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Solitary Confinemen

Solitary confinement: Bill C-56 not enough to eliminate risk of abuse

By **Lisa Kerr**

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(July 12, 2017, 8:48 AM EDT) -- On July 4, a trial about the constitutionality of "solitary confinement" began in British Columbia Supreme Court. In recent years, solitary has been raised in multiple legal proceedings, public investigations and media reports. This is the first comprehensive, constitutional challenge to the legislative provisions that govern the practice.

The claim is based on ss. 7, 12 and 15 of the *Charter of Rights and Freedoms*, and it attacks multiple provisions of the *Corrections and Conditional Release Act* which authorize what is formally called "administrative segregation." Under these provisions, inmates can be segregated indefinitely for a broad range of managerial reasons. While the act indicates that the practice is meant to be a last resort, it is administered with no independent or external oversight and comes with a long record of abuse and ill effects.

Segregated inmates are locked in cells for up to 23 hours per day. They have no meaningful social interaction or activities and very little access to fresh air and exercise. They do not know when they will be released. For many inmates, the isolation is painful and leaves permanent damage. In 2014-15, the Office of the Correctional Investigator reported that 14 of 30 inmate suicides that year took place in segregation cells; five had been in segregation for more than 120 days.

There are three main components to the legal challenge. The plaintiffs seek a declaration that the provisions are unconstitutional because they authorize prolonged and indefinite segregation; because they authorize the segregation of mentally ill inmates; and because of the additional burdens that segregation places on Indigenous inmates.

This is public interest litigation. The two plaintiffs are the John Howard Society of Canada and the B.C. Civil Liberties Association, both groups with long-standing engagement on prisoner rights. An individual inmate is not named as a plaintiff because of the barriers and risks associated with bringing such litigation while incarcerated.

The plaintiffs are represented by leading constitutional counsel Joseph Arvay and Alison Latimer — a pair known for their ability to adduce extraordinary evidentiary records. In an opening statement, counsel for the plaintiffs promised that the court would hear from a broad range of lay and expert witnesses, including multiple current and former inmates who have experienced segregation, domestic and international prison scholars who will describe the history of solitary and its alternatives, mental health professionals and physicians who will discuss the effects of isolation, and experienced Canadian prison officials who will describe how segregation works on the ground.

There is no question that the death of Ashley Smith is a major impetus to the case. In 2013, a coroner's inquest ruled that Smith's death in a segregation cell was a homicide. The coroner recommended that indefinite solitary confinement be abolished, that strict time limits be implemented and that placement of vulnerable groups in segregation be prohibited. Upon taking office in 2015, Prime Minister Trudeau instructed his Justice minister to implement the Smith inquest recommendations.

By January 2017, there was still no reform legislation in sight. Nevertheless, the federal government sought and received an adjournment of the B.C. trial at that time, on the basis that it was devising a reform that could render the lawsuit unnecessary. On June 19, 2017 — two weeks before the delayed trial was to commence — the Liberal government tabled Bill C-56. In his comments about the draft bill, Minister of Public Safety Ralph Goodale stated that the segregation of inmates should be kept to an absolute minimum and that using isolation on mentally ill people only makes matters worse. While the minister's comments seemed to confirm the inadequacy of the current law, the government sought another adjournment. This time the B.C. Supreme Court refused.

The draft Bill C-56 looks like a compromise. The Liberals wanted to implement the Smith inquest recommendations, but the Correctional Service of Canada has long resisted time limits on administrative segregation. Bill C-56 says that an inmate "shall be released" from segregation after 21 days, "unless the institutional head orders that the inmate is to remain in segregation." Eventually, the presumptive release will come at 15 days, but the "institutional head" or warden always retains the power to continue the segregation.

In other words, Bill C-56 does not include a cap on the number of days that inmates can be held in isolation. Under the current act, the "institutional head" or warden already makes administrative segregation decisions. In this way, this bill is more of the same.

Bill C-56 would also implement "independent external review," activated when segregation continues beyond those specified days. This is a paper review only. There is no hearing and no access to counsel. The outcome of the review is non-binding, meaning that the warden can disregard the recommendation. Again, this reform is an improvement, but not one that will place hard limits on a practice that is prone to excess.

Crucially, Bill C-56 does not prohibit the placement of mentally ill people or other vulnerable groups in isolation. The prison service proposes to put those protections in policy. I have argued that such a critical reform should be placed directly within legislation. The bill is also silent on how many hours an inmate should be released from a segregated cell each day. The prison service proposes a maximum of 22 hours per day to be included in policy — an unacceptably trivial improvement from the previous rule of 23 hours.

Even if Bill C-56 becomes law, the proposed scheme will not do enough to implement fixed and effective controls on a practice that is always at risk of abuse. Prisons are challenging and resource-strapped places, such that staff make use of whatever tools are at their disposal. As UBC professor Michael Jackson testified in the opening week of this trial, the fact that segregation is currently available unrestricted means that officials don't look for other ways to solve problems. Mental health units and prison transfers can alleviate many of the problems that give rise to segregation. There is no reason that a prison ever needs to lock inmates in cells for 22 or 23 hours of the day.

The federal government is defending the B.C. claim by arguing that the prison service only makes use of segregation when it is strictly necessary. It seems unlikely that the record will support that claim. More convincingly, the government emphasizes that the prison service has reduced its reliance on segregation in recent years, and that Bill C-56 would go a long way to improving things further. For purposes of this lawsuit, those latter claims only seem to confirm that the legislation before the B.C. courts is not a minimally impairing scheme.

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