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LEGISLATIVE SUMMARY

# BILL C-56:
# AN ACT TO AMEND THE CORRECTIONS AND CONDITIONAL RELEASE ACT AND THE ABOLITION OF EARLY PAROLE ACT

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Lyne Casavant
Jean-Philippe Duguay
Legal and Social Affairs Division
Parliamentary Information and Research Service

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.



*Legislative Summary of Bill C-56*
(Legislative Summary)

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# LEGISLATIVE SUMMARY OF BILL C-56: AN ACT TO AMEND THE CORRECTIONS AND CONDITIONAL RELEASE ACT AND THE ABOLITION OF EARLY PAROLE ACT

## 1 BACKGROUND

Bill C-56, An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act, was introduced in the House of Commons by the Honourable Ralph Goodale, then Minister of Public Safety and Emergency Preparedness, on 19 June 2017.[1]

Bill C-56 amends the *Corrections and Conditional Release Act* (CCRA)[2] to

- establish an initial presumptive limit of 20 days for offenders to be confined in administrative segregation, which will be reduced to 14 days after 18 months of application of this new regime;
- prescribe independent external reviews of the cases of offenders held in administrative segregation beyond the presumptive limit and of those who have been in administrative segregation at least three times or for 90 cumulative days in the last calendar year;
- reintroduce the principle of "least restrictive" measures in certain provisions of the CCRA; and
- reinstate an offender's right to an oral hearing by the Parole Board of Canada following a suspension, termination or revocation of parole or statutory release.

Finally, the bill also amends the *Abolition of Early Parole Act* (AEPA)[3] to make offenders who committed an offence before 28 March 2011 but only sentenced for the offence after that date eligible for accelerated parole review.

Since its introduction, Bill C-56 has been largely superseded by Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act,[4] which replaces administrative and disciplinary segregation with structured intervention units.

### 1.1 SEGREGATION IN FEDERAL PENITENTIARIES

The CCRA allows for two types of segregation: disciplinary segregation and administrative segregation.

Disciplinary segregation is a punitive measure used to sanction offenders by isolating them from the general population. Because it is a disciplinary measure, it is imposed by an independent chairperson appointed pursuant to the *Corrections and Conditional Release Regulations* (the Regulations)[5] on offenders who have been charged with, and found guilty of, a serious disciplinary offence. The maximum duration for disciplinary segregation is 30 days, although offenders with two consecutive disciplinary segregation sanctions may spend a maximum of 45 days in segregation (section 40(2) of the Regulations). The rules for disciplinary segregation are outlined in section 44(1)(f) of the CCRA and in sections 29, 40(1) to 40(3), and 97(2)(a) of the Regulations. Correctional Services Canada (CSC) policies on the use of disciplinary segregation are laid out in Commissioner's Directive 580.[6] Bill C-56 does not propose amendments to provisions pertaining to disciplinary segregation.

Unlike disciplinary segregation, administrative segregation is not considered to be a punishment under the CCRA. According to the Act, it is a measure of last resort that can be taken only when the institutional head (warden) is satisfied that there is no reasonable alternative. The purpose of this type of segregation "is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates" (section 31(1)). There are only three grounds that can justify confining an offender in administrative segregation. These are set out in section 31(3) of the CCRA:

- The offender poses a threat to the security of the institution or the safety any person.
- The offender could interfere with an investigation that could lead to a criminal charge or a serious disciplinary offence.
- The offender's safety would be at risk if the offender were not segregated.

Offenders may be placed in administrative segregation voluntarily or involuntarily. Although administrative segregation placements are subject to periodic reviews, there are no time restraints on such placements. CSC is simply required by law to return the offender to the general offender population "at the earliest appropriate time" (section 31(2)). The rules for administrative segregation are laid out in sections 31 to 37 of the CCRA and sections 19 to 23 of the Regulations.

### 1.2 A NOTE ON TERMINOLOGY: "SOLITARY CONFINEMENT"

The term "solitary confinement" is generally applied in international fora to capture various forms of segregation, including those justified for security and disciplinary reasons. While there is no universally agreed-upon definition of the term "solitary confinement," definitions provided by the Istanbul Statement on the Use and Effects of Solitary Confinement (Istanbul Statement) and the United Nations Standard Minimum Rules on the Treatment of Prisoners (also known as the "Nelson Mandela Rules") are frequently cited.

### 1.2.1 Istanbul Statement on the Use and Effects of Solitary Confinement

In December 2007, medical doctors, social workers and other professionals gathered in Istanbul, Turkey for the 5th International Psychological Trauma Symposium. During this conference, a panel discussion was held on international practices of solitary confinement and isolation. In response to "an increase in the use of strict and often prolonged solitary confinement practices in prison systems in various jurisdictions across the world," the Istanbul Statement was adopted on 9 December 2007.[7] It defines solitary confinement as the "physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day."[8]

### 1.2.2 United Nations Standard Minimum Rules on the Treatment of Prisoners

The United Nations Standard Minimum Rules for the Treatment of Prisoners were first adopted in 1957 but were revised in 2015 and are now known as the "Nelson Mandela Rules."[9] The Nelson Mandela Rules "are often regarded by states as the primary – if not only – source of standards relating to treatment in detention, and are the key framework used by monitoring and inspection mechanisms in assessing the treatment of prisoners."[10] The Nelson Mandela Rules define solitary confinement as "the confinement of prisoners for 22 hours or more a day without meaningful human contact."[11] The Rules add that "prolonged solitary confinement" is solitary confinement that exceeds 15 consecutive days.[12]

### 1.2.3 The Correctional Service of Canada and the term "Solitary Confinement"

It should be noted that CSC does not appear to consider that administrative segregation amounts to solitary confinement. In its response to the Coroner's Inquest Touching the Death of Ashley Smith, it stated that "the term solitary confinement is not accurate or applicable within the Canadian federal correctional system."[13] CSC went on to say that "Canadian law and correctional policy allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives."[14] However, in a recent court challenge, *British Columbia Civil Liberties Association v. Canada (Attorney General)* (*BCCLA v. Canada*) Justice Leask concluded in his reasons for judgment that administrative segregation "is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide."[15]

## 1.3 CONCERNS WITH THE USE OF ADMINISTRATIVE SEGREGATION

Concerns with the use of administrative segregation in federal penitentiaries have been raised in substantive public documents (e.g., reports of public inquiries or by the Correctional Investigator) since at least the 1970s. Some critics have argued that there is an overreliance on administrative segregation, which raises issues of procedural fairness. They also question whether the psychological effects of administrative segregation justify its stated purpose.[16] From 2012 to 2015, reliance on administrative segregation had been stable. In 2015–2016 and 2016–2017 decreases in the use of administrative segregation were recorded (see Table 1 below).

**Table 1 – Administrative Segregation Placements, 2012–2013 to 2016–2017**

| | Women | Men | Indigenous | Non-Indigenous | Total |
|---|---|---|---|---|---|
| 2012–2013 | 416 | 7,805 | 2,526 | 5,695 | 8,221 |
| 2013–2014 | 349 | 7,787 | 2,482 | 5,654 | 8,136 |
| 2014–2015 | 461 | 7,858 | 2,595 | 5,724 | 8,319 |
| 2015–2016 | 378 | 6,410 | 2,056 | 4,732 | 6,788 |
| 2016–2017 | 289 | 5,748 | 2,058 | 3,979 | 6,037 |

Source: Table prepared by the authors using data obtained from Public Safety Canada, "Table C17," *2017 Corrections and Conditional Release Statistical Overview*.

More recently, concerns about administrative segregation have been raised in two court challenges: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen (CCCLA v. The Queen)* and *BCCLA v. Canada*, as mentioned above.[17] In both cases, the plaintiffs alleged that the administrative segregation provisions of the CCRA violate the *Canadian Charter of Rights and Freedoms*[18] (the Charter) and sought a declaration of invalidity pursuant to section 52 of the Charter. Both Courts found that certain practices related to the administrative segregation of federal offenders violate section 7 of the Charter.[19] In *BCCLA v. Canada*, the Court also found that these practices contravened section 15 of the Charter.[20] It is important to note that these cases are not identical and that sometimes distinct arguments have been put forward. Both judgments have been appealed.

### 1.3.1 Duration of Administrative Segregation Placements

The psychological harm that can result from being confined in administrative segregation has been the source of criticism in Canada for some time. In 1975, James A. Vantour led an investigation into the use of segregation by the Canadian Penitentiary Service.[21] The investigation found that most offenders who spent time in segregation expressed "resentment, bitterness, considerable hatred and described deep depression, loneliness, concern about their physical and mental [well-being], and a feeling of hopelessness."[22] The investigators explained that smashing cells, self-mutilation, and suicide were not uncommon responses to segregation.

They concluded that segregation is not practical and "enhances the inmate's anti-social attitude and, in general, constitutes a self-fulfilling prophesy."[23]

These concerns have continued to be raised in subsequent reports and in litigation. In *BCCLA v. Canada*, Justice Leask of the British Columbia Supreme Court stated that some of the harms caused by administrative segregation include

> anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill inmates.[24]

Further, some of CSC's research has revealed that self-injurious behaviour is likelier to occur in segregation (45.1% vs. 21.6% in the general inmate population). While its research found that suicides are less likely to occur in segregation (22.2% vs. 60% in the general inmate population), it identified prior segregation as a possible precipitating factor in close to 10% of suicides that occurred in the general inmate population.[25]

One frequent concern is the indeterminacy of administrative segregation. In *BCCLA v. Canada*, Justice Leask stated that the indeterminate nature of segregation "exacerbates its painfulness, increases frustration, and intensifies … depression and hopelessness."[26] Section 31(2) of the CCRA simply states that the inmate should be released from administrative segregation "at the earliest appropriate time." With no maximum limit, some placements have lasted years. According to CSC's statistical report for 2015–2016, more than 347 men, the majority of whom (177) were Indigenous, spent more than 120 days in administrative segregation during that reporting period (see Table 2 below).

Recent scientific studies have shown that solitary confinement can cause irreparable psychological harm, especially if it is imposed for more than 15 days. This was recognized in the Mandela Rules' prohibition against prolonged solitary confinement.

The Coroner's Inquest Touching the Death of Ashley Smith made a recommendation to limit the duration of solitary confinement for all offenders to a maximum period of 15 days (until it is abolished entirely). In response, CSC stated that it was unable to fully support the coroner's recommendations regarding segregation and seclusion "without causing undue risk to the safe management of the federal correctional system."[27] That argument was reiterated by the government in *BCCLA v. Canada*. The judge, however, disagreed with CSC, adding that the 15-day maximum "is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm."[28]

CSC's statistical overview reports do not provide information on the aggregate number of segregation placements lasting 30 days or more, but it does provide a breakdown of various lengths of placement. As shown in Table 2, between 2014–2015 and 2016–2017, the number of administrative segregation placements lasting 30 days or more diminished from 2,748 (32.6%) to 1,505 (24.9%) with the Indigenous offender population experiencing a slightly larger reduction, from 884 (34.1%) to 493 (24.4%) compared to non-Indigenous offenders (1,864 [32%] to 1,012 [24.9%]) (see Table 2).

**Table 2 – Duration of Administrative Segregation Placements, 2014–2015 to 2016–2017**

| Year | Gender and Race | <30 Days | >30 Days | 30–60 Days | 61–90 Days | 91–120 Days | >120 Days |
|---|---|---|---|---|---|---|---|
| 2014–2015 | Women | 446 (97%) | 14 (2.64%) | 12 (2.6%) | 1 (0.2%) | 0 | 1 (0.2%) |
| | Men | 5,221 (65.6%) | 2,734 (34.3%) | 1,419 (17.8%) | 508 (6.4%) | 311 (3.9%) | 496 (6.2%) |
| | Indigenous | 1,706 (65.9%) | 884 (34.1%) | 430 (16.6%) | 171 (6.6%) | 103 (4.0%) | 180 (6.9%) |
| | Non-Indigenous | 3,961 (68%) | 1,864 (32%) | 1,001 (17.2%) | 338 (5.8%) | 208 (3.6%) | 317 (5.4%) |
| | **Total** | **5,667 (67.3%)** | **2,748 (32.6%)** | **1,431 (17%)** | **509 (6%)** | **311 (3.7%)** | **497 (5.9%)** |
| 2015–2016 | Women | 365 (97.6%) | 9 (2.4%) | 7 (1.9%) | 2 (0.5%) | 0 | 0 |
| | Men | 4,593 (69.5%) | 2,013 (30.4%) | 1,120 (17%) | 438 (6.6%) | 208 (3.1%) | 247 (3.7%) |
| | Indigenous | 1,506 (71.3%) | 607 (28.8%) | 346 (16.4%) | 128 (6.1%) | 63 (3.0%) | 70 (3.3%) |
| | Non-Indigenous | 3,452 (70.9%) | 1,415 (29%) | 781 (16%) | 312 (6.4%) | 145 (3.0%) | 177 (3.6%) |
| | **Total** | **4,958 (71%)** | **2,022 (28.9%)** | **1,127 (16.1%)** | **440 (6.3%)** | **208 (3.0%)** | **247 (3.5%)** |
| 2016–2017 | Women | 279 (93.9%) | 18 (16.1%) | 15 (5.1%) | 3 (1%) | 0 | 0 |
| | Men | 4,278 (74.2%) | 1,487 (25.9%) | 944 (16.4%) | 292 (5.1%) | 138 (2.4%) | 113 (2.0%) |
| | Indigenous | 1,525 (75.6%) | 493 (24.4%) | 331 (16.4%) | 93 (4.6%) | 36 (1.8%) | 33 (1.6%) |
| | Non-Indigenous | 3,032 (75%) | 1,012 (25%) | 628 (15.5%) | 202 (5%) | 102 (2.5%) | 80 (2.0%) |
| | **Total** | **4,557 (75.2%)** | **1,505 (24.9%)** | **959 (15.8%)** | **295 (4.9%)** | **138 (2.3%)** | **113 (1.9%)** |

Source: Table prepared by the authors using data obtained from Public Safety Canada, "Table C18," *2015 Corrections and Conditional Release Statistical Overview*; "Table C18," *2016 Corrections and Conditional Release Statistical Overview*; and "Table C18," *2017 Corrections and Conditional Release Statistical Overview*.

### 1.3.2 Procedural Fairness Issues

Calls for oversight of administrative segregation in the federal correctional system also date to the 1970s. The Vantour Report raised concerns that offenders were being placed in segregation without having their placement reviewed and justified by an impartial party. These concerns continued to be raised in subsequent reports. Most observers recommended external independent reviews of administrative segregation while some called for judicial oversight. Justice Leask of the British Columbia Supreme Court also criticized the current system. In *BCCLA v. Canada*, he stated that

> the existing statutory regime permits the warden to quite literally be the judge in his or her own cause with respect to placement decisions. At a minimum, it creates a reasonable apprehension of bias, if not actual bias, in favour of continued segregation. Because of the serious risk of harm that arises from placements in administrative segregation, I conclude that this lack of impartiality in the review process is contrary to the principle of procedural fairness guaranteed by s. 7 of the Charter.[29]

He concluded that

> procedural fairness in the context of administrative segregation requires that the party reviewing a segregation decision be independent of CSC. Such an independent reviewer must have the authority to release an inmate from segregation, not simply make recommendations that the warden may override or disregard. Given that the harms of segregation can manifest in a short time, meaningful oversight must occur at the earliest possible opportunity, certainly no later than the five-day review.[30]

Similarly, in *CCCLA v. The Queen*, Justice Marrocco of the Ontario Superior Court of Justice found that a high degree of procedural fairness is required in involuntary segregation decisions. In particular, the Court found that the provisions of the CCRA concerning the review of decisions beyond five working days do not ensure sufficient procedural safeguards under section 7 of the Charter.[31] Among the Court's reasons, it is mentioned that the institutional head is the authority that both makes and reviews decisions.

# 2 DESCRIPTION AND ANALYSIS

## 2.1 AMENDMENTS TO THE *CORRECTIONS AND CONDITIONAL RELEASE ACT*

### 2.1.1 Reinstatement of the Principle of Least Restrictive Measures (Clauses 1, 2 and 8)

The guiding principle of "least restrictive" measures in corrections is "constitutionally derived and mandated by the principle of 'retained rights.'"[32] According to this principle, restricting rights of prisoners, except those that are limited by the nature of incarceration, must be justified. As described by the Correctional Law Review Working Papers in 1987, justifiable limitations "are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible."[33] The working paper goes on to say that

> [i]n administering the sentence, the least restrictive course of action should be adopted that meets the legal requirements of the disposition consistent with public protection and institutional safety and order.[34]

Clauses 1, 2 and 8 of Bill C-56 re-establish the principle of "least restrictive" measures or determinations in the CCRA (amending sections 4(c), 28 and 101(c), respectively). This principle was removed from the CCRA in 2012 as a result of the coming into force of the *Safe Streets and Communities Act* (the former Bill C-10) in favour of a language that provided for correctional measures or determinations to be "necessary and proportionate."[35] The principle of "least restrictive" measures applies to all measures taken by CSC, starting with the selection of the penitentiary in which the offender will be held.[36] This principle also applies to all determinations concerning the offender's conditional release into the community.[37]

### 2.1.2 Duration of Segregation Placement, Considerations for Release and Independent External Reviewer (Clauses 3 to 6)

#### 2.1.2.1 Duration of Segregation Placement (Clauses 4 and 5)

Section 31(2) of the CCRA provides that offenders placed in administrative segregation are to be released "at the earliest appropriate time." Appropriate time is not defined in the Act. Clause 4 creates new subsection 35.1(1) that imposes an initial 20-day limit on the use of administrative segregation, unless an order to exceed it is made in writing by the institutional head. Clause 5 reduces that presumptive limit to 14 days, 18 months after the legislation comes into force, as set out in clause 13 of the bill.

#### 2.1.2.2 Considerations for Release (Clause 3)

Section 32 of the CCRA specifies sections of the Act that must be considered when the institutional head is deciding whether to release an offender from administrative segregation. Clause 3 amends this section to make reference to new sections 35.1(2), 35.3(1), 35.5 and 35.5(1) added by clause 4 of the bill.

#### 2.1.2.3 Reviews (Clause 4)

Section 32 of the CCRA specifies that the institutional head ultimately decides whether to release an offender from administrative segregation. The decision shall be based on whether it is the most appropriate time or on a recommendation from a Segregation Review Board appointed by the institutional head to conduct a hearing, or further hearings, to review the offender's case (section 33(1)). The review process is described in more detail in section 21 of the Regulations. Of importance, a review of the case must take place within five days of the offender being placed in administrative segregation. The five-day review is chaired by the deputy warden. The head of the institution chairs the subsequent reviews, which must occur every 30 days.[38]

Clause 4 provides for an automatic hearing to review the case of offenders placed in administrative segregation that shall be conducted by a person or persons designated by the institutional head before the end of the 20th day (or of the 14th day, 18 months after coming into force). Following that hearing, the designated person or persons must make a recommendation to the institutional head as to whether the offender should be released from administrative segregation (new section 35.1(2)).

Clause 4 also stipulates that the offender must be present for the review hearing unless any of the conditions outlined in sections 33(2)(a) to 33(2)(c) of the CCRA apply: the offender chooses not to participate; there are reasonable grounds to believe the offender's presence jeopardizes the safety of any person present at the hearing; or the offender seriously disrupts the hearing (new section 35.1(3)). Should the institutional head decide not to release the offender from administrative segregation, clause 4 adds a provision specifying that the offender must receive a copy of the order before the end of the 20th day (or of the 14th day, 18 months after coming into force) with written reasons justifying the decision, as well as a written notice that the offender's placement will be reviewed by an independent external reviewer (new section 35.1(4)).

#### 2.1.2.4 Independent External Reviewer (Clauses 4, 6 and 7)

Clause 6 introduces new sections to the CCRA that establish the position of independent external reviewer and its role, functions and responsibilities (new sections 37.1 to 37.5). It stipulates that the Minister of Public Safety and Emergency Preparedness (the Minister) shall appoint one or more independent external reviewers, with knowledge of the administrative decision-making processes in general, for one or more terms of no more than five years, to serve on a full- or part-time basis.

One of the independent external reviewers may be designated senior reviewer by the Minister. The senior reviewer's responsibilities and functions include advising, evaluating and training independent external reviewers. The senior reviewer is also responsible for submitting a report to the Minister on the reviews undertaken each fiscal year, which will include the number of reviews undertaken and their recommendations.

Reports by the senior reviewer shall not contain personal information, as defined in section 3 of the *Privacy Act*[39] or disclose any information, other than that required by the CCRA, that comes to their knowledge in the course of the exercise of their powers, or the performance of their duties and functions (new section 37.4).

Independent external reviewers are not competent or compellable witnesses in any civil proceedings relating to their role. Criminal or civil proceedings may not be laid against independent external reviewers for anything done said or reported in the course of performing their duties (new sections 37.5 and 37.6).

Clause 4 of the bill provides that the external independent reviewers are responsible for reviewing cases of offenders held in administrative segregation for a period exceeding 20 days (or 14 days, 18 months after coming into force). External reviewers are also responsible for reviewing the cases of any offender who, in the same calendar year, has been placed in administrative segregation three or more times, has spent more than 90 days cumulatively in administrative segregation, or reaches the 90-day limit by the third working day after the day on which the offender was placed in administrative segregation (new section 35.2(1)).

For offenders held in administrative segregation for longer than 20 days (or 14 days, 18 months after coming into force) pursuant to an order by the institutional head, new section 35.2(2) requires the external independent reviewer to conduct further regular reviews.

To conduct a review, the external independent reviewer shall have access to all the information that is before the institutional head and ensure that the offender is given an opportunity to make written representations (new sections 35.2(3) and 35.2(4)). The external independent reviewer may also communicate with the offender held in

administrative segregation, require any CSC personnel to provide any additional information or produce any document, paper or thing that the reviewer believes may be relevant (new sections 35.2(5) and 35.2(6)). Any document paper or thing provided to or produced for the reviewer must be returned within 10 days following the reviewer's recommendation (new section 35.2(7)).

Upon completion of the review, the independent external reviewer shall provide a recommendation to the institutional head on whether the offender should remain in administrative segregation (new section 35.3(1)). A copy of the recommendation and its reasoning shall be provided to the offender before the end of the next working day after the day it was provided to the institutional head (new section 35.3(2)).

Should the institutional head decide not to release an offender from administrative segregation following a recommendation from the independent external reviewer, the institutional head shall meet with the offender to explain the reasoning for the decision and provide it in writing. The institutional head shall take these actions before the end of the second working day after the day on which the recommendation was provided (new section 35.4). Clause 7 provides that reviews and recommendations by external independent reviewers are not subject to offender grievance procedures (new section 90(2)).

Clause 4 also creates new sections of the CCRA that give the regional head (the head of the regional headquarters for the region in which the offender's penitentiary is located) authority to designate a person to review the case of offenders placed in administrative segregation, conduct further reviews of these cases and provide recommendations based on these reviews (new sections 35.5(1) and 35.5(6)). Offenders shall be informed in writing before the review process begins and shall be given an opportunity to provide written representations to the designated person (new subsections 35.5(2) and 35.5(3)). Following the review, the designated person will provide the regional head with a recommendation on whether to release an offender from administrative segregation and the regional head shall issue a written order that the inmate be released or remain in administrative segregation (new section 35.5(4)). The offender shall be provided with a written copy of the order along with supporting reasons (new section 35.5(5)).

#### 2.1.3 Obligation of the Parole Board of Canada to Hold a Hearing (Clause 9)

Prior to the coming into force of section 527 of *The Jobs, Growth and Long-Term Prosperity Act*[40] in December 2012, the Parole Board of Canada (PBC) had an obligation to hold hearings in the presence of offenders following suspensions, cancellations, terminations or revocations of parole or statutory release, unless offenders waived their right to a hearing in writing or refused to attend the hearing.

*The Jobs, Growth and Long-Term Prosperity Act* amended section 140(1)(d) of the CCRA to repeal this obligation, except in cases involving cancellation of parole. Holding hearings in all the other cases was left to the discretion of the PBC under section 140(2) of the CCRA.

The removal of this requirement was found to be unconstitutional by the Quebec Court of Appeal in 2015. In the case of *Canada (Procureur général) c. Way*,[41] the appellate court upheld the Superior Court finding that the deprivation of the right to oral hearing of the day parole of Benoît Way and the full parole of Maxime Gariépy constituted an unjustified violation of section 7 of the Charter. This decision was appealed to the Supreme Court of Canada in 2016. Soon after the Supreme Court decided to grant leave for the appeal, the Attorney General of Canada decided to discontinue its appeal.[42] According to the Department of Justice Charter Statement for Bill C-56, this decision was made further to a government commitment to amend section 140(1)(d) of the CCRA in the interest of enhancing procedural fairness in parole and statutory release hearings.[43]

Accordingly, clause 9 of Bill C-56 reinstates an offender's right to an oral hearing in all circumstances by amending section 140(1)(d) of the CCRA to mandate in-person hearings following a *suspension*, cancellation, *termination or revocation of parole or following a suspension, termination or revocation of statutory release* [Authors' emphasis]. As noted in the Charter Statement for Bill C-56, reintroducing this requirement ensures uniformity across the country, since appellate court decisions are only binding within the province where they were made.

### 2.2 AMENDMENTS TO TRANSITIONAL PROVISIONS OF THE *ABOLITION OF EARLY PAROLE ACT* (CLAUSE 10)

With the enactment of the CCRA in 1992, the accelerated parole review (APR) procedure was incorporated in the conditional release scheme to allow non-violent offenders at low risk of reoffending to be released from a penitentiary as early as possible in order to serve the rest of their sentences under supervision in the community.[44] By accelerating the release of such offenders, APR was intended to enable CSC and the PBC to focus their efforts and correctional resources on offenders sentenced for offences involving violence or serious drug-related offences and considered to be at high risk of reoffending.[45]

APR involves three elements that distinguish it from the normal parole procedure:

- First, APR guarantees that the offender's case will be reviewed in advance by the PBC so that the offender may be granted parole as soon as possible, without the PBC having to hold a parole hearing.
- Second, offenders who are entitled to APR benefit from a presumption in favour of parole: in APR cases, the PBC may not refuse parole unless it is of the opinion

that there are reasonable grounds to believe that the offender will commit an offence involving violence before the expiration of the sentence. For all other offenders, the PBC uses a general reoffending criterion to grant or refuse release, a criterion that is more stringent. In these cases, the PBC would only grant release if there are no grounds to believe that the offender will commit an offence, whether the offence is violent or not, before the expiration of the sentence.

- Third, starting in 1997, the APR regime for day parole was triggered earlier than the normal day parole process. While offenders who are not entitled to APR are generally eligible for day parole six months before their full parole eligibility date (that is, at one-third of the sentence, or a maximum of seven years), offenders who are entitled to APR are eligible for day parole after serving one-sixth of the sentence. In both cases, however, the CCRA provides for a minimum of six months' imprisonment before eligibility for day parole, since the longer of the times referred to is used. This means that an offender who is sentenced to imprisonment for two to three years and who does not meet the APR criteria may also be granted day parole after serving only six months of the sentence.[46]

In 2011, the APR procedure was eliminated from the CCRA as a result of the coming into force of the AEPA.[47] Pursuant to the transitional provisions of the AEPA (section 10(1)), the abolition of APR affected all offenders who were sentenced or transferred to a penitentiary for the first time after Bill C-59 came into force, on 28 March 2011, and all those who, upon coming into force of the bill, had not yet served one sixth of their prison sentence.

In the 2014 case of *Canada (Attorney General) v. Whaling*,[48] the Supreme Court of Canada found section 10(1) of the AEPA to be unconstitutional. The Supreme Court ruled that applying the repeal of APR to those already serving sentences added to their punishment and, therefore, violated section 11(h) of the Charter, which protects against double jeopardy (the right not to be punished more than once for the same criminal act). It concluded that the infringement was not justified under section 1 of the Charter.[49] An important aspect of that decision was the determination that "an offender has an expectation of liberty that is based on the parole system in place at the time of his or her sentencing, and that thwarting that expectation may engage a constitutionally protected liberty interest."[50] Writing for the Court in *Whaling*, Justice Wagner (as he then was) noted specifically:

> The effect of the retrospective application provision, s. 10(1) of the *AEPA*, was to deprive the three respondents of the possibility of being considered for early day parole, which was an expectation they had had at the time they were sentenced. This amounts to a lengthening of the minimum period of incarceration for persons – like the respondents – who would have qualified for early day parole under the APR system.

> In my view, s. 10(1) had the effect of punishing the respondents again. It retrospectively imposed a delay in day parole eligibility in relation to offences for which they had already been tried and punished. The effect – extended incarceration – was automatic and without regard to individual circumstances.[51]

Justice Wagner went on to hold that the retroactive application of section 10(1) did not provide a reasonable limit on the right to be protected against double jeopardy that could be justified in a free and democratic society, since the Crown failed to show that less intrusive measures were unavailable to accomplish its objective. He explained:

> In my view, having the repeal apply only prospectively was an alternative means available to Parliament that would have enabled it to attain the objectives of reforming parole administration and maintaining confidence in the justice system without violating the s. 11(*h*) rights of offenders who had already been sentenced. Regarding the Crown's argument that retrospective application is necessary to maintain confidence in the justice system, I would point out that the enactment of *Charter*-infringing legislation does great damage to that confidence. The Crown has produced no evidence to show why the alternative of a prospective repeal, which would have been compatible with the respondents' constitutional rights, would have significantly undermined its objectives.[52]

The Supreme Court decision invalidated the application of section 10(1) of the AEPA for offenders sentenced prior to 28 March 2011.

Furthermore, appeal courts across Canada have also found this section to be contrary to section 11(i) of the Charter, which guarantees that any person charged with an offence has the right "if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment."

Currently, this situation occurs every time the repeal of the APR regime applies to an offender incarcerated for an offence committed prior to 28 March 2011. In such cases, the repeal of APR has the effect of increasing the amount of time the offender would be incarcerated compared to the regime in force at the time they committed their offences.[53] That said, none of these appellate cases were appealed to the Supreme Court for a definitive answer that would apply nationwide.

Clause 10 of Bill C-56 amends the transitional provisions contained in section 10 of the AEPA in response to the ruling of the Supreme Court in *Whaling* and the rulings of a number of appellate courts to ensure conformity with the requirements of sections 11(h) and 11(i) of the Charter, as well as consistency with section 11(i) in all jurisdictions. Clause 10 amends section 10(1) of the AEPA to ensure that offenders

eligible for the APR regime who committed offences before the enactment of the AEPA, but were convicted and sentenced after that, will be entitled to the application of the APR regime. For greater certainty, amended section 10(2) of the AEPA also provides that the APR regime will apply even if the offender commits another offence after 28 March 2011.

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NOTES

1. Bill C-56, An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act, 1st Session, 42nd Parliament.
2. *Corrections and Conditional Release Act* [CCRA], S.C. 1992, c. 20.
3. *Abolition of Early Parole Act* [AEPA], S.C. 2011, c. 11.
4. Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act, 1st Session, 42nd Parliament (S.C. 2019, c. 27). See also Lyne Casavant and Maxime Charron-Tousignant, *Legislative Summary of Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act*, Publication no. 42-1-C83-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 27 August 2019.
5. *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations].
6. Commissioners directives are internal policies issued by the Commissioner of the Correctional Service of Canada (CSC). While they must comply with the CCRA, they are not subject to regulations. See CSC, "Discipline of Inmates: Disciplinary Segregation," Commissioner's Directive, No. 580, 26 October 2015, ss. 57–59.
7. *The Istanbul Statement on the Use and Effects of Solitary Confinement*, International Psychological Trauma Symposium, Istanbul, 9 December 2007.
8. Ibid, p. 1.
9. United Nations [UN], General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Resolution 70/175, adopted 17 December 2015, 8 January 2016.
10. Penal Reform International, *UN Nelson Mandela Rules (revised SMR)*.
11. UN (2016), Rule 44.
12. Ibid.
13. CSC, "Section 3.2: Background," *Response to the Coroner's Inquest Touching the Death of Ashley Smith*, December 2014.
14. Ibid.
15. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 (CanLII), para. 247 [*BCCLA v. Canada*].
16. The following reports discuss these issues in detail:
    - Government of Canada, *Commission of inquiry into certain events at the Prison for Women in Kingston / the Honourable Louise Arbour Commissioner*, 1996.
    - CSC, "Independent Adjudication," Chapter H in *Commitment to Legal Compliance, Fair Decisions and Effective Results*, Report of the Task Force Reviewing Administrative Segregation, March 1997. It should be noted that the Task Force did not recommend immediate implementation of independent adjudication, but that CSC evaluate its potential benefits through a limited experiment.
    - CSC, *Human Rights and Corrections: A Strategic Model*, Report of the Working Group on Human Rights, December 1997.

- House of Commons, Standing Committee on Justice and Human Rights, Subcommittee on Corrections and Conditional Release Act, *A Work in Progress: The* Corrections and Conditional Release Act, Third Report, 2nd Session, 36th Parliament, May 2000.
- Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*, December 2003.
- CSC, "Verdict of Coroner's Jury – *The Coroners Act* – Province of Ontario," *Coroner's Inquest Touching the Death of Ashley Smith*. See also Howard Sapers, Correctional Investigator of Canada, *A Preventable Death*, 20 June 2008.

17. *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [*CCCLA v. The Queen*]; and *BCCLA v. Canada*.
18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter].
19. Section 7 of the Charter protects the right to life, liberty and security of the person.
20. Section 15 of the Charter protects equality rights.
21. James A. Vantour et al., *Report of the Study Group on Dissociation*, Canadian Penitentiary Service Study Group on Dissociation, 24 December 1975.
22. Ibid., p. 24.
23. Ibid.
24. *BCCLA v. Canada*, para. 247.
25. See Jenelle Power and Dana L. Riley, "Table 5 – Descriptive Characteristics of Self-Injury and Suicide Incidents of Offenders in Custody"; and "Figure 1 – Possible Precipitating Events or Risk Factors that Occurred Prior to the Self-Injury or Suicide Incident in the Institutions," *A Comparative Review of Suicide and Self-Injury: Investigative Reports in a Canadian Federal Correctional Population*, Research report, CSC, May 2010, pp. 12 and 15, respectively.
26. *BCCLA v. Canada*, para. 248.
27. CSC (2014).
28. *BCCLA v. Canada*, para. 250.
29. Ibid., para. 355.
30. Ibid, para. 410."
31. See *CCCLA v. The Queen*, paras. 146–156 and 272–273. Section 7 of the Charter states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
32. Canadian Bar Association, Letter to the Chair of the Standing Committee on Public Safety and National Security (Re: Bill C-83, Corrections and Conditional Release Act amendments), 19 November 2018.
33. Solicitor General of Canada, "Correctional Authority and Inmate Rights," *Influences on Canadian Correctional Reform*, Correctional Law Review Working Papers, Working Paper No. 5, October 1987, p. 172.
34. Ibid., p. 65.
35. Bill C-10, An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts (short title: *Safe Streets and Communities Act*), 1st Session, 41st Parliament (S.C. 2012, c. 1).

    The change of language introduced by the *Safe Streets and Communities Act* was based on a recommendation formulated in a 2007 report presented by the CSC Review Panel in response to the mandate it received from the federal government earlier that year to review CSC operations. The rationale provided by the panel for amending the language in these Acts was that the principle of least restrictive measures

    > has been emphasized too much by the staff and management of CSC, and even by the courts in everyday decision-making about offenders. As a result an imbalance has been

> created that places the onus on CSC to justify why the least restrictive measures shouldn't be used, rather than on offenders to justify why they should have access to privileges based upon their performance under their correctional plans. The panel believes that this imbalance is detrimental to offender responsibility and accountability.

CSC, *A Roadmap to Strengthening Public Safety*, Report of the Correctional Service of Canada Review Panel, October 2007, p. 16.

36. In selecting a penitentiary, for example, CSC must take "all reasonable steps" to ensure that the penitentiary in which the inmate is confined is one that provides the least restrictive environment for that person (section 28 of the CCRA).

37. Prior to the coming into force in 2014 of section 9 of *An Act to amend the Criminal Code and the National Defence Act (mental disorder)* (short title: *Not Criminally Responsible Reform Act*), the "least restrictive" principle was also found in the *Criminal Code* [Code] framework that governs the treatment of accused who are declared unfit to stand trial or not criminally responsible on account of mental disorder. More specifically, section 672.54 of the Code provided that the court or the Review Board must make the disposition regarding these accused that is the *least onerous and least restrictive* considering "the need to protect the public from dangerous persons, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused." [Authors' emphasis]

    Since 11 July 2014, with the coming into force of section 9 of the *Not Criminally Responsible Reform Act*, this notion that the court or Review Board must make the disposition that is the least onerous and least restrictive was replaced with the need to make the disposition "that *is necessary and appropriate in the circumstances*" [Authors' emphasis]. *An Act to amend the Criminal Code and the National Defence Act (mental disorder)*, S.C. 2014, c. 6.

38. Regulations, section 21.

39. *Privacy Act*, R.S.C. 1985, c. P-21.

40. Bill C-38, An Act to implement certain provisions of the budget tabled in Parliament on March 29, 2012 and other measures (short title: *Jobs, Growth and Long-Term Prosperity Act*), 1st Session, 41st Parliament (S.C. 2012, c. 19), s. 527. The bill received Royal Assent on 29 June 2012.

41. *Canada (Procureur général) c. Way*, 2015 QCCA 1576 (CanLII) [AVAILABLE IN FRENCH ONLY].

42. Supreme Court of Canada, "Discontinuance of the appeal, (Letter Form)," *Attorney General of Canada, et al. v. Benoît Way, et al.*, Docket No. 36746, 7 September 2016.

43. Department of Justice, *Charter Statement – Bill C-56: An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, 21 June 2017.

44. For more information about the history of the Accelerated Parole Review [APR] regime, see Lyne Casavant and Dominique Valiquet, *Legislative Summary of Bill C-59: An Act to amend the Corrections and Conditional Release Act (accelerated parole review) and to make consequential amendments to other Acts*, Publication no. 40-3-C59-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 11 February 2011.

45. Brian A. Grant, *Accelerated Parole Review: Were the Objectives Met?*, Research Branch, Correctional Service of Canada, February 1998, p. iv.

46. Application of the one-sixth-of-sentence rule has a greater impact on offenders who are sentenced to imprisonment for longer terms. For example, an offender sentenced to imprisonment for nine years who is entitled to APR could be granted day parole after serving a year-and-a-half of the sentence, while an offender given the same sentence who does not meet the APR criteria could be granted day parole only after serving two-and-a-half years of the sentence.

47. AEPA, s. 10. The amendment was based on a recommendation by the CSC Review Panel in its 2007 report. The panel justified abolishing APR by citing the fact that offenders granted parole under that procedure generally had a higher recidivism rate than other offenders. See CSC (2007).

48. *Canada (Attorney General) v. Whaling*, 2014 SCC 20 (CanLII).

49. Section 11 of the Charter enshrines principles of non-retroactivity in the criminal law by providing that

    > [a]ny person charged with an offence has the right
    >
    > …

> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

50. *Canada (Attorney General) v. Whaling*, para. 58. Justice Wagner became the Chief Justice of Canada on 18 December 2017, replacing Chief Justice Beverley McLachlin.

51. Ibid., paras. 70–71.

52. Ibid., para. 80.

53. See *Liang v. Canada (Attorney General)*, 2014 BCCA 190 (CanLII); *Canada (Attorney General) v. Lewis*, 2015 ONCA 379 (CanLII); *Nucci et al v Canada (Attorney General)*, 2015 MBCA 122 (CanLII); and *Parent v. Guimond*, 2016 QCCA 159 (CanLII).