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THE IMPACT OF THE RULE OF LAW ON THE OPERATIONAL PROCEDURES AND POLICY-MAKING OF THE NATIONAL PAROLE BOARD

by

Othniel O'Neill Collins

B.A. Simon Fraser University, 1969

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

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The Impact of the Rule of Law on the Operational Procedures and Policy-Making of the National Parole Board

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ABSTRACT

Recent years have witnessed a growth in the number and powers of administrative boards. Although elected officials make final decisions on public policy questions, administrative officials have accumulated vast powers which may be used to influence policy decisions and to affect the individual and collective rights of citizens. As a consequence, the longstanding interest of scholars and practitioners in the preservation of administrative responsibility has become more acute. In the criminal justice system, the Parole Board is an example of an administrative board whose activities have potentially serious consequences, not only for the criminal offenders who are subjected to the operational policies and decisions of the Parole Board, but also the general public.

This thesis traces the development of the National Parole Board and examines the impact of the rule of law and the demands of 'natural justice' on several areas of its operational procedure, including: 1) Introduction; 2) Parole Background - The Canadian Experience; 3) The Right to Hearings and Reasons for Decisions; 4) Parole Forfeiture, Revocation and Mandatory Supervision Suspension; 5) The Right of Access to Information and Legal Representation; and, 6) Summary.

An analysis of the impact of court challenges and the recommendation of various investigative committees reveals that the operational procedures of the Board have been significantly

affected by judicial decisions which have served to introduce due process safeguards into the parole process.

A primary conclusion of the thesis is that the rule of law has been instrumental in providing significant reform in the parole process and lessening the arbitrariness of many previous operational policies. Such interventions, however, have not addressed the discretion extended by Parole Board Members in making parole decisions, nor served to clarify the criteria employed by Parole Board Members in reaching a decision in specific cases. The Parole Board as an administrative board, has therefore retained considerable autonomy.

ACKNOWLEDGEMENTS

I am grateful to my former colleagues at the National Parole Board and the Correctional Services of Canada-Parole, who have kept me up-to-date with the changes in parole legislation and policy-making, and without whose guidance and encouragement this work would not have been completed.

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DEDICATION

To my children Nathan and Rachel

who endured their father's

absences with equanimity.

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CHAPTER 1

INTRODUCTION

Administrative bodies constitute a major mechanism for decision-making in our society. The scope and complexity of government activities have become so great that it is often difficult to determine whether administrative officials are acting *ultra vires* of their mandate or within the limits of their prescribed responsibilities. While politicians are held responsible for personal wrong doing, they are seldom expected to assume personal responsibility by way of resignation for the acts of administrative appointees about which they could not reasonably be expected to have knowledge. Yet, it is frequently impossible to assign individual responsibility to these appointees for administrative transgressions because a number of these officials may have contributed to the decision-making process.

While the involvement of politicians and their appointees in dramatic and well-publicized events has drawn much attention to the issue of political responsibility, the status of administrative responsibility has also become a matter of increasing concern. Although elected officials make the final decision on public policy questions, administrative officials have accumulated vast powers to influence policy decisions and to effect the individual and collective rights of the citizenry. As a consequence, the long standing interest of scholars and practitioners in the preservation of administrative

responsibility has become more acute. This concern is shared in varying degrees by all major actors in the political system - be they legislators, judges, special interest groups and mass media representatives, or members of the general public.

The notion of administrative justice has been questioned in recent years by the multiplication of bodies such as administrative boards commissions and agencies. In the discharge of their duties administrative officials are often perceived to be assuming the traditional functions of the courts of law and determining the rights of individuals, thereby undermining the doctrine of the supremacy of law. In sum, it has been argued that the rise of administrative bodies probably has been one of the most significant bureaucratic innovations of the 20th century, and perhaps more individuals today are affected by their decisions than by all the courts.[1]

The literature identifies several major areas of concern relating to administrative boards, including their legal basis, procedures, accountability, decision-making, structure and size.[2] Some of these boards have very little impact on people's lives, as the consequences of their decisions are fairly diffuse, and removed from day to day activities. On the other hand, vast powers have been granted to many modern administrative boards who play dominant roles in our society. One such board is the National Parole Board, which through its decision-making, may have a significant impact on not only the criminal offender, but the general public as well.

The purpose of this thesis is to examine the extent to which the operational procedure and policy-making of the National Parole Board have been impacted and influenced by the intervention of the rule of law, or more specifically, by court decisions. This examination will proceed in the following manner. First, the conventional theory of administrative responsibility will be described, then an analysis will be made of the Board's policy-making and parole procedures. This analysis will focus on the circumstances where the Board's failure to provide due process safeguards to inmates/parolees have been called into question by the courts. Finally, a number of hypotheses relating to the achievement of responsible administrative decision-making are formulated.

Administrative Boards: Critical Concerns

One of the distinguishing features of administrative agencies is that they have power to determine, either by rule or decision, private rights and obligations. According to Weber, (1974) bureaucracy in its ideal type embodies a legalistic purity, where officials are subjected to strict systematic control and discipline and enforces the law "without hatred or passion and hence without affection or enthusiasm".[3] However, in reality decision-making by bureaucrats is relatively free of legal control and often involves a high degree of discretion.[4]

An intrinsic element of administrative agencies is the political arena in which they operate. Quite often the actions

of administrative officials are integrally related to policy considerations, since administrative actions inevitably generate political consequences. It is difficult to alter this fact regardless of the nature of the administrative structure, the decision-making strategy, or the nature of the public policy itself. In the case of the National Parole Board, its members and administrators must perform their functions in a highly politicized environment which places them in the domain of public scrutiny.

According to Gawthrop (1971) given the nature of our puralist political system, there is virtually no such thing as a purely apolitical administrative decision. Any decision - save the most innocuous and trivial ones made by an administrative official - will almost inevitably run counter to the political objectives of some particular group in our society.[5] As a consequence, the administrator no matter how innocent, how objective, how disinterested, how apolitical he may attempt to be, creates political sound waves every time he makes an administrative decision.[6]

Lowi is of the opinion that the behaviour of organizations cannot be understood politically unless one relates policy to the most central characteristic of politics which is the exercise of legitimate coercion.[7] Politics he claims, involve not only the allocation of values but also the selection of various ways in which the legitimate coercive powers of the state can be utilized to secure support and/or compliance for

the value or values being chosen or ranked.[8]

Administrative boards have been criticized for procedures which are vague, or conflicting and whose initial purposes have become obsolete, or have changed over time. Officials on administrative boards are often perceived as having no direct accountability to the electorate. These decision-makers are not bound to follow the formal procedures of law courts, consequently, they are free to choose their own procedures whether they have statutory authority to do so or not. It is arguable that given this freedom they may be tempted to act in a manner that is not in accordance with the rules of "natural justice".[9]

Estey claims that the trend in administrative law, legislatively speaking, has been against granting the right to appeal on the misguided theory that the administrative board brings to the subject a characteristic or inherent expertise and therefore they are better equipped and versed to handle the problem than a court or some other collection of human beings.[10] He feels that members of Canadian administrative boards are seldomly, if ever, made personally liable whenever they act arbitrarily, and since they are acting in the name of the Crown and often with statutory authority they are shielded from the consequences of injurous acts.[11]

Generally speaking the criteria for decision-making by administrative boards are usually vague and inconsistent. This has the potential for bias especially when the appeal process is

restricted to its own select group of members. Doern, et. al., (1975), found that the structure of some boards is one of loosely connected autonomous units, and often there is no evidence of substantial concensus on regional or national policies as the activities of some of their members are only marginally related.[12]

According to Kersell, (1976)[13] administrative tribunals in Canada have not been found to be effective controls on administrators as individuals have turned from them to the ordinary courts for protection of their rights and interests *vis a vis* the bureaucracy. Kersell argues that the earlier assumption that administrative law would be more humane and flexible in meeting the needs of the clients of government have given way to the realization that often it is the administrative needs and convenience of public servants which come first.[14]

Davis (1969)[15] argues that modern government is not possible without considerable discretion and power, although he sees the poor as having difficulty making their case in the administrative process.

Although admitting that some discretion is necessary, Davis is concerned with the amount of "unnecessary discretion" wielded at all levels of administration, which provides opportunity for administrators to depart from official policy.[16] He suggests the use of precise rules to "confine" discretion, set its boundaries and shave it down to a minimum compatible with the effective exercise of the task to be performed, or to "structure"

discretion, and channel it to take cognizance of officially sanctioned criteria. Davis also suggests that where possible discretion should be "checked" by persons other than the decision-maker, and "structured" in such a way as to be "open", that is, exposed to public scrutiny, through open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedures.[17]

It can be argued that rules should be created for governing administrative discretion as this reflects a political philosophy that rejects unlimited freedom for the administrative decision-maker who is not subject to direct accountability to the electorate. Rules are thus seen as a means of both reducing the free exercise of discretion and providing specific standards against which official decisions may be measured. It seems plausible that where there is no congruence between rule and decision, affected persons could hold officials accountable through challenge by judicial review. The adherents of this view, which Davis terms the "extravagant version of the rule of law", maintains, therefore, that administrative action, however benignly exercised, should always be subject to predetermined rules and judicial challenge.[18]

All administrative boards pay a high price in public reputation and standing for failure to publish their decisions. Some are surrounded by an aura of graft and political favouritism largely because they do not publish coherent reasons for their decisions. Therefore, it is inevitable that charges of

corruption will be levelled against such boards where ever reasons for decisions are not published.

Many administrative boards with strong chairpersons who have been in office for many years, display a marked degree of benign paternalism towards those in their charge. This is particularly marked in areas of so-called "privilege", involving matters such as parole liquor licencing and welfare.

Despite statutory exhortations to administrative boards that they licence and regulate "in the public interest", or words with similar meaning, most boards greatly discourage public participation by inadequate publication of their decisions and procedures.

Some administrative boards regard their work as so highly technical as not to be of any interest to the public. Consequently, they ignore demands for comprehensive information on their operations.

Since the National Parole Board is considered to be an administrative agency, its origins, structure and mandate will be discussed in the next chapter, as its policy formulation and decision-making may be affected by all of these factors. The concept of the rule of law will also be examined, since this is one potential source of outside control over the Board's deliberations.

NOTES

1. See W.Z. Estey, "The Usefulness of the Administrative Process". Special Lectures of the Law Society of Upper Canada, Toronto: Osgoode Hall Law School, 1971, pp. 307-08.
S. Wexler, "Non Judicial Decision Making". 13 Osgoode Hall Law Journal (1975).

2. See for example such authors as Peter Self, Administrative Theories and Practices: An Inquiry into the Structure and Processes of Modern Government. University of Toronto Press (1974).
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Robert Presthus, Elite Accommodation in Canadian Politics, Toronto, Macmillan (1973).

3. M. Weber, The Theory of Social and Economic Organization, Trans. A. Henderson and T. Parsons, at 340, Free Press (1974).

4. S. Wexler, Supra, Note. No.1.

5. Louis C. Gawthrop, Administrative Politics and Social Change, New York: St. Martin's Press, (1971) p. 25.

6. Ibid.

7. Theodore J. Lowi, The End of Liberalism, New York: Norton, (1969) p. 298.

8. Ibid.

9. See for example the comments of such authors as Ronald R. Price, "Bringing the Rule of Law to Corrections", Canadian Journal of Criminology and Corrections, 16, (1974);
Keith Jobson, "Fair Procedure in Parole". 22 University of Toronto Law Journal (1972); and,
D.J. Mullan, "Fairness: The New Natural Justice". 25 University of Toronto Law Journal (1975).

10. W.Z. Estey, "The Usefulness of the Administrative Process", Special Lectures of the Law Society of Upper Canada, Supra, Note No. 1.

11. Ibid, p. 308.

12. Bruce Doern et. al., Supra Note, No. 2.

13. J. Kersell. "Statutory and Judicial Control of Administrative Behaviour", Canadian Public Administration, vol. 19, p. 295, (Summer, 1976).

14. Ibid.

15. K.C. Davis, Discretionary Justice, A Preliminary Inquiry. Louisiana State University Press, Baton Rouge (1969).

16. Ibid, p.65.

17. Ibid.

18. Ibid.

CHAPTER II

THE CONCEPT OF PAROLE - THE CANADIAN BACKGROUND

Since its introduction in Canada, parole[1] has been the subject of numerous debates in an attempt to determine whether or not it has achieved its goals of reforming and rehabilitating the offender, and offering protection to the public by changing the offender's attitude toward crime. From a rehabilitation program that was first centered on moral reform and self-discipline,[2] its emphasis in later years has been rehabilitation through participation in prison programs, be they individual or group counselling, vocational or academic training, or the like, which are intended to transform prisoners into law abiding citizens.[3] Yet, with the possible exception of mandatory supervision, the parole process has engendered more criticism from legal scholars and the general public, and has been subjected to more committee reports, judicial decisions and ministerial announcements than any other rehabilitative program.[4] In sum, although parole has been a major rehabilitative program in Canada for over 25 years, there are lingering doubts as to its efficacy.[5]

Parole as it is known today is an out-growth of a number of measures that include apprenticeship by indenture, conditional pardon, the transportation of criminals to America and Australia, The English and Irish experiences with the 'ticket-of-leave', the indeterminate sentence and the work of American prison reformers during the 19th century.

The first approach to parole in actual practice is considered to be the 'ticket-of-leave' system which was adopted in Australia under the progressive leadership of Captain Alexander Maconochie. An investigation by the Transportation Committee of Parliament in the year 1837, led to the setting up of a system whereby the convict upon his arrival in the penal colony was first placed in a chain gang at hard labour. If his conduct proved satisfactory his status within the colony was gradually improved from time to time until he finally became eligible for a conditional release or 'ticket-of-leave'. Under his 'ticket-of-leave' the convict was free to seek private employment from the free settlers in a colonial territory, and, after a reasonable time of good behaviour during his conditional leave status, was granted a complete pardon.[6]

According to Newman, (1968)[7] the English Penal Servitude Act of 1853, governing prisoners convicted in England and Ireland, substituted imprisonment for transportation. The act related to conditional release and gave legal status to the system of 'ticket-of-leave'. By this act, prisoners who received sentences of fourteen years or less were committed to prison, but the judge was granted permissive power to order the transportation of imprisonment of individuals who had received terms of more than 14 years. The law also specified the length of time prisoners were required to serve before becoming eligible for conditional release on 'ticket-of-leave'.

The Irish 'ticket-of-leave' plan received great impetus from Sir William Crofton who became head of the Irish prison system in 1854, one year after the enactment of the Servitude Act. It was Crofton's idea that the intent of the law was to make penal institutions something more than places of safekeeping, and that the programs in the prisons should be designed toward reformation, hence 'tickets-of-leave' were granted only to prisoners who gave visible evidence of definite achievement and change of attitude.[8]

The Irish penal system under Crofton's administration became famous for its classification stages where marks were obtained for good conduct and achievement in education and industry. Indeterminate sentences were also utilized, where conditions were made as nearly normal as possible and where no more restraint was exercised over the inmates than was necessary to maintain order.[9] This policy was adopted in later years in Canada, in both the federal and provincial penal systems and like its predecessor, its main success was the management of inmates through various stages of the incarceration process.

In Canada the concept of conditional release of inmates on parole is also traceable to the original systems of indenture, conditional pardon, transportation of criminals and the 'ticket-of-leave'. Parole in Canada is identified with the Ticket of Leave Act,[10] which provided for the conditional liberation of convicts. This Act which was passed by Parliament in 1899, represented the first attempt to statutory control the

pre-expiration dates on which inmates were released.[11]

Prior to 1899, prisoners were released from custody by order of the Governor General upon the advice of a Minister of the Crown as an expression of the Royal Prerogative of Mercy. These releases were unconditional and approved mainly on the basis of humanitarian considerations. No eligibility criteria were involved. However, the government of Wilfred Laurier recognized the need for government assistance in the social rehabilitation of prisoners, consequently the Ticket-of-Leave Act was primarily based on the notion of clemency.[12] The conditional release was seen as a method of bridging the gap between the control and restraints of institutional life and the freedom and responsibility of community life.

Because Canada was sparsely settled, the task of developing a system of parole supervision was difficult. Therefore much reliance was placed on the monthly reporting of the parolee to the police, and the guidance and supervision that was volunteered by such agencies as the Salvation Army, the John Howard Society, and the Elizabeth Fry Society. The administration of the Act was the responsibility of officers of the Department of Justice who constituted a section of the Department known as the Remission Branch which later became the National Parole Service.[13]

There were two exceptions to the universal applicability of the Ticket-of-Leave Act. The Prisons and Reformatories Act was amended in 1913 in response to a provincial request to permit

imposition of definite-indeterminate sentences in Ontario. The Ticket-of-Leave Act continued to apply to the definite portion of these sentences but not to the indeterminate portion. The Prisons and Reformatories Act was further modified in 1916, to permit creation of the Ontario Parole Board, with jurisdiction over the indeterminate portion. The second exception was made for British Columbia in 1948, when definite-indeterminate sentences were authorized for convicted offenders between the ages of 16 and 23 (reduced to 22 in 1969). The British Columbia Board of Parole was established at the same time.[14]

In 1953, the Minister of Justice appointed a Committee of Inquiry into the principles and procedures followed in the Remission Service. The committee was under the chairmanship of Mr. Justice Gerald Fauteux and its report which became known as the Fauteux Report[15] recommended the enactment of legislation to create a National Parole Board. On February 15, 1959 the Parole Act was proclaimed transferring the authority to grant conditional release to a board with members appointed by the Governor-in-Council.

The Role of the National Parole Board

The responsibilities of the Board are contained in the Parole Act.[16] The Act sets out the legitimacy of the Board as a decision-making body, its operational mandate and structure. It also provides for regulations to be made pursuant to the Act. The Parole Act requires the Board to review the case of every

inmate in federal institutions and applications from inmates in Provincial institutions (except those provinces which have their own provincial parole boards) with a view toward the granting or denying of parole.[17]

The National Parole Board is an independent statutory body not answerable for its decisions to any judicial body, or minister. Nevertheless, it is part of the Ministry of the Solicitor General who reports to Parliament on the Board's behalf. The Board has absolute authority to grant, deny, or revoke day parole and full parole and to revoke mandatory supervision. It is also authorized to grant unescorted temporary absences to inmates in Federal institutions and to set conditions by which inmates must abide while on release.[18]

From an original number of five the National Parole Board has now expanded to a total of 26 members with provision made for the appointment of Regional Community Board members who participate as full voting members in the review for any conditional release of persons serving life, or indeterminate sentences.

Board members who serve at the Ottawa headquarters are appointed by the Federal Cabinet "to hold office during good behaviour for a period not exceeding ten years". Regional members are appointed for a period not exceeding five years and are eligible for reappointment.[19] The Board is comprised of six divisions, five regional and one headquarter. These divisions constitute a single body with each member having equal status,

except the Chairman and Vice-Chairman who have additional duties at headquarters and the Senior Board Member in the regions.

The Ottawa division of the Board makes decisions regarding provincial cases, clemency cases and those cases requiring more votes than can be cast at the Regional Division level. Regional Divisions of the Board are primarily concerned with panel hearings for all Federal cases in their regions, decisions regarding the release of inmates on temporary absences and decisions regarding parole revocation and termination of day paroles.

The Internal Review Committee

An Internal Review Committee was created by the Board in 1978 to review complaints which applied to the parole process from inmates in Federal institutions.[20] The review is undertaken by three members of the Board who have not previously acted on the particular case. Grounds for review include, but are not limited to the following considerations:

1. the reasons given for decision do not support the decision;
2. there was significant information in existence at the time of the hearing which was not considered;
3. there was an error in fact or in law; and,
4. there is new evidence which was not available at the time of the hearing.

Decisions subject to re-examination include:

1. the denial of full parole, or of parole by exception; and,

2. the revocation of day parole, full parole, or mandatory supervision.

The creation of the Internal Review Committee was an attempt by the Board to stem the tide of criticism that had been levied against it for failing to propose an amendment to Section 23 of the Parole Act, which specifically excludes appeals or reviews to any court, or other authority, and in totality to allow its decisions to be examined by the courts.[21]

How the Board Operates

The National Parole Board has its own secretariat at headquarters and in each region. These employees are responsible for computing parole eligibility dates, monitoring such areas as case preparation and parole supervision, preparing panel hearing schedules, notifying district offices of Board decisions, maintaining records and compiling statistics.

From its inception until October 15, 1977, the Board was assisted by its field staff known as the National Parole Service. The National Parole Service came under the responsibility of the Commissioner of Corrections in 1977, however, it continues to provide services to the Board in performance of its two basic responsibilities of Case Preparation and Supervision of Parolees.

The jurisdiction of the National Parole Board is specific in that it does not have jurisdiction over the following group of

offenders:

- juveniles within the meaning of the Young Offenders Act;
- persons who have violated the laws of provincial legislatures; and,
- those persons serving intermittent sentences.[22]

The Board is legally guided by the following criteria when considering a case for release:

1. The Board may grant parole to an immate subject to any terms or conditions it considers desirable if it considers that:
   a. in the case of a grant of parole other than day parole, the inmate has derived maximum benefit from incarceration;
   b. the reform and rehabilitation of the inmate will be aided by the grant of parole; or
   c. the release of the inmate on parole will not constitute undue risk to society.[23]
2. The Board may impose any terms and conditions that it considers desirable in respect of an inmate that is subject to mandatory supervision;
3. Provide for the guidance and supervision of paroled inmates for such periods as the Board considers desirable;
4. Grant discharge from parole to any paroled inmate, except an inmate on day parole or a paroled inmate who was sentenced to death or to imprisonment for life as a minimum punishment;
5. In its discretion, revoke the parole of any paroled inmate to whom discharge from parole has been granted, or revoke

the parole of any person who is in custody pursuant to a warrant issued under Section 16 of the Parole Act; and,

6. Under the Parole Act and subject to the approval of Cabinet, the Board has the power to "make rules and regulations for the conduct of its proceedings and the performance of its duties and functions".[24]

The philosophy of parole appears to be based on the idea that parole is a transitional phase between strict confinement in an institution and complete freedom in the community. In actuality this is questionable, since the paroled inmate is required to abide by the terms and conditions of parole, one of which includes supervision by a parole officer. It was stated earlier that the rehabilitative model of parole evolved from a notion of clemency where the granting of parole is seen as a privilege and not as a right. To a large extent this view has permeated the parole granting philosophy in that once parole is granted the inmate is deemed to be on conditional release and in effect is serving the remainder of his sentence in the community.

The Ouimet Committee definition of parole gives credence to this point of view:

> Parole is a procedure whereby an inmate of a prison who is considered suitable may be released, at a time considered appropriate by a parole board, before an expiration of his sentence at large in society, but subject to stated conditions, under supervision and subject to return to prison if he fails to comply with the conditions governing his release.[25]

This definition of parole compares very favourable with that of the United Nations, Department of Social Affairs:

> Parole may be defined as the conditional release of a selected convicted person before completion of a term of imprisonment to which he has been sentenced. It implies that the person in question continues in the custody of the State of its agent and that he may be reincarcerated in the event of misbehaviour. It is a penological measure designed to facilitate the transition of the offender from the highly controlled life of the penal institution to the freedom of community living. It is not intended as a gesture of leniency or forgiveness.[26]

This notion of conditional release is further re-emphasized once more in the form the inmate is required to sign, in which he agrees to comply with certain conditions. The form is worded as follows:

> I understand that I am still serving my term of imprisonment and that parole has been granted to me to resume my activities as a citizen at large in the community under supervision.... I solemnly swear....[27]

According to Parizeau and Szabo (1977) this statement reflects a philosophy inherent in the law of societies with a long-standing British cultural tradition where an effort is made to trust a person's word until proven to the contrary:

> I have read...and fully understand and accept all the conditions..., regulations and restrictions governing my release on parole. I will abide by and conform to them strictly. I understand if I violate them I may be recommitted.[28]

The principle here is that the parolee's signature represents a type of personal commitment which he is obligated to fulfill. In this case 'ignorance of the law is no excuse'. In general, all paroled inmates must report to their supervisors once a month, or as often as the case may require, and consult with them on

all matters regarding employment, social and family obligations, and prospective major purchases such as a car, or a house.

Paroled inmates may also be required to live in a certain area of the country and to inform his parole officer and receive permission whenever he wishes to leave the area.

The Board may also impose specific restrictions which are related to the parolee's former problems. For example, alcoholics and drug addicts must agree to abstain from their habits and to comply with all the restrictions imposed on them by the Board or their parole supervisor.[29]

Parole, may in fact, be suspended or revoked. A parolee may also forfeit his right to parole. Section 16 of the Parole Act states that:

> A member of the Board or any person designated by the Board may, by a warrant in writing signed by him, suspend any parole...and authorize the apprehension of a paroled inmate whenever he is satisfied that the arrest of the inmate is necessary or desirable in order to prevent a breach of any term or condition of the parole or for the protection of society.[30]

Although the primary purpose of parole is the rehabilitation of the offender and the protection of society, it can be argued that parole granting philosophy is not constant. Unlike other administrative boards such as marketing boards, the National Parole Board operates with a wide degree of discretion, and is faced with the dilemma of treatment versus punishment. Board members are also influenced by several variables such as political pressure in the form of opinions of legislators,

judges and the general public, members' individual philosophies and biases, economic factors, backgrounds and personal experiences.[31] Since decisions of the Board are not subject to review by an outside agency or the courts, the Rule of Law is potentially the most effective instrument for modifying the Board's operational procedures and policy-making. The concept of the Rule of Law will be discussed briefly in the remainder of this chapter. The assumption that the National Parole Board conduct its reviews with adherence to the laws of natural justice and in the spirit of due process will be tested by examining how effective the Rule of Law has been on the parole process.

Such an analysis should shed insights into the extent to which the courts have supported the rights of offenders to due process safeguards.

The Rule of Law

The term "Rule of Law" has no absolute and static meaning. In a formal sense, the Rule of Law means any ordered structure of norms set and enforced by an authority in a given community. According to Goodhart (1958), the Rule of Law is the essential foundation of liberty. It is free from any particular ideological content and encompasses tyrannous as well as liberal and humanitarian orders.[32]

The doctrine of the Rule of Law has its antecedents in the constitution of the United Kingdom, and, according to Conroy (1980) it was imported intc he Canadian constitutional system by the preamble to the British North America Act.[33] These elements of the Rule of Law have been reaffirmed in later years by several noted authors[34] and formed the basis for deliberations in several Royal Commission of Enquiries.[35]

The due process decisions of the courts have a contemporary counterpart in Hayek's thesis[36] that the Rule of Law means that government in all it's actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty which authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Hayek's thesis thus purports that the rule of law inherently imposes legal limitations on administrative discretion.

The Franks Committee held the notion that what is according to the Rule of Law is antithesis to being what is arbitrary.

> The Rule of law stands for the view that decision should be made by the application of known principles or laws. In general such decisions will be predictable and the citizen will know where he is. On the other hand there is what is arbitrary. A decision may be made without principle, without any rules. It is therefore unpredictable, the antithesis of a decision taken in accordance with the Rule of Law.[37]

In his Royal Commission Report on Civil Rights in Ontario, Mr. Justice McReur states:

> We think that the power of the judicial ought not to be restricted, but that it should be expanded for the

following reasons:

1. Disciplinary effect on the right of review;

2. Tribunals are not independent. They are creatures of the government; and,

3. Departmental tribunals are likely to acquire a degree of departmental bias.

Lastly he claims that:

> ...the most secure safeguard for the civil right of the individual to have his rights determined according to the Rule of Law lies in the independence of review by the courts.[38]

A similar position was taken by the noted American writer Dickinson:

> Nothing has been held more fundamental to the supremacy of law than the right of every citizen to bring the action of government officials to trial in the ordinary courts on the common law. That government officials, on the contrary should themselves assume to perform the functions of a law court and determine the rights of individuals, as in the case under a system of administrative justice, has been traditionally felt to be inconsistent with the supremacy of law.[39]

Dickinson is of the opinion that every citizen is entitled, first, to have his rights adjudicated in a regular common-law court, and secondly, to call into question in such a court the legality of any act done by an administrative official.[40]

Perhaps the strongest opinion in recent years on the supremacy of The Rule of Law on correctional policies has been by the Sub-committee of the Standing Committee on Justice and Legal Affairs which reported on the Penitentiary System in Canada:

> The Rule of Law establishes rights and interest under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative power.... Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates.[41]

The following three chapters will analyze the impact of the Rule of Law on specific areas of the parole process including: 1) the right to hearings and the reasons for decisions; 2) parole forfeiture, revocation and mandatory supervision suspension; and, 3) the right of access to information and legal representation.

NOTES

1. The Parole Act which was proclaimed on February 15, 1959, created the National Parole Board with a mandate to parole eligible inmates in federal and provincial institutions.

2. J.V. Barry, Alexander Maconochie of Norfolk Island, Oxford: Oxford University Press, p. 246, (1958).

3. Parole is a procedure which is designed to be a logical step in the reformation and rehabilitation of offenders. See Report of a Committee appointed to inquire into the Principles and Procedures followed in the Remission Service of the Department of Justice of Canada - Cited as the Fauteaux Report, Ottawa: Queen's Printer, p. 51, (1956).

   In his first Annual Report, 1969, the Chairman of the Board stated: "The purpose of parole is to aid in the reformation and rehabilitation of the offender, having due regard, of course, for the protection of the public".

4. Supra, Note 9, Chapter I.
   R. Price, "Bringing the Rule of Law to Corrections";
   K. Jobson, "Fair Procedure in Parole"; and,
   J. Mullen, "Fairness: The New Natural Justice".

5. Lois James, The Prisoner's Perception of Parole, Toronto: Centre of Criminology, University of Toronto, (1971);
   Janet Schmidt. Demystifying Parole, Boston: D.C. Heath and Co., (1971); and,
   Herman Schwartz. "Let's Abolish Parole", Reader's Digest, vol. 52, No. 8, New York, (1973).

6. Charles L. Newman, Source, book on Probation Parole and Pardons. Illinois: Thomas Books, p.18, (1968).

7. Ibid, p.19.

8. Ibid.

9. Ibid.

10. An act to provide for the conditional liberation of penitentiary convicts, (cited as the Ticket of Leave Act), 62-63 Vict. C. 49 (SC 1899).

11. Ibid, p. 62.

12. The "notion of clemency" was based on the premise of the convict's repentence for the crime he had committed, and the Ticket-of-Leave was an expression of the Government's willingness to forgive, thereby providing the convict with an opportunity to redeem himself in the community.

13. Report of the Standing Senate Committee on Legal and Constitutional Affairs, Parole in Canada. Ottawa, Queen's Printer, p.36 (1974).

14. Ibid, p.37.

15. Fauteux Report Supra, Note No. 3.

16. Parole Act. Queen's Printer, Ottawa, sec.6 (1978).

17. Ibid, p.17.

18. Parole Act, (1978).

19. Ibid, p.3.

20. Report of the Solicitor General, House of Commons, Ottawa: Queen's Printer, p.136, (1978).

21. One inmate for example, described the Internal Review Committee process euphemistically as a bureaucratic sleight of hand where a small cadre of Board Members protect each other's self-interest by upholding the original decisions in most cases. This comment was made to the writer by an inmate in a federal institution in British Columbia in 1978.

    The outcome of the Internal Review Committee process seems to give weight to the inmate's argument, in that the majority of cases which are reviewed by the Committee result in the original decision being affirmed. A small percentage is returned to the region for review, with an estimate of eight or nine percent resulting in a reversal of the original decision. Source: Report of the Solicitor General, House of Commons, (1978).

22. Supra, Note 16, p.6.

23. Handbook, The National Parole Board of Canada. A Guide to conditional release for penitentiary inmates, Ottawa: Ministry of Supply and Services, (1978).

24. National Parole Board, Policy and Procedures Manual, Ottawa, 1981.

25. Report of the Canadian Committee on Corrections, Toward Unit, Criminal Justice and Corrections. Cited as the Ouimet Committee Report The Queen's Printer, Ottawa, p.329 (1969).

26. United Nations, Department of Social Affairs, Parole and After Care. New York, p.1. (1954).

27. Supra, Note No. 24, p.90.

28. Alice Parizeau and Denis Szabo, The Canadian Criminal Justice System; Toronto: Lexington Books, p. 159, (1977).

29. Before parole is granted, the inmate must agree to the "terms" and "conditions" which are stipulated by the Board. Failure to abide by these conditions may result in suspension and/or revocation of parole.

30. Parole Act, p. 13, (1979).

31. Supra, Note No. 9, Chapter I.

32. A. Goodhart, The Rule of Law and Absolute Sovereignty, Philadelphia: University of Pennsylvania Press, p. 106, (1958).

33. J.W. Conroy: Canadian Prison Law, Vancouver: Butterworth and Co. Western Canada, p.2, (1980).
British North America Act, 30, 31 Vict. C-3, (1867).

34. See for example such authors as A.V. Dicey, Introduction to the Study of the Law and the Constitution, New York: St. Martin's Press, p. 202, (1960).
F.Hayek, The Constitution of Liberty, Chicago: University of Chicago Press, p. 213, (1960). Hayek claims that what is required under the Rule of Law is that a court should have the power to decide whether the law provide for a particular action that an authority has taken.
J. Dickinson, Administrative Justice and the Supremacy of Law, New York: Russell and Russell, p.33-35, (1927).

35. See for example the findings of such Royal Commissions as: Report to the Committee on Administrative Tribunals and Enquiries (cited as the Frank's Committee) House of Commons, London, (1957).
J.C. McRuer, Royal Commission Inquiry into Civil Rights Ontario, (1968).
Standing Senate Committee on Justice and Legal Affairs, Third Report, Issue No. 45, House of Commons, Ottawa, (1976).

36. F. Hayek. The Road to Serfdom, Chicago: University of Chicago Press, P. 54, (1944).

37. The Franks Committee, (1957).

38. I. McReur, Supra, Note No. 33.

39. Dickinson, Administrative Justice, p.33, Supra, Note No. 32.

40. Ibid, p.35.

41. Standing Committee on Justice and Legal Affairs, Supra, Note, No. 33.

CHAPTER III

THE INMATE'S RIGHT TO PAROLE, POST SUSPENSION, AND REVOCATION HEARINGS, AND THE OBLIGATION OF THE BOARD TO GIVE THE REASONS FOR THE DECISION

Parole hearing is the process whereby an inmate appears before a panel of the Board to speak to matters relating to his application for parole. Parole suspension hearings and revocation hearings involve a similar process of the inmate's appearance before a panel of the Board to discuss the circumstances which gave rise to suspension or revocation of the parole, and in most instances, to request cancellation of parole suspension or revocation.[1]

The denial of the inmate's right to be heard for parole consideration has been one of the most contentious issues of the Board's operational policies. In refusing hearings, inmates felt they were denied a right which was afforded to them by the courts, in which they were permitted to be heard in person to speak to matters which gave cause to their initial imprisonment, continued detention or incarceration.[2]

During the first decade of the Board's existence in Canada (1959-1969), no provision was made for parole hearings since the consideration for parole was not viewed as a matter of right, nor a process which was subject to established procedural safeguards.

The Fauteux Committee (1956) in its recommendation that a National Parole Board be established, proposed that the Board should not be required to grant to inmates an appointment for a personal interview with Board members prior to the decision being made.[3] The Committee was satisfied that such interviews do not serve a sufficiently useful function in the parole process to justify the expenditure of time and money. This recommendation was reflected in the Parole Act which stated that: "The Board in considering whether parole should be granted or revoked is not required to grant a personal interview to the inmate or to any person on his behalf".[4]

The view of the members of the Fauteux Committee was that the appearance of the inmate before the Parole Board would involve little more than a short personal appearance by the inmate, and they, therefore, believed that such a process would not be as useful to the Board in its deliberations as an examination and analysis of the written material in the offender's case file. The Committee felt that the Board's time could be better spent by focussing on written material, rather than travelling to the different institutions for the purpose of interviewing parole applicants.[5]

Due to the recommendations of the Fauteux Committee, the National Parole Board, during its early years of operation followed the procedure of providing notice to inmates of the Board's decisions by correspondence to inmates from its national headquarters in Ottawa. In effect, apart from his application

for parole which was submitted in writing, the inmate had no other direct input into the decision-making process as the reports upon which the parole decision was made were submitted by the parole office, the institutional staff and the police.

Subsequent to the recommendations of the Fauteux Committee (1956), the Canadian Committee on Corrections (Ouimet, 1969) was the first instance in which the usefulness of parole application hearings was considered. In its final report, the Ouimet Committee adopted a less conservative approach than that assumed by Fauteux and concluded that there were serious limitations to the Board's policy of not holding hearings:

> From the viewpoint of the inmate, the decision making body is far away and invisible. Further the lack of specific time known to him when his case will be reviewed and a decision made creates a state of uncertainty and strain.[6]

From a review of trends in the United States (specifically the State of California), the Provinces of British Columbia and Ontario and several European countries, the Ouimet Committee concluded:

> The content and orientation of the personal interview give the inmate a sense of 'having been heard' or having had 'his day in court'. The fact that he knows in advance that a definite date has been fixed, at which his case would come up leading to a quicker decision that through the present procedure tends to reduce the restlessness and frustration which the indefiniteness of the waiting period under present procedures certainly magnifies.[7]

One recommendation made by the Ouimet Committee in its final report was that legislation should be enacted to provide for sittings of the Board in panels of not less than three members within the institution where the parole applicant was

imprisoned, and further that the parole applicant should have the right to appear before such a panel and make representations in person.[8] I can therefore be argued that the Board's implementation of the procedure in 1970[9] which provided for hearings during the parole application process, was influenced by the recommendations of the Ouimet Committee.

Further support for a parole hearing was provided by the 1972 Task Force on Release of Inmates.[10] which recommended "open" and "informed" hearings, with the inmate being given the fullest possible opportunity to participate. This was an obvious reinforcement of the position stated earlier by the Ouimet Committee. The Task Force further noted that one of the principal benefits of granting a hearing was that it permitted communication and dialogue between the inmate and the Parole Board members and contributed to a greater understanding on both sides.[11] The Standing Senate Committee on Legal and Constitutional Affairs (1974) also expressed its support for formal hearings with the provision for appropriate representation by the parole applicant.[12] In 1978, the National Parole Board promulgated regulations which required it to hold hearings on all full parole applications by federal inmates unless the inmate specifically requested in writing that he did not wish to be heard.[13]

It should be noted, however, that parole applicants do not appear at all types of hearings conducted by the National Parole Board. Currently, the Board is not required to hold a hearing on

an application for day parole because the regulations deal only with hearings on applications for full parole; although as a matter of practice, the Board generally holds hearings on all first applications for day parole by federal inmates in federal institutions.[14] Further, there is no requirement for a hearing on termination of day parole pursuant to S. 10(2) of the Parole Act, and it is the policy of the Board not to hold such hearings. However, on a referral for revocation of day parole a hearing is required, or at the request of the inmate, by virtue of S. 20(2) of the Parole Regulations.

As with day parole, there is no statutory requirement for a hearing on an application for temporary absence, either with or without escort. Also, as in the case of day parole, the National Parole Board has adopted a policy of holding a hearing on all first applications for temporary absences by federal inmates in penitentiaries.[15]

No hearing is required by the Board in termination of temporary absences with escort, and none is held. There is no provision for revocation of such absences since they are not within the statutory definition of parole. With respect to approving temporary absences with escort, the Board is neither required to hold a hearing, nor does it do so as a matter of policy.

The implementation of panel hearings involving the parole applicant was viewed by the Federal Government as a positive development and, in reporting to Parliament the Solicitor

General stated:

> The Board has found that the face to face interview with an inmate is a beneficial process, since Board members can look more closely at specific areas of concern and are more easily able to pin-point aspects of an inmate's case about which they prefer to have more information before deciding whether to grant or deny full parole.[16]

Furthermore, he concluded, "...that in comparison with the previous method of selection without an interview panel hearings are a more equitable means of reaching a decision".[17]

While a number of deficiencies have been identified with the parole hearing process,[18] it has been considered a positive step forward since it was one of the few opportunities for the inmate to participate in the parole process. Further, it appears that the inmate's participation served as an important check on the information which was presented to the Board. The hearing process provided inmates with an opportunity to challenge information in their files that was mentioned during the parole hearing.

The Inmate's Right to Parole Suspension and Revocation Hearings

Although amendments to the Parole Act which provided for hearings on full parole applications were implemented by the Board in 1970, no provision was made for hearings involving the inmate during the parole forfeiture, revocation or post suspension process. This omission drew criticism from many sources, as reflected in the comments of one legal scholar.

> Once parole is granted, this right to liberty should not be terminated without a hearing in accordance with the

> rules of fundamental fairness.... The statutory rule embraced in section 20 of the Parole Act is fundamentally unfair; it is unfortunate to see the courts shut their eyes to such unfairness and waive aside a grievous loss of liberty as a mere administrative decision.[19]

The fact that hearings were mandatory for offenders who were on probation added strong arguments for post-suspension and revocation hearings for inmates on parole. English, Canadian and U.S. courts had supported the notion that the probationer should be protected and held that any proceedings to terminate probation had to be conducted in a judicial manner, complete with a fair hearing, right to counsel, right to cross-examination and the right to introduce evidence.[20]

It took several years before regulations were drafted by the Solicitor General to allow for post-suspension and revocation hearings. Although Commissions of Inquiry had recommended hearings for inmates whose paroles were suspended or revoked, the National Parole Board and the Government seemed to have taken the position that they had no obligation to provide a hearing to parole violators, since these violators had abused the privileges that were accorded them with the grant of parole.

The case of Mitchell v. The Queen (1975) was one of the earliest cases in Canada where the fairness concept in parole suspension and revocation was questioned. Writing for the majority of judges, Mr. Justice Marland dismissed the inmate's argument that he had been denied his right to a fair hearing as provided in S. 2(e) of the Canadian Bill of Rights, on the basis that the application had no rights in respect of his parole.

However, in contrast, Mr. Justice Dickson and the Chief Justice stated that "parole is a precious right, therefore, the paroled inmate has extensive rights, even if on conditional liberty, and these rights should not be withdrawn without good reason".[21]

In Re Nicholson and Haldimand Norfolk Regional Board of Commissioners of Police, (1978)[22] Chief Justice Laskin stressed the duty of fairness which rested on the Board of Police Commissioners. The Chief Justice quoted extensively from the reasons of Lord Denning M.R. in Selvarajan v. Race Relations Board (1976):[23]

> The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and the report, then he should be told the case made against him and be afforded a fair opportunity of answering it.

A similar view of parole was assumed by the Supreme Court of the United States in the landmark decision in Morrissey v. Brewer,(1972) where the court held that an inmate whose parole was revoked without a hearing was in effect deprived of "due process" under the 14th Amendment of the United States Constitution. The court rejected the concept that rights in parole proceedings spring from "privilege" rather than "right", and adopted the principle that the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss..." and that depends upn whether the recipient's interest in avoiding loss outweighs the governmental interest in summary

adjudication.[24]

More importantly, the court rejected the conventional arguments against judicial interference in what had been regarded as "administrative decisions":

> It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege'. By whatever name the liberty is valuable and must be seen within the protection of the Fourteenth Amendment.
> ...The State has no interest in revoking parole without some informal procedural guarantees. Although the parolee is often formally described as being 'in custody', the argument cannot even be made here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. A simple factual hearing will not interfere with the exercise of discretion....[25]

In the decision Chief Justice Burger stated that due process required a hearing at two different stages: a preliminary hearing to determine whether there were reasonable and probable grounds to believe that the arrested parolee committed the acts which constituted the alleged violation of parole conditions, and second, a subsequent revocation hearing to evaluate contested facts and to determine if there was a basis for revocation.[26] Based upon this information presented before the hearing officer, there should be a determination if there is reason to warrant the parolee's continued detention. In reference to the revocation hearing, the Court stated:

> The parolee must have an opportunity to be heard and to show if he can that he did not violate the conditions of parole, or if he did, that circumstances in mitigation suggest the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable

time after the parolee is taken into custody....[27]

The Court also suggested minimum requirements of due process for the revocation hearing:

a. written notice of the claimed violation of parole;

b. disclosure to the parolee of evidence against him;

c. opportunity to be heard in person and to present witnesses and documentary evidence;

d. the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation);

e. a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

f. a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.[28]

Although judgments of United States courts are not binding in Canada, given the fact that the United States Supreme Court is held in such high esteem, its judgments on such important cases as those involving inmates rights to due process safeguards may indeed influence legislative changes in Canada. Secondly, since the Canadian parole legislation is similar to that of the United States Board of Parole, it is conceivable that the National Parole Board may feel the need to review its policy on any given issue as a result of policies adopted by the United States Board of Parole.

Since the findings of the U.S. Supreme Court in Morrissey v. Brewer was of major significance on parole jurisdictions in the United States, it can be argued that the National Parole board was cognizant of the criticism it would have incurred if changes did not occur in its post suspension and revocation hearing policies. It is noted that although the National Parole Board implemented procedures for parole hearings as early as 1970, it did so by procedural alterations and not through amendment to the Parole Act which was not made until 1978. This period of time required by the Solicitor General to convert this procedure into official regulations gives the appearance that both the Government and the Board were treating the issue as a matter over which the Board had the power to exercise sole discretion rather than something which the inmate had a right to expect. It appears that the Board was expressing either implicitly or explicitly, the notion that the granting of parole was a privilege, and thus hearings were not a right to which inmates were entitled.

The right of the parolee to be given a revocation hearing was brought sharply into focus in the recent cases of Regina v. Harold Martins (1983)[29] and Her Majesty the Queen v. Dennis Cadeddu (1983).[30] In the former case, Martins claimed he was not given a fair revocation hearing by the National Parole Board when the decision was made to revoke his parole. His request for a post-revocation hearing was based on the premise that he was not given an opportunity to explain the circumstances that had led to his parole officer being unable to contact him.

Martins' request for a post-revocation hearing was granted. However, the Board affirmed its previous decision to revoke parole. A re-examination of the Board's decision was conducted by the Internal Review Committee in accordance with Martins' request. The Internal Review Committee supported the initial decision to revoke parole. After all avenues to the Board failed, Martins applied to the Supreme Court of British Columbia (for *habeas corpus* with *certiorari in aid*) to be released from Matsqui Medium Security Institution under the provisions of the Parole Act and the Canadian Charter of Rights.

In his summation, Mr. Justice Legg stated that the issue before the court was whether the board exceeded its jurisdiction or lost jurisdiction by reason of a failure to comply with a duty of fairness. He noted that while there was no statutory requirement that the board hold a post-revocation hearing or parole hearing, the fact that it did so was because it was under a duty to exercise its powers in accordance with the principles of fundamental justice, as is provided for under Section 7 of the Canadian Charter of Rights and Freedoms.[31] The Court concluded that since Martins was not present in person throughout the hearing, it was a departure from the principles of fundmental justice. Consequently, a new post revocation hearing was ordered at which Martins was present in person throughout the hearing and which he was given a full opportunity to understand and answer all matters of concern to the Board on the question of whether revocation of parole should be altered and the grounds for the Board's decision.

In line with the judgment rendered in Martins' case, the Chairman of the National Parole Board implemented a series of steps on short notice which reflected the Court's concern for due process safeguards in the conduct of its hearings. The Board amended its policy and procedures to provide for 1) the presentation of the Correctional Services of Canada representative's case in the presence of the inmate and his/her assistant if any; 2) the content of the hearing to be put in writing by the Correctional Services of Canada and placed in the inmate's file; lastly, provision was made, where the Board determines that it has information which is considered to be confidential in nature and which in their opinion is exemptable through the provisions of the Privacy Act, the inmate would then be informed of his/her right to request access to that information through the submission of a formal request under the Privacy Act.[32]

Shortly before Martins' judgment, in the case of Her Majesty the Queen v. Dennis Cadeddu, Mr. Justice Potts ruled that Cadeddu's incarceration without a hearing upon revocation of parole was in contravention of his right under ss. 7 and 9 of the Canadian Charter of Rights and Freedoms, which provide that:

> 1) Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice; and,
>
> 2) Everyone has the right not to be arbitrarily detained or imprisoned.[33]

In view of the provisions of the Charter, the learned judge held that Cadeddu should not be deprived of his liberty except in accordance with the principles of fundamental justice.

According to Mr. Justice Potts, the Ontario Board of Parole (which derives its authority from Sec. 5.1 (1) and (2) of the Parole Act) is subject to a duty of fairness in exercising its parole jurisdiction, and that by reason of that duty of fairness and the fact that the decision to revoke the applicant's parole had serious consequences for him, the Board was required to provide the applicant with an opportunity for an in-person hearing.[34] He stated:

> Considering that the rights protected by s.7 are the most important of all those enumerated in the Charter, that deprivation of those rights has the most severe consequences upon an individual, and that the Charter establishes a constitutionally mandated enclave for protection of rights, into which government intrudes at its peril, I am of the view that the applicant could not be lawfully deprived of his liberty without being given the opportunity for an in-person hearing before his parole was revoked.
> ...although nothing in the common law or in federal or provincial legislation required the Board to grant a hearing--or, for that matter, forbade the Board to do so--I am of the opinion that the Charter dictates that such an opportunity be given. The Board, having revoked the applicant's parole without affording him the opportunity for a hearing therefore exceeded any jurisdiction it could possess.[35]

More recently another of the National Parole Board Long-standing policies on the parole hearing process was recently judged to be unfair by the courts. This involved the regulation which required a certain number of members to hear each application depending on the severity of the offence for which the offender was confined.[36] Historically, it was the

practice of the Board to have fewer members, than the regulation stipulated, sit through hearings on such matters as applications for parole and temporary absence passes. The Board argued that this situation was necessitated because of a shortage of Board members and an increasing case load. Moreover, it was claimed by the Board that the required number of members later voted on whether the application were to be approved. In practice, if the two or three panel members voted negatively at the initial hearing, the decision was deemed to be final unless the inmate appealed to the Internal Review Committee.

The matter of inadequate numbers of voting members was tested in the Federal Court of Canada in the cases of O'Brien v. The National Parole Board (1984)[37], and Ford v. The National Parole Board (1984).[38] O'Brien brought a motion in the Federal Court of Canada, Trial Division, for *certiorari* to quash a decision of the National Parole Board denying him an Unescorted Temporary Absence (UTA). Because he was serving a sentence of life imprisonment, seven Board members were required to vote on his application for UTA or parole.

Although there is no requirement at law to hold a hearing to consider Unescorted Temporary Absence applications, the Board granted a hearing which was held before three Board members who voted affirmatively. The other four voters voted negatively on a paper review.

Mr. Justice McNair held that Section 7 of the Canadian Charter of Rights and Freedoms was not applicable, since the

administrative decision to deny O'Brien's request for Unescorted Temporary Absences did not constitute the deprivation of any constitutionally enshrined right to liberty within the meaning of Section 7 of the Charter. However, he concluded that the common law duty of fundamental fairness applies, so that in those cases in which the Board elects to hold a hearing, even though it is not legally obliged to do so, all the members of the Board required to vote on the application must be present at the in-person hearing.

The decision of the National Parole Board, in denying O'Brien's application, was quashed by the judge, and the Board was ordered to grant O'Brien a new hearing forthwith before the full panel of Board members required to determine the merits of the application.

The facts in the Ford case are similar to those involved in O'Brien's, except that Ford applied for day parole rather than an Unescorted Temporary Absence. Because his sentence was 12 years, five votes were required. Since the hearing was held before only two Board members, the decision of the National Parole Board denying Ford's application for day parole was quashed and the board was directed to conduct a new hearing before not less than five of its members.

In commenting on the Court's decision, the Chairman of the National Parole Board indicated that he was considering asking the government to decrease the number of Board members required to hear parole applications or to change the Parole Act to

increase the number of Board members to ease the heavy workload. The Chairman observed that it would be "almost impossible" to hear all cases, since it would now be required to have as many as seven Board members sit on every parole application. His concluding remarks seem to express his frustrations which the impact of the rule of law has had on the policies and procedures of his agency:

> We'll meet the requirements of the court's decision as best as we can, which will mean reducing the opportunities of inmates for (Temporary Absence) hearings.[39]

The response of the Chairman of the National Parole Board to a required change in operating procedure to comply with the principles of fundamental fairness was to suggest the possibility of a decrease in temporary absence opportunities for inmates. Although the National Parole Board has not increased its membership, and the regulations requiring a specified number of votes for specific types of offences have not been amended, the National Parole Board is complying with the Federal Court ruling.

Informing Inmates of Reasons for the Decision

The regulations which required the Board to give reasons for its decisions were implemented the same year (1978) as those which required the Board to hold hearings on all full parole applications by federal inmates. According to the regulations; the Board is required to provide the inmate with the reasons for its decision in all cases where it denies parole, or revokes

parole or mandatory supervision.[40]

These regulations go much further than what was contemplated by the Fauteux Committee when it recommended the creation of the National Parole Board. Since the members of the Fauteux Committee had held there was no necessity that offenders be present at parole application hearings, it was not surprising that this same committee saw no need for the parole board to list the reasons for its decisions. According to the Fauteux Committee's final report, the Board should not be required to make public at any time, the reasons for any decision that it may have in a particular case, but it should be authorized, at its discretion, to disclose the reasons to the inmates concerned.[41]

Since the Parole Act was structured in such a fashion as to make parole a privilege rather than a right, the Board was under no duty to grant hearings or give reasons for its decisions. It was, therefore, not surprising that during the first two decades of its operation, the Board's prevailing style was one of informality and the avoidance of standards of due process, including strict rules of evidence, and cross-examinations in its deliberations. Due process standards were viewed as inappropriate and as a potential hinderance to the Board's work and effectiveness. In sum, it appears that the Board was acting in a manner as Sykes (1958) describes, "where providing explanation implies that those who are ruled have a right to know, and...if explanations are not satisfactory. the rule or

order will be changed".[42]

Given this position, it is instructive to consider the factors which operated to influence the Board to adopt in 1978 regulations requiring the listing of reasons almost 20 years after the course was charted in an opposite direction. In contrast to the Fauteux Committee (1956), the Ouiment Committee (1969) assumed a more tolerant and enlightened approach. While the Ouimet Committee was of the opinion that the decisions of the Board should not be subject to judicial review, they were sympathetic to the idea that reasons for decisions should be provided to inmate applicants:

> There are difficulties in giving reasons in written form, but they can be given verbally and interpreted if the applicant appears before a panel of the Board.[43]

The Ouimet Committee outlined several advantages for giving the parole applicant the reasons for the denial of parole:

> He knows what he must do to prepare himself for later applications. He knows that it is the final authority, the Board itself, that has decided which factors are important in relation to his application, and he is less likely to assume that an adverse decision is due to institution staff or staff of the Parole Service having presented his case unfairly. Both the staff and the inmate now have an objective goal towards which they can work together. This will provide the staff with an opportunity to interpret further for the benefit of the applicant, the full significance of the Board's reasons.[44]

The Board's failure to give reasons for decisions was also criticized by the Hugessen Committee (1973) as one aspect in the parole process which gave rise to justifiable complaint. The Committee observed that there was no organized system for the keeping of proper records of such reasons. Furthermore, given

the likelihood than an inmate whose parole was denied or deferred, will not be seen by the same parole board members at his next hearing; it was essential that the reasons for such denial or deferral should be accurately recorded for the guidance of the subsequent panel. The Committee concluded:

> Since one of the greatest advantages in granting a hearing to the inmate is that it allows the Board to explain to him as clearly as possible the reasons for its decisions, such reasons should be set down in writing as fully as possible for the file and a copy given to the prisoner himself.
>
> A further advantage to requiring the Board to give reasons for their decisions, is that this is likely to lead to a greater clarification and articulation of the criteria for parole and a better understanding of such criteria by the inmate population.[45]

In the 1977 report of a study of the parole process prepared for the Law Reform Commission of Canada[46] the authors summarized several points in favour of requiring written reasons for decisions:

> Without reasons, the inmate will, at times, fail to understand why the decision was reached and will, therefore, be inclined to see the process as being arbitrary.
>
> Only through written reasons can all participants in the process, such as inmates, Correctional Service personnel, and other Board members develop guidelines for future cases.
> It permits the application of criteria to be tested by others.[47]

It can be argued that the Government's decision to specify reasons for decisions was influenced by the comments of the Ouimet and Hugessen Committees and the findings of the Law Reform Commission of Canada. However, the case findings by the

courts appear to have been the most significant motivator. In one of the first decisions on this issue, the Supreme Court was divided as to whether the National Parole Board was obligated to provide to inmates reasons for parole decisions. In the case of Mitchell v. The Queen (1975), the non-imposition of due process standards by the Board was supported by Mr. Justice Richie:

> The very nature of the task entrusted to the Board, involving as it does, the assessment of the character and qualities of prisons...make it necesary that such a Board be clothed with as wide a discretion as possible, and that its decision should not be subject to the same procedures as those which accompany the review of decisions of a judicial or quasi-judicial tribunal.[48]

However, in the same case, the Board was branded by another judge as unaccountable and unreviewable:

> The plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if he were a mere puppet on a string.[49]

A similar view of the rules of fairness principle as they apply to decisions of the Board was expressed earlier by Mr. Justice Pennel in his remarks in the case of Exparte Beauchamp (1970):

> I do not suggest that the National Parole Board is required to invoke the judicial process, but its decisions are of vital importance to the inmate since his whole future may be affected. In my judgment, fairness demands a consideration of the inmate's side of the story before revoking parole...the fact remains that the revocation of parole is akin to a punitive measure which carries with it, the duty to act fairly. There is always a reasonable chance that a consideration of the inmate's side of the story might alter the result.[50]

During this time, there were several decisions in the American courts which held that written reasons for the denial of parole must be given to the inmate by the parole board. In Johnson U.S., ex tel. v. Chairman, New York State Board of Parole, (1971) the Court stated that the due process clause of the 14th Amendment required the Parole Board to provide a written statement of reasons to the inmate when parole is denied.[51] In the case of Childs v. The United States Board of Parole, (1974) The Court affirmed the requirement that the reaosns for a decision by the Board must be given on due process grounds.[52]

Perhaps the most significant case in which the question of reasons for decisions was addressed was that of Morrissey v. Brewer where the United States Supreme Court held that the due process clause applied to the parole revocation decision, since the termination of parole inflicts a "grievous loss" on the inmate.[53]

This review has revealed that decisions of both Canadian and American courts played a direct role in the adoption of the regulation that reason for the parole board's decision on an application for parole, post suspension or revocation must be communicated to the applicant. Currently, parole regulations require:

1) Written notification to be provided to both federal and provincial inmates of the decision as to whether or not parole has been granted; and,

2) Written notification to be provided to both federal and provincial applicants within fifteen days of an

adverse full parole decision, the reasons for the decision and the time when the Board will again review the case.[54]

The Board's policy on the specification of reasons for decisions was reviewed in 1984. This allowed the board to adopt structured guidelines for granting, denying and revoking paroles, and terminating day paroles.[55]

Even in cases in which the Board makes a decision that is favourable to the applicant, members are now required to provide reasons for the decision. In addition, reasons for adverse decisions are recorded by members for inclusion in the written notification to the inmate, and stated in such form that interpretation by the institution staff is not required, and in language that is easily understood by the inmate.[56]

NOTES

1. Handbook, The National Parole Board, Minister of Supply and Services, Canada (1979) p.15.

2. The accused has the right in Canadian Courts to be heard in person and give evidence on his behalf. Reference, Criminal Code of Canada, section 469.

3. Fauteux Report, (1956), p.51.

4. Parole Act, (1959), sec. 6.

5. Supra, Note No. 3.

6. Ouimet Committee Report, (1969) p.329.

7. Ibid, p.341.

8. The Ouimet Committee recommended that the Board should sit in panels of not less than three members at parole hearings. However, in 1970, the Board commenced hearings at federal institutions throughout Canada and sat in panels of two members.

9. The Boar commenced hearings in in federal institutions in 1970 without any amendment to the Act.

10. Report of the Task Force on Release of Inmates (cited as the Hugessen Committee). Information Canada, Ottawa: (1973).

11. Ibid, p.34.

12. Standing Senate Committee on Legal and Constitutional Affairs, Parole in Canada, House of Commons, Ottawa: (1974), recommendation No. 74.

13. It is important to note that these changes did not occur as a consequence of intervention by the courts - but rather by Commissions of Inquiry. The amended parole regulations were approved by Cabinet on the recommendation of the Solicitor General.

14. Canada, National Parole Board, Policy and Procedures Manual, Ottawa: (1981) p.147.

15. Ibid, p.127.

16. Solicitor General's Report to Parliament, House of Commons, Ottawa: (1970).

17. Ibid.

18. Carriere and Silverstone (1976) found that parole hearings varied among provinces and within institutions, and often reflected the preferences and personalities of Board members, classification officers and parole service officers, and in some instances of the inmates themselves. See P. Carriere and S. Silverstone, The Parole Process: A Study of the National Parole Board. (Ottawa: Minister of Supply and Services 1976), p.90. (The study was commissioned by the Law Reform Commission of Canada). A major weakness in the parole hearing process was that while inmates were given the opportunity to speak at the hearings, many lacked the capacity and skills to respond to questions, or to speak and present strong arguments in favour of their release on parole. Inmate parole applicants were therefore disadvantaged because they had no right to call witnesses during the parole hearing to support their application for parole.

19. K. Jobson, "Fair Procedure in Parole", University of Toronto Law Journal vol. 267, (1972) p.282.

20. The right to judicial proceedings for the termination of probation was first developed in case law - The King v. Smith (1925) and subsequently recognized in statutory form in the Criminal Code of Canada, s. 666 which makes breach of probation an offence. Since probation is part of the sentencing process and an order of the Court, breach of probation becomes a summary conviction offence Sec. 666(1) C.C., therefore, the need for a judicial hearing is provided for. In contrast, parole is granted at the discretion of an administrative board, and because the grant of parole is deemed to be a "privilege" and not a "right", no provision was made in the Parole Act for any reference to the courts for the determination of revocation.

    In the United States, the decsion in Mempa v. Rhay (1967) clearly established that revocation of probation proceedings was protected by the requirements of due process.

21. Mitchell v. The Queen (1975), 24 C.C.C. (2d) 241, p.257.

22. Re Nicholson and Haldimand Norfolk Regional Board of Commissioners of Police, (1978), 88 D.L.R. (3d) 671.

23. Selvarajan v. Race Relations Board (1976) 1 All E.R. 13, P 19 (C.A.) (only portions of the quoted reasons by Chief Justice Laskin are reproduced above).

    The fairness principle was first enunciated by Lord Loreburn in the case of The Board of Education v. Rice (1911) A.C., 179, 182 (H.L) in which he remarked: "In such cases...they must act in good faith and fairly listen to

both sides for this is the duty lying on everyone who decides something".

24. Morrissey v. Brewer (1972) 92 S.ct. 259 pp.2600-01.

25. Ibid, p.2601.

26. Ibid, p.2602.

27. Ibid, p.2603.

28. Ibid, p.2603-04.

29. Regina v. Harold Martins, Supreme Court of British Columbia, (1983) unreported.

30. Her Majesty the Queen v. Dennis Cadeddu, Supreme Court of Ontario, (January, 1983) unreported.

31. Canadian Charter of Rights and Freedoms, Ottawa: Queen's Printer (1981).

32. National Parole Board Policy and Procedures Circular, October 21, 1983, Ottawa. (The procedures encompass nine steps, although only three are cited here for emphasis).

33. Supra, Note 31, s.s. 7 and 9.

34. Supra, Note 30, p.18.

35. Ibid.

36. The numbers of members required to vote is determined by the length of sentence and nature of the offence. This ranges from two to seven members. A simple majority of the required votes is needed to authorize temporary absence or to grant day parole or full parole for all inmates except lifers or persons serving indeterminate sentences; in these cases, two thirds of the votes are required to grant any type of release. Reference Handbook, The National Parole Board, Minister of Supply and Services (Ottawa: 1979), p.16.

37. O'Brien v The National Parole Board, Federal Court of Canada, as reported in the Ottawa Citizen, November 29, 1984.

38. Ford v. The National Parole Board (1984) 43 C.R. (3d) 26 3742.

39. Supra, Note 30.

40. Parole Regulations, P.C. 1978-1528 as amended by PC 1981-1668.

41. Fauteux Committee Report, p.82.

42. Gresham M. Sykes, The Society of Captives: A Study of a Maximum Security Prison, Princeton: Princeton University Press, (1958), p.75.

43. Supra, Note 6, p.242.

44. Ibid.

45. Supra, Note 41, p.34.

46. Supra, Note 13, p.107.

47. Supra, Note 18, p.107.

48. Supra, Note 21.

49. Ibid, p.258.

50. Exparte Beauchamp, (1970), 30R. 607 (Ontario High Court).

51. Johnson U.S. extel., v. Chairman, New York State Board of Parole, 363 F.Supp.406, aff'd, 500 F.2d. 925 (2d Cir. 1971).

52. Childs v. The United States Board of Parole 511 F.2d 1270 (D.C. Cir. 1974).

53. Supra, Note25.

54. Criminal Law Amendment Act (1977) S.C. 1976-1977, C.53. S.26.

55. National Parole Board, Policy and Procedures Circular, (Ottawa, August 28, 1984).

56. Ibid.

CHAPTER IV

THE FORFEITURE OF PAROLE, THE REVOCATION OF PAROLE AND THE SUSPENSION OF MANDATORY SUPERVISION

Forfeiture is a procedure whereby the person while on parole was convicted of an indictable offence punishable by imprisonment for a term of two years or more. As a result of the conviction, the parolee automatically lost his privileges and was returned to the institution to serve the remainder of the remission that was credited to him before he was released on parole, in addition to the new sentence imposed by the court.[1] Under the provisions of section 13 of the Parole Act, parole was automatically forfeited and the Board had no discretion in the matter.[2] This automatic loss of privileges was similar to the provisions of the Ticket-of-Leave Act, which provided for the foreiture of a licence where the parolee was convicted of an indictable offence.[3]

Although the Fauteux Committee (1956) proposed a more tolerant approach to the forfeiture provisions of the Ticket-of-Leave Act, they expressed the view that the purpose of parole was not simply to allow a measure of freedom for offenders. The Committee did not seek to justify parole on economic or humanitarian grounds. The justification for parole, according to the Committee, lay in its rehabilitative value for the prisoner and its contribution to greater community safety and security. Parole release was to be governed not only by the consideration of reformation of the offender, but by community

safety as well.[4]

The parole legislation of 1959 appeared in many respects to be more enlightened than the provisions of the Ticket-of-Leave Act, and although Section 8, in particular, emphasized the rehabilitative aspects of parole, the provisions of the Act regarding the suspension, revocation and forfeiture of parole articulated a somewhat different position. The wording of sections 11 and 12, for example, clearly emphasized that the adherence to legal norms by the parolee constituted the most important criteria insofar as suspension and revocation were concerned. Also, this emphasis on legality, as opposed to rehabilitation was further reinforced by section 13, which provided for automatic forfeiture in any case where a parolee offender was convicted of an indictable offence carrying a maximum sentence of two years or more.[5]

It would appear that in the span of thirteen years between the tabling of the Fauteux Committee's report in 1956, and the Report of the Canadian Committee on Corrections in 1969, political interest groups were petitioning the government to adopt a more liberal attitude with respect to the harsh penalties of the parole forfeiture legislation.[6] This was due in large measure to criticism of the Parole Act by members of the legal profession, prison rights groups and the inmates themselves.[7] Suspension and revocation of parole were considered as preventive penalites by these groups, whereas forfeiture was looked upon as a purely punitive action.

The view of the Ouimet Committee (1969) was that the automatic forfeiture of parole on conviction for an indictable offence constituted an unnecessary restriction of the authority of the Board and that the Board should have the power in exceptional cases to reach a decision on the merits of the individual case. For example, the Committee felt that in the case of an offender who was serving a sentence of 20 years for armed robbery, and who was released on parole after serving 12 years of his sentence, such an individual should not be subjected to automatic parole forfeiture and be returned to the penitentiary to serve the outstanding balance of his 20 year term.[8]

In its final report, the Ouimet Committee recommended that the Parole Act be amended so as to provide that the automatic forfeiture of parole be made subject to a condition that the National Parole Board had the power to exempt a parolee from the operation of forfeiture where extraordinary circumstances justified such an exemption.[9]

The Hugessen (1973) and Goldenberg (1974) Committees recommended that the time successfully served on parole should be credited to the prisoner against his sentence even though his parole had been cancelled.[10] This they felt would minimize the harsh penalties of forfeiture which resulted in reincarceration and the automatic forfeiture of remission with which the inmate was credited before he was released on parole.

Notwithstanding the recommendations of the various committees,[11] the early decisions of the courts supported the Board's point of view that its decisions were administrative in nature and not subjected to review by the courts. The major case on record centered around a challenge to the validity of section 17 of the Parole Act which stated that, upon forfeiture, any sentence imposed for the new offence had to be served consecutively to the unexpired portion of the original sentence. In R. v. Markwart (1969)[12] a Saskatchewan magistrate held that imposing sentence was a judicial function, and, therefore, section 17 was *ultra vires* of the jurisdiction of the Parole Act. Accordingly, he sentenced the accused to a concurrent term. However, on an appeal by the Crown, the Saskatchewan Court of Appeal reversed the decision and varied the sentence to render it consecutive.

In the judgment, Culliton, C.J.S. stated, that in pith and substance, section 17 was really concerned with the effect of forfeiture, and thus, did not infringe upon the judicial prerogative to any untoward degree.[13]

The judgment in Markwart at the appeal court level supported the Board's policy on parole forfeiture. After this decision, there were no other major challenges in the courts as the sentence of a paroled inmate was deemed to continue in force until the parole period expired. In practice, the Board granted parole only to those inmates who were considered to be low risks. Consequently, the parole forfeiture rate remained fairly

Table 1. Parole Grants and Forfeiture Rates 1959-1977

Year	Grant	Forfeitures	Forfeiture Rates
1959	2,038	58	2.8
1960	2,525	94	3.7
1961	2,297	144	6.3
1962	1,872	86	4.6
1963	1,789	101	5.6
1964	1,754	64	3.6
1965	1,992	92	4.6
1966	2,291	101	4.4
1967	2,821	154	5.5
1968	3,162	309	9.8
1969	4,371	473	10.8
1970	5,193	789	15.2
1971	5,126	843	16.4
1972	3,803	746	19.6
1973	2,780	678	24.4
1974	3,134	399	12.7
1975	2,606	433	16.6
1976	2,179	401	18.4
1977	2.627	325	12.4

SOURCE: National Parole Board Statistics 1959 - 1977

low during the first decade of the Board's operation, 1959-1969. However, statistics show that the forfeiture rates increased significantly during the early 1970's. This increase in forfeiture rates can be attributed to an increase in the parole grant rates where inmates who were considered to be moderately high risks were released on parole, and reverted to criminal behaviour while on parole. Secondly, the increase could have resulted from the enforcement patterns of the police and the decision of Crown attorneys to charge offenders with new offences.

Figure 1. Forfeiture Rates: 1959 – 1977

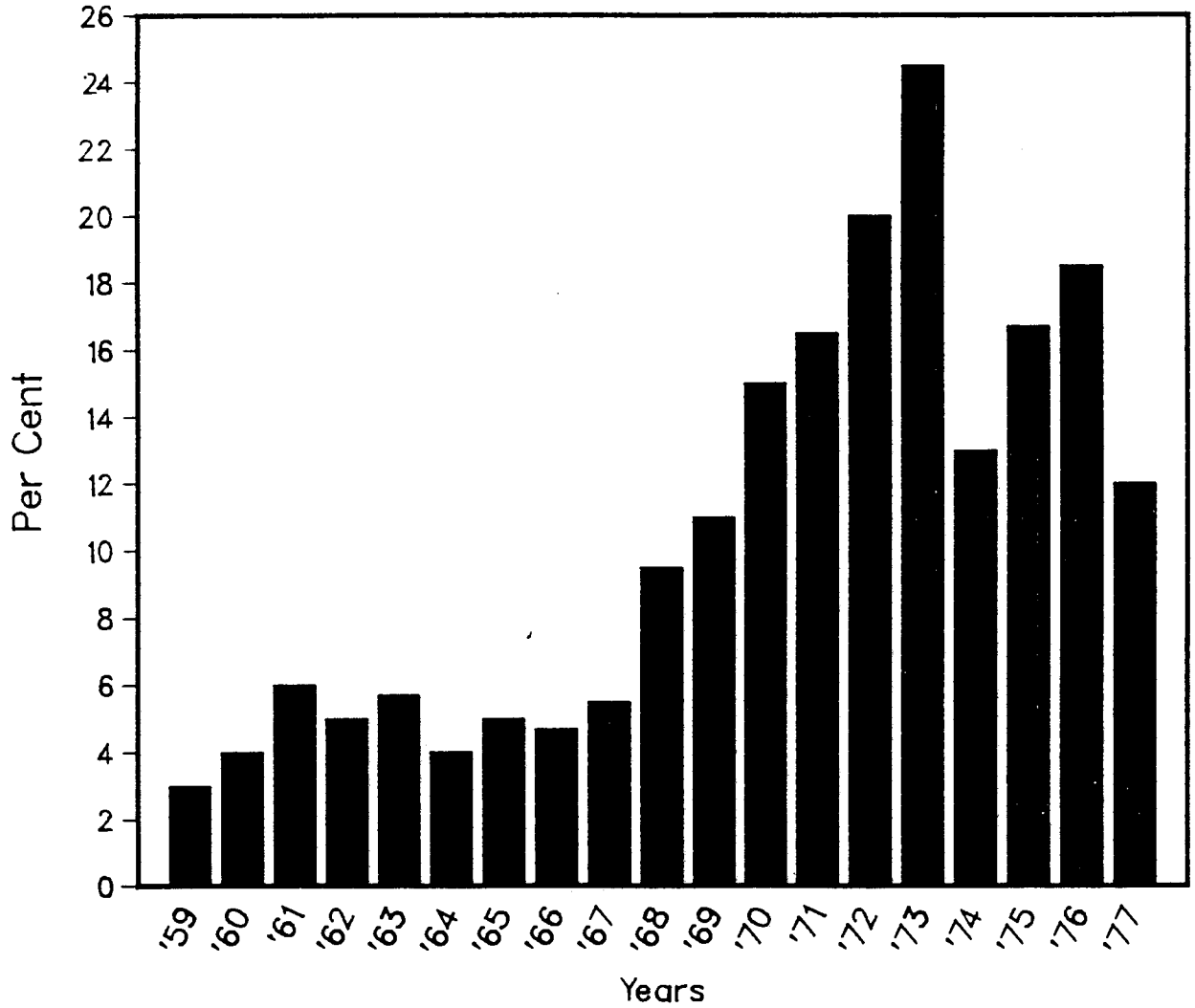
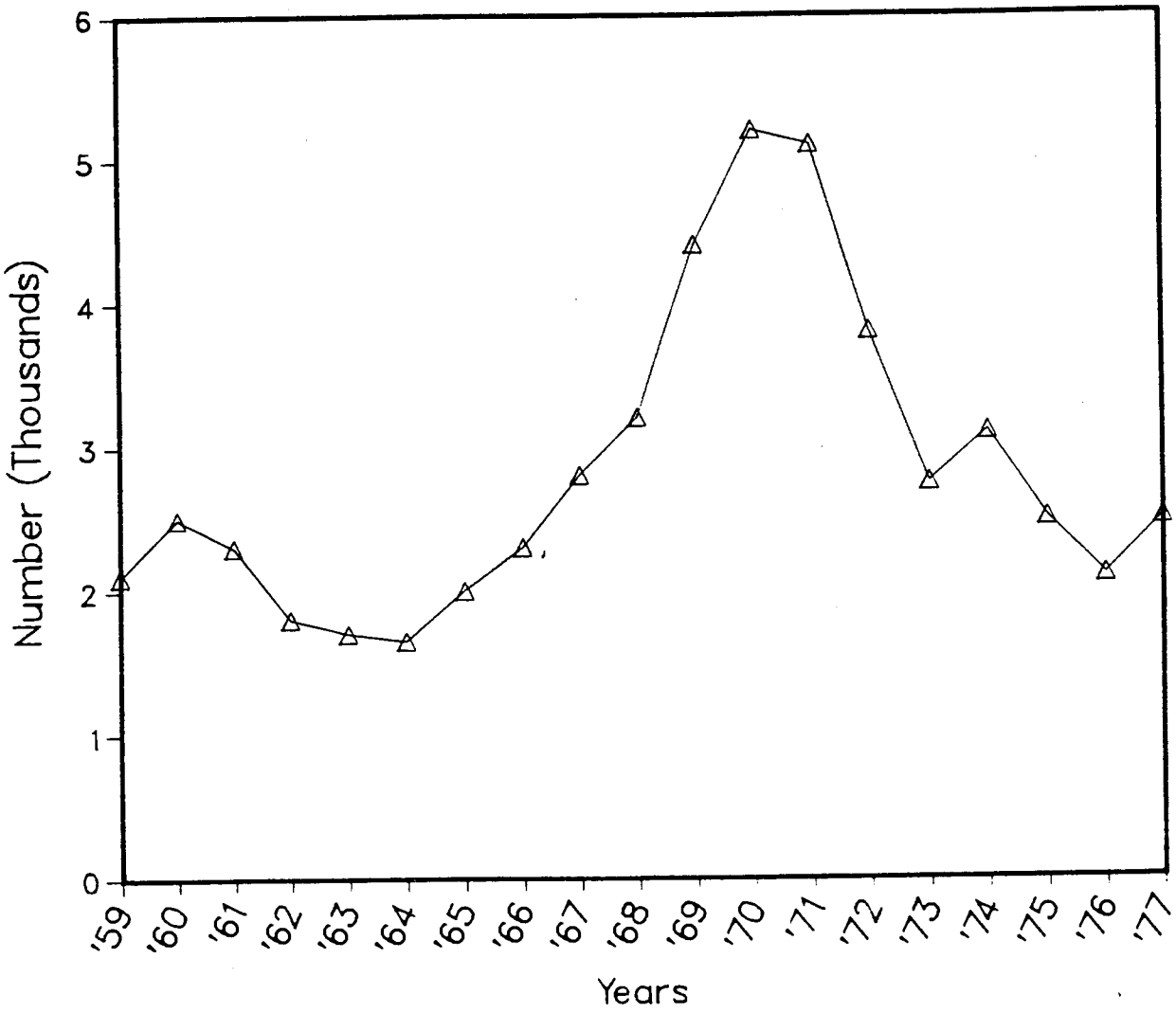


Figure 2. Parole Grants: 1959 – 1977



Under the policy which was in effect until 1977, forfeiture of parole was applied uniformly to all paroled inmates who were convicted of indictable offences that were punishable by imprisonment for a term of two years or more. However, it appears that by the mid-1970's the government was becoming increasingly aware of the fact that the parole legislation regarding forfeiture was harsh, in that no provision was made for restoration of earned remission upon conviction of indictable offences. Consequently, amendments to the Parole Act were passed in the House of Commons in 1977, which deleted parole forfeiture from the Act, and replaced it with Revoked (with offence) which allowed for restoration of remission which the inmate had to his credit when his parole was forfeited.[14]

Parole Revocation

Revocation is a procedure which occurs after the inmate has been convicted of a new offence while on parole, or after day parole, full parole, or mandatory supervision has been suspended because of a violation of the release conditions, or because the designated parole officer has reasonable grounds to believe a continuation of release will entail a risk to the public.

Under section 16 of the Parole Act any member of the Board or any person designated by the Board may

> ...suspend any parole...and authorize the apprehension of a paroled inmate whenever he is satisfied that the arrest of the inmate is necessary or desirable, in order to prevent a breach of any term or condition of parole, or for the rehabilitation of the inmate or the

protection of society.[15]

In practice a revocation usually occurs after a suspension, following the investigation by the Correctional Service of Canada and a review by the Board of the subsequent report, and a post-suspension hearing if applicable. However, where the inmate advises the Board in writing that he does not wish to have a suspension hearing, the Board may take its decision to revoke or not to revoke as soon as its inquiries have been completed.[16]

The Ouimet Committee was of the opinion that adequate due process safeguards were built into the parole revocation process, consequently, they made no recommendation concerning modification of the parole revocation procedures. However, because the process was seen by inmates and members of the legal profession as arbitrary, and a denial of the rights of parolees to due process safeguards, many challenges were spurred in the courts to the Board's revocation policies. Unfortunately, as the following discussion reveals, the challenges succeeded in reinforcing the Board's position that parole was a privilege and not a right.

One early case was McCaud v. National Parole Board (1976)[17] McCaud was paroled from Kingston Penitentiary in October 1961, after serving four years of a ten year sentence. Less than two years later, on June 6, 1963 he was taken into custody and informed that his parole had been revoked. An application for *habeas corpus* was brought before the Supreme Court of Canada on the grounds that no reason for revocation had ever been given,

and as well, the National Parole Board had persisted in denying a hearing into the matter despite the efforts of the applicant to obtain one. Both these circumstances, McCaud argued, violated sec. 2 (e) of the Canadian Bill of Rights (1960).

On May 12, 1964, the application was heard before Mr. Justice Spence of the Supreme Court of Canada. In dismissing the application, Spence stated:

> In my view, the provision of S.2(e) of the Canadian Bill of Rights do not apply to the question of the revocation of the applicant's parole under the provisions of the Parole Act. Section 8 (d) of the Parole Act, 1958 (Can) C.38 provides that the Board may...revoke parole at its discretion. Section 11 of the said Parole Act provides that the sentence of a paroled inmate shall, while the parole remains unrevoked and unforfeited, be deemed to continue in force until the expiration thereof according to law, and therefore when the applicant had his parole revoked he was under sentence which continued in force. The question of whether that sentence must be served in a penal institution or may be served while released from the institution and subject to the conditions of parole is altogether a decision within the discretion of the Parole Board as an administrative matter and is not in anyway a judicial determination.[18]

This judgment was supported by the full court, and consequently the position of the Board that its decisions with respect to revocation were not subjected to judicial control were affirmed.

The second case involved Howarth v. National Parole Board (1976).[19] Howarth was serving a sentence of seven years and was paroled after serving three years. After a period of two years on parole, Howarth's parole was suspended for a charge which was withdrawn before a preliminary hearing was held. Nevertheless, the board subsequently revoked parole, although it gave no

reasons for its decision nor was Howarth given a hearing. Howarth applied to the Federal Court of Appeal for a review of the Board's decision on the ground that it failed to follow rules of natural justice. The Court held unanimously that it had no jurisdiction to hear the application as parole revocation was purely an administrative matter.[20]

On appeal to the Supreme Court of Canada, Mr. Justice Pigeon, who wrote the decision for the majority, held that parole revocation was an administrative decision note required by law to be made on a judicial basis.[21]

Mr. Justice Pigeon denied that the amendments to the Parole Act[22] implied an intention to require the Board to act in a judicial manner in revoking parole. However, a different note was struck by the dissenting judgment of Mr. Justice Dickson who was of the view that the Board was under a duty to act judicially when it decided whether or not the conditions of parole had been breached.[23]

Although the Howarth case appeared to be concerned only with determining the limits of the Federal Court of Appeal's jurisdiction, it had important implications, for through its judgment, the Supreme Court said in effect, that parolees had no judicial rights. This was also made clear by the decision taken in the case of Mitchell v. The Queen (1975)[24]

The Mitchell case involved an appeal to the Supreme Court of Canada from the Manitoba Court of Appeal affirming a decision by

the Court of Queen's Bench which had refused relief by way of *habeas corpus*. Mitchell's parole had been suspended a matter of days before the end of his sentence and revoked nearly six weeks after the sentence would have otherwise expired. The challenge to this revocation relied on section 2(c)(1) and (e) of the Canadian Bill of Rights on the grounds, *inter alia*, that natural justice safeguards were not afforded at the time of the apprehension on suspension of his parole (specifically, that he was not told the reason for his suspension) and at the stage of suspension "review" required by Section 16 (3) of the Parole Act.[25]

Richie J. (Judson, Pegeon and Beetz J.J. concurring) citing McCaud and Howarth, stated:

> ...the very essence of...parole...is that it is a privilege awarded to certain prisoners at the discretion of the Parole Board and not a right to which all prison inmates are entitled....[26]

In making a strong defence of the need for discretion by Board members, the judges stated:

> ...the very nature of the task entrusted to this Board, involving as it does the assessment of the character and qualities of prisoners, and the decision of the very difficult question as to whether or not a particular prisoner is likely to benefit from reintroduction into society on a supervised basis, all make it necessary that such a board be clothed with as wide a discretion as possible and that its discretion should not be open to question on appeal or otherwise be subject to the same procedures as those which accompany the review of decision on a judicial or quasi-judicial tribunal.[27]

Martland (de Grandpre J. concurring) took the same view, also rejecting Mitchell's other argument:

> The reasons for the arrest and the subsequent detention...were that his parole had been suspended and later revoked. To require more would be to be made aware of the reasons which had prompted the person designated...to suspend his parole and the reasons which later prompted the Parole Board to revoke his parole. This information he was not entitled to have.[28]

McCaud and Howarth were again cited. In dissenting, Laskin C.J.C. (Dickson J. concurring) considered that Howarth was distinguishable by the significant fact that the Supreme Court did not deal with the application of the Canadian Bill of Rights.[29] He rejected the view that it was sufficient for purposes of Section 2 (c) (i) that the appellant was made aware that his parole had been suspended, stating:

> If the Board had acted properly, any arrest in the circumstances is an arrest upon a suspension, and hence it is the reason for the suspension that must be provided if Section 2 (c) (i) is to have more than an empty meaning. I am of the opinion that the same objection must be maintained in respect of the continued detention of the appellant following the revocation of parole.[30]

Chief Justice Laskin concluded that there was nonconformity with Sections 2 (c) (i) and 2 (e) of the Canadian Bill of Rights, that "both violations...are matters of departure from rules of natural justice which he regarded as of jurisdictional significance", and that Mitchell was "detained under the authority of a tribunal that has acted outside its jurisdiction".[31]

The Chief Justice also commented on the Howarth case:

> The [Howarth] case appears to me to have proceeded as much on a classification of the Board as not being a judicial or quasi-judicial tribunal as on it being involved in an exercise of administrative authority

> only. I do not think it follows that a denial of judicial or quasi-judicial status to a tribunal relives it from observance of some or at least of the requirements of natural justice....
>
> Even certiorari can no longer be said to be the test of whether a tribunal is of a judicial or quasi-judicial character.[32]

In his dissent the Chief Justice's language was striking:

> The uncontested facts on which this application was based tend to shock from their mere narration, and further the plain fact is that the Board claims a tyrannical authority that I believe is without precedent among administrative agencies enpowered to deal with a person's liberty. It claims an unfettered power to deal with an inmate, almost as if it were a mere puppet on a string. What standards the statute indicates are, on the Board's contentions for it to apply according to its appreciation and without accountability to the Courts. Its word must be taken that it is acting fairly, without it being obliged to give the slightest indication of why it was moved to suspend or revoke parole.[33]

In dissenting separately Spence J. indicated, with reference to his decision in McCaud, that parole revocation at that time did not entail loss of remission, whereas under the Parole Act as amended Section 20 (1), a decision to revoke one's parole was no longer merely of an administrative character but one which deprived him of very important personal rights: "surely there can be no doubt...that the provision of the Canadian Bill of Rights and the tenets of natural justice apply to such a decision".[34]

While the Canadian courts were viewing parole as a privilege rather than a right, and supporting the Board's contention that administrative powers were being exercised in decisions to revoke parole, the American courts were adopting a more liberal position by insisting that the paroled inmate had extensive

rights even if based on conditional liberty, and that this liberty could not be withdrawn without good reason. Similar to the dissenting judges in Canada, the American judges disregarded the administrative/judicial dichotomy and spoke in broader terms of the "duty to act fairly". In a landmark decision in Morrissey v. Brewer,[35] Chief Justice Burger of the U.S. Supreme Court stressed that parole had to be viewed as an integral part of the modern penological system, not just as an "*ad hoc*" exercise of clemancy.[36] The question of whether parole was a right or privilege was regarded as irrelevant:

> It is hardly useful any longer to try to deal with this problem in terms of whether parolees' liberty is a "right" or a "privilege". By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal...fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.[37]

Although the courts generally affirmed the National Parole Board's policy on statutory remission, and the procedures respecting suspension and revocation of parole were tested with success. During the 1970's there were two similar cases which highlighted the consequences of parole revocation with respect to parolees who were forced to reserve all of the time they had spent on parole, as well as losing credit for statutory remission which had been granted at the beginning of their sentences.

In December 1973, Le Heinworth's[38] application to the Federal Court for declaratory relief to restore his statutory remission was dismissed. However, on November 27, 1974 the

Supreme Court of Canada overturned the Ontario Court of Appeal decision in Marcotte[39] arguing that section 22 of the Penitentiary Act (1960), created a "right" to statutory remission which was unaffected by section 16(1) of the Parole Act. This right, the Court further argued, could only be abrogated by the judicial process.[40]

Immediately following the Marcotte decision Le Heinsworth brought a writ of *habeas corpus* in the Ontario High Court, and on December 12, 1974, he was also released.[41] One consequence of the Marcotte and LeHeinsworth decisions was the release of numerous inmates who had lost statutory remission in similar circumstances.

These two decisions also had immediate effect on those inmates whose initial paroles were granted prior to the 1969 parole amendments. Unfortunately, those inmates who were paroled after 1969 did not benefit from the amendments to the Parole Act since these amendments specifically provided that all remissions, both earned and statutory were to be forfeited upon parole revocation.[42]

The new regulations left little doubt as to the fate of those inmates sentenced after the amendments came into force. However, the status of those inmates who were sentenced before, but paroled after 1969, was unclear, and the years immediately following the Marcotte decision were to witness a plethora of cases designed to test the issue. Some succeeded, others failed.

Two provincial superior courts subsequently made rulings similar to that of the Supreme Court of Canada. In Dwyer (1975),[43] the B.C. Supreme Court held that since statutory remission was granted at the time of sentencing under legislation that was in force prior to 1969, to apply the 1969 amendment to inmates who were sentenced before 1969, would violate the provisions against retroactive laws contained in the Bill of Rights. A similar ruling was made by the Ontario High Court in Spice (1975).[44] However, in Fraser (1975)[45] the Manitoba Court of Appeal held that a "person who is paroled after after the changes in parole regulations came into effect is subject to the conditions which the Board attached to the parole". This position was subsequently affirmed by the Federal Court of Appeal in Zong (1976)[46] and by the Supreme Court of Canada in Howley (1976).[47] As a result of the Supreme Court's decision, inmates in all provinces who were paroled after 1969, became subject to the new amendments regardless of when they were actually sentenced.

In 1975, there were two successful challenges in the Courts which precipitated amendments to the Board's operating policies relating to the referral of the case to the Board within the specified time after parole suspension was effected and the Board's authority to revoke parole after the Warrant expiry date was passed. In December 1975, Russell Charles Elliot[48] filed a writ of *habeas corpus* in the Supreme Court of British Columbia claiming that he should be released from prison, because after his mandatory supervision was suspended, his case was not

referred to the Board within 14 days as is specified in the Parole Act. Elliot was ordered released. Finding in his favour, the trial judge stated:

> If the Board could embark on the procedure set out in Section 16 of the Act and then for whatever reasons decide to proceed in a different way than that which was envisioned by Parliament, section 16 (3) would be rendered nugatory.... In my view, the absence of a review constituted a breach of fundamental procedural requirement which, on the facts of this case, resulted in the Board's order for revocation being made without or in excess of jurisdiction.[49]

After the Elliot decision, the Board brought its policies in line with provisions of the Parole Act to provide for the review of the case of every parolee and mandatory supervision releasee within 14 days of the suspension of a parole or mandatory supervision.

Shortly before the Elliot case, Vidlin (1975)[50] file a writ in the B.C. Supreme Court, claiming that he should be released from penitentiary as the Board had no authority to revoke his parole after his warrant expiry date was passed, this being the date of the completion of his full sentence. Section 16 of the Parole Act provides for any member of the Board or a person designated by the Chairman to issue a suspension warrant to apprehend an inmate whose parole had been suspended and to return him to custody. Since there was no provision in the Act authorizing the Board to revoke parole after warrant expiry date, the Court upheld the applicant's challenge on the basis that there was no lawful authority by which he should be retained at the penitentiary. The judge found that the

suspension of parole did not prevent Vidlin's term of imprisonment from expiring on December 1974, he concluded that all orders or warrants issued after that date were null and void.

The Vidlin ruling had an immediate effect on the Board's operating policies and procedures. The policy was amended and parole was no longer revoked after warrant expiry date. All unexecuted suspension warrants that were outstanding after warrant expiry dates were recalled, and the National Parole Service was instructed to refer all suspended cases to the Board for revocation decisions at least 60 days before warrant expiry date.[51]

Although several court cases resulted in modifications to the Board's operational policies, most challenges to the Board's powers in revocation decisions were denied on the basis that its decisions were administrative in nature and not subject to judicial review.

Mandatory Supervision

The National Parole Board assumed additional responsibilities with the passage of the 1969 amendments to the Parole Act authorizing mandatory supervision.[52] Section 15.1,2 of the Act provides that where an inmate is released from a federal institution prior to the expiration of his sentence..., as a result of remission, including earned remission, and the

term of such remission, and the term of such remission exceeds 60 days, he shall be subject to mandatory supervision commencing upon his release and continuing for the duration of such remission under terms and conditions similar to parole.[53] The Penitentiary Act was also amended to provide for the release of inmates on mandatory supervision where statutory and earned remission amounted to 60 days or more.[54]

The mandatory supervision legislation became effective on August 1, 1970, and all inmates who were sentenced to penitentiary after that date became subject to mandatory supervision. It should be noted that although the terms and conditions of mandatory supervision are similar to parole, the two programs are not the same. Whereas the parolee has been granted parole by the National Parole Board and is released with a parole certificate, the inmate on mandatory supervision has been released as a result of remission, consequently, the National Parole Board is not involved in the decision to release. In practice the inmate is provided with a mandatory supervision certificate which authorizes his presence in the community.

The proponents of mandatory supervision felt that since inmates were prone to recidivism during the first year of release, close surveillance and supervision would serve to provide protection to the society and enhance the inmate's chances of successful re-entry.[55] This view was shared by the Hugessen Committee who felt that:

> Provided that the period of mandatory supervision is kept reasonably short, that credit is given for time served in the community and that there are procedural safeguards surrounding revocation, the cost to the inmate can be kept sufficiently low to warrant the continuation of such protection to society as is afforded by mandatory supervision.[56]

There was widespread opposition to the introduction of mandatory supervision by prison inmates who had previously been free of the constraints of the Parole Board or of supervision by parole officers. Since the combined period of statutory and earned remission amounted to one third of the sentences, it was expected that the inmates would be prepared to test the legislation in the courts on the basis that the imposition of and/or revocation of mandatory supervision was a denial of "natural justice". The following cases illustrate the singular lack of success of challenges to the legality of the new amendments, and secondly, the extent to which the Board was prepared to go to assert its authority in an area where it had limited jurisdiction.

In early 1975, Paul Lambert[57] brought an action for declatory relief before the Trial Division of the Federal Court, claiming that the Board had no authority to either suspend mandatory supervision or to subsequently revoke it. This application was dismissed on the grounds that "...the Parole Board has full authority to deal with the plaintiff". In addition, the Court asserted that an action based upon "natural justice" considerations was really an application for a type of review which could only be obtained from the Court of Appeal

under section 28 of the Federal Court Act.

Several months later, Lambert brought an application for *habeas corpus* before the Ontario High Court, citing sections 2(c) and 2(e) of the Bill of Rights. The application was dismissed, with Mr. Justice Pennel applying the decisions in Howarth and Mitchell supra, to the concept of mandatory supervision.

The Lambert decision was followed in subsequent cases[58] which affirmed the right of the Board to revoke mandatory supervision. Given these successes, the Board felt it had not only the authority to suspend and revoke mandatory supervision, but the right of jurisdiction to determine whether or not the inmate should be released on mandatory supervision. However, the Moore (1983)[59] case which involved the tactic of "gating" by the Board, proved to be an acid test for the Board and set the stage for one of the strongest defences of its policies.

This tactic of "gating" by the Parole Board evolved as a result of a few highly publicized cases of offenders on manadatory supervision, who had not been granted parole, who committed crimes. The outcry centered on the Parole Board, most people in the community thinking that these offenders were on parole and not knowing that the Board was not involved in mandatory release decisions. To counter this increased pressure the Board came up with the idea of "gating" until some form of legislation could be enacted to address the circumstances of offenders who were dangerous to the community being denied

parole several times but ultimately being released on mandatory supervision. Therefore, "gating" was a reactive decision by the Board to political and public pressure.

The first major challenge on "gating" to the courts was made by Marlene Moore who was eligible for release on mandatory supervision on December, 1982. Although her sentences were not due to expire until March 24, 1983, Moore was eligible for release by virtue of the remission she had earned under section 24(1) of the Penitentiary Act.

Since Moore was judged as being too dangerous to be released into society, it was decided by the Board that she should be "gated". The policy of "gating" involved the Board revoking the inmate's mandatory supervision and re-arresting him/her outside the prison gates immediately upon his/her release. As a consequence of this arrest, the inmate was reincarcerated in the penitentiary. Permission to be released was refused.

In Moore's case, the Chairman of the National Parole Board contended that the board's action was based on its concern for her anticipated conduct in view of her lengthy record of violence, both in and out of prison. The court found that notwithstanding the inmate's conduct, so long as she had to her credit a period of earned remission, she was entitled to be released from the penitentiary, as the Board had no jurisdiction over her release.[60]

In addressing arguments of the Crown and the Chairman of the National Parole Board, Mr. Justice Eberle concluded that as Miss Moore had earned remission to her credit under section 24 of the Penitentiary Act, and as she had not lost it under section 24(1) of that Act, the Board did not have the authority to withold her release on mandatory supervision.[61]

In its decision, the Court addressed several points related to the Board's practice of "gating" inmates:

1. The Judge pointed out that although Section 6 of the Parole Act gives exclusive jurisdiction and absolute discretion to the Parole Board "to grant or to refuse to grant parole or temporary absence...and to revoke parole or terminate day parole" there is no provision in any section of the Parole Act which gives the Board any discretion in the granting of release under mandatory supervision where remission time stands to the credit of the inmate.
2. Although Section 9 (1) of the Parole Act gives the Governor-in-Council power to make regulations for a broad range of activities concerning parole and temporary absences, the only mention of mandatory supervision is in clause (1) which deals with the revocation of mandatory supervision. Therefore, the Board has no power to make regulations in connection with the granting of mandatory supervision.
3. Section 12 of the Act provides for the issue of certificates "where an inmate is released under mandatory supervision". In view of the fact that the difference in the wording is

significant, and because it does not speak of the Board granting release under mandatory supervision, the Board's sole role is to impose terms and conditions on an inmate who is released by the prison authorities.

4. Section 15 (1) of the Parole Act begins "Where an inmate is released...as a result of remission...he shall...be subject to mandatory supervision...". It does not say "where the Board released an inmate on mandatory supervision". Since the regulations under the Act employ the same approach, the board is not given any role to play in releasing a prisoner under mandatory supervison, save to set the terms and conditions of it.

5. Lastly, the major issue was whether Section 16 of the Act allows the Board to suspend and revoke a release under mandatory supervision either in anticipation of misconduct, or whether the Board may suspend mandatory supervision only in the event of further misconduct by the inmate while at large under mandatory supervision.

The judge found that the National Parole Board had no authority to revoke Miss Moore's release under mandatory supervision and exercise the practice of 'gating' based on her past conduct, or on the belief and opinion of the Chairman, or even by relying on the power given it in Section 16 of the Parole Act to suspend a release under mandatory supervsion if 'satisfied' that it is necessary or desirable to do so in order to prevent a breach of any term or condition of parole to protect society.

On appeal to the Ontario Court of Appeal, Mr. Justice Dubin writing for the Court in a unanimous judgment supported the reason that the respondent was entitled to be released from imprisonment on December 14, 1982, and since she was denied that right, she was subsequently detained illegally. The court held that the Board had no authority to apply the use of the "gating" procedure since it was not entitled to forfeit, in whole or in part, the period of earned remission immediately upon the release of an inmate.[62]

Shortly after the judgment was rendered in the Moore case, a similar issue arose in British Columbia where the Crown appealed from the decision of Mr. Justice McKay in granting *habeas corpus* to Patrick Arnold Truscott.[63] Truscott claimed he was legally detained in prison as a result of the Board's 'gating' policy. The majority of the B.C. Court of Appeal agreed with the reasons of Mr. Justice Dubin in the Moore case. Paraphrasing those reasons Mr. Justice Seaton remarked:

> An inmate who is eligible for release as a result of earned remission pursant to the provisions of the Penitentiary Act, over which the National Parole Board has no control, is entitled to be released in a real sense under mandatory supervision, subject to such terms and conditions as may be imposed by the National Parole Board. His release must not be a charade or a sham. The power to suspend or revoke such mandatory supervsion pursuant to Section 16 of the Parole Act cannot be invoked by the National Parole Board by reason only of prerelease conduct of the inmate. The Board has no power to decide whether or not an inmate is to be released on mandatory supervision.[64]

In agreeing with Mr. Justice Seaton, Mr. Justice Anderson noted that the appeal could not succeed because the Board never

acquired jurisdiction. Since the respondent was not released in any real sense, the Board had no authority to cancel the mandatory supervision.[65]

The decisions in Moore and Truscott were supported by the Supreme Court of Canada. The Court held that an overwhelming case had been made against "gating".[66] After the ruling, the Solicitor General promised that new legislation would be introduced in the House of Commons to make "gating" legal and to provide safeguards for prisoners affected by it.[67]

The many challenges in the courts involving the issue of due process safeguards in the parole process have raised questions about the need of such fundamental rights as the inmate's right of access to information from the Board and his right to legal representation at hearings. The issues will be examined in the following chapter.

NOTES

1. Parole Act, (1959), Section 13.

2. Ibid.

3. Ticket-of-Leave Act (1899), p.1.

4. Fauteux Committee Report, (1956), p.53.

5. Supra, Note No. 1.

6. During the early 1970's prison rights groups made numerous requests to the Solicitor General for a repeal of the Parole Act. A similar position was taken by such parole supervision agencies as the John Howard Society and the Elizabeth Fry Society.

7. See for example, the comments of K. Jobson, "Fair Procedure in Parole", (1972) University of Toronto Law Journal, 22 267, p.282;
R. Price "Bringing the Rule of Law to Corrections", (1974) Canadian Journal of Criminology and Corrections, 16 p.209;
Gordon E. Kaiser, "The Inmate as a Citizen: Imprisonment and the Loss of Civil Rights in Canada", (1971), p.209, Queen's Law Journal 2, 11; and,
D.J. Mullan, "Fairnee: The New Natural Justice", (1975) University of Toronto Law Journal, 25 281.

8. The Ouimet Committee Report, p.242.

9. Ibid.

10. The Hugessen Committee Report (1973), recommendation No. 49. Standing Senate Committee on Legal and Constitutional Affairs, Parole in Canada (cited as the Goldenberg Committee Report), Ottawa (1974), recommendation No. 67.

11. See for examples the reports of such committees as noted earlier, Ouimet (1969), Hugessen (1973) and Goldenberg (1974).

12. R. v. Markwart (1969), 1.C.C.C. p.167.

13. Ibid, p.170.

14. The forfeiture section of the Parole Act was repealed in 1977. Criminal Law Amendment Act, (1977).

15. Parole Act (1959), section 16.

16. National Parole Board, Policy and Procedures Manual, (1980), p.111.

17. McCaud v. National Parole Board (1964), 1.S.C.R. 453, (1964), 50 D.L.R. (3d) 349.

18. Ex Parte McCaud (1965) 1 C.C.C. at p.168.

19. Howarth v. National Parole Board (1976), 1 S.C.R. 453, (1974), 50 D.L.R. (3d) 349.

20. Jacket C.J., Pratte and Thurlow J.J. In his judgment, Thurlow J. expresed the view that he might have reached a different conclusion if the matter had been affected by authority.

21. Martland, Judson, and J.J. de Grandpre concurring. Beetz J. wrote a separate decision in which he adopted Pigeon J's judgment.

22. Parole Act, R.S.C., (1970), C.P-2 Amended by Criminal Law Amendment Act (1976-77)

23. Laskin C.J. and J. Spence concurring.

24. Mitchell v. The Queen (1975) 24 C.C.C. (2n) 241 p.257.

25. Parole Act (1959).

26. Mitchell v. The Queen (1975) 24 C.C.C. (2n) 241 p.257.

27. Ibid.

28. Ibid, p.253.

29. Ibid, p.247.

30. Ibid, p.250.

31. Ibid, p.251.

32. Ibid, p.247.

33. Ibid, pp.244-245.

34. Ibid, pp. 260-261.

35. Morrissey v. Brewer, 92 S.C. 2593, 408 U.S. 471 (1972).

36. Ibid, p.2598. Brennan J. filed a concurring opinion in which Marshall J. joined. Douglas J. dissented in part (he held that a parolee was entitled to be represented by counsel).

37. Ibid, p.2601-2607.

38. Le Heinsworth v. Solicitor General of Canada (1973), F.C. 1200 (Trial Div.)

39. Marcotte v. Deputy Attorney General of Canada (1976), 1 S.C.R. 108, (1975), 51 D.L.R. (3d) 259, 19 C.C.C. (2d) 357. 3 N.R. 613, reversing (1973), 13 C.C.C. (2d) 114 (Ont. C.A.).

40. Ibid.

41. Ex parte Le Heinsworth, (1974), 21 C.C.C. (2d) 26 (Ont. H.C.).

42. Parole Regulations, R.S.C. (1970), S.20(1).

43. Regina v. Dwyer (1975), 4 W.W. R. 54 (B.C.S.C.).

44. Re Spice (1975), 23 C.C.C. (2d) 141 (Ont. H.C.).

45. Ex parte Fraser (1975), 27 C.C.C. (2d) 479 (Man. C.A.).

46. Zong v. Commissioner of Penitentiaries, (1976), 1 F.C. 657 (Fed. C.A.).

47. Howley v. Deputy Attorney General of Canada (1976), 34 C.R.N.S. 302 (S.C.C.).

48. R. v. Elliot (1976), 3 W.W.R. 264, 34 C.R.N.S. 117 (B.C.S.C.).

49. Ibid.

50. R. v. Vidlin (1976), W.W.D. 64, 38 C.C.C. (2d) 378.

51. National Parole Board, Policy and Procedures Manual (policy 106-3 1(2) p.112).

52. R.S.C. (1970), C P-2, s.15.

53. Parole Act, (1979), S.15.1)

54. Penitentiary Act S.24(2).

55. Solicitor General Report to Parliament (1973-74), House of Commons, Ottawa, p.51.

56. Hugessen Committee Report at p.28.

57. Lambert v. The National Parole Board (1976), 2 F.C. 169 (Trial Division).

58. See for example, such cases as Nicholson v. The National Parole Board, (1975), 2 F.C. 169 (Trial Division);

Daughton v. The Queen (Man. Q.B., unreported - (June 26, 1975)), affirmed (Man. C.A. unreported - July 23, 1975); and,
Regina v. Gorog (1975), 4 W.W.R. 192 (Man. C.A.).

59. Her Majesty the Queen v. Marlene Moore, Supreme Court of Ontario (January 26, 1983).

60. Ibid.

61. Ibid.

62. Her Majesty the Queen v. Marlene Moore, Ontario Court of Appeal, (February 23, 1983).

63. Patrick Arnold Truscott vs. the Director of Mountain Institution and The National Parole Board. British Columbia Court of Appeal, (March 25, 1983).

64. Ibid, p.6.

65. Ibid, p.10.

66. The Globe and Mail (Toronto: May 18, 1983).

67. Parliament was dissolved before action was taken by the previous government to make "gating" legal. However, the Bill was recently introduced in the House of Commons to prevent the automatic release of violent offenders. Toronto Star, (September 24, 1985).

CHAPTER V

THE INMATE'S RIGHT OF ACCESS TO INFORMATION AND TO LEGAL REPRESENTATION IN PAROLE HEARINGS

With the right of inmates to parole hearings, it was expected that demands would be made by inmates to the National Parole Board for access to information on which its decisions were based. Similarly, once it was established that the inmate has a right to a hearing, it was expected that in the interest of fairness, counsel should be allowed to be present at the parole hearing at the inmate's request.

Several factors such as court decisions in Canada and the United States, comments of investigative committees, and the effect of nother legislation have been identified as impacting on the provision of these due process safeguards. These factors will be examined in this chapter to determine to what extent they have influenced the government and the National Parole Board to implement these due process safeguards.

The right of access to information became effective June 1, 1978.[1] According to the Chairman of the National Parole Board this was in accordance with the Board's desire to extend a greater degree of due process safeguards in the areas of parole and revocation hearing to federally incarcerated inmates. This view was supported by the Solicitor General, who on reporting to Parliament stated:

> ...assistance at hearings is intended to provide an opportunity for inmates to ensure that all facts and

circumstances in support of their release are presented to the Board in a clear and articulate manner.[2]

Access to information appears to have been a less controversial issue as compared to nother due process challenges which have been directed at the Board. Issues such as the right to hearings and reasons for decisions appear to have taken on a greater degree of importance, consequently very little case law has been developed on the subject. There were two early English cases[3] which dealt with arguments for access to information which was claimed to be confidential. However, before the Couperthwaite case,[4] most of the pronouncement in Canada on the right of access to information came from Government appointed Task Forces and Parliamentary Committees.[5] In addition, the enactment of the Canadian Human Rights Act[6] provided a strong impetus to the Board to develop policies and procedures in order to comply with provisions of the Act pertaining to access of information.

A major American case relating to access to information by parolees whose paroles had been revoked was Morrissey v. Brewer, (1972).[7] In this case the Court suggested that disclosure to the parolee of evidence against him was one of the minimum requirements of due process for the revocation hearing. Also in Childs v. The United States Board of Parole (1974),[8] where, in granting relief to the plaintiffs, the Court stated:

> ...defendants [The Parole Board] are to submit to the Courts within 60 days, proposed regulations governing access by the prisoner to the information which will be before the Board and the submission of responses on behalf of paroled applicants.

In Canada the Task Force on Release of Inmates (Hugessen Committee 1973),[9] addressed the issue of access to materials in inmate's files and concluded that it was their:

> ...distinct impression that most of the material contained in Parole Board files upon which the parole decision is based, could with safety, be shown to the inmate concerned.

The Committee argued that the danger in not allowing the inmate access to all material which may be used in reaching the parole decision is that files might contain information which is false. In its report, the Hugessen Committee recommended that, in principle, all material which is made available to the Parole Board for the purpose of its decision should be made available to the inmate prior to his parole hearing.[10]

Shortly after the Hugessen Report was published, the Canadian Criminological Association presented a brief to the Standing Senate Committee on Legal and Constitutional Affairs, supporting the position that inmates should have a qualified right of access to all evidence against them.[11] These views were reflected in the Goldenberg Report (1974) which contained recommendations for statutory hearing rights on the granting and cancellation of parole, including the right to be present, the right to see the material on which the decision was based and to have reasons for the decision and assistants who are not members of the legal profession.[12]

It can be argued that with the passage of the Canadian Human Rights Act in 1977,[13] the National Parole Board was in an indefensible position to withhold any longer access to

information to inmates applying for parole. Paragraphs 54(a) to (g) of the Act require administrative boards, and in this case the National Parole Board, to make as much information as possible available to the inmate, and to withhold it only if there is a legitimate interest to protect by doing so. The Parole Regulations were therefore amended to reflect the intent of the Human Rights legislation. Section 17 of the Parole Regulations which became effective on June 1, 1978[14] requires the Board, when reviewing a case for full parole, to provide the inmate orally, or in writing, with all the relevant information in its possession, subject only to the Human Rights Act, and to documents prepared before that Act came into effect.

Even with these regulations, the Human Rights Act provided the Board with considerable discretion. The Board, for example, could withhold information on the basis that it had a legitimate interest to protect by doing so. Further, it could be argued that the majority of the documents in any given case were prepared before the Act came into force.

In addition to this, the Privacy Act which was proclaimed on July 1, 1983, provided the Board with unlimited reasons to withhold from the inmate information collected by the Board. For example, the Board could withhold information from the inmate or his assistant if it could reasonably be expected that disclosure of it would create problems in criminal investigations; reveal information originally obtained on a promise of confidentiality, express or implied; or result in physical harm to that

individual or any nother person; or impede the functioning of a court of law. Psychiatric reports may also be withheld if disclosure to the inmate would be contrary to his best interest. This leaves the Board with considerable discretion and control over access to information.[15]

The provisions of the Privacy Act appear to have placed inmates in a "no win" situation, as any information which is adverse to them could be placed into one of the above noted exemptions. While a few minor improvements such as broadening of the circumstances for information and imposed timeliness in obtaining information were made to the new legislation, these appear to have only cosmetic effects, since the wide range of exemptions that are provided for in the Act allow the Board to retain much of its discretionary powers. Further, although it is now possible for the inmate to seek information at any time, there is nothing in the Act which compels the Board to provide the information sought. Neither is there any guarantee that provision of the information will alter any subsequent negative decisions of the Board.

Under previous legislation, if the Board decided to supply the information in writing, it was to be done at least 15 days before the review. The early practice of the Board was to provide what it considered relevant information to the inmate only, at the beginning of the parole hearing. The Board is now required to supply information in writing to the inmate whenever such information is requested. It was on the basis of this

legislation that the case of Couperthwaite v. National Parole Board (1982) was premised. Couperthwaite petitioned the Federal Court[16] for a writ of *mandamus* to compel the Board to comply with the provisions of the Parole Act and sections 14, 15 and 20.1 of the Parole Regulations and Section 1(a) and (b) and Section 2(c) of the Canadian Bill of Rights as amended, and in addition, or in the alternative, the common law duty of the National Parole Board to act fairly.

Couperthwaite contended that he could have been denied a right to a fair hearing in accordance with the principles of fundamental justice if the board carried out its implied intention to conduct a portion of his parole review hearing *ex parte*. It was further argued that due process of law was violated if the Board was permitted, in the absence of the applicant during the hearing process, to accept information or evidence from persons, including the living unit officer, classification officer and/or parole officer. This process it was claimed, violated sections 14, 15 and 20.1 of the Parole Regulations.

In defence of the Board, the Chairman of the National Parole Board argued that the *ex parte* discussion was not considered to be a part of the hearing. Rather, the purpose of the meeting was to familiarize the Board members with all the information on the particular case and to bring that information up to date by identifying any information that had come to the Board since the staff compiled its reports and supplied them to the Board. The

Board assumed that it was important that the inmate be excluded from the meeting as some of the new information might fall within one or more of paragraphs (a) to (g) of section 54 of the Human Rights Act, and the Government might order that it be kept confidential and not disclosed to the inmate. Finally, the Board's personnel argued that the meeting was not part of the hearing, but merely the final stage of preparation for the hearing and therefore neither the inmate nor his lawyer had a right under section 20.1 of the Regulations to be present.

The Court, however, condemned the unfairness of the *ex parte* hearing, Mr. Justice Smith observing:

> The fact that the merits of the case are sometimes discussed with the parole officer and the LUDO is important, because in any case where this has occurred it is impossible to say that what was said in that discussion cannot have had any influence on the minds of the board members in reaching their final decision to grant or refuse parole. It is very likely that much of what is said in a discussion of the merits will not be information about facts, but opinions of what conclusions may or should be drawn from the facts. To the extent that it is opinion of this kind is not information and is not required to be shared with the inmate, who, not having been present and not heard the discussion, is in no position to explain, clarify or correct the facts on which the opinion is based.
>
> There is always some danger, nothwithstanding that it is not intended, that discussions of this kind may result in one or more members of the Board coming to the conclusion that parole should be refused, though they have not yet seen the inmate or heard what he has to say.[17]

The dichotomy between the Boards administrative and judicial functions and its duty to act fairly were also commented on by Mr. Justice Smith:

The Board is not a Court of Law. It is an administrative

> body. It does not sit in a judicial capacity. There is, to my mind, some doubt whether its functions are not, in some circumstances quasi-judicial in nature. Be that as it may, the Board's parole decisions do affect seriously the inmate applicant's interest to be at liberty. To be at liberty on parole and not confined to prison is an important interest, though it is conditional. Then assuming that the Board in this case is acting in a purely administrative, not quasi-judicial capacity, it is still bound to act in accordance with the general rule to act fairly. Where the person whose position is being reviewed is entitled to a hearing, as in the case here, he is normally, under the principle of fairness, entitled to hear the evidence against him and to have full opportunity to reply to it. That principle in my opinion, applies to parole hearings.... In the situation we are discussing where in the absence of the inmate, facts and sometimes merits are discussed, that principle may be breached, because it is possible and I think probable that not all the things discussed will be made known to him following his admittance to the hearing room.[18]

Mr. Justice Smith held that it was clear to him that the *ex parte* meeting of the Board with staff officers immediately before the inmate and his representative are admitted to the hearing is closely connected with the purpose of the hearing and that what takes place there may have some influence on the decision subsequently made by the Board. In conclusion he stated:

> This being so, after considering all the evidence, and notwithstanding the contrary view so strongly and well expressed by Mr. Outerbridge, ..., I have come to the conclusion that this meeting should properly be regarded as being part of the parole hearing.[19]

As a result of the Court's decision in Couperthwaite v. The National Parole Board, the Board was required to comply with provisions of the Parole Regulations to provide Couperthwaite with a hearing in person, and with access to the information he sought to enable him to refute any incorrect or damaging

allegations by the officers of the Correctional Service of Canada. It appears that in its judgment, the Court was affirming the judgment of the English cases referred to earlier, that is, fairness demands that those who are affected be given knowledge of the pertinent facts sufficient to enable them to respond adequately to the charges against them.

The Right to Legal Representation before the Parole Board

The right to legal representation at parole hearings became effective on April 1, 1981,[20] and was one of the last due process safeguards introduced into the parole process. Prior to this date, arguments to the Board for the right to legal representation or nother assistance at parole application hearings were unsuccessful. The Board, following the recommendation of the Fauteux Committee (1956), maintained an atmosphere of congeniality at hearings and attempted to avoid court-like adversarial practices.

The board's reluctance to allow assistance at hearings was supported by the various Committees and Task Forces that had deliberated on the matter and by the negative comments of judges in Canada and the United States. The Fauteux Committee, for example, saw no need for the Board to hear oral arguments by counsel or nother representatives of the applicant, arguing that the Board should be allowed to exercise it discretion to grant hearings in "proper cases". However, all representation to the Board should be in writing.[21] The Quimet Committee (1969) was

silent on the issue and the Hugessen Report (1973) expressed particular reservations to the presence of lawyers at parole hearings. This Committee was of the opinion that the need for lawyers at parole hearings should only be where the inmate is incapable of expressing himself fully and clearly by reason of education, background, language or temperament.[22]

A contrary position, however, was adopted by the Standing Senate Committee on Legal and Constitutional Affairs (1974), which recognized the inmates' need for assistance, and recommended that they be given the right to representation at parole hearings. However, the Committee was of the opinion that such representation at the parole hearing should be limited to lay persons who would not prevent Board members from entering into direct dialogue with the inmate.[23] Having received strong support from the various committees for the position, that representation when it existed, should be by lay persons, the Board did not perceive a need to amend the Parole Act to provide for legal representation at hearings.

While judicial reference to the propriety of legal representation at hearings was left to the United States Courts, by 1971, there were only 18 states in the United States which permitted counsel at parole release hearings, although all but four states granted parole hearings.[24] Entitlement to assigned counsel was not granted by any Federal Court, and the right was denied in all nother state courts with the exception of Hawaii[25] and Pennsylvania[26]

In Morrissey v. Brewer (1972) the Court refused to confront the question of the right to Counsel at parole revocation hearings. However, it was emphasized that parole revocation hearings should have greater flexibility than criminal proceedings. For example, the Court stated that:

> ...the process should be flexible enough to consider evidence including letters, affidavits, and nother material that would not be admissible in an adversary criminal court.[27]

The issue of legal representation at parole revocation hearings was further addressed in Ernest v. Willingham (1969),[28] in which the Court held that there was no constitutional right to retained or appointed counsel at a parole revocation hearing.

In Lawson v. Coiner (1968)[29] the Court did not accept the proposition that just because a probationer had certain legal rights a parolee should have them too:

> ...an attorney need be present to protect...personal legal rights of the prisoner whose probation is ceasing - whereas the same legal rights do not extend to a parolee.

This same principle was reiterated in the case of Lewis v. Rockefeller (1969),[30] where the Court held that due process does not require that candidates for parole be represented by counsel at parole hearings.

Support to the notion of representation by counsel at parole hearings was given in the cases of Gagnon v. Scarpelli (1973)[31] and Flemming v. Tate (1964).[32] In Gagnon the Court confronted the issue it had avoided in Morrissey as to whether there was a right to appoint counsel at a probation or parole hearing.

Although the Court refused to find that there was an absolute right to appointed counsel in revocation hearings, it found that the effectiveness of the right guaranteed by Morrissey might, in some circumstances require the skills of counsel:

> ...Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness - the touchstone of due process - will require that the state provide at its expense counsel for indigent probationers and parolees.[33]

In Flemming, the District of Columbia Court of Appeal showed that the interest of the parolee in making full representation with the assistance of counsel need not interfere with the Parole Board's role of making a treatment-oriented decision. In endorsing the parolee's right to appear with retained counsel at revocation hearings the Court stated:

> The presence of counsel does not mean that he may take over control of the proceeding. The receipt of testimony offered by the prisoner need not be governed by the strict rules of evidence, any more than the application of those rules is necessary in many informal administrative hearings. The presence of counsel and the receipt of testimony offered by the prisoner need not prolong the hearing beyond the time necessary in any event for the Board to ascertain the facts upon which it is about to act. The participation by counsel in a proceeding such as this need be no greater than is necessary to insure to the Board as well as to the parolee, that the Board is accurately informed from the parolee's standpoint before it acts, and the permitted presentation of testimony by the parolee need be no greater than is necessary for the same purpose. But we believe that these minima are essential to a valid appearance before the Board as required by the Statute.[34]
>
> ...the presence of counsel is meant as a measure of protection to the prisoner, it should not be permitted to become a measure of embarrassment to the tribunal. The receipt of testimony offered by the prisoner is one

> of the fundamentals of fair play, so frequently asserted by the courts. These two features, the presence of counsel and the receipt of evidence are the basic characteristics of our whole system of administration of justice. To say that they cause the degradation of a proceeding into an uncontrolled melee is to deny fundamentals.[35]

Since the National Parole Board was not challenged by similar judicial pronouncements in Canada, there was no perceived need to modify its policies to allow for legal representation. Support for this position was forthcoming in Re Gilbert and the Queen (1975)[36] in which the Court held that the fundamental justice for an accused is a fair trial, therefore, counsel is not always a necessary concomitant to a fair trial.[37]

Until the case of Dubeau and the National Parole Board (1981)[38] it appears that the focus of challenges to the Board's operational policies centered around the rights of inmates to fair hearings rather than representation by counsel. In Dubeau, the Court concluded that the duty of fairness imposed on the National Parole Board was broad enough to include the presence of legal counsel at a hearing in cases where it required fairness.

No data are available as to the percentage of cases in which counsel appear on behalf of inmates at parole hearings, nor has there been a thorough analysis on the effects on the presence of counsel at parole hearings. However, Beck (1975)[39] found that adults with representatives were paroled on an average of six weeks earlier than inmates without representatives. Carriere and Silverstone (1976)[40] felt that the need for representation was

apparent in some of the parole hearings they observed.

Since the right to legal counsel at probation revocation hearings is provided for in the Criminal Code,[41] where a probationer who is charged with a violation of a probation order has a right to appear in court, with counsel, and to benefit by the rules of evidence. It is argued, therefore, that a case could have been made for legal representation at the early stages of the parole hearing process in Canada.

In a document published in 1981 by the Department of the Solicitor General - the work of a group which included officials from the National Parole Board it was recommened that:

> ...in certain parole hearings...legal representation on behalf of offenders should be permitted.[42]

Since the practice was already in place in Federal institutions where inmates had the right to be represented by counsel at Institutional Disciplinary Boards, the National Parole Board was no longer in a position to make a viable case for denying legal representation at parole hearings. The Parole Regulations[43] were, therefore, amended to provide that in hearings for full and day parole, revocation of full or day parole, or where mandatory supervision has been suspended and revocation is contemplated, the Board must allow the inmate to be assisted by a person of his choice. This includes legal counsel, who is entitled to accompany the inmate to the hearing, to advise him on questions asked by Board members and to address the Board on the inmate's behalf.

NOTES

1. Parole Regulations. P.C. 1978-1528 as amended by P.C. 1981-993 and P.C. 1981-1668.

2. Solicitor General's Report to Parliament 1981-82. Ottawa: Queen's Printer (1982).

3. R. v. Gaming Board of Great Britain, 2 All E.R. 528 (C.A.) (1970); and,
Re Pergaron Press Ltd. 3 All ER. 533 (C.A.) (1970).

4. Keith Frederick Couperthwaite v. National Parole Board, Federal Court of Canada, Trial Div. T-3763 - 81 (June 23, 1982).

5. Task Force on Release of Inmates (cited as the Hugessen Committee Report Ottawa: Queen's Printer, (1973).

6. Canadian Human Rights Act, S.C. (1976-77) vol 11 C.33.

7. Morrissey v. Brewer (1972) 92 S.ct. 2593.

8. Childs v. The United States Board of Parole, 511 F2d. 1270 (D.C. Cir. 1974)

9. Supra, Note No. 5. The Hugessen Committee Report p.32.

10. Ibid.

11. The Canadian Journal of Criminology and Corrections, 144 p.152 (1973).

12. Supra, Note No.5 The Goldenberg Report, recommendations 36-40.

13. Supra, Note No. 5.

14. Supra Note, No.1.

15. Ibid.

16. Supra, Note No.4.

17. Ibid, p.10.

18. Ibid, p.11.

19. Ibid.

20. Parole Regulations, sec. 20.1 (1981).

21. The Fauteux Committee Report, p.82.

22. Supra, Note No. 5. The Hugessen Committee Report, p.34.

23. Supra, Note No. 12.

24. Comment "Due Process: The Right to Counsel in Parole Release Hearings", Iowa Law Review, 498 (1968).

25. In the Matter of Sumida, (unreported 1st. Cir., Ct. November 15, 1967).

26. Commonwealth v. Tinson, 249 A 2d. 549 Penn. S.C. (1969). The Court stated that to distinguish Mempha on the ground of a distinction between parole and probation was completely untenable.

27. Supra, Note No. 7.

28. Ernest v. Willingham, 406 F. 2d 681 (1969).

29. Lawson v. Coiner, 291 F. Supp.79, 83 (U.S. District Court N.D. West Va.) (1968).

30. Lewis v. Rockefeller, 305 F. Supp.258 (U.S. Dist. Ct. S.D.N.Y.) (1969).

31. Gagnon v. Scarpelli, 411 U.S. 778; 93 S.ct. 1756 (1973).

32. Flemming v. Tate (1964) 156 F.2d. 848.

33. Supra, Note No. 34.

34. Supra, Note No. 33.

35. Ibid.

36. Re Gilbert and the Queen, (1975) 53 D.L.R. (3rd) 441 p.453.

37. Ibid.

38. Dubeau and the National Parole Board, (1981) 54 C.C.C. (2nd) 553 (1981).

39. James L. Beck. "The Effect of Representation at Parole Hearings", Criminology, California: (1975).

40. P. Carriere and S. Silverstone. The Parole Process: A Study of the National Parole Board. (Ottawa: Minister of Supply and Services Canada, 1976).

41. The Criminal Code, Canada, sec. 640 (a).

42. Canada. Solicitor General. Mandatory Supervision: A

Discussion Paper. (Ottawa: 1981).

43. Parole Regulations P.C. 1981-993.

CHAPTER VI

SUMMARY

This study has examined the impact of the rule of law on the National Parole Board. The policy-making and operational procedures of the Board were singled out for study, as through its decision-making, it has significant impact on not only the criminal offenders, but the general public as well.

The National Parole Board is similar to other administrative boards in several respects:

1. its members serve by Ministerial appointments;
2. the professional backgrounds and/or experience of its members are seldom homogenous;
3. they exercise wide discretion on decision-making;
4. policy-making is vague as are reasons for decisions which are seldom given;
5. decisions are not appealable to a court of law; and,
6. its members conduct are not accountable to the legislature.

The analysis has revealed that because the operational policies of the National Parole Board are often vague and conflicting, these policies have been significantly affected by judicial decisions which have served to introduce due process safeguards into the parole process.

While the term "rule of law" has no absolute or static meaning, operationally, it is an ordered structure of norms set and imposed by an authority in a given community. According to

Hayek (1944) the rule of law means that Government in all its actions is bound by rules fixed and announced beforehand--rules which make it possible to foresee with fair certainty which authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.[1] In the case of the National Parole Board, it was purported that the rule of law inherently imposes legal limitations on its administrative discretion.

Examples were provided where the rule of law has had a significant effect on policy-making and operational procedures of the National Parole Board. A majority of judges and appointed committees affirmed the supremacy of the rule of law on the Board's operational policies by contending that the rule of law establishes rights and interests under law and protects inmates/parolees against the illicit, or illegal, use of any power, private or official, by providing them with recourse to the courts through the legal process. Since decisions of the Board are not subject to review by an outside agency or the courts, the rule of law is seen as the most effective instrument for modifying the Board's policy-making and operational procedures.

The decade of the 1970's ushered in a new era of forced awareness on the National Parole Board with respect to the provision of procedural safeguards to inmates/parolees. For example, though the Parole Act gives the Board exclusive jurisdiction and absolute discretion to grant, deny or revoke day parole and full parole, there were several decisions by the

Courts which gave hope to the critics of the Board that at long last, the Courts were sympathetic to the notion of providing expanded review over Parole Board decisions.

The legislation which replaced the Ticket of Leave Act was certainly more progressive and enlightened than the Act which was repealed, and although its overall orientation emphasized the rehabilitative aspects of parole, the provisions regarding suspension, revocation and forfeiture articulated a somewhat different position. The wording in Sections 11 and 12 of the Parole Act clearly emphasized that the adherence to legal norms constituted the most important criteria insofar as suspension and revocation were concerned. In a similar vein, the emphasis on legality was further reinforced by Section 13, which provided for automatic forfeiture in any case where a parole offender was convicted of an indictable offence carrying a maximum sentence of two years or more.[2]

In addition to the limitations that were imposed by Sections 11, 12 and 13 of the Parole Act, which dealt with suspension, revocation and forfeiture, the initial liberality of the 1958 Act was further constricted by Parole Regulations which were attendant to the Act. For example, while Section 8 of the Parole Act placed no restrictions on eligibility other than rehabilitation, the Regulations narrowed the possibility of parole at an early date in the sentence by prescribing that the lesser of one third of the sentence imposed, or four years, had to be served before consideration was given to parole. This more

limited opportunity for parole was subjected to even greater restrictions by the Board's insistence that inmates meet a clearly defined criteria before parole could be granted.[3]

The fact that the Act of 1958 did not become the subject of numerous legal challenges can be explained by the fact that the Parole Act was seen to be more humane and progressive than the Ticket of Leave Act, and also, because the notion that parole was a "privilege" and not a "right" was reflected in the parole legislation. Therefore, the challenges which occurred were few in number and all involved some aspect of parole suspension or parole revocation.

While few in number, these early cases[4] exerted a profound influence on the Board's decision-making policies, and although not always favourable to the litigants the comments of the dissenting judges undoubtedly influenced the Government in its attempts to reach for ways to make the policies of the Board comply with the temper of the times. However, modification of the Board's operational policies did not emanate solely from court decisions. There were other factors of influence such as media comments, findings of Task Forces and Investigative Committees, the influence of due process provisions in other jurisdictions, changes in public attitudes and comments and/or criticism from special interest groups.

The Parole Act was structured in such a fashion to make parole a privilege rather than a right, and in doing so the Board was under no duty to grant hearings or give reasons for

decisions. The Parole Act protected the Board from providing explanations for its operational policies. Consequently, when hearings were implemented, the prevailing style of operation was one of informality and flexibility and avoidance of court-like standards (strict rules of evidence, cross-examinations) in its deliberation.

In the early years of the Parole Board's operation, and before the decision of Martineau v. Matsqui Institution Disciplinary Board,[5] there was a tendency among judges to differentiate a right from a privilege. A right was the only obligation which the courts felt they were legally entitled to enforce. Privileges were perceived as being administrative in nature, hence, the courts were reluctant to interfere with decisions which were denied as administrative. Since the granting of parole was deemed to be a privilege and not a right, and because in actuality the inmate was serving the remainder of his sentence in the community, the inmate's attempts at judicial interventions were usually unsuccessful.

In recent years, the right/privilege dichotomy is no longer relevant to judicial reviews since the courts have adopted the position that any public body exercising power over subjects may be amendable to judicial supervision. The courts have decided that decisions will be reviewed for the application of the rules of natural justice if the decision-making body is set up to act judicially or quasi-judicially. Conversely, if the decision-making body is administrative in nature the decision

will be reviewed for the application of the duty to act fairly.

It is important to note that in the early decisions of the Supreme Court of Canada, in Ex-parte McCaud (1965), Howarth v. National Parole Board (1976) and Mitchell v. The Queen (1975) supra, an administrative duty of fairness was not considered to be necessary. McCaud complained that he was never informed of the reasons why his parole was revoked and that he was given no opportunity to be present at a hearing and to oppose the revocation thereof. He challenged the revocation as being contrary to section 2(c) of the Canadian Bill of Rights. Spence J. held that the revocation was an administrative matter and not in any way a judicial determination and dismissed the application. In Howarth, what was at issue was the legitimacy of the National Parole Board refusal to give full reasons for the revocation, or to grant a hearing to reconsider the issues.

With the introduction of the Federal Court Act,[6] the Federal Court was given jurisdiction to ajudicate cases arising from decisions of boards, commissions, or other tribunals. Under Section 28, any decisions made "other than a decision or order not required by law to be made on a judicial or quasi-judicial basis, is now reviewable". Those other decisions (i.e., those relating to a duty to act fairly) can now be reviewed under Section 18 of the same Act.

> The Trial Division has exclusive jurisdiction to:
>
> (a) issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warrento*, or grant declaratory relief against any federal board,

commision or other tribunal, and,
(b) to hear and determine any application or other proceeding for relief in the nature of the relief contemplated by para (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.[7]

In other words, the Trial Division assumed the jurisdiction to grant all traditional "common law" remedies with the exception of *habeas corpus* insofar as federal agencies were concerned, and all actions against the Attorney General of Canada to obtain relief against a federal agency must be brought in the Trial Division.

Because the right of hearings was one of the major challenges to the Board's operational policies an extensive amount of case law has accumulated. Although the Fauteux Committee (1956) supra, saw no need for hearings in the parole process, and in fact argued against its implementation, all subsequent Committees and Task Forces[8] which were appointed to study the parole process recommended that legislation be enacted to provide for hearings. Also there were some noted American cases[9] which emphasized that an inmate whose parole was revoked without a hearing was in effect deprived of due process safeguards. These courts rejected the concept that rights in parole proceedings spring from "privileges" rather than "right", and suggested minimum requirements of due process for the revocation hearing.

By the late 1960's the Government and the Board realized that public opinion and judicial pronouncements were calling for

due process safeguards in the parole hearing process. Consequently, the Board provided hearings at the application stage of the parole process without any formal amendment to the Parole Act.

The right to parole revocation hearings and the granting of reasons for decisions were slower to develop and the primary impetus seems to have been the intervention of the Courts in upholding the challenges to the Board's operational policies. However, the Board was able to use the mechanism of hearings to enhance their legitimacy, and to provide what Jowell (1975) describes as "symbolic reassurance that the democratic rules of the game have been followed".[10]

Parole forfeiture required the inmate to serve the balance of his remission that remained to his credit when he was released on parole, plus the conditional new sentence. However, the Board was hardly criticized for this procedure because the affected inmate was perceived as "breaking faith with the system" by not living up to his commitment when he was released. Inmates' reluctance to challenge the Board may have resulted from their perception that they had "broken faith with the system", and, indeed, were responsible for their predicament. Secondly, it was the commital of the indictable offence which automatically forfeited parole as was provided for in the Parole Act.

All the court challenges of the Board's forfeiture policies failed. However, by mid-1970's, it was apparant that the

procedure was viewed by Investigative Committees, critics of the Board and inmates as being harsh and arbitrary. Consequently, the Parole Act was amended to eliminate the forfeiture provision and replace it with revocation (with offence). This allowed for restoration of remission which the inmate had when paroled.

The research shows that unlike parole forfeiture which occurred as a result of a conviction in a Court of Law, parole revocation has been perceived to be a decision of the Board which is arbitrary in nature and where most of the substantial rights and procedural safeguards which are accorded to the average citizen have not been provided to the parolee. This point of view was the impetus of numerous challenges to the Board's operational policies and produced some of the most positive results in the areas of due process safeguards for parolees.

The Board's revocation policy and mandatory suspension procedures were the target of numerous challenges in the courts and generated strong judicial comments.[11] As a result of the judgment of the courts, the Parole Act was amended to provide for suspension and revocation hearings. Inmates were granted credit for remission earned while on parole. The Board's operating policy was also amended to provide for the review of the case of every parolee and mandatory releasee within 14 days of parole or mandatory supervision suspension; and the Board was no longer able to revoke parole after the warrant expiry date.[12]

It can be argued that the creation of the Internal Review Committee was an attempt by the Board to stem the tide of criticism for failing to propose an amendment to Section 23 of the Parole Act which specifically excluded appeals or reviews to any Court or other authority and in totality to allow its decisions to be examined by the courts.

An analysis of the workings of the Internal Review Committee shows that the majority of cases which are reviewed result in the original decision being affirmed. A small percentage are returned to the regions for review with approximately eight or nine percent resulting in a reversal of the original decision.[13]

The setting up of the 'working group' by the Board in 1983 to review the whole area of internal review: authority, structure, process, etc., confirmed the misgivings of its critics regarding the propriety of its internal self-examination. Although a new name (Appeal Committee) was given to the Committee, its decisions can be questioned as the membership of the Appeal Committee is constructed only from regular headquarters members, instead of being an independent body of Board Members who are duly appointed to fulfill exclusive review or appellate functions that are provided for in other administrative agencies.[14]

As the policy stands, appeals to the Internal Review Committee will continue to be dealt with by way of a file review, and although appellants are permitted to submit, or to have written representation submitted on their behalf, no

provision is made for personal appearances of inmates or representation by lawyers on their clients behalf. Once again, it will be left to the courts to determine whether or not this policy violates the legal principles of due process safeguards.

The Moore (1983) supra, case illustrates the extent to which the Board was prepared to go to uphold what it considered to be its legitimate authority in the mandatory supervision process. The courts found that the Board had no power to make regulations in connection with the granting of mandatory supervision. Furthermore, since the Board had no power to refuse to release an inmate under mandatory supervision, the policy of 'gating' was declared to be a denial of 'natural justice'.

Generally speaking, the decision of the Board to grant the right of access to information was not as magnanimous as it would appear. The wide range of exemptions pursuant under the Human Rights Act and later the Privacy Act makes the exercise almost academic, to the point where any information sought can be limited in content and to factual information of which the inmate may already be aware. Secondly, since compilation of most of the data is done by the Correctional Services of Canada - parole and institutional staff, and as recipients of that information, the Board is in an enviable position to defend accusations which suggest that its decisions were based on erroneous information. Therefore, it can be argued that in adopting policies for the furnishing of information the Board was only complying with the judgments of the courts and

provisions of the Charter of Rights and Freedoms.[15]

Even with the right of access to information, it should be noted that the mere existence of formal channels does not in itself ensure due process. While rule making procedures (such as access to information) may substantially affect the merits of the arguments presented, in practice, however, they amount to what Edelman (1964) calls "symbolic reassurance" - "quiescence" of mass public.[16] In other words, operational procedures may be used by an administrative agency to give the impression of participation, whereas, no more than proforma adherence to an "empty democratic" ritual was followed.

Once it was established that the inmate has a right to a hearing, it was expected that in the interest of fairness, counsel should be allowed to be present at the inmate's request. Since no provision was made in the Parole Act for legal representation during the parole process, the Board was under no obligation to accede to the wishes of the inmates to be represented by counsel at parole hearings. It would appear that the granting of the right to legal representation at parole hearings was motivated in part by the decision of the Court in Dubeau (1981) supra, the conclusions of the Solicitor General's Working Group of 1980, and the practice that was already in place in federal institutions in Canada where inmates had the right to be represented by counsel at Institutional Disciplinary Boards.

Since most of the concerns regarding procedural safeguards have been addressed, there may be fewer challenges of the Board's operating policies in the courts. However, the Board may receive increased complaints from offenders that their rights have been violated under sections 7 and 9 of the Canadian Charter of Rights and Freedoms[17]

The Board will have to establish a *prima facie* case in order to satisfy the courts that the parolee's rights have not been violated. If they act arbitrarily, or if their actions are not in accordance with the principles of fundamental justice, such decisions could be declared void and of no effect as per section 50 of the Charter.

This thesis was not designed to examine the efficacy of parole, or whether or not parole itself should be abolished. There is certainly a wide divergency of opinion on both issues, and a segment of either one could be the subject of a separate thesis. However, since it is generally conceded that the parole system is the offspring of the prevailing view that punishment should be reformative, it is argued that the Parole Board has a moral obligation to protect this principle, reaffirm its commitment to the principles of fundamental justice and provide due process safeguards to those who are affected by its policy-making.

The Board can least afford to give the impression that it is not committed to the concept of justice, otherwise the parole system could be viewed as arbitrary and capricious. As Dean

McGeorge Bundy remarked:

> In the end, due process depends also on the fairness and good sense of laymen, and it comes out in favour of 'civic virtue, clear communication and a decent confidence in our own strength'.[18]

In the Royal Commission Inquiry into Civil Rights, Mr. Justice McRuer stated:

> The individual who suffers from an unjust decision made by a statutory tribunal suffers just as acutely as from an unjust decision made in the ordinary courts. In fact he may suffer more acutely because in many cases he has no right to appeal, he does not know on what material the decision is based, nor the reasons for the decision.[19]

He further emphasized that procedural safeguards are essential to ensure the fair exercise of statutory power, and he also stressed that the preservations of rights and liberties is largely a matter of ensuring fair procedures in decision-making:

> The essence of justice is largely procedural. Time and again thoughtful judges have emphasized this truth. Mr. Justice Douglas: 'It is not without significance that most of the provisions in the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherance to strict procedural safeguards is our main assurance that there will be equal justice under the law'. Mr. Justice Jackson: 'Procedural fairness and regulations are the indispensable essence of liberty'. Mr. Justice Frankfurter: 'The history of liberty has largely been the history of procedural safeguards'.[20]

The need for due process safeguards in policy-making was perhaps expressed best by Mr. Justice Dickson in his eloquent remarks in his judgment in Martineau (1979) supra:

> In the final analysis, the simple question to be answered is this. Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying

question which the courts have sought to answer in all cases dealing with natural justice and with fairness.[21]

This is the basic question the National Parole Board must ask in the discharge of its operational functions. It is the offender's right to have decisions affecting him made on the basis of the duty to be fair, or in accordance with the rules of natural justice. To do otherwise will expose the Board to the prescriptions of the Rule of Law.

The primary conclusion of this thesis is that the rule of law has been instrumental in providing significant reform in the parole process and lessening the arbitrariness of many previous operational policies. Such interventions, however, have not addressed the discretion extended by Parole Board Members in making parole decisions, nor served to clarify the criteria employed by Parole Board Members in reaching a decision in specific cases. The Parole Board as an administrative board, has therefore retained considerable autonomy.

NOTES

1. F. Hayek. The Constitution of Liberty (Chicago: University of Chicago Press, (1960).

2. See for example such court decisions as Mempa v. Rhay, (1967), 389, U.S. 128;
Morrissey v Brewer, (1972), 92. S.ct. 2593; and,
Her Majesty the Queen v. Dennis Cadeddu, Supreme Court of Ontario, (January, 1983).

3. Parole Act. R.S.C. Queen's Printer, (Ottawa, 1958).

4. See for example such court decisions as McCaud v. National Parole Board, (1964), 50 D.L.R. (3rd) S.C.C.;
Howarth v. National Parole Board, (1976), 1 S.C.C. 453, (1974), 50 D.L.R. (3rd); and,
Mitchell v. The Queen, (1975), 24 C.C.C. (2d) 241.

5. Martineau v. Matsqui Institution Disciplinary Board, Supreme Court of Canada, (December 13, 1979). Referred to as Marineau No. 2.

6. Federal Court Act R.S.C. (1970) 2nd. Supplement C.10, Ottawa, Queen's Printer.

7. Ibid.

8. See for example, such investigative committees as: Ouimet (1969); Hugessen (1973); and, Standing Senate Committee on Legal and Constitutional Affairs (1974).

9. See for example court decisions as Mempha v. Rhay, (1967), 389, U.S. 128; and,
Morrissey v. Brewer (1972) 92 S.ct. 2593.

10. Jeffery L. Dowell. Law and Bureaucracy: Administrative Discretion and the Limits of Legal Action, New York: Dunellen Publishing Company Ltd., (1975) p.196.

11. Supra, Note 4.

12. See for example, such cases as Elliot v. The National Parole Board, (1975), Supreme Court of B.C. unreported;
Vidlin v. Her Majesty the Queen, (1975), Supreme Court of B.C. unreported;
Dwyer v. The National Parole Board 4 W.W.R. 54, (1975); and,
Lambert v. The National Parole Board, (1976), 2 F.C. 169 (Trial Division).

13. National Parole Board Policy and Procedures Circular, Ottawa, (1984).

14. See for example, such administrative boards as the Pensions Review Board - Pensions Act C.P.-7. as amended by 1980-81, c.c. 19, 65, 76;
War Veterans Allowance Board - War Veterans Allowance Act R.S., C. W.-5 amended by 1980, c.19; and,
Charter of Rights and Freedoms. Ministry of Supply and Services Canada, (1981).

15. Charter of Rights and Freedoms, Ministry of Supply and Services, Canada, (1981).

16. Murray Edelman, The Symbolic uses of Politics, Urbana: University of Illinois Press, (1964), at p.22.

17. 15 Sections 7 and 9 provide:
7)Everyone has the right to life, liberty and security of the person and the right not to be deprived except in accordance with the principles of fundamental justice.
9)Everyone has the right not to be arbitrarily detained or imprisoned.

18. McGeorge Bundy, quoted in Arthur E. Sutherland, Government Under Law, DA Capo Press; (New York, 1968) p.364.

19. McRuer, J.C. Royal Commission Inquiry into Civil Rights Ontario: (1968)

20. Ibid, pp. 206-207.

21. Supra, Note No. 5.

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