THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

July 18, 2022

Via email: marco.mendicino@parl.gc.ca

The Honourable Marco Mendicino, P.C. M.P.
Minister of Public Safety
Confederation Building, Suite 203
House of Commons
Ottawa, ON K1A 0A6

Dear Minister:

Re: Proposed Amendment to Section 18 of the Corrections and Conditional Release Regulations relating to Institutional Adjustment

We are writing on behalf of the Canadian Bar Association's Criminal Justice Section and its Committee on Imprisonment and Release (CBA Section) to propose an amendment to s. 18 of the *Corrections and Conditional Release Regulations* (CCRR).

The CBA is a national association of over 37,000 lawyers, notaries, law students and academics, with a mandate that includes seeking improvement in the law and the administration of justice. The Criminal Justice Section represents specialists in criminal law from across Canada, and a balance of Crown and defence lawyers. The Committee on Imprisonment and Release is a committee of academics and lawyers specializing in prison law and sentencing.

We recommend amending the CCRR with respect to security classification. Section 18 of the CCRR includes as a criterion for determining security classification level, the degree of "supervision and control" the person requires within the penitentiary. The Commissioner's Directive 710-6, Review of Inmate Security Classification,[1] refers to this criterion as a person's "institutional adjustment" rating.

Institutional adjustment

In our practices, CBA Section members have seen this criterion applied in a discriminatory way that results in Indigenous people and people with mental health disabilities being held in higher levels of security, regardless of the risk they may pose to others. The Directive demonstrates that the concept of "institutional adjustment" is code for a person having higher needs for mental health support or for culturally appropriate healing – neither of which are available or conducive to offering in a maximum security environment.

[1] Commissioner's Directive 710-6, Correctional Service Canada, January 2018: online.

The maximum-security environment creates or exacerbates trauma because of the frequent use of isolation and violence.[2] People can be trapped in higher security levels when programs are not available or responsive to their needs. This has a particularly harsh impact on people serving indeterminate or life sentences, who often cannot cascade to lower security and achieve conditional release, and so remain in prison far beyond their parole eligibility dates. Some people on determinate sentences are released from maximum security to the community on their statutory release date or on warrant expiry, which makes their reintegration extremely difficult, and is not in the interests of public safety.

Factors

The Commissioner's Directive outlines the factors to consider in determining the level of supervision and control required for an individual. some factors are discriminatory based on mental health disability or Indigeneity. For example:

- identify whether the inmate displays special needs or socio-cultural factors indicating a requirement for special intervention on an ongoing basis (Aboriginal inmate, woman inmate, etc.)
- identify whether the inmate has a history of mental health issues, suicidal ideation, self-injury. For Aboriginal offenders, provide an analysis of their history of mental health concerns, suicidal ideation and/or self-injury within the context of their Aboriginal social history.
- current emotional stability and whether this will impact on the inmate's institutional adjustment.

There is no direction to use these factors to reduce a person's rating under institutional adjustment and the reasonable assumption is that they increase a person's security rating, as they indicate a person who has difficulty adjusting to institutional life. Rather than placing people with mental health or culturally appropriate healing needs in a more punitive and restrictive environment, we suggest that Correctional Service Canada (CSC) place them in an environment that will meet their needs, and in effect reduce their safety risk.

The Correctional Investigator reports that Indigenous people tend to be placed in higher levels of security than other people in prison.[3] Section 18 of the CCRR and policy governing interpretation of "institutional adjustment" perpetuate this inequality. For example, one listed consideration reads:

> *review the Security Intelligence file, record date of review and consultation with the Security Intelligence Officer. Indicate whether the inmate has any affiliations with criminal organizations/gangs, or continues to be involved in criminal activities while in custody. Identify the existence of incompatibles or co-convicted inmates and the impact on institutional adjustment. For Aboriginal offenders, consider any affiliations within the context of their Aboriginal social history (this may be related to family fragmentation and a lack of cultural identity linked to a desire to belong).*

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2 Annual Report of the Correctional Investigator of Canada Tabled in Parliament, February 2020: online.

3 Indigenous People in Federal Custody Surpasses 30% Correctional Investigator issues Statement and Challenge, January 2020: online

Gladue factors

Although the CCRA has been amended to state *Gladue* factors[4] are not to be considered to increase an assessment of "risk", consideration of institutional adjustment is not a consideration of "risk". There lies the problem.

There is no direction in section 18 to consider *Gladue* factors as reducing an Indigenous person's institutional adjustment rating related to security intelligence. It suggests using *Gladue* factors to explain allegations of gang affiliation, affiliation with criminal organizations or involvement in criminal activities in custody, but not as a mitigating factor. In this way, the policy may encourage staff to use *Gladue* factors to increase or justify an Indigenous person's security classification rating. The reference to "Aboriginal offenders" in the section on security intelligence might encourage an institutional parole officer to view relationships with other Indigenous prisoners as related to gang activity. Our CBA Section members' clients have told us that when they form supportive bonds with each other, CSC accuses them of being in gangs.

Over-representation of Indigenous people

The over-representation of Indigenous people in prison follows over 100 years of residential schools. The Truth and Reconciliation Commission report[5] acknowledges the genocide Canada committed against Indigenous people which included forcibly taking children away from families to remote locations and subjecting them to programs designed to destroy their pride and self-respect.

It is not surprising that Indigenous people tend to have high institutional adjustment ratings, given that their imprisonment by Canada is an extension of the genocidal policies of residential schools. It is difficult for them to have a low rating for institutional adjustment in a security driven prison environment that is not culturally safe, or trauma informed. We believe such environments perpetuate violence and do not achieve the foundation of trust and respect necessary for healing.

Security classification based on safety risk

The CBA Section proposes that security classification be based on the safety risk the person may pose to others, rather than on the degree of supervision and control required, which can become a self-fulfilling prophecy when a **person** begins to demonstrate symptoms of long-term isolation and force from experiencing this high degree of supervision (i.e. isolation) and control (uses of force).

Recommendations:

We recommend amending the *Corrections and* **Conditional** *Release Regulations* as follows:

> **18** For the purposes of section 30 of the Act, an inmate shall be classified as
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> - **(a)** maximum security where the inmate is assessed by the Service as
>   - **(i)** presenting a high probability of escape and a high risk to the safety of the public in the event of escape, or
>   - **(ii)** presenting a high risk to the safety of staff or offenders in the penitentiary;
> - **(b)** medium security where the inmate is assessed by the Service as
>   - **(i)** presenting a low to moderate probability of escape and a moderate risk to the safety of the public in the event of escape, or

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4 See *R. v. Gladue*, 1 S.C.R. 688.

5 Truth and Reconciliation Commission Report, December 2015: online.

    - **(ii)** presenting a moderate risk to the safety of staff or offenders in the penitentiary; and
- **(c)** minimum security where the inmate is assessed by the Service as
    - **(i)** presenting a low probability of escape and a low risk to the safety of the public in the event of escape, and
    - **(ii)** presenting a low risk to the safety of staff or offenders in the penitentiary.

We would welcome an opportunity to discuss this proposal further.

Yours truly,

(*original letter signed by Julie Terrien for Tony Paisana and Jen Metcalfe)*

Tony Paisana
Chair, Criminal Justice Section

Jen Metcalfe
Chair, Committee on Imprisonment and Release