Disabled federal inmates, accommodation and the rule of law in Canada

by

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A Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of

MASTER OF LAW

in the Faculty of Law

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University of Victoria

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We acknowledge and respect the Lək'ʷəŋən (Songhees and Xʷsepsəm/ Esquimalt) Peoples on whose territory the university stands, and the Lək'ʷəŋən and W̱SÁNEĆ Peoples whose historical relationships with the land continue to this day.

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Abstract

There is a body of evidence through sources including reported cases, government reports and academic literature indicating that the Government of Canada, through Correctional Service Canada (CSC), is not meeting its legal duty to accommodate disabled federal inmates. The absence of adequate measures to address this and compel CSC to meet these obligations is a rule of law problem. This thesis provides case examples of Canada's failure to accommodate, considers contributing system elements and suggests measures to compel Canada to address this rule of law problem. The thesis examines the factors which contribute to the problem, including: the carceral burden which should but is not conditioning punishment; residual elements of the historic concept of civil death; and structural shortcomings, including judicial deference, the lack of an independent, impartial grievance process; and the scarcity of legal information or legal assistance to support rights claims. Arguing that the consequence of non-accommodation is unacceptably harsher conditions for non-accommodated disabled inmates, the thesis considers and dismisses the likelihood that effective change will occur without measures similar to those in *R. v. Jordan*[1] or the recent Senate Bill S-230[2]. Reference is made to the experience of 'carceral clawback' in which reforms are either eroded or their scope limited to minimize institutional change. The thesis concludes that institutional change to achieve rule of law compliance is unlikely absent measures that carry serious consequence such as

[1] *R v Jordan*, [2016] 1 SCR 631.
[2] *Public Bill (Senate) S-230 (44-1) - Third Reading - Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona's Law) - Parliament of Canada*.

sentence reduction or release in cases of rights violations resulting from non-accommodation.

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ACKNOWLEDGEMENTS AND DEDICATION

I am grateful to my two advisors Patricia Cochran and Cindy Holder for their insights and their patience as I have worked through the various issues in this thesis.

I am also very grateful to my friends, Richard Butler and Silvia Moreno-Garcia who took the time to read early drafts and to provide their thoughts and comments.

Finally I want to thank my life-partner, Karen Fyfe, for her patience during our early morning walks, listening to hours of my ramblings as I have tried to work through the issues in this thesis.

This thesis is dedicated to the Access Pro Bono organization and to those lawyers who dedicate time to representing incarcerated individuals in their pursuit of rights within the Canadian correctional system.

INTRODUCTION AND OVERVIEW

Argument

There is evidence that disabled federal inmates are not receiving adequate or appropriate accommodation to address their disabilities while in federal custody. This failure engages statutory provisions regarding the preservation of inmate rights[3], the right to be treated with dignity[4], the duty to accommodate to the point of undue hardship[5], and the right to a fair, impartial process to address rights violations[6]. This thesis argues that these failures, together with the absence of an adequate remedy, amounts to a failure of the rule of law and suggests potential measures to address this rule of law failure.

Overview

Disability, including serious illness, is a relevant consideration for a court at the time of sentencing. In numerous cases the court, in determining a fit sentence, has recognized, as did Justice Karakatsanis, in *R. v. Summers*[7], that adjustments are necessary to offset onerous conditions of custody. Justice Martin recognized this principle for those with a disability in *R. v. Hills*[8]*,* discussing reasonably foreseeable offender characteristics:

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[3] Canada, *Corrections and Conditional Release Act, S.C. 1992, c. 20*, s 4 (d).
[4] *Ibid*, s 70.
[5] *MacDonald v Canada (Attorney General), 2017 FC 1028*, 2017 Federal Court.
[6] *Annual Report of the Office of the Correctional Investigator 2017-2018*.
[7] *R v Summers*, 1 SCR 575 at para 22. Although the case involved general conditions of pre-trial custody, rather than disabled inmate accomodation, the principle should have application to all imprisonment conditions.
[8] *R v Hills, 2023 SCC 2*, at para 86.

> [86] … **As a rule, characteristics that are reasonably foreseeable for offenders in Canadian courtrooms, like** age, poverty, race, Indigeneity, **mental health issues and addiction, should not be excluded from consideration**.
>
> [emphasis added]

The sentencing process is complex, more so for an individual with a disabling illness or disability.[9] Disabilities occurring after sentencing potentially result in a different, harsher carceral experience than when provision is made during sentencing for a subsisting disability[10]. The Correctional Service of Canada (CSC) controls virtually every aspect of daily life within a federal prison[11] but operates in an environment in which its staff and decision makers rarely face accountability for unfulfilled accommodation obligations[12]. Insofar as the legal duty to accommodate disabilities is jurisprudentially established[13], non-accommodation implicates the state itself. Absent meaningful consequences the state is in the position of condoning rule of law erosion.

Within this context questions regarding the reasons for non-accommodation, and the societal implications of a 'nation jailer' permitted to operate in continuous contravention of its own laws, highlight a need for change. This thesis argues that the Canadian government is not acting within the rules that it has set for itself and that the rules

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[9] See, for example, the discussion by Justice Martin and cases referenced in *R. v. Hills* [*Ibid* at para 135.
[10] The fact of incarceration itself and conditions in federal penal institutions can frequently cause or contribute to disabilities. Although impacts are not limited to solitary confinement, a strong example of this has been identified as "Special Housing Unit Syndrome", or "SHU Syndrome" with documented effects such as anxiety, hallucinations and cognitive disturbances among the mental health impacts of solitary confinement.
[11] *Human Rights of Federally Sentenced Persons*, Senate Report, by Standing Senate Committee on Human Rights & Honourable Nancy J Hartling, Senate Report (Canada, Standing Senate Committee on Human Rights, June 2021) at 80 online: <https://sencanada.ca/content/sen/committee/432/RIDR/reports/2021-06-16_FederallySentenced_e.pdf>.
[12] I use the term "accommodation" to refer to measures to mitigate the onerous impacts of imprisonment on disabled inmates, such as providing interpreters, adequate medical and psychiatric treatment and counselling, as well as white canes, or other necessary devices.
[13] *MacDonald v. Canada (Attorney General), 2017 FC 1028*, *supra* note 5.

themselves are insufficient to compel compliance. A democratically elected government not following its own rules invites similar disdain for the rules from the inmates that it seeks to rehabilitate and others in society and undermines imprisonment as a legitimate form of punishment for the disabled.

The Canadian Senate, Standing Committee on Human Rights has prepared an extensive report[14] (the Senate Report) regarding conditions in Canadian federal institutions as well as proposed legislation[15] with consequences, to address rule of law failures within CSC. The Standing Committee visited 28 institutions and held 30 public hearings with testimony from 155 witnesses[16]. The resulting report represents a significant body of work, providing 71 recommendations for action in respect of the Canadian correctional system[17].

The Senate Report and its recommendations stand in contrast to less sympathetic views expressed towards those convicted of serious criminal offences, whether or not disabled[18]. This thesis argues that a democracy cannot respect the rule of law and yet permit activities within its control which either ignore or operate outside the rule of law. Such actions should disentitle the offending agency from purporting to act with the authority of that democratic government. I characterize this disentitlement as “lacking legitimacy”, meaning that while the unlawful activity may occur, it is inconsistent with

[14] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.
[15] *Public Bill (Senate) S-230 (44-1) - Third Reading - Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona’s Law) - Parliament of Canada*, *supra* note 2.
[16] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.
[17] At least 13 of the recommendations include reference to mental or physical health.
[18] For example, later in this thesis I describe the “good riddance” comment by BC Premier Eby regarding the murder of Pickton while in custody and the video prepared by MP Caputo implying that the treatment of Paul Bernardo is not sufficiently harsh.

democratic values or the rule of law. Government actions that lack legitimacy should be prevented by the courts and the voting public from continuing.

Rule of Law

The rule of law was discussed by A. V. Dicey[19], who described the "rule or supremacy of law" in terms of three essential elements: the supremacy of the law over arbitrariness; no one is above the law, including government; and the role of the court in ensuring compliance with the rule of law.[20]

Dicey's three principles were expanded by Lord Bingham in a lecture to the House of Lords on November 16, 2006, to include 8 subrules.[21]

Essential elements of the rule of law which are not present in CSC processes include accessibility, procedural fairness and non-arbitrariness. The ability of CSC to act or fail

[19] Roger Michener & A V Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis, IN, UNITED STATES: Liberty Fund, Incorporated, 1982) part II.

[20] 1. Supremacy of law over arbitrariness - "[N]o man is punishable or can be lawfully made to suffer in body or deprived of their goods unless they had violated the law which has been established in an ordinary way and applied by an ordinary court."
2. No one is above the law, including the government – "[N]o man is above the law. … he is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals."
3. Role of the Courts – "[T]he constitution is pervaded by the rule of law. …the general principles of the constitution … are … the result of judicial decisions … ."

[21] Eve Collyer Merritt, "Rule of law: Principles, challenges and government commitments" (2024), online: <https://lordslibrary.parliament.uk/rule-of-law-principles-challenges-and-government-commitments/>.
Sub-rule 1: The law must be accessible so far as possible, intelligible, clear and predictable.
Sub-rule 2: Questions of legal right and liability should generally be decided by application of the law and not the exercise of the discretion.
Sub-rule 3: The law must apply equally to everyone, unless differences can be justified.
Sub-rule 4: The law must provide appropriate protection of essential and basic human rights.
Sub-rule 5: The parties in civil disputes must be able to resolve disputes without facing a huge legal cost or excessive delays.
Sub-rule 6: The executive must use the powers given to them reasonably, in good faith, for the proper purpose and must not exceed the limits of these powers.
Sub-rule 7: There must be adjudicative procedural fairness.
Sub-rule 8: The state must comply with the obligations of international law which whether deriving from treaty or international custom and practice governs the conduct of nations.

to act with relative impunity transforms unlawful conduct into usurpation of authority amounting to a societal rule of law failure.

The Federal Court in *MacDonald v. Canada*[22] has recognized the legal right of a disabled federal inmate to receive accommodation for their disability, to the point of undue hardship. To ensure that this is not a right without an effective or realistic remedy, adequate oversight and redress systems are required. The absence of an effective or realistic remedy fundamentally erodes the rule of law. This principle has been recognized by Canada's highest court. As noted by Justice Karakatsanis for the Supreme Court of Canada (SCC) in *Hryniak v. Mauldin*[23],

> "Without an effective and accessible means of enforcing rights, the rule of law is threatened."

As the SCC stated in *Reference re Secession of Quebec*[24], the most fundamental principle of the rule of law is that everyone, including the government itself, is subject to, and required to obey the law. The rule of law failure within Canadian penitentiaries was succinctly stated by retired SCC Justice Louise Arbour (Arbour) in a frequently quoted passage from her report on Kingston Women's Prison: "The Rule of Law is absent, although there are rules everywhere"[25].

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[22] *MacDonald v. Canada (Attorney General), 2017 FC 1028*, *supra* note 5 at para 29. A recent decision by the Supreme Court of Canada may present added evidentiary challenges to the assertion of these rights: *R v Sharma*, [2022] SCC 39. In *Sharma*, the SCC has arguably shifted a greater evidentiary burden onto the human rights claimant. For a discussion of the impact of *Sharma* on persons with disabilities, see: Caitlin Salvino, "R v Sharma's "Clarification" of the Section 15 Framework and its Creation of Unique Barriers for Disability-Based Equality Claims" (2024) 32:4 Const Forum 1.
[23] *Hryniak v Mauldin*, [2014] 1 SCR 87.
[24] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 72.
[25] *Commission of Inquiry Into Certain Events At The Prison For Women In Kingston*, by Louise Arbour (1996) online: <http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm>. The reference is found in paragraph 3.1.2.

Professor Jeremy Webber has recently argued[26] that contrary to the "dominant way of thinking about the rule of law" as "a constraint, a limit, on government", "there is a strong argument that democracy needs the rule of law for its fullest expression". I agree with Webber's statement that democracy and the rule of law work together, in the sense that a requirement that government comply with democratically established laws, conditioned by the ability of the state, (subject to any constitutional limitations), to change laws through democratic processes, supports both the rule of law and democratic principles[27]. A government which, rather than pursuing the democratic process, ignores democratically established laws or processes is acting both undemocratically and contrary to the rule of law.[28] A sustainable, functioning democracy relies on the rule of law[29] for credible domestic and international legitimacy and the SCC has underscored the importance of the democracy/ rule of law relationship, stating that democracy, "in any real sense of the word cannot exist without the rule of law."[30]

> "At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in

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[26] Jeremy Webber, "A democracy-friendly theory of the rule of law" (2024) 16:2 Hague J Rule Law HJRL 339–374.

[27] Webber provides a "pared-down definition of the rule of law" which focuses on the "virtues associated with the governance of society through law—through, that is, the use of general rules, capable of being known by citizens in advance, so that citizens have the opportunity to organize their affairs within the framework provided by those rules." He also notes that "In situations in which democratic processes are absent, severely degraded, or exclusionary, the system can forfeit any claim to the respect of people subject to it."

[28] As Webber puts it, "Democracy requires that the integrity of the law, democratically adopted, be respected right through to a law's ultimate application. If that law is ignored, distorted by corruption, or undermined by government officials' or judges' lack of fidelity to good-faith interpretation of the law, then the people's ability to rule themselves is sabotaged. In this respect too, fidelity to law is integral to democracy."

[29] This concept was validated recently in the 2024 Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel awarded to three economists (Acemoglu, Johnson and Robinson) for their work demonstrating the importance of rule of law for a country's economic success.

[30] *Reference re Secession of Quebec*, *supra* note 24 at para 67.

> which to conduct their affairs. It provides a shield for individuals from arbitrary state action."[31]

In Canada, since 1982, the rule of law includes compliance with the Canadian *Charter of Rights and Freedoms* (the *Charter*). The *Charter* begins with the statement that "Canada is founded upon principles that recognize … the rule of law".

Reinforcing the significance of the rule of law in Canada, the SCC has described the evolution of Canada's constitutional arrangements as:

> "… characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability."[32]

It is clear from both Arbour's observation and these statements by the SCC that a democratic government that ignores its legal obligations to accommodate disabled prisoners is taking the first step down the path of eroding the democratic principles upon which it relies for its legitimacy as a representative of those it governs. Although disabled inmate imprisonment impacts only a small number of Canadians within a highly marginalized group, imprisonment is one of the most extreme exercises of sovereign power. A government that does not hold itself accountable for complying with its own democratically established laws in relation to imprisonment and accommodation, signals an element of optionality with respect to the rule of law.

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[31] *Ibid* at para 70.
[32] *Ibid* at para 48.

Disability

The term “disability” can apply to a range of possible physical, mental and other conditions[33]. As a working definition for the purpose of this thesis I have adopted the approach taken by the Law Society of British Columbia in its report on “Lawyers with Disabilities”:

> “Questions were raised as to what constitutes a disability. For example, does disability include chronic illnesses or the aging process? Generally, the consensus was that disability is a self-identified limitation that inhibits capacity to effectively and/or efficiently perform work or that has a significant impact on daily activities. A definition accepted in many employment contexts is that included in the *Employment Equity Act* SC 1995, c. 44 s.3, which is “**persons who have long-term or recurring physical, mental, sensory, psychiatric or learning impairment.”** Participants agreed that it is useful to move away from equating disability with the use of a wheelchair and to move towards identifying disability in terms of difficulty with a particular function. In this way, effective means to overcome particular difficulties are more likely to be found.“[34] [emphasis added]

Discussing the concept of disability in *Granovsky*[35], Justice Binnie referred to the multiplicity of impairments which attract equality rights under *Charter* s. 15:

> The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called “disabled” individual may not be impaired or limited in any way at all. An appreciation of the common humanity that people with disabilities share with everyone else, and a belief that the qualities and

[33] While I will use a definition from within a Canadian law framework, there are many competing definitions and models. Other definitions may view disability in terms of the relationship between a person and their environment rather than as a personal trait. I believe that the harmful impact of non-accommodation will apply at least equally under other definitions.

[34] *Lawyers with Disabilities: Overcoming Barriers to Equality*, by Law Society of British Columbia (2004) online: <https://www.lawsociety.bc.ca/Website/media/Shared/docs/publications/reports/DisabilityReport2004.pdf>.

[35] *Granovsky v Canada (Minister of Employment and Immigration)*, [2000] 1 SCR 703 at para 29.

> aspirations we share are more important than our differences, are two of the driving forces of s. 15(1) equality rights.

When used in this thesis, the term “disability” describes a condition that places the incarcerated individual apart from those inmates who do not have the condition, impeding activities of daily living in ways which those without the disability will not experience. Unlike other grounds for discrimination, such as ethnic origin, disability is not required to be either immutable nor permanent in order to attract *Charter* protection[36].

Because disabilities take many different forms, the accommodation obligations on CSC must also take many different forms. Findings from the Senate Report suggest that for inmates with mental health issues, CSC’s version of treatment can involve some form of isolation or solitary confinement.[37] The SCC has determined that there is no basis for distinguishing between the constitutional rights of those with physical disabilities and those with mental disabilities,[38] and that issues regarding the constitutionality of laws that implicate or violate the *Charter* rights of people with disabilities are important and substantial.[39]

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[36] *Ibid* at para 27. In *Granovsky,* Justice Binnie said, “Some of the grounds listed in s. 15 are clearly immutable, such as ethnic origin. A disability may be, but is not necessarily, immutable, in the sense of not being subject to change. As this case shows, disabilities may be acquired in the course of life, and may grow more severe or less severe as time goes on. Disabilities are certainly not ‘immutable’ in the secondary sense of “[n]ot varying in different cases” (New Shorter Oxford English Dictionary (1993), vol. 1, p. 1317). Unlike gender or ethnic origin, which generally stamp each member of the class with a singular characteristic, disabilities vary in type, intensity and duration across the full range of personal physical or mental characteristics … As Sopinka J. pointed out in Eaton, supra, at para. 69, disability **/a**“means vastly different things depending upon the individual and the context”.

[37] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 122. “During visits to penitentiaries, committee members observed the use of segregation, separation and isolation of federally-sentenced persons occurring by other names, including “medical observation” or “mental health observation.” “

[38] *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 at para 85.

[39] *Ibid* at para 98.

The Evidence - Case Examples

In addition to Arbour's criticism[40], others have criticized CSC's failures with respect to inmates' rights both generally and for the rights of disabled inmates specifically. These criticisms have come from the Office of the Correctional Investigator (OCI), the Standing Senate Committee on Human Rights (Canadian Senate), the Structured Intervention Unit Implementation Advisory Panel (SIUIAP)[41] and many academics. This is contrary to the Mission Statement of CSC, a situation which Professor Michael Jackson describes as a gap between reality and the rhetoric of "social control talk" used by CSC to create an appearance of compliance through carefully chosen language. Jackson provides an excerpt from the CSC Mission Statement, found in Commissioner's Directive 001, which says that:

> "The Correctional Service of Canada (CSC), as part of the criminal justice system and *respecting the rule of law,* contributes to the protection of society by actively encouraging and assisting offenders to become law-abiding citizens while exercising reasonable, safe, secure and humane control."[42]

The cases below provide examples which have departed from this mission statement in ways that engage the rule of law failure.

Kitten Keyes: A CBC News report from 2021 described the claim of Kitten Keyes, a disabled, wheelchair-bound inmate who was reportedly seeking $10 million from Correctional Services of Canada (CSC) for the failure to accommodate her physical disability. The report says that Keyes was made to sleep on the floor of her cell for 21

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[40] Arbour, *supra* note 25.
[41] *Solitary Confinement and the Structured Intervention Units in Canada's Penitentiaries - The Final Report of the SIU IAP*, by Public Safety Canada (27 January 2025) online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2024-siu-iap-sltry-cnfnmnt/index-en.aspx>.
[42] Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Rochester, NY, 2002) at 36.

days because her wheelchair would not fit through the door to her cell and that she did not receive any assistance from corrections officials[43]. While she was eventually moved to a wheelchair-accessible cell the report also states that she has only been able to take a bath or shower four times in her three years in federal prison because her bathrooms do not have wheelchair-accessible showers.

The Keyes matter provides one example of the types of challenges faced by physically disabled federal inmates in Canada.[44] It also raises the question as to whether or not damages are the most appropriate remedy for what are effectively systemic human rights failures.

<u>Marvin Tekano</u>: The case of Marvin Tekano[45], who suffered from mental disabilities that led him to engage in self-harming head banging provides another example. CSC responded by placing Mr. Tekano in segregation, which CSC viewed as "the **only** way to protect Mr. Tekano and to monitor his behaviour"[46] [emphasis added]. This example highlights the limited ability of CSC to respond to each inmate disability appropriately.

<u>Peter Collins</u>: Peter Collins, an inmate with a damaged spine as a result of a motorcycle accident in his youth successfully claimed damages before the Canadian

[43] John Chipman, "Disabled inmate was forced to sleep on cell floor for 3 weeks, lawsuit alleges | CBC News", *CBC* (15 September 2021), online: <https://www.cbc.ca/news/canada/disabilities-prison-lawsuit-1.6065673>.

[44] It may be, based on judicial commentary in the Ontario Court of Appeal in another case [*R v CD*, [2005] 195 OAC 355 at para 88.] that there would be issues with Keyes' credibility but the premise of non-accommodation remains a valid one, as indicated in the other cases discussed in this chapter. (In the *R. v. CD* case, the Court, in paragraph 88 notes, "[88] The reliability of the evidence is seriously attenuated by Keyes' lengthy criminal record of more than sixty convictions over twenty-one years, a record that includes convictions for several offences involving dishonesty and disrespect for the administration of justice. Keyes has demonstrated a complete disregard for authority and for the legal process. One would have to exercise extreme caution before accepting her evidence.")

[45] *Tekano v Canada (Attorney General)*, [2010] FC 818.

[46] *Ibid* at para 47.

Human Rights Tribunal (CHRT) after he was made to stand for the daily inmate count despite medical recommendations that he be permitted to sit.[47] This example illustrates the shortcomings with either the collection of disability information upon intake to an institution or possibly the persistent non-accommodation of disabilities even if known to CSC.

Stephane Bissonnette: Mr. Bissonnette, a mentally ill inmate, died in prison while under observation and was the subject of a report included in the OCI Annual Report for 2023/24.[48] In the report the OIC commented on the inability of CSC to properly care for inmates with mental disabilities, observing:

> "In a number of disturbing respects, Mr. Bissonnette's death in the care and custody of CSC fits within a pattern of incidents sharing similar case histories that the Office has previously documented in public reports. Stéphane was a mentally ill person with complex behaviours and needs. He had a high propensity to direct violence inward, and, on occasion, toward others. His history of federal incarceration – prolonged placements in administrative segregation, numerous placements in Enhanced Observation (suicide watch), frequent transfers in and out of psychiatric facilities, multiple placements in restrictive confinement and the frequent use of Pinel restraints to manage self-injury or suicidal ideation – indicate that CSC struggled to safely and humanely manage this troubled individual. Though his case is unique in some respects, **Stéphane's death follows a familiar pattern and illustrates the continuing (mis)management of serious mental illness in Canada's prison system.** [emphasis added]

Ashley Smith:[49] The Ashley Smith case, rather than being a non-accommodation case, provides a strong example of the inability of CSC to manage challenges within its

[47] *Collins v Correctional Service of Canada - Canadian Human Rights Tribunal*, [2010] CHRT 33.
[48] "Office of the Correctional Investigator Annual Report 2023-24 | OCI | BEC", online: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2023-24>.
[49] The facts discussed in relation to Ashley Smith are taken from a comprehensive review by Rebecca Bromwich: Rebecca M Bromwich, "Theorizing the Official Record of Inmate Ashley Smith: Necropolitics, Exclusions, and Multiple Agencies" (2017) 40:3 Manit Law J 193.

institutions. Ashley Smith died from self-strangulation in 2017 while guards watched and videotaped her in her cell.

As Rebecca Bromwich describes in an article in the Manitoba Law Journal[50], initially imprisoned pursuant to a youth court order for breaching her conditions of probation by throwing crab-apples at a postal worker, Smith was involved in multiple disciplinary matters while in custody which ultimately led to her being placed within the federal correctional system when she turned 18 years of age. During her time in youth custody Smith was involved in a large number of relatively minor incidents and spent a considerable amount of time in solitary confinement. While in federal custody, as the incidents continued Smith became known as highly unmanageable and frequently engaged in self-harm.

While the incidents of self-harm and dangerous use of ligatures strongly suggest that Smith suffered from mental issues, the response from CSC was an order, possibly from the Acting Warden, not to intervene. Correctional staff followed the order, only intervening when it was too late and Smith died from self asphyxiation.

The Smith case provides an extreme example of CSC shortcomings. It is a tragic case in which CSC, unable to address the needs of Smith, responded to the challenges by issuing an order not to intervene, which, in turn, resulted in Smith's demise.

<u>Other Examples:</u> There are many other examples of the inability of CSC to meet the challenges of disabled prisoners. In her book "Punished for Aging", Adelina Iftene[51]

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[50] *Ibid*.
[51] Adelina Iftene, *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (University of Toronto Press, 2019) Google-Books-ID: A9GhDwAAQBAJ.

describes other challenging circumstances for physically disabled inmates. Iftene's research focused on aging prisoners.[52] The experience of unaccommodated, physically disabled inmates would be consistent with that of aging prisoners in most cases. Many of the conditions that Iftene describes would be equally (if not more) impactful, particularly for disabled inmates.[53] Iftene provides examples, such as reports of terminally ill inmates being left in their cells or transferred to minimum security units with limited or no access to palliative care. The cases discussed here and by Iftene stand in contrast to the services available to non-incarcerated citizens.[54]

Accommodation Duties Matrix

Human rights have been characterized as indivisible rights[55] rather than hierarchical. As described in the 1993 Vienna Declaration and Program of Action[56]:

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[52] Iftene conducted in-person interviews with 197 male inmates over 50 years old at 7 federal penitentiaries.

[53] Some of the conditions experienced by the inmates that Iftene interviewed included: "… a drug restriction prevents older people from using anything but Tylenol 3; people have to pick up medication in person each day by lining up outdoors in some locations, regardless of the weather conditions; individuals go through terminal illnesses while incarcerated without any systematic pain management and other palliative care; older people are housed in institutions that lack hand rails, elevators, clean pathways, and disability-accessible washrooms; mentally ill prisoners, including those with dementia, are placed in solitary confinement at higher rates; access to medical diets and medical items that could help manage illness and disability is severely restricted, either by policy documents (such as the *National Healthcare Framework)* or wardens' discretionary decisions; staff members are poorly trained in emergency care and many institutions do not have a 24/7 nurse on-site; in some institutions, people have restricted access to psychiatric care unless they are suicidal; post-surgery, prisoners often recover in their cells without round-the-clock medical supervision; some officers regularly play pranks on older prisoners and call them degrading names; older, disabled, and incontinent prisoners are still sleeping on top bunks with no significant exemption from the "first-come, first serve" basis; prisoners who are wheelchair users must crawl to their beds because there is no room to take a wheelchair into the cell; people have to choose between breakfast and pill pickup because they do not move fast enough to make it to both; and younger prisoners systematically victimize older prisoners without the CSC providing safer accommodation."

[54] Iftene, *supra* note 50 at 68–70.

[55] Cindy Holder, "Human Rights Without Hierarchy: Why Theories of Global Justice Should Embrace the Indivisibility Principle" in *Cuest Justicia Glob Tirant Lo Blanch - Libr Tirant Lo Blanch* 125. Holder, at 127, describes the indivisibility principle as "…one of the bedrocks of contemporary human rights advocacy and legal interpretation" meaning that "…it proscribes trade-offs, within or across people."

[56] United Nations, *Vienna Declaration and Programme of Action*, 1993 part I (5).

> "5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis."

A distinction can be made however between human rights, which are indivisible, and the extent to which an individual can advance "claims", which may be subject to limits, as in the case of incarceration. Holder explains this distinction, describing claims as identifying "specific institutional arrangements, ranges of services or performances" that the person claiming is able to expect from the State[57].

Applying this analysis in relation to disability and incarceration provides four categories of rights and claims, with the added consideration of a "carceral burden" (discussed in Chapter 2) that arises in connection with the state's decision to incarcerate an individual.

In my characterization, consider that a person may be either disabled or not disabled and may be either incarcerated or not incarcerated. On a continuum of human rights and government responsibilities, a non-incarcerated, non-disabled person (I will call this Category A) would enjoy basic human rights for which they could advance a standard set of claims. A non-incarcerated disabled person (Category B) would enjoy basic human rights, a standard set of claims plus additional claims to remove barriers that would impede their disability and to be protected against (and have access to a remedy for) discrimination in relation to those rights and claims. An incarcerated, non-disabled person (Category C) would enjoy the same basic rights as a person in Category A, subject only to a limited ability to advance claims due to any restrictions resulting from

[57] Cindy Holder, *supra* note 54 at 135.

the necessity of their incarceration. The incarcerated person would also be entitled to expect that the government as jailer would discharge its carceral burden as a result of the control it has elected to exert over that individual. An incarcerated, disabled person (Category D) is in the position of Category C, but with the greater accommodation obligations (claims to removal of barriers, protection against and remedy of discrimination in relation to the more limited claims, and the carceral burden imposed on government as a result of incarceration. In my argument, there is a higher responsibility on government to achieve accommodation than in the case of a Category B person, due to the extent of government's control over the Category D person. The following table provides an illustration of how these various rights and responsibilities could be viewed.

TABLE 1 – RIGHTS AND CLAIMS

Non-Incarcerated, No disability (Category A) *Basic Rights, for which they could advance a standard set of claims*	**Incarcerated, No disability (Category C)** *Same basic rights as a person in Category A, subject only to a limited ability to advance claims due to any restrictions resulting from incarceration. Government bears carceral burden*
Non-Incarcerated, Disability (Category B) *Basic human rights, a standard set of claims plus additional claims to remove barriers that would impede their disability - protected against (and have access to a remedy for) discrimination in relation to those rights and claims; additional rights against discrimination on the basis of disability.*	**Incarcerated, Disability (Category D)** *Basic Rights as a person in Category A or C, but with claims to removal of barriers, protection against and remedy of discrimination in relation to the more limited claims, and the carceral burden imposed on government as a result of incarceration.* *Government bears carceral burden, duty to remove barriers and duty to accommodate disability*

While this is my own characterization, for illustrative purposes, the chart highlights the additional duties engaged by incarceration. By not meeting these duties and enjoying relative impunity CSC creates a serious rule of law problem.

METHODOLOGY

There is extensive jurisprudential material and academic literature identifying problems with the modern carceral system. From this material, two key questions – how disabled Canadian federal inmates are treated, and how they should be treated –reinforce the need for a "rule of law" approach to punishment and accommodation.

Determining whether, and if so when it is acceptable to limit human rights in favour of public safety, prison security and budget or other constraints contributes to democratic accountability. While rights limitations are necessary in relation to public safety and can be largely justified in relation to prison security, justification for reasons of budget or administrative convenience become increasingly less defensible.

Justification based on public safety or prison security recognizes the need to balance among competing human rights. Restricting an individual's freedom can be justified when that individual presents a safety or security threat to the human rights of others. In relation to budget or convenience however, Canadian society and its legislators have chosen to protect human rights by limiting the extent to which they can be overridden for reasons of expediency or efficiency[58].

At the operational level these questions frequently involve finite resource allocation decisions. Even at the highest federal level, budget allocation decisions are constrained by politics, credit rating, cost of borrowing and general priorities. Analyzing resource allocation decisions in the correctional context involves both legal and social

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[58] This is the rationale behind the 'undue hardship' test in relation to human rights and described by Justice Pentney in *MacDonald v. Canada (Attorney General), 2017 FC 1028*, *supra* note 5.

considerations. Every department faces difficult decisions regarding budget allocation priorities. Regardless of difficulty, these decisions must comply with legal obligations.

The argument in this thesis that government is not operating within the rule of law is primarily, but not exclusively doctrinal, with consideration of legislation and cases establishing the duty to accommodate.

Other material, such as the Senate Report[59] describe ways in which CSC is not meeting its obligations both generally and in respect of disabled inmates. Given the many factors involved, a socio-legal method extends the analysis beyond purely doctrinal, considering the background, history and practices that have led to the present circumstances.

A socio-legal methodology may be defined as:

> "A field of enquiry that is mainly preoccupied with empirical studies of the institutions of the law (e.g. the courts, the jury, the police, and the legal profession), rather than with providing a theoretical account of the "law in action"[60].

In this case, the "institution of law" being studied is the federal penitentiary system.

Because the research in this thesis is based on a literature review of academic articles, government reports, legislation and case law, the taxonomy described by Chris Dent[61] has been helpful in selecting a methodology. Dent's taxonomy helps to identify and understand the components which I suggest have placed Canada offside the rule of law in relation to disabled federal inmate accommodation.

[59] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.
[60] Jonathan Law, ed, *A Dictionary of Law* (Oxford University Press, 2022) at 208.
[61] Chris Dent, "A Law Student-Oriented Taxonomy for Research in Law" (2017) 48:2 Vic Univ Wellingt Law Rev 371–388.

Dent identifies three main components or dimensions of legal research: (1) the method; (2) the approach and (3) the purpose.[62] The selection of one's research material is guided by the selected "method".

Method

'Doctrinal' research is essentially '*in-law'* research whereas socio-legal and critical research are '*about law'*.[63] A doctrinal method would focus on the legislation and case law governing the CSC and disabled federal inmates. The research in this thesis relies on this type of doctrinal analysis to describe the legal obligations giving rise to a duty to accommodate. The recent *Accessible Canada Act*[64]*,* for example, requires that CSC identify and remove barriers in the area (among others) of the design and delivery of programs and services[65] by the year 2040, based on the expansive principles in section 6 of the Act.

Besides legal obligations there are important ethical, philosophical and moral aspects that underscore the importance of human rights and accommodation both for disabled inmates and for a truly democratic society. Understanding these aspects takes this thesis beyond a circumscribed legal framework [66]. The reports by the Senate and the OCI in particular, compel a broad, socio-legal consideration of the issue. While customary doctrinal sources are relevant in determining that CSC is not compliant with

[62] *Ibid* at 372.
[63] Dent at 375 describes the distinction another way - between 'doctrinal' as the research lawyers do (in law), and socio/legal or critical as the research others do (about law). Although not relevant in this thesis, Dent also references research into legal theory as "one special case of doctrinal research. *Ibid* at 377.
[64] Canada, *Accessible Canada Act, S.C. 2019, c. 10*.
[65] *Ibid*, s 5(e).
[66] As Dent observes, the doctrinal method, "cannot say anything about the non-legal issues that relate to the law." Dent, *supra* note 60 at 377.

the rule of law, a socio-legal discussion “about” law considers some of the 71 Senate Report recommendations that deal with health and disability[67].

Non-accommodation attracts both legal and non-legal critiques. The legal critique will demonstrate a failure by CSC to comply and the non-legal critique will consider the consequences for disabled inmates and the possible factors that set the stage for continued non-compliance. There are both social and legal implications if laws enable disregard of a jurisprudential mandate regarding disabled inmate accommodation. Socially, the lack of accommodation places obstacles in the path of rehabilitation, failing to prepare an offender for return to public life. From a legal perspective, non-accommodation takes CSC outside the rule of law.

Approach

The approach to legal research sets the perspective from which the topic is viewed. Dent discusses three research approaches, namely - historical, empirical and comparative before acknowledging that there is a clear role for “non-historical, non-comparative, non-empirical research”[68]. Each of these approaches serves a purpose in this thesis. This is not a thesis about the history of imprisonment as punishment[69], but modern attitudes towards inmate human rights are shaped in part by that history.

From an empirical perspective, reference is made to a number of empirically-based sources, such as Adelina Iftene, Lawrence Motiuk and the 2021 Senate Report. Iftene

[67] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.
[68] “… non-historical, non-comparative, non-empirical research is the un-named norm of legal research where the questions posed by legal researchers do not suggest an answer that looks to the past, to other jurisdictions or to an exploration of how the law works in practice.” Dent, *supra* note 60 at 381.
[69] For that, one might look, as I did, to the work by Michael Ignatieff, examining the history of prisons in the 16th and 17th centuries - Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850* (Pantheon Books, New York, 1978).

conducted interviews with large numbers of aging inmates to obtain data regarding the conditions of their incarceration.[70] Motiuk's research identified in the 1990s that the population of inmates in Canada with disabilities would increase as the inmate population aged and recommended early action to prepare.[71] As mentioned earlier, the 2021 Senate Report[72] involved extensive institutional visits and public hearings and provides an extensive picture of the Canadian federal penitentiary system. I have relied on these materials and have not undertaken any independent empirical research.

The Senate Report provides a very useful corroborative source for information about non-accommodation. My purpose in referring to the Senate Report and other material is to develop a reasonable picture of current conditions within federal penal institutions, allowing these actual conditions to be weighed against the legally mandated accommodation requirements for which the CSC is responsible.

Purpose

Dent's taxonomy discusses the need for a clear linkage between the 'purpose' of the research, the 'goal' or 'audience' of the research[73] and the researcher's motivation for undertaking the work. The underlying purpose of this work is normative[74], seeking through descriptive means to appeal to both legislators and the general public in order

[70] Iftene, *supra* note 50.
[71] Motiuk, Lawrence L, "Raising Awareness of Persons with Disabilities in Canadian Federal Corrections" (1994) 6:2 Forum Correct Res, online: <https://www.researchgate.net/publication/270451416_Raising_awareness_of_persons_with_disabilities_in_Canadian_federal_corrections>.
[72] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.
[73] Dent, *supra* note 60 at 385.
[74] Dent suggests two purposes – descriptive and normative.

to, as Dent expresses, "prompt, or support an argument for, legal change."[75] In this case what is sought is a systemic change in which CSC is compelled (and properly funded) to meet its legal accommodation obligations towards disabled inmates through a combination of effective independent legal processes, increased judicial scrutiny, and meaningful consequences for failures to act in accordance with those legal obligations. Ultimately the purpose of this research is to identify a rule of law failure by highlighting shortcomings or inconsistencies and supporting an argument for change. This is consistent with Dent's observation that "much of the legal research produced is aimed at arguing for change."

Primary and Secondary Material

As already referenced, I have drawn on a significant body of both primary and secondary material related to the rule of law, punishment, imprisonment and the human rights of disabled people.

Primary sources include constitutional and legislative documents (*Canadian Charter of Rights and Freedoms*, *Criminal Code of Canada*, *Corrections and Conditional Release Act, Accessible Canada Act*, *Canadian Human Rights Code*) and international conventions including the *Convention on the Rights of Persons with Disabilities*[76] and

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[75] Dent, *supra* note 60 at 387. While the writer has personal experience working pro-bono with disabled federal inmates, this work will not be a direct element of the thesis due both to the ethical considerations that would be involved and the small sample size. Personal knowledge gained from seeing the challenges faced by disabled inmates has provided the motivation for selecting this topic and has equipped me with enough, albeit still relatively limited exposure to the resistance or inability of CSC to meet its accommodation responsibilities.

[76] "Convention on the Rights of Persons with Disabilities", online: *OHCHR* <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-persons-disabilities>.

the *Standard Minimum Rules on the Treatment of Prisoners*[77]. Primary sources also include an extensive body of Canadian case law in relation to the interpretation of the legislation and the human rights of federal inmates generally and decisions by the Canadian Human Rights Tribunal.

Secondary sources will include Reports by the OCI; the Senate Report; the reports of the SIUIAP, and academic journal articles and texts relating to rule of law, prison law, disability and the history of punishment.

Chapter Summaries

Chapter 1 of this thesis begins by outlining the legal context within which CSC operates, including its statutory authority and an overview of Canadian legislation related to disability and an explanation of “accommodation”. The chapter will also discuss the judicial environment, which includes deference to the “expertise” of the CSC regarding decisions involving sentence administration. The chapter will finish with a discussion of the factors contributing to limited “access to remedy” options presently available for inmates.

Chapter 2 will consider two seemingly inconsistent concepts applicable to imprisonment - punishment and carceral burden. Together however, these two concepts are useful in analyzing the state’s role and obligations in punishing through imprisonment. Chapter 2 also considers how the reference to ‘treatment’ in *Charter* s. 12 might distinguish Canadian rights from those in the U.S Constitution, and support an argument regarding

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[77] “The United Nations Standard Minimum Rules for the Treatment of Prisoners”, online: <https://r.search.yahoo.com/_ylt=AwrOtKTB6TNmQW0AaR_rFAx.;_ylu=Y29sbwNncTEEcG9zAzMEdnRpZAMEc2VjA3Ny/RV=2/RE=1715887809/RO=10/RU=https%3a%2f%2fwww.unodc.org%2fdocuments%2fjustice-and-prison-reform%2fGA-RESOLUTION%2fE_ebook.pdf/RK=2/RS=JVCwzZXEy1QGmtKypLZYrI0TqhA->.

non-accommodation as a *Charter* breach, albeit only in cases which courts consider to meet a "gross disproportionality" test

Chapter 3 discusses proportionality and conditions, suggesting that the adverse impacts of prison for unaccommodated, disabled inmates are greater than those experienced by non-disabled inmates[78]. Characterizing these adverse impacts in terms of the "conditions" experienced by disabled inmates, I will discuss how, as between two inmates imprisoned for the same offence, the harshness of the punishment experience is greater for a disabled than a non-disabled inmate, both from the philosophical perspective of what is deserved (desert) and from the perspective of how the courts have approached this disproportionality.

Chapter 4 will suggest reasons that the Canadian penitentiary system is not equipped to accommodate disabled inmates. The discussion will consider the lack of reliable data, the history of using imprisonment as a form of punishment, including the historic concept of civil death, aspects of which still seem present within the prison system; the impossibility of accommodating the full range of disabilities among inmates; the effect of judicial deference discussed in Chapter 1, and the risk that it contributes to a 'rule of law

[78] This is not to say that the conditions experienced by federal inmates generally are acceptable. The Senate Report noted that "While some restrictions are an expected reality of incarceration, the observations made by the committee have informed their concerns that the wellbeing and rehabilitative needs of federally-sentenced persons are considered secondary to security constraints and budgetary concerns. During site visits and committee meetings, the committee heard stories of federally-sentenced persons within the CSC's custody being deprived of some of their most basic needs. The conditions of confinement the committee witnessed in some of Canada's federal penitentiaries were harsh. The committee was particularly concerned by conditions in correctional facilities, the salaries of federally-sentenced persons, the quality and quantity of food, access to hygiene products, access to family visits and community supports as well as the lack of availability of health care, including physical, mental, dental and pharmacare services." Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 80.

vacuum', and the inaccessibility or ineffectiveness of existing "remedies". The chapter will suggest possible measures to respond to the rule of law failure.

Chapter 5 will conclude by discussing the rule of law legitimacy implications for CSC and Canada.

The key argument in this thesis is that Canada, through CSC, has a legal and moral duty to fully accommodate disabled inmates within its custody, that it is not fulfilling this obligation, that the legal and jurisprudential environment is insufficient, and that this failure to fulfill its legal obligation is a breach of the rule of law. This carries wider implications, and one can look to other examples of serious consequences for Charter non-compliance (such as the *Jordan*[79] case), for remedies which would significantly incentivize full accommodation.

[79] *R. v. Jordan*, *supra* note 1.

CHAPTER 1 - Legal Context within which CSC operates

The objective in Chapter 1 is to set out the legal framework that provides both the legal authority (to carry out the punishment prescribed by the court's sentence) and the legal obligations (to provide the care required by disability legislation) applicable to the CSC. Taken together these statutory provisions are intended to provide a framework for a lawful, reasonable, and rehabilitation-based correctional system. By considering these legal requirements as a whole, I hope to illuminate the challenge faced by CSC in discharging the dual responsibilities of punishing and caring. This chapter will also introduce the concept of judicial deference, the impact of which will be discussed in Chapter 4.

Statutory Authority for Federal Incarceration

Many of the acts prohibited by the Criminal Code of Canada carry the possibility of imprisonment as the punishment. Canadian prison sentences of less than two years are served in provincial facilities[80], and sentences of two years or more are served in federal institutions.[81] A person serving a prison sentence in a federal institution is subject to the *Corrections and Conditional Release Act* (CCRA). The CCRA describes its purpose in section 3 as contributing to the:

> "…maintenance of a just, peaceful and safe society by
>
> > (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
> >
> > (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens

[80] A consideration of provincial and territorial facilities is beyond the scope of this thesis although it is likely that similar issues would be present.
[81] Canada, *Criminal Code, R.S.C. 1985, c. C-46*, s 743.1.

> through the provision of programs in penitentiaries and in the community."[82]

Section 3.1, added in 2012, confirms "the protection of society" as "the paramount consideration".

This legislation creates the Correctional Service of Canada (CSC)[83] and makes CSC responsible for:

- the "care and custody" of inmates [section 5(a)];
- the provision of programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community [s. 5(b)];
- the preparation of inmates for release [s. 5(c)];
- parole, statutory release supervision and long-term supervision of offenders [s. 5(d)]; and
- maintaining a program of public education about CSC operations [s. 5(e)].

A person sentenced to a term of federal imprisonment is described by CCRA section 9 as being in the lawful custody of the CSC [84]. The only basis upon which the head of a CSC institution can refuse an inmate is if they are "suffering from a dangerous, infectious or contagious disease."[85]

While the description may seem unusual, the CSC is providing a "service" both to the inmates within its control and to the public at large. While the fundamental objective is

[82] Later in this chapter I suggest that rehabilitation and reintegration are also 'services' provided to federal inmates by CSC.
[83] *CCRA*, *supra* note 3, s 5.
[84] The effect of lawful custody (discussed below) is a significant restriction on the individual's rights, but only to the extent necessary to carry out the sentence of the court.
[85] CCRA s. 13 (Other than Labrador and Newfoundland, where the consent of an officer designated by the Lieutenant Governor in Council is required for a sentenced person to be transferred to a federal institution). [CCRA s. 15]

to protect public safety and to deliver the court's prescribed punishment through imprisonment, CSC also has responsibility for "assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community."[86] CSC is required by CCRA section 70 to provide safe, healthful living and working conditions and avoid undermining personal dignity, taking:

> "…all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity."

This view of the "service" provided by CSC to inmates is reinforced by the charges levied for monthly room and board, as well as for telephone and other services provided to inmates. As a service provider CSC is necessarily burdened with responsibilities towards those inmates within its care, custody and control.

The CCRA also sets out extensive principles that guide the CSC in discharging its duties. Among these principles are:

- with respect to retention of rights[87],

> "offenders retain the rights of all members of society except those that are, as a consequence of the sentence, **lawfully and necessarily**[88] removed or restricted;
> [emphasis added].

- with respect to remedies for rights breaches[89],

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[86] *CCRA*, *supra* note 3, s 3 (b).
[87] *Ibid*, s 4 (d).
[88] These two prerequisites to the removal or restriction of rights are not being honoured when CSC denies the human rights of disabled inmates by failing to provide the accommodation required by law.
[89] *CCRA*, *supra* note 3, s 4 (f).

> "correctional decisions are made in a forthright and fair manner, with access by the offender to an **effective** grievance procedure"[90]; [emphasis added] and

- with respect to discrimination[91],

> " correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups[92];

- CCRA section 86 provides for essential health care; and reasonable access to non-essential health care that "conforms to professionally accepted standards".

- Section 86.1 provides for patient-centred care and patient advocacy, supporting

> "the professional autonomy and the clinical independence of registered health care professionals and their freedom to exercise, without undue influence, their professional judgment in the care and treatment of inmates".

- The CCRA also obligates CSC[93] to

> "take into consideration an offender's state of health and health care needs in all decisions affecting the offender".

- The CCRA specifically prohibits "cruel, inhumane or degrading treatment or punishment"[94].

These provisions underscore the "service provider" characterization of CSC relative to inmates within CSC custody.

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[90] CCRA sections 90 -91.2 provide for access to the grievance procedure. As discussed below, the extensive criticism of the grievance process by the OCI, the Senate Report and even some jurisprudence calls into question the extent to which it can be credibly defended as "forthright and fair".
[91] *CCRA*, *supra* note 3, s 4 (g).
[92] One is left to assume that those with a disability other than "persons requiring mental health care" are somehow captured within the general reference to "other groups" – a less than satisfactory protection for those who are, for example, physically disabled.
[93] *CCRA*, *supra* note 3, s 87.
[94] *Ibid*, s 69.

One of the relatively few circumstances under which CSC is subject to monitoring is the investigation required by the CCRA upon the death or serious injury[95] of an inmate, unless the death was pursuant to MAID[96] or unless a registered health care professional employed or engaged by CSC investigates the quality of care provided to the inmate and reports in writing that the death was due to natural causes. In this latter case a copy of the report is provided to the OCI and may form part of a report by the OCI[97].

Commissioner's Directive 800: Health Services (CD 800) sets out extensive health care requirements for which the Assistant Commissioner, Health Services, and/or Health Services Directors General are responsible. These include, in section 7 of CD 800, a requirement that the Manager, Institutional Mental Health, "ensure the provision of comprehensive mental health services to support rehabilitation and successful reintegration, and in section 11 that all institutional staff and contractors have responsibility to "inform a health care professional of the condition of any offender who appears to have a physical or mental health concern, whether or not the offender identifies a health concern and relay an offender's request for health services to a health care professional in a timely manner."

When a person enters a federal institution, CSC is required[98] to collect specific information about the person. This is done pursuant to Commissioner's Directive 705-3

[95] *Ibid*, s 19.
[96] MAID refers to "Medical Assistance in Dying" permitted under sections 241.1 and 241.2 of the Criminal Code of Canada.
[97] The OCI report on the death of Stephane Bissonnette, contained in the 2023-24 Annual Report, is an example of the OCI's reporting - note 47.
[98] *CCRA*, *supra* note 3, s 23.

(CD 705-3) which describes information to be collected in an "Immediate Needs Identification and Admission Interview". The information to be collected under CCRA section 23 and CD 703-3 is extensive but deficient in having no specific information collection requirement regarding disabilities or accommodation needs. Information regarding disability and accommodation requirements may be collected under section 23 (b)[99], and a "Computerized Mental Health intake Screening System" (CoMHISS) is offered[100] as a screening device. Where mental health issues are identified, Commissioner's Directive 800-10[101] sets out applicable requirements providing for accommodation.

The extent to which these provisions are effective will be discussed in Chapter 3.

A Correctional Investigator (OCI) is appointed under Part III of the CCRA

> "to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group."[102]

Although the independent OCI has wide powers of investigation and can produce reports and make recommendations, OCI reports are not binding on CSC or the Parole

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[99] "…(b) relevant information about the person's personal history, including the person's social, economic, criminal and young-offender history;"

[100] Correctional Service Canada, "Computerized Mental Health Intake Screening System" (15 July 2024), online: <https://www.canada.ca/en/correctional-service/corporate/transparency/info-source/privacy-impact-assessments/computerized-mental-health-intake.html> Last Modified: 2021-02-15.

[101] Correctional Service Canada, "Guideline 800-10: Intellectual disability" (25 May 2018), online (organizational descriptions;policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/guidelines/800-10.html> Last Modified: 2023-03-17.

[102] *CCRA*, *supra* note 3, s 167 (1).

Board.[103] If action is not taken on recommendations, the OCI can report the failure to the Minister[104] but has limited recourse beyond reporting.

Disability Legislation

Having described the responsibilities of the CSC under the CCRA, I now turn to disability legislation and treaties which form the basis for a system in which disabled inmates are both legally and morally entitled to accommodation by CSC, beginning with the larger legal framework that creates obligations for the federal government towards everyone with disabilities. The same framework applies to both incarcerated and non-incarcerated Canadians and includes:

- The *Canadian Charter of Rights and Freedoms*[105], particularly section 15 (providing for equality of treatment) and section 12 (prohibiting cruel and unusual treatment or punishment)
- The *Canadian Human Rights Act*[106], (sections 2, 3 and 5 – describing and prohibiting discrimination)

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[103] *Ibid*, s 179 (3).
[104] *Ibid*, s 180.This limit upon the OCI repeats the shortcomings of the 'inspectorate' described by Ignatieff, which was created in England in 1835 with limited powers, "…the inspectors were only given authority to publicize abuses, not to close prisons or order changes." Michael Ignatieff, *supra* note 68 at 188.
[105] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, 1982.
[106] Canada, *Canadian Human Rights Act, R.S.C. 1985, c. H-6*. Section 2 describes the purpose of the Act, which is " …to give effect, … to the principle that all individuals should have an opportunity equal with other individuals to … have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on … disability …". Sections 3 and 4 set out prohibited discrimination and provide for orders in cases of discrimination.

- The *Accessible Canada Act* (including the preamble, definition of “barrier”, section 5,6,7, Parts 4 and 5 – which bring CSC within the ‘regulated entities’ required to have an accessibility plan)[107]
- The *Convention on the Rights of Persons with Disabilities*[108] (Article 14-2 – requiring that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and to be treated in compliance with the objectives and principles of the Convention, including by provision of reasonable accommodation.)

In addition, specific provisions related to inmates are found in *The United Nations Standard Minimum Rules for the Treatment of Prisoners*[109] (Rule 2-2, 5-2)

Duty to Accommodate

I argue that there is an analytical difference between those incarcerated and those not incarcerated. The difference stems from the additional disability-related accommodation obligations that burden the state when it acts to restrict the rights of its citizens and others by placing them under its control in carceral confinement. As referenced earlier, the Federal Court of Canada has recognized that the general obligation to accommodate disabled individuals up to the point of ‘undue hardship’ applies as well to inmates.[110] In *MacDonald v. Canada*, a decision of the Federal Court of Canada, Mr. Justice Pentney, a former Deputy Minister of federal justice, recognized

[107] *Accessible Canada Act, S.C. 2019, c. 10*, *supra* note 63. This Act applies in respect of federal prisons.
[108] note 75.
[109] note 76.
[110] *MacDonald v. Canada (Attorney General), 2017 FC 1028*, *supra* note 5 at para 29.

this duty and discussed the low onus borne by the disabled individual, setting the standard as simple awareness of the disability-related need on the part of the service provider:

> "[29] There is no question that the Respondent is subject to the Charter, as well as the *Canadian Human Rights Act*, … . **Both impose a duty to accommodate the particular needs of persons with a disability, unless doing so would cause "undue hardship"** … It is also accepted that the onus on the person seeking accommodation is quite limited – it is sufficient that the employer or service provider be aware of a disability-related need to trigger the duty … This process may involve some dialogue between the person seeking the accommodation and the authorities who are responsible to provide it, to ensure that the particular disability-related needs of the person are actually being met."
>
> [emphasis added, citations omitted]

The duty on CSC to accommodate[111] disabled inmates within its control is a duty to both remove barriers and to provide the resources they need for daily living[112]. While CSC has a basic duty to refrain from discriminatory practices, typically applicable to all prisoners, both disabled and non-disabled, it is also subject to a positive duty to accommodate, specifically applicable to disabled inmates[113]. Although Canadian case law has stated that the obligation on CSC is not to provide "perfect or a preferred accommodation"[114] the 'undue hardship'[115] test has been confirmed to apply in the case

[111] The United Nations Convention on the Rights of Persons with Disabilities defines the term "reasonable accommodation" as: "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;"
[112] Despite the statement in *Sharma [majority, paragraph 63]* denying the existence of general, positive obligation on the state to remedy social inequalities or enact remedial legislation, I believe such an obligation must apply to the CSC and disabled federal inmates.
[113] Sharon Dolovich, "Cruelty, Prison Conditions, and the Eighth Amendment" (2009) 84:4 NYU Law Rev 881–979.
[114] *Tekano v. Canada (Attorney General)*, *supra* note 44 at para 40.
[115] *MacDonald v. Canada (Attorney General), 2017 FC 1028*, *supra* note 5.

of disabled inmates. The imposition of a positive duty should be reasonable but should accommodate the unique disabilities of each individual disabled inmate to avoid compromising an inmate's dignity or imposing a harsher sentence than intended by the courts.[116]

Canadian equality legislation requires removal of barriers that interfere with the rights, freedoms or inherent dignity of those within an enumerated or analogous group. Removal of barriers may be carried out on an incremental basis[117], however such an approach will not protect legislation which is held to be unconstitutional as perpetuating or permitting the disadvantage experienced by those with a disability.

The legal obligation to remove barriers is clear[118]. In *Eaton v Brant County Board of Education*[119], the SCC explained that the objective of eliminating discrimination and preventing exclusion from the mainstream of society is to allow disabled persons to "enjoy society's benefits":

> "The principal object of certain of the prohibited grounds is the elimination of discrimination by the attribution of untrue characteristics based on stereotypical attitudes relating to immutable conditions such as race or sex. In the case of disability, this is one of the objectives. The other equally important objective seeks to take into account the true characteristics of this group which act as headwinds to the enjoyment of society's benefits and to accommodate them. Exclusion from the mainstream of society results from the construction of a society based solely on "mainstream" attributes to

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[116] This argument, discussed further below, will take issue with several decisions, including *Cunningham v Canada*, [1993] 2 SCR 143., and *Canada (Attorney General) v Whaling*, [2014] 1 SCR 392., which suggested that "conditions" that impact the length of a sentence (including loss of a right to early parole) would be overseen by the courts but that the variability of conditions between or even within an institution, were not properly the subject for judicial interference.
[117] *R. v. Sharma*, *supra* note 22.
[118] Interestingly, as noted in Caitlin Salvino, R v Sharma's "Clarification" of the Section 15 Framework and its Creation of Unique Barriers for Disability-Based Equality Claims, 2024 32-4 *Constitutional Forum* 1, 2024 CanLIIDocs 941, <https://canlii.ca/t/7ncbw>, retrieved on 2024-09-24, early versions of Charter s. 15 " excluded any reference to disability as a ground of discrimination." The disability provision was added only following extensive advocacy by disability interest groups.
[119] *Eaton v Brant County Board of Education*, [1997] 1 SCR 241 at para 67.

> which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. **Rather, it is the failure to make reasonable accommodation**, to *fine-tune society* so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them. The discrimination inquiry which uses "the attribution of stereotypical characteristics" reasoning as commonly understood is simply inappropriate here. It may be seen rather as a case of reverse stereotyping which, by not allowing for the condition of a disabled individual, ignores his or her disability and forces the individual to sink or swim within the mainstream environment. **It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability.**" [emphasis added]

While those in prison may not view the absence of discrimination as allowing them to "enjoy society's benefits", the importance of "fine-tuning" to avoid relegation and banishment of disabled inmates from participation is, at the very least, vital to the rehabilitation objective imposed by law on the CSC. But more than that, CSC by not accommodating "forces the individual to sink or swim within the mainstream environment"[120] of the institution, exposing them not only to discrimination but also to abuse and being taken advantage of by other inmates. The "central purpose" of *Charter* section 15 requires the CSC to recognize the actual characteristics of each individual disabled inmate and to provide "reasonable accommodation of these characteristics" to the point of undue hardship.

The SCC has described a positive obligation to accommodate as a cornerstone of human rights jurisprudence:

> "It is "a cornerstone of human rights jurisprudence . . . that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is

[120] *Eaton v. Brant County Board of Education*, *supra* note 118.

> subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate."[121]

In this thesis, I characterize the 'removal of barriers' requirement as passive accommodation or a negative duty to accommodate. Some accommodation might simply require removal of a distinction, as was the case in *Ontario (Attorney General) v. G*[122], in which the court required removal of differential treatment between individuals who were, pursuant to *Criminal Code* Part XX.1 not competent by reason of a mental disorder (NCRMD) and those convicted of a sexual offence under the Ontario Christopher's law regarding sexual offender registration.

A second form of accommodation may involve both positive and negative elements. This is the case with a requirement that an existing barrier be removed to benefit a disadvantaged group generally, for example, replacing or supplementing a stairway access with a ramp. Following the initial positive action of constructing the ramp, the accommodation becomes passive in the sense that (other than regular maintenance), it does not require further action to accommodate disabled individual access.

A third form of accommodation (and the one best characterized as a positive duty to accommodate) is aimed at meeting specific individual needs. This form of accommodation seems the least common and, (possibly because: (1) it is the most personal to the individual disabled inmate's needs, and (2) there are so many inmates each with different accommodation requirements), most difficult to enforce or to comply

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[121] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 79.
[122] *Ontario (Attorney General) v G*, [2020] 3 SCR 629.

with in the standardized environment of a carceral setting. Rather than simply refraining from discriminatory actions or removing barriers, the third form requires actively accommodating each specific disability up to the point of undue hardship[123]. Rarely would the resources of state be so taxed by the accommodation requirements for an individual's disability as to meet the "undue hardship" threshold.

The act of imprisoning an individual but not making provision for all necessary accommodation might also be characterized as discriminatory, relative to others without disability, who are able to communicate, read notices, participate in classes or prison work and navigate prison grounds unimpaired. The discrimination provision in *Charter* section 15(1) provides:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The SCC, in *Quebec (Attorney General) v. A*[124], described the test regarding discriminatory state breaches of section 15 in terms of state conduct "widening the gap":

> "The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. The key is whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group. If the state conduct widens the gap between

[123] I suggest that the test in *MacDonald* should apply to disabled inmates, notwithstanding the jurisprudence in *Sharma*, in which the majority stated that "s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation".
[124] *Quebec (Attorney General) v A*, 2013 SCC 5.

the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[125]

In *Fraser*[126], the SCC explained the purpose and test for section 15:[127]

> [27] Section 15(1) reflects a profound commitment to promote equality and prevent discrimination against disadvantaged groups. … To prove a *prima facie* violation of s. 15(1), a claimant must demonstrate that the impugned law or state action:
>
> • on its face or in its impact, creates a distinction based on enumerated or analogous grounds; and
>
> • imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.
>
> [citations omitted]

Discussing "adverse impact or systemic discrimination" rather than direct (or explicit) discrimination the SCC referred with approval to the definition of "discrimination" found in the Abella report on equality in employment and adopted by then Chief Justice Dickson in *CN v. Canada*[128],

> "Discrimination . . . means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or a group's

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[125] Applied in a carceral context in *Inglis v. British Columbia (Minister of Public Safety)* 2013 BCSC 2309 at para. 521 [see also para. 613], "In *Quebec v. A*, Abella J., whose judgment with respect to s. 15 was agreed with by the majority of the Court, provided the clarification that at the second step of the analysis, the question is whether the distinction discriminates by perpetuating disadvantage or prejudice or by stereotyping, stating in part at paras. 327 and 332:
"[327] We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*. In explaining prejudice in *Withler*, the Court said: "[W]ithout attempting to limit the factors that may be useful in assessing a claim of discrimination, it can be said that where the discriminatory effect is said to be the perpetuation of disadvantage or prejudice, evidence that goes to establishing a claimant's historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered" (para. 38). [Emphasis in original.]
…
[332] The root of s. 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."

[126] *Fraser v Canada (Attorney General), 2020 SCC 28,* [2020] 3 SCR 113.

[127] *Ibid* at para 27.

[128] *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.

> right to the opportunities generally available because of attributed rather than actual characteristics. . . . It is not a question of whether this discrimination is motivated by an intentional desire to obstruct someone's potential, or whether it is the accidental by-product of innocently motivated practices or systems. *If the barrier is affecting certain groups in a disproportionately negative way, it is a signal that the practices that lead to this adverse impact may be discriminatory."*

As Abella J. explained in *Fraser*[129], discrimination can occur even when legislation is apparently neutral:

> "Adverse impact discrimination occurs when a seemingly neutral law has a disproportionate impact on members of groups protected on the basis of an enumerated or analogous ground … Instead of explicitly singling out those who are in the protected groups for differential treatment, the law indirectly places them at a disadvantage." [citations omitted]

The objective is "substantive equality" as the "animating norm" of the section 15 framework.[130] The test for discrimination is the same whether the issue is direct or indirect (adverse impact) discrimination.[131]

In *Sharma*[132], the SCC considered (and potentially narrowed the application of) section 15, potentially putting it out of reach of most disabled federal inmates. Although the *Sharma* case presents a number of hurdles, one obstacle for disabled inmates may be paragraphs 63 and 64, in which the Court says that

> "… s. 15(1) does not impose a general, positive obligation on the state to remedy social inequalities or enact remedial legislation",

and that,

> "… when the state does legislate to address inequality, it can do so *incrementally* ".

[129] *Fraser v. Canada (Attorney General), 2020 SCC 28, supra* note 125 at para 31.
[130] *Ibid* at paras 40–41.
[131] *Ibid* at para 49.
[132] *R. v. Sharma*, *supra* note 22. Ms. Sharma, a single mother, was behind on rent and facing eviction and agreed to her boyfriend's request that she import the cocaine in exchange for a $20,000 payment. The record indicated a "life of significant hardship and intergenerational trauma".

There may be a need for further clarification regarding the extent to which this language applies to disabled inmate conditions within a federal penitentiary.

Sentencing and Sentence Administration Distinguished

There is a line between sentencing and sentence administration that has often been recognized by the courts. The prevailing view is that a judge is responsible for sentencing and the CSC is responsible for carrying out the sentence. US Supreme Court Justice Anthony Kennedy described this distinction, and its shortcomings in a 2003 speech, saying

> "When the door is locked against the prisoner, we do not think about what is behind it.... were we to enter the hidden world of punishment, we would be startled by what we see."[133]

As Justice Kennedy suggests, the judicial role, for the most part, ends once sentence is pronounced. To similar effect in Canadian jurisprudence, Arbour J. said, in *Wust*,

> "Rarely is the sentencing court concerned with what happens after the sentence is imposed, that is, in the administration of the sentence."[134]

One result of constrained judicial interest in sentence administration is CSC autonomy over prison conditions and inmate treatment. Lisa Kerr has noted this, referring to,

> "… the central fact of the penitentiary itself: that the correctional authority has a great deal of freedom to adjust the conditions of prison sentences",[135]

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[133] Quoted (at p. 589) in Debra Parkes, "The Punishment Agenda in the Courts" (2014) 67:1 Supreme Court Law Rev Osgoode's Annu Const Cases Conf 589–615.

[134] *R v Wust 2000 SCC 18*, [2000] 1 SCR 455. (Quoted with approval by Wagner J. in *Canada (Attorney General) v. Whaling*, *supra* note 115 at para 61.)

[135] Lisa Kerr, "Easy Prisoner Cases" (2015) 71:1 Supreme Court Law Rev Osgoode's Annu Const Cases Conf, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/9> at 244.

and observing the necessity for a ‘conditions’ issue to rise to the level of constitutional interests before the courts become involved:

> “Most “conditions” issues will be left to the correctional authority; only “conditions” decisions that affect the amount of “in-prison” time will engage constitutional interests.”[136]

Expanding on the limited judicial interest in sentence administration, Kerr has also noted the challenges for individuals facing unique difficulties in custody:

> “Judges purport to stipulate the severity of punishment, but tend not to consider how prison conditions will shape the severity of the sanction. Even where a particular defendant is likely to face unique difficulties in custody, courts tend to take notice in limited and rare ways.” [137]

This distinction between the courts’ focus on sentence ‘term’ and CSC autonomy respecting sentence ‘conditions’ can limit the recourse options available to a disabled inmate. The conditions experienced by an unaccommodated, disabled inmate serving five years in a federal penitentiary can be very different from the conditions experienced by a healthy 22-year-old male, also serving a 5-year sentence.[138] This represents an important gap between the courts’ carefully administered sentencing standards and the actual experience of inmates once institutionalized. In effect, despite the focus of the courts on proportionality, without accommodation, a disabled inmate can experience a more excessive punishment than is merited by the index offence.

A further distinction applies to disabilities or health issues present at the time of sentencing rather than those which arise post-sentencing. In a number of cases a

[136] *Ibid* at 245.
[137] Lisa Kerr, “Sentencing Ashley Smith: How Prison Conditions Relate to the Aims of Punishment” (2017) 32:2 Can J Law Soc Rev Can Droit Société 187–207.
[138] Adelina Iftene discusses this distinction extensively in her book, Iftene, *supra* note 50.

foreseeable disability or deteriorating health has received judicial consideration at the time of sentencing. In *R. v. Hills*[139] in the course of determining that a 4 year mandatory minimum sentence for a firearms offence was not excessive, Justice Martin discussed the potential for a reduced sentence to reflect the comparatively harsher experience of imprisonment for offenders suffering disabilities:

> Courts should consider the effect of a sentence on the *particular* offender. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, **a reduction in sentence may be appropriate.** … For this reason, **courts have reduced sentences to reflect the comparatively harsher experience of imprisonment for certain offenders**, like offenders in law enforcement, for those suffering disabilities. … The effects of a sentence are not measured in numbers alone. They are "often a composite of many factors" and include the sentence's "nature and the conditions under which it is applied"" [140]
>
> [Emphasis added. Citations omitted]

After sentencing, disabilities or health issues become matters for consideration by the Parole Board rather than the courts unless they were foreseen and contemplated at the time of sentencing. In *R. v. Salehi,*[141] a case involving an accused with Parkinson's disease whose health was projected to deteriorate during imprisonment. Justice Willcox, for the Court, explained the distinction:

> [67] Where there is evidence at the time an offender is sentenced that at some point his continued confinement will constitute an excessive hardship, that evidence must be weighed in sentencing the offender. Section 121 of the CCRA gives the parole board the authority to grant parole to relieve against excessive hardship, but not against excessive hardship that was reasonably foreseeable at the time of sentencing …."

[139] A review of many of these cases was provided by Justice Martin in *R. v. Hills, 2023 SCC 2*, *supra* note 8 at para 135.
[140] *Ibid* at paras 135–136.
[141] *R v Salehi*, [2022] BCCA 1.[Leave to appeal to the SCC refused]

In this passage Willcox J. identifies how a disability arising after sentencing, which is a matter for the Parole Board, is treated differently from one that is known to the court at the time of sentencing and incorporated into the sentencing decision. Although the court recognizes the validity of providing relief from excessive hardship, decisions regarding release from custody for excessive hardship arising from disabilities that develop or worsen after sentencing are left to the Parole Board. The question then is whether the Parole Board will apply the same considerations as the court when considering the case of a disabled inmate experiencing excessive hardship resulting from non-accommodation or whether the standard parole requirements will be applied.

Chapter 4 will suggest that judicial deference or the unavailability of accessible judicial oversight can thus provide fertile ground for "rule of law" issues to arise within prisons. That said, there are a number of other factors that constitute obstacles for an unaccommodated disabled inmate.

Contributing Factors or Constraints

The expression "*ubi jus ibi remedium*", which suggests that there is no value to a right without an effective remedy, is often elusive for disabled federal inmates. Despite CCRA s. 4(d) which provides that:

> "(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted"

disabled inmates face obstacles to enforcing the basic human rights enjoyed by non-incarcerated Canadians with a disability. The constraints include:

- **financial constraints** (applicable to all inmates but more pronounced for those with a disability since they have more health-related costs);

- **constrained access to legal information and assistance** (limited and dated legal material in the institution's library, possibly coupled with a visual or cognitive disability which impedes their ability to read and understand legal material);
- **time constraints** (even if material is available, much of the day is taken with routine, limiting the time available to research, if capable);
- **communication constraints** (no access to email or internet) – even if a lawyer is assisting, communication is slowed by need to only deal by mail, telephone or in-person, with every meeting requiring a prior appointment arranged through CSC;
- **limited access to external remedies** (OCI, Courts, Human Rights Commission or Tribunal) and significant evidentiary hurdles and gross disproportionality requirements; and
- **ineffective grievance process** (slow, asymmetrical, not independent and focused on informal resolution with limited or no external oversight)

In the Senate Report the Standing Senate Committee on Human Rights in a brief paragraph described these extensive limitations and their restrictive impact, saying: [142]

> "Escalating grievances to the courts or to an independent body such as the CHRC, the Office of the Privacy Commissioner or the OCI can be very difficult due to practical restrictions on access to lawyers (including cost and institutional routines), lack of understanding on how to escalate complaints, and very restricted access to computers and a total lack of access to the Internet."

Discussing the greater challenges faced by inmates with disabilities, the Senate Report notes further that,

> "The problems enumerated above with access to justice **are amplified for federally sentenced persons with disabilities.** For

[142] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 181.

> example, the committee learned that federally-sentenced persons who are deaf or hard of hearing face major barriers in communicating with parole officers, lawyers and correctional officers. According to the Canadian Association of the Deaf, the CSC provides limited or no training to staff on communicating with this vulnerable population."[143] [emphasis added]

I will briefly review each of these constraints.

Financial Constraints

The 2022-2023 Annual Report of the Correctional Investigator described, in critical terms, the inadequacy of the existing inmate pay structure, calling it

> "an inadequate and antiquated Offender Program Assignments and Inmate Payments program…which tops out at $6.90 per day before deductions."[144]

The Annual Report calculates that,

> "an individual receiving the most [c]ommon level of pay after mandatory deductions will have net (or *"take home"*) earnings of about 46 cents an hour."

Describing the system as "so fundamentally flawed that it fails to substantively meet its primary legislative and policy objective", the Correctional Investigator states that the compensation system is so deficient that many sentenced individuals "live near or in a constant state of impoverishment and destitution".

Despite pay levels that date back to the 1980s, federally incarcerated Canadians are required to purchase many products, including personal hygiene items such as soap and shampoo, and items such as clothing, footwear, over the counter health and

[143] *Ibid* at 182.
[144] Ivan Zinger, "Office of the Correctional Investigator Annual Report 2022-2023 | OCI | BEC", online: <https://oci-bec.gc.ca/en/content/office-correctional-investigator-annual-report-2022-2023>. The Annual Report further states that "the largest proportion of the population (50%) earns Level C pay, which is $5.80 per day."

personal products, dietary supplements/vitamins at market value.[145] The resulting economics are such that, after spending their limited income on the necessities of daily living, federal inmates will not have funds remaining to pay for legal services, court filing fees or even the cost of printing or photocopying materials required in the court process. For disabled inmates facing additional costs to supplement health care needs, this situation is even more restrictive. Added to this, CSC may use the threat of seeking an order for their costs payable by the unsuccessful inmate as a way to discourage inmate litigation.[146]

Access to legal information and assistance (information about rights)

Many in federal prisons have no knowledge of their rights.[147] The material in prison libraries is often outdated.[148] These facts, as well as literacy challenges, combine to impede a disabled inmate's ability to effectively assert the human rights or other rights which purport to be preserved by the CCRA. When combined with the non-accommodation of their disabilities, the sense of helplessness resulting from outdated libraries contributes to even harsher conditions.

During the interviews preliminary to preparation of its report, the Senate committee became aware that West Coast Justice Prison Legal Services, the only legal clinic that provides legal services in segregation, was advised that they would no longer be

[145] *Ibid*. The Annual Report indicates that Amazon is the primary national supplier of goods to Canadian penitentiaries.
[146] The writer has personal experience with the threat of costs being used against a disabled inmate.
[147] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 49. "The committee met with numerous persons serving federal sentences. Many were unaware that they retain many of the same rights enjoyed by all Canadians."
[148] *Ibid* at 181. "Senators noted at several penitentiaries that the legal resources available in the libraries are extremely outdated. Similarly, the committee was informed that federally-sentenced persons do not always have timely access to the most up-to-date Commissioner's Directives."

permitted access to the segregation unit at Kent Institution. This was consistent with information received from federally-sentenced persons that “legal clinics rarely, if ever visited to help them with complaints”[149]. One consequence of limited legal access is that many, if not most disabled inmates have extremely limited financial resources, do not know the law, and can only rarely seek assistance from those who do.

While all federal inmates experience access to justice challenges, those with disabilities are among those least able to, and yet most in need of access to justice. Despite Commissioner’s Directive 084[150] which permits inmate access to legal counsel, challenges such as the relatively small number of lawyers practicing in the area, physical restrictions, such as no email or electronic communication (other than telephone), mail searches (even, in some cases, for mail marked “Subject to Solicitor Client Privilege”), restricted hours between cell counts, lockdowns and work requirements, combine to reduce the likelihood or efficacy of legal assistance.

In terms of self-representation, even with access to library materials, as required by Commissioner’s Directive 720[151], those who do not have a lawyer or wish to undertake their own legal research may face literacy barriers or limited access to legal resources.

[149] *Ibid*.
[150] Correctional Service Canada, “Commissioner’s directive 084: Inmates’ access to legal assistance and the police” (1 September 2002), online (policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/894.html> Last Modified: 2007-06-30.
[151] Correctional Service Canada, “Commissioner’s directive 720: Education programs and services for inmates” (15 May 2017), online (policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/720.html> Last Modified: 2023-01-24.

Recent correspondence from the Canadian Bar Association has underscored the issue of deficient access of the general inmate population to legal counsel.[152] The letter, from August, 2023 addressed to Commissioner Anne Kelly, provides an extensive description of the obstacles that federal inmates experience when seeking legal assistance. With such limited access to justice, disabled inmates are not in a position to pursue their legal right to be accommodated.[153] While accommodation may occur sporadically in individual cases, the cases discussed in this thesis suggest that failure to accommodate is the rule rather than the exception within federal institutions[154].

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[152] Canadian Bar Association, “CBA Letter re Right to Counsel”, online: <https://r.search.yahoo.com/_ylt=AwrOtx2b5R9olHIH.i7rFAx.;_ylu=Y29sbwNncTEEcG9zAzIEdnRpZAMEc2VjA3Ny/RV=2/RE=1748130459/RO=10/RU=https%3a%2f%2fwww.cba.org%2four-impact%2fsubmissions%2fprisoners-exercise-of-right-to-counsel%2f/RK=2/RS=yi75JkTH0nv_a2Kud_IJ6f7rWZE->.

[153] The challenge presented by a growing disabled inmate population was recognized in the 1994 Motiuk report (referenced earlier) which noted, “A major survey of persons with disabilities in Canada and an examination of staff and offenders in the Correctional Service of Canada suggest that the provision of specialized or technical aids or services may be one of the new challenges facing federal corrections. This is becoming particularly evident as the number of offenders serving long-term sentences and the average age of the institutional population continue to rise.” Motiuk, Lawrence L., *supra* note 70.

[154] See for example the testimony of Dr. Ivan Zinger before the House Public Safety Committee, February 10, 2023 (*House of Commons Standing Committee on Public Safety and National Security, Minutes of Meeting #56, February 10, 2023 - Evidence of Ivan Zinger, Correctional Investigator*, by Ivan Zinger (10 February 2023) online: <https://openparliament.ca/committees/public-safety/44-1/56/dr-ivan-zinger-23/?page=1> [*Ivan Zinger Testimony*]. at 9:25 am), “With respect to the effectiveness of the office, I would point out that we only have the power to make recommendations, which is not binding on Correctional Service Canada, the government or the minister. That's the appropriate approach.
In terms of effectiveness on the ground, when my investigators meet with wardens, the success rate is very high. We're able to settle cases with them. Over the years, I've always had a great deal of respect for those in these positions. They are very strong, very professional, and things work very well.
The problem arises when I make more systemic recommendations, as I do in my annual report, that are directed at the Commissioner of the Correctional Service of Canada, the minister or the Government of Canada. It's clear to me that in such cases our effectiveness rate drops significantly.
“I also state in my report that sometimes when Correctional Service Canada refuses or ignores our recommendations, they do so at their own risk. We document various issues and concerns very thoroughly, and that documentation is used by counsel in court. Recently, only two weeks ago, minimum sentences were rejected in Supreme Court of Canada decisions, and these decisions were based on three reports from the office. The reports are cited in both Supreme Court decisions.”

Time Constraints

The manner and frequency of inmate counts is prescribed in Commissioner's Directive 566-4.[155] At least two formal counts daily require inmates in medium security institutions to return to their cells to be counted. Inmates are subject to disciplinary consequences if they are late. In addition, the majority of each day is programmed with work and courses, leaving very limited time for library research, even if a disabled inmate had the capacity and library resources were adequate.[156]

These time constraints are onerous for many with a disability. Consider for example, a prisoner with a physical disability who struggles even to go to pick up medications and canteen supplies within the time permitted, taking longer to travel to and from these and then trying to find time to research a legal issue in the library.

Communication Constraints

Commissioner's Directive 720 sets out provisions related to legal advice. As a general requirement communication, if it can be arranged, must be arranged in advance.[157] Written communication must be by mail or courier because email and internet access are not permitted. The result is that communication is more difficult and takes longer for a lawyer dealing with a person in prison than for a non-incarcerated client.

This can be an impediment to efficient case preparation or settlement negotiations. An inmate with a hearing disability would be further constrained in the forms of available

[155] Correctional Service Canada, "Commissioner's directive 566-4: Counts and security patrols" (30 June 2015), online (policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/566-4.html> Last Modified: 2023-03-17.
[156] Correctional Service Canada, "Serving time" (24 April 2014), online (organizational descriptions): <https://www.canada.ca/en/correctional-service/programs/offenders/correctional-process/serving-time.html>. The site includes a typical daily schedule showing the limited time available for non-programmed activity.
[157] When lockdowns occur, for example, no communication is possible.

communication, as would an inmate with a visual or cognitive disability. These additional hurdles for disabled inmates can contribute to a view within CSC that it is free from the type of necessary oversight that would assure closer compliance with its accommodation obligations.

Limited Access to External Remedies

Disciplinary consequences are very much in the forefront in federal correctional institutions[158]. Federal inmates are subject to a strict regime within which they face many more opportunities for disciplinary consequences than they would when not in prison, but have limited options if they wish to challenge the actions of CSC in terms of fairness. An inmate who is late for the daily ‘in-cell’ counts, or who commits a minor rule breach, or who even speaks disrespectfully while being taunted by staff, may risk further punishment.[159] As a result federal inmates risk encounters with disciplinary authority far more frequently than do non-incarcerated citizens.

A grievance procedure is available. As will be discussed in Chapter 4, it is perceived as less than fair by most inmates because (1) it is an asymmetrical process in which the CSC is both a party and the adjudicator, and (2) inmates believe that evidence of CSC staff stands a strong chance of being accepted over the evidence of the inmate. The Senate Report discussed this problem, noting that the number of incidents which would

[158] See, for example, *Sharif v. Canada (Attorney General)*, in which an inmate was held by a discipline panel to be fighting when he was simply attempting to keep his meal tray away from a corrections officer *Sharif v Canada (Attorney General)*, [2018] 2018 FCA 205. and the comments by Stratas J. [at paragraph 30] after deciding that the test for discipline was not made out, “This area of law governs the relationship between the pressing imperatives of the state and the fundamental rights of inmates detained by it—an area where legal norms are best defined clearly, not left to uncertainty, speculation and later litigation. It is also an area where cases are often evasive of review because inmates do not often have the capability or means to litigate.”
[159] *Ibid*.

support a grievance is likely higher than the number of formal grievances reported due to the shortcomings of the grievance process:

> "… statistics on complaints made internally or to the OCI or CHRC may be an underestimation of the problem given that many federally-sentenced persons avoid filing grievances because the process is ineffective and they fear intimidation and retaliation."[160]

In addition to the internal complaint and grievance process and permitted appeals, inmates may have recourse to judicial reviews, *habeas corpus* applications or complaints to the Canadian Human Rights Commission[161], processes which are complex, slow and not easily navigated by someone in custody in a federal institution, - even less so when disabled.

There is a general administrative law requirement that a party exhaust other avenues (in this case the internal grievance process) before proceeding to court. [162] This requirement presents another obstacle for disabled inmates seeking to enforce their human rights to proper accommodation both in terms of the time added and the requirement to start in a complaint and grievance process that the OCI, referring to a CSC internal audit, has described as "broken, ineffective, dysfunctional, and in my opinion, likely beyond repair or salvage."[163] The criticisms by the OCI are, by

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[160] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 171.

[161] Complaints to the Canadian Human Rights Commission (CHRC) may offer a successful avenue for disabled federal inmates but the very heavy caseload at the CHRC and the Canadian Human Rights Tribunal can mean long delays.

[162] *CB Powell Limited v Canada (Border Services Agency)*, [2010] FCA 1413 at para 30. This requirement was, for example, applied in a recent Federal Court decision in relation to an inmate's claim of breach of rights related to religion (Charter s. 2(1) and 15), "Likewise, Mr. Richards' allegations of CSC misconduct in connection with his application for *habeas corpus* either were or could have been the subject of offender grievances. Consequently, all of these matters fall outside the proper scope of this action and, accordingly, will not be considered further.": *Richards v Canada*, 2022 FC 1763 at para 12. See also *Alam v Matsqui Institution (Warden)*, [2022] BCSC 115 at para 60.

[163] *note 6 at 9.* While *habeas corpus* can be pursued in provincial superior courts, judicial review of CSC matters is available only in Federal Court.

themselves, not sufficient to bypass the grievance process[164]. Despite the compelling discussion by Chief Justice Wagner of the legality principle[165] these obstacles contribute to an environment in which CSC can successfully avoid or minimize its accommodation obligations with virtually no oversight.

Chapter 1 Summary

This chapter has outlined the legal context within which CSC operates together with the legislation creating accommodation obligations with respect to disabled inmates. Numerous factors which limit the ability of disabled inmates to seek recourse for lack of accommodation have been identified as falling short of the legality principle and thus contributing to a rule of law failure.

While a legislative and jurisprudential framework is in place to protect the human rights of disabled federal inmates, there are nonetheless many factors which facilitate an unacceptably low level of compliance by CSC with its accommodation obligations.

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[164] *Ritch v Canada (Attorney General)*, [2022] FC 1462 at para 23.
[165] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, *supra* note 37.

CHAPTER 2 - Punishment and Carceral Burden

Introduction

This chapter will discuss literature relating to punishment and carceral burden as they engage the responsibilities of CSC. These two concepts approach imprisonment from different perspectives. The literature regarding punishment offers a number of different theories which provide justification for imprisonment as an acceptable societal response to conduct which has been characterized as criminal. The literature regarding "carceral burden" suggests that the state, when it elects to imprison the offending individual, is burdened with the obligations that accompany that election.

There is a conceptual inconsistency between imposing punishment and providing care. Both apply to a prisoner with a disability. In the correctional context this creates a situation in which Canada, through CSC is legislatively mandated to operate federal prisons for the confinement of those convicted of a serious criminal offence while, concurrently under Canadian legislation and case law, having a legal duty to accommodate disabled federal inmates.

The two concepts are considered together here to foster an understanding of the elements necessary if imprisonment of disabled inmates is to meet the test for legitimacy. While punishment involves the state's restriction of rights through imprisonment, the existence of a carceral burden modifies and imposes obligations in relation to the conduct of the punishment. Considering punishment and carceral burden together supports a clearer understanding of the state's role and obligations in the proper imposition of imprisonment as punishment for disabled offenders.

The Concept of Imprisonment as Punishment

Lisa Kerr has described punishment theory as being

> "concerned with the moral claims or social goals that might justify the state's power to punish."[166]

In *R. v. Bissonnette*[167] Chief Justice Wagner discussed the objectives of punishment in terms of: (a) retribution; (b) deterrence; (c) prevention/ public safety; or (d) reform/rehabilitation. Each of these objectives is intended to make society better, safer or to re-balance a wrong by imposing punishment on the wrongdoer:[168]

> "In Canadian law, the fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more objectives, including denunciation, deterrence and rehabilitation, …"

Court-administered punishment in Canada is largely focused on two objectives: (a) retribution, in which society seeks to denounce and punish conduct that departs from acceptable social norms; and (b) deterrence, which seeks to protect society by preventing crime from occurring, removing those who commit crimes from society and preparing them through rehabilitation to return to society.[169] These objectives are consistent with the provisions of sections 3 and 3.1 of the *Corrections and Conditional Release Act*:[170]

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[166] Lisa Kerr, "How the Prison Is a Black Box in Punishment Theory" (2019) 69:1 Univ Tor Law J 85–116 at 85.
[167] *R v Bissonnette, 2022 SCC 23*, 2022 Supreme Court of Canada at para 45 [*R. v. Bissonnette*].
[168] Alec Walen, "Retributive Justice" in Edward N Zalta & Uri Nodelman, eds, *Stanf Encycl Philos*, winter 2023 edn (Metaphysics Research Lab, Stanford University, 2023). These objectives are subject to two limits, namely not punishing the innocent and not imposing disproportionate punishment. *R. v. Hills, 2023 SCC 2*, *supra* note 8. No sentencing objective should be applied to the exclusion of all others. Deterrence does not override reformation and rehabilitation.
[169] *R. v. Bissonnette*, *supra* note 169 at paras 45–53.
[170] *CCRA*, *supra* note 3, s 3.

Purpose of correctional system

3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

- **(a)** carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
- **(b)** assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Paramount consideration

3.1 The protection of society is the paramount consideration for the Service in the corrections process.

Extending Kerr's point, if the present application of punishment theory is not achieving the "moral claims or social goals" one may ask whether, at least for individuals that cannot be accommodated, the state, rather than operating outside the rule of law, can (or should) forfeit its right to punish. In other words, 'how can the state justify imposing an extreme restriction on individual rights unless it does so compliant with the rule of law?'.[171]

Because punishment in a democratic state is not simply the vengeful imposition of suffering on a wrongdoer, proportionality is a fundamental requirement in sentencing[172]. As will be discussed in the next chapter, the proportionality requirement extends beyond sentencing into the actual imposition of the punishment. Even those who view punishment on the basis of its retributive impact recognize the essential requirement of proportionality.

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[171] Or alternatively, what are (or should be) the requirements for a state to retain the right to punish through imprisonment.

[172] Canadian Sentencing Commission with the collaboration of Internet Archive, *Sentencing reform : a Canadian approach : report of the Canadian Sentencing Commission* ([Ottawa] : Minister of Supply and Services Canada, 1987).

Two schools of thought in relation to punishment are ‘consequentialism’ and ‘retributivism’.[173] - Consequentialism is primarily a utilitarian approach, seeking the greatest good for the majority in society while minimizing the negative impact on others. Nothing in a consequentialist approach would support excessively harsh conditions. Instead, a consequentialist would look for measures that prevent or offset overall harm (which includes harm to the offender) to the greatest extent possible. A consequentialist approach is unlikely to be inconsistent with the application of a carceral burden to the state’s right of imprisonment.

Retributivism, on the other hand, is premised on the concept of ‘desert’. Under a retributivist approach, a wrongdoer receives the punishment that they deserve in response to their wrongful actions. This approach to punishment may be influenced by individual perceptions of proportionality. Despite the courts, as sentencing authority, applying punishment based on temporal proportionality, those responsible for custodial conditions may view proportionality differently. They may, in other words, view a higher level of rights deprivation as achieving proportionality relative to the gravity of the offence.[174] Retributivism as justification for imprisonment may therefore present greater challenges in relation to the imposition of a carceral burden.

One might ask whether a failure to accommodate disabled inmates can be justified where retribution or denunciation is the sole objective. This view might suggest that a more negative experience would impose greater retribution or denunciation. If taken to

[173] Matthew Altman, *A Theory of Legal Punishment: Deterrence, Retribution, and the Aims of the State* (London: Routledge, 2021) ch 1.
[174] This seems to be the rationale behind the Caputo and Eby comments referenced earlier.

the level of gross disproportionality, such an approach would not be consistent with the laws of Canada. McLachlin CJ recognized this in *Nur*[175]*,* saying that:

> "…a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending."

As Kerr explains, the *Criminal Code* requirement ensures that proportionality is present even under a retributive approach to punishment:

> "Retributive and expressive theories of punishment are not abstract or academic topics for the Canadian legal system. Rather, these are theories that are at least partly endorsed in our *Criminal Code*. An *expressive* theory of punishment appears in the provision that punishment should "denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct." Retribution or just deserts is explicitly present in the *Code*'s commitment to proportionality, in the provision that punishment "must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Given that these theories of punishment circulate in real ways in our legal system, it is worth asking whether and how these theories speak to how punishment is delivered on the ground."[176]

The same proportionality argument can be applied in relation to a purely "public safety" theory of punishment. While the CCRA expressly provides that "The protection of society is the paramount consideration for the Service in the corrections process"[177], it is not the only consideration. Public safety and accommodation of disabled inmates as required by law are not mutually exclusive objectives.

In the context of what he describes as 'extreme carceral conditions', Richard Lippke[178] considers the perspective of those for whom punishment is justified based on

[175] *R v Nur*, 1 SCR 773 at para 45. McLachlin C.J.'s statement on this point was adopted by Wagner C.J. in *Bissonnette,* [*R. v. Bissonnette*, *supra* note 169 part 51.]
[176] Kerr, *supra* note 137.
[177] *CCRA*, *supra* note 3, s 3.1.
[178] Richard L Lippke, *Rethinking Imprisonment* (Oxford University Press, 2007).

retribution. Using the extreme restrictions of "supermax" maximum security institutions in the United States, Lippke suggests that even retributivists will not support those aspects of imprisonment that detract from inmate autonomy, except to the extent needed to maintain order within the institution. In that sense Lippke makes the point that the loss of autonomy deprives inmates of the ability to essentially rehabilitate by "fashioning independent and meaningful lives for themselves"[179]. Aspects of bureaucratic control that do not form part of the punishment imposed by courts can be outside the rule of law "if they are not reasonably related to the promotion of legitimate penal aims, or if they are arbitrarily or discriminatorily enforced"[180]. If the authority to imprison derives from legislation based on the legitimate punishment objectives, the introduction of other elements of harsh, arbitrary or discriminatory treatment or conditions, which are not themselves "related to the promotion of legitimate penal aims" undermines that authority. Central to this view is the need for coherence between the sentence imposed by the court and the sentence administered by the jailer. The point is sometimes expressed in terms of being sentenced to prison "as punishment" rather than "for punishment"[181].

The imposition of punishment by a democratic state, or indeed the exercise of any power or control over its citizens, is subject to requirements such as transparency, consistency, predictability, and "subjecting the state to the discipline of law"[182]. These

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[179] *Ibid* at 116. "…the rules and procedures prisons must enforce to maintain order have great potential to further stunt and deform prisoners' lives if they are not reasonably related to the promotion of legitimate penal aims, or if they are arbitrarily or discriminatorily enforced."
[180] *Ibid*.
[181] Sir Alexander Paterson, SK Ruck, & Clement Attlee, *Paterson on Prisons* (Frederic Muller Ltd., 1951) at 23.
[182] Webber, *supra* note 26 at 344., referring to the "kinds of legal excellence" described by Lon Fuller, "The Morality of Law", 1969.

are all elements of the rule of law which foster accountability and public confidence. Two recent examples may assist in illustrating how a politician's perception of public opinion may lead to public comments supporting a departure from these requirements and favouring harsher treatment than the punishment prescribed by law.

In the first example, Frank Caputo, a federal Conservative Member of Parliament and non-practising member of the Law Society of British Columbia produced a short video regarding the transfer of the notorious killer Paul Bernardo from a maximum to a medium security institution.[183] In the video, Caputo, criticizes the transfer of Bernardo to a medium-security facility. It is apparent from Caputo's comments that he is expressing the view that anything other than absolute deprivation is unacceptable, regardless of the fact that the CSC decision was based on the legal requirements applicable to all inmates.

In the second example, British Columbia Premier David Eby issued a written statement regarding the murder of Robert Pickton by another inmate[184]. In the statements by the Premier and the [then] Minister of Public Safety and Solicitor General, the Premier, also a member of the Law Society of British Columbia, is quoted as saying "Good riddance". The Premier's comment risks being interpreted as a less than veiled expression of approval for the murder of a convicted serial killer by another inmate.

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[183] John Paul Tasker, "Conservative, Bloc MPs prompt "emergency" probe of Paul Bernardo's prison conditions", *CBC News*, online: <https://www.cbc.ca/news/politics/conservative-bloc-mps-emergency-probe-paul-bernardo-1.7135986>.
[184] British Columbia Government, "Premier's, minister's statements on the death of Robert Pickton" (31 May 2024), online: <https://news.gov.bc.ca/releases/2024PSSG0028-000854>.

These examples should be contrasted with the comments by Chief Justice Wagner in *R. v. Bissonette*[185]. After describing Bissonette's crimes as being "of unspeakable horror", Wagner CJ explains the role of the Court is to impose punishment that is proportional and that achieves an appropriate balance, having regard to all circumstances, including those of the accused[186]. Wagner CJ indicates that this is true, even for the "vilest of criminals"[187]:

> "It is in the context of those crimes that this Court must rule on the constitutional limits on the state's power to punish offenders. The appeal requires us to weigh fundamental values of our society enshrined in the *Canadian Charter of Rights and Freedoms* and to reaffirm our commitment to upholding the rights it guarantees to every individual, including the vilest of criminals."

The examples are provided as illustrations of political statements in support of arbitrary punishment or consequences that lack transparency, consistency, predictability, and subjecting the state to the discipline of law, which in turn indicates the important role of the court in preserving or restoring these elements in a state's approach to punishment.

In contrast to the many historic forms of corporal and capital punishment, imprisonment might be considered generally more acceptable. Aubert[188] has suggested that because corporal forms of punishment were less expensive to administer they were more common historically before a nation was able to afford extended custodial sentencing. Corporal and capital punishment also tended to be more visible forms of punishment,

[185] *R. v. Bissonnette*, *supra* note 169.
[186] *Ibid* at para 61.
[187] *Ibid* at para 2.
[188] Vilhelm Aubert, "Law and Social Change in Nineteenth-Century Norway" in *2 Law Soc Change Ninet-Century Nor* (Cornell University Press, 2018) 55.

which would serve to reinforce the power of the sovereign or state to the citizens and provide a deterrent effect against others committing similar offences.

My argument is not that disabled offenders should not face imprisonment, but rather that the changing composition of federal prison populations, together with the systemic inability of CSC to meet its accommodation obligations should be relevant factors in selecting an appropriate form of punishment, length of a sentence, or conditions for parole eligibility and release for an individual with a disability. Applied both at the time of sentencing and in relation to accommodation failures during a prison term, such an approach would create a strong incentive for CSC to meet its accommodation obligations.

Louise Arbour observed in 1994[189] that “Corrections is the least visible branch of the criminal justice system.” This led Arbour to the previously referenced observation that “The Rule of Law is absent, although there are rules everywhere.”[190] In a democratic society the requirement to act lawfully must surely be both prerequisite and condition for the state’s exercise of a punishment power over its citizens.

In relation to disabled inmates, questions such as, ‘what are the reasons for punishment’ of this individual, ‘what are the objectives’ and ‘how is punishment thought to achieve those objectives in light of the individual’s personal circumstances’ can guide the necessary accommodation requirements to ensure that the disability can be overcome and the punishment objectives can be achieved. Both the objectives and the required accommodation could be relevant considerations for the sentencing court, with

[189] Arbour, *supra* note 25. (The “Arbour Report”)
[190] *Ibid*.

ongoing recourse to the Courts if an inmate's disability worsens, requiring additional accommodation.

The clearest compatibility of punishment objectives with accommodation obligations can be seen in relation to the objective of rehabilitation. In many cases accommodation of an inmate's disability is a fundamental prerequisite to their ability to pursue rehabilitation. Consider for example a blind inmate who is unable to read the written material from a course that forms one of the prerequisites to release on parole. Or an unaccommodated deaf inmate who is unable to participate in required discussions in a mandatory rehabilitation program course. Not only are the unaccommodated inmates experiencing discrimination by being denied the opportunity for parole available to other inmates, they also suffer a loss of dignity when their disability is made salient.

As Lisa Kerr has suggested, if a punishment is not meeting legitimate objectives (or, as discussed in the next chapter, is grossly disproportionate), the limitations or conditions under which citizens, through a social contract with their democratic government, can be characterized as having agreed to state-imposed restrictions on their rights, are not being met, creating a lack of legitimacy for the imposed punishment. For the punisher to retain the legitimate authority to impose punishment therefore, I argue that it must be crafted such that it meets appropriate punishment objectives, in compliance with the rule of law, and that the resources necessary to facilitate that achievement must be provided, including sufficient resources to accommodate disabled inmates.

In the discussion that follows I will examine the concept of a carceral burden which the state accepts when it exercises control through imprisonment. Properly discharged, the

carceral burden can align the administration of punishment with the punishment objectives for a disabled inmate. As outlined previously in Table 1, the rights and claims of disabled individuals will be different from non-disabled inmates - the state's carceral burden will be greater for disabled inmates.

Carceral Burden

The concept of a carceral burden is premised on the principle that a state electing to imprison its citizens or other individuals, placing them under the state's complete control, must assume and properly discharge the burden of caring for those prisoners.[191] It is easy to see the tension between those aspects of punishment which seek to impose deprivation on offenders and the concept of a carceral burden, which asserts that the state's removal of privileges is accompanied by responsibilities towards those deprived.

The carceral burden discussion is not to suggest that disabled offenders should be placed in the same position as disabled non-offenders, but rather that the punishment and conditions experienced by a disabled offender should be equal to and not greater than those experienced by a non-disabled offender. For disabled inmates, an expectation that the state will meet its carceral burden is reinforced by the extensive legislative framework related to both inmates and disabilities[192].

[191] Dolovich, *supra* note 112.
[192] This includes, for example, *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, *supra* note 104; *Canadian Human Rights Act, R.S.C. 1985, c. H-6*, *supra* note 105; *Accessible Canada Act, S.C. 2019, c. 10*, *supra* note 63; ""Mandela Rules" passed, standards on the treatment of prisoners enhanced for the 21st century", online: *U N Off Drugs Crime* <//www.unodc.org/unodc/en/press/releases/2015/May/mandela-rules-passed--standards-on-the-treatment-of-prisoners-enhanced-for-the-21st-century.html>.

Sharon Dolovich[193] explains carceral burden in terms of the obligations assumed by the state when it chooses to exercise the power to restrict the liberty of a citizen. Although Dolovich works within the framework of the US Constitution Eighth Amendment regarding cruel and unusual punishment, her approach has relevance in the Canadian context. As Dolovich describes her approach, she:

> "… first addresses the question of when prison conditions are cruel, by considering as a normative matter what the state is doing when it incarcerates convicted offenders as punishment and what obligations it thereby incurs toward its prisoners."

After establishing a baseline of state obligations, Dolovich then:

> "… turns to the question of constitutional implementation and considers what doctrinal standards would best capture this understanding of cruel conditions."

Dolovich explains the rationale for the concept that the state bears a carceral burden, saying that it is based on the:

> "…recognition that the state, when it puts people in prison, places them in potentially dangerous conditions while depriving them of the capacity to provide for their own care and protection."

Dolovich argues that the state, having elected to expose individuals to the dangers of prison, "has an affirmative obligation to protect prisoners from serious physical and psychological harm" and characterizes the obligation as "an ongoing duty to provide for prisoners' basic human needs" that "may be understood as the state's carceral burden."[194] which she discusses in detail, describing extreme overcrowding and exposure to violence. [195]:

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[193] Dolovich, *supra* note 112.
[194] *Ibid* at 891.
[195] *Ibid* at 892.

> "The state's carceral burden is the price society pays for the decision to incarcerate convicted offenders. This arrangement may be thought of as society's carceral bargain. It allows society to remove certain individuals from the shared public space, but only on the condition that the state assumes an ongoing affirmative obligation to meet the basic human needs of the people exiled in this way. The prohibition on cruel punishment means that the terms of the bargain are nonnegotiable. If society prefers, it can choose not to incarcerate. But if it wants the benefits of incarceration, society must bear the burden, even if this choice should oblige the state to provide for the needs of people in prison in ways it routinely fails to do for needy people in the free world."

Although the general conditions in Canadian prisons may not reach the extremes described by Dolovich, her analysis of the state's responsibilities when choosing to incarcerate its citizens can be applied in the case of disabled inmates to support accommodation obligations upon the CSC.

Dolovich asserts that the Eighth Amendment cruel and unusual punishment prohibition extends beyond sentences to include sentence administration.[196] Since the judicial sentencing decision is made before the sentence is served, variations in the conditions of sentence administration receive little or no judicial consideration.

Dolovich argues that because an offender may be in custody for an extended period of time and face "all manner of unspeakable conditions",

> "If the prohibition on cruel punishment is to mean anything in a society where incarceration is the most common penalty for criminal acts, it must also limit what the state can do to prisoners over the course of their incarceration."[197]

Although the "unspeakable conditions" that Dolovich refers to are based on American prisons, which are potentially much worse for the average inmate than Canadian

[196] *Ibid* at 884.
[197] *Ibid* at 885.

prisons, the term may be appropriate in a Canadian context, for example, when an inmate with a mental disability is placed in a segregated environment or an inmate with a hearing disability is left with limited or no means of communicating. Although Canadian courts have developed a clear test for section 12 of the *Charter,* the greater vulnerability of disabled federal inmates, and resulting harsher conditions of imprisonment, merits closer scrutiny in relation to 'treatment' and the question of whether, if accommodation is not feasible, realistic alternatives to prison exist for disabled offenders.

Section 12 of the *Canadian Charter of Rights and Freedoms* provides:

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

While section 12 appears to offer reasonable protection in relation to "punishment", Canadian courts have set a high threshold at "gross disproportionality", which can present significant obstacles to disabled inmates. In *R. v. Smith (Edward Dewey)*[198], although Justice Lamer (as he then was) begins by acknowledging the relevance of the "effect" on the sentenced person, saying that

> "… the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed"[199],

he then goes on to confirm the acceptability of "merely excessive" punishment, explaining that the test for a breach of section 12

[198] *R v Smith (Edward Dewey)*, [1987] 1 SCR 1045.
[199] The reference to "quality of the punishment" by Lamer J. would seem to suggest some relevance for 'conditions' however his subsequent discussion makes it clear that only the most grossly disproportionate conditions will be of interest or concern to the Court.

> "… is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive."

After determining that 'merely excessive' punishment is acceptable in Canada, Lamer J. reiterates the test as "grossly disproportionate", noting that section 12 will only be infringed

> "… where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate."

Reviewing the history of the precursors to section 12, Lamer J. notes that even capital punishment has been held by Canadian courts to not constitute cruel and unusual punishment.[200] The US Courts take a similar approach, limiting relief to circumstances where the punishment is considered 'grossly disproportionate'[201] to the index offence being punished. In light of CCRA section 70, a question still to be answered is whether, for disabled inmates, the appropriate test is "dignity" or "gross disproportionality".

A further question - whether the non-accommodation of disabled inmates would need to be both 'cruel' and 'unusual' has been answered in the affirmative in Canada. In *Miller v. Canada*, Ritchie CJ for the majority in the SCC, considering section 2(b) of the Canadian Bill of Rights confirmed that the words are to be read conjunctively for both 'treatment' and 'punishment':[202]:

> In my opinion the words "cruel and unusual" as they are employed in s. *2(b)* of the *Bill of Rights* are to be read conjunctively and refer to "treatment or punishment" which is both cruel and unusual.

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[200] Lamer J. refers to the decision of the Supreme Court of Canada in *Miller and Cockriell v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680, in which all the judges of the Court agreed that capital punishment for murder did not constitute cruel and unusual punishment.
[201] See, for example, the discussion in footnote 3 Dolovich, *supra* note 112 at 883. Dolovich examines whether a punishment must be both 'cruel' and 'unusual' and sets out the 'grossly disproportionate' test.
[202] *Miller et al v The Queen*, [1977] 2 SCR 680.

The reference to ‘treatment’ in the Charter offers an opportunity for a further distinction from American jurisprudence. Dolovich[203] identifies a further gloss on the way American courts have restricted the application of the Eighth Amendment to a narrow definition of “punishment”. U.S. Supreme Court Justice Scalia[204] has limited the application of the Eighth Amendment to circumstances which are direct responses to a culpable act – “a deliberate act intended to chastise or deter” - excluding unintended suffering due to harsh conditions from the U.S. definition of “punishment” and arguably as unprotected by the Eighth Amendment.

The term “treatment” can have several meanings, including medical “treatment” or the non-punishment conditions of one’s confinement. Including “treatment” as well as “punishment” could be argued to expand the protection of *Charter* section 12 to include conditions that are outside the specific subject matter of a penal sentence pronounced by the courts. I argue that the concept of ‘treatment’ is sufficiently broad to admit ‘conditions’ which are experienced by the inmate even though not directly imposed by the court as part of the sentence, or necessary to achieve the punishment for an offence.

The Eighth Amendment in the United States refers only to ‘punishment’ - “…nor cruel and unusual punishments inflicted.” In contrast the *Charter* prohibits “…any cruel and unusual treatment or punishment.” The use of both terms (punishment and treatment) in the *Charter,* suggests that treatment must be different from punishment and, I suggest, should invite consideration of ‘conditions’. This is not a distinction that

[203] Dolovich, *supra* note 112 at 896.
[204] Wilson v. Seiter, 501 U.S. 294, 296 (1991)

Canadian courts have to date embraced however.[205] There has been some limited consideration of “treatment” as distinct from “punishment”. In *Re LaPorte and the Queen*[206], Hugessen J for the Quebec Court of Queen’s Bench was called on to consider an order authorizing surgery of an accused to determine whether metal objects detected on x-ray were police bullets. This would seem to fit within the “medical treatment” aspect of the term. Although Justice Hugessen ultimately vacated the order, the surgery itself would not have been considered cruel and unusual “treatment”:

> “Secondly, petitioner has suggested that the search warrant is in breach of s. 2 (b) of the Canadian Bill of Rights which prohibits the imposition of cruel and unusual treatment or punishment. Here again I do not think this argument need long delay us. **The operation which the warrant authorizes to be carried out on Laporte is certainly not a punishment**. Equally if the carrying out of a surgical operation by competent and qualified persons upon a patient who is under general anaesthetic is to be characterized as a cruel and unusual treatment, it does not appear to be so regarded by the thousands of people who undergo such treatment in our major hospitals every day. The order contained in the warrant is certainly unusual but there is nothing in the medical evidence which leads me to think that the operation itself is in any way out of the ordinary.”[207] [emphasis added]

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[205] It does not seem that this view is necessarily supported by Canadian Courts, which generally conflate “punishment” and “treatment” without distinguishing them. See for example the following passage: “[58] There is a high threshold for establishing that punishment or treatment is cruel and unusual. In *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, [2017] O.J. No. 4401, 2017 ONCA 667, 355 C.C.C. (3d) 41, Laskin J.A. said, at para. 9:
"[C]ruel and unusual" is a high bar to meet. The Supreme Court has used various expressions to describe this high bar: "so excessive as to outrage standards of decency"; "grossly disproportionate to what would have been appropriate"; "grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable". The point underlying these expressions is that merely excessive treatment or disproportionate treatment is not enough to establish a s. 12 violation. In the context of punishment, the Supreme Court has cautioned against stigmatizing every excessive or every disproportionate sentence as being a constitutional violation. So too with treatment.” *Canadian Civil Liberties Association v Canada*, [2019] ONCA 243. [Leave to appeal to SCC granted 2020-02-13].
[206] *Re Laporte and the Queen*, [1972] 29 DLR (3d) 651.
[207] *Ibid* at 653 (D.L.R.).

Support for “non-punishment conditions” as “treatment” might be found in dictionary definitions of ‘treatment’. The definitions from The Canadian Oxford Dictionary[208] include:

> **treatment**
>
> **1.** a process or manner of behaving towards or dealing with a person or thing: *received rough treatment*.
>
> **…**
>
> **5.** [prec. By *the*] *informal* the customary way of dealing with a person, situation, etc.: *got the full treatment*.

The dictionary definition might support an argument that there is a correlation between ‘treatment’ and ‘conditions’. The argument would suggest that it is reasonable to conclude that harsh conditions can result from harsh treatment. To date however, as Debra Parkes has noted[209], section 12 *Charter* litigation “has had relatively little application in relation to prison conditions.” In discussing ‘conditions’ as opposed to punishment, Parkes references two cases (*Bacon*[210] and *Palmantier*[211]) in which section 12 was applied in relation to the conditions being experienced by prisoners. Parkes suggests that these cases are a departure from the typically ‘hands off’ approach of courts to prison conditions, as it was discussed in *R. v. Aziga*:

> “[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 guaranteed right, prevailing jurisprudence indicates that it is not generally open to the courts to question or second guess the judgment of**

[208] Katherine Barber, ed, “The Canadian Oxford Dictionary” in *Can Oxf Dict* (Oxford University Press, 2005).
[209] Parkes, *supra* note 133 at 605.
[210] *Bacon v Surrey Pretrial Services Centre (Warden)*, [2010] 805 BCSC [*Bacon*].
[211] *R v Palmantier 2014 NWTTC 10*, 2014.

> **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." [emphasis added]

Parkes notes, in discussing the *Bacon*[212] case, (which involved a finding by Justice McEwan that the imposition of solitary confinement amounted to cruel and unusual treatment or punishment), that there were deprivations of writing instruments and visits while in solitary confinement, which the court found to be cruel:

> "…cruelty by any measure … including, for example, the denial of writing instruments and visits that caused the prisoner obvious psychological distress."[213]

While one may question the extent to which denial of writing instruments reaches the threshold of gross disproportionality, the reference to "psychological distress" can have equal application to circumstances involving a loss of dignity. While the precedential value of *Bacon* may be limited[214], an argument might be made that it reinforces the linkage between "conditions" and "treatment".

In the *Palmantier*[215] case, Parkes[216] references conditions which are better described as "treatment" than "punishment". These included "the denial of basic items such as clothing, a shower, running water, a mattress and bedding" which led to a judicial finding that the treatment of Palmantier was "inhumane and uncivilized" and sufficient to "outrage standards of decency". Parkes includes the discussion by Judge Schmaltz at

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[212] *Bacon*, *supra* note 213.
[213] Parkes, *supra* note 133 at 608.
[214] Although it is a decision at the British Columbia Supreme Court level, the *Bacon* case was referenced with approval by the Supreme Court of Canada in *R v Haevischer*, 2023 SCC 11.
[215] *R v Palmantier 2014 NWTTC 10*, *supra* note 214.
[216] Parkes, *supra* note 133 at 609.

paragraphs 46-48 which compellingly describes the impact on a society of falling short of appropriate moral and ethical standards:

> "As a society we would not tolerate subjecting people to that kind of treatment, even if they are in custody, it would be inhumane, and "so excessive as to outrage standards of decency", and that is the definition of cruel and unusual treatment. I find the conditions that Mr. Palmantier was held in to be unacceptable, and amount to cruel and unusual treatment, and consequently a breach of his right under section 12 of the *Charter*.
>
> As I have said before in *Firth*, I cannot help but wonder how we can expect a person to behave in a respectful and civilized manner, when the state, the authorities, subject the person to inhumane and uncivilized conditions."[217]

Judge Schmaltz, in two paragraphs, has captured the point of this thesis with respect to the failure to accommodate disabled inmates. He has recognized that, aside from the elements of confinement necessary for carrying out the imposed prison sentence, and any safety or security requirements, inmates, (and I would add, particularly those with a disability), are legally entitled to be treated in the same manner within prison as they would be if they were not. When he asks "how we can expect a person to behave in a respectful and civilized manner, when the state, the authorities, subject the person to inhumane and uncivilized conditions", he is acknowledging the harmful message that is being delivered to inmates when the authorities themselves do not comply with the rule of law. The result in *Palmantier* was a sentence reduction:

> [Palmantier] "received a reduction in his sentence as a remedy for the violations of his section12 rights."[218]

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[217] *Palmantier* was referenced with approval by Charbonneau J. in *R v. Durocher*, 2019 NWTSC 37 at para. 180, "In a very different context, the point about the importance of detention conditions and treatment of prisoners being humane and adhering to certain minimum standards was made in this jurisdiction in *R v Palmentier*, 2014 NWTTC 10." [sic]
[218] Parkes, *supra* note 133 at 610.

In doing so Judge Schmaltz recognized the impact that harsher conditions can have on the proportionality equation and rebalanced the equation by reducing the time that Palmantier was required to serve under those harsher conditions. The same argument might be extended to inmates whose disabilities go unaccommodated.

In *Re LaPorte and the Queen*[219], Justice Hugessen provided concluding comments supporting the preservation of human dignity, a view similar to that of Judge Schmaltz in *Palmantier*, extending the discussion to consider significant consequences (a release from custody) as appropriate to balance the protection of society and the protection of the rights of individual members of society:

> The criminal law has always had to strike the precarious balance between the protection of society on the one hand and the protection of the rights of the individual members of such society on the other. Both rights are equally important, but **any conflict between them must wherever possible be resolved in a manner most compatible with individual human dignity.** The constant preoccupation of our Courts with the protection of the citizen against the state results in the Crown having always to bear the burden in any criminal prosecution. I am not the first Judge, and I trust that I shall not be the last, to decide that the possibility that some guilty persons may escape the net of justice is not too high a price to pay for the right to live in freedom. If the Crown cannot prove its case against Laporte without doing physical violence to his person then it is better that the case be not proved. [emphasis added]

The cases of *Bacon*, *Palmantier* and *LaPorte* provide examples which I suggest (despite the requirement for "gross disproportionality" in *Cunningham*[220] and *Whaling*[221] - discussed in Chapter 3), provide support for impacts to a disabled person's dignity constituting sufficiently egregious conditions or treatment to require a rebalancing in

[219] *Re Laporte and the Queen*, *supra* note 209 at 661–662.
[220] *Cunningham v. Canada*, *supra* note 115.
[221] *Whaling v Canada*, [2024] FC 12.

favour of individual rights. As to the question whether the conditions that result from, or are exacerbated by an inmate's own disability can ever be so grossly disproportionate as to justify a *Charter* section 12 remedy, while *Bacon* and *Palmantier* support the possibility, Cory J. for the SCC in *Steele*[222]: has cautioned against "trivializing" the protections in the *Charter*

> "It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the *Charter*. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*.

Having provided this caution, the SCC ordered the release of Mr. Steele.

Chapter 2 Summary

This chapter has discussed the need for punishment to be conditioned by a carceral burden, particularly with respect to disabled inmates. When an individual subject to a disability is sentenced to prison, accommodation provides a rebalancing of conditions, necessary to realistically support a rehabilitation objective. Regardless of which view of punishment is applied, a failure, with impunity, to meet the legal requirements to accommodate would be outside the rule of law. The ability to provide continuous accommodation is a necessary precondition to the state's legitimately exercising its imprisonment right over a disabled individual and an additional dimension of the elevated state responsibilities that accompany disability will apply when imprisonment is involved. Because an individual's unique circumstances have been recognized as a relevant factor in sentencing decisions, similar treatment should also apply throughout imprisonment, potentially justifying sentence review upon the occurrence of disabilities

[222] *Steele v Mountain Institution*, [1990] 2 SCR 1385.

occurring or worsening post-sentence. Because there are implications, both jurisprudential and ethical, when a democratic state acts against its own citizens but fails to meet the resulting obligations to those citizens, a general justification onus should be borne by CSC for any non-trivial allegation of failure to meet its accommodation obligations. Characterized in this thesis as ‘legitimacy’, the obligations are based on the underlying premise that the state is governed by the rule of law, and bears the legal and moral duty to meet its accommodation obligations.

CHAPTER 3 Proportionality and Conditions

Proportionality

This chapter will consider the requirement of proportionality in both sentencing and sentence administration, discussing how the conditions experienced by an unaccommodated disabled inmate can result in conditions which upset the proportionality equation.

In a modern democratic state, when a prison sentence is considered appropriate, the focus for the Courts incorporates proportionality[223], both in relation to an accused's level of culpability, and in relation to the punishment imposed on other offenders. Modifications may be necessary to accommodate the differential circumstances of disabled inmates. Chief Justice Wagner recognized this when, in *Bissonnette*[224] he acknowledged the relevance of personal characteristics:

> "Determining whether a punishment is grossly disproportionate requires a contextual and comparative analysis: a punishment is found to be so in the specific circumstances of a particular case, in relation to the punishment that would have been just and appropriate having regard to the offender's personal characteristics and the circumstances surrounding the commission of the offence." [emphasis added]

Temporal consistency alone does not achieve experiential proportionality unless adjusted for individual characteristics and resulting experiential distinctions. Support for this approach may also be found, albeit in a significantly different context, in *Gladue*[225]

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[223] See, for a discussion of proportionality and the test for gross disproportionality, *R. v. Smith (Edward Dewey)*, *supra* note 201.
[224] *R. v. Bissonnette*, *supra* note 169 at para 62.
[225] *R v Gladue*, [1999] 1 SCR 688.

and *Ipeelee*[226]*,* - cases in which the background and the previous residential school and other harmful experiences within the Indigenous community following colonization have been recognized as relevant factors in sentencing decisions.

The shortcomings of an exclusively temporal focus have been explored by Lisa Kerr who has referred to punishment theory as a black box.[227] Kerr suggests that while punishment theory

> "… promises to deal with the question of whether state punishment can be justified and on what grounds", …"most consideration of "punishment" does not consider prisons, the differential impact on different individuals, the difference in experience from one prison to the next."

Kerr has suggested that achieving complete proportionality is likely impossible:

> "It is easy to agree on the idea of ordinal proportionality – that penalties should be graded in relation to the severity of crimes. Cardinal proportionality is far more difficult to resolve. Even if we could agree on how to rank every crime in a scale from least to most serious, the principle of proportionality cannot by itself tell us where to start, or what punishment is deserved, for any single crime."[228]

The importance of both aspects of proportionality[229] in sentencing was confirmed by Justice LeBel in *Ipeelee*[230] while discussing the concept of "justice for the offender" and the fundamental principles necessary for a "fit" sentence:

> [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing — the maintenance of a just, peaceful and safe society through the

[226] *R v Ipeelee*, [2012] SCC 13.
[227] Kerr, *supra* note 168.
[228] *Ibid* at 92–93.
[229] Cardinal Proportionality refers to the absolute severity of the punishment in relation to the gravity of the offence. It aims to have the punishment proportionate to the seriousness of the crime committed taking into consideration the moral blameworthiness of the offender. Ordinal Proportionality involves deciding the severity of the punishment for an offence in proportion to the severity of punishments for other offences. The aim is to have similar crimes receive similar sentences in order to maintain consistency and fairness across different cases
[230] *R. v. Ipeelee*, *supra* note 229 at para 37.

> imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 533:
>
>> It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.
>
> Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and **ensures justice for the offender**. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. [emphasis added]

In referring to "justice for the offender", LeBel J. was recognizing the potential impacts of colonization on the "moral blameworthiness" of an Indigenous offender[231]. For a disabled accused, the effects of colonization may or may not be a factor. Nor may "moral blameworthiness" be a consideration. Instead, I suggest that a further factor – the harsher conditions of inadequately accommodated incarceration - may impact the proportionality of punishment. If one focuses on a punishment that "ensures justice for the offender", harsher conditions resulting from non-accommodation may be relevant.

[231] The effect of colonialism on Aboriginal Peoples is very different from the circumstances of an individual with a disability. This discussion is included simply to illustrate a recognition by the Court of the concept of "justice for the offender".

A further argument may challenge whether the "grossly disproportionate" test is the correct test for disability accommodation. CCRA section 70, referenced earlier, requires that CSC:

> "…take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and **free of practices that undermine a person's sense of personal dignity**." [emphasis added].

Thus, one measure of the extent of accommodation necessary, is the impact of non-accommodation on an inmates "sense of personal dignity".

Many articles [232] and judgments[233] have described the disproportionate impact of solitary confinement on inmates suffering from mental disabilities. While the 2019 amendments targeted the most egregious accommodation failures by replacing solitary confinement with SIUs and limiting the permitted duration of isolation, there remain many other accommodation obligations that are not being met.

Conditions

The Office of the Correctional Investigator of Canada (OCI) has, on numerous occasions, identified shortcomings in the treatment by CSC of disabled federal inmates, particularly those with mental health challenges. In its 2011-2012 Annual Report[234], the OCI noted that federal penitentiaries in Canada likely house the largest populations of individuals with mental illnesses in the country. Discussing the challenges faced by

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[232] For example, *Solitary by another name*, by West Coast Prison Justice Society (16 November 2020) online: <https://prisonjustice.org/solitary-by-another-name-reporta/>.

[233]The two cases referenced earlier have not proceeded following the legislative changes: *Attorney General of Canada v British Columbia Civil Liberties Association*, 2020 Supreme Court of Canada - Leave Decision; *Attorney General of Canada v Corporation of the Canadian Civil Liberties Association*, 2020 Supreme Court of Canada - Leave Decision.

[234] "Annual Report of the Office of the Correctional Investigator 2011-2012", online: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2011-2012>.

both CSC and inmates with disabilities, the OCI described the problems experienced by these inmates:

> " … many mentally disordered inmates do not manage well in a prison environment. Some manifest symptoms of their illness through disruptive behaviour, aggression, violence, self-mutilation, suicidal ideation, withdrawal, refusal or inability to follow prison orders or rules. Within corrections, these symptoms of mental illness are often misunderstood as manipulative or malingering behaviour, **and are regularly met by a range of inappropriate responses including disciplinary sanctions, transfer to higher security institutions and separation from general population**. This state of affairs is especially prevalent in the maximum security and multi-level institutions where it is not uncommon for more than half of the offender population to be receiving institutional mental health services and/or presenting some degree of mental health dysfunction. " [emphasis added].

In addition to discussing the need for improved mental health services and the need to address deficiencies such as shortages of clinical staff and inadequate facilities, the OCI is critical of the use of segregation involving inmates with mental health issues. In the 2023-24 Annual Report[235], for example, when discussing the factors contributing to the death of Stephane Bissonnette (referenced earlier), the OCI referred to

> "Mismanagement of seriously mentally ill, self-injurious and suicidal individuals **in highly restrictive placements and inappropriate conditions of confinement.**" [emphasis added]

Also in the 2023-24 Annual Report the OCI noted that while conditions may have improved following the introduction of Strategic Intervention Units (SIUs), other segregation-like conditions were occurring:

[235] note 47.

> "The rules governing the SIUs do not extend to other areas of the institutions and thus fail to prevent segregation-like conditions from existing elsewhere."[236]

The findings by the OCI are consistent with those of the SIUIAP final report, which found that "those with deteriorating mental health tended to stay in SIUs longer than others"[237] The point of this discussion is to again highlight the differential conditions experienced by an unaccommodated federal inmate with a disability relative to one who does not have a disability. CSC has recognized the vulnerability of disabled inmates for at least 35 years. A 1991 report (Endicott Report) prepared for CSC advised that [intellectually] disabled inmates

> "are at serious risk of harm due to their special susceptibility in the correctional system to abuse, exploitation, manipulation, misunderstanding of what is expected of them, and inability to benefit from most existing habilitative programs."[238]

The Endicott Report describes itself as

> "… essentially an overview of the history of discriminatory treatment of a class of persons who are as poorly equipped to cope with the correctional system as that system is ill-equipped to deal with them."[239]

The report describes imprisonment as "a much more devastating experience for most persons with intellectual disabilities than for others", referring to the risk of victimization

[236] *Ibid*.
[237] Canada, *supra* note 40. When one considers the conditions under which imprisonment occurs, it is likely that new or aggravated disabilities are likely while incarcerated.
[238] *Persons With Intellectual Disability Who Are Incarcerated For Criminal Offences: A Literature Review*, by Orville R Endicott (March 1991) online: <https://www.csc-scc.gc.ca/research/r14e-eng.shtml>.
[239] *Ibid*.

and exploitation and greater exposure to disciplinary violations and resulting loss of privileges as well as a lack of programs to meet their needs.[240]

The distinction between the formal sentence as pronounced for an offender, and the sentence experienced by that offender, which depends both on the condition of the institution to which the offender is sent and on the individual offender's condition has been explored by Lisa Kerr, noting the limited judicial oversight of 'conditions':[241]

> "The conditions of confinement and other concrete features and experiences of imprisonment are delegated to prison officials and, while governed by a legislative and policy framework, attract minimal constitutional coverage and largely deferential modes of judicial review."

Referring to the comment by Wagner J. (as he then was) distinguishing between 'duration' and 'conditions' in *Whaling:*

> "… offenders have 'constitutionally protected expectations as to the duration, but not the conditions, of their sentences' ".[242]

Kerr takes issue with the view expressed by Wagner J., arguing that:

> "the duration and conditions of custody are not so neatly separated, but rather interact with and bear upon one another throughout the administration of a custodial term imposed by a court."

By recognizing duration but not other conditions, Chief Justice Wagner overlooks the possibility that a disabled inmate's unique circumstances or challenges might, in some cases, produce grossly disproportionate conditions relative to the general inmate population.

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[240] On this last point, see, for example, *Steele v. Mountain Institution*, *supra* note 225. In *Steele* the Court ordered that Mr. Steele be released unconditionally after a lengthy incarceration because, in part, there were no penitentiary facilities available to treat his condition.
[241] Lisa Kerr, *supra* note 135.
[242] *Ibid* at 244. Citing *Canada (Attorney General) v. Whaling*, *supra* note 115 at para 57.

The importance of public scrutiny over the administration of prison sentences was the topic of a 2020 report[243] by Colin Cameron.[244] Cameron and a number of other authors suggest that as a result of "increased scrutiny by prison advocacy groups and human rights lawyers" there have been a number of reforms, including some to the health and mental health services provided to federal inmates. Key among this increased scrutiny were two Court decisions[245] regarding the use of administrative segregation, which led to the 2019 amendments to the CCRA contained in Bill C-83[246]. These amendments introduced structured intervention units (SIUs) in place of administrative segregation. The explanatory note to Bill C-83[247] describes the purpose of clause 10 of the Bill in terms of enhanced mental health care and tailored programming:

> The new provisions allow inmates to be transferred to structured intervention units (SIUs), a new correctional intervention model for inmates who cannot safely stay in the mainstream inmate population. Inmates in an SIU will receive structured interventions, enhanced mental health care, and programming tailored to address their specific needs. The goal is to treat the underlying causes of high risk behaviour, reduce the number of violent incidents in penitentiaries, and improve correctional outcomes such as rehabilitation.

Despite government's stated objective, there remains some question as to whether SIUs are in fact materially different from solitary confinement. This is reflected in the

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[243] Colin Cameron et al, "Psychiatry in the federal correctional system in Canada" (2021) 18:2 BJPsych Int 42–46.
[244] Cameron is (or was at the time of publication) National Senior Psychiatrist in the Correctional Service of Canada.
[245] *British Columbia Civil Liberties Association v Canada (Attorney General),* [2019] BCCA 228; *Canadian Civil Liberties Association v. Canada*, *supra* note 208.
[246] *Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act*, (7 May 2019).
[247] *Ibid*.

conclusions of the final report of the SIUIAP[248], that SIUs are not in compliance the legislation that created them and that isolation is continuing to occur that is not within the SIU structure.

The variety of possible disabilities creates challenges in a carceral context for both the jailer and the inmate. Some inmates may suffer from both physical and mental disabilities, as for example, a stroke victim or brain-damaged inmate. The range of possible disabilities presents complex resource and expertise challenges for the jailer even if motivated to accommodate. An inmate's circumstances can change significantly during the time they are imprisoned. Unless the conditions of incarceration are considered, both at the time of sentencing and throughout the term of a prison sentence, (and as discussed earlier, review by the Courts is generally limited to personal characteristics that exist or are foreseeable at the time of sentencing or conditions which result in increased sentence duration), proportionality in sentencing is not actually achieved.

There is some recent SCC support for the recognition of the conditions related to an accused person's circumstances at the time of sentencing. In *Hills*, while considering mandatory minimum sentences, Justice Martin, for the Court, recognized the relevance of personal characteristics which may result in a harsher sentence:[249]

> [135] Courts should consider the effect of a sentence on the *particular* offender. The principle of proportionality implies that where the impact of imprisonment is greater on a particular offender, a reduction in sentence may be appropriate …. For this reason, courts

[248] *Structured Intervention Unit Implementation Advisory Panel 2023 to 2024 Annual Report*, by Public Safety Canada (4 October 2024) online: <https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2024-siu-iap-nnlrpt-2023-24/index-en.aspx>.

[249] *R. v. Hills, 2023 SCC 2*, *supra* note 8 at paras 135–136.

> have reduced sentences to reflect the comparatively harsher experience of imprisonment for certain offenders, **like … those suffering disabilities** …. To ensure that the severity of a mandatory minimum sentence is appropriately characterized under s. 12, it is necessary to consider the impact of incarceration in light of these individualized considerations … .
>
> [136] The effects of a sentence are not measured in numbers alone. They are "often a composite of many factors" and include the sentence's "nature and the conditions under which it is applied" …. Thus, as Lamer J. observed, a sentence of "twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement" …. When presented with a sufficient evidentiary record, **courts should consider how the conditions of confinement — for example, the difference between the supports available while serving a non-custodial conditional sentence versus serving a custodial sentence in a federal institution — would affect an individual offender**. Trial courts have increasingly been of this view … .
>
> [Emphasis added. Citations omitted]

Justice Martin further observed the relevance of the impact of a sentence on dignity, noting[250] that:

> "If the effect of a mandatory punishment is to inflict mental pain and suffering on an offender such that the offender's dignity is undermined, the penalty cannot stand."

It is possible that shortcomings in the Canadian carceral environment are due to inadequate oversight rather than legislative deficiencies. Even the federal government, in the *BC Civil Liberties* case[251], implicitly admitted problems with the unsupervised control by CSC of prison conditions, going so far as to argue in that case that the issue was maladministration by its own client, the CSC, rather than unconstitutional

[250] *Ibid* at para 133.
[251] *Attorney General of Canada v. British Columbia Civil Liberties Association*, *supra* note 235. This case was one of two cases challenging the CSC practice of solitary confinement.

legislation."[252] While legally important, this distinction is irrelevant to the disabled inmate experiencing discrimination or non-accommodation.

The SCC has confirmed that the application of a normative rule may infringe the *Charter* where the decision-maker has acted pursuant to an enabling statute, even if the normative rule itself is not objectionable in terms of administrative or constitutional law.[253] A number of observations by Justice Fothergill in *BW v. Canada*[254], a recently certified class action in Federal Court underscore the same maladministration perspective. This class action, with pleadings patterned on similar class action pleadings for which certification was successfully upheld in the Federal Court of Appeal[255] and another recently certified class action in the Federal Court Trial Division[256], will advance a claim that "Older Inmates, defined as those aged 50 years or more, have been harmed by systemic discrimination in prisons administered by CSC"[257]. In the reasons approving certification, which are equally if not more relevant to the discussion of disabled inmates, Justice Fothergill made the following observations:

- "CSC's apparent reluctance to implement recommendations in public reports that were intended to prevent the Abuse of Older Inmates and alleviate the Inability to Access Healthcare potentially exposes the Defendant to an award of punitive damages."[258]

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[252] *British Columbia Civil Liberties Association v. Canada (Attorney General), supra* note 247 at para 4. "The Attorney General says that demonstrated instances of the unconstitutional application of the provisions are attributable to maladministration of a constitutionally compliant legislative scheme by the Correctional Service of Canada ("CSC") …"
[253] *Poulin v Canada (Attorney General)*, 2008 Federal Court at para 47. *Multani v Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256 at para 21.
[254] *BW v Canada (Attorney General)*, [2024] FC 77.
[255] *Canada (Attorney General) v Nasogaluak*, [2023] FCA 61.
[256] *Araya v Canada (Attorney General)*, [2023] FC 1688.
[257] As discussed earlier, comments with respect to discriminatory practices affecting older inmates are generally equally applicable to disabled inmates, many of whom are themselves elderly.
[258] *B.W. v. Canada (Attorney General)*, *supra* note 256 at para 110.

- "The Defendant does not rely on the inmate grievance process as a preferable procedure, presumably in light of the repeated criticisms of this process in numerous OCI reports."[259]
- "If this proposed class action is not certified, it is unlikely that individual Class members will pursue alternative forms of redress on their own."[260]

Taken together Justice Fothergill's observations provide insight into the extent to which the prison experience is controlled by CSC as well as how CSC is able to operate outside the rule of law by not discharging its positive duty to accommodate. As discussed earlier, the extent of control over inmates is one of the elements giving rise to the imposition of a carceral burden on CSC.

The limited tools available to the judiciary at the time of sentencing allow at best, limited options to achieve proportionality of conditions, focusing primarily on duration and considering circumstances only at the time of sentencing.[261] Some judicial support for considering conditions might be found in the decision by the BC Court of Appeal in *R. v. Salehi*[262], in which Mr. Salehi's deteriorating health was a factor:

> [66] It is an error not to consider the effect of an offender's proven ill health where the offender is suffering from a medical condition that is likely to result in hardship exceeding the normal consequences of a conviction and sentence. …The principle of parity demands that a sentencing judge consider particularly harsh conditions of imprisonment… ." [citations omitted]

[259] *Ibid* at para 116.
[260] *Ibid* at para 123.
[261] Lisa Kerr, discussing the power of prison officials over prison conditions and, in consequence, the severity of an inmate's punishment, observed[261], "As Michel Foucault described so well, the rise of the penitentiary in the late 18th century marked a shift away from more specific and concrete sanctions like banishment or physical punishments. When punishment for serious offences means time spent in the physical custody of the state, officials are free to "modulate" the severity of a judicially imposed sanction. It is prison officials — not courts — that control the administration, quality and rigours of punishment." [See Michel Foucault, *Discipline and Punish: The Birth of the Prison, translated by Alan Sheridan* (New York: Pantheon Books, 1977), at 244-47.]"
[262] *R. v. Salehi*, *supra* note 141.

Contrasting *Salehi* with the findings by Justice Fothergill in *BW v.* Canada, I argue that CSC cannot meet a positive obligation to accommodate disabled inmates if there are (a) breaches of *Charter* rights and human rights and, (b) as found by Fothergill J., an "apparent reluctance to implement recommendations in public reports", an inadequate grievance process, and the inability of individual inmates to "pursue alternative forms of redress on their own".

In the Arbour Report, Louise Arbour discussed the requirement of 'fair' prison conditions and lawful conduct of prison officials as an essential part of the criminal justice system, in these terms:

> "A fair criminal process produces reliable convictions and, as a result, the management of a custodial sentence does not have to be plagued with uncertainties about the legitimacy of the enterprise. However, even though the presumption of innocence is displaced by the conviction, in the imposition of punishment, all authority must still come from the law. Parliament authorizes the imposition of certain sentences; the courts impose them and corrections officials implement the court orders. **A guilty verdict followed by a custodial sentence is not a grant of authority for the State to disregard the very values that the law, particularly criminal law, seeks to uphold and to vindicate, such as honesty, respect for the physical safety of others, respect for privacy and for human dignity. The administration of criminal justice does not end with the verdict and the imposition of a sentence.** Corrections officials are held to the same standards of integrity and decency as their partners in the administration of criminal law."[263] [emphasis added]

Others have also discussed the need to look beyond the 'term' of a custodial sentence and consider as well the 'conditions' of that sentence. Lisa Kerr, for example, has observed the relationship between the qualitative terms of incarceration and the severity of the sentence:

[263] Arbour, *supra* note 25.

> "While sentencing judges purport to hunt for and select a fit sanction in response to a particular level of blameworthiness, it is the penal administrative context that determines the qualitative terms of incarceration and ultimately the form and severity of state sanctions."[264]

This distinction between the term of a prison sentence and the conditions under which it is served has been considered by the SCC on a number of occasions, although the scope of the distinction has been limited. In *Cunningham v. Canada*[265] McLachlin J. (as she then was) stated the distinction in slightly different terms but nonetheless considered length of sentence (term) a more important consideration for the court than the conditions (form) within which the sentence is served:

> "A restriction affecting the form in which a sentence is served, the issue here, may be less serious than an *ex post facto* increase in the sentence."

In *Cunningham*, legislative changes and a decision under that legislation deferring Mr. Cunningham's parole until he had completed his full sentence, while recognized by the Court as a deprivation of his liberty, was held to be justified under *Charter* section 1.[266]

Although the 'manner' in which Cunningham's sentence was to be served had changed (which McLachlin J. found to meet the test as being a substantial change in conditions amounting to a further deprivation of liberty), he was not entitled to relief under *Charter* section 7 because total duration had not changed. As McLachlin J. observed,

> "In the case at bar, the appellant was sentenced to 12 years and was required under his warrant of committal, both before and after the amendment of the *Parole Act* to serve that sentence in its entirety.

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[264] Kerr, *supra* note 137.
[265] *Cunningham v. Canada*, *supra* note 115 at 149–150.
[266] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, *supra* note 104, s 1. Section 1 imposes limits on certain rights granted by the *Charter,* provided they are 'reasonable limits, prescribed by law, that can be demonstrably justified in a free and democratic society".

> Thus, the duration of the restriction of his liberty interest has not been affected."

Commenting in *Cunningham* on the distinction between term and conditions, McLachlin J.[267] did not consider changes in form (which by extension would include certain conditions) as being contrary to fundamental justice:

> "A change in the form in which a sentence is served, whether it be favourable or unfavourable to the prisoner, is not, in itself, contrary to any principle of fundamental justice."

Similarly, in *Canada (Attorney General) v. Whaling*[268], Wagner J. (as he then was) for the court, when considering the definition of "punishment" confirmed the distinction between conditions and duration, writing:

> "The criminal law distinguishes between the sentence imposed on an offender and the conditions of the sentence. Changes to the conditions of a sentence, such as eligibility for parole, do not alter the sentence itself."[269]

Justice Wagner's view is similar in approach to the narrow definition of 'punishment' used by American courts, distinguishing 'punishment' from 'conditions'. He adopted (at paragraph 21) the definition of punishment from *R. v. Rodgers*[270], which had been used by Holmes J. at the trial level:

> As a general rule, it seems to me that the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing."[271]

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[267] *Cunningham v. Canada*, *supra* note 115 at 152.
[268] *Whaling* is a case that again addressed the retrospective removal of an inmate's expectation of early parole release.
[269] *Canada (Attorney General) v. Whaling*, *supra* note 115 at para 1.
[270] *R v Rodgers*, [2006] 1 SCR 554 at para 63.
[271] *Canada (Attorney General) v. Whaling*, *supra* note 115 at para 21. The reference is to *R. v. Rodgers*, *supra* note 272 at para 63.

Referring back to *Cunningham*, Wagner J. reinforces this distinction between conditions and duration, writing: [272]

> "Generally speaking, offenders have constitutionally protected expectations as to the duration, but not the conditions, of their sentences. Various changes in the management of an offender's parole are not punitive, even though they may engage the offender's liberty interest by marginally increasing the likelihood of additional incarceration."

Besides the institutional prison conditions, an individual's psychological and health conditions will be factors in their prison experience. In Part II of her article "Sentencing Ashley Smith"[273], Kerr provides a discussion of disability and health-need cases. Kerr endeavours to identify the operating principles that inform judicial consideration of factors such as health and disabilities during sentencing, noting that sentencing courts:

> "… are only rarely pressed to consider how the severity of the sanctions they impose will be shaped by the traits of defendants and prison conditions."

Kerr distinguishes between the question of disproportionality at the time of sentencing as opposed to a sentence *becoming* disproportionate. This would be relevant, for example, to an inmate who developed a disability after becoming incarcerated. Discussing the absence of judicial guidance in the sentencing process, Kerr notes:

> "Nor do sentencing judges state, in their reasons for sentence, what is required in terms of prison conditions for particular offenders."

This omission by the sentencing court effectively shifts discretion regarding treatment conditions to the CSC. When changed circumstances, such as a worsened, or newly developed disability occur, the inmate bears the onus of pursuing relief.[274] An inmate

[272] *Canada (Attorney General) v. Whaling*, *supra* note 115 at para 57.
[273] Kerr, *supra* note 137.
[274] This was the situation for Ashley Smith, imprisoned for a relatively minor offence but whose mental state worsened over time, *Ibid*.

who is healthy when sentenced, but whose condition subsequently changes significantly, resulting in a later-onset disability, is faced with meeting the Parole Board criteria for release rather than having their sentence reconsidered by a court or by the Parole Board on the basis of human rights.[275] Inmates with disabilities will typically face challenges meeting Parole Board considerations such as having a viable release plan or achieving completion of rehabilitative programming. If the disability renders the inmate incapable of meeting these considerations, the onset of a post-sentencing disability may leave an inmate unable to meet the Parole Board requirements.

One view is that the test for disproportionate conditions is an objective test. Benjamin Berger[276] has correctly pointed out that there must be limits on the extent to which subjectivity can be considered in any attempt to include conditions when seeking proportionality in sentencing. Berger discusses the challenges in attempting to achieve subjective proportionality:

> "… focusing on the subjective experience of punishment would involve us in the unattractive exercise of calibrating punishment to expensive tastes and insensitive offenders."

To illustrate, Berger takes the subjective approach to an extreme, asking:

> "Would we have to account for the offender who would suffer more in prison because he is used to silk sheets or because of the shame of a conviction given his social circles? Might we have to punish

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[275] An excellent discussion of the impact of changed conditions on inmates is provided by Howard Sapers in the Annual Report of the Office of the Correctional Investigator 2010-2011, in relation to elderly inmates. *Annual Report of the Office of the Correctional Investigator 2010-2011* online: <https://oci-bec.gc.ca/en/content/annual-report-office-correctional-investigator-2010-2011#ss1b>. CCRA section 102 sets out the criteria for granting parole as:

> **(a)** the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
> **(b)** the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

[276] Benjamin L Berger, "Sentencing and the Salience of Pain and Hope" (2015) Osgoode Leg Stud Res Pap Ser 97 at 18.

> more severely the offender who is inured to deprivations, having lived a particularly harsh life?"

Berger's examples do not realistically consider the circumstances of disabled individuals; they are more appropriately characterized as ' individual preference'. Continuing his argument, Berger links suffering and punishment, suggesting that "… some regard to the sources and character of that suffering is essential to a just sentencing process", pointing out that "suffering is the phenomenological essence of punishment."[277] Berger's argument regarding suffering risks disregarding the impact on dignity for unaccommodated disabled inmates, whose experience may be materially worse than their non-disabled counterparts. The disabled inmate's harsher experience results from their objectively-verifiable disability rather than a subjective preference. The circumstances in which CSC would be acting contrary to the rule of law by not accommodating an inmate's subjective personal preferences would be rare, if at all. In contrast, when CSC does not accommodate, despite an objectively determined legally-prescribed accommodation obligation, the rule of law issue becomes relevant.

Chapter 3 Summary

From this chapter it should be apparent, not surprisingly, that the CCRA provides authority for differential treatment between inmates and non-incarcerated citizens, restricting the rights of disabled inmates in order to carry out sentences imposed by Canadian courts. The usual hurdle for disproportionality in sentences is 'gross disproportionality'. Even when a failure to accommodate does not offend a 'grossly disproportionate' measure of proportionality however, the failure may place CSC in breach of multiple Canadian disability laws, including provisions in the *Charter*, the

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[277] *Ibid* at 19.

Human Rights Code, CCRA section 70, and the *Accessible Canada Act.* Further the test of gross disproportionality is an overly punitive test relative to the statutory provisions against undermining a person's personal sense of dignity under CCRA section 70. The difference in conditions experienced by a disabled inmate have been recognized by courts and have, albeit rarely, been mitigated by sentence reductions or releases from custody. I suggest that the specific legal duty to accommodate and preserve dignity for a disabled inmate prevails over the more general gross disproportionality test. A contrary interpretation would invite CSC to disregard its statutory obligations with impunity.

CHAPTER 4 – Accommodation Challenges and Possible Remedial Measures

This chapter will consider a number of factors or possible impediments to the ability, commitment or willingness of CSC to meet its accommodation obligations. These include a lack of consistent, reliable data regarding the number and nature of inmate disabilities, a lingering historic view of imprisonment as suffering and the residual elements of the concept of civil death, resource shortages and the complexity of inmate disabilities, the effects of judicial deference and a resulting lack of oversight and ineffective existing remedies.

It will then discuss possible measures which could address the shortcomings.

Lack of Data

Comprehensive current data on disabled federal inmates is limited, making it difficult to describe the scope of the issue with accuracy. This is both expected and unexpected. It is expected due to the wide range of possible physical and mental disabilities, making it difficult to identify and classify for each federal inmate. It is unexpected in the sense that CSC is providing a service which is subject to a legal duty to accommodate. CSC should have a detailed knowledge of the disabilities of those inmates within its care and control and the required accommodation measures.

Every disabled inmate should know exactly what accommodation measures they are entitled to expect for their disability and have appropriate recourse to an effective process when these obligations are not being met.[278]

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[278] A recent example of the lack of data may be found in the evidence presented by Senator Kim Pate on November 30, 2023: “Senator Dalphond**:** My next question is about something different. I think you seemed to agree with Senator Boisvenu that there are 15,000 people who are serving time in federal penitentiaries now across Canada and that between 40% to 50% of them will be suffering some kind of

Thirty years ago, the 1994 study by Lawrence Motiuk, prepared for the CSC identified the coming disability challenge within Canada Corrections in these terms:

> "A major survey of persons with disabilities in Canada and an examination of staff and offenders in the Correctional Service of Canada suggest that the provision of specialized or technical aids or services may be one of the new challenges facing federal corrections. This is becoming particularly evident as the number of offenders serving long-term sentences and the average age of the institutional population continue to rise."[279]

The "major survey" referenced by Motiuk was the 1991 *Health and Activity Limitation Survey* undertaken by Statistics Canada for the Canadian general population. Although the survey did not include federal inmates, a separate survey was conducted at three federal correctional institutions[280] using the *Health and Activity Limitation Survey -1991 User's Guide* as a model. The corrections survey indicated a 4.1% overall disability rate within federal correctional facilities[281]. "Disability" was defined using the World Health Organization definition: "any restriction or lack (resulting from impairment) of ability to perform an activity in the manner or within the range considered normal for a human being." The conclusion reached by Motiuk in the 1994 report was that specialized programming and services were likely necessary, both for staff and for disabled inmates[282]:

> "Hopefully, a systematic approach to assessing and reassessing special needs, coupled with an awareness of the limitations and

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mental illness. Senator Pate: Part of the challenge, as we know from other work that we've done in this committee, is that the holders of those records is Correctional Service Canada. Their estimates can go anywhere from 10% to 95% when we're talking about federally sentenced women, particularly federally sentenced Indigenous women who are dealing with past trauma and abuse. The numbers are elusive in terms of how many we would be dealing with." - Senate of Canada, "Standing Senate Committee on Legal and Constitutional Affairs (44th Parliament, 1st Session)" (30 November 2023), online: *SenCanada* <https://sencanada.ca/en/committees/lcjc/>.

[279] Motiuk, Lawrence L., *supra* note 70 at 1.

[280] A maximum-, a medium-, and a minimum-security penitentiary.

[281] Motiuk, Lawrence L., *supra* note 70.

[282] *Ibid* at 6.

> barriers experienced by persons with disabilities, will improve the Correctional Service of Canada's provision of services. As a result, we may need specialized programming and services for staff and offenders with disabilities."

Motiuk's recommendations are consistent with the view that a carceral burden imposes additional accommodation obligations on CSC. Despite the evidence and caution provided by Motiuk, tI suggest that the examples provided earlier in this paper, and the extensive discussion by Iftene[283] are more consistent with a view that CSC has not implemented Motiuk's recommendations to date.[284]

This apparent non-implementation raises serious questions about the willingness or ability of CSC to accommodate inmates who suffer from a disability, particularly within a 'one size fits all' correctional environment.[285] While a lack of action by CSC may be due to budget limitations[286] or the previously discussed lack of public support for improving conditions for federal inmates, these and other reasons might be said to have their roots in the retributive aspect of punishment and the concept of civil death (discussed below).

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[283] Iftene, *supra* note 50.
[284] See also the joint report by the Office of the Correctional Investigator and the Canadian Human Rights Commissioner, describing conditions experienced by aging federal inmates, - *Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody*, by Ivan Zinger & Marie-Claude Landry (Office of the Correctional Investigator, 28 February 2019) online: <https://oci-bec.gc.ca/en/content/aging-and-dying-prison-investigation-experiences-older-individuals-federal-custody-0> [*Aging and Dying in Prison*].
[285] See, for example, the discussion of the 'one size fits all" centralized "cook-chill" food preparation services in the Senate report [Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 88–90.]
[286] *Ibid* at 80. "While some restrictions are an expected reality of incarceration, the observations made by the committee have informed their concerns that the wellbeing and rehabilitative needs of federally-sentenced persons are considered secondary to security constraints and budgetary concerns."

Although, as discussed in Chapter 1, CSC collects extensive information about an inmate upon intake, a 2006 internal audit[287] identified numerous shortcomings, including

> "… inconsistent definitions for disabilities being used by staff; lack of disability related information on the Offender Management System (OMS), or if on OMS, spread over many reports in no particular location within the reports; and few distinct program codes reflecting the specialized programs in place to address the needs of inmates with disabilities."

Although the audit report was prepared nearly 20 years ago, a 2020 report by the Mental Health Commission of Canada[288] noted similar concerns:

> "The quality of mental health services and supports in corrections was seen as a major impediment to improving mental health among persons who are justice-involved. Many key informants and survey respondents described the quality of mental health care as poor, lacking consistency across jurisdictions, and limited because of its punitive nature (e.g., a focus on curbing public safety concerns rather than supporting rehabilitation, as in recovery-oriented care). "

History of imprisonment as punishment

A brief consideration of the history of imprisonment may help to contextualize the continued use of imprisonment as a form of punishment for offenders with physical or mental disabilities. The relevance to this thesis is threefold: first, to assist in understanding the rationale behind the rehabilitation objective and thereby appreciate the importance of accommodation if this objective is to have any meaning in relation to disabled inmates; secondly, to underscore the importance of having punishment viewed by the public as fair relative to the offence; and thirdly to reinforce the 'rule of law'

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[287] *Accommodating the Needs of Offenders with Disabilities Audit Report*, by Performance Assurance Sector, Correctional Service Canada (April 2006) online: <https://publications.gc.ca/collections/collection_2019/scc-csc/PS84-79-2006-eng.pdf>.

[288] *Mental health and the criminal justice system: "What we heard."*, by Mental Health Commission of Canada (2020) online: <https://mentalhealthcommission.ca/wp-content/uploads/drupal/2020-08/mental_health_and_the_law_evidence_summary_report_eng.pdf?form=MG0AV3>.

importance of a government following its own rules. In discussing the historical concept of “civil death” I have considered its possible implications in relation to reluctance to accommodate in the modern-day treatment of inmates.

Throughout history punishment of some form has provided a means of controlling behaviour within different legal and social regimes. The coercive power to punish is frequently among the basic attributes exercised by a governing power[289], including those in Europe and North America. Punishment provides a means to exercise control and to maintain stability. Over time, and with the emergence of democratic forms of government, the exercise of that power tends to transform from theatrical public displays, such as executions and corporal punishment to a “new age of penal justice”, focused on deterrence, rehabilitation and ultimately public safety.[290] Regardless of the form of punishment, the ability of the state to exercise power is often used to both motivate and control the citizenry, maintaining social order.

Although imprisonment in some form has existed for millennia, imprisonment as a primary form of punishment is a relatively recent development. Ignatieff notes that “Before 1775, imprisonment was rarely used as a punishment for felony.”[291]

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[289] Michel Foucault, *Penal Theories and Institutions Lectures at the Collège de France, 1971-1972 (1st ed. 2019.).* (Springer International Publishing.) at 38. Describing the suppression of the va-nu-pieds at the direction of Cardinal Richelieu, Foucault says, “in the kingdom, the king’s army exercises a function of justice.”

[290] Michel Foucault & Alan Sheridan, *Discipline and Punish : the birth of the prison.* (1977).

[291] Michael Ignatieff, *supra* note 68 at 15. See also Chris Chapman, Allison C Carey & Liat Ben-Moshe, “Reconsidering Confinement: Interlocking Locations and Logics of Incarceration” in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disabil Incarcer Imprisonment Disabil U S Can* (New York: Palgrave Macmillan US, 2014) 3 at 3.

Early prisons, such as Newgate Prison in London, England, were crowded and vermin-infested, with jailers who engaged in various forms of torment of the prisoners.[292] The experience in early Canadian prisons was no better. The first penitentiary in Canada was opened in Kingston, Ontario in 1835 and in 1849 the Brown Commission Report condemned the Kingston Warden's regime as a living hell filled with arbitrariness and injustice.[293]

Imprisonment has a more recent history as a formal element of punishment.[294] Ignatieff suggests that the 1770s represent a starting point for the use of modern prisons as a means of reforming or rehabilitating criminals, describing the

> "… first use of confinement as a coercive education that we should trace the germ of the idea of recasting the character of the deviant by means of discipline"[295]

Significant in this approach is the belief that an offender's character is capable of being recast, opening the door to the possibility of rehabilitation. This, in effect, is the genesis of the rehabilitation objective in modern punishment.

Ignatieff describes the development of penitentiaries in conjunction with the parallel and very similar development of a number of other institutions (such as asylums and workhouses) during the 16th and 17th centuries[296]:

> It was no accident that penitentiaries, asylums, workhouses, monitorial schools, night refuges, and reformatories looked alike, or that their charges marched to the same disciplinary cadence. Since they made up a complementary and interdependent structure of control, it was essential that their diets and deprivations be calibrated

[292] Peter Ackroyd, *London: The Biography* (Random House UK, 2001) at 247–259.
[293] Jackson, *supra* note 41 at 20.
[294] Dario Melossi & Massimo Pavarini, *The Prison and the Factory (40th Anniversary Edition): Origins of the Penitentiary System* (London: Palgrave Macmillan UK, 2018). Michael Ignatieff, *supra* note 68 at 15.
[295] Michael Ignatieff, *supra* note 68 at 11.
[296] *Ibid* at 214.

> on an ascending scale, school-workhouse-asylum-prison, with the pain of the last serving to undergird the pain of the first. Nor was it accidental that these state institutions so closely resembled the factory. As we have seen, Wedgwood, Strutt, and Boulton, the creators of the new factory discipline, drew inspiration from the same discourse on authority as the makers of the prison: Nonconformist asceticism, faith in human improvability through discipline, and the liberal theory of the state."

As Ignatieff's description suggests, prison or other forms of confinement have been used for different purposes. In some cases, such as poorhouses, imprisonment was intended as a means to induce productivity among the poor, rather than as a way of punishing offenders[297]. There are also similarities between the concept of rehabilitation and the concept of canonical penitence, in which an offending cleric would be subjected to a period of isolation, allowing reflection and repentance. Many reformers espoused a similar view, believing that solitary reflection and aversion to the shame associated with guilt provided a path to reform.

As Ignatieff observed[298] the challenge was to preserve the efficacy of punishment by preserving, in the eyes of the punished and the public, both its moral legitimacy and respect for those who imposed it:

> "If social order depended on making citizens feel ashamed at the prospect of punishment, then it was essential that the actual infliction of punishment conserve its moral legitimacy in the eyes of the public. The key problem for social order, therefore, was to represent the suffering of punishment in such a way that those who endured it and those who watched its infliction **conserved their moral respect for those who inflicted it. The efficacy of punishment depended on its legitimacy.** Hence a paradox: the most painful punishments, those that aroused the greatest guilt, were those that observed the strictest standards of justice and morality. From such punishment there could be no psychological escape into contempt for the punisher, assertions of innocence, or protests against its cruelty.

[297] Melossi & Pavarini, *supra* note 296 at 55.
[298] Michael Ignatieff, *supra* note 68 at 72.

> Nothing in the penalty's infliction would divert offenders from contemplating their own guilt." [emphasis added]

Ignatieff references a similar expression of support for the concept of humane punishment supporting reform, by John Howard:[299]

> "Shew them that you have humanity, and that you aim to make them useful members of society; and let them see and hear the rules and orders of the prison that they may be convinced that they are not defrauded in their provisions or clothes, by contractors or gaolers. Such conduct would prevent mutiny in prisons and attempts to escape; which I am fully persuaded are often owing to prisoners being made desperate by the profaneness, inhumanity and ill-usage of their keepers."

Critique of the state's misapplication of its imprisonment powers is also not new. In considering the history of imprisonment we find the same concern expressed in an 1812 article by William Allen:[300]

> ""Underlying this anxiety about legitimacy was a highly significant assumption: the treatment of prisoners was a symbolic test of the morality, not simply of the state, but of the "ruling powers" of society." … "In other words, punishment, as the most extreme of the state's powers over citizens, was the test of its dealings with citizens in all lesser exercises of authority. **The magistrates who supervised prisons were charged with nothing less than maintaining the state's reputation as a moral agent. On the legitimacy of the state as a moral agent rested, in turn, the legitimacy of the "ruling powers of society" and their continued hegemony in the social order**." [emphasis added]

This concern from over 200 years ago about the "legitimacy" of the state as a moral agent provided the grounding for important changes to the penal system of the day. The same concern could operate today to ground the move away from inadequate

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[299] *Ibid* at 73. Ignatieff quotes Howard, *Lazarettos*, p. 222.
[300] Allen is quoted in *Ibid* at 167. Ignatieff is quoting the statement by William Allen in *The Philanthropist II, 1812,* "If a part of the population placed in this situation, so immediately under the eye of the ruling powers … are not taken care of as they ought to be, is it not a matter of moral certainty that the other parts of the population are equally or still more neglected" … The behaviour of government, therefore, in this department is a sample of its behaviour in all the rest."

accommodation for disabled federal inmates in order to maintain “legitimacy” as a moral agent.

This recognition - that for a punishment and the punisher to be seen as having moral legitimacy both must be beyond reproach - helps distinguish democratic, rule of law governments from other forms. As such, I suggest that the same principle applies equally today to meeting the legal duty to accommodate disabled inmates.

The eventual development of penitentiaries in England, replacing punishments such as ‘transportation’ (to America and later to Australia) or execution, with a term of imprisonment, changed the nature of punishment and gradually led to concepts such as proportionality in which courts would determine the appropriate duration of a sentence of imprisonment relative to the gravity of the offence for which punishment was being imposed.

In Canada, imprisonment has become an accepted consequence[301] for serious criminal conduct.[302] While one aspect of sentencing is the consistent application of quantitative sentencing standards among individuals convicted of each type of criminal offense, there are other factors that impact the intensity of punishment. As Justice Karakatsanis (dissenting) observed in *Sharma:*[303]

> ”A fit sentence is always defined by the totality of circumstances. The question is always: for “this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?””.

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[301] There are other consequences, such as non-carceral sentences for less serious crimes and *Review Act* confinement for individuals found to be NCRMD.
[302] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 50.
[303] *R. v. Sharma*, *supra* note 22 at para 169. [Dissenting Opinion]

While this statement by Justice Karakatsanis indicates the multiple considerations that should inform a sentencing judge, her reference to “committed by this offender” recognizes the relevance of personal characteristics (including an inmate’s disability) to the sentencing decision. It is not, in my view, a significant additional step for the sentencing court to consider as well, the harsher impact of imprisonment on a disabled but unaccommodated inmate. Inadequate accommodation of disabled inmates may seem relatively insignificant compared to public flogging or being placed in stocks in a public square but for disabled inmates, although the physical experience may be different, the impact on dignity is present in each case[304].

It is not just the manner in which the coercive power to punish is exercised that has changed over time. In democratic states, including Canada, decisions as to how the power is exercised are made by elected representatives through legislation rather than by decree issued by an unelected sovereign. One consequence of this change is that, as with all decisions and actions by a democratically elected government, the discharge of the mandate to imprison is, or can be, the subject of public scrutiny. While military strength and control of a police force remain as a significant means of exercising power, today in Canada the exercise of government’s power needs to come within the rule of law in order to receive continued public support.

Accommodation of disabled federal inmates has not historically been at the top of the list of government actions subjected to public scrutiny, nor is it likely ever to be. Instead this role falls to specialized bodies like the OCI, the Standing Senate Committee on

[304] The current perspective on dignity was referenced earlier in *R. v. Hills, 2023 SCC 2*, *supra* note 8 at 133.

Human Rights, or to the Canadian courts, whose public reports draw attention to areas where the power to imprison is not being conducted in accordance with the legal requirements within which CSC is expected to operate.

Historic Concept of Civil Death

In her doctoral dissertation, Tanya Monforte provided a useful working description of “civil death”:

> “Civil death implies the lawful abrogation of legal rights… the death of the legal subject or, alternatively understood, an end to legal personality through the abrogation of rights”[305].

Historically, the removal of an individual’s rights might have been through a formal process. Daniel Beer provides a descriptive account of the 1861 civil (rather than physical) execution of Mikhail Mikhailov in St. Petersburg, Russia[306]. Beer describes the ritualistic process in which Mikhailov, his head half shaved, was driven in a “chariot of shame” to a specially prepared scaffold, the sentence read and a specially prepared sabre broken over his head in a mock execution, prior to his being taken for six years of hard labour followed by lifelong exile to Siberia. Through this public display of “the absolute supremacy of the autocracy and the legal and moral defeat of individuals who dared to challenge it”, Beer explains that Mikhailov “ceased to be a legal subject within the Russian Empire: he had lost all his civil rights; his formal relations with his family had been severed; his right to own property had been terminated.”

Debra Parkes suggests that although, “… the concept that prisoners lost all civil and property rights, was abolished by English legislation in the late 19th century”, a paucity

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[305] Tanya M Monforte, *A Theory of Civil Death: Legal Status and Security Under Neoliberalism* (Dissertation, McGill University, 2021) n 14. Montforte includes a quotation from Joshua M Price, *Prison and social death* (New Brunswick: Rutgers University Press, 2015 at p. 19).

[306] Daniel Beer, “Civil Death, Radical Protest and The Theatre of Punishment in the Reign of Alexander II” (2021) 250:1 Past Present 171–202. Daniel Beer is a professor of modern history at Royal Holloway, University of London.

of judicial and legislative oversight has effectively allowed aspects of civil death to persist:

> "…the 20th century pre-Charter history of corrections in Canada was largely characterized by a legislative and judicial "hands off" doctrine that entailed a broad delegation of power to administrative officials and a reluctance by courts to intervene in the affairs of prisons where prisoners claimed inhumane conditions or treatment. [307]

Without strong judicial oversight aspects of a modern form of civil death have persisted.[308] The concept of civil death is frequently found in U.S. felon disenfranchisement laws. As of 2011 legislation operated in forty-eight states to prevent those in prison from voting, with thirty-five states extending the prohibition to those on parole as well. In some states the prohibition is permanent.[309]

The preservation of prisoner civil rights is reflected in CCRA section 4(d) which preserves inmate rights except to the extent necessary to carry out the sentence.[310] Despite this I suggest that some aspects of the concept have survived and may provide some insight as to how disabled inmate non-accommodation can be considered acceptable by CSC.

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[307] Debra L Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (22 April 2008) Rochester, NY, online: <https://papers.ssrn.com/abstract=1123712> at 633.

[308] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11.

[309] Jonah A Siegel, "Felon Disenfranchisement and the Fight for Universal Suffrage" (2011) 56:1 Soc Work 89–91. Siegel references a 2006 paper which estimated disenfranchisement exceeded 5 million Americans, including 2 million who had completed their sentences, (Christopher Uggen, Jeff Manza & Melissa Thompson, "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders" (2006) 605:1 Ann Am Acad Pol Soc Sci 281–310.

[310] "…(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;"

Although it was not always the case, Canada is relatively unique in having judicially preserved the right to vote while incarcerated[311]. The idea that a person in Canada convicted of a crime suffers civil death has been rejected by the SCC in *Martineau*[312]*,* *Solosky*[313] and *Sauvé*[314] and in the *Corrections and Conditional Release Act* section 4(d) [315]. The concept of "civil death" was rejected by the SCC in *Sauvé*[316] as "ancient and obsolete". Despite this, aspects of the concept of civil death may help to understand a lack of public concern over the conditions of disabled inmates.

In *Sauvé*, faced with the federal government's arguments reminiscent of civil death, the SCC expressly rejected the concept and preserved inmate voting rights.[317] Following the earlier 1993 decision[318] in which a provision in the *Canada Election Act* prohibiting voting by all inmates was declared unconstitutional, the federal government had introduced legislation limiting the inmate voting prohibition to those serving over two years in a federal institution. Led by then Chief Justice McLachlin, the Court decided

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[311] See, for example, the discussion of *Sauvé* by Christopher J. Wydrzynski [Christopher J Wydrzynski, "Sauvé v. Canada: The Right Thing to do for Wrongdoers?" (2004) 83:1 Can Bar Rev 261 at 271–274.], which references the stricter approach in other jurisdictions, particularly some American states, which impose a lifetime disenfranchisement on ex-felons.
[312] *Martineau v Matsqui Institution*, [1979] 1 SCR 602 at 624–625. Mr. Justice Dickson (with Chief Justice Laskin and Justice McIntyre) in minority concurring reasons rejected the "disciplinary exception" to the availability of *certiorari* and confirming rejection of the argument that prisoners have no legally enforceable rights.
[313] *Solosky v The Queen,* 1980 Supreme Court of Canada 821. While not expressly stated, the preservation of a right to solicitor-client privilege demonstrates recognition of rights surviving incarceration.
[314] *R v Sauvé,* [2002] SCR 519.
[315] *CCRA*, *supra* note 3. Section 4 provides: "4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows: … (d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;"
[316] *R. v. Sauvé, supra* note 316 at para 43.
[317] *R. v. Sauvé, supra* note 316.
[318] *Sauvé v Canada (Attorney General) (No 1),* [1993] 2 SCR 438.

that even this revised version of the legislation was itself in breach of section 3 of the *Charter.*[319]

While the majority categorically rejected the arguments in support of the voting restriction, it is notable in *Sauvé*[320] that both the arguments by the Government of Canada, (suggesting that the broad denial of rights was an appropriate societal response and an accepted component of the punishment of wrongdoers), and the discussion by Justice Gonthier,[321] (agreeing, in dissent with the federal government's arguments), supported federal inmate disenfranchisement, and in doing so, effectively supported the constitutionality of some level of perpetuation of the civil death concept.[322].

While some rights, such as the right to vote, have led the SCC to criticize "civil death" as "ancient and obsolete", the fact that it was necessary for the SCC, as recently as 2002 to expressly reject the concept, leaves the possibility that at least some aspects influence the ways in which inmates, including disabled inmates, are treated. This was explained in *May v. Ferndale*[323] by LeBel and Fish JJ:

> 23 … At common law, for a long time, a person convicted of a felony and sentenced to prison was regarded as being devoid of rights. Convicts lost all civil and proprietary rights. The law regarded them as dead. On that basis, courts had traditionally refused to review the internal decision making process of prison officials … By the

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[319] *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*, *supra* note 104.
[320] *R. v. Sauvé, supra* note 316.
[321] See for example the comment by Gonthier J. in dissent at para. 146 "Ultimately, in part, "the disenfranchisement is a civil disability arising from the criminal conviction." Gonthier J.'s 'civil disability' seems to be just a different expression for 'civil death'].
[322] The government's stated objectives for denying the right to vote were described by McLachlin CJC [para. 21] as "denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or "enhanc[e] the general purposes of the criminal sanction""
[323] *May v Ferndale Institution, 2005 SCC 82,* [2005] 3 SCR 809 at paras 23–24.

> end of the 19th century, although the concept of civil death had largely disappeared, the prisoner continued to be viewed in law as a person without rights … .
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> 24 It was this view that provided the original rationale for Canadian courts' refusal to review the internal decisions of prison officials. The "effect of this hands off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions … .

While judicial oversight is now more available, the issue of judicial deference, discussed further below, remains, and I suggest, enables elements of civil death to continue.

Resource Shortages, complexity and the Impossibility of accommodating the full range of disabilities among inmates[324];

If one includes both physical and mental disabilities within the population at large, and the likelihood that not only are they present within federal correctional institutions but that they manifest to a greater extent within a carceral environment, the challenge for CSC to meet its legal accommodation obligations is extensive and diverse.

A study from 2020 reported that 73% of federally incarcerated men and 79% of federally incarcerated women met the criteria for one or more current mental disorders[325].

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[324] This point is made by the Senate Report: "During meetings with health care professionals as well as with federally-sentenced persons during site visits, the committee was informed that the CSC is struggling to deliver appropriate health services in a timely manner. The committee heard that medical needs are going unmet or are inappropriately dealt with. Some penitentiaries lack the appropriate resources required for the provision of health care. The committee was informed that doctors, psychiatrists, and dentists are only contracted to work a restricted number of times weekly or monthly." Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 110.

[325] Of these, 12% of federally incarcerated men and 17% of federally incarcerated women met the criteria for a current major mental illness, including bipolar, major depressive, and psychotic disorders. Mental Health Commission of Canada, *supra* note 290. For comparison, the Senate Report indicated "30% of federally-sentenced persons and 50% of federally-sentenced women have mental health disorders, far exceeding rates in the general population." Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 42.

Data on physical disabilities in Canadian prisons are less available, however the 2022 Statistics Canada survey on disabilities reported 8 million Canadians (or 27 percent of the population) with a disability of which 55.8 percent (or approximately 15 percent of the population) had a physical disability. If data was readily available, similar percentages could be expected within federal prisons. The lack of useful data, as well as the likely number and variety of disabilities presents a significant hurdle to CSC's ability to meet its legal and moral obligations.

For inmates with a physical disability the nature of obligations may be relatively straightforward. Specialist organizations such as the Canadian National Institute for the Blind can provide recommended accommodations for visual disabilities. Accommodation of disabilities must be more than a one-time initiative. Items can be broken or damaged, whether due to the disability or as a result of interactions with other inmates. Timely replacement or repair is necessary but is frequently not carried out or delayed within federal institutions[326].

The study by the Mental Health Institute of Canada (MHIC)[327] identified several areas where changes are needed in the federal correctional system. Chief among these were the need for continuity of care and the need to address shortages of appropriate health professionals. There are different health authorities and health services providers across different institutions, which can result in very little continuity, particularly for inmates with a mental disability. Inmates may be transferred involuntarily to another

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[326] I have experience with visually disabled inmates waiting several months for simple repair or replacement of a badly damaged white cane, for example.
[327] Mental Health Commission of Canada, *supra* note 290.

institution or another province or territory. This can significantly impede any mental health treatments and jeopardize rehabilitation and release.[328]

MHIC signal a number of consequences that result from lack of continuity in health care including hindering:

> "… a person's ability to recover or improve their quality of life and manage their symptoms. In addition, the lack of continuity can often interfere with a person's access to medications owing to the lack of information sharing (i.e., access to patient records). Such interruptions can lead to delays in a person's access to necessary medications, repetitions of medications in a course of treatment, and can force inmates to switch medications, depending on whether or not a specific medication is allowed in a given jurisdiction."[329]

The MHIC report identified quality of care and supports as a second significant impediment to improvement, highlighting the focus on a punitive, (aimed at curbing public-safety concerns) rather than a rehabilitative approach.[330]

The Senate Report contains an extensive discussion about the limits of mental health care within federal correctional institutions. The report describes the 'downward spiral' often experienced by inmates with FASD and reviews evidence as to how correctional officers who, the report says are not trained to deal with mental health issues, adopt a

[328] Similar evidence is provided in the Senate Report, "Two studies were conducted by the CSC to better understand the prevalence of metal health issues among incoming federally-sentenced men and incoming federally-sentenced women in 2015 and 2018 respectively. The study on federally-sentenced men found that, within the sample, 70% of federally-sentenced "met criteria for at least one mental disorder." Likewise, the study on federally-sentenced women found "that more than three-quarters of women inmates had a lifetime or current mental disorder and at least two-thirds of the women reported symptoms consistent with a co-occurring mental disorder with alcohol/substance use or borderline or antisocial personality disorder."" Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 120.
[329] Mental Health Commission of Canada, *supra* note 290 at 5.
[330] *Ibid* at 6. The findings in the MHIC report are consistent with the findings in the Canadian Senate in their report regarding "inadequate access to essential services such as health care, dental care, and mental health care" - Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 40.

'security-first' approach in contrast to the therapeutic approach within psychiatric hospitals that the Senators visited.[331]

Contributory effects of judicial deference and lack of oversight

Within the legal context that CSC operates, a level of judicial deference to the "expertise" of the CSC in relation to matters of sentence administration has been recognized.[332] The history of judicial deference towards corrections decisions creates another barrier to access to justice and the assertion of inmate human rights.[333] Lisa Kerr has noted this, suggesting that,

> "The prospect of excessive judicial deference to the claims of prison administrators poses a chronic threat to the scope and viability of prisoners' rights."[334]

Kerr suggests that there is a general tendency for courts to accept the evidence of CSC over that of inmates. As a result, she discusses the need for expert witnesses to effectively challenge the perceived expertise of prison officials. As was discussed in Chapter 1, the cost of expert witnesses is usually out of reach for most disabled federal inmates.

The importance of judicial oversight cannot be overstated. Even simple observation as described by Jeremy Bentham in the concept of the Panopticon, has been recognized as contributing to improved behaviours. One of the key elements of the Panopticon

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[331] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 119–129.
[332] Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill Law J 43–94.
[333] *Maltby, Sinclair, Perrin and Morin v Saskatchewan Attorney General, Saskatchewan Minister of Social Services, and Director of the Saskatoon Provincial Correctional Centre, (1982) 143 DLR (3d) 649, 20 Sask R 366, 2 CCC (3d) 153*, 1982 Court of King's Bench for Saskatchewan at para 20 [*Maltby (1982)*]. This case is frequently cited for the principle of judicial deference, "The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate."
[334] Kerr, *supra* note 132.

was the structure in which it was possible to observe inmates in a way that they did not know whether or not they were being observed. The effect of this perceived observation or oversight was intended to create a situation in which behaviour was based on the assumption of being constantly monitored. The lesson from the Panopticon is that whether or not one is actually being observed is less important than the perception that observation at any time is possible. In contrast, the confidence that one is not being observed, or even that there is tacit approval for one's wrongful conduct, can have the opposite effect, even leading to erosion of the rule of law within institutions. A level of confidence in judicial deference rather than oversight can similarly contribute to rule of law erosion.[335]

Despite multiple OCI reports identifying the need for change, the many deficiencies and corresponding recommendations identified in the Senate Report, the paucity of meaningful judicial criticism or legislative change can be taken by CSC as support to maintain the status quo in their operation of federal prisons. In part this may be a result of a broad view by the courts of what constitutes 'routine administrative' matters within the federal system. In *Maltby*[336], for example, the Court discussed the "wide-ranging deference" to be accorded prison officials regarding policies and practices:

> [4] As a rule courts uniformly refrain from considering challenges to routine administrative assignments. Courts do not sit to superintend the administration of the jail and penitentiary systems. What the courts do sit to do is to Insure that those who administer that system comply with the requirements of the Canadian Constitution. The duty to confront and resolve constitutional questions regardless of their complexity and magnitude is the very essence of judicial

[335] It is ironic that Bentham's concept was intended to monitor prisoners but that it has equal application with respect to monitoring the conduct of the jailer.
[336] *Maltby (1982)*, *supra* note 142 at para 21. Similar language was repeated in the *Aziga* case by the Ontario Superior Court of Justice - *R v Aziga*, [2008] CANLII 39222 at para 34.

> responsibility. When these arise the courts cannot simply abdicate their function out of misplaced deference to some sort of hands off doctrine.
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> …
>
> “ [20] 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. *Bell* V. *Procunier*, 417 U.S. at 827. The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate. “

The SCC, has also reinforced deference in relation to CSC decisions such as transfers and threat or risk assessments.[337]

Ineffectiveness of existing “remedies”.

The existing remedies available to disabled federal inmates suffer from deficiencies. The internal CSC grievance process has been the subject of criticism from multiple sources. The Standing Senate Committee on Human Rights has called the grievance process “broken and ineffective”[338]. The Federal Court of Canada has described it as “slow and inadequate”.[339] Among academics, Professor Debra Parkes has called the grievance process “woefully inadequate”[340], and Associate Professor Adelina Iftene, discussing *May v. Ferndale*[341], which she characterized as “one of the most important

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[337] Affirmed most recently in *Sipos v Canada*, [2025] FC 1413. See also, *Mission Institution v Khela*, [2014] 1 SCR 502 at paras 73–75.
[338] Standing Senate Committee on Human Rights & Honourable Nancy J. Hartling, *supra* note 11 at 39–40.
[339] *Gates v Canada (Attorney General), 2007 FC 1058*, 2007 Federal Court at para 29.
[340] Kim Pate & Debra L Parkes, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006), online: <https://papers.ssrn.com/abstract=1583191> at 270.
[341] *May v. Ferndale Institution, 2005 SCC 82, supra* note 325.

legal indictments of the internal grievance system and of judicial review in Federal Court. (para 64), has said:

> "The SCC affirmed the importance of judicial oversight over prison decisions and stated that the concurrent jurisdiction of superior courts by way of habeas corpus is essential because the grievance procedure is highly flawed, and superior courts are better placed to hear prison claims than the Federal Court."

To be effective, an accountability mechanism needs to be "independent, accessible and provide enforceable remedies."[342] The criticisms of the grievance process suggest that it is not independent, has limited accessibility and rarely provides enforceable remedies.

In the case of the grievance process, while the process itself is simple, there is a lack of decision-maker independence and objectivity. The distinction between independence and impartiality was recognized and described by Justice LeDain in *Valente:*[343]

> "Impartiality refers to a state of mind or attitude … in relation to the issues and the parties in a particular case"… "Independence" … connotes not only a state of mind but also a status or relationship to others …that rests on objective conditions or guarantees."

Independence is thus a higher standard, involving both an objective state of mind and circumstances which are free from any possible interference. A 2006 article[344] by Debra Parkes and Kim Pate sets out the key elements of independence of a decision-maker as requiring:

1. *Legal and Operational Autonomy* – with no reporting relationship with the body that it is overseeing;

[342] Iftene, *supra* note 50 at 154. Citing Pate & Parkes, "Time for Accountability", *supra* note 339.
[343] *Valente v The Queen*, [1985] 2 SCR 673.
[344] Pate & Parkes, "Time for Accountability", *supra* note 339 at 266–268.

2. *Financial Autonomy* – with no ability of the body it oversees to influence or impact its budget;
3. *Appointment and Dismissal Autonomy* – in the form of security of tenure – such that the body being overseen has no control or influence over the decision-maker's tenure; and
4. *Associational and ideological autonomy* – which, in a prison context would require avoidance of the tendency to be overly sympathetic to concerns about institutional security.

The grievance decision-maker, being an employee of CSC, fails in all of these categories of independence/autonomy and yet, given the financial and access to justice challenges faced by disabled federal inmates, this is the primarily, and often the only recourse available to them to seek a remedy for human rights breaches.

A disabled inmate may also reasonably be concerned about possible consequences from a grievance, such as retaliation in the form of increased disciplinary measures, or exclusion from a prerequisite program required for parole eligibility.

Without an effective grievance process it is hard to see how unaccommodated disabled inmates can succeed in enforcing their human rights. As such the current grievance process does not meet the requirements of the "legality principle", which, in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*[345], the SCC has said "derives from the rule of law". The SCC, discussed the "legality principle" in relation to public interest standing. Several of the Court's comments in that case have

[345] *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, *supra* note 37.

relevance to the ability of disabled inmates to challenge unlawful state action. In paragraph 33 -35, Chief Justice Wagner, for the Court, explained the legality principle [citations omitted]:

> [33] The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action …. Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law".
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> [34] Access to justice, like legality, is "fundamental to the rule of law" … As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice".
>
> [35] Access to justice means many things, such as knowing one's rights, and how our legal system works; being able to secure legal assistance and access legal remedies; and breaking down barriers that often prevent prospective litigants from ensuring that their legal rights are respected. …"

Applying Chief Justice Wagner's comments to the flaws which have been identified with the CSC grievance process, it seems obvious that the current grievance process falls outside the "legality principle" and gives rise to a rule of law failure.

Commissioner's Directive 081 (CD) sets out the complaint and grievance process for inmates. Pursuant to section 7 of CD081 the process consists of three levels:

a. written complaint – submitted by the offender at the institution/district parole office and responded to by the supervisor of the staff member whose actions or decisions are being grieved
b. initial grievance (institutional/district level) – submitted to the Institutional Head/District Director
c. final grievance (national level) – submitted to the Commissioner.

Independent, impartial assessment may be available only if a grievance reaches the level of judicial review as there does not appear to be any other form of impartial assessment within the CSC grievance process. The decision-maker at each stage is internal to CSC and independence (or at least, objectivity) is arguably reduced through the delegation authorized by CD081 section 8 which provides:

> "The Assistant Commissioner, Policy, has been designated to make decisions with respect to grievances at the national level. As well, any Correctional Service of Canada (CSC) staff member who holds a position equal to or higher in rank than that of Assistant Commissioner may also be designated by the Commissioner to make decisions with respect to grievances at the national level."[346]

On the issue of enforceable remedies, although section 21 of CD081-1[347] provides for corrective action, it is drafted in a way that leaves a considerable scope for direction by CSC staff as to what corrective action to take:

> 21. "The decision maker will determine the corrective action that best resolves the complaint/grievance so similar issues do not occur in the future. Some considerations for corrective action are the following:
>
>   a. the redress sought by the grievor
>   b. the seriousness of any misconduct involved and any further actions necessary to respond
>   c. the potential for repetition by other staff members of the actions for which there was a complaint
>   d. what is required to ensure future compliance with relevant legislation and policy
>   e. who is accountable for implementing the corrective action."

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[346] Correctional Service Canada, "Commissioner's directive 081: Offender Complaints and Grievances" (13 March 2023), online (policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/081.html>.
[347] Correctional Service Canada, "Guidelines 081-1: Offender complaint and grievance process" (13 March 2023), online (consultations;policies): <https://www.canada.ca/en/correctional-service/corporate/acts-regulations-policy/commissioners-directives/guidelines/081-1.html> Last Modified: 2023-03-13.

While the redress sought by the grievor is a ‘consideration’ for the decision-maker, it is not determinative, nor does it carry any greater weight than the other considerations. For disabled inmates it is of little value to receive a grievance response which effectively says “you’re right, it wasn’t intentional, and we will instruct staff not to do it again” only to have the same or similar discriminatory conduct repeated a week later due to the lack of a meaningful enforcement mechanism or consequences faced by CSC or its staff members. I argue that this outcome is enabled by the lack of independence of the grievance decision makers and the absence of *stare decisis* or of mechanisms to identify and address the systemic discrimination implications of repeated accommodation failures.

An internal audit from 2018[348] identified shortcomings in the fairness, timeliness and accessibility requirements in the CCRA. Reviewing the specific requirements:

> (1) CSC have "a procedure for fairly and expeditiously resolving offenders' grievances on matters within the jurisdiction of the Commissioner"; and
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> (2) that "every offender shall have complete access to the offender grievance procedure without negative consequences".

the 2018 audit found multiple flaws, stating that it was

> “unclear as to who was responsible for overseeing the complaints and grievance process Service-wide. Additionally, there was little

[348] *Audit of offender redress, 2018*, audit;program descriptions, by Correctional Service Canada, audit;program descriptions (6 March 2018) online: <https://www.canada.ca/en/correctional-service/corporate/transparency/audits-evaluations/offender-redress.html>. The 2017-2018 Annual Report of the Office of Correctional Investigator summarized the audit’s findings as “As a recent internal audit reminds once again, the internal inmate complaints and grievance system is broken, ineffective, dysfunctional, and, in my opinion, likely beyond repair or salvage. For grievances that reached national headquarters (NHQ) for a final decision, the average response time was 217 working days for "high priority" cases, and 281 working days for "routine priority" grievances. National reviews maintained the institutional decision in 97.9% of all cases. Chronic backlogs persist and even the unreasonably protracted response times laid out in CSC policy (not law) are not met 45% of the time. This is not a system that can be relied upon to provide assurance or feedback on CSC operations in real-time.”

> Service-wide oversight being conducted other than a self-assessment at the institutional level."

The audit further commented on oversight deficiencies, noting that it:

> "…did not find any proactive or on-going oversight to ensure that all institutions were following the requirements of the Commissioner's Directive."

and that

> "The lack of such oversight allowed for institutions to be in non-compliance with the Directive, as was found at some of the sites visited." [349]

The audit also found confidentiality concerns in multiple cases of potential conflict of interest or breach of privacy where responses to grievances were sent to the complainant through the Visits and Correspondence Unit, (V&C) which opens correspondence before forwarding. The specific concern identified was one of 'conflict of interest' in that:

> "V&C is staffed by correctional officers, who, by virtue of the fact that they interact directly and frequently with offenders, can often be the subject of offender complaints and grievances. This may create a conflict of interest, whereby the individuals who may be the subject of a complaint or grievance are charged with the responsibility of ensuring that complaints and grievances are delivered to the institutional administration."

As recently as the 2020-2021 Annual Report, the Correctional Investigator commented on the "egregious delays and backlogs" in the CSC grievance system[350]. For a disabled inmate, facing the challenges of incarceration and having limited ability to seek redress, these "egregious delays and backlogs" reinforce the absence of the rule of law

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[349] *Ibid* at 11.
[350] Office of the Correctional Investigator Government of Canada, "Annual Report of the Office of the Correctional Investigator 2021-2022 - Office of the Correctional Investigator" (1 November 2022), online: <https://oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20212022-eng.aspx> Last Modified: 2022-11-03.

or any meaningful recourse, from the federal prison system. In other words, there is no meaningful way for that inmate to hold the system accountable for its accommodation failures.

As noted by Parkes and Pate[351] most other remedies suffer from a lack of accessibility. Poverty, lack of education and limited legal resources combine to place them out of the reach of most disabled federal inmates. Those that are able to pursue judicial remedies risk retaliation or possible transfer.

A further deficiency in any remedies is the concept of "carceral clawback".[352] This term, used by Pat Carlen[353] describes the tendency of correctional institutions, despite government reform mandates, to revert to past practices. The tendency for carceral claw back may be bolstered by limited judicial supervision, allowing CSC for example, to interpret an adverse human rights or judicial decision as relating to a single individual rather than as requiring systemic change.

As discussed earlier, the rule of law, described by Dicey and expanded by Lord Bingham includes principles of accessibility, protection of fundamental human rights and fair adjudicative procedures[354]. From the discussion to this point it is hopefully apparent that disabled federal inmates frequently do not enjoy access to these principles in relation to legally required accommodation. While it is conceivable that these deficiencies are simply inadvertent omissions from the processes designed for

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[351] Pate & Parkes, "Time for Accountability", *supra* note 339 at 269–273.
[352] *Ibid* at 253–254.
[353] Pat Carlen, "Carceral Clawback: The Case of Women's Imprisonment in Canada" (2002) 4:1 Punishm Soc 115–121. At 116, Carlen describes carceral clawback as "…the power of the prison constantly to deconstruct and successfully reconstruct the ideological conditions for its own existence"
[354] Merritt, "Rule of law", *supra* note 21.

CSC, it is not unthinkable that the complaint and grievance process, although superficially appearing compliant with the rule of law, has been designed in a manner that avoids providing the actual benefits of the rule of law. It is worth noting that even the reports of the OCI, rather than being tabled directly in Parliament, are tabled through the Minister of Public Safety, further eroding independent review of CSC practices and policies.

An American concept – the “Structural Error Doctrine”[355], while not directly applicable, may assist in understanding the potential criticism of the processes available to unaccommodated disabled federal inmates. The doctrine distinguishes between “harmless” errors, which would have had no effect on outcome, and “structural” errors, which have a fundamental and detrimental impact on the fairness or outcome of a legal process.

Applying the concepts of the structural defects to the inmate grievance process a court might find that the lack of independence, inaccessibility resulting from the inmate compensation structure, limited legal resources and other factors, are effectively denying disabled federal inmates’ access to the rule of law.

Changes Needed

From the many reports describing the disabled inmate accommodation gap, respect for the rule of law is not a sufficient government priority within its carceral institutions to achieve a level of accommodation that is up to the point of undue hardship. While the reasons may be less relevant than the fact that accommodation needs are not being

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[355] Zachary Henderson, “A Comprehensive Consideration of the Structural-Error Doctrine” (2020) 85:4 Mo Law Rev, online: <https://scholarship.law.missouri.edu/mlr/vol85/iss4/6>.

met, this thesis has discussed the reasons in order to understand the necessary changes. Necessary changes include:

(1) an independent, fair process for addressing allegations of human rights breaches;
(2) ongoing independent oversight with enforcement capabilities;
(3) measures to enable inmates whose rights are breached to understand their rights and to access effective remedial processes; and
(4) meaningful consequences for failures by CSC to meet its legal obligations.

Independent, Fair Process

The discussion in this thesis and in the Senate Report and reports by the OCI have established that the existing grievance process is neither independent, impartial nor fair. It is a process staffed and controlled by CSC which takes advantage of the limited resources of most inmates and the process exhaustion requirement to place judicial review beyond the reach of most disabled inmates. It is a system designed to create an appearance of due process without the necessary impartiality.

Although the Canadian Human Rights Commission and Canadian Human Rights Tribunal provide an impartial fair process, these organizations are operating at or near capacity, resulting in sometimes lengthy delays. Because these agencies deal with all federal cases, one option might be to create a separate division to deal with corrections issues and to move cases to a properly resourced commission and tribunal at an early stage rather than exhausting the grievance process.

Ongoing Independent Oversight

Following on the lack of independence/ impartiality, the thesis has discussed the level of judicial deference towards CSC with respect to institutional administration which has consistently created an accountability gap. Without strong accountability, decisions regarding inmate human rights accommodation may be made on the basis of budget or other internal priorities. The result has been a steady erosion of the rule of law. A greater level of judicial involvement throughout sentence administration, rather than simply at the time of sentencing, could encourage CSC to modify its processes. A first step in this change would be a more relaxed approach to the requirement that a disabled inmate exhaust the internal grievance process prior to having the ability to seek judicial review of a CSC decision regarding accommodation. A second area for consideration could include Parole Board decisions which decline a CRCA s. 121 release application [terminally ill, physical or mental health likely to suffer serious damage if offender continues to be held in confinement, or for whom continued confinement would constitute an excessive hardship that was not reasonably foreseeable at the time the offender was sentenced][356]

Possible remedial measures

As this thesis has discussed, federal inmates have limited access to legal information or the resources necessary to pursue their legal rights. While this is true for all federal inmates, the impact is magnified for those with disabilities. Remedial measures could include better access to up-to-date legal material and increased support from the legal

[356] *CCRA*, *supra* note 3, s 121.

community. Test cases and class actions, some of which are presently underway, can provide some support.

Consequences

Sentence Reduction or Release

In *Jordan*[357], the SCC was prepared to see offenders released rather than imprisoned when their section 11(b) *Charter* right to a trial within a reasonable time had been breached. This is a very strong message by the SCC that the government must comply with the *Charter.* There is a parallel situation in the case of disabled (or other) inmates who have been convicted but whose rights are being ignored or violated by the government through failure to accommodate. This result has already been seen in *Steele*[358] when the unavailability of suitable programs for Mr. Steele resulted in an order that he be released from custody.

The value of a SCC measure such as that developed by the Court in *Jordan* can be seen in the increased effort to meet the timelines established by the SCC[359]. It is evident from *Jordan* that the government does respond to such measures. A similar approach by the SCC in the case of non-accommodation disabled inmate human rights breaches should similarly attract the full attention of the CSC and government. If the CSC were faced with sentence reductions or inmate releases for failures to

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[357] *R. v. Jordan*, *supra* note 1.
[358] *Steele v. Mountain Institution*, *supra* note 225.
[359] See for example, the Ontario Court of Justice Practice Direction regarding trial scheduling: *Ontario Court of Justice Practice Direction: Jordan-Compliant Trial Scheduling*, online: <https://www.ontariocourts.ca/ocj/notices/jordan-compliant-trial-scheduling/>.

accommodate, budgets would be adjusted to ensure that funds were available and proper training provided.

Senate Bill S-230

The Canadian Senate has introduced Bill S-230[360] which contains similar provision for sentence reduction when an inmate's rights have been breached through abuse of solitary confinement. As set out in the introductory summary to Bill S-230 key elements include:

(a) requiring that inmates with disabling mental health issues be transferred to a hospital;

(b) requiring that any confinement in a structured intervention unit for longer than 48 hours must have an order of a superior court;

(c) allowing for the provision of correctional services and plans for release and reintegration into the community to persons from disadvantaged or minority populations by community groups and other similar support services; and

(d) allowing sentence reduction applications if there has been unfairness in the administration of an individual's sentence.

While Bill S-230 specifically targets solitary confinement, many of the provisions would be beneficial to ensure government compliance with its accommodation obligations.

[360] "Public Bill (Senate) S-230 (44-1) - First Reading - Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona's Law) - Parliament of Canada", online: <https://www.parl.ca/DocumentViewer/en/44-1/bill/S-230/first-reading>.

1. Judicial Oversight – Bill S-230 would require judicial supervision of anyone who is in solitary confinement for more than 48 hours.[361] For disabled inmates, access to judicial supervision when accommodation was not forthcoming would prioritize the provision of legally required accommodation. In a presentation to the Senate Human Rights Committee in connection with Bill S-230, Senator Kim Pate, speaking in support of judicial oversight and sentence adjustment, gave evidence linking “correctional interference with the lawful sanction” with “shortening a sentence:

> “The other recommendation for judicial oversight involves the recognition that Louise Arbour made, also in 1996, that where the treatment individuals receive at the hands of CSC amounts to correctional interference with the lawful sanction, that should be reviewable by a judge in the same way a judge can, in a sentencing situation, review sentence and determine that the conditions of confinement pretrial should be recognized in shortening a sentence. So that remedy is also included.”[362]

2. Mental Health Professionals – The Bill would require increased use of properly trained mental-health professionals. In light of the overwhelming number and variety of disabilities within federal institutions, this recommendation could be expanded to encompass an increase in all health professionals providing services, both mental and physical.

3. Correctional Plans – A Commissioner’s Directive recognizing the obstacles that disabled inmates face with program compliance and requiring accommodation would conceivably contribute to better possibilities for rehabilitation and release.

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[361] Section 5, amending CCRA section 33, *Public Bill (Senate) S-230 (44-1) - Third Reading - Providing Alternatives to Isolation and Ensuring Oversight and Remedies in the Correctional System Act (Tona’s Law) - Parliament of Canada*, *supra* note 2.
[362] Senate of Canada, *supra* note 280.

Chapter 4 Summary

This chapter has considered reasons that the Canadian penitentiary system is poorly equipped to deal with the wide range of accommodation requirements of disabled inmates. I have suggested that this is largely due to factors, including the lack of reliable data, a view of punishment which may still contain remnants of the historic concept of civil death, judicial deference and the inaccessibility or ineffectiveness of the remedies available to federal inmates. Appropriate measures, with sufficiently serious consequences, would significantly improve the likelihood that CSC would be motivated to bring itself within the rule of law.

CHAPTER 5 - Conclusion

This thesis has argued that the evidence of failure by CSC to discharge its accommodation obligations to disabled federal inmates, with no meaningful recourse available to those inmates, amounts to a rule of law failure. To support this the thesis has argued that accommodation rights are human rights and legal requirements up to the point of undue hardship. Government compliance with its legal obligations is required by Canadian law. Because a democratic government's authority to govern rests on the support of the electorate and compliance with the rule of law, impeding or removing rights through imprisonment must be conducted in accordance with the rule of law. This obligation applies from arrest, through trial, conviction, sentencing and continues during the time of imprisonment.

In this thesis I have attempted to first describe the legal framework that empowers the state, through CSC to imprison those within its control, including people with a disability, and to identify the source of the state's obligations with respect to accommodation for those with disabilities, both in custody and not in custody. Within the CSC legal environment, the role of the judiciary, including judicial deference to matters of prison administration has been identified and later discussed as an obstacle to both legal and in terms of fairness and to examine possible reasons for the rule of law failure. Case examples have provided context regarding the human rights and rule of law failures by CSC, and contributing factors, including the many constraints faced by those in prison have been discussed.

The discussion regarding carceral burden has shown that regardless of which punishment objective one considers, when a democratic state elects to imprison people, it accepts an accompanying burden to care for them while in state custody and that in Canada this burden extends to ensuring accommodation of disabled prisoners, to the point of undue hardship.

The importance of proportionality in punishment has been recognized by Canadian courts. In discussing the disproportionate conditions experienced by unaccommodated disabled inmates the thesis has considered the history of imprisonment as punishment, the concept of civil death and factors such a resource shortages which limit the ability of CSC to respond to the wide range of disabilities within its institutions. Other contributing factors discussed included the contributory effects of judicial deference and the systemically ineffective grievance process and other remedies available to disabled inmates.

Having discussed the reasons for the rule of law failure, the thesis concludes that without significant changes, it is unlikely that disabled inmate accommodation will ever reach a sufficient level of priority among competing demands for government resources. Inmates are in prison as punishment. The thesis concludes that is probable that more significant measures, similar to those found in *Jordan*, or Senate Bill S-230, providing for sentence reductions or release in cases of accommodation failure will be necessary if the legal obligation to accommodate disabled inmates is to be met by CSC, bringing it back within the rule of law.

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