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## Cracking Down on Cages: Feminist and Prison Abolitionist Considerations for Litigating Solitary Confinement in Canada

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***CRACKING DOWN ON CAGES***  
Feminist and Prison Abolitionist Considerations for Litigating  
Solitary Confinement in Canada

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**ABSTRACT**

Guided by prison abolition ethic and intersectional feminism, my key argument is that *Charter* section 15 is the ideal means of eradicating solitary confinement and its adverse impact on women who are Aboriginal, racialized, mentally ill, or immigration detainees. I utilize a provincial superior court's failing in exploring a discrimination analysis concerning Aboriginal women, to illustrate my key argument. However, because of the piecemeal fashion in which courts can effect developments in the law, the abolition of solitary confinement may very well occur through a series of 'little wins'. In Chapter 11, I provide a constitutional analysis, arguing that solitary confinement unduly violates Aboriginal women's *Charter* section 15 right against discrimination, and therefore, Aboriginal women must not be subjected to it. Hopefully, a discrimination challenge against solitary confinement spearheaded by Aboriginal women will pave the way for future discrimination challenges by other vulnerable women.

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**KEY WORDS**

solitary confinement  
segregation  
Canada  
*Charter*  
discrimination  
abolition  
crimmigration  
intersectionality  
feminism

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## LIST OF ABBREVIATIONS

BCCLA or “BCCLA decision”	<i>British Columbia Civil Liberties Association v Canada (Attorney General)</i> , 2018 BCSC 62.
CBSA	Canada Border Services Agency
CCLA or “CCLA decision”	<i>Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen</i> , 2017 ONSC 7491.
CCRA	<i>Corrections and Conditional Release Act</i> , SC 1992, c 20.
CD	Commissioner’s Directives
CHRC	Canadian Human Rights Commission
CSC	Correctional Service Canada
IRPA	<i>Immigration and Refugee Protection Act</i> , SC 2001, c 27.
MCSA	<i>Ministry of Correctional Services Act</i> , RSO 1990, c M22.
<i>MCS Regulations</i>	Ontario, RRO 1990, Reg 778: GENERAL.
MCSCS, PSMI	Ministry of Community Safety and Correctional Services, “Institutional Services Policy and Procedures Manual: Placement of Special Management Inmates, Government of Ontario” (6 December 2016).
NWAC	Native Women’s Association of Canada
OCI	Office of the Correctional Investigator
OHRC	Ontario Human Rights Commission
OWJN	Ontario Women’s Justice Network
P4W	Prison for Women in Kingston, Ontario
TRCC	Truth and Reconciliation Commission of Canada

## **CHAPTER ONE: INTRODUCTION**

### **My Research Topic**

I wish to start this research project with a quote from the Late President of South Africa, Mr. Nelson Rolihlahla Mandela. He was imprisoned for 27 years (November 1962 until February 1990)<sup>1</sup> – much of that time in solitary confinement – for leading an Anti-Apartheid movement.<sup>2</sup>

*It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.*<sup>3</sup>

I want to discuss why this quote is significant. There are three main reasons. My first reason relates to the research question of this paper. My research question is the following.

Under the anti-carceral lens, which originates from the prison abolition ethic, would pursuing a *Charter* section 15 case serve as a more effective way to abolish the practice of solitary confinement compared to the more popular *Charter* provisions that are relied upon to challenge the practice (i.e., sections 7 and 12) and compared to other methods of advocating against the practice (i.e., lobbying, public awareness campaigns, launching a human rights complaint, giving into a settlement)?

I will respond and elaborate on this research question in the next paragraph. My second reason relates to the legacy of Nelson Mandela's inspiring life story on the emerging global perspective of solitary confinement and our increasing awareness of the traumatic experience of this practice. In 2015, the United Nations General Assembly achieved a

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1 Biography.com Editors "Nelson Mandela Biography.com", Biography (6 September 2017) online: <[www.biography.com/people/nelson-mandela-9397017](http://www.biography.com/people/nelson-mandela-9397017)>.

2 United Nations, "Nelson Mandela Rules" Nelson Mandela International Day, online: <[www.un.org/en/events/mandeladay/rules.shtml](http://www.un.org/en/events/mandeladay/rules.shtml)> [UN, "The Nelson Mandela Rules"].

3 *Ibid.*

unanimous vote for adopting a revised version of the *Standard Minimum Rules for the Treatment of Prisoners*.<sup>4</sup> The revised version, which promotes the humane practice of solitary confinement, was renamed, “*The Nelson Mandela Rules*”, in honour of him. My third reason why Mandela’s quote is significant is that it serves as the underlying theme of this paper. With this paper, I aim to encourage critical reflections on whether it is acceptable for a country like Canada, which prides itself on its multicultural and peacekeeping identity, to continue the State practice of solitary confinement, knowing the discriminatory way it is wielded and its harmful effects.

In response to the research question that I posed in the previous paragraph, my response is this. Yes, *Charter* section 15 is the superior means of abolishing solitary confinement. As I endeavour to prove this argument, I want to clarify two points on my research topic. The first point is that, from a strategic standpoint, the framing of this discrimination claim should focus on the disproportionate manner in which solitary confinement is used on vulnerable groups of women (i.e., Indigenous, racialized, and mentally ill, foreign national women) and the disadvantage of this practice for these women, using the available grounds of race, national or ethnic origin, disability, Aboriginal reserve status, and citizenship. As will be seen, an array of literature raises concerns about the application of solitary confinement in immigration holding centres, provincial jails, and federal penitentiaries. This literature will be insightful to understand this State practice.<sup>5</sup> I will explore how the prescribed law and policy governing the practice of solitary

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4 *United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*, UN General Assembly, 17 December 2015, Resolution A/RES/70/175 [*The Nelson Mandela Rules*].

5 Justin Piché and Karine Major, “Prisoner Writing in/on Solitary Confinement: Contributions from the Journal of Prisoners on Prisons, 1988-2013” (2015) 4 *Canadian Journal of Human Rights* 1 at 8 [Piché & Major].

confinement in Canada leads to direct and indirect discrimination. Further, I will show how the discriminatory way solitary confinement is practised ultimately supports the conclusion that solitary confinement should no longer be used in Canada.

The second clarifying point is that even though my research focus is on women in solitary confinement, I do not intend to mean that men never experience discrimination when they are placed in solitary confinement, or that solitary confinement is only discriminatory if it is used on women. My focus on women is motivated by a desire to narrow the focus of this paper, raise awareness to some of the unique ways in which women experience discrimination when they are placed in solitary confinement, and discuss the benefits of challenging the practice of solitary confinement, using women as the potential claimants instead of men, who have long dominated prisoner litigation. I argue that men ultimately stand to benefit from women launching a discrimination claim.

This paper strives to give a thorough argument for eradicating solitary confinement under *Charter* section 15. The intended contributions of this essay will include explaining how *Charter* section 15 lends itself well to the prison abolition ethic and anti-carceral lens; defining the international law conception of solitary confinement; briefly recounting the history of solitary confinement in Canada and how it is currently prescribed in law and policy; explaining the various harms the practice causes; demonstrating why the *Charter*, and why section 15 in particular, are the effective means of dismantling the “Carceral State”; discussing why women inmates should be championed as the principal claimants of a discrimination claim against solitary confinement; demonstrating what the



discrimination claim would look like using the example of Aboriginal women; and pointing out some challenges that may arise with launching the section 15 claim.

For quick reference, in Chapter 11, titled “Arguing the Discrimination Claim”, I conduct a constitutional analysis where I argue that solitary confinement violates Aboriginal women’s *Charter* section 15 right against discrimination, and I refute that the practice can nevertheless continue under *Charter* section 1 as a reasonable limit on section 15. The section 15 analysis that I conduct for Aboriginal women in solitary confinement is based on the multiple grounds of race, national or ethnic origin, sex, disability, and Aboriginal reserve status. The practice imposes a compounded burden on Aboriginal women that leads to severely negative psychological, social, emotional and spiritual harms, in addition to poor criminal justice outcomes.

In the section 1 analysis, I argue that the racial bias against Aboriginal peoples that is ubiquitous throughout the criminal justice system, as acknowledged by the Supreme Court of Canada, means that it will not be possible for solitary confinement to be practised in a non-discriminatory manner. The bias that influences this correctional decision-making does not rationally connect to achieving the legislative objectives of the State. Further, the alternative measures that are available in place of solitary confinement render the practice obsolete and excessively restrictive concerning Aboriginal women. And further still, the deleterious effects of solitary confinement overwhelmingly outweigh any salutary effects that are alleged to derive from the practice. Accordingly, Aboriginal women should not be subjected to any form of solitary confinement.

I wish to make clear at the outset that my ultimate view is that all forms of solitary confinement should be abolished for all inmates in the criminal justice and immigration systems, and I believe abolishing this practice is a helpful step towards gradually dismantling Canada's 'Carceral State'. Yet, the constraints of legal argument are such that providing arguments to end solitary confinement for Aboriginal women, specifically, can only allow for requesting a court to order that all Aboriginal women must not be held in any form of solitary confinement. This is partly guided by the fact that, when warranted, courts will effect piecemeal developments of law. As a result, the eventual abolition of solitary confinement may very well occur through a series of 'little wins', removing one vulnerable group after another out of harm's way in solitary confinement, until the State is eventually compelled on its own to use alternative means to manage all its inmates. It is my hope that a discrimination challenge against solitary confinement spearheaded by Aboriginal women will pave the way for additional discrimination challenges to achieve the 'big win' – a total ban on solitary confinement in Canada.

## **CHAPTER TWO: MY CONTRIBUTIONS TO SEVERAL CONVERSATIONS**

### **Why several conversations?**

The reason why I think my major research is contributing to various conversations is because my major research project deals with several areas of law (i.e., human rights, constitutional law, criminal law, and immigration law). Therefore, my project will inevitably be making arguments and critiques about how these areas of law intersect and impact one another, which may be informative and meaningful for anyone whose preoccupation is any one of the areas of law that I incorporate into my project.

### **Human Rights and Constitutional Law Discourses**

Since my research will predominantly take on a human rights and constitutional law discourse, I aim to contribute by exploring the multi-faceted or multi-ground issues that uniquely arise for women serving sentences, awaiting trial, and women held in immigration detention. The lived experiences of women in each of these situations will be important to consider in order to flesh out the impact that both systems of law – criminal law and immigration law – have on women who are placed in solitary confinement. Uncovering these experiences will provide a basis for determining if, when, and how human rights and constitutional rights are triggered. While the constitutional law issues will largely take on a domestic-focused discussion in my research paper, my discussion of human right law issues will address both the domestic-based discourse and international-based discourse. By engaging international human rights law, I will be contributing to a much broader conversation where I will be offering a perspective of the Canadian context

on issues women face in solitary confinement while serving criminal sentences or held in immigration detention.

### Feminist Discourses

Detained people in the criminal justice system and the immigration system are often rendered a forgotten, out-of-sight-out-of-mind, ‘underclass’ of people. Further, detained women tend to be overshadowed and overlooked by larger numbers of detained men in discussions of criminal justice or immigration law issues, generally. I aim to give the much-needed attention to women’s issues in the criminal justice system and immigration system and highlight how solitary confinement in either context can be a gendered issue, impacting women in unique ways compared to men.

### “Crimmigration” Policy Discourses

My research relates to the broader issue of crimmigration policy decisions — the nexus between criminal law and immigration law in policy-making and state practices. The contribution that I make will refocus the issue of solitary confinement on women and their unique experiences while in custody for criminal or immigration purposes. By discussing the incarceration of women serving sentences, awaiting trial or held in immigration detention, specifically, I aim to draw connections between these experiences and offer a unique comparison of how these seemingly separate systems of law have a lot in common, especially when they place their subjects in the same facilities.

### Immigration Law Discourses

I aim to contribute to immigration law discourses by exploring the ways in which women held in immigration detention in correctional facilities are *de facto* criminalized by their status as foreign nationals in Canada. I also aim to explore how the precarious status and condition of women held in immigration detention – in immigration holding centres or correctional institutions – affects their ability to rely on constitutional law and human rights law to protect them from discriminatory state practices that are used against them.

### Criminal Law Discourses

I aim to contribute to criminal law discourses by showing how criminal justice practices, such as detention and incarceration, are used as convenient means to control and monitor foreign nationals in Canada, in the context of a heightened national security focus in immigration practices. I also aim to show how the experiences of incarceration and solitary confinement are not just unique to individuals serving criminal sentences or awaiting trial. Those held in immigration detention are faced with similar and sometimes worse experiences.

### Prison Abolition Discourse

I plan to contribute to the prison abolition discourse by elaborating on how this American theoretical perspective can be applied to the Canadian context and how aspects of the prison abolition ethic – namely, carceral logic – have relevance to the Canadian immigration system, especially with the development of the crimmigration trend.

### **CHAPTER THREE: METHODOLOGICAL APPROACHES**

My research project will engage a mixed methods analysis of four methodological approaches: feminist, doctrinal, interdisciplinary, and comparative.

#### **Feminist Approach**

##### Why is the Feminist Approach well-suited?

The core methodological approach of my paper will be a feminist legal approach. More specifically, my research will adopt an intersectional feminist approach to the law by showcasing how multiple axes of identity, such as sex, disability, and race, colour our experience of the world around us. My choice to consider a multi-ground claim of discrimination is inspired by an intersectional theoretical perspective promoted by feminist critical legal scholars, like Kimberlé Crenshaw.<sup>6</sup> In line with the feminist legal perspective, my research is important because often women's experiences of navigating the criminal justice system and the immigration system are made indistinct and invisible by the larger group of men who are navigating these same systems.<sup>7</sup> By forgetting women and their particular needs, we become ignorant to the more damaging effects that the criminal justice system and immigration system have on women. By failing to recognize these effects, we allow for these women to continue to suffer in silence, ironically in a country where we boldly tout our progressive constitutional and human rights on the international stage.

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6 Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color" of Kimberlé Crenshaw, *Critical race theory: the key writings that formed the movement* (New York: The New Press, 1996) [Crenshaw].

7 Joanne Belknap, *The Invisible Woman: Gender, Crime and Justice*, 2nd ed (Belmont, CA: Wadsworth Publishing, 2001) at 3-4 [Belknap].

Assumptions and Perspectives of the Feminist Approach

For my feminist legal methodology, I will also draw inspiration from Katharine Bartlett and her explanations of feminist legal methods.<sup>8</sup> Throughout my research project, I will mostly engage in a feminist analysis centred on “asking the woman question”.

The “asking the woman question” feminist method involves identifying the gender-based implications of rules and practices, which on the surface, may be regarded as neutral, objective, and taken-for-granted.<sup>9</sup> This method reveals the perspective of how political choices and institutional practices contribute to women’s disadvantage, and this method asserts the perspective that the status of women in society is the result of how our society is organized, not the inherent characteristics of women.<sup>10</sup> This feminist method can be incorporated into analyzing the precedential value of cases, stating the facts of a case, or in applying law to facts.<sup>11</sup> This method aims to expose gender bias in substantive rules and encourage legal decision-making that is cognizant and sensitive to this bias.<sup>12</sup>

Bartlett importantly points out that when using a feminist lens on legal issues, we need to be aware of the methods that are engaged to arrive at legal answers, because method organizes and determines our apprehension of ‘truth’.<sup>13</sup> Method is the means by which power structures in our society are maintained, and scholars engaging feminist legal analysis must be attentive to method to avoid perpetuating the status quo of power structures which these feminist scholars seek to challenge.<sup>14</sup> Bartlett says that method can

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8 Katharine T Bartlett, “Feminist Legal Methods” (1990) 103:4 Harvard Law Review 829 [Bartlett].

9 *Ibid* at 837.

10 *Ibid* at 843.

11 *Ibid*.

12 *Ibid* at 846.

13 *Ibid* at 830.

14 *Ibid* at 830-831.

have the effect of empowering a group, and I would add that method can equally have the effect of disempowering another group.<sup>15</sup>

This feminist legal method will be particularly useful for exploring how laws governing solitary confinement, may be perpetuating disadvantages against women. One observation I point out is that while human rights legislation encourages complainants to bring forth multi-ground discrimination claims in recognition of the intersectional identities of complainants, the application of *Charter* section 15 seems to be a bit more rigid in that the expectation is that a person will assert a discrimination claim based on one enumerated or analogous ground.<sup>16</sup> Case law has also suggested that courts have trouble fully incorporating an intersectional analysis into legal reasoning.<sup>17</sup> This could have deleterious impacts on women meeting the evidentiary burden of *Charter* discrimination claims. However, decisions, such as *Law v Canada*<sup>18</sup> and *Withler v Canada*,<sup>19</sup> from the Supreme Court of Canada are encouraging, since the Court explains that it is acceptable to assert a *Charter* discrimination claim based on a combination of enumerated or analogous grounds.<sup>20</sup>

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<sup>15</sup> *Ibid.*

<sup>16</sup> Policy and Education Branch, Ontario Human Rights Commission, “An Intersectional Approach to Discrimination: Addressing Multiple Grounds in Human Rights Claims” (OHRC, 2001) at 8 [Policy and Education Branch].

<sup>17</sup> *Ibid.*

<sup>18</sup> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1 [*Law*].

<sup>19</sup> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 63, [2011] 1 SCR 396 [*Withler*].

<sup>20</sup> *Law*, *supra* note 18 at 554-555.



Shortcomings and Limits of the Feminist Approach

A shortcoming of the feminist method of “asking the woman question” is that the woman question itself can perpetuate the exclusion of groups of women who are more profoundly marginalized in society, particularly racialized women.<sup>21</sup> Asking a question on behalf of all women leads to artificially universalizing women’s experiences. This in essence leads to more privileged classes of women, namely White women – perhaps even White female scholars – having the advantage of asking the woman question based on their terms and from their privileged positions, while lesser privileged groups of women are stuck with the disadvantage of dealing with a generalized answer to the woman question that lacks responsiveness to the heterogeneity of women’s experiences.<sup>22</sup> In my research project, I endeavour to be diligent about ensuring that the woman question that I ask is reflective and considerate of the diverse experiences of women held in solitary confinement. One solution that was offered in Bartlett’s article was to change the “woman question” to the “question of the excluded” and to specify which women the question is referring to.<sup>23</sup> That way, it’s clear that the question and corresponding answer is limited to a particular group of women and not all women.<sup>24</sup>

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21 Bartlett, *supra* note 8 at 847.

22 *Ibid* at 847.

23 *Ibid* at 848.

24 *Ibid* at 848.

## **Doctrinal Approach**

### Why is the Doctrinal Approach well-suited?

I will utilize the doctrinal approach for explaining the relevant statutes, which authorize solitary confinement, and immigration detention. I will also use this method to distill the leading *Charter* cases on discrimination into the legal tests that must be met to prove discrimination. Moreover, in some instances, I will mention other key cases that address some of the issues that arise in my research project on solitary confinement. However, ultimately, my doctrinal analysis will be reform-oriented, as Terry Hutchinson describes, because I will be assessing the existing laws that allow for the practice of solitary confinement and then make recommendations for change, namely, abolishing solitary confinement on the basis that the practice is used in a discriminatory way that offends Canadian constitutional law.<sup>25</sup>

### Assumptions and Perspectives of the Doctrinal Approach

Doctrinal methodology is the dominant method for conducting research in the legal domain. It is considered the methodology that distinguishes research in the legal discipline from research produced from other disciplines.<sup>26</sup> For that reason, the methodology has several assumptions that allow this methodology to be so widely used and accepted in legal scholarship. Firstly, doctrinal methodology is the assumed manner in which legal scholarship is conducted and the most popular method revealing how we, as legal scholars,

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<sup>25</sup> Terry Hutchinson, “The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law” (2015) 3 *Erasmus Law Review* 130 at 132 [Hutchinson].

<sup>26</sup> *Ibid* at 130.

know what we know.<sup>27</sup> So much so that sometimes legal scholars, even in graduate studies in law, fail to specifically state in their academic writing that they will be using doctrinal methodology to arrive at the answer to their legal research question.<sup>28</sup> As Hutchinson remarks, since each person can implement doctrinal methods in idiosyncratic ways, it is especially important to know how a scholar arrives at their answer, so we can be comfortable with accepting the answers that the scholar provides in their research project.<sup>29</sup>

Secondly, doctrinal methodology assumes that we can know what the law means and we can find our answers about the law, by looking to the law itself.<sup>30</sup> By contrast, in reform-oriented research, interdisciplinary sources are incorporated into doctrinal research, and doctrinal research ultimately takes on a consultative nature and function.<sup>31</sup> Similarly, Hutchinson says that doctrinal scholars can benefit from understanding the law from the perspective of scholars who do not belong to the legal discipline, such as criminologists or psychologists.<sup>32</sup> This is the objective of what Hutchinson refers to as “fundamental research”, which posits the following points: (1) law is a starting point of research – which I note is an assuming pronouncement; (2) law is a social phenomenon in itself; and (3) law is a problem that can function as a cause and effect.<sup>33</sup>

Thirdly, mastering the art of doctrinal methods is assumed as equating to thinking like a lawyer, which can mean that even though a non-legal response may be sufficient to address a social problem, doctrinal thinkers – lawyers – by reflex will tend to use the tools

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27 *Ibid* at 131.

28 *Ibid.*

29 *Ibid.*

30 *Ibid* at 130.

31 *Ibid* at 132.

32 *Ibid.*

33 *Ibid.*

of their discipline – doctrinal methods – to tackle the social problem.<sup>34</sup> Hutchinson states that some legal scholars recognize that this can be a very limiting way of seeing the world. Thus, while legal scholars may not use non-doctrinal methodologies themselves, they might incorporate the results from these other methodologies into their legal scholarship, which I would view as using the approach of looking for ways to fit extra-disciplinary research methods into a doctrinal project.<sup>35</sup> This reform-oriented trend in doctrinal-based research reveals that “thinking like a lawyer” does not necessarily need to be about thinking just within the confines of the legal domain.

#### Shortcomings and Limits of the Doctrinal Approach

The main limitation of doctrinal approach in the analysis and synthesis of cases, is that because case law traditionally builds our knowledge of the law in a piecemeal fashion, our understanding of the scope and meaning of the law will only go so far as the facts of cases enable judges to reasonably expound on the law.<sup>36</sup> However, I would add that it will be up to legal scholars and advocates to be creative by expanding on the significance and relevance of facts presented before courts to encourage judges to make more substantial contributions to how we understand the law and envision it operating in our everyday lives.

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<sup>34</sup> *Ibid* at 130-131.

<sup>35</sup> *Ibid* at 130.

<sup>36</sup> *Ibid* at 131.

## **Basic Interdisciplinary Approach**

### Why is the Basic Interdisciplinary Approach well-suited?

Solitary confinement has captured the interest of people from different disciplines: criminology, sociology, psychology, and law. Having read Mathias Siems' article,<sup>37</sup> I want to engage a basic interdisciplinary approach, because in order to give meaningful critique and analysis of the law, it's important to look beyond traditional legal academia and gain insights from other realms of study to see the various ways in which law impacts our society according to different disciplines. I ascribe to the idea that law is a social construct, which is a perspective congruent with Hutchinson's description of "fundamental doctrinal research", as I mentioned earlier.<sup>38</sup> The interdisciplinary approach also recognizes that law develops overtime within a social context of changing ideologies and phenomena in society. I believe we must try to understand how society influences the law, just as much as we try to understand how the law influences society. Criminal law and immigration law are both areas of law that are constantly developing with the tides of political power and social climate. Consulting various academic disciplines will help give rich perspectives on how these areas of law are developing in Canadian society as it pertains to solitary confinement. The practice of solitary confinement is to a large extent studied by non-legal academics. Therefore, my research will inevitably rely on literature that is not legal or doctrinal in nature, and that originates from different theoretical and methodological approaches.

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37 Mathias M Siems, "The Taxonomy of Interdisciplinary Legal Research: Finding the Way out of the Desert" (2009) 7 *Journal of Commonwealth Law and Legal Education* 5 [Siems].

38 Hutchinson, *supra* note 25 at 132.

### Assumptions and Perspectives of the Basic Interdisciplinary Approach

Proponents of interdisciplinary research describe doctrinal approaches to scholarship as overly “rigid” and prevent both the law student and the law teacher from embarking on a more fluid, less restricted, journey of questioning how law impacts society.<sup>39</sup> Moreover, they say that doctrinalism encourages “intellectual tunnel vision” by focusing too much on the technicalities of the law.<sup>40</sup> As a result, interdisciplinary approaches are called “rebellious” in that they are not confined by what the law has to offer, and take the perspective that we can arrive at a “greater truth” in the answers to our questions by transcending the legal domain.<sup>41</sup> Sometimes other disciplines can answer our legal questions better than the legal discipline can by itself.<sup>42</sup>

### Shortcomings and Limits of the Basic Interdisciplinary Approach

According to Siems, critics of interdisciplinary research say that this approach is too impractical and difficult to implement, since traditional legal research can be completely done from beginning to end in the comfort of one’s office or law library.<sup>43</sup> I would say this preference for ‘arm-chair scholarship’ and aversion to research that requires leaving the office or law library may suggest laziness on the part of these critics who repackage sentiments of feeling inconvenienced into a criticism. As Siems explains in his article, these are not strong objections against using interdisciplinary research.<sup>44</sup> I would

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39 Siems, *supra* note 37 at 4.

40 *Ibid.*

41 *Ibid* at 5.

42 *Ibid.*

43 *Ibid* at 7.

44 *Ibid.*

also venture to say that the academic aversion to interdisciplinary research and the convenience of “arm-chair scholarship” is a key reason why using only a doctrinal research methodology is so widely utilized by legal scholars.

Critics also say that interdisciplinary research has “little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner.”<sup>45</sup> However, in my situation, I would challenge this view, because the non-legal sources I have amassed are just as relevant and crucial to answering my research question as my legal sources. Moreover, I would say that my non-legal sources are the very sources that help provide a concrete explanation of the problematic use of solitary confinement and how the practice impacts the inmates subjected to it.

A final criticism against interdisciplinary research, which is a more persuasive one, is that legal academics may run the risk of misunderstanding the nuance and theoretical perspective of the other disciplines whose research is incorporated into legal research projects.<sup>46</sup> Moreover, legal academics may be unaware of, or misunderstand the limitations of the research produced by other disciplines.<sup>47</sup> Regarding this criticism, I have the benefit of having studied criminology and psychology as my two primary focuses of study for my undergraduate degree, so this academic background will help me to understand the perspectives of these disciplines as I conduct my research. Fortunately, most of literature from non-legal disciplines that discuss solitary confinement, derive from criminology and psychology.

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid* at 8.

<sup>47</sup> *Ibid.*

## **Comparative Approach**

### **Why is the Comparative Approach well-suited?**

My research project will employ a comparative approach in two main ways. The first way is by comparing criminal law and immigration law to highlight the connections between each system operating under these two areas of law, mainly through a discussion of the ‘crimmigration’ policy trend, which is connected to the practice of solitary confinement in Canada. The second way in which a comparative approach will be engaged is by comparing constitutional law and human rights law and looking at how each body of law would address a discrimination claim regarding solitary confinement, specifically, what remedies are available under each area of law for a successful discrimination case.

### **Assumptions and Perspectives of the Comparative Approach**

As articulated by Stefan Vogenauer,<sup>48</sup> when using a comparative approach to find solutions to a legal problem that exists in different legal systems, one must consider the law that pertains to each of these systems.<sup>49</sup> The ‘source of law’ of a given legal system is deemed to be any source which has weight or an authoritative effect akin to traditional notions of law, such as cases and legislation.<sup>50</sup> The source of law must be understood and interpreted in the same way by experienced lawyers that practice within those same legal systems. This is important because different legal systems are juridified differently and operate under different legal principles and terminology.<sup>51</sup> Hence, it is important that the

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48 Stefan Vogenauer, “Sources of Law and Legal Method in Comparative Law” in Mathias Reimann and Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2015) [Vogenauer].

49 *Ibid* at 872.

50 *Ibid*.

51 *Ibid* at 873.



solutions one proposes for a legal problem that exists in the compared legal systems are appropriate and relevant for each legal system, based on how they uniquely operate and are utilized by experienced lawyers.<sup>52</sup>

Vogenauer makes the interesting point in his article on comparative law that legal reasoning is the method – the “path” – through which legal scholars use a source of law to arrive at a decision on a particular legal issue.<sup>53</sup> Vogenauer is describing the tasks of a doctrinal methodological approach in his discussion of comparative legal approaches, which indicates that doctrinalism – with its unique perspectives, assumptions, and limitations – is key to utilizing the comparative legal approach.

Based on a surface level comparison, I note that criminal law and immigration law are guided by different principles (i.e., constitutionally-entrenched legal rights guide criminal law and administrative law principles guide immigration law). Each system is operated by a different array of officials. Notably, though, correctional law primarily follows administrative law principles, including *habeas corpus*, which is a right available to both immigration detainees and those incarcerated for criminal purposes in correctional institutions. Heeding to Vogenauer’s cautions for devising solutions to problems that exist in multiple areas of law, I will seek to leverage off the connections that do exist between the immigration system and the criminal justice system – through correctional law, for example – when advancing my arguments.

Vogenauer provides some questions to promote a deeper understanding of the legal systems being compared, namely, criminal law (more specifically, correctional law) and

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<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid* at 885.

immigration law.<sup>54</sup> The questions are the following: (1) What is the style of lawmaking?; (2) Who applies and interprets the law?; (3) Which factors are taken into account in the application and interpretation of the law?; and (4) How are these factors ranked? These questions will help me stay aware of the key differences that exist between the criminal justice system and the immigration system. While I will devote a significant portion of my research project to highlighting the connections and similarities between both systems, each of these systems are nonetheless different in many ways. The differences between these systems may impact how I engage with the *Charter* issue of discrimination on the topic of solitary confinement.

#### Shortcomings and Limits of the Comparative Approach

The limitations of using a comparative approach, which apply to my research project include that I need to have a thorough understanding of how criminal justice system operates differently from the immigration system and how the sources of law governing each system are interpreted by their respective adjudicators.<sup>55</sup> My arguments will only be useful if I have carefully considered the differences and similarities between criminal law and immigration law in my analysis. This will require cross-referencing between principles of constitutional legal rights and principles of administrative law in my project.

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<sup>54</sup> *Ibid* at 886.

<sup>55</sup> *Ibid* at 878.

## **CHAPTER FOUR: THEORETICAL APPROACH**

*Advocates of incarceration . . . hoped that the penitentiary would rehabilitate its inmates. Whereas philosophers perceived a ceaseless state of war between chattel slaves and their masters, criminologists hoped to negotiate a peace treaty of sorts within the prison walls. Yet herein lurked a paradox: if the penitentiary's internal regime resembled that of the plantation so closely that the two were often loosely equated, how could the prison possibly function to rehabilitate criminals?*

- Author Adam Jay Hirsch <sup>56</sup>

In this paper, I adopt an anti-carceral theoretical lens. To get a fuller understanding of this perspective, it is helpful to explore its origin – the prison abolition ethic – and how it further informs the litigation perspective that I argue should be implemented to abolish solitary confinement.

### **The Prison Abolition Ethic**

The theoretical underpinnings of my research align with the prison abolition perspective. Allegra M. McLeod, a law professor at Georgetown University, offers what she describes as “the first sustained discussion” of the “prison abolition ethic”.<sup>57</sup> Although, in the past, anti-prison activists and scholars, such as renowned Angela Y. Davis, have also produced literature specifically on the idea of “prison abolition”.<sup>58</sup> Professor McLeod says that prison abolition calls for an end to punitive policing (e.g., stop-and-frisk routines) and “prison-backed”<sup>59</sup> punishment as the policy response for what are really social, economic,

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56 Adam Jay Hirsch, *The Rise of the Penitentiary: Prisons and Punishment in Early America* (New Haven and London: Yale University Press, 1992) at 84.

57 Allegra M McLeod, “Prison Abolition and Grounded Justice” (2015) 62 *UCLA Law Review* 1156 at 1156 [McLeod].

58 See for example, Angela Y Davis, *Are Prisons Obsolete* (Toronto: Open Media, 2003) [Davis].

59 As I understand it, McLeod uses the term “prison-backed punishment” as opposed to “prison-based punishment” to encompass not only instances of imprisonment, but also non-custodial sentences where imprisonment is the consequence of a breach of conditions for different forms of release, including bail, probation, or parole.

and political problems in society.<sup>60</sup> The abolitionist sees the penal act of caging, chaining, confining, and controlling human beings as inherently violent, dehumanizing, and morally wrong.<sup>61</sup> In other words, prisons are a form of State violence.<sup>62</sup> Prison abolitionists seek to raise awareness of the conditions of imprisonment to actually see and know what we are in fact talking about. Through this, we are better able to make an informed opinion on the how we use of prisons in our society and whether our ideology of criminal regulation is accurately being implemented.<sup>63</sup> I find this to be an important aim, because we simply cannot give a fully informed opinion as to what punishment a person deserves, or whether prisons do what we want them to do, or whether prisons and imprisonment is a necessity, when life in prison is shrouded in opacity from public view.

The critical social thought and the growing social movement that embodies prison abolition draws its ideological inspiration mainly from the work of W.E.B. Du Bois, who wrote about slavery abolition in the United States.<sup>64</sup> Du Bois argued that meaningful slavery abolition required more than simply ending the practice of slavery. Black slaves, who were the property of White masters for over 240 years in America, were disenfranchised. They had no political or socioeconomic base to leverage from. And, they struggled to attain equal footing with the rest of society during the 90 years of legalized segregation that followed.<sup>65</sup> The State had a positive responsibility that accompanied the

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60 McLeod, *supra* note 57 at 1172. For more information on the racially discriminatory manner in which the American criminal justice system operates, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010). Ava DuVernay, “13th” (USA: Forward Movement & Kandoo Films, 2016) on Netflix.

61 McLeod, *supra* note 57 at 1172.

62 Debra Parkes, “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32 Canadian Journal of Law and Society 165 at 181 [Parkes, “Solitary”].

63 McLeod, *supra* note 57 at 1175.

64 *Ibid* at 1162.

65 *Ibid* at 1184, 1188.

negative responsibility of abolishing slavery; the State needed to orchestrate a fundamental restructuring of democracy and social institutions that enabled freed slaves to participate fully in society.<sup>66</sup> Yet, there were utter flaws in the “Reconstruction” process during the post-slavery era. What transpired has been described as “preservation through transformation”.<sup>67</sup> Ultimately, the public’s resistance to slavery abolition and the legacy of slavery led to the proliferation of incarceration, as criminal law operated in racially subordinating ways to criminalize and marginalize blackness.<sup>68</sup> Slavery abolition was in desperate need of positive undertakings by the State to equip and integrate former slaves into a free and prosperous American society. Considering the strong connections that today’s American criminal justice system has to the slave trade, McLeod explains that prison abolition equally requires much of the same positive actions by the State to support today’s marginalized, and predominantly Black, communities in a free and prosperous American society.<sup>69</sup> McLeod reveals that the much needed work that prison abolition demands is essentially the unfinished work of slavery abolition and the legacy of deep-seated racial discrimination in society.

An abolitionist endeavours, through scholarship, to fully unearth the State-sanctioned dehumanization, violence, and racial degradation that gave birth to, and is perpetuated by, incarceration practices and punitive policing measures, including solitary confinement.<sup>70</sup> The abolition ethic focuses on substituting criminal law and policy as the primary response to crime, with a process of gradual decarceration, using transformative

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<sup>66</sup> *Ibid* at 1163.

<sup>67</sup> *Ibid* at 1185.

<sup>68</sup> *Ibid* at 1193.

<sup>69</sup> *Ibid* at 1163.

<sup>70</sup> *Ibid* at 1172.

social policy and regulation.<sup>71</sup> McLeod cautions, though, that the social policy and regulation must contemplate the following considerations: the root causes of crime; the interpersonal harm enabled by institutions; different forms of empowerment that can be used in society; and regulatory approaches that exist outside the sphere of criminal justice.<sup>72</sup> Speaking from the American context, McLeod argues that prison abolition is an empirically-sound and much-needed paradigm shift to overhaul a retributivist and harm-producing institution in America that has developed from a history of racial subordination and disenfranchisement.<sup>73</sup> McLeod argues that the unfortunate lack of interest in the prison abolition account impedes moral, legal, and political imagination.<sup>74</sup> She says it is troubling that prison abolition does not have a stronger footing in criminological scholarship, in light of the appalling condition of the American criminal justice system, and the insights that the prison abolition ethic has to offer on gradual decarceration through addressing the problem of crime through non-criminal justice means.<sup>75</sup>

In the Canadian context, Debra Parkes, a law professor at University of British Columbia, affiliates with this theoretical perspective, and goes so far as to describe a litigation strategy of “prison abolitionist lawyering” to challenge the practice of solitary confinement by dismantling the carceral logic that is assumed by the judiciary, the legal system, and society in general. I will discuss the “carceral logic” and the “anti-carceral” litigation strategy in fuller detail later in this Chapter under the heading, “Challenging the ‘Carceral State’ in Canada through Prison Abolitionist Lawyering Ethic”.

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<sup>71</sup> *Ibid* at 1208.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at 1237.

<sup>74</sup> *Ibid* at 1156.

<sup>75</sup> *Ibid*.

Adopting prison abolition ethic to the Canadian context, for the purposes of this research project, it is important to recognize that Canada also has a history of State-sanctioned dehumanization, violence, and racial degradation that gave birth to, and is perpetuated by, incarceration practices and punitive policing measures, such as solitary confinement. The Supreme Court of Canada remarked in *R v Gladue*, “Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison.”<sup>76</sup> In 2016, while Canada’s crime rates reached a 45-year low, incarceration rates soared to an all time high.<sup>77</sup> Different groups, including Aboriginal peoples, the Black community, and individuals with mental health issues, have been marginalized in our society, and in turn, have also been overly criminalized in our justice system.

For Aboriginal peoples, the history of colonialism, displacement, and residential schools has current day ripple effects in the form of lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Aboriginal peoples.<sup>78</sup> Aboriginal people are implicated in Canada’s correctional system in numbers that are grossly disproportionate to their representation in general society.<sup>79</sup> More than any other group in Canada, they are subject to the damaging impacts of the criminal justice system’s heaviest sanctions.<sup>80</sup> According to the Office of the Correctional Investigator, “Between 2007 and 2016, while the overall

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<sup>76</sup> *R v Gladue*, [1999] 1 SCR 688 at para 52, 1999 CanLII 679 (SCC) [*Gladue*].

<sup>77</sup> Jody Chan, Lorraine Chuen, and Marsha McLeod, “Everything you were never taught about Canada’s prison systems” *Intersectional Analyst* (20 July 2017) online: <[www.intersectionalanalyst.com/intersectional-analyst/2017/7/20/everything-you-were-never-taught-about-canadas-prison-systems](http://www.intersectionalanalyst.com/intersectional-analyst/2017/7/20/everything-you-were-never-taught-about-canadas-prison-systems)>.

<sup>78</sup> *R v Jackson*, 2018 ONSC 2527 at para 81.

<sup>79</sup> *Gladue*, *supra* note 76 at para 60.

<sup>80</sup> *Ibid.*

federal prison population increased by less than 5%, the Indigenous prison population increased by 39%.<sup>81</sup> For the last three decades, there has been an increase every single year in the federal incarceration rate for Indigenous people.”<sup>82</sup>

Across North America, individuals of African descent also have a long and tragic history marked by slavery, systemic discrimination, marginalization and systemic recruitment into criminality, which is coupled with over-policing that results in disproportionate incarceration and differential experiences while incarcerated.<sup>83</sup> The Office of the Correctional Investigator’s *2011-2012 Annual Report* identified Black inmates as one of the fastest growing sub-populations in federal corrections. From 2003 to 2013, African Canadian federally sentenced inmates have increased each year growing by nearly 90% while white inmates declined by 3% over the same period. These increases have occurred though the problem has been consistently raised.<sup>84</sup>

As for individuals with mental health issues, it is reported that they are over-represented in the criminal justice system, as they are criminally charged for conduct that

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81 Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2016-2017* (Ottawa, OCI, 2017) at 48 [2016-2017 Annual Report].

82 *Ibid* at 48.

83 *Jackson*, *supra* note 78 at paras 31, 87. *R v Parks*, (1993) 1993 CanLII 3383 (ON CA) at para 54, 84 CCC (3d) 353 (Ont CA). *R v Golden*, 2001 SCC 83 (CanLII) at para 83, [2001] 3 SCR 679. In the recent decision of *R v Jackson*, a sentencing judge briefly recounts some of the prevailing challenges of anti-Black racism in Canada and how this has led to over-representation in the criminal justice system. “While it is obviously true that every visible minority community experiences the indignities and wounds of systemic discrimination throughout Southern Ontario, it is the Black community which is the focus. It is Blacks who are being shot, it is Black youth that is unemployed in excessive numbers, it is Black students who are being inappropriately streamed in schools, it is Black kids who are disproportionately dropping-out, it is housing communities with large concentrations of Black residents where the sense of vulnerability and disadvantage is most acute, it is Black employees, professional and non-professional, on whom the doors of upward equity slam shut. Just as the soothing balm of “multiculturalism” cannot mask racism, so racism cannot mask its primary target.” [sic] *Jackson*, *supra* note 78 at para 27. In the case, the judge takes judicial notice of the history of colonialism (in Canada and elsewhere), including slavery, policies and practices of segregation, inter-generational trauma, and racism both overt and systemic as they relate to African Canadians. The sentencing judge also acknowledges how this has led to persistent socio-economic ills and higher levels of incarceration. *Ibid* at para 82.

84 *Ibid* at para 43.



is clearly connected to their illness. They are not adequately treated while incarcerated, and when they are released, they get into further trouble.<sup>85</sup> Among the prison population, 27.6% have an identified mental health need, a rate much higher than in the general population (which was about 10% in 2012). Suicide, an extremely serious indication of a person who is mentally unwell, is the reason for about 20% of all deaths in custody each year.<sup>86</sup> Most inmates who die in segregation, also had a documented history of mental illness, but few, if any, receive therapeutic interventions.<sup>87</sup> To add insult to injury, the story of Ashley Smith at the Grand Valley Prison for Women in Kitchener, Ontario, represents a shocking example of the kind of treatment, or lack thereof, that a suicidal and vulnerable segregated inmate can receive in a moment of crisis.<sup>88</sup> On October 19, 2007, when 19-year-old Ashley Smith was segregated in a suicide watch cell, correctional officers observed Smith killing herself using a ligature that she tied around her neck. The officers did not intervene. Her death was videotaped. Accordingly, at an inquest, her death in segregation was ruled a homicide.<sup>89</sup>

The standard for criminal responsibility is very low. Hence, instead of being declared not criminally responsible by reason of mental disorder (NCR), which would allow a person with serious mental health issues to get psychiatric help in a hospital, this individual can find themselves convicted for criminal offences and sentenced to imprisonment where they are less likely to get adequate care or to become effectively

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85 Peter Goffin, "People with mental illness too often landing in prison instead of hospitals, experts say" *The Star* (29 September 2017), online: <[www.thestar.com](http://www.thestar.com)> [Goffin].

86 *Ibid.*

87 Kim Pate, "How Canada's Prisons are Failing Women (And Everyone Else)" *Horizons* Spring 2016 (2 May 2016) 24 at 29 [Pate].

88 *Ibid* at 29.

89 *Ibid.*

rehabilitated.<sup>90</sup> By contrast, forensic psychiatry units, where people ruled NCR are placed, provide secure in-patient treatment, employ specialists (i.e., psychiatrists, psychologists, social workers, and substance abuse counsellors) to provide patients with long-term rehabilitation, and “manage the risk” of reintegrating NCR individuals into society.<sup>91</sup> The discriminatory force of the justice system, which is a fundamental concern of the prison abolition ethic is precisely why I argue that invoking *Charter* section 15 closely aligns with this perspective and its call for gradual decarceration.

### **The Reformist; The Rival**

The reformist is traditionally preoccupied with suggestions on reducing the cost and imposition of incarceration by allowing less serious offenders to serve their sentence through monitored release, which inevitably leads to incarceration, if terms of release are violated. Still, for the reformist, criminal law and policy remains a primary response to crime.<sup>92</sup> According to the abolition perspective, the reformist is too comfortable with incarceration and punitive policing practices.<sup>93</sup> Unlike the reformist, the abolitionist rejects the idea that these characteristics of imprisonment are superficial flaws that can be repaired while still maintaining a heavy use of criminal law administration compared to other social project administrations, such as the education system, housing, the workforce and labour, the healthcare system, social supports and programming, and the political arena.<sup>94</sup> Compared to abolitionist scholarship, reformist scholarship generally does not exhibit as

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<sup>90</sup> *Goffin*, *supra* note 85.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> McLeod, *supra* note 57 at 1207.

great of a sense of urgency towards changing these practices, nor does the reformist push for transformative policies that address the wide range of social problems that the abolitionist aims to address.<sup>95</sup> Reformist arguments are more modest, as they generally do not tackle the root of the crime problem, and therefore, do not go far enough to offer effective ways to improve the way society deals with crime.<sup>96</sup> McLeod contends that prison abolitionists have better awareness of the transformation that must really take place to address the problems of criminal law administration.<sup>97</sup> The prison abolition ethic rejects the vengeance and shrugs off the complacency that commonly attaches to the treatment of criminals – even vilest of them – in the justice system.<sup>98</sup>

Prison reformists and prison abolitionists also differ on the issue of “preventive justice” – the measures taken to reduce the incidence of harm. For the reformist, the assumed source of potential harm is the individual, and the reformist aims to reduce an individual’s potential risk to the public safety.<sup>99</sup> Accordingly, prison reformists tend to be preoccupied with procedural reforms to the justice system to curb individual risk. For the prison abolitionist, the assumed sources of harm are adverse social conditions, and the abolitionist promotes a substantive overhaul on preventive measures so there is increased funding for social programming that reduces criminal behaviour.<sup>100</sup> The abolitionist is calling for a strengthening of the social arm rather than the criminal arm of the State through grounded justice, that is, abolition plus social-based preventive measures.<sup>101</sup>

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid* at 1218.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid* at 1156.

<sup>99</sup> *Ibid* at 1218.

<sup>100</sup> *Ibid.*

<sup>101</sup> *Ibid* at 1225, 1232.

Prison abolition may seem to an average person, today, as unrealistic, but McLeod suggests that this is no reason to believe it will never become our reality. She ascribes to the notion that “There has never been a major social transformation in the history of mankind that has not been looked upon as unrealistic, idiotic, or utopian by the large majority of experts even a few years before the unthinkable became reality.”<sup>102</sup> This is a quote that McLeod takes from Sebastian Scheerer, a German abolitionist criminologist. McLeod says that the abolition of slavery is a classic example to illustrate what is said in this quote.

### **The Retributivist; The Opponent**

With that said, the prison abolitionist’s biggest contender is not the prison reformist. Although, I perceive that the mainstream reformist’s modest demand for changes to the justice system can be quite a barrier for an abolitionist who advocates for bolder, broad-based changes. This is especially true, since the relatively larger community of reformists already faces much resistance on criminal justice issues, underscoring the perceived unthinkable idea of prison abolition. The biggest contender for the prison abolitionist – and ultimately for an advocate of the abolition of solitary confinement – is the retributivist. This is due to the retributivist’s popular, ‘common-sense-like’ perspective.<sup>103</sup>

McLeod says the retributivist objection to prison abolition is that the State must punish an individual who commits a wrong or illegal act – within the constraints of procedural fairness – for three main reasons. Firstly, the victim must receive a remedy for the harm suffered. Secondly, punishment recognizes and honours the moral agency of the

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<sup>102</sup> *Ibid* at 1238.

<sup>103</sup> *Ibid* at 1233.

victim and the perpetrator. And lastly, punishment is the State's response to the challenge to the rule of law exhibited by the perpetrator's wrongdoing.<sup>104</sup> The State's punishment meted out to the perpetrator must be proportional to the blameworthiness of the perpetrator and the degree of harm experienced by the victim.<sup>105</sup> Pre-trial detainees, the legally-innocent, make up about 70% of individuals placed in solitary confinement in provincial correctional institutions.<sup>106</sup> The majority of people held in pre-trial detention are charged with non-violent offences. This very statistic undermines the common assumption that solitary confinement is reserved for the "worst of the worst" convicted criminals.<sup>107</sup>

Admittedly, I would say that the retributivist logic advocates a perspective that is fairly attractive and resonates with instinctive notions of what is 'just'. The fact that Western societies, like Canada, or America, generally ascribe to retributivist ideals for criminal law administration indicates that the people of these societies generally believe in the idea that 'you reap what you sow'. If you do good, then you will be rewarded with good. If you do something bad, then you are punished for your bad behaviour. Simply, you get what you deserve. This renders an individual-based assessment of one's conduct, which I would point out, is consistent with the prison reformist approach to criminal law administration. This kind of assessment also assumes each person is a free and independent agent, who is uninfluenced and unfazed by problematic social settings, or under-serving public institutions, or a troubled upbringing. Essentially, the retributivist logic assumes that

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<sup>104</sup> *Ibid* at 1232.

<sup>105</sup> *Ibid* at 1233.

<sup>106</sup> Ontario, Independent Review of Ontario Corrections Team, *Segregation in Ontario: Independent Review of Ontario Corrections* (Ontario: Independent Review of Ontario Corrections Team, 2017) at 41, 65 [Ontario, *Segregation in Ontario*].

<sup>107</sup> *Ibid*.

an individual's social environment is free of any moral or legal failings, meaning that if an individual does wrong, it is really his or her fault. The individual deserves full blame. That individual is the 'bad guy'. And the State is supposed to be the 'good guy'. Neither the State, nor society, owes anything to the wrongdoer, except a punishment. The individual's choice to do bad must be addressed at the individual level. It's a contrived, symbolic act of moral purging. McLeod explains that the retributivist sees imprisonment as the primary means of meting out a just punishment, since it avoids the State engaging in overt brutality that denies the perpetrator human agency or objectifies the perpetrator as a spectacle of violence, as in the case of the death penalty or flogging. Moreover, McLeod explains there is a democratic consensus that supports incarceration as a criminal sanction.<sup>108</sup>

The prison abolitionist takes issue with the fact that the retributivist, like the reformist, believes that the brutal violence, dehumanization, and racial subordination in the criminal justice system are incidental facts that have no substantial impact on the legitimacy of punishment.<sup>109</sup> The abolitionist argues that these facts should be contemplated in our pursuit of what we call 'justice'.<sup>110</sup> The abolitionist wants the retributivist to come to terms with the wrongs that the justice system – guided primarily by retributivist aims – is doing, rather than holding fast to a vision of retribution in society that is unattainable due to the historical and societal flaws contributing to crime in the first place.<sup>111</sup>

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108 McLeod, *supra* note 57 at 1232.

109 *Ibid* at 1233.

110 *Ibid* at 1234.

111 *Ibid*.

## **Solitary Confinement as a Stepping Stone for Prison Abolition**

*“How can we subject prisoners to unnecessary solitary confinement, knowing its effects, and then expect them to return to our communities as whole people? It doesn’t make us safer. It’s an affront to our common humanity.”*

*- Former President of the United States of America, Barack Obama<sup>112</sup>*

In line with the contentions made by McLeod, I contend that the abolition of solitary confinement is on the cusp of our reality. And it’s a change that is an important step towards the movement of gradual decarceration.<sup>113</sup> The State’s decision to place an inmate in solitary confinement is plagued with the familiar kinds of sociological, historical, institutional, and moral problems that apply to the State’s initial determination that a person deserves to be incarcerated.<sup>114</sup> Solitary confinement has become a normalized part of prison life, even though it entails heightened levels of violence and dehumanization, and has been described by a growing body of critics and survivors as a form of torture.<sup>115</sup> McLeod says, “Solitary confinement’s justification and presumed efficacy flows from the assumed legitimacy of prison confinement in the first place.”<sup>116</sup> The initial justification or logic behind incarceration is that, due to the seriousness of an individual’s alleged or proven criminal conduct, that individual deserves to be removed from society. Moreover,

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112 Kevin Liptak, “Obama bans solitary confinement for juveniles in federal prison” *CNN Politics* (26 January 2016) online: <[www.cnn.com](http://www.cnn.com)>.

113 I wish to stress that abolishing solitary confinement is not a sufficient end in itself, but a step towards a greater goal. As Parkes cautions, “If prisoner rights litigation is not accompanied by a critique of carceral logics: if, for example, we seek only to abolish those smaller cages (solitary confinement) but leave intact the logic of caging people in the first place, then some other correctional tool or practice will take the place of solitary and we will soon be fighting that.” In America and Canada, there has been a tendency to repackage and rename the idea of isolating prisoners when its disturbing conditions in correctional institutions are exposed and challenged. Parkes, “Solitary”, *supra* note 62 at 179.

114 McLeod, *supra* note 57 at 1178. For more information, see the following thought-provoking documentary series, elaborating on some of the racial injustices perpetrated by the American criminal justice system, including the problematic use and consequences of solitary confinement: Jenner Furst, “Time: The Kalief Browder Story” (USA: Roc Nation, The Weinstein Company & Cinemart, 2017) on Netflix.

115 McLeod, *supra* note 57 at 1178.

116 *Ibid* at 1179.

that individual deserves to be detained in a setting where they are denied the ability to do as one pleases, socialize with whom one pleases, and control various details of one's life. Once the initial decision to incarcerate and deprive a person of basic liberties has been legitimized by the State, McLeod explains that the justification of solitary confinement adopts this same logic of the initial decision to incarcerate to life within prison walls.<sup>117</sup>

Parkes, who also ascribes to the prison abolition ethic, says this:

Imprisonment itself creates its own logic and imperative for the use of solitary. When people are put in cages, many of them will not respond well to that environment. They will act out. They will harm themselves or others. Consequently, they are put in smaller cages (segregation cells) and they do even less well, but they are contained. The fundamental carceral logic of punishing and caging goes unchallenged.<sup>118</sup>

In the context of solitary confinement, the initial justification for incarceration is granted, and may also buttress why an individual is placed in solitary confinement.<sup>119</sup> The initial justification is granted because, at that point, the State has already satisfied itself through police discretion or by due process that an individual deserves to be held in custody. I gather that the State's decision to incarcerate an individual can also buttress a decision to place that individual in solitary confinement, for example, when the nature of the crime alleged or proven against the individual is such that the individual would either pose a safety risk to other inmates, or may be targeted by other inmates (e.g., crimes related to child sexual abuse, gang or drug related offences, or seriously violent offences).

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<sup>117</sup> *Ibid.* Within prison walls, the concept of "prison-backed punishment" would essentially mean punishing an inmate by placing them in solitary confinement in a smaller prison.

<sup>118</sup> Parkes, "Solitary", *supra* note 62 at 179.

<sup>119</sup> *Ibid.*



For a moment, I want to focus on McLeod's point that the justification of solitary confinement applies the same logic of prison confinement to life within prison walls. I think this is a crucial point, as McLeod reveals that, like general public life, there are aspects of prison life that contribute to the rising trend in solitary confinement. The inmate population is a microcosmic society. It is a brutish and violent one filled with individuals, who from the prison abolitionist account, have not received adequate resources in society to promote human flourishing (e.g., education, employment, mental and physical healthcare, social supports, and political empowerment). As a result, McLeod explains there is constant tension among inmates to exert the remnants of power and domination they have left in prison as a means of improving their social condition and protecting themselves while in prison.<sup>120</sup> This leads to incidents of murders, assaults, and sexual abuse; many inmates are placed in solitary confinement for offending the prison rules or for their own protection.<sup>121</sup> In some instances, it has been found that solitary confinement is used to terrorize members of the prisoner population in Canada.<sup>122</sup> Yet, neither this nor threats of physical force that correctional guards impose is enough to maintain order in an environment where inmates are confined against their will, and are also feared by their jailers.<sup>123</sup> Correctional guards fail to adequately protect all inmates.<sup>124</sup> No doubt, prison life is a hard life.

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120 McLeod, *supra* note 57 at 1180. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at paras 100-101 [*BCCLA v Canada*].

121 McLeod, *supra* note 57 at 1180.

122 Parkes, "Solitary", *supra* note 62 at 180.

123 McLeod, *supra* note 57 at 1180.

124 *BCCLA v Canada*, *supra* note 120 at para 571. Section 31(3) of the *CCRA* identifies three categories of inmates who may be placed in administrative segregation. The first two categories are clearly involuntary. Category (c) is "allowing the inmate to associate with other inmates would jeopardize the inmate's safety." Historically, inmates segregated for this reason were referred to as "voluntary". This terminology has recently ceased to be used because

Now, I want to unpack McLeod’s explanation of how solitary confinement is justified in society. She says the “presumed efficacy” of solitary confinement flows from the State’s initial decision to incarcerate. I contrast these words with McLeod’s description of the initial decision to incarcerate as having “assumed legitimacy”. McLeod’s words “assumed legitimacy” suggest that despite a whole sophisticated machinery designed to investigate, prosecute, and adjudicate crimes, a decision to convict and imprison a person carries a false sense of legitimacy – or a false sense of ‘justice’ – because of the machinery’s fundamentally flawed design that is premised on racial degradation, dehumanization, and inherent violence. So, it’s peculiar how solitary confinement is *presumed* effective, when the practice borrows its legitimacy from a system that is deemed illegitimate in the first place. And the words, “presumed efficacy”, suggest that the State takes the position that there is evidence or reason to believe that solitary confinement, contextualized by a flawed system, is beneficial despite the long-established and well-documented deteriorating impact of solitary confinement on inmates. As was articulated by Canada’s Office of the Correctional Investigator,<sup>125</sup> “Segregation is the most onerous and depriving experience that the State can legally administer in Canada”.<sup>126</sup> Solitary confinement makes people worse off. That’s irrefutable. To presume that the practice has efficacy – or to choose not to question it, which was the approach taken in recent *Charter*

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there was a perception that these inmates needed to be segregated because of CSC’s inability to keep them safe in the general prison population.

125 The Office of the Correctional Investigator has the following Mission Statement: “As the ombudsman for federally sentenced offenders, the Office of the Correctional Investigator serves Canadians and contributes to safe, lawful and humane corrections through independent oversight of the Correctional Service Canada by providing accessible, impartial and timely investigation of individual and systemic concerns.” Office of the Correctional Investigator, “Home” (4 July 2018) online: <[www.oci-bec.gc.ca/index-eng.aspx](http://www.oci-bec.gc.ca/index-eng.aspx)>.

126 Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015* (Ottawa, OCI, 2015) at 31 [2014-2015 Annual Report].

challenge cases – is to be wilfully blind to the human suffering that is perpetrated by the State, and to keep the moral agency of the State intact.

The conditions of jails and prisons are inherently conducive to inmate deterioration and are ineffective. This is evident when the State resorts to isolating inmates to address problems that occur within the prison population, where State control is already at its highest degree, and the effectiveness of the State's actions can be observed plainly, provided one gets access to observe the State's operation of prisons. I would say this is precisely why it is an awry notion that the State would place individuals in solitary confinement for "their own protection", considering the destructive effects of the practice. 'Protective' solitary confinement reveals the problematic nature of prison life, suggesting that the prison society that the State creates and controls is worse than the mental battle that takes place in an inmate's mind. Inevitably, the fact that the State uses the practice of solitary confinement reveals the State's poor management of inmates and exemplifies the State's poor criminal justice administration. Litigation strategies that leave the State practice of solitary confinement in tact are simply accommodating the State's poor administration.

What the correctional system also fails to do is that it fails to prepare inmates for living productive lives when they are released in the general public, which the vast majority will. Jails and prisons lack educational opportunities, sufficient mental and physical healthcare, proper nutrition, and productive social programming. Inmates continue to lack the very things that they needed prior to their incarceration. Jails and prisons fail to offer inmates adequate opportunities for self-improvement or to improve social conditions

outside prison, which is ironic, because one might expect an institution that is described as ‘correctional’ to really invest in these kinds of opportunities. It is no wonder inmates deteriorate under these conditions. Adopting the prison abolition logic, I argue that in an environment where there are deficient resources for inmates held captive against their will, the increased number of placements in solitary confinement is an expected result. And in solitude, inmates experience the greatest limitations to their free will, ability to socialize, and control minute details of their lives. In the ‘Carceral State’, the inmate in solitary confinement has been failed by general society, and once again failed by the prison society. With that considered, one might better understand why these isolated individuals might be full of rage when they are released from prison and are met with a merciless world that labels them as criminals.

The trauma caused by the experience of solitary confinement is inherent to the practice and is fuelled by the perilous and hostile environment of correctional facilities. Tweaking certain aspects of the practice of solitary confinement, such as the time periods, the seriousness of prison violations that warrant isolation, or the physical conditions of solitary confinement misses the mark on the issue at stake – that is, addressing the social-based problems that lead to an individual being placed in solitary confinement. As will be demonstrated in this paper, many courts, advocates, and policymakers have acknowledged the plight of different marginalized groups in society (i.e., Aboriginal peoples, Black people, and mentally unwell people), as they are funnelled into the criminal justice system in higher proportions than the rest of society. But, their reformist approaches have not effectively addressed the problem. The effective approach is decarceration of the Carceral

State and obtaining a court decision that prompts the State to implement social programming that addresses the various needs of marginalized and criminalized groups.

### **Challenging the “Carceral State” in Canada through Prison Abolitionist Lawyering**

*I found solitary confinement the most forbidding aspect of prison life. There is no end and no beginning; there is only one's mind, which can begin to play tricks. Was that a dream or did it really happen? One begins to question everything.*

– Mr. Nelson Rolihlahla Mandela, Late President of South Africa<sup>127</sup>

Parkes encourages a fusing of prison abolition ethic with prisoner litigation strategies and articulates that when deciding to litigate, it's important to understand the “carceral logic” that informs and legitimizes the practice of solitary confinement and other forms of isolation in correctional facilities.<sup>128</sup> The prevailing carceral logic in Canada is that these correctional facilities are rehabilitative and solitary confinement is necessary for inmates who do not adjust to the correctional environment, or who are dangerous and must be caged.<sup>129</sup>

I would venture to say that this carceral logic also applies to immigration holding centres and the justification of many instances of solitary confinement that are imposed while detained for immigration purposes. Immigration holding centres have been

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127 Rachele Larocque, Independent Review of Ontario Corrections Team, *Segregation Literature Review* (Ontario: Independent Review of Ontario Corrections, January 2017) [Larocque].

128 Parkes, “Solitary”, *supra* note 62 at 183. Critics argue that the history of prisoner litigation is instructive in that litigation has not been very effective in creating social change and has instead led to “band-aid reforms at best”. Yet at the same time, it is noted that “Like a biblical flood, the age of mass incarceration is finally ebbing,” and litigation has played a significant role, along with activism and reform efforts to reveal “the depth of depravity” of this practice. *Ibid* at 178. I argue that the prison abolition ethic, and more specifically, an anti-carceral logic approach, can be used to leverage from the progressive strides achieved through reformist efforts, but also create more meaningful, broad-based changes that will benefit the quality of life for society overall.

129 *Ibid* at 183.

characterized as a positive experience for foreign nationals seeking asylum in Canada. Immigration detainees specifically are often extremely vulnerable: they can be asylum-seekers, pregnant women, minors, elderly, victims of torture, and persons with mental or physical disabilities.<sup>130</sup> Jason Kenney, former Minister of Citizenship and Immigration Canada between 2008 and 2013, reportedly described the conditions of an immigration holding centre for a news outlet, saying “It’s basically like a two- or three-star hotel with a fence around it.”<sup>131</sup> All the while, these immigration holding centres operate as medium-security facilities.<sup>132</sup> Dawson critiqued that this kind of reference to hotel conditions, and implicitly, the comforts and privileges of a hotel, depicts to the public an idea of Canadian hospitality, suggesting that Canada was detaining asylum-seekers in hotel-like conditions, because Canada is a benevolent nation.<sup>133</sup> The former Minister also pointedly stated that “they are not jails”,<sup>134</sup> even though there were, and still are, many immigration detainees held in provincial jails awaiting a determination of their immigration matters.<sup>135</sup> They also tend to wait in jail for longer periods.<sup>136</sup> Dawson also explains this precise characterization of immigration detention, coupled with the rhetoric that Canada’s hospitable reputation makes the country vulnerable to abuse of the immigration system, enables the State to

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<sup>130</sup> Hanna Gros & Paloma van Groll, “*We Have No Rights*”: *Arbitrary imprisonment and cruel treatment of migrants with mental health issues in Canada* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2015) at 13 [Gros & van Groll].

<sup>131</sup> Carrie Dawson, “Refugee Hotels: The Discourse of Hospitality and the Rise of Immigration Detention in Canada” (2014) 83:4 *University of Toronto Quarterly* 826 [Dawson].

<sup>132</sup> Gros & van Groll, *supra* note 130 at 75.

<sup>133</sup> Dawson, *supra* note 131 at 826.

<sup>134</sup> *Ibid* at 826, 829.

<sup>135</sup> *Ibid* at 826.

<sup>136</sup> *Ibid* at 829. The groups most commonly subject to immigration detention are new arrivals awaiting hearings to determine their admissibility; new arrivals who have been refused permission to enter Canada and are awaiting removal; rejected asylum-seekers awaiting deportation; undocumented people awaiting decisions about their admissibility; and people who have violated the terms of their visas. *Ibid* at 828.

legislate and create policies that hold asylum-seekers for lengthy periods while their immigration status is being determined.<sup>137</sup>

In her article, Carrie Dawson, a professor at Dalhousie University, contrasts the Minister's reference to hotel conditions, and the implicit comforts and privileges of a hotel, with an excerpt from a submission prepared by Janet Cleveland, Cecile Rousseau, and Rachel Kronick for the House of Commons, suggesting a contrary representation of these facilities:

Immigration Holding Centres are run as medium-security prisons, with fences topped with razor wire, centrally controlled locked doors, security guards, and surveillance cameras everywhere. Men and women are held in separate wings, with a special section for children detained with their mothers. There are regular searches with metal detectors, and sometimes body searches. Personal effects are confiscated on arrival. Wake-up times, meal times and all other activities are regulated by rigid rules. For example, one of our study respondents was placed in 24-hour solitary confinement because he refused to get up at the 6AM wakeup call. There are virtually no activities except TV, so people have nothing to do except wait and worry... Suicidal detainees are either placed under 24/7 individual surveillance, usually in solitary confinement, or transferred to a provincial prison.<sup>138</sup>

The description of life in an immigration holding centre, and particularly, the examples of circumstances when solitary confinement was employed (i.e., not cooperating with the facility's schedule and suicidal ideation) also reflect the logic that their confinement is necessary, because they are not adjusting well to the carceral environment.

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<sup>137</sup> *Ibid* at 827.

<sup>138</sup> *Ibid* at 829-830. For more information on solitary confinement in the context of immigration detention see as examples, Gros & van Groll, *supra* note 130. Hanna Gros, *Invisible Citizens: Canadian Children in Immigration Detention* (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2017) [Gros]. Hanna Gros & Yolanda Song, "No Life for a Child" A Roadmap to End Immigration Detention of Children and Family Separation (Toronto: International Human Rights Program, University of Toronto Faculty of Law, 2016) [Gros & Song].

Understanding this carceral logic can assist with dismantling unconstitutional aspects of the criminal justice system, by targeting and challenging the legitimacy of this logic.<sup>139</sup> Yet, as cautioned by Parkes, without awareness of this carceral logic, prison advocates may inadvertently entrench correctional logics in constitutionalized form, which create barriers to prisoners in need of constitutional protections.<sup>140</sup> In fact, a failure to challenge the carceral logic has the effect of expanding and proliferating carceral sites.<sup>141</sup> This is explained by Parkes when she offers the example of what transpired after federal Correctional Investigator, Howard Sapers, conducted a review of segregation practices across Ontario; the Ontario government decided to build two new and improved prisons, with expanded capacity, in response to recommendations to impose hard time limits on the use of segregation and to incorporate independent oversight.<sup>142</sup> The recommendation by the Correctional Investigator was a reformist critique that implicitly affirmed and legitimated the practice of segregation, because these recommendations articulated ways to make segregation more tolerable, rather than rejecting the use of segregation altogether. An anti-carceral framework adopts a focus on strategies to get people out of prison instead of making prisons better; it also encourages coalition-building and connections to abolitionist and other critical social movements, which are fighting for like-minded causes.<sup>143</sup>

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139 Parkes, “Solitary”, *supra* note 62 at 180.

140 *Ibid* at 178, 180.

141 *Ibid* at 183.

142 *Ibid* at 183-184.

143 *Ibid* at 183, 185.



## **CHAPTER FIVE: SOLITARY CONFINEMENT – THE INTERNATIONAL LAW**

### **CONCEPTUALIZATION**

*[My] cell was as long as me, as tall as me, as fat as me. There's a light on you all the time, you know, like one of these bright lights all the time. And you just got a mattress on the floor and a toilet. There's no sink to wash your hands. And it's infested with bugs; you sleep with them and eat with them. And there's no windows for sunlight – you don't know if it's light or dark out.*

*– Marie, a segregated women inmate sharing her experience<sup>144</sup>*

According to the *UN Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules)*,<sup>145</sup> solitary confinement is the “the confinement of prisoners for 22 hours or more a day without meaningful human contact.”<sup>146</sup> Prolonged solitary confinement is “solitary confinement for a time period in excess of 15 consecutive days”<sup>147</sup>.<sup>148</sup> *The Mandela Rules* prohibit indefinite and prolonged solitary confinement, and this State practice is absolutely prohibited in the case of women, children, and those with mental and physical disabilities who would be worsened by enduring such an experience.<sup>149</sup> This rule is peculiar, because solitary confinement almost invariably has a worsening impact on every individual subjected to it, not just those who have disabilities. This is especially since destructive psychological and physiological effects can manifest in as soon as 48 hours, and individuals placed in solitary confinement are frequently held in these isolating conditions for longer than 2 days. While the international community

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144 Joane Martel, “Telling the Story: A Study in the Segregation of Women Prisoners” (2001) 28:1 Social Justice 196 at 196.

145 *The Nelson Mandela Rules*, *supra* note 4.

146 *Ibid.*, r 44.

147 *Ibid.*

148 The period of 15 days for prolonged segregation comes from a Report of the Special Rapporteur on the *Convention Against Torture* in 2011, that provided evidence of mental and physical harm found in studies of people who experienced solitary for lengthy periods. *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 at para 54 [*CCLA v The Queen*].

149 *The Nelson Mandela Rules*, *supra* note 4 at r 45(2).

promotes implementing constraints on how, when, and how long solitary confinement should be imposed, as I have indicated earlier, the more appropriate policy decision to make is to completely abolish the practice of solitary confinement. *The Nelson Mandela Rules* specify that the concept of solitary confinement focuses on the lived reality of isolation, or the nature of isolating conditions, while placed in a prison cell for 22 to 24 hours. It matters less what policies govern the practice or what terminology a State uses instead of “solitary confinement” to describe the practice.<sup>150</sup>

In Canada, “segregation” is the key term used throughout correctional law and policy which is captured by the discourse on solitary confinement. Throughout this paper, I plan to use the term “solitary confinement”, even though Canadian legislation and literature use more benign-sounding terminology for the practice (i.e., segregation).<sup>151</sup> There are several justifications for this. Many provincial correctional institutions confine some of the custodial population for 22 or more hours per day in cells that are not designated as a “segregation area”, and are therefore, not included in official segregation statistics.<sup>152</sup> Isolated individuals placed in these ‘non-segregation cells’ are denied the same level of oversight and review of their confinement, and are denied the same level of mental health services by correctional staff.<sup>153</sup> Nevertheless, individuals in this situation

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150 Parkes, “Solitary”, *supra* note 62 at 167.

151 The term “administrative segregation”, in particular, has been criticized by Michael Jackson, professor of law at University of British Columbia, as a “benign semantic camouflage” for the most extreme form of incarceration. Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver/ Toronto: Douglas & McIntyre, 2002) at 287 [Jackson, “Justice”].

152 Ontario Ombudsman, “Segregation: Not an Isolated Problem: Submission in response to the Ministry of Community Safety and Correctional Services’ consultation on its review of policies related to segregation of inmates” (27 April 2016) at 4 [Ontario Ombudsman, “Segregation”].

153 *Ibid* at 20.

would still be considered subjected to solitary confinement under the *Mandela Rules*. Those subjected to these conditions still suffer the associated harms of this State practice.<sup>154</sup>

Notably, in *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*<sup>155</sup> (*CCLA*), the Ontario Superior Court of Justice stated that if Canada wishes that the solitary confinement discourse does not apply to the practice of administrative segregation, it must change the nature of the confinement that administrative segregation entails.<sup>156</sup> This includes changing the amount of time an inmate is held within a cell and the amount of human contact they have access to while in segregation. Until this happens, the Court said that the practice of administrative segregation is considered solitary confinement as defined in *The Nelson Mandela Rules*.<sup>157</sup>

*The Nelson Mandela Rules* are not binding international law since the nation states had not agreed as to whether the *Rules* will bind them. Yet, the Court in *CCLA* found it noteworthy to point out that Canada participated in drafting *The Nelson Mandela Rules*.<sup>158</sup> It is also noteworthy that in 2016, the Ontario Ombudsman, in its review of the practice of segregation in Ontario jails, endorsed *The Nelson Mandela Rules* on prolonged segregation to urge the Ministry of Community Safety and Correctional Services to end indefinite segregation.<sup>159</sup> With that said, I contend that Canada, as a human rights role model in the

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154 Parkes, “Solitary”, *supra* note 62 at 167.

155 *CCLA v The Queen*, *supra* note 148.

156 *Ibid* at paras 45-46.

157 *Ibid*.

158 *Ibid* at paras 48-49.

159 Ontario Ombudsman, “Segregation: Not an Isolated Problem: Submission in response to the Ministry of Community Safety and Correctional Services’ consultation on its review of policies related to segregation of inmates” (27 April 2016) at 3, 16 [Ontario Ombudsman, “Segregation”].

international community and a participant in drafting *The Nelson Mandela Rules*, must be held against the same standards that it helped to set for the rest of the world.

At the same time, *The Nelson Mandela Rules* represent a reformist approach to practising solitary confinement. While these *Rules* appear to allow for, and even support, the idea of completely abolishing the practice, these *Rules* still acquiesce to the notion that solitary confinement is otherwise a legitimate practice, by creating limits on how it can be used. In line with an abolitionist perspective, I would refute the legitimacy of solitary confinement, however, I would ascribe to the conceptualization of solitary confinement provided in *The Nelson Mandela Rules*. Doing this enables my paper, which contends for abolition, to remain a part of the conversation about all forms of solitary confinement and maintain a large audience for this paper.

While the works cited in this paper discussing the practice of “segregation” may be making observations and commentary based on the ‘official segregation statistics’ or the designated ‘segregation areas’ of correctional facilities, I use the term of solitary confinement to call into question the potential discriminatory nature of various forms of isolation that are very well missing in segregation statistics. And, I contend that the issue of discrimination may be more pervasive and more damaging than what is suggested by ‘official’ sources of information. The experience of solitary confinement does not simply end where classifications of “segregation” to an “area” end.

While solitary confinement is traditionally associated as a practice imposed on incarcerated individuals charged or convicted of criminal offences,<sup>160</sup> I seek to highlight

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<sup>160</sup> *CCLA v The Queen*, *supra* note 148 at paras 38-46. Parkes, “Solitary”, *supra* note 62 at 167.

that the practice is also imposed on immigration detainees, who find themselves in provincial jails or who are placed in designated immigration holding centres. Hence, I also use the general term of solitary confinement to capture the experiences of isolation endured by immigration detainees. Indeed, it is true that solitary confinement is a real and common phenomenon in Canada, in more ways than the State may be willing to acknowledge, and the individuals impacted are therefore enduring the harms of this practice.<sup>161</sup> A final reason for using the term solitary confinement is to use as much uniformity throughout my paper as reasonably possible, as a convenience for the reader. However, whenever the focus of the discussion requires a deliberate use of the term “segregation” due to governing law and policy, then this term will be used.

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<sup>161</sup> Parkes, “Solitary”, *supra* note 62 at 167.

## **CHAPTER SIX: SOLITARY CONFINEMENT IN CANADA – A BRIEF**

### **HISTORY**

*Twenty years ago, I was often called and asked to assist, even permitted into segregation cells to provide human contact and to intervene when women were self-injuring or threatening suicide. Now, in only the most desperate cases, I may be permitted to plead through meal slots with women as they smash their heads against walls, try to gouge out their own eyes or smear blood and feces on their bodies and surroundings.*

*- Canadian Senator and long-time feminist prisoner advocate, Kim Pate<sup>162</sup>*

In keeping with the prison abolition ethic, it is worthwhile to consider the history behind solitary confinement to understand its origins and recognize trends in the way this correctional practice has been implemented by the State. Solitary confinement in Canada was a practice borrowed from the United States.<sup>163</sup> Solitary confinement was devised by the Philadelphia Quakers, as part of operating what they conceptualized as “the penitentiary”, an institution that would replace the harsh punishments, which offenders were traditionally subjected to, such as flogging.<sup>164</sup> When solitary confinement was first introduced in America 200 years ago in the 1820s, the American penitentiary system attracted international attention, particularly from European countries, whose delegates would visit for prison tours and return to Europe with principles to adopt in the European prison systems.<sup>165</sup>

Penitentiaries, where solitary confinement was imposed, were created to make offenders “penitent”.<sup>166</sup> Solitary confinement was considered an innovative way to compel

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162 Pate, *supra* note 87 at 28.

163 *BCCLA v Canada*, *supra* note 120 at para 19.

164 Correctional Service Canada, “History of the Canadian Correctional System” online: <[www.csc-scc.gc.ca/educational-resources/092/ha-student-etudiant-eng.pdf](http://www.csc-scc.gc.ca/educational-resources/092/ha-student-etudiant-eng.pdf)> [CSC, “History”].

165 *BCCLA v Canada*, *supra* note 120 at para 19.

166 CSC, “History”, *supra* note 164.

prisoners to rehabilitate by spending the entire day alone, primarily confined in a cell, so they could repent and reflect on their transgressions in silence.<sup>167</sup> It was also an opportunity to remove the offender from the negative influences of general society as well as prison society.<sup>168</sup> The idea of solitary confinement was conceived with positive, even redemptive, intentions. Yet, as more countries adopted the practice of isolating prisoners, an increase in mental health issues, physical disease, and death among the isolated prisoners, was documented in America and Europe.<sup>169</sup> Nevertheless, the practice continued and spread across the globe.

The practice of isolating prisoners was first sanctioned in Canadian law with the enactment of the *Penitentiary Act* of 1834<sup>170</sup>.<sup>171</sup> In Canada, the first penitentiary was built in Kingston, Ontario, in 1835.<sup>172</sup> For over 30 years, Kingston Penitentiary operated as a provincial jail until the passage of the *British North America Act, 1867*<sup>173</sup> (i.e., the *Constitution Act, 1867*), which established federal and provincial responsibilities for justice. Hence, prior to Confederation, Kingston Penitentiary represented the beginning of the practice of solitary confinement in the Province of Ontario, just as much as it was for Canada as a whole. The *Penitentiary Act (1868)*<sup>174</sup> provided the federal government with the responsibility of operating Kingston Penitentiary and two other pre-Confederation

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<sup>167</sup> *CCLA v The Queen*, *supra* note 148 at para 1.

<sup>168</sup> *BCCLA v Canada*, *supra* note 120 at para 17.

<sup>169</sup> *Ibid* at paras 20-22.

<sup>170</sup> *An Act to Provide for the Maintenance by the Government of the Provincial Penitentiary*, (1834) 4 Will. IV, c.37, s 36 (British North American Legislative Database, 1758-1867, online: <bnald.lib.unb.ca/node/3862>).

<sup>171</sup> *CCLA v The Queen*, *supra* note 148 at paras 1-2.

<sup>172</sup> CSC, “History”, *supra* note 164.

<sup>173</sup> *British North America Act, 1867*, 30-31 Vict, c 3 (UK) [*Constitution Act, 1867*].

<sup>174</sup> *Penitentiary Act (1868)*, 39 Vict c 75.

prisons in Saint John, New Brunswick, and Halifax, Nova Scotia.<sup>175</sup> This created a federal system "for the establishment, maintenance and management of penitentiaries for offenders sentenced to two years or more."<sup>176</sup> Since penitentiaries – which first implemented the practice of solitary confinement – were reassigned to the care of the federal government, and since the history and practices of the federal system are more thoroughly documented and scrutinized than the provincial systems, my remaining discussion of the history of solitary confinement will be dominated by events arising in the federal correctional system.

“Dissociation” was a former name for segregation in Canada. It was governed under section 2.30 of the *Penitentiary Service Regulations*,<sup>177</sup> which authorized the warden to isolate a prisoner if the warden was satisfied it was necessary for “the maintenance of good order and discipline in the institution” or was in “the best interests of an inmate”. These criteria were vague, enabling placement decisions to be determined based on rumours, hunches, and intangible feelings about the inmate’s reputation or attitude.<sup>178</sup>

A history of alarming government reports, constitutional challenges, violent and deadly prison riots in the 1970s, and then the enactment of the *Canadian Charter of Rights and Freedoms (Charter)*<sup>179</sup> in 1982, created a culminating moment to reassess regulations on dissociation. A Correctional Law Review was appointed to conduct a general review of federal laws on corrections and concluded that the criterion for placement and release from dissociation – that is, “for the good order of the institution” – was overly vague and broad.

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175 Correctional Service Canada, “Penitentiaries in Canada” (20 October 2014) online: </www.escc-scc.gc.ca/about-us/006-1006-eng.shtml> [CSC, “Penitentiaries”].

176 *Ibid.*

177 *Penitentiary Service Regulations*, PC 1962-302, SOR/62-90.

178 *BCCLA v Canada*, *supra* note 120 at para 24.

179 *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982 c 11.



Based on the constitutional review, provisions on dissociation needed to establish the right to a hearing, a requirement to provide reasons, restrictions for the time period of dissociation, and a right to be seen by a health professional.<sup>180</sup>

In 1992, the *Corrections and Conditional Release Act (CCRA)*<sup>181</sup> was enacted, two years after Ontario's *Ministry of Correctional Services Act*<sup>182</sup> (MCSA) was enacted. "Dissociation" was now called "segregation". Many features of the practice contained in the federal prison rules – "the Commissioner Directives" (CD)<sup>183</sup> – were now legally binding under the CCRA and its subordinating regulations. As documented in several internal and external reports, problems persisted in the implementation of the practice of segregation.<sup>184</sup> Most notable was the report by Justice Louise Arbour, the *Commission of Inquiry into certain events at the Prison for Women in Kingston*, released in 1996, where she noted there was a prevalent corporate culture within the Correctional Service Canada as high as the ranks of management of a lack of regard to the rights of prisoners.<sup>185</sup>

In 2007, the suicide death of 19-year-old female, Ashley Smith, who had been held in continuous segregation for over a year in federal correctional institutions was another highly publicized incident that reignited a discussion, and prompted additional reports, on the problematic use of segregation.<sup>186</sup> The *Coroner's Inquest Touching the Death of Ashley*

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<sup>180</sup> *BCCLA v Canada*, *supra* note 120 at para 33.

<sup>181</sup> *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA].

<sup>182</sup> *Ministry of Correctional Services Act*, RSO 1990, c M22 [MCSA].

<sup>183</sup> Commissioner's Directives comprise of the Correctional Service Canada's national policies concerning the operation of federal prisons. *BCCLA v Canada*, *supra* note 120 at para 73.

<sup>184</sup> *BCCLA v Canada*, *supra* note 120 at para 40.

<sup>185</sup> Solicitor General of Canada, *Commission of Inquiry into certain events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 39 [*Arbour Report*].

<sup>186</sup> *BCCLA v Canada*, *supra* note 120 at para 41.

*Smith*<sup>187</sup> was completed in 2013. The jury at the inquest articulated 11 reformist-based recommendations concerning the issue of segregation. These included the abolition of indefinite solitary confinement;<sup>188</sup> long-term segregation should not exceed 15 days for women;<sup>189</sup> until the abolition of all segregation and seclusion in all CSC institutions, inmates should not spend more than 60 cumulative days in segregation within a calendar year;<sup>190</sup> restrictive conditions of segregation should be reduced to a minimum;<sup>191</sup> and both the institutional head and a mental health professional should visit all segregated inmates at least once a day, but never simply attend visits by communicating through the food slot in the cell door<sup>192, 193</sup>.

In December 2014, Correctional Service Canada (CSC)<sup>194</sup> released a *Response to the Coroner's Inquest Touching the Death of Ashley Smith*<sup>195</sup> to address the jury's recommendations. Along with other refutations, CSC rejected the term of "solitary confinement" to refer to practices of administrative segregation, stating it is not a form of punishment. In so many words, CSC stated it was "an interim population management measure resulting from a carefully considered decision made by the Institutional Head to facilitate an investigation or to protect the safety and security of individuals and/or the

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187 Correctional Service Canada, *Coroner's Inquest Touching the Death of Ashley Smith* (19 December 2013) online: <[www.csc-scc.gc.ca/publications/005007-9009-eng.shtml](http://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml)>.

188 See Recommendation number 27.

189 See Recommendation number 28.

190 See Recommendation number 29.

191 See Recommendation number 30.

192 See Recommendations numbers 31 and 32.

193 *BCCLA v Canada*, *supra* note 120 at para 45.

194 Federally-sentenced prisoners are held in a correctional facility operated by the Correctional Service Canada. "The Correctional Service Canada (CSC) is the federal government agency responsible for administering sentences of a term of two years or more, as imposed by the court. CSC is responsible for managing institutions of various security levels and supervising offenders under conditional release in the community." Correctional Service Canada, "Our Role" (31 October 2016) online: <[www.csc-scc.gc.ca/about-us/006-0001-eng.shtml](http://www.csc-scc.gc.ca/about-us/006-0001-eng.shtml)>.

195 Correctional Service Canada, *Response to the Coroner's Inquest Touching the Death of Ashley Smith* (11 December 2014) online: <[www.csc-scc.gc.ca/publications/005007-9011-eng.shtml](http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml)>.

institution”.<sup>196</sup> However, I would again highlight that the focus of the definition of solitary confinement, as provided by the *Mandela Rules*, is not on meting out a punishment. The focus of the definition is on the experience of the individual subjected to the practice and the conditions the individual endures while subjected to the practice. The Office of the Correctional Investigator (OCI) described CSC’s response to the *Ashley Smith Inquest* as “frustrating and disappointing”,<sup>197</sup> and further described the persistent overuse of administrative segregation as “the most commonly used population management tool to address tensions and conflicts in federal correctional facilities” and manage inmates who have mental health issues, are self-injurious, and are suicide risks.<sup>198</sup> According to the OCI, about half (48%) of federal inmates were placed in administrative segregation at least one time during their sentence.<sup>199</sup>

In 2015, Prime Minister Justin Trudeau recognized the importance of addressing the challenges with the practice of segregation in his mandate letter to the Minister of Justice and Attorney General of Canada, Jody Wilson-Raybould.<sup>200</sup> The letter read, in part:

In particular, I will expect you to work with your colleagues and through established legislative, regulator, and Cabinet processes to deliver on your top priorities: . . . [including] implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness.<sup>201</sup>

I note that Prime Minister Trudeau, acknowledged the practice of segregation as a form of solitary confinement in his mandate letter, contrary to the representations that have been

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<sup>196</sup> *BCCLA v Canada*, *supra* note 120 at para 46.

<sup>197</sup> *2014-2015 Annual Report*, *supra* note 126 at 15.

<sup>198</sup> *Ibid* at 26-27.

<sup>199</sup> *Ibid* at 26.

<sup>200</sup> *BCCLA v Canada*, *supra* note 120 at para 46.

<sup>201</sup> Prime Minister Justin Trudeau, “Mandate Letter: Minister of Justice and Attorney General of Canada Mandate Letter” (November 12, 2015) online: <[pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter](http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter)>.

asserted by other members of the government (i.e., ministry officials and legal counsel at the provincial and federal levels), as they advocate for the constitutionality and legitimacy of segregation.

## **CHAPTER SEVEN: THE LEGAL REGIME OF SOLITARY CONFINEMENT**

### **A General Summary**

Solitary confinement is prescribed in law and policy. The *CCRA* has provisions for administrative segregation in *CCRA* sections 31-31 and disciplinary segregation under *CCRA* sections 38-44 with tests for placement and release and details addressing due process and conditions of confinement.<sup>202</sup> In the federal system, the *CCRA* determines the grounds for placing an inmate in administrative segregation under subsection 31(3),<sup>203</sup> which are the same grounds that the institutional head (the Warden) must refer to when determining whether to continue or end a placement in administrative segregation.<sup>204</sup> Commissioner's Directive (CD) 709<sup>205</sup> also stipulate rules and conditions for implementing administrative segregation. The *CCRA* includes a statutory definition of "administrative segregation": "to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates".<sup>206</sup>

The *CCRA* and its subordinating regulations require periodic review of an inmate's placement in administrative segregation at an institutional segregation review board ("ISRB") after 5 days by the Deputy Warden, and at 30 days and every 30 days thereafter by the Warden.<sup>207</sup> The Regulations direct regional reviews of placements in administrative segregation by the Regional Segregation Review Board ("RSRB") if they continue past 60

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<sup>202</sup> *BCCLA v Canada*, *supra* note 120 at para 34.

<sup>203</sup> *Ibid* at paras 78-79. *CCRA*, *supra* note 181, s 32.

<sup>204</sup> *BCCLA v Canada*, *supra* note 120 at para 81.

<sup>205</sup> Correctional Service Canada, "Commissioner's Directives 709 – Administrative Segregation" online: <[www.csc-scc.gc.ca/acts-and-regulations/709-cd-eng.shtml](http://www.csc-scc.gc.ca/acts-and-regulations/709-cd-eng.shtml)> [CD 709].

<sup>206</sup> *CCRA*, *supra* note 181, s 31(1).

<sup>207</sup> *CCRA*, *supra* note 181, s 21(2). *BCCLA v Canada*, *supra* note 120 at para 81.

days.<sup>208</sup> However, CD 709 has reduced this period to 38 days, and every 30 days thereafter.<sup>209</sup> The CD 709 also requires a national review of cases where an inmate exceeds 60 days in segregation, or has had 4 segregation placements, or spent 90 cumulative days in segregation within a calendar year.<sup>210</sup>

Disciplinary segregation in the federal system can be ordered at a disciplinary hearing<sup>211</sup> – akin to court within prison walls – pursuant to subparagraph 44(1)(f), where an inmate is guilty of a serious disciplinary offence under *CCRA* section 40. CD 580 provides rules for disciplining inmates, which include rules for the segregation of inmates for disciplinary offences.

Regulation 778 under Ontario’s *Ministry of Correctional Services Act*, (“*MCS Regulations*”)<sup>212</sup> also prescribe “administrative segregation” under section 34 and “close confinement” (also known as “disciplinary segregation”) under section 32. There is no definition of segregation prescribed in statute or regulations for the Ontario’s correctional system. Instead, a definition is provided in policy drafted by the Ministry of Community Safety and Correctional Services (MCSCS).<sup>213</sup> According to the Independent Review of Ontario Corrections, the Ministry of Community Safety and Correctional Service’s policies regarding segregation are only available through an onerous freedom of information request.<sup>214</sup> The definition is provided in section 413 of the policy document:

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<sup>208</sup> *BCCLA v Canada*, *supra* note 120 at para 82.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*

<sup>211</sup> See *CCRA*, *supra* note 181, ss 38-44.

<sup>212</sup> Ontario, RRO 1990, Reg 778: GENERAL [*MCS Regulations*].

<sup>213</sup> Ministry of Community Safety and Correctional Services, “Institutional Services Policy and Procedures Manual: Placement of Special Management Inmates, Government of Ontario” (6 December 2016) [MCSCS, PSMI].

<sup>214</sup> Ontario, *Segregation in Ontario*, *supra* note 107 at 4.

Segregation: An area (for administrative segregation or close confinement housing, inmates are confined to their cells, limited social interaction, supervised/restricted privileges and programs, etc.) designated for the placement of inmates who are to be housed separate from the general population (including protective custody, special needs unit(s). etc.)

Interestingly, “segregation” refers to a physical “area”, even though those who are subjected to the practice describe it as both a physical and mental experience.<sup>215</sup> The definition focuses on a physical area, as opposed to the treatment of an inmate, or the form of confinement.<sup>216</sup>

The Ontario Ministry’s regulations and policy requires a Superintendent or his or her designate to review administrative segregation placements within the first 24 hours, and every five days.<sup>217</sup> A review must also take place every 30 days, and the Ministry’s policy states what review obligations apply to inmates in segregation or “other area designated as an extension of segregation.”<sup>218</sup>

Under subsection 32(2) of the *MCS Regulations*, an inmate can be placed in “close confinement” or “disciplinary segregation”, if the Superintendent “determines that an inmate committed a misconduct of a serious nature”.<sup>219</sup> No statutory definition of “misconduct of a serious nature” exists. But, this misconduct will typically include assaulting another inmate or staff member, assault with a weapon, possession of contraband, significantly damaging property, or inciting a riot or disturbance.<sup>220</sup> The “Discipline and

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215 Michael Jackson, “Reflections on 40 Years of Advocacy to End the Isolation of Canadian Prisoners” (2015) 4:1 Canadian Journal of Human Rights 57 at 66 [Jackson, “Reflections”].

216 Ontario Ombudsman, “Segregation”, *supra* note 159 at 4.

217 MCSCS, PSMI, *supra* note 213, s. 6.6. Ontario, *Segregation in Ontario*, *supra* note 107 at 30.

218 MCSCS: PSMI, *supra* note 213, s. 6.6. Ontario, *Segregation in Ontario*, *supra* note 107 at 30-31.

219 *MCS Regulations*, *supra* note 212, s 32(2). Debra Parkes, “A Prisoner’s Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms” (2007) 40:2 University of British Columbia Law Review 629 at 644 [Parkes, “Prisoner’s Charter?”]. The provincial governments have not followed suit with incorporating independent chairpersons for disciplinary proceedings. *Ibid.*

220 Ontario, *Segregation in Ontario*, *supra* note 107 at 26.

Misconduct Policy” also governs close confinement.<sup>221</sup> Close confinement can be sanctioned when correctional staff files a Misconduct Report and this punishment is ordered following a four-step adjudicative process: (1) the initial description of the misconduct, (2) the investigation, (3) a distinct inmate interview, and (4) the determination of the disposition.<sup>222</sup>

Inmates who (1) are self-injurious; (2) are suicidal; or (3) have a serious mental illness with significant impairment, may be subjected to solitary confinement under CD 843, which instructs correctional staff to place identified inmates in observation cells (e.g., “High Watch”, “Modified Watch”, “Suicide Watch”, clinical isolation or seclusion).<sup>223</sup> The point of this and other means of managing inmates with mental health issues also governed by *CCRA* sections 85-88 is “using observation or restraint as a last resort for the purpose of preserving life and preventing serious bodily harm, while maintaining their dignity in a safe and secure environment”.<sup>224</sup> The Ontario system also has policy, not law, which instructs correctional staff to place inmates in other forms of restricted housing that can be equivalent to “segregation” (i.e., medical isolation and a special needs unit).<sup>225</sup> Medical isolation is “[t]he isolation (segregation) of an inmate for health care purposes (e.g., to prevent the spread of infection).”<sup>226</sup> Special needs units (SNU) are a “dedicated or allocated physical location ... used to assess, stabilize, treat and house special needs

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<sup>221</sup> *Ibid* at 28.

<sup>222</sup> *Ibid* at 28-29. MCSCS, PSMI, *supra* note 213, s. 6.4.4.

<sup>223</sup> Correctional Service Canada, “Commissioner’s Directive 843 – Interventions to Preserve Life and Prevent Serious Bodily Harm” online: <[www.csc-scc.gc.ca/acts-and-regulations/843-cd-eng.shtml](http://www.csc-scc.gc.ca/acts-and-regulations/843-cd-eng.shtml)> [CD 843]. Office of the Correctional Investigator, “Risky Business: An Investigation of the Treatment and Management of Chronic Self-Injury Among Federally Sentenced Women” (30 September 2013) at 31 [OCI, “Risky Business”].

<sup>224</sup> CD 843, *supra* note 223.

<sup>225</sup> Ontario, *Segregation in Ontario*, *supra* note 107 at 27.

<sup>226</sup> *Ibid*. MCSCS, PSMI, *supra* note 213, s 4.9.



inmates.”<sup>227</sup> The policy governing SNUs defines an inmate with a special need(s) as an individual who meets one or more of the following criteria:

- Presentation of a severe and/or persistent mental illness (e.g. schizophrenia, affected disorder, organic brain syndrome, borderline personality disorder, dementia, etc.);
- An intellectual disability; and/or
- A significant physical disability (e.g., restricted mobility, deaf, blind, etc.)<sup>228</sup>

While inmates with mental illness and/or intellectual disability are not supposed to be placed in segregation, the Ministry can still segregate these inmates if it “can demonstrate and document that all other alternatives to segregation have been considered and rejected because they would cause an undue hardship.”<sup>229</sup>

Many important executive powers in the Ontario system are prescribed in regulation and policy, as opposed to a statute, public and political scrutiny in drafting these powers of correctional staff is reduced. Further, amendments to a regulation are considerably easier to achieve than they are for a statute. Accordingly, I argue that the ease with which powers for Ontario correctional staff can be added and modified with limited scrutiny, contributes to the lack of accountability and close monitoring of the provincial system, compared to the federal system. This has been repeatedly identified by critics as a problem. Notably, the *MCS Regulations* provide that if an inmate is held in administrative segregation, “as far as practicable”, that inmate will have access to “the same benefits and privileges as if the inmate were not placed in segregation”.<sup>230</sup> The federal system also has

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227 MCSCS, PSMI, *supra* note 213, s 4.16.

228 *Ibid*, s 4.15.

229 MCS Regulations, *supra* note 212, s 3.1.3. Ontario, *Segregation in Ontario*, *supra* note 107 at 28.

230 *MCS Regulations*, *supra* note 212, s 34(4).

a comparable provision in the *CCRA* statute.<sup>231</sup> However, for the federal legislation, it has been noted in court that the omnibus nature of one of the qualifications to retaining equal rights and benefits (i.e., “limitations specific to the administrative segregation area”), plus the limitations of the existing infrastructure in prisons, means that the operational reality is such that life in segregation is significantly different from life in the general prison population.<sup>232</sup>

### **A Focus on Solitary Confinement and Immigration Detainees**

Under this sub-heading I will answer two questions: (1) How do immigration detainees find themselves in provincial jails in the first place?; and (2) How do they end up in solitary confinement? To start with the first question, the Canada Border Services Agency (CBSA)<sup>233</sup> may choose to detain a foreign national arriving to Canada pursuant to subsections 55(2)-(3) of the *Immigration and Refugee Protection Act (IRPA)*,<sup>234</sup> While

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231 *CCRA*, *supra* note 181, s 37 states the following: An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

- (a) can only be enjoyed in association with other inmates; or
- (b) cannot be enjoyed due to
  - (i) limitations specific to the administrative segregation area, or
  - (ii) security requirements.

232 *BCCLA v Canada*, *supra* note 120 at para 110.

233 The Canada Border Services Agency (CBSA) ensures Canada's security and prosperity by facilitating and overseeing international travel and trade across Canada's border. Canada Border Services Agency “About the Canada Border Services Agency” (2 December 2016) online:<[www.cbsa-asfc.gc.ca/agency-agence/menu-eng.html](http://www.cbsa-asfc.gc.ca/agency-agence/menu-eng.html)>.

234 *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

Subsection 55(2) reads as follows:

- An officer may, without a warrant, arrest and detain a foreign national, other than a protected person,
  - (a) who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2); or
  - (b) if the officer is not satisfied of the identity of the foreign national in the course of any procedure under this Act.

Subsection 55(3) states the following:

- A permanent resident or a foreign national may, on entry into Canada, be detained if an officer

some immigration detainees are detained due to past criminality, most of them are not.<sup>235</sup> Rather immigration detainees are more often detained because they are considered a flight risk, their identity cannot be confirmed, or are broadly considered a “danger to the public”.<sup>236</sup>

According to the International Human Rights Program at the University of Toronto, Faculty of Law, 60% of all immigration detention takes place in Ontario, and 53% of all immigration detention takes place in the Greater Toronto Area alone.<sup>237</sup> In the Greater Toronto Area, once a CBSA officer decides to detain a foreign national, the CBSA, with delegated authority from the Ministry of Public Safety, determines the site of detention of the foreign national: (1) a designated immigration holding centre run by the CBSA; (2) or a provincial correctional facility run by Ontario’s Ministry of Correctional Services (MCS), which is enabled through an agreement between the CBSA and the MCS.<sup>238</sup> Immigration detainees do not have a say in this decision. In 2013, over 7370 foreign nationals were detained in Canada, and it was calculated that about 30% of all immigration detainees were placed in provincial jails.<sup>239</sup> In the 2016-2017 fiscal year, there was a total of 1212 immigration admissions to Ontario jails.<sup>240</sup>

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- (a) considers it necessary to do so in order for the examination to be completed; or
  - (b) has reasonable grounds to suspect that the permanent resident or the foreign national is inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality.

235 Gros & van Groll, *supra* note 130 at 13.

236 *Ibid.*

237 *Ibid* at 14.

238 *Ibid* at 75. Ontario, Independent Review of Ontario Corrections Team, *Corrections in Ontario: Directions for Reform* (Ontario: Independent Review of Ontario Corrections Team, 2017) at 94 [Ontario, *Directions for Reform*].

239 Gros & van Groll, *supra* note 130 at 14.

240 Ontario, *Directions for Reform*, *supra* note 238 at 94.

The CBSA also has the discretionary power to transfer an immigration detainee from an immigration holding centre, which is a medium-security facility, to a maximum-security provincial jail.<sup>241</sup> A key motivation for the CBSA to send immigration detainees to provincial jails is to reduce the federal agency's own costs for detaining the foreign nationals, in addition to a lack available space to hold all the foreign nationals that the CBSA detains.<sup>242</sup> Outside of Ontario, British Columbia, and Quebec, there are no immigration holding centres, and all immigration detainees are placed in provincial jails, where they are exposed to the criminal population.<sup>243</sup> Although they have not committed a crime in Canada, immigration detainees in provincial jails are treated the same members of the criminal population, without much distinction.<sup>244</sup>

To respond to the second question, as is true in immigration holding centres, when immigration detainees are placed in provincial jails, they can be subject to solitary confinement.<sup>245</sup> This explains why I have decided to raise awareness to the unique issues concerning solitary confinement that arise in the provincial correctional system, even as other literature tends to focus on practices of the federal system. If detainees are in distress, become difficult to deal with, start screaming in their cells persistently, display signs of a mental health issue, or express suicidal ideation, then they will be placed in solitary confinement in provincial jails.<sup>246</sup>

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241 Gros & van Groll, *supra* note 130 at 75.

242 *Ibid* at 14, 75.

243 *Ibid* at 75.

244 Ontario, *Directions for Reform*, *supra* note 238 at 94.

245 See for example: Anna Mehler Paperny and Patrick Cain, "A severely sick man spent 400 days in solitary. This isn't an anomaly: In Canada, it's common", *Global News* (29 April 2016) online: <globalnews.ca>.

246 Gros & van Groll, *supra* note 130 at 18. Dawson, *supra* note 131 at 829-830.

### **The Crimmigration Trend**

While most Canadians are immigrants or descended from immigrants, an era has emerged in Canada where foreign nationals coming to the country are treated as criminals or national security threats with no basic rights.<sup>247</sup> This era is dubbed the “crimmigration” era. In developed countries, such as Canada, migration is becoming synonymous with risk, leading to a securitization of borders in response to contemporary anxieties and fears increasing in a globalized world.<sup>248</sup> Canada, among other Western nations, avoid the immigration of unwanted migrants by criminalizing their activities.<sup>249</sup> Mainstream media regularly depicts refugees, in particular, as a source of chaos and disorder, whose troubled backgrounds and cultural differences make them unsuitable for Canada.<sup>250</sup>

A recent example of this emerging trend in modern Canadian society is the increasing number of foreign nationals entering Canada from the United States through unofficial border crossings after Donald Trump was elected as President in November 2016. News reports and political discourse described asylum-seekers as “illegal migrants”.<sup>251</sup> Moreover, politicians indicated that enhanced detention measures are needed to screen whether any of the “hundreds of illegal migrants” or “bogus” refugees coming to Canada have “paid criminal networks tens of thousands of dollars to come here in violation of several Canadian laws.”<sup>252</sup> This commentary from politicians reflects a predisposition to

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247 Gros & van Groll, *supra* note 130 at 14.

248 Wayne Antony, Gillian Balfour, C. Lesley Biggs, Carolyn Brooks, Lynn Caldwell, Elizabeth Comack, Pamela J. Downe, Susan Gingell, Margot A. Hurlbert, Carriane Leung, Darryl Leroux, Les Samuelson, and Bernard Schissel, *Gender, Race & Canadian Law* (Black Point, Nova Scotia: Fernwood Publishing Company) at 81 [Antony et al].

249 *Ibid.*

250 *Ibid* at 82.

251 See for example Robert Benzie, “Ford government is ending co-operation with Ottawa on resettlement of asylum-seekers” *TheStar* (5 July 2018) online: <[www.thestar.com](http://www.thestar.com)>.

252 Dawson, *supra* note 131 at 833, 837.

criminalize migrants rather than recognize their international right to leave their country of origin to flee from persecution under the *Convention Relating to the Status of Refugees*<sup>253, 254</sup> As these political views gain popularity, critics have warned that “refugees are vanishing”.<sup>255</sup>

Ironically, this crimmigration trend is developing even though Canada’s multicultural ideals are enshrined in law and are so cherished in Canadian society.<sup>256</sup> Crimmigration has become the policy-making marriage of criminal law and immigration law, and the marriage is a peculiar one, as the two fields of law do not necessarily have congruent functions within society.<sup>257</sup> While criminal law aims to prevent and address personal evils and proprietary harms suffered by individuals and society, immigration law determines who may or may not cross Canada’s borders, and who may or may not reside on Canadian land.<sup>258</sup> But, one academic source by Raquel Aldana, Won Kidane, Beth Lyon, and Karla McKanders, inspires my research by making the following important connections between criminal law and immigration law:

1. Both systems govern the relationship between the federal State and the individual.
2. Both are preoccupied with attributing a label to each individual navigating their respective systems. Each label determines the State’s dealings with that individual, reaping potentially life-changing outcomes (e.g., “not-guilty” versus “guilty”; “admissible” versus “inadmissible”).<sup>259</sup>

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253 *Convention Relating to the Status of Refugees*, UN General Assembly, 28 July 1951, Treaty Series, vol 189, p 137.

254 Dawson, *supra* note 131 at 833, 837.

255 *Ibid* at 833.

256 *Canadian Multiculturalism Act*, RSC, 1985, c 24 (4th Supp).

257 Raquel Aldana, Won Kidane, Beth Lyon, & Karla McKanders, *Global Issues in Immigration Law: Cases and Materials* (St Paul, MN: West Academic Publishing, 2013) at 321 [Aldana et al].

258 *Ibid*.

259 Admissibility in Canadian immigration law refers to whether a foreign national is allowed to enter to Canada.

There is a list of reasons why a foreign national may be deemed inadmissible or prohibited from entering Canada, and these reasons are prescribed in *IRPA*, *supra* note 234, ss 34-42. The main reasons for inadmissibility can be any of the following: security; human or international rights violations; criminality; organized criminality; health grounds; financial reasons; misrepresentation; non-compliance with the *IRPA*; or having an inadmissible family member.

3. Both systems, at their core, are systems of inclusion and exclusion. They create “insiders” and “outsiders,” determining if, how, and when, a person will be included as part of society. That said, when policymakers seek to entrench barriers for immigrants to attain citizenship or membership in society, it is convenient for them to draw upon another area of law that is also designed to exclude.<sup>260</sup>

Bringing immigration detainees into the domain of the criminal justice system through correctional facilities – co-mingling them with the criminal population often without any distinction – squarely exemplifies this crimmigration trend. Criminal law practices are infused into the immigration system, and migrants are increasingly criminalized.<sup>261</sup> Insofar as immigration detainees are affected by solitary confinement in jails and in immigration holding centres, I recognize the links that my research topic has with the “crimmigration” trend – the nexus between criminal law and immigration law in policy-making and State practices. Further, the use of solitary confinement – a practice born out of corrections institutions – in immigration holding centres also demonstrates a reciprocal influence of the immigration and criminal justice systems, to the disadvantage of migrants to Canada. The criminalization of immigration detainees in these ways among others enables the State

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260 Aldana et al, *supra* note 257 at 321. For example, non-citizens who have been convicted of a crime and sentenced to six months of imprisonment or more will be deported without access to an appeal process. This is true, even for an individual who immigrated to Canada at a young age, grew up and became acclimatized in Canada, have possibly diminished or non-existent social ties to the country they emigrated from, but never applied for Canadian citizenship. Antony et al, *supra* note 248 at 82.

261 Dawson, *supra* note 131 at 833. According to Koskie Minsky LLP’s website: “Koskie Minsky LLP and Henein Hutchison LLP have commenced a class action against the Government of Canada and the Province of Ontario alleging human rights violations relating to the treatment of immigrant detainees in Ontario’s prisons. The statement of claim issued on August 11, 2016 alleges, among other things, that the Canada Border Services Agency and the Ontario Ministry of Community Safety and Correctional Services have been negligent, have breached their fiduciary duties and have breached the Canadian Charter of Rights and Freedoms in incarcerating immigrant detainees in Ontario’s correctional facilities.” Koskie Minsky LLP, “Immigrant Detainee Class Action” (2015) online: <[kmlaw.ca/cases/immigrant-detainee-class-action/](http://kmlaw.ca/cases/immigrant-detainee-class-action/)>. As of November 27, 2017, a certification of the class of immigration detainees, who will be the plaintiffs, has successfully been ordered by the Ontario Superior Court of Justice. *Ibid.* For more information, see *Dadzie v Her Majesty the Queen in Right of Ontario*, 2017 ONSC 7101.

to exclude these detainees from participation in the general Canadian public, and to determine when and under what circumstances these detainees may integrate with society.



## **CHAPTER EIGHT: SOLITARY CONFINEMENT – WHAT’S**

### **THE HARM IN IT?**

*If you know you are going to spend a long time in the hole and you keep on hoping that you will get out and keep thinking about what you are missing, it slowly drives you mad. Alternatively, it makes you so angry and desperate that you either run into problems with the guards or you take it out on yourself, which is what I used to do by slashing up. Now what I do is to withdraw from the world as you know it, so that the world is like wrapped in a fog, you can't see it and so you forget about it. Then it becomes possible to do the time because the world really stops.*

*- Mr. Donnie Oag, recounting his experience of 1,000 days in solitary confinement<sup>262</sup>*

In line with the prison abolition ethic, it's important to raise awareness to the State-sanctioned harm that is inflicted when isolating immigration detainees and criminal inmates, to help establish why the State should no longer play a part in this practice. Solitary confinement has become a normalized part of prison life, even though it entails heightened levels of violence and dehumanization, and has been described by a growing body of critics and survivors as a form of torture.<sup>263</sup> A Senator from the United States, John McCain, articulated the experience as such: "It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment."<sup>264</sup> This is a particularly powerful statement comparing forms of suffering, since Senator McCain was a prisoner of war in Vietnam and "was beaten regularly; denied adequate medical treatment for two broken arms, a broken leg, and chronic dysentery; and tortured to the point of having an arm broken again".<sup>265</sup>

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262 Jackson, "Reflections", *supra* note 215 at 66.

263 *Ibid.*

264 McLeod, *supra* note 57 at 1179, n 97.

265 *Ibid.*

The immediate consequence of solitary confinement is that an inmate is denied meaningful human contact except through a food slot built into the cell door.<sup>266</sup> This deprivation of social contact is the source of the greatest psychological pain for isolated inmates.<sup>267</sup> The harmful effects of sensory deprivation can develop as quickly as 48 hours, altering brain activity.<sup>268</sup> Studies on the effects of solitary confinement mention the following as the potential adverse effects to the psychological, social, and spiritual health of inmates after extended periods of time: delirium, psychosis, major depression, hallucinations, paranoia, aggression, rage, loss of appetite, self-harm, disruption of sleep patterns.<sup>269</sup> Psychiatrist, Dr. Stuart Grassian was featured in the recent decision of *BCCLA v Canada* describing the effects of solitary confinement, and he is also featured in Professor Allegra McLeod's article on prison abolition ethic. Dr. Grassian has conducted research on the effects of solitary confinement both in Canada and America, and shared additional effects from his research. Inmates can also develop hypersensitivity to external stimuli,<sup>270</sup> panic attacks, difficulty with thinking or concentration or memory, intensive obsessional

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266 Kevin Griffin, "Aboriginal woman settles lawsuit that claimed she was treated inhumanely in B.C. jail" *Vancouver Sun* (22 May 2013) online: <[www.vancouversun.com](http://www.vancouversun.com)> [Griffin].

267 *BCCLA v Canada*, *supra* note 120 at para 185.

268 *CCLA v The Queen*, *supra* note 148 at paras 123, 126. The College of Family Physicians of Canada also concluded that solitary confinement can alter brain activity and result in symptoms within days. *Ibid* at para 126.

269 Piché & Major, *supra* note 5 at 24. *BCCLA v Canada*, *supra* note 120 at paras 160, 185. McLeod, *supra* note 57 at 1178. Canadian Civil Liberties Association, "Submission to the Ministry of Community Safety and Correctional Services Review of Segregation in Ontario Adult Correctional Facilities" (5 May 2016) online: <[ccla.org/cclanewsites/wp-content/uploads/2016/05/2016-05-05-CCLA-Submission-re-MCSCS-Segregation-Review.pdf](http://ccla.org/cclanewsites/wp-content/uploads/2016/05/2016-05-05-CCLA-Submission-re-MCSCS-Segregation-Review.pdf)> at 4 [CCLA "Submission"].

270 According to research conducted by Dr. Grassian, some inmates report a progressive inability to tolerate ordinary stimuli. *BCCLA v Canada*, *supra* note 120 at para 165.

thoughts,<sup>271</sup> overt paranoia, problems with impulse control,<sup>272</sup> and suicidal ideation and behaviour<sup>273</sup>.

Self-mutilation and suicide are more prevalent in solitary confinement, due to environmental stresses: the isolation, punitive sanctions, and severely restrictive living conditions related to their confinement.<sup>274</sup> Sadly, suicidal behaviours are often regarded by correctional staff as a manipulative tactic of the inmate, and is met with punishment, typically more administrative segregation. Ironically, segregation is the very thing that encourages incidents of suicide attempts.<sup>275</sup> Inmates with mental health issues or a suicide risk spend 30% more time in segregation than other inmates placed in segregation.<sup>276</sup>

The reduced environmental stimulation and social isolation in solitary confinement can be “strikingly toxic” to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances.<sup>277</sup> In more severe cases, segregated inmates have developed florid delirium, a confusional psychosis with intense agitation, fearfulness and disorganization.<sup>278</sup> Inmates who are more psychologically resilient eventually suffer severe psychological pain, especially when isolation is prolonged and/or the inmate views the isolation as an arbitrary exercise of power and intimidation by staff.<sup>279</sup>

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271 *Ibid.* Dr. Grassian stated that some inmates report the emergence of primitive aggressive fantasies of revenge, torture and mutilation of the prison guards. In each case the fantasies were described as entirely unwelcome, frightening and uncontrollable.

272 *Ibid.* Dr. Grassian found that some inmates reported episodes of loss of impulse control with random violence, such as throwing things around, “snap[ping] off the handle over absolutely nothing”, and even impulsive self-mutilation.

273 *Ibid* at para 185.

274 *Ibid* at para 186.

275 Piché & Major, *supra* note 5 at 15.

276 Ontario, *Segregation in Ontario*, *supra* note 107 at 100.

277 *BCCLA v Canada*, *supra* note 120 at para 164.

278 *Ibid.*

279 *Ibid.*

For women, the effects of solitary confinement may be compounded.<sup>280</sup> Female inmates tend to experience their confinement as a form of rejection, abandonment, invisibility, and a denial of their existence, which exacerbates any pre-existing distress resulting from a history of trauma or abuse before becoming incarcerated.<sup>281</sup> Female inmates report that they feel re-traumatized by their placement of solitary confinement, which often involves violent extractions from their cells by male guards, strip searches witnessed by male guards, and a lack of privacy going to the washroom while in solitary confinement. These concerns are again compounded by disadvantages these women face as inmates with mental illness, or with Indigenous or racialized ethnicities. The fact that solitary confinement is disproportionately used on vulnerable (i.e., inmates with mental health issues, Aboriginal inmates and other racialized inmates) is therefore especially disturbing.<sup>282</sup> Sometimes women are incarcerated in a segregated maximum security unit inside a men's prison, reflecting a lack of State resources to incarcerate women, which again, can disadvantage women greatly due to their often tumultuous backgrounds.<sup>283</sup>

Detention subjects foreign nationals to ongoing risk of facing the harms of solitary confinement.<sup>284</sup> Contrary to the general experience of the criminal custodial population, immigration detainees usually cannot be certain as to when their detention will end. Anxiety over the outcome of their matters in the immigration system and the hardship of detention has severe mental health effects on immigration detainees.<sup>285</sup> The uncertainty of

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280 CCLA "Submission", *supra* note 269 at 4.

281 *Ibid.*

282 *Ibid.*

283 Parkes, "Prisoner's Charter?", *supra* note 219 at 630

284 *Ibid.*

285 Gros & van Groll, *supra* note 131 at 14, 18.

when detention will end also exacerbates levels of stress, which trigger or worsen mental health issues. This uncertainty is a serious problem; while some are detained for days, weeks, or months, others are detained for many years. One male detainee, named Kashif Ali, was released into society in Ontario after 7 years in detention, mainly in solitary confinement.<sup>286</sup> Yet, Ali still has precarious immigration status.<sup>287</sup> Another male detainee, named Michael Mvogo, was detained for 9 years, much of this time in solitary confinement, before deportation from Canada.<sup>288</sup> Even while detained for much shorter periods of time, foreign nationals, such as Lucia Vega Jimenez who was detained for a total of three weeks, have been among the number of suicide deaths occurring in solitary confinement or immigration holding cells.<sup>289</sup> For inmates who endure solitary confinement, the psychological harm can eventually become a prolonged or permanent disability, greatly affecting an inmate's capacity to reintegrate with society after release.<sup>290</sup> When these isolated inmates find themselves released into society, many are “mentally destroyed” and “full of rage”.<sup>291</sup>

This is a humble attempt to capture some of the harms produced by the experience of solitary confinement carried out by the State.

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286 Kate McGillivray, “Immigration detainee freed after being held in Canada for 7 years due to ‘legal limbo,’” CBC News (1 May 2017) online: <www.cbc.ca>.

287 *Ibid.*

288 Nick Logan, “‘Man with no name’ detainee deported from Canada” *Global News* (25 August 2015) online: <globalnews.ca>.

289 Andrea Woo, “Woman who died in CBSA custody feared returning to domestic trouble in Mexico” *The Globe and Mail* (31 January 2014) online: <theglobeandmail.com>.

290 *BCCLA v Canada*, *supra* note 120 at para 164.

291 McLeod, *supra* note 57 at 1179, n 95.

## **CHAPTER NINE: WHY LITIGATION?**

*Solitary confinement does one thing: it breaks a person's will to live... If you're not broken when they put you into a hole, you're broken when they take you out . . . It makes no sense to hurt people so badly that they can't function when they come out.*

*- Ms. BobbyLee Worm, survivor of the CSC Management Protocol<sup>292</sup>*

It is worthwhile to discuss why I would support litigating the legitimacy of solitary confinement, as opposed to solely employing other methods of social change, such as lobbying, public awareness campaigns, making a human rights complaint, entertaining settlements or negotiations with the State regarding the use of the practice, and other means of social justice advocacy. I will breakdown my explanation for this viewpoint into the following sub-issues: (1) why all forms of solitary confinement, including administrative segregation, disciplinary segregation, and the isolation or seclusion of individuals with mental health issues, need to be abolished; (2) the corporate culture in corrections that is resistant to change; (3) the lack of public support to lobby or campaign against solitary confinement; (4) the failings of a settlement for a human rights complaint launched by Christina Jahn, who was isolated in an Ontario provincial jail; (5) the settlement failings of a *Charter* and tortious legal action launched by BobbyLee Worm, who was isolated in a federal prison; and (6) why launching a human rights complaint to a tribunal would not provide a satisfactory result.

Ultimately, what I intend to do with each of these sub-issues is support the argument that seeking a court order that abolishes the practice of solitary confinement will

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<sup>292</sup> Griffin, *supra* note 266.

provide stronger authority to establish constitutional protections as well as enforce humane treatment for inmates. Further, litigation using an anti-carceral or prison abolition ethic, offers the benefit of a forum – the courtroom – where the imbalance of power between the State, who jails, and the inmates and detainees, who are jailed, is diminished; the State-perpetrated harm can be displayed in a public fashion; and the adversarial process enables an opportunity to put the State to task in justifying such a destructive practice.

### **Abolishing All Forms of Isolation**

All forms of solitary confinement must be abolished. The safety and well-being of the most vulnerable in prisons and jails are overwhelmingly at stake. Regarding the provincial correctional system, the Ontario Human Rights Commission (OHRC) expressed concerns regarding the rights of prisoners held in segregation. More specifically, the OHRC stated that segregation “is disproportionately used on, and has particularly harmful effects for, Code-protected groups such as Black and Indigenous prisoners, prisoners with mental health disabilities, and women”.<sup>293</sup> Similar concerns have also been raised by the Ontario Ombudsman and the OCI.<sup>294</sup> The Canadian Human Rights Commission (CHRC) disapproves the use of solitary confinement on mentally ill inmates in particular,<sup>295</sup> to the extent where the CHRC Chief Commissioner has recently called for a complete end to all solitary confinement in federal prisons.<sup>296</sup> Former Supreme Court Justice, Louise Arbour,

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293 Larocque, *supra* note 127 at 14.

294 *Ibid.*

295 Canadian Human Rights Commission, “Solitary confinement violates human rights of the mentally ill: CHRC” *Cision Newswire* (12 December 2014) online: <[www.newswire.ca](http://www.newswire.ca)>.

296 Marie-Claude Landry, “We Must Put An End To The Use Of Solitary Confinement in Federal Prisons” *The Huffington Post* (16 January 2017) online:<[huffingtonpost.ca](http://huffingtonpost.ca)>.

who was commissioned in the widely influential Prison For Women inquiry in 1996, has more recently expressed disapproval of the manner in which solitary confinement is utilized in prisons and jails, in light of the deaths occurring in solitary confinement and coroner's inquests that fail to compel the State to meaningfully change its ways.<sup>297</sup> Support for the abolition of solitary confinement is on the rise.

The practice of administrative segregation is wreaking havoc on the prison and jail populations. Called the "steel-door solution" by some critics, administrative segregation is used to separate, punish and deal with the most difficult and vulnerable prisoners.<sup>298</sup> Among federal prisons, inmates who have been identified in their correctional plans as having mental health issues are 63.2% more likely to have been placed segregation than those without mental health issues at a 48% likelihood.<sup>299</sup> The OCI also reported that administrative segregation is commonly used to manage mentally ill inmates, self-injurious inmates, and inmates at risk of suicide.<sup>300</sup> Over 85% of federal inmates with a history of self-injury have been subjected to segregation.<sup>301</sup> As explained by expert witnesses, the greater vulnerability of mentally ill inmates when placed in stressful, traumatic conditions, such as segregation, the greater the risk of harm that they face.

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297 The House, "Former Supreme Court Justice Louise Arbour argues that it's time to reconsider the practice of solitary confinement" (Toronto: Canadian Broadcasting Corporation, 9 July 2016) online: <[www.lib.uwo.ca/cgi-bin/ezpauthn.cgi?url=http://search.proquest.com/docview/1802673522?accountid=15115](http://www.lib.uwo.ca/cgi-bin/ezpauthn.cgi?url=http://search.proquest.com/docview/1802673522?accountid=15115)> [The House].

298 Larocque, *supra* note 127 at 14.

299 *BCCLA v Canada*, *supra* note 120 at para 493.

300 *Ibid* at para 494.

301 *Ibid*.



Inmates with mental health issues should not be incarcerated where they will face the high likelihood of isolation in conditions that will only exacerbate mental illness.<sup>302</sup> As the CHRC endorses, inmates with mental illnesses should instead be placed in a treatment facility or a hospital where they can receive the appropriate, much-needed healthcare. The status of a mental disability means that these inmates have an entitlement to accommodations for their specific needs.

Aboriginal inmates were disproportionately impacted as rates of their placement in segregation increased by 31% between 2005 and 2015, while rates of non-Aboriginal inmates being placed in segregation increased only by 1.9% in the same period.<sup>303</sup> Among the Aboriginal prison population, while Aboriginal women make up a very low proportion, they comprise of 50% of segregation placements, and hence, are greatly over-represented.<sup>304</sup> Aboriginal inmates also remain in segregation for longer periods on average compared to Black and Caucasian inmates.<sup>305</sup> Despite a tumultuous social history, which should encourage CSC to make conscious efforts to alleviate the systemic disadvantages Aboriginal inmates face, CSC has been poor at acknowledging and documenting the ways they consider this social history and its impact on Aboriginal inmates who become segregated.<sup>306</sup> Culture-sensitive programming for inmates is lacking,

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302 Canadian Human Rights Commission, "Treat people with serious mental disabilities in hospitals, not jails: CHRC" *Cision Newswire* (19 December 2013) online: <[www.prnewswire.com/news-releases/treat-people-with-serious-mental-disabilities-in-hospitals-not-jails-chrc-236605441.html](http://www.prnewswire.com/news-releases/treat-people-with-serious-mental-disabilities-in-hospitals-not-jails-chrc-236605441.html)>.

303 *BCCLA v Canada*, *supra* note 120 at para 467.

304 *Ibid* at para 470.

305 *Ibid* at para 468.

306 *Ibid* at paras 478-481.

particularly for Aboriginal inmates, and this contributes to instances of violence and behavioural challenges that lead to segregation placements.<sup>307</sup>

Additional problems arise with the practice of administrative segregation among the Ontario provincial system. Staff of the Ontario Ministry struggles greatly to accurately track its segregation placements and to clearly understand what conditions count as segregation under the governing regulations and what do not.<sup>308</sup> A 2016 report by the Ontario Ombudsman uncovered that on many occasions, inaccurate and inconsistent information was used to justify and explain lengthy placements of segregation for vulnerable inmates. Moreover, there were many superficial and inadequate review exercises carried out without meaningful assessment of the circumstances of each inmate.<sup>309</sup> One Ministry official was quoted as saying: “We probably tracked livestock better than we do human beings.”<sup>310</sup>

Interestingly, disciplinary segregation tends not to be the focus of debate or litigation regarding solitary confinement, which reveals how the carceral logic prevails and retributivist assumptions remain unquestioned, even among those who profess themselves to be prisoner advocates. Michael Jackson, a law professor at University of British Columbia, poignantly remarks that trends in “the practices around solitary confinement are a litmus test of the legitimacy of state punishment.”<sup>311</sup> In that vein, I argue that it is important to consider how disciplinary segregation is administered by the State and discuss whether this specific practice represents legitimate State punishment.

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<sup>307</sup> *Ibid* at para 490.

<sup>308</sup> Ontario Ombudsman, “Out of Oversight, Out of Mind” (April 2017) at 6 [Ontario Ombudsman, “Oversight”].

<sup>309</sup> *Ibid*.

<sup>310</sup> *Ibid*.

<sup>311</sup> Jackson, “Reflections”, *supra* note 215 at 58.

Generally, courts seem to be satisfied with allowing the practice of disciplinary segregation, because there are legally prescribed limitations for the duration of isolation, compared to administrative segregation, which courts admonish as a practice whose relevant provisions enable prolonged solitary confinement.<sup>312</sup> Moreover, disciplinary segregation already includes a level of independent oversight and procedural protections for inmates that administrative segregation is lacking.<sup>313</sup> In fact, much of the controversy associated with disciplinary segregation among courts and prison reformers has been how it ultimately affects numbers of administrative segregation placements. As remarked by the British Columbia Supreme Court, the OCI noted in its 2014-2015 Annual Report on federal corrections that one alarming aspect to the use of administrative segregation, is that it is “used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system”.<sup>314</sup> During the reporting period, there were 209 placements in disciplinary segregation, which accounted for 2.5% of the total segregation placements in federal prisons.<sup>315</sup> Meanwhile, there were 8,309 placements in administrative segregation.<sup>316</sup> The OCI found that the cumbersome procedural safeguards for placements in disciplinary segregation explained the significant discrepancy in numbers.<sup>317</sup>

However, even disciplinary segregation has shown to be a problematic practice. Black inmates are consistently over-represented in placements for disciplinary and

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<sup>312</sup> *CCLA v The Queen*, *supra* note 148 at para 5.

<sup>313</sup> Debra Parkes, “Ontario solitary confinement ruling hardly counts as a victory” *The Globe and Mail* (19 December 2017) online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>.

<sup>314</sup> *2014-2015 Annual Report*, *supra* note 126 at 30. *BCCLA v Canada*, *supra* note 120 at para 95.

<sup>315</sup> *Ibid.*

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

involuntary segregation.<sup>318</sup> It has been reported concerning Black women inmates that they are held against a different standard compared to Caucasian women inmates in prison; for example, a Caucasian woman received 24 hours in segregation for the same action that resulted in a Black woman being segregated for three weeks.<sup>319</sup> This is contextualized by other challenges that Black inmates face, including poorer outcomes on other important correctional indicators (i.e., classifications to maximum security; use of force incidents by correctional staff; and being labelled as gang affiliated).<sup>320</sup> Segregation can only be used as a last resort and for as short a period as possible. It has become a standard tool of population management to maintain the safety and security of the institution; however, this approach may be disproportionately impacting Black inmates.<sup>321</sup>

### **Lobbying and Campaigning Against Solitary Confinement**

Lobbying or launching public awareness campaigns to end the practice of solitary confinement may be more financially feasible and easier means of social justice advocacy that be employed against this State practice. However, they should not be employed just on their own. Even among Canada, retributivist values are strongly rooted in society, which is demonstrated by the State's large financial investment in criminal justice administration. There is not very much widespread desire among the public to show concern for the

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318 Canada, Office of the Correctional Investigator, *Annual Report 2012-2013 of the Office of the Correctional Investigator*, (Ottawa: OCI, 2013) at 7, 10 [2012-2013 Annual Report]. Jackson, *supra* note 78 at paras 53-54.

319 Canadian Human Rights Commission, "Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women" (December 2003) online: <[www.chrc-ccdp.gc.ca/eng/content/protecting-their-rights-systemic-review-human-rights-correctional-services-federally](http://www.chrc-ccdp.gc.ca/eng/content/protecting-their-rights-systemic-review-human-rights-correctional-services-federally)> [CHRC, "Protecting"].

320 Jackson, *supra* note 78 at para 54.

321 Office of the Correctional Investigator, "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries Final Report" (28 February 2014) online: <[www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx](http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20131126-eng.aspx)>.

treatment of prisoners. And the public will less likely feel compelled to urge their elected representatives to reconsider this State practice, as compared to other policy issues that may directly affect their lives (i.e., healthcare, education, labour and employment), for which they are more likely to demand political response.

### **A Corporate Culture Resistant to Change**

Senior officials and policymakers may be motivated to change policies around how segregation is practised. However, this in itself is an obstacle to achieve due to the persistent lack of recognition and cooperation displayed by the State regarding rather basic issues, such as acknowledging that segregation is a form of solitary confinement according to international standards. But, even if senior officials and policymakers make the required acknowledgements and policy changes, another obstacle lies in the corporate culture that exists among correctional front-line staff, which will likely undermine these policy changes. Correctional institutions are closed spaces and they lack the transparency that is conducive for accountability.<sup>322</sup> This lack of transparency is especially true for the Ontario provincial system, as it is not as closely monitored as the federal system is through legally-prescribed yearly reporting by the OCI watchdog.<sup>323</sup> Lisa Kerr, a law professor at Queen's University, stated, “jails are among ‘the least-scrutinized institutions in our society’ and too often use solitary confinement as a tool to manage prisoners.” Professor Debra Parkes, who writes on carceral logic and prison abolitionist lawyering, commented that “Bringing a case to court — which can be costly or out of reach for many inmates — is often the only effective

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<sup>322</sup> Parkes, “Solitary”, *supra* note 62 at 177.

<sup>323</sup> See *CCRA*, *supra* note 181, Part III, titled “Correctional Investigator”.

way to compel documents and information from the system.”<sup>324</sup> Correctional institutions are also described as the antithesis of fundamental values, including liberty and human dignity.<sup>325</sup>

While policymakers declare strong commitments to upholding human rights and the rule of law, frequent instances of grave abuses and violations persist. The Ontario Ombudsman receives 4,000 complaints every year concerning correctional matters.<sup>326</sup> During the 2014-2015 fiscal year, the Ontario Ombudsman noted a significant increase in segregation-related complaints, including one where an inmate was kept in solitary confinement for over three years, and was only released to join the rest of the jail population after the Ontario Ombudsman intervened in the matter.<sup>327</sup>

The culture of abuse and non-compliance among correctional staff has historically been a problem in Canada, lagging progress for both the provincial and federal correctional systems. This is demonstrated by recurring litigation over the manner in which solitary confinement is implemented against inmates and the numerous reports that have studied the trends regarding this State practice.<sup>328</sup> Recurrent recommendations calling for reform are ignored, reaffirming the Government’s poor reputation for human rights compliance in

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324 Lucas Powers, “Solitary confinement reform in Canadian jails hindered by secretive system” *CBC News* (3 March 2016), online:<[www.cbc.ca](http://www.cbc.ca)>.

325 Parkes, “Prisoner’s Charter?”, *supra* note 219 at 675.

326 Ontario Ombudsman, “Segregation”, *supra* note 159 at 2, 10.

327 *Ibid.*

328 An early example of a case constitutionally challenging the practice of solitary confinement and manner in which it is implemented is *McCann et al v The Queen et al*, [1976] 1 FC 570 (TD). In this case, the Federal Court recognized that the conditions of isolation that the Plaintiffs were subjected to amounted to cruel and unusual punishment, yet the Court did not determine it was necessary to impose due process requirements in decisions to isolate prisoners. An early example of a report that was commissioned to study trends in the use of solitary confinement (specifically, dissociation) is Solicitor General of Canada, *Report of the Study Group on Dissociation*, (Ottawa: Public Works and Government Services Canada, 1975). This report was released several months after the *McCann* decision was released by the Federal Court, and the report recommended that decisions to isolate prisoners should be overseen by review boards chaired by the Warden at every correctional institution to review administrative segregation placements at fixed intervals. *BCCLA v Canada*, *supra* note 120 at para 30.

the correctional system.<sup>329</sup> This feeds a dangerous and dysfunctional correctional culture which produces a perpetual risk of harm to inmates, as a result of a stark power imbalance between the jailers and the jailed.<sup>330</sup> This corporate culture also means that correctional staff, who dare to report the misconduct and abuses of fellow correctional staff – and therefore break the unofficial code of silence – become social pariahs.<sup>331</sup> Staff who report others are subjected to verbal abuse and harassment at work.<sup>332</sup> They are called “rats”.<sup>333</sup> And they face risks to their personal safety while interacting with the prisoners at the correctional facilities. One correctional officer in the provincial correctional system disclosed to the Ontario Ombudsman that in response to her involvement in disclosing the misconduct of her peers, she would be left to her own devices without backup. When she requested for assistance, she would sometimes be ignored by her colleagues.<sup>334</sup> The work environment becomes intolerable for many employees and they choose to leave their jobs.<sup>335</sup> As a result, correctional staff are conditioned to follow this unofficial code of silence.<sup>336</sup> The corporate culture emboldens and insulates staff who engage in rogue acts

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329 Parkes, “Solitary”, *supra* note 62 at 177. For example, the Canadian Human Rights Commission, Justice Louise Arbour’s report recommended judicial supervision and reviews of segregation decisions by an independent adjudicator. *Arbour Report*, *supra* note 185 at 255-256. These same recommendations were echoed by Correctional Service Canada’s own Task Force on Administrative Segregation and the Office of the Correctional Investigator. However, no reasonable efforts have been made to follow these recommendations or to reform the practice of solitary confinement in a way that addresses the particular needs of female inmates. CHRC, “Protecting”, *supra* note 319 at 45.

330 For more information see Ontario Ombudsman, “‘The Code’: Investigation into the Ministry of Community Safety and Correctional Services’ response to allegations of excessive use of force against inmates” (June 2013) at 9 [Ontario Ombudsman, “The Code”].

331 *Ibid.*

332 *Ibid.*

333 *Ibid* at 47.

334 *Ibid.*

335 *Ibid.*

336 *Ibid* at 9.

of violence against inmates with the help of others to conspire to lie or destroy or falsify records. And incidents of brutalized inmates occur time and again.<sup>337</sup>

Justice Louise Arbour, for instance, commented on this over 20 years ago when she investigated the violent strip searches and cell extractions conducted by male guards on eight female inmates in Kingston, Ontario's federal Prison for Women.<sup>338</sup> She stated these grave incidents that were "symptomatic of a culture that did not respect the rule of law" as opposed to "individual examples of a failure to respect the law". She also stated the following:

. . . significantly in my view, when the departures from legal requirements in this case became known through this inquiry's process, their importance was downplayed and the overriding public security concern was always relied upon when lack of compliance had to be admitted. This was true to the higher ranks of the Correctional Service management, which leads me to believe that the lack of observance of individual rights is not an isolated factor applicable only to the Prison for Women, but is probably very much part of CSC's corporate culture.<sup>339</sup>

On the issue of non-compliance under the *CCRA* and the abuse of administrative segregation, Michael Jackson, a law professor at University of British Columbia, asserts that these problems are attributed to three things: (1) the legislation itself; (2) the manner in which correctional staff administer the legislation; and (3) a lack of effective enforcement of the legislation.<sup>340</sup> The judiciary, the Office of the Correctional Investigator, and other reform-oriented critics seem to have tremendous faith in the Government's

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<sup>337</sup> *Ibid.*

<sup>338</sup> Soon after the Arbour inquiry, the Prison for Women in Kingston, Ontario, was permanently closed down in 2000. Correctional Service Canada, "The Closing of the Prison for Women in Kingston July 6, 2000" (6 March 2008) online: <[www.csc-scc.gc.ca/text/pblct/brochurep4w/12-eng.shtml](http://www.csc-scc.gc.ca/text/pblct/brochurep4w/12-eng.shtml)>.

<sup>339</sup> *Arbour Report*, *supra* note 185 at 39.

<sup>340</sup> *BCCLA v Canada*, *supra* note 120 at para 35.



willingness to change. Time after time, they produce lengthy legal decisions, recommendations, and arguments on how to make solitary confinement more tolerable through reform-based safeguards against extreme degrees of deprivation.<sup>341</sup> Regrettably, this has all proven to make little difference. Ridding the practice of solitary confinement altogether removes the opportunity for correctional staff, management, or policymakers to rely on excuses for failing to follow reform-based safeguards that were hard fought through constitutional litigation and strenuously advocated by reformists. Ridding the practice is also the better way to recognize and redress the racial discrimination, dehumanization, and disadvantage that this practice causes.

### **Why the Jahn settlement with the Ontario government was, and still is, ineffective**

The story and legal settlement arising from the human rights complaint of Christina Jahn is instructive for why litigation is appropriate. In 2012, Jahn filed a human rights complaint against the Ministry of Community Safety and Correctional Services for discriminating against her on the ground of disability by holding her in segregation for over 200 days at the Ottawa-Carleton Detention Centre, rather than providing her the treatment she needed for her mental health issues.<sup>342</sup> At the time of the complaint, Jahn suffered from mental health issues, addictions, and cancer.<sup>343</sup>

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341 Some legal scholars perceive the correctional system as not being receptive of judicial admonitions addressing instances of abuse of discretion and a persistent contempt for inmate rights. Jackson, “Justice”, *supra* note 151 at 374.

342 Ontario, *Segregation in Ontario*, *supra* note 107 at 53. Public Interest Remedies: Schedule “A” In the matter of *Christine Nadine Jahn v Her Majesty the Queen in Right of Ontario* as represented by the Minister of Community Safety and Correctional Services before the Human Rights Tribunal of Ontario (24 September 2013) online: <[www.ohrc.on.ca/sites/default/files/Jahn%20Schedule%20A\\_accessible.pdf](http://www.ohrc.on.ca/sites/default/files/Jahn%20Schedule%20A_accessible.pdf)>. [Jahn Public Interest Remedies].

343 Ontario, *Segregation in Ontario*, *supra* note 107 at 53.

In September 2013, a settlement was reached between the Ministry, 42-year-old Christina Jahn, and the Ontario Human Rights Commission.<sup>344</sup> The Ministry committed to providing Jahn with compensation, but the settlement also included 10 public interest remedies that the Ministry agreed to implement to improve segregation practices involving inmates with mental health issues.<sup>345</sup> Further, the settlement included commitments to introduce mental health screenings, and to study improvements in mental health services at correctional facilities with female inmates.<sup>346</sup> Deadlines were included in the settlement and were monitored by the Ontario Human Rights Commission.<sup>347</sup>

Deadlines were not met. This was partly because the timelines to achieve certain policy changes were overly ambitious and there was lack of coordination on the part of the Ministry to bring together a team to start working on implementing the commitments made in the settlement.<sup>348</sup> This led to a Contravention of Settlement application for failing to distribute information about inmates' rights while in segregation. This was ultimately settled, as well.<sup>349</sup> Eventually, as a result of the settlement, the Ministry created a revised version of policy, which was released on September 24, 2015.<sup>350</sup> Pursuant to the *Ontario Human Rights Code*,<sup>351</sup> the revised policy focuses on the Ministry's duty to accommodate inmates with mental health issues to the point of undue hardship.<sup>352</sup> Regarding the Jahn settlement, the Ontario Ombudsman stated that it will be difficult for the Ministry to

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344 Ontario Ombudsman, "Segregation", *supra* note 159 at 2.

345 *Ibid* at 1.

346 Ontario, *Segregation in Ontario*, *supra* note 107 at 54.

347 *Ibid*. For more information, see Jahn Public Interest Remedies, *supra* note 342.

348 Ontario, *Segregation in Ontario*, *supra* note 107 at 54.

349 *Ibid*.

350 Ontario Ombudsman, "Segregation", *supra* note 159 at 5.

351 *Human Rights Code*, RSO 1990, c H19 [*Ontario Code*].

352 Ontario Ombudsman, "Segregation", *supra* note 159 at 5.

implement its recent amendments to policy on segregation, since the Ministry has failed to implement simpler procedural requirements under previous policy.<sup>353</sup> Indeed, the Ministry has still not followed through with all the commitments it made during settlement and, according to the Independent Review of Ontario Corrections, policies around mental health services for inmates have not been sufficiently updated.<sup>354</sup> The status quo effectively remains unchallenged for inmates with mental health issues, and they remain extremely vulnerable.

### **Why the Worm settlement with the federal government didn't help either**

BobbyLee Worm, a Cree woman from Saskatchewan, was 19-years-old when she was sentenced to 6 years and 4 months of imprisonment, as a first-time offender, for offences that included robbery.<sup>355</sup> She was first admitted to Edmonton Institution for Women in Alberta, but was later transferred to Fraser Valley Institution for Women in British Columbia.<sup>356</sup> Like many Indigenous women caught in the criminal justice system, prior to incarceration, Worm had a troubled background, consisting of trauma and abuse.<sup>357</sup> Many of her family relatives had attended residential schools. During her childhood and adolescence, she suffered extreme physical, emotional and sexual abuse. Her past led her to develop Post-Traumatic Stress Disorder (PTSD) and depression, which both required close monitoring and ongoing treatment.<sup>358</sup> Worm started using drugs and became addicted

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<sup>353</sup> *Ibid* at 13.

<sup>354</sup> Ontario, *Segregation in Ontario*, *supra* note 107 at 54-55.

<sup>355</sup> *Worm v Attorney General of Canada*, 2011 BCSC (Notice of Civil Claim) at para 1. Griffin, *supra* note 266.

<sup>356</sup> Griffin, *supra* note 266.

<sup>357</sup> *Ibid*.

<sup>358</sup> *Worm*, *supra* note 355 at para 4.

at a young age, but by the time of the legal action, she accomplished three years of institutional sobriety.<sup>359</sup>

While Worm was incarcerated at Fraser Valley Institution, she was subjected to a policy regime – not legally prescribed – that began in 2005, called the “Management Protocol”.<sup>360</sup> The CSC created this regime to strategize how the Warden would handle female prisoners who were deemed as high risk.<sup>361</sup> This practice features prolonged and indefinite administrative segregation with three phases, which CSC indicated should take a minimum of six months before an inmate returns to general population.<sup>362</sup> Depending on the inmate’s conduct, the inmate would be subject to different levels of physical liberty and access to prison services or programming – graduating to a less restrictive phase of the Protocol for ill-defined ‘good behaviour’ and regressing to a more restrictive phase for bad behaviour, which could include something as minor as swearing or being disrespectful to staff.<sup>363</sup> Women in the most restrictive phases had no contact with other inmates, often for many months at a time. Regardless of the phase, life for women subjected to the Protocol was extremely structured and regulated, and a judicial officer did not review these placements.<sup>364</sup> The Protocol itself stirred up aggressive and anti-social behaviours due to the harmful physical, psychological, and social effects of solitary confinement.<sup>365</sup> Due to the zero-tolerance model of this regime that punished a broadly-defined concept of

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<sup>359</sup> *Ibid* at para 3.

<sup>360</sup> Griffin, *supra* note 266.

<sup>361</sup> Worm, *supra* note 355 at para 10.

<sup>362</sup> *Ibid*. Juliana Ho, “Solitary Confinement” *Law Now* (5 January 2016) online: <[www.lawnow.org/solitary-confinement/](http://www.lawnow.org/solitary-confinement/)>.

<sup>363</sup> Worm, *supra* note 355 at paras 11, 13.

<sup>364</sup> *Ibid* at para 11.

<sup>365</sup> *Ibid* at para 17.

aggressive behaviour, it was very difficult for a woman to earn their way out of the Management Protocol and return to the general prison population.<sup>366</sup> Affected women could also return to segregation for actions that would not warrant segregation if they were in the general prison population.<sup>367</sup>

Worm was deemed as one of the small number of "difficult to manage", mostly Indigenous, women prisoners subjected to this prolonged segregation.<sup>368</sup> Following several fights with other prisoners, Worm spent three-and-a-half years, the majority of her sentence, in solitary confinement, which included two instances of segregation for almost a year.<sup>369</sup> She was denied access to programs, treatment for her pre-existing PTSD, Aboriginal spiritual services, and basic legislative protections.<sup>370</sup> She suffered considerable psychological and emotion harm.

In 2011, Worm sued for damages arguing that staff at Fraser Valley Institution, who subjected her to this regime, did so without lawful authority and without due regard to the harm Worm would suffer as a result.<sup>371</sup> She argued that although the staff owed her a duty of care, they breached the expected standard of care, and therefore, were negligent.<sup>372</sup> She also sought a declaration that *CCRA* sections 31, 32, and 33 enabling indefinite administrative segregation, and the policy authorizing the Management Protocol, are of no force and effect under *Constitution Act, 1982*, section 52 due to violations against *Charter*

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<sup>366</sup> *Ibid* at para 12.

<sup>367</sup> *Ibid*.

<sup>368</sup> Parkes, "Solitary", *supra* note 62 at 172.

<sup>369</sup> Griffin, *supra* note 266.

<sup>370</sup> Parkes, "Solitary", *supra* note 62 at 172. *Worm*, *supra* note 355 at para 12.

<sup>371</sup> *Worm*, *supra* note 355 at para 26, 29.

<sup>372</sup> *Ibid* at para 27.

sections 7 and 12.<sup>373</sup> By the time Worm commenced the legal action, she was 24-years-old. In 2013, the CSC settled the lawsuit with Worm. While the settlement led to the formal abolition of the Management Protocol, prolonged solitary confinement continues for female prisoners under new policies and procedures.<sup>374</sup>

What the Jahn and Worm settlements reveal is that, relative to a settlement, a court order recognizing the practice of solitary confinement as a discriminatory practice provides stronger authority to provide constitutional protection and enforce humane treatment of inmates.

### **Why not go to a Human Rights Tribunal?**

The available remedies within the human rights legal framework have a determining factor on whether it is worthwhile to undergo the process of the Ontario Human Rights Tribunal or Canadian Human Rights Tribunal. The remedies also determine whether the discriminatory way solitary confinement is used can be avoided in the future. In line with the compensatory focus of human rights legislation, under the *Ontario Code*, an inmate in the provincial correctional system (i.e., immigration detainee or inmate in criminal custody) could potentially receive damages to remedy injuries to one's dignity, feelings and self-respect from the Ministry of Community Safety and Correctional Services.<sup>375</sup> An immigration detainee could obtain similar remedies at the Canadian Human Rights Tribunal.

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<sup>373</sup> *Ibid* at para 29.

<sup>374</sup> Parkes, "Solitary", *supra* note 62 at 172.

<sup>375</sup> *Ontario Code*, *supra* note 351, ss 34 and 45.2(1).

The Federal Tribunal can order Canada Border Services Agency to cease its discriminatory practice and take measures to prevent future discriminatory practices from happening.<sup>376</sup> Further, the federal tribunal could compensate an immigration detainee up to \$20,000 for any pain and suffering experienced as a result of the discrimination. Further still, the federal tribunal could compensate an immigration detainee up to \$20,000 for discrimination that was wilful or reckless.<sup>377</sup>

The Ontario Tribunal could also order the Ministry to do anything that, in the opinion of the Tribunal, the Ministry ought to do to comply with the *Ontario Code*.<sup>378</sup> This remedy can address future practices, even if such an order was not requested,<sup>379</sup> and this remedial power serves to ensure that the *Ontario Code*'s systemic public interest objectives are achieved.<sup>380</sup> Public interest remedies, aim to promote greater awareness to discrimination and can include orders for creating non-discriminatory policies and procedures, internal human rights complaint procedures, and education and training programs. An immigration detainee could obtain similar remedies at the Canadian Human Rights Tribunal.<sup>381</sup>

Regarding public interest remedies, as indicated from the *Jahn* settlement and independent reports on the correctional corporate culture, this will not likely reform the status quo of placing seriously vulnerable individuals in solitary confinement. The lack of

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<sup>376</sup> *Canadian Human Rights Act, RSC 1985, c H-6, ss 53(2) [Canada Act]*.

<sup>377</sup> *Ibid*, ss 53(2).

<sup>378</sup> *Ontario Code, supra* note 351, ss 34 and 45.2(1).

<sup>379</sup> *Ibid*, ss 34 and 45.2(2)

<sup>380</sup> Mary Cornish, Fay Faraday, and Jo-Anne Pickel, *Enforcing Human Rights in Ontario* (Aurora, ON: The Cartwright Group Ltd, 2009) at 127 [Cornish, Faraday & Pickel]. Human Rights Legal Support Centre, "What Remedies Are Available to Me at the HRTTO?" online: <[www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto#order](http://www.hrlsc.on.ca/en/how-guides/what-remedies-are-available-me-hrto#order)>.

<sup>381</sup> *Canada Act, supra* note 376, ss 53(2)(a), (e).

compliance with the *Jahn* public interest remedies also demonstrates that the Government generally does not take human rights cases – and the anti-discrimination principles they try to achieve – seriously. In addition, while pursuing a human rights complaint may be useful for seeking damages that can help an inmate who experienced discrimination based on disability, for example, seek counselling and psychiatric treatment, the result is primarily that only one individual benefits from making the human rights complaint, usually through compensation. Abolishing solitary confinement is the desired result, and I would contend that a constitutional case, would be more effective at achieving this desired result. Due to the principle of constitutional supremacy, which is embodied and protected under *Constitution Act, 1982*, subsection 52(1), in constitutional cases, the foremost objective is on comporting federal and provincial statutes, regulations, and policies with the *Canadian Constitution*,<sup>382</sup> rather than compensating a complainant, and figuratively throwing money at a problem that really needs to be eradicated.

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382 Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law Inc, 2009) at 374 [Sharpe & Roach].



## **CHAPTER TEN: JUSTIFYING THE DISCRIMINATION CLAIM**

*I think the thing to remember is that a sentence of imprisonment, the punishment is the deprivation of liberty, it's not an opportunity for further abuse, that's not the point of imprisonment.*

- Former Canadian Supreme Court Justice, Louise Arbour<sup>383</sup>

As discussed earlier, prison abolition ethic is motivated by fully unearthing the State-sanctioned dehumanization, violence, and racial degradation that gave birth to, and is perpetuated by, incarceration practices and punitive policing measures, such as solitary confinement.<sup>384</sup> The historical and ongoing discriminatory force of the justice system against already vulnerable persons is a fundamental concern of abolitionists. Accordingly, I argued that legal principles of *Charter* section 15 most closely aligns with the abolitionist perspective compared to any other legal tool at one's disposal to officially abolish the practice of solitary confinement. However, compared to other *Charter* provisions that have been relied upon to advocate for the interests of the incarcerated (i.e., sections 7 and 12), subsection 15(1) is the more unconventional basis to litigate the constitutionality of solitary confinement practices. In this Chapter, I wish to argue why *Charter* subsection 15(1) is the most appropriate constitutional right to effectively challenge carceral logics as a prisoner advocate and to advance the prison abolitionist vision for how we deal with crime.

I aim to do this by discussing the protections provided by subsection 15(1); explaining why it is worthwhile to use the *Charter* as the means to achieve the abolition of solitary confinement by commenting on the history of *Charter* litigation regarding this practice; offering a critique of the most recent decisions on solitary confinement –

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383 [sic]. The House, *supra* note 297.

384 McLeod, *supra* note 57 at 1172.

specifically, administrative segregation – that have been released by the courts to date; articulating what I believe are the benefits of advancing a discrimination claim; and finally, arguing why a multi-ground of discrimination framework should be employed for the *Charter* challenge.

### **The Statutory Interpretation of Subsection 15(1) of the *Charter***

Subsection 15(1) of the *Charter* states as follows:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 involves the two-step analysis of proving, firstly, that a law, in its purpose or effect, creates a distinction based on an enumerated or analogous ground, and secondly, that the impugned law creates a disadvantage by perpetuating prejudice or stereotyping.<sup>385</sup>

The Supreme Court of Canada provides a definition for understanding what “discrimination” means under the *Charter* in the decision, *Andrews v Law Society of British Columbia*, which still resonates today.<sup>386</sup> Justice McIntyre says the following in *Andrews*:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.<sup>387</sup>

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<sup>385</sup> *BCCLA v Canada*, *supra* note 120 at paras 452-453. *R v Kapp*, 2008 SCC 41 at paras 17, [2008] 2 SCR 483 [Kapp].

<sup>386</sup> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 [Andrews].

<sup>387</sup> *Kapp*, *supra* note 385 at paras 16, 18.

To combat discrimination, the Supreme Court explains that section 15 is intended to promote substantial equality, as opposed to formal equality.<sup>388</sup> Formal equality refers to an understanding of equality commonly associated with the “similarly situated” test, which is akin to the American equal protection jurisprudence and is also rooted in Aristotle’s philosophical view that “things that are alike should be treated alike”.<sup>389</sup> In determining similarities or differences, some criterion is used, which tends to be the purpose of the rule, policy, or law in place. The focus of formal equality becomes an individual’s situation, and the relevance his or her personal characteristics at issue to the purpose of the challenged rule, policy, or law.<sup>390</sup> Critique of the similarly situated test highlighted that the test was inherently unreliable since the exercise of determining the purpose is uncertain and subject to manipulation, defining a purpose too narrowly and uncritically, and rendering a personal characteristic irrelevant in a discrimination case. Further, the test provides no guidance for determining that a certain legislative purpose is discriminatory.<sup>391</sup> Substantive equality, by contrast focuses on the impact of laws on members of groups subject to stereotyping and historic disadvantage.<sup>392</sup> Substantial equality fundamentally endorses the view that the work of promoting equality involves promoting a society in which everyone can feel secure in knowing that, under the law, they are recognized as human beings who are equally deserving of concern, respect, and consideration.<sup>393</sup>

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<sup>388</sup> *Ibid* at para 15. *Andrews, supra* note 386 at 171.

<sup>389</sup> Sharpe & Roach, *supra* note 382 at 312.

<sup>390</sup> *Ibid*.

<sup>391</sup> *Ibid* at 312-313

<sup>392</sup> *Ibid* at 313.

<sup>393</sup> *Andrews, supra* note 386 at 171.

**On the History of Litigating Solitary Confinement: Why bother with the *Charter* then?**

Interestingly, Professor Michael Jackson articulates that the major benefit of the enactment of the *Charter*, as it pertains to prisoners, is not the litigation that it encourages, but rather “the climate and culture of respect” that the *Charter* produces among both governments and citizens for fundamental human rights and freedoms.<sup>394</sup> When the *Charter* was enacted in 1982, one would have reasonably thought that prisoners would substantially benefit, as it was difficult to conceive of a class of vulnerable people subjected to the most extreme level of State control in a society of majoritarian indifference.<sup>395</sup> The incident where female prisoners at the Prison for Women, were strip-searched by male correctional officers and illegally detained in segregation for many months exemplified the culture of abusive power that prison advocates were hopeful that the *Charter* would address.<sup>396</sup> Moreover, historically, inmates were treated as people without any rights.<sup>397</sup> In effect, they were sentenced to a “civil death” as they lost all civil and property rights, and this phenomenon continued until the practice of the “civil death” was abolished by British legislation in the late 1800s. Still, throughout the 1900s, leading up to the *Charter*, the legislature and judiciary adopted a “hands off” doctrine that allowed a broad delegation of administrative power to correctional officials, a lack of an interventionist approach, and a deference to these officers’ judgment in their treatment of the inmates.<sup>398</sup>

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394 Parkes, “Prisoner’s Charter?”, *supra* note 219 at 630.

395 *Ibid* at 632.

396 *Ibid*.

397 *Ibid* at 633.

398 *Ibid*.

The enactment of the *Charter* encouraged Canadians to envision a liberal, human rights-focused nation.<sup>399</sup> The media reported a narrative that Canada's new human rights approach led the nation to become “soft on crime”.<sup>400</sup> This ignited a public sentiment of “new punitiveness”, countering the emergence of the human rights era, and the public endorsed criminal justice measures, such as longer sentences, “no frills” imprisonment, shaming, and “three strikes” laws.<sup>401</sup> But prisoners and their allies were before courts in a few instances to fight for their rights.<sup>402</sup> A small number of *Charter* claims were successful.<sup>403</sup> The most significant of these successful cases, with the exception of prisoner voting rights,<sup>404</sup> focused on affording prisoners more procedural rights under *Charter* section 7, rather than substantive rights for prisoners to increase their residual liberty interests.<sup>405</sup>

The *Charter* section 12 right against cruel and unusual punishment or treatment may naturally give the impression of being the ideal provision for challenging the practice of solitary confinement.<sup>406</sup> This is especially because the international community,

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399 *Ibid* at 635.

400 *Ibid* at 635-636.

401 *Ibid* at 635.

402 The majority of *Charter* claims, especially the successful claims, were launched by inmates of federal system, since the relatively shorter incarceration terms in provincial jails make it less likely that provincial inmates will put together a *Charter* challenge. Parkes, “Prisoner’s *Charter*?”, *supra* note 219 at 640. Further, it has been reported that some immigration detainees may not know what legal rights they can exercise until, for example, a criminal inmate incarcerated with them at a provincial jail suggests that they contact Legal Aid Ontario for assistance with their legal issues. Gros & van Groll, *supra* note 130 at 38.

403 Parkes, “Prisoner’s *Charter*?”, *supra* note 219 at 635.

404 *Ibid* at 639, 642. Although prisoner voting is considered as a substantive right, rather than a procedural fairness right within the corrections context, a right to participate in the political process through voting is analogous to a procedural right, which does not change but rather that flows from the substantive right to vote. Simply, it is a participatory right, instead of a right to specific conditions or treatment. *Ibid*.

405 *Ibid* at 634. Prisoners possess residual liberty interests, according to the Supreme Court through a trilogy of cases. The Court held that prisoners have procedural rights that must be respected when correctional officers decide to transfer them to administrative segregation or to high maximum security units. *Cardinal and Oswald v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 [*Cardinal*]; *R v Miller*, [1985] 2 SCR 613, 52 OR (2d) 585; and *Morin v Canada (National Special Handling Unit Review Committee)*, [1985] 2 SCR 662, 24 DLR (4th) 71.

406 Parkes, “Prisoner’s *Charter*?”, *supra* note 219 at 659.

including Canada, determined that 15 continuous days of isolation is torture under the *Mandela Rules*. The legal test for a violation of section 12 is that a treatment or punishment must be “so excessive as to outrage the standards of decency”. This has proven very difficult for prisoners to establish.<sup>407</sup> I would argue that the wording of this test encourages courts to hold unnecessarily high expectations for what will cross the line as excessive mistreatment of inmates, because of the prevailing carceral logic. Thus, this legal test enables courts to dismiss complaints against State conduct that is nevertheless abusive, oppressive, and harmful to the well-being of inmates.<sup>408</sup>

Two recent notable cases – one from December 2017 and one from January 2018 – have been stirring up public attention while arguing for the constitutional rights of federally-sentenced prisoners subjected to the practice of administrative segregation. In December 2017, the Applicants – the Canadian Civil Liberties Association (CCLA) – sought a declaration that *CCRA* sections 31-37 are invalid for violations under *Charter* sections 7, 11(h), and 12, because of a lack of independent review for administrative segregation placements.<sup>409</sup> The Ontario Superior Court of Justice only recognized a section 7 violation. In January 2018, the Plaintiffs – the British Columbia Civil Liberties Association (BCCLA) and the John Howard Society of Canada – sought a declaration that *CCRA* sections 31-33 and 37 sanctioning administrative segregation in Canadian

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<sup>407</sup> *Ibid.*

<sup>408</sup> Strategically, most of the analytical work for Charter claims regarding prison conditions is done through section 7. For example, section 12 and gross disproportionality – a principle of fundamental justice under section 7 – are closely connected, hence, courts may address their reasoning on gross disproportionality under either a Charter section 7 analysis or section 12 analysis when they are both invoked. For example, see *CCLA v The Queen, supra* note 148 at para 83. But, again, the scope of section 7 litigation heavily focuses on procedural fairness, and this tends not to be particularly helpful for making significant improvements for prison conditions.

<sup>409</sup> *CCLA v The Queen, supra* note 148 at para 3.

penitentiaries, are invalid as the provisions enable indeterminate and prolonged solitary confinement within the international law meanings, which ultimately violate *Charter* sections 7, 9, 10(b), 12, and 15.<sup>410</sup> The Supreme Court of British Columbia recognized a violation of section 7 and 15, yet relied on the section 7 violation – not the section 15 violation – to determine that the provisions enabling indeterminate and prolonged administrative segregation failed the section 1 reasonable limits test. Section 7 once again led the constitutional debate around solitary confinement, yet not much progress was achieved from prison abolitionist perspective.

What these two recent cases, and past *Charter* cases, illustrate is that the preoccupation with addressing procedural problems with the corrections system has been an impediment to making greater strides in prisoner advocacy and dismantling the “Carceral State”. The modest, reformist approach of tweaking procedural rights of prisoners ultimately enables a discriminatory practice to continue that is contextualized by a prison system and a justice system plagued by racial discrimination, dehumanization, lack of social supports, and a perpetuation of disadvantage. Past *Charter* cases have not adequately addressed the root problems of the injustices prevalent in prison society and general society, which lead to the prevalence of solitary confinement and other destructive features of the correctional system. Rather, these *Charter* cases focus on the symptomatic consequences of the “Carceral State” – namely, the procedural problems and the imbalance of power that exists between the jailers and the jailed.

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<sup>410</sup> *BCCLA v Canada*, *supra* note 120 at para 2.

Despite my critique of past *Charter* litigation, I do not contend that all hope in the *Charter's* utility for protecting prisoners is lost. I contend that the way past cases have framed their *Charter* claims – with the reformist rather than an abolitionist mindset – have not been conducive to effectively advancing the interests of prisoners. Prisoner advocates have not yet made the best use of the *Charter* to their advantage. And I argue that solitary confinement is an example where a shift in the litigation approach can make the real difference.

### **The Two Recent Decisions: The Civil Liberties Associations Cases**

These two cases on the practice of solitary confinement in Canada left much desired. It certainly would not have been foolish for a person, superficially informed that two civil liberties associations were spearheading constitutional challenges against the practice of solitary confinement, to expect the litigation to target the practice in its entirety. And, abolishing this source of harm in an already damaging social institution. One would less likely expect that this litigation would take the more modest approach of focusing on how to make solitary confinement a more tolerable experience. Surely, this might come as a deflating realization to anyone sympathetic to the dismal experience of prison life.

The Judge in *CCLA*, for instance, poignantly remarks that the focus of this case is not a question of whether the initial decision to place an inmate in administrative segregation complies with the *Charter*, as the Judge noted that courts have already ruled that the Warden must be allowed wide discretionary power to enable quick responses,



which may take the form of placing an inmate in administrative segregation.<sup>411</sup> And while the Judge in the *BCCLA* decision showed much concern for the detrimental effects of prolonged and indeterminate solitary confinement, which are prevalent in federal prisons, he did not go far enough to say that solitary confinement in general should no longer be practised. These two cases reaffirmed the legitimacy of solitary confinement, keeping in tact the discretionary power given to correctional staff to place an inmate in solitary confinement.

Notably, in contrast to the *CCLA* case, the Judge in the *BCCLA* case heard arguments on the issue of a violation under *Charter* section 15, and the Judge ruled that the Plaintiffs successfully established a violation. The Plaintiffs argued that administrative segregation has a disproportionately negative impact on women, Aboriginal inmates, and the mentally ill.<sup>412</sup> But, the Judge found that administrative segregation had a discriminatory impact on mentally ill inmates and Aboriginal inmates and he declined to declare discrimination against women alone.<sup>413</sup> Aboriginal inmates face discrimination due to the recognized historical trauma and disadvantage that the Aboriginal community has endured. The Judge found that this is neither adequately nor consistently considered by correctional staff in decisions to place Aboriginal inmates in administrative segregation, even as the Aboriginal community is over-represented in the criminal justice system, including in administrative segregation placements.<sup>414</sup> Moreover, since Aboriginal inmates are placed in segregation more often and for longer periods, they have limited access to

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<sup>411</sup> *CCLA v The Queen*, *supra* note 148 at para 114. *Cardinal*, *supra* note 405.

<sup>412</sup> *BCCLA v Canada*, *supra* note 120 at paras 438-442, 454.

<sup>413</sup> *Ibid* at paras 456-524.

<sup>414</sup> *Ibid* at paras 470-474.

programming, which impacts their ability to later on transfer to a lower security institution, or obtain conditional release, or fulfill a correctional plan to demonstrate rehabilitation.<sup>415</sup> Mentally ill inmates face disadvantage, because the correctional staff use unreliable instruments to detect the mental health status of an inmate (i.e., Computerized Mental Health Intake Screening System (ComMHISS) and the Suicide Risk Checklist)<sup>416</sup> and also follow an under-inclusive policy (i.e., CD 709) for determining which inmates cannot be placed in administrative segregation according to the manifesting nature of their mental illness.<sup>417</sup>

Unlike the *BCCLA* case, the Judge in the *CCLA* decision did not engage with a section 15 analysis. Surely, this was largely the result of the limited scope of arguments and evidence presented before the Ontario Superior Court of Justice by the lawyers representing the Applicant, the *CCLA*, and what they saw fit as the effective way to challenge the practice of administrative segregation. Ultimately, if a party bringing a claim fails to raise a key issue, then the judge has no opportunity to meaningfully consider the issues with the relevant evidence and make a determination of its merits. In that regard, the *CCLA* decision was a missed opportunity to bring awareness to the discriminatory use of the practice, which is a critical consideration, and I would contend, should have been the primary focus of the case.

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<sup>415</sup> *Ibid* at para 484.

<sup>416</sup> *Ibid* at paras 521-523.

<sup>417</sup> *Ibid* at paras 500-504.

In the *BCCLA* case, the Judge began his reasonable limits analysis under *Charter* section 1 by explaining how he would address the section 15 violation that the Plaintiffs established with evidence. The Judge said the following:

I will state at the outset that my analysis principally addresses the s. 7 infringements. Given my ultimate conclusion that those infringements cannot be justified in this case, there is little purpose in undertaking a detailed analysis with respect to the infringements of s. 15, although I do refer to the treatment of inmates with mental illness as an alternative to administrative segregation. Moreover, the parties, including the Government who bears the onus on this issue, did not meaningfully address the s. 15 infringements in the context of s. 1.<sup>418</sup>

The *BCCLA* decision recognized a violation of *Charter* section 15 concerning discrimination against Aboriginal inmates and inmates with mental health issues. Yet, the Judge in this case also explicitly stated that his reasonable limits analysis under *Charter* section 1 focused on the section 7 violation more so than the section 15 violation.<sup>419</sup> The Judge says, “Given my ultimate conclusion that those infringements cannot be justified in this case, there is little purpose in undertaking a detailed analysis with respect to the infringements of s. 15.”<sup>420</sup> This wording reflects the Judge’s view that the established section 15 violation has lesser importance compared to the section 7 violation. The Judge buttresses his approach for his section 1 analysis, stating that “the parties, including the Government who bears the onus on this issue, did not meaningfully address the s. 15 infringements in the context of s. 1”. This also reflects the lesser importance that was attributed to the section 15 violation by the parties in the case. The fact that the government

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<sup>418</sup> *Ibid* at para 547.

<sup>419</sup> *Ibid*.

<sup>420</sup> *Ibid*.

did not make full submissions concerning how the section 15 violation could be salvaged under section 1 indicates that the CCLA and the John Howard Society of Canada, failed to effectively put the State to task in demonstrably justifying its section 15 violation in the context of Canada's free and democratic society. Essentially, the State got away with this discriminatory practice by simply not giving a meaningful explanation for its discriminatory policies and conduct.

Hence, we see that while counsel in the *BCCLA* case provided the Judge with the opportunity to assess the issue of discrimination on its merits, counsel and the Judge involved in the case did not regard the violation of section 15 to be the primary focus of the case. This is demonstrated by the fact that much attention was given to litigating the legal regime for review hearings of administrative segregation placements – which centred on procedural safeguards – as opposed to the practice of administrative segregation as a whole – which prompts a fundamentally more critical analysis. This enabled the Judge to set aside the section 15 issue, saving himself the task of reconciling one pertinent issue – the pink elephant in the courtroom, if you will: *how can we justify the State practice of administrative segregation in the correctional system of Canada's free and democratic society, knowing with proof that it is wielded in a discriminatory manner?* I argue that this is a question that should have rendered administrative segregation a constitutionally invalid practice altogether. Arguing more broadly against the practice of solitary confinement, I will engage in the analysis in Chapter 11, titled “Arguing the Discrimination Claim” to demonstrate how the State would not succeed in justifying this discriminatory practice.

It is perplexing how the Judge in *BCCLA* would acknowledge that inmates with mental health issues are disproportionately subjected to administrative segregation and suffer more when placed in segregation, yet allow a practice to continue that is recognized as triggering serious psychological harm.<sup>421</sup> The Judge's decision essentially enables inmates to remain in harm's way and mentally deteriorate. Another perplexing issue is how the Judge in *BCCLA* acknowledged that the sentencing terms and rehabilitative programming for Aboriginal inmates are disproportionately adversely affected by the practice of administrative segregation, but moved on to allow this racially discriminatory practice. Procedural safeguards for the review process of administrative segregation will not amount to safeguards against discrimination, especially if the courts do not feel compelled to impose safeguards against discrimination, specifically.

For the *CCLA* and *BCCLA* decisions, shifting the focus of the constitutional analysis from concerns about procedural fairness to discrimination, essentially means a paradigm shift in the constitutional analysis where a prison reformist perspective is replaced with a prison abolition perspective. These two cases reflect a prison reformist approach in that they are preoccupied with tweaking certain aspects of the practice of solitary confinement under the assumption that the flaws that exist in this practice, and our justice system generally, are superficial in nature and can be remedied while maintaining a heavy use of criminal justice administration.<sup>422</sup> Parkes, commenting on the *BCCLA* case,

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<sup>421</sup> According to the OCI, administrative segregation is “the most commonly used population management tool to address tensions and conflicts in federal correctional facilities” and manage inmates who have mental health issues, are self-injurious, and at risk of suicide. *2014-2015 Annual Report*, *supra* note 126 at 26-27. Often, correctional staff use segregation as a behaviour modification tool. It's been described by the segregated as “a test to break your spirit, to bend your will. The longer you resist, the longer the enemy tries.” Piché & Major, *supra* note 5 at 17.

<sup>422</sup> McLeod, *supra* note 57 at 1207.

also agrees that the reformist approach is apparent in this litigation.<sup>423</sup> The very fact that these cases took on a reformist approach – which the parties advancing these constitutional challenges enabled – is problematic as this means that the carceral logic underlying the practice of solitary confinement remains in tact. I argue that by failing to push *Charter* section 15 as the core constitutional issue, the prisoner advocates in each case failed to tackle the root of the problems concerning solitary confinement and the justice system as a whole, and thus, were too modest in their demands for change. Through public interest standing, prisoners are able to benefit from allies, such as the CCLA, the BCCLA, and the John Howard Society of Canada, as these organizations can advocate knowledgeably, strategically, and in prisoners’ interests.<sup>424</sup> However, they missed a precious opportunity to take a meaningful step in dismantling the Carceral State. The two cases do not reflect as much urgency to transform how various social problems – such as mental illness or racism or sexism – are regulated through the criminal justice system.<sup>425</sup>

### **What a Discrimination Focused Analysis Can Do**

Here I want to discuss in more detail why section 15 is the superior *Charter* provision for challenging and abolishing the practice of solitary confinement. Further, I posit that arguing this discrimination claim, with women – not men – as the party launching the *Charter* challenge will bolster the chances of abolishing solitary confinement. In Canada, female inmates have been described as “too few to count” in the correctional

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423 Parkes, “Solitary”, *supra* note 62 at 183.

424 *Ibid* at 180.

425 McLeod, *supra* note 57 at 1208.

system.<sup>426</sup> They face unique disadvantages in a system that is designed for a mainly male population. Ironically, the only sex discrimination case heard by the Supreme Court concerning the correctional system, involved treatment of male prisoners.<sup>427</sup> Specifically, the CSC policy allowed for female correctional officers to work on the front lines in men's prisons, which included conducting frisk searches and cell surveillance. This sex discrimination claim was ultimately not successful mainly because the historical trend of male violence against women is not matched by a comparable trend of female violence against men, hence the CSC policy in question was not discriminatory in a substantive sense.<sup>428</sup> However, I have several reasons for the litigation approach that I am proposing, which I think will bring a fresh perspective by litigating solitary confinement using a feminist and prison abolitionist approach.

First, using women as the complainants, as opposed to men, would allow for a more nuanced and fuller discrimination claim using intersectional analysis<sup>429</sup> (i.e., considering the axes of sex,<sup>430</sup> race, national or ethnic origin,<sup>431</sup> disability,<sup>432</sup> aboriginal reserve

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426 Parkes, "Prisoner's Charter?", *supra* note 219 at 662.

427 *Weatherall v Canada (Attorney General)* (1993), 23 C.R. (4th) 1, [1993] 2 SCR 872 at 873.

428 Parkes, "Prisoner's Charter?" *supra* note 219 at 662-663.

429 Crenshaw, *supra* note 6. Kimberlé Crenshaw and Abby Dobson, "The urgency of intersectionality" *TEDWomen 2016 Conference* online: <[www.ted.com/talks/kimberle\\_crenshaw\\_the\\_urgency\\_of\\_intersectionality](http://www.ted.com/talks/kimberle_crenshaw_the_urgency_of_intersectionality)> [Crenshaw & Dobson].

430 Sex is implicated since this research focuses on the unique forms of discrimination faced by women. In the immigration context, female foreign nationals must often choose between allowing their children to be detained with them or giving them away to family members in Canada or child protective services. See Gros & Song, *supra* note 138. See also Gros, *supra* note 138.

431 National or ethnic origin is implicated due to the over-representation of Indigenous, foreign national, and racialized women who are more likely to be placed in solitary confinement. National or ethnic origin in the case of Indigenous peoples, particularly, can showcase how persistent colonial trauma in Indigenous communities ultimately play a role in rates of solitary confinement.

432 Disability is implicated due to the disproportionate effect of solitary confinement on inmates with mental health issues and the vicious cycle of re-entry into solitary confinement as a result of triggered or worsening psychological, social, and physical problems in solitary confinement.

status,<sup>433</sup> and citizenship<sup>434</sup>) and would highlight the compounded damaging impacts that solitary confinement has on women, compared to men.

Second, there has been significant amount of interdisciplinary research, as well as studies, coroners inquests, and reports on the provincial and federal systems that have documented for many years the unique forms of discrimination that incarcerated women face, which include discriminatory uses of solitary confinement.<sup>435</sup> Counsel and courts alike could rely on this body of research, and the experts producing this research, to unearth the extent of constitutional violations using the help of expert evidence.

Third, through recent litigation it has already been found that Indigenous women are especially disadvantaged by the practice of solitary confinement. Due to the deeply insightful intersectional perspective of women's experiences of solitary confinement and the body of research that has documented this, the courts should be less likely to find outright that solitary confinement is not a discriminatory practice. As a result, courts would likely have no other choice but to find that the practice is unconstitutional and should no longer be used.<sup>436</sup>

Fourth, from a legal realist perspective, the courts are likely to show more empathy for the traumatic experiences that women face while subjected to solitary confinement, as

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433 This is an analogous ground recognized in *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203. Aboriginal inmates, especially Aboriginal women inmates, can be incarcerated or subjected to solitary confinement in institutions far from their reserve communities, where many Aboriginal inmates may have lived prior to imprisonment. Aboriginal cultural traditions may accord strong connections between lands and identity. This can be negatively impacted by imprisonment or solitary confinement.

434 This is an analogous ground recognized in *Andrews*, *supra* note 386. Again, like the ground of national or ethnic origin, this ground is engaged because foreign nationals are subjected to solitary confinement and this can have adverse impact on them as they navigate the Canadian immigration system.

435 See for example: *Arbour Report*, *supra* note 185. "Timeline: The Life & Death of Ashley Smith" *CBC News* (12 November 2010) online: <[www.cbc.ca](http://www.cbc.ca)>. Debra Parkes, "Cruel and unusual punishment: It's time to end solitary confinement" *The Globe and Mail* (6 June 2016) online: <[theglobeandmail.com](http://theglobeandmail.com)>.

436 *BCCLA v Canada*, *supra* note 120 at paras 470-471. CHRC, "Protecting", *supra* note 319 at 45. Ontario Ombudsman, "Segregation", *supra* note 159 at 3, 9. *MCS Regulations*, *supra* note 212, s 34(4).



opposed to men. Influenced by the social context of progressive human rights country like Canada, courts are likely to err on the side of the female claimants and their unique rights interests to ameliorate disadvantage.<sup>437</sup> Legal realists posit that judges are key legal actors who have significant discretion. Realists are interested in analyzing the personalities, political assumptions, economic preferences, idiosyncrasies and other non-rational factors that affect actors within the legal system. Further, realists contend that formal legal rules alone often cannot provide determinative right answers, and judicial decision-making often means thinking beyond the law for insight (e.g., criminology, psychology, sociology, economics). Those involved in the legal system, whether as parties or officials, are strongly influenced by the larger social forces operating around them.<sup>438</sup>

Fifth, even though the complainants of the discrimination claims would be women, a court's finding that solitary confinement is unconstitutional based on discrimination would still mean that men, the larger group of incarcerated individuals would benefit from such a favourable decision from the courts. This is especially since Aboriginal men and men with mental health issues are disproportionately impacted by solitary confinement. While the provincial jail population is larger than the federal prison population, the benefit of a favourable decision respecting provincial jails could similarly benefit the federal prison population. And lastly, inmates who are less adversely affected by solitary confinement, usually Caucasian men, would still benefit from having the practice abolished altogether, because they would never be at risk of experiencing solitary confinement.

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437 Richard F Devlin, "Jurisprudence For Judges: Why Legal Theory Matters For Social Context Education" (2001) 27 *Queen's Law Journal* 161.

438 *Ibid.*

Sixth, settlements or negotiations proposed by the State will effectively mean an invitation to maintain the status quo of continuing the discriminatory practice of solitary confinement. Counsel advocating for prisoners must be cautious of this. Despite this, it is likely that a strong discrimination case would likely dissuade counsel from accepting any settlements or negotiations, anyway.

Seventh, a denial that solitary confinement is not a discriminatory practice, along with the State's poor reputation of implementing reformist-oriented recommendations, settlements, and court decisions, could mean that Canada will continue to fail its international obligations under various treaties, including the *Mandela Rules*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,<sup>439</sup> *The UN Convention on the Rights of Persons with Disabilities*,<sup>440</sup> *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians*,<sup>441</sup> and the *International Covenant on Civil and Political Rights*.<sup>442</sup>

### **Building the Case: Using a Multiple Ground Framework**

Not only is it important to frame a Charter challenge against solitary confinement as a case of discrimination. It's important that the discrimination case is crafted based on a multi-ground framework, inspired by the intersectional analytical approach. Using a 'single

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<sup>439</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Treaty Series, vol 1465, p 85.

<sup>440</sup> *The UN Convention on the Rights of Persons with Disabilities*, 4 January 2009, HL Paper 9 / HC 93 [incorporating HC 1204-i of Session 2007-08].

<sup>441</sup> *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians*, 2003.

<sup>442</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, Treaty Series, vol 999, p 171.

ground' framework of discrimination, such as just sex, or just race, or just ethnic and national origin, is an insufficient way to fully capture the magnitude of the discrimination faced by women in these unique situations, and can actually pose a barrier to meeting the evidentiary burden for a discrimination case, which means the interests of protecting these women's basic rights are dismissed.<sup>443</sup> The Ontario Human Rights Commission is instructive in that it has long embraced the idea of adopting an intersectional analytical approach for human rights complaints against discrimination. The Commission states this approach comprises of two features.<sup>444</sup> First, there is a shift from the assumption of working with a single ground framework to the assumption that an individual's experiences are linked to more than one ground. Second, there must be consideration for contextual factors: discriminatory stereotypes; the purpose of legislation, regulation and policy; the nature and/or position of the individual concerned; and the social, political, and legal history of the person's treatment in society.<sup>445</sup> Decisions<sup>446</sup> from the Supreme Court of Canada are encouraging, as they show it is acceptable to assert a *Charter* discrimination claim based on a combination of enumerated or analogous grounds.<sup>447</sup>

The two recent civil liberties associations cases challenging provisions on administrative segregation, are illustrative for why a multi-ground framework is crucial for putting together a discrimination claim. An intervenor of the *BCCLA* decision, West Coast LEAF, argued on the issue of intersecting axes of discrimination. Before ultimately dismissing the importance of the section 15 violations in his section 1 analysis, the Judge

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443 Policy and Education Branch, *supra* note 16 at 5.

444 *Ibid* at 28.

445 *Ibid* at 28.

446 *Law*, *supra* note 18 at 554-555. *Withler*, *supra* note 19 at 63.

447 *Ibid*.

remarked that as a result of finding that mentally ill inmates (both men and women) and Aboriginal inmates (both men and women) are entitled to section 15 relief, it was not necessary to give “special consideration” for how women belonging to either group of inmates face discrimination.<sup>448</sup> Interestingly, however, the Judge remarked that Aboriginal women endure more severe disadvantage from the practice of administrative segregation compared to men.<sup>449</sup> In making this remark, the Judge stated that Aboriginal women, as a group, are significantly over-represented in placements in administrative segregation. This over-representation is particularly detrimental, because they commonly have pre-existing distress from past experiences of physical or sexual abuse, more so than other inmates, and this distress is exacerbated in segregation.<sup>450</sup>

As highlighted by feminist critical legal scholars, the cumulative and compounding impact of discrimination derived from belonging to multiple groupings of identity can create a situation of multiple discrimination.<sup>451</sup> Hence, it can be difficult to untangle the complex nature of this kind of discrimination according to the multiple bases of discrimination.<sup>452</sup> Moreover, it can be difficult to prove a rights violation without the benefit of arguing an experience of this compounded discrimination. Kimberlé Crenshaw, a law professor at Columbia University and the University of California, Los Angeles (UCLA), articulates powerfully that the multiple facets of a woman’s identity that count as a discrimination ground, do not necessarily mean that a woman has multiple opportunities

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<sup>448</sup> *BCCLA*, *supra* note 120 at para 524.

<sup>449</sup> *Ibid* at para 470.

<sup>450</sup> *Ibid* at paras 470-471.

<sup>451</sup> Crenshaw, *supra* note 6. Crenshaw & Dobson, *supra* note 429.

<sup>452</sup> Crenshaw, *supra* note 6 at 28.

to establish a discrimination claim.<sup>453</sup> These facets of her identity collectively shape her experience – her single experience – her unique challenges – and by describing the ways in which they compound her vulnerability should not be obstructed by a rigid, regressive framework of how discrimination law works. The law on discrimination, itself, must also be inclusive.<sup>454</sup>

Often women’s experiences of navigating the criminal justice system are made indistinct and invisible due to the larger group of men who are navigating the system.<sup>455</sup> By forgetting women we become ignorant to the more deleterious effects that the criminal justice system have on women. By failing to recognize these effects, we allow for these women to continue to suffer in silence, ironically in a country where we boldly tout our progressive constitutional and human rights reputation on the international stage. The fact that the Judge acknowledged that Aboriginal women in segregation, for example, endure more significant disadvantage compared to their male counterparts, but did not further explore the nuance of this form of intersecting disadvantage was another letdown of the discrimination analysis conducted in the *BCCLA* decision. The unique experience of Aboriginal women in administrative segregation was diminished and subsumed with the larger group of Aboriginal male inmates.

Other experiences of discrimination in the context of administrative segregation were not addressed by counsel or the judges in either of the two recent cases, which could have further emphasized the State practice of solitary confinement as a discriminatory

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453 Crenshaw & Dobson, *supra* note 429.

454 *Ibid.*

455 Belknap, *supra* note 7 at 3-4.

practice. Black inmates are consistently over-represented in placements especially for disciplinary and involuntary segregation.<sup>456</sup> Specifically, it has been reported that Black female inmates are held against a different standard compared to White female inmates in prison; for example, a White woman received 24 hours in segregation for the same action that resulted in a Black woman being segregated for three weeks.<sup>457</sup>

Since, immigration detainees are detained in provincial jails, the recent civil liberties associations cases on the federal system could not have reasonably engaged with any evidence on the disadvantages suffered by immigration detainees when they are subjected to solitary confinement. As explained earlier, immigration detainees are gripped with stress and anxiety over the outcome of their immigration matters and uncertainty about the length of their detention.<sup>458</sup> They often may suffer from physical and psychological trauma from persecution they may have faced in their country of origin and are re-traumatized by the conditions of their immigration detention in Canada. All of this is exacerbated by solitary confinement, triggering or worsening severe mental health issues. Female immigration detainees are specifically impacted, as oftentimes they must choose between allowing their children to be detained with them or giving them away to family members in Canada, or child protective services. Female detainees may face solitary confinement along with their child in order to provide their child with a product deemed as contraband in the general population of the immigration holding centre (e.g., humidifier). Regardless, they will also feel the psychological pain as they stress over the care and well-

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<sup>456</sup> 2012-2013 Annual Report, *supra* note 318 at 7, 10. Jackson, *supra* note 78 at paras 53-54.

<sup>457</sup> CHRC, "Protecting", *supra* note 319 at 45.

<sup>458</sup> Gros & van Groll, *supra* note 130 at 14, 18.

being of a child and whatever traumas they endured prior to detention, while in detention and in isolation, specifically.

All these intersectional experiences of discrimination must be presented and intently advocated by counsel before courts and the courts should do well to recognize the nuanced forms of compounded discrimination that significantly affect women.

## **CHAPTER ELEVEN: ARGUING THE DISCRIMINATION CLAIM**

*Instead of continuing to support institutions that manufacture and exacerbate mental health problems, Canada should abolish the practice of segregation and rethink prisons altogether . . . Let's remember that jails are the least effective and most expensive non-responses to social justice issues. For women, these archaic institutions have distinctly gendered effects upon those whose lives have been marked by victimization long before they end up behind bars. Around the globe, nation states are revisiting the rush to incarcerate. We need to join those ranks.*

*- Canadian Senator and long-time feminist prisoner advocate, Kim Pate<sup>459</sup>*

In Chapter 10, titled “Justifying the Discrimination Claim”, I discussed reasons why *Charter* section 15 is the ideal rights provision to launch a case seeking to abolish the practice of solitary confinement. Importantly, I also discussed two recent constitutional challenges, specifically against procedural aspects of administrative segregation, that were spearheaded by civil liberties associations. I described how these cases fell short of achieving meaningful relief to prisoners subjected to different forms of isolation. Arguably, these two decisions are representations of society’s current disposition when it comes to the treatment of prisoners. We might acknowledge that prisons are not helping inmates, but our reflex is to change peripheral aspects to the practice, hoping that they will translate to core transformation that legitimizes the practice. We fail to question the legitimacy of the State’s decision to incarcerate or to isolate.

As I explained earlier, a critical failing from the two civil liberties associations cases is their analyses, or lack thereof, of *Charter* section 15. The Judge in the *BCCLA* decision

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459 Pate, *supra* note 87 at 24, 30.



stated that “In the present, however, I am satisfied that the impugned provisions do not have a disproportionate effect on women.”<sup>460</sup> And he also stated the following:

In my respectful view it is not necessary to give special consideration to mentally ill women inmates in light of my finding that mentally ill inmates (including both men and women) are entitled to s. 15 relief. I believe that the same is true with respect to Aboriginal women; having found an entitlement to s. 15 relief for Aboriginal inmates (including both men and women), no further consideration of West Coast LEAF’s submissions is necessary.<sup>461</sup>

Of the section 15 analysis that was provided, it was void of an intersectional approach. Hence, the Judge failed to fully explore how a discrimination analysis would apply to the greater disadvantages endured by Aboriginal women and mentally ill women in solitary confinement, as encouraged by West Coast LEAF. The Judge pointed out the following in his analysis on discrimination against Aboriginal inmates:

I am satisfied that administrative segregation has a small, but significant, disproportionate effect on Aboriginal men. The disproportionate effect on Aboriginal women is more severe. Consequently, Aboriginal inmates satisfy the first stage of the s. 15 test.<sup>462</sup>

It was disappointing that the Judge acknowledged that Aboriginal women in segregation, for example, endure more severe disadvantage compared to their male counterparts, but did not further explore the nuance of this form of intersecting disadvantage through a focused and complete section 15 analysis. The unique experience of Aboriginal women in administrative segregation was diminished and subsumed with the larger group of Aboriginal male inmates, and it appears the plight of Aboriginal women was what bolstered

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<sup>460</sup> *BCCLA v Canada*, *supra* note 120 at para 463.

<sup>461</sup> *Ibid* at para 524.

<sup>462</sup> *Ibid* at para 471.

the Judge's finding that Aboriginal inmates, as a whole group, both men and women, experience disadvantage from administrative segregation.

Seeing the shortcomings of recent litigation regarding section 15, with this Chapter, I seek to illustrate a more comprehensive application of section 15, guided by an intersectional feminist analysis. Instead of being overshadowed and subordinated by the experience of male inmates in the *BCCLA* decision, I will highlight and expand on the example and experience of Aboriginal women. I will create an opportunity out of the Judge's acknowledgement of Aboriginal women's unique disadvantage in solitary confinement to explore what could have been the outcome of giving the "special consideration" that the Judge determined was unnecessary for Aboriginal women. I aim to answer: *What could this discrimination claim look like?* My analysis will broadly capture solitary confinement and will not be limited to any particular form of solitary confinement, as was the situation in *BCCLA*. The basis of the subsection 15(1) claim that I will advocate is to establish adverse impact discrimination (i.e., "indirect discrimination"), as opposed to proving a sanctioned discriminatory purpose of solitary confinement (i.e., "direct discrimination").<sup>463</sup>

### **The Rights Analysis Stage: Establishing the Subsection 15(1) Violation**

At this stage, a *Charter* breach must be established on a balance of probabilities. Subsection 15(1) involves the two-step analysis of proving, firstly, that a law, in its purpose

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<sup>463</sup> *Withler*, *supra* note 19 at para 64.

or effect, creates a distinction based on an enumerated or analogous ground, and secondly, that the impugned law creates a disadvantage by perpetuating prejudice or stereotyping.<sup>464</sup>

Again, the Supreme Court's definition of "discrimination" under the *Charter* was provided in *Andrews v Law Society of British Columbia*,<sup>465</sup> and it is interpreted as the following:

I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.<sup>466</sup>

Section 15 seeks to advance substantial equality which endorses the view that equality involves promoting a society in which everyone can feel secure in knowing that, under the law, they are recognized as human beings who are equally deserving of concern, respect, and consideration.<sup>467</sup> The legal concept of equality generally represents the notion that the law should apply to all even-handedly.<sup>468</sup>

### 1. Distinction is based on enumerated or analogous grounds

Cognizant of *Charter* subsection 32(1), which limits the application of the *Charter* to State breaches of rights and freedoms, the State action that is the focus of this *Charter* challenge under subsection 15(1) is the practice of solitary confinement. The first criterion in the subsection 15(1) analysis is to satisfy this question: *Does the law create a distinction*

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<sup>464</sup> *BCCLA v Canada*, *supra* note 120 at paras 452-453.

<sup>465</sup> *Andrews*, *supra* note 386.

<sup>466</sup> *Kapp*, *supra* note 385 at paras 16, 18.

<sup>467</sup> *Andrews*, *supra* note 386 at 171.

<sup>468</sup> *Sharpe & Roach*, *supra* note 382 at 307.

based on an enumerated or analogous ground?<sup>469</sup> One way of demonstrating that the practice of solitary confinement has an adverse distinction is to show how the State practice imposes a burden on Aboriginal women that is not imposed on others.<sup>470</sup> Or, the State has failed to consider the already disadvantaged position of Aboriginal women within the context of Canadian society, resulting in substantively different treatment based on personal characteristics.<sup>471</sup> The issue of whether the State intends to cause the adverse distinction is irrelevant in these kinds of analyses.<sup>472</sup> In *Charter* cases of successful adverse impact claims, claimants leveraged their case on self-evident societal patterns that were amenable to judicial notice.<sup>473</sup> Yet, the claimant has the onus to make sure the court is fully informed of the relevant historical, social, political, and legal context of the claim,<sup>474</sup> which is a task that is very much welcomed by an advocate aligned with the prison abolition ethic who seeks the opportunity to unearth the State's discriminatory conduct.

Intersecting grounds of discrimination in this claim,<sup>475</sup> it is argued that Aboriginal women subjected to solitary confinement experience an adverse distinction based on the following enumerated grounds: race, national or ethnic origin, mental disability, and sex. Aboriginal women also experience a distinction based on the analogous ground of "Aboriginal reserve status", which was recognized as an available ground of discrimination in the decision of *Corbiere v Canada (Minister of Indian and Northern Affairs)*.<sup>476</sup>

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<sup>469</sup> Withler, *supra* note 19 at para 61.

<sup>470</sup> *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 SCR 657.

<sup>471</sup> Department of Justice Canada, "Section 15 – Equality rights" *Charterpedia* (2 January 2018) online: <[www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html](http://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html)> [DOJ, "Section 15"].

<sup>472</sup> *Law*, *supra* note 18 at para 80.

<sup>473</sup> DOJ, "Section 15", *supra* note 471.

<sup>474</sup> *Law*, *supra* note 18 at para 83.

<sup>475</sup> *Ibid* at 554-555. Withler, *supra* note 19 at para 63.

<sup>476</sup> *Corbiere* *supra* note 433.

Regarding the analogous ground of Aboriginal reserve status, this provides protection against discrimination to a member of an Indian Band living off a reserve.<sup>477</sup> Once a ground has been determined to be analogous, it will always remain as such.<sup>478</sup> I will address how Aboriginal women in solitary confinement have a claim to each of these grounds in turn.

(a) Race and National or Ethnic Origin

The law, regulations, and policy on the State practice of solitary confinement, may purport to treat all inmates the same. However, they have an adverse distinction or indirect distinction against Aboriginal women based on the grounds of race and national or ethnic origin, because the State fails to take into account the current-day colonial trauma affecting Aboriginal people.<sup>479</sup> The State also fails in accounting for the racially-biased manner in which the criminal justice system and other social administrations by the State operate. And these failures by the State have affected the higher rates in which Aboriginal women are subjected to solitary confinement.

For centuries, Aboriginal peoples have sustained the harshest brunt of racism in the historical development of Canada. In a 2016 article, fervent feminist prisoner advocate, Senator Kim Pate, who is intimately familiar with the disadvantages of Aboriginal peoples, discussed some of the early colonial assaults perpetrated on the Indigenous peoples that forever changed the trajectory of their collective progression and well-being in Canada. Senator Pate highlighted that the European settlers in Canada breached their peacekeeping

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<sup>477</sup> *Ibid.*

<sup>478</sup> *Ibid* at paras 13-15 and 58-62.

<sup>479</sup> I decided to analyze the grounds of race and national or ethnic origin together due to the strong connections that both of these grounds have in explaining the disadvantage experienced by Aboriginal women.

treaties they initially formed with Indigenous communities; the settlers outlawed Indigenous cultural and spiritual laws, practices, and ceremonies; and the settlers forcibly dislocated Indigenous communities from lands they originally occupied for hundreds of years onto poorly managed reservations.<sup>480</sup> In addition, the European settlers imposed their own definitions of “Aboriginal” identity onto Indigenous peoples. Through statute and judge-made law, authorized by core legislative provisions, such as subsection 91(24) of the *Constitution Act, 1867*, section 35 of the *Constitution Act, 1982*,<sup>481</sup> and the *Indian Act*,<sup>482</sup> the current-day Canadian State continues to control the conduct of Indigenous peoples and circumscribe its dealings with Indigenous peoples based on the identities that the State has attributed to them.<sup>483</sup>

In the *BCCLA* decision, the Judge found that the CSC is aware of the historical disadvantage of Aboriginal inmates impacting Aboriginal over-representation throughout the correctional system. So much so that in its Commissioner’s Directives (i.e., CD 702) the CSC lists many aspects of what they coin “Aboriginal social history” to encourage awareness among staff of this historical disadvantage.<sup>484</sup> Defining “Aboriginal social history”, CD 702 states as follows:

. . . the various circumstances that have affected the lives of most Aboriginal people. Considering these circumstances may result in alternative options or solutions and applies only to Aboriginal offenders (not to non-Aboriginal offenders who choose to follow the Aboriginal way of life). These circumstances include the following (note that this is not an exhaustive list):

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480 Pate, *supra* note 87 at 25-26.

481 *The Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

482 *Indian Act*, RSC 1985, c I-5.

483 Ontario Women’s Justice Network, “Over-Represented and Over-Classified: Crisis of Aboriginal Women in Prison” (1 June 2014) online: <owjn.org/2014/06/over-represented-and-over-classified-crisis-of-aboriginal-women-in-prison/> [OWJN].

484 *BCCLA*, *supra* note 120 at para 473.

- effects of the residential school system
- sixties scoop into the adoption system
- effects of the dislocation and dispossession of Inuit people
- family or community history of suicide
- family or community history of substance abuse
- family or community history of victimization
- family or community fragmentation
- level or lack of formal education
- level of connectivity with family/community
- experience in the child welfare system
- experience with poverty
- loss of or struggle with cultural/spiritual identity

The human potential of Aboriginal peoples have been staggeringly interrupted by severe social setbacks.<sup>485</sup> Through witness testimony, Ms. Brigitte Bouchard, the Warden at the Edmonton Institution for Women, attributed the higher representation of Aboriginal inmates in segregation to the entrenched violence and gang affiliation resulting from such social history factors.<sup>486</sup> The OCI found through a file review of Aboriginal female inmates that over half reported that they or a family member attended a residential school; two-thirds of their parents had substance abuse issues; 48% had been removed from their family home; and almost all had previous traumatic experiences, including sexual and physical abuse, and substance abuse problems.<sup>487</sup> The Judge in the *BCCLA* decision found that Aboriginal social history is neither adequately nor consistently considered by correctional staff in decisions to place Aboriginal inmates in administrative segregation, even as

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485 Geraldine Malone, “Why Indigenous Women Are Canada’s Fastest Growing Prison Population” *Vice* (2 February 2016) online: <ww.vice.com> [Malone].

486 *BCCLA*, *supra* note 120 at paras 113, 474.

487 *Ibid* at para 474.

Aboriginal peoples are over-represented in all aspects of the criminal justice system, including in administrative segregation placements.<sup>488</sup>

Despite what the CSC might have intended with policies such as CD 702 on Aboriginal social history, in the *BCCLA* decision, several of CSC's witnesses acknowledged that Aboriginal inmates are still subjected to racism and racial profiling.<sup>489</sup> In an independent review, correctional officers and female inmates alike reported that, based on their observations, Aboriginal women inmates are singled out for segregation more frequently and for longer periods compared to other inmates.<sup>490</sup> Studies and commission reports repeatedly note that Aboriginal inmates fare worse in almost every correctional decision than non-Aboriginal inmates.<sup>491</sup> According to the OCI, "Between 2007 and 2016, while the overall federal prison population increased by less than 5%, the Indigenous prison population increased by 39%. For the last three decades, there has been an increase every single year in the federal incarceration rate for Indigenous people."<sup>492</sup> They are subject to the damaging impacts of the criminal justice system's heaviest sanctions.

Indeed, two decades ago, the Supreme Court recognized that "there is widespread bias against aboriginal people within Canada, and '[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system'".<sup>493</sup> Although systemic and background factors can also partially explain rates of crime and

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<sup>488</sup> *Ibid* at paras 470-474, 483.

<sup>489</sup> *Ibid* at para 486.

<sup>490</sup> CHRC, "Protecting", *supra* note 319 at 45.

<sup>491</sup> *BCCLA*, *supra* note 120 at paras 485-486. *Gladue*, *supra* note 76 at para 68.

<sup>492</sup> *2016-2017 Annual Report*, *supra* note 81 at 48.

<sup>493</sup> *Gladue*, *supra* note 76 at para 61. *R v Williams*, [1998] 1 SCR 1128 at para 58.



recidivism for non-aboriginal offenders, the circumstances of Aboriginal offenders differ from the majority, since Aboriginal people are victims of systemic and direct discrimination, derived from the deep-seated colonial legacy in Canada.<sup>494</sup> The problem is so prevalent in Canada, that in interpreting subsection 718.2(e) of the *Criminal Code*,<sup>495</sup> the Supreme Court in *R v Gladue* encouraged sentencing judges to take judicial notice of the broad systemic and background factors affecting Aboriginal peoples when they appear before them for sentencing to reduce the over-representation of Aboriginal peoples in prisons.<sup>496</sup>

In the years that have gone by since *R v Gladue* in 1999, Canadian courts apparently still struggle to apply sentencing principles to ameliorate the Aboriginal over-representation.<sup>497</sup> In fact, the over-representation regrettably continues to soar. Aboriginal people are also less likely to become “rehabilitated” since the place of their internment is often culturally inappropriate, in addition to the “rampant” discrimination they face in penal institutions.<sup>498</sup> Certainly, the idea of addressing social problems in Indigenous communities by using criminal justice measures – including “Aboriginal social history” in segregation decision-making – proves to be gravely ineffective. The dismal social problems require more State investment in preventive social supports and programming, other than the criminal justice system, to redress the colonial and racist onslaught on Indigenous communities. In this regard, the State has failed to address the plight of Aboriginal peoples, which includes decisions regarding placements in solitary confinement.

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<sup>494</sup> *Gladue*, *supra* note 76 at para 68.

<sup>495</sup> *Criminal Code*, RSC, 1985, c C-46.

<sup>496</sup> *Gladue*, *supra* note 76 at paras 87, 93.

<sup>497</sup> *BCCLA*, *supra* note 120 at para 483.

<sup>498</sup> *Gladue*, *supra* note 76 at para 68.

(b) Sex

Distinction based on the ground of race or national or ethnic origin may not be a contentious issue for anyone who pays attention to the tremendous disadvantage that Aboriginal peoples face in Canadian society through all facets of life, leading to particularly adverse outcomes in almost all criminal justice decisions. Yet, in the analysis of distinction based on sex, we arrive at an opportunity to fill in a gap in the section 15 analysis, left by prior litigation on solitary confinement. Solitary confinement has an adverse distinction against Aboriginal women based on sex, because the State fails to consider the acutely traumatized and vulnerable condition in which they enter the correctional system in comparison to other female inmates. This leads to higher rates of Aboriginal women in solitary confinement. The Judge in the *BCCLA* decision briefly noted that Aboriginal women endure more severe disadvantage from the practice of administrative segregation compared to Aboriginal men, because they are significantly over-represented in placements in administrative segregation.<sup>499</sup> The Judge found this over-representation as particularly detrimental, because Aboriginal women commonly have pre-existing distress from past experiences of physical or sexual abuse, compared to other inmates.<sup>500</sup> This distress is exacerbated in segregation.<sup>501</sup>

Yet, despite acknowledging this impact on Aboriginal women, the Judge in the *BCCLA* decision was not prepared to affirm intervenor submissions concerning

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<sup>499</sup> *BCCLA*, *supra* note 120 at para 470.

<sup>500</sup> *Ibid* at paras 470-471.

<sup>501</sup> *Ibid*.

intersecting grounds of disadvantage affecting the over-representation of Aboriginal women in segregation.<sup>502</sup> The Judge indicated that an acknowledgement of discrimination against Aboriginal women had been satisfied by his finding that Aboriginal inmates, generally, are discriminated in segregation practices.<sup>503</sup> This Judge's finding, here, exemplifies the problem of failing to adopt a contextualized approach to discrimination through intersectional analysis. Without taking the effort to delve into the unique context of Aboriginal women's lives as it pertains to solitary confinement, the remedy that is ultimately fashioned by a court in discrimination cases will miss the mark. Recognizing section 15 violations, yet rendering them less worthy of consideration than the section 7 violations in his *Charter* section 1 analysis,<sup>504</sup> the Judge ordered the following remedies for the impugned provisions (i.e., *CCRA* sections 31-33 and 37), subject to a 12-month suspension of a declaration of invalidity:

On the basis of the findings made in these Reasons, I am prepared to make the following s. 52 declaration:

1. The impugned laws are invalid pursuant to s. 7 of the Charter to the extent that:
  - a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
  - b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
  - c) the impugned laws authorize internal review; and
  - d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.
  
2. The impugned laws are invalid pursuant to s. 15 of the Charter:
  - a) to the extent that the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and

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<sup>502</sup> *Ibid* at para 524.

<sup>503</sup> *Ibid*.

<sup>504</sup> *Ibid* at paras 545-547.

b) also to the extent that the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.<sup>505</sup>

These remedies amount to little benefit to Aboriginal women and their specific needs. As a result of the Judge's generalized section 15 analysis, the Judge assumed that the needs of Aboriginal women and Aboriginal men are the same.<sup>506</sup> While Aboriginal women have more in common with Aboriginal men than they do with non-Aboriginal inmates in the correctional system, there are significant differences.<sup>507</sup> These differences should be considered in decision-making for solitary confinement placements.

The situation for Aboriginal women is distinctly gendered.<sup>508</sup> Before European settlers arrived in Canada, Aboriginal societies were either matriarchal – power, wealth, and inheritance passed on through the mother – or they recognized women as equals with powerful leadership roles.<sup>509</sup> European contact meant the imposing of a patriarchal worldview and a society that favoured male dominance.<sup>510</sup> In addition to the racist and colonial legacy affecting all Aboriginal peoples, and the under-serving and damaging, social institutions operating in Aboriginal communities, Aboriginal women are still met with misogyny that is specifically tied to society's perception of them as sub-class women.<sup>511</sup>

Growing up in deeply afflicted and troubled communities, Aboriginal women continue to endure high rates of physical and sexual abuse, for which they are frequently

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<sup>505</sup> *Ibid* at para 609.

<sup>506</sup> CHRC, "Protecting", *supra* note 319 at 20.

<sup>507</sup> *Ibid*.

<sup>508</sup> Pate, *supra* note 87 at 26.

<sup>509</sup> *Ibid*.

<sup>510</sup> OWJN, *supra* note 483.

<sup>511</sup> Pate, *supra* note 87 at 26.

blamed and to which police often fail to meaningfully respond.<sup>512</sup> CSC documented that 91% of Indigenous women (and 86% of all women) serving federal sentences have experienced physical and/or sexual abuse.<sup>513</sup> This creates a situation where Aboriginal women, left as easy targets in society, are forced to fend for themselves.<sup>514</sup> Aboriginal women are 3.5 times more likely than non-Aboriginal women to be victims of violence.<sup>515</sup> Aboriginal women between the ages of 25-44 are 5 times more likely to die from acts of violence than other women the same age.<sup>516</sup> The vulnerable position of Aboriginal women, a segment of women who have been ignored by Canadian society, has led to rising numbers of missing and murdered Indigenous women and girls with little outcry from the general public.<sup>517</sup> Canada has recently committed to investigating this phenomenon, which is expected to reveal the extent of victimization and lack of response from law enforcement.<sup>518</sup>

By contrast, when Aboriginal women use force to repel or defend against personal attacks, they are likely to face swift police response, criminalization, and imprisonment.<sup>519</sup> Many who work in and around the criminal and penal systems agree that very few women pose a risk to public safety and consider it a waste of human and financial resources to incarcerate them instead of addressing the socio-economic and health challenges that prompt police response.<sup>520</sup> Women, who are usually poor mothers with low education and

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<sup>512</sup> *Ibid.*

<sup>513</sup> *Ibid.*

<sup>514</sup> *Ibid.* Native Women's Association of Canada, *Indigenous Women in Solitary Confinement: Policy Backgrounder* (Ottawa: NWAC, 2017) at 7 [NWAC].

<sup>515</sup> OWJN, *supra* note 483.

<sup>516</sup> *Ibid.*

<sup>517</sup> Pate, *supra* note 87 at 26.

<sup>518</sup> *Ibid.*

<sup>519</sup> *Ibid.*

<sup>520</sup> *Ibid* at 30.

employability, are often incarcerated after educational, health and social services have failed them.<sup>521</sup> Incarcerating Aboriginal women continues the cycle of child protection removals, poverty and homelessness, risk of victimization, substance abuse, low education attainment, and other social problems afflicting Aboriginal communities.<sup>522</sup>

Aboriginal people consist of about 4% of the total Canadian population, yet Aboriginal women are the fastest growing prison population in Canada, increasing by 109% between 2001 and 2012.<sup>523</sup> The high and increasing incarceration rate is an indicator of the health of Canadian society.<sup>524</sup> The distinctly racist and misogynist treatment towards Aboriginal women echoes within the walls of prisons and jails. Now, about 63% of all incarcerated women in Canadian prisons are Aboriginal.<sup>525</sup> In provincial custody, 41% of the women are Aboriginal.<sup>526</sup> Aboriginal women make up 50% of segregation placements in prisons.<sup>527</sup> Aboriginal women are more likely to be placed in involuntary solitary confinement.<sup>528</sup> Sometimes women inmates are incarcerated in a segregated maximum security unit inside a men's prison, reflecting a lack of State resources to incarcerate women, which again, greatly disadvantages women due to their tumultuous backgrounds.<sup>529</sup>

After the federal Prison for Women (P4W) in Kingston, Ontario, permanently closed down, the number of segregation cells for women serving federal sentences

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<sup>521</sup> *Ibid* at 26, 30.

<sup>522</sup> NWAC, *supra* note 514 at 8.

<sup>523</sup> Malone, *supra* note 485.

<sup>524</sup> *Ibid*.

<sup>525</sup> Pate, *supra* note 87 at 25.

<sup>526</sup> Malone, *supra* note 485.

<sup>527</sup> BCCLA, *supra* note 120 at para 470.

<sup>528</sup> NWAC, *supra* note 514 at 4.

<sup>529</sup> Parkes, "Prisoner's Charter?", *supra* note 219 at 630.

increased.<sup>530</sup> Now, there are six federal prisons for women located in (1) Abbotsford, B.C.; (2) Edmonton, Alberta; (3) Nekaneet Reserve, Saskatchewan; (4) Kitchener, Ontario; (5) Joliette, Quebec; and (6) Truro, Nova Scotia. In addition to federal prisons, there are segregation units in prisons for men, psychiatric hospitals and provincial jails. The number of isolation cells has doubled, and the number of maximum-security cells has quintupled.<sup>531</sup>

Instead of rehabilitating Aboriginal women, the correctional system further oppresses them and reinforces violence against them.<sup>532</sup> The extremely high rates of physical and sexual abuse among Aboriginal women makes them particularly vulnerable to the negative impacts of solitary confinement.<sup>533</sup> Female inmates tend to experience solitary confinement as a form of rejection, abandonment, invisibility, and a denial of their existence, which exacerbates pre-existing distress resulting from a history of trauma or abuse prior to incarceration.<sup>534</sup> Female inmates report that they feel re-traumatized by their placement of solitary confinement, which can involve violent extractions from their cells by male guards, strip searches witnessed by male guards, and a lack of privacy going to the washroom while in solitary confinement.<sup>535</sup>

Compared to non-Aboriginal women, Aboriginal women are more likely to be classified as maximum security and more likely to be held in solitary confinement.<sup>536</sup>

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<sup>530</sup> Pate, *supra* note 87 at 28.

<sup>531</sup> *Ibid.*

<sup>532</sup> OWJN, *supra* note 483.

<sup>533</sup> BCCLA, *supra* note 120 at para 470.

<sup>534</sup> CCLA “Submission”, *supra* note 269 at 4.

<sup>535</sup> *Ibid.* Kim Pate, “When strip searches are sexual assaults” (5 October 2011) online: <[www.caefs.ca/wp-content/uploads/2013/05/October\\_2011\\_Kim\\_Pate\\_When\\_strip\\_searches\\_are\\_sexual\\_assaults.pdf](http://www.caefs.ca/wp-content/uploads/2013/05/October_2011_Kim_Pate_When_strip_searches_are_sexual_assaults.pdf)>.

<sup>536</sup> Pate, *supra* note 87 at 26.

Compared to men inmates, women are usually classified as maximum security due to difficulty with institutional adjustment, as opposed to posing a risk to public safety.<sup>537</sup> Policies, such as the Secure Unit Operational Plan<sup>538</sup> – mainly governing aspects of custody, care and supervision of maximum security women inmates – focus on how to control security risks, instead of addressing needs related to institutional adjustment.<sup>539</sup> In maximum security, not only are Aboriginal women more likely to face solitary confinement, but they are more likely to be denied access to culturally-appropriate programming and parole eligibility.<sup>540</sup> Hence, the sanctioned approach for controlling risk (i.e., physical segregation, controlled movement) promotes more adjustment problems for incarcerated Aboriginal women and reduces their chances of obtaining a lower security classification.<sup>541</sup>

Despite the well-intended remedies of the Judge in *BCCLA* decision to reform the practice of administrative segregation, these remedies simply do not impose the more appropriate court order that should have been rendered as it concerns Aboriginal women: abolishing the practice of solitary confinement against Aboriginal women. The very decision to allow Aboriginal women to be subjected to solitary confinement, even after acknowledging the particularly severe effect that it has on the well-being of incarcerated Aboriginal women, means that the State is permitted to continue its systematic practice of exacerbating violence against Aboriginal women through isolation.

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537 CHRC, “Protecting”, *supra* note 319 at 47.

538 Office of the Deputy Commissioner for Women, Correctional Service of Canada, *Secure Unit Operational Plan — Intensive Intervention in a Secure Environment* (Ottawa, CSC, 2003) at 3.

539 CHRC, “Protecting”, *supra* note 319 at 47.

540 OWJN, *supra* note 483.

541 CHRC, “Protecting”, *supra* note 319 at 47-48.



(c) Disability

Aboriginal women more frequently enter the correctional system in distressed mental health conditions. As such, the State imposes a burden on Aboriginal women based on disability by subjecting them to solitary confinement, which further regresses their mental health conditions. Incarcerated Aboriginal women are almost invariably survivors of historical abuse from childhood through to adulthood, and they are still mentally unwell, due to lack of social supports to assist with their past trauma.<sup>542</sup> In fact, some of the most significant differences between women and men inmates are the prevalence of diagnosed mental illnesses, self-abuse, and suicide attempts. Federally incarcerated women are 3 times more likely to suffer from depression than their male counterparts. Women are also more likely than men to take part in escalated self-destructive behaviours, such as slashing and cutting.<sup>543</sup> The common incidence of self-mutilation and previous suicide attempts, specifically among Aboriginal women inmates, signify the fundamentally destructive effect of incarceration on Aboriginal women.<sup>544</sup>

As determined in *BCCLA*, mentally ill inmates generally face disadvantage, because the correctional staff use unreliable instruments to detect the mental health status of an inmate (i.e., Computerized Mental Health Intake Screening System (ComMHIS) and the Suicide Risk Checklist)<sup>545</sup> and also follow an under-inclusive policy (i.e., CD 709) for determining which inmates cannot be placed in administrative segregation according to

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<sup>542</sup> *Ibid* at 39.

<sup>543</sup> *Ibid* at 8.

<sup>544</sup> *Ibid* at 7, 39.

<sup>545</sup> *BCCLA*, *supra* note 120 at paras 521-523.

the manifesting nature of their mental illness.<sup>546</sup> In the midst of the evidentiary portion of litigation in *BCCLA*, the CSC changed CD 709 to say the following respecting inmates with mental health issues as of August 1, 2017:

a prohibition on the use of administrative segregation for inmates with a “serious mental illness with significant impairment”, **and inmates who are either actively engaging in self-injury that is likely to result in serious bodily harm or are at elevated or imminent risk for suicide<sup>547</sup> (emphasis added)**

CD 709 defines “serious mental illness with significant impairment” as follows:

...[P]resentation of symptoms associated with psychotic, major depressive and bipolar disorders resulting in significant impairment in functioning. Assessment of mental disorder and level of impairment is a clinical judgment and determined by a registered health care professional. Significant impairment may be characterized by severe impairment in mood, reality testing, communication or judgment, behaviour that is influenced by delusions or hallucinations, inability to maintain personal hygiene and serious impairment in social and interpersonal interactions. This group includes inmates who are certified in accordance with the relevant provincial/territorial legislation.<sup>548</sup>

The Judge found it was problematic that, according to the federal correctional policy (i.e., CD 709), an inmate must display either an active self-injurious behaviour or a “serious mental illness with significant impairment”, before correctional staff would determine that an inmate cannot be admitted into administrative segregation.<sup>549</sup> The Judge determined that this correctional policy, by its very wording, was discriminatory. The two classes of

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<sup>546</sup> *Ibid* at paras 500-504.

<sup>547</sup> *Ibid* at para 84.

<sup>548</sup> *Ibid* at para 502.

<sup>549</sup> *Ibid* at paras 84, 500.

inmates identified in CD 709 too narrowly excluded other groups of inmates still struggling with serious mental health issues that were not visible or ongoing.<sup>550</sup>

One expert witness in the case, Dr. Kelley Blanchette listed some of the categories of people who would be excluded from the two classes mentioned in CD 709:

1. inmates with recent self-injurious histories who were not actively engaging in self-injury;
2. inmates who emphatically deny suicidal ideation but whose psychiatric history and behaviour suggests otherwise;
3. inmates afflicted with psychiatric disorders and whose psychotropic medications have been initiated or recently changed or withdrawn;
4. inmates withdrawing from alcohol or drugs; and
5. inmates with psychiatric and concurrent substance abuse disorders”.<sup>551</sup>

Withal, CD 709 also created a lot of confusion as to how to assess and identify individuals who fall under the two classes of inmates, meaning that those who fell under either class could still be at-risk of solitary confinement.<sup>552</sup> The excluded inmates with mental health issues are equally at-risk of serious harm if they are admitted in administrative segregation.<sup>553</sup> Thus, the Judge concluded that the *CCRA* provisions create a more burdensome effect on mentally ill inmates.<sup>554</sup> The Judge determined that the legal regime, and the CSC protocols for dealing with mental health issues were inherently discriminatory.<sup>555</sup> They fail to adequately respond to the prevalence of mental illness in

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<sup>550</sup> *Ibid* at para 500.

<sup>551</sup> *Ibid*.

<sup>552</sup> *Ibid* at paras 500-509.

<sup>553</sup> *Ibid* at para 510.

<sup>554</sup> *Ibid*.

<sup>555</sup> *Ibid* at paras 519-523.

correctional institutions. And solitary confinement reinforces, perpetuates, and exacerbates disadvantage.<sup>556</sup>

The flaws revealed in CD 709, as articulated by Dr. Blanchette regarding the excluded categories of inmates who do not get relief from solitary confinement, ultimately disadvantage Aboriginal women. Aboriginal women inmates, are consistently high risk for suicide, self-injurious behaviours, and alcohol and drug abuse.<sup>557</sup> In fact, alcohol and drugs tend to figure more prominently in the lives and criminal offences committed by incarcerated women, as income-generating crimes such as fraud, shoplifting, prostitution-related offences, and robbery are often perpetrated to support their addictions.<sup>558</sup> As a result, Aboriginal women will invariably remain a disproportionate sub-group of the excluded categories of mentally unwell inmates who the State can still deposit in isolation. The inherently discriminatory State policies concerning solitary confinement for the mentally ill enable Aboriginal women to remain a sub-group that is disproportionately at-risk of solitary confinement.

#### (d) Aboriginal Reserve Status

The State imposes a burden on Aboriginal women through its practice of solitary confinement, because the State fails to account for the disruptive impact this practice has on the ability for Aboriginal women to maintain community ties with social supports on reserves, where many Aboriginal women inmates lived prior to incarceration. In the

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<sup>556</sup> *Ibid.*

<sup>557</sup> CHRC, “Protecting”, *supra* note 319 at 7.

<sup>558</sup> *Ibid* at 7.

BCCLA decision, the Judge noted that there are fewer institutions for women than there are for men, and women are on average further away from their home communities.<sup>559</sup> This can especially be a problem for Aboriginal inmates, because their cultural identity is often inextricably linked with the land.<sup>560</sup> Already distanced from their reserve communities, segregation imposes a greater hardship on some Aboriginal women inmates compared to non-Aboriginal women inmates, as time spent in solitary confinement, leads to weakened or severed community ties, disrupted healing opportunities, and reduced access to spiritual and cultural resources, practices, and programming.<sup>561</sup>

### Bringing This All Together

Having gone through each of the grounds engaged in this discrimination claim, it is important to emphasize that additional historical problems uniquely impacting Aboriginal women are not being sufficiently considered by the State when subjecting Aboriginal women to solitary confinement:

- The high prevalence of physical, emotional, and sexual abuse (including while attending residential schools as late as the mid-1990s and placed in the child welfare system).
- The high rates of psychological trauma (i.e., Post-Traumatic Stress Disorder, depression, anxiety, suicidality, self-injurious behaviours) resulting from histories of abuse, which persist and worsen without professional help.
- The lack of concern by law enforcement, and society as a whole, to the high rates of missing and murdered Indigenous women and girls in Canada.
- The high likelihood of being incarcerated in institutions that are far from their reserve communities, which has a negative cultural impact on the identities of Aboriginal women. The place and conditions of

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<sup>559</sup> BCCLA, *supra* note 120 at para 470.

<sup>560</sup> *Ibid.*

<sup>561</sup> CHRC, "Protecting", *supra* note 319 at 45.

internment weakens and severs community ties and opportunities for rehabilitation.

All facets of the personhood of an Aboriginal woman that have been discussed under each of the mentioned grounds of discrimination – race, national or ethnic origin, sex, disability, and aboriginal reserve status – multiply compound the vulnerability and burden that Aboriginal women face in decisions concerning solitary confinement. The problems that have been described under each of the grounds of discrimination are simultaneously affecting the experience of Aboriginal women in the context of solitary confinement, specifically, and the criminal justice system, generally. Focusing on simply one aspect of Aboriginal women, namely, their race or national or ethnic origin, as was done in the *BCCLA* decision, means a discrimination analysis that is devoid of additional contextual factors that play a parallel role in the disadvantage that Aboriginal women face.

As already determined by experts, studies, commissioned reports, and past litigation focused on solitary confinement, the intersecting axes of identity have mainly served to put Aboriginal women at further jeopardy. Their multi-faceted identity has meant they are farther away from attaining substantive equality, and solitary confinement has been another State practice that has worsened this problem. In that vein, Aboriginal women held in solitary confinement cannot reasonably feel secure in knowing that, under the law, they are recognized as human beings who are equally deserving of concern, respect, and consideration, as endorsed by the Supreme Court in *Andrews*.<sup>562</sup>

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<sup>562</sup> *Andrews*, *supra* note 386 at 171.

## 2. The distinction is discriminatory

The second criterion in the subsection 15(1) analysis is to satisfy this question: *Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?*<sup>563</sup> The Supreme Court explains that “prejudice” refers to “the perpetuation of prejudice or disadvantage to members of a group on the basis of personal characteristics identified in the enumerated and analogous grounds.”<sup>564</sup> Elaborating on “stereotyping”, this refers to “stereotyping on the basis of these grounds that results in a decision that does not correspond to a claimant’s or group’s actual circumstances and characteristics.”<sup>565</sup> The Supreme Court explains that a member of a group that has historically faced greater disadvantage in Canadian society is less likely to have difficulty establishing discrimination.<sup>566</sup> As has been discussed in the first stage of this subsection 15(1) analysis, Aboriginal women are among Canada’s historically and currently most disadvantaged groups in society. The State has failed to show regard for the heightened vulnerability and low social positioning of Aboriginal women in decision-making regarding solitary confinement. Now with the second stage of the subsection 15(1) analysis, the focus is to demonstrate how solitary confinement perpetuates prejudice or stereotyping against Aboriginal women.

Solitary confinement is inherently a psychologically harmful practice. A summary of the health effects of being subjected solitary confinement is key to establishing that solitary confinement creates a disadvantage by perpetuating prejudice or stereotyping. The

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<sup>563</sup> *Withler*, *supra* note 19 at para 61.

<sup>564</sup> *Kapp*, *supra* note 385 at para 17.

<sup>565</sup> *Ibid.*

<sup>566</sup> *Law*, *supra* note 18 at para 68. *Withler*, *supra* note 19 at para 65.

immediate consequence of solitary confinement is that an inmate is denied meaningful human contact except through a food slot built into the cell door.<sup>567</sup> This deprivation of social contact is the source of the greatest psychological pain for isolated inmates.<sup>568</sup> The harmful effects of sensory deprivation can develop as quickly as 48 hours, altering brain activity.<sup>569</sup> Studies on the effects of solitary confinement mention the following as potential adverse effects to the psychological, social, and spiritual health of inmates after extended periods of time: delirium, psychosis, major depression, hallucinations, paranoia, aggression, rage, loss of appetite, self-harm, disruption of sleep patterns,<sup>570</sup> hypersensitivity to external stimuli,<sup>571</sup> panic attacks, difficulty with thinking or concentration or memory, intensive obsessional thoughts,<sup>572</sup> paranoia, problems with impulse control,<sup>573</sup> and suicidal ideation and behaviour<sup>574</sup>. Self-mutilation and suicide are more prevalent in solitary confinement, due to environmental stresses, specifically, the isolation, punitive sanctions, and severely restrictive living conditions related to their confinement.<sup>575</sup>

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567 Kevin Griffin, “Aboriginal woman settles lawsuit that claimed she was treated inhumanely in B.C. jail” *Vancouver Sun* (22 May 2013) online: <[www.vancouver.sun.com](http://www.vancouver.sun.com)> [Griffin].

568 *BCCLA v Canada*, *supra* note 120 at para 185.

569 *CCLA v The Queen*, *supra* note 148 at paras 123, 126. The College of Family Physicians of Canada also concluded that solitary confinement can alter brain activity and result in symptoms within days. *Ibid* at para 126.

570 Piché & Major, *supra* note 5 at 24. *BCCLA v Canada*, *supra* note 123 at paras 160, 185. McLeod, *supra* note 57 at 1178. Canadian Civil Liberties Association, “Submission to the Ministry of Community Safety and Correctional Services Review of Segregation in Ontario Adult Correctional Facilities” (5 May 2016) online: <[ccla.org/cclanewsites/wp-content/uploads/2016/05/2016-05-05-CCLA-Submission-re-MCSCS-Segregation-Review.pdf](http://ccla.org/cclanewsites/wp-content/uploads/2016/05/2016-05-05-CCLA-Submission-re-MCSCS-Segregation-Review.pdf)> at 4 [CCLA “Submission”].

571 According to research conducted by Dr. Grassian, some inmates report a progressive inability to tolerate ordinary stimuli. *BCCLA v Canada*, *supra* note 120 at para 165.

572 *Ibid*. Dr. Grassian stated that some inmates report the emergence of primitive aggressive fantasies of revenge, torture and mutilation of the prison guards. In each case the fantasies were described as entirely unwelcome, frightening and uncontrollable.

573 *Ibid*. Dr. Grassian found that some inmates reported episodes of loss of impulse control with random violence, such as throwing things around, “snap[ping] off the handle over absolutely nothing”, and even impulsive self-mutilation.

574 *Ibid* at para 185.

575 *Ibid* at para 186.



In 2012-2013, the OCI reported that a small number of women prisoners (37 of 264 total prisoners) disproportionately accounted for about 36% of all 901 reported self-injury incidents, which includes both men and women.<sup>576</sup> Aboriginal prisoners accounted for over 35% of all self-harming incidents. Aboriginal women, specifically, accounted for nearly 45% of all self-injury incidents among the women prisoner population.<sup>577</sup>

Suicidal behaviours are often viewed by correctional staff as a manipulative tactic of the inmate, and is met with punishment, typically more solitary confinement.<sup>578</sup> Ironically, this is the very thing that encourages incidents of suicide attempts.<sup>579</sup> Poor criminal justice outcomes respecting Aboriginal women, including rates of solitary confinement, arise from prejudice as Aboriginal women are racially profiled, adversely impacted because of their sex, or singled out for behaviours connected to mental illness. As they mentally deteriorate in confinement, correctional staff will continue to regard them as ‘difficult to manage’ inmates, leading to continued confinement, and the vicious and deadly cycle of stereotyping and prejudice continues.

Solitary confinement perpetuates prejudice. Curiously, the Judge in *BCCLA* acknowledged that sentencing terms and rehabilitative programming for Aboriginal inmates are disproportionately negatively affected by the practice of administrative segregation. Aboriginal inmates are denied meaningful opportunities to show rehabilitation and carry out their correctional plan.<sup>580</sup> But, the Judge moved on to allow this racially discriminatory practice. The Judge allowed a practice that enables the State to deem

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<sup>576</sup> OCI, “Risky Business”, *supra* note 223 at 3.

<sup>577</sup> *Ibid.*

<sup>578</sup> Piché & Major, *supra* note 5 at 15.

<sup>579</sup> *Ibid.*

<sup>580</sup> *BCCLA v Canada*, *supra* note 120 at para 484.

Aboriginal inmates not rehabilitated in disproportionate numbers, even though the State, by its very doing, has contributed to the lack of rehabilitation. Ultimately the State has created the public risks, and as a result, has demonstrated an example of poor criminal justice administration. Procedural safeguards for the review process of administrative segregation, which the Judge aimed to implement through the remedies he ordered, will not amount to safeguards against discrimination. This is especially if courts do not feel compelled to impose safeguards against discrimination, specifically.

The Judge in *BCCLA* said the following on discrimination against women in general:

Indeed, there have been past injustices in the treatment of women inmates as detailed in Justice Arbour's report and, more recently, the existence of the Management Protocol, which caused one of the witnesses, Ms. Worm, to spend approximately one half of her five-year robbery sentence in administrative segregation. After years of protests by the OCI, CSC terminated the Management Protocol in 2011. In the present, however, I am satisfied that the impugned provisions do not have a disproportionate effect on women.<sup>581</sup>

However, this pronouncement by the Judge is inaccurate, seeing the unique disadvantage that Aboriginal women endure when they are subjected to solitary confinement. And the Judge in *BCCLA* acknowledged this disadvantage against Aboriginal women, noting that the disproportionate effect is more severe for Aboriginal women compared to Aboriginal men.<sup>582</sup> Certainly, this finding concerning the relative effects of solitary confinement as between Aboriginal men and women played a significant role in the Judge's conclusion

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<sup>581</sup> *Ibid* at para 463.

<sup>582</sup> *Ibid* at para 470.

that administrative segregation perpetuates or exacerbates disadvantage against Aboriginal inmates. As such, State discrimination against Aboriginal inmates was established.<sup>583</sup>

As the Judge in *BCCLA* failed to recognize, solitary confinement is a direct threat to women's personal security, as the number of women, particularly Aboriginal and poor women, entering prison with mental health problems increases.<sup>584</sup> Contrary to stereotypes, these women, who have experienced lifetimes of abuse and suffer with mental health issues, do not pose a great risk to public safety. To subject them to solitary confinement, including maximum security classifications, is to treat them in a manner that does not correspond to their actual circumstances and characteristics.<sup>585</sup> Yet, solitary confinement creates a self-fulfilling prophecy. The deterioration that Aboriginal women undergo in solitary confinement inevitably makes them a danger to themselves and others, as the number of women who are housed in isolating or segregated conditions continues to rise.<sup>586</sup> While Aboriginal women inmates are placed in solitary confinement more often and for longer periods, they self-destruct and become unable to show themselves worthy of transferring to a lower security institution, or obtaining conditional release.<sup>587</sup> These women can spend their entire sentences – and some can even die – in solitary confinement.<sup>588</sup>

Correctional staff frequently use solitary confinement as a behaviour modification tool in a way that defies their principle of implementing the practice when there are no “reasonable” or “possible” alternatives available.<sup>589</sup> One inmate described solitary

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583 *Ibid* at paras 471-472.

584 Pate, *supra* note 87 at 29.

585 Kapp, *supra* note 385 at para 17.

586 Pate, *supra* note 87 at 29.

587 *BCCLA v Canada*, *supra* note 120 at para 484.

588 Pate, *supra* note 87 at 30.

589 *CCRA*, *supra* note 181, ss 31(3). *BCCLA v Canada*, *supra* note 120 at paras 372, 391-392.

confinement as “a test to break your spirit, to bend your will. The longer you resist, the longer the enemy tries.”<sup>590</sup> According to the OCI, administrative segregation is “the most commonly used population management tool to address tensions and conflicts in federal correctional facilities” and manage inmates who have mental health issues, are self-injurious, and at risk of suicide.<sup>591</sup> As long-time critic of solitary confinement and former Canadian Supreme Court Justice, Louise Arbour, stresses, punishment should not be an opportunity for the State to engage in further abuse of its inmates.<sup>592</sup>

The Supreme Court says, “In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context.”<sup>593</sup> The practice of solitary confinement is counter-productive to achieving the healing and reconciliation in Canadian society that is spearheaded by the Truth and Reconciliation Commission of Canada,<sup>594</sup> which has highlighted the need to eradicate Aboriginal over-representation throughout the criminal justice system among its 94 Calls to Action.<sup>595</sup> Instead, the practice is an affront to the ameliorative work in social, political, and legal contexts, that

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590 Piché & Major, *supra* note 5 at 17.

591 2014-2015 Annual Report, *supra* note 126 at 26-27.

592 [*sic*]. The House, *supra* note 297.

593 Withler, *supra* note 19 at para 66.

594 The Truth and Reconciliation Commission of Canada explains its role on its website: “The Truth and Reconciliation Commission of Canada has a mandate to learn the truth about what happened in the residential schools and to inform all Canadians about what happened in the schools . . . The Commission hopes to guide and inspire First Nations, Inuit, and Métis peoples and Canadians in a process of truth and healing leading toward reconciliation and renewed relationships based on mutual understanding and respect.” Truth and Reconciliation Commission of Canada, “About Us”, online: <[www.trc.ca/websites/trcinstitution/index.php?p=4](http://www.trc.ca/websites/trcinstitution/index.php?p=4)>.

595 See in particular, Calls to Action 30-32 of Truth and Reconciliation Commission of Canada, Truth and Reconciliation Commission of Canada: Calls to Action (2015) online: <[nctr.ca/assets/reports/Calls\\_to\\_Action\\_English2.pdf](http://nctr.ca/assets/reports/Calls_to_Action_English2.pdf)> at 3 [TRCC].

governments in Canada must do to eradicate the rampant social problems persisting in Aboriginal communities as a result of poor State social administrations.

The idea that solitary confinement is not discriminatory, because those who are subjected to it are simply the individuals who find themselves incarcerated – meaning the State is not intentionally trying to disadvantage Aboriginal women – holds no weight. Intention is not necessary to prove to show that a State practice imposes a burden on a claimant. Discrimination can still be established based on adverse impact on a person or group as a result of personal characteristics. Yet, at the same time, solitary confinement, along with other criminal justice practices are fundamentally State-controlled decisions. The fact that Aboriginal women are more frequently placed in solitary confinement and for longer periods reflects what the Supreme Court judicially noted in *Gladue*,<sup>596</sup> that is, there is a culture of racial-bias in all stages of the criminal process, as systemic and systematic decision-making repeatedly disadvantages Aboriginal peoples.

### **The Balancing Test: Disputing the State's Reasonable Limits Claim Under Section 1**

Competing societal interests may at times require that a claimant's *Charter* rights be limited.<sup>597</sup> Entrenching this principle, *Charter* section 1 states the following:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

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<sup>596</sup> *Gladue*, *supra* note 76 at para 61.

<sup>597</sup> *BCCLA v Canada*, *supra* note 120 at para 548.

This results in two criteria that must be satisfied by the State after a *Charter* violation is established.<sup>598</sup>

1. Is the purpose for which the limit is imposed pressing and substantial?
2. Are the means by which the legislative purpose is furthered proportionate?
  - (a) Is the limit rationally connected to the purpose?
  - (b) Does the limit minimally impair the *Charter* right?
  - (c) Is the law proportionate in its effect?<sup>599</sup>

Without the benefit of assessing the State's justifications for the *Charter* subsection 15(1) violation against Aboriginal women, I will nevertheless provide reasons why continued practice of solitary confinement must fail under a *Charter* section 1 analysis.

### 1. The Pressing and Substantial Objectives

At this stage, the State's law, policy, or action – whose measures causing the *Charter* violation are claimed to advance – must have sufficient importance to justify overriding the *Charter* violation.<sup>600</sup> The Supreme Court rules that the standard to override a *Charter* violation must be high to prevent objectives that are trivial or discordant with principles of a free and democratic society becoming salvaged under *Charter* section 1.<sup>601</sup> In *CCLA*, the Judge articulated the purposes of administrative segregation in the federal prison system: “The purposes of administrative segregation are the preservation of the security of the penitentiary, the safety of the people working in the penitentiary, the safety

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<sup>598</sup> *Ibid* at 178. *BCCLA v Canada*, *supra* note 120 at para 549.

<sup>599</sup> *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 27.

<sup>600</sup> *R v Oakes*, [1986] 1 SCR 103 at para 69, 26 DLR (4th) 200 [*Oakes*].

<sup>601</sup> *Ibid* at para 69.

of the inmates housed there and the integrity of serious investigations.”<sup>602</sup> Notably, *CCRA* subsection 31(1) provides a statutory purpose for administrative segregation, which is “to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.” It appears the provincial correctional systems would ascribe to similar objectives for the practice of administrative segregation, especially since the grounds for which an inmate can be placed in administrative segregation are similar under both the federal and Ontario provincial laws. Subsection 31(3) of the federal *CCRA* says the following:

The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

- (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;
- (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or
- (c) allowing the inmate to associate with other inmates would jeopardize the inmate’s safety.

Concerning administrative segregation, section 34 of Ontario’s *MCS Regulations*, reads as follows:

- The Superintendent may place an inmate in segregation if,
- (a) in the opinion of the Superintendent, the inmate is in need of protection;
  - (b) in the opinion of the Superintendent, the inmate must be segregated to protect the security of the institution or the safety of other inmates;
  - (c) the inmate is alleged to have committed a misconduct of a serious nature;
- or
- (d) the inmate requests to be placed in segregation.

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<sup>602</sup> *CCLA v The Queen*, *supra* note 148 at para 159.

As for disciplinary segregation, the federal *CCRA* articulates the intended purpose of disciplinary segregation, under section 38, which is “to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates’ rehabilitation and successful reintegration into the community”. In the Ontario provincial system, disciplinary segregation is known as “close segregation”. Again, it is inferred that the provincial system would ascribe to the same legislative objective, since segregation for disciplinary reasons in the federal and provincial systems is imposed when an inmate commits a serious “disciplinary offence” under *CCRA* sections 40 and 44(1)(f) or “misconduct” under subsection 32(2) of the *MCS Regulations*.

Solitary confinement can also be used on inmates with mental health issues. In the federal system, inmates who (1) are self-injurious; (2) are suicidal; or (3) have a serious mental illness with significant impairment, may be subjected to solitary confinement under CD 843, which instructs correctional staff to place identified inmates in observation cells (e.g., “High Watch”, “Modified Watch”, “Suicide Watch”, clinical isolation or seclusion).<sup>603</sup> The point of this and other means of managing inmates with mental health issues pursuant to *CCRA* sections 85-88 is “using observation or restraint as a last resort for the purpose of preserving life and preventing serious bodily harm, while maintaining their dignity in a safe and secure environment”.<sup>604</sup> The Ontario system also has policy that

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603 CD 843, *supra* note 223. OCI, “Risky Business”, *supra* note 223 at 31.

604 CD 843, *supra* note 223.



enables correctional staff to place inmates in forms of “segregation” for similar legislative purposes (i.e., medical isolation<sup>605</sup> and special needs units<sup>606</sup>).<sup>607</sup>

It is admitted that the legislative objectives for solitary confinement identified above are pressing and substantial concerns for the State in the operation of correctional institutions.

### Refuting an Ameliorative Object for Solitary Confinement

*Charter* subsection 15(1) is aimed at preventing discriminatory distinctions that adversely impact members of groups identified by the grounds enumerated in section 15 or analogous grounds determined by courts.<sup>608</sup> Contrarily, subsection 15(2) preserves the right for the government, without fear of a *Charter* subsection 15(1) challenge, to create programs that operate to help disadvantaged groups improve their situation.<sup>609</sup> It is ultimately the State’s responsibility to prove that solitary confinement falls within the scope of achieving an ameliorative object under subsection 15(2), and as such, is not discriminatory.<sup>610</sup>

To entertain the idea that any form of solitary confinement has an ameliorative purpose simply represents a lack of awareness of the State violence that is perpetrated through this practice. I will venture to argue why a court should not accept representations by the State that solitary confinement has an ameliorative object.

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605 MCSCS, PSMI, *supra* note 213, s 4.9. Ontario, *Segregation in Ontario*, *supra* note 107 at 27.

606 MCSCS, PSMI, *supra* note 213, s 4.16.

607 Ontario, *Segregation in Ontario*, *supra* note 107 at 27.

608 Kapp, *supra* note 385 at para 16.

609 *Ibid.*

610 *Ibid* at paras 39-41.

As articulated by legal scholars, such as Professor Debra Parkes at the Law Faculty of University of British Columbia, Canadian society generally assumes a “carceral logic” that correctional facilities are rehabilitative, and solitary confinement is necessary for inmates who do not adjust to the correctional environment, or who are dangerous and must be caged.<sup>611</sup> Parkes makes this poignant explanation:

Imprisonment itself creates its own logic and imperative for the use of solitary. When people are put in cages, many of them will not respond well to that environment. They will act out. They will harm themselves or others. Consequently, they are put in smaller cages (segregation cells) and they do even less well, but they are contained. The fundamental carceral logic of punishing and caging goes unchallenged.<sup>612</sup>

This carceral logic has informed and legitimized the practice of solitary confinement throughout Canadian history.<sup>613</sup> The fallacy of this carceral logic is most apparent when reviewing the health effects of solitary confinement. The Judge in *BCCLA* acknowledged that inmates with mental health issues are disproportionately subjected to administrative segregation and suffer more when placed in segregation. He recognized that “psychological harm [is] inherent in the segregation experience”.<sup>614</sup> The State cannot reasonably expect for a practice that has been determined as inherently psychologically harmful, to advance an ameliorative purpose for inmates, who are already vulnerable and suffer from higher rates of mental health issues.

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<sup>611</sup> Parkes, “Solitary”, *supra* note 62 at 183.

<sup>612</sup> *Ibid* at 179.

<sup>613</sup> *Ibid* at 183.

<sup>614</sup> *BCCLA v Canada*, *supra* note 120 at para 484.

The conditions of jails and prisons are also inherently conducive to inmate deterioration and are ineffective.<sup>615</sup> This is evident when the State resorts to isolating inmates to address problems that occur within the prison population, where State control is already at its highest degree, and the effectiveness of the State's actions can be observed plainly, provided one gets access to observe the State's operation of prisons.

This is precisely why it is also an awry notion that the State would place individuals in solitary confinement for "their own protection", considering the destructive effects of the practice. 'Protective' solitary confinement reveals the problematic nature of prison life, suggesting that the prison society that the State creates and controls is worse than the mental battle that takes place in an inmate's mind. Inevitably, the fact that the State uses solitary confinement reveals the State's poor management of inmates and exemplifies the State's poor criminal justice administration. As the Judge in *BCCLA* stated in reference to the old concept of "voluntary segregation", "This terminology has recently ceased to be used because there was a perception that these inmates needed to be segregated because of CSC's inability to keep them safe in the general prison population."<sup>616</sup> The 2014-2015 Annual Report from the OCI supports this judicial finding: "Most inmates who voluntarily request administrative segregation would return to the general inmate population if the risk to their physical integrity was removed and their safety assured by the CSC."<sup>617</sup> It is clear that the State must do better with administering corrections. A court must not allow for the prevailing carceral logic of incarceration and solitary confinement to crystallize in

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<sup>615</sup> Pate, *supra* note 87 at 30.

<sup>616</sup> *BCCLA v Canada*, *supra* note 120 at para 571.

<sup>617</sup> *2014-2015 Annual Report*, *supra* note 126 at 31.

constitutionalized form, creating barriers to vulnerable prisoners in desperate need of basic protections that will recognize their human dignity and show they are deserving of concern.<sup>618</sup>

## 2. The Proportionality Analysis

At this second stage in the *Charter* section 1 analysis, the State must satisfy that the way in which the State aims to further its legislative purposes is proportionate.<sup>619</sup> This involves addressing three sub-issues: (a) rational connection; (b) minimal impairment; and (c) a comparison of salutary and deleterious effects.

### (a) Rational Connection

To establish a rational connection, the State must show “a causal connection between the infringement and the benefit sought on the basis of reason or logic.”<sup>620</sup> The measures must be carefully designed to achieve the objective. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily.<sup>621</sup> The State must show that it is reasonable to suppose that the limit may further the goal, not that it will do so.<sup>622</sup>

In *BCCLA*, the Judge recognized that there is no rational connection between prolonged segregation, which the provisions concerning administrative segregation allow,

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<sup>618</sup> Parkes, “Solitary”, *supra* note 62 at 178, 180.

<sup>619</sup> *Hutterian Brethren*, *supra* note 599 at para 27.

<sup>620</sup> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 153.

<sup>621</sup> *BCCLA v Canada*, *supra* note 120 at para 552.

<sup>622</sup> *Hutterian Brethren*, *supra* note 599 at para 48.

and its legislative objective.<sup>623</sup> Saving “temporary segregation” as rationally connected to the objectives of security and safety, the Judge found that indefinite segregation and prolonged segregation (i.e., solitary confinement for more than 15 days under rule 44 of the *Nelson Mandela Rules*)<sup>624</sup> inflicts harm on inmates and ultimately undermines institutional security.<sup>625</sup> This practice of keeping inmates segregated for months or even years is unnecessary and undermines the objectives, as inmates lose the ability to interact with other human beings; are deprived from rehabilitative and educational group programming; and descend into mental illness.<sup>626</sup> Professor Michael Jackson, whose evidence was relied on by the Judge stated that in segregation, inmates generate “a powerful and toxic mix of bitterness, resentment and anger that undermines respect not only for correctional authority but also for lawful society to which most inmates will return”.<sup>627</sup> Inmates become more dangerous in prison society and general society.<sup>628</sup>

Countering the ingrained carceral logic that was kept intact in *BCCLA* and the line of cases in the past that have touched on solitary confinement, I argue that the very act of isolating or secluding inmates is not rationally connected to the objectives of administrative segregation (i.e., to maintain security and safety) or disciplinary segregation (i.e., to promote the good order of the penitentiary, through a process that contributes to the inmates’ rehabilitation and successful reintegration into the community”). The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily.<sup>629</sup> But, as

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<sup>623</sup> *BCCLA v Canada*, *supra* note 120 at para 553.

<sup>624</sup> *The Nelson Mandela Rules*, *supra* note 5, r 44.

<sup>625</sup> *BCCLA v Canada*, *supra* note 120 at para 326.

<sup>626</sup> *Ibid* at paras 327-328.

<sup>627</sup> *Ibid* at para 328.

<sup>628</sup> *Ibid* at para 330.

<sup>629</sup> *Ibid* at para 552.

recent as the *BCCLA* decision in January 2018, a number of the CSC's witnesses agreed that Aboriginal inmates in particular may be racially profiled within prison walls.<sup>630</sup>

Meanwhile in the Ontario correctional system, placement in specialized units, which includes mental health units, special needs units, and segregation, is often determined by correctional staff's personal intuitions and unverified information from previous custodial terms.<sup>631</sup> This decision-making process easily reinforces stereotypes, which results in individualized and systemic discrimination.<sup>632</sup> A former corrections staff member who spoke to the Independent Review of Ontario Corrections Team was moved to tears while recalling the stereotypes of Indigenous peoples that were expressed by colleagues at a ministry-delivered cultural sensitivity training course.<sup>633</sup> Racial profiling – targeting inmates based on a *Charter*-protected ground of identity – does not reflect a corporate attitude among correctional staff of imposing limits on vulnerable inmates without arbitrariness.

Worse still, the 2014-2015 Annual Report from the OCI uncovered the following concerning women inmates:

The women reported to the Office that they saw no difference between administrative segregation, disciplinary segregation, suicide watch or clinical isolation or seclusion. They perceived these placements, regardless of their name or purpose, as punishment for their self-injurious behaviour. Further, as the Office's prison suicide investigation noted, segregation was found to be an independent factor that elevated the risk of suicide.<sup>634</sup>

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<sup>630</sup> *Ibid* at para 486.

<sup>631</sup> Ontario, *Directions for Reform*, *supra* note 238 at 6.

<sup>632</sup> *Ibid*.

<sup>633</sup> *Ibid* at 169.

<sup>634</sup> 2014-2015 Annual Report, *supra* note 126 at 31.

Another OCI report, which considered the phenomenon of chronic self-injury in women's prisons, revealed as follows:

The Office heard from a number of women that they routinely refrain from discussing their self-injury ideations or behaviour with either mental health staff or other support staff (e.g., Elders) out of fear that these individuals will inform security staff and the women will be segregated as a result.<sup>635</sup>

This finding by the OCI reveals that solitary confinement does not promote security for women inmates, as they feel reprimanded when they demonstrate signs of distress in the correctional environment, which could very well discourage them from seeking help. In isolation, without meaningful human contact, women inmates are relegated to suffer in tortuous silence. Solitary confinement does not promote safety, as it is the very institutional practice that boosts the risk of suicide among inmates. Solitary confinement does not promote "good order", because it is the very institutional practice that obstructs the rehabilitation of inmates and impedes the process of successful integration with the community. The State cannot reasonably suppose a practice that has been determined as inherently psychologically harmful, or that is wielded in a racially-biased way, or that is perceived by women inmates as punishment for having legitimate and serious health issues, furthers the legislative objectives that the State promotes.

#### (b) Minimal Impairment

This inquiry in the proportionality analysis focuses on whether there are alternative, less drastic means of achieving the State's objective in a real and substantial manner.<sup>636</sup>

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<sup>635</sup> OCI, "Risky Business", *supra* note 223 at 26.

<sup>636</sup> *Hutterian Brethren*, *supra* note 599 at para 53.

The means that are chosen by the State should violate a *Charter* right or freedom "as little as possible".<sup>637</sup> In this inquiry, the Court must accord Parliament a measure of deference, particularly on complex social issues where Parliament may be better positioned than the courts to choose among a range of alternatives.<sup>638</sup> However, if the State is best characterized as "the singular antagonist" of an individual whose *Charter* right has been violated, then a court can assess with greater certainty whether the least intrusive means have been chosen to further the State's objective.<sup>639</sup> In *Multani v Commission scolaire Marguerite-Bourgeoys*,<sup>640</sup> a case involving issues of discrimination, the Supreme Court pronounced in its minimal impairment inquiry that there is a duty to make reasonable accommodation for those adversely affected by a State rule or policy that is neutral on its face, but causes undue hardship to a claimant.<sup>641</sup>

The Judge in *BCCLA* ruled that segregation is overly restrictive by sanctioning solitary confinement in circumstances where some lesser form of restriction would achieve the legislative objective.<sup>642</sup> The Judge noted that the previous iteration of administrative segregation under *CCRA* subsection 31(1), which existed prior to 2012, stated the following: "The purpose of administrative segregation is to keep an inmate from associating with the general inmate population."<sup>643</sup> Contrarily, the current statutory purpose of administrative segregation is more restrictive, and involves "not allowing an

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<sup>637</sup> *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 352.

<sup>638</sup> *Hutterian Brethren*, *supra* note 599 at para 53.

<sup>639</sup> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 994 [*Irwin*].

<sup>640</sup> *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].

<sup>641</sup> *Ibid* at para 53.

<sup>642</sup> *BCCLA v Canada*, *supra* note 120 at para 326.

<sup>643</sup> *Ibid* at para 333.



inmate to associate with other inmates”.<sup>644</sup> The Judge observed that the previous iteration allowed for accommodations where sub-populations of compatible inmates could coexist in the same space.<sup>645</sup> If an inmate’s safety is in jeopardy because of other inmates, the Judge concluded that the logical and less impairing recourse is to simply remove the inmate from those particular inmates, not from all inmates.<sup>646</sup>

The Government in *BCCLA* claimed that the law on administrative segregation, in particular, ensures a minimal impairment as the State says that segregation is used in exceptional circumstances when no other option exists to maintain the safety of inmates and/or the institution.<sup>647</sup> Further, it is only applied for the shortest time possible to achieve these ends.<sup>648</sup> But the Judge found there were other options that the State has already implemented instead of solitary confinement to achieve its legislative objective.

As one example, Stony Mountain Institution in Manitoba has a sheltered unit for intellectually, low-functioning inmates who have difficulty living in general population, because they engage in habits that are offensive or annoying to other inmates, or they are loner inmates who prefer staying in their cells.<sup>649</sup> The activities in the unit promote social skills in inmates. These inmates would have otherwise been at high risk for segregation.<sup>650</sup> As another example, a living unit at Edmonton Institution for Women is available for low-functioning women who require special supervision to live among others – previously their dysfunctional behaviours often led to conflict and violence – landing them in segregation.

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<sup>644</sup> *Ibid* at para 332.

<sup>645</sup> *Ibid* at para 334-335.

<sup>646</sup> *Ibid* at para 335.

<sup>647</sup> *Ibid* at para 556.

<sup>648</sup> *Ibid* at para 556.

<sup>649</sup> *Ibid* at para 585.

<sup>650</sup> *Ibid*.

But, in the living unit, a behavioural counsellor supervises the unit part-time to provide supportive counselling and teach social skills.<sup>651</sup>

As for inmates suffering from mental illness, the Judge in *BCCLA* concluded that “the most obvious – and far less impairing – alternative to administrative segregation is treatment.”<sup>652</sup> The Judge specifically said that “There is no reason why CSC cannot treat mentally ill inmates as a health problem, not a security problem.”<sup>653</sup> Dr. Kelly Hannah-Moffat pointed out in evidence one illustrative initiative in the United States for inmates with serious mental health issues.<sup>654</sup> The New York Department of Corrections and the Department of Health and Mental Hygiene aim to abolish solitary confinement and adopt a treatment approach for inmates with serious mental health issues who break institutional rules. These inmates will be placed in clinical settings where clinical staff have authority to provide individual and group therapy in response to problematic behaviour. Moreover, inmates with mild to moderate mental health and behavioural problems (e.g., personality disorders) can be managed in a setting where tangible incentives that allow inmates out of their cells are awarded when inmates participate in programs and obey institutional rules.<sup>655</sup>

In his minimal impairment analysis, the Judge in *BCCLA* accepted the testimony of the Government’s witness, Dr. Margo Rivera, who commented on alternative measures that have been created over the years.<sup>656</sup> Dr. Rivera explained that those measures that failed and were shut down, did so because resources were reduced, rendering these

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<sup>651</sup> *Ibid* at para 586.

<sup>652</sup> *Ibid* at para 593.

<sup>653</sup> *Ibid* at para 595.

<sup>654</sup> *Ibid* at para 594.

<sup>655</sup> *Ibid*.

<sup>656</sup> *Ibid* at para 587.

measures no longer ineffective. This would happen, even though staff approved the utility of these alternative measures in providing the extra attention and intervention that was needed to lessen episodes of “acting out” and divert vulnerable inmates from solitary confinement. Moreover, Dr. Rivera advised that special-needs alternative measures are more effective when they are created and supervised by staff who are committed to the success of their functioning.<sup>657</sup>

These creative examples of alternatives represent healthier and more productive ways for the State to achieve its legislative objectives in a real and substantial manner. These measures avoided solitary confinement, in spite of situations where inmates exhibit intellectual challenges or behavioural problems that would attract administrative segregation or commit institutional offences that would attract disciplinary segregation. The measures demonstrate the ingenuity and progressive imagination that can be unlocked for the safety, well-being, and rehabilitation of inmates.<sup>658</sup> Surely, there are more alternatives that can be devised to engage all inmates in these ameliorative measures and avoid instances of regressive solitary confinement. A court can know with great certainty that these lesser intrusive means will advance the legislative objectives, especially since the State is “the singular antagonist” of the *Charter* rights of Aboriginal women inmates, specifically, and the custodial population generally.<sup>659</sup> The State has primary control over how inmates are managed and rehabilitated in correctional institutions. Solitary

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<sup>657</sup> *Ibid.*

<sup>658</sup> *Ibid* at para 569.

<sup>659</sup> *Irwin*, *supra* note 639 at 994.

confinement – in any form – is simply an archaic, excessively restrictive, and counter-productive measure. The State has alternative means at its disposal.

(c) Salutory Versus Deleterious Effects

This final inquiry of the proportionality analysis weighs the impact of the law on protected rights against the beneficial effect of the law and policy in terms of the greater public good.<sup>660</sup> The inquiry entails a broad evaluation of whether the benefits of the impugned law and policy are worth the costs of the rights limitation.<sup>661</sup> The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.<sup>662</sup>

Regarding the salutary effects of solitary confinement, the State argued in *BCCLA* that administrative segregation is “a measure that is used to separate either at-risk inmates from unsafe conditions or aggressors who pose a threat to personal or institutional safety.”<sup>663</sup> The State contends there is no greater salutary effect than keeping inmates alive. Administrative segregation restricts a segregated inmate’s residual liberty interest to protect the *Charter* section 7 right to life of the segregated inmate or others. The correctional system also has a societal interest in protecting the safety of inmates under its care.<sup>664</sup> Surely, segregation based on mental health issues would have similar salutary effects. In the case of disciplinary segregation, another salutary effect that might be

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<sup>660</sup> *Hutterian Brethren*, *supra* note 599 at paras 76-77.

<sup>661</sup> *Ibid.*

<sup>662</sup> *Oakes*, *supra* note 600 at para 71.

<sup>663</sup> *BCCLA v Canada*, *supra* note 120 at para 598.

<sup>664</sup> *Ibid.*

proffered is the opportunity to instill respect for the law and for authority figures, which include those within prison and outside prison.

However, the salutary effects mentioned above are not being achieved through solitary confinement. Rather, the deleterious effects better represent the impact of the practice of solitary confinement on prison society and general society. Solitary confinement aggravates the depressing and oppressive carceral environment due to instances of racism and bias exhibited by correctional staff. It triggers and worsens the psychological, social, and spiritual health issues of inmates. It develops vengeful and enraged attitudes in inmates towards staff and creates a lack of trust between correctional staff and inmates. It dissuades women inmates, largely Aboriginal women inmates, from seeking help from correctional staff – including health professionals – regarding their struggles with self-injurious habits or suicidal ideation. It makes inmates more likely to commit suicide, which directly militates against the State’s main salutary appeal of keeping inmates alive. It impedes the successful rehabilitation and integration of inmates in the community, which means that isolated inmates leave imprisonment posing the same or greater risk to public safety. And without access to the programming that is either available or possible as an alternative to solitary confinement, isolated inmates lack sufficient social skills training, psychiatric help, and counselling for challenges they face while imprisoned or for criminogenic life obstacles they experienced prior to imprisonment. These deleterious effects reveal that a court should afford little weight to the State’s alleged salutary effects.

### **Justifying the Remedy**

It is a longstanding Canadian legal principle that one cannot depend on a right, if there is no effective remedy available to protect it.<sup>665</sup> The remedy imposed is the operative component of a court order that makes a right concrete within a fact scenario.<sup>666</sup> *Constitution Act, 1982*, subsection 52(1) is applicable to this discrimination challenge to the extent that law and policy enables the State to subject Aboriginal women to different forms of solitary confinement. The unique combination of personal characteristics of Aboriginal women in the context of Canadian society has resulted in their compounded vulnerability and risk of disadvantage in the correctional system. And this renders any law or policy that allows the State to isolate, seclude, or segregate Aboriginal women inherently discriminatory. *Charter* subsection 24(1) is also applicable to this discrimination challenge to the extent that the State's conduct or actions, while enforcing the law and policy on solitary confinement, demonstrates a disposition of the State to discriminate against Aboriginal women.

From the outset, the point of this analysis on remedies is not to suggest that a court should grant Aboriginal women remedies under both subsections 52(1) and 24(1), as it is recognized that courts will rarely award remedies deriving from both provisions in the same case.<sup>667</sup> The point of this analysis is to show that under either remedy provision, which showcases a different perspective on how discrimination is perpetrated by the State, it can

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<sup>665</sup> Sharpe & Roach, *supra* note 382 at 373. *Hunter v Southam Inc.*, [1984] 2 SCR 145 at 169.

<sup>666</sup> *Ibid.*

<sup>667</sup> Sharpe & Roach, *supra* note 382 at 374. Debra M McAllister, "Charter Remedies and Jurisdiction to Grant Them: The Evolution of Section 24(1) and Section 52(1)" (2004) 25 Supreme Court Law Review 1 at 17. *Mackin v New Brunswick (Minister of Finance)*; *Rice v New Brunswick*, 2002 SCC 13, [2002] 1 SCR 405.

be demonstrated why a court should order a remedy that ensures the State ends the practice of solitary confinement on Aboriginal women.

Constitution Act, 1982, Subsection 52(1)

A remedy under subsection 52(1) is sought against prescriptions in law or policy that sanction administrative segregation, disciplinary segregation, segregation or seclusion for mental health reasons, and other forms of internment that equate to solitary confinement under *The Nelson Mandela Rules*. The law and policy governing solitary confinement are inconsistent with the right against discrimination under *Charter* subsection 15(1) to the extent that they enable the State to subject Aboriginal women to this practice. The array of law and policy that exists, which authorize different forms of solitary confinement, do not allow for requesting a remedy that addresses a pinpointed singular passage of text in either the federal or provincial legal schemes.<sup>668</sup> Accordingly, under subsection 52(1), the remedy requested is for a reading down of law or policy, so that all Aboriginal women in prison or jail must not be subjected to conditions of solitary confinement. I will explain why this remedy is warranted to address the *Charter* subsection 15(1) violation concerning Aboriginal women.

*Constitution Act, 1982*, subsection 52(1), the constitutional supremacy clause, reads:

The *Constitution of Canada* is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.

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668 Department of Justice Canada, “Subsection 52(1) – The supremacy clause” *Charterpedia* (28 June 2018) online:<[www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art521.html](http://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccd1/check/art521.html)> [DOJ, “Subsection 52(1)”].

The broad language of subsection 52(1) reflects that all law, which includes common law, must be consistent with the *Constitution of Canada*.<sup>669</sup> Subsection 52(1) is available when a *Charter* violation results from the legislation itself, as opposed to when the State engages in a *Charter*-infringing discretionary action despite a constitutionally-consistent legislation.<sup>670</sup> In other words, it must be demonstrated that the provisions themselves cannot be enforced upon without violating Canada's constitutional laws.<sup>671</sup> In providing a remedy under subsection 52(1), the guiding principles that must be adhered to are respect for the role of the legislature – that is, going as far as necessary to protect rights and no further – and respect for the purposes of the *Charter* – which is represented by the purpose of the specific *Charter* right that is engaged in litigation.<sup>672</sup>

The purpose of section 15 is to promote substantive equality in Canada. This entails considering the impact of laws on members of groups subjected to stereotyping and historic disadvantage and striving for a society in which everyone can feel secure in knowing that, under the law, they are recognized as human beings who are equally deserving of concern, respect, and consideration.<sup>673</sup> The law and policy authorizing solitary confinement as applied to Aboriginal women is inherently discriminatory and will continue to offend the constitutional principle of substantive equality, because of the unique intersecting aspects of identity that represent Aboriginal women in the context of Canadian society.

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669 *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 25, 33 DLR (4th) 174.

670 *Schachter v Canada*, [1992] 2 SCR 679 at paras 719-720, [1992] SCJ No 68. *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 at para 144, [2011] 3 SCR 134.

671 *CCLA*, *supra* note 148 at para 26.

672 *Schachter*, *supra* note 670 at 700-702. *R v Sharpe*, [2001] 1 SCR 45 at para 114, [2001] SCJ No 3.

673 *Sharpe & Roach*, *supra* note 382 at 313. *Andrews*, *supra* note 386 at 171.



The identity of Aboriginal women in Canada is forever marked by colonial trauma. The Supreme Court in *Gladue* recognized that the circumstances of Aboriginal offenders differ from the majority, because they are victims of systemic and direct discrimination, derived from the deep-seated colonial legacy in Canada.<sup>674</sup> The CSC admits to the current day ripple effects of colonialism in Canada in CD 702, which lists various features of “Aboriginal social history”. Again, the list includes the following:

- effects of the residential school system
- sixties scoop into the adoption system
- effects of the dislocation and dispossession of Inuit people
- family or community history of suicide
- family or community history of substance abuse
- family or community history of victimization
- family or community fragmentation
- level or lack of formal education
- level of connectivity with family/community
- experience in the child welfare system
- experience with poverty
- loss of or struggle with cultural/spiritual identity

However, this list in correctional law does not capture the derogation of the social positioning that Aboriginal women once had prior to European contact – a time when they were leaders and matriarchs possessing inheritance, wealth, and power in their communities. This list does not highlight how the plundering and dislocation of their communities, or the funnelling of their children in residential schools and the child welfare system, commenced cycles of physical, emotional, and sexual abuse of Aboriginal women and girls. This list does not emphasize the high prevalence of psychological harm sustained by Aboriginal women and girls, because of their histories of abuse and impoverished

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<sup>674</sup> *Gladue*, *supra* note 76 at para 68.

upbringings. Nor does this list explain how the psychological harm sustained by Aboriginal women and girls is manifested in the substances they abuse, or the crimes they commit, or the lack of their collective progression in society. This list does not mention how incarcerated Aboriginal women removed from their reserve lands experience a deterioration of social and cultural ties that diminishes their chances for rehabilitation and successful re-integration in Canadian society. Colonial trauma has become ingrained, all-encompassing, and prevailing in the experience and identity of Aboriginal women in Canadian society.

The vulnerability is apparent. But then they are subjected to solitary confinement. The law and policy permitting this practice on Aboriginal women has been determined in court to cause a more severe disproportionate effect on Aboriginal women's ability to rehabilitate and socially re-integrate. Aboriginal women, themselves, have expressed that they perceive their placement in solitary confinement as punishment, whenever they disclose their suicidal or self-injurious ideation and behaviours to correctional staff. The histories of abuse which haunt and distress Aboriginal women are all the more exacerbated when they are deposited in solitary confinement. They share that they feel rejection, abandonment, invisibility, and a denial of their existence when placed in solitary confinement. The law and policy on solitary confinement do not demonstrate to Aboriginal women that they are equally deserving of concern, respect, and consideration, as they are entitled to under section 15. Rather, the law and policy perpetuate disadvantage against them.

A remedy that excludes Aboriginal women from any form of solitary confinement shows respect for the legislature by only going so far as it is necessary to protect the equality rights of Aboriginal women and shows respect for the purposes of the *Charter* – specifically section 15 – by promoting substantive equality.

Charter Subsection 24(1)

In the alternative, a remedy is sought under *Charter* subsection 24(1). Subsection 24(1) is applicable to this discrimination challenge to the extent that the State's conduct or actions, while enforcing the law and policy on solitary confinement, demonstrates a disposition of the State to discriminate against Aboriginal women. The remedy requested is for declaratory relief: the court should declare that the manner in which the State uses solitary confinement against Aboriginal women is unconstitutional, because Aboriginal women's section 15 rights to equality are violated by the State's discriminatory use of the practice.

*Charter* subsection 24(1) states the following:

Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

*Charter* subsection 24(1) should be given the same generous and purposive interpretation as other provisions of the *Charter*.<sup>675</sup> While subsection 52(1) of the *Constitution Act, 1982*, provides a remedy for laws that violate a *Charter* right either in purpose or effect,

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<sup>675</sup> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 25, [2003] 3 SCR 3 [*Doucet-Boudreau*].

subsection 24(1) of the *Charter* provides a remedy for State actions that violate a *Charter* right.<sup>676</sup> The purpose of a subsection 24(1) remedy is to provide responsive and effective remedies.<sup>677</sup> Under subsection 24(1), judges are afforded an explicit grant of remedial discretion to redress persons whose own rights have been violated. The Supreme Court has pronounced, “It is difficult to imagine language which could give the court a wider and less fettered discretion.”<sup>678</sup> This remedial discretion is not hampered by statutes or common law, but only the following constitutional principles:

1. An appropriate and just remedy in the circumstances of the *Charter* claim is one that is relevant to the experience of the claimant and that meaningfully addresses the circumstances that led to the violation of a *Charter* right.<sup>679</sup>
2. An appropriate and just remedy must respect the relationships between, and the separation of, the legislature, the executive, and the judiciary. By imposing a remedy under subsection 24(1), a court must not depart unduly or unnecessarily from its role of adjudicating disputes and providing remedies focused on redressing those disputes.<sup>680</sup>
3. An appropriate and just remedy is judicial by its nature – it vindicates rights while invoking the powers of the courts.<sup>681</sup>
4. An appropriate and just remedy is one that is fair to the party against whom the order is made. The remedy should not create substantial hardships that do not relate to protecting a right.<sup>682</sup>
5. Section 24 is a component of the constitutional scheme for vindicating *Charter* rights and freedoms. Considering the broad language and the array of roles this remedy provision plays in *Charter* cases, it should be allowed to evolve to meet the challenges and circumstances of cases. The evolution may lead to creative and novel features relative to the traditional and historical practice of applying this provision, since tradition and history cannot impede reasoned and compelling notions of appropriate and just remedies.<sup>683</sup>

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676 Sharpe & Roach, *supra* note 382 at 374. *R v Ferguson*, 2008 SCC 6 at para 61, [2008] 1 SCR 96 [*Ferguson*].

677 *Doucet-Boudreau*, *supra* note 675 at para 25.

678 *Ibid* at para 50.

679 *Ibid* at para 55.

680 *Ibid* at para 56.

681 *Ibid* at para 57.

682 *Ibid* at para 58.

683 *Ibid* at para 59.

Under subsection 24(1), a court of competent jurisdiction has discretion to make a declaration of unconstitutionality, as it is regarded by the Supreme Court as “an effective and flexible remedy for the settlement of real disputes”,<sup>684</sup>

While the Judge in *BCCLA* noted the Management Protocol, which mainly targeted Aboriginal women, including Ms. BobbyLee Worm, was terminated by the CSC in 2011,<sup>685</sup> this does not mean that the State’s discriminatory use of solitary confinement has ended. The end of the Management Protocol did not lead to the end of disproportionate numbers of Aboriginal women in solitary confinement. Reporting from community advocates and the OCI repeat this same problem on a consistent basis.<sup>686</sup> With the permanent closing of the P4W in Kingston, Ontario, came an influx of cells constructed for solitary confinement in women’s federal prisons and provincial jails, enabling the over-representation problem to increase. Although several of CSC’s witnesses confirmed that Aboriginal inmates are still subjected to racism and racial profiling,<sup>687</sup> the Judge in *BCCLA* was still willing to permit a practice to continue that disproportionately affects Aboriginal inmates. Despite the fact that racism against Aboriginal inmates is reported by correctional staff in the Ontario provincial system, the practice of solitary confinement is legitimized as tool for managing inmates.

Awarding remedies, the Judge in *BCCLA* ruled that “The impugned laws are invalid pursuant to s. 15 of the Charter: . . .to the extent that the impugned laws authorize and

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684 *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 46-47 [2010] 1 SCR 44.

685 *BCCLA v Canada*, *supra* note 120 at para 463.

686 See as examples *2014-2015 Annual Report*, *supra* note 126. OCI, “Risky Business”, *supra* note 223. NWAC, *supra* note 514. Pate, *supra* note 87.

687 *Ibid* at para 486.

effect a procedure that results in discrimination against Aboriginal inmates.”<sup>688</sup> In his decision, the Judge was narrowly focused on administrative segregation and the following problems deriving from the impugned laws that authorize this practice: (a) instances of prolonged or indefinite segregation; (b) the phenomenon that the institutional head is the judge and prosecutor in its own cause; (c) internal review rather than independent review; and (d) deprivation of rights to counsel at segregation hearings and reviews.

These identified problems in *BCCLA* hearken back to the 1996 *Arbour Report* that was conducted after eight women were subjected to violent strip searches, cell extractions by male guards, and were held in segregation for months at P4W in 1994. The same exact problems noted in *BCCLA* were also noted by Former Supreme Court Justice, Louise Arbour. Arbour noted the problems with prolonged segregation on the women inmates.<sup>689</sup> Arbour raised concerns about the lack of independent review in decisions regarding continued segregation.<sup>690</sup> Arbour found that the segregation review process for “prison within a prison” was not operating in accordance to the principles of fundamental justice.<sup>691</sup> And Arbour pointed out that the CSC did not respect inmates rights to counsel and discussed some barriers to providing inmates with access to counsel.<sup>692</sup> Despite this report illuminating the problematic conduct of the State in prisons, over twenty years later, and a court is tasked with addressing these same problems, because of the State’s unwillingness to respect the constitutional rights of its inmates. What’s worse is that the OCI, which functions as a legally-prescribed watchdog of the federal prison system, serves a frequent

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<sup>688</sup> *BCCLA v Canada*, *supra* note 120 at para 609.

<sup>689</sup> *Arbour Report*, *supra* note 185 at 80-81, 105.

<sup>690</sup> *Ibid* at 79, 105.

<sup>691</sup> *Ibid* at 105.

<sup>692</sup> *Ibid* at 16, 31, 36, 90, 108.

reminder to the CSC that it is failing to provide inmates with these procedural safeguards.<sup>693</sup> The legislative branch of government may mean well in legally prescribing protections and safeguards for prisoners, but history shows that the executive branch of government fails to change its ways.

In addition to this culture of resistance to change by correctional officials, there is a culture of racism that prevails. The Supreme Court made it clear in *Gladue*, that racial bias at nearly all points of criminal justice decision-making has contributed to Aboriginal over-representation. The over-representation problem since this Supreme Court decision has not alleviated, but instead has gotten worse. Solitary confinement has become one of many criminal justice measures that has disproportionately impacted Aboriginal women in particular. Solitary confinement will continue to be used in a discriminatory manner as long as it is at the disposal of the State and the State is bent on making adverse determinations concerning Aboriginal peoples. Procedural safeguards against solitary confinement will not amount to safeguards against discrimination, especially if the courts do not feel compelled to impose effective safeguards against discrimination, specifically. Procedural protections do not make right the prejudice and stereotyping that Aboriginal women experience at the moment of the initial decision by correctional staff to place them in solitary confinement.

Aboriginal women need assurance that they will not be relegated to silence and subjected to psychologically harmful treatment on the basis of their identity. Aboriginal women should not have to feel that their personal security can be further jeopardized when

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<sup>693</sup> See for example *2014-2015 Annual Report*, *supra* note 126 at 21, 25, 29,

they find themselves in State custody. Aboriginal women in the hands of the State should never have to worry that by entering the doors of a correctional institution, their likelihood of suicide increases. Given the already marginalized and vulnerable condition in which Aboriginal women enter the correctional system, and their continuing vulnerability at the mercy of the State's highest degrees of control, the circumstances of this *Charter* claim warrant the vindication of Aboriginal women's equality rights through a declaration of unconstitutional invalidity.



## **CHAPTER TWELVE: CHALLENGES WITH THE LITIGATION**

In the past, launching a *Charter* section 15 claim for other problems in the correctional system has presented different obstacles.<sup>694</sup> Claims of racism have been unsuccessful due to insufficient evidence or because evidence is expensive to gather. Furthermore, much of the research on prisons is commissioned by the government or public institutions, and they may be unwilling or cannot be compelled to testify on issues of discrimination.<sup>695</sup> Claims have also failed because cases have been poorly framed, usually by unrepresented litigants or counsel who lack experience in prison law or *Charter* law.<sup>696</sup> These issues certainly affect the success of the discrimination claim that I have put forward. This is why the financial and legal backing of ally advocacy groups or organizations that are willing to do pro bono work can be very beneficial for overcoming and avoiding a lot of the problems that arose in past discrimination litigation. In cases where an inmate relies on the assistance of an advocacy group or organization, the public interest advocate must keep close contact with the inmate. This may be difficult if that inmate is restricted from privileges, such as phone use and public visits, while held in isolation.

An advocate for a woman inmate asserting the Charter claim, should be guided by a feminist and prison abolitionist perspective, and they will have the responsibility of (1) ensuring that women, and the intersecting aspects of their identity, remain a key focus of the litigation; (2) dismantling constitutionalized and entrenched carceral logic; and (3) attacking the legitimacy that has been attributed to the practice of solitary confinement by

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694 Parkes, "Prisoner's Charter?", *supra* note 219 at 667.

695 *Ibid* at 668. For example, psychologists and psychiatrists had refused to testify against CSC for fear that they would jeopardize service delivery contracts and/or access to the prison(s) for women to conduct their research.

*Ibid.*  
696 *Ibid* at 667.

the State throughout history.<sup>697</sup> Attacking the carceral logic is critical in order to avoid the expansion and proliferation of carceral sites as a result of ill-strategized advocacy.<sup>698</sup> The safety and well-being of criminal inmates and immigration detainees depends on this.

Even as a conscious advocate makes effort to incorporate intersectional feminism in a discrimination claim against solitary confinement, courts may have difficulty with seeing the value of this litigation approach or incorporating intersectional feminism in their legal decisions. The advocate should not only advocate against solitary confinement, but they should advocate for intersectional feminism. This will help to validate having a female inmate advance the discrimination claim, as opposed to a male inmate who represents the majority of the individuals navigating the criminal justice and immigration systems. The advocate may very well have to educate courts on intersectionality, so they can become more aware of how discrimination can be experienced differently and more comfortable with engaging in a multi-ground discrimination analysis.

The prison abolition ethic may generally present as a form of political ideology, given its heavy focus on the social changes that the State should implement to address criminality and reduce reliance on the criminal justice system. An advocate who employs a prison abolition ethic will have the task to adapt this ethical framework to legal argument

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697 Parkes, "Solitary", *supra* note 62 at 178, 180.

698 Of relevance, I note that I am concerned about the major discrepancies between these two civil liberties associations cases, such as the amount of historical accounting of solitary confinement in Canada, the Charter violations invoked, the constitutional remedies requested, and the remedies the courts ordered. Both superior court cases seem to be moving onto the appeal stage now, partly because of the inconsistent court rulings. See, Mike Hager, "Federal government appealing B.C. Supreme Court decision on solitary confinement" *The Globe and Mail* (19 February 2018) online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)>. Perhaps the discrepancies that exist will lead to further diminished or meagre constitutional protections won for prisoners, particularly if the cases are appealed further to the Supreme Court of Canada, and the Supreme Court is tasked with reconciling the differences between these superior court decisions. Considering these cases were heard before the superior courts around the same time, the parties launching the constitutional challenges would have benefited from concerting their litigation strategies, as a matter of solidarity and as a matter of achieving consistency in prisoner advocacy.

and the doctrinalism of the legal profession. The advocate should strive to anchor arguments to constitutional and legal principles, to which the courts will be most receptive.

Cognizant of the fact that discrimination can be experienced differently, it is important to galvanize support from other vulnerable groups affected by solitary confinement and encourage intervenors from these other vulnerable groups to advocate on their behalves. This can breakup the heavy workload of proving the discrimination claim among multiple advocates. Working in concert, they can more easily achieve the evidentiary burden by bolstering each other's discrimination claims through making connections between different experiences of discrimination in solitary confinement.

Due to the piecemeal fashion in which law develops – guided by the facts presented in court and an awareness of Canadian history – a Judge may hear a case of discrimination against Aboriginal women, for example, and because the courts are more familiar with their significant plight in Canadian society, the courts simply restrict the abolition of solitary confinement to Aboriginal women and are unwilling to protect other vulnerable groups from the practice of solitary confinement. In the case of immigration detainees, a court may be less willing to affirm their equality rights, because they are deemed a national security risk and because of the prejudice that their constitutional rights as foreign nationals are less important than Canadian citizens. Nevertheless, all other inmates would be at risk of solitary confinement, which is not ideal. An advocate should endeavour to further challenge the carceral logic of solitary confinement using evidence of its harmful effects and emphasize the possibility of lesser restrictive means for achieving legislative objectives that stand to benefit all inmates, not only Aboriginal women inmates. It would also help

the advocate to highlight how discrimination is experienced differently by the claimant they are representing, due to the unique intersecting aspects of their identity, which compound their vulnerability.

Another concern is that if a court awards a remedy under *Charter* subsection 24(1), the underlying premise of this remedy, as indicated by the difference in purposes between subsection 24(1) and subsection 52(1) remedies, is that the law and policy on solitary confinement is constitutionally consistent. In other words, it is simply the State's unconstitutional conduct that must be redressed. Contrary to a subsection 52(1) remedy, which addresses unconstitutional laws, a subsection 24(1) remedy may perhaps entrench the carceral logic that the practice of solitary confinement, itself, is legitimate. This carceral logic would crystallize in constitutional form and may create an obstacle for other vulnerable groups before the courts to prove that a practice, whose laws and policy, were previously determined by courts as constitutional, is inherently discriminatory when it is applied to them. It may be more difficult to convince a court, that may already be leaning towards awarding a subsection 24(1) remedy, that a remedy under subsection 52(1) is more appropriate in the circumstances of the *Charter* claim. This is especially if this request for a subsection 52(1) remedy is largely motivated by reasons derived from the prison abolitionist lawyering ethic.

While the Ontario Superior Court of Justice,<sup>699</sup> will most likely be the court of first instance for a discrimination claim under the *Charter*, it may be difficult to decide who the

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<sup>699</sup> Provincial superior courts have constant and concurrent jurisdiction to award constitutional remedies under both subsections 24(1) and 52(1). Yet, to award a remedy under subsection 24(1), a court must have jurisdiction, independent of this remedy provision, over the parties, the subject matter of the constitutional case, and the remedy requested. Sharpe & Roach, *supra* note 382 at 375.

respondents implicated in the *Charter* claim of discrimination will be. Rules 16.02 (1)(f)-(h) of the *Ontario Rules of Civil Procedure*<sup>700</sup> will dictate the key actors to serve with the originating process<sup>701</sup> in commencing the *Charter* challenge, namely Her Majesty the Queen in right of Canada, Her Majesty the Queen in right of Ontario, and the Attorney General of Ontario. For discrimination suffered by the inmates of the criminal population, the Ontario Ministry of Community Safety and Correctional Services<sup>702</sup> will have to be served with an originating process, as well. For immigration detainees, there are quite a few government ministries that would likely have a stake in the outcome of the discrimination case: the Ministry of Public Safety and Emergency Preparedness,<sup>703</sup> the Immigration, Refugees and Citizenship Canada,<sup>704</sup> and the Ontario Ministry of Community Safety and Correctional Services. One approach is to sue all the possible respondents that

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700 Ontario, RRO 1990, Reg 194: Rules of Civil Procedure.

701 According to Rule 1.03 (1) of the Rules of Civil Procedure:

“originating process” means a document whose issuing commences a proceeding under these rules, and includes,

- (a) a statement of claim,
- (b) a notice of action,
- (c) a notice of application,
- (d) an application for a certificate of appointment of an estate trustee,
- (e) a counterclaim against a person who is not already a party to the main action, and
- (f) a third or subsequent party claim,

but does not include a counterclaim that is only against persons who are parties to the main action, a crossclaim or a notice of motion; (“acte introductif d’instance”)

702 The Ontario Ministry of Community Safety and Correctional Services establishes, maintains, operates and monitors Ontario's adult correctional institutions and probation and parole offices. For more information see Ontario, “The Ontario Ministry of Community Safety and Correctional Services: Ministry information” online: <[www.mcscs.jus.gov.on.ca/english/about\\_min/mandate.html](http://www.mcscs.jus.gov.on.ca/english/about_min/mandate.html)>.

703 Public Safety Canada was created in 2003 to ensure coordination across all federal departments and agencies responsible for national security and the safety of Canadians. Public Safety Canada works with five agencies and three review bodies, united in a single portfolio and all reporting to the same minister. The Canada Border Services Agency (CBSA) manages the nation's borders by enforcing Canadian laws governing trade and travel, as well as international agreements and conventions. The CBSA facilitates legitimate cross-border traffic and supports economic development while stopping people and goods that pose a potential threat to Canada. For more information see Government of Canada, “About Public Safety Canada” online: <[www.publicsafety.gc.ca/cnt/bt/index-en.aspx](http://www.publicsafety.gc.ca/cnt/bt/index-en.aspx)>.

704 Immigration, Refugees and Citizenship Canada facilitates the arrival of immigrants, provides protection to refugees, and offers programming to help newcomers settle in Canada. For more information see Government of Canada, “Immigration, Refugees and Citizenship Canada” online: <[www.canada.ca/en/immigration-refugees-citizenship.html](http://www.canada.ca/en/immigration-refugees-citizenship.html)>.

would have a stake in the discrimination case, and then leave it up to the trial judge to decide whether all the respondents who have been served with this discrimination challenge are the appropriate respondents. That way, by suing all who are potentially responsible in the case, the discrimination case is less likely to fail as a result of not having the right respondent involved in litigation.

### **CHAPTER THIRTEEN: CONCLUDING REMARKS**

*You know, I'm not the first to have said that the way you could measure the level of, the quality of a civilization, is how it treats its offenders. Because the temptation, it can bring the worst out of us and it has, I think, historically, both in mobs and in politicians. I think that's where we need to rise above that and, you know, go to the heart of the human dignity, of people who are essentially in the care of the state, regardless of the fact that they're serving a sentence as a form of punishment, I accept that.*

*- Former Canadian Supreme Court Justice, Louise Arbour<sup>705</sup>*

This paper focused on the practice of solitary confinement in the context of Ontario jails, federal prisons, and immigration holding centres, and the experience of women who are subjected this practice while serving criminal sentences, awaiting trial, or held in immigration detention. The paper aimed to demonstrate how *Charter* section 15 is the ideal means of eradicating solitary confinement – guided by prison abolition ethic and intersectional feminism – considering the severely negative impact that it has on women who are Indigenous, racialized, mentally-ill, or immigration detainees. With the benefit of reading the *CCLA* and *BCCLA* decisions that were released by provincial superior courts in December 2017 and January 2018, respectively, I showcased the welcomed strides and unwelcome drawbacks that these reform-oriented cases provided in tackling procedural aspects to this practice. But more importantly, with the *BCCLA* case, I utilized the court's failing in exploring a discrimination analysis focused on Aboriginal women, to carry out a section 15 analysis and substantiate the key argument of my paper.

The thought of abolishing solitary confinement may appear to the retributivist or the reformist as unthinkable. In practice, it may seem like a hard-fought war featuring

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<sup>705</sup> The House, *supra* note 297.

multiple constitutional battles to vindicate the rights of different vulnerable groups, one after another. Yet, McLeod reminds us that history reveals that when persistent and fearless advocacy is galvanized in the face of detractors, we inch closer and closer to realizing major social transformations that reflect better versions of justice in a liberal society.

The Late Nelson Mandela said, “A nation should not be judged by how it treats its highest citizens, but its lowest ones.” It is notable that there are many members of the international community who resonate with this principle of determining a country’s regard for human dignity. Canada’s esteemed international reputation for progressive social policy and human rights is tainted by the fact that it treats its most vulnerable individuals in its custody, like they are not humans at all.



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