



Prison Law in Canada

Tentative Report Titles and Abstracts

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Lisa Kerr – Interpreting Retained Rights: The Legality of Educational and Digital Deprivation in Canadian Prisons

The idea that prisoners do not forfeit constitutional rights by reason of their confinement is well settled in Canadian law. It is equally clear that the delineation of rights retained by prisoners must be compatible with the objectives of imprisonment and imprisonment as a specific institutional form.

Where does the right to learn and the related right to access online educational resources fit in this paradigm? The policies of the Correctional Service of Canada make clear that prison staff are expected to facilitate inmate access to education. But that policy conflicts with the near total ban on inmate access to the internet, the result of which is that individuals held in Canadian prisons are largely prohibited from accessing training and education beyond high school credentials.

The prison service prohibits federal prisoners from paying for and accessing those experiences themselves, because it prohibits even controlled and supervised access to the internet. At one time, postsecondary education was available to prisoners through paper-

correspondence programs, which they could access and pay for at their own initiative and expense. Today, however, it is nearly impossible to find a distance-education provider that does not require Internet access in order to complete coursework. The few paper courses that still exist are disappearing fast.

This report explores the legality of this state of educational and digital deprivation. It documents and analyzes the remedial steps that the Correctional Service of Canada has taken to date and indicates potential paths for facilitating access to education for the future.

Jeffrey Kennedy – Beyond the State: Legal Life in Canadian Prisons

This report explores the existence and significance of multiple legal orders within Canadian prisons. In doing so, it first identifies and unpacks the variety of systems of norms that exist apart from, but interact with, formal state law. The report describes a diverse set of frameworks and the roles they play in governing what ultimately happens within and around prisons: for instance, the “inmate code” and its parallels among correctional officers, (in)formal conflict resolution and decision-making roles taken on by committees of those being imprisoned, and the possibilities for Indigenous communities to facilitate and take responsibility for individuals under correctional mandate. Accounting for these frameworks, the report argues, is essential to a complete and effective understanding of prison law.

After identifying the variety of systems of norms in the prison context, the report explores the value of thinking about these phenomena not just as social or political, but as *legal* in nature. By extension, it explores the implications of having a plurality of legal orders within prisons for prison law as a field as well as for the specific designs and implementations of state law. To do so, it undertakes analysis of the interconnections between state and non-state orders to illustrate the ways in which state law can—for better or worse—be complemented, altered, resisted, or undermined by alternative systems of norms, and vice versa.

The report illustrates dynamics such as the ways in which unofficial law or unwritten principles can influence the interpretation and implementation of statutory provisions, and how unofficial codes are invoked and grappled with in formal court proceedings. To do all of this, the report employs the lens of legal pluralism and draws on current prison practice, caselaw, and existing empirical and sociological literature. Ultimately, its lessons promise to help orient legal actors, chart pathways for further research, and help lay a foundation for a richer approach to legal changes in and around Canadian prisons.

Philip Goodman and Fernando Avila – Who Gets In, Who Gets Out: The Ramifications of Restricting Access to Canadian Jails and Prisons

Although prisons often appear as self-contained institutions, they are in constant interaction with the outside world. In light of this reality, this report examines the formal and informal

rules and procedures that determine who can access prisons as ‘visitors.’ There are two principal reasons for which this matters. First, transparent prisons are on balance more just and are often seen (including by prisoners) as more legitimate. Second, people seek access to prisons for all sorts of socially positive reasons, such as visiting incarcerated friends and family, conducting research, and teaching and studying alongside people who are incarcerated. Exploring these diverse forms of access provides firsthand insight into how these processes function in practice.

To understand the relevant rules and procedures – and how they can be used to harm socially positive goals – the report uses an interdisciplinary and comparative approach. It analyzes first-hand experiences of people seeking to visit prisons or jails, legal frameworks, institutional policies, and discretionary practices that shape carceral access. We build on previous research by scholars who have used the concept of prison porosity to describe the extent to which prisons enable or obstruct movement, shape social ties, and control access to resources and the possibility of returning to life outside with minimal trauma.

Prisons too often operate as spaces of exclusion, severing connections with the outside world not only by restricting visits but also by limiting access to education, legal assistance, and other crucial resources. These barriers make the transition out of incarceration even more difficult than it already is, reinforcing cycles of marginalization and exclusion. If the goal is for prisoners to navigate society after their release, prisons should reduce the disconnection from the world they will eventually re-enter.

Robin Hansen – Bringing the Rights of the Child into Focus: Pregnancy and Childbirth Considerations in Bail, Sentencing and Corrections Processes

Pregnancy, childbirth and childcare obligations raise distinct considerations within the context of incarceration-related decision-making. This report explores incarceration decisions, namely bail, sentencing and corrections processes, by taking into account the rights of affected children. Incarceration of a would-be primary caregiver prior to or following childbirth can have significant impacts on a child, including health effects that are both immediate and lifelong. In most parts of Canada, a newborn born to an incarcerated person is automatically separated at birth, without an individualized consideration of the child’s best interests. This is notwithstanding extensive evidence demonstrating that infant-caregiver bonding is foundational to a child’s healthy development.

This report seeks to identify the junctures in legal system processes (bail, sentencing, corrections) where Canadian statutes must be read in light of the United Nations Convention on the Rights of the Child (UNCRC) Article 3, necessitating a consideration of an affected child’s best interests. Children’s rights under international and Canadian law point to the fundamental principles of due process and the value of community placement. In addition

to identifying how Canada's international human rights obligations combined with *Canadian Charter* guarantees inform the interpretation of Canadian legislation, this report also outlines practical mechanisms which will allow this to be achieved.

The report will present international and comparative examples in which children's rights are brought within criminal law processes. This will include discussion of options such as: Memoranda of Understanding among state agencies, sentencing and bail guidelines relating to pregnancy and childcare obligations, and the incorporation of children's rights assessment tools and checklists into legal processes, among others. The report will also draw on international sources including treaty commentary by the UN Committee on the Rights of the Child. This focused exploration of the potential impact of a child's rights analysis in a particular context will show how law's operation can shift to ensure that adverse effects on children are reduced and that children's legal rights are respected.

Marie Manikis – Re-Imagining Gladue by Integrating Indigenous Victims' and Communities' Feminist Perspectives

The over-incarceration of Indigenous people in Canada is one of the most pressing issues of our criminal legal system. Despite accounting for approximately 5% of the adult population in Canada, Indigenous people are overrepresented in the federal correctional system, accounting for 28% of all federally sentenced individuals and 32% of all individuals in custody, while Indigenous women account for 50% of all federally incarcerated women. In addition, Indigenous women experience far higher rates of gender-based violence than non-Indigenous women.

Enacted in 1995 as a remedial measure to reduce these disproportionate levels of incarceration, s. 718.2(e) of the *Criminal Code* gave rise to the "*Gladue* framework", named after the landmark Supreme Court of Canada decision that first interpreted the provision. This framework requires judges to consider both systemic and individual factors in sentencing Indigenous offenders, encourages alternatives to imprisonment, and recognizes the relevance of Indigenous legal traditions.

In 2015, the *Canadian Victims' Bill of Rights* introduced amendments to the *Criminal Code*, including to the *Gladue* framework, requiring judges to consider, among other things, the harm done to victims or to the community when sentencing Indigenous offenders. Aspects of these amendments, with their emphasis on denunciation and deterrence, conflict with the remedial purposes of the *Gladue* framework.

Available research has yet to analyze how these amendments have been understood by decision-makers and their impact on sentencing and the *Gladue* principles. This report explores existing tensions through engagement with feminist, and particularly Indigenous

feminist, perspectives on *Gladue*, and examines approaches that highlight the importance of limiting the use of imprisonment to address complex forms of violence. In doing so, the report provides a framework for re-imagining criminal law responsibility in a relational way that integrates the state's colonial power and agency in contexts of violence suffered by Indigenous women. The remedial and pluralist ethos and promise of *Gladue* can be reconciled with Indigenous women's vulnerabilities and voices.