Solitary, Segregation or a Structured Intervention Unit – An Unconstitutional Way to Do Time?

Introduction

The Government of Canada has stated they are ending the practice of segregating inmates and leaving them in cells alone for extended periods of time. While Canada does not use the term solitary confinement, the term is used internationally to describe the practice of confining a prisoner for more than 22 hours a day without meaningful human contact.[1] The Ontario Court of Appeal recently confirmed that Canada's segregation regime is in fact solitary confinement.[2] Additional challenges to the *Corrections and Conditional Release Act* ("the Act")[3], the legislation that governs segregation, have resulted in Canada's segregation regime being declared unconstitutional. Parliament has responded with new laws in Bill C-83, which they claim will eliminate segregation

Until the changes in Bill C-83 are fully implemented, Canada continues to use two forms of solitary confinement:

1. Disciplinary segregation – this form of segregation was intended as punishment for an inmate who was charged with, or found guilty of, serious disciplinary offences. There was a 30-day limit on keeping an inmate segregated under this regime.[4]

2. Administrative segregation – this form of segregation was used when an inmate posed a threat to the safety of the staff or other inmates. It was also used if an inmate's own safety was at risk. Importantly, there was no limit on how long an inmate could be placed in administrative segregation. The only guidelines were to return the inmate to the general prison population "at the earliest appropriate time".[5]

The portions of the Act that related to administrative segregation were the focus of court challenges in Ontario and British Columbia. With judges in both provinces ruling that the practice was unconstitutional, the federal government was forced to respond. This article will address the state of solitary confinement in Canada following the court cases and outline government legislation which attempts to develop a constitutional regime.

Segregation Challenges – How We Got Here

Ontario Challenges

The Canadian Civil Liberties Association ("CCLA") challenged the portions of the Act that regulated administrative segregation. CCLA argued that this form of segregation violated certain *Charter* protected rights. In the December 2017 decision, Justice Marrocco of the Ontario Superior Court agreed.[6] The Court found that the Act infringed on an inmate's

section 7 rights, the right to life, liberty, and security of the person. The main issue was that the decision to place and keep an inmate in segregation was made internally by prison administration, and was not subject to meaningful, timely review. The Court said this was unfair to the inmate. The Court suspended the ruling that portions of the Act were unconstitutional for one year. This was to allow the federal government the time necessary to amend the Act to comply with the *Charter*.

Despite a win at the Ontario Superior Court, the CCLA appealed the decision to the Ontario Court of Appeal. The group felt that prolonged solitary confinement amounted to cruel and unusual punishment, which was prohibited under section 12 of the *Charter*.[7] Prolonged solitary confinement is prohibited by the Mandela Rules, a set of rules adopted by the United Nations that govern the treatment of prisoners. Prolonged solitary confinement is confinement that lasts for 15 days or longer.[8] While the Court of Appeal acknowledged that these rules were not binding on Canada, Canada did have a role in drafting them. As the CCLA argued, this meant that the rules reflect the social view of Canadians regarding acceptable treatment of inmates.[9]

Ultimately, the Court of Appeal agreed with CCLA. The Court stated that the use of prolonged administrative segregation amounted to cruel and unusual punishment because it "causes foreseeable and expected harm which may be permanent, and which cannot be detected through monitoring until it has already occurred."[10] While the lower court gave the government one year to amend the Act, the Court of Appeal gave the government just 15 days before the portions of the Act at issue were rendered unconstitutional and therefore unenforceable.[11] The Court later gave the government two extensions, but ultimately refused to extend the declaration past June 18, 2019.[12]

British Columbia Challenges

The British Columbia Civil Liberties Association and the John Howard Society of Canada took a similar challenge to the British Columbia Supreme Court ("BCSC"). Just one month after the ONSC decision, the BCSC found the provisions allowing for administrative segregation to violate equality rights (section 15 of the Charter) and the right to life, liberty and security of the person (section 7). The BCSC also gave the government one year to amend the law before their ruling would render administrative segregation unconstitutional.

The federal Attorney General appealed this decision. The British Columbia Court of Appeal agreed with the lower court in part. They found that administrative segregation infringed on an inmate's right to life, liberty and security of the person as segregation puts the inmate at risk of self-harm and suicide. Further, segregation can cause serious psychological suffering. The fact that there was no limit on how long an inmate could be placed in administrative segregation made the provisions overbroad and a further infringement on the inmate's section 7 Charter rights.

The Court of Appeal also found that the use of an internal review board to determine whether an inmate should stay in segregation was procedurally unfair and a further infringement on the individual's section 7 rights.

Parliament's Response

Bill C-83

The federal government, despite appealing the BCSC decision, started amending the Act in 2018. They introduced Bill C-83 in October 2018. The Bill was presented as the government's move to eliminate solitary confinement all together. Some notable components of the Bill included:

- Abolishing administrative and disciplinary segregation in all federal institution

- The creation of "structured intervention units" for inmates who cannot be maintained safely in the general prison population. Inmates in these units will have four hours out of their cell and two hours of meaningful human contact each day.

- An external review committee to review each case of a prisoner in a structured intervention unit within one month of the inmate being placed there.

- Mental health support for inmates

- Increased support for Indigenous offenders[13]

The Bill passed on June 21, 2019. The federal government had to ask the Supreme Court of Canada for an extension on the Ontario Court of Appeal ruling to give them more time to implement the changes made as a result of Bill C-83. The Supreme Court has given the government until November 2019 to fully implement the changes to the segregation regime.[14]

Critiques of the Bill

Critics of the Bill argue that the government has made no real changes to segregation and instead just changed the name to "structured intervention units."[15] Despite the increase in time inmates are allowed out of their cells, many are concerned that 4 hours is still insufficient when it comes to the well-being of inmates in segregation.[16]

The largest concern is the fact that there is still no limit on how long an inmate can be placed in one of these units. This means inmates are still at risk of being placed in prolonged solitary confinement. The federal government has appealed the Ontario Court of Appeal decision that would impose a 15 day limit on keeping an inmate in segregation to the Supreme Court of Canada.[17] The government argued that the limit puts the safety and security of the rest of the prison in danger if an inmate must be released prematurely. The application stated, "there is currently no alternative recourse to address these situations placing the safety and security of all federal institutions, the inmates and the staff at high risk."[18] The Supreme Court of Canada has yet to state whether they will hear the appeal.

The Canadian Bar Association believes that the changes made are too vague and do not

really provide safeguards to address abuse of this new form of segregation.[19] Senator Kim Pate, a supporter of ending solitary confinement in any manner, was vocal throughout the Bill's legislative process. She stated that she would rather see the Bill killed than have any further amendments made as "fixing up C-83 is more work than 'it's worth."[20]

Conclusion

There is still a lot of work left to be done to implement the changes made in Bill C-83, but the government has until November 2019 to do so. With that being said, many are concerned that no real change will be made. Canada's new segregation system potentially comes with just as many constitutional issues as the old one.

The Supreme Court of Canada appeal could mean that the government is required to make additional changes to the new regime. A firm cap on how long an inmate can be placed in solitary confinement is one possibility. It may be some time before a meaningful new system of controlling troublesome inmates is in place.

[1] "Mandela Rules" (2019), online: Solitary Confinement < http://solitaryconfinement.org/mandela-rules> [Mandela Rules].

[2] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 25 .

[3] SC 1992, c 20

[4] 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*.

[6] *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491

[7] *Canadian Civil Liberties Association, supra* note 2 at para 3.

[8] Mandela Rules, *supra* note 1.

[9] *Canadian Civil Liberties Association, supra* note 2 at para 29.

[10] *Ibid* at para 5.

[11] *Ibid* at para 150.

[12] Patrick White, "Ottawa asks Supreme Court for solitary confinement extension as deadline looms", *The Globe & Mail* (12 June 2019), online: <https://www.theglobeandmail.com/canada/article-ottawa-asks-supreme-court-for-solitary-confinement-extension-as/>.

[13] Government of Canada, "Parliamentary Passage of Bill C-83: Transforming corrections to focus on rehabilitation and mental healthcare" (21 June 2019), online: <https://www.canada.ca/en/public-safety-canada/news/2019/06/parliamentary-passage-of-bill-c-83-transforming-corrections-to-focus-on-rehabilitation-and-mental-healthcare.html>.

[14] Justin Ling, "The long slog to fix solitary confinement in Canada", *The Canadian Bar Association*, online: < https://www.nationalmagazine.ca/en-ca/articles/law/in-depth/2019/the-long-slog-to-fix-solitary-confinement-in-canad>.

[15] *Ibid*.

[16] *Ibid*.

[17] Patrick White, "On solitary confinement, Ottawa seeks leave to appeal court ruling of 15-day limit", *The Globe & Mail* (10 April 2019), online: < https://www.theglobeandmail.com/canada/article-federal-government-appeals-caps-on-solitary-confinement-to-supreme/>.

[18] *Ibid*.

[19] Ling, *supra* note 13.

[20] *Ibid*.