Creating a Federal Inmate Grievance Tribunal

Jeremy Patrick
Canadian Civil Liberties Association[1]

À l'heure actuelle, les détenus dans les pénitenciers canadiens peuvent accéder à une large gamme de mécanismes devant assurer le respect de leurs droits, dont le régime interne de règlement des plaintes, la Commission canadienne des droits de la personne et le Bureau de l'Enquêteur correctionnel. Cependant, divers facteurs font en sorte que ces mécanismes ne suffisent pas à insuffler au système correctionnel l'imputabilité ou le respect de la primauté de la loi nécessaires. L'auteur propose donc l'établissement d'un tribunal fédéral de traitement des plaintes qui soit habilité à statuer sur le bien-fondé de certaines plaintes. Ce tribunal, dont l'auteur présente une structure éventuelle, devrait être une instance indépendante et posséder, entre autres, la capacité de régler les plaintes avec rapidité et équité et d'émettre des ordonnances exécutoires.

Federal inmates in Canada currently have access to a wide variety of mechanisms that purport to ensure their rights are respected: internal grievance systems, the Canadian Human Rights Commission, the Office of the Correctional Investigator, the court system, and more. However, for a variety of reasons, each of these mechanisms is inadequate to import accountability and the rule of law into the prison system. Instead, this article proposes the creation of a Federal Inmate Grievance Tribunal to rule on the merits of selected grievances. Key features of the proposed tribunal include fairness and independence; timely resolution of cases; and the ability to issue binding orders. In addition, the structure of the proposed tribunal is discussed.

In the summer of 2004, the Office of the Correctional Investigator (OCI) released a discussion paper titled *Shifting the Orbit* (Canada, OCI 2004b). The primary question raised by the paper was ''whether some form of independent adjudication of the decisions affecting significant human rights and statutory entitlements will further the entrenchment of justice in the care, custody and reintegration of federal offenders'' (27). In other words, should an independent adjudicative tribunal be created to deal with certain inmate grievances? If so, how should such a body be structured?

The thesis of this article is that independent, external, and binding adjudication of certain inmate grievances is a necessary step in the movement toward greater accountability and respect for the rule of law in the correctional system. In the words of Mary Campbell, ''not only must substantive rights be well articulated, there must be a framework that both provides a mechanism for exercising those rights [and which] exposes the implementation of those rights to systematic scrutiny'' (1998: 286). A federal inmate grievance tribunal is one way of shoring up such a framework.

However, special care and attention must be given to the particular features of the tribunal in order to ensure that it is fair, speedy, and capable of effecting real change. Unfortunately, as experience demonstrates, an unresponsive, biased, or exceedingly slow grievance system can be just as problematic as having no system at all: ''the worst possible scenario . . . is to have a complaint and grievance process which is so deficient, both in time and in substance, that it becomes itself a source of further frustration and resentment'' (Arbour 1996: 194). The first section of this article discusses the rationale for creating an independent adjudicative tribunal, while the second section examines how that tribunal should be organized.

The case for a grievance tribunal

From an outsider's perspective, the Correctional Service of Canada (CSC) sits in a curious and largely inexplicable vacuum of accountability. After all, every *other* government actor in the criminal justice system is subject to at least one specialized external oversight mechanism with the power to issue binding opinions on the propriety of particular conduct (Arbour 1996: v): police officers are subject to public complaint commissions (Ceyssens 2003: 7-1–7-94), prosecutors and criminal defence counsel are subject to discipline by law societies (Hutchinson 1999), and judges must answer to the Canadian Judicial Council (Judges Act, §58–71) or its provincial analogues and to appellate courts. A closer examination of the CSC demonstrates that its anomalous position is simply not warranted – indeed, several features of the correctional system militate strongly in the direction of increased accountability.

Canadian penitentiaries are run, by and large, outside the public eye (Arbour 1996: v). A bewildering maze of statutes, regulations, commissioner's directives, regional instructions, standing orders,

and post orders is supposed to govern the day-to-day operation of these institutions (Arbour 1996: 3–4), but in practice applicable rules may be unknown, misunderstood, or simply ignored (Arbour 1996: 181; Canada, Solicitor General 1987: 9–10). Apart from law enforcement, the CSC is the only domestic government agency that uses physical force on an almost daily basis: more than 1,100 use-of-force incidents were recorded in the 2002–2003 reporting year (Canada, OCI 2003: 3). A recent OCI analysis of the CSC's use of force found ''unreasonably high levels of non-compliance'' in areas such as strip-searching, deployment of gas, and the use of physical restraints (Canada, OCI 2001: 15).

Given that Canada's 13,000 inmates (Statistics Canada 2003: 39) filed almost 7,000 inquiries and complaints with the OCI in the last reporting year (Canada, OCI 2004a: 47), a fair and effective mechanism to address these complaints is clearly needed. According to a Correctional Law Review study

> [a] grievance procedure which preserves the appearance and reality of fairness prevents much of the feelings of frustration and bitterness experienced by inmates, and emphasizes to all parties that they are responsible for reaching workable solutions. (Canada, Solicitor General 1987: 110)

Unfortunately, the consensus among inmates and researchers is that the internal grievance system is slow, frustrating, and ineffective.

In her well-known 1996 report on the forced strip-searching and segregation of inmates at the Kingston Prison for Women, Justice Louise Arbour (1996: 153) notes that almost all of the problems examined during the inquiry were first raised through the inmate grievance procedure; but the grievances were either ignored, answered several months late, or answered by someone without the authority to investigate the facts or provide an effective response (154). Arbour concludes that ''by far the most troubling aspect of the responses to these grievances, which raised important issues of fundamental inmate rights, was the number of times in which the responses failed to deal properly with the substance of the issues raised'' (154) and that the grievance process ''has no chance of success unless there is a significant change in the mindset of the Correctional Service towards being prepared to admit error without feeling that it is conceding defeat'' (193).

A decade later, the same problems persist. Almost half of ''priority'' inmate grievances were answered late by CSC officials in 2001–2002, according to the Canadian Human Rights Commission (CHRC 2003b: 64); inmates consider the process ''slow and not very effective'' or ''useless'' (63); and recently both the CHRC and the OCI have concluded that the system is often ineffective in vindicating inmate rights (CHRC 2003b: 63; Canada, OCI 2003: 31, 2002: 31, 2001: 23).

The intransigence CSC has shown toward inmate grievances can also be found in its response to recommendations for change made by the OCI. The CSC's ''demonstrated unwillingness'' (Arbour 1996: 194) to actually implement change is an old but persistent problem. Indeed, the organization often refuses to consider the substance or specifics of recommendations made to it. For example, a recent OCI annual report notes that the CSC simply did not seriously address certain concerns raised by the OCI regarding Aboriginal offenders (Canada, OCI 2003: 18), women offenders (20), access to programming (23), inmate injuries and institutional violence (25), double bunking (28–29), the use of force (30), and inmate grievance procedures (37). The report concludes that ''the lack of responsiveness of the Correctional Service to our findings and recommendations made it virtually impossible to focus upon, and bring resolution to, the content of our submissions'' (2003: 4; see also Canada, OCI 2000: 59; Jackson 2002: 576).[2]

Similarly, even when the CSC examines recommendations and agrees that change is necessary, actual implementation of proposals is stymied by ''a bureaucratic process of excessive review, consultations and endless study'' (Canada, OCI 2000: 5). It took almost 12 years for the CSC to implement recommendations regarding community placement of women offenders (CHRC 2003b: 54); ''consultation'' and ''draft'' policies on sexual harassment circulated for at least six years (Canada, OCI 2002: 13), while ''draft'' policies on suicide prevention circulated for more than three years (Canada, OCI 2001: 18). When the CSC was required to conduct investigations, its reports were sometimes not completed until six to eight months after the incident (Canada, OCI 2002: 19).

Moreover, these are not simply abstract or academic problems. Particular incidents of potential civil rights violations include an inmate who was stabbed 30 times and suffered a collapsed lung and a fractured nose, but was deemed by the CSC *not* to have a ''serious

bodily injury'' as required to trigger an internal investigation (Canada, OCI 2000: 38–40); an inmate who was beaten with a baton, gassed, and then left wet and naked on a concrete slab, but no investigation was deemed necessary by the CSC (Canada, OCI 2000: 51); and an inmate who was moved to segregation, chained naked to a bed in a cell without a mattress, and then confronted and apparently punched by a prison guard who told the surveillance camera operator to ''turn it off'' seconds before the videotape was stopped, but again no investigation was deemed necessary (Canada, OCI 2000: 52). It took 20 months and frequent OCI intervention before the CSC admitted error and issued an apology to uncircumcised male inmates who were forced to retract their foreskins during a strip search (Canada, OCI 2001: 29–30).

It is normal, and even expected, for an ombudsman and a monitored body to disagree occasionally on the *necessity* of proposed changes, and a devotion to studying problems carefully before implementing solutions is admirable. On the other hand, CSC's sustained refusal even to consider recommendations or fulfil past commitments is clearly a problem. The OCI has often been praised for its ability as a correctional ombudsman (Arbour 1996: 171), but the power to conduct investigations and make recommendations has not, by itself, proved sufficient to ensure that human rights and civil liberties are respected in penitentiaries (CHRC 2003b: 67; Canada, OCI 2004b: 29; Arbour 1996: 62–63).

In response, the OCI has advocated ''the establishment of an administrative tribunal with authority to adjudicate and implement resolutions on significant areas of concern arising from our Office's investigations'' (Canada, OCI 2004b: 30). The possibility of establishing external review of at least some types of CSC decisions was raised at least as early as 1987 by the Solicitor General's Correctional Law Review Working Group (Canada, Solicitor General 1987: 114) and, in one form or another, has been endorsed by a wide variety of commentators, including the Canadian Criminal Justice Association (Canada, Solicitor General 1987: 109), Justice Arbour in her role as commissioner of the Kingston Inquiry (Arbour 1996: 258), the CHRC (2003b: 67–68), the House of Commons Standing Committee on Public Accounts (CHRC 2003b: 67), the Parliamentary Sub-Committee on Review of the Corrections and Conditional Release Act (Canada, OCI 2004b: 15), the Cross Gender Monitoring Project (Canada, OCI 2004b: 15–16), and Michael Jackson in his well-known book *Justice Behind the Walls* (2002: 587–588).[3]

Because the grievance process and OCI recommendations are seen as insufficient, the common theme among these various submissions is that an external body with ''teeth'' is necessary to instil the rule of law in the correctional system (Arbour 1996: 180). Accountability and the rule of law are basic features of good government, but they are even more necessary when the use of coercive force is frequent and a vulnerable, captive population is involved (see generally Canada, OCI 2003: 57; Arbour 1996: 97; Canada, Solicitor General 1987: 16). Although more research is needed, ''[e]xternal monitoring bodies are common in other countries'' (CHRC 2003b: 67), and ''[a]lthough experience shows that the independent review level is required in only about 1% of all cases, it is the most critical element in ensuring credibility, and in encouraging the parties to work hard at finding workable solutions at earlier levels'' (Canada, Solicitor General 1987: 114). In examining the idea of external review, the CHRC has concluded that

> [i]t is in the interests of everyone concerned – the Correctional Service, staff, inmates and society – if safeguarding human rights is strengthened by adding an independent oversight function. A specialized oversight function can provide an unbiased and informed view of human rights compliance within the correctional context. (2003b: 67)

To date, the CSC has rejected proposals for external review (Canada, OCI 2004b: 3). The next section of this article discusses particular features of the independent adjudicative tribunal that will answer these objections and help to ensure that the rule of law is entrenched in the Canadian correctional system.

The nature of the grievance tribunal

In Canada and other countries, administrative tribunals to resolve complaints are an increasingly common mechanism to ensure government respect for civil rights and the rule of law. Not all complaints systems work equally well, however. The challenge in creating a federal inmate grievance tribunal is deciding how to structure the system so that it embodies the positive features of accountability without simply creating another layer of unresponsive bureaucracy.

Experience shows that three key principles are embodied in a good complaints system. First, the system must, both in fact and in perception, be fair and unbiased. Second, it must be efficient

and timely. Finally, it must have the authority and willingness to effect real change. Although many details of the tribunal will no doubt need to be worked out in the future, I attempt here to articulate the key elements of an inmate grievance tribunal that is independent, timely, and effective.

Key features of the tribunal

The tribunal must be independent of both the CSC and the OCI

The principle that adjudicative bodies should be independent of the parties before it is a fundamental tenet of our legal system. The rationale is simple: A neutral decision maker is more likely to reach a fair ruling than one who suffers from a conflict of interest with one of the parties. Even in the absence of actual bias, the appearance of impropriety must be avoided if participants are to have confidence in the system.

An inmate grievance tribunal that is dependent upon the CSC will almost certainly be viewed as biased by inmates, just as a tribunal composed of OCI staff would be viewed as biased by CSC officials (Canada, Solicitor General 1987: 117). Independence and neutrality similarly require that the tribunal not be dependent on either the CSC or the OCI for funding or administrative staff. Finally, the body should operate at arm's length from inmates, the CSC, and the OCI: Written submissions by a party should be circulated to other relevant parties, and *ex parte* hearings should be prohibited.

Members of the tribunal should be chosen according to merit, not patronage

Tribunal members should be knowledgeable about correctional issues through legal, academic, or professional experience and should be screened for good judgement and objectivity. Merit selection of this type lies in contradistinction to patronage appointment, a system heavily criticized recently for placing unqualified members on the Immigration and Refugee Board (Moore 2004; ''Minister promises'' 2004).

Tribunal decisions and rules of procedure should be in writing

Written decisions fulfil several important functions: They demonstrate to the losing party that the tribunal has considered their arguments seriously and disposed of them for good reasons; they clarify the law

for CSC staff charged with writing policies or authorizing particular conduct; and they provide a record for appellate courts reviewing the tribunal's decision. Likewise, written rules of procedure provide notice to parties of the actions expected of them.

Fixed timelines should operate throughout the system

As discussed above, excessive delays in investigating and adjudicating grievances are some of the most common problems associated with the current inmate complaint system. These problems exist in other complaint systems as well: Complaints made under the Quebec Police Act about treatment of protesters at the 2001 Summit of the Americas are still in progress (Canadian Civil Liberties Association 2001), while the average age of complaints filed with the Canadian Human Rights Commission was, until recently, 25.3 months (CHRC 2004: 1). Suffice it to say that, if an inmate does have a legitimate grievance, it will only be exacerbated if two to three years pass before a remedy is offered.

As will be explained further below, I envision that the OCI will continue as the primary investigator and advocate of inmate grievances, and thus I see no need for the new tribunal to oversee the timeliness of those investigations. However, strict timelines should govern the tribunal's actions once a complaint is filed with it: Statutes should set forth deadlines for each party to make submissions, for hearings to be held, and for a final decision to be rendered.[4] For example, a period of 30 days for a party to respond once a complaint is filed with the tribunal, followed by 60 days before a hearing is held and another 60 days for the tribunal to issue a decision, would allow the entire process, exclusive of preliminary investigation and appeals, to be completed within six months.[5]

The tribunal must have authority to issue binding, legally enforceable remedies

If the tribunal does not have this authority, it will simply duplicate the current role of the OCI as an ombudsman recommending changes. At a minimum, two primary remedies should be available to the tribunal: the ability to order monetary compensation for the infringement of inmate rights (CHRC 2003b: 67–68; Jackson 2002: 587–588) and the ability to issue mandatory injunctions instructing the CSC to take a specific action to terminate an illegal practice or policy (CHRC 2003b: 67). The former is self-explanatory, but examples of the latter power could be an order allowing an inmate to participate in a particular

treatment program or educational activity; an order to alter the involuntary transfer policy to confer greater due-process rights; or an order to return seized property. Importantly, the tribunal should be authorized to find that current CSC practices or policies violate governing regulations and statutes, as well as the Canadian Charter of Rights and Freedoms (see, e.g., Solicitor General 1987: 12, 103–108).

In her report on the Kingston Prison for Women, Justice Arbour proposes judicially enforced reductions in sentence length as a potential remedy for unconstitutional conditions (Arbour 1996: 183; see also Jackson 2002: 583–586). Although it may or may not be appropriate for judges to oversee the implementation of sentences in this way, a reduction in sentence length would probably not be an appropriate remedy for the tribunal to possess. My hesitation to endorse tribunal-ordered sentence reduction is premised on two points. First, as the legitimate goals of the correctional system are incapacitation and deterrence, sentence reduction could pose a severe threat to public safety and trespass on the jurisdiction and expertise of the National Parole Board. Second, sentence reduction does not sufficiently address the core problem of unconstitutional conditions or behaviour, nor is it necessarily an incentive to correctional officials to change their behaviour.

In order to ensure that the system remains streamlined and effective, the tribunal should not hold the power to discipline individual correctional officers for misconduct. The ability to discipline individuals would require enhanced due-process protections, increase the likelihood of appeals, and possibly reduce cooperation in investigations. Presumably, the current methods of disciplining correctional officers would continue, and tribunal decisions might influence the initiation or outcome of those methods.

The role of the OCI

The OCI should act as a "gatekeeper," with the sole authority to file formal complaints with the tribunal

For more than 30 years, the OCI has existed as the primary resource for inmates who have been unable to resolve disputes through the normal grievance process. The OCI has a credibility, expertise, and network of contacts within the correctional system that no other oversight body possesses (Arbour 1996: 194). The primary reason for

making the OCI the ''gatekeeper'' for the system is that the tribunal would otherwise be overwhelmed with a flurry of inmate complaints requiring a vast investment of staff resources and time to investigate and adjudicate. The CHRC fulfils a similar ''gatekeeper'' function in the context of human rights complaints; of the 1,084 signed complaints received in 2003, the CHRC referred only 158 to the Human Rights Tribunal (CHRC 2004: 8, 13). Similarly, of 800 signed complaints received in 2002, only 70 were referred to the Human Rights Tribunal (CHRC 2003a: 15, 19).

Making a referral from the OCI mandatory allows for development of the kind of ''triage'' system now being implemented by both the CHRC (CHRC 2004: 47) and the Commission for Public Complaints against the RCMP (2004: 33). The fact that the OCI receives almost 7,000 inquiries and complaints each year (Canada, OCI 2003: 3) indicates that a method of prioritizing complaints is a necessity if the tribunal is to function efficiently. Factors in the triage system would include the seriousness of the alleged illegal acts; the number of inmates who could be affected by the outcome; whether there are disputed factual claims or questions of credibility; and, of course, the likelihood of success (CHRC 2004: 48). The hypothesis is that a few carefully screened and selected cases, pressed vigorously before a tribunal, are more likely to effect real systemic change than would hundreds of indiscriminate claims.

The OCI should appear as a representative of the inmate's interests before the tribunal

Although it must be conceded that this alters the OCI's traditional role as a pure ombudsman, there is little chance that the system could function otherwise. Complaints systems that are fair in theory often fail miserably in practice because of the resource and knowledge differential between complainants and the organization they are complaining about. Analysis of complaint systems of various kinds validates this assertion made by a criminologist about the Toronto police complaints system:

> In the context of low visibility police–citizen interactions where complainants are "one shot players" with a poor understanding of the system and few resources which they can assert to control or influence the course of the investigation, there is little chance that any of their concerns could be substantiated by amassing documentary or other physical evidence. (Ericson and Baranek 1982, quoted in Landau 1994: 76)

Professional advocates are needed both to distinguish between the relevant and irrelevant results of an investigation and to fully articulate the legal arguments necessary to show that a violation of the law has occurred. Although inmates should certainly be afforded the right to retain their own legal counsel before the tribunal, in practice few prisoners have access to attorneys (OCI 2003: 53–54). Without OCI involvement, most inmates would be forced to represent themselves before the tribunal, seriously reducing their likelihood of success.[6] Finally, the OCI's ''enhanced and direct access to information'' (Canada, OCI 2003: 9) allows it to conduct any factual investigations needed to support an inmate's claim, thus avoiding the obvious implication of bias in some other complaints systems where an organization investigates itself (see Landau 1994: 75).

The OCI should continue to resolve as many complaints as possible through informal means

In other words, recourse to the tribunal should be a last resort when other options have failed. Voluntary resolution of complaints avoids the time and expense of formal action while also preventing problem situations from escalating (CHRC 2004: 49; Canada, OCI 2003: 9). For example, the CHRC often tries 60 days of mediation before referring a complaint to the Human Rights Tribunal (CHRC 2004: 16–17). And, although serious problems with the CSC's response to OCI recommendations have been noted, it would be disingenuous to say that the CSC *never* addresses problems brought to its attention. The OCI should retain discretion to determine if and when further attempts to resolve a complaint informally would be futile.

Safeguards: Access to the courts must remain unfettered.

Given that complaints systems in other areas have not been an unqualified success, and that the effectiveness of an inmate tribunal cannot be predicted with certainty, the availability of access to the judicial system should not be constrained. Indeed, one of the major conclusions of the Arbour report is that ''increased judicial supervision [of corrections] is required . . . There is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control'' (Arbour 1996: 197). Similarly, a Solicitor General working group on corrections has stated that ''the judicial system must always be available to an individual to challenge a denial of rights or abuse of power, to ensure that the rule of law is applied in our correctional system'' (Canada, Solicitor General 1987: 103). Courts have been a

major tool of progressive correctional reform in the United States; although this has been less true in Canada, the possibility of more frequent prison litigation should not be foreclosed. Any future legislation creating an inmate grievance tribunal should provide in explicit terms that recourse to the tribunal is not a prerequisite to filing a civil action.

The role and objections of the CSC

This article envisions the federal inmate grievance tribunal operating according to the standard adversarial method of administrative hearings: The OCI would bring claims to the tribunal and would normally advocate on behalf of the inmate; the CSC would represent itself; and tribunal hearing officers would issue a final decision. As is currently the case, both the CSC and the OCI would continue to conduct investigations and be required to exchange information and evidence.

The precise grounds for the CSC's objections to the creation of independent review are unknown at this time, but likely objections would include (1) the idea that external authorities are insufficiently sensitive to security needs and would not possess the expertise of CSC decision makers (Canada, Solicitor General 1987: 117); (2) the fact that adequate mechanisms to resolve disputes already exist (Canada, OCI 2004b: 29); and (3) the idea that ''independent review will dilute accountability and even the motivation to take appropriate decisions that should be required of internal decision-makers'' (Canada, OCI 2004b: 29).

With respect to the first objection, the fear that external reviewers will lack the expertise and sensitivity of internal staff members is a fear that, if given weight, would stall all attempts to instil accountability in any area of government; indeed, it would preclude ordinary judicial review and political oversight. Although there are obviously no guarantees, this fear does not appear to be justified by the history of other systems of accountability present throughout the Canadian criminal justice system. Even under standard principles of administrative law, the expertise of internal staff members is generally given real weight. Further, tribunal members are to be chosen based upon merit, and the CSC will have an opportunity to articulate its security concerns before any decisions are rendered. As one commentator states, ''experience in other jurisdictions suggests that correctional authorities which use [independent review] are quickly reassured by

the fairness and reasonableness of the solutions decided by outsiders'' (Canada, Solicitor General 1987: 117).

I have already discussed why the second objection, that adequate mechanisms already exist, is simply not valid. The inmate grievance system is slow and usually ineffective, prisoners rarely have access to the courts, recommendations made by the OCI are often not given serious weight, and the CHRC becomes involved only in questions of discrimination, not in poor conditions generally or misconduct unrelated to discrimination.

In the absence of the present factual context, the fear that independent accountability might reduce the motivation for internal decision makers to take appropriate action might have some merit. However, the facts clearly demonstrate that the CSC already suffers from a serious lack of accountability and that, in Justice Arbour's famous words, ''the Rule of Law is absent, although rules are everywhere'' (1996: 181). To put it simply, the last decade demonstrates that the CSC is incapable of reforming itself to adequately instil the rule of law; outside intervention is necessary, and the creation of an inmate grievance tribunal is the first step in creating that much-needed accountability.

Conclusion

This article represents a preliminary exploration of the need for increased accountability in the Canadian federal correctional system. Several areas would be fruitful for further research: the structure and experiences of correctional oversight bodies in other countries; the structure and experiences of Canadian oversight bodies in other areas; studies on the sociology of institutions to determine how best to instil compliance with rules; and analyses of the costs involved in creating a new tribunal. Similarly, many details of the tribunal will have to be worked out, such as the number of tribunal members, their terms of office, and the size of adjudicative panels. Finally, as most of the research and commentary on correctional accountability has taken place in the context of persons actually confined in penitentiaries, consideration should be given to whether offenders on parole or placed in community correctional facilities require access to oversight mechanisms like the tribunal (CSC Working Group 1999: 5).

A federal inmate grievance tribunal is necessary. A careful analysis shows that no other mechanism or organization has yet succeeded in

creating an atmosphere within the correctional system that is conducive to promoting human rights, civil liberties, and the rule of law. The tribunal must, however, be carefully structured to carry out the principles of timeliness, fairness, and effectiveness. The model presented here consists of an independent, merit-based tribunal operating according to fixed timelines and issuing written decisions. The OCI is envisioned as both a gatekeeper to the tribunal and an advocate once a case is filed. The role of the CSC changes the least, as it is asked only to represent its own interests before the tribunal and to cooperate in sharing the results of investigations with the OCI. The model presented here is intended to be functional while requiring as little reorganization and investment of financial resources as possible. As the first priority should be to do no harm, however, recourse to the judicial system must remain unfettered by an exhaustion requirement.

If such a tribunal is established, the only way to measure its success is to ask, Is there more compliance with the rule of law after it was created than there was before? Have there been any tangible, positive outcomes from referring cases to the tribunal? The continued existence of the tribunal must be seen as neither inevitable nor precarious; instead, it should be constantly examined, tested, and refined in order to ensure that it achieves its intended purposes.

Notes

1. This article represents solely the views of the author and not necessarily those of any organization he is associated with.

2. The OCI's most recent annual report appears to take a more optimistic view (Canada, OCI 2004a: 42), but it remains to be seen whether this encouraging sign will become a trend.

3. Jackson's excellent discussion of the subject foreshadows many of the points made later in this article.

4. As with most legal deadlines, limited extensions of time should be available for good cause shown upon application to the tribunal.

5. For certain types of inmate complaints made in exigent circumstances, such as those involving access to immediately necessary health care, even six months may be far too long to wait. In such a situation, an emergency court injunction would presumably remain the preferred remedy.

6. Note that this advocacy model is slightly different than that of the CHRC, which often but not always takes part in tribunal hearings. In its last reporting year, for example, the CHRC was present for 72% of total tribunal hearing days (CHRC 2005: 14). In my view, the substantial and almost uniform difficulty inmates have in obtaining legal counsel militates for more frequent representation by the OCI in the proposed tribunal. Presumably, OCI representation of inmates would continue if the CSC seeks judicial review of a tribunal decision.

References

Arbour, Louise, chair
1996 Report of Commission of Inquiry into Certain Events at the Prison for Women in Kingston. Ottawa: Public Works and Government Services Canada [PWGSC].

Campbell, Mary E.
1998 Revolution and counter-revolution in Canadian prisoners' rights. Canadian Criminal Law Review 2: 285–329.

Canada, Office of the Correctional Investigator [OCI]
2000 Annual report of the Correctional Investigator 1999–2000. Ottawa: PWGSC.

Canada, OCI
2001 Annual report of the Correctional Investigator 2000–2001. Ottawa: PWGSC.

Canada, OCI
2002 Annual report of the Correctional Investigator 2001–2002. Ottawa: PWGSC.

Canada, OCI
2003 Annual report of the Correctional Investigator 2002–2003. Ottawa: PWGSC.

Canada, OCI
2004a Annual report of the Correctional Investigator 2003–2004. Ottawa: PWGSC.

Canada, OCI
2004b Shifting the orbit: Human rights, independent review and accountability in the Canadian corrections system. Ottawa: PWGSC.

Canada, Solicitor General
1987 Correctional authority and inmate rights. Correctional Law Review Working Paper No. 5.

Canadian Civil Liberties Association
2001 CCLA files complaints over Quebec summit. CCLA Newsnotes, December.

Canadian Human Rights Commission [CHRC]
2003a Annual Report: 2002.

CHRC
2003b Protecting their rights: A systemic review of human rights in correctional services for federally sentenced women. Ottawa: PWGSC.

CHRC
2004 Annual Report: 2003. Ottawa: PWGSC.

CHRC
2005 Annual Report: 2004. Ottawa: PWGSC.

Ceyssens, Paul
2003 Legal Aspects of Policing. Scarborough, ON: Carswell.

Commission for Public Complaints against the RCMP
2004 Annual Report: 2003–2004. Ottawa: PWGSC.

Correctional Service of Canada [CSC] Working Group on Human Rights
1999 Human rights in community corrections. Ottawa: CSC.

Ericson, Richard V. and Patricia M. Baranek
1982 The Ordering of Justice: A Study of Accused Persons as Dependents in the Criminal Process. Toronto: University of Toronto Press.

Hutchinson, A.C.
1999 Legal Ethics and Professional Responsibility. Concord, ON: Irwin.

Jackson, Michael
2002 Justice Behind the Walls. Vancouver: Douglas and McIntyre.

Landau, Tammy
1994 Public Complaints against the Police: A View From Complainants. Toronto: Centre of Criminology, University of Toronto.

Minister promises IRB appointments will now be "merit based."
2004 CBC News Online, March 16. http://www.cbc.ca/stories/2004/03/16/canada/refugeeboard040316

Moore, Oliver
2004 Ottawa moves to end patronage at refugee board. The Globe and Mail, March 16.

Statistics Canada
2003 Adult correctional services in Canada, 2001–2002. Ottawa: Industry Canada.

Legislation cited

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

Judges Act, R.S.C. 1985, c. J-1

page 304 blank