

CASE COMMENT

Centring the Margins: Reflections on British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)

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INTRODUCTION

CANADIAN COURTS HAVE historically balked at scrutinizing the inner workings of the correctional system, and this reticence has continued well into the *Charter* era. With few exceptions,¹ a great degree of deference continues to be afforded to correctional authorities on those rare occasions when a challenge to prison conditions or the conduct of prison administrators makes it before a judge for a decision on its merits.² Judges' reluctance to "unnecessarily interfere" in adjudicating prison rights claims is troubling,³ not least because for people in prison – among the most marginalized in our society – courts

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¹ See, e.g., *Bacon v. Surrey Pretrial Services Centre*, 2010 BCSC 805; *R v. Hamm*, 2016 ABQB 440; *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3080.

² For a comprehensive review of judicial deference in the prison context, see Lisa Kerr, "Contesting Expertise in Prison Law," *McGill Law Journal* 60, 1 (2014): 43.

³ In *R v. Aziga*, (2008), 78 WCB (2d) 410, 2008 CanLII 39222 (ONSC), the judge dismissed for lack of adequate evidentiary foundation an application alleging *Charter* violations in pretrial detention. In so doing, he applied an excessively deferential standard of review (at para. 34): "... the courts ought to be extremely careful not to unnecessarily interfere with the administration of detention facilities ... Unless there has been a manifest violation of a constitutionally guaranteed right, prevailing jurisprudence indicates that it is not generally open to the courts to question or second guess the judgment of institutional officials. Prison administrators should be accorded a wide range of deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and maintain institutional security."

are often the only viable (albeit imperfect) sites of resistance. For many of us, people in prison tend to be out of sight, out of mind.

Over the past decade or so, however, prison conditions and prisoner experiences have become difficult to ignore. Through media coverage of the preventable deaths of people serving out sentences in solitary confinement; the courage of their family members to speak out; and the ongoing work of the Office of the Correctional Investigator, the Canadian Association of Elizabeth Fry Societies, the John Howard Society of Canada, and others; we are in the midst of a long overdue conversation about what correctional services in this country look like, how people in prison are treated, and what must change. Parliamentarians are also taking notice. Two House of Commons committees and one Senate committee are currently undertaking separate, related studies concerning the experience of incarcerated people in Canada.⁴ Proposed legislation to amend the *Corrections and Conditional Release Act (CCRA)*⁵ was introduced by the minister of public safety and emergency preparedness in the House of Commons in June 2017.⁶ Alongside these domestic developments, a consensus in favour of more robust protection for prisoners is emerging at international law. The Standard Minimum Rules for the Treatment of Prisoners were revised in 2015 for the first time since their adoption in 1957 and were unanimously adopted by the United Nations General Assembly as the “Nelson Mandela Rules.”⁷ The revision made substantive changes to the treatment of prisoners to reflect contemporary norms and best practices and, for the first time

⁴ The House of Commons Standing Committee on the Status of Women is engaged in a study on *Indigenous Women in the Federal Justice and Correctional Systems*. The House Standing Committee on Public Safety and National Security is undertaking a study on *Indigenous People in the Correctional System. A Study on the Issues Relating to the Human Rights of Prisoners in the Correctional System* is ongoing at the Senate Standing Committee on Human Rights.

⁵ S.C. 1992, c. 20 [CCRA].

⁶ *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, Bill C-56, as at first reading 17 June 2017 (Canada, 42nd Parl., 1st sess.).

⁷ UNGA, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, Res. 70/175, UNGAOR, 70th Sess. (annex), UN Doc A/RES/70/175 (17 December 2015), online: <http://undocs.org/A/RES/70/175> (Mandela Rules). Juan Méndez, the UN’s Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) from 2010 to 2016, undertook a study on the use of solitary confinement in member states, finding that “where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and other torture.” UNGA, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 66th Sess., UN Doc. A/66/268 (5 August 2011), online: <http://undocs.org/A/66/268> (Special Rapporteur Interim Report).

in an international standard, placed limitations on the use of solitary confinement.

The practice of isolating people in Canadian prisons is not new, nor are calls for an end to its use. From at least as far back as the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*,⁸ in which Justice Louise Arbour undertook a comprehensive review of a cell extraction, strip search, and subsequent segregation of female prisoners at the only federal prison for women at the time, the practice of isolating prisoners has come under scrutiny. In the decades following the Arbour Commission, numerous task forces, working groups, committees, investigators, and advocates have criticized the practice of long-term isolation, some calling for its outright abolition, and others recommending significant and meaningful reform to limit the risks and bolster procedural fairness.⁹ Until very recently, Correctional Service Canada (CSC) has resisted all recommendations for meaningful change to isolated confinement.

CSC has not and will not volunteer to change. Any progress made over the past few years has come as a consequence of actual or impending litigation. Victories for prisoners and their advocates are few and far between, which is what makes the past few months so remarkable. Within the span of just over a month, judgments in two challenges to administrative segregation – one brought in Ontario and the other in British Columbia – were released, both ruling (for vastly different reasons) that the current regime authorizing segregation of prisoners for administrative reasons is unconstitutional.¹⁰

⁸ The Honourable Louise Arbour, Commissioner, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996).

⁹ For a review of the findings of these bodies, see West Coast Prison Justice Society, *Solitary: A Case for Abolition* (November 2016) at 13–21.

¹⁰ Judgment in *Corporation of the Civil Liberties Association of Canada v. Her Majesty the Queen*, 2017 ONSC 7941 was released on 18 December 2017. Justice Marrocco, writing for the Ontario Superior Court of Justice, narrowly focused his ruling on the absence of meaningful review mechanisms for decisions to segregate prisoners. Just over a month later, judgment in *British Columbia Civil Liberties Association v Canada (Attorney General)* [BCCLA and JHSC v. Canada] was released on 17 January 2018. Writing for the Supreme Court of British Columbia, Justice Leask declared the legislative regime unconstitutional on a number of substantive and procedural bases. In both cases, the judges suspended the declaration of the law's invalidity for twelve months to allow the government time to respond. Notices of appeal have been filed in both cases. On 17 January, 2018, the Canadian Civil Liberties Association filed an appeal to the Ontario Court of Appeal. The Attorney General of Canada filed an appeal to the BC Court of Appeal on 16 February 2018. It is quite likely that these cases will go up on further appeal to the Supreme Court of Canada.

This case comment offers initial reflections on the recent judgment of the British Columbia Supreme Court. In this case, the BC Civil Liberties Association (BCCLA) and the John Howard Society of Canada (JHSC) brought a challenge under sections 7, 9, 10, 12, and 15 of the *Canadian Charter of Rights and Freedoms* to the provisions of the *CCRA* that authorize and effect the practice of administrative segregation.¹¹ The plaintiffs successfully convinced the Court that the impugned provisions of the *CCRA* violate the section 7 rights to life, liberty, and security of the person of all those who are subjected to them as they permit prolonged administrative segregation and define segregation too restrictively; additionally, the laws do not accord with procedural fairness because they allow the warden to be the judge and prosecutor of his or her own cause, authorize internal review, and deprive prisoners of the right to counsel at the segregation hearings and reviews. The plaintiffs were also successful on their section 15 equality claims: the laws are unconstitutional to the extent that they authorize and effect any period of administrative segregation for the mentally ill and/or disabled, and to the extent that they authorize and effect a procedure that results in discrimination against Indigenous persons.¹²

BCCLA and JHSC v. Canada is a groundbreaking ruling not only in the result – declarations that prolonged, indefinite solitary confinement violates the *Charter* – but also because it provides much needed insight into prison administration, the translation of law to prison practice, and, most significantly, the lived experiences of people in prison. There are many layers to this judgment; many high points and a few missed opportunities, all of which will no doubt come to be the subject of considerable scholarly study, discussion, and debate. This comment highlights two promising facets of the Court's engaged approach to the psychosocial dimensions of isolated confinement: (1) the acknowledgment of administrative segregation as nothing less than solitary confinement and (2) an approach to harm that centres social deprivation.

¹¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [Charter].

¹² While Justice Leask considered that present CSC practice does not accord segregated inmates their proper s. 10(b) rights, he declined to make a declaration to that effect as it would normally arise in a case where an individual plaintiff seeks a remedy under s. 24(1) of the *Charter*. The Court found no violation of s. 9's protection against arbitrary detention and no basis upon which to make a finding on s. 12's protection against cruel and unusual treatment or punishment.

SOLITARY CONFINEMENT BY ANY OTHER NAME

Under federal law, “administrative segregation” is a term of art used to describe a form of solitary confinement authorized by the *CCRA*. Sections 31 to 37 of the *CCRA* set out the regime. It is a distinct way of isolating particular prisoners from all others, operating both as a status and as a physical place in which people are housed within the prison.

Prison officials insist that the administrative use of isolation is not intended to serve a punitive purpose. The *CCRA* authorizes a different kind of isolation – disciplinary segregation – as a sanction where a prisoner has been found guilty of a serious offence.¹³ Administrative segregation, by contrast, is intended for use only “to maintain the security of the penitentiary or the safety of any person” by not allowing an individual to associate with others in the prison.¹⁴ Whether intended to be punitive or not, the law nevertheless provides prison officials with unbounded discretion to use isolation as a tool to manage prisoners and prison affairs.¹⁵

The initial decision to place individuals in administrative segregation and any further decisions not to release them may be ordered where the warden is satisfied that there is “no reasonable alternative” to isolation and one of the following three circumstances exists:

- (1) The warden believes that the individual’s actions or intentions are such that they would “jeopardize the security of the penitentiary or the safety of any person” and that allowing the individual to associate with others would so jeopardize security or safety;¹⁶
- (2) That allowing the individual to associate with others would

¹³ Sections 38 to 44 of the *CCRA* set out the regime for discipline within the prison. Under s. 44(i)(f), prisoners who are found guilty of a serious disciplinary offence may be segregated from other inmates (with or without restrictions on visits with family, friends, and other persons from outside the penitentiary) for a maximum of thirty days.

¹⁴ *CCRA*, s. 31(1).

¹⁵ While further discussion is outside the scope of this piece, it is important to note that many observers contest the official view that administrative segregation is not punitive by pointing to the harsh conditions of administrative segregation cells (indistinguishable from those used for disciplinary segregation) and the imposition of strict schedules and behavioural norms. Moreover, maintaining a dichotomy of isolation as punishment and isolation as prison management is a distinction without a difference from the perspective of those in isolation. See, for example, Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas and McIntyre, 2002) at 286-89; Canada, Parliament, House of Commons, Standing Committee on Justice and Human Rights, Subcommittee on Corrections and Conditional Release Act, *A Work in Progress: The Corrections and Conditional Release Act* (May 2000) (Chair: Paul DeVillers) at para. 5.20.

¹⁶ *CCRA*, s. 31(3)(a).

interfere with an investigation that could lead to a criminal or a serious disciplinary offence charge;¹⁷ or

(3) That the individual's own safety would be jeopardized by allowing her or him to associate with others.¹⁸

Whereas the *CCRA* sets out a maximum cap of thirty days for the use of isolation as punishment, the law provides no such limitation on the use of administrative segregation. Individuals isolated for administrative reasons (as described above) may be – and are – segregated for prolonged and indefinite periods.¹⁹

The question of caps – hard or soft – on the duration of placements in segregation is fraught. There is a sense that caps will place much needed legal parameters and accountability around the practice of isolating prisoners, which is likely to continue for as long as society continues to imprison people. Yet drawing a line to select a particular time period after which *merely harmful* activities become *constitutionally unpalatable* ones can feel uncomfortably arbitrary. Against this backdrop, there are broader concerns that, in order to contemplate the drawing of hard caps for time spent in isolation, we must buy into prison- and punishment-centric logics that reify isolation as necessary and, in some instances, as desirable.

The former special rapporteur on torture defines solitary confinement as “the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day,” and *prolonged* solitary confinement as “any period of solitary confinement in excess of 15 days,” a point at which some harmful psychological effects of isolation are understood to become permanent.²⁰ Rule 44 of the Mandela Rules likewise defines solitary confinement as the “confinement of prisoners for 22 hours or more a day without meaningful human contact” and prolonged solitary confinement as that which exceeds fifteen consecutive days.²¹ This

¹⁷ *CCRA*, s. 31(3)(b).

¹⁸ *CCRA*, s. 31(3)(c).

¹⁹ See, for example, Office of the Correctional Investigator, *Administrative Segregation in Federal Corrections: 10 Year Trends* (28 May 2015) at 2, 8, online: <http://www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20150528-eng.pdf>.

²⁰ Special Rapporteur Interim Report, *supra* note 8 at para. 26. In his report, the special rapporteur acknowledged the seeming arbitrariness in selecting a threshold at which an already harmful practice becomes prolonged and especially harmful. The fifteen days were selected as the threshold because studies have shown that at that point in time some of the harmful psychological effects of isolation can be irreversible.

²¹ Mandela Rules, *supra* note 8.

fifteen-day maximum on the use of solitary confinement is held by Justice Leask to be a generous but “defensible” standard.²²

Notwithstanding this definition, CSC has long taken the position that solitary confinement simply does not exist in Canadian prisons. In response to the *Coroner’s Inquest Touching the Death of Ashley Smith* completed in 2013, CSC rejected the term “solitary confinement” as inaccurate or inapplicable within the federal correctional system, stating that law and policy “allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives.”²³ CSC further described administrative segregation as an “interim population management measure resulting from a carefully considered decision” in which there is “frequent interaction with others, including staff and visitors, as well as structured contact with peers.”²⁴

The position of the government was no different in this case. From the outset, the government argued that “administrative segregation” is not “solitary confinement” because prisoners in administrative segregation have daily opportunities for meaningful human contact. There was plentiful evidence before the Court – from prisoners, plaintiffs’ experts, and on cross-examination of government witnesses – to contest this official narrative of prisoner experience. Justice Leask observed that, in reality, prisoners subjected to administrative segregation have only “limited and superficial” opportunities for human contact.²⁵ Prisoners themselves described perfunctory visits from correctional staff, interactions conducted entirely through a meal slot in the door, and being alone in their cells for twenty-three hours a day with very minimal (if any) direct contact with other prisoners.²⁶ Plaintiffs’ expert Dr. Haney describes these types of interactions as “pro forma routine rote interactions” that are “essentially life maintenance functions” – not meaningful social interaction.²⁷ Such interactions are, in Dr. Haney’s view, “bound by the very thick psychological barrier that exists between prisoners and staff” and that, “despite the good intentions of many staff members, is virtually unsurmountable.”²⁸

²² *BCCLA and JHSC v. Canada* at para. 250.

²³ CSC, *Response to the Coroner’s Inquest Touching the Death of Ashley Smith* (December 2014) at s. 3.2, online: <http://www.csc-cc.gc.ca/publications/005007-9011-eng.shtml>.

²⁴ *Ibid.*

²⁵ *BCCLA and JHSC v. Canada* at para. 124.

²⁶ *BCCLA and JHSC v. Canada* at paras. 129-32.

²⁷ *BCCLA and JHSC v. Canada* at para. 133.

²⁸ *Ibid.*

Justice Leask ultimately finds that CSC does in fact practise solitary confinement as defined in the Mandela Rules. He further makes a specific factual finding that people subjected to administrative segregation are confined without meaningful human contact.²⁹ The implications of this finding are significant. CSC can no longer shield its practice of solitary confinement behind vocabulary that makes the practice of isolation sound (even marginally) more palatable. Moreover, incarcerated people themselves emerge as the true experts in what makes their lived experience of isolation more or less meaningful, more or less affirming.

The reasons further uncover the dehumanizing and demeaning way in which some correctional staff interact with people in segregation cells: standing outside the cell, not making eye contact, and relying on voices being carried through a meal slot.³⁰ Justice Leask also finds no “legislative justification” for the common practice of communicating with prisoners confined in segregation cells through the meal slot in the door, noting specifically the experience of a CSC staff elder who, for most of his interactions in administrative segregation, was required to kneel or squat on the floor in the corridor outside the cells to make eye contact with the prisoners he was visiting.³¹

Moreover, there is potential here that identifying what types of conduct clearly will not constitute meaningful human contact may assist people confined in other forms of isolation or seclusion in advocating for humane and dignified treatment.

CENTRING SOCIAL DEPRIVATION

While the *CCRA* provides legislative authority for administrative segregation, Commissioner’s Directive 709 governs its use and management.³² Jointly with related guidelines and policies, CD 709 sets out when and how decisions about administrative segregation are to be made at the institutional level. In October 2015 and again this past August 2017,³³

²⁹ *BCCLA and JHSC v. Canada* at para. 137.

³⁰ *BCCLA and JHSC v. Canada* at para. 139.

³¹ *BCCLA and JHSC v. Canada* at para. 138.

³² The commissioner of Correctional Service Canada is the head of the CSC and reports to the minister of public safety Canada. The commissioner operationalizes the *CCRA* and the *Corrections and Conditional Release Regulations*, SOR/92-620 through Commissioner’s Directives (CDs). Commissioner’s Directives set out concrete guidelines intended for use by correctional staff at each institution. Commissioner’s Directives may themselves provide authority for the development of guidelines (GLs) that further explicate the process for implementing the CD.

³³ The October 2015 changes to CD 709 were focused on enhancing the role of mental health services and professionals in the process for admission to and review of administrative segre-

CSC revised CD 709 in an effort to address enduring criticism about the overuse and misuse of administrative segregation.

Over the past couple of years, the average length of an individual's stay in administrative segregation has decreased, as have the overall total numbers of administratively segregated prisoners. Evidence before the Court indicated that the total number of prisoners in administrative segregation had declined from 638 in 2014-15 to fewer than three hundred as of 31 July 2017.³⁴ Nevertheless, people subjected to administrative segregation have no more certainty today than they did yesterday as to when their ordeal will end. The harms of isolated confinement persist. Reforms undertaken and proposed by CSC do not address the serious and well-recognized psychological and physiological harms caused by such isolation.³⁵

The government sought to have these declining numbers obscure the constitutional frailty of the legislative regime itself. This was offered as an efficient way to address the plaintiffs' claims, calling on the Court to test the *Charter* compliance of the government's current policy responses to its historic (and continuing) overuse and misuse of administrative segregation. Throughout the litigation, the prospect of further and more substantive policy reforms that would purport to squarely address the plaintiffs' chief concerns loomed large. The latest revision to CD 709 came into force on 1 August 2017, part way through the evidentiary phase of the trial.

Government efforts to redirect the litigation to assess the validity of policy reforms were largely unsuccessful. Despite assuming that administrative segregation is currently practised in accordance with the revised CD 709, the Court took a thorough and critical look at all proffered evidence of psychological, social, and physical harms arising from prolonged and indefinite periods of isolation. And here, too, Justice Leask's attention to the psychosocial dimensions of solitary confinement is crucial to a proper understanding of the lasting harms of prolonged

gation: CSC, Internal Audit Sector, *Status Report on Administrative Segregation* (8 December 2016), Annex D, online: <http://www.csc-ccc.gc.ca/publications/092/005007-2540-eng.pdf> (Status Report). The more recent August 2017 revisions to CD 709 include a prohibition on the use of administrative segregation for inmates who meet certain criteria for serious mental illness, those who are actively engaging in self-injury that is likely to result in serious bodily harm, or those at elevated or imminent risk for suicide: CSC, Commissioner's Directive 709 Administrative Segregation (1 August 2017), s. 19, online: <http://www.csc-ccc.gc.ca/politiques-et-lois/709-cd-eng.shtml>.

³⁴ *BCCLA and JHSC v. Canada* at para. 65.

³⁵ Craig Haney, "Restricting the Use of Solitary Confinement" *Ann. Rev. Criminol.* 1 (2018): 285.

solitary confinement and to how confinement in isolation itself can become a risk factor for further periods of solitary confinement.

The Court accepts the evidence of Dr. Haney that the predominant harms of solitary confinement arise from a reduction in meaningful social contact over long periods of time. The lasting, permanent harm of solitary confinement often manifests as continuing intolerance of social interaction, which has obvious implications for successful re-adjustment first to the prison's general population and second to the broader community upon release.³⁶ According to Dr. Haney, individuals experiencing prolonged deprivation of social contact come to adapt to their environment and, over time, gradually "chang[e] their patterns of thinking, acting and feeling to cope with the profoundly asocial world in which they are forced to live, adapting to the absence of social support and the routine feedback that comes from normal, meaningful social contact."³⁷ Adaptions that may have worked in isolation may be "acutely dysfunctional" in the social world that the vast majority of prisoners will one day re-enter.

The evidence of several witnesses who had been deprived of social contact for prolonged periods of time is apt. Ms. Worm describes her challenge with reintegrating into the general population due to a hypersensitivity to large spaces.³⁸ She provided evidence that the long periods she spent in isolation created "considerable social anxiety" that has continued to adversely affect her to the present day: she is anxious when she is alone, when she interacts with new people, or leaves her home.³⁹ Mr. Busch also describes his experience of being released directly into the general population after sixty-six days in isolation as an undiagnosed "post-traumatic stress disorder": he was "anxious all the time" and "found it hard to think clearly." He "reacted negatively to everyone – other inmates, guards, and day-to-day things" that had not bothered him before, and he "struggled to interact with other people." His "thoughts would start racing and [his] heart would pound. Everything felt like it was just too much."⁴⁰ Mr. Brownjohn's experiences overlap with those described by Ms. Worm and Mr. Busch. He felt "distrust, anger and anxiety around other people" after being released from his first segregation placement. Upon being released directly from segregation

³⁶ *BCCLA and JHSC v. Canada* at para. 249.

³⁷ *BCCLA and JHSC v. Canada* at para. 183.

³⁸ *BCCLA and JHSC v. Canada* at para. 281.

³⁹ *BCCLA and JHSC v. Canada* at para. 284.

⁴⁰ *BCCLA and JHSC v. Canada* at para. 282.

into the community, he “found [himself] getting anxious in public places, particularly in large crowds of people.”⁴¹

The Court sifts through competing expert opinions and methodological approaches to understanding whether, and to what extent, prolonged and indefinite segregation harms the people who are subjected to it. In doing so, the Court squarely addresses the harms of isolation that arise from social deprivation and that have often been obscured by being channelled through the filter of behavioural problems. The centring of prisoners’ voices is an especially welcome development. It mitigates to some extent the risk of pathologizing and homogenizing group experiences, which often takes place to the detriment of those on the margins. And while the judgment does not neatly close the loop by connecting the harms arising from prolonged social deprivation to the “institutional adjustment” difficulties that plague many Indigenous, female, and young people in prison, the ruling holds some promise for disrupting prevailing narratives about “problem prisoners” in future advocacy efforts.

CONCLUSION

The judgment of the BC Supreme Court in *BCCLA and JHSC v. Canada* is a long-awaited departure from judges’ traditional reticence to “unnecessarily interfere” in the administration of justice within correctional facilities. With this judgment and the recent ruling on administrative segregation in Ontario, the ball is firmly in CSC’s court to fundamentally transform (or, better yet, abolish) the practice of isolating people for administrative reasons. Despite the promise of this judgment, past experience suggests that cautious optimism is in order. The government has had numerous opportunities to revision correctional law and practice in Canada and has resisted doing so at nearly every turn. To be sure, nothing less than a complete attitude shift is required, such that prison officials see the inmates in their care and custody first and foremost as people, not as risks to mitigate or security threats to assess. It can be done and it is long past due.

⁴¹ *BCCLA and JHSC v. Canada* at para. 283.