct equality protections under section 15, and distinct residual "liberty" and "security of the person" protections under section 7, each of which has some counterpart under the Fourteenth Amendment. While there are many differences between the two systems, the structure of litigation is similar in both countries in the contemporary period: prisoners are thought to possess ordinary constitutional rights with which the government cannot interfere, but the prison context bears on the question of finding an infringement and the question of whether the infringement might be justified.

[25] In the United States, this notion of civil death for prisoners was captured with the peculiar language that prisoners were "slaves of the state"-- phrasing born of the Reconstruction Period and the turn to criminal law for ongoing domination of former slaves. See the 1871 Virginia case *Ruffin v Commonwealth*, 35 Va App 79 where a convicted felon claimed a constitutional right with respect to a jury trial for a murder charge he was facing. Given that the charge was for a murder committed while the accused was already incarcerated, the case was summarily dismissed on the grounds that an incarcerated person could not request ordinary constitutional rights. This principle applied all the way through to *Atterbury v Ragen*, 237 F (2d) 953 (7th Cir 1956), which held that prisoners cannot bring a complaint to federal court even in a case alleging severe beatings, starvation, and the abuse of solitary confinement by prison staff, and notwithstanding the plain language of the *Civil Rights Act of 1871*, Pub L No 113-142, 17 Stat 13 (codified as amended at 18 USCA § 241, 42 USCA §§ 1983, 1985(3), and 1988) bestowing a federal cause of action in such circumstances.

[26] For illustration of the original British reasoning, the Court of King's Bench refused in 1822 to make an order with respect to matters of prison administration on the following grounds: "'[W]e have no authority whatever to interfere with the regulations of the prison, the legislature having provided for those regulations in another manner. I am not aware of any instance in which this Court has granted an attachment under circumstances like the present"' (Bayard Marin, *Inside Justice: A Comparative Analysis of Practices and Procedures for the Determination of Offenses against Discipline in Prisons of Britain and the United States* (Cranbury, NJ: Associated University Presses, 1983) at 252, quoting *R v Carlile* (1822), 1 Dow & Ry KB at 536-37). Another

example, from 1843, is the Court of Queen's Bench which, in rejecting a prisoner request to pursue his literary interests in prison, said the court "'could not interfere with the regulations of the prison"' (*ibid* at 252-53, quoting *R v Cooper* (1843), 1 LTOS 143). But there was some variation: in 1848, a court ordered that a remand prisoner ought to be allowed to have books, at least while preparing for trial (see *ibid* at 253, citing *R v Bryson* (1848), 12 JP 585).

27 In *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983), quotes the writings of the warden of Kingston penitentiary in 1867 as follows: "[S]o long as a convict is confined here I regard him as dead to all transactions of the outer world" (*ibid* at 82). A historical trajectory wherein Canadian prisoners were considered civilly dead until the 1970s is confirmed in Mandel, *supra* note 19 at 79.

28 See Malcolm M Feeley & Van Swearingen, "The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts and Implications" (2004) 24:2 Pace L Rev 433 at 440.

29 RSC 1992, c 20 [CCRA].

30 The *pre-Charter* history is set out in Jackson, *Prisoners of Isolation*, *supra* note 27. Jackson has noted that the *Charter's* principal benefit for prisoners is not necessarily "to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms" (*Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & Mclntrye, 2002) at 62).

31 See *Sauvé*, *supra* note 9.

32 In *May v Ferndale*, 2005 SCC 82, [2005] 3 SCR 809 [*May*] the court unanimously held that the prisoner grievance system is marked by inadequacies, and that prisoners must retain the right to file *habeas corpus* in provincial superior courts in order to challenge correctional decisions that impair residual liberty interests. The court in *May* rejected the argument from the federal government that prisoners must first exhaust the prisoner grievance process and then seek judicial review in Federal Court, with its slower timelines and hurdles.

33 Section 1 of the *Charter* contemplates that the government may justify a law that infringes a right, but the law must survive the rigorous test established in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*]. The government must demonstrate that the impugned law pursues a purpose that is pressing and substantial in a free and democratic society, and that it satisfies the proportionality analysis set out in *Oakes*.

34 "Proportionality in its Strict Sense" (2014) at 2 [unpublished].

35 *Ibid.*

36 As the Ontario Court of Appeal first put it in 1983, section 1 requires evidence as to the "economic, social and political background" of a rights-limiting law, with the analysis assisted by "references to comparable legislation of other acknowledged free and democratic societies" (*R v Southam Inc* (1983), 146 DLR (3d) 408 at para 30, 41 OR (2d) 113 (ONCA)). This empirical approach was affirmed and deepened under the test set out in *Oakes*, *supra* note 33, and in subsequent cases, discussed below in Part II.

37 Parkes, "A Prisoners' *Charter?"*, *supra* note 23 at 670.

38 (1995), 40 CR (4th) 263, 98 CCC (3d) 207 (BCCA).

39 Parkes, "A Prisoners' *Charter?*", *supra* note 23 at 671.

40 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap, 1986) at 223.

41 This conventional account has been questioned by Richard H Pildes, "Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism" (1998) 27:2 J Legal Stud 725 (1998). Pildes argues that, with respect to the United States, rights function not as atomistic individual entitlements or trumps, but rather work to police the kinds of justifications that government can offer when acting in various spheres. Indeed, while there is no explicit limitation clause for constitutional rights in the United States constitution, the United States Supreme Court often allows for restriction of individual rights, and utilizes various levels of judicial scrutiny of legislative ends in ways that resemble section 1 analysis under the *Charter*. See also Stephen Gardbaum, "The Myth and the Reality of American Constitutional Exceptionalism" (2008) 107:3 Michigan L Rev 391. Gardbaum points out that while the United States Constitution suggests a textual basis for categorical rights, this is not the case in practice. The United States Supreme Court has "long implied limits on most textually unlimited rights, so that only a small subset of constitutional rights has been held to be absolute" (*ibid* at 417).

42 *Martineau v Matsqui Institution Disciplinary Board* (1979), [1980] 1 SCR 602 at 622, 106 DLR (3d) 385 [*Martineau*].

43 [1984] 2 FC 642, 19 DLR (4th) 502, appeal quashed as moot [1987] 2 SCR 687, 41 CCC (3d) 287 [*Howard*].

44 The full text of section 7 is as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

45 See *Howard*, *supra* note 43 at para 25.

46 *Ibid* at para 4.

47 *Ibid* at para 93.

48 *Ibid* at paras 81-82.

49 *Ibid* at para 82.

50 (1982), 143 DLR (3d) 649, 2 CCC (3d) 153 (Sask QB) [*Maltby*].

51 *Ibid* at para 4.

52 *Ibid.*

53 The Court wrote:
The lawful incarceration of the applicants as remand inmates bears with it necessarily reasonable limitations on their rights previously enjoyed in a free and democratic society. These restrictions are no doubt the sort of reasonable restrictions that the framers of the *Canadian Charter of Rights and Freedoms* envisioned when they included in section 1 the words ... "guarantees the rights and freedoms set out in it *subject only to such reasonable limits prescribed by law* ..." ... The institution may and certainly must place restrictions and limitations on the rights of the applicants so that sufficient security will ensure that they will remain in custody and will not pose a danger to themselves or to other inmates or staff (*ibid* at para 5 [emphasis in original]).

54 *Ibid* at para 20, citing *Pell v Procunier*, 417 US 817, 94 S Ct 2800 at 2806 (1974) [*Pell* cited to S Ct].

55 2011 ONSC 2160, 85 CR (6th) 247 [*Farrell*].

56 *Ibid* at para 47.

57 Aid at para 61.

58 *Ibid* at para 55.

59 *Ibid.* The court's suggestion that the prisoner grievance system is an adequate replacement for access to judicial review is strikingly underinformed. Since 1987, the Office of the Correctional Investigator has raised in its annual reports significant concerns with the effectiveness of the CSC's internal grievance process. See Ivan Zinger, "Human Rights Compliance and the Role of External Prison Oversight" (2006) 48:2 Can J Criminology & Criminal Justice 127. In addition, the Supreme Court of Canada has found the prisoner grievance system to be characterized by delay, lack of independence, and lack of remedial power (see *May*, *supra* note 32).

60 The court cites three other trial level decisions for the proposition that "lighting, yard access, telephone access, programs and education, clothing and blankets, meals, library, toiletries, air quality, exercise facilities, bedding and medical treatment" are all "unfounded or too trivial" to amount to cruel and unusual treatment in violation of the *Charter (Farrell*, *supra* note 55 at para 68, citing *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6205, CRR (2d) 91 (Alta QB); *R v CAV-F*, 2005 NSSC 71, 233 NSR (2d) 69).

61 (2008), 78 WCB (2d) 410, 2008 CanLII 39222 (ONSC) [*Aziga*].

62 *Ibid* at para 36, citing *MacKay v Manitoba*, [1989] 2 SCR 357 at 361, 61 DLR (4th) 385, (holding that *Charter* decisions should not be made in a factual vacuum, to avoid the risk of ill-considered opinions).

63 *Ibid* at para 34.

64 *Ibid* [emphasis added].

65 *Ibid* at para 35.

66 See "So What Is the Real Legacy of *Oakes*? Two Decades of ProportionaUty Analysis under the Canadian *Charter's* Section 1"

(2006) 34 Sup Ct L Rev (2d) 501.

67 *Ibid* at 522, 504 [emphasis in original].

68 A recent example is *Chaoulli v Quebec (AG)*, 2005 SCC 35, [2005] 1 SCR 791 [*Chaoulli*] where the court struck down a prohibition on private health insurance aimed at protecting the quality of the public system. The majority in *Chaoulli* cited evidence from other OECD countries indicating that a private option could coexist with a viable public system, given certain protective legislative measures (see *ibid* at paras 77-84).

69 [1990] 1 SCR 3, 74 CR (3d) 1 [*Shubley*].

70 *Ibid* at 21. Section 11(h) of the *Charter* provides that a person found guilty and punished for an offence cannot be punished for it again. In *R v Wigglesworth*, [1987] 2 SCR 541, 45 DLR (4th) 235, the Court held that a proceeding is only barred by section 11(h) if they are either criminal proceedings or result in punishment which involves the imposition of true penal consequences (see *ibid* at para 21).

71 *Shubley*, *supra* note 69 at 20.

72 *Ibid.*

73 *Ibid* at 23.

74 *Ibid* at 9.

75 Parkes, "A Prisoners' *Charter?*", *supra* note 23 at 658.

76 "Solitary Confinement, Remission and Prison Discipline", Case Comment on *R v Shubley*, (1990) 75 CR (3d) 356 at 357.

77 More recent cases than *Shubley* have sent very different signals. See *May*, *supra* note 32; *Sauvé*, supra note 9; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*].

78 See House of Commons, Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* (1977) (Chair: Mark MacGuigan), which sparked a major re-examination of prison law and resulted in the implementation of legally-trained independent chairpersons to preside over disciplinary proceedings.

79 See generally Malcolm M Feeley & Edward L Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York: Cambridge University Press, 1998). This important book contains case studies of the Arkansas, Texas, and Colorado prison reform litigation. See also Margo Schlanger, "Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders" (2006) 81:2 NYUL Rev 550.

80 See generally James B Jacobs, *Stateville: The Penitentiary in Mass Society* (Chicago: University of Chicago Press, 1977). Jacobs

explains that the prisoner rights movement was part of the new dynamics of mass society: where it was fundamental that "rights of citizenship" be extended to "heretofore marginal groups like racial minorities, the poor, and the incarcerated" (*ibid* at 6). See also See James B Jacobs, "The Prisoners' Rights Movement and Its Impacts, 1960-80" in Norval Morris & Michael Tonry, eds, *Crime and Justice: A Review of Research*, vol 2 (Chicago: University of Chicago Press, 1991) 429 at 432.

81 See *ibid.*

82 Feeley & Rubin, *supra* note 79 at 14.

83 Court-appointed experts have been particularly crucial so as to avoid the "war of experts" that traditional adversarial suits entail. For discussion of one such federal rule of procedure, see Herbert A Eastman, "Rule 706 Experts: A Greater Engine for Discovering the Truth in Prison Reform Cases" (1994) 14:1 Saint Louis U Pub L Rev 51. See also Feeley & Swearingen, *supra* note 28.

84 A notable recent example is the prisoner class actions in California, where court-appointed Receivers and Special Masters monitored the implementation of multiple court orders aimed at improving health care services and other Eighth Amendment matters in the state prison system over the course of many years. These court-appointed agents, along with additional experts, advised the California court of ongoing constitutional breaches, and eventually advised that it would be impossible to render California prisons constitutionally compliant absent a significant reduction in the prisoner population. This expert-driven process eventually resulted in the granting of a mandatory prisoner release order, which the United States Supreme Court upheld in *Brown v Plata*, 131 S Ct 1910, 179 L Ed 2d 969 (2011). As Jonathan Simon observes: "[T]he *Brown* majority broke with the posture of extreme deference toward imprisonment choices and unleashed a potential sea change in penal policy" (*Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America* (New York: New Press, 2014) at 152). Notably, Simon cites an insistence on empirical evidence and expert assessment as central to the reasoning of the majority decision at the Supreme Court (see *ibid* at 153).

85 Jacobs, "The Prisoners' Rights Movement", *supra* note 80 at 439.

86 See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Chicago: University of Chicago Press, 2001); David Garland, Mass *Imprisonment: Social Causes and Consequences* (London: Sage, 2001) at 1-3.

87 See Feeley & Rubin, *supra* note 79 at 56-57: "Since the late 1980s, the decline of momentum in prison conditions litigation has been abundantly evident." Feeley and Rubin consider an early indicator to be the decision in *Bell v Wolfish*, 441 US 520, 99 S Ct 1861 (1979) [*Bell* cited to S Ct], where the Supreme Court reversed a lower-court decision holding the federal jail in New York City unconstitutional on a wide variety of grounds. By 1991, the case of *Wilson v Seiter*, 501 US 294, 111 S Ct 2321 (1991) [*Wilson*] is, to Feeley & Rubin, the signal of a "true retrenchment". *Wilson* holds that conditions must be specifically imposed as punishment in order to be covered by the Eighth Amendment, or must be the result of wanton behavior by correctional officials. As Feeley and Rubin conclude, the *Wilson* reasoning could preclude conditions of confinement suits on the ground that the conditions are "the result of an insufficiently trained staff, an insufficiently funded operational budget, an insufficiently large physical plant, or any of the other insufficiencies that genuinely bedevil state prison systems" (Feeley & Rubin, *supra* note 79 at 49).

88 Pub L No 104-134, 110 Stat 1321-66 (1996) (codified as amended at 42 USCA § 1997e) [PLRA]. The PLRA contains extraordinary limits on prisoner litigation in federal courts, which is the only viable constitutional venue for prison law. The PLRA requires administrative exhaustion, limits actions to those with showings of physical injury, caps attorney's fees, and discourages repeat filings by jailhouse lawyers. The PLRA has been very effective in vastly reducing the number of prisoner claims. For discussion of the legislative history and impact of the law, see Margo Schlanger & Giovanni Shay, "Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act" (2008) 11:1 U Pa J Const L 139.

89 For more detailed treatment on whether the litigation and mobilization around prisoners' rights and other penal issues in the 1960s

and 1970s actually resulted in more humane, liveable prisons, see Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America* (New York: Cambridge University Press, 2006) at 167-69.

90 Margo Schlanger calls for scholarship that attends to the multi-player politics of institutional reform litigation, rather than a focus on the doctrine-creating activity of judges alone: see "Beyond the Hero Judge: Institutional Reform Litigation as Litigation", Book Review of *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* by Malcolm M Feeley & Edward L Rubin, (1999) 97:6 Mich L Rev 1994 at 2009-36. As an example of this approach, Schlanger gives a complex account of how California litigation has delivered substantial civil rights achievements while also generating new risks of unconstitutional conditions of jail confinement. See Margo Schlanger, "*Plata v. Brown* and Realignment: Jails, Prisons, Courts, and Politics" (2013) 48:1 Harv CR-CLL Rev 165 at 177-78.

91 416 US 396, 94 S Ct 1800 (1974) [*Martinez* cited to S Ct].

92 548 US 521, 126 S Ct 2572 (2006) [*Beard* cited to S Ct].

93 *Martinez*, supra note 91 at 1803 [internal quotations omitted].

94 *Ibid* at 1807-08.

95 *Ibid* at 1811.

96 *Ibid.*

97 482 US 78, 107 S Ct 2254 (1987) [*Turner* cited to S Ct].

98 The court in *Turner* struck down a prohibition on prisoner marriages, because the prohibition was stunningly broad and not connected to any legitimate objective. The other factors under the *Turner* test are: whether an alternative means is open to exercise the right, what impact an accommodation of the right would have on guards, other inmates and prison resources, and whether there are "ready alternatives" to the regulations (see *ibid* at 2262). Each of these factors have tended to provide prison officials with opportunities to avoid protection of the right.

99 Dolovich, *supra* note 2 at 246.

100 See generally Cheryl Dunn Giles, "*Turner v. Safley* and Its Progeny: A Gradual Retreat to the 'Hands-Off Doctrine?" (1993) 35:1 Ariz L Rev 219.

101 539 US 126, 123 S Ct 2162 (2003) [*Overton* cited to S Ct].

102 *Ibid* at 2165.

103 *Ibid* at 2168-69.

104 "We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them" (*ibid* at 2167, citing *Pell*, *supra* note 54 at 826-27).

105 See e.g. Susan N Herman, "Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue" (1998) 77:4 Or L Rev 1229. For further commentary as to judicial hands being "on" or "off," see Owen J Rarric, "*Kirsch v. Wisconsin Department of Corrections:* Will the Supreme Court Say 'Hands Off Again?" (2002) 35:2 Akron L Rev 305; Patricia Yak, "*Hudson v. Palmer*: Return to the 'Hands-Off Approach to Prisoners' Rights?" (1985) 5:4 Pace L Rev 781.

106 *Beard*, *supra* note 92 at 2576.

107 *Ibid* at 2578.

108 *Ibid* at 2579.

109 *Ibid* at 2581.

110 *Ibid* at 2577.

111 *Ibid* at 2588, Stevens J, dissenting.

112 *Ibid* at 2591, Stevens J, dissenting.

113 *Ibid* at 2592, Ginsburg J, dissenting [internal quotation omitted].

114 *Ibid*, citing *Shimer v Washington*, 100 F (3d) 506 at 510 (7th Cir 1996), holding that prison officials "cannot avoid court scrutiny by reflexive, rote assertions" [internal quotations omitted].

115 *Ibid* at 2593, Ginsburg J, dissenting. That Justice Ginsburg's fears are well-founded is illustrated in the 7th Circuit decision in *Singer v Raemisch*, 593 F (3d) 529 (7th Cir 2010) at 534, which upheld summary judgment dismissing a First Amendment challenge to a prison ban on a role-playing game known as "Dungeons and Dragons." The prison asserted that the game was somehow connected to gang activity. The court held that substantial deference must be offered to the professional judgment of prison administrators. In the result, the claim of the prisoner plaintiff who cherished the game could not survive even a summary application to dismiss, even after filing evidence that suggested the benefits of the game and its lack of connection to gang activity.

116 See generally Dolovich, *supra* note 2.

117 See *ibid* at 246. The first example of *doctrine-constructing* deference is *Turner*, *supra* note 97, where the court held that prison regulations that infringe rights may be upheld if they are "reasonably related to legitimate penological interests" (*ibid* at 2261). Another case where Dolovich says deference is written into the standards is *Whitley v Albers*, 475 US 312, 106 S Ct 1079 (1986)

[cited to S Ct], where the court held that use offeree violates the Eighth Amendment only where prison officials exhibit "deliberate indifference" or where force is applied "maliciously and sadistically for the purpose of causing harm" (*ibid* at 1084, 1081 [internal quotations omitted]). Finally, deference is written into the standard articulated in *Farmer v Brennan*, 511 US 825, 114 S Ct 1970 (1994) [*Farmer* cited to S Ct], which held that deliberate indifference is the equivalent of criminal recklessness, protecting prison officials from liability for even egregious conditions (see *ibid* at 1980).

118 See Dolovich, *supra* note 2 at 246-47. One example of *procedural rule-revising* is *Jones v North Carolina Prisoners' Labor Union, Inc*, 433 US 119, 97 S Ct 2532 (1977) [cited to S Ct] where the lower court had found no evidence to support security concerns regarding the activities of a prisoner labour union. On review, the Supreme Court overturned on the basis that "in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response," courts should not intervene (*ibid* at 2539). This was an example of revising familiar aspects of the legal process into defendant-friendly procedures: defendants receive substantial deference, even where extensive expert evidence is adduced on the side of the plaintiff.

119 See Dolovich, *supra* note 2 at 246-48. One example of *situation-reframing*, or recasting history in ways that assist the state and disregard prisoner experiences, is *Rhodes v Chapman*, 452 US 337, 101 S Ct 2392 (1981) [cited to S Ct]. In this case, the court rejects a challenge to double-celling, on the basis that it does not violate the Eighth Amendment since double-celling did not "create other conditions intolerable for prison confinement" (*ibid* at 2400). This was despite the weight of evidence at trial indicating that the space was fell far short of that required to prevent serious mental, emotional, and physical deterioration.

120 Dolovich, *supra* note 2 at 249.

121 In Canada, the reports of the Office of the Correctional Investigator are an invaluable resource both for setting strategic litigation agendas and informing judges of systemic issues. Section 189 of the CCRA, *supra* note 29 sets out that the Correctional Investigator is not a competent or compellable witness in legal proceedings, but this does not prevent the use of the reports as evidence.

122 The focus of prison studies has shifted over the years, from the workings of prisoner society (see Gresham M Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton: Princeton University Press, 1958)), to models of prison management (see John J Dilulio, Jr, *Governing Prisons: A Comparative Study of Correctional Management* (New York: Free Press, 1987)), to the effects of modern forms of law on prison administration (see Jacobs, "The Prisoners' Rights Movement," *supra* note 80). For a Canadian study that tracks the progression of penal law and prison administration in recent years, see Jackson, *Justice Behind the Walls*, *supra* note 30.

123 See Alison Liebling & Helen Arnold, *Prisons and their Moral Performance: A Study of Values, Quality, and Prison Life* (New York: Oxford University Press, 2004).

124 *Ibid* at 50 [emphasis in original].

125 prison effects research is helpfully compiled in Alison Liebling & Shadd Maruna, "Introduction" in Alison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Portland, Or: Willan, 2005) 1.

126 Alison Liebling's research on prison suicide reveals how custodial life takes place on a continuum of distress, and how particular social and institutional arrangements can enhance vulnerability to self-harm and suicide. See generally *Suicides in Prison* (New York: Routledge, 1992). See also Alison Liebling, "Moral Performance, Inhuman and Degrading Treatment and Prison Pain" (2011) 13:5 Punishment & Society 530. For a report on the rates of suicide in Canadian prisons, which are seven times higher than the national average, see Howard Sapers, "Deaths in Custody" in *Annual Report 20112012* (Ottawa: Office of the Correctional Investigator, 2012) 18. See also Howard Sapers, "A Three Year Review of Federal Inmate Suicides (2011-2014)" (Ottawa: Office of the Correctional Investigator, 2014).

127 See Elaine Crawley & Richard Sparks, "Older Men in Prison: Survival, Coping and Identity" in Alison Liebling & Shadd Maruna, eds, *The Effects of Imprisonment* (Portland, Or: Willan, 2005) 343.

128 Empirical studies indicate that prison overcrowding is related to rule infractions and assaultive behaviour, and to the rate of communicable disease, illness complaints, psychiatric commitments, stress, hypertension, and death. A study supported by the United States National Institute of Corrections concludes: "[S]tudies whose results do not conform to this pattern are few in number and do not seriously challenge the conclusion that prison overcrowding can have pronounced negative consequences on the lives of individual inmates" (Terence P Thornberry & Jack E Call, "Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects" (1984) 35:2 Hastings LJ 313 at 351). For discussion of how recent crime legislation may increase the prison population and impact the quality of prison healthcare in Canada, see Adelina Iftene & Allan Manson, "Recent Crime Legislation and the Challenge for Prison Health Care" (2013) 185:10 Can Medical Assoc J 886.

129 See e.g. *Bedford v Canada (AG)*, 2013 SCC 72, [2013] 3 SCR 1101; *Canada (AG) v Downtown Eastside Sex Workers*, 2012 SCC 45, [2012] 2 SCR 524.

130 See e.g. *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, [2011] 3 SCR 134 [*PHS*].

131 Sohtary confinement is a widespread prison practice used to manage prisoners who are perceived to be disruptive or vulnerable. In Canada, indefinite solitary is permitted under both federal and provincial legislation, where it is called "administrative segregation." Evidence has now emerged that the lack of peer contact and minimal time out of a cell can have severe impacts on health. The practice presents the most significant risks to prisoners with preexisting mental health issues, which is particularly concerning given that mentally ill prisoners are at high risk of being segregated and are often least able to meet the behavioural standards required to merit release from segregation. There is now a large literature on these issues. For just two examples, see Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" (2003) 49 Crime & Delin'cy 124; Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22 Wash UJL & Pol'y 325. For many years in his annual report, the CI has called for "an end to the unsafe practice that allows for prolonged segregation of mentally disordered inmates in Canadian penitentiaries" (Sapers, "Deaths in Custody," *supra* note 126 at 19). In May 2012, Canada was criticized for its use of "solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness" (Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention*, UNCAT, 48th Sess, UN Doc CAT/C/CAN/CO/6 (2012) at 6). The refusal of the federal government and the Correctional Service of Canada to reform its practices, notwithstanding multiple independent recommendations for reform, is chronicled in Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48:2 Can J Criminology & Criminal Justice 157. For more on the history of the legal regulation of solitary in comparative perspective, see Lisa Kerr, "The Chronic Failure of US and Canadian Law to Control Prisoner Isolation", Queen's LJ [forthcoming in 2015).

132 See Jackson, *Prisoners of Isolation*, *supra* note 27.

133 [1976] 1 FC 570, 29 CCC (2d) 337 [*McCann*].

134 See Jackson, *Prisoners of Isolation*, *supra* note 27 at 134--203 (noting, for example, that one governmental report conducted in response to *McCann* "was content to leave the authority to segregate untrammelled by any substantive criteria, with the result that their recommendations left the basis for the decision as vague and unprincipled as it had always been" at 139). In the weeks following the *McCann* judgment, the segregated prisoners at the British Columbia Penitentiary were moved out of the contested cellblock, but after a security incident prisoners were returned with few changes having been made (see *ibid* at 140-41).

135 *R v Olson* (1987), 62 OR (2d) 321 at para 40, 38 CCC (3d) 534 (ON CA), aff'd *R v Olson*, [1989] 1 SCR 296, 47 CCC (3d) 491

[*Olson*].

136 [1987] 1 SCR 1045, 40 DLR (4th) 435.

137 *Olson*, *supra* note 135 at para 35.

138 *Ibid* at para 40.

139 The reality is that both Clifford Olson's crimes and his prison circumstances were extremely rare. On the occasion of his death, one reporter said this about the impact that Olson had on Canadian law: "His crimes gave rise to the victims of violence movement, their representation at trials and parole hearings, and the establishment of a missing children's registry; his incessant demands for parole led to an amendment of the Criminal Code barring multiple murders from applying for early parole under the faint-hope clause; and his ability to collect pension and old age income supplements resulted in the passage of Bill C-31 denying such payments to prisoners while they are incarcerated" (Sandra Martin, "The life and death of Clifford Olson", *The Globe and Mail* (30 September 2011), online: < www.theglobeandmail.com/news/national/the-life-and-death-of-clifford-olson/article4197011/>). In terms of his challenge to solitary confinement, while this is the only *post-Charter* case about administrative segregation that has reached the Supreme Court, the brief opinion it elicited is of little precedential value. The case was litigated, poorly, by Olson himself. In addition, Olson was not held in twenty-three hour per day cellular confinement, but was kept in a separate area of the prison under the control of designated correctional officers.

140 *Bacon*, *supra* note 17 at paras 168-69.

141 *Ibid* at para 170.

142 *Ibid.*

143 *Ibid* at para 303.

144 *Ibid* at para 292.

145 See *ibid* at para 302.

146 *United States v Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*Burns*].

147 See *ibid* at para 119.

148 *Ibid* at para 94.

149 *Ibid* at paras 301-03.

150 This is precisely the approach envisioned in Ronald Dworkin, "Social Sciences and Constitutional Rights--the Consequences of Uncertainty" (1977) 6:1 JL & Educ 3. Dworkin considers a problem that arose from the United States school desegregation cases. A concern had emerged that desegregation decisions in the federal courts, including the Supreme Court in the decision of *Brown v Board of Education*, 347 US 483, 74 S Ct 686 (1954) [*Brown*], had been decided on the basis of propositions that could be either confirmed or disconfirmed by the "social sciences." A worry emerged as to whether constitutional rights should rest upon evidence that could contain arbitrary or transitory elements: see Edmond Cahn, "Jurisprudence" (1955) 30 NYUL Rev 150 at 157-68; Kenneth B Clark, "The Desegregation Cases: Criticism and the Social Scientist's Role" (1960) 5 Vill L Rev 224. To respond to this worry, Dworkin distinguishes between "causal" and "interpretive" judgments flowing from social evidence, and notes that the latter entails analyzing a phenomenon by "specifying its meaning within the society in which it occurs" (Dworkin, *supra* note 150 at 4). Dworkin agreed that there would be "ample reason to deplore any general dependence of adjudication upon complex judgments of causal social science" (*ibid* at 6). But these same objections do not apply to interpretive judgments, which must be framed in the critical vocabulary of the community in question, which serves as a check on meaning and gives "refuge from the arbitrary" (*ibid*). Dworkin notes that interpretive judgments are not foreign to the judge, and do not draw on arcane technology. Rather, such judgments are central to constitutional adjudication. It seems to me that Justice McEwan used the expert evidence before him in order to make an interpretive judgment about the mode of confinement delivered in the Surrey Pretrial segregation unit.

151 *Bacon, supra* note 17 at para 338.

152 *Ibid* at para 333. A subsequent petition was decided in *Bacon v Surrey Pretrial Services Centre*, 2012 BCSC 1453, 292 CCC (3d) 413 concerning, *inter alia*, the surreptitious recording of Mr. Bacon's telephone calls with his lawyer and interference with his legal mail.

153 *Bacon, supra* note 17 at para 334.

154 *Ibid* at para 336 [internal quotations omitted]. Justice McEwan concluded further that Bacon is entitled to equal treatment to general population prisoners in all material respects, including the same amount of time out of cell, and being informed of what he may expect in terms of things like time at the gym, with no "unreasonable and petty deprivations" simply because of the fact that he is in separate confinement (*ibid*). The court emphasized that Mr. Bacon is a pretrial defendant and presumed innocent.

155 One further implication of this decision is that Mr. Bacon may be in a position to request a stay of the prosecution brought against him. Under Canadian law, a stay may be granted for an abuse of process only "in the clearest of cases" (*R v O'Connor*, [1995] 4 SCR 411 at para 53, 130 DLR (4th) 235 [internal quotations omitted] [*O'Connor*]). There are two categories where the court may be moved to grant a stay: (a) where the abuse of process deprives the accused of a fair trial (trial fairness concerns); or (b) where the affront to the administration of justice by the abuse of process is such that the prosecution should be terminated (institutional concerns). See e.g. *ibid; R v Regan*, 2002 SCC 12, [2002] 1 SCR 297. While the standard for obtaining a stay is difficult to meet, and may be unlikely in the context of Mr. Bacon's very serious case, mistreatment in a remand facility may raise trial fairness concerns as a general matter. Institutional concerns are certainly raised by unconstitutional treatment of prisoners. The final question is whether the trial would serve to perpetuate the abuse, and whether another remedy is capable of removing that prejudice. The point is that there might be real consequences to this decision, even though Justice McEwan did not grant the request that Mr. Bacon be placed in the general population.

156 *Bacon, supra* note 17 at para 314. However, echoing the suggestion that I made at the outset of this paper that *Sauve* may have been an "easy" case, Justice McEwan noted that *Sauve* concerned issues "unmediated by the sort of operational and resource considerations that go into the analysis of a particular standard of treatment" (*ibid*).

157 *Sauvé*, *supra* note 9 at para 58.

158 For more on the prospects of a federal challenge, see Kerr, *supra* note 131.

159 Access to the program was contingent upon approvals by the Ministry of Children and Family Development (MCFD), acting pursuant to the provisions of the *Child, Family and Community Service Act*, RSBC 1996, c 46, which assessed whether it would be in the best interests of the child.

160 For example, Brent Merchant, the key decision maker who was Provincial Director of Corrections, testified that his decision to cancel the program was based on the fact that "he believed he could not guarantee the safety of infants in a custody setting. He stated that was a risk that he was not prepared to take" (*Inglis*, *supra* note 17 at para 183).

161 The Warden of Alouette testified that, when she started as Warden in 2007, "there was a lot of work being done to assess the best way to phase out the Program and to communicate the decision to the general population" (*ibid* at para 170). The Warden agreed that "she was never asked to assess the Mother Baby Program and she did not conduct such an assessment. She did not undertake any study of any other mother baby programs" (*ibid* at para 171). Merchant testified that the decision to cancel was made not because of a specific problem or review but because he arrived at the opinion that "the mandate of Corrections does not include babies" (*ibid* at para 182).

162 In his testimony, Merchant agreed that he was aware of no instance in British Columbia or elsewhere of an infant being exposed to any prison contraband such as drugs. See *ibid* at para 184. The Warden testified that she was "not aware of any safety incidents while she was warden involving mothers and babies and that she was not aware of any actual safety incidents from before she became warden" (*ibid* at para 171). Another government witness, Dr. Elterman, testified that "he had found no report of any death of an infant in a mother baby program anywhere in the world," and that in a literature review he had found no instance of any literature recommending against having a mother-baby program (*ibid* at paras 292, 294). But see the work of Lynn Haney for a feminist caution against mother-baby programs, which was not canvassed in the *Inglis* trial: "Motherhood as Punishment: The Case of Parenting in Prison" (2013) 39:1 Signs: J of Women in Culture & Society 105.

163 *Inglis*, *supra* note 17 at para 6.

164 Alison Granger-Brown. See *ibid* at paras 84--88.

165 Dr. Amy Salmon. See *ibid* at paras 89-92.

166 Dr. Ronald Abrahams. See *ibid* at paras 93-94.

167 Dr. Peggy Koopman. See *ibid* at para 255.

168 Dr. Ruth Martin. See *ibid* at para 262.

169 Professor Michael Jackson. See *ibid* at para 274.

170 And this was in fact how the program had been conducted, given the involvement of the MCFD in placement decisions. See *ibid* at paras 289-92.

171 Dr. Richelle Mychasiuk, for example, had no experience with prisons, never visited Alouette, and drew from literature on "high

risk environments" that were not prison studies (*ibid* at para 303). Justice Ross was critical of this category of evidence. See *ibid* at paras 300-306.

172 For example, "Dr. Elterman was of the opinion that any mother baby program at [Alouette] should be housed in a separate unit. He had not been told by the defendants in his instructions that there is a separate unit at [Alouette], Monarch House, that is currently standing empty. Indeed he was instructed by the defendants to assume that there was no separate unit" (*ibid* at para 293).

173 *Ibid* at para 321.

174 *Ibid* at para 186.

175 *Ibid* at para 379.

176 [1980] 1 SCR 821, 105 DLR (3d) 745 [*Solosky*]. See *ibid* at 839 for an articulation of the retained rights principle.

177 *Ibid* at 840.

178 See *Inglis*, *supra* note 17 at para 410.

179 *Ibid* at para 460.

180 See *ibid* at para 455.

181 *Ibid* at para 459.

182 See *ibid* at paras 369, 434.

183 See *ibid* at para 370. See also *ibid* at para 371: "The defendants submit that Corrections is entitled to make decisions that will inevitably result in children being seized by the state without any consideration of the best interests of the children affected. In my view the state cannot be permitted, through such compartmentalization, to avoid its obligations."

184 See *Simons v Canada* (25 September 2012), Toronto (Ont Sup Ct) (Notice of Application). Plaintiffs include Steven Simons, Canadian HIV/AIDS Legal Network, Prisoners with HrV/AIDS Support Action Network, Canadian Aboriginal AIDS Network, and CATIE.

185 *Ibid* at 4.

186 See S Skoretz, G Zaniewski & NJ Goedhuis, "Hepatitus C virus transmission in the prison/inmate population" (2004) 30:16 Can Communicable Disease Report 141 at 142.

187 See Correctional Service Canada, *1995 National Inmate Survey: Final Report*, by Price Waterhouse, 1996 No SR-02 (Ottawa: Correctional Services of Canada, 1996) at 144-46.

188 See Will Small et al, "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison" (2005) 40 Substance Use & Misuse 831 at 839.

189 See Correctional Services of Canada, Commissioner's Directive No 821-2, "Bleach Distribution" (4 November 2004).

190 See World Health Organization Europe, *Status Paper on Prisons, Drugs and Harm Reduction* (Copenhagen: WHO Europe, 2005), noting that bleach can "create a false sense of security between prisoners sharing paraphernalia" (*ibid* at 12).

191 For a treatment of the expert material likely to be adduced at trial, see Sandra Ka Hon Chu & Richard Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada* (Toronto: Canadian HIV/AIDS Legal Network, 2009) at 2-8.

192 CCRA, *supra* note 29, s 86. See also Correctional Services of Canada, Commissioner's Directive No 800, "Health Services" (18 April 2011).

193 See Alan C Ogborne, *Harm Reduction and Injection Drug Use: An International Comparative Study of Contextual Factors Influencing the Development and Implementation of Relevant Policies and Programs* (Ottawa: Health Canada, 2001) at 13.

194 See *PHS*, *supra* note 130 at para 136.

195 The legal argument is outlined in detail in Ka Hon Chu & Elliott, *supra* note 191 at 13-38.

196 At least one study concludes that needle and syringe programs have not led to increased violence, and have not resulted in equipment being used as weapons against staff or other prisoners, in Germany, Spain, and Switzerland. See Scott Rutter et al, *Prison-Based Syringe Exchanges Programs: A Review of International Research and Program Development*, NDARC Technical Report No 112 (Sydney: National Drug and Alcohol Research Centre, 2001).

197 "[R]esource issues can never justify a sub-constitutional level of treatment" (*Bacon*, *supra* note 17 at para 336).

198 "Social Scientists Take the Stand: A Review and Appraisal of Their Testimony in Litigation" (1956) 54:7 Mich L Rev 953 at 969. For further discussion of the debate ignited by the Supreme Court's reliance on expert evidence in its decision to declare school segregation unconstitutional, see *supra* note 150. For contemporary treatment of the legacy of *Brown* and the challenges of relying on social science in rights litigation, see Rachel F Moran, "What Counts As Knowledge? A Reflection on Race, Social Science, and the Law" (2010) 44:3/4 Law & Soc'y Rev 536.

199 Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Chicago: Aldine, 1961) at xiii, 1ff.

200 I am grateful to Emma Cunliffe for pressing me to consider how a shift to a more empirical mode of analysis may generate new problems, particularly in light of disparate levels of access to expertise as between plaintiffs and defendants in prison litigation, and

given the ability of governments to control and impede certain research agendas. Such concerns are only partially alleviated by the fact that the burden of proof under section 1 is on the government. These are important worries, even if we might all agree that an evidence-based approach to prisoner rights is still preferable to modes of constitutional review that grant automatic deference to prison officials. Notably, in both *Inglis* and the upcoming Ontario litigation discussed above, much of the evidence emerges not from prison studies but from the fields of developmental psychology and epidemiology, extended to issues arising in the penal context. Evidence may be more easily secured, and claims more easily advanced, in these kinds of cases. This returns me to my original claim that issues connected to the core of prison management will be the most difficult for prisoners to litigate.

201 Dolovich, *supra* note 2 at 245.

202 Ironically, in the 1970s *McCann* litigation, counsel for the plaintiffs, Michael Jackson, was inspired by expanding levels of judicial intervention in American prisons. Jackson wanted to convince Canadian courts to follow suit. See Jackson, *Prisoners of Isolation*, *supra* note 27 at 82--84. Given the virtual revival of the hands-off doctrine in the US, there is now little likelihood that plaintiffs' counsel would point to United States law.

203 For a fuller explanation of the reasons why efforts to reform segregation have failed, see Jackson, "The Litmus Test of Legitimacy", *supra* note 131.

204 *Sauvé*, supra note 9 at para 22. The Supreme Court of Canada also recently affirmed the importance of access to judicial review for prisoners. See *Khela, supra* note 77. The Court stated that prisoners should have unfettered access to legal forums and remedies "given their vulnerability and the realities of confinement in prisons" (*ibid* at para 44). The Court affirmed its holding from *May*, *supra* note 32, which held that the availability of an internal prison grievance system was not a "complete, comprehensive and expert procedure" that could justify a superior court declining jurisdiction to hear *habeas corpus* applications (*ibid* at paras 50-51).

205 *Beard*, *supra* note 92 at 2593, Ginsburg J, dissenting.

60 MCGLJ 43

End of Document

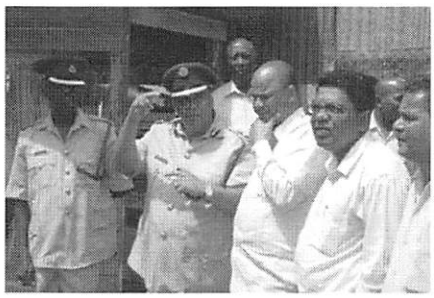
StabroekNews.com (http://www.stabroeknews.com/)

Public Safety...Inside story: The problems of the Prison Service

By Staff Writer On February 25, 2010 @ 5:09 am In Guyana Review

Will there ever be an end to the Guyana Prison Service's problems?

The murders of two more Georgetown Prison inmates in early February hardly made headline news. The incidents passed as part of a pattern of problems which have plagued the prison system for years but have never been dealt with decisively by the government.



(http://s1.stabroeknews.com/images/2010/02/20100225deputy.jpg)

Former Deputy Director of Prisons Poshanand describes the problems.

This time, the inmate Solomon Blackman – who was serving a sentence for murdering two policemen and wounding two others five years ago – was beaten to death by a mob of angry inmates in the Georgetown Prison's 'capital dormitory' minutes after he had murdered a fellow inmate, Dawan 'Dyal' Singh. There have been other killings from time to time.

Irate inmates no longer clamber onto the prison roof as they used to do occasionally since 1993. Their aim then was to protest being held in remand without trial for months and to attract the media's attention in order to advertise their grievances with the administration. The problems persist, even though there are fewer protests.

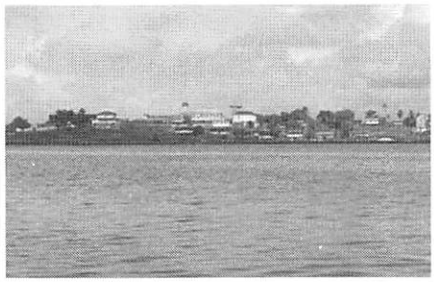
Reports galore

The Ministry of Home Affairs is fully aware of the plethora of problems in the prison system. As with the Guyana Police Force and the Guyana Fire Service, the Guyana Prison Service has been the subject of several foreign and local reports which made recommendations for reform. A British team – comprising Alastair

Papps, Arthur de Frisching and Brian Fellowes from the International Consultancy Group of the British Government Cabinet Office Centre for Management and Policy Studies – presented its Prison Reform Report to then Minister of Home Affairs Ronald Gajraj since July 2001.

The Report – which was the result of investigations and consultations conducted over an 18-month period – read like a template for recommendations for reform over the past decade. Its main findings were that the criminal justice system did not offer adequate alternatives to incarceration; conditions for both staff and prisoners were awful; prisoners' basic human rights were frequently infringed; the Georgetown Prison was seriously overcrowded and that there was minimal scope for constructive work to help prisoners to resettle in society.

The 30-page Report of Board of Inquiry into Escape of Five Prisoners from Georgetown Prison on February 23, 2002 which was presented to Gajraj in June by former Chancellor of the Judiciary Cecil Kennard who was Chairman of the Commission of Inquiry also made important recommendations for change. The Commission, among its other recommendations, stated explicitly that "The escape in our view could have been avoided if high-profile prisoners [had been] transferred to the Mazaruni Prison."



(http://s1.stabroeknews.com/images/2010/02/20100225prison.jpg)

Mazaruni Prison. Pleasant from afar.

The Guyana Prison Service itself, to its credit, produced its own substantial, ten-year 2001-2011 Strategic Development Plan based on a series of consultancy reports, retreats, workshops and visits. That initiative was followed by the Carter Center of the USA which, in another report presented to the Ministry in February 2002, called for the establishment of a Criminal Law Review Committee to examine existing laws, practices, and procedures for the criminal justice system including imprisonment.

The Report of the Disciplined Services Commission which the Chairman Justice Ian Chang handed over to the Speaker of the National Assembly in May 2004 also examined prison conditions. The Report made 28 recommendations for improvements mainly to the Georgetown, Mazaruni and New Amsterdam prisons. These included increasing the staff to deal with the growing number of inmates, implementing the recommendations of the Criminal Law Review Committee Report and improving the capacity of the Mazaruni Prison in order to reduce overcrowding – especially by high-risk prisoners – at the Georgetown Prison.

The US Bureau of Democracy, Human Rights and Labor in its Country Reports on Human Rights Practices last year confirmed that "Prison and jail conditions were poor and deteriorating, particularly in police holding cells. Capacity and resource constraints were a problem. The Prison authority reported that there were 2,100 prisoners in five facilities, more than half of whom were in Georgetown's [Camp Street] Prison, which was designed to hold 610 inmates but held 1,100. Overcrowding at the Camp Street Prison was in large part due to backlogs of pretrial detainees, which constituted approximately 60 percent of its total population."

Without implementing the scores of recommendations of previous commissions, it would be a waste of time to convene new ones that are bound to restate old truths. But this is precisely what the Ministry of Home Affairs proceeded to do last year.

The Ministry commissioned yet another study the findings of which varied only slightly from those that have remained unimplemented for the last decade. This most recent report on the Guyana Prison Service – released in November last year – was based on a review conducted by a team headed by Lloyd Nickram, Management Specialist within the Public Service Ministry. Predictably, it identified a number of problems within the system including long-standing concerns such as chronic overcrowding.

This latest 68-page Report addressed the issue of capability within the Service and pointed to the need for employment review policies to allow for only qualified persons to be hired and high performers to be promoted. Nickram restated what has been known for years – the chronic issue of overcrowding in the prisons...is a direct result of a large number remands and convictions for petty crimes."

The Administration, by any stretch of imagination, has to be well aware of both the problems in the system and the proposals for reform. But, if for no other reason, prison problems should be taken seriously because they have continued to

get worse. The consequences of the escape of another gang of desperadoes, such as the country experienced in Mashramani 2002, would be too catastrophic to contemplate.

Problems galore

The Prison Service possesses three major prisons – at Georgetown, Mazaruni and New Amsterdam. There is also a remand centre at Timehri and, recently, Lusignan was designated as a juvenile holding centre. Their weak physical condition requires regular maintenance, the distances that separate them exhaust the Service's meagre transport resources and supervision and security absorb scarce staff. These prisons, for which the Ministry of Home Affairs is responsible, seem doomed to remain an archipelago of the archaic unless they are substantially improved.

The prison population increases every year. There were over 2,000 inmates in January this year – 1,100 in the Georgetown Prison; about 390 including 80 women in New Amsterdam; 305 in Mazaruni; 170 in Lusignan and 100 in Timehri. Two out of every five prisoners are on remand.

The vast majority of prisoners' complaints are about the day-to-day realities of prison life – badly prepared meals; beatings by bullies; congested cells; filthy mattresses; intimidation by staff; poor health care and personal hygiene and lack of training, recreation and constructive activity. Other perennial problems – rotting infrastructure; delays in court procedures which result in large numbers of pre-trial or remand prisoners being held for long periods awaiting trial and shortage of supervisory staff which results in being locked down for excessive periods – all fuel frustration.

As the prison population soared over the years, partly because of the magistrates' propensity to sentence more minor offenders to prison terms and to overindulge the practice of remand, there has not been a commensurate improvement in the Prison Service's infrastructure or an appropriate increase in its personnel.

This has been aggravated by the Service's low rates of pay; inability to attract suitably qualified applicants; employment of a greater proportion of women in a largely male inmate population and resort to recruiting a large number of under-qualified 'assistant' prison officers.

The combination of low pay, long hours, dangerous work, a stressful setting and insufficient training is dangerous. In addition, some of today's prisoners also tend to be more truculent and violent. Some, like Soloman Blackman, are quite mad

and should have been confined in a psychiatric hospital not let loose in a prison.

Georgetown and Mazaruni are the most problematic prisons. The Georgetown Prison, a huge museum occupying a city block, is old, overcrowded, unsafe and understaffed. It must be renovated, the large number of petty offenders who are handed custodial sentences must be reduced and the staff must be retrained and increased to deal with the inflated number of inmates. There is also a cogent case for rehabilitating the ancient Mazaruni Prison to accommodate Georgetown's high-risk, long-term convicts and for establishing a comprehensive programme of activities to occupy prisoners' time beneficially.

The Mazaruni Prison, situated on the northern bank of the Mazaruni River and built in 1845 as a maximum-security prison, is ancient in appearance, insecure in structure, understaffed in management. This Prison was the scene of the country's most destructive prison riot in August 1997 when four dormitories were burnt to the ground. The lessons of insufficient staffing seem not to have been learnt.

The Mazaruni Prison, if rehabilitated and expanded, could offer the best prospect not only for relieving the congestion at the Georgetown Prison but also for producing food through agriculture and for engaging prisoners in constructive activities as a form of training and rehabilitation.

Despite mounting evidence of the menace of murder and disorder, the Administration has not done enough over the past decade to correct the problems that plague the Prison Service. Public funding for the strengthening of the country's jails has been paltry, suggesting an interest in no more than stop-gap measures.

The Guyana Prison Service at present does not possess the personnel and resources to deal with the growing horde of desperate and dangerous inmates. Clement Rohee, nevertheless, has the opportunity to break the cycle of neglect by re-reading and implementing the recommendations of the several reports handed to his predecessor over the past decade.

Related

URL to article: **http://www.stabroeknews.com/2010/guyana-review/02/25/public-safety-inside-story-the-problems-of-the-prison-service/**

GUYANA

By Mr. Malcolm McAndrew,
Deputy Director of Prisons

I. Purpose

Prisons/Correctional Services were established to safely secure persons who have violated the laws of the land and were convicted by a recognized Court of Law committed to serve a term of imprisonment. During the period of imprisonment, it is intended that prisoners should be involved in retraining activities that can target their deviant behaviors so that on release they can live meaningful lives. In instances where persons are sentenced to death, the prison system is expected to enforce that directive by authorized means.

II. Relevance of Prisons

- Prisons form part of the criminal justice system (judiciary, police, probations);
- Protect society by keeping in custody criminals who violated the laws of the land;
- Retrain criminals to live useful lives on their return to society;
- Provide labor and other services provided by their captive labor force; and
- Creates employment and numerous economic opportunities.

III. Questions of the Relevance of Prisons

- They are failing institutions;
- Breeding ground for criminal behaviors;
- Breeding ground for sexual deviance;
- Breeding ground for the spread of diseases (STD, TB, Pox, HIV/AIDS);
- Use of excessive force and authority; and
- Inequality of judicial sentencing leading to over crowding and a high minority population.

IV. The challenges for the Guyana prison service

1. External Impact

- The culture of organized crime has transcended into the prisoners way of life (Mafia & Cartel);
- Use of phones as effective threats to the security of locations and officers. Institution close nature is eroded;

- Illegal arms smuggling has led to the proliferation of small arms in the prisons;

- The new international fight against crime and terrorism will result in the incarceration of prisoners of a high profile/special nature who require specialized security treatment regime; and

- Issues of organized criminal activities within prisons (riot, drug use, and trafficking) give prisoners a new awareness to defy authority and compromise security.

2. Internal Impact

- Lack of resources (human, financial, and material);

- Poor infrastructure to secure and segregate various types of offenders;

- Inadequate technological infrastructure (security, surveillance systems);

- Poor judicial practices that contribute to overcrowding and perception of injustice;

- Increasing levels of organization among prisoners developing a strong criminal subculture;

- Lack of legislation to support the treatment of prisoners and provide required resources;

- Lack of information sharing in a structured/strategic method;

- Poor public image as a result of a perception of failure and oppression;

- The spread of contagious diseases in the prison and the lack of resources needed to combat same;

- Lack of community support to assist discharged prisoners;

- Inadequate resources to facilitate the provision of retraining programme to target skills/attitudes inadequacies so that prison can function in the open society;

- Lack of corporate involvement in retraining prisoners;

- Buildings weak in structure and inadequate in design;

- High percentage of prisoners on remand for long periods;

- Inexperienced staff members at the subordinate, supervisory and administrative levels;

- The high percentage of female staff members;

- Inadequate medical care for inmates consequent to the lack of sustained visits to the Prisons by Government Medical Officers;

- Inadequate information and technological systems to enhance security; and

- An unstable Judicial System.

3. Countermeasures

- Prisons must be seen as an integral member of the Criminal Justice System notwithstanding its negative images;

- Management must be able to present the challenges of the prison environment in a professional and academic manner to stakeholders in order to position the department more advantageously in order to acquire scarce resources;

- Develop strategic linkages with the security in terms of developing coordinated crime fighting strategies/and information sharing forums;

- Development of the appropriate infrastructure (technological and structural) to minimize the challenges of overcrowding, organized criminal subculture, and separating of special watch prisoners;

- Amending and drafting of new legislations to support strategies to combat crime;

- Developing strategic linkages with key Ministries in order to provide necessary and effectives services to the inmate population (human services, health, legal, and education);

- Developing core competences of prison officers to meet their multi-dimensional tasks in the prison environment;

- Control and relocation of prisoners in mass fire scenarios; and

- Measures for the control of prisoners, destruction of buildings and possible relocation of inmates during riots;

- Hostage taking; and

- The spread of contagious diseases, for example Tuberculosis and HIV/AIDS.

The development of the Guyana Prison Service to meet these challenges will necessitate that the Prison Administration collaborate in a sustained and integral manner with Government, other partners of the Criminal Justice Administration and all relevant stakeholders. Collectively, we can provide the necessary structures, resources, facilities, and legislation to ensure the Guyana Prison Service execute its mandate in the most effective and efficient manner.

4. Best Practice

- Allow free access to calls to admission inmates;

- Inmate continued contact with relatives thru visits and telephone calls;

- Access to worship with their religious denomination;

- Access to Medical services;

- Segregation of narcotic offenders;

- Counseling of substances abuse thru specialized programmes;

- Program for violent offender which is compulsory for parole application;
- Access of inmates to retraining and skill programmes;
- Inmate ability to be released on parole after completion of 12 months or 1/3 of sentence, which ever is greater;
- Remanded inmates' access to Magistrates every seven days;
- Committed prisoner access to High Court Judge on presentation of Jail delivery done at conclusion of April session;
- Inmates ready access to members of Visiting Committee on request;
- Convicted inmates' ability to earn finance to assist their family;
- Provision of special meals and counseling of HIV inmates;
- Establishment of a Sentence Management Board to effectively manage the sentences of convicted prisoners;
- Establishment of a Training Board to plan and manage training of both Officers and Inmates;
- Establishment of a Recruitment Board to ensure qualified staff are recruited; and
- Establishment of Visiting Committees to perform oversight role in ensuring that prisons are managed effectively.

PUBLIC
SIMULTANEOUS DISCLOSURE

DOCUMENT OF THE INTER-AMERICAN DEVELOPMENT BANK

GUYANA

CITIZEN SECURITY STRENGTHENING PROGRAMME

(GY-L1042)

LOAN PROPOSAL

This document was prepared by the project team consisting of: Dana King (ICS/CTT) co-Project Team Leader; Luana Ozemela, co-Project Team Leader (SCL/GDI); Lina Marmolejo (IFD/ICS); Melissa Gonzalez (IFD/ICS); Joel Korn (IFD/ICS); Derise Williams (CCB/CGY); Randy Seepersad (Consultant); Martin Rossi (Consultant); Paula Louis-Grant (FMP/CGY); Emilie Chapuis (FMP/CGY); and Monica Lugo (LEG/SGO). Comments received from Carlos Santiso (IFD/ICS), Nathalie Alvarado (IFD/ICS), Ariel Zaltsman (IFD/IFD), Veronica Gonzales Stuva (IFD/IFD), Arnaldo Posadas (IFD/ICS), Laura Jaitman (IFD/ICS), Leopoldo Laborda (SPD/SDV) and Guilherme Sedlaceck (SPD/SDV) contributed to the quality of the document.

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ELECTRONIC LINKS

REQUIRED

1. Project Execution Plan
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38999407
2. Monitoring & Evaluation Plan
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38994983
3. Procurement Plan
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38999407

OPTIONAL

1. Annual Operations Plan (AOP)
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38999407
2. Economic Analysis
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38994975
3. Detailed Budget
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38999407
4. Detailed Results Framework
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39136198
5. Project Monitoring Report
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38994712
6. Summary of Citizen Security Programme (GY0071; 1752/SF-GY)
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38891411
7. Community Selection Criteria
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38999384
8. Logical Framework
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39057665
9. Theoretical framework and empirical evidence regarding interventions
   http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39002147
10. Terms of Reference – Project Implementing Unit (PIU) Project Manager
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38949635
11. Terms of Reference – PIU Financial Specialist
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38949768
12. Terms of Reference – PIU Procurement Specialist
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38949896
13. Terms of Reference – PIU Community Action Specialist
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38950995
14. Terms of Reference – PIU Monitoring and Evaluation Specialist
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38950746
15. Operations Manual from Citizen Security Programme (GY0071; 1752/SF-GY)
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=18039866
16. Disbursement Table
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39019331
17. Safeguard and Screening Form for Screening and Classification of projects
    http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38783741

ABBREVIATIONS

AOP	Annual Operating Plan
CAC	Community Action Council
CAOs	Community Action Officers
C&V	Crime and Violence
CS	Citizen Security
CSP	Citizen Security Programme
CSSP	Citizen Security Strengthening Programme
CI	Crime Investigation
CO	Crime Observatory
CP	Crime Prevention
DV	Domestic Violence
EA	Executing Agency
EEOP	Electronic Optional Link
FL	Forensic Laboratory
GCI-9	Ninth General Increase in the Resources of the IDB
GPF	Guyana Police Force
GPS	Guyana Prison Service
HR	Human Resources
ICIS	Integrated Crime Information System
ICSS	Implementation of the Citizen Security Strategy
IDB	Inter-American Development Bank
IT	Information Technology
M&E	Monitoring and Evaluation
MOHA	Ministry of Home Affairs
NIJ	National Institute of Justice
PIU	Project Implementing Unit
R&R	Rehabilitation and Reintegration
RCT	Randomized Controlled Trial
RF	Results Framework
SNS	Safe Neighbourhood Survey
SP	Strategic Plan
UNDP	United Nations Development Program
UNODC	United Nations Office on Drugs and Crime
VAW	Violence Against Women

PROJECT SUMMARY
GUYANA
CITIZEN SECURITY STRENGTHENING PROGRAMME
(GY-L1042)

<table>
<tr><th colspan="5">Financial Terms and Conditions</th></tr>
<tr><td colspan="2" rowspan="2">Borrower: Co-operative Republic of Guyana
Executing Agency (EA): Ministry of Home Affairs (MOHA)</td><td>Amortization Period:</td><td>FSO
40 years</td><td>OC
30 years</td></tr>
<tr><td>Disbursement period:</td><td>5 years</td><td>5 years</td></tr>
<tr><td>Source</td><td>Amount</td><td>Grace Period</td><td>40 years</td><td>6 years</td></tr>
<tr><td>IDB (Ordinary Capital):</td><td>US$7.5 million</td><td>Supervision and Inspection Fee:</td><td>N/A</td><td>*</td></tr>
<tr><td>IDB (Fund for Special Operations):</td><td>US$7.5 million</td><td>Interest Rate:</td><td>0.25%</td><td>SCF Fixed**</td></tr>
<tr><td>Local:</td><td>US$0</td><td>Credit Fee:</td><td>N/A</td><td>*</td></tr>
<tr><td>Total:</td><td>US$15 million</td><td>Currency of Approval:</td><td colspan="2">US dollars</td></tr>
<tr><th colspan="5">Project at a Glance</th></tr>
<tr><td colspan="5">Project objective: The general objective is to contribute to a reduction in crime and violence (homicides, burglaries and robberies and domestic violence) in Guyana. The specific objectives are to: (i) improve behaviors for non- violent conflict resolution in target communities; (ii) increase Guyana Police Force (GPF) effectiveness in crime prevention and crime investigation nationally; and (iii) improve Guyana Prison Service (GPS) effectiveness in reducing offender recidivism at the national level.</td></tr>
<tr><td colspan="5">Special contractual conditions prior to the first disbursement: (i) presentation of evidence that MOHA has created the Project Implementing Unit (PIU) and hired the project manager, procurement specialist (with contract management experience), financial specialist, community action specialist, and monitoring and evaluation specialist; (ii) presentation by the EA, to the Bank's satisfaction, of the Procurement Plan, Annual Operating Plan, and project Operations Manual that includes fiduciary management arrangements; (iii) appointment by MOHA of a liaison to the PIU from GPF, GPS, and Forensic Laboratory; and (iv) establishment of the Steering Committee referenced in paragraph 2.7 (¶3.3).
Special contractual condition precedent to execution of Component I: will be the validation of selected intervention communities and update of the Results Framework community-level indicators, in accordance with the 2012 Census data (¶3.4).</td></tr>
<tr><td colspan="5">Exceptions to Bank policies: None</td></tr>
<tr><td colspan="5">Project qualifies for: SEQ ☒ PTI ☒ Sector ☒ Geographic ☐ Headcount ☐</td></tr>
</table>

(*) The credit fee and inspection and supervision fee will be established periodically by the Board of Executive Directors during its review of the Bank's lending charges, in accordance with the relevant policies.

(**) The Borrower shall pay interest on the outstanding balance of the Ordinary Capital loan at a Libor based rate. Each time the outstanding balance reaches 25% of the net approved amount or $3 million, whichever is greater, the interest rate will be fixed.

I. DESCRIPTION AND RESULTS MONITORING

A. Background, Problem Addressed, Justification

1.1 According to the 2012 Census Preliminary Report,[1] Guyana's population is 747,884. Roughly 90% of the population is located on the coasts, which comprise less than two-thirds of the country's total land mass, with the remaining 10% dispersed throughout Guyana's vast hinterland regions.

1.2 Guyana's homicide rates are comparable to the rest of Latin America and the Caribbean;[2] and have steadily increased since 2000 (from 9.9/100,000 in 2000 to 20.7 in 2013).[3] The national robbery rate (214.9/100,000) significantly exceeds global averages, though the burglary rate (143/100,000) is below.[4] Meanwhile, more than 1 in 6 women report being victims of physical assault[5] – the highest rate in the Caribbean – and 71% of the population reports having suffered emotional violence within the last 12 months.[6]

1.3 These crimes are highly concentrated in certain communities. The 20 communities[7] that rank highest for Homicides, Burglaries, Robberies, and Domestic Violence (DV) – which have been selected as this project's target communities because of these rates - have average rates that are significantly higher than the national average: 2013 robbery, burglary, and DV rates are 1,539, 641.8, and 1,104.6 per 100,000.[8]

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[1] The Report contains a limited release of highly aggregated data (i.e. (i) total and regional populations; (ii) population by gender at national and regional levels; and (iii) number of dwellings at regional level).

[2] Guyana's 2013 homicide rate is more than 3 times the world average (6.2/100,000); and in line with these rates: Central America (approx 25/100,000), South America (approx 21/100,000), and the Caribbean (approx. 20/100,000). "Global Study on Homicide." United Nations Office on Drugs and Crime (UNODC), (2013).

[3] Ibid and "Caribbean Human Development Report, United Nations Development Program (UNDP) (2012).

[4] 2012 UNODC global burglary and robbery rates are 201/100,000 and 137.5/100,000, respectively.

[5] 2011 Safe Neighbourhood Survey (SNS) indicates significant underreporting rates (85%) for physical assault.

[6] 2011 SNS.

[7] Stabroek, Lacytown, Sophia, Kuru Kururu, Bel Air, Port Mourant, Adelphi Village, Annandale, Mon Repos, South Ruimveldt, Tuchen De Vrierden, Bush Lot Village, Albion, Wismar, Agricola, Enmore, East La Penitence, Lusignan, McDoom, and Charlestown. 7 of these were 1752/SF-GY intervention communities.

[8] These figures are from Crime Observatory crime data and population projections based on the 2002 Census. These 20 communities represent about 5% of Guyana's population and were the site of 15.5% of homicides, 19.5% of robberies, 19.4% of burglaries, and 13.9% of Domestic Violence (DV) cases (physical) in 2013.

Table 1. Crime and Violence (C&V) Rates per 100,000 persons

C&V		Unit	2011	2012	2013
Homicide	National	Rate	17.3	18.6	20.7
	Target communities		53.6	n/a	81.1
Robbery	National	Rate	95.9	91.3	214.9
	Target Communities		425.7	403.4	1539
Burglary	National	Rate	155.5	122.5	143.1
	Target communities		538.4	374.9	641.8
DV	National	Rate	665.7	506.2	431.2
	Target communities		1,286.5	832.0	1,104.6

Data Sources: Guyana Crime Observatory and 2011 Safe Neighbourhood Survey

1.4 **Problem addressed and causal factors.** The general problem to be addressed by this project is Guyana's high Crime and Violence (C&V) rates (homicides, burglaries and robberies, and DV) nationally. The project will address this general problem by focusing on three specific problems: (i) high incidence of violent behavior at the community level; (ii) low Guyana Police Force (GPF) effectiveness to prevent and investigate crime at the national level; and (iii) high offender recidivism at the national level.

1.5 **High incidence of violent behavior at the community level.** Community vulnerability factors for C&V fall within 3 categories: (i) prevalence of social norms that tolerate use of violence within interpersonal relationships; (ii) low employment and educational levels; and (iii) low participation of community members in resolving community problems. According to the 2011 Safe Neighbourhood Survey (SNS), there is a high tolerance of violence in interpersonal relationships and within the home in Guyana: 41.63% of the population strongly agrees that a man is justified in slapping his wife. Average 2013 DV rate in target communities is 1,104.6 per 100,000 persons. 17% and 71% of persons surveyed by the 2011 SNS stated they had experienced physical or emotional DV within the last year, respectively. Unemployment, shown to increase C&V propensity, and underemployment, associated to low educational attainment, are prevalent in target communities.[9] Target community economic participation rate is low: on average 31.1% of persons over 15 years of age are reported as working, compared to 48.8% nationally.[10] 73.9% of target community members over 15 years of age lack any form of formal qualification; a serious impediment to accessing employment;[11] yet there is limited provision of remedial and vocational training nationally.[12] There is low participation of community

[9] See Bushway, Shawn, "Labor Markets and Crime" chapter in Crime and Public Policy, Wilson and Peterscilia (2011); Stephen, Machin et al. "The Crime Reducing Effect of Education." 2010. Farrington, D. P., "Predicting Persistent Young Offenders." (2001); and Sabates, R., "Educational attainment and juvenile crime." (2008).

[10] Electronic Optional Link (EEOP) #7 provides data on target community economic participation and formal qualification rates.

[11] See Downes, Andrew. "Labor Markets and Human Resources Development in the Caribbean" (2007).

[12] A study of the National Job Corps in the United States found remedial education may reduce crime. See Peter Z., Burghardt, J and Glazerman, S. National Job Corps Study: The Impacts of Job Corps on Participants' Employment and Related Outcomes. Princeton, N.J: Mathematica Policy Research, Inc. Most recent data indicates that in Guyana there are over a 136,000 people aged 15-64 with no formal qualifications, but in

members in resolving community problems,[13] which has been associated to lack of tools to help them identify problems and develop bottom-up solutions.[14]

1.6 **Shortcomings in GPF effectiveness to prevent and investigate crime.** There is a need for greater GPF efficacy nationally in CP and CI. Despite Guyana's significant CP investments, including US$1.729 million in Information Technology (IT) systems,[15] C&V has risen significantly in the last years. In Guyana's 20 highest-crime communities, homicides have increased 51.3% in the last 3 years, peaking at 81.1/100,000 in 2013. This is in part due to (i) limited reach of IT systems; (ii) lack of police training and specialization; and (iii) lack of quality data. Existing IT systems have limited reach. The Integrated Crime Information System (ICIS), which collects and stores GPF crime data, is available at GPF headquarters and 7 division offices but none of GPF's 72 district offices.[16] The GPF Strategic Plan (SP) also notes the lack of CP training and tools. Only 7 GPF staff are qualified to analyze data for policing planning and strategy in Guyana. Finally, lack of C&V data hinders GPF's homicides, burglaries and robberies CP capacity. Currently, Guyana conducts only 1 crime survey: the SNS.[17]

1.7 GPF also has limited CI ability (2012 clearance rate[18] for homicides, robberies, and burglaries is 56%, 20%, and 18%, respectively) due to: (i) poor community relations; and (ii) weak CI skills training. Evidence shows that police CI effectiveness depends on close interaction with citizens.[19] 67.6% of Guyanese

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2011 only 4,287 participated in training, or 3.15%, nationally. These figures were taken from reports from Citizen Security Programme (CSP) and the Bureau of Industrial Training, Ministry of Labour.

[13] The 2011 SNS reported that only 28.21% of persons have tried to help solve a problem in their communities or neighborhoods within the last 12 months. Evidence shows that the existence of collective efficacy (strong ties among community members, existence of shared values and expectations) has been associated with 30% reduction in potential for victimization (Sampson 2004. Neighborhood and Community: Collective Efficacy and Community Safety. New Economy). A follow-on study revealed a relationship between collective efficacy levels and rape and homicide rate reductions (Maxwell et al 2011, collective efficacy and criminal behavior in Chicago, 1995-2004. National Institute of Justice (NIJ)).

[14] See Sherrod et al. (2010). Handbook of Research on Civic Engagement in Youth.

[15] See IDB Project Monitoring Report for 1752/SF-GY (October 2013).

[16] The CSP-financed Integrated Crime Information System (ICIS) operates in Guyana Police Force (GPF) headquarters and 7 Division offices. GPF disposes of 1 Policy Analyst per Police Division (7 in total), while the Crime Observatory has only 1 Policy Analyst, to analyze ICIS data.

[17] July 2014 interview with Crime Observatory staff.

[18] Clearance rate is determined by dividing the number of cases closed (crime author identified) within a reporting period, with the number of open cases during the same reporting period. A case is "cleared" when the Office of Public Prosecutions pronounces that there is sufficient evidence for the GPF to charge a suspect for the crime.

[19] Goldstein, H., "Improving Policing: A Problem-Oriented Approach," in Crime and Delinquency (April, 1979). Wilson, J.Q. and G. Kelling. "Broken Windows: The Police and Neighborhood Safety". The Atlantic Monthly (March, 1982). Currently, GPF stations are not equipped to properly receive citizens willing to report crime. 54 of 72 police stations need to be rehabilitated to receive victims of Violence against Women (VAW) as well as the general public. Ineffective GPF disciplinary and accountability mechanisms contribute to reduced GPF transparency to the public. The Police Complaints Authority, tasked with investigating citizen complaints of police misconduct, is understaffed, requiring all investigations to be conducted by the

do not trust the police. There is low citizen cooperation with GPF for CI: 85% and 62.8% of persons do not report instances of DV and personal theft, respectively. The GPF SP notes that there is no comprehensive CI training for GPF staff, and lack of CI training and tools contributes to GPF's limited CI capacity.[20]

1.8 Improving GPF's CP and CI effectiveness of DV cases, in particular, requires special solutions due to the fact that victims and perpetrators often share intimate relationships.[21] Limited GPF effectiveness in DV CP is due to: (i) weak inter-agency coordination to prevent DV;[22] and (ii) lack of data to understand its causes and the profile of victims, whereas limited GPF's effectiveness in DV CI[23] is in part attributed to a lack of effective police training to receive DV complaints, preserve evidence and increase the probability of filing charges.[24]

1.9 **Limited availability of Rehabilitation and Reintegration (R&R) programs for inmates.** Guyana Prison Service (GPS) R&R services need improvement; given recidivism rates (21.3%)[25] and inmate education levels (58.9% have less than primary education). Prison rehabilitation programs are shown to improve social and economic reintegration and reduce criminal recidivism.[26] Evidence also demonstrates that prison overcrowding prevents effective implementation of rehabilitation programs.[27] GPS capacity to offer R&R opportunities is weak, due to a number of factors, including: (i) prison overcrowding;[28] and (ii) inexistence of comprehensive inmate R&R model and management tools.[29] Recent data shows Guyana's prisons operate at 33% over official capacity levels.[30] 56% of Guyana's prison population is comprised of pre-trial detainees, which exerts pressure on GPS capacity to deliver rehabilitation activities. Alternatives to pre-trial detention to reduce the number of pre-trial detainees in prison have not

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GPF itself.

[20] See Capita Symonds, Institutional Modernisation of Guyana Police Force. (2011).

[21] 54.4% of victims of sexual offences stated that the offender was the intimate partner or ex-partner. SNS, 2011

[22] Although since 2008, there has been a National Policy on DV complemented by a National DV Oversight Committee and a National Task Force on DV to implement inter-agency coordination; inter-agency referral rates continue to be low. In 2010, only 4% of DV cases were referred to the Probation and Welfare Services.

[23] Currently, all recruits undergo GBV training at the Felix Austin Police College during their induction program. However, only 46% of the population agree that the police are effective in dealing with the problems that really concern people in their neighborhoods (SNS 2011), 45.5% of DV cases reported remain pending at the police station and only 37% result in a warning or charges (GPF, 2010 data).

[24] Myers, Roxanne (2012). Gender-Based Violence in Guyana – An Overview of Incidence and Drivers.

[25] In Guyana, recidivism is defined as convict return to prison at least three times.

[26] IDB Citizen Security (CS) and Justice Sector Framework Document (2014).

[27] Ibid.

[28] Overcrowding in penitentiaries has become a risk factor for the stability of these institutions (UNDP Regional Human Development Report, 2013). Overpopulation has also been shown to hinder delivery of services and rehabilitation programs (Espinoza (2014); IDB CS and Justice Sector Framework Document (2014).

[29] This is in accordance with the Guyana Prison Service (GPS) Strategic Plan (SP) (2010-2015), p. 23-24-33.

[30] According to the European Committee on Crime Problems, severe overcrowding is defined as a situation in which the planned capacity of a prison or prison system is exceeded by more than 20%.

been studied.[31] As noted in the GPS SP, currently there is no case management program to collect and analyze data on inmates and R&R activities; and to support and track inmate progress toward rehabilitation, either during or following their prison stay. Also, R&R activities reach only 43% of inmates and are offered on an ad-hoc basis, without reference to a rehabilitation methodology. Finally, GPS staff receives no training in delivering rehabilitation services.[32]

1.10 **Lessons learned.** In 2006, the Inter-American Development Bank (IDB) approved the Citizen Security Programme (CSP) (1752/SF-GY), which closed in July 2014. CSP aimed to enhance Citizen Security (CS) by addressing community risk factors and strengthening the Ministry of Home Affairs (MOHA) and GPF. A June 2014 assessment indicated that CSP achieved, in whole or part, 15 out of 17 planned outputs, 3 of 8 expected outcomes, and 2 of 3 expected impacts. Notwithstanding CSP's achievements, C&V levels (see ¶1.3) continue make C&V a pressing concern for Guyana. Lessons learned under CSP include: the importance of full-time, dedicated, Project Implementing Unit (PIU) staff with requisite experience and skills, as well as structured and consistent Executing Agency (EA) oversight of PIU performance.[33] For community-level activities, 2 lessons emerged: (i) active community participation in identification and execution of activities and (ii) community-wide public awareness campaigns to ensure community buy in and support are needed.[34] These were incorporated in the design of this project (see ¶3.1 and ¶1.18). Electronic Optional Link (EEOP) #6 provides a summary of CSP results.[35]

1.11 **Strategic alignment.** The Citizen Security Strengthening Programme (CSSP) is aligned with the Operational Guidelines for Program Design and Execution in the Area of Civic Coexistence and Public Safety (GN-2535-1); the IDB Country Strategy with the Government of the Co-operative Republic of Guyana ("Guyana") 2012-2016 (GN-2690);[36] the 2014 Country Programme Document; the Sector Strategy on Institutions for Growth and Social Welfare (GN-2587-2); the Operational Policy on Gender Equality (GN-2531-10);[37] and Guyana's

[31] This is in accordance with GPS SP.

[32] Revamping the GPS training curricula to establish a clear plan for professional development is recommended in the GPS SP. Currently, GPS offers only 1 employee training: a 6 week training at entry focused on custodial tasks.

[33] Recommended EA supervision would include monitoring of outputs and progress toward achievement of Annual Operating Plan (AOP) targets, as well as systematic oversight of the Project Implementing Unit (PIU) observance of fiduciary protocols.

[34] To integrate these recommendations into CSSP, the project has enhanced PIU staffing levels to include full-time specialists in each of the core project execution areas as a condition to project eligibility. Similarly, Component 1 will finance social marketing and support for active community participation (e.g. funding of small-scale, community-led projects and hiring of full-time Community Action Officers - CAO).

[35] While CSSP is complementary to CSP-financed activities in certain areas (ICIS expansion, support to the FL), the project embarks on several new areas and is not considered a second-phase operation.

[36] CSSP will contribute to CS, a dialogue area in the Strategy through which the IDB aimed to support GPF capacity building and community empowerment, as well as address principal risk factors to community safety.

[37] CSSP will contribute to the IDB's gender mainstreaming by addressing the priority issues of VAW and

Poverty Reduction Strategy and Justice Sector Reform Strategy. CSSP is also aligned with the CS and Justice Sector Framework Document (GN-2771-3) and financed activities comply with the Framework's dimensions of success by (i) providing access to comprehensive C&V prevention programs to women at risk; (ii) orienting police work to collaborative problem solving with the community; and (iii) ensuring access to R&R programs for prisoners. CSSP will contribute to the lending priorities of the Ninth General Increase in the Resources of the IDB (AB-2764) (GCI-9) for: (i) small and vulnerable countries; and (ii) poverty reduction and equity enhancement. It will also contribute to the regional development goal of reducing homicides and to the product cities benefited with CS projects, as defined in the Results Framework (RF).

1.12 In 2013, the IDB approved Support for the Implementation of the CS Strategy (ICSS) (ATN/OC-14259-GY), a US$1.67 million grant to support MOHA, GPF, and GPS to implement 5-year SPs developed and financed under CSP. CSSP will be coordinated with ICSS and other ongoing IDB projects in the Caribbean; including grants to support C&V data generation and implementation of youth-focused programs (ATN/OC-13652-RG, RG-T2517, RG-T2446, ATN/OC-14203-RG), labor market insertion (ATN/OC-13609-RG, ATN/OC-14040-BH, ATN/OC-13417-JA) and Violence Against Women (VAW) (TT-L1037).

1.13 **Rationale for intervention.** CSSP will contribute to reducing C&V in Guyana, through a comprehensive approach that combines preventive strategies with institutional strengthening activities.[38] CSSP will target: (i) communities with the highest rates nationally for homicides, burglaries and robberies and DV; (ii) GPF capacity weaknesses in CP and CI; and (iii) GPS capacity to deliver R&R services. CSSP beneficiaries will be: (i) persons aged 15-64 in the 20 target communities for Component I;[39] and (ii) the GPF and GPS for Components II and III, respectively.[40]

1.14 **Community-level crime and violence prevention.** CSSP will focus Component I interventions on 20 communities, selected based on community-level homicides, burglaries and robberies, and DV rates. CSSP's aims to address community C&V vulnerability through differentiated social prevention interventions focused on developing a common core of skills and capabilities among community members to allow them to cope with violence, unemployment, and counterproductive behavior risk factors and stimulate protective factors. Three types of interventions, to be carried out in existing community facilities, are envisaged at

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gender-specific crime data collection; ensuring gender balance in Component I activities; and financing activities focused on reducing violence associated with gender norm attitudes.

[38] Violence prevention is an essential component of comprehensive strategies to reduce crime (see EEOP#9).

[39] Component I interventions will directly benefit 4,000 individuals aged 15-64, who will participate in and/or receive services. Total population of the communities is 27,892 persons, which will indirectly benefit from CSSP.

[40] Direct beneficiaries for GPF are 4,500 police officials; and, for GPS, the all 1,287 sentenced inmates (male and female) as of December 31, 2013 and 389 GPS staff.

the individual, family, and community level: (i) awareness-raising campaigns, workshops and family-oriented activities to reduce the prevalence of social norms that tolerate use of violence within interpersonal relationships;[41] (ii) socio-educational and employment-related activities to create opportunities for economic integration and productive use of time[42] and to reduce probability of involvement in criminal activities;[43] and (iii) mechanisms to help community members to identify problems and develop bottom-up solutions to prevent C&V through Community Action Councils (CAC).[44]

1.15 **GPF crime prevention and investigation.** CSSP will contribute to strengthening GPF CP capacity[45] for homicides, burglaries and robberies at the national level by enhancing homicides, burglaries and robberies CP activities. Evidence and policing theory shows that police work can be effective when it acts proactively to prevent C&V.[46] This requires police skills training and specialization, along with strengthened IT systems to complement these efforts. Data availability and analysis is needed for effective homicides, burglaries and robberies CP. CSSP will improve homicides, burglaries and robberies information and GPF capacity to analyze and translate it into operational information. CI capabilities will also be strengthened to improve reported crime clearance by (i) promoting improved GPF community engagement and cooperation; and (ii) improving CI skills and tools. Additionally, given that DV victims often share an intimate relationship with their perpetrators, addressing DV CP and CI becomes more complex than compared to other crimes and require complementary strategies. In addition to the GPF's CP and CI activities described above, CSSP will support the GPF in reducing DV at the national level through three additional activities: (i) improved coordination with other DV responder agencies to prevent DV; (ii) special DV surveys to understand its causes and the profile of victims; and (iii) effective police training to receive DV complaints and increase charges. Activities will be conducted within GPF facilities.

1.16 **Rehabilitation and reintegration.** CSSP will implement prevention actions within the penitentiary system by creating a R&R model. All activities will be conducted within GPS facilities. R&R will be based on risk and needs analysis methodologies and cognitive-behavioral programs, shown to be effective in

[41] Protective factors also include family stability and caring parents (see EEOP#9).
[42] Creating opportunities for the productive use of time has proven effective in reducing C&V (see EEOP#9).
[43] Education and employment are protective factors in the lives of at-risk youth. Increasing opportunities for education, employment, mentoring, conflict resolution training, developing skills, and giving recognition to youth can lead to healthy behavior and work to prevent or reduce delinquency. See footnotes 12, 14, 15 and EEOP#9.
[44] Local CP efforts based on cooperation among neighbors can contribute to reduced crime (see EEOP#9).
[45] Evidence shows that CP improves as a result of better training in understanding the causes and patterns of crime. See Reiss, Albert J. Jr. Police Organization in the Twentieth Century. In Michael Tonry and Norval Morris, eds., Modern Policing. Crime and Justice, Vol. 15. Chicago: University of Chicago Press (1992).
[46] Police homicides, burglaries and robberies CP is effective when interventions are targeted: in places where crime is concentrated; to more vulnerable individuals and repeat victims; and on repeat, high-harm offenders (Sherman, L. 2011. Strategic Thinking about CS: A Conceptual Framework.

reducing recidivism;[47] and interventions to facilitate and improve reintegration upon prison release. Evidence shows effective R&R programs combine job opportunities, training and individual change.[48] CSSP activities finance sustainable reentry initiative by: (i) assessing R&R needs across the prison system; (ii) developing a R&R model based on the needs assessment; (iii) developing a case management program to support and track inmate progress;[49] and (iv) offering training to GPS staff on delivering R&R services.[50] In addition, alternatives to incarceration and pre-trial detention will be studied to contribute to reduction of the unsentenced prison population and overcrowding.[51]

B. Objective, Components and Cost

1.17 The general objective is to contribute to a reduction in C&V (homicides, burglaries and robberies, and DV) in Guyana. The specific objectives are to: (i) improve behaviors for non-violent conflict resolution in target communities; (ii) increase GPF effectiveness in CP and CI nationally; and (iii) improve GPS effectiveness in reducing offender recidivism at the national level. CSSP will finance the following components:

1.18 **Component I. Community C&V prevention (US$5,728,600)**. This component seeks to address C&V vulnerability factors through evidence-based interventions in target communities. Community selection criteria were average crime rates for the past 3 years for homicides, burglaries and robberies, and DV (See EEOP#7). Community needs and asset assessments will be conducted with and in each community to tailor interventions to community needs, identify community assets (physical and human), and ensure community involvement to support implementation. Non-governmental, governmental and private sector organizations will be contracted to provide evidence-based interventions and training to community members to: (i) address risks associated with interpersonal violence and norms that promote acceptance of violence (e.g. parenting,[52] gender

[47] Methodologies such as the "Risk, Need, and Responsivity" (Bonta and Andrews, 2005) allow better tailoring of rehabilitation programs by combining individual needs, circumstances, and learning styles (Petersilia, 2003). See also Landerberger and Lipsey, 2005.

[48] IDB CS and Justice Sector Framework Document (2014).

[49] One case management program, Project Chance, was shown to reduce participant recidivism rates to 11% as compared 60% recidivism rates for comparable populations. See Healey, Kerry Murphy. Case Management in the Criminal Justice System. NIJ (February 1999).

[50] Correctional officer training has been shown to support positive behavioral change in prisoners. Following a 10 hour officer training program, monthly incidents of prisoners committing battery using bodily waste decreased from 14 incidents/month to 4 incidents/month. Packer, G. Impact of a Mental Health Training Course for Correctional Officers on a Special Housing Unit. Psychiatric Services Vol. 60 No. 5 (May 2009).

[51] Two examples of alternatives to incarceration and pre-trial detention that have reduced recidivism are: (i) Hawaii's Opportunity Probation with Enforcement: participants were found 55 % less likely to be arrested for a new crime. NIJ. In Brief: Hawaii Hope. U.S. Department of Justice [2010]. (ii) Multisystemic Therapy, as alternative treatment for violent or chronic offenders: youth participants found to have up to 59% fewer re-arrests and up to 68% fewer drug-related arrest http://mstservices.com/proven-results/proven-results.

[52] Parenting education will be based on the Triple P model. A Randomized Control Trial evaluation of Triple P found a 22% reduction in a validated scale measuring parental over-reactivity (Morawska, A. 2010).

norms,[53] and conflict resolution); and (ii) support economic inclusion with private sector partnerships[54] (e.g. vocational and remedial education, job-readiness, job seeking and job placement,[55] entrepreneurship,[56] mentoring,[57] counseling and psychological skills training,[58] and literacy programs[59]). Training to community members will be complemented by awareness raising campaigns and workshops.[60] Finally, low participation of community members in resolving community problems will be addressed with mechanisms to help community members to identify problems and develop bottom-up solutions to prevent C&V,[61] though the creation, formalization and strengthening of the CAC (e.g. training of Community Action Officers (CAOs) in community needs assessment, cross-cultural awareness, rapid impact project,[62] proposal design and implementation).[63]

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[53] Programa H encourages a positive conception of masculinity. A quasi-experimental survey showed significant positive changes in 10 of 17 gender attitude items, with no changes in the control group. (Moestue, et al 2013.)

[54] CSSP will take into account existing successful strategies to approximate private sector to communities and to satisfy labour force needs such as the National Training Project for Youth Empowerment's Certification delivered by the Board of Industrial Training. Also, CSSP will seek to achieve gender balance in all trainings.

[55] The YouthBuild program in El Salvador achieved reinsertion results above other programs' average: 85% of participants graduated, and, of these, 77% achieve reinsertion (35% obtain employment, 23% self-employment, and 19% returned to school). The program attributes this in large part to individualized job-placement services.

[56] In a Randomized Controlled Trial (RCT) of the *Juventud y Empleo* program in Dominican Republic, the employment rate of youth improved five percentage points between the treatment and control group-improvements in wages and job formality were greater. (Ibarraran et al, 2012).

[57] An evaluation of the effectiveness of the Big Brothers, Big Sisters community-based mentoring program show that 46% of participating youths are less likely to use drugs, and 32% are less conflict-prone (Grossmanet al, 1998).

[58] Becoming a Man, a social-cognitive and counselling program for male teens in Chicago, reduced C&V arrests by approximately 44%, according to an RCT. (University of Chicago, CrimeLab, Policy Brief on Becoming a Man, July 2012).

[59] A quasi- experimental evaluation of the Kingston YMCA program, designed to provide at-risk, low income males with intensive remedial education, social skills training, and personal development training, demonstrated positive results in reducing aggressive behavior among young men who dropped out of school.

[60] For DV programming, funds were allocated for knowledge exchange with international organizations to ensure service providers are trained on best practices in this area. An example of a successful mass communications campaign is *"Somos Diferentes, Somos Iguales"* initiative in Nicaragua. A 2 year longitudinal study found that young people "greatly exposed" to the program were 33% more likely than those "less exposed" to know of a DV support center in their area and 48% more likely to have attended one in the last six months. (Mostue, et al 2013).

[61] About 5% young adults who do not attend college report being involved in community service as a result of being recruited by someone in a service organization or through institutionalized opportunities for community service. Flanagan, Constance and Levine, Peter (2010). Civic Engagement and the Transition to Adulthood.

[62] CAOs, 1 per community and overseen by the Community Action Specialist, will be contracted to assist in the design and implementation of community engagement strategies; serve as the local focal point for community collaboration and service provision; and CAC establishment and formalization. Ibid footnote 16 shows 30% reduction in potential victimization from collective efficacy (Sampson 2004; Maxwell (2011).

[63] CAC formation will take into account existing community organizations to avoid duplication in function and activities.

1.19 **Component II. Strengthening GPF crime prevention and investigation capacity (US$5,513,400).** This component seeks to support strengthening of GPF CP and CI capacity at the national level. In order to improve CP effectiveness, CSSP will finance an evidence-based CP policing model at the national level, which includes: (i) IT improvements;[64] (ii) police training and specialization in evidence-based policing;[65] and (iii) 4 national high quality C&V surveys, to expand access to C&V data.[66] To strengthen GPF CI capacity, CSSP will finance a model for effective CI to strengthen: (i) community relations;[67] and (ii) forensic and criminal trainings and tools.[68] Additionally, to strengthen DV CI and CP capacity, CSSP will finance (i) inter-agency coordination mechanisms;[69] (ii) 1 national high quality survey to understand the extent and causes of DV and VAW;[70] and (iii) scenario-based DV training for police officers.[71]

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[64] Evidence suggests that police forces implementing a combination of IT, specialization and skilled workers have a roughly 5% lower offending rate than police forces that solely implement IT. Garicano, P. IT upgrade and Human Resources (HR) specialization. 2010. IT to be financed include ICIS expansion to all police sub-divisions, hiring and training policy analysts to assist with crime data reporting and analysis within the Crime Observatory and GPF; Electronic Document Management System completion; development and implementation of standard operating procedures, acquisition of a patrol management information system. HR specialization to be financed include strengthening HR management tools and mechanisms, a police performance capacity diagnostic, development of HR management plan and performance assessments (at individual and enterprise levels), curricula development and creation of a GPF Monitoring and Evaluation (M&E) unit for operational analysis, planning and coordination.

[65] Colombia's Plan Cuadrante involved comprehensive police training, improved interpersonal skills, implementation of new patrolling protocols, use of data and IT improvements, and reduced homicides 22% in 8 Colombian cities. (Mejia 2013).

[66] There is currently no evidence available to quantify impact of data collection. Data collection activities include: capacity building for demographic data collection and analysis, application of a SNS, a national business victimization survey, a national survey on the quality of government services; a national victimization and public security perception survey; a national public urban safety survey, and C&V study in Amerindian communities.

[67] A Chicago-based community training program seeking to improve police-community relations and actively engage community in solving problems found that, on average, 26% percent of all problems identified in the trainings were partially or completely solved during the 4-month follow-up period covered by the study. Friedman, Warren and Clark, Michael. Community Policing: What Is the Community and What Can It Do? Measuring what Matters: Proceedings From the Policing Research Institute Meetings. To strengthen police-community relations, CSSP will finance police psycho social support and counseling; rehabilitation of 18 police stations to better receive citizens; and improvements to GPF disciplinary control and accountability mechanisms – the Police Complaints Authority and Office of Professional Responsibility - to conduct independent investigations.

[68] Evidence suggests that a police force implementing a combination of IT, specialization and skilled workers can improve clearance rates by 15% violent crime (Garicano, 2010). Trainings and tools will be provided in criminal and forensic investigation and evidence collection (including development of standard reporting tools; guidelines and protocols for forensic evidence collection and maintenance, and support to the FL to achieve ISO certification).

[69] A multiagency approach to DV was found to decrease DV re-victimization by 60%. Peel Institute on Violence Prevention, Strengthening Violence Prevention through Increased Service Collaboration and Coordination. (2014). Best practices suggest representation of the police, prisons, courts, and DV service providers. Participating agencies will be confirmed during implementation.

[70] Specific VAW Survey victimization estimates are substantially higher than those generated from common victimization surveys. One study in the US found that the average annual rate of assault by an intimate was

1.20 **Component III. Strengthening GPS rehabilitation and social reintegration services (US$2,340,000).** This component seeks to improve GPS effectiveness in reducing offender recidivism at the national level, through financing 2 streams of activities. To strengthen GPS capacity to deliver R&R services,[72] the following activities will be financed: (i) a prison census of Guyana's 5 prisons, including needs assessment; (ii) design and implementation of an R&R model aligned with international best practices;[73] (iii) design and implementation of a case management program;[74] and (iv) development and implementation of a R&R service delivery training plan.[75] To address prison overcrowding, CSSP will finance a study of incarceration alternatives for pre-trial detainees.[76]

C. Key Results Indicators

1.21 CSSP's expected results are: (i) decrease in national homicides, burglaries and robberies rates; and (ii) decrease in DV prevalence. Result indicators are described in Annex II.

Table 2. Expected Results

Key Results	Baseline (per 100,000)	Target (per 100,000)
1. Homicide in Guyana	20.7	15
2. Robbery in Guyana	214.9	182.67
3. Burglary in Guyana	143	121.55
4. Prevalence of DV in Guyana (physical)	17%	14
5. Prevalence of DV in Guyana (emotional)	71%	60

5.8 times higher in the NVAW than compared to the NCVS. Tjaden and Thoennes (2000). Extent, Nature, and Consequences of Intimate Partner Violence: Findings From the National VAW Survey.

[71] Quasi-experimental evaluation of the Sexual Assault Nurse Examiner Program, a police training to receive DV complaints, shows that training increased charge and conviction rates by 30% and 21%, respectively.

[72] An international expert organization will be hired to support R&R activity implementation in accordance with international best practices.

[73] There is growing evidence of the positive effect of rehabilitation programs in reducing prisoner recidivism. (Droppelmann, 2010). The R&R model to be financed under CSSP will include programs shown to be effective such as: (i) cognitive behavioral therapies, recidivism fell by 25% in the targeted population (Lipsey, et al 2007); (ii) prison industries, shown to reduce recidivism by 24% in participating offenders (Uggen & Staff 2001); (iii) vocational training or apprenticeship programs, participants were shown 33% less likely to recidivate than the control group. (Uggen, C. et al, 2001); and (iv) education programs (primary, secondary, and post-secondary), shown to produce 8.3% decrease in recidivism (Drake, Aos and Miller 2009), see EEOP#9. CSSP will finance design and implementation of a R&R public awareness campaign; R&R facilities' upgrade; and development and implementation of a private sector and civil society partnership plan to assist offenders in R&R.

[74] The primary aim of the risk-need assessment and monitoring approach to offender rehabilitation is to reduce the offender's risk of re-offending and protect the community from further harm. Methodologies to identify basic principles of "Risk, Need, and Responsivity" have been developed for such purpose and have helped to make prison interventions effective in reducing recidivism (Bonta, et al 2007), see EEOP#9.

[75] Effective R&R programs should consider, among other things, proper selection and training of teams. (Brown et al. (2011); Delaney & Weir (2011); McGuire (2002); Serin (2005).

[76] Evidence shows the need to expand alternatives to prison in criminal sentencing (Persilia, 1987).

1.22 **Economic analysis**. A cost-benefit analysis, complemented by an appropriate sensitivity assessment, found CSSP economically feasible (42% economic rate of return; US$13.2 million net present value using IDB standard 12% discount rate).

II. FINANCING STRUCTURE AND MAIN RISKS

A. Financing Instruments

2.1 CSSP will be financed through a Specific Investment Loan for an estimated total cost of US$15 million. The loan will be financed with resources from the biannual allocation for Guyana (document GN-2442-42) of the Single Currency Facility of the Ordinary Capital and the Fund for Special Operations.

Table 3. Project costs

Category	IDB and Total (US$)	%
1.1 Project management	758,000	5%
2.1 Component I. Community C&V prevention	5,728,600	38.2%
2.2 Component II. Strengthening GPF CP and CI capacity	5,513,400	36.76%
2.3 Component III. Strengthening GPS rehabilitation and social reintegration services	2,340,000	15.71%
3.1 Auditing, monitoring and evaluation	345,000	2%
4.1 Contingencies	315,000	2.33%
Total/ Percentage (%)	15,000,000	100%

B. Environmental and Social Safeguard Risks

2.2 In accordance with the "Environment and Safeguards Compliance Policy (OP-703), CSSP is classified as Category "C". There are no negative social or environmental risks associated with proposed activities.

C. Fiduciary Risk

2.3 As discussed in Annex III, based on the IDB's July 2014 institutional and financial management assessment of the MOHA, CSSP has a medium fiduciary risk. Supervision and mitigation actions will focus on strengthening CSSP's accounting and financial reporting system, procurement process and PIU capacity as it relates to familiarity with IDB fiduciary policies and procedures. Following is the identified fiduciary risk and related mitigation actions:

Table 4. Fiduciary Risks and Mitigation Actions

Fiduciary Risk	Mitigation Action
Management of fiduciary-related matters	As part of project preparation, terms of reference prepared for each of the fiduciary specialists, to ensure persons with appropriate experience and skills are hired.
	IDB will conduct ex-ante review for all project-related procurement
	As part of the annual financial audit, auditor to conduct semi-annual asset management and project execution audits.
	Presentation of the project Operations Manual will be a condition precedent to the first disbursement

2.4 The procurement of works, goods, and services will be conducted in accordance with the Policies for the Procurement of Works and Goods (GN-2349-9) and the Policies for the Selection and Contracting of Consultants financed by the IDB (GN-2350-9). As specified in Annex III, procurement of goods, works and consulting services will be subject to ex-ante review and IDB no objection and disbursements will be reviewed on an ex-post basis. IDB will periodically assess procurement and financial procedures through inspection visits. The general level of risk may evolve depending on the results of said visits.

D. Other Key Issues and Risks

2.5 **Risks and mitigation measures.** Risk analysis workshops were held with MOHA, stakeholder ministry, and civil society representatives; during which 6 key risks were identified and 4 were given medium risk ratings. Fiduciary risk was given a high risk rating. CSSP's overall risk rating is medium. Table 5 presents those risks and mitigation measures not assessed in Section II-C.

Table 5. Summary Risks and Mitigation Measures

Risk	Rating	Mitigation Measure
Lack of beneficiary engagement and/or community resistance to community-based interventions.	Medium	Non-governmental, governmental, and private sector organizations that already have community connections will be hired to carry out community-based activities. Also, CACs will be constituted of community residents to oversee and participate in project execution. Three rapid impact projects designed and overseen by the CACs, will be financed to foster engagement. Finally, the project will hire a community action officer to work in each intervention community; to serve as a liaison between community members and the project, as well as to explain the project, engage beneficiaries in project activities, and establish the CACs.
Reluctance or resistance to new approaches proposed in the GPF and GPS training activities.	Medium	As a condition precedent to eligibility, MOHA will appoint GPF and GPS liaisons to the PIU, who will be responsible for ensuring appropriate communication channels between the PIU and those institutions; and identify methods to increase GPF and GPS ownership and engagement.
Lack of timely available and reliable administrative data to implement project activities.	Medium	As a condition precedent to eligibility, MOHA will appoint GPF and GPS liaisons to the PIU as well as establish a Steering Committee to oversee project implementation. These entities are meant to foster and support relevant institutional collaboration in the generation and provision of administrative data necessary for project implementation.
Working with CS institutions, such as the police and the correctional system may pose reputational risks for the IDB.	Medium	1. Strengthening external and internal accountability mechanisms-Police Complaints Authority and Office of Professional Responsibility -through hiring of investigators and training.
		2. Hiring international expert organization to support, guide prison work and ensure execution in accordance with international best practices.

2.6 **Safeguards for support to the police and penitentiary**. In accordance with CS Operational Guidelines (GN-2535-1), CSSP will finance under Component I the strengthening of the Police Complaints Authority and GPF's Office of Professional Responsibility, GPF's external and internal accountability mechanisms. Under Component III, CSSP will finance the hiring of an international expert organization to support implementation of prison-related

activities. This will ensure rigorous technical monitoring to improve GPF and GPS (i) accountability and integrity and (ii) respect for human rights.

2.7 **Institutional viability.** CSSP is the second IDB-financed project to be implemented by MOHA. MOHA has demonstrated the administrative capacity and familiarity with IDB requirements and procedures to oversee this operation. IDB will provide ongoing training and guidance to support execution, particularly with respect to fiduciary responsibilities and procedures, as per recommendations from other projects implemented in Guyana. To facilitate coordination with beneficiary agencies, GPF, GPS, and Forensic Laboratory (FL) liaisons to the PIU will be appointed. A Steering Committee composed of governmental, civil society, and private sector entities (MOHA to appoint, with IDB no-objection) will be established to oversee and guide execution.

2.8 **Sustainability.** CSSP is Guyana's second major investment, with IDB support, to enhance the CS sector and indicates Guyana's ongoing commitment to invest in the sector. As part of CSSP's evaluation, Guyana will define operational and financial resources necessary to ensure CSSP sustainability.

III. IMPLEMENTATION AND MANAGEMENT PLAN

A. Summary of Implementation Arrangements

3.1 The Borrower is the Co-operative Republic of Guyana. The EA is MOHA,[77] which will create and oversee a PIU for project execution. This PIU – responsible for overall project administration, including planning, budgeting, accounting, procurement implementation, and monitoring – will include a full-time, dedicated project manager, financial specialist, procurement specialist, Monitoring and Evaluation (M&E) specialist, and community action specialist.

3.2 PIU responsibilities include: (i) Annual Operating Plan (AOP) preparation and implementation;[78] (ii) financial administration, accounting, and preparation of budgets and disbursement requests; (iii) annual procurement plan preparation and procurement of works, goods and services; (iv) preparation of technical reports and financial statements; (v) monitoring of CSSP activity progress, environmental and social safeguards compliance, and actual and planned results variance; (vi) selection and hiring of the external audit firm and implementation of recommendations; (vii) hiring of consultants to conduct external evaluations; and (viii) serving as liaison to IDB.

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[77] The GPS, GPF, the Crime Observatory (CO), and the Forensic Laboratory (FL) operate under the Ministry of Home Affairs (MOHA). The CO and the FL work with GPF to gather and analyze crime-related data.

[78] The AOP, presented by November 30th each year, will detail implementation plans for the following year; and include annual goals, budget, and implementation schedule for each programmed activity. The AOP for the first year is contained in the Project Execution Plan.

3.3 **Special contractual conditions prior to the first disbursement: (i) presentation of evidence that MOHA has created the PIU and hired the project manager, procurement specialist (with contract management experience), financial specialist, community action specialist, and M&E specialist; (ii) presentation by the EA, to the Bank's satisfaction, of the Procurement Plan, AOP, and the project Operations Manual that includes fiduciary management arrangements; (iii) appointment by MOHA of a liaison to the PIU from GPF, GPS, and FL; and (iv) establishment of the Steering Committee referenced in paragraph 2.7.**

3.4 Special contractual condition precedent to execution of Component I will be the validation of selected intervention communities and update of the RF community-level indicators, in accordance with the 2012 Census data.[79]

B. Summary of Arrangements for Monitoring Results

3.5 Project monitoring will be based on the RF, M&E Arrangements, Procurement Plan, and AOP. Current Government data collection systems allow for data collection on all RF indicators except Component I output indicators; for which the PIU's M&E Specialist will be tasked with creating data collection and monitoring systems. MOHA will submit semi-annual progress reports within 60 days of semester end, containing: (i) narrative description of activities, procurement processes, and implementation issues for the reported period; (ii) RF indicator update; (iii) statement of costs by component activities and RF indicator; and (iv) identification of implementation risks/events and mitigation measures.

3.6 **Evaluation.** The EA shall hire an independent external consultant to conduct CSSP's mid-term and final evaluation.[80] The final evaluation will include conduct of an impact evaluation of Component I using a difference-in-differences approach or more advanced statistical tools available at the time of project closure supplemented with a before-and-after comparison (see EEOP#3), to allow comparison of changes in relevant RF indicators in the treated and designated control communities. The evaluations will provide valuable information for future interventions as well as confirm the validity of external evidence on C&V prevention interventions in the context of Guyana.

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[79] To update the Results Framework, Guyana will reapply the community selection methodology presented in EEOP#7 using 2012 Census data to identify the 20 communities with highest homicides, burglaries and robberies, and DV rates nationally; re-determine baseline levels; and re-compute targets using methodology presented in M&E.

[80] The mid-term and final evaluations will be carried out upon (i) commitment of 60% of loan resources; and (ii) commitment of 90% of loan resources.

Development Effectiveness Matrix			
Summary			
I. Strategic Alignment			
1. IDB Strategic Development Objectives	**Aligned**		
Lending Program	**i) Lending to small and vulnerable countries, and ii) Lending for poverty reduction and equity enhancement.**		
Regional Development Goals	**Homicides per 100,000 habitants.**		
Bank Output Contribution (as defined in Results Framework of IDB-9)	**Cities benefited with citizen security projects.**		
2. Country Strategy Development Objectives	**Aligned**		
Country Strategy Results Matrix			
Country Program Results Matrix	**GN-2756-2**	**The intervention is included in the 2014 Operational Program.**	
Relevance of this project to country development challenges (If not aligned to country strategy or country program)	**GN-2690**	**Citizen security is included as an area for continued strategic dialogue in the Country Strategy.**	
II. Development Outcomes - Evaluability	**Evaluable**	**Weight**	**Maximum Score**
	8.5		**10**
3. Evidence-based Assessment & Solution	**9.0**	**33.33%**	**10**
3.1 Program Diagnosis	**2.4**		
3.2 Proposed Interventions or Solutions	**3.6**		
3.3 Results Matrix Quality	**3.0**		
4. Ex ante Economic Analysis	**7.0**	**33.33%**	**10**
4.1 The program has an ERR/NPV, a Cost-Effectiveness Analysis or a General Economic Analysis	**4.0**		
4.2 Identified and Quantified Benefits	**0.0**		
4.3 Identified and Quantified Costs	**1.5**		
4.4 Reasonable Assumptions	**0.0**		
4.5 Sensitivity Analysis	**1.5**		
5. Monitoring and Evaluation	**9.5**	**33.33%**	**10**
5.1 Monitoring Mechanisms	**2.0**		
5.2 Evaluation Plan	**7.5**		
III. Risks & Mitigation Monitoring Matrix			
Overall risks rate = magnitude of risks*likelihood	**Medium**		
Identified risks have been rated for magnitude and likelihood	**Yes**		
Mitigation measures have been identified for major risks	**Yes**		
Mitigation measures have indicators for tracking their implementation	**Yes**		
Environmental & social risk classification	**C**		
IV. IDB´s Role - Additionality			
The project relies on the use of country systems			
Fiduciary (VPC/PDP Criteria)	**Yes**	**Procurement: i) Information system, ii) Shopping method, and iii) Contracting individual consultant.**	
Non-Fiduciary			
The IDB's involvement promotes improvements of the intended beneficiaries and/or public sector entity in the following dimensions:			
Gender Equality			
Labor			
Environment			
Additional (to project preparation) technical assistance was provided to the public sector entity prior to approval to increase the likelihood of success of the project			
The ex-post impact evaluation of the project will produce evidence to close knowledge gaps in the sector that were identified in the project document and/or in the evaluation plan	**Yes**	**The program proposes an impact evaluation of Component I: Community crime and violence prevention. The evaluation is based in a difference-in-differences approach, as part of the effort to assess the effectiveness of interventions to reduce crime and violence in targeted communities.**	

The main problems contributing to the high rate of Crime and Violence (C&V) (homicides, burglaries and robberies, and DV) in Guyana have been identified and quantified, as have been their determinants. However, the POD has not quantified how much of the problems can be explained by the determinants of the problems identified. The project's vertical logic is clear and well specified. The project presents adequate evidence of internal validity of the proposed solutions. However, no evidence of external validity is provided.

The Results Matrix is adequately constructed and contains all of its required elements for monitoring the project. The program includes a satisfactory monitoring and evaluation plan and the data required for monitoring the project has been identified. However, the POD does not include annual estimates of the cost of products.

The economic analysis is limited given that it only partially identifies and quantifies the benefits of the project. The program proposes an impact evaluation of Component I, Community C&V prevention, using a difference-in-differences approach, to assess the effectiveness of interventions to reduce C&V in the targeted communities.

The Program's overall risk is rated Medium. Mitigation measures were identified with appropriate monitoring indicators. We note the possible risk related to the availability of the 2012 Census (Baselines), the 2017 Census (Midterm measurements), and the 2020 Census (Targets and PCR). The Risk Matrix has adequately identified this risk, which will require special attention by the Bank during implementation, since it could compromise the evaluability of the project.

RESULTS MATRIX[1]

Objective of the Project: CSSP's general objective is to contribute to a reduction in C&V (HBR and DV) in Guyana. The specific objectives are to: (i) improve behaviors for non-violent conflict resolution in target communities; (ii) increase Guyana Police Force (GPF) effectiveness in CP and CI nationally; and (iii) improve Guyana Prison Services (GPS) effectiveness in reducing offender recidivism at the national level.

IMPACT

Indicators	Unit of Measure	Baseline		Targets		Source/Means of verification
		Value	Year	Value	Year	
EXPECTED IMPACT: The expected impact of this project is to reduce crime and violence (homicides, robberies, burglary and DV) in Guyana.						
1. Homicide in Guyana	Rate (# of homicides/ 100,000 inhabitants)	20.7	2013	18.68	2020	Crime Observatory
2. Robbery in Guyana	Rate (# of robberies/ 100,000 inhabitants)	214.9	2013	193.92	2020	Crime Observatory
3. Prevalence of domestic violence in Guyana (physical)	% who suffered DV (physical) in the last 12 months	17	2011	15.2	2020	Safe Neighborhood Survey (SNS)
4. Prevalence of domestic violence in Guyana (emotional)	% who suffered DV (emotional) in the last 12 months	71	2011	63.4	2020	SNS

EXPECTED OUTCOME

Indicators	Unit of Measure	Baseline		Midterm measurements		Targets		Source
		Value	Year	Value	Year	Value	Year	
OUTCOME 1 – Improve behaviors for non-violent conflict resolution in target communities								
1. Robbery in target communities.	Rate (# of robberies/100,000 inhabitants)	1539	2013	1408.06	2017	1288.26	2020	Crime Observatory
2. Burglary in target communities.	Rate (# of Burglary /100,000 inhabitants)	641.8	2013	587.19	2017	537.24	2020	Crime Observatory
3. Domestic Violence in target communities.	Rate (# of DV cases /100,000 inhabitants)	1104.6	2013	1006.06	2017	916.31	2020	Crime Observatory
INTERMEDIARY OUTCOME 1- Reduce prevalence of community vulnerability factors for crime and violence in target communities								
4. Persons reported as	% of persons aged 15	31.1	2002	31.8	2017	32.6	2020	Census (source), SNS

[1] For additional information please see Detailed Results Framework.

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

Indicators	Unit of Measure	Baseline		Midterm measurements		Targets		Source
		Value	Year	Value	Year	Value	Year	
working(employed or self-employed) in target communities.	or older							(means of verification
5. Persons with no formal qualifications in target communities.	% of persons aged 15 or older	73.9	2002	62.8	2017	53.4	2020	Census (source), SNS (means of verification
6. Persons who have tried to help solve a problem in their neighborhoods /communities within the last 12 months.	%	28.21	2011	29.6	2017	31.1	2020	SNS
7. Persons who strongly agree that a man is justified in slapping his wife.	%	41.6	2011	38.1	2017	35	2020	SNS
OUTCOME 2 – Increase GPF effectiveness in crime prevention and crime investigation nationally								
8. Homicide in 20 target communities.	Rate (# of homicide/100,000 inhabitants)	81	2013	80.11	2017	79.23	2020	Crime Observatory
9. Homicide cases with author identified.	%	56	2012	62	2017	68	2020	GPF
10. Robbery cases with author identified.	%	20	2012	38	2017	72	2020	GPF
11. Burglary cases with author identified.	%	18	2012	34	2017	65	2020	GPF
12. Percentage of DV cases reported resulting in charges or warnings	%	37	2010	44	2017	53	2020	GPF
13. Percentage of persons who do not trust the Police.	%	67.6	2011	61	2017	55	2020	SNS
14. Percentage of the population who was victimized and do not report DV.	%	85	2011	77	2017	69	2020	SNS
15. Percentage of the population who was not victimized and do not report theft cases to the police.	%	62.8	2011	57	2017	51	2020	SNS
OUTCOME 3 – Improve GPS effectiveness in reducing offender recidivism at the national level								

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

Indicators	Unit of Measure	Baseline		Midterm measurements		Targets		Source
		Value	Year	Value	Year	Value	Year	
16. Proportion of convicted adults in the prison system who were readmitted for the third time	%	21.3	2013	18	2017	15	2020	GPS
INTERMEDIARY OUTCOME 3 – Reduced recidivism of ex-convicts from the Guyana Prison System								
17. Proportion of inmates with less than primary education.	%	58.9	2013	53	2017	49	2020	GPS

OUTPUTS

Output	Estimated Cost (US$)	Unit of measure	Base line	Year 1	Year 2	Year 3	Year 4	Year 5	Target 2020	Sources
Component 1: Community Crime and Violence Prevention										
1. Number of community needs and asset assessments completed.	100,000	# of community assessments	0	0	20	0		0	20	PIU
2. Number of Community Action Councils established and formalized.	673,600	# of CAC's	0	0	20	0	0	0	20	PIU
3. Number of Rapid Impact Projects designed and implemented.	120,000	# of RIP's	0	0	0	20	20	20	60	PIU- 3 RIP/community
4. Number of Community Action Councils trained and certified in cross-culturally sensitive community mobilization and gender based violence.	120,000	# of CAC's	0	0	0	0	20	0	20	PIU
5. Number of training courses provided and completed by community members on Parenting.	400,000	# of courses	0	0	20	20	0	20	60	PIU
6. Number of training courses provided and completed by community members on preventing Violence against Women.	400,000	# of courses	0	0	20	20	0	20	60	PIU
7. Number of training courses provided and competed community members	400,000	# of courses	0	0	20	20	0	20	60	PIU

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

Output	Estimated Cost (US$)	Unit of measure	Base line	Year 1	Year 2	Year 3	Year 4	Year 5	Target 2020	Sources
on conflict resolution.										
8. Number of public awareness campaigns in the media developed and implemented in target communities.	200,000	# of campaigns	0	0	20	20	0	20	60	PIU
9. Number of public education workshops completed for behavioral change in target communities.	150,000	# of workshops	0	0	0	20	0	20	40	PIU. 2 workshops/community over Project life
10. Number of community members certified in vocational training.	750,000	# of beneficiaries	0	0	2,800	2,800	0	2,800	8,400	PIU. The number of beneficiaries per training workshop are based on number of trainings supported under CSP GY0071
11. Number of job readiness training workshops completed by community members.	625,000	# of workshops	0	0	20	20	0	20	60	PIU
12. Number of job seeking, placement services programs delivered and completed for community members.	475,000	# of job seeking programs	0	0	20	20	0	20	60	PIU
13. Number of entrepreneurship training programs delivered and completed by community members	375,000	# of trainings	0	0	20	20	0	20	60	PIU
14. Number of mentoring programs completed by community members.	940,000	# of programs	0	0	20	20	0	20	60	PIU
Component 2: Strengthening GPF Crime Prevention and Investigation Capacity										
15. Number of diagnostics of GPF performance assessment completed.	120,000	# of diagnosis	0	1	0	0	0	0	1	PIU
16. Number of police training curricula and educational programing revised and updated.	1,550,000	# of curricula	0	0	1	0	0	0	1	PIU
17. Number of Electronic Document Management system phases	1,092,000	# of phases	0	0	0	0	0	6	6	PIU

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

Output	Estimated Cost (US$)	Unit of measure	Base line	Year 1	Year 2	Year 3	Year 4	Year 5	Target 2020	Sources
completed.										
18. Number of Monitoring and Evaluation units for GPF created and operational.	72,000	# of Units	0	0	1	0	0	0	1	PIU
19. Number of Gender and other demographic data specialist trained and hired in Crime Observatory.	60,000	# of Specialist	0	1	0	0	0	0	1	PIU
20. Number of Data Analysts trained and hired in Crime Observatory.	126,000	# of Analysts	0	0	3	0	0	0	3	PIU
21. Study on C&V in Amerindian communities conducted and published.	50,000	# of studies	0	0	1	0	0	0	1	PIU
22. Number of Violence against Women surveys conducted and completed	240,000	# of surveys	0	0	0	1	0	1	2	PIU
23. Number of Safe Neighborhood Surveys conducted and completed.	200,000	# of surveys	0	0	1	0	1	0	2	PIU
24. Number of National Business Victimization survey conducted and completed	60,000	# of surveys	0	0	1	0	0	0	1	PIU
25. Number of National Surveys on the Quality of Government Services and their Impact conducted and completed.	60,000	# of surveys	0	0	0	0	1	0	1	PIU
26. Number of National Public Urban Safety Surveys conducted and completed.	60,000	# of surveys	0	0	0	0	1	0	1	PIU
27. Number of National Victimization and Public Security Perception Surveys conducted and completed	60,000	# of surveys	0	0	0	0	0	1	1	PIU
28. Number of Crime Mapping studies conducted and completed.	20,000	# of mapping studies	0	0	0	0	0	1	1	PIU
29. Number of police officers who	68,000	# Police	0	0	0	3,400	0	0	3,400	PIU

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

Output	Estimated Cost (US$)	Unit of measure	Base line	Year 1	Year 2	Year 3	Year 4	Year 5	Target 2020	Sources
completed training on DV scenario response .		officers								
30. Number of police officers who completed training on community engagement and cooperation.	588,000	# Police officers	0	0	0	3,400	0	0	3,400	PIU
31. Number of police officers who completed training on criminal and forensic investigation techniques.	1,087,400	# Police officers	0	0	425	425	425	425	1,700	PIU. Half of the police force 1,700 officers will benefit from Criminal and Forensic investigation training
Component 3 : Strengthening GPS rehabilitation and social reintegration services										
32. Number of prison census and needs assessments conducted and completed.	800,000	# prison census and needs assessments	0	0	4	0	0	0	4	PIU
33. Number of social reintegration model plans designed and operating.	285,000	# of models	0	0	1	0	0	0	1	PIU
34. Number of case management and monitoring systems designed and implemented.	550,000	# of systems	0	0	1	0	0	0	1	PIU
35. Number of GPS staff who completed training in rehabilitation and social integration model.	655,000	# of GPS staff	0	0	0	390	0	0	390	PIU
36. Number of studies conducted and completed on alternatives to pre-trial detention.	50,000	# of studies	0	0	1	0	0	0	1	PIU
Total estimated costs of outputs (includes stipend for participants and service delivery providers (Component I), and knowledge activities for GPF and GPS (Components II &III)										**US$13,582,000**
Total estimated costs for Evaluation, Audit, Project Administration, and Contingencies										**US$1,418,000**
Total estimated cost of the Programme										**US$15,000,000**

*Given possible population shifts within Guyana since 2002, it is likely that (i) the baseline and targets and (ii) intervention communities will need to be adjusted once 2012 Census data is made available as crime rates were calculated using national population and intervention communities selected on the basis of crime rates. It should be noted however that the methodology used to calculate targets (provided in appendix 1) will remain consistent.

** Outcome targets were calculated by assigning an expected outcome change percentage for treated and control group members, resulting from program activities. Expected change for each outcome indicator was derived from existing evidence (internal validity) as cited in the Loan Proposal Document. Then, a sum of weighted means of the expected change on treated and control group members was computed.

FIDUCIARY ARRANGEMENTS

COUNTRY:	Co-operative Republic of Guyana (CRG)
PROJECT Nº:	GY-L1042
NAME:	Citizen Security Strengthening Programme
EXECUTING AGENCY:	Ministry of Home Affairs (MOHA)
FIDUCIARY TEAM:	Emilie Chapuis (FMP/CGY); Paula Grant and Naveen Jainauth-Umrao (FMP/CGY)

I. EXECUTIVE SUMMARY

1.1 The general objective of the Programme is to contribute to a reduction in C&V (homicides, robberies, burglaries, and D&V) in Guyana. The total estimated budget is US$15 million financed by the IDB from the Ordinary Capital and the Fund for Special Operations resources.

1.2 The Executing Agency (EA) is Ministry of Home Affairs (MOHA). In 2006, the IDB approved the Citizen Security Programme (CSP) (1752/SF-GY) which was successfully executed by MOHA. Also in 2013, the IDB approved Support for the Implementation of the Citizen Security Strategy (ATN/OC-14259-GY; GY-T1107), a US$1.67 million technical assistance grant to further support MOHA and its subsidiary agencies. The grant will finance modernization of the MOHA; strengthening of the Guyana Police Force capacity for crime prevention, social outreach, and community policing; as well as modernization of the Guyana Prison Service, among other activities.

1.3 Concerning procurement-related activities to be executed under the present operation, an institutional capacity assessment of MOHA was conducted on July 30, 2014. The conclusions of the evaluation showed that the level of risk in procurement is high. Consequently, the operation will be placed under ex-ante supervision for all procurement-related activities and in accordance with Appendix 1 – Section 2 of the Policies for the Procurement of Works and Goods financed by the IDB (GN-2349-9) and the Policies for the Selection and Contracting of Consultants Financed by the IDB (GN-2350-9) that will apply to the present operation.[1]

1.4 An institutional and financial management assessment (using the SECI methodology) of MOHA was undertaken in July 2014. This coupled with the Bank's knowledge and experience gained from the execution and assessments of CSP have concluded the fiduciary risks as medium. A further assessment of the fiduciary risks will be conducted during execution as part of the fiduciary supervision plan.

II. EXECUTING AGENCY'S FIDUCIARY CONTEXT

2.1 The EA for the present operation will be the MOHA. The Project Implementing Unit (PIU) is yet to be formed and organized. It is anticipated that the PIU's structure will be identical to that of the PIU who executed 1752/SF-GY. Based on

[1] The Use of Country System is Guyana has not been approved to date. The latest MAPS assessment was conducted in December 2013 and has yet to be approved by the Government of CRG.

lessons learned from the execution of the previous Loan, recruiting personnel with a high degree of technical expertise, largely in the areas of project management, contract management and Procurement and financial management is critical to PIU fiduciary management. From a fiduciary perspective a dedicated Financial Specialist, Procurement Specialist and, if proved necessary based on the workload in the procurement field, a procurement assistant is essential for the maintenance of a strong system of internal controls, in particular segregation of duties.

2.2 An Integrated Fiduciary Assessment (IFA) was conducted in 2012 which provided an update to the 2007 combined PEFA performance measurement framework and OECD-DAC procurement assessment. The 2012 IFA results, like the 2007 PEFA, concluded that Guyana's overall budget planning, accounting and reporting systems worked well; IFMAS (finance and accounting system used by the Government) operated consistently and reliably providing updated information about all elements of budget execution, and budget planning and reporting was being done in accordance with cash accounting standard. The Public Financial Management indicator scores from the 2012 IFA, continued to show encouraging results with slight improvements in areas such as strengthened external audit function, budget preparation process, revenue administration, among others. The IFA highlighted that attention needed to be paid to the internal control environment, internal audit, payroll control and procurement control among others. To date, confirmation from the Borrower on the results of the 2012 IFA as well as 2007 PEFA remain outstanding. The Bank's Guide for the Use of Country Systems Assessment was also conducted in 2012; this is yet to be finalized. The Auditor General's Office (AoG) is currently eligible to audit all Bank-financed Technical Cooperations and loan operations deemed to be of low or medium complexity and risk. This was based on an assessment of the capacity of the AoG undertaken by the Bank in 2011 and the continued institutional strengthening support given by the Bank to the AoG. On the Procurement side, a modern legislative and regulatory framework exists for procurement but the Public Procurement Commission, a key element of the system, is not yet in operation. In addition, the other main weaknesses identified related to the supervision of statutory bodies, public procurement and internal audit and control.

2.3 For this operation, the Bank is recommending: (i) the use of the IFMAS accounting system of the EA or other accounting system acceptable to the Bank, for the financial administration of the project; and (ii) for external control, the Auditor General of Guyana.

III. FIDUCIARY RISK EVALUATION AND MITIGATION ACTIONS

3.1 The procurement institutional capacity assessment of July 2014 showed that the general level of risk for procurement related activities for the execution of GY-L1042 is defined as High. Consequently, the project will be placed under ex-ante review to ensure compliance with the general principles of project procurement as defined by the Bank's procurement policies. The level of risk may be reviewed during the operation's execution and based on the findings and

results of the regular supervision missions that will take place during the execution period. Two factors explain the level of risk for this operation:

a. The PEU for this new operation was functioning under 1752/SF-GY until June 30, 2014. Since then, it has been dissolved and the staff is no longer on duty. This entails that all key personnel have to be recruited anew. Although the procurement activities foreseen in the initial procurement plan for the operation are not complex in nature, ensuring the proper use of funds in accordance with the general principles of project procurement such as defined in the International Best Practices as well as in the Bank's Procurement Policies is cardinal to achieving the expected results. It is also important to note that the selection of the PEU's staff will be essential to the prevention of fraud and corruption. A suggested mitigation measure is to ensure the recruitment of a procurement specialist who has experience in procurement planning and oversight and, to the extent possible, is knowledgeable of the Bank's procurement policies and procedures. CIPS certification would be a plus. Additionally, the newly recruited staff should receive adequate training in procurement under Bank's policies, including the technical personnel. Recruitment of the key personnel is placed as condition prior to eligibility.

b. To date, essential pillars like the Unit's organization and duties, support and oversight systems, procurement documentation management systems and the general procurement environment cannot be assessed, essentially because the PEU is not operating. As mitigation measure and although it is anticipated that the PEU's structure will be identical to that adopted under 1752/SF-GY, it is recommended that this activity be completed as a condition prior to the operation's eligibility. It is also recommended that the Manual of Operations contain a section on the organization of the procurement function, including the functioning of: (i) the procurement cycle management and associated workflows contemplating the necessary segregation of duties within the project team[2] for all procurement related activities; (ii) the procedural and decisional workflows[3], including a description of the unit's organization and duties, clear rules and procedures for delegation of authority, reference to the code of ethics applicable to the staff and a mapping of the procurement process to be conducted under the operation; and (iii) the implementation and maintenance of adequate systems of contract management and controls, focusing also on maintaining adequate record systems to support all Bank-financed expense. It is also recommended that these specific functions be placed under the responsibility of qualified key personnel.

3.2 Concerning Financial Management, it is necessary to have staff with a high degree of technical expertise, largely in the areas of project management, contract management and Procurement and financial management. From a fiduciary

[2] This will allow avoiding potential conflict of interests and ensure that internal control mechanisms are indeed functioning to guarantee the proper use of funds.

[3] The workflow should also include the information related to the ex-ante supervision modality and all other information necessary given that GY-L1042 will be subject to the Bank's Procurement Policies (GN-2349/50-9).

perspective a dedicated Financial Specialist, Procurement Specialist and a Procurement Assistant are essential for the maintenance of a strong system of internal controls, in particular segregation of duties. The Project Team has developed a preliminary Risk Mitigation Matrix that will be discussed with the EA. This Matrix outlines the necessary mitigating actions to be taken with the MOHA. The Bank and the MOHA will undertake joint reviews of the Matrix on a yearly basis, and introduce necessary additional mitigating actions as a result of such reviews.

IV. ASPECTS TO BE CONSIDERED IN THE SPECIAL CONDITIONS OF CONTRACT

4.1 **Conditions prior to eligibility.** Relevant fiduciary conditions prior to eligibility include: (i) the Project Implementing Unit is officially appointed and the recruitment of its key personnel is completed to ensure its capacity to execute in accordance with the Bank's Policies, rules and procedures that will apply to this Financial Facility. Key personnel will include: (a) a project manager; (b) a financial specialist; (c) a procurement specialist with knowledge of the Bank's procurement policies and (c) full-time specialists in each of the core project execution areas; and (ii) the EA has approved the following planning documents: (a) Project Operations Manual; (b) a Procurement Plan; and (c) an Annual Operating Plan (AOP). Regarding the POM, it should contain all the information as detailed in Section III.2 (b) above. The approved documents are distributed to the PEU.

4.2 **Type of funds to be used by EA.** The type of funds to be used are established in the following manner: (i) reimbursement of actual expenses: the effective rate of exchange on the date of payment of each expenditure, as published by the Central Bank of Guyana; (ii) reporting on accounts (Advance of Funds): the effective rate of exchange used in the conversion of the currency of the operation to the local currency; (iii) disbursements in alternate currencies from the US dollar or local currency; and (iv) disbursements in another currency different from the US dollar and the Guyana dollar. In cases of reimbursement of a guarantee of letter of credit, the equivalent of the currency of the operation will be fixed in accordance with the amount effectively disbursed by the IDB.

4.3 **Registries, inspections and reports.** All records and files will be maintained by the EA, according to accepted best practices, and be kept for up to three years beyond the end of the operation's execution period.

V. FIDUCIARY ARRANGEMENTS FOR PROCUREMENT EXECUTION

5.1 The procurement fiduciary arrangements establish the conditions applicable to all procurement execution activities under this operation.

5.2 **Procurement Execution.** All project related procurement activities will be performed by the PIU following Bank's Procurement Policies: Policies for the Procurement of Goods and Works financed by the Bank (GN-2349-9) and Policies for the Selection and Contracting of Consultants financed by the Bank (GN-2350-9).

5.3 **Procurement of Works, Goods and Non-Consulting Services.** The contracts for Works, Goods, and Non-Consulting Services[4] generated under the project and subject to International Competitive Bidding will be executed through the use of the Standard Bidding Documents issued by the Bank. The processes subject to National Competitive Bidding (NCB) will be executed through the use of National Bidding Documents agreed to by the Bank. The technical specifications review during the preparation of the selection process, is the responsibility of the project sector specialist. There is no direct contracting anticipated at this point.

5.4 **Selection and Contracting of Consultants**. The consulting services contracts generated under this project will be executed through the use of the Standard Request for Proposals issued or agreed to by the Bank. The terms of reference review for the selection of consulting services is the responsibility of the project sector specialist.

5.5 **Selection of Individual Consultants**. The selection will be made in accordance with Bank's Procurement rules and procedures and will consist in evaluating the capacity of at least three candidates against set and agreed Terms of References.

5.6 No exceptions to the Bank's Procurement Policies (GN-2349/50-9) are requested, nor are retroactive contracts anticipated.

Table 1. Thresholds (miles US$)

ICB Threshold*		**NCB****		**Consulting Services**
Works	**Goods**	**Works**	**Goods**	**Int. shortlist**
≥1,000,000	**≥100,000**	**100,000 – 1,000,000**	**25,000 – 100,000**	**≥100,000**

(*) When procuring simple works and common goods and their amount is under the International Competitive Bidding thresholds, Price Comparison may be used
(**) When procuring complex works and non-common goods with amounts under the NCB range, Price Comparison shall be used.

Table 2. Main Procurement Activities

Activity	Procurement Method	Estimated Date	Estimated Amount 000'US$
Goods			
Acquisition of patrol management tools.	Price comparison		250
Works			
N/A	N/A	N/A	N/A
Firms			
Support to the forensic laboratory to achieve ISO certification	QCBS		1,650
Rehabilitation of the police station			1,000
Preparation and implementation of census and needs assessment	QCBS		1,600
Preparation and implementation of victimization survey	QCBS		500
Individual consultants			
Strengthening of Police Complaints Authority to conduct independent investigations - training	CI		360
International Technical Advisor	CI		200

*To access the 18 month procurement plan, see Electronic Required Link #4.

[4] Policies for the Procurement of Goods and Works Financed by the Inter-American Development Bank (GN-2349-9) paragraph 5.2: The services different to consulting services have a similar process as procurement of Goods.

VI. FINANCIAL MANAGEMENT

6.1 **Financial Statements and Reports, audited or unaudited:** (i) semi-annual financial reports of the program are to be included in the semi-annual progress report which will be submitted by the MOHA to the Bank; (ii) annual financial statements of the project, audited by the Auditor General of Guyana are to be submitted to the Bank within 120 days at the end of each fiscal year, beginning with the fiscal year in which the first project expenditures are incurred; and (iii) a final financial audit report of the program is to be submitted by MOHA within 120 days after the date of the last disbursement.

6.2 **Programming and Budget.** The Borrower has committed to allocate, for each fiscal year of project execution, adequate fiscal space to guarantee the unfettered execution of the project; as determined by normal operative instruments such as the AOP and the Project Execution Plan.

6.3 **Accounting and Information Systems**. It is expected that the IFMAS accounting system will facilitate the recording and classification of all financial transactions, provide information related to planned versus actual financial execution of the project, the financial execution plan for the next six months that will be attached to each request for Advance of Funds, annual Financial Statements, performance reports, and any other reports, financial or otherwise, audited or unaudited, that may be required from the Bank from time to time.

6.4 **Disbursements and Cash Flow.** The Bank will supervise the creation of an Advance of Funds, using the Advance of Funds methodology.

6.5 Whenever resources from the financing are requested through an Advance of Funds, they will be deposited into a Special Account, denominated in US dollars, established exclusively for the Project at the Central Bank of Guyana.

6.6 Required resources from this Special Account will be transferred to another bank account in a commercial bank, denominated in Guyana Dollars to be utilized for payment of expenditures in local currency.

6.7 The EA commits to maintaining strict control over the utilization of the Advance so as to ensure the easy verification and reconciliation of balances between the EA's records and IDB records (WLMS1).

6.8 The project will provide adequate justification of the existing Advance of Funds balance, whenever 80% of said balance has been spent (see paragraph 3.2 for justification). Advances will normally cover a period not exceeding 180 days and no less than 90 days. In order to request disbursements from the Bank, the EA will present the following forms and supporting documents:

Type of Disbursement	Mandatory Forms	Optional forms/ information that can be requested by the IDB
Advance	Disbursement Request/ Financial Plan	List of Commitments Physical/Financial Progress Reports
Reimbursements of Payments Made	Disbursement Request/ Project Execution Status/ Statement of Expenses	List of Commitments Physical/Financial Progress Reports
Direct Payment to Supplier	Disbursement Request Acceptable Supporting Documentation	List of Commitments Physical/Financial Progress Reports

6.9 Generally, supporting documentation for Justification of Advances and Reimbursement of Payments Made will be kept at the office of the EA. Disbursements' supporting documents may be reviewed by the Bank on an ex-post basis. These reviews do not entail a blanket approval, based on the samples reviewed, of the whole universe of expenditures.

6.10 **Internal Control and Internal Audit.** The management of the project will assume the responsibility for designing and implementing a sound system of internal controls for the project.

6.11 **External Control and Reports**. For each fiscal year during project execution, MOHA will be responsible to produce semi-annual financial reports for the project, annual Audited Financial Statements of the Program and one final Audited Financial Statements at the end of the Program, audited by the Auditor General of Guyana

6.12 **Financial Supervision Plan.** Financial Supervision will be developed based on the initial and subsequent risk assessments carried out for the project. Financial, Accounting and Institutional Inspection visits will be performed based on our risk assessed, covering the following: (i) Review of the Reconciliation and supporting documentation for Advances and Justifications; (ii) Compliance with procedures; (iii) Review of compliance with the lending criteria; and (iv) ex-ante Review of Disbursements.

6.13 **Execution Mechanism**. MOHA will be the EA and will manage the Advance of Funds.

6.14 **MOHA** will be responsible for, among other things: (i) preparation of required project reports; (ii) monitoring product, output and outcomes achievement using established indicators; (iii) preparation and submitting disbursement request to the Bank and justification of expenses; (iv) preparation of annual financial program expenses; (v) ensure compliance with all aspects of the Project Operating Manual; and (vi) maintain adequate documentation filing system.

DOCUMENT OF THE INTER-AMERICAN DEVELOPMENT BANK

PROPOSED RESOLUTION DE-__/14

Guyana. Loan ____/BL-GY to the Co-operative Republic of Guyana
Citizen Security Strengthening Programme

The Board of Executive Directors

RESOLVES:

That the President of the Bank, or such representative as he shall designate, is authorized, in the name and on behalf of the Bank, to enter into such contract or contracts as may be necessary with the Co-operative Republic of Guyana, as Borrower, for the purpose of granting it a financing to cooperate in the execution of a citizen security strengthening programme. Such financing will be for the amount of up to US$7,500,000 from the resources of the Bank's Fund for Special Operations, corresponds to a parallel loan within the framework of the multilateral debt relief and concessional finance reform of the Bank, and will be subject to the Financial Terms and Conditions and the Special Contractual Conditions of the Project Summary of the Loan Proposal.

(Adopted on _____)

GY-L1042
LEG/SGO/CCB/GY-39068400

DOCUMENT OF THE INTER-AMERICAN DEVELOPMENT BANK

PROPOSED RESOLUTION DE-__/14

Guyana. Loan ____/BL-GY to the Co-operative Republic of Guyana
Citizen Security Strengthening Programme

The Board of Executive Directors

RESOLVES:

That the President of the Bank, or such representative as he shall designate, is authorized, in the name and on behalf of the Bank, to enter into such contract or contracts as may be necessary with the Co-operative Republic of Guyana, as Borrower, for the purpose of granting it a financing to cooperate in the citizen security strengthening programme. Such financing will be for the amount of up to US$7,500,000 from the resources of the Single Currency Facility of the Bank's Ordinary Capital, corresponds to a parallel loan within the framework of the multilateral debt relief and concessional finance reform of the Bank, and will be subject to the Financial Terms and Conditions and the Special Contractual Conditions of the Project Summary of the Loan Proposal.

(Adopted on _____)

GY-L1042
LEG/SGO/GY-39068407-14

REPORT OF

BOARD OF INQUIRY

INTO

ESCAPE OF FIVE PRISONERS

FROM

GEORGETOWN PRISON

ON FEBRUARY 23, 2002

DATED
2002-05-30

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INTRODUCTION

On Saturday 23rd February this year (2002) five prisoners, namely, Dale Moore, Andrew Douglas, Shawn Brown, Mark Fraser and Troy Anthony Dick escaped from the Georgetown Prison.

In the process of so doing, Assistant Prison Officer Troy Williams received certain serious injuries from which he died and Prison Officer Roxanne Whinfield was shot in the head. Up to this time she is still hospitalized suffering from serious injuries to the brain.

The five prisoners are still at large and are considered dangerous.

The Honourable Minister of Home Affairs has established a Board of Inquiry to enquire into the circumstances surrounding the said escape and matters incidental thereto.

The Board is required, in particular, to enquire into and, report on the following though, not limited thereto:

(a) The circumstances surrounding the escape;

(b) Matters prior to, during and after the escape;

(c) All matters relating to and/or incidental to the escape;

(d) Culpability of person or persons involved;

(e) Recommendations as to appropriate disciplinary action to be taken against those found culpable;

(f) The existing security arrangements in respect of the custody, management, and control of prisoners with specific reference to those that may be classified as "dangerous prisoners" at the Georgetown Prison;

(g) Such other matter (s) as may in the opinion of the Board be considered relevant for the purpose of the enquiry.

COMPOSITION OF THE BOARD

(1)	Mr. Cecil C. Kennard, OR, CCH	-	Chairman
(2)	W/Lt. Col. Christine King, MEM	-	Member
(3)	Senior Supt. of Police Frederick Caesar	-	Member
(4)	Deputy Commissioner of Police (Retired) Sultan Kassim, DSM	-	Member
(5)	Deputy Director of Prisons (Retired) Steve Fredericks	-	Member
(6)	Mr. Errol E. VanNooten, MSc, BSc Crime Prevention Specialist	-	Member
(7)	Ms. J. Clarke	-	Secretary

The Board convened at the Georgetown Prison Officers' Club at 2 p.m. (14:00 hrs) on the 1st March 2002 and thereafter at the said venue on the following dates:-

Tuesday	5th March 2002
Tuesday	12th March 2002
Wednesday	13th March 2002
Thursday	14th March 2002
Friday	15th March 2002
Monday	18th March 2002
Tuesday	19th March 2002
Thursday	21st March 2002
Friday	22nd March 2002
Tuesday	26th March 2002
Wednesday	27th March 2002
Thursday	28th March 2002
Tuesday	2nd April 2002
Wednesday	3rd April 2002
Thursday	4th April 2002
Friday	5th April 2002
Monday	8th April 2002
Wednesday	10th April 2002
Monday	15th April 2002
Tuesday	16th April 2002
Friday	19th April 2002

Monday	22nd April 2002
Thursday	25th April 2002
Tuesday	30th April 2002
Friday	3rd May 2002
Monday	6th May 2002
Tuesday	7th May 2002
Friday	10th May 2002
Tuesday	28th May 2002

In addition, members of the Board of Inquiry did visit the Prisons on two (2) occasions, namely on the 13th March 2002 at 2 p.m. (14:00 hrs) and on the 8th April 2002 at 2 p.m. (14:00 hrs) in order familiarize itself with the various sections. At the request of the Board a plan of the important sections was prepared for the use of the Board. This plan enabled us to appreciate where the various areas referred to by the witnesses in their evidence before us were located.

The plan was of great help as it enabled us to have a proper picture of the relevant areas of the prison, the areas where Assistant Prison Officer Williams received his injuries and where Prison Officer Whinfield was shot.

The Board interviewed the following persons:-

(1)	Dale Erskine	-	Director of Prisons
(2)	Colin Howard	-	Officer –in-Charge of Georgetown Prison and Senior Supt. of Prison
(3)	Clement Duncan	-	Supt. of Prison/Medex
(4)	Ido Lyte	-	Chief Prison Officer
(5)	Lennox Allen	-	Chief Prison Officer
(6)	Hugh Fanfair	-	Asst. Supt. of Prison
(7)	Hubert Trim	-	Prison Officer (Trade Instructor)
(8)	Matthew Thomas	-	Assistant Prison Officer
(9)	Pamela Nurse	-	Prison Officer
(10)	Eon Stephney	-	Assistant Prison Officer

(11)	Aubrey Joseph	-	Corporal of Police (CID)
(12)	Lena Williams	-	Principal Officer II
(13)	Esther Charles	-	Prison Officer
(14)	Roxanne Nelson	-	Woman Assistant Prison Officer
(15)	Carl Lakeram	-	Prison Officer
(16)	Rawle Caleb	-	Inmate of Georgetown Prison
(17)	Alston Scott	-	Cadet Officer
(18)	Terrence Joseph	-	Inmate of Georgetown Prison
(19)	Michelle Johnson	-	A Civilian
(20)	Maurice Griffith	-	Prison Officer
(21)	Wayne Briggs	-	Assistant Prison Officer
(22)	Quincy Bent	-	Assistant Prison Officer
(23)	James Gittens	-	Inmate of Georgetown Prison serving a sentence of twenty (20) years for Carnal Knowledge.
(24)	Philbert Adams	-	Senior Supt. of Police
(25)	Bachan Geer	-	Deputy Supt. of Police
(26)	Kennard Barran	-	Assistant Commissioner of Police (Retired)
(27)	Selall Persaud	-	Senior Supt. of Police

CIRCUMSTANCES SURROUNDING THE ESCAPE

On Saturday 23rd February last thirty-six (36) Prison Officers reported for duty at the Georgetown Prison between 5.30 a.m. and 8.30 a.m. Among them were Senior Supt. of Prison and Officer-in-Charge of Georgetown Prison Colin Howard, Supt. of Prison/Medex Clement Duncan, Assistant Supt. of Prison Hugh Fanfair and Cadet Officer Alston Scott who were responsible for the top management of the Prison for that day. The middle managers/supervisors were Plant Maintenance/Supervisor Augustus Taylor, Chief Officers Phillip Bandoo, Lonsdale Chapman, Ido Lyte and Lennox Allen, Principal Prison Officers II J. Lamazon, C. Lewis, L. Williams (female) and Prison Trade Instructors D. Griffith and H. Trim. The above named fourteen (14) persons had to supervise twenty-two (22) basic grade ranks who were detailed to work

at the front gate (No. 1), No. 2 gate, Self Support Division, Operations Room, the Capital Division, the Wood and Brick Prisons, Observation Posts I and II (OP I & OP II), Kitchen, Condemned Division, No. 3 gate, Pave and Self Support Division, Young Offenders Division, Dining Hall and other ancillary functions.

Since the installation of the razor wire and security cameras on the perimeter walls with monitors, sometime in 2000, the escape of prisoners by scaling the fence had been made extremely difficult while the back and front gates remain vulnerable points (See Establishment Order 22/2000 – dated 7th August 2000 by the then Officer-in-Charge of Georgetown Prison Mr. Ulric Williams).

Action was then taken and certain procedure were put in place in order to prevent escape through that medium, (the front and back gates) by requiring that, among other things, an armed sentry be placed in the area of the front gate daily until all high profile prisoners are secured in their division for the night.

The Director of Prisons in a statement dated 11th March 2002 stated: "on a review of the security arrangements on the day, I am satisfied there was sufficient Officers (Seniors and Juniors) on the ground to ensure that, security of the Prison, was as typical on such days. A number of Officers were strategically located as was expected, except **for the armed sentry who is usually placed at the front gate on special occasions, inclusive of games day" (see also Statement of 6th March 2002).**

It would, therefore, follow that on special occasions, such as Saturday 23rd February 2002 an armed sentry ought to have been placed in the area of the front gate. Particularly so, as those on duty in that area were all female and, also because of the size of the Prison population.

The evidence reveals that the five (5) escapees who were considered special watch/high profile prisoners, were housed at different sections of the Prison. Prisoners Andrew Douglas and Shawn Brown were kept in the "Strong Cell" at nights but in the day were in the Self Support Division. Dale Moore, who had previously

escaped and who was at large for a considerable length of time before he was recaptured was kept in the Wood Prison at nights. However, during the day he was kept in the Self Support Division even though the evidence reveals that he had not been receiving Self Support for a long time prior to 23rd February 2002. The same would apply to Shawn Brown.

Mark Fraser, who had previously escaped on two occasions, was kept in the Wood Prison, while Troy Anthony Dick was housed in the Brick Prison.

Though it would appear that there was adequate staff on duty on the day in question, with the exception of the Operations Room, the Main Gate, the Self Support and Young Offenders' Division, it was clear to us that they were not properly deployed. For instance, Prison Officer Matthew Thomas, who was the Literacy Officer at the Prison and who had not previously worked in Observation Post II and had little experience in the use of firearm was detailed by Chief Prison Officer Lyte to work there. He was given no instructions how he should act in the case of emergency. He was not even provided with a Communication Set. His only means of indicating that something was wrong was by the blowing of a whistle.

Prison Officer Roxanne Nelson (female) who was the only person on duty in the Operations room was unable to cope with the emergency that had arisen. She was confused and did not sound the siren nor did she make contact with Operations Room, Brickdam Police Station, by the radio set until she was told to do so by Prison Officer Matthew Thomas, who had left his post at Observation Post II to tell her that something was amiss and that she should sound the siren. One would have expected that she needed no prompting in order to do this as one would have thought that as part of her training she would have known what to do in the case of an emergency. For reasons we find difficult to understand there was no armed sentry in the area of the front gate, as there ought to have been. More about this later.

At about 8:30 to 9:00 hrs (on 23/02/02) the Director of Prisons spoke to the Officer-in-Charge of Georgetown Prison (Howard) and Chief Prison Officer Ido Lyte, who was one of the Duty Officers (Chief Prison Officer Lennox Allen being the other) of

the need to be specially careful that day. In answer to me as to the reason for this he said that he had a "gut feeling" that something was likely to happen.

At about 10:40 hrs on that day prisoner Dale Moore who was in the Self Support Division made a request to be taken to his Division (Wooden Prison). The deceased APO Troy Williams was then performing duties at the Self Support Division, the No. 3 gate and the Young Offenders' Section. T. I. Trim had earlier been assigned to work in these areas to assist APO Williams but he was removed from there and asked to assist in the feeding of prisoners which would have been about 11 hrs.

It is to be noted that there is an iron gate (No. 3 gate) between the Self Support Division and the Young Offenders' Division and entry to those sections would have to be through the No 3 gate.

At this point of time Shawn Brown was seen near to the No. 2 gate where Prison Officer Roxanne Whinfield was on duty. Brown ought not to have been there. He should have been locked in the Self Support Division.

Chief Prison Officer Ido Lyte requested Assistant Prison Officer Troy Williams to "pass" Prisoner Dale Moore through the No. 3 gate and as he Lyte was approaching the gate he (Lyte) observed two prisoners, one of whom he identified as Dale Moore struggling with Assistant Prison Officer Williams. Both prisoners had what appeared to be knives. The three (3) men were then near to the entrance (gate) of the Self Support Division.

At this point in time it would appear that Prison Officer Whinfield had opened the No. 2 gate for prisoner James Gittens to get back into the Prison Yard. Prisoner Shawn Brown who was nearby passed through the No. 2 gate and demanded the keys for the front gate (Main gate) from Whinfield who resisted the demand and in the ensuing struggle Whinfield was shot by Brown. It would appear that during the struggle the keys which Whinfield had possession of got stuck on the clothing of Prison Officer Esther Charles who was on duty between the Main gate (front gate) and

No. 2 gate without her realizing this. Charles was one of the Officers on duty in the Self Support Area at that time.

A struggle ensued between Charles and Brown, who eventually got possession of the keys and opened the front gate (small) and made good his escape followed by Dale Moore.

Around this time Andrew Douglas was seen by Chief Officer Lyte passing through a "pigeon hole" in the gate of the Self Support Division. Around this time also Mark Fraser and Troy Anthony Dick were seen by Assistant Prison Officer Stephney on the roof of the Dietary (Stores). It would appear that these two prisoners then jumped from the roof into the area between the No. 2 and No. 3 gates, after which they made good their escape, passing firstly through the No. 2 gate, which was open, then through the front gate (small) which was previously opened by Shawn Brown. Andrew Douglas also made his exit through this means (No. 2 and front gates).

It is our view even though Chief Prison Officer Lyte had testified that it was Shawn Brown and Dale Moore whom he had seen struggling with Troy Williams with what appeared to be knives, that he might have mistaken as regards to Shawn Brown. From the evidence we heard, it seems very unlikely that Shawn Brown could have been where Lyte had seen him (near to the Self Support gate) as the evidence clearly suggests that Shawn Brown's intention was to get through the No. 2 gate at the first available opportunity and this would have been as soon as Prison Officer Whinfield had opened the No. 2 gate to let prisoner Gittens into the Prison Yard and he (Brown) had positioned himself by the No. 2 gate in order to achieve his objective. The possibility exists that the other prisoner seen struggling with Assistant Prison Officer Williams was not Shawn Brown but, it could be either Andrew Douglas, Mark Fraser or Troy Anthony Dick. From where Lyte was his view might have been obstructed by some plants that were between him and where the three men were or he could have been confused. It is worthy of mention that the Post Mortem Report of Troy Williams reveals that more than one sharp instrument was used to cause the several injuries which resulted in his death.

The five prisoners, having exited the Prison, ran south in Camp Street then West in D'Urban Street and then south in George Street being pursued by the Officer-in-Charge Mr. Colin Howard, Cadet Officer Alston Scott and Prison Officer Bent.

In George Street the five prisoners commandeered the motorcar (No. PGG 4697) of Clairmont Niles and drove to Mandela Avenue where the car encountered problems, after which they commandeered the motor car (No. PGG 6626) of Rhonda Marshall, who happened to be driving her car in that area.

From there the car was driven to the Turkeyen/Sophia Area where the five Prisoners were seen by Prison Officer Carl Lakeram to be exiting it. They then ran into the nearby fields and disappeared from the view of Lakeram. As of this date, all five (5) escapees remain at large.

OBSERVATIONS

The impression that members of the Board got was that some of the Prison Officers who appeared before it were less than frank and attempted to cover up what really took place that day, and these would include the Director of Prisons and the Officer-in-Charge Howard. We shall say more of this later.

If indeed instructions were given by the Director of Prisons to Chief Prison Officer Lyte and Officer-in-Charge Howard for those on duty to be on the alert as he had had a "gut feeling" that something was likely to happen, then why some of those Officers on duty were not sufficiently alert and why no armed sentry was placed in the area of the front gate?

Howard testified that after the Director of Prisons had spoken to him at about 8:30 – 9:00 hrs on 23/02/02 he gave instructions for the Officers on duty to be on the alert. Those persons include Chief Prison Officers Lyte and Allen. Howard told us that he instructed Lyte and Allen to inform the others on duty of the need to be especially alert. It is not clear to us whether those instructions were passed on to all the others who were on duty that day.

From the evidence we found that many of the Officers, including Matthew Thomas, Hubert Trim and Pamela Nurse received no such instructions.

Why did Assistant Prison Officer Troy Williams and Prison Officer Roxanne Whinfield not see it fit to cause Shawn Brown to be locked in the Self Support Division instead of allowing him to roam about in the area between the No. 2 and No. 3 gates? Of APO Williams it must be said that he alone was monitoring three areas after T. I. Trim was removed from those areas to assist with the feeding of the prisoners. The Officers (female) who were on duty in the area where PO Whinfield was, appeared to be in a relaxing mood and seemed to be quite unconcerned with what was taking place. She was left on her own, so to speak.

Mr. Howard, Chief Prison Officers Allen and Lyte were on duty that day but did not also see it fit to have Shawn Brown locked away in the Self Support Division. It would seem to us that Shawn Brown was a privileged prisoner and could do as he liked. At one time he was selected an Orderly by Prison Officer Nurse when clearly he was an unfit person for that position, and this was with the concurrence of Mr. Howard, according to the evidence of Pamela Nurse. Rule 254 of the Prison Rules clearly places the duty of selecting an Orderly on the Officer-in-Charge and any selection must be carefully done. (See also Prisoner Circular No. 9/99 which prohibits High Profile Prisoners from being made Orderlies).

Howard would want us to believe that he had nothing to do with the selection of Shawn Brown as Orderly. We fail to see how Prison Officer Nurse could have taken decision by herself to select Brown as an Orderly when the Rule does not permit this. We feel that Howard had something to do with the selection of Brown as an Orderly and is trying to avoid any responsibility for this, knowing full well that this was irregular.

As a matter of fact as we mentioned earlier, Shawn Brown and Dale Moore should not have been kept in the Self Support Division as they had not been receiving Self Support for a considerable period of time prior to 23/02/02. There was no

coordination between the Officers working at the Self Support Area (front gate) (those receiving the meals) and those whose duties were to remove the prisoners from the areas where they were kept and taken to the Self Support Division for their meals.

The lack of co-ordination resulted in Dale Moore and Shawn Brown being kept in the Self Support Division when they should not have been there. This probably laid the foundation for the plan to escape as Shawn Brown had positioned himself near to the No. 2 gate from where he could have seen that there was no armed sentry by the front gate (main gate).

The Director of Prisons clearly stated that, apart from further remand days, (Tuesdays and Thursdays) an armed sentry ought to be placed by the main gate on special occasions, including games day (Saturday).

Mr. Howard on the other hand stated that an armed sentry would be posted there only on further remand days (Tuesday and Thursdays). We would prefer the evidence of Director of Prisons to that of Howard, on this issue. It would, therefore, follow that Howard had failed in his duty to ensure that an armed sentry was posted at the front gate, particularly so as he had been spoken to earlier that day by the Director to be specially careful. This was an important omission on his part as he was on duty that day. It was his duty to approve the areas where Officers should be posted. (See Section 4 (2) of the Prison Act). When I asked Mr. Howard why no armed sentry was placed at the front gate after the Director of Prisons had spoken to him on the morning of the 23rd February 2002 he could offer us no satisfactory explanation.

We are all of the view that if an armed sentry was posted at the front gate, the prisoners, even though Shawn Brown had a firearm, would have been very reluctant to attempt an escape. It would appear that Shawn Brown was fully aware of the days on which no armed sentry would be placed by the front gate and he planned his escape with the others for that day and had positioned himself near the No. 2 gate at the time of the incident.

One James Gittens, a convicted prisoner serving a sentence of twenty (20) years for Carnal Knowledge, was an Assistant Orderly at the Reception area. It would seem strange that he would want to be washing his clothes on that Saturday and thus the need to borrow an iron from the Reception area to press (iron) his clothing when it was his usual practice to wash his clothing on a Thursday or a Friday. It would seem that he was part of the plan, though unwittingly, to escape as he chose that very moment to re-enter the Prison yard through the No. 2 gate when Shawn Brown was nearby, thus providing an opportunity for Brown to escape.

As soon as the No. 2 gate was opened for him (Gittens) to re-enter the Prison Yard, Shawn Brown went up to Prisoner Officer Whinfield and demanded of her the keys for the front gate and when she refused to do so he shot her.

The escape, in our view could have been avoided if the Prison Authorities had taken all security measures necessary to ensure that the five (5) escapees, who are all high profile prisoners, were locked in their respective areas and closely monitored, rather than permitting, at least one of them (Shawn Brown), to play games and to walk freely in a restricted area of the Prison area (between the No. 2 and No. 3 gates).

Howard may have given Shawn Brown permission to be out of his cell as he was the person who had concurred for Shawn Brown to be made an Orderly and he was on duty that day. If Howard was not in agreement for Shawn Brown to be made an Orderly he would have stepped in. However, it was the Director of Prisons, who had ordered that Shawn Brown ceases to be an Orderly.

It is our impression that the Prison Officers felt intimidated by the prisoners, thus their only resort was to permit them to do whatever they wished.

This was brought out clearly in the case of Shawn Brown and Woman Prison Officer Whinfield. He was standing in the area near the No. 2 gate (for which she was responsible) and even spoke to her, yet she nor the other Prison Officers on duty in the area at that time saw it fit to have him removed and returned to the Self Support Division.

Shawn Brown, Dale Moore and Andrew Douglas were kept in the Self Support Division during the day and even though they were considered to be High Profile Prisoners they were seen to be associating with each other in breach of Rule 28 of the Prison Rules which prohibits them from occupying adjoining cells.

As we said earlier, Assistant Prison Officer Troy Williams was responsible for the gate to the Self Support Division and the No. 3 gate (as well as the Young Offenders' Division). If he did not allow Brown access through the Self Support Division gate or if he had not failed to secure it, then it remains a mystery how Shawn Brown got through that gate (Self Support). Cadet Officer Scott passed Brown in an area where he was not supposed to be (between the No. 2 and No. 3 gates) but did nothing about it. However, he refuses to admit that he saw Shawn Brown in that area. The reason for this is obvious. He does not want to admit that he was at fault in not causing Shawn Brown to be placed in his cell. He was more concerned with having a hair cut at that point of time, which was a breach of Establishment Order No. 5/2000 (Barbering should be done between 8:00 hrs and 10:00 hrs and 14.30 hrs and 16:00 hrs).

It is interesting to note that Prison Circular dated 2nd September 1999 – No. 9/99 provides that where a High Profile Prisoner is seen in an unauthorised area he must be immediately questioned as to his presence there and a report must be made to the Duty Officer of the incident.

It is our view that the Duty Officers, namely Chief Prison Officers Lyte and Allen and, to a lesser extent, Superintendent Duncan did not co-ordinate the duties, did not properly brief persons under their command, and did not check all areas and systems to ensure that the prisoners were secured. Therefore, they seemed to have left every thing to chance.

Allen, when he gave evidence, gave the impression that he was quite unaware of the happenings of the day. His conduct that day left much to be desired. However, Howard is not free from blame as having been spoken to by the Director to be specially

careful he did not see to it that security was "beefed up", even though he was on duty and was in the Prison Yard for over two (2) hours.

The Officer assigned duties at Observation Post II Matthew Thomas was placed at risk with a weapon (shotgun) of which he had little knowledge and training. Serious doubts exist whether he was in fact at his post at the relevant time as he had failed to observe certain important events. Even if he was, it would seem that he was not sufficiently alert.

It was obvious to us that a significant number of Prison Officers were not au fait with Prison Establishment Orders and other important Standing Operational Procedures. The system of reading of Orders at the parades has not worked effectively. Copies of these documents must be studied at Training Courses and also made available to Prison Officers as reference documents to guide them along in the performance of their duties.

It seems to us that the Director of Prisons' instructions on the day in question were disregarded by the Officer-in-Charge Howard in that:

(1) He failed to step up security, in particular, he failed to ensure that an armed sentry was placed by the front gate;

(2) The Officers on duty were not properly briefed.

According to the Director of Prisons, the performance of Prison Officer Maurice Griffith c/d Sparman over the years had been unsatisfactory as he had committed several irregularities, yet the Director did little or nothing to cause him to be removed from the Prison Service (see Section 4 (1) of the Prison Act). There is a possibility that it was Maurice Griffith who had provided the weapon which Shawn Brown used to shoot Prison Officer Whinfield, if the statement of a Prisoner, whose name is being withheld, is accepted. The Prisoner had given a statement, but when he was called to clarify certain points in his statement he stated that he did not wish to be questioned but would rely on what he had stated therein. In view of the fact that he had refused to answer questions we were unable to test his credibility.

We have discovered that monies confiscated from Prisoners are being utilized by the Prison Authorities for administrative and other purposes. This should not be encouraged. This is totally wrong, as the money ought to be paid into revenue. This should be investigated as there seems to be an absence of records to indicate the amount taken from prisoners and how those monies were utilized. There is evidence from Howard where a considerable amount of money, eleven thousand dollars ($11,000) found on a prisoner was used to purchase games equipment and other items. This was done with the concurrence of the Director of Prisons, according to Howard.

On the 8th November 1992 Mark Fraser was convicted in the High Court for the offence of Robbery with Aggravation and was sentenced to 25 years imprisonment. He escaped from Prison on 22nd July 1993 and was recaptured two (2) days later. He again escaped on 2nd March 1995 and was recaptured on 16th January 2002 (a period of 2502 days). He was dealt with under Section 37 of the Prison Act and a forfeiture of 220 out of 440 days of his remission was imposed by the Director of Prisons even though Section (37) (b) (v) of the Prison Act stipulates that there should be a forfeiture of all remission earned. This was improper (See also Section 52 of the Prison Act).

There is a statement from one Selwyn Bailey an ex-prisoner who stated inter alia:-

> "I also visited Shawn Brown whereby I used to take video cassettes for him to view in the Prison".

This was a clear violation of Rule 295 of the Prison Rules which provides:-

> "No prisoner shall be allowed to write to, or receive letters, **or visits from any ex-prisoner, unless there is a proven close relationship**". (See also Prison **Circular No. 14/99 dated 22nd September 1999** by then acting Director of Prisons Dale Erskine).

There is nothing to suggest that Bailey was in any way related to Shawn Brown. These are some of the several irregularities, which came out during the course of the Inquiry. We had earlier mentioned others.

The Director of Prisons Erskine stated before us that on the 28-01-2002 he had received information from Senior Superintendent of Police Adams who was then based at Brickdam Police Station that he (Adams) had received information that a weapon (firearm) was thrown over the Prison fence for escapee Andrew Douglas. We are not satisfied that proper searches were made for the weapon, even though the Director and the Officer-in-Charge would want to believe this was done.

It would appear that the Prison Authorities did not take the information they had been provided with seriously as a consequence did not pursue the matter as vigorously as they should have done. This is a serious omission on the part of the Director of Prisons and the Officer-in-Charge which would justify censuring. It is important to note that a firearm was in fact used by Shawn Brown to shoot Prison Officer Whinfield. Had the information received by the Director of Prisons been properly investigated the escape might not have taken place as the weapon might have been found. The Police who was called in to assist with the investigations was also found wanting in this respect. It has been clearly established that a firearm was used by the five (5) prisoners to successfully escape. This said weapon was used to maim Prison Officer Whinfield and also to intimidate other Officers to the point of them retreating. The firearm also caused a Police Patrol team that was in the vicinity of the Prison to retreat, when they discovered that the escapees were armed. As such, the weapon must be considered as a pivotal instrument in the escape. In the Board's assessment, it is unlikely that any escape would have been successful without the use of the gun. For this reason, the Board has identified some of its main areas of concern as follows:-

(a) The circumstances surrounding the weapon being thrown over the Prison wall.

(a) The nature and extent of any search conducted to recover the weapon.

(b) The measures taken by the Prison Authorities once the information was

made known to them.

(c) The nature and extent of the investigation conducted by the Police after receiving the information prior to the escape.

(d) The nature and extent of any investigation conducted by the Police subsequent to the escape, after it was discovered that a firearm was in fact used during the said escape.

According to a report dated March 11, 2002, from Mr. Dale Erskine, Director of Prisons, he had received information on January 28, 2002 from a Senior Police Officer that a weapon intended for Andrew Douglas, was thrown over the Prison wall sometime earlier. The report continued that the perpetrator who allegedly confessed to this act was at the time confined in an East Coast of Demerara Police Station lock-up. Based on this information, a joint search comprising Police and Prison personnel was conducted and certain specific areas of the Prison were searched.

In a memo dated January 30, 2002, the Officer-in-Charge, Mr. Howard outlined to the Director the composition of the search team together with a list of the items found. This memo further identified the locations that were searched and concluded that the duration of the search was approximately ninety (90) minutes. It is incomprehensible that an allegation of such serious nature could have been addressed in ninety minutes. Taking into account the locations to be searched and the number of inmates that must also be searched, it is inconceivable that a thorough and comprehensive search could have been conducted in the time period stated.

The question now arises as to what, if any, appropriate course of action was taken by the Prison Authorities following the unsuccessful bid to recover the weapon. Testimony from numerous Prison personnel revealed that Douglas had been known to associate with Shawn Brown, Dale Moore and Mark Fraser on a regular basis. The association of these prisoners is well known to the Prison Authorities. As such, a responsible and prudent course of action would have required the segregation, isolation and neutralisation of all members of this group. It was unwise for the authorities to believe that Douglas would have had the weapon on his person or in close proximity to where he was housed in the Prison. A reasonable investigative

approach would have required that the Prison Authorities direct their attention towards the other members of the group. This was not done.

The Prison Authorities did not obtain the proper identity of the person who allegedly threw the weapon. The fact that the identity was unknown to Prison Authorities certainly precluded them from taking any appropriate precautionary steps to prevent the perpetrator from visiting any of the five prisoners while they were in prison. As such it remains possible that the perpetrator could have visited the escapees while they were incarcerated at the Prison.

In summary the Georgetown Prison Authorities failed to:-

(1) Conduct a thorough and comprehensive search of the Prison, when they initially received information of a weapon being thrown over the wall.

(2) Consistently monitor the activities of Andrew Douglas and other members of the group, after being in receipt of the information.

(3) Isolate, neutralize and segregate members of the group, after being in receipt of the information.

The testimony given by the members of the Guyana Police Force (GPF) and the Guyana Prison Service (GPS) was based on their recollection of events surrounding the information obtained that a weapon was thrown over the Prison wall for Andrew Douglas. No written report was prepared by either entity on the information received and the ensuing investigations of the matter. Failure to document the information and the investigative activities of the matter has certainly led to several discrepancies in the testimony given during the hearing. This has certainly resulted in some level of confusion as to dates and chronology of events subsequent to the receipt of the information. What emerged during our analysis of the investigations is the lack of a structured, coordinated and fully planned investigative exercise of the information received.

According to the testimony of the Police witnesses, sometime during the latter

stages of January 2002, information was obtained by a Police Officer via a confidential source that some time around January 22, 2002, Wayne Norville aka Ribsy did throw a weapon over the wall of the Georgetown Prison. According to the source, the intended recipient of the weapon was Andrew Douglas. This information was then relayed through several command levels and finally passed on to the Alberttown Criminal Investigation Division (CID).

From the testimony of Detective Corporal Aubrey Joseph assigned to the matter, he was requested to appear at the Brickdam station sometime around the January 29, 2002 to conduct an interview with Wayne Norville. After conducting such interview/interrogation he indicated that having known Norville for several years, he believed his denial of ever throwing a weapon over the Prison wall. As a matter of fact the witness added that Norville provided an alibi of being locked up at an East Coast of Demerara Police station during the period he was suspected of committing the act. The Detective admitted that he did not verify the alibi provided by Norville. The Detective added that he spent approximately one half-hour interviewing him. There was never a follow-up investigation, although the witness added that he had seen Norville at the Alberttown Police Station lock-ups subsequent to his interviews.

It is unclear as to why the Police failed to take proper investigative action against Norville when it was realized that a gun was in fact used in February 23, 2002 escape. Having established that the information received was credible, the Police had a professional obligation to remove the investigation from its state of dormancy and move to detain Norville for an indepth interview and sustained interrogative exercise. In this case, this was never done.

Whatever the reason may have been for not conducting a comprehensive investigation in this matter, it has certainly borne a tremendous financial and psychological burden on the Police Force and society at large. The millions that must be spent to re-capture the escapees, coupled with the daily fear and apprehension of our citizens, have certainly outweighed any possible justification for the less than a thorough investigation.

In summary, the Police failed to:-

(1) Conduct a thorough investigation of the information received
(2) Verify the alibi offered by Norville.
(3) Ascertain whether there was any independent and verifiable links between Norville and the escapees but rather relied on Norville's denial as the sole basis for discontinuing the investigation for the weapon.
(4) Conduct a complete and thorough interrogation of Norville
(5) Continue the investigations when it was established that on February 23, 2002 a firearm was used to facilitate the escape.

The Officer-in-Charge of Georgetown Prison (Howard) from the evidence, displayed weak leadership, which resulted in break-down of discipline at the Prison. He was far from being honest with us. As from his answers, one gets the impression that he tried to cover up his deficiencies and that of some of his Officers. Apart from the unauthorized use of monies taken from prisoners, and those found in cells, he also kept at the Prison, Narcotics found on prisoners and in cells, without informing the Police, which was a breach of the Narcotic and Psychotropic Substances Act. Further, he failed, as we said earlier, in his duty on the day of the escape to ensure that an armed sentry was posted at the front gate, which was a requirement according to the Director of Prisons. This was particularly important, as he had been directed by the Director of Prisons to be specially careful that day (23-02-2002).

It is to be noted that on our second visit to the Prison on the April 8, 2002, we observed an extension speaker in the cell of prisoner Delon George (high profile prisoner) who was in the Strong Cell. This was certainly irregular. When Mr. Howard was recalled to clarify certain matters he was, specifically asked whether an enquiry was being carried out in relation to that matter. The answer he gave was quite unsatisfactory as nothing seemed to have been done.

At one point in his evidence, Howard stated that apart from high profile prisoners being taken out of the institution in order to be escorted to the hospital and

to the court, they were also taken out for other unspecified purposes. As a matter of fact, he recalled prisoner Dale Moore being one of such prisoners. He asserted that all the relevant documents were prepared and submitted in connection with the removal of Dale Moore and any other such prisoner. He was then requested to produce the documents associated with the removal of prisoner Dale Moore. Upon being recalled at a later date, he retracted his earlier statement and advised us that he was mistaken; that he had no knowledge of any high profile prisoner being removed from the institution for reasons other than being taken to the court or to receive medical attention.

There seems to be no proper system in place for the monitoring of high profile prisoners. For one thing there is nothing to distinguish them (high profile prisoners) from the other prisoners. How could a young recruit be able to identify a high profile prisoner when there are no distinguishing features, whether by means of clothing or otherwise?

So far as training of Prison Officers is concerned we feel that there ought to be a better system of training for them before they enter the Prison Service. They would also need further training after being in the system for a few years (refresher training). In addition, as we said earlier, copies of establishment Orders and other relevant documents ought to be given to them so that they could be acquainted with their contents. This would enable them to be better able to perform their functions. Merely to read out those documents to them at parades would not have the same impact as handing them the documents so that they can be in a position to read and to appreciate their contents.

It is our impression that some of the Prison Officers are involved in taking in prohibited items into the Prison for prisoners. The present practice of search of 20% of the Officers at random every month is not adequate (Establishment Order 86/2001) as it could turn out that a number of the same Officers are the ones who are repeatedly searched, while others are not searched at all. Therefore it is necessary that a fair and impartial format for random searches of Prison Officers be developed.

We have found that all the Prison Officers who were on duty in the area between the No. 1 gate (main gate) and No. 2 gate were female. Thus, in our view, is not a desirable thing.

There ought to be a mixture of the Officers performing duties there, that is to say, both male and female, and an armed sentry (male) should also always be placed in that area.

We had earlier mentioned that Shawn Brown should never have been appointed an Orderly, having regard to his background. This would equally apply to James Gittens, who was an assistant Orderly at the reception area and who could possibly have been a part of the plan to escape. Therefore, there should be strict compliance with Rule 254 of the Prison Rules which requires that an Orderly should be carefully selected by the Officer-in-Charge within such limits as the Director of Prisons may determine.

On the day in question many of the Prison Officers, who were on duty were utterly confused and did not know what to do. Many of them took cover. It points conclusively to the fact that they were not trained to cope with an emergency. Therefore, it is absolutely necessary that verifiable emergency drills should be conducted at least once per month so as to prepare them for emergencies.

In the Operations Room there was only one Officer (female) to monitor the movements of prisoners. This was totally inadequate, and this may also have contributed to the escape. Assuming that that Officer had to answer a call of nature, then there would have been no one in the Operations Room. In order to have a proper monitoring of the prisoners from there, there should be at least two persons there at any one time, and one should be a male.

The prison population comprises over two hundred and fifty high profile prisoners. The Prison has a capacity for only (580) five hundred and eighty prisoners but the present population is about eight hundred (800). Efforts, should, therefore be made towards the reduction of the Prison population by placing some of the prisoners

at the Mazaruni Prison, providing there is accommodation there and appropriate security measures are in place. If rehabilitation work to the buildings has not yet been completed at the Mazaruni Prison serious efforts should be made to have this done as early as possible. We feel that there is urgent need for a new and larger Prison as the present one had outlived its usefulness. Further, it needs to be relocated to an area where there is adequate land space, including an area to be used as a farm so that prisoners can be beneficially occupied in agriculture and other activities. The only purpose for which the present Prison can be effectively used is as a Remand Centre and to house prisoners who are serving very short sentences.

In passing we may mention that it is not a wise thing to have members of the Prison service participating in Mashramani celebrations, even if they are off duty in view of the events of 23rd February last. As long as over-crowding of the Prison continues, and prisoners' trials are delayed, (this is likely to continue for a long time) attempts would be made by some prisoners through frustration to escape. Therefore, security should be stepped up on such occasions as the Police who usually provide back-up services would be engaged in other duties on the streets maintaining public order.

On that day there was considerable movement of Prison Officers and prisoners in and out of the Prison yard. They were involved in making a shed on a lorry that was to take Prison Officers to participate in the float parade. This should never have been permitted, that is, movement in and out of the Prison.

According to the Director of Prisons there is a vacancy for twenty-five (25) Prison Officers. To run an effective Prison System adequate staff is absolutely necessary. Therefore, every effort should be made to fill the existing vacancies as early as possible, having regard to the over-crowding of the Prison.

As we said earlier, the person who was on duty at Observation Post II had no Communication Set. All he had as a means of communicating was a whistle. Therefore, it is absolutely necessary that there be a Communication Set there for those on duty. On our visits to the Prison we observed that the person on duty there, is

unable to have a clear view of certain important sections of the Prison. We, therefore feel that it (Observation Post II) should be resited in order to be more effective. Maybe, it should be placed somewhere between the Brick Prison and the Reception Area to allow for a clear view of those blind areas northwest of the Administration Buildings and the area housing the Strong Cells.

When prisoners are taken to the Georgetown Hospital for treatment, they are seen speaking to relatives and other persons and the possibility exists for them to be given prohibited items. This is totally wrong (Establishment Order No. 10/2002). Therefore, unless it is absolutely necessary all prisoners should be treated at the Prison Infirmary. We had earlier mentioned that the evidence suggests that high profile prisoners are sometimes removed from the Prison for purposes other than to attend court or to be taken to the hospital. This is irregular and should no longer be permitted.

According to Prison Officer Nelson there was a Mashramani banner on the western side of the Administration Building which prevented her from having a clear view of the area between the main (No. 1) and No. 2 gates. As a result she was unable to observe what was taking place there on the 23rd February, 2002. In the future no obstacles should be placed there so that those on duty in the Operations Room would have an unimpeded view of that area (between the main gate (front) and the No. 2 gate).

As mentioned earlier Andrew Douglas was seen escaping through a "pigeon hole" in the gate of the Self Support Division. That opening was obviously made to facilitate the passing of utensils with meals for the prisoners in the self Support Division. What is, amazing, however, is that even though the opening is large enough to allow prisoners who are slimly built, as Andrew Douglas is, to pass through it had no means of security to prevent such action from taking place (escape through opening).

There should have been a flap with a padlock which should only have been opened when self support is in progress. It reinforces the impression that we got from

hearing of the evidence and by visiting the Prison that systems are put in place without being properly thought out. For instance, Observation Post II. Immediate steps, should, be taken to remedy this weakness in the system.

The practice is for a Senior Officer to escort a high profile prisoner whenever he is being removed from one section of the Prison to another but what we find is that a Junior Officer (Assistant Prison Officer Williams) was asked to escort Dale Moore to Chief Prison Officer Lyte, who was in the yard of the Prison. (See Prison Circular 11/2000 dated 28/07/2000 and evidence of Director of Prisons and Officer-in-Charge).

Dale Moore is facing five (5) murder charges and had previously escaped from Prison. Whenever he is removed by the Police from the Prison environment he is handcuffed and shackled with at least eight (8) heavily armed Police personnel in two (2) motor vehicles. However, whenever he is being removed from one area to another in the Prison security was totally relaxed.

Prison Officer Stephney stated before us that he had escorted Mark Fraser (high profile prisoner and who had escaped on two previous occasions) who was located in the Wood Prison to Chief Prison Officer Lyte in order for him to play games. This was about 10:30 hrs. Chief Prison Officer Lyte admitted that. This action was highly irresponsible and appears to be in breach of Section 39 (b) (iv) of the Prison act – (playing games). It was approaching "feed up" time and, therefore, it was quite unwise for him not to direct that Fraser be taken back to his location (Wood Prison). It is now history that Mark Fraser had escaped shortly after this.

The general feeling is that great latitude is being given to high profile prisoners. Why should they be allowed to play games and be involved in other activities? The conclusion we have drawn from the evidence of Chief Prison Officer Lyte is that even though he would not like them to be involved in games, it is the Officer-in-Charge's wishes that they be allowed to do so.

The system, as it relates to high profile prisoners ought to be tightened. If this is not done soon there will be further problems in the near future.

Further it is beyond our comprehension that the population of high profile prisoners is as much as two hundred and fifty (250). We cannot imagine that about 1/3 (one third) of the Prison population comprise of high profile prisoners. Maybe, there ought to be a redefinition of the term "high profile".

Orders pertaining to the proper management of the Georgetown Prison, which were submitted to us, upon request show a lack of initiative by the Officer-in-Charge. Every Prison has its own regime and even though the overall treatment of prisoners incarcerated there should be constant, circumstances dictate that each prison makes its own orders for its proper management. The Orders made by the Director of Prisons relate to all the prisons under his control. However, the Officer-in-Charge of a Prison has the responsibility of making Orders of his own in order to ensure that the Director's instructions are complied with. This was sadly lacking at the Georgetown Prison. An Order was made by the Director of Prisons relative to the classification of inmates according to their profiles i.e. the nature of their offences, etc. We have seen nothing which was produced before us by the Officer-in-Charge, which supplemented the Director's Order.

RECOMMENDATIONS

Having given matured consideration to all the evidence, statements given by those who appeared before us and all documents submitted to us we summarise our recommendations as follows:

(1) The vacancy for twenty-five (25) Prison Officers should be filled immediately, if not already filled.

(2) Person on duty at OP II should be provided with a communication set.

(3) OP II should be re-sited and placed somewhere between the Brick Prison and the Reception Area in order to allow for a clear view of those blind

areas north west of the Administration Buildings and the area housing the Strong Cells.

(4) Ratio of female Officers working in the area between the main or front gate (No. 1) and the No. 2 gate should be revised as to allow for at least one male Officer to be on duty (This is apart from the armed sentry who should be placed by the main gate).

(5) An armed sentry (male) should be on duty daily in the area of the front gate for the period from the unlock to final lock down of the Prison.

(6) Better co-ordination among those who have to deal with self support prisoners. The system is in total chaos and should be reviewed and strictly enforced.

(7) The number of prisoners, including high profile prisoners, should be reduced by placing some at the Mazruni Prison.

(8) All high profile prisoners should be readily identifiable by way of a specific colour of their outer-most garment.

(9) A fair and impartial format for random search of Prison Officers should be developed.

(10) There is a need for a walk through and X-Ray Scanner at the front gate.

(11) There is a need for all Prison Officers to be appropriately trained before entering the Service and for there to be follow-up training to be done either on the job or in a formal setting in order to equip them with tools for the difficult tasks they are required to perform. Training is the key to effective custodial work and, therefore, there must be organized programmes of training for all Prison Officers.

(12) A Prison Officer who had received little or no training in the use of a firearm should never be issued with one (Matthew Thomas' case is an example).

(13) Two or more Officers must be on duty at all times in the Operations Room, and at least one should be a male.

(14) All prisoners should be treated at the Prison Infirmary unless it is absolutely necessary to take them to the Georgetown Hospital. A Doctor should be required to visit the Prison on a daily basis, as this would alleviate the task of having to take them to the Georgetown Hospital and thus reduce the risk of an escape.

(15) The procedure for the appointment of orderlies must be strictly enforced as this will ensure that the Officer-in-Charge would know who has been selected.

(16) There should be established an effective feed back system between the Georgetown Prison and the Headquarters of the Guyana Prison Service to apprise the Director of Prisons of action taken on his instructions/ directives.

(17) The practice of utilizing money confiscated from prisoners or found in the cells for administrative and other purposes should cease immediately. This should be investigated, as there seems to be an absence of records as regards their use. All monies found on a prisoner or in the Prison must be paid in to revenue.

(18) The Police must be informed promptly whenever Narcotic is discovered at the Prison - whether in the prisoner's possession or in the cell. The practice of keeping the narcotic at the Prison is both unacceptable and unlawful. It must, therefore, be handed over to the Police and a report submitted to the Ministry for information.

enable them to identify special prisoners.

(26) Staffing will always be a problem in any system and must never be used as an excuse. Work Plans should be revised whenever these situations arise and all available specialists within the system should be utilized to carry out routine duties.

(27) Officers not on duty must not be permitted to go beyond the No. 2 gate without the express permission of the Officer-in-Charge or his deputy. In any case he/she must be escorted to and fro by some one chosen by the Officer-in-Charge or his deputy.

(28) The opening in the gate of the Self Support Division must be sealed by placing a flap with a padlock to secure it.

(29) A comprehensive disciplinary procedure should be introduced whereby Officers found to be corrupt can be dealt with in an expeditious manner.

(30) An independent unit should be set up to conduct all internal investigations in the Prison.

(31) A reasonable criteria should be established for candidates seeking position in the Prison Service.

(32) Prison Officers, not in uniform should be required to have an identification tag on their outermost garment, while within the confines of the Prison.

(33) Verifiable emergency drills should be conducted at least once every month.

(34) An incentive programme should be arranged which will encourage

prisoners to report knowledge of criminal activities or security violation to the Prison Authority. In order to be successful such a programme will require a highly confidential network.

(35) There should be a better communication network within the Prison.

(36) Steps should be taken to have Prison Officer Maurice Griffith removed from the Service.

(37) Supt. Duncan should be replaced as the Deputy in charge of the Georgetown Prison as he is unsuitable for that position.

(38) Chief Prison Officers Allen and Lyte should be considered for early retirement so that they can be removed from the Prison Service. Their attitude to their work leaves much to be desired. They were aware of irregularities committed within the Prison yet no remedial action was taken by them. This sort of behaviour is unacceptable from persons whose duty it is to enforce discipline among their subordinates and also to ensure that inmates observe all the rules and regulations within the Prison system. Chief Prison Officer Lyte is heavily dependent upon his superiors and is reluctant to make decisions which would ensure proper management of the Prison.

(39) Cadet Officer Scott displayed an irresponsible attitude. He failed to ensure that Shawn Brown was locked away in his cell, having seen him in a restricted area (Between the Nos. 2 and 3 gates). (See Prison Circular No. 9/99). In addition, he breached Establishment Order No. 5/2000 when he chose to have a hair cut outside the permitted hours. Further, he displayed an aggressive attitude during the interview and tended to be rude when he was asked why he did not see to it that Dale Moore was escorted to his division when the latter had made a specific

request to him to be taken to his division. Any promotion to which he may be entitled to in the future should be withheld for the next five (5) years.

(40) The Officer-in-Charge Colin Howard should be relieved of his responsibility as Officer-in-Charge, as he is unsuitable for the position. He should be held culpable for maladministration since the answers he gave us revealed flaws in his management technique, some of which were referred to earlier. It is clear that he displayed weak leadership, which resulted in a breakdown of discipline in the Prison. He was far from being truthful with us and one gets the impression that he did so in order to cover up his deficiencies.

(41) So far as the Director of Prisons is concerned, he is not free from criticism as he did not take the necessary steps to have Maurice Griffith aka Sparman removed from the Prison Service, even though he had considered him to be an "undesirable ".

It must be mentioned that Mr. VanNooten is not in agreement for Any Prison Personnel to be removed or transferred from the Institution. His reason for this is stated thus:-

"I have intentionally refrained from making any recommendations to remove and/or transfer any personnel from the Institution. I have taken this course of action, because all of the evidence obtained has indicated that the problems relative to the management of the Prison are institutionalised and will not be eradicated by a cosmetic approach. Merely transferring or removing personnel will not bring about any meaningful changes. Any new administration will certainly inherit the problems of the previous, with added problems and outcomes guaranteed to be similar to those of the past. The problem is not just the human resource. It is also the lack of direction and any structured framework by

which to function. There are no stated goals or objectives and the Institution seems to operate on a day to day basis.

The Ministry must work with Prison Authority to promulgate a comprehensive manual outlining the policies, procedures and objectives. It is not the person, but rather the modus operandi that produces incompetence, mismanagement and inertia. No staff should be in doubt as to policies and the overall objectives of the Prison service. The management must refrain from taking actions that expose their lack of insight and proactive capabilities".

CONCLUSION

In conclusion we would say that most of the members of the Prison Service, if not all, who were on duty that day were in some way or the other negligent in the performance of their duties. Though it may sound a bit harsh, the deceased Troy Williams and the injured Roxanne Whinfield would be included. Had they seen to it, as I said earlier, that Shawn Brown was placed in his cell, instead of being allowed to be in a restricted area where both were on duty this tragedy might not have taken place. However they are not totally to be blamed. As we have indicated earlier in this report, others share greater responsibility. There were several other Officers on duty in the area where they were working but all took cover because of fear. Cadet Officer Scott who happened to be in the area of the front and No. 2 gates did nothing to assist either Officer. Rather than help he took cover in the Administration Building.

Post Script

I would like to express my sincere thanks to the other distinguished members of the Board of Inquiry for their maximum cooperation and help during the Inquiry and in the preparation of the report. It was a pleasure working with them. With their wide and varied experience we were able to examine the several documents produced before us and the evidence of the witnesses called at the Inquiry in great detail. As a result all the information required for the preparation of the report was obtained.

So far as Ms. Jermin Clarke is concerned, I would like to say that she did a very thorough job in preparing the transcript of the evidence of the numerous witnesses, who were called. All in all, she performed creditably and on no occasion did she complain, even though many of the sessions were of long duration.

C. C. Kennard, OR, CCH
Chairman

Dated this 30th day of May 2002.