Privately Managed Prisons in Canada

Gordon Mitchell (2007)

Introduction.

The topic of this paper is the administration of prisons by private, for-profit contractors. Privatization is possible to varying degrees, such as when contractors provide laundry, food, health, or recreational services to a state-run facility. The focus here, however, is on the extreme case of the overall management of a prison facility by a private, for-profit contractor. It is the position of the British Columbia Civil Liberties Association (BCCLA) that such privately managed facilities represent a violation of detainees' liberties beyond what is justified by their offences.

Motivation.

There are a number of factors motivating the BCCLA to present its position on this issue at this time. To begin, in May of 2006 the Harper government introduced a set of tough-on-crime bills that will without question increase the number of inmates in Canadian prisons (Trautman, p. 23). One aim of the bills is to expand the range of crimes to which mandatory minimum sentences apply. Such mandatory minimums deny judges the authority to mitigate sentences, regardless of the circumstances surrounding the offence at hand. Other bills in the set lessen the number of offences eligible for conditional sentencing. A conditional sentence is one not served in prison, but rather under supervision in the community. This paper neither approves nor disapproves of these bills; it only notes that they will lead to a substantial rise in the Canadian prison population.

According to Trautman,

> "[Former Justice Minister, current President of the Treasury Board, Vic] Toews says the proposed increase to mandatory minimum sentences will add 300 to 400 inmates to the federal prison system over the next several years. And the elimination of conditional sentences [...] will bring thousands more inmates into provincial correctional systems – 3,800 by government estimates" (ibid.).

However, other estimates suggest that prison populations would increase by even greater numbers. Statistics Canada figures from 2004 report the total number of adults serving conditional sentences to be 18,857 (2003-2004). Again according to 2004 numbers, Canada's adult prison population then stood at 32,007 inmates and put

prisons at roughly eighty-nine percent capacity (ibid.). Even if only a portion of those serving conditional sentences were incarcerated it would push Canada's prisons beyond their capacity. This would mean that existing prisons would need to be expanded and/or new facilities would have to be built. This situation is exacerbated by the fact that building and managing a prison is a very costly endeavour. It costs an average of $51,538 per year to house an inmate (ibid.) and, "the last federal prison constructed, Fenbrook Institution in Gravenhurst, Ontario, in 1998, cost $62 million" (Trautman). Bill C-9, addressing conditional sentences, received Royal Assent on May 31, 2007 and comes into effect six months post. Bill C-10, expanding minimum sentencing, passed the House of Commons on May 29, 2007 and will next go to the Senate. Other bills with similar ends are also pending. The upshot is that this legislation will require Canada to increase its expenditure on prisons and their management significantly.

A cost-cutting measure that is popular with conservative governments in general, of which the Harper government is no exception, is the privatization of services. While the Harper government denies any intention to privatize prison management (NUPGE), there is reason to believe that they are at least considering it. Facing a similar rise in costs in the prison sector in 2001, Mike Harris' Ontario government experimented with the private management of prisons (Trautman, p. 24). Some of the people involved with that programme can now be found in Harper's cabinet including, "Minister of Finance Jim Flaherty (formerly Ontario's attorney-general) and [former Treasury Board president, current Minister of the Environment] John Baird, a well-known advocate of private prisons" (ibid., p. 23). The presence of such pro-privatization cabinet members, the proposed sentencing bills, and the high costs associated with building and running prisons suggest to the Association that it now needs to take a position on this issue.

Empirical Questions.

How well a prison is being managed can be evaluated against a number of criteria and the focus of such evaluations commonly falls on the treatment of inmates, the quality of services provided, the security of the facility, and the cost of building and running it. With respect to the first two it is argued that private contracting, because of its competitive nature, motivates managers to treat inmates well and to provide them with high quality services. Because the contract could be awarded elsewhere at the end of its term, management has an incentive to outperform its competitors in these areas. Some have even gone so far as to suggest that competition with private contractors will improve the quality of services provided in publicly run facilities (New Brunswick; Tabarrok). In addition, proponents of privatization suggest that contractors have more flexibility with respect to decision-making than do public

managers; a common assertion against bureaucracies. The result, it is claimed, is that private contractors are able to respond more quickly to changes in the types of services available, allowing them to adopt service advancements in a timelier fashion. Similar arguments are made regarding the security of facilities. Because private managers fear losing their contracts they are motivated to provide as secure a facility as possible and they are more responsive to advancements in the tactics and technologies for doing so.

The most strongly argued benefit of privatization is increased cost-effectiveness. Proponents assert, among other things, that private contracting, "allows prisons to be financed, sited, and constructed more quickly and cheaply than government prisons", "may reduce overly generous public employee pensions and benefits", "discourages waste because prodigality cuts into profits", "counteracts the motivation of budget-based government agencies to continually grow in size and to maximize their budgets", and, "avoids cumbersome and rigid government procurement" (New Brunswick, p.44). In essence, the argument is the standard conservative line that the private sector can provide as well or better than the public sector, and can do so less expensively. Opponents of privatization hold that these benefits are overstated. They argue that the motivation to provide good treatment, quality services, and a secure facility is countered by the motivation to increase profits by cutting corners on staffing, training, programmes, facilities, etc.

In the end, whether or not privately run prisons truly succeed in providing these purported benefits is an empirical question and there have been a number of studies conducted in pursuit of an answer. Perrone and Pratt have compiled and compared the findings of every such study performed in the United States as of 2003:

> "we collected every U.S. study that has been conducted on these issues through a systematic search through electronic databases (NCJRS and NCCD archives), along with academic journals, edited volumes, and public/governmental reports" (p. 303).

Their stated aim was to address, "the quality of confinement and cost-effectiveness of public versus private prisons" (ibid.). With respect to quality, what they found was that,

> "at this point it is unclear how the private facilities 'measure up' in terms of their relative quality of confinement. To date, the studies are too methodologically diverse (and often too methodologically weak) to draw any firm conclusions. They typically do not control for confounding factors such as age and security level [e.g. maximum security, medium security, etc.], they fail to employ similar methods of data collection, and they do not assess the domains on equal measures [e.g., official reports, surveys, etc]. Such limitations cloud our ability to determine whether private agencies operate their facilities at a higher quality than the state" (ibid., p. 311).

They conclude that, "neither advocates nor critics of prison privatization may, at this point, legitimately claim that the 'bulk' of the empirical evidence is on their side" (ibid.).

Perrone and Pratt reach a similar conclusion with respect to matters of cost:

> "the existing cost comparisons offer little in the way of firm conclusions about whether turning over the responsibility of managing prisons to the private sphere will result in any substantial and/or consistent cost savings. Indeed, the variations in the methodological approaches taken by researchers and the lack of generalizability associated with the case study method do not lend themselves well to any concrete conclusions about cost-effectiveness"..., "neither side of the correctional privatization debate should, at this time, be able to legitimately claim that the weight of empirical evidence is on their side" (ibid., pp. 315-316).

Perrone and Pratt concentrate on the situation in the United States, but there are other jurisdictions in which privately managed prisons are operating. As of August, 2004, there were seven privately managed prisons in Australia, housing roughly 17 percent of the inmate population, and in the U.K. approximately ten percent of inmates reside in privately managed facilities (Roth). In Australia, there has been minimal research into the performance of privately managed prisons versus their publicly run counterparts (ibid.). Similar to Perrone and Pratt's findings in the U.S., the studies that have been carried out in Australia do not seem to favour either side of the debate:

> "One study of prisons in Australia found that in the period 1990-99, public and private prisons had similar rates of death from all causes and from suicide specifically. [...] An empirical study of one private prison in Queensland concluded that the private sector failed to deliver on the promises of both internal and external reform. This was explained on the basis that properly [sic.] regulatory structures had not been put in place. In Victoria, an independent investigation into private prisons found that the introduction of the private sector had mixed results and made recommendations to promote greater cohesiveness across the system. The Metropolitan Women's prison in Victoria is the only private prison in Australia to have been reclaimed by the state due to deficiencies (Roth, p. 1).

The literature evaluating private prisons in the U.K. is relatively sparse as well. However, in 2003 the National Audit Office (NAO), an independent body charged with monitoring public spending in Britain, published a report assessing private prisons with respect to cost efficiency and service provision. The NAO concluded that:

> "The use of the PFI [Private Finance Initiative] is neither a guarantee of success nor the cause of inevitable failure. Like other forms of providing public services, there are successes and failures
and they cannot be ascribed to a single factor. [...] But a general verdict that the PFI is either good
or bad in the case of prisons, or more generally, cannot be justified (NAO Report, p. 9).

In terms of evidence, then, be it from the U.S., Australia, or the U.K., what we are faced with is a collection of inconclusive and/or methodologically questionable reports which do not lend firm support to either side of the debate.

Moral Questions.

A separate point of contention has to do with the moral and political basis of the authority to incarcerate someone, and with the scope of that authority. Canadian society is based on the notion of a social contract in the liberal tradition of Hobbes, Locke, and Mill, and as such, places great importance on personal liberty. Deeply rooted in Canadian society and law is the liberal idea that people's status as rational, moral agents with privileged knowledge of their own wants and ends affords them the right to pursue those ends in whatever manner they choose, to the extent that they do not do so at the expense of another's right to the same. Because of this, incarceration is taken very seriously. Detaining people against their will is understood to be a very severe restriction of their liberty. The state reserves the right to do so, but only when it has been proven that the detainees have acted in such a way as to bring about substantial, unjustified and unauthorized harm to others. Upon incarceration, the state becomes responsible for the detainees and must ensure that they do not suffer any loss of liberty over and above what has been deemed appropriate by society for their offence. The gravity of this responsibility is compounded by the fact that their incarceration greatly restricts their own ability to protect these residual liberties. The question at hand, then, is whether or not the state has the power and authority to transfer this weighty responsibility to a private contractor.

In order to answer this question satisfactorily we must first examine what it means for someone to have a right to something. Talk of rights is notoriously tricky, but there are some conventions that help to clarify what is meant. The having of a right to something can be interpreted in at least two ways; positively and negatively. If a person is said to have the right to an education in the positive sense it means that the state (or whatever body is granting the right) has a responsibility to provide that person with an education. If the same person is said to have the right to an education in the negative sense it means that no one may interfere (whether intentionally or not) with that person's pursuit of an education. Often these complimentary responsibilities of provision and non-interference are held to differing extents by differing members of society with respect to different rights and different people (and of course these will differ from society to society as well). For example, students' right to an education might require of their school district, say, that it provide them access to an acceptable classroom and a qualified teacher within a reasonable distance of their homes. The same right, however, might merely require of their neighbours that they not interfere with their attempts to get to class.

The situation is similar for detainees. Society has deemed that because of their offences some of their liberties should be suspended, but they retain other rights and the state has a special responsibility to protect those remaining liberties. As stated above, their incarceration complicates the issue because they may have difficulty acquiring (or be strictly unable to acquire) on their own that which they need to avoid losing their residual liberties. In such cases the state has a responsibility to provide them with that which is necessary to avoid the loss of those liberties; be it food, warm clothing, medical attention or other services. Private citizens have no such responsibility; private citizens are merely required not to interfere with detainees' residual liberties. Thus, if offenders are to be placed in a privately managed prison facility, the state must take steps to ensure that their residual liberties are not compromised while they are there; the state must somehow instil in the private firm a responsibility to the detainees akin to the state's own. The vehicle for generating responsibility in this way is a contract, and as the Department of the Solicitor General for New Brunswick states,

> "Contract specificity is crucial for success in private prison management. If performance criteria are to be presented to bidders, and if the performance of the successful contractor is to be subsequently audited, then having a detailed contract that specifies expectations and responsibilities on the part of the government and the private contractor is essential. If the private contractor does not operate according to the standards in the contract, then the government has a breach of contract remedy. Many of the concerns of the opponents of privatization can be eliminated by a clearly drafted contract" (p. 34).

The problem, however, is that no degree of contract specificity could suffice to transfer the level of responsibility that the state has to a private contractor. The reason for this can be traced back to the difference between the state's relationship to the detainees and the contractor's; the state's purpose in incarcerating the offenders is to serve justice, while the private contractor's purpose is to turn a profit. The result is that the private contractor is subject to certain moral hazards that the state is not. Most prominently, the private contractor has an incentive to compromise a detainee's residual liberties if there is a potential cost-savings in doing so. As is suggested by the above quotation, the strategy for eliminating (or at least minimizing) such behaviour is to write penalties for it into the contract. A tighter contract does not, however, change the private contractor's motive. Private contractors' prime concern continues to be profit, and as such, if there is a profit-boosting measure that is not prohibited by their contract, but that never-the-less compromises detainees' residual liberties, the contractors have an incentive to adopt that measure. Unfortunately, even the most stringently written contract cannot account for every possible contingency, which means that the moral hazards faced by private contractors cannot be written away. In contrast, the state is not concerned with profit, but with the administration of justice,

and therefore does not face the same moral hazards. This is not to suggest that public managers do not look to reduce costs. They too face budgetary constraints, but their budgets are not set with an eye to profit. A mandate to provide the best run facility possible under given budgetary constraints will invoke an entirely different managerial strategy than a mandate to minimize costs without violating contract terms. The Association's concern is that placing offenders in the custody of private contractors motivated by profit will introduce risks that are not present in a public facility.

Health Services Analogy.

As stated above, owing to a sparse collection of studies and questionable methodology, the empirical analysis regarding the performance of privately managed prisons versus publicly managed ones is inconclusive. There is, however, telling analysis from the health care sector which can be seen as strongly analogous.

In a report published in the Canadian Medical Association Journal, Devereaux, et. al., evaluate studies done comparing risk adjusted mortality rates between private for-profit hospitals and private not-for-profit hospitals in the U.S. (2002). Devereaux chose to focus on mortality rates because they are seen as a quantitative indication of the level of care provided by hospitals. Devereaux's hypothesis was that patients who received care from for-profit hospitals would have higher risk adjusted mortality rates than those treated in not-for-profit hospitals. The impetus behind this hypothesis was a suspicion that the presence of the profit motive would have a negative impact on the quality of care provided because it would generate an incentive to cut corners if doing so would minimize costs. Devereaux's study confirmed this hypothesis: "Our meta-analysis suggests that private for-profit ownership of hospitals, in comparison with private not-for-profit ownership, results in a higher risk of death for patients (ibid., p. 1399).

In explaining their findings, Devereaux, et. al., point out that, "[t]ypically, investors expect a 10%–15% return on their investment", and that, "[a]dministrative officers of private for-profit institutions receive rewards for achieving or exceeding the anticipated profit margin" (ibid., pp. 1404-05). Devereaux also suggests that,

> "In addition to generating profits, private for-profit institutions must pay taxes and may contend with cost pressures associated with large reimbursement packages for senior administrators that private not-for-profit institutions do not face" (ibid.).

Devereaux goes on to say,

> "Considering these issues one might feel concern that the profit motive of private for-profit hospitals may result in limitations of care that adversely affect patient outcomes. Our results

> suggest that this concern is justified. Studies included in our review that conducted an initial analysis adjusting for disease severity, and another analysis with further adjustment for staffing levels, support this explanation for our results. The private for-profit hospitals employed fewer highly skilled personnel per risk-adjusted bed. The number of highly skilled personnel per hospital bed is strongly associated with hospital mortality rates and differences in mortality between private for-profit and private not-for-profit institutions predictably decreased when investigators adjusted for staffing levels. Therefore, lower staffing levels of highly skilled personnel are probably one factor responsible for the higher risk-adjusted mortality rates in private for-profit hospitals" (ibid., p. 1405).

These findings are relevant to the private prisons debate because much of the moral argument against private prisons rests on the premise that the profit motive introduces risks to inmates not found in publicly run prisons. That for-profit hospitals employ fewer highly skilled personnel per bed is in keeping with this concern. In the private prisons discussion, opponents of privatization claim that the profit motive introduces an incentive to cut corners on service provision if there is an associated reduction in costs, and that this increases the risk of unwarranted liberty infractions faced by inmates. While the empirical data gathered on prisons has proven inconclusive in regards to this claim, Devereaux demonstrates that such concerns *are* warranted in the analogous case of for-profit hospitals. In an effort to increase profits, hospital managers reduce service levels to a point where their patients are markedly worse off than those in not-for-profit hospitals.

There are two important similarities which make for-profit hospitals and privately managed prisons analogous in this regard. Firstly, the managerial decisions made in the running of both hospitals and prisons have a direct impact on the well-being of their patients and inmates to the extent that both patients and inmates are in the custody of those hospitals and prisons. Secondly, the profit motive, which Devereaux attributes the lower service standards to, is present in both cases. Because of these similarities the Association holds that Devereaux's findings have implications for private for-profit prisons as well. The profit motive can be seen as providing incentives counter to the preservation of detainees' residual liberties, and as such, placing offenders in the custody of private for-profit contractors exposes those detainees to risks above and beyond those faced by detainees in publicly managed facilities. These additional risks are not intended by inmates' sentences and are therefore unjustified.

Further Concerns.

The profit motive spawns other concerns as well. M^{c}Farland, McGowan, and O'Toole argue that private prison companies have, "the incentive and the wherewithal to extend the amount of time convicts will remain in prison" (p. 13). By keeping inmates incarcerated longer the prison companies are increasing the demand for their services. They do so, M^{c}Farland suggests, by lobbying for stiffer sentencing laws (such

as those recently introduced by the Harper government as touched on above) and by abusing the influence their position of authority in the prison system gives them over parole hearings (ibid.). In regards to lobbying, in the U.S., supporters of private prisons point out that labour unions representing public prison workers make larger campaign contributions than do private prison companies (ibid., p. 14). The article does not say what the unions lobby for. It would indeed be troublesome if unions were lobbying to protect the jobs of prison workers who were found to have mistreated inmates or misused their authority in some other way. However, even if this were the case it would not negate the flagrant injustice of allowing the profit motive to infiltrate the sentencing process. Regarding private contractors' influence over parole hearings, privatization advocates assert that there is no evidence of interference (ibid.). While that may be true, again, it does not negate the fact that private managers have the ability and incentive to extend an inmate's period of incarceration unjustly, and this represents a risk to inmates' residual liberties not present in a publicly managed prison.

M^{c}Farland, et. al., also point out that,

> "Prison officials have the prerogative to impose disciplinary measures ranging from revocation of yard privileges to the imposition of solitary confinement, and so have a great deal of control over just how punitive an experience each sentence truly is" (ibid., p. 15).

This recognition highlights similarities between privately run prisons and private security forces which the Association has voiced its concern about previously. In keeping with the report issued by the Honourable Wallace T. Oppal[1] for the Commission of Inquiry, Policing in B.C., the Association holds that,

> "Private security personnel can have a significant impact on the freedoms and liberties of citizens. Security personnel often detain individuals, use physical force in dealing with individuals, undertake searches of property or persons and use covert surveillance to gather personal information about people. These actions implicate the *Charter* rights of individuals. Yet *Charter* protections for citizens against intrusions by private security personnel are not always available given their status as "non-governmental" actors. In the absence of *Charter* remedies, we believe that there is even greater reason for government to ensure that there is adequate training and accountability for private security personnel" (Stockholder).

Just as private security personnel can have significant impact on the freedoms and liberties of citizens, private prison personnel can have significant impact on the residual freedoms and liberties of detainees. Considered in the light of private contractors' incentive to minimize costs and Devereaux's findings regarding the lower staffing levels of highly skilled personnel at for-profit hospitals, the Association holds

[1] The Honourable Wally Oppal, Attorney General of British Columbia, was at the time of the report a Justice of the BC Supreme Court.

that the points raised in the above quotation from Stockholder add further weight to the argument that placing offenders in the custody of privately managed prisons exposes them to risks not associated with publicly run facilities. Additionally, the sorts of *Charter* rights that the Honourable Wally Oppal is concerned about are notoriously difficult to sue for, meaning that detainees who have suffered a violation in this regard are unlikely to receive any restitution.

Concluding Remarks.

Liberal societies, including Canada, recognize that incarceration represents a harsh restriction of liberty which only the state has the authority to sanction, and then, only when offences of a certain severity have been committed. In sentencing offenders to incarceration the state places them in an extremely vulnerable position whereby they are especially susceptible to the loss of further liberties. As such, the state incurs a special responsibility to safeguard the detainees' residual liberties which, it has been argued, may even qualify as a fiduciary duty (MacDonald). It is the position of the Association that it would be in breach of this special responsibility to place offenders in the custody of a private, profit-driven firm susceptible to the moral hazards outlined above. The *Corrections and Conditional Release Act* (1992, c. 20) states, "that offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence" (Part I, 4(e)). Placing offenders in the custody of a privately managed prison exposes them to risks above and beyond those intended by their sentences, and hence beyond what society has deemed appropriate for their offences. To borrow a phrase from M^{c}Farland, McGowan, and O'Toole, prison privatization, "is an illegitimate delegation of government authority" (p. 15).

Owing to the recent introduction of certain sentencing bills, Canada is facing a potential spike in its prison population. That spike will be accompanied by a substantial rise in costs. One strategy that has been suggested for mitigating the cost increase is to contract out the management of prison facilities to private firms. This suggestion raises at least two questions. Firstly, do privately managed prisons actually exhibit the benefits their advocates claim they do? Here the literature from the U.S., Australia, and the U.K. is markedly undecided, and those studies that do make strong claims one way or the other can be shown to be methodologically unsound. The second question is a moral one. The administration of correctional facilities is a service unlike most others the government performs. With the exception of certain aspects of policing, military operations and medical services, prison administration is the only service involving the deliberate compromise of liberties. Cost efficiencies and other administrative benefits (if indeed they are to be had) may justify contracting out road construction or garbage collection to private, for-profit firms, but they cannot justify

the contracting out of prison administration. The state has a special responsibility to those persons it has sentenced to incarceration. Placing offenders in the custody of private, for-profit firms exposes them to risks above and beyond those found in public facilities. This amounts to a failure in regards to the state's special responsibility to its detainees and a violation of their residual liberties. The British Columbia Civil Liberties Association is opposed to the private management of prisons in Canada.

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