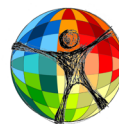


Breaking Down the Walls: Coordinating Legal and Extra-Legal Strategies to Abolish Solitary Confinement in Canada

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ABSTRACT

Solitary confinement remains a pervasive human rights crisis within the Canadian prison system. Despite several reports, inquests, endless recommendations, and reform initiatives, solitary confinement continues to harm prisoners. In this paper, I argue that coordinating legal and extra-legal strategies is required to eliminate the use of solitary confinement in provincial, territorial, and federal corrections facilities in Canada. First, I describe the nature and scope of the current human rights crisis of solitary confinement in Canada within the framework of the country's international and domestic human rights obligations. Second, I briefly review the history of solitary confinement in Canada by investigating how the prison reformation movements in England and the United States influenced Canadian prison reform. I conclude the historical analysis with an examination of the Canadian prison system's resistance to reforming solitary confinement practices despite several legislative initiatives, commissions of inquiry, and independent reports. Third, I examine the strengths and weaknesses of current Charter, class action, and human rights litigation in the continuous fight to reduce solitary confinement in Canada. Finally, I explore several extra-legal strategies under an imagined National Solitary Confinement Strategy. I argue that updating Canada's international commitments under the Convention Against Torture, re-imagining alternative mechanisms for independent oversight of prisons, and mainstreaming prisoners' rights in both general society and the legal community would complement and reinforce any successful litigation efforts. A comprehensive and coordinated strategy would lay the groundwork for eventually abolishing the use of solitary confinement in the Canadian prison system.

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Introduction

*Time ticks by so slowly,
almost as if it's standing still.
Seconds minutes hours days,
looking out my window sill.
To pass some time I've counted bricks,
top to bottom wall to wall there's 326.
Constantly someone screams,
and someone always bangs.
Neverending madness,
this constant chaos drives me insane.
Forgotten names and words of hate,
are carved and etched there and there.
Spit piss and excrement,
filth is everywhere.
Living like an animal,
trapped inside this cage.
Call it Hell or a cell,
call it a box full of rage.
Call it whatever you want,
because for now I call it home.
Call it Solitary Confinement,
because I am confined and all alone.*

— A poem called “SEG” by prisoner CT ¹

Ashley Smith. Edward Snowshoe. Terry Baker. Adam Capay. Michael Nehass. These are just a few of the names of individuals who have suffered greatly or perished under the care of the state.² These individuals remained invisible until their stories were discovered by chance or came to light as a result of their horrific deaths. They fought internal demons exacerbated by the

¹ A poem called “SEG” by prisoner CT (See West Coast Prison Justice Society, *Solitary: A Case for Abolition* (November 2016), online: <<https://prisonjustice.org/2016/04/20/solitary-confinement/>> at 50 [WCPJS Report]).

² See “Solitary confinement: How four people's stories have changed hearts, minds and laws on the issue” with reports from Patrick White, Joe Friesen and Adrian Morrow, *The Globe and Mail* (12 November 2017), online: <<https://www.theglobeandmail.com/news/national/solitary-confinement-canada-required-reading/article35391601/>> [The Globe and Mail, “Four People’s Stories”]; Breese Davies, “To Live and Die in Solitary Confinement” *The Walrus* (21 December 2016), online: <<https://thewalrus.ca/to-live-and-die-in-solitary-confinement/>>; Rhiannon Russell, “In the hole” *The Walrus* (15 December 2015), online: <<https://thewalrus.ca/in-the-hole/>>.

state's carceral system where many of them lost their battles. Solitary confinement was the violent tool that accelerated their declines—a tool that continues to brutally affect incarcerated people across Canada today.³

Internationally, Canada is often regarded as a model country for human rights.⁴ However, a country's human rights record must be scrutinized beyond public perception to measure concretely how it treats its most vulnerable populations – particularly prisoners. While some incarcerated people have committed grievous offences, many have experienced a complexity of factors and life circumstances that have led to their contact with the criminal justice system. Prisoners, like any other member of society, deserve to be treated with human dignity. Their presence behind bars does not negate their status as rights holders. And yet, incarcerated individuals are usually invisible, misunderstood, and ignored by the general public. They risk being disproportionately subjected to human rights abuses and subsequently lack recourse to vindicate their rights.

In this paper, I argue that coordinating legal and extra-legal strategies is required to eliminate the use of solitary confinement in provincial, territorial, and federal corrections facilities. In Part I, I survey the current crisis of solitary confinement in Canada and demonstrate our country's lack of compliance with international and domestic human rights obligations. In Part II, I provide a brief history of the use of solitary confinement to contextualize its origins and understand Canada's resistance to eliminating the practice. In Part III, I discuss current litigation strategies challenging solitary confinement, including their powers and their limitations. In Part IV, I propose three priorities that a

³ Based on recent conversations that I have had with people who work with prisoners and their rights, I am using the terms "individual", "prisoner", and "incarcerated person" throughout the paper to humanize prisoners and protest the stigma associated with terms such as "criminal", "inmate", "convict", and "offender".

⁴ Amnesty International, "Human Rights in Canada", online: <<https://www.amnesty.ca/our-work/priority-countries/canada>>; Human Rights Watch, "Canada", online: <<https://www.hrw.org/americas/canada>>.

National Solitary Confinement Strategy might adopt to move towards abolishing solitary confinement.⁵

Legislative Framework of the Canadian Corrections System

Federal governments are responsible for incarcerated people serving sentences of two or more years. The *Correctional Service of Canada* (CSC) manages federal correction facilities under the *Corrections and Conditional Release Act* (CCRA).⁶ Provincial governments have jurisdiction over incarcerated people serving sentences less than two years.⁷ Provincial corrections facilities also claim jurisdiction over individuals on remand who are waiting for their trial or sentencing, as well as incarcerated people who are waiting to be transferred to federal prisons.⁸ Prisoners are governed by the acts and regulations of the prison where they are serving their sentence.⁹

Current Crisis: Solitary Confinement in Canada

Defining Solitary Confinement

Juan Méndez, the *United Nations Special Rapporteur on Torture*, explains that:

There is no universally agreed upon definition of solitary confinement...In many jurisdictions, prisoners held in

⁵ This paper is inspired by my experiences as a legal intern at the Yukon Human Rights Commission, from May to July 2017, where I learned of the violent treatment of Michael Nehass in segregation at the Whitehorse Correctional Centre, see "Michael Nehass naked, shackled in Yukon video court appearance" *CBC News* (13 May 2014), online: <<http://www.cbc.ca/news/canada/north/michael-nehass-naked-shackled-in-yukon-video-court-appearance-1.2641421>>.

⁶ *Corrections and Conditional Release Act*, SC 1992, c 20, online: <<http://laws-lois.justice.gc.ca/eng/acts/C-44.6/>> [CCRA]. This Act came into force on November 1992 and replaced the Penitentiary and Parole Acts that previously governed Correctional Service Canada operations.

⁷ Public Safety Canada, "Federal and provincial responsibilities", online: <<https://www.publicsafety.gc.ca/cnt/cntrng-crm/crrctns/fdrl-prvncl-rspnsblts-en.aspx>>.

⁸ See e.g. Ontario Ministry of Community Safety and Correctional Services, "Correctional Services", online: <https://www.mcscs.jus.gov.on.ca/english/corr_serv/CS_main.html>.

⁹ *Criminal Code*, RSC 1985, c C-46, s 743.1, online: <<http://laws-lois.justice.gc.ca/eng/acts/C-46/>>.

solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.¹⁰

The *United Nations Standard Minimum Rules for the Treatment of Prisoners* (referred to as the Mandela Rules) defines solitary confinement as the “confinement of prisoners for 22 hours or more a day without meaningful human contact”.¹¹

In the Canadian context, the use of solitary confinement is disguised as a management tool to “protect the safety and security of the individuals and the institution”.¹² Correctional Service Canada (CSC) employs the term “segregation” and claims that the practice in Canadian prisons does not meet the UN’s criteria for solitary confinement.¹³ The CCRA permits segregation for punitive and administrative reasons.¹⁴ The

¹⁰ Juan E. Méndez, *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) at para 25 [Mendez Report].

¹¹ *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess, UN Doc A/Res/70/175, (17 December 2015), Rule 44 [Mandela Rules].

¹² Debra Parkes, “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32:2 CJS 165 at 166 [Parkes, “Abolitionist Lawyering”].

¹³ Correctional Service Canada, “Administrative Segregation”, (updated January 2017), online: <<http://www.csc-scc.gc.ca/publications/005007-3005-eng.shtml>> [CSC, “Administrative Segregation”]; see also Correctional Service Canada, “Response to the Coroner’s Inquest Touching the Death of Ashley Smith” (Ottawa: CSC, December 2014) at 3.2, online: <<http://www.csc-scc.gc.ca/publications/005007-9011-eng.shtml#3.2>>.

¹⁴ CCRA, *supra* note 6 ss 31-41; Administrative segregation is not administered for punishment or sanction, but rather when an inmate may interfere with an investigation, or more often, when an inmate represents a threat to another individual, the institution, or themselves. Administrative segregation can be voluntary or involuntary, meaning that a prisoner can elect to place themselves in segregation (CSC, “Administrative Segregation”, *supra* note 13). When segregation is used as a punitive sanction, hearings are conducted by independent chairpersons and a sanction of 30-45 days in segregation is imposed if the chairperson is satisfied beyond a reasonable doubt that the prisoner committed the offence. Jackson argues three points: that the reasons allowing a prisoner to be placed in segregation are too broad, that the review

Canadian Government maintains that the use of administrative segregation “is different from and not analogous to the concept of solitary confinement referred to in many foreign jurisdictions and should not be confused with it.”¹⁵ However, the court has recently recognized that what the public, the media, and academia refer to as solitary confinement is what corrections refers to as segregation.¹⁶

Solitary confinement is an intersectional issue disproportionately affecting mentally ill prisoners, women, and Indigenous and racialized people.¹⁷ A majority of prisoners who engage in self-harming behaviour spend time in segregation.¹⁸ The Office of the Correctional Investigator (OCI), the federal prisons ombudsman, has found that Indigenous prisoners are more likely to experience solitary confinement and remain in segregation longer than any other group.¹⁹ The OCI reports a general upward trend in segregation admissions within the last ten years.²⁰ In the 2014-2015 fiscal year, there were 8,309 (non-disciplinary)

of segregation decisions should be made by independent decision-makers and not by administrators within correctional services, and that there is no limitation on how long a prisoner can be placed in segregation (see Michael Jackson, “Reflections on 40 Years of Advocacy” (2015) 4:1 Can J Hum Rts 57 at 64, 65).

¹⁵ *British Columbia Civil Liberties Association v Attorney General of Canada* [Further Amended Response to Civil Claim], [22 June 2017] S150415, Vancouver Registry, SCBC at para 13, online: <https://bccla.org/our_work/bccla-and-jhsc-v-ag-of-canada-challenging-solitary-confinement/>.

¹⁶ *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 15 [Hamm].

¹⁷ Office of the Correctional Investigator, “Administrative Segregation in Federal Corrections 10 Year Trends”, (28 May 2015), online: <<http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20150528-eng.aspx#bookmark0>> [OCI, “10 Year Trends”].

¹⁸ *Ibid.*

¹⁹ Ivan Zinger, Office of the Correctional Investigator, *Annual Report 2016-2017*, (Ottawa: The Correctional Investigator Canada, June 2017) at 41 [OCI, “Annual Report 2016-2017”]. “As of March 31, 2017, there were 414 offenders in segregation, 151 of whom (36.5%) were Indigenous”. The number of Black prisoners admitted to segregation has increased significantly within the past ten years. The year 2014-2015 saw the highest number of federally-sentenced women (FSW) admitted to segregation, and FSW experience the highest average number of admissions to segregation per individual prisoner (see OCI, “10 Year Trends”, *supra* note 17).

²⁰ OCI, “10 Year Trends”, *supra* note 17.

administrative segregation placements in federal penitentiaries.²¹ According to the OCI, the average number of days that a prisoner spends in solitary confinement is 23.²²

Statistics regarding administrative segregation in provincial and territorial facilities are profoundly lacking.²³ The Ombudsman of Ontario recorded 183 segregation-related complaints from April-December 2016.²⁴ From January 2012 to the publishing of a report in November 2016, Prisoners' Legal Services in British Columbia documented 728 calls from Federal prisoners and 424 calls from provincial prisoners seeking assistance regarding their segregation conditions.²⁵ There is mounting and undeniable evidence that the use of solitary confinement in Canada is growing.²⁶

²¹ OCI, "10 Year Trends", *supra* note 17.

²² OCI, "Annual Report 2016-2017", *supra* note 19 at 40.

²³ Debra Parkes, "Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement" (2015) 4:1 Can J Hum Rts vii at viii.

²⁴ Paul Dubé, Office of the Ombudsman of Ontario, *Out of Oversight, Out of Mind*, (April 2017) at 8-10, online: <<https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2017/out-of-oversight-out-of-mind>> [ON Ombudsman Report]. The Ombudsman of Ontario has been monitoring segregation in Ontario provincial corrections facilities since 2013, after being contacted by a prisoner and realizing that there existed inadequate documentation of his placement.

²⁵ WCPJS Report, *supra* note 1 at 7-8. Prisoners reported being confined to dirty cells for at least 23 hours per day, sleeping in these cells, eating all of their meals in these cells, being denied access to any meaningful human contact or prison programming, and being allowed only brief visits from medical and psychological staff who communicated through the cell doors. They were denied access to outdoor exercise, books or anything to occupy their minds, and requests for complaint forms were often not respected. Sometimes prisoners certified under the *Mental Health Act* were held in separate confinement while waiting for a place at the psychiatric hospital. When their segregation placements were up for review, prisoners explained not knowing what procedures to follow in order to be moved back into the general prison population. They also reported feeling that mental health concerns were not adequately addressed. Some reviews were not conducted in person and prisoners subsequently received a report with little explanation as to their ongoing placement in segregation.

²⁶ "Data confirms alarming systemic overuse of segregation in Ontario's correctional facilities", Ontario Human Rights Commission (18 October 2016), online: <http://www.ohrc.on.ca/en/news_centre/data-confirms-alarming-systemic-overuse-segregation-ontario%E2%80%99s-correctional-facilities>; See also Efrat Arbel, "Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits on Punishment" (2015) 4:1 Can J Hum Rts 121 [Arbel];

Canada's International Legal Obligations

Under international law, Canada has committed to ensuring that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and that it “shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction”.²⁷ According to Juan Méndez, “any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances.”²⁸ Méndez also specified that any use of solitary confinement on people with mental disabilities is “cruel, inhuman, or degrading treatment and violates article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 16 of the *Convention against Torture*.”²⁹ Canadian courts have recognized the Mandela Rules that, in addition to limiting solitary confinement to 15 days, also outlaw the use of solitary confinement on vulnerable prisoners such as youth and prisoners with disabilities.³⁰ These rules outline the expected basic standard

Michael Jackson, “Reflections on 40 Years of Advocacy” (2015) 4:1 Can J Hum Rts 57 [Jackson, “40 Years”]; Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2015) 4:1 Can J Hum Rts 89 [Kerr, “Unlawful Prison Policies”]; Lisa Kerr, “The Chronic Failure to Control Prisoner Isolation in US and Canadian Law” (2015) 40:2 Queen’s LJ 483 [Kerr, “Chronic Failure”].

²⁷ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 7 (entered into force 23 March 1976, accession by Canada 19 May 1976); *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS 1465 art 2.1 (entered into force 26 June 1987, ratified by Canada 24 June 1987); Canada is also a state party to other international treaties relevant to the prison context and use of solitary confinement such as the *Convention on the Rights of Persons with Disabilities*, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/106 (adopted by the General Assembly 24 January 2007, ratified by Canada 11 March 2010) which obligates states to “take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment” (art 15(2)).

²⁸ Mendez Report, *supra* note 10 at paras 76. Mendez states that there is no justification for the use of solitary confinement as punishment because the severe pain and suffering caused goes “beyond any retribution for criminal behaviour.” (at para 72).

²⁹ *Ibid* at 78.

³⁰ Howard Sapers, *Segregation in Ontario: Independent Review of Ontario Corrections*, (March 2017), online: <

of care in detention facilities and can assist in the application of Charter and human rights principles to the Canadian prison context.³¹

During its concluding observations on Canada's compliance under the ICCPR in 2015, the United Nations Human Rights Committee expressed concern over the number and length of cases of administrative or disciplinary segregation. The Committee recommended that these kinds of segregation should only be used as a last resort and should be avoided for prisoners with mental illness.³² Despite encouragement from the Correctional Investigator in a 2015-2016 annual report, Canada has not signed on to the *Optional Protocol on the Convention Against Torture*, which would enable a significant increase in independent oversight through national and international inspections of detention facilities.³³

Canada's Domestic Human Rights Frameworks

While Canada enjoys a progressive yet contested history of human rights protections, the legislative mechanisms that safeguard human rights at the provincial, territorial and federal levels are the most relevant to the practice of solitary confinement.³⁴ The *Canadian Charter of Rights and Freedoms* protects civil liberties, fundamental freedoms, equality rights, and due process.³⁵ Similar to international legal instruments to which

<https://www.mcscs.jus.gov.on.ca/english/Corrections/IndependentReviewOntarioCorrections/IndependentReviewOntarioCorrectionsSegregationOntario.html>> at 23-24 [Sapers Report]; Mandela Rules, *supra* note 11 Rule 45. This rule states that "solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible..."

³¹ *Ibid.*

³² United Nations Human Rights Committee, *Concluding observations of the sixth periodic report of Canada*, CCPR/C/CAN/CO/6 (13 August 2015) at para 14; see also United Nations Committee Against Torture, *Concluding observations of the Committee against Torture*, CAT/C/CAN/CO/6, (25 June 2012) at para 19(c).

³³ Howard Sapers, Office of the Correctional Investigator, *Annual Report 2015-2016*, (Ottawa: The Correctional Investigator Canada, June 2016) at 69.

³⁴ See generally Dominique Clément, Will Silver, Daniel Trottier "The Evolution of Human Rights in Canada" (2012) Canadian Human Rights Commission, Minister of Public Works and Government Services [Clément].

³⁵ *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 ss 7, 9, 10, 12, 15 [Charter].

Canada is a party, section 12 of the Charter guarantees that “everyone has the right not to be subjected to any cruel and unusual treatment or punishment”.³⁶ Solitary confinement decisions must guarantee procedural fairness while the conditions must comply with Charter standards.³⁷ Furthermore, each province and territory has their own Human Rights Acts or Codes to protect individuals against discriminatory treatment based on grounds such as sex, disability, and race.³⁸ The *Canadian Human Rights Act* protects individuals from discrimination if they are receiving federal government services.³⁹ Governments, including correctional authorities, have an obligation to ensure equal access to programs and services and accommodate any grounds-based needs of prisoners, such as medical services for a mentally disabled prisoner.⁴⁰ Prisoners can bring human-rights-related claims through provincial and territorial Human Rights Commissions and Tribunals, provincial superior courts, and the Federal Court.⁴¹

Prisoner Experiences of Solitary Confinement

Solitary confinement strips prisoners of their dignity. Conversations with prisoners have uncovered the abuse and inhumane treatment that often occurs in segregation units: humiliating strip searches, dehumanizing remarks and harassment from prison guards, and feelings of being under constant surveillance.⁴² Confinement conditions may include extended periods of no human contact, inadequate food, infrequent access to showers, lack of access to the outdoors, and sometimes a total lack of stimuli.⁴³ Prolonged isolation affects prisoners’ ability to remain connected to family which subsequently impacts their re-

³⁶ Charter, *supra* note 35 at s 12.

³⁷ Sapers Report, *supra* note 30 at 19-20.

³⁸ Clément, *supra* note 34 at 25.

³⁹ *Canadian Human Rights Act*, RSC 1985, c H-6.

⁴⁰ Sapers Report, *supra* note 30 at 18-19.

⁴¹ Lisa Kerr, “Easy Prisoner Cases” (2015) 71 SCLR 235 at paras 6-7 [Kerr, “Easy Prisoner Cases”].

⁴² Justin Piché & Karine Major, “Prisoner Writing in/on Solitary Confinement: Contributions from the *Journal of Prisoners on Prisons*, 1988-2013” (2015) 4:1 Can J Hum Rts 1 at 17, 20, 21 [Piché]. It is not uncommon for women prisoners to experience sexual assault at the hands of guards.

⁴³ *Ibid* at 19, 22, 23.

integration into society when released.⁴⁴ Prisoners report internalizing feelings of worthlessness; they identify the intention of solitary confinement as a strategy to “break their spirit”.⁴⁵ When prisoners display their suffering through anger and physical violence, the system invalidates them as “defective” or “dangerous”, and justifies the use of isolation to contain them.⁴⁶

The use of solitary confinement on prisoners without mental disabilities can cause severe psychological symptoms, including self-harm and suicide; when prisoners have pre-existing mental disabilities, solitary confinement exacerbates their symptoms.⁴⁷ The profound damage and long-term consequences of solitary confinement prompted the Canadian Medical Association Journal in 2014 to call for abolishing the practice in Canada.⁴⁸ Solitary confinement is, at its core, “violence against the relational structure of “being-in-the-world”.⁴⁹

Even though the harms of solitary confinement are well-documented, and Canada enjoys robust domestic and international human rights legal protections, the practice of prolonged solitary confinement continues, even on vulnerable prisoners such as youth and people with mental disabilities.⁵⁰ Given the current reality, Canada is definitively in violation of its domestic and international human rights obligations. The questions then arise: why is there continued abuse of the practice? And why is there resistance to abolition?

⁴⁴ Piche, *supra* note 42 at 18.

⁴⁵ *Ibid* at 17, 21.

⁴⁶ Peter Collins, “Education in Prison or the Applied Art of “Correctional” Deconstructive Learning” (2008) 17:1 *Journal of Prisoners on Prisons* 71 at 78.

⁴⁷ WCPJS Report, *supra* note 1 at 4; Also see Stuart Grassian, “Psychiatric effects of solitary confinement” (2007) 22 *JL & Pol’y* 325.

⁴⁸ Piché, *supra* note 42 at 24, 25, 26; Diane Kelsall, “Cruel and unusual punishment: solitary confinement in Canadian prisons” (2014) 186:18 *CMAJ* 1345.

⁴⁹ Lisa Guenther, “Political Action at the End of the World: Hannah Arendt and the California Prison Hunger Strikes” (2015) 4:1 *Can J Hum Rts* 33.

⁵⁰ Parkes, “Abolitionist Lawyering”, *supra* note 12; Sapers Report, *supra* note 30; WCPJS Report, *supra* note 1; ON Ombudsman Report, *supra* note 24.

A Brief History of Solitary Confinement

The Beginnings of Prison Reform

The present-day Canadian penitentiary system is rooted in prison reforms within colonial Britain and the United States during the 19th and 20th centuries.⁵¹ Prior to 1775, the preferred methods of punishment in England included hanging, transportation to the colonies, and other forms of corporal abuse.⁵² To enforce laws against vagrancy, the poor were put to work in the houses of correction where prisoners were meant to earn their keep.⁵³ The responsibility for prisons was decentralized and prison keepers operated without oversight or limitations on their powers. Prisons in the 18th century were characterized broadly by arbitrary decision-making, abuses of power, and unsanitary conditions.⁵⁴

In the late 18th century, a crime wave overwhelmed the prison system; both transportation to the colonies and the death penalty suddenly seemed disproportionate for minor offences such as petty crime.⁵⁵ The concept of solitary confinement had already been introduced in Europe by the time John Howard, a county sheriff, published his pivotal report, *The State of the Prisons in England and Wales*, 1777. John Howard had become concerned with the prison crisis and had meticulously visited and inspected every prison in England and Wales. His proposed

⁵¹ I will be focusing specifically on the history of federal penitentiary systems, though provincial prison systems were heavily influenced by this history too. For the purposes of this paper, I am unable to do justice to the distinct histories of provincial prison systems. For more information on particular provincial systems see WCPJS Report, *supra* note 1; Sapers Report, *supra* note 30.

⁵² Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983) at 6-8 [Jackson, "Isolation"].

⁵³ *Ibid.* England's carceral system consisted of debtors' prisons, county and borough jails, as well as houses of correction as its main institutions of detention. The county and borough jails saw various categories of prisoners confined together. Between 1770 and 1777, only 2.3% of sentences at London's major criminal court resulted in imprisonment. Sentences lasted usually 1 year or less and never longer than 3 years. Prisons were mostly populated by prisoners awaiting trial, transportation to the colonies, or execution. Debt collection was the leading basis for imprisonment compared to other criminal convictions.

⁵⁴ *Ibid* at 8.

⁵⁵ *Ibid* at 9.

reforms laid the groundwork for the Penitentiary Act of 1779.⁵⁶ Solitary confinement was perceived as an intermediate penalty combining “correction of the body” with “correction of the mind”.⁵⁷ Prison reform was inspired by the desire to “institutionalize fundamental changes in the morality and behavior of the poor” and to stop the spread of physical and moral disease between prisoners while isolating them from society.⁵⁸ The early penitentiaries in England, the United States and Canada were modeled after the Octagon, a prison “designed to maximize surveillance and minimize potential for escape”.⁵⁹ For John Howard, implementing strict standards of morality in the prison system would enable punishment to “maintain its moral legitimacy” and facilitate prisoners’ reformation by encouraging them to reflect on their own guilt.⁶⁰

Rule-based discipline became pivotal to establishing the authority of the prison system, removing prisons from the grasp of powerful, unruly prisoners and corrupt prison keepers.⁶¹ As the center-piece of prison reform, solitary confinement was “designed to provide rational punishment that was both the most terrible penalty short of death that a society could inflict and the most humane.”⁶² Prisoners would labour during the day and suffer confinement in their solitary cells at night.⁶³ The Penitentiary Act of 1779 was built around the theory that “in the silence of their cells, superintended by authority too systematic to be evaded, too rational to be resisted, prisoners would surrender to the lash of remorse.”⁶⁴ New penal institutions employed solitary confinement as a tool for moral re-education and to maintain state control over

⁵⁶ Jackson, “Isolation”, *supra* note 52 at 9-10.

⁵⁷ *Ibid* at 9.

⁵⁸ *Ibid* at 10-11; see also Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1705-1850* (New York: Pantheon 1978) at 61-62 [Ignatieff].

⁵⁹ Jackson, “Isolation”, *supra* note 52 at 10. Work, silence, isolation, and prayer formed the basis of the Michele House of Correction for “delinquent and criminal youth” commissioned by Pope Clement XI in 1703. The goal of this institution was to reform criminals using the “Catholic tradition of monastic discipline”.

⁶⁰ *Ibid* at 11.

⁶¹ *Ibid* at 12.

⁶² *Ibid* at 13.

⁶³ *Ibid* at 13.

⁶⁴ Ignatieff, *supra* note 58 at 78.

a prisoner's conscience so "they would lose the capacity to resist both in thought and action."⁶⁵

During the 1790s, political radicals were imprisoned without trial and isolated from ordinary prisoners. Solitary confinement became a symbol of political repression and lack of due process.⁶⁶ Prisoners often resisted and rioted.⁶⁷ Political organizations spoke out against the practice, calling it an "ingenious mode of intellectual torture".⁶⁸ In 1800, increasing public awareness of solitary confinement's horrors culminated in the launch of a Commission of Inquiry into the treatment of prisoners at Coldbath Fields, a penitentiary where prisoners worked and slept in their cells in perpetual solitude.⁶⁹

Entrenching Solitude in Prison Reformation

Prison reform in the United States mirrored the emphasis on strict discipline and hard labour being practiced in England. Solitary confinement was perceived as the most effective means of prisoner reformation by the Philadelphia Prisoners' Aid Society. Following new legislation in 1790, special single cells were built to isolate the most "hardened criminals". Continuous solitary confinement led to disastrous results – most prisoners died within one year.⁷⁰

Subsequent modifications led to the development of the Auburn System – separate confinement at night and work alongside other prisoners by day in complete silence.⁷¹ In the Pennsylvania system, prisoners were meant to work, eat, and

⁶⁵ Ignatieff, *supra* note 58 at 102. The crime wave in England that resulted from demobilization and a trade depression was "perceived as a pattern of insubordination among poor". Reformers sought to isolate prisoners from the outside world to "separate deviant from law-abiding". Although a reformer himself, John Howard expressed concern regarding the risk that extreme solitary confinement would break prisoners' spirits (Jackson, "Isolation", *supra* note 52 at 14-15).

⁶⁶ Jackson, "Isolation", *supra* note 52 at 15-16.

⁶⁷ *Ibid* at 15.

⁶⁸ *Ibid* (citing London Correspondence Society *Moral and Political Magazine* 2 January 1797) at 26.

⁶⁹ Jackson, "Isolation", *supra* note 52 at 17.

⁷⁰ *Ibid* at 17-18.

⁷¹ *Ibid* at 18.

sleep in their cells in a state of perpetual solitude.⁷² The prisoner “was supposed to turn his thoughts inward, to meet God, to repent his crimes and eventually to return to society as a morally cleansed Christian citizen”.⁷³

In 1977, prolific social theorist Michel Foucault interrogated the constant tensions between the religious, medical, economic and administrative goals of each system: Which system could offer the best conversion and most surveillance at the lowest cost and in the safest way possible?⁷⁴ The United States penitentiary model became particularly influential in England, which subsequently impacted Canadian prison reform.⁷⁵ In England, overcrowding challenged the implementation of solitary confinement. However, the Auburn “rule of silence” could be introduced along with other oppressive measures to control, subdue, and reform prisoners.⁷⁶ Ultimately, the Pennsylvania system was perceived as more effective and more humane despite these prisons sending five to fifteen prisoners to the asylum every year.⁷⁷ Initially, periods of solitary confinement were capped at 18 months and then reduced to nine.⁷⁸ Solitary confinement significantly marked prisoners upon their release and manifested

⁷² Jackson, “Isolation”, *supra* note 52 at 19.

⁷³ Peter Scharff Smith “A religious technology of the self. Rationality and religion in the rise of the modern penitentiary” (2004) 6:2 *Punishment and Society* 195 at 206.

⁷⁴ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon 1977) at 239.

⁷⁵ Jackson, “Isolation”, *supra* note 52 at 21.

⁷⁶ *Ibid* at 22.

⁷⁷ Ignatieff, *supra* note 58 at 3-11. Jackson, “Isolation”, *supra* note 52 at 22. A member of the English Prison Discipline Society, William Crawford, was sent to the United States to investigate and report back on the Auburn and Pennsylvania systems in 1834. In Crawford’s eyes, the Pennsylvania discipline system was superior, more effective and more humane. He perceived the enforced solitude of the Pennsylvania system as “inspir[ing] permanent terror” in a civil way that subdued prisoners into “habitual submission”. Crawford’s work inspired the construction of a “model prison”, Pentonville Penitentiary, opened in 1842. At Pentonville, prisoners spent most of their time in their 13^{1/2} by 7^{1/2} cells. They worked in solitude in their own cells for over 8 hours every day. When not working, prisoners were expected to think, write, read from the Bible, or pace. The only contact that prisoners had with the outside world was their attendance at chapel and the specific times allotted for exercise. If a prisoner lashed out, they were thrown in one of the black holes in the basement of the penitentiary or physically abused.

⁷⁸ Jackson, “Isolation”, *supra* note 52 at 30.

into periodic “hysterical” fits, crying or nightmares.⁷⁹ Despite the evident horrors, the practice was prescribed for all prisons in England by 1865 under the English Prison Act and remained Europe’s preferred disciplinary regime in the late 1800s.⁸⁰

Canada’s Prison Reform as a Moral Crusade Against the Poor

In Canada, during the 19th century, crime was perceived as a “social disease of the poor” and the penitentiary discipline as necessary to reform the poor’s “morality and habits”.⁸¹ The government became increasingly concerned with further “corrupting” prisoners by locking them up with more violent offenders.⁸² During the 1830s, commissioners were tasked with making recommendations regarding the penitentiary system that Canada should adopt.⁸³ After visiting penitentiaries at Auburn and Philadelphia, the commissioners suggested that Canada adopt the Auburn model – namely, manual labour alongside other prisoners during the day in strict silence and solitary confinement at night. In Canada, the Philadelphia system was perceived as “experimental and untested”.⁸⁴ The government passed its first Penitentiary Act in 1834 and the city of Kingston housed the first penitentiary under the Act in 1835. John Howard’s rules and the England Penitentiary Act of 1779 provided the theoretical and organizational underpinnings for Canada’s system.⁸⁵ Working in silence and spending time in isolation was meant to encourage “reformation and moral re-education”.⁸⁶

⁷⁹ Ignatieff, *supra* note 58 at 3-11. Upon release, many prisoners struggled to cope with the everyday sounds of the regular world which were now overwhelming. They plugged their ears with cotton wool and effectively isolated themselves despite being physically free from the four walls of their cell.

⁸⁰ Jackson, “Isolation”, *supra* note 52 at 31-32.

⁸¹ *Ibid* at 25-26.

⁸² *Ibid* at 26-27.

⁸³ *Ibid*.

⁸⁴ *Ibid* at 27.

⁸⁵ *Ibid* at 27.

⁸⁶ *Ibid* at 28-32. During the first decade of the Kingston Penitentiary’s operation, a royal commission (the Brown Commission) discovered cruel punishments being inflicted upon the prisoners by the warden’s discipline management system. Terror and physical abuse was being used to enforce silence and solitude. The commissioners realized that subjecting prisoners to a barbaric number of physical abuses in an attempt to oppress them into

By the 1860s, the Crofton prison discipline system developed in Ireland influenced Canadian authorities; it included: “money incentives, progressive easing of punitive conditions, [and the] prospect of conditional release before expiry of term”.⁸⁷ The prisoner lived in complete solitude for the first 9 months before being transferred to different institutions, gradually transitioning to the “reformatory phase” where privileges were awarded based on progress.⁸⁸ The Penitentiary Act of 1868 provided a legislative framework to implement a modified version of the Crofton model for Canadian penitentiaries that would include solitary confinement.⁸⁹ By 1875, a single inspector, J.G. Moylan, was responsible for national penitentiary control and oversight.⁹⁰ According to Moylan, “the breaking of a man’s corrupted spirit in aid of reformation was a desirable and legitimate purpose of imprisonment”.⁹¹

respecting the silent system was ineffective and unsustainable with regard to attaining the goal of moral reformation. To achieve initial control over the prisoners’ mind and begin the process of moral reform, the commissioners recommended an initial period of solitary confinement up to six months of a prisoners’ sentence after which he would be able to work and eat in the presence of other prisoners in complete silence. While it was recognized that prolonged periods of solitary confinement were extremely harmful and could result in insanity, the commission largely recommended leaving the administration of separate confinement as punishment to the discretion of the warden and prison management system. However, the Brown Commission did recognize the importance of controlling the warden’s abuses of power and recommended the appointment of national inspectors to oversee the management of prisons and to report directly to the executive of government. The Brown Commission’s recommendation of an initial solitary confinement period akin to the Philadelphia model was not implemented, largely due to cost.

⁸⁷ *Ibid* at 32.

⁸⁸ *Ibid* at 32-33.

⁸⁹ *Ibid* at 33-34.

⁹⁰ *Ibid* at 34-36. Inspector Moylan reiterated and endorsed “the principles of prison discipline” inspired by John Howard. He believed in the importance of controlling abuses of power and ensuring fairness and justice. In his reports, Moylan recognized prisoners’ rights to be free from severe punishment and the importance of ensuring prison officers respect the rule of law, but he contrasted these views with his opinion that prisoners had “surrendered their body and soul to be experimented upon” in the name of reform (citing Annual Reports of the Inspector of Penitentiaries 1875, 1879, 1881).

⁹¹ Jackson, “Isolation”, *supra* note 52 at 37.

Towards the end of Moylan's twenty-year term as Inspector of Penitentiaries, a "Prison of Isolation" was built at the Kingston Penitentiary – a block of cells for the "solitary confinement of both incorrigible and habitual offenders and the newly received prisoners."⁹² Once approved by the Inspector and Minister of Justice, prisoners were to observe strict rules of silence, work in their cells, eat a restricted diet, and have no access to visitors or letters. From 1897-1903, the length of time that prisoners were confined in the Prison of Isolation ranged from 3 to 24 months with an average of about 6 months.⁹³

Under the Penitentiary Act of 1834, solitary confinement was eventually authorized specifically as a *disciplinary* measure for prisoners' misconduct. Penitentiary regulations were significantly revised in 1933, restricting solitary confinement to no longer than three days.⁹⁴ By 1962, the Penitentiary Service Regulations replaced the term solitary confinement with "dissociation".⁹⁵ Prisoners could be placed in *punitive dissociation* for up to 30 days for serious disciplinary offences or *non-punitive dissociation* to maintain "good order and discipline in the institution".⁹⁶ Non-punitive dissociation was divided into "administrative segregation" and "protective custody", the latter category reserved for prisoners at risk in the general prison population such as sex offenders and informers.⁹⁷ This model is most similar to the segregation practices used in the CSC's system today.

Resistance to Change

A 1970s Study Group on Dissociation, created by the Solicitor General, found that penitentiary practices did not comply with existing solitary confinement laws and policies.⁹⁸ The Study Group's recommendations of establishing segregation review boards and an independent chairperson to oversee serious

⁹² Jackson, "Isolation", *supra* note 52 at 36.

⁹³ *Ibid* at 37-38.

⁹⁴ *Ibid* at 40.

⁹⁵ *Ibid* at 43.

⁹⁶ *Ibid* at 43.

⁹⁷ *Ibid* at 44.

⁹⁸ Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 296 [Jackson, "Behind the Walls"].

disciplinary hearings were implemented a few years after the success of an important prisoners' rights case.⁹⁹ From the 1970s to the passing of the CCRA in 1992, prisoners' rights cases established a duty of procedural fairness in segregation reviews; policies were changed to reflect these duties.¹⁰⁰ The CCRA was meant to bring the federal corrections regime in line with the Canadian Charter of Rights and Freedoms.¹⁰¹ However, discretion in segregation placements remained with correctional authorities. Their decisions were not subject to independent oversight, allowing for an environment of abuse to occur.¹⁰²

Canadians were shocked when a video surfaced on national television of a male emergency response team strip-searching women prisoners in segregation at the Prison for Women in Kingston, Ontario.¹⁰³ These events took place in April 1994, several years after the new CCRA had been passed, and led to the launch of a Commission of Inquiry conducted by Justice Louise Arbour.¹⁰⁴ Justice Arbour unreservedly criticized the CSC:

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 the CSC's corporate culture... If prolonged segregation in these deplorable conditions is so common throughout the Correctional Service that it failed to attract anyone's attention, then I would think that the

⁹⁹ Jackson, "Behind the Walls", *supra* note 98.

¹⁰⁰ *Ibid* at 296-97; *Cardinal and Oswald v Director of Kent Institution*, [1985] 2 SCR 643 at 653-54 [*Cardinal*], citing *Martineau v Matsqui Institution Inmate Disciplinary Board*, [1980] 1 SCR 602 (*Martineau No. 2*).

¹⁰¹ Jackson, "Behind the Walls", *supra* note 98 at 62; Jackson, "40 Years", *supra* at 64.

¹⁰² Jackson, "Behind the Walls", *supra* note 98 at 296-97.

¹⁰³ Jackson, "40 Years", *supra* note 26.

¹⁰⁴ *Ibid*; 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) [Arbour Commission].

Service is delinquent in the way it discharges its legal mandate.¹⁰⁵

These concerns were reiterated by a 1996-97 Task Force comprised of correctional authorities and external consultants.¹⁰⁶ Despite changes to how segregation reviews were documented and how staff were trained in the substantive and procedural legal requirements, the CSC struggled to comply with basic procedural fairness rules.¹⁰⁷ Without an independent review process, the interests of prison administrators would always supersede the prisoners' interests in their institutional liberty.¹⁰⁸ Repeated calls to establish independent adjudication for administrative segregation were met with refusal or discontinued pilot projects.¹⁰⁹ In 2007, once the Conservative government came into power with a "tough-on-crime" agenda, the prospect of establishing independent oversight for segregation placements was abandoned.¹¹⁰ The most recent reform, Bill-56 tabled in June 2017, establishes external reviewers and sets a maximum of 21 days for administrative segregation placements (moving to 15 days, 18 months after the legislation comes into effect).¹¹¹ Yet, ultimate discretion remains with prison administration.

Resistance to establishing independent oversight of segregation placements seems to stem partly from correctional authorities' position that they alone possess intimate knowledge of the "dynamics" of correctional institutions.¹¹² Because decisions

¹⁰⁵ Arbour Commission, *supra* note 104 at 39 and 81-82.

¹⁰⁶ Jackson, "40 Years", *supra* note 26 at 71-73.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid* at 73-76; see also Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (Ottawa: Correctional Service of Canada, 1997) at 33, Sub-committee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, *A Work in Progress: The Corrections and Conditional Release Act* (Ottawa: Public Works and Government Services, 2000), Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights and Correctional Services for Federally Sentenced Women* (Ottawa: Canadian Human Rights Commission, 2004).

¹¹⁰ Jackson, "40 Years", *supra* note 26 at 79-80.

¹¹¹ Canada, Bill C-56, *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, 1st Sess, 42nd Parl, 2017 (passed through its first reading in the House of Commons on June 19, 2017).

¹¹² Jackson, "40 Years", *supra* note 26 at 72.

to place prisoners in segregation involve balancing the safety and security of other prisoners and staff, correctional authorities claim that “no outsider, however well-educated in the law, could provide an adequate substitute for correctional experience and understanding.”¹¹³ Prison conditions are becoming more violent, restrictive, and indifferent to principles of human rights, the rule of law, and policy.¹¹⁴ In fact, the CSC has been criticized for their alleged refusal to acknowledge the harms of segregation.¹¹⁵ With this correctional culture of superiority, it is no wonder that similar issues persist on provincial and territorial levels.¹¹⁶ Despite several reports, inquests, endless recommendations, and reform initiatives, solitary confinement continues to harm prisoners.¹¹⁷ Abolishing the practice is the only way to ensure that it is not overused and abused; litigation appears as a strong first step toward abolition.¹¹⁸

Current Litigation Strategies: Leveraging Human Rights Principles

Overview of Canada’s Prisoners’ Rights Litigation

Canada’s history of prisoner litigation is remarkably recent. During the 1970s, eight federal prisoners successfully challenged the conditions of their solitary confinement in *McCann v The Queen*.¹¹⁹ The judge declared that their confinement constituted cruel and unusual punishment contrary to s. 2(b) of the

¹¹³ Jackson, “40 Years”, *supra* note 26 at 72.

¹¹⁴ *Ibid* at 86-87; see generally Office of the Correctional Investigator, *Unauthorised Force: An Investigation into the Dangerous Use of Firearms at Kent Institution between January 8 and January 10* (Ottawa: The Correctional Investigator Canada, 21 March 2010). Prisoners share that they are placed in solitary confinement for seemingly arbitrary reasons or in response to acts of resistance (Piché, *supra* note 42).

¹¹⁵ *Canadian Civil Liberties Association v Her Majesty the Queen* [2017] No. CV-15-520661 (ON Sup Ct) (Factum of the Applicant at paras 38-39), online: < <https://ccla.org/ccla-segregation-challenge/> > [CCLA Factum].

¹¹⁶ See generally ON Ombudsman Report, *supra* note 24; WCPJS Report, *supra* note 1.

¹¹⁷ WCPJS Report, *supra* note 1 at 72; Ontario Human Rights Commission, “Supplementary Submission of the Ontario Human Rights Commission to the Ministry of Community Safety and Correctional Services’ Provincial Segregation Review” (October 2016) at 11, online: < <http://govdocs.ourontario.ca/node/31687> >.

¹¹⁸ *Ibid*.

¹¹⁹ *McCann v. The Queen* [1976] 1 FC 570 [McCann].

Canadian Bill of Rights.¹²⁰ In the 1980s, the Supreme Court of Canada recognized that prisoners have procedural rights and “residual liberty interests”.¹²¹ Solitary confinement has been characterized by the Supreme Court of Canada as a “prison within a prison”.¹²² Additionally, there have been numerous successful *habeas corpus*¹²³ claims of individual prisoners challenging their solitary confinement conditions.¹²⁴ As previously mentioned, Michael Jackson, the lawyer on the historic McCann case, has documented federal corrections’ resistance to changing its solitary confinement practices despite international and domestic criticisms.¹²⁵ Litigation is perceived by many prisoners’ rights advocates as the way forward to enforce rights and abolish the practice of solitary confinement.¹²⁶ The following section will examine the most recent cases across Canada challenging solitary confinement.

1. Charter Litigation: BCCLA and CCLA cases

Both the *British Columbia Civil Liberties Association* (BCCLA) and the *Canadian Civil Liberties Association* (CCLA) in collaboration with two non-profit agencies, the *John Howard Society of Canada* and the *Canadian Association of Elizabeth Fry*

¹²⁰ *Ibid*; *Canadian Bill of Rights* SC 1960, c 44, s 2(b).

¹²¹ *Cardinal*, *supra* note 100; *R v Miller* [1985] 2 SCR 613 at paras 32, 36; *Morin v National Special Handling Unit Review Committee* [1985] 2 SCR 662.

¹²² *Martineau v. Matsqui Institution Disciplinary Board* [1980] 1 S.C.R. 602.

¹²³ *Habeas corpus* dates back to the time of the Magna Carta in England and prohibits and provides a remedy for unlawful detention. Once a prisoner demonstrates that their residual liberty has been deprived, the correctional authorities possess the burden to prove that the confinement conditions and procedure are lawful. (Parkes, “Abolitionist Lawyering”, *supra* note 12 at 173).

¹²⁴ See e.g. *Bacon v Surrey Pretrial Services Centre* (Warden) 2010 BCSC 805 (this prisoner was held in solitary confinement while on remand and the court also found the solitary confinement conditions constituted cruel and unusual punishment violating s. 12 of the Charter); see also *Hamm*, *supra* note 16 (a group of self-represented prisoners brought a successful *habeas corpus* claim and were released from segregation); Courts have also recently reiterated the right of prisoners to seek *habeas corpus* review for confinement conditions (see *May v Ferndale Institution* [2005] 3 SCR 809 and *Mission Institution in Khela* [2014] 1 SCR 502 at paras 29, 40).

¹²⁵ Jackson, “40 Years”, *supra* note 26.

¹²⁶ Parkes, “Abolitionist Lawyering”, *supra* note 12.

Societies, have launched Charter claims challenging the constitutionality of solitary confinement.¹²⁷

The BCCLA case seeks a declaration that the provisions of the CCRA that govern administrative segregation in federal institutions are invalid because they: violate the life, liberty and security of prisoners, they constitute cruel and unusual treatment or punishment and arbitrary detention, and they violate the right to equality with regard to the effects of segregation on Indigenous and mentally ill prisoners.¹²⁸ BCCLA argues that administrative segregation is problematic because it is not subject to the external oversight and procedural protections that currently govern disciplinary segregation.¹²⁹ Their case is ambitious on various accounts, including its comprehensive challenge to several CCRA provisions, its attack on the application of the disputed provisions, and its systemic approach in recognizing that segregation disproportionately targets mentally ill and Indigenous prisoners.¹³⁰

The CCLA case is similar to the claim brought forward by the BCCLA; it seeks a declaration that sections 31-37 of the CCRA, the regime governing administrative segregation, violates the life, liberty and security of prisoners, the right not to be tried and punished again for an offence, and the right not to be subjected to cruel and unusual treatment or punishment.¹³¹ The CCLA is asking the court to strike down the legislative provisions and allow the government no longer than six months to develop new legislation.¹³² Both the BCCLA and CCLA case have recently gone to trial; the judges in the Supreme Court of British Columbia and the Ontario Court of Justice heard oral arguments in July and September of 2017. These notable cases are among the first

¹²⁷ British Columbia Civil Liberties Association, "BCCLA and JHSC v AG Canada: challenging solitary confinement in Canadian prisons", (19 January 2015), online: <https://bccla.org/our_work/bccla-and-jhsc-v-ag-of-canada-challenging-solitary-confinement/>; Canadian Civil Liberties Association, "CCLA Segregation Challenge", (13 September 2017), online: <<https://ccla.org/ccla-segregation-challenge/>>.

¹²⁸ *British Columbia Civil Liberties Association v Attorney General of Canada* [Amended Notice of Civil Claim], [21 June 2017] S150415, Vancouver Registry, SCBC at 7-8, online: <https://bccla.org/our_work/bccla-and-jhsc-v-ag-of-canada-challenging-solitary-confinement/> [BCCLA Civil Claim].

¹²⁹ *Ibid* at paras 12-15.

¹³⁰ *Ibid* at para 11.

¹³¹ CCLA Factum, *supra* note 115 at para 1.

¹³² *Ibid* at paras 226-227.

systemic Charter challenges of Canada's solitary confinement regimes for federal penitentiaries.

2. *Class Action Litigation: Compensation for Suffering*

In a recently certified 2016 class action case from Ontario, several prisoners are suing the federal government for damages, alleging that the government's management of their penitentiaries is in violation of ss. 7, 9, and 12 of the Charter.¹³³ In addition to their arguments that Canada did not provide "reasonable access to mental healthcare" and "used improper physical and forceful punishments", the prisoners allege that Canada "over-relied on the use of extended periods of solitary confinement."¹³⁴ The two representative plaintiffs of the lawsuit spent extensive amounts of time in administrative segregation. The claim alleges systemic abuse in the operation and management procedures of correctional authorities.¹³⁵ In the class action certification, the judge refers to administrative segregation as solitary confinement, suggesting that arguments invoking international obligations apply.¹³⁶ In his reasons for certifying the class action, the judge cites several systemic institutional abuse cases.¹³⁷

The Québec court has also approved a class action lawsuit against federal corrections, alleging Charter violations and civil fault; the claim explains that prisoners are spending over 23 hours per day in solitary confinement.¹³⁸ The representative plaintiff states that she has spent more than 9 months in solitary confinement.¹³⁹ The claim is also seeking damages for mentally ill individuals.¹⁴⁰ This claim is unique in its ambitious remedial order of Charter, civil, and punitive damages.¹⁴¹ In certifying the class action, the judge mentions the Ontario class action as complementary but distinct from the action currently before her court.¹⁴² These class actions, if successful, will serve as important

¹³³ *Brazeau v. Attorney General (Canada)* 2016 ONSC 7836.

¹³⁴ *Ibid* at para 3.

¹³⁵ *Ibid* at para 8.

¹³⁶ *Ibid* at para 5.

¹³⁷ *Ibid* at para 10.

¹³⁸ *Gallone c Procureur Générale du Canada* 2017 QCCS 2138.

¹³⁹ *Ibid* at paras 2, 6.

¹⁴⁰ *Ibid* at para 9.

¹⁴¹ *Ibid* at para 22.

¹⁴² *Ibid* at paras 14-16.

justice mechanisms for prisoners to assert their rights and claim damages for any suffering they have experienced at the hands of the state.

3. Human Rights Claims: Public Interest Remedies

A strength of human rights claims is that they can encompass systemic and creative public interest remedies. In 2013, Ontario settled a human rights complaint brought by Christina Jahn against the Ministry of Community Safety and Correctional Services (MCSCS). Ms. Jahn was incarcerated in solitary confinement for approximately 210 days at the Ottawa-Carlton Detention Centre. During her incarceration, Ms. Jahn was living with a mental illness, addictions, and cancer.¹⁴³ The settlement included a number of comprehensive public interest remedies that addressed some longstanding and current criticisms of all segregation regimes.

With regard to segregation, the MCSCS agreed to:

- Implement policy changes to prohibit the use of disciplinary or administrative segregation for prisoners with mental health disabilities;
- Ensure prisoners are provided with individualized mental health services while in segregation;
- Provide mental health training for corrections staff;
- Conduct reviews of administrative segregation placements at least once every 5 days;
- Provide all prisoners with a "Segregation Handout" informing them of their rights upon being placed in segregation (this information would also be included in the MCSCS's "Information Guide for Adult Institutions"), and;

¹⁴³ See Ontario Human Rights Commission, "Jahn Schedule "A" Public Interest Remedies", online: <<http://www.ohrc.on.ca/en/segregation-and-mental-health-ontario%E2%80%99s-prisons-jahn-v-ministry-community-safety-and-correctional>> [Jahn A]. The Commission intervened in Ms Jahn's application because of the systemic issues regarding the provision of mental health services in Ontario's correctional facilities, particularly for women.

- Conduct annual reviews and statistical reporting of its segregation policies and practices and provide these reviews to the Commission.¹⁴⁴

A significant issue that accompanies public interest remedies is the risk of non-compliance as evidenced by a second settlement in 2015. This agreement required MCSCS to post signs in all segregation areas explaining that prisoners must receive information about their rights; it also called for the development of a notification process for *Elizabeth Fry* and *John Howard Society* staff to report to MCSCS when prisoners had not been adequately informed.¹⁴⁵ While these public interest remedies move in the right direction, the onus put on prisoners to exercise their rights is troubling, given that they may be too vulnerable to understand and assert their rights.¹⁴⁶ Furthermore, while the MCSCS agreed to amend their policies and not place mentally ill prisoners in segregation, the settlement agreement stated that the MCSCS could justify placing prisoners in segregation if “alternatives have been considered and rejected because they would constitute undue hardship”.¹⁴⁷ Given the lack of external oversight on institutional decision-making, the onus is once again on prisoners and “watchdogs”, such as the *Human Rights Commission* and the *Elizabeth Fry* and *John Howard Societies*. In fact, the *Ontario Human Rights Commission* has recently filed a contravention application with the *Human Rights Tribunal of Ontario*, alleging that the government has failed to adhere to

¹⁴⁴ *Ibid.* Several public interest remedies relating to mental health were also outlined in the Settlement Agreement requiring MCSCS to: conduct and complete a report on best practices for serving women prisoners with major mental illness, ensure that “evidence-based, gender-responsive” mental health screening is implemented in all provincial facilities, conduct a review to ensure adequacy and availability of psychiatric sessions, collaborate with mental health professionals to ensure appropriate treatment plans.

¹⁴⁵ See Ontario Human Rights Commission, “Jahn Schedule “C” Public Interest Remedies”, online: <<http://www.ohrc.on.ca/en/segregation-and-mental-health-ontario%E2%80%99s-prisons-jahn-v-ministry-community-safety-and-correctional>>.

¹⁴⁶ Debra Parkes, “A Prisoners’ Charter?: Reflections on Prisoner Litigation Under the Canadian Charter of Rights and Freedoms” (2007) 40 UBC L Rev 629 [Parkes, “Prisoners’ Charter”].

¹⁴⁷ Jahn A, *supra* note 143.

several promises in the settlement agreement. They claim that the situation has worsened.¹⁴⁸

Litigation as a Strategy to Advance Human Rights in Canadian Prisons

Human rights litigation can be a powerful strategy to lay the groundwork for social and legal reform while raising the necessary public awareness to reinforce social movements.¹⁴⁹ The high-profile nature of the BCCLA and CCLA cases prioritize human rights in Canadian prison reform. The aspirations for the current Charter litigation implicating solitary confinement practices rests in the perceived power of the courts to enforce human rights.¹⁵⁰ Only courts truly “have the power to enforce rights and require meaningful changes to be made.”¹⁵¹ Court orders may finally have the legitimacy and authority to force the legislature to return to the drawing board; years of inquiries and reports have had limited success at initiating substantive reform.

The BCCLA and CCLA cases are powerful for their extensive use of social science and expert evidence, their emphasis on international human right norms, and the inclusion of first-hand testimony from prisoners. In particular, these cases endeavor to underline the systemic issues surrounding solitary confinement practices with regard to Indigenous and disabled prisoners.¹⁵² Despite the fact that the majority of the ongoing litigation focuses on declaring provisions invalid in the legislation of federal corrections facilities, the systemic lens through which the cases are being argued will undeniably impact solitary confinement practices across the country. A notable strength in human rights litigation is the ability for parties to demand public interest remedies as illustrated in the *Jahn Settlement*. For

¹⁴⁸ Nick Boisvert, “Human rights commission accuses Ontario of mistreating prisoners with mental health issues: Province says it “must do better” in response to accusations” CBC News (26 September 2017), online: <<http://www.cbc.ca/news/canada/toronto/human-rights-segregation-1.4307737>>.

¹⁴⁹ See generally Martha L. Minow, “Brown v. Board in the World: How the Global Turn Matters for School Reform, Human Rights, and Legal Knowledge” (2013) 50:1 San Diego L Rev 1 [Minow].

¹⁵⁰ Parkes, “Abolitionist Lawyering”, *supra* note 12.

¹⁵¹ *Ibid* at 177.

¹⁵² BCCLA Civil Claim, *supra* note 128; CCLA Factum, *supra* note 115.

example, provincial human rights claims could seek to establish independent oversight procedures for reviewing solitary confinement placements. Similarly, Charter litigators, in establishing that current legislative schemes deny prisoners of their right to institutional liberty, could argue that access to independent adjudication is a fundamental principle of justice.¹⁵³ These current litigation strategies could further entrench and expand the legal understanding of prisoners as rights holders.¹⁵⁴

Despite the power of human rights litigation, this strategy is far from the ultimate solution to abolish current solitary confinement practices. Indeed, outside the procedural rights context, section 7 and Charter litigation in Canada has historically had little substantive impact on improving prisoners' overall situations.¹⁵⁵ Courts have traditionally taken a "hands-off" approach, preferring to defer to the contextual and on-the-ground expertise of correctional authorities.¹⁵⁶ Courts may articulate legal tests that accommodate the preferences of the government and correctional authorities, even if the prisoner's claim is successful.¹⁵⁷ However, recent decisions in favour of prisoners challenging their conditions of confinement illustrate that judges may be less enthusiastic about deferring to prison administrators.¹⁵⁸

Lack of access to courts, procedural requirements, and evidentiary barriers remain overwhelming obstacles for prisoners attempting to assert their rights.¹⁵⁹ Prisoners may often self-represent and lack funding to bring forward their claims since many legal aid schemes do not cover prisoners' rights cases.¹⁶⁰ Systemic human rights cases often require substantial amounts of social science and expert evidence, including experts willing to testify on behalf of prisoners; this obligation may be the reason we are witnessing organizations such as BCCLA and CCLA

¹⁵³ Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48 Canadian Journal of Criminology and Criminal Justice 157 at 191.

¹⁵⁴ Arbel, *supra* note 26.

¹⁵⁵ Parkes, "Prisoners' Charter", *supra* note 146 at 649.

¹⁵⁶ *Ibid* at 633; Kerr, "Easy Prisoner Cases", *supra* note 41; Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43.

¹⁵⁷ Kerr, "Easy Prisoner Cases", *supra* note 41.

¹⁵⁸ See generally Parkes, "Abolitionist Lawyering", *supra* note 12.

¹⁵⁹ Parkes, "Prisoners' Charter", *supra* note 146 at 631.

¹⁶⁰ *Ibid* at 667-69.

bearing the costs of litigation. In Canada in particular, most of the detailed research regarding prisoners is commissioned by Correctional Service Canada or provincial corrections departments, presenting obvious issues of impartiality.¹⁶¹ The lengthy procedural process of the legal system creates a risk that courts will refuse to hear solitary confinement litigation if the prisoner's segregation has ended before the trial begins. This issue of mootness has particular significance for prisoners in provincial or territorial facilities when considering Charter challenges given the short-term nature of their sentences.¹⁶² However, courts may still exercise their discretion to find a "live controversy" and continue proceedings.¹⁶³ Furthermore, the Charter, class action, and human rights litigation – focusing on systemic issues and correctional authorities' decision-making processes – bypasses the issues of a case relying on a single prisoner's experience.

While courts can enforce rights, litigation remedies may remain narrow and the practicalities of their implementation proving difficult. Much of the ongoing litigation, if successful, will result in declaratory relief, allowing parties to define rights and obligations. In the case of solitary confinement, the government will be expected to draft new legislation informed by international norms and expert evidence. However, this new legislation may prove inadequate when administrators cannot be trusted and a need for monitoring and compliance arises – these factors make subsequent litigation highly likely.¹⁶⁴ Public interest remedies such as those outlined in the *Jahn Settlement* require detailed action plans and follow-through to ensure their implementation. The recently filed contravention application illustrates the difficulties in ensuring the execution and sustainability of litigation remedies. Finally, formal legal outcomes have a limited capacity to address systemic and structural issues related to the management of corrections facilities. Even if the BCCLA and CCLA litigation is

¹⁶¹ Parkes, "Prisoners' Charter", *supra* note 146 at 667-69.

¹⁶² *Ibid* at 640.

¹⁶³ *Ibid* at 667-69.

¹⁶⁴ Robert Sharpe & Kent Roach, *Charter of Rights and Freedoms*, 5th ed (Toronto: Irwin Law, 2013) at 407-08, 410, citing Iacobucci J in dissent *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 SCR 1120 at paras 259-61. Further litigation arose due to the parties dissatisfaction with the government response to the declaration, see *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2007] 1 SCR 38.

successful at declaring the segregation provisions in the CCRA unconstitutional, this legal change will not necessarily address underlying social issues such as de-escalation and trauma sensitivity training for corrections staff or the provision of adequate mental health services for incarcerated individuals.¹⁶⁵

Finally, we should scrutinize the risks of prisoners' rights litigation by examining its legacy in the United States. A potential outcome in solitary confinement litigation is the legitimization or "constitutionalization" of the practice.¹⁶⁶ Courts may impose limits and procedural protections to which the government and correctional authorities will respond by building solitary confinement units and establishing protocols that meet minimum standards.¹⁶⁷ Given the prison system's resistance to reform, changes would likely be minimal, or worse, appear on paper and remain unimplemented. The *Prison Litigation Reform Act*, a 1996 US statute that restricted the rights of prisoners to bring claims to court, illustrates the backlash initiated by litigation when a society is not ready to recognize prisoners as rights holders.¹⁶⁸ These lessons teach us that our litigation strategies should perhaps be calling for abolishing the "practice of solitary confinement entirely, rather than merely placing limits on its use where it is considered to have crossed the line of torture or cruel treatment".¹⁶⁹ The persistence of human rights abuses in solitary confinement practices, in spite of successful legal challenges and settlement agreements, may result in a diminished respect for the

¹⁶⁵ Parkes, "Prisoners' Charter", *supra* note 146 at 645-46.

¹⁶⁶ Keramet Reiter, "The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006" (2012) 57 *Studies in Law, Politics and Society* 69 at 117-18 [Reiter, "Restrictive Alternative"]; Parkes, "Abolitionist Lawyering", *supra* note 12 at 178.

¹⁶⁷ Parkes, "Abolitionist Lawyering", *supra* note 12 at 170; Reiter, "Restrictive Alternative", *supra* note 166; "Judicial intervention has not addressed the central issue of the power to separate an individual indefinitely from her community and basic liberties"...In response to a Charter challenge in 2011, prison officials reacted defensively and suggested building a supermax prison for women to better manage isolation, ignoring the human rights concerns at the centre of the litigation (Kerr, "Chronic Failure", *supra* note 26 at 509, 518, 520).

¹⁶⁸ Parkes, "Prisoners' Charter", *supra* note 146 at 636-37.

¹⁶⁹ WCPJS Report, *supra* note 1 at 4.

legitimacy of the rule of law; this issue already plagues our prisons.¹⁷⁰

Extra-Legal Strategies: Alternatives and Complements to Litigation

A Multi-Method Approach

While litigation provides legitimacy to enforce and implement prison reform, extra-legal strategies create the conditions where limiting and abolishing solitary confinement is possible.¹⁷¹

Extra-legal strategies complement and reinforce legal efforts, and following a successful outcome, these tactics work alongside court orders to ensure sustained implementation. In fact, cases that have succeeded in limiting solitary confinement used a “multi-method approach” to prison reform litigation by integrating empirical scholarship, critical investigative reporting, and prisoner collective activism to change the legal conversation and public attitudes towards prisons and solitary confinement practices.¹⁷²

The following section will examine several extra-legal strategies under the framework of an imagined *National Solitary Confinement Strategy* adopted by governments and correctional authorities across Canada. I argue that updating Canada’s international commitments under the *Convention Against Torture*, re-imagining alternative mechanisms for independent oversight of prisons, and mainstreaming prisoners’ rights in both general society and in the legal community warrant prioritization in a *National Solitary Confinement Strategy*.

Recent Recommendations for Reform

Canadian prisoners’ rights activists have tirelessly advocated for implementing judicial oversight, independent adjudication, and procedural fairness measures to ensure that the

¹⁷⁰ Minow, *supra* note 149; Arbour Commission, *supra* note 104.

¹⁷¹ Minow, *supra* note 149.

¹⁷² Keramet Reiter, “Lessons and Liabilities in Litigating Solitary Confinement” (2016) 48 Conn L Rev 1167.

administration of segregation regimes conforms to human rights norms.¹⁷³ Calls for reform have ranged from a Model Segregation Code advocating for independent adjudication of segregation placements to a blueprint for abolition advocating for increased mental health support in prisons.¹⁷⁴ In the past five years alone, several comprehensive reports have been published with wide-ranging recommendations including: updating segregation definitions to comply with international standards, human rights education for corrections staff and prisoners, partnerships between correctional authorities and Human Rights Commissions, and automatic tracking of segregation placements.¹⁷⁵ Despite these comprehensive roadmaps for reform, governments and correctional authorities remain resistant to change.¹⁷⁶

During a recent conference attended by prison officials and prisoners' rights advocates regarding mental health care in prisons, British Columbia's prison director announced the development of a *National Solitary Confinement Strategy*.¹⁷⁷ This strategy is a collaborative effort between the CSC and the provincial governments to develop standardized solitary confinement guidelines. The development of the strategy was made public in June 2017, yet a concrete framework remains elusive. Below, I propose three priorities to incorporate into a *National Solitary Confinement Strategy* ("Strategy") that would render the current litigation more effective and lay the foundation to sustain the elimination of solitary confinement practices in Canadian prisons.

¹⁷³ Jackson, "Behind the Walls", *supra* note 98; Arbour Commission, *supra* note 104 at 105, 135, 183; Parkes, "Prisoners' Charter", *supra* note 146 at 674; see also Sapers Report, *supra* note 30; ON Ombudsman Report, *supra* note 24; WCPJS Report, *supra* note 1.

¹⁷⁴ Jackson, "Isolation", *supra* note 52; Jackson, "40 Years", *supra* note 26; WCPJS Report, *supra* note 1.

¹⁷⁵ See Correctional Service Canada, "Coroner's Inquest Touching the Death of Ashley Smith: Verdict of Coroner's Jury" (19 December 2013), online: <<http://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml>>; Sapers Report, *supra* note 30 at 104-111, ON Ombudsman Report, *supra* note 24 at 61-66, WCPJS Report, *supra* note 1 at 96. All of these reports include implementing comprehensive mental health reforms in prison facilities including standardized screening and ongoing assessments and operationalizing specialized mental health units and services.

¹⁷⁶ Parkes, "Abolitionist Lawyering", *supra* note 12 at 166.

¹⁷⁷ Patrick White, "Amid pressure, officials draft national solitary confinement strategy" *The Globe and Mail* (19 June 19 2017), online: <<https://www.theglobeandmail.com/news/national/ottawa-provinces-to-pursue-universal-guidelines-on-solitary-confinement/article35210516/>>.

Immediate Priorities for a National Solitary Confinement Strategy

1. Reinforcing Canada's International Commitments

The *National Solitary Confinement Strategy* should include statements re-iterating Canada's international human rights obligations and incorporating the Mandela Rules. Canada's human rights commitments should never fall below basic international standards. Canada does not need to "reinvent the wheel" by creating their own guidelines; basic minimum standards are present in international human rights instruments and grounded in empirical research. At the very least, the government and correctional authorities need to adopt these standards as a starting point for the *Strategy*. More specifically, Canada should immediately ratify and incorporate the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("OPCAT").¹⁷⁸

OPCAT is particularly significant because it calls for state party signatories to establish independent oversight ("national preventive mechanisms") for detention centres. State party signatories must also unreservedly open their prisons to receiving regular visits from independent international bodies. OPCAT creates a collaboration between state parties, their established national preventive mechanisms (NPM), and the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).¹⁷⁹ Incorporating OPCAT will also signal Canada's commitment to openness and transparency in prison management. Currently, particularly on the provincial level, Ombudsman offices are tasked with investigating

¹⁷⁸ *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 57th Sess, A/RES/57/199 (entered into force on 22 June 2006) [OPCAT].

¹⁷⁹ *Ibid* arts 1, 3. Article 24 provides that these independent oversight mechanisms must be established one year after entry into force of OPCAT by the state party. The OPCAT allows for visits to any place where persons are deprived of their liberty, which could include immigration detention centres and mental health care institutions (United Nations Human Rights Office of the High Commissioner, OPCAT Subcommittee on Prevention of Torture, "The SPT in Brief", online: <<http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/Brief.aspx>>)

correctional facilities.¹⁸⁰ The SPT could collaborate with already established provincial ombudsmen offices, human rights commissions, and the federal OCI to standardize procedures for monitoring solitary confinement across Canada in federal and provincial prisons. Canada has announced its commitment to eventually sign onto OPCAT with limited follow-through to date.

¹⁸¹ Including it in the *Strategy* will increase Canada's accountability and provide international assistance in establishing independent oversight of prisons.

2. *Re-Imagining Independent Oversight*

As recognized by prisoners' rights advocates, independent oversight of the prison system, particularly solitary confinement placements, is an important mechanism to ensure accountability. This oversight could be accomplished through a parliamentary committee, the judiciary, or a prison ombudsman.¹⁸² While repeated calls for independent oversight are ignored and litigation is currently underway, it remains that "the courts alone cannot ensure that a "Charter culture" prevails in Canadian prisons...[and]...effective oversight and accountability of prisons is extremely difficult to put in place."¹⁸³ In the interim, I propose a civil society watchdog as a viable option to assist current litigation efforts and provide a centralized resource for solitary confinement oversight. An agile and Canadian civil society watchdog can be established immediately without government authority; it has the potential to operate with true independence and be just as effective as any government body or ombudsman.

¹⁸⁰ The Ombudsman of Ontario is currently the only provincial ombudsman that has risen to the task.

¹⁸¹ Adrian Wyld, "Canada to join UN anti-torture protocol after more than a decade" *The Globe and Mail* (24 March 2017) online: <<https://www.theglobeandmail.com/news/politics/canada-to-join-un-anti-torture-protocol-after-years-of-delay-foreign-affairs/article29827536/>>.

¹⁸² *Arbour Commission*, *supra* note 104; Samantha Wright Allen "'Repressive,' 'risk-averse' corrections system needs parliamentary oversight, says Sen. Pate" *The Hill Times* (29 November 2017), online: <<http://www.hilltimes.com/2017/11/29/repressive-risk-averse-corrections-system-needs-oversight-says-senator/127126>>. This article explains that the current issue with the OCI, our federal corrections ombudsman, is that the office has no remedial powers.

¹⁸³ Parkes, "Prisoners' Charter", *supra* note 146 at 675.

Within the context of supermax prisons in the United States, a non-profit national watchdog group called *Solitary Watch* “investigates, documents, and disseminates information on the widespread use of solitary confinement in U.S. prisons and jails”.¹⁸⁴ *Solitary Watch* combines critical investigative journalism with legal expertise to provide a centralized source for research, first person narratives, and up-to-date news on solitary confinement in the United States. The resource is available for the public as well as practicing lawyers, scholars, educators, correctional authorities, activists, as well as prisoners and their families. *Solitary Watch* is a comprehensive and accessible database with daily updates, digestible fact sheets, informative investigative articles, and a library of resources. The non-profit strives to incorporate the voices of prisoners in writing and video testimonials to humanize the issues. The ultimate goal of an organization like *Solitary Watch* is to initiate discussion and provide information that will increase public awareness of solitary confinement while assisting current advocacy efforts.¹⁸⁵

In Canada, while prisoners’ rights organizations are actively involved in the fight to eliminate solitary confinement, their mandates extend beyond this particular issue. The numerous recommendations from recent reports demonstrate the need for a specialized, national body to focus on solitary confinement. For example, a civil society watchdog could collaborate with provincial and territorial ombudsmen to coordinate the tracking of solitary confinement placements in provincial and territorial corrections facilities. The watchdog’s centralized resources and database would assist lawyers and prisoners’ in preparing for their court challenges. Depending on the availability of financial resources, the non-profit could provide a Prisoners’ Legal Challenges Fund to support individual and systemic cases

¹⁸⁴ Solitary Watch, “About Solitary Watch”, online:
<<http://solitarywatch.com/about/>>.

¹⁸⁵ *Ibid*; See also the Vera Institute’s “Safe Alternatives to Segregation Initiative” as an example of an organization that researches solitary confinement and partners with local corrections facilities in various US states to significantly reduce its use and implement safe and effective alternatives, online: Safe Alternatives to Segregation Initiative Resource Centre, A Project of the Vera Institute of Justice, “About Us”, online:
<<http://www.safealternativestosegregation.org/about>>.

challenging solitary confinement.¹⁸⁶ Most importantly, a non-profit that focuses on revealing the humanity behind the human rights crisis of solitary confinement has the immediate capacity and creative flexibility to raise public awareness more than any government body.

A civil society watchdog is certainly not a catch-all solution; it risks encountering the challenges that plague any prisoners' rights non-profit. A lack of funding capacity and limited power can diminish its ability to hold correctional authorities accountable. While a civil society watchdog is not a permanent solution, nor is it meant to remove certain government responsibilities, it exists as an extra-legal, interim solution that can provide assistance to current litigation efforts. Such an organization has the potential to become a powerful lobby for reform in collaboration with other prisoners' rights organizations.

3. *Culture Change: Mainstreaming Prisoners' Rights*

A broader, cultural change in how we perceive prisoners and the prison system is paramount in enabling any penal reform and prisoners' rights litigation. As advocate Michael Jackson states, "the principal benefit flowing from a constitutionally entrenched Charter of Rights and Freedoms is not to be found in the litigation it spawns, but rather in the climate and culture of respect it creates amongst both governments and citizens for fundamental human rights and freedoms."¹⁸⁷ As Canada's prison history has illustrated, and Stephen Harper's more recent "tough-on-crime" rhetoric has reinforced, our carceral system is designed to demonize incarcerated individuals.¹⁸⁸ Prisoners are perceived as dangerous, prisons as necessary, and solitary confinement as reasonable to control prisoners who cannot adjust to the prison environment.¹⁸⁹ Communicating a greater understanding of prison operations and the lives of those imprisoned should form the

¹⁸⁶ Kim Pate & Debra Parkes, "Time for Accountability: Effective Oversight of Women's Prisons" (2006) 48 *Canadian Journal of Criminology and Criminal Justice* 251 at 276.

¹⁸⁷ Jackson, "Behind the Walls", *supra* note 98 at 62.

¹⁸⁸ Elizabeth Comack, Cara Fabre, and Shanise Burgher, *The Impact of the Harper Government's "Tough on Crime" Strategy: Hearing from Frontline Workers* (Manitoba: Canadian Centre for Policy Alternatives, 2015).

¹⁸⁹ Parkes, "Abolitionist Lawyering", *supra* note 12 at 183.

foundation for any prisoners' rights litigation and underlying reform movements.

Prisoners' rights groups need to work with media organizations to raise awareness of the general conditions and the specific realities of solitary confinement practices inside provincial, territorial and federal prisons. Showing the public that solitary confinement is harmful and inhumane is an important first step in projecting the image of prisoners as human beings and as rights holders that deserve Charter-based protections. For example, A US-based project combines virtual reality with investigative journalism to immerse the viewer in a solitary confinement cell.¹⁹⁰ This virtual experience includes first-hand testimony from prisoners and statistics about solitary confinement. There is a correlation between society's moral attitudes and perceptions of what constitute acceptable forms of punishment.¹⁹¹ When individuals perceive prison life to be easy, enjoyable, safe, and "not harsh enough," they are more likely to prefer a punitive approach to dealing with crime.¹⁹² However, individuals are capable of supporting both punitive and progressive alternatives to punishment.¹⁹³ Changing societal attitudes around prison is possible.¹⁹⁴ Revealing solitary confinement as a practice that causes and exacerbates mental illness while disregarding human dignity may mobilize public sentiment and respond to evolving social attitudes. The seismic potential of human stories has been demonstrated recently by the public outrage surrounding the death of Ashley Smith or Adam Capay's 1,600 days spent in isolation.¹⁹⁵

¹⁹⁰ "6x9: A virtual experience of solitary confinement", *The Guardian*, online: <<https://www.theguardian.com/world/ng-interactive/2016/apr/27/6x9-a-virtual-experience-of-solitary-confinement>>.

¹⁹¹ Kerr, "Chronic Failure", *supra* note 26.

¹⁹² Kevin H. Wozniak, "Perceptions of Prison and Punitive Attitudes: A Test of the Penal Escalation Hypothesis" (2016) 41:3 *Criminal Justice Review* 352 at 361.

¹⁹³ *Ibid* at 352.

¹⁹⁴ For a discussion of how media consumption may affect public attitudes towards punishment see Jared S. Rosenberger & Valerie J. Callanan, "The Influence of Media on Penal Attitudes" (2011) 36:4 *Criminal Justice Review* 435.

¹⁹⁵ Kerr, "Chronic Failure", *supra* note 26 at 522; *The Globe and Mail*, "Four People's Stories", *supra* note 2.

The legal profession itself does not prioritize knowledge of prison law.¹⁹⁶ Law schools have a responsibility to ensure the curriculum includes the voices of prisoners crushed under the full weight of our criminal justice system. Criminal law courses should centre prisoners' voices and introductory criminal law courses should consider the events that unfold after the judges' verdict. Clinical legal opportunities should offer student internships at prisoners' legal clinics¹⁹⁷ and visits to prisons should be as encouraged as court house visits.

Outreach strategies should strive to include the participation of prisoners themselves when possible to humanize those affected and ensure that their experiences are centered in the discourse. For example, throughout their court challenge, the BCCLA kept a trial blog with links to their trial documents and powerful pull quotes from trial testimony that could be shared on social media, along with video interviews of testifying prisoners.¹⁹⁸ Howard Sapers, in his report on segregation in Ontario Corrections, recommends that the government "undertake a campaign to inform the public and seek feedback in regard to the corrections transformation agenda".¹⁹⁹ A national, independent solitary confinement watchdog would play an important role in gathering and disseminating current information about the realities of solitary confinement in order to promote public awareness and buttress litigation efforts.

Awareness is a prerequisite to action. An effective *National Solitary Confinement Strategy* would incorporate strategies to promote public awareness and mobilization, re-assert Canada's commitment to international human rights norms, and provide interim, extra-legal solutions to coordinate and complement legal and government efforts to eliminate solitary confinement. Courts and governments respond to public pressure. Achieving and sustaining the elimination of solitary confinement

¹⁹⁶ Kerr, "Chronic Failure", *supra* note 26 at 490.

¹⁹⁷ Queen's University Law School is the only Canadian law school that has a Prison Law Clinic, see Queen's Law, "Prison Law Clinic", online: <<https://law.queensu.ca/clinics/prison-law-clinic>>.

¹⁹⁸ British Columbia Civil Liberties Association, "Solitary Confinement Trial Updates", online: <<https://bccla.org/2017/11/solitary-confinement-trial-updates/>>.

¹⁹⁹ Sapers Report, *supra* note 30 at 111.

requires mobilizing creative strategies that look beyond law and policy.

Conclusion

Solitary confinement is “contrary to one of the essential aims of the penitentiary system...to rehabilitate...and facilitate re-integration.”²⁰⁰ The OCI has confirmed that its recent reduction of solitary confinement has not had any observable impact on the safety and security of corrections staff or prisoners.²⁰¹ However, the evidence is overwhelming that reducing its use is not enough. Historically, the use of isolation was touted as a tool to reform prisoners; today, isolation is used to manage and control prisoners.²⁰² Solitary confinement is a systemic issue embedded in historical organizational practices and institutional cultures; it requires a range of actors and strategies to transform and sustain abolition.

The West Coast Prison Justice Society describes solitary confinement as an “extreme end result of a correctional system that views prisoners as less than human and undeserving of dignity”.²⁰³ We need to move beyond merely a change in the “culture of corrections”, and commit to a broader cultural shift in how we perceive prisoners and the criminal justice system.²⁰⁴ The history of our carceral systems should inform our litigation strategies, policy initiatives, and movements for abolition. The current litigation strategies challenging solitary confinement are promising, yet they have their limitations. Abolishing solitary confinement in Canada can be achieved by coordinating legal and extra-legal strategies to support and sustain any successful litigation outcomes. In this paper, I proposed three attainable priorities that should be considered in a *National Solitary Confinement Strategy*. These first steps are my humble suggestions to spread awareness of solitary confinement practices in Canada and consolidate resources to assist with abolition efforts.

²⁰⁰ Mendez Report, *supra* note 10 at para 79; see WCPJS Report, *supra* note 1.

²⁰¹ OCI, “Annual Report 2016-2017”, *supra* note 19 at 40.

²⁰² Kerr, “Chronic Failure”, *supra* note 26 at 523.

²⁰³ WCPJS Report, *supra* note 1 at 71.

²⁰⁴ *Ibid* at 72.

We must remember the names of those who have suffered. Ashley Smith. Edward Snowshoe. Terry Baker. Adam Capay. Michael Nehass. And many more. We must ensure that these atrocities are never again repeated.

In the cautionary words of Michael Jackson, “[w]e are in danger of bending justice out of shape. I have always believed that the practices around solitary confinement are a litmus test of the legitimacy of state punishment...those who are concerned with issues of human rights must demand and demonstrate the greatest vigilance.”²⁰⁵

²⁰⁵ Jackson, “40 Years”, *supra* note 26 at 58.

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