Solitary Confinement vs the Charter of Rights and Freedoms

Solitary confinement – a prisoner's isolation from other inmates and prison staff for 22 hours or more a day– can have major negative impacts on human health.[1] Its use can cause or exacerbate mental illnesses, increase the risk of prisoners committing suicide, and, according to the United Nations Special Rapporteur on Torture, it may constitute torture when used for periods longer than 15 consecutive days.[2]

What protections do prisoners in Canada have against this kind of confinement?

This article outlines how the current federal laws on administrative segregation – one form of solitary confinement used in Canada – may engage the rights of prisoners that are guaranteed by the *Canadian Charter of Rights and Freedoms*.[3]

Solitary confinement in Canada

In Canada, solitary confinement used within prisons is referred to as "segregation." A prisoner can be placed in segregation for general safety or security reasons (called "administrative segregation"), or as a punishment for their conduct while in prison (called "disciplinary segregation").[4] Unlike segregation used for disciplinary reasons, the use of administrative segregation does not require that a prisoner first receive a hearing before an independent adjudicative body, and there is no strict time limit on the isolation period.[5]

Administrative segregation continues to be widely used in Canada's federal prisons. In 2015, the average segregation period for prisoners in federal penitentiaries was 27 days, and 48 percent of inmates had experienced segregation at least once.[6]

Current use of administrative segregation in federal prisons

Administrative segregation is the practice of placing a prisoner in solitary confinement to ensure the safety of the prisoner, his or her fellow inmates, or the penitentiary, or to stop interference with an ongoing investigation.[7]

The *Corrections and Conditional Release Act* (*CCRA*) says that a prison's "institutional head" can use administrative segregation when he or she believes on "reasonable grounds" that it is necessary for an ongoing investigation or safety reason, and when there is "no reasonable alternative."[8] Section 31(2) of the *CCRA* states that a prisoner should be released from segregation "at the earliest appropriate time." Current federal corrections policy also says that prisoners can remain in solitary confinement for 23 hours each day.[9]

Critics point out that the *CCRA* places no strict time limits on how long a prisoner can remain in administrative segregation.[10] In addition, a prison's institutional head makes the decisions to use this form of segregation with minimal independent, external review or

oversight.[11]

Lawsuits that are proceeding to trial in both British Columbia and Ontario in 2017 claim that the provisions of the *CCRA* that govern administrative segregation, and the way that those provisions have been applied in federal prisons, violate the *Charter*.[12]

The devastating results

The use of administrative segregation in Canada's federal prisons has produced several tragic stories over the past decade.

In 2007, 19-year old Ashley Smith strangled herself to death while in segregation at a federal prison in Kitchener, Ontario. Smith, whose significant mental health issues and history of self-harm were well known, spent the last 11.5 months of her life in segregation status within federal prisons.[13]

Three years later, Edward Snowshoe, a 24-year old man of Aboriginal descent, killed himself after spending 162 days in administrative segregation in federal prisons.[14] In 2017, a 38-year old Metis inmate, Guy Langlois, hung himself in his prison cell after spending 118 days in segregation.[15]

While the use of administrative segregation has been reduced in recent years, as of June 19, 2017, 399 federal inmates were in segregation, and 94 of those inmates had been in solitary confinement for more than 60 days.[16]

***Charter* rights engaged**

The *Charter* guarantees prisoners, like all Canadians, the right to life, liberty, and security of the person (section 7), the right to be free from cruel and unusual punishment (section 12), and equality rights (section 15). Prisoners, therefore, are protected from solitary confinement laws and practices that violate these constitutionally protected rights.

A majority of the Supreme Court of Canada in the case of *Sauvé v Canada (Chief Electoral Officer)* found that while some rights may be justifiably limited for criminals, prisoners are not "temporary outcasts from our system of rights and democracy."[17] Inmates therefore continue to hold on to their rights and freedoms while in prison, including those rights guaranteed by sections 7, 12, and 15 of the *Charter*.

Section 7

Section 7 of the Charter guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Government laws and actions violate section 7 if they both deprive an individual of life, liberty, or security of the person *and* are not in accordance with the principles of fundamental justice.[18]

Administrative segregation engages the right to liberty because confining an individual to a cell for 23 hours a day physically constrains and restricts a prisoner's freedom in a way that

differs from inmates held in the general (unsegregated) prison population.[19] In the case of *Bacon v Surrey Pretrial Services Centre (Warden)*, the Supreme Court of British Columbia found that the placement of a prisoner awaiting trial into solitary confinement was one way that his liberty had been reduced.[20]

In some cases, administrative segregation will engage the right to security of the person because of the severe mental and physical suffering that can be caused by long-term isolation from meaningful human contact.[21]

The right to life may also be engaged by the use of lengthy terms of administrative segregation, given that prisoners are more likely to commit suicide in those circumstances.[22]

The British Columbia Civil Liberties Association (BCCLA) and the John Howard Society of Canada (JHSC) argue that current laws on administrative segregation also fail to comply with the principles of fundamental justice. These groups argue that the *CCRA* includes no definite time limits on administrative segregation and that its use in prisons has significant impacts on prisoners that outweigh the law's benefit and purpose (which together, indicate arbitrariness and gross disproportionality).[23] The minimal level of oversight and independent decision-making for the imposing of, and release from segregation, is flagged for potentially failing to meet the requirement for procedural fairness when life, liberty, or security interests are engaged.[24]

Section 12

Section 12 of the Charter guarantees the rights of federal inmates not to be subjected to cruel and unusual treatment or punishment. However, the bar is set high for what kind of treatment is considered "cruel and unusual."[25] To violate section 12, treatment must be "so excessive as to outrage the standards of decency" or "grossly disproportionate to what would have been appropriate."[26]

Despite the high bar for what constitutes "cruel and unusual" treatment, the current laws on administrative segregation and how those laws have been applied may engage the section 12 rights of prisoners. Critics, including the BCCLA and the JHSC, argue that this form of solitary confinement is excessive and that it violates basic decency and human dignity because of the harm it can have on the human mind and body.[27] Notably, the B.C. Supreme Court in *Bacon* found that a prisoner held in administrative segregation had been subjected to conditions that were "condemned by the international community" and amounted to cruel and unusual treatment.[28]

Section 15

Section 15 of the Charter guarantees equality before and under the law, and the right to the equal protection and equal benefit of the law without discrimination based on grounds including race, national or ethnic origin, and mental or physical disability.

Statistics show that Aboriginal people are more likely than non-Aboriginals to be placed in

administrative segregation.[29] Similarly, prisoners who have been identified as having mental health or "cognitive" issues are more likely to have spent time in segregation.[30] These prisoners who suffer from mental illnesses before being isolated from human contact also frequently experience some of the severest negative impacts to their health.[31]

It may be possible for some prisoners to prove that administrative segregation is imposed upon them differentially or impacts them more significantly than other prisoners because of their race or mental disability.[32] They may also be able to show that the differential treatment disadvantages them by perpetuating prejudice or stereotyping, which will amount to a violation of section 15 of the *Charter*.[33] This is one of the claims being made in the court challenge brought against the federal government in B.C.

Moving forward

The BCCLA and the JHSC have filed a lawsuit against the federal government in B.C., claiming that the *CCRA*'s provisions that govern administrative segregation, and how those provisions have been applied in federal prisons, violate the *Charter* rights of prisoners. In Ontario, the Canadian Civil Liberties Association and the Canadian Association of Elizabeth Fry Societies have also filed a lawsuit that challenges the laws on administrative segregation, and how those laws have been used.

In B.C., the trial proceedings for the constitutional challenge began on July 4, 2017, while the challenge brought in Ontario is scheduled to be heard on September 11, 2017.[34]

Meanwhile, the federal government has already proposed changes to the *CCRA* in Bill C-56: *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*.[35] One proposed change is that prisoners placed in administrative segregation will be released after 15 days of confinement, unless ordered otherwise by the institutional head. External review by an independent party will be triggered when a prisoner remains in segregation longer than 15 days, in which case the reviewing party will make a recommendation as to whether or not the confinement should continue.[36]

The court challenges will go ahead despite the proposed changes to the law, which critics claim do not go far enough to make the *CCRA* compliant with the *Charter*.[37] And so, the solitary saga continues…

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[1] *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UNODC, 77th sess, UN Doc A/RES/70/175 (2015), r 44.

[2] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNODC, 66th sess, UN Doc A/66/150 (2011) at para 76 ; Lisa Coleen Kerr, "The Chronic Failure to Control Prisoner Isolation in US and Canadian Law" (2015) 40:2 Queen's LJ 483 at paras 17-18 (QL).

[3] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK),

1982, c 11.

[4] Kerr, *supra* note 2 at paras 16, 31; Correctional Service Canada, "Profile of Offenders in Administrative Segregation: A Review of the Literature", by Shauna Bottos, 2008 No B-39 (September 2007), online: <www.csc-scc.gc.ca/research/b39-eng.shtml>.

[5] *Ibid; Corrections and Conditional Release Act*, SC 1992, c 20, s 44(1)(f) ; *Corrections and Conditional Release Regulations*, SOR/92-620, s 40(2).

[6] Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015*, by Howard Sapers (26 June 2015), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx#s1> [Correctional Investigator, *Annual Report*].

[7] *CCRA*, ss 31(1),(3).

[8] *Ibid,* s 31(3). The "institutional head" is the person who is normally in charge of the prison.

[9] Correctional Investigator, *Annual Report*, *supra* note 6; Kerr, *supra* note 2 at para 8.

[10] Kerr, *ibid* at paras 8, 16, 31.

[11] *Ibid*.

[12] *British Columbia Civil Liberties Association v Canada (AG)* (21 June 2017), Vancouver, BC SC 150415 at 8 (amended statement of claim) ; *Canadian Civil Liberties Association v Canada (AG)* (27 January 2015), Toronto, Ont Sup Ct 15-520661 at 9-10 (statement of claim) .

[13] Correctional Investigator of Canada, "A Preventable Death", by Howard Sapers (20 June 2008) at 3, 5-6, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20080620-eng.pdf>; The Canadian Press, National Post Staff & Postmedia News, "Ashley Smith death ruled a homicide by inquest jury", *National Post* (19 December 2013), online: <nationalpost.com/news/canada/ashley-smith-death-ruled-a-homicide-by-inquest-jury/wcm/9be701b4-8f24-49df-9b81-a57b6ad26b94>.

[14] The Honourable Judge James K Wheatley, *Report to the Attorney General:Public inquiry into the death of Edward Christopher Snowshoe* (Edmonton: Justice and Solicitor General, 2014), online: <open.alberta.ca/publications/fatality-inquiry-2014-july-8>.

[15] Alison Crawford & Philippe-Vincent Foisy, "Federal inmate dies by suicide after 118 days in solitary confinement", *CBC News* (23 May 2017), online: <www.cbc.ca/news/politics/suicide-solitary-confinement-csc-guy-langlois-1.4127975>.

[16] Correctional Service Canada, "Trends in Administrative Segregation 2014 to 2016", by Larry Motiuk& Mike Hayden, RIB 16-05 (June 2016), online:

<www.csc-scc.gc.ca/research/005008-rib-16-05-eng.shtml>; "Solitary confinement: How four people's stories have changed hearts, minds and laws on the issue" *The Globe and Mail* (21 June 2017), online: <www.theglobeandmail.com/news/national/solitary-confinement-canada-required-reading/article35391601/>.

[17] 2002 SCC 68 at paras 40, 47.

[18] Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 232.

[19] *BCCLA Statement of Claim, supra* note 12. See also Canada, Department of Justice, *Charter Statement - Bill C-56: An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, online: <www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c56.html> . Note that the Charter Statement for Bill C-56 examines the *Charter* rights of prisoners that may be engaged by an amended version of the provisions of the *CCRA* that relate to administrative segregation.

[20] 2010 BCSC 805 at paras 322-324 .

[21] See *BCCLA Statement of Claim, supra* note 12 at 8*; Bacon, ibid* at paras 305, 316-317, 324; *Interim report of the UN Special Rapporteur, supra* note 2 at para 76; Kerr, *supra* note 2 at para 17.

[22] *BCCLA Statement of Claim*, *supra* note 12; Correctional Investigator, *Annual Report*, *supra* note 6.

[23] *BCCLA Statement of Claim, ibid* at 8-9.

[24] *Ibid* at 9; Kerr, *supra* note 2 at para 29; *Howard v Stony Mountain Institution*, 19 DLR (4th) 502 at 517.

[25] Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629 at para 41 (QL).

[26] *R v Smith*, [1987] 1 SCR 1045 at 1072.

[27] *BCCLA Statement of Claim, supra* note 12 at 10; Kerr, *supra* note 2 at para 29; *CCLA Statement of Claim, supra* note 12.

[28] *Bacon, supra* note 20 at para 303.

[29] Correctional Investigator, *Annual Report*, *supra* note 6; Canada, Office of the Correctional Investigator, "Administrative Segregation in Federal Corrections: 10 Year Trends" (28 May 2015) at 2-3, 14-15, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20150528-eng.pdf> [Correctional Investigator, "10 Year Trends"].

[30] Correctional Investigator, *Annual Report*, *ibid;* Correctional Investigator, "10 Year Trends", *ibid* at 20-21.

[31] Correctional Investigator, *Annual Report*, *ibid*; *Interim report of the UN Special Rapporteur, supra* note 2 at para 68.

[32] *BCCLA Statement of Claim, supra* note 12 at 10; Kerr, *supra* note 2 at para 29.

[33] *BCCLA Statement of Claim*, *ibid*; *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 182; *R v Kapp,* 2008 SCC 41 at paras 17-18.

[34] British Columbia Civil Liberties Association, "Justice, not torture: challenging solitary confinement in Canadian prisons" (2017), online: <bccla.org/our-work/solitary-confinement/>; Canadian Civil Liberties Association, "Court Denies Canada's Attempt to Adjourn CCLA's Segregation Challenge" (6 July 2017), online: <ccla.org/court-denies-canadas-attempt-adjourn-cclas-segregation-challenge/>.

[35] 1st Sess, 42nd Parl, 2017, (first reading 19 June 2017); *Charter Statement*, *supra* note 19.

[36] *Ibid*.

[37] See Patrick White, "Ottawa attempts to stall solitary-confinement lawsuit", *The Globe and Mail* (21 June 2017, online: <www.theglobeandmail.com/news/national/ottawa-attempts-to-stall-solitary-confinement-lawsuit/article35416108/>; Sunny Dhillon, "Court rejects Ottawa's bid to adjourn B.C. solitary confinement lawsuit", *The Globe and Mail* (27 June 2017), online: <www.theglobeandmail.com/news/british-columbia/court-rejects-bid-to-adjourn-bc-solitary-confinement-lawsuit/article35477159/>; Canadian Civil Liberties Association, *supra* note 34.