Position of the Canadian Association of Elizabeth Fry Societies (CAEFS) Regarding the Exchange of Services Agreement (ESA) Between the Correctional Services of Canada (CSC) and the Government of British Columbia

Background

The Exchange of Services Agreement (ESA) between the Correctional Services of Canada (CSC), on behalf of the Government of Canada, and B.C. Corrections, on behalf of the Government of British Columbia, was executed prior to the coming into force of the *Corrections and Conditional Release Act* (*CCRA*). It is the position of CAEFS, therefore, that the ESA does not reflect or protect federally sentenced women, as it does not incorporate the requisite legal obligations of the Correctional Service of Canada (CSC).

Section 743.1 of the *Criminal Code of Canada* describes the circumstances in which a person may be sentenced to serve a term of imprisonment in a penitentiary, or in a prison other than a penitentiary. Generally speaking, a person sentenced to more than two years or an aggregate of two years or more is sentenced to a penitentiary, whereas anyone sentenced to a term of imprisonment that is less than two years will be sent to a prison other than a penitentiary.

Section 743.3 of the *Criminal Code* provides that a sentence must be served in accordance with the enactments and rules that govern the institution to which the person is "sentenced". Accordingly, a person who is sentenced to more than two years is a person who is thereby sentenced to a penitentiary and consequently serves that sentence in accordance with the legislation governing penitentiaries. On the other hand, a person sentenced to imprisonment for less than two years is thereby sentenced to imprisonment in accordance with legislation governing prisons "other than penitentiaries".

Section 91(28) of the *Constitution Act* provides that the federal government is responsible for penitentiaries and s. 92(6) confers jurisdiction on the provincial government for prisons and reformatories other than penitentiaries.

Section 16(1) of the *CCRA* provides legislative authority for the negotiation of exchange of service agreements between federal and provincial governments. Pursuant to this provision, agreements may be negotiated whereby federally sentenced prisoners may be confined in provincial prisons and provincially sentenced prisoners may be confined in penitentiaries.

Section 16(2) of the *CCRA* stipulates that a prisoner serving a provincial sentence who is transferred under an exchange of service agreement to a penitentiary is subject to the legislative and regulatory regime which governs the penitentiary, notwithstanding s. 743.3 of the *Criminal Code* [which provides that the provincial sentence must be served in accordance with provincial law]. With respect to prisoners serving a federal term of imprisonment, however, there is no comparable provision in the *CCRA*. This reality notwithstanding, federally sentenced prisoners who are transferred to provincial prisons under exchange of services agreements end up being subjected to provincial enactments, policies and procedures.

It is CAEFS' view that this differential treatment by Parliament demonstrates a clear and purposeful legislative intention to keep federally sentenced prisoners under federal jurisdiction. As articulated by the legislative scheme of the *CCRA,* Parliament clearly expressed a desire to see specific and different treatment of the two categories of prisoners. Moreover, CAEFS contends that the clear policy reason for this approach is the reality that whatever perceived disadvantage may be experienced by provincially sentenced prisoners who might be held in federal penitentiaries, such disadvantage will be relatively short term. The reality for women serving federal prison terms is obviously vastly different.

Federally Sentenced Women Imprisoned at the Burnaby Correctional Centre for Women

In order to comply with the *Criminal Code* and the *CCRA*, the ESA between Canada and British Columbia must reflect the legislative obligations of CSC to federally sentenced prisoners. The current ESA between the Government of Canada and the Government of British Columbia does not provide for the application of the provisions of the *CCRA* to federally sentenced women (FSW) imprisoned at the Burnaby Correctional Centre for Women (BCCW). FSW from the Pacific Region who are serving lengthy sentences imprisoned at BCCW are therefore disadvantaged for the duration of their period of incarceration. This is especially true for women serving life sentences.

Legislative authority and jurisdiction cannot be conferred or altered by a mere contractual agreement. Accordingly, the extent to which the existing ESA, by virtue of paragraph 6, attempts to place federally sentenced women under the "jurisdiction" of the provincial prison, it is not valid. Furthermore, pursuant to the *CCRA*, CSC has many statutory obligations to federally sentenced prisoners which must be fulfilled, whether the prisoner is confined in a penitentiary or in a provincial prison.

CSC cannot contract out of its statutory obligations to prisoners, especially by contracting with a third party -- in this case, the province of British Columbia. Under the current legislation, if the federal government wishes to contract with the province to confine a federal prisoner in BCCW or any other provincial jail, then the federal government has an obligation to ensure that the circumstances of such confinement comply with the legislative and regulatory provisions of the *CCRA*.

FSW imprisoned at BCCW experience disadvantage as a result of the reality that they are not confined in accordance with the provisions of the *CCRA*. Some specific examples of the manner in which they experience such disadvantage are articulated below.

Placement and Transfer

Paragraph 2 of the ESA between the federal and B.C. governments contravenes sections 28 and 29 of *CCRA*. These sections vest authority exclusively in CSC to penitentiary place and transfer FSW and stipulate that such authority is to be exercised in accordance with a range of criteria set out in the Act and Regulations. Paragraph 2 of the ESA disregards these fundamental legal entitlements of FSW by giving authority to British Columbia to decide, together with the federal authorities, which women will be confined at Burnaby and therefore designated as prisoners who are covered by the agreement.

Penitentiary transfers affect the liberty interest of prisoners and thus have often attracted the scrutiny of the courts. Such procedural protections as access to the CSC grievance process and the Office of the Correctional Investigator are important entitlements which are available to all federally sentenced prisoners pursuant to the provisions of the *CCRA*. Federally sentenced women cannot lose such entitlement by virtue of an ESA.

Although paragraph 4(d) of the ESA stipulates that decisions must be made fairly, it does not adequately address the legal duty of CSC to act fairly and in accordance with due process. The ESA should not, indeed can not derogate from that duty. Moreover, the ESA should specifically require that decisions of the Commissioner of Corrections with respect to transfers from the jurisdiction of the Government of Canada to the Government of B.C. are subject to all of the provisions of the *CCRA*. As such, a protocol which incorporates the transfer procedures outlined in the *CCRA* should be included in the ESA.

Paragraphs 7 and 19 of the ESA specify BCCW as the place of confinement for all federally sentenced women in the Pacific Region, except for those granted humanitarian passes, court appearances, medical appointments and/or community integration releases. These provisions also specify that if the fifty ESA beds at BCCW are full and there are no additional bed spaces available there, FSW may be transferred to other provincial prisons in British Columbia. Even when BCCW is full, the ESA should not permit FSW to be confined in other provincial prisons.

Programs

Pursuant to s. 76 of the *CCRA*, CSC is required to provide a range of programs for FSW to address their needs and contribute to their successful community reintegration. Section 80 of the *CCRA* requires that Aboriginal prisoners also receive specific programming and services. CSC must assess which programs are needed to fulfil these requirements and then secure the agreement of B.C. to provide them. The agreement currently provides that all core programs be made available to both federally and provincially sentenced women.

In order to ensure that FSW have access to the programs and services to which they are entitled, this position should be reconsidered. It might be that certain programs should be offered separately to FSW and those women serving provincial sentences, given the reality that the issues affecting the two groups may be different. In addition, CAEFS membership in B.C. and FSW are concerned that federally sentenced women have been delayed in being admitted to programs because provincial prisoners serving short sentences have been given priority access to programs in order to allow them to access same prior to their release.

It is particularly important that federally sentenced women have access to meaningful vocational and employment/ job skills acquisition and apprenticeship programs. Such opportunities are not generally developed as a priority for provincially sentenced women, since their shorter terms of imprisonment necessarily limit the potential for them to be able to receive as much benefit from them.

Grievance Procedure

The grievance procedure set out in the *CCRA* and the Regulations is not available to FSW at BCCW, nor is a comparable procedure provided by the B.C. Corrections Act. FSW are consequently denied a significant entitlement which Parliament has made available to prisoners serving lengthy terms of imprisonment in penitentiaries. FSW whose geographic locations result in them having to serve their sentences at BCCW should not be prejudiced by being prohibited from being able to accessing the same types of review and remedial procedures.

All conditions of confinement should be subject to the sort of regularized scrutiny envisioned and provided for by the grievance process. Further, it is especially important that prisoners serving long terms of imprisonment have a means of redress against wrongful or illegal actions which may be applied to them over an extended period of time. Indeed, particularly since the publication of the Arbour Commission report, and given her findings and recommendations, there can be no serious dispute of either the reality that wrongful acts are perpetrated by prison authorities, or the necessity for access to internal and external bodies for review and remedial action.

Decisions of provincial authorities cannot be subject to review by a federal body. Pursuant to the *CCRA,* the Commissioner of Corrections is the final decision maker in terms of grievances from prisoners in federal penitentiaries. It is therefore our view that, at the very least, the ESA should provide for a grievance procedure which parallels the procedure set out in the *CCRA* and Regulations.

Correctional Investigator

In the current ESA, there is no reference to the Office of the Correctional Investigator, and that Office does not generally involve itself in matters relating to federally sentenced women in B.C. Moreover, s. 167(2) of the *CCRA* excludes from the purview of the Correctional Investigator any investigations into "any problem of an offender related to the offender's confinement in a provincial correctional facility, whether or not the confinement is pursuant to an [ESA]". Although this provision is the statutory recognition of the constitutional limitations of a federal investigative body over provincial authorities, it should not be interpreted to limit the power of the Correctional Investigator to examine decisions of CSC which effect federally sentenced women in a provincial institution.

For instance, for the reasons set out above, the CSC has an obligation to provide programs designed particularly to address the needs of FSW, and, more particularly, pursuant to s. 79 of the *CCRA*, CSC has a further obligation to provide programs and services for Aboriginal FSW. If CSC does not ensure that those programs are provided at BCCW, the Correctional Investigator should not be hampered from exercising its investigative function to examine the failure of CSC to meet its statutory duty. Given the lack of such access to the Correctional Investigator, FSW at Burnaby are seriously disadvantaged. They are advised that they may complain to the B.C. Ombuds office, but that office has no jurisdiction over federal bodies and is consequently impotent in terms of holding CSC to its statutory obligations.

Segregation

Segregation from the general prison population is such a severe and restricted form of confinement that the courts have held that it constitutes a separate and distinct form of confinement and therefore requires its own separate legal basis and review. Parliament recognized the severity of segregation as a sanction and stipulated that its use by correctional authorities must be monitored and controlled to guard against its arbitrary imposition. The Arbour Commission found that the arbitrary and illegal use of segregation was so prevalent at the Prison for Women and that correctional acceptance of such was so pervasive throughout the CSC that external scrutiny by the courts is necessary to properly regulate extended periods of segregation.

The ESA should include the same sorts of provision for segregation review boards as those that are mandated pursuant to the *CCRA* and with the understanding that all decisions affecting the segregation of federally sentenced women prisoners must be made in accordance with the provisions in ss. 31-37 of the *CCRA*. It is simply unacceptable that FSW imprisoned in B.C. are subject to a lesser standard of legal procedural protection with respect to the use of segregation than are federally sentenced prisoners in penitentiaries across the country.

Contents and Disclosure of Files

Paragraph 11(b) of the ESA stipulates that the federal and provincial governments may agree upon what information can be released by the Director of Burnaby upon request by a federally sentenced woman, as well as what information will be subject to the *Privacy Act* and the *Access to Information Act*. This derogates from the broader entitlement of FSW pursuant to s. 27 of the *CCRA*, to information used in the process of decision making by correctional authorities. In addition, it attempts to circumvent the *Access to Information Act* and the *Privacy Act* by limiting the information to which those Acts apply. All information produced by BCCW for and about FSW, in fulfillment of the provisions of the ESA must be considered to be federal information, to which both of the federal Acts apply.

One example of the serious disadvantage which can and has resulted from the current reality is the limited access that FSW have to their records for preparation for parole hearings. This places federally sentenced women at Burnaby in the position of having a lower standard of fairness apply to them in the crucial area of decision making concerning conditional release.

Canadian Charter of Rights and Freedoms

The foregoing provides specific examples of the failure by the Government of Canada to apply the *CCRA* to federally sentenced women imprisoned at BCCW pursuant to the ESA. The provisions of the *CCRA* and s. 743.3 of the *Criminal Code of Canada* demonstrate and articulate a clear legislative recognition of the importance of national standards with respect to the governance of the conditions under which prisoners serve long terms of imprisonment -- the most severe sanction provided for in the criminal justice system. The *CCRA* in particular provides checks and balances to the power of correctional authorities, and provides obligations to and entitlements for federally sentenced prisoners. It is especially important that prisoners who are subject to the power of the state for lengthy periods of time have these protections.

The ESA ignores this basic reality. As a consequence, FSW at BCCW are seriously disadvantaged as compared to other federally sentenced prisoners in Canada. The ESA carves out of a discrete category of prisoners who are distinguished by being women. Men serving federal sentences of imprisonment in British Columbia receive the same statutory entitlements and protections as do other federally sentenced prisoners. This distinctive treatment of women therefore also serves to replicate the situation which prevailed for far too long at the Prison for Women in Kingston. CAEFS views the treatment of FSW at BCCW as a discrete population of women prisoners who, by virtue of the ESA receive lesser entitlements, as a clear violation of s. 15 of the *Canadian Charter of Rights and Freedoms*.

Conclusion

It is sadly ironic that because FSW are so few and although women represent a more law abiding portion of the Canadian population, they are not currently afforded the protection of the very legislative schemes enacted to protect them. CAEFS urges the Government of Canada, via CSC and its negotiations with the Government of British Columbia, to rectify the inequities imposed upon FSW in the Pacific Region by virtue of the inadequacies of the current ESA.

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