

Prisoners’ Rights in Alberta: Challenges and Opportunities

VII Laws Affecting Prisoners’ Rights

Contents

A.	CONSTITUTIONAL AND HUMAN RIGHTS LEGISLATION	1
1.	<i>Constitution Act, 1867 and Constitution Act, 1982</i>	1
2.	<i>Charter of Rights and Freedoms</i>	3
3.	<i>Human Rights Legislation</i>	10
B.	THE RULE OF LAW	12
C.	INTERNATIONAL UNITED NATIONS HUMAN RIGHTS STANDARDS AND NORMS	13
D.	COMMON LAW	13
E.	CORRECTIONS LAW	13
1.	<i>Federal corrections legislation, regulations and policies</i>	14
2.	<i>Alberta corrections legislation, regulations and policy</i>	15
F.	CRIMINAL LAW	16
G.	SUMMARY	17

The Canadian Constitution, criminal law legislation and corrections legislation are the foundation upon which Canada’s criminal justice system is built and the primary laws affecting prisoners’ rights.

A. CONSTITUTIONAL AND HUMAN RIGHTS LEGISLATION

1. Constitution Act, 1867 and Constitution Act, 1982

The source of all government power comes from the Canadian Constitution. The *Constitution Act, 1867*¹ grants the federal government and provincial governments separate and distinct powers to enact laws governing specific subject matters and divides criminal law powers and correctional law powers between the federal and provincial governments.

¹ *The Constitution Act, 1867*, 30 & 31 Vict, c 3 [*Constitution Act, 1867*].

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

The federal government is granted exclusive power to enact laws governing criminal law and procedure.² This gives it the power to enact and amend the *Criminal Code*,³ the legislation that governs the majority of criminal law matters in Canada, and other criminal law legislation.

The provinces and territories are granted exclusive power to enact laws governing the administration of criminal law and procedure in their respective jurisdictions,⁴ which gives them the power to administer criminal investigations, charges and detention through the police, the prosecution of criminal charges through crown prosecutors and the adjudication of criminal cases through the courts.

The federal government is given the exclusive power to enact laws governing the establishment, maintenance, and management of federal penitentiaries.⁵ This gives it the power to enact the *Corrections and Conditional Release Act*⁶ and its regulations. Prisoners who receive a sentence of two years or more are under the supervision of the federal correctional authority, Correctional Service Canada (CSC).

The provinces are granted the exclusive power to enact laws governing the establishment, maintenance, and management of provincial prisons,⁷ which gives them the power to enact provincial corrections law, in Alberta, the *Corrections Act*⁸ and its regulations. Prisoners who receive a sentence of less than two years are under the supervision of provincial correctional authorities; in Alberta, Alberta Correctional Services (ACS).

The Constitution also grants the federal government the power to enact laws in respect of Aboriginal people and their lands.⁹ This is the power that is the basis for sections 25 and 27 of the *Canadian Charter of Rights and Freedoms*¹⁰ and section 35 of the *Constitution Act, 1982*.¹¹ Section 35 recognizes and affirms existing Aboriginal rights and treaty rights of Aboriginal people (defined as including the Indian, Inuit and Métis peoples of Canada).

In addition, the *Constitution Act, 1867* provides for the separation of powers between the legislative, executive and judicial branches, which means that each branch is to act independently of the other. The separation of powers between the legislative and judicial branches is extremely

² *Constitution Act, 1867*, section 91(27).

³ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

⁴ *Constitution Act, 1867*, section 92(14).

⁵ *Constitution Act, 1867*, section 91(28).

⁶ *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

⁷ *Constitution Act, 1867*, section 92(6).

⁸ *Corrections Act*, RSA 2000, c C-29 [*Corrections Act*].

⁹ *Constitution Act, 1867*, section 91(24).

¹⁰ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

¹¹ The [Constitution Act, 1982](#), being Schedule B to the [Canada Act 1982 \(UK\), 1982, c 11](#).

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

important in the context of prisoners' rights actions, since it is the courts who judge whether government legislation and government actions violate prisoners' rights.

2. Charter of Rights and Freedoms

The *Constitution Act, 1982* includes the *Charter*, the highest law in Canada. The *Charter* protects the fundamental rights and freedoms of prisoners, unless such rights and freedoms are lawfully and necessarily removed or restricted. As part of the Constitution, the *Charter* binds the federal, provincial and territorial governments and government agencies, including ACS and CSC. As a result, no government law, regulation, policy or administrative decision can violate prisoners' rights and freedoms, unless they are found to be subject to reasonable limits prescribed by law under section 1 of the *Charter*.

One of the important functions of *Charter* litigation is to shed light on and address challenging social issues, including human rights violations in the hidden world of Canada's correctional institutions. The enactment of the *Charter* has resulted in an increase in the number and types of claims brought by prisoners and this body of jurisprudence clearly affirms that prisoners do not, by virtue of their imprisonment, lose their guarantee of basic human rights.

Prisoners have had some success in challenging the constitutionality of various provisions of criminal legislation and revealing and prohibiting some correctional practices and policies that violate prisoners' rights. For example, critiques by external parties and human rights legal cases ultimately led to the cancellation of the former federal corrections "management protocol". The management protocol was designed to deal with a small group of "difficult to manage", mostly Aboriginal women prisoners, by placing them in a prolonged period of solitary confinement.¹² The Ontario and British Columbia courts have also recently ruled that federal corrections legislation and practices surrounding solitary confinement are unconstitutional.¹³

However, prisoners' advocates and other experts on prison law and practice point out that the *Charter* rights of individual prisoners are often illusory.

In his 2002 review of prisoners' rights, Professor Michael Jackson stated that "[t]he principal benefit flowing from a constitutionally entrenched *Charter of Rights and Freedoms* is not to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms."¹⁴

In her 2007 review of close to 25 years of prisoners' rights cases, Professor Debra Parkes concluded that "[t]he experience of daily life in prisons and jails across this country belies the

¹² Lisa Kerr, *The Origins of Unlawful Prison Policies*, (2015) Can J HR, Vol 4, No 1, at pp 91-119.

¹³ These decisions are discussed under the section on "segregation" under Heading X.

¹⁴ Michael Jackson, *Justice Behind the Walls* (Toronto: University of Toronto Press, 2002) at 62.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

existence of an entrenched bill of rights, which one might expect, at a minimum, to act as a check on the excesses of state power in closed institutions.”¹⁵

In her subsequent 2014 review of the law, Professor Parkes attributes the relative lack of success in prisoners' *Charter* challenges to a number of factors, including the inability of prisoners to effectively access the courts, mootness (discussed below), the relatively few lawyers experienced in practicing prison law, and the deference that the courts have traditionally paid to the administrative decisions of correctional authorities.¹⁶

One of the earliest cases to affirm that prisoners are rights-holders under Canadian constitutional law was the Supreme Court's decision in *Sauvé v Canada*.¹⁷ In a 5 to 4 decision, the Court struck down a law that barred federal prisoners from voting in federal elections on the basis that it violated their democratic right to vote under section 3 of the *Charter*. In the majority decision, the Court ruled that the Canadian government was not permitted to make prisoners temporary outcasts from our system of rights and democracy.¹⁸

Professor Parkes points out however, that *Sauvé* must be distinguished from the vast majority of prisoners' rights cases, which challenge correctional decisions and actions that implicate safety and security. In such cases, the courts tend to accord great deference to the decisions of correctional authorities.¹⁹ As an example, Professor Parkes points to the following passage by the Ontario Supreme Court from *R v Aziga*:²⁰

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 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.

Most sections of the *Charter* have significance to the protection of prisoners' rights; however the most heavily litigated sections are sections 7, 12 and 15. *Charter* litigation also involves the question of whether the government laws, regulations, policies, practices or decisions in question are reasonable limitations on prisoners' rights under section 1 of the *Charter*, and the question of

¹⁵ Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms," (2007) 40 UBC Law Rev at 629-676 [Parkes, *A Prisoners' Charter?*].

¹⁶ Debra Parkes, "The Punishment Agenda in the Courts," (2014) 67 Sup Ct Law Rev (2d) 589 at pp 590, 595 and 596 [Parkes, *Punishment Agenda*].

¹⁷ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 (CanLII) [*Sauvé*], online: <http://canlii.ca/t/50cw>.

¹⁸ *Sauvé* at para 40.

¹⁹ Parkes, *A Prisoners' Charter?* at p 629; Parkes, *Punishment Agenda* at p 605.

²⁰ *R v Aziga*, 2008 CanLII 39222 (ONSC) at para 34, online: <http://canlii.ca/t/2038q>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

the remedies that prisoners can be awarded for violations of their rights under sections 24 and 52 of the *Charter*.

a. Section 1 – limits on Charter rights

Section 1 of the *Charter* guarantees the rights and freedoms specified in the *Charter* “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The Supreme Court of Canada established the test for the application of section 1 of the *Charter* in *R v Oakes* in which it ruled that it is “necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important” to reasonably limit a *Charter* right or freedom. In addition, the means chosen for achieving the objective of the law must “be rationally connected to the objective” and impair the right or freedom in question “as little as possible”; and the effect of the impairment must be proportionate to the objective.²¹

b. Section 7 - 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

The application of the majority of the sections in criminal laws, and government decisions in the realm of the criminal law will impair the life, liberty or security of prisoners. For example, sentencing accused persons to custody will necessarily deprive them of their liberty. The focus of most cases is rather on whether the deprivation of a prisoner’s life, liberty or security rights accords with the principles of fundamental justice.

The principles of fundamental justice include a general duty of procedural fairness that governs every public authority making an administrative decision that affects the rights, privileges or interests of an individual.²² It involves the fair balancing of societal interests and the interests of the individuals who allege that their section 7 *Charter* rights have been violated.²³ In addition, the principles of fundamental justice are not defined in the abstract but must be interpreted in the context of the alleged infringement.²⁴

In the recent Ontario Supreme Court decision in *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*,²⁵ in which the court ruled that CCRA provisions governing the administrative segregation of prisoners violated their section 7 and 12 *Charter* rights, the court explained:

Procedural fairness is a basic value underpinning our constitutional order and has been accepted as such in early *Charter* cases. Subsequent cases held that the principles of fundamental justice are informed by the procedural fairness requirements found in

²¹ *R v Oakes*, [1986] 50 SCR (3d) 1 at paras 69 – 70 [*Oakes*].

²² *Cardinal v Kent Institution*, 1985 CanLII 23 (SCC) [*Cardinal*], online: <http://canlii.ca/t/1ftwk>.

²³ *Cunningham v Canada*, 1993 CanLII 139 (SCC), online: <http://canlii.ca/t/1fs4b>.

²⁴ *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 (SCC), online: <http://canlii.ca/t/1fsf6>.

²⁵ *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 (CanLII) at paras 109-110 [*CCLA v Queen*], online: <http://canlii.ca/t/hpdbx>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

administrative law. Just as in administrative law, the extent of procedural fairness required varies with the context.

While fundamental justice is not synonymous with natural justice, the principles of fundamental justice are very often procedural in nature. At a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness. [Citations omitted]

The procedural fairness requirements under administrative law, which are referred to as the principles of natural justice, and described as synonymous to the concept of due-process under the criminal law, are set out in the Office of the Alberta Ombudsman's "Administrative Fairness Guidelines".²⁶ As explained in the foregoing quote, fundamental justice is not synonymous with "natural justice" but also includes substantive justice principles which require that the government laws cannot be arbitrary, overbroad or grossly disproportionate. Government entities, such as ACS and CSC that are given the right to make decisions governing almost every aspect of prisoners' lives, are responsible for ensuring that their decisions and actions are procedurally and substantively fair. The Alberta Civil Liberties Research Centre resource, *Enforcing Your Rights, Know Your Charter Rights* explains the procedural and substantive rights granted under section 7 of the *Charter*.²⁷

In *Baker v Canada (Minister of Citizenship and Immigration)*, the Supreme Court listed five factors affecting the procedural fairness required in making or reviewing a decision:²⁸

- the nature of the decision being made, and process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the agency itself.

c. Section 12 - prohibition against cruel and unusual treatment or punishment

The test to determine whether a treatment or punishment is cruel and unusual under section 12 of the *Charter* is whether the treatment or punishment is so excessively disproportionate that it outrages Canadian standards of decency.²⁹ This is a very high test to meet.

²⁶ Office of the Alberta Ombudsman "Administrative Fairness Guidelines", online: <https://www.ombudsman.ab.ca/determining-fairness/administrative-fairness-guidelines/>.

²⁷ Alberta Civil Liberties Research Centre, *Enforcing Your Rights, Know Your Charter Rights*, online: <http://www.aclrc.com/section-7>.

²⁸ *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 at paras 23 – 26 (SCC) [*Baker*], online: <http://canlii.ca/t/1fqlk>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

d. Section 15 - prohibition against discrimination

Subsection 15(1) states that “[e]very 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”. Section 15 prohibits governments from treating a person or group of persons in ways that breach their right to formal and substantive equality. Formal equality requires that persons or groups of persons that are alike, be treated alike, and is intended to prohibit discrimination arising from prejudice or stereotyping. Substantive equality considers the impact of the law in the social and economic context in which it operates,³⁰ and is intended to ameliorate the position of groups within our society who have suffered greater disadvantage than those in mainstream society.³¹

Section 15 does not apply to every distinction but only to differential treatment based upon the enumerated grounds in section 15, or on grounds that are analogous to section 15 grounds.³² An analogous ground is one based on “a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity”;³³ for example, citizenship status, marital status, or sexual orientation. While some cases seemed to indicate that analogous grounds may vary with the context, now once a ground is found to be analogous, it is permanently so.³⁴

In *R v Kapp*³⁵ and *Withler v Canada*, the Court reworked and clarified the test for analyzing whether a law or government action violates the guarantee to equality under section 15 of the *Charter*. The Court subsequently further developed and clarified the test in *Quebec v A* and *Kahkewistahaw First Nation v Taypotat*.³⁶

The following analysis is now applied to determine if a law or government action is discriminatory under section 15 of the *Charter*.

First, the law or government action being challenged must create a *distinction*, either directly or indirectly, in respect of an individual or group on the basis of an enumerated or analogous

²⁹ *R v Ferguson*, 2008 SCC 6 (CanLII) at para 14, online: 2008 SCC 6 (CanLII), <<http://canlii.ca/t/1vv90>>; *Parkes, Punishment Agenda* at p 598.

³⁰ *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) [Andrews], online: <<http://canlii.ca/t/1ft8q>>; *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII) [Withler], online: <http://canlii.ca/t/2g0mf>.

³¹ *Law v Canada (Minister of Employment & Immigration)*, 1999 CanLII 675 (SCC) [Law], online: <http://canlii.ca/t/1fqh9>.

³² *Withler* at para 31.

³³ *Corbiere v Canada (Minister of Indian & Northern Affairs)*, 1999 CanLII 687 (SCC) [Corbiere], online: <http://canlii.ca/t/1fqhc>.

³⁴ *Corbiere* at paras 8-9.

³⁵ *R v Kapp*, 2008 SCC 41 (CanLII) [Kapp], online: <http://canlii.ca/t/1z476> and *Withler v Canada (Attorney General)*, 2011 SCC 12 (CanLII) [Withler], online: <http://canlii.ca/t/2g0mf>.

³⁶ *Quebec (Attorney General) v A*, 2013 SCC 5 (CanLII) [Quebec v A], online: <http://canlii.ca/t/fvsc0> and *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 (CanLII) [Taypotat], online: <<http://canlii.ca/t/gj637>>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

ground.³⁷ Not all distinctions based upon enumerated or analogous grounds are contrary to section 15. The distinction must amount to discrimination that is intentional (direct) or has an adverse effect on a protected person or group.³⁸ A distinction is intentional or direct when the law or action, on its face, treats individuals differently on the basis of an enumerated or analogous ground (e.g. gender requirement that limits admission to police force to men). A law or action has an adverse effect (indirect effect) when it purports to treat everyone the same but has a disproportionately negative impact on individuals that can be identified by an enumerated or analogous ground (e.g. height requirement that effectively excludes most women from admission to police force).

Second, if a distinction on an enumerated or analogous ground is established, the court must determine whether the distinction is part of an ameliorative program under subsection 15(2) of the *Charter*, which is a program directed at improving the situation of a group that is in need of ameliorative assistance in order to enhance substantive equality. This is determined by considering the objective of the program, rather than its effect. There must be a correlation between the program and the disadvantage experienced by the group.³⁹

Third, if the program is not found to fall under subsection 15(2) of the *Charter*, the challenged law or action must create an arbitrary or discriminatory disadvantage for the person or group challenging it. This may be established by showing that the law or action perpetuates prejudice or stereotyping. It may also be established by showing that the law or action creates an “arbitrary disadvantage” that may not involve prejudice or stereotyping.⁴⁰

Many prisoners' *Charter* challenges allege that correctional policies, practices or decisions are discriminatory under subsection 15(1) of the *Charter*. These challenges are not as successful as challenges under sections 7 and 12. An example of a successful challenge is found in the Alberta Court of Queen's Bench decision in *Trang v Alberta (Edmonton Remand Centre)*.⁴¹ In this case, the court found that guards at the Edmonton Remand Centre had used racial slurs to refer to the prisoners in question and that this perpetuated prejudice and stereotyping based on race and constituted unlawful discrimination under section 15. The remand guards were found to be government actors, based on the court's finding that the statutory and regulatory framework gave them authority to act on behalf of the government in respect of the prisoners under their supervision. The court ruled that there is a lower threshold for proving discrimination in the correctional environment compared to the workplace, based on the fact that the correctional

³⁷ *Quebec v A* at paras 319-47 and *Taypotat* at para 19.

³⁸ *Withler*.

³⁹ *Quebec v A* at para 158.

⁴⁰ *Quebec v A* at paras 319-47; *Taypotat* at paras 16 – 20.

⁴¹ *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6 (CanLII) [*Trang*], online: <http://canlii.ca/t/27g9w>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

setting is more coercive than the workplace setting, since unlike employees, prisoners have no choice to leave their environment.⁴²

e. Charter sections affecting Aboriginal people

In addition to the importance of the foregoing *Charter* sections, sections 25 and 27 have particular importance to the rights of Aboriginal prisoners. Section 25 states that *Charter* rights and freedoms must not be construed “so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada.” Section 27 states that the *Charter* is to be interpreted in a manner consistent with the “preservation and enhancement of the multicultural heritage of Canadians.”

f. Charter remedies

Charter remedies are discussed under Heading IX and in the case law discussed or referenced throughout this report.

g. Barriers to advancing Charter challenges in prisoners' rights cases

There are a number of substantial barriers to advancing prisoners' *Charter* rights.

Typically, *Charter* cases regarding the rights of prisoners involve those serving sentences in the federal correctional system. This is partly due to the fact that prisoners under the supervision of provincial corrections systems spend far less time in remand or sentenced custody compared to federal prisoners, which means that they are less likely to have the time necessary to litigate a *Charter* claim, before they are released from correctional supervision.⁴³

Many *Charter* cases that are heard do not provide significant insight into judicial decision-making because the issues are either settled before trial or the prisoner is released before a decision is made. This is especially the case where *Charter* claims are brought by prisoners under the supervision of provincial correctional authorities, and who are serving sentences of less than two years. Provincial prisoners are often no longer facing the circumstances that led to their *Charter* claim by the time the challenge comes before the court. In such cases, the prisoner is often faced with an application to dismiss the claim on the grounds of “mootness”. The Supreme Court explained in *Borowski*⁴⁴ that the mootness doctrine allows a court to refuse to hear a matter that is hypothetical or abstract and that will not resolve any controversy between the parties. A court may nevertheless exercise its discretion to hear a moot issue in certain circumstances. In *Skulsh v Katz*,⁴⁵ the British Columbia Supreme Court helpfully summarized the leading case law regarding how this discretion is to be exercised, and explained that a court considers three grounds for

⁴² *Trang* at paras 1098 – 1130.

⁴³ *Parkes, A Prisoners' Charter?* at p 639-640; Heading IV (Crime and Correctional Statistics) provides statistics on the average time provincial/territorial prisoners spend in remand and sentenced custody.

⁴⁴ *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), online: <http://canlii.ca/t/1ft7d>.

⁴⁵ *Skulsh v Katz*, 2012 BCSC 350 (CanLII) [*Skulsh*], online: <http://canlii.ca/t/fqhtf>; *Skulsh* was recently applied in *Charlie v British Columbia (Attorney General)*, 2016 BCSC 2292 (CanLII), online: <http://canlii.ca/t/gw3j7> in which a prisoner successfully challenged the procedural fairness of her detention in segregation in a BC correctional facility.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

finding an issue moot. These are listed as the “need for an adversarial context, concerns for judicial economy and an awareness of the courts’ proper law making function.”⁴⁶ More recently, the Supreme Court stated, in *Mission Institution v Khela*,⁴⁷ that where the circumstances giving rise to a *Charter* application change quickly, and before a judicial review application can be heard by the courts, a moot issue should be tried if it is important and rarely comes before the court as a “live” issue.⁴⁸

The complexity of the substantive and procedural law surrounding *Charter* challenges raises another barrier to *Charter* litigation that presents an even greater challenge for prisoners, many of whom are struggling with mental health issues, do not have the resources to retain legal representation and may be making *Charter* applications while incarcerated.⁴⁹

3. Human Rights Legislation

The federal government and provincial/territorial governments have enacted human rights legislation that prohibits discrimination on specific grounds and in specific areas. A jurisdiction’s human rights legislation takes precedence over all other laws of the jurisdiction, and therefore has a quasi-constitutional effect. The legislation binds private persons and business entities in the jurisdiction. It also binds the government of the jurisdiction, which includes agents of the government such as the police and correctional authorities. Although the federal and provincial/territorial human rights legislation is very similar, there are important differences. One significant distinction for Alberta prisoners is that the Alberta human rights legislation does not prohibit discrimination on the basis of a criminal record, which is a protected ground under the legislation of some other Canadian jurisdictions.

The *Alberta Human Rights Act*⁵⁰ is Alberta’s human rights legislation. The *AHRA* prohibits discrimination on the following 15 grounds: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, and sexual orientation (Code-related grounds). Discrimination based on any of the Code-related grounds is prohibited in five areas or practices: publications (section 3); goods, services, accommodation or facilities customarily available to the public (section 4); tenancy (section 5); employment practices and applications and advertisements (sections 7 and 8); and membership in a trade union (section 9).

⁴⁶ These considerations are further explained in paras 83 to 92 of *Skulsh*.

⁴⁷ *Mission Institution v Khela*, 2014 SCC 24 (CanLII) at para 14 [*Khela*], online: <http://canlii.ca/t/g69pg>.

⁴⁸ Judicial review is discussed under Heading IX.

⁴⁹ For example, see the Alberta Queen’s Bench decision in *R v Cullen*, 2016 ABQB 272 (CanLII) [*Cullen*], online: <http://canlii.ca/t/grnqf>.

⁵⁰ *Alberta Human Rights Act*, RSA 2000, c A-25.5 [*AHRA*].

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

“Discrimination” is not defined in the *AHRA*. Its meaning has been developed through human rights tribunal and court decisions. There are three main types of discrimination: direct, adverse effect and systemic discrimination.⁵¹

Direct discrimination occurs when individuals or groups of individuals are specifically excluded in an area or practice covered by the human rights legislation (for example, employment) on the basis of one or more of the 15 grounds under which discrimination is prohibited. Direct discrimination is often based on negative attitudes, stereotypes and biases.

Adverse effect discrimination occurs when rules, standards, policies, practices or requirements that appear to be neutral on their face have a negative effect on individuals or groups of individuals as a result of discrimination under one or more of the 15 grounds upon which discrimination is prohibited. For example, prisoners with mental disabilities are disproportionately negatively affected by correctional rules governing solitary confinement.

Systemic (sometimes also referred to as institutional) discrimination occurs when organizational or administrative structures include patterns of behaviour, policies or practices that create or perpetrate disadvantage for individuals or groups of individuals as a result of discrimination under one or more of the grounds upon which discrimination is prohibited. For example, numerous reports and inquiries have found that Aboriginal people experience discrimination, which results in them experiencing poorer treatment, throughout the criminal justice system.

Currently, the *AHRA* does not provide for a complaint of systemic discrimination (unlike some other jurisdictions). However, a number of individuals can complain about discrimination in the same context or place, and even combine their complaints.

A person's protection from discrimination under the *AHRA* is not absolute. Section 11 of the *AHRA* permits discrimination if the discriminating party can prove that discrimination is “reasonable and justifiable in the circumstances”. An employer may also discriminate if the employer can prove the discrimination is justified as a “*bona fide* (good faith) occupational requirement”. Persons or entities that discriminate are also required to prove that they attempted to accommodate the needs of the people against whom they discriminate, in order to lessen the discrimination experienced, unless it would cause undue hardship. This is referred to as a “duty to accommodate to the point of undue hardship.” These concepts are further discussed and developed on the Alberta Human Rights Commission (AHRC) website.⁵²

⁵¹ The following explanation of the types of discrimination and examples of each is taken from the Ontario Human Rights Commission, “Forms of Discrimination”, online: <http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/6-forms-discrimination>.

⁵² Alberta Human Rights Commission, “Human Rights in the Workplace”, online: <https://www.albertahumanrights.ab.ca/employment/Pages/employment.aspx>; Alberta Human Rights Commission, *Duty to Accommodate*, online: https://www.albertahumanrights.ab.ca/Documents/Bull_DutytoAccom_web.pdf.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

Prisoners who believe they have been subjected to discrimination can file a complaint with the AHRC. A person filing a complaint has the onus of proving (on the balance of probabilities) that he or she has suffered discrimination because of a Code-related ground in one of the areas where discrimination is prohibited. Once that burden is satisfied, the onus shifts to the discriminating party to show that the (a) discrimination is justified in the circumstances, or (b) that it has accommodated the person's needs to the point of "undue hardship".

The Alberta Civil Liberties Research Centre resource, *Making a Human Rights Complaint*,⁵³ provides information on the process for filing, investigating, making decisions, accommodating and ordering remedies for discrimination. In most cases, prisoners must exhaust the internal complaints process of the correctional institution before they will be allowed to file a complaint with the AHRC or a legal challenge in the courts.⁵⁴

The West Coast Prison Justice Society, which operates Prisoners' Legal Services in British Columbia, a legal aid clinic for prisoners in Canada, discusses some of the decisions that have been made by human rights commissions across Canada in response to prisoners' complaints of discrimination against correctional authorities.⁵⁵ The Alberta Civil Liberties Research Centre resource, *Annotated Alberta Human Rights Act*,⁵⁶ also summarizes cases that have been decided under each section of the AHRA.

B. THE RULE OF LAW

The Rule of Law is part of the Canadian common law inherited from Great Britain. It is often expressed by the statement, "no one is above the law". At its core, the Rule of Law is a restraint on the arbitrary exercise of power.⁵⁷ This means that laws are reasonably predictable, bind the government as well as private citizens⁵⁸ and are enforced uniformly.⁵⁹ The Supreme Court of Canada confirmed in *Martineau v Matsqui Institution Disciplinary Board* that "the rule of law must run within penitentiary walls."⁶⁰ A more detailed discussion of the origins and application of the Rule of Law can be found in the Alberta Civil Liberties Research Centre resource, *Striking the Right Balance: Implications of Expanding Executive Powers for Canadian Democracy*.⁶¹

⁵³ Alberta Civil Liberties Research Centre, "Making a Human Rights Complaint," online: <http://www.aclrc.com/making-a-human-rights-complaint/>.

⁵⁴ See Heading IX (Processes for Challenging Government and Correctional Decisions and Related Remedies).

⁵⁵ West Coast Prison Justice Society, online: <<https://prisonjustice.org/cases/>>.

⁵⁶ Alberta Civil Liberties Research Centre, "Annotated Alberta Human Rights Act", online: <http://www.aclrc.com/downloadable-resources/>.

⁵⁷ Jack Watson, "You Don't know What You've Got 'Til It's Gone: The Rule of Law in Canada – Part I", (2014)

52 Alta L Rev 689 1 [Watson].

⁵⁸ Watson at 704.

⁵⁹ Watson at 955.

⁶⁰ *Martineau v Matsqui Institution Disciplinary Board*, (1980) 1 SCR 602 at 622.

⁶¹ Alberta Civil Liberties Research Centre, "Striking the Right Balance: Implications of Expanding Executive Powers for Canadian Democracy", online:

C. INTERNATIONAL UNITED NATIONS HUMAN RIGHTS STANDARDS AND NORMS

Canada is a member state of the United Nations (UN). The UN is mandated to support its member states in implementing international standards and norms to protect the rights of individuals, including prisoners. This is accomplished through international treaties and other agreements. Treaties are international agreements that are signed (ratified) by participating countries. When a country signs a treaty or other international agreement, it signifies that the country supports the treaty and that the country's laws and policies should not contradict it. Canada has ratified a number of UN treaties and agreements protecting the rights of citizens generally and prisoners specifically. Although these treaties are not enforceable in Canadian courts, they are looked to for guidance on interpretation of Canadian laws. Some of the treaties relevant to prisoners' rights are discussed throughout this report.⁶²

D. COMMON LAW

The common law originates from court decisions as opposed to law that is imposed under legislation. Prisoners originate court claims alleging violations of their rights by the government through three main avenues:

- civil suits seeking remedies, in particular, monetary damages;
- appeal applications seeking reversals of decisions of lower courts or criminal or correctional administrative authorities; and
- judicial review applications seeking court reviews of decisions of criminal or correctional administrative authorities.

The processes for seeking remedies in the courts are discussed under Heading IX.

E. CORRECTIONS LAW

In Canada, as noted above, responsibility for corrections is divided between the federal and provincial/territorial governments.

The federal government is responsible for providing correctional services for adults who are convicted of a criminal offence that imposes a sentence of two years or more and who are serving their sentences in federal correctional institutions or under federal supervision in the community.

Each province and territory is responsible for providing correctional services for adults who are remanded in custody, or convicted of offences imposing sentences of less than two years and

<https://static1.squarespace.com/static/511bd4e0e4b0cecdc77b114b/t/57644f4320099e81d080db40/1466191759351/Striking+the+Right+BalanceFinal+copy.pdf>.

⁶² For a list of UN instruments that may affect prisoners' rights and country ratification information see the United Nations Office on Drugs and Crime, "Compendium of United Nations standards and norms in crime prevention and criminal justice", online: <https://www.unodc.org/unodc/en/justice-and-prison-reform/compendium.html>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

servicing their sentences in their respective jurisdictions. Persons are remanded in custody if they have been:

- charged with a crime and are awaiting a bail hearing or trial;
- convicted of a crime and are awaiting sentencing or transfer to the correctional institution or community where they will serve their sentence under supervision; or
- detained in custody under non-criminal legislation—for example, persons detained under Canada's *Immigration and Refugee Protection Act*.⁶³

The federal and provincial/territorial governments are granted broad powers to operationalize and administer correctional services under corrections legislation, which includes the power to enact regulations. Correctional authorities also issue internal policies and guidelines to guide corrections staff in the manner in which they are to fulfill their responsibilities. Although these policies do not have the force of law, their specific provisions and the manner in which they are applied have a significant impact on how prisoners will be treated in their day-to-day lives within the institution.

1. Federal corrections legislation, regulations and policies

The Federal Ministry of Public Safety is responsible for federal adult corrections and administers correctional services through its agency, Correctional Service Canada (CSC).

The federal CCRA and its regulations govern the provision of federal correctional services. The CCRA was enacted to comply with the fundamental rights and freedoms guaranteed under the *Charter* and 2017 marked its 25th anniversary. Section 3 of the CCRA states that the purpose of the 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* [emphasis added]. Section 3.1 of the CCRA states that CSC's paramount consideration is the protection of the public.

Section 4 of the CCRA states that the principles that guide CSC in achieving the purposes under section 3 include: 1) CSC using measures that are consistent with the protection of society, staff members *and offenders and that are limited to only what is necessary and proportionate* to attain the purposes of this Act [emphasis added]; 2) offenders retaining the rights of all members of society, except those necessarily restricted or removed by virtue of incarceration; 3) corrections decisions that are made in a forthright and fair manner with access by the offender to an effective grievance procedure; and 4) correctional policies, programs and practices that respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups.

The *Corrections and Conditional Release Regulations* are enacted under the CCRA.⁶⁴

⁶³ *Immigration and Refugee Protection Act*, SC 2001, c 27.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

Correctional Service Canada also publishes extensive policies particularizing how it will deliver correctional services under the *CCRA*. The policies consist of Commissioner's Directives and Standard Operating Practices and are published on the CSC website.⁶⁵

2. Alberta corrections legislation, regulations and policy

The Ministry of Justice and Solicitor General is responsible for Alberta correctional services and administers correctional services through Alberta Correctional Services (ACS).⁶⁶

The Alberta *Corrections Act* governs the provision of correctional services in Alberta.

Unlike the *CCRA*, the *Corrections Act* does not incorporate a human-rights approach to corrections and does not contain provisions protecting prisoners' rights similar to those found in the *CCRA*. The *Corrections Act* states that the Ministry responsible for corrections has the power to administer adult corrections in Alberta. Section 2 states that the Ministry is responsible for the following correctional services:

- probation and parole supervision and counselling;
- safe custody and detention of inmates; and
- supervision, treatment and training of inmates with a view to their ultimate rehabilitation in society.

Section 2 also makes the Ministry responsible for "the promotion and assistance of programs designed to prevent and reduce crime within the community" and the "provision of a broad range of options and alternatives to the court at the time of sentencing, such as work instead of a fine, performance of community service, restitution to a victim or similar alternatives."

The regulations enacted under the *Corrections Act* are the *Correctional Institution Regulation*,⁶⁷ which further governs the implementation of the Act; the *Designated Correctional Institutions Order*,⁶⁸ which designates specific facilities as correctional institutions; and the *Fine Option Order*,⁶⁹ which gives prisoners who have been sentenced to pay a fine the opportunity to discharge the fine by earning credits for work performed.

Alberta Correctional Services also produces internal policies specifying how correctional services will be delivered, however, these policies are not publicly available.

⁶⁴ *Corrections and Conditional Release Regulations*, SOR/92-620, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-92-620/>.

⁶⁵ Correctional Service Canada, *Acts, Regulations and Policy*, online: <http://www.csc-scc.gc.ca/acts-and-regulations/index-eng.shtml>.

⁶⁶ Alberta Justice and Solicitor General, Correctional Services, online: https://www.solgps.alberta.ca/programs_and_services/correctional_services/Pages/default.aspx.

⁶⁷ *Correctional Institution Regulation*, AR 205/2001, online: <http://canlii.ca/t/52pj7>.

⁶⁸ *Designated Correctional Institutions Order*, AR 252/1999, online: <http://canlii.ca/t/52q6c>.

⁶⁹ *Fine Option Order*, AR 92/1999, online: <http://canlii.ca/t/52z35>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

Each Alberta correctional institution is appointed a Director who is responsible, in respect of that institution, for directing and co-ordinating institutional programs in accordance with the regulations enacted under the *Corrections Act*, and directing the operation, management and administration of the institution including matters of security, inmate control, staff discipline and the care, custody, treatment and training of inmates.⁷⁰

Michael Jackson, speaking as an expert witness in the Alberta Queen's Bench decision in *Trang*,⁷¹ a *Charter* challenge to prisoners' treatment in the Edmonton Remand Centre, described the *Corrections Act* and its regulations as skeletal and similar to the former *Penitentiary Act*,⁷² which governed federal corrections prior to the enactment of the *CCRA*.

F. CRIMINAL LAW

The *Criminal Code* governs the majority of criminal law matters. It sets out broad categories of criminal offences, related defences and sentences and the law of criminal procedure. This report also refers to the following criminal law legislation. The *Controlled Drugs and Substances Act*⁷³ deals with offences and penalties in respect of the possession and trafficking of controlled drugs and substances. The *Identification of Criminals Act*⁷⁴ gives the police and the judiciary the power to require an accused or convicted individual to have their fingerprints and photograph taken for the purpose of establishing their identity. The *Criminal Records Act*⁷⁵ provides for the suspension of the criminal records of prisoners. The *Prisons and Reformatories Act*⁷⁶ allows provincial/territorial prisoners to earn a remission of their sentences.

The *Criminal Code* classifies offences into one of three types: summary, indictable or hybrid (dual procedure). Indictable offences are generally more serious offences, have greater maximum sentences, involve more complex court procedures and are tried in the highest trial court, in Alberta, the Alberta Court of Queen's Bench. Summary offences are generally less serious offences, have lower maximum sentences, involve less complex court procedures and are tried in provincial criminal courts. Hybrid offences can be more or less serious offences, depending upon the circumstances under which they are committed. If the offence is a hybrid offence, the prosecution (the Crown prosecutor) has the option to decide (elect) whether it will prosecute the claim as an indictable offence or summary conviction offence (summarily). If the Crown elects to proceed summarily, the hybrid offence is treated as a summary conviction offence.⁷⁷

⁷⁰ *Corrections Act*, section 7.

⁷¹ *Trang*, at paras 146 – 147.

⁷² This was first enacted in 1868, and was replaced by the *CCRA* in 1992.

⁷³ *Controlled Drugs and Substances Act*, SC 1996, c 1.

⁷⁴ *Identification of Criminals Act*, RSC, 1985 C I-11.

⁷⁵ *Criminal Records Act*, RSC 1985, c C-47.

⁷⁶ *Prisons and Reformatories Act*, RSC 1985, c P-20.

⁷⁷ *R v Dudley*, 2009 SCC 58 (CanLII) at paras 1 – 3, online: <http://canlii.ca/t/272k3>.

Prisoners' Rights in Alberta: Challenges and Opportunities
VII Laws Affecting Prisoners' Rights

G. SUMMARY

In this section, we have set out the various Canadian laws affecting prisoners' rights. In the following sections, we will be providing examples of the application of these laws in various circumstances experienced by prisoners.