

**Aboriginal
Prisoners'
Legal
Rights**



in British Columbia provincial prisons

This booklet explains your rights, and how to exercise your rights, as an Aboriginal prisoner in provincial custody.

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Aboriginal prisoners

Aboriginal people are over-represented in British Columbia prisons. Aboriginal people make up 18% of people admitted to remand in BC, and 20% of people sentenced in BC. But only 4.4% of the population of BC is Aboriginal.¹

The reasons Aboriginal people are imprisoned at higher rates than other people in Canada may include:

- systemic discrimination and prejudices about Aboriginal people;
- poverty;
- substance abuse; and
- family problems over generations caused by residential schools and colonial adoption policies.²

Canadian courts have said that Aboriginal people have faced discrimination historically, that this discrimination has affected Aboriginal people and communities negatively and that there is a duty to address the over-representation of Aboriginal people in the criminal justice system.³

BC Corrections has a duty to consider how you might have been affected by discrimination as an Aboriginal person when it makes decisions about you during your sentence.⁴

BC Corrections also has a duty to provide Aboriginal programs, which can help Aboriginal prisoners be successful when returning to the community.

Liberty rights

BC Corrections has a duty to consider how you might have been affected by discrimination because of your Aboriginal heritage when it makes decisions about your liberty, including:

- security classification;
- disciplinary sanctions;
- administrative segregation; and
- “Enhanced Supervision Program”.

The law recognizes that Aboriginal people and communities might be affected by the following factors because of First Nations’ history of colonization:

- low income;
- unemployment;
- lack of opportunities and options;
- lack of formal education;
- substance abuse;
- loneliness;
- community fragmentation; and
- poor social and economic conditions.⁵

Security classification

Prisoners sentenced to 30 days or more are classified to secure, medium or open custody. You should be classified to the lowest level of security needed to protect society.⁶

You will be classified as **secure custody** based on your danger to the community, escape risk, behaviour and other factors.⁷

You can be classified as **medium custody** if you have no pattern of violence while on community supervision, no pattern of escape in the past 3 years and no ongoing immigration issues.⁸

You can be classified as **open custody** if you have no pattern of violence, no history of escape in the past 5 years (and you are considered unlikely to escape) and no ongoing immigration issues.⁹

A classification officer will interview you before making a report on your classification. This officer must discuss with you the information considered in deciding your classification, unless there are safety or privacy reasons not to share information with you.¹⁰

If you would like your Aboriginal heritage considered during your classification, you should tell the classifications officer about your background.

You can ask the assistant deputy warden for the written reasons for your classification.¹¹

You have the right to appeal classification and placement decisions to the warden. If you are not happy with the warden's decision, you can make a complaint to the Investigation and Standards Office.¹² For information on how to make a complaint, see Prisoners' Legal Services' booklet "Prisoners' Legal Rights in British Columbia provincial prisons".

You can also ask to be reclassified if things have changed, or if your Aboriginal heritage was not considered when you were first classified.¹³ A classifications officer will review your request and make a decision. You can appeal this decision to the warden and make a complaint to the Investigation and Standards Office if you are not happy with the warden's decision.

Disciplinary sanctions

You can call Prisoners' Legal Services for advice or assistance if you are charged with a disciplinary offence. You can also ask for a copy of our booklet "Prisoners' Legal Rights in British Columbia provincial prisons" for more information.

You can ask prison staff to resolve an issue informally before you are charged. Staff must try to stop you from breaking a rule and give you a chance to stop the offence before they have you charged, if possible.¹⁴ Also, staff must try to address your concerns if the circumstances allow.¹⁵

You can ask that an Elder or Native Liaison be involved to help resolve the issue before you are charged.

If you are found guilty of an offence after a hearing, or if you plead guilty to an offence, the decision maker should consider your Aboriginal background before deciding on a penalty of segregation or loss of earned remission.

You can appeal the finding of guilt, or the penalty for the offence, to the Investigation and Standards Office. You have **7 days** from the date of the decision to file an appeal.¹⁶ Call Prisoners' Legal Services if you would like help to appeal.

Administrative segregation

Sections 17 and 18 of the *Correction Act Regulation* deal with administrative segregation, or “separate confinement”. For more information about administrative segregation, see Prisoners' Legal Services' booklet “Prisoners' Legal Rights in British Columbia provincial prisons”.

BC Corrections has a duty to consider your Aboriginal background when making a decision to put you in administrative segregation.

If you have been given a separate confinement notice under s. 18 of the *Correction Act Regulation*, you have the right to make submissions about why you should not be in segregation or why your segregation should be for less time.¹⁷

If you want to have your side heard, you must put your submissions in writing to the warden. If your Aboriginal heritage was not considered in the decision to put you in segregation, you can put any factors that affect you because of your Aboriginal background in your submissions. You can call Prisoners' Legal Services for help.

“Enhanced Supervision Program”

“Enhanced Supervision Programs” (ESP) are often set up at provincial prisons as units with more security than regular units. These units are similar to segregation units because prisoners are often locked up in their cells for long periods of time. Because they are like segregation, you should have the right to the reasons you are on ESP, the length of time you will be on ESP and the right to make submissions about your ESP placement.¹⁸

If you are put on ESP, you can call Prisoners’ Legal Services for help.

A case manager should make a case plan for you within 4 days.¹⁹ The case plan includes:

- the reasons you are put on ESP;
- the programs you must complete, if any; and
- how you are expected to behave.²⁰

Staff should give you a copy of your case plan and the chance to make submissions about your plan.²¹

Your ESP status should be reviewed every week. Policy requires the warden or his or her designate to consider your progress in meeting the goals in your case plan. The review should summarize the reason for your continuation on ESP or for letting you out of ESP.²²

Staff should consider your Aboriginal background when making decisions about your ESP placement and when making your case plan.

If your Aboriginal status was not considered when you were placed on ESP or when your case plan was developed, you can make a complaint to the warden. You can also make a complaint if you think your ESP placement is not fair. If you are not satisfied with the warden's response to your complaint, you can make a complaint to the Investigation and Standards Office.²³

Access to Aboriginal spirituality

BC Corrections must provide religious programs for prisoners.²⁴ The BC *Human Rights Code* prohibits discrimination on the basis of religion. This means that BC Corrections cannot give you fewer rights to Aboriginal spirituality than other prisoners have to their religions.

In keeping with human rights law, Aboriginal spirituality and its followers must be given the same respect as mainstream faiths and their followers. Access to Aboriginal spirituality is a right, not a privilege.

You have the right to practice your Aboriginal spirituality in prison. You also have the right to regular counselling with a Native Liaison or Elder in prison.

Native Liaisons and Elders

The Native Liaison or Elder can:

- give you spiritual counselling;
- make programs for Aboriginal prisoners; and
- teach you about your Aboriginal heritage, including traditional ceremonies, and arts and crafts.

If you would like to meet with a Native Liaison or Elder, submit a written request to the Native Liaison or Chaplain.

Native Liaison or Elder counselling usually takes place during the regular working day or during spiritual gatherings. You can submit a request to see a Native Liaison or Elder at anytime.

If you do not get an answer to your request or your request is denied, you can make a complaint to the warden.²⁵ See the section on complaints below.

Spiritual items

You should be allowed to use spiritual items (such as a medicine bundle) in your cell, in segregation and during ceremonies, unless the item could be harmful.²⁶

Spiritual items that are allowed include:

- sweetgrass;
- sage;
- ceremonial pipes (only used by recognized pipe carriers);
- ceremonial blankets;
- eagle feathers;
- seashells; and
- medicine bags that hold herbs (they must stay sealed).²⁷

Your medicine bundle may be searched, but correctional officers should not handle your medicine bundle. You or an Elder might be asked to open your bundle during a search, or at some institutions a mechanical scan will be used. Staff must always treat your medicine bundle with respect.

If BC Corrections finds contraband in your medicine bundle, it will be taken away from you and you will not be given another medicine bundle unless the warden allows it.²⁸

Access to Aboriginal spirituality in segregation

Prisoners in segregation have the same rights to spirituality as other prisoners, unless there are valid safety reasons that you cannot take part in an activity.²⁹ This is the case whether you are in administrative segregation or disciplinary segregation.

You have the right to take part in spiritual activities in segregation that you can do on your own or with an Elder or Native Liaison. This includes things like smudging or counselling with the Elder or Native Liaison. Any limits on these kinds of activities must be reasonable and based on valid safety concerns.

You might not be able to take part in group activities like sweat lodge ceremonies, healing circles or drum ceremonies in segregation if there are safety concerns.

Complaints

If you think your rights have been violated or you have been discriminated against, you can call Prisoners' Legal Services for help to resolve your complaint at any stage of the process.

Keep detailed notes of what happened, the time and date of events, the names of people involved and the names of any witnesses. Keep a record of all documents related to your complaint.

It is best to try to resolve complaints at the lowest level. Start by raising your concern with staff.³⁰ If your complaint is not resolved, you can make a written request. Keep a copy of your request form.

If your request goes unanswered or you are not happy with the response, you can make a complaint to the warden. Keep a copy of your complaint. You can give your complaint to a staff person. The staff person must give your complaint to the warden as soon as he or she is able to.³¹

The warden has 7 days to investigate your complaint and must give you a written decision without undue delay.³²

If you are not happy with the warden's decision you can make a complaint to the Investigation and Standards Office.³³

If your complaint is about discrimination and it is not resolved through BC Corrections, you can make a complaint to the BC Human Rights Tribunal. Call Prisoners' Legal Services if you would like advice or help with a human rights complaint.

Getting legal help

You can contact Prisoners' Legal Services for advice or assistance with issues that affect your liberty (such as segregation or disciplinary charges), health care or human rights.

For assistance from Prisoners' Legal Services, you must have a referral from the Legal Services Society. Contact their call centre at 604-681-9736. Once you have a referral, you can call Prisoners' Legal Services directly at 604-853-8712.

Prisoners' Legal Services phones are open Monday to Friday from 9:00 a.m. to 11:00 a.m. and from 1:00 p.m. to 3:00 p.m.

Endnotes

1 Juristat Article – The changing profile of adults in custody, 2006/2007. Statistics Canada, Catalogue no. 85-002-X, vol. 28, no. 10; <http://www.statcan.gc.ca/pub/85-002-x/2008010/article/10732-eng.htm#a4>.

2 Office of the Correctional Investigator, “Backgrounder: Aboriginal Inmates”, (2010-02-10).

3 *R. v. Gladue*, [1999] 1 S.C.R. 688 (*Gladue*) at ¶ 59 and 68.

4 *Gladue* at ¶ 67-68; *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534, at ¶ 56; *R. v. Sim* (2005), 78 O.R. (3d) 183 (C.A.), at ¶ 16.

5 *Gladue* at ¶ 67-68.

6 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.2.8. “Classification Objectives”, (revised March 2009) at ¶ 2.

7 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.5.3. “Criteria for classifying inmate to secure custody” (revised March 2009).

8 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.5.4. “Criteria for classifying inmate to medium custody” (revised March 2009).

9 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.5.5. “Criteria for classifying inmate to open custody” (revised March 2009).

10 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.4.2. “Classification Interview”, (revised August 2010); Chapter 4.5.1.1. “Inmate dissatisfied with placement” (revised March 2009).

11 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.5.1.1. “Inmate dissatisfied with placement”, (revised March 2009) at ¶ 3.

12 *Correction Act*, SBC 2004, c. 46 (“CA”), s. 28(2)(d)(i).

13 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.5.7. “Reclassification”, (revised March 2009).

14 *Correction Act Regulation* (“CAR”), s. 22.

15 CAR, s. 4.

16 CAR, s. 29.

17 CAR, s. 18(3)(b).

18 CAR, s. 18(3)(a).

19 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 4.8.4. “Case manager/ Individualized case plan”, (revised February 2011) at ¶ 2. (Adult Custody Policy, Ch. 4.8.4)

20 Adult Custody Policy Ch 4.8.4. at ¶ 3.

21 Adult Custody Policy Ch 4.8.4. at ¶ 4.

22 Adult Custody Policy Ch 4.8.4. at ¶ 6.

23 CA, s. 28(2)(d)(i).

24 CAR, s. 38.

25 CAR, s. 37.

26 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 10.6.5. “Ceremonial items”, (revised July 2006) (Adult Custody Policy “Ceremonial Items”).

27 Adult Custody Policy “Ceremonial Items”, Chapter 10.6.5 at ¶ 3.

28 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 1.16.4, “Seizure”.

29 BC Corrections Branch Adult Custody Policy (April 2005), Chapter 1.21.3, “Segregation pending disciplinary hearing”, (revised February 2011); Chapter 1.21.5, “Segregation for separate confinement”, (revised February 2011).

30 CAR, s. 4.

31 CAR, s. 37(1).

32 CAR, s. 37(2).

33 CA, s. 28 (2)(d)(i).

This publication contains general information only. Each situation is unique. Law and policy can also change. If you have a legal problem, contact Prisoners' Legal Services or a lawyer.



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