CASE COMMENT

Ongoing Advocacy for Prisoners' Rights in the Continued Administration of Solitary Confinement: British Columbia Civil Liberties Association and John Howard Society of Canada v. Canada (Attorney General)[1]

Bibhas D. Vaze

The issue of solitary confinement in Canadian prisons – popularly understood as the isolation of prisoners in small cells without any meaningful human contact for protracted periods – has become one of the few prison issues for which the public and the human rights community have had any serious concern. The reality is that the inhumanity of solitary confinement is part and parcel of the inhumanity that surrounds the administration of Canadian prisons more generally.

On this past 17 January 2018, Justice Leask of the British Columbia Supreme Court declared Canada's current laws governing the administrative segregation of federal prisoners to be unconstitutional. To be clear, and as was generally found by the Court, segregation is what is commonly thought of as solitary confinement.[2] What must be understood is that the Court did not outlaw the practice of solitary confinement in Canada's prisons but merely declared that the laws currently governing its use violated the *Canadian Charter of Rights and Freedoms*. Indeed, the administrative segregation laws were suspended by the Court for one year so that the federal government could have the opportunity to rewrite the statute in a manner that would allow its continued use so long as it conformed to constitutional standards. The implications of this for counsel and the community is that the inhumanity of solitary confinement is something that will have to be grappled with on an ongoing basis for years to come.

[1] 2018 BCSC 62.
[2] *BCCLA and JHSC v. Canada* at para. 137.

It must be acknowledged that the judgment in *BCCLA and JHSC v. Canada* is a landmark ruling. Simply put, it will save lives. The decision paves the way towards effectively ending the improper and inhumane use of solitary confinement in Canada's prisons. And it can be said that the Court went as far as it could, in the context of what a superior court can permissibly do, in outlawing the inhumanity of how solitary confinement has been administered. However, the judgment also makes it clear that the unconstitutionality of the administration of solitary confinement was as much a result of how the law was being used as it was of the law itself. What this makes starkly apparent is that, no matter what new laws are written, only persistent advocacy and oversight of solitary confinement will ensure that it is practised in a humane way.

THE RULING EXPLAINED

At the outset of the Court's judgment, what was at issue was the constitutionality of sections 31-33 of the *Corrections and Conditional Release Act (CCRA)* concerning administrative, as opposed to disciplinary, segregation. To be clear, administrative segregation is the practice by which prisoners in federal penitentiaries are kept separate from all other inmates and remain in their cells for most of every day. As the sections enumerate, administrative segregation is to be used in situations involving the "safety and security of the penitentiary and its persons" and can be employed when an individual acts in a manner that could jeopardize the safety of a penitentiary or its persons, when there is an ongoing investigation into potentially unsafe conduct, and/or when the safety of the segregated inmates themselves may be jeopardized by associations with other inmates. The statute further stipulates that prisoners should be released from administrative segregation at the "earliest appropriate time" and that institutions are to conduct segregation review hearings.[3]

What strikes any person reviewing the statute is the broad and permissive nature of the language: a prisoner could be labelled as a threat to the security of the penitentiary or as facing threats to her/his own safety with little or no evidence. This could result in her/him being placed in solitary confinement for any length of time. Even disciplinary segregation – whereby a prisoner could be sanctioned and face segregation for a maximum of thirty days for having committed any disciplinary offence enumerated in section 40 of the *CCRA* – allows for greater due process before such a sanction is imposed than does solitary confinement. In the

[3] *CCRA*, ss. 31-33.

case of disciplinary segregation, a prisoner is officially accused, evidence is presented before an independent chairperson, and the person can be either convicted or acquitted.

Ironically, it may have been this very lack of precise language that assisted the defendants (Canada) in *BCCLA and JHSC v. Canada* in arguing that administrative segregation was not solitary confinement, notwithstanding the plaintiffs' claim that it causes short- and long-term psychological and social harm; it was on the basis of the undefined nature of the statute that the defendants argued that, in operation, administrative segregation actually did allow for meaningful human contact and therefore the practice of administrative segregation was neither solitary confinement nor in violation of the *Charter*.[4]

The judgment largely picks apart the foregoing defence and goes even further. Early on, the Court lays out the history of the use of solitary confinement, from the belief that it was the best method of rehabilitation because it induced penitence to the understanding that it had a severely adverse impact on the well-being of prisoners. The Court then went on to review developments in the march towards bringing the rule of law into the prisons, culminating with the watershed development of the *CCRA* in the early 1990s. The key takeaway from this chronicling, both in terms of deeming administrative segregation laws to be unconstitutional and in terms of post-judgment understanding is the Court's notation that, despite the steady efforts to impose standards and prison oversight culminating in the *CCRA*, for years afterwards the laws were routinely ignored.[5] This was cited as early as 1997 by Madam Justice Louise Arbour (later of the Supreme Court of Canada) in her report on events at the Kingston Prison for Women (the institution had been locked down, its inmates segregated, and female prisoners strip-searched by male staff), where she noted that events "were symptomatic of a culture that did not respect the rule of law."[6]

And it appears that over the next two decades that same disrespect continued to play a role in the loss of lives. Ashley Smith and Edward Snowshoe both committed suicide after spending prolonged periods in segregation or solitary confinement, whichever term one chooses to use. Indeed, with respect to Mr. Snowshoe, it appears that the laws put in place to promote equality in the criminal justice system were further disrespected: the Court later pointed out that Indigenous prisoners were

[4] Para. 3.
[5] Paras. 15-35.
[6] Para. 37.

more likely to spend time, and longer periods of it, in segregation than were non-Indigenous prisoners. Overall, while reviewing the generally ignored annual and repeated findings of the Federal Office of the Correctional Investigator, the Court found that, over the years, administrative segregation (while decreasing in recent times) had been rampantly and flagrantly overused.[7]

The Court had the assistance of both prisoners themselves and internationally recognized mental health experts in establishing as fact much of what many of us had inherently known, which is that solitary confinement leads to short- and long-term adverse mental health and social adjustment issues. The Court further found, among other things, that: (1) there was effectively nothing in place to govern the maximum duration of time that a prisoner could be in solitary confinement, (2) this could lead to inhumane and intolerable situations, (3) the Correctional Service Canada (CSC) has not properly explored alternatives to administrative segregation, (4) there is a lack of legal oversight with regard to the use of administrative segregation (with prison wardens acting as the only arbiter of decisions made by themselves or their staff), (5) reviews of the well-being of prisoners in solitary are improper or non-existent, (6) there is an absence of rehabilitative programming, and, (7) that there is a lack of procedural safeguards for prisoners facing administrative segregation, including absence of counsel at segregation review hearings. The Court additionally found that the administrative segregation laws disproportionately affected those with pre-existing mental health illnesses and disabilities. Significantly, the Court also found that the disproportionate impact of solitary confinement on Indigenous prisoners, including restricted access to elders and programs, served to enhance the general inequality faced by Indigenous people in prison.[8]

These findings led the Court to conclude that sections 31-33 of the *CCRA* violated sections 10(b) (right to counsel), 15 (equality), and 7 (the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice) of the *Charter*. Section 10(b) concerns the obvious violation of the right to counsel during review hearings, while section 15 applies to the unequal treatment of Indigenous inmates and those suffering from mental health illnesses.[9] With respect to section 7, the Court found that the liberty of prisoners is affected when they are placed in

[7] Para. 64.
[8] Paras. 486-90.
[9] Paras. 437, 489, and 523.

administrative segregation; however, considering the harm this inflicts upon them, so are their rights to life and security of the person. As to whether any of this was in accordance with the principles of fundamental justice, the Court found that, while there was a supposed purpose to the administrative segregation laws (i.e., maintenance of safety and security in penitentiaries), they were counterproductive in that not only could they inflict significant harm on prisoners (and thereby undermine their safety and security), but they could also subject vast numbers of prisoners to segregation even though there were less harmful alternatives. And more fundamentally, there was a lack of any real oversight of the use of administrative segregation, with wardens effectively acting as judges in their own cases.

Anytime a law is found to violate the *Charter*, the government fallback is to invoke the *Charter*'s section 1, which allows that there may be reasonable limits on any right. As such, if it can be shown that a law constitutes a "reasonable limit" on an otherwise enjoyable right, that law can be maintained. In this case, the Court found that sections 31-33 of the *CCRA* did *not* constitute a reasonable limit on the rights violated by the *Charter*. On the contrary, not only did the laws under these sections result in prisoners suffering severe harm but there were numerous acceptable alternatives to them.

Ultimately, the Court's remedies for the constitutional violations of sections 31-33 were as follows:

> On the basis of the findings made in these Reasons, I am prepared to make the following s. 52 declaration:
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> 1. The impugned laws are invalid pursuant to s. 7 of the *Charter* to the extent that:
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> a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
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> b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
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> c) the impugned laws authorize internal review; and
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> d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.
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> 2. The impugned laws are invalid pursuant to s. 15 of the *Charter* to the extent that:

> a) the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and
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> b) also the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.[10]

This was what the Court ordered, and is, in this writer's view, about as far as the Court could go in crafting a remedy. It should be noted, however, that over the course of the judgment, the Court did not shy away from sometimes cryptic pronouncements on how things could be practised constitutionally, not only by outlining the history of non-compliance with the rule of law in prisons but also in stating that "properly resourced subpopulations are a less impairing alternative than administrative segregation."[11]

PRISON CULTURE, THE SPIRIT OF RIGHT ADMINISTRATION, AND FUTURE NECESSARY ADVOCACY

The issue of resources invokes one of the key issues respecting the operational administration of administrative segregation laws, whether constitutional or not: prison culture and the culture of administration. For the average criminal lawyer or social scientist, the findings made by the Court in *BCCLA and JHSC v. Canada* should come as no surprise. It has thus always been a nagging question, if we rightly assume that Federal prisons are not bastions of socio- or psychopathic staff, as to why CSC is so intent on being able to employ solitary confinement, and why solitary confinement has to be as inhumane as it is. As a review of several years of reports by the Office of the Correctional Investigator would reveal, there is a resource crunch: fewer – and thus more overworked – staff to administer individual prisoner cases and an inability to provide rehabilitative programming. It also appears there is no wide-scale push to structurally redesign prisons so that there is an opportunity to lessen the harmful effects of segregation or, as the Court in *BCCLA and JHSC v. Canada* put it, create "properly resourced subpopulations" so that within prisons there are more physical spaces to put prisoners who may not be able to associate with *some* other inmates.

Anecdotally, this writer has also been informed by highly placed sources that the staff and guard unions have also sought to maintain the well-being of their members in the tasks of prison administration. The

[10] Para. 609.
[11] Para. 590.

result of all of this is a sometimes-deadly confluence of circumstances in which the inhumanity of administrative segregation is ignored or unseen in the interests of what administrators want and what is easy or convenient. The point here is that it will only be if prison culture allows for it – as punctuated by active advocacy – that any kind of humanity will be brought towards administering or effectively abolishing solitary confinement.

This is not a constitutionally innovative concept. In the 1987 case of *R. v. Lyons*,[12] the Supreme Court of Canada was called upon to assess whether the dangerous offender provisions of Canada's criminal law, which allowed for indeterminate sentences, were cruel and unusual and thus in violation of s. 12 of the *Charter*. In finding that the impugned laws did not violate s. 12, the Court placed heavy emphasis on the parole process in allowing those with indeterminate sentences to secure release. In the Court's view, if the parole process worked as it should through the then-National Parole Board, it could ensure that those with indeterminate sentences could appropriately have an opportunity to be released to the community.

In July of 2016, this writer was counsel to the family of Christopher Roy at an inquest into his death by suicide at Matsqui prison in June of 2015.[13] Christopher had been in administrative segregation for sixty days when he hung himself in his cell. Numerous discoveries were made at that inquest detailing how the complete misadministration of Christopher's case likely resulted in his suicide. He had been placed in administrative segregation because he had just returned from the community after breaching his parole, and due to "incompatibles" at medium-security facilities, he could not immediately be placed in the general population of any local institution. It took in the area of six weeks for CSC to even recommend an appropriate placement. Though Christopher had been returned to prison simply because he had gone AWOL and relapsed into addiction, no exploration was made by CSC about returning him to the community under restrictions.

At some point, Christopher had had enough and barricaded himself in his cell just a few days before his death. Once that episode ended, he informed staff of thoughts that verged on paranoia. Throughout this period, non-qualified personnel were assessing him for suicidal ideation

[12] [1987] 2 SCR 309.

[13] For details and facts regarding Mr. Roy's inquest as a whole, along with recommendations made by the jury hearing the evidence, please see https://www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/inquest/2016/roy-christopher-robert-jury-finding-2015-0378-0097.pdf.

and finding no risk. Throughout, Christopher did not have true segregation review hearings. Throughout, Christopher was kept in a small cell and during his one hour out could exercise in an enclosed structure about the size of a squash court. And the response from Matsqui once he barricaded himself in his cell was to make a decision to send him to Kent Institution, a notoriously restrictive, dangerous and violent maximum-security penitentiary.

The decision to send Christopher to Kent was made without his input and served on him just a few hours before he hung himself. The decision was served on him by an Institutional Parole Officer (IPO) who had returned to work just that day after an extended period of leave, only to find Christopher's case newly transferred to her along with over twenty-five other cases. There did not appear to be any red flag or note on Christopher's file regarding his recent behaviour. When the IPO served the Kent papers on Christopher, she spent, at most, less than three minutes talking to him through his food slot at the door to his segregation cell.

A few hours later Christopher was found hanging in his cell after a routine cell check. During the inquest there was evidence that guards were not checking segregation cells at particularly frequent intervals and that the segregation range and its guards neither had training nor equipment which would allow them to perform forms of acute emergency medical care. Paramedics later arrived after Christopher was found and were able to restore his pulse, but by then it was too late.

In this writer's view, this could have played out differently if the administration of the entirety of Christopher's situation had been handled differently along with real attention to the reality of his languishing in solitary and the institutional adjustments that should have been made to address it. The mishandling of all of it was even more stark considering Christopher's death occurred just one-and-a-half years following the over-100 recommendations made at the inquest into the death of Ashley Smith. And one wonders whether, if Christopher had known that he could retain a lawyer to petition the Court to have him released from administrative segregation by way of habeas corpus, that could have made a difference. We don't know, but maybe Christopher did know, and laboured under the belief that a lawyer was unnecessary because every week he believed that he would be released that week.

Whatever the new laws written by the federal government in the next year governing the use of administrative segregation, be they broad, rigid, or strictly-defined, what is going to matter more, as what has

really mattered since the invocation of the *CCRA*, is how and whether CSC decides to administer prisoner "safety" issues and AS as a whole in an effectively humane manner. As the Court implicitly points out in its review of the evidence in *BCCLA and JHSC v. Canada*, what existed before was not, in fact, unsalvageable in operation. A major part of the case involved the lack of oversight procedures over a prison warden's review of segregation and decisions to place people in segregation. However, even during this entire period, the law has been defined that placement in segregation is a deprivation of liberty, and where a prisoner is deprived of such liberty and says that such deprivation is unlawful, they can and should seek their release by way of habeas corpus before a local court, and can do so expeditiously. This can and should continue to be employed, perhaps en masse for anyone kept in segregation for any extended period of time.

The hope of new laws should never be seen as a panacea of any sort, as maladministration and misuse can simply shift into other or new areas. What is interesting in this case is that the laws governing disciplinary segregation were not sought to be struck down, nor were they. However, while disciplinary segregation can only be imposed for a maximum of thirty days, disciplinary offences can cover a wide range of conduct, from trifling to extremely serious. And while disciplinary court is conducted by an Independent Chairperson, as counsel who practice in the area can attest, such hearings are often not fair, impartial, or independent, with a lengthy judicial review process being the only remedy against them. The use, abuse, or overuse of disciplinary segregation going forward will fundamentally depend on the role of counsel in bringing the rule of law inside prison walls. Similarly, if the federal government writes new laws that allow for effective oversight of segregation decisions in line with Justice Leask's judgment, what will be of fundamental importance is the role that counsel *actually* – as opposed to *theoretically* – play in that process.

The landmark decision in *BCCLA and JHSC v. Canada* should move us. But that movement has to be with a view to continuing to engage in steadfast advocacy, both to ensure that the new laws written reflect the principles of the *Charter* as enunciated in the Court's judgment, and that they are administered in the way that we know they must be.