55 C.R. (7th) 382

The End Stage of Solitary Confinement

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Canadian prisons and jails have long been free to use solitary confinement with little in the way of legal limits or standards. Under the federal provisions that authorize administrative segregation, in place since 1992, solitary could be imposed for a number of broadly-articulated reasons.[1] The decision to segregate required no hearing and attracted no form of independent or external review. The legislation did not specify any minimum humane conditions, which allowed the distinguishing feature of administrative segregation to be "the elimination of meaningful social interaction or stimulus."[2] A lack of time limits meant that segregation was often prolonged and that segregated inmates never knew when release may come. The lax federal regime, which has many provincial equivalents, has now been declared unconstitutional by multiple courts and replaced in new legislation.

This article argues that the legal system has reached the end stage of the disease of solitary confinement, and analyzes a few of the salient features of this process. The shortcomings of the federal provisions that, until now, authorized solitary, have been well documented.[3] The negative health effects of solitary are well-established in medical literature, and have now been accepted by every Canadian judge who has seriously con-

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[1] See ss. 31–37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*]. Of course, the practice of solitary confinement predates the 1992 provisions. For historical perspective, see e.g. Michael Jackson, *Prisons of Isolation: Solitary Confinement in Canada* (University of Toronto Press, 1983).

[2] *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243 (Ont. C.A.) at para. 20.

[3] See e.g. Lisa Kerr "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) Queen's Law Journal, Vol. 40, No. 2, 483–530; Debra Parkes "Solitary Confinement, Rights Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic" (2017) 32(2) Canadian Journal of Law and Society 165.

sidered the issue.[4] In response to a mountain of bad press and lawsuits, the Correctional Service of Canada ("CSC") has drastically reduced the numbers of inmates who are officially held in segregation.[5] These are just a few of the indicators that solitary has become broadly unacceptable, and that key legal and penal actors are now willingly engaging in a process of reduction and reform.

In the terminal stage of a progressive disease, the medical issues facing the patient will evolve and proliferate. Part 1 of this article shows how the harmful effects of segregation and the inadequacies of the governing law have proliferated across a striking array of legal contexts. Solitary has generated stays of proceedings in criminal cases, justified large grants of credit for time spent in pretrial custody, and led to a $20 million *Charter* damages award against the federal government. The main cases have emerged in the federal context, but copycat provincial regimes are also in trouble.[6] In most of these cases, courts have granted various

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[4] Medical expertise about the effects of isolation has come mostly from US-based experts, whose work has catalyzed a widespread view that this practice is incompatible with modern commitments to human dignity. David C. Fathi, "United States: Turning the Corner on Solitary Confinement?" (2015) 4:1 Can J. Human Rights 167.

[5] In 2008-9, the CSC made 7,719 placements in administrative segregation, with a very consistent average daily count of 900. In 2010, the Correctional Investigator called these numbers "astonishing" given that the total incarcerated population in the CSC's maximum-and minimum-security institutions that have segregation units is less than 10,000. Approximately 37% of those segregated prisoners spent over 60 days in administrative segregation. See Howard Sapers & Ivan Zinger, "The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections" (2010) 30:5 Pace L. Rev 1512 at 1525-26. In 2014, these numbers began a significant decline. In the BC solitary litigation discussed later in this piece, the government led evidence that fewer than 300 inmates were in segregation as of July 31, 2017, and the average stay had declined to 22 days. Prison officials testified that the decline is largely a result of "increased institutional will" on the part of CSC, partially in response to the deaths of Ashley Smith and Eddie Snowshoe. See *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, 43 C.R. (7th) 1 (B.C. S.C.) at paras. 65–70.

[6] Provincial settings present unique difficulties due to the large majority of inmates held on remand. For a glimpse of reform work happening in Ontario, see the settlement agreement flowing from the case of Christina Jahn, who was sub-

forms of *Charter*-based relief to isolated prisoners even where prisons and jails acted pursuant to existing legislative boundaries. These outcomes speak powerfully to how inadequate those legislative boundaries have long been.

Part 2 unpacks how, between 2017 and 2019, the federal provisions authorizing administrative segregation were declared unconstitutional by courts in both British Columbia and Ontario. There are substantial differences between the trial and appeal decisions in these cases that are important to clarify and understand. To date, every judge has concluded that these provisions are invalid, but there is considerable variation in the analytic paths taken to that result. These cases will likely be heard at the Supreme Court of Canada in the coming year.

To close, Part 3 reflects on legislation passed in response to the BC and Ontario cases. Notwithstanding that appeals are still underway, the federal government passed Bill C-83, *An Act to Amend the Corrections and Conditional Release Act*. The government's position is that this legislation abolishes solitary confinement. The bill does contain important protections for segregated inmates that have never before been specified in legislation. Critics have lamented the absence of three features: time limits, judicial oversight, and categorical restrictions for vulnerable inmates, like the mentally ill. There are few unqualified victories in the process of prison reform. Serious questions remain about the adequacy of laws that still allow separation and isolation as a technique of prison management.

Part 1. Effects Across the System

Stays of Proceedings in Criminal Prosecutions

In the end stage of solitary confinement, the practice has interfered with the ability of the criminal justice system to perform its basic function of deciding guilt and innocence. In one prominent instance, *R v. Capay*, sol-

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jected to 210 days in isolation at the Ottawa Carleton Detention Centre in 2011-2012. Pursuant to that agreement, Justice David Cole was appointed as Independent Reviewer and Kelly Hannah-Moffat as Independent Expert. For their work to date, see the "Interim Report of the Independent Reviewer of the Ontario Ministry of Correctional Services' Compliance with the 2013 Jahn Settlement Agreement and the Terms of the Consent Order of January 16, 2018 Issues by the Human Rights Tribunal of Ontario." (February 2019)

itary led to a stay of proceedings because extensive isolation damaged the psychological integrity of a defendant and made a fair trial impossible.[7]

Adam Capay was charged with murder in connection with the June 3, 2012 stabbing death of Sherman Quisses, of the Neskantaga First Nation, inside a provincial jail. Before this event, Capay had arrived in the jail system with serious personal challenges, summarized by one expert as "extremely impaired medical and social background."[8] Mr. Capay was in a "significantly disturbed state of mind" and was likely suffering from a mental disorder at the time of the killing.[9] The attack, which was captured on video, was unprovoked and had no logical or consistent motivation.[10] Following the attack, Mr. Capay was placed in a particularly punitive form of solitary confinement. Awaiting trial on the murder charge, Mr. Capay spent more than four years or 1,647 days in solitary. For the majority of those days, the lights were kept on 24 hours a day. On most days, he had no yard access and no time out of his cell. During the initial three-month period, he was subjected to near total isolation during which time his mental health deteriorated dramatically.[11]

Mr. Capay's state of mind at the time of the killing promised to be the only issue at trial, as his only defence would be that he was not criminally responsible by way of mental disorder. The problem was that, due to the effects of solitary, Mr. Capay was in no position to lead evidence supporting that defence. Segregation had had caused "significant cognitive impairments" including the permanent loss of memory with respect to the period of time prior to and during the initial period of segregation.[12] Mr. Capay should have been promptly assessed following the June 3, 2012 assault, which would have preserved and generated the medical information crucial to issues of criminal responsibility, including physiological data and contemporaneous psychiatric observation and as-

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[7] *R. v. Capay*, 2019 ONSC 535 (Ont. S.C.J.).

[8] During childhood, Mr. Capay faced parental alcoholism and serious sexual abuse. He presented in adulthood with antisocial personality disorder, among many other challenges. *Capay* at para. 264.

[9] *Capay* at para. 247.

[10] *Capay* at para. 248.

[11] *Capay* at para. 41.

[12] *Capay* at para. 408.

sessment.[13] Instead, he was placed in complete isolation for several months, "creating a complete vacuum of evidence relating to his mental health status during that period of time."[14]

Mr. Capay received segregation reviews pursuant to provincial law, but Justice Fregeau called the process "meaningless" at both the "institutional and regional levels."[15] Justifications for continued segregation consisted of a rote single comment, reiterating generic reasons noted on previous reviews.[16] From year to year, the substance of the reviews did not change. There were a few notations that Mr. Capay was harming himself and hearing things, but no other new information.[17] Correctional officials were aware of Mr. Capay's mental health issues throughout, and yet, between June 2012 and December 2016, Mr. Capay had a total of 10 hours of contact with a psychiatrist.[18]

Justice Fregeau determined that these *Charter* violations had a permanent impact on trial fairness, and there was no alternative to what is meant to be an exceedingly rare remedy in our system: a stay of proceedings.[19] A stay of a murder prosecution in relation to the conduct of jail officials is an extraordinary consequence of the exercise of a power

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[13] *Capay* at para. 259.

[14] *Capay* at para. 260. A medical expert concluded that "the effects of segregation, in particular, on Mr. Capay's memory, impair the ability to determine today the etiology, nature and severity of the altered or disturbed state of mind that the evidence indicates he was in at the time the offence was committed." (*Capay* at para. 269)

[15] *Capay* at para. 386.

[16] *Capay* at para. 388.

[17] As prison law expert Michael Jackson testified in evidence that was accepted by the court: "you have a sense that in June 2012 until sometime in 2016, time stopped. He was kind of trapped in a place and a space that never changed . . . There's, you know, people are filling out forms. They're checking boxes, but it's as if Adam Capay disappeared." (para. 387) Another expert, Professor Hannah-Moffat, said it was "egregious and shocking" that these reviews contained no discussion of measures to mitigate the impact of segregation, such as Indigenous programming, psychiatric treatment, or educational opportunities. (para. 269)

[18] *Capay* at para. 402.

[19] *Capay* at paras. 497–503.

largely condoned by governing legislation. It speaks to the need for both legislative reform and cultural change within Ontario corrections.[20]

A stay of proceedings was also granted in *R v. Ugbaja*.[21] This decision is arguably even more striking than *Capay*, as it was done on the basis of the residual abuse of process category rather than any compromise of the right to a fair trial.[22] Mr. Ugbaja was charged with importing and trafficking heroin. While held in pretrial, he was denied access to medical care, held in solitary for a lengthy period, not given usual yard time, and denied a fair administrative process in his segregation reviews.[23]

As in *Capay*, inadequate reviews were a disturbing feature of Mr. Ugbaja's case. The court emphasized that the official documentation in respect of his segregation was "in critical respects false and misleading" and gave the false impression that segregation was fully justified.[24] In

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[20] Mr. Capay's situation was only discovered when a correctional officer expressed his worry about his ongoing segregation to Ontario's chief human-rights commissioner, Renu Mandhane. In the wake of Ms. Mandhane's public disclosure, Howard Sapers was hired to review Ontario's segregation practices. The former federal prisoner ombudsman compiled comprehensive new prison legislation, which included a 15-day cap on segregation. That bill was passed by the former provincial Liberal government, but the Progressive Conservative government has yet to take the final step of implementing the new law.

[21] *R. v. Ugbaja*, 2019 ONSC 96 (Ont. S.C.J.).

[22] The *Ugbaja* decision cites *R c. Piccirilli*, 2014 SCC 16, *(*sub nom. *R. v. Babos)* 8 C.R. (7th) 1 (S.C.C.) at para. 32, discussing the rare occasions when a stay of proceedings will be granted, which fall under two categories. The *Capay* case is the first: where state conduct compromises a fair trial. The second residual category is where state conduct creates no threat to trial fairness, but risks undermining the integrity of the judicial process. For a stay application in the residual category, the first stage of the test is to ask "whether the state has engaged in conduct that is offensive to social notions of fair play and decency" and "whether proceeding with a trial in the face of that conduct would be harmful to the integrity of the justice system." At the second stage, the court balances a number of factors, including the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society.

[23] *Ugbaja* at para. 64.

[24] *Ugbaja* at para. 67.

concluding that the balance of factors justifies a stay of proceedings, the court said that Mr. Ugbaja's confinement was "lengthy, without justification and carried out with total disregard for the principles of fundamental justice."[25] The judge opined that "society's understanding of the harm associated with administrative segregation has increased significantly over the last few years,"[26] together with a recognition of the need for sufficient procedural protections beyond those provided for in existing laws.

Enhanced Credit for Remand Time

Just as *Capay* and *Ugbaja* show how solitary has impaired the ability of the criminal justice system to determine guilt and innocence, a large body of sentencing cases show how solitary is affecting the sentencing context. In *R v. Blanchard*, an Edmonton trial court denied a stay of proceedings, though it accepted that multiple *Charter* breaches occurred during Mr. Blanchard's placement in administrative segregation at Edmonton Remand Centre ("ERC").[27] Mr. Blanchard was locked in a 90-foot cell for 23 hours a day. He faced severely limited physical recreational opportunities and mental stimulation, inadequate food and lack of appropriate utensils, difficulty in obtaining new eyeglasses, difficulty in obtaining new hearing aids, denial of medication on one occasion, and verbal abuse by correctional officers.[28] Justice Macklin was particularly critical of the lack of physical exercise, fresh air, and mental stimulation afforded to segregated inmates, noting an initial plan to install television sets in each cell and the subsequent reversal of that decision.[29]

The judge expressed confusion at the jail's treatment of Mr. Blanchard, noting that better treatment would "do nothing but assist in both creating

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[25] *Ugbaja* at para. 68.

[26] *Ugbaja* at para. 68.

[27] *R v. Blanchard*, 2017 ABQB 369 (Alta. Q.B.).

[28] *Blanchard* at para. 223. In addition, Mr. Blanchard's criminal record was given to other inmates by staff, and abuse from other inmates that was encouraged or condoned by officers. ERC also failed to take steps to investigate serious allegations made against officers.

[29] *Blanchard* at para. 230.

a more humane environment and possibly reducing conflict."[30] While accepting that ss. 7 and 12 *Charter* rights were breached, the court pointed to the possibility of dealing with what it called "egregious" state conduct through a sentence reduction.[31]

In *R v. Prystay*, similarly, a stay application was dismissed but the use of solitary confinement at ERC led to a sentence reduction as a remedy for a breach of s. 12.[32] In March 2017, while held in remand, Prystay assaulted another inmate. He was placed in administrative segregation for 13.5 months, which constituted cruel and unusual punishment for the following reasons: excessive length, adverse effects on physical and psychological health, lack of procedural fairness and indefinite placement not imposed in accordance with ascertainable standards. As of April 2017, correctional officers recommended that Prystay return to general population, but this "carried no weight" with ERC senior management.[33] He was, eventually, gradually reintegrated. Justice Pentelechuk noted that the gradual process made sense, but that it could have been done months earlier.[34]

Like *Blanchard* the *Prystay* case unfolded at ERC. The staff testified that certain improvements had been made in consideration of Macklin J.'s comments in *Blanchard* — a stationary bike installed, access to reading materials improved.[35] Pentelechuk J. commended these changes, but said they are "insufficient to ameliorate the deleterious effects from extended time in administrative segregation."[36] The officials who testified conceded that more can and should be done. Pentelechuk J. observed that the lack of meaningful human contact seemed to be the "most pernicious consequence of placement in segregation", with effects that make it more challenging "to relate to others in an acceptable way."[37]

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[30] *Blanchard* at para. 230.

[31] *Blanchard* at para. 232.

[32] *R v. Prystay*, 2019 ABQB 8 (Alta. Q.B.).

[33] *Prystay* at para. 61.

[34] *Prystay* at para. 61.

[35] *Prystay* at para. 37.

[36] *Prystay* at para. 38.

[37] *Prystay* at para. 39.

Like so many other cases about administrative segregation, *Prystay* describes inadequate internal reviews. The decision to segregate was made because of the Director's view that Mr. Prystay was "downplaying, deflecting and minimizing" his actions.[38] Pentelechuk J. found this to be "curious evidence" given that Mr. Prystay admitted responsibility for the March 2017 assault.[39] The internal reviews Mr. Prystay received were "cursory" and "meaningless,"[40] and often led to "boilerplate reply."[41] No psychological assessment of Mr. Prystay was ever completed.[42] He was never given an end date as to when, if his good behaviour continued, he would be transitioned back to general population, or what steps he needed to take to facilitate this.[43]

While the evidence was "shocking and deeply disturbing," Pentelechuk J. noted that Mr. Prystay had committed serious offences and had a serious criminal record. Unlike *Capay* he did not argue that the *Charter* breaches threatened trial fairness, meaning that a sentence reduction could be an appropriate remedy.[44] Pentelechuk J. awarded a very high rate of 3.75 for days served in administrative segregation. She settled on a net sentence of 77 days remaining to be served, so as to facilitate Mr. Prystay's desire to have time before release to arrange to attend a residential treatment program.

Class Action Charter Damages Award

It is no surprise that solitary confinement has also been the subject of tort litigation, with considerable success. In *Brazeau v. Attorney General (Canada)*, on application for summary judgment, Perell J. ordered the government to pay $20 million in *Charter* damages to a class of mentally ill prisoners placed in administrative segregation.[45] In a complex judg-

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[38] *Prystay* at para. 99.

[39] *Prystay* at para. 100.

[40] *Prystay* at paras. 107 and 109.

[41] *Prystay* at para. 117.

[42] *Prystay* at para. 126.

[43] *Prystay* at para. 119.

[44] *Prystay* at para. 162.

[45] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 (Ont. S.C.J.).

ment based on 31,000 pages of evidence,[46] the court accepted that administrative segregation as practiced by CSC is a form of solitary confinement, that it is harmful and may cause psychiatric injuries, and that the harms of administrative segregation are amplified for people who suffer from mental illness.[47]

Perell J. concluded that 2,000 class members, comprised of mentally ill inmates placed in administrative segregation, suffered a s. 7 breach because of deficiencies in the review procedures provided for in the federal legislation: because they could not access independent review of the warden's decision.[48] The breach occurred from November 1, 1992 — when the administrative segregation regime was enacted — to the present. In sum, once again, straightforward administration of the legislative regime itself was sufficient to give rise to a substantial damages award.

Two subclasses of claimants, containing fewer numbers of people, were entitled to additional relief. Perell J. concluded that it was contrary to the principles of fundamental justice under s. 7 for inmates to be involuntarily placed in segregation for more than 30 days. In other words, for involuntary placements, the judge accepted that it could take up to 30 days to resolve the security problem that gave rise to the placement. More than 30 days, however, generated a *Charter* breach.[49] For inmates voluntarily placed in segregation, a breach occurred after 60 days.[50] Finally, Perell J. held that s. 12 was breached when placement in segregation, whether involuntary or voluntary, exceeds 60 days.[51] The issue of time limits was also one of the central claims in the BC and Ontario constitutional challenges, and will be a key topic before the Supreme Court of Canada in appeals to come.

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[46] *Brazeau* at para. 159.

[47] *Brazeau* at para. 156.

[48] *Brazeau* at para. 156.

[49] *Brazeau* at para. 317.

[50] *Brazeau* at para. 17.

[51] *Brazeau* at para. 372.

Part 2. The Federal Provisions Fall: the BC and Ontario *Charter* Litigation

At one time, the legal community may have thought solitary confinement was *Charter* compliant because, in a 1987 decision, the Supreme Court of Canada upheld the Ontario Court of Appeal's finding that "segregation to a prison within a prison is not *per se* cruel and unusual treatment."[52] Notorious serial killer Clifford Olson brought the case *pro se* and filed no expert evidence. The court concluded that Olson was "continually observed," his health "protected," and there did not appear to be any "adequate alternative" given that he was despised in the prison community.[53] It is clear that *Olson* falls far short of constitutionalizing inmate isolation in general. In fact, the *Olson* court accepted that segregation could become so excessive that it would outrage standards of decency, in violation of s. 12.

The first comprehensive *Charter*-based challenge to federal segregation laws was filed by the BC Civil Liberties Association (BCCLA) in March 2011.[54] The plaintiff in that case, an Indigenous woman named Bobby Lee Worm, was held in solitary for four years under a notorious regime of segregation that applied only to women, called the "Management Protocol." CSC ignored years of critique from both the judiciary and the Correctional Investigator, but it reacted immediately to the court filing, promising in the press to revise the policy.[55] In May 2011, not 60 days after pleadings were filed, the prison service announced that it had cancelled the Protocol. CSC offered a settlement to Ms. Worm, ending the litigation.

The Worm case was a success, but it did not touch the legislation that enabled the Protocol and solitary generally. In pursuit of lasting systemic change, the BCCLA joined forces with the John Howard Society of Canada to file public interest litigation in BC Supreme Court. In 2018, they

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[52] *R v. Olson* (1987), 62 O.R. (2d) 321 (Ont. C.A.) at para. 40.

[53] *Olson* at para. 35.

[54] For details of this case, see Lisa Kerr, "The Origins of Unlawful Prison Policies" (2015) Canadian Journal of Human Rights, Vol. 4, No. 1, 91–119.

[55] See e.g. Robert Matas, "Ottawa to Alter Solitary Confinement Protocol for Women" The Globe and Mail (March 15, 2011), online: <www.theglobeandmail.com/news/british-columbia/ottawa-to-alter-solitary-confinement-protocol-for-women/article571833/>.

secured a declaration from the BC Supreme Court that the administrative segregation provisions are constitutionally invalid, in violation of multiple constitutional rights.

A second *Charter*-based challenge was subsequently filed in Ontario by the Canadian Civil Liberties Association. The Ontario court agreed that the federal legislation was unconstitutional, though on more narrow grounds than the BC court, and in the face of a more narrow evidentiary record. The BC and Ontario Courts of Appeal have now agreed with the ultimate results in the trial courts, though with important differences in reasoning. Tracing the similarities and differences between these cases helps to disclose what will be at issue at the Supreme Court of Canada and, ultimately, the viability of the new regime for inmate separation under Bill C-83.

The Trial Decisions[56]

There are a number of important similarities between the BC and Ontario trial decisions. Both courts reject the longstanding position from CSC that our prison system does not even use solitary. Both courts find, in the face of a large body of expert evidence, that solitary can have severe effects on mental health, which was contested to a degree by Canada's experts. Both courts declare that the current rules governing the use of solitary violate s. 7.

In BC, the factual findings at the heart of Justice Leask's opinion relate to the harms of solitary. He concludes that administrative segregation as enacted by s. 31 of the *CCRA* "is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide."[57] He notes that "the risks of these harms are intensified in the case of mentally ill inmates," though "all inmates subject to segregation are subject to the risk of harm to some

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[56] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, 43 C.R. (7th) 1 (B.C. S.C.) [*BCCLA*, Trial Judgment]; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, 43 C.R. (7th) 153 (Ont. S.C.J.) [*CCLA*, Trial Judgment].

[57] *BCCLA*, Trial Judgment at para. 274.

degree."[58] Negative health effects can occur after only a few days in segregation, increasing as the segregation continues.[59] As a result, the regime violate s. 7 and is arbitrary: the "prolonged segregation" that the provisions authorize "undermines the very security and safety the provisions are meant to promote."[60] The most significant conclusion he reaches, upheld on appeal, is that the provisions violate s. 7 because they authorize and effect prolonged, indefinite segregation, and because they are procedurally unfair due to an inadequate review process.

In Ontario, Justice Marrocco echoes Justice Leask's concerns with the absence of fair reviews. His central concern is that the provisions allow prison wardens to review their own decisions to segregate. Marrocco J. calls this futile review "an anomaly even within the context of penitentiary decision-making."[61] Justice Marrocco declares that the laws violate s. 7 due to an inadequate review process.

The differences between the BC and Ontario trial decisions are far more numerous and substantial than the similarities. To begin with the procedural issues, both judges discuss the need for greater oversight at length, but only the Ontario court concludes that it would be acceptable for additional review to be done from within CSC. Marrocco J. opines that CSC can do the extra review, but that part of the decision spans just nine paragraphs.[62] In the only paragraph that aims to justify this part of the decision, the court cites the interests of inmates and their need for expediency in declining to order independent review.[63] Presumably, the applicants in *CCLA* did not make that argument to the court, and yet the court's reasoning is framed as if less procedural fairness will serve them best.

In contrast, the BC court spends 54 paragraphs, or 14 pages, discussing the history of calls for independent oversight of solitary and explaining

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[58] *BCCLA*, Trial Judgment at para. 274.

[59] *BCCLA*, Trial Judgment at para. 250.

[60] *BCCLA*, Trial Judgment at para. 328.

[61] *CCLA*, Trial Judgment at para. 150.

[62] *CCLA*, Trial Judgment at paras. 168–176.

[63] *CCLA*, Trial Judgment at para. 173: "The only realistic way to conduct a timely review of the decision to segregate is if the review is an administrative review provided by the Correctional Service of Canada."

why the prison culture needs a truly independent, external check.[64] There is a simple explanation for the BC difference. Michael Jackson, who has written extensively about the need for an independent check in prison decision-making, filed an extensive report and testified in the BC case.[65] Jackson did not give evidence in Ontario.

On the topic of access to counsel, the BC court finds that the *Charter* requires inmates to be able to have counsel appear at segregation reviews. That issue wasn't part of the Ontario claim, but it's worth noting that, the Ontario court seems to think inmates already have the right to have counsel present.[66] The court refers to s. 33(2) of the Act, but that provision says only that the *inmate* has the right to attend the hearing. There is no provision for counsel to attend reviews.

Turning away from process to the issue of substantive limits on segregation, the BC court holds that the *Charter* requires time limits. Justice Leask does not find that the constitution requires a particular time limit, though he notes that the 15-day maximum prescribed by the Mandela Rules is a "defensible standard."[67] He concludes that a time limit on segregation would "create the pressure" to ensure that segregation decisions were "made and implemented promptly", while still allowing CSC to use the practice for short periods to address security concerns.[68] He outlines a number of alternatives that would enable a cap on segregation placements.[69]

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64 *BCCLA*, Trial Judgment at paras. 356–410.

65 For a sample of his work on this subject, see e.g. Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48:2 Can J Criminology & Criminal Justice 157.

66 *CCLA*, Trial Judgment at para. 117,

67 *BCCLA*, Trial Judgment at para. 250. In reviewing Justice Leask's decision on this issue, the BC Court of Appeal confirms that the order does not mandate, in all circumstances, adherence to a hard cap of 15 days. The question of whether alternative limits would be acceptable is something that the Court of Appeal says should be determined "in the context of a reformulated legislative regime in which the issue squarely arises." (*British Columbia Civil Liberties Association v. Canada (Attorney General)* (2019), 2019 BCCA 228 (B.C. C.A.) at para. 151).

68 *BCCLA*, Trial Judgment at para. 566.

69 *BCCLA*, Trial Judgment at paras. 571–591.

In much of the Ontario decision, Marrocco J. agrees that the evidence shows that "keeping a person in administrative segregation for an indefinite prolonged period exposes that person to abnormal psychological stress" that could "result in permanent psychological harm."[70] The Ontario court accepts evidence — much of it offered from prison employees — suggesting that a cap on the maximum amount of time an inmate can be placed in solitary is achievable.[71] The Ontario court also notes that Canada has been censured by the International Committee Against Torture for its used of prolonged solitary, even on persons with mental illness.[72] Notwithstanding these and related findings, the court declines to find the legislation invalid on the grounds that it lacks time limits or because of how mentally ill people are treated and how they experience segregation.

The limited scope of the Ontario declaratory relief flows from Marrocco J.'s view that the problems do not flow from the legislation itself but from maladministration of the legislation. He finds that it was possible for solitary to be administered in a rights-respecting fashion — for short periods of time, with protections for the mentally ill, and so on. He points to the *Little Sisters* decision to say that simply because a legislative scheme is open to maladministration, that is not a basis for striking it down.[73] Because of this frame and this application of *Little Sisters*, the Ontario court is looking only at the face of the legislation and asking whether it *could* be administered in a constitutional way.

In Ontario, Marrocco J. accepts that harms accrue as segregation continues, that initial screening mechanisms are faulty, and that screening does not prevent the segregation of mentally ill inmates.[74] But he points to the fact that the legislation already directs CSC to consider the health care needs of inmates in all decisions.[75] In BC, Justice Leask is also cogni-

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[70] *CCLA*, Trial Judgment at para. 252.

[71] *CCLA*, Trial Judgment at para. 268.

[72] *CCLA*, Trial Judgment at para. 268.

[73] *CCLA*, Trial Judgment at paras. 23–27, citing *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, 38 C.R. (5th) 209 (S.C.C.) at para. 71.

[74] *CCLA*, Trial Judgment at para. 259.

[75] Section 87(a) of the CCRA says that the Service "shall take into consideration an offender's state of health and health care needs (a) in all decisions affect-

zant of the various mechanisms that are meant to protect people in segregation, but he points to evidence that these approaches are not sufficient. As one example, 14 of the inmates who died by suicide in segregation between 2011 and 2014 had completed the Suicide Risk Checklist and had been seen by a health care professional.[76] Inmate Christopher Roy, whose father Robert testified for the plaintiffs, completed the Checklist, answering "no" to each of the questions posed. He hanged himself in his cell two months later while still in administrative segregation.

The Ontario court finds, further, that a daily visit by a nurse is "sufficient to negate the potential cruelty of indefinite segregation."[77] The BC court says this about the daily visits: "As I understood the evidence of witnesses describing the behaviour of wardens, correctional staff, psychologists and nurses, most individuals that interact with inmates in administrative segregation simply stand erect outside the inmates' cells, speak to the inmates without making eye contact and rely on their voices being heard through the food slot. I consider this behaviour to be demeaning and inhumane."[78] Where the Ontario court sees a layer of protection, the BC court sees more dehumanizing treatment.

Another striking difference between the two cases is with respect to Indigenous inmates. The BC court spends a great deal of time discussing how solitary violates s. 15 because of its disproportionate impact on Indigenous people. The BC court focused specifically on the experience of Indigenous women, thanks in large part to the intervention by LEAF at the trial level.[79] The BC court heard evidence that Indigenous women made up 50% of segregation placements in women's prisons, and they tended to suffer more distress there due to their health and personal histories. The Ontario trial decision, in contrast, does not mention Indigenous people. The case simply wasn't brought that way and that evidence was not put before the court.

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ing the offender," which includes administrative segregation. See the discussion at *CCLA*, Trial Judgment, paras. 213–229.

[76] *BCCLA*, Trial Judgment at para. 93.

[77] *CCLA*, Trial Judgment at para. 233.

[78] *BCCLA*, Trial Judgment at para. 139.

[79] For discussion of this evidence, see *BCCLA*, Trial Judgment at paras. 464–490.

A final point is about the lack of inmate voices in the Ontario case. It appears from the judgment that three inmate affidavits were filed. Remarkably, the only reference to that material is not to their experiences of isolation under these laws. Rather, the court extracts only the criminal records of the three affiants, and the evidence is cited only to prove the point that prisons are full of very difficult people.[80] Section 12 jurisprudence calls for analysis of the lived reality of penal treatment, in order to analyze the question of grossly disproportionate punishment.[81] Rather than citing inmate experiences, Marrocco J. constructs a hypothetical scenario in which segregation could be justified in order to dismiss the s. 12 claim.[82]

In contrast, inmate evidence appears throughout the BC decision, and is used not only to describe qualitative experience, but also to resolve legal issues. As one example, inmate evidence is cited to show how an inmate named Blair experienced 79 days of segregation in the absence of any legitimate reason, and how the Warden who reviewed the decision to segregate — Mr. Pyke — employed circular and arbitrary reasoning in opting to continue the segregation.[83] Mr. Pyke testified at the trial and was *still*, at trial, justifying his decision to segregate Blair. Justice Leask used this account as a basis for departing from the Ontario conclusion that CSC can fairly review its own decisions to segregate.

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[80] *CCLA*, Trial Judgment at para. 192.

[81] See e.g. *Bacon v. Surrey Pretrial Services Centre*, 2012 BCSC 1453 (B.C. S.C.), Justice McEwan explains that s. 12 requires the range of deprivations must be analyzed in their totality: there the applicant had experienced "unmitigated segregation" combined with "*additional deprivations* known to cause psychological harm" (para. 316). Crucially, the evidence should be assessed from the perspective of the incarcerated person: "it is not a question of catering to trivial complaints, but of recognizing the psychologically corrosive effect that having no autonomy over even the smallest things can have on a person" *Bacon*, at para. 315. He reminds us, further, that the question of whether prison conditions constitute a breach of s. 12 is not to be equated with "standards derived from opinion polls" or standards that reflect the "odium attached to particular individuals." (para. 301) The criminal record of an inmate is not relevant to the question of whether they have experienced punishment that infringes s. 12.

[82] See Marrocco J.'s approach at para. 265; Benotto J.A. explains that this approach was in error at paras. 87–89.

[83] *BCCLA*, Trial Judgment at paras. 399–410.

Like Marrocco J., however, Leask J. dismisses the s. 12 complaint, reasoning that the absence of a personal plaintiff precludes a sufficient factual record to determine whether the "conditions, duration and reasons for segregation" of a particular inmate violate s. 12.[84] It is an odd feature of these trial decisions regarding the acceptability of solitary confinement that the prohibition on "cruel and unusual punishment" has so little bearing on the outcome.

The Appeal Decisions[85]

Both the BC and Ontario Courts of Appeal upheld the lower court decisions that the federal provisions infringe the *Charter*, but with reasons for judgment that depart in significant ways from one another and from the approaches taken at trial.

The BC Appeal: Section 7 and the Maladministration Argument

In BC, the government's strategy was to concede that the impugned provisions had been applied by CSC in an unconstitutional manner, but to maintain that they were constitutionally valid. And, since there was no individual litigant seeking a remedy under s. 24(1), the government argued that declaratory relief under s. 52(1) was unavailable. As discussed above, this argument was partially successful in the Ontario trial court.

Fitch J.A. for the BC Court of Appeal rejected that position on the two lead issues, holding that the trial judge did not err in finding that the impugned provisions infringe s. 7 because they authorize indefinite and prolonged administrative segregation in conditions that constitute solitary confinement, and because they authorize internal rather than external review of decisions to segregate. Fitch J.A. agreed, however, that maladministration was the problem on other issues: access to counsel at segregation review hearings, and discrimination in respect of mentally ill or disabled inmates. On those issues, Fitch J.A. reasoned, the problem was

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[84] *BCCLA*, Trial Judgment at para. 527, citing *R v. Marriott*, 2014 NSCA 28 (N.S. C.A.) at para. 38.

[85] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228 (B.C. C.A.) [*BCCLA*, Appeal Judgment]; *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243 (Ont. C.A.) [*CCLA*, Appeal Judgment].

not with the legislation itself. For that reason, he set aside the aspects of the order below declaring the legislation invalid on those grounds.

But the story does not end there. In novel reasoning that is sure to attract attention at the Supreme Court, Fitch J.A. turned to the concept of inherent jurisdiction to grant declaratory relief possessed by superior courts, noting that this path provides an "important residual remedy" where relief under s. 24(1) is unavailable.[86] He then declared that CSC has, in its administration of the impugned provisions, breached multiple legislative obligations to consider the health care needs of inmates and ensure access to counsel in respect of administrative segregation.[87]

Fitch J.A. declined to uphold the trial judge or grant any new declaration on the issue of discrimination against Indigenous inmates. Notably, he observed that the Attorney General conceded that CSC has discriminated against Indigenous inmates on this topic. Still, Fitch J.A. found that he was "unable to discern the precise basis upon which either the trial judge's findings or the Attorney General's concession rests."[88] He declined any declaration under this heading on the basis that it would "necessarily be vague," and would "fail to identify the offending practice with sufficient particularity to permit the implementation of remedial measures."[89]

Ontario Appeal: Section 12 and a 15-Day Limit

In Ontario, the government did not challenge the s. 7 analysis on appeal, but the CCLA raised a new argument on s. 12 that was accepted. Justice Benotto, writing for the court, concludes that the solitary provisions violate s. 12 because the regime exposes inmates to a risk of "severe and often enduring negative health consequences".[90] Justice Benotto points to the powerful findings of Marrocco J. on these issues, which show that the problem with solitary is that it causes foreseeable and expected harm when it extends beyond 15 days.[91] Justice Benotto was convinced that

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[86] *BCCLA*, Appeal Judgment at paras. 255–272.

[87] *BCCLA*, Appeal Judgment at paras. 269-270.

[88] *BCCLA*, Appeal Judgment at para. 272.

[89] *BCCLA*, Appeal Judgment at para. 272.

[90] *CCLA*, Appeal Judgment at para. 97.

[91] *CCLA*, Appeal Judgment at para. 73.

solitary infringes s. 12 because of its negative effects on health, which has been a powerful line of concern about solitary confinement for many years.[92]

Compare Justice Benotto's approach to the BC trial court decision not to grant relief pursuant to s. 12. In both cases, the government argued that s. 12 requires an individual analysis, which was not possible given that the case was brought as public interest litigation.[93] Recall that Justice Leask accepts this position, stating that the absence of a personal plaintiff precluded a sufficient factual record for purposes of s. 12. Justice Benotto disagrees, noting that while many cases are brought by individuals and thus turn on detailed evidence of the treatment they endured, that does not preclude the application of s. 12 to other contexts.[94]

Part 3. Reflections on Bill C-83

In one respect, Bill C-83 is a clear indication of progress: it announces an official aim to end segregation, thus signalling the government's wish to be seen as abolishing this practice.[95] Consider that, not long ago, CSC

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[92] This line of concern is particularly prevalent when it comes to isolating mentally ill inmates. David Fathi, director of the ACLU National Prison Project, says that a rule against placing the seriously mentally ill in solitary is no longer in dispute under American law: every federal court to consider the question has held that supermax-style confinement of the seriously mentally ill is unconstitutional. David C. Fathi, "The Common Law of Supermax Litigation" (2004) 24:2 Pace L. Rev. 675 at 681–84. Another argument on s. 12 might also emphasize that indefinite solitary in the absence of procedural fairness is what gives rise to an experience of isolation that violates s. 12.

[93] See the *BCCLA*, Trial Judgment at paras. 524–534,

[94] *CCLA*, Appeal Judgment at paras. 94-95.

[95] The legislative summary of the bill makes clear that its purpose is to "eliminate the use of administrative segregation and disciplinary segregation." Public Safety Minister Ralph Goodale has been clear in the press that the aim of the bill is to end solitary confinement. See e.g. Patrick White, "Liberals unveil bill to end solitary confinement in federal prisons" *Globe and Mail*, October 16, 2018, online: <https://www.theglobeandmail.com/canada/article-liberals-introduce-bill-to-end-solitary-confinement-in-federal-prisons/>.

denied that it even relies on solitary.[96] And the practice has been forcefully defended for years under Liberal and Conservative governments alike, including in the current government's litigation strategy in the very cases that gave rise to Bill C-83. The political discourse surrounding Bill C-83 confirms the newly dismal optics of unlimited solitary confinement, now widely understood as a form of torture. Today, the facts are broadly accepted: segregation is solitary, and solitary is a practice that is beyond the pale for a modern state. The process of litigation itself has likely helped to elevate debate and increase understanding on these issues, including for corrections officials who participated in and observed the court processes.

The animating idea of Bill C-83 is to ameliorate the extreme isolation that has defined solitary confinement and been at the root of the harm caused by it. The legislation replaces the impugned provisions that authorize administrative segregation, but it still allows CSC to separate inmates by placing them in "structured intervention units" (SIUs). Section 36(1) specifies that inmates placed in SIU must be offered a minimum of four hours outside of their cells between 7:00am and 10:00pm. Two of those hours must involve "an opportunity to interact" through "activities" including "programs, interventions and services" that encourage the inmate to "make progress towards the objectives of their correctional plan or that support the inmate's reintegration into the mainstream inmate population."

Along with a right to minimum time outside of cells, the new regime brings a system of "independent external decision-makers" (IEDMs) to review SIU decision-making. Independent review did not appear in early drafts of the bill — the government likely took a cue from Justice Marrocco's conclusion that CSC could conduct additional reviews internally. Thanks to a robust legislative process that secured important amendments, the final version of Bill C-83 includes the independent review that Justice Leask was careful to identify as constitutionally required.

According to rules set out at ss. 37.6(1) to 37.91(1), the IEDMs are to be appointed by the Minister of Public Safety. They must have "knowledge

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[96] See e.g. "Response to the Coroner's Inquest Touching the Death of Ashley Smith" (Ottawa: CSC, December 2014) at 3.2, maintaining that "the term solitary confinement is not accurate or applicable within the Canadian federal correctional system."

of administrative decision-making processes" and cannot have been a staff member of CSC in the previous five years. CSC is required to furnish all relevant information about an inmate's case to the IEDM, who can only order that an inmate remain in SIU if statutory criteria are met. Health staff are able to make recommendations regarding SIU placements, and can trigger an IEDM review if their recommendations are not followed.

Important details about the IEDM reviews are yet to be established in regulations, but it is already apparent that the new reviews will not be a panacea for the harms of isolation. IEDMs are not required to meet the prisoner, there is no right to counsel, and many had hoped for tighter timelines: the IEDM review is scheduled to occur at the 60-day mark, following various internal reviews. An earlier IEDM review may occur if an inmate has not, for any reason, spent the minimum time out-of-cell for 5 days in a row. At that review, the IEDM has the power to "make any recommendation" that she considers "appropriate to remedy the situation," including removal from the SIU.

Others had hoped powers of review would be lodged within the judiciary. A leading prisoner advocate for many years, Senator Kim Pate pressed hard for a broad range of amendments, including a system of judicial oversight of all SIU placements within 48 hours. Critics of this proposal emphasized that the median stay in segregation is 11 days, meaning that courts could be burdened with thousands of 48-hour reviews. Several worried about the impact on Superior Courts. Different concerns emerged from the prison law community, as some worried that inmates would have difficulty accessing counsel and evidence in the space of two days, making the scheme a recipe for adjournments and judicial deference to corrections. Bill C-83 may have been a missed opportunity to implement a degree of judicial oversight on a more reasonable timeline. Ultimately, the success of the IEDM system will depend on the independence and skill of those appointed to these positions.

Some critics maintain that Bill C-83 is constitutionally infirm because it does not contain the time limits that Justice Leask called for, nor the specific 15-day limit that Justice Benotto mandated. The government's reply is largely to the effect that those limits were for the practice of solitary confinement, which it has ended by mandating out-of-cell time. In other words, more robust reforms are not required since conditions of confinement no longer amount to solitary. This is a complex position that

makes definitive statements on the constitutionality of the bill difficult to make.

The most significant concern about Bill C-83 may be the ambiguity that inheres in provisions meant to address the impact of isolation on inmates with mental illness. This is the core issue that has motivated so much reform work on solitary. Courts have agreed with experts that the most vulnerable group of prisoners in solitary are those with mental illness, and the *BCCLA* and *Brazeau* decisions found *Charter* violations under this heading. Allan Manson emphasized this point in his submission to the Senate before Bill C-83 was passed. Manson pointed out that the criteria for placement and continuation in the SIU make no specific reference to mental illness. The provisions require a daily visit from a "registered health care professional," and the final version of the bill does mandate a mental health assessment within 24 hours of placement in a SIU. Manson was emphatic that the only *Charter*-compliant legislative response is to prohibit the use of any form of solitary confinement for prisoners with a history of mental illness or who are exhibiting symptoms associated with mental illness.

If appeals of the *BCCLA* and *CCLA* decisions are heard at the Supreme Court in the coming year, the court will only review the decisions striking down the previous regime. But the details of any ruling may disclose whether Bill C-83 will pass constitutional muster. With this in mind, it is crucial, in my view, to press to the court that s. 12 of the *Charter* should be brought to bear on this method of state treatment. Section 7 has been a powerful tool for uncovering the lack of procedural fairness in the law, which Bill C-83 goes some distance to address. But the prohibition on "cruel and unusual" treatment in s. 12 is best positioned to reveal the wrong of isolating those with mental illness, which Bill C-83 may still allow. It is also best positioned to reveal the wrong of indefinite separation, permitted under Bill C-83. Recall that Justice Benotto is the only judge to land on a specific time limit, and she is the only judge to seriously engage in a s. 12 analysis.[97]

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[97] It may be that time limits for an SIU placement can be more forgiving than for administrative segregation, but the absence of any cap in Bill C-83 gives rise to a serious question about whether indefinite separation from even the constrained liberties of general population is an acceptable penal method. For more on the s. 12 argument, see Lisa Kerr and Benjamin L. Berger, "Methods and

Conclusion

The practice of separating inmates from one another can be a legitimate tool in the difficult job of managing prisons. Incarcerated people, deprived of ordinary forms of support and pleasure, can encounter and generate challenges as they try to navigate the complex demands of the prisoner society and relations with staff. Periods of separation from difficult and potentially dangerous dynamics may be called for in the name of humane and responsible management. Separation, does not, however, require or necessarily entail the destructive method of solitary confinement as it has been practiced — and legislatively condoned — in so many of our institutions of detention and punishment for so long. On this general point, Canadian judges now seem to agree. On the details of what the *Charter* requires for new legislation authorizing inmate separation, we have yet to see how the story will end. The risk that abuses will find a way to appear again is ever present in the prison context, not unique to Bill C-83. It is the end stage of solitary, but the question is what will arrive in its place.

Severity: the Two Tracks of Section 12" (forthcoming in the Supreme Court Law Review).