

10th Anniversary of the Arbour Commission Report

“One must resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner.”

Madam Justice Louise Arbour 1996

Background

On International Women's Day, March 8, 2001, CAEFS, together with the Native Women's Association of Canada (NWAC), and with the support of the Canadian Bar Association (CBA), the National Association of Women and the Law and 24 other equality-seeking groups in Canada wrote to the Chief Commissioner of the Canadian Human Rights Commission (CHRC) to urge the Commission to conduct a broad-based systemic review and issue a special report, pursuant to section 61(2) of the *Canadian Human Rights Act*, regarding the treatment of women serving federal terms of imprisonment. The areas of concern raised then persist today. They are:

- ◆ **discrimination on the basis of sex** faced by all women throughout the system as it contravenes several of the prohibited grounds articulated in s. 3(1) of the *Canadian Human Rights Act*. This discrimination affects the way women are classified, the kind of programs and treatment they receive and the timely manner in which they are released back into the community. The situation facing Canadian women prisoners has been well documented in a series of reports. See:

Justice Louise Arbour. Commission of Inquiry into Certain Events at the Prison for Women in Kingston:

http://www.justicebehindthewalls.net/resources/arbour_report/arbour_rpt.htm

Auditor General of Canada 2003:

[http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20030404ce.html/\\$file/20030404ce.pdf](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20030404ce.html/$file/20030404ce.pdf)

- ◆ **discrimination on the basis of race** that is the particular experience of Aboriginal and other racialized women. Aboriginal women represent 30% of the total population of federally sentenced women, yet they are less than 3% of the population of Canada. The over representation is all the more pronounced among prisoners classified as maximum security, where Aboriginal women usually represent approximately 50% of the maximum security population. As well, Aboriginal women are 14% less likely to be released into the community on conditional release than are non-Aboriginal women. See:

Annual Reports of the Correctional Investigator (1999 – 2005):

http://www.oci-bec.gc.ca/reports_e.asp

Submission of Native Women's Association of Canada:

<http://www.elizabethfry.ca/submissn/nwac/1.htm>

discrimination **on the basis of disability** is experienced by federally sentenced women with cognitive and mental disabilities. A lack of appropriate placement options and treatment programs, re-training, classification as maximum security inmates, contributes to worsening the situation for the growing number of women with disabilities now in Canadian prisons, where those with the most disabling challenges tend to be further isolated in segregation units See:

Submission of the DisAbled Women's Network of Canada:

<http://www.elizabethfry.ca/submissn/dawn/1.htm>

- ◆ Canadian prisons, like their US counterparts, are rapidly becoming “dumping grounds” for the mentally ill in lieu of community-based support and treatment programs. See:

Special report on US prisons by Human Rights Watch International

<http://www.hrw.org/press/2003/10/us102203.htm>

The complaint launched by CAEFS and other national equality seeking groups, focused on the systemic discrimination experienced by federally sentenced women. The named party responsible for that discrimination is the Government of Canada, and not merely the Correctional Service of Canada. The facts associated with the sheer numbers of women serving federal sentences, their demographics, particularly those with respect to race and disability, presented a prima facie case of discrimination. Accordingly, it was the contention of CAEFS and other organizations that the onus falls on the Government of Canada, including the Correctional Service of Canada, to establish how they will address the discriminatory patterns evidenced by their own data and research.

- 1) [CAEFS' Submission to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women](#)
[View in PDF format](#) (343k)
- 2) [The Lived Experience of Discrimination: Aboriginal Women Who are Federally Sentenced & The Law: Duties and Rights](#)
[View in PDF format](#) (252k)
- 3) [CAEFS' Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women](#)
[View in PDF format](#) (181k)

Key findings of the Report

- The Commission found that, while CSC has made some progress in developing a system specifically for women offenders, systemic human rights problems

remain, particularly with regard to Aboriginal women, racialized women and women with disabilities.

- The report sets out the following guiding principles to ensure that the treatment of federally sentenced women is consistent with human rights laws:
- Federal women prisoners have a right not to be discriminated against and a right to correctional services as effective as those received by men;
- Equality must be based on the real needs and identities of women in prison, not on stereotypes or generalizations; and
- The duty of CSC is to promote and protect the human rights of women and means that they must take into account the fact that some of the reasons women are criminalized, their life experiences and their rehabilitation needs are unique.

The report identified systemic barriers to full equality and put forward 19 recommendations for action related to:

- risk and need assessment;
- safe and humane custody and supervision;
- rehabilitation and reintegration programming; and
- mechanisms for redress.

Furthermore, the Office of the Correctional Investigator also reported that a security classification process appropriate to women offenders has yet to be finalized. Yet it was initially identified as problematic by the Task Force on Federally Sentenced Women in 1990 and further commented on by Justice Arbour in 1996. There remain significant barriers to the safe reintegration of women offenders, such as the overall lack of access to programming specifically designed to meet the needs of women. As well, there is not enough meaningful employment and employability programming, and inadequate accommodation and support for women offenders upon their release into the community.

Access to programs in secure units remains problematic. Only one true minimum-security institution exists and it is under-utilized. Systemic barriers and limited opportunities persist for Aboriginal women offenders to reintegrate in a timely fashion into their home communities as evidenced by the disproportionate number of Aboriginal offenders on statutory release.

Most disturbing as a statistic is the over-representation of Aboriginal women in maximum security. Although Aboriginal women account for only 3% of the female population of Canada, they represent 31% of the women incarcerated in federal prisons and account for fully 46% of the women classified as maximum security.

The maximum security units are full in all but the newly opened Fraser Valley prison. CSC just recently contracted with two women to review the cases of women segregated

in the Edmonton Institution for Women. Since both are unfamiliar with the current law and the history of correctional responses to the women in the ‘max’ units, stakeholders (per s. 77 of the CCRA) are concerned that this initiative may further entrench current practices.

Segregation is only supposed to be used for specific safety and security reasons and that segregation was otherwise considered an exceptional measure.¹ In 2002-2003, however, CSC reported that there were 375 federally sentenced women in prison, and that there were 265 admissions of women to segregation the same year.

Aboriginal women tend to be segregated more often and for longer periods of time. As of 2003 the CHRC reported that an Aboriginal woman had been in segregation for 567 days. That woman spent a significant part of last year unconscious and on life support, as a result of her ‘treatment’ within a segregated prison mental health unit.

Another young Aboriginal woman who is currently segregated has spent most of her sentence in isolation, more than 1500 days of which are classified as segregation by CSC. In January of this year, after spitting in the presence of staff [no spittle made contact with any staff member] this young woman was not only charged with assault, but reports being encouraged by staff to plead guilty to assaulting a correctional officer, without the benefit of legal advice. After her guilty plea, and without the benefit of the context of the guilty plea, this woman was sentenced to an additional sentence of six months in prison.

Louise Arbour expressed that the worst aspect of segregation is that the prisoner has no idea how long they will be there, and no assurances that her health needs will be addressed. She wrote that “the findings that I made earlier support the conclusion that prolonged segregation is a devastating experience, particularly when its duration is unknown at the outset and when the inmate feels that she has little control over it.”² She also recognized that women are affected differently than men by segregation. The use of segregation interferes with the rehabilitation process, in addition to jeopardizing safety and mental health by exacerbating distress, especially for those with histories of physical and/or sexual abuse.³

Remedies for Violations of Rights

The third paragraph of Article 2 of the International Covenant on Civil and Political Rights requires that effective remedies be provided for persons whose rights have been violated. This provision calls for every person to have their claims of human rights violations heard by a competent administrative, judicial or legislative authority. This is a right that is denied to women in federal prisons.

¹ Canada, Fourth Report to the United Nations Human Rights Committee.

² Canada, Commission of Inquiry into Certain Events at the Prison for Women in Kingston. Report. Ottawa, Public Works and Government Services Canada, 1996. (Cat. No. JS42-73/1996E). (Commissioner: the Honourable Louise Arbour).

³ The Canadian Human Rights Commission, “Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women”. Ottawa, 2003.

Appropriate and timely resolutions of harassment grievances have yet to become a reality. Limited training in women-centred approaches for front-line staff has further hindered progress despite previous commitments.

Finally, the Service's governance structure remains inconsistent with that recommended by Justice Arbour to ensure the development of an effective "separate stream" for women's Corrections.

Currently the CSC provides for an internal grievance process that is available to federally sentenced prisoners who feel that CSC has violated their civil and political rights. The grievance procedure was criticized by Louise Arbour following the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Of greatest significance was her finding that CSC could not be expected to process complaints against themselves because of their inability to accept responsibility for what happens within the institutions.⁴

According to the Office of the Correctional Investigator, the power imbalance between prisoners and CSC/prison staff are a key cause of the ineffectiveness and inefficiencies of the current complaint mechanisms.⁵ Of course this power imbalance is amplified for women from traditionally marginalized groups such as racialized women, Aboriginal women, women with disabilities, and women who are lesbian.

There are other explanations for the weakness and ineffectiveness of the current grievance procedure system. Women are rarely adequately informed about their right to grieve, and if even when they are fully aware of the right, they are most usually discouraged from utilizing the grievance process. Often women will not pursue a grievance because of a perceived or real threat that doing so might cause correctional staff to be an increased risk to them. For example, in order to implicitly or explicitly discourage women from lodging grievances, women in prison report instances where they are advised or encouraged to consider how grievances might affect their family contact visits, their community release planning process, their security classification and other aspects of their ability to progress through the correctional setting during their sentence.⁶

CAEFS has found that grievances rarely come to the attention of the national leadership in CSC, as they are often deemed to be 'resolved' by staff. In many cases the complaint is given to the staff member it is against or to the person who made the decision which is being grieved. This is unfair and illegal.

⁴ Canada. Commission of Inquiry into Certain Events at the Prison for Women in Kingston. *Report*. Ottawa: Public Works and Government Services Canada, 1996. (Cat. No. JS42-73/1996E). (Commissioner: The Honourable Louise Arbour).

⁵ Office of Correctional Investigator. *Correctional Investigator's Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women January 2004* (online). Available: http://www.oci-bec.gc.ca/reports/OCIResponse_CHRC_e.asp. [June 2005]

⁶ Canadian Association of Elizabeth Fry Societies. *CAEFS' Response to the Canadian Human Rights Commission's Consultation Paper for the Special Report on the Situation of Federally Sentenced Women 2003*. (online). Available: http://www.elizabethfry.ca/caefs_e.htm. [June 2005]

It has been communicated to women in both overt and subtle ways that if they complete the process they will experience an unpleasant outcome. It basically comes down to the women's word against that of the staff. CAEFS has seen and is aware of numerous situations at every prison for women, where prisoners have been pressured to either not file a complaint or grievance; or, if they have already filed, to withdraw it.

According to a report by the Women's Legal Action and Education Fund (LEAF), there is a presumption of staff innocence that skews the investigative process in favour of the respondent. This is coupled with an assumption that complainants are overly sensitive, overly excited and lack credibility.⁷ What is most disturbing is that the Cross-Gender Monitor found that the grievance process was being used to route allegations of sexual misconduct against staff. It is inappropriate to be using the grievance process, which is ineffective and time consuming, to process complaints that deserve immediate attention and resolution.⁸

Federally sentenced women who are located in provincial facilities due to the Exchange of Services Agreements (ESAs) between the federal government and provincial governments do not even have access to the grievance process. This is because CSC does not require that the Corrections and Conditional Release Act (CCRA) apply to the conditions of confinement to which women are subjected pursuant to ESAs and/or Memoranda of Understanding (MOU) with provincial correctional and health authorities. Most provincial corrections and mental health legislation do not have adequate grievance provisions.

In their 2003-2004 Annual Report, the Correctional Investigator once again documented the failure of the Correctional Service of Canada to implement key recommendations of Madam Justice Arbour's 1996 *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Over the years the Correctional Service repeatedly claimed that it took "decisive action on all [of Justice Arbour's] 87 recommendations/sub-recommendations, with few exceptions." But subsequent significant inquiries, commissions, and reports^[5] for the most part have repeated many of Justice Arbour's key 1996 recommendations.

As a consequence of the inaction, the Office of the Correctional Investigator recommend that in May of 2006 the Minister appoint an Expert Committee to publicly report on the progress detailed in the Service's response on the advancement of human rights, fairness and equity issues since Madame Justice Arbour's report of 1996 the Committee's report to be provided to the Minister by October 2006. To date, no such Committee has been appointed.

⁷ Women's Legal Education and Action Fund (LEAF). *The Tip of the Iceberg: Barriers to Disclosure of the Abuse and Mistreatment of Federally Sentenced Women May 2003* (online). Available: http://www.elizabethfry.ca/caefs_e.htm. [June 2005].

⁸ Correctional Service of Canada. *Cross Gender Monitoring Project: Third and Final Annual Report 2000* (online). Available: http://www.csc-scc.gc.ca/text/prgrm/fsw/gender3/toc_e.shtml. [June 2005].

Conclusion

The urgency of the situation has most recently found voice in the Concluding Observations of the United Nations Human Rights Committee reviewing Canada's compliance with the International Covenant on Civil and Political Rights. The Committee called upon Canada to implement the recommendations of the Canadian Human Rights Commission (2003) and, in particular, to establish external redress and adjudication processes for prisoners (UNHRC 2005). Article 26 of the UNHRC report requires that Canada report back within one year on how it plans to implement those recommendations.

Recommendation:

The cornerstone of any oversight strategy must be accessible and effective judicial review for illegalities and rights violations, including the remedial sanction proposed by Justice Arbour.⁹

Justice Arbour also underscored the reality that there are a relatively small number of federally sentenced women, and that they generally pose an extremely low risk to public safety. She urged the government to recognize this as an opportunity to pilot innovative programs and initiatives,¹⁰ to reduce the number of women who are incarcerated in federal prisons, for as Justice Arbour suggested, to do so would “free the resources necessary to ensure that those who are imprisoned are treated in accordance with the law.”¹¹

⁹ In making her recommendation for judicial oversight to remedy interference with the integrity of the sentence, Justice Arbour addressed the concern that such a remedy would be an undue burden on an already stretched court system. Justice Arbour noted that any additional burden “would only be so in relation to the Correctional Service’s non-compliance with the law” (at p. 184), pointing out that there are ways to control frivolous litigation, should such a problem arise.

¹⁰ Ibid. p.229.

¹¹ Canada. Commission of Inquiry into Certain Events at the Prison for Women in Kingston. *Report*. Ottawa: Public Works and Government Services Canada, 1996, pp. 184-5. (Cat. No. JS42-73/1996E). (Commissioner: The Honourable Louise Arbour).

The following groups recommend that the Minister of Justice and the Minister of Public Safety take immediate action to implement these recommendations:

Amelia Rising Sexual Assault Centre
Amnesty International
Assaulted Women's Helpline
Canadian Association of Elizabeth Fry Societies
Canadian Federation of University Women
Canadian Research Institute for the Advancement of Women
DisAbled Women's Network of Ontario
Education Wife Assault
John Howard Society of Canada
Marine & Environmental Law Institute - Dalhousie Law School
Human Rights and Indigenous Education and Advocacy Workers - Australia
Justice for Girls
Ka Ni Kanichihk
Life Spin
Low Income Families Together
Match International
National Association of Women and the Law
National Network for Mental Health
National Organization of Immigrant and Visible Minority Women of Canada
Native Women's Association of Canada
Ontario Women's Health Network
Provincial Advisory Council on the Status of Women
Sexual Assault Support Centre of Ottawa
South Asian Women's Centre
Strength in Sisterhood
Women's Legal Education and Action Fund
Womenspace

Additional Letters of Support from:

Canadian Bar Association
Congress of Aboriginal Peoples
Seventh Step Society of Canada
St. Leonard's Society of Canada