

# Privatizing Correctional Services

*EDITED BY STEPHEN T. EASTON*



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## About the Authors

**STEPHEN T. EASTON** is professor of Economics at Simon Fraser University. He received his A.B. from Oberlin College in 1970 and an A.M. in 1972 and a Ph.D. in 1978 from the University of Chicago. He has published extensively; recent publications include *Rating Global Economic Freedom* (with M.A. Walker, Fraser Institute 1992); *Education in Canada: An Analysis of Elementary, Secondary and Vocational Schooling* (Fraser Institute 1988; 2nd ed. forthcoming); *Legal Aid Efficiency: Cost and Competitiveness* (with P.J. Brantingham and P.L. Brantingham, Queen's University 1994). Professor Easton was an associate editor for *Economic Inquiry* from 1980 to 1984, on the board of editors for the *Canadian Journal of Economics* from 1984 to 1987, organizer for the Canadian Economics Association's Canada-France Roundtable in 1988 and representative for the Canadian Economics Association to the Social Science Federation of Canada Aid to Scholarly Publications from 1991 to 1994. He is a senior research fellow of The Fraser Institute.

**FRED HONSBERGER** received his B.A. from Wilfrid Laurier University in 1970 and a Masters degree in Applied Criminology from the University of Ottawa in 1973. Since then he has worked in Ontario and Nova Scotia as correctional officer and counsellor, probation officer and director of Community Corrections. He is now the executive director of the Correctional Services Division of the Department of Justice in Nova Scotia, where he is responsible for 12 correctional institutions and 17 community corrections field offices.

**CHARLES H. LOGAN** is a professor and associate head of Sociology at the University of Connecticut, where he has taught since 1970. He has published widely on many criminal justice issues and is a leading authority on privatization in corrections. He

served as a professional staff member of the President's Commission on Privatization and wrote the chapter on the contract operation of prisons for the Commission's Report. He has been a visiting fellow at several agencies within the US Department of Justice and has received support for his research from the National Institute of Justice. He is the author of *Private Prisons: Cons and Pros* (Oxford University Press, 1990) and several other publications on private prisons.

**MAEVE MCMAHON** is assistant professor in the department of Law, Carleton University, Ottawa, Canada. A criminologist with a Ph.D. from the University of Toronto, she is the author of *The Persistent Prison? Rethinking Decarceration and Penal Reform* (University of Toronto Press, 1992) and of *Women on Guard: Discrimination and Harassment in Corrections* (University of Toronto Press, forthcoming). During the early 1990s, she took leave from the university to work as policy advisor and executive assistant to the solicitor general and minister of Correctional Services in Ontario. During the 1993/94 term, Dr. McMahon was a visiting professor at Vilnius University, Lithuania. Her areas of research and publication include criminological theory, imprisonment and alternatives, privatization and criminal justice, postcommunist transformation in the Baltics, police accountability, and women working in prisons for men. Her current research, sponsored by the Social Sciences and Humanities Research Council of Canada, is on activist intellectuals in Criminology. Dr. McMahon is also working with the Lithuanian and Canadian governments and non-government organizations toward the development of alternatives to imprisonment in Lithuania.

**DAVE PETERS** has been an active member of the Nova Scotia Government Employees Union (NSGEU) for more than three decades. As full-time president since 1993 of the 17,000-member union, he directs the largest employee organization in Nova Scotia and one of the largest in Eastern Canada. Following his initial employment with the provincial department of Transportation in 1963, Mr. Peters was elected to the union's executive branch as secretary-treasurer and, since that time, has continued to serve the union both in the Locals and as an executive officer. Over the years, he has gained wide experience and recognition through his active participation on the union's 10 provincial

committees and many of its projects. As NSGEU president, Mr. Peters also holds the office of Nova Scotian vice-president to the 310,000-member National Union of Public and General Employees (NUPGE), which represents provincial government employees at the national and international level, and is a vice-president of the 55,000-member Nova Scotia Federation of Labour. Mr. Peters attended St. Francis Xavier University in Antigonish and is a graduate of the Financial Management course at Algonquin College in Ottawa.

**CHARLES W. THOMAS** received his B.S. (1966) from McMurry University and his M.A. (1969) and Ph.D. (1971) degrees from the University of Kentucky. He is presently professor of Criminology and director of the Private Corrections Project at the University of Florida and has served on the faculties of Virginia Commonwealth University (1969–73), of the College of William and Mary (1973–75), and of Bowling Green State University (1975–80). He is the author of more than 100 books, research journals and law review publications. Professor Thomas is regarded as the leading authority on the economic, legal, and policy implications of correctional privatization, with result that he has assisted in drafting privatization legislation for numerous jurisdictions, testifying before a large number of local, state, and federal legislative bodies, and serving as a consultant to such agencies and organizations as the American Correctional Association, National Institute of Corrections, and the Florida Correctional Privatization Commission. Professor Thomas is also a member of the Corrections and Sentencing Committee of the American Bar Association, the American Correctional Association, and the American Jail Association.

**MICHAEL A. WALKER** is the executive director of The Fraser Institute. Born in Newfoundland in 1945, he received his B.A. (summa) from St. Francis Xavier University in 1966 and completed the work for his Ph.D. in Economics at the University of Western Ontario in 1969. Dr. Walker writes regularly for daily newspapers and financial periodicals. His articles have also appeared in technical journals in Canada, the United States and Europe; these include *The American Economic Review*, the *Canadian Journal of Economics*, *Canadian Public Policy*, *Health Affairs*, and the *Canadian Tax Journal*. He has written or edited 40 books on economic matters.

Since 1995, **TIM WILSON** has been head of the unit within Her Majesty's Prison Service (England and Wales) that is responsible for the procurement of custodial services from private companies. Within the Home Office, he has worked on criminal justice, fire service, and government voluntary (*i.e.*, non-profit) organization matters. He has also been twice seconded to the Lord Chancellor's Department. The greater part of his career, however, has been spent in the Prison Service, covering prisoner litigation, law relating to sentences, and modernization of prisoner records, managing the £300M capital building program and planning inquiries. He has lectured on the policy of the British Government at various universities in England and at conferences in North America. In 1997, he served as an independent member of the Republic of South Africa's examination panel considering requests for qualification for that country's equivalent of the UK DCMF program.

# Preface

MICHAEL A. WALKER

The Fraser Institute has had a long-standing interest in the issue of privatization. In the 1970s, the publications of The Fraser Institute provided the ideas that inspired the first large-scale privatization in North America. The documentation found in *Privatization: Theory and Practice*, which described the process followed to privatize the British Columbia Resources Investment Corporation provided guidance to the Thatcher government of the early 1980s as it set about its own program of privatization. Somewhat later, *Privatization: Tactics and Techniques* made it possible for privatizers around the world to learn from North American and British experience.

*Privatizing Correctional Services* is squarely in the tradition of The Fraser Institute's interest in privatization and provides a good survey of what is known at the present time about the capacity of the private sector to deliver prison services. The book is based upon papers delivered at a conference held during 1996 in Toronto and upon the authors' revisions to these papers in the light of comments at the conference and the suggestions of referees.

It is fair to say that, when we mounted the conference on the privatization of prisons, many of the people to whom we sent the information thought the idea to be ridiculous. Even some of

the Institute's most devoted supporters felt that the privatization of prisons ought to be put in the same category as the Institute's proposals made years ago to privatize roads and the management of elephant stocks in Africa!

It may, for some readers, make the arguments and evidence presented in this book more readily acceptable if they recall that the privatization of elephants and roads is now commonplace—and, indeed, so is the privatization of prison services. Four percent of the prison services in the United States are now privately provided and even an institution as studied in its ways as the British penitentiary system has adopted the contracting-out model.

*Privatizing Correctional Services* forms part of the Law and Markets project, which the Institute launched in the summer of 1996 in order to examine the economic consequences, current and future, of Canada's laws and legal system. The Fraser Institute has long had a strong interest in the Rule of Law and the efficiency of the legal system as critical factors in the growth of a market economy. The director of the project is Owen Lippert, a Senior Policy Analyst with the Institute since 1994. Under the aegis of the Law and Markets project, numerous articles appeared in 1996 in such publications as *The Financial Post*, *The Globe and Mail*, *Canadian Lawyer* magazine and the Sterling chain of newspapers.

In the years ahead, the Law and Markets project will begin to bring forth interesting and engaging facts and analyses from several scholars and researchers. Professors Steven Easton and Paul Brantingham of Simon Fraser University will direct the research in criminal law topics, including an update of their highly successful 1996 publication, "The Crime Bill: Who Pays." Professor Steven Globerman, also of Simon Fraser University, will direct the research on civil law topics. To provide guidance and comment, an advisory board of eminent practitioners and scholars has been formed.

The area of the law and the legal system is a rich and varied one. We look forward to contributing a much-needed economic perspective to the emerging debate over the primary ordering of Canada's economy and society.

As ever fascinated by the power of the market to solve complex problems, I was pleased to work with the Institute's director of Special Events, Mrs. Lorena Baran, to arrange the conference that has produced this book. I have been as pleased

to collaborate with Stephen Easton in arranging the publication of the papers. However, it is important for readers to recognize that while the Fraser Institute is happy to make this volume available for wider discussion, the authors of the papers have worked independently and therefore the views they express are theirs alone and do not necessarily reflect those of the members or the trustees of the Fraser Institute.



# Introduction

STEPHEN T. EASTON

This volume presents papers selected from those given at the Fraser Institute's Conference *The Privatization of Correctional Services* held in Toronto, July 10–11, 1996. The process of privatizing correctional facilities and functions has been taking place in a number of countries for the past 20 years and, although in Canada some aspects of service provision are already performed by the private sector, privatization of major prison services is just beginning. As in other areas of this sort, the services provided by government are not synonymous with services being produced by government. Lower costs, better safety for prisoners and staff, and more facilities within the prison are just some of the potential gains that have sparked interest in privatization.

The first two chapters explore where it is that provision of correctional services by the private sector has been taking place and what issues have been raised in consequence. Experience with privatization in the United States is detailed by Charles Thomas, director of the Private Corrections Project at the Center for Studies in Criminology and Law at the University of Florida. Tim Wilson, head of the Contracts and Competition Group of Her Majesty's Prison Service reviews British experience with contractual management of custodial services by the

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private sector. These chapters will be exceptionally useful for Canadians who are just beginning privatization of prisons as they show both the extent of privatization in two large jurisdictions and the kind of learning that has taken place as they have shifted the provision of correctional services to the private sector over the past decades.

The next three chapters provide differing views about privatization of prisons. The first two explore some of the deficiencies as seen from theoretical and practical perspectives. Dave Peters, president of the Nova Scotia Government Employees Union, explores some practical problems that he has seen develop in the United States during its privatization process. Maeve McMahan, assistant professor of Law at Carleton University, outlines some reservations about the process from the perspective of someone who has been involved in the research and administration of justice. On the other side, Charles Logan, professor of Sociology at the University of Connecticut, provides a rebuttal to many of the arguments used against privatization, arguing that the process of privatization does not take place in a vacuum but must be contrasted with what is currently taking place in public facilities.

In the last chapter, Fred Honsberger, executive director of the Nova Scotia Correctional Services, describes the process of privatization that has begun in Nova Scotia. His experience with the process is a guide to the kinds of changes in thinking that will have to take place among our administrators as privatization progresses.

In *Issues and Evidence from the United States*, **Charles Thomas** finds that even the most optimistic observer would not suggest that the way in which the public sector has run adult correctional institutions in the United States has been exemplary. He notes, however, that the idea of privatizing prisons is still routinely greeted with skepticism and, in some cases, overt hostility. Some of the critics of privatization are members of the current management and operational staff of prisons for whom any change in management would have significant consequences. Others have reasons loftier than pure self-interest: "Their contention is that it is ethically inappropriate to delegate the power to punish to a private entity whose exercise of such power would be motivated . . . to achieve a financial benefit." Even though it is well understood that the institution has no

power to set the terms, duration, or conditions of incarceration, they still see it as inappropriate. Nor do they look at the evidence that private entities can provide and, in fact, have provided services in a successful fashion.

Although there are many technical issues that need to be specified to permit a government's effective choice of a private prison operator, Thomas believes that there are also more fundamental questions that must be answered before such a contract decision is met. Is it possible for a government to contract with a private entity for managing a prison facility, or does fundamental justice guaranteed either by statute or constitution prevent it? Is there any evidence that private prison contracts provide a cost-saving and service level that would be acceptable to the contracting parties? Are choices for prisons limited to specialized facilities?

In the last decade, American experience has provided answers to some of these questions. Thomas finds that the establishment of private prisons in the United States has typically involved an explicit set of enabling laws and regulations set out by the state legislature and these are more stringent with respect to permitted behaviour and accreditation than those imposed on public prisons. This has meant that development of private prisons faced significant hurdles initially. From the first contracts awarded by the Immigration and Naturalization service in the early 1980s to the first state-level award in 1985 in Kentucky, to the 1988 award of four 500-bed facilities in Texas, the progress of privatization was slow. Since 1990, when there was a capacity of private facilities of 15,300 beds, progress has been more rapid so that by the end of 1995 there were 63,600 beds available. As of 1996, there were 17 private corrections management firms negotiating contracts in Australia, Canada, the United Kingdom and the United States and providing housing for more than 85,000 prisoners.

The development of private facilities has meant that falsehoods about privatization have been disproved. Large as well as small facilities can be managed privately. Many jurisdictions have chosen to use private management, including 18 American states and a number of foreign countries. Both high and low security institutions have been managed privately and there is little evidence that private firms are unable to control the prison population under their management.

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In reviewing the evidence from the institutional settings privatized to date, Thomas finds that privately built and managed facilities appear to be able to operate at a significantly lower cost than public facilities, although it is difficult to state with precision how much lower the costs are because public expenditures on corrections tend to understate costs while private cost accounting tends to understate the savings. For example, public sector expenditure on prisons generally takes budgeted funds on an average cost per day, per prisoner. Land acquisition, tendering, procurement, and so on are usually not part of this calculation although it must be included in the costs for the private competitor. Private sector managers are required to meet regulatory standards that are in excess of public sector requirements. It is thus difficult to compare actual service levels even though the same basic functions are being performed.

In spite of these difficulties, there is little doubt that cost savings have been achieved. In many cases, there is a statutory requirement that an operating cost savings in the order of 7 percent to 10 percent be achieved for the project to be privatized at all. The private sector has a number of cost advantages: pension benefits are typically less than in the public sector; hiring and firing decisions are far less cumbersome than those in the public sector. The real question is how much the cost saving will be, not whether there will be a cost saving. In a variety of recent studies of privatization of correctional services in the United States, estimates of the savings range between 5 percent and 14 percent. In Australia, public prisons cost 40 percent more to manage than comparable private facilities.

Thomas finds that private contracting-out also improves service. There are fewer prisoner lawsuits, most contracts are renewed, private facilities (unlike public facilities) are accredited on the basis of a number of different indicators, and at least one authority concluded that private prisons outperform public institutions in almost every dimension.

Since 1987, Her Majesty's Prison Service has been learning to live with the private sector. Prisons are now part of a "mixed economy," **Tim Wilson** writes in his chapter, *Contractual Management of Custodial Services in the United Kingdom*. There are now 130 facilities ranging in size from 60 to over 1,000 places and housing over 54,600 inmates. More and more inmates convicted of violent crimes are incarcerated in private facilities and there are

3,000 “lifers.” Operating costs amount to £1.4 billion with another £117 million spent on capital expenditure. The average cost for a prisoner place is £24,600 (50,400 \$CAN) per year.

In the early 1980s, debate over contractual management of prisons in the United Kingdom was confused by a failure to distinguish between, on the one hand, the state’s role in determining whether liberty should be curtailed and in regulating where that curtailment should be served and, on the other, the function of managing or servicing that determination. By 1988, a Green Paper recommended that the private sector be involved in prisons to improve cost effectiveness and provide accommodation facilities more quickly and flexibly than was possible through public construction and operation. By 1989, court escort and custody duties were privately contracted and the process of developing a procedure for construction of remand centres was begun. The Criminal Justice Act of 1991 provided the regulatory framework to operate and maintain private management in remand facilities and escort activities and this was extended beyond remand prisons in 1994.

The first remand prison opened in 1992, a second in 1993, another in both 1994 and 1995 and three more are scheduled to be opened in 1998. Capacity ranges from 330 to 850 inmates and currently amount to 4 percent of the inmate population. The goal is that 15 percent of the facilities will be privately managed as new facilities are built over the next fifteen years.

Administratively, the group responsible for contracting for the private facilities was transferred to the Prison Service in 1993. Until then it had been reporting to the Home office directly. This change has given both the private contractors and the administration of the Prison Service a stake in the successful outcome of the contracting process.

Cost saving from the private escorting of prisoners is estimated by the Prison Service at 13 million pounds for the period from 1996 to 1999 and, as of 1993/94, the private sector establishment operates at 15 percent to 25 percent lower costs for equal or better levels of service performance. Further, private prisons have had the added costs of dealing with a lower proportion of stable inmates and a higher proportion of high-risk offenders than other prisons.

As part of the Government’s Private Finance Initiative, the principles of custodial services have been based mainly upon

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output specification, which sets output requirements but not input requirements. Risk is transferred to the private sector in the design, planning, and construction process through the payment options, with the party best able to bear the risk doing so at a specified price. The contractor is paid on a daily rate for available places. Thus no payment is made until the facility is up and running. Performance is monitored and payment is made when the contractor meets performance indicators. Volume risk arises with assignment of additional inmates and must be paid for with a supplement. Construction-cost risks such as time overruns are controlled by the contractor; no allowance is made by the Prison Service for overruns. Maintenance is monitored by regular dilapidation surveys. A five year price review permits costs that are external to the prison system to be reassessed and taken into account in new contracts. With these and other requirements met, the net present value of the savings over the lifetime of the contract is estimated at 10 percent relative to risk-adjusted public sector comparators.

What leads to success in contractually managed prisons? Clear and comprehensive statutory frameworks, clarity about what services are being purchased, understanding the local penal culture while learning lessons from abroad, understanding what constraints exist in the market in terms of borrowing rates, and the development of a partnership between private contractors and the government to use what is learned to make the system function effectively. The United Kingdom has passed through the initial stages of the privatization process and now needs to look abroad to learn from alternatives that exist in other countries that have developed audit, disciplinary, and commercial arrangements for their prisons.

In *The Unions' View of Privatizing Corrections*, **Dave Peters** has practical concerns. When he looks at examples of privatization in the United States, he sees many examples of abuses. He illustrates and documents from newspaper stories the kinds of things that can go wrong: abuse of inmates, inadequate screening of staff and using prison labour to perform work that was previously done by non-prison labour are some of the kinds of problems that he sees. Private prisons will tend to spend less on personnel either by employing fewer staff or by paying each staff-member less. Public prisons have better pay and benefits than private prisons in his experience.

More generally, Peters is worried about the ability of public sector to identify the true cost of the supposedly cheaper private sector alternative. He argues that the kinds of monitoring of costs that must take place with private contractors is an uncounted cost that should be added to the totals. Who, he wonders, is responsible for cost overruns and failures of private firms?

Finally, although he is not opposed to change, Peters argues that as the most intrusive act a society can take against someone, it is not appropriate for the delivery of this service to be in the hands of a for-profit enterprise. His visits to American facilities have convinced him that the public sector is the appropriate place for these activities.

In *Control as Enterprise: Some Recent Trends in Privatization and Criminal Justice*, **Maeva McMahon** asks who profits from for-profit prisons? The private sector, she argues, will try to supply resources for which there is no demonstrated need or demand. For example, electronic monitoring is often cited as an alternative to incarceration at a substantial cost saving. But in reality, electronic monitoring is used for low-risk offenders who would have been released into the community rather than retained in custody. Thus there is no real cost saving. Further, if parolees are closely monitored, they will be more likely to be found to be in violation of their parole and expensively returned to prison. There is also a moral argument against electronic monitoring. It involves a continual physical presence and is an intrusive form of surveillance.

Another example of a product the private sector tries to sell to the police as an alternative to lethal force is Capsicum, an incapacitating spray. But there is no evidence to support this claim, and Capsicum may result in more, not less, force being used as it may augment rather than diminish the alternatives to non-violent responses to particular situations.

By emphasizing how dangerous certain situations can be, private industry has increased people's fear of crime. They then sell burglar alarms, pepper spray, and the like to the fearful. Further, fear breeds intolerance of deviant behaviour and the marginalized like the mentally ill and the homeless. Thus private entrepreneurial intrusions into the crime industry must be watched carefully.

**Charles Logan** rebuts many of the common arguments raised against for-profit prisons in his *Objections and Refutations*. There are several issues that frequently emerge in the

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discussions of private prisons. In each case, they are also issues for public prisons and it is important to recognize that they are not unique to private institutions. Among these issues are: propriety, cost, quality, quantity, liability, accountability, and dependency.

Propriety is invested in the law. Whether it is a public or a private guard who abuses a prisoner, the law is the same. Keepers do not put people in jail; they are responsible for them once they are incarcerated, and all keepers are bound by the same sets of rules, which are consistent with the authority of the law. Cost: it is sometimes argued that we act as cost effectively as is possible in incarcerating people in our public prisons. Yet, even within the public system there are wide variations in costs. Some do better than others. Private prisons run more cheaply because they can avoid rigid government procurement procedures, avoid civil service and other government bureaucratic costs, and engage in a range of activities that permit costs to be reduced. Realistic savings are in the range of 5 percent to 15 percent.

Will private prisons save money by lowering the quality of institutionalization? By most measures, private prisons provide at least as good a service as public prisons: they have fewer escapes, fewer disturbances, and both staff and prisoners appear to rate the services more highly than services in public facilities. Quantity: there is a fear that private prisons will lobby to keep their institutions full. There is currently an excess demand for facilities for which the current prisoner population is paying the price in overcrowding. If, however, we began to incarcerate fewer prisoners, the lobbying done by public sector employees is far more likely to encourage maintaining incarceration facilities than lobbying by private companies. Private companies would tend to move to supply the types of activities that would be demanded in the new regime. But this is an empirical matter and studies of the state of New York indicate that the bulk of campaign contributions came from state teacher unions, other public employee unions, as well as regulated industry groups such as medical associations and banking associations. Government lobbying is done by the participants in government.

Liability: it is sometimes suggested that by permitting a private prison, the government will not be able to escape liability for the actions of its agent, the private prison administration.

However, by providing higher-quality institutions, private prisons reduce the public's exposure to liability; they tend to have fewer lawsuits and fewer apparent problems. They are certified, which is not the case in public institutions, and this enhances the legal defence against lawsuits. They carry insurance and can more easily settle out of court than can the government. This option reduces costs as well.

**Accountability:** the argument that contracting reduces accountability because private contractors are a step removed from elected public officials is almost surely wrong. Private contractors are subject to the same law as public providers and, in addition, they are accountable to regulators, insurers, shareholders, and competitors.

**Dependency:** the argument is made that private contractor can go broke and leave the government without correctional capacity. It took a new company about 7 months to site, finance, construct, and open a 350 bed facility with about \$2 million as an initial investment; market entry is not particularly difficult. Governments can guard against "lowballing" and other contractual ploys by choosing bidders who have realistic estimates and who face competition.

In sum, private prisons are equal or superior to public facilities along almost every dimension one can choose to measure. In addition, they provide a benchmark with which to assess our public prisons.

Private prisons are going to be another option in corrections for a long time to come. The arguments for and against them are important and must be weighed. A foray into private prison construction and ownership in Nova Scotia is taking place now, although in fairness it should be noted that privatization of particular services within corrections has been present for some time across the country. The evidence from Nova Scotia is interesting as, in the Nova Scotia Custody Configuration Project, **Fred Honsberger** testifies to the kinds of changes in attitude that will have to occur to make private prisons work.

Nova Scotia has had a history of small dispersed jails, which are now old and expensive to operate. There is a lack of capacity which has resulted, for example, in release of inmates to house arrest earlier than is normal. This kind of outcome "erodes the order of the court." The Correctional Services were asked to use the Cooperative Business Solutions approach; that is, they were

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asked to specify outcomes and then find the best method to reach those outcomes using outside help rather than relying solely on internal resources.

Nova Scotia's Correctional Services issued a Call For Proposals and held a bidders' conference that outlined the objectives: provide safe and secure institutions for the protection of inmates, staff and public; establish the number of beds in the right areas of the province; provide activity for inmates to reduce recidivism; provide a safe and healthy environment for staff; and keep to the existing (restrained) budget. Six consortia formed to bid on the contract and one was selected. This consortium will work in a partnership with the team from the Nova Scotia Government to plan, design, staff, configure, construct, and operate the facilities.

It is important to recognize that privatization is not only about security. There are many options about what can be privatized: food service, maintenance, habilitative programs, education, and work activity illustrate just a few of the possible activities that can be separately considered. The Nova Scotia Government Employees' Union will be given a chance to make adjustments and recommendations to retain these operations in the public sector.

Government is ultimately the body that must make the choice about how to provide the service in a cost effective way. In Nova Scotia, a not-for-profit society already fully operates a youth facility and so Nova Scotia already has had experience with operating outside the public sector. This new process that has been begun will surely change the management of Nova Scotia's correctional facilities.

### **Concluding note**

The chapters in this book consider both pros and cons in the privatization debate. The situation today differs from that of 20 years ago because we now have experience with the product. The process by which a government chooses to privatize is important, and, as our authors have described, there are clearly things that should and should not be done.

From the perspective of governments, prison privatization is clearly worth trying since it appears to be less costly on a simple dollars and cents basis, and the level of service is at least comparable and arguably better than that provided in public institu-

tions. How it will fare in longer run has yet to be determined. Will private facilities reduce the dreadful recidivism we currently have? Will inmates lead more useful lives after release? These kinds of questions are difficult to answer at the present time but they remain the hope of those looking at current arrangements. By acknowledging the important issues, these essays represent a bridge to a richer understanding of the costs of incarceration that need to be marked into the ledger book in addition to the simple costs of prison construction and operation.