

## Bill C-83 and the Canadian Charter of Rights and Freedoms

Introduction: Western prison systems have, for decades, been challenged by questions about the legitimacy and legality of solitary confinement, a practice where prisoners are separated from the general population of the prison in extreme conditions of deprivation for long, sometimes indeterminable, periods of time. During these decades, a substantial body of evidence has developed which shows the damage which this practice causes. While much of the harm is due to the duration of solitary confinement, much of it arises from the isolated conditions of confinement and can occur after a short period. In Canada, this concern resulted in various pronouncements decrying the use of solitary confinement from Coroners' inquests, the Office of the Correctional Investigator, human rights commissions and academics. Litigation was commenced in Ontario and British Columbia presenting detailed evidence and resulting in important judgments that found certain aspects of the practice under the *Corrections and Conditional Release Act* [CCRA] violated the *Charter*. In response, on October 16, 2018, the Government of Canada tabled for first reading Bill C-83. On second reading, the Minister of Public Safety stated that the major purpose of Bill C-83 was to "completely eliminate the existing practice of administrative segregation [i.e. solitary confinement] and replace it with a new approach, and that is the creation of structured intervention units, or SIUs"<sup>1</sup>.

In this paper, I want to use the findings of the major judicial cases as tools to scrutinize the provisions of Bill C-83. The two major cases are the Ontario Court of Appeal decision in *Canadian Civil Liberties Association v. Canada*<sup>2</sup> [hereinafter referred to as "CCLA"] and the

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<sup>1</sup> Hansard, No. 337, October 18, 2018

<sup>2</sup> 2019 ONCA 243

B.C. Supreme Court decision in *British Columbia Civil Liberties Association v. Canada*<sup>3</sup> [hereinafter referred to as “BCCLA”]. Also, I will refer to the 2019 decision in *Brazeau v. Canada*<sup>4</sup>. This case was a decision on summary judgment in a class action dealing with the use of solitary confinement and mentally-ill prisoners. The presiding judge made use of both the BCCLA and CCLA judgments and also had in the record affidavits from various experts.

When I say “tools”, I mean that I will use the findings of the courts as yardsticks to evaluate whether the new SIU proposal conforms with *Charter* standards. By findings, I am referring both to findings of fact and legal conclusions. The former are significant because of the large body of international and Canadian expert evidence that forms the record in these cases. The judgments are founded on the testimonies of an impressive group of well-respected experts from a variety of disciplines and backgrounds. Many factual findings were made about the current CCRA regime. Given the proposed new SIU process, I will only refer to these CCRA findings sporadically when they are relevant. With respect to the latter, conclusions of legal analysis, this represents the most current judicial scrutiny by senior Canadian jurists who had the advantage of multiple refined arguments from the parties and intervenors. At a minimum, these conclusions should provide Parliament with the standards it needs to consider whether and to what extent Bill C-83 might violate the *Charter*.

I do not intend to go through the arduous process of analyzing each decision.

Instead, I will catalogue the findings around the following sub-headings:

- Harms of Solitary Confinement
- Duration of confinement

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<sup>3</sup> [2018] B.C.J. No. 53

<sup>4</sup> [2019] O.J.L. 1451.

- Conditions of Confinement
- Review of Placement and Confinement
- Monitoring
- Indigenous Offenders
- Mentally-ill prisoners

This will permit a template which will enable us to evaluate Bill C-83.

Canadian Jurisprudence:

(a) Factual Findings:

It is true that the expert evidence based on research related to regimes of solitary confinement defined as requiring a prisoner to spend 22 hours per day in a cell whereas the SIU regime speaks of 20 hours per day in a cell. However, there is nothing in the research to indicate that a modest reduction by two hours would change any of the findings of harm. More importantly, virtually all experts agreed that the major impact of solitary confinement arises from the isolation and lack of stimulus. As the Court of Appeal held in CCLA, "...the distinguishing feature of administrative segregation is the elimination of meaningful social interaction or stimulus"<sup>5</sup>.

Harms of Solitary Confinement:

In general, all courts found that solitary confinement "imposes a psychological stress capable of producing serious permanent observable negative mental health effects"<sup>6</sup>. Moreover, it causes sensory deprivation and has harmful effects "as early as 48 hours after admission" and can "alter

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<sup>5</sup> CCLA, para. 20

<sup>6</sup> Ibid, at para. 73.

brain activity and result in symptoms within seven days”<sup>7</sup>. More specifically, prisoners in solitary confinement:

- experience the isolated conditions of solitary confinement, sensory deprivation, and constant lockdown status very negatively and stressfully;
- who are already experiencing mental health problems, have a history of suicide attempts, and have high levels of hopelessness, are more likely to report suicidal ideation;
- are at significant risk for the development of psychiatric symptoms including depression and suicidal ideation;<sup>8</sup>

As well, prisoners subject to long-term solitary confinement may develop previously undetected psychiatric symptoms<sup>9</sup>. Solitary confinement has “repeatedly been linked to appetite and sleep problems, anxiety, panic, rage, loss of control, depersonalization, paranoia, hallucinations, self-mutilation, increased rates of suicide and self-harm, an increased level of violence against others, and higher rates of frustration.”<sup>10</sup> Other findings of harmful consequences include:

- declines in mental functioning
- cognitive-behavioral problems among prisoners including difficulty in solving interpersonal problems, unawareness of the consequences of their actions, inability to make positive choices, and a tendency to display disregard for others as a result of being socially unaware and impulsive
- heightened levels of anxiety, increased risk of panic attacks, and a sense of impending emotional breakdown
- older prisoners (those over 50) with chronic medical conditions, and/or with physical disabilities are at high risk of immediate and future harm<sup>11</sup>
- where the solitary confinement is indeterminate and the prisoner does not know when he or she will be released, the harms are intensified<sup>12</sup>.

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid, at para. 76. Also see BCCLA, para .247

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> BCCLA, at para. 308

<sup>12</sup> Ibid, at para. 204

- loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdowns, self-mutilation, and suicidal ideation and behaviour.<sup>13</sup>

#### Duration of Confinement:

With respect to duration, all courts agreed that harmful consequences can arise sometimes as early as 48 hours and that prolonged confinement exacerbates the occurrence of harmful effects especially if it is indeterminate. With respect to indeterminacy, it was found in BCCLA that it increases the “painfulness, increases frustration, and intensifies the depression and hopelessness”<sup>14</sup>.

Some specific aspects of the expert testimony from two of the world’s leading experts are worth noting:

-He [Dr. Grassian] deposed that adverse health effects can occur after only a few days and the risk of harm is acute for mentally ill inmates. He said that where the placement in segregation is indeterminate and the inmate does not know when he or she will be released, the harm of the placement is intensified. He said that while not all individuals will become seriously ill after fifteen days of solitary confinement, all will suffer greatly as a consequence of experiencing it<sup>15</sup>.

- Dr. Haney said that depriving people of normal social contact and meaningful social interaction over long periods of time can damage or distort their social identities, destabilize their sense of self and, for some, destroy their ability to function normally in free society. He said that prisoners may develop habits, tendencies, perspectives, and beliefs that are difficult or impossible to relinquish once they are released. It was his view that over time the social deprivations of isolation caused a social pathology<sup>16</sup>.

#### Conditions of Confinement:

Here, we are considering the combination of environmental factors that produce isolation devoid of stimulus. While the major concern for researchers has been the lack of contact with other

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<sup>13</sup> Brazeau, at para. 214..

<sup>14</sup> BCCLA, at para. 248

<sup>15</sup> Brazeau, at para. 204

<sup>16</sup> Ibid, at para. 216

people, other relevant factors are cell size and furnishings, lighting and access to natural light, access to health and psychiatric care, opportunities to exercise, access to reading and writing materials, access to television or radio, access to showers, and access to communications with outsiders. Some relevant findings shed light on these issues:

Dr. Grassian opined that the circumstances of administrative segregation made it impossible for a medical practitioner to be able to diagnose and provide appropriate psychiatric care. He said that the availability of television, books, exercise and other stimuli without meaningful human interaction did not ameliorate the experience of solitary confinement.<sup>17</sup>

In his 2011 Report to the United Nations, Professor Mendez stated that solitary confinement reduces meaningful social contact to an absolute minimum and that the consequence is an insufficient stimulus and the inmate cannot maintain a reasonable state of mental health. He said these consequences had been confirmed by research that indicated that when a person is deprived of sufficient social stimulus, he or she becomes incapable of maintaining alertness and attention and that within even a few days brain activity becomes abnormal<sup>18</sup>.

..... the denial of access to exercise spaces that allow sustained walking, and/or the housing of inmates in conditions that contribute to social isolation or sensory deprivation, poses a substantial risk of serious harm to older inmates and those with chronic medical conditions and/or physical disabilities<sup>19</sup>.

#### Review of Placement and Confinement:

Only the BCCLA case addressed this issue in detail both by examining the CCRA review mechanism and by listening to the testimony of both prisoners and experts. It concluded:

There is, as well, a feature specific to administrative segregation that further demands independent adjudication: the open-ended nature of placements. In circumstances where an inmate remains in segregation until the warden determines he or she should be released, it is especially important that the statutory criteria for segregation be rigorously applied. An independent adjudicator is best placed to ensure that robust inquiry occurs at segregation reviews and that institutional staff and administrators make the case for segregation by demonstrating that there are no reasonable alternatives<sup>20</sup>.

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<sup>17</sup> Ibid, at para. 207

<sup>18</sup> Ibid, at para. 226

<sup>19</sup> BCCLA, at para. 308

<sup>20</sup> Ibid, at para. 391

### Monitoring:

In the CCLA case, the trial judge would have found a violation of s. 12 of the Charter except for the monitoring processes of the CSC which he concluded saved the CCRA regime from descending to the level of “cruel and unusual treatment or punishment”. This finding was reversed by the Court of Appeal which concluded that:

The practical effect of monitoring combined with a proper application of s. 87(a) is that it allows the CSC to remove an inmate from administrative segregation *only after* they have detected decompensation *which has already occurred*. In other words, monitoring, while effective at identifying inmates who have suffered harm, is ineffective at preventing it<sup>21</sup>.

Similarly, the BCCLA case found the monitoring processes deficient:

At the time an inmate is placed in administrative segregation, they are taken through the Suicide Risk Checklist. I have already discussed the shortcomings of the checklist. Dr. Koopman's evidence, which I accept, is that its use is a high risk practice that places too much faith on a very general instrument and interpretation by someone without the knowledge to make the judgments required. I have also detailed how the mental health monitoring and supports that are in place for segregated inmates are simply not up to the task<sup>22</sup>.

### Indigenous Offenders:

Just as there is an over-representation of indigenous men and women in the total penitentiary population, a similar result happens with the number of indigenous prisoners in solitary confinement<sup>23</sup>. Consequently, any harmful effects particular to the indigenous sub-population are experienced disproportionately. With respect to the criteria for placing indigenous prisoners in solitary confinement and monitoring or reviewing their confinement, the BCCLA case found:

I wish to acknowledge that Canadian courts have had some difficulties applying the *Gladue* factors and, unfortunately, the 18 years that have passed since *Gladue* was decided have not seen a marked reduction in the imprisonment of Aboriginal Canadians.

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<sup>21</sup> CCLA, at para. 79

<sup>22</sup> BCCLA, at para. 521

<sup>23</sup> See BCCLA,

Having said that, on the evidence before me, CSC has not done a good job of using Aboriginal social history to reduce the impact of administrative segregation on Aboriginal inmates. There is a box to be ticked on a form and it is ticked. Meaningful results have not followed<sup>24</sup>.

Mentally-ill Prisoners:

Here, there is virtually unanimous agreement amongst the findings in the various judicial decisions being considered. Mentally-ill prisoners are more vulnerable to the deleterious effects of solitary confinement. Damaging consequences can occur as soon as 48 hours after the commencement of the confinement. The extent and nature of the negative mental health effects is exacerbated by the duration of confinement and its indeterminacy. The attention paid to the solitary confinement of mentally-ill prisoners by the Commissioners' Directives is inadequate and misses the mark<sup>25</sup>. These findings are supported by examples from the expert testimonies:

Both Dr. Grassian and Dr. Haney gave evidence that the risks of harm from segregation are greater for inmates with mental illness. Dr. Haney explained in some detail why this is so. In part, it is because of the greater vulnerability of the mentally ill in general to stressful, traumatic conditions. As well, some of the conditions of isolation exacerbate the particular symptoms from which inmates with mental illness suffer. For example, inmates prone to psychotic breaks are denied the stabilizing influence of social feedback, while

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<sup>24</sup> BCCLA, at para. 483

<sup>25</sup> See BCCLA at paras. 503-504 which read:

**503** I accept the evidence of Dr. Koopman as to the inadequacy of the new CD. It is her opinion that the definition of serious mental illness is both unclear and too narrow. The definition intermingles symptoms and diagnoses, and is not sufficiently clear as to how inmates will be assessed as having a mental disorder and who will make the determination. Further, there are a great number of mental disorders listed and discussed in the DSM-5 beyond psychotic, major depressive and bipolar disorders, and the CD does not address whether inmates with any of these diagnoses will also be excluded from segregation. If a diagnosis is not required for exclusion from segregation, the CD does not explain the nature of the symptomatology that will need to be present and identified for the inmate to be excluded on the basis of behaviour.

**504** As Dr. Blanchette agreed, individuals may have significant impairment as a result of mental disorders other than those included in the definition. She agreed, as well, that inmates with a serious mental illness with *moderate* instead of significant impairment may fare worse in segregation than inmates who do not have the impairment at all.

those who suffer from disorders of impulse control are likely to find their pre-existing condition made worse by the frustration and anger that segregation generates<sup>26</sup>. BCCLA

Dr. Koopman expressed her view that administrative segregation exacerbates symptoms and provokes recurrence of mental disorder. Dr. Martin and Dr. Hannah-Moffat also gave evidence about exacerbation of pre-existing mental illness being one of the harms of the practice<sup>27</sup>.

In Brazeau, the court concluded:

I find as a fact that: (a) administrative segregation as practiced by the Corrections Service is a form of solitary confinement; (b) administrative segregation is harmful and may cause psychiatric injuries; and (c) the harms of administrative segregation are amplified for people who suffer from mental illness<sup>28</sup>.

(b) Legal Findings:

All three cases under consideration made rulings about constitutional invalidity with respect to some aspects of the CCRA regime. Certainly, one can expect the Government to argue that the C-83 regime is different. However, when one examines the nature of the legal conclusions and the underlying analysis, it is clear that they are translatable, at least to some extent, to the C-83 context. As a result, these conclusions must be the starting point for Parliamentary consideration.

BCCLA legal conclusions:

This Court did not find a violation of s. 12 of the *Charter*<sup>29</sup>, but did find various violations of sections 7 and 15, as follows:

Section 7 of the *Charter* is violated on grounds of overbreadth:

Prolonged segregation is both unnecessary for and, indeed, even inconsistent with, the objective of maintaining institutional security and personal safety. While the separation of inmates can be justified for the limited time it legitimately takes to make alternative

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<sup>26</sup> Ibid, at 497

<sup>27</sup> Ibid, at 498

<sup>28</sup> Brazeau at para. 156

<sup>29</sup> BCCLA, at para. 534

arrangements to ensure inmate safety or enable an investigation, indefinite and prolonged segregation with its attendant harms is simply not necessary to enable such steps to be taken. To my mind, there is no rational connection between, for example, the legitimate need for CSC to have the authority to separate inmates who have a conflict with one another and the authority to keep one or both in segregation indefinitely for periods of months or even years<sup>30</sup>.

Accordingly, I find that to the extent that the impugned provisions authorize the isolation of inmates in circumstances where that is not necessary to achieve institutional and personal safety and security [e.g. if an inmate's safety is in jeopardy at the hands of particular inmates], it is overbroad.<sup>31</sup>

Section 7 of the *Charter* is violated on grounds of procedural unfairness:

Section 31 in its present form, logically interpreted, precludes the possibility of inmates being safely managed in these less isolating situations. Take s. 31(3) (c) for example: allowing the inmate to associate with other inmates would jeopardize the inmate's safety. If an inmate's safety is in jeopardy at the hands of particular inmates, it would be logical - and less impairing - to segregate the inmate from those particular inmates, not from all inmates<sup>32</sup>.<sup>335</sup>

Returning to the present case, the existing statutory regime permits the warden to quite literally be the judge in his or her own cause with respect to placement decisions. At a minimum, it creates a reasonable apprehension of bias, if not actual bias, in favour of continued segregation. Because of the serious risk of harm that arises from placements in administrative segregation, I conclude that this lack of impartiality in the review process is contrary to the principle of procedural fairness guaranteed by s. 7 of the *Charter*. Whether procedural fairness necessitates that an independent arbiter adjudicate any such review is the question I turn to next<sup>33</sup>.

..... procedural fairness in the context of administrative segregation requires that the party reviewing a segregation decision be independent of CSC. Such an independent reviewer must have the authority to release an inmate from segregation, not simply make recommendations that the warden may override or disregard. Given that the harms of segregation can manifest in a short time, meaningful oversight must occur at the earliest possible opportunity, certainly no later than the five-day review<sup>34</sup>.

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<sup>30</sup> BCCLA at para. 327

<sup>31</sup> BCCLA, at para. 336 explained in preceding paras.

<sup>32</sup> Ibid at para. 335

<sup>33</sup> Ibid at para. 355

<sup>34</sup> Ibid at para. 410

I conclude that procedural fairness requires that any inmate who wishes to be represented by counsel at an ISRB hearing is entitled to such representation<sup>35</sup>.

With respect to indigenous offenders, the BCCLA court concluded:

On the basis of the evidence presented to the Court, I am satisfied that the impugned laws fail to respond to the needs of Aboriginal inmates and instead impose burdens or deny benefits in a manner that has the effect of perpetuating their disadvantage and thus violating s. 15<sup>36</sup>.

Here, it must be noted that the judge added that the “CSC should make a concerted effort to improve the assessment tools and programs for Aboriginal inmates”<sup>37</sup>.

With respect to mentally-ill prisoners, the Court found that s.15, the equality provision of the *Charter*, was being violated:

On the evidence before this Court, the most serious deficiency in dealing with administrative segregation placements is the inadequacy of the Government's processes for dealing with the mentally ill. I am satisfied that the law (including the newly revised CD 709) fails to respond to the actual capacities and needs of mentally ill inmates and instead imposes burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. Accordingly, I find that the plaintiffs have established a breach of s. 15<sup>38</sup>.

CCLA legal conclusions:

The major legal conclusion of the Ontario Court of Appeal in the CCLA case was a violation of s. 12 of the *Charter*. This was a function of duration, indeterminacy and the inadequacy of the monitoring mechanisms. The Court held:

This evidence led the application judge to conclude that, where administrative segregation exceeds 15 consecutive days, inmates face “foreseeable and expected” harm. As he stated at para. 254, “there is no serious question the practice of keeping an inmate in administrative segregation for a prolonged period is harmful and offside responsible medical opinion.” Inmates under normal prison conditions are not exposed to harm of this sort.

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<sup>35</sup> Ibid at para. 421

<sup>36</sup> Ibid, at para. 489

<sup>37</sup> Ibid at para. 490

<sup>38</sup> Ibid, at para. 522

The effect of prolonged administrative segregation is thus grossly disproportionate treatment because it exposes inmates to a risk of serious and potentially permanent psychological harm.

Even when conscientiously applied by the institutional head, ss. 31(2), 31(3) and 69 do not preclude the possibility of prolonged administrative segregation. I conclude that the legislative safeguards are inadequate to render the Act constitutional.

I would allow the appeal in part and declare that administrative segregation longer than 15 consecutive days as provided for in ss. 31-37 of the *Corrections and Conditional Release Act* violates s. 12 of the *Charter* and cannot be justified under s. 1.<sup>39</sup>

Brazeau legal conclusions:

The legal conclusions in this case are relevant but are limited by the fact that it was a summary judgment in a class action. In order to reach his decision, the trial judge was only required to focus on two sub-classes (a) prisoners who were involuntarily placed in administrative segregation for more than thirty days; and (b) those who were voluntarily placed in administrative segregation for more than sixty days<sup>40</sup>. It is important to note that this case was argued and determined prior to the release by the Court of Appeal of the CCLA decision. Had this been available, the sub-classes used by the judge may have been different. That is, based on 15 day periods rather than 30 days.

Still, it is significant to examine some of the Brazeau specific legal findings especially since the general class was defined as mentally-ill prisoners:

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<sup>39</sup> See, respectively, paras. 98, 99, 115 and 150

<sup>40</sup> Brazeau at para. 17

.....I concluded that Class Members suffered a section 7 breach when they could not access an independent review of the warden's decision to place them in administrative segregation<sup>41</sup>.

Where the placement is involuntarily, I conclude that on a subclass-wide basis, it is not contrary to the principles of fundamental justice, for the Correctional Service to take up to thirty days to resolve the security problem. However, for involuntary placements of a mentally ill inmate, more than thirty days in administrative segregation is a subclass-wide *Charter* breach<sup>42</sup>.

With respect to s. 12, the Court described the violation in these terms:

.....the placement of a seriously mentally ill inmate in administrative segregation goes beyond what is necessary to achieve the genuine and legitimate aim of securing the safety of the institution. Once the placement in administrative segregation exceeds sixty days for a seriously mentally ill voluntarily-placed inmate and once the placement exceeds sixty days for a seriously mentally ill involuntarily-placed inmate, the evidence establishes that the treatment is unacceptable to a large segment of the population. It does not accord with public standards of decency or propriety in the treatment of a mentally ill inmate. It is also unnecessary because there could have been alternative ways less draconian than then equivalent of solitary confinement to address a security concern, and an indeterminate time to resolve a security concern cannot be justified<sup>43</sup>.

As a result, the judge ordered the Government to pay the class \$20 million in *Charter* damages.

#### Analysis of Bill C-83:

Now with this critical background, we can turn our attention to the provisions of Bill C-83. First, I need to repeat that simply changing the name to SIU and reducing the number of hours in a cell to 20 hours does not, by itself, change the context upon which the factual and legal findings were based, especially the centrality of isolation. Also, as I shall point out below, much of the proposed provisions are vague or severely lacking in particulars. The proposed s. 96(g) empowers the Government to pass regulations with respect to “the confinement of inmates in a structured intervention unit”, but until these are produced the Bill remains vague in a number of

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<sup>41</sup> Ibid, at para. 156

<sup>42</sup> Ibid, at para. 317

<sup>43</sup> Ibid, at para. 371

respects. Without specific statutory guarantees, one cannot be satisfied that Bill C-83 adequately addresses judicial concerns as discussed above.

#### Duration of Confinement:

From a *Charter* perspective, Bill C-83 is deficient in a number of respects but the most significant is the issue of duration. The Ontario Court of Appeal in CCLA has mandated 15 days as the constitutional limit of solitary confinement before a prisoner experiences “cruel and unusual treatment or punishment”. The assertion in s. 33 that confinement “is to end as soon as possible” has no practical effect. Moreover, Bill C-83 continues the practice of indeterminacy.

Bill C-83 violates the CCLA mandate as follows:

- after the institutional head confirms the placement in the SIU within 5 days [see s. 29.01(2)], the confinement continues for up to 30 days before it is reviewed again by the institutional head [s. 37.3(1) (b)]

- both of the above timelines for review commence on the day of placement in the SIU but s.37.91(1) permits an additional 5 days prior to the placement during which restrictions “as though the inmate were in a SIU “may be imposed. Thus, we are looking at potential confinement of 35 days.

- if the prisoner remains in an SIU, the next review by the institutional head does not occur for another 30 days, and then “every 60 days” after that [see s. 37.4]

- negative decisions of the institutional head under s. 37.3 (1) (b) are followed after 30 days by a review by the Commissioner

- negative decisions of the institutional head under s. 37.3(2) [a rejection of the recommendation of a registered mental health professional] are then reviewed by a Committee [see s.37.31 (3)] “as soon as practicable”

- the new external review mechanism is only triggered 30 days after each negative Commissioner’s decision and “as soon as practicable” after a negative Committee decision

-s. 37.5 makes reference to transfers to SIU for a “prescribed number of times” but the actual number is left for the regulations. Accordingly, indeterminacy is entrenched in Bill C-3 subject only to a review “in the prescribed manner and within the prescribed period” both of which are left to the regulations.

One can easily see how these cumbersome and delayed procedures work to compound the duration of confinement. They are not structured to expedite SIU decisions or their review.

Criteria for Placement and Continuation of Confinement:

These are set out in s. 34(1) and s. 37.41. The latter reads:

37.41 (1) The institutional head, the Commissioner or the committee established under subsection 37.31(3) may determine that an inmate should remain in a structured intervention unit only if they believe on reasonable grounds that allowing the inmate’s reintegration into the mainstream inmate population (a) would jeopardize the safety of the inmate or any other person or the security of the penitentiary; or (b) would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence.

(2) In making the determination, the institutional head, the Commissioner or the committee, as the case may be, shall take into account

- (a) the inmate’s correctional plan;
- (b) the appropriateness of the inmate’s confinement in the penitentiary;
- (c) the appropriateness of the inmate’s security classification;
- and

(c) any other consideration that he or she considers relevant.

The cases discussed above identified two vulnerable groups for whom solitary confinement can violate the *Charter*: indigenous offenders [BCCLA] and mentally-ill prisoners [Brazeau].

However, neither s. 37.41(1) or (2) address these concerns. Looking at the situation of mentally-ill prisoners, I make a larger observation below. With respect to s. 37.41(1) or (2), there is no specific reference to a mental illness history or the exhibition of symptoms of mental illness.

The word “appropriateness” in s.37.41 (2) (b) and “any other consideration” in s.37.41 (2) (d) are

too vague to remedy this defect. Moreover, the proposed new s.87 (a) does not adequately address this issue.

Bill C-83 does not mandate a mental health assessment at any time during confinement.

Although a prisoner in an SIU shall be seen by a “registered health care professional” every day [s. 37.1(2)] and a staff member “shall refer” to health care any SIU prisoner showing “signs of emotional distress or exhibiting behaviour that suggests “urgent need for mental health care” [s. 37.11, these again are vague and do not address the omission in placement and continuation criteria to refer to mental illness. Although a “registered health care professional” may make recommendations about a prisoner in an SIU [s. 37.2] which triggers a decision by the institutional head “ as soon as practicable”, if the institutional head rejects the recommendation this leads to a review “as soon as practicable” by a Committee established under s. 37.31(3). This is not a process which responds to the concerns about solitary confinement and mentally-ill prisoners in an effective and expeditious manner

With respect to indigenous offenders, the major issue addressed by the BCCLA case related to over-representation and failures to consider indigenous background when making segregation decisions. Bill C-83 attempts to address this problem in s. 79.1, a provision of general application which ought to apply to SIU decisions. I will examine this provision below and address its inadequacy.

#### Conditions of Confinement:

Here, the key question is whether the SIU will counter-act the isolation that lies at the heart of the concerns about solitary confinement. Without seeing an SIU in operation [especially without knowing what regulations will apply], it is not possible to comment comprehensively. We need to know how the SIU will be configured including cell size, cell furnishings, and other available space. We need to know what “meaningful human contact” and “opportunity to participate in programs” [s. 32(1) (a) and (b)] mean. . Bill C-83 contains no guarantees addressed to ameliorating isolation. There are even no guarantees about a matter as simple as reading and writing materials, or even exercise. Even the removal of physical barriers to human contact is qualified by the phrase “every reasonable effort” [s. 37(2)].

Bill C-83 only provides:

36 (1) The Service shall, every day, between the hours of 7:00 a.m. and 10:00 p.m., provide an inmate in a structured intervention unit

(a) an opportunity to spend a minimum of four hours outside the inmate’s cell; and

(b) an opportunity to interact, for a minimum of two hours, with others, through activities including, but not limited to,

(i) programs, interventions and services that encourage the inmate to make progress towards the objectives of their correctional plan or that support the inmate’s reintegration into the mainstream inmate population, and

(ii) leisure time.

Given the judicial findings discussed above, surely the elements of the SIU regime established by Bill C-83 should be clearer and more prescriptive.

Indigenous Offenders:

In the BCCLA case, the court concluded that the use of solitary confinement for indigenous offenders violated their s. 15 “equality” rights. Before turning to the proposed s. 79.1 of Bill C-83, it is helpful to quote one of the BCCLA court’s observations:

“...the OCI has, over the years, cast doubt as to whether the requirement to consider Aboriginal social history has had the desired impact. Most recently in its *2015-2016 Annual Report*, the OCI found insufficient and uneven application of social history considerations in correctional decision-making. The OCI noted, for example, that some inmates' files contained only a brief notation that Aboriginal social history was taken into account with little, if any, explanation how precisely it was considered and applied<sup>44</sup>.”

This comment holds true notwithstanding the existence of CD 702. The proposed s. 79.1 is a provision of general application to all “decisions under this Act” and should apply to the SIU regime. However, s. 79. 1 is defective in two respects. Subsection (1) makes no reference to the offender’s particular family history which should include parents, grandparents and other close relatives and their attendance at residential schools and adoptions out of the community. Subsection (2), while perhaps well-intentioned, has the result of making indigenous background irrelevant to assessments of risk. Instead, it should provide that the factors of indigenous background in subsection (1) cannot support an “adverse inference” about risk.

#### Mentally-Ill Prisoners:

All courts have agreed that the most vulnerable group of prisoners in solitary confinement and those subject to the greater risk of its intrinsic dangers are mentally-ill prisoners. Specifically, both the BCCLA and Brazeau cases found *Charter* violations. The various mental health harms

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<sup>44</sup> BCCLA, para. 478

which supported these legal conclusions are discussed above. However, it is useful to recount some of the corollary judicial observations:

- mental health harms can occur within 48 hours of solitary confinement
- symptoms of mental health harms can be difficult to observe in solitary confinement
- the use of solitary confinement exacerbates symptoms and provokes recurrence of mental disorder.
- harmful psychiatric, psychological, emotional and cognitive consequences can last far beyond release from solitary confinement
- the therapeutic effects of anti-psychotic drugs are diminished in solitary confinement
- the current CD which makes those prisoners with "serious mental illness with significant impairment" inadmissible to solitary confinement is inadequate because it is "unclear and too narrow". The use of a narrow category excludes relevant disorders and relevant symptoms<sup>45</sup>.

It is my opinion that the only *Charter*-compliant legislative response is to prohibit the use of any form of solitary confinement for prisoners with a history of mental illness or who are exhibiting symptoms consistent with mental illness. Thus, all decisions about placement and continuation of confinement must include the mandatory requirement to determine whether a prisoner has a history of mental illness or is exhibiting symptoms consistent with mental illness.

#### External Review:

Although the CCLA case found the current monitoring practices were inadequate, the BCCLA case found that the CCRA scheme of reviews conducted by CSC officials violated the s.7 *Charter* guarantee of procedural fairness. That court required that reviews be conducted by an independent and impartial decision-maker and that the prisoner have a right to counsel. The BCCLA court also held that given that "the harms of segregation can manifest in a short time,

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<sup>45</sup> See BCCLA at paras. 502-503.

meaningful oversight must occur at the earliest possible opportunity, certainly no later than the five-day review.”<sup>46</sup>

Within the reasons of the BCCLA decision, the court examined the debate about who the decision-maker should be. The expert opinion of Professor Michael Jackson advocated a scheme similar to that under the CCRA for disciplinary decisions. A counter-vailing opinion arises from the Commission of Inquiry into Certain Events at the Prison for Women in Kingston conducted by Justice Louise Arbour. The Court quoted her 1996 report:

Justice Arbour went on to say the following at p. 105 of her report:

... I see no alternative to the current overuse of prolonged segregation but to recommend it be placed under the control and supervision of the courts. Failing a willingness to put segregation under judicial supervision, I would recommend that segregation decisions made at an institutional level be subject to confirmation within five days by an independent adjudicator. Such a person should be a lawyer, and he or she should be required to give reasons for a decision to maintain segregation. Segregation reviews should be conducted every 30 days, before a different adjudicator, who should also be a lawyer. It should be open to an inmate to challenge the legality or fairness of his segregation by applying to a court for a variation of sentence in accordance with the principle set out earlier<sup>47</sup>.

However, Bill C-83 has opted for a model akin to the current disciplinary hearing approach in the CCRA rather than judicial review.

In my opinion, the provisions in Bill C-83 for an “independent external decision-maker” are inadequate and do not satisfy procedural fairness requirements. Nor is there a clear analogy to the disciplinary process especially now that C-83 has removed segregation from the list of available disciplinary sanctions [see. Bill c-83, s.11, repealing CCRA, s. 44(f)].

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<sup>46</sup> Ibid at para. 410

<sup>47</sup> Ibid, at para. 360

At a disciplinary hearing conducted by an “independent chairperson”, there is a formal fact-specific charge. The prisoner shall be present<sup>48</sup> and has a right to counsel<sup>49</sup>. The prisoner is entitled to make a full and complete defence<sup>50</sup>. Reports will be adduced, oral evidence can be heard and the Chairperson can order witnesses to attend. The adjudicator can only make a finding of guilt if “satisfied beyond a reasonable doubt, based on the evidence presented at the hearing, that the inmate committed the disciplinary offence in question”<sup>51</sup>. In other words, the issues are about a particular offence and a particular event. A disciplinary hearing is not a competent tribunal to hear Charter claims.

SIU decisions are much more qualitative and the record will consist mostly of opinions about security issues and, perhaps, mental health assessments. More importantly, as well as conformity with the statutory criteria will be the protection of the prisoner’s *Charter* rights. There is also the potential issue of withholding information from the prisoner under s. 37.71(2) which can be based on “the public interest”. Surely, this is a legal question. In the beginning, there will also be other legal questions particularly the need to interpret the statutory criteria. SIU decisions are more complex than the straight-forward factual decisions of a disciplinary hearing.

Looking specifically at the proposed Bill C-83 provisions for “independent external decision-maker” and their reviews:

-the only qualification is “knowledge of administrative decision-making processes in general”

-the authority of an “independent external decision-maker” is only triggered in two situations: (1) 30 days after a Commissioner’s decision under s. 37.41; and (2) “as soon as practicable” after a negative decision from a Committee established under 37.31(3))

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<sup>48</sup> CCRA, s. 43(2)

<sup>49</sup> CCRA Regs., s. 31(2).

<sup>50</sup> Ibid, s. 31(1)

<sup>51</sup> CCRA, s, 43(3)

- there is no requirement to meet the prisoner in person
- there is no right to counsel
- all material can be submitted by documents
- there are no timelines for when the review must begin or finish
- other than s. 37.83 dealing with recommendations about a failure to take all reasonable steps to provide the opportunities under s.36(1), there does not appear to be an express authority in Bill C-83 to direct that a prisoner be removed from an SIU<sup>52</sup>.

Accordingly, relying on the requirements of procedural fairness under s. 7 of the *Charter*, this process is unsatisfactory.

There is much to commend Justice Arbour’s judicial supervision argument especially now that it is clear that solitary confinement can violate Charter guarantees. Judges have the legal and *Charter* experience to ensure that the job is done expeditiously, fairly and right. An analogy can be drawn to 90-day reviews of bail under s. 525 of the Criminal Code recently discussed by the Supreme Court of Canada in *R v. Myers*<sup>53</sup>. The issue for the s. 525 review is one of statutory criteria: *Is the continued detention of the accused in custody justified within the meaning of s. 515(10)?* Section 525 reflects a concern to limit unnecessary pre-trial detention by subjecting earlier decisions to judicial review. The Supreme Court put the onus on the jailer to initiate the review after 90 days of detention and stressed that the review move expeditiously to hearing. Again, this is a situation where *Charter* interests underlie the statutory issue.

If Parliament is concerned to reduce the harms of solitary confinement, judicial review after each decision of the institutional head would be more effective and efficient than the complicated and burdensome Bill C-83 scheme. It would ensure that:

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<sup>52</sup> Section 37.8 uses the word “determine” but does not provide for the removal of the prisoner. Perhaps this will appear in the regulations.

<sup>53</sup> 2019 SCC 18

- (a) The process is expeditious and, thus, does not compound concerns about duration and indeterminacy;
- (b) The decision-maker will be competent to address the relevant questions including questions of law; and
- (c) The decision-maker will have the authority to make any orders required to remedy improper decisions about continued confinement or the conditions of confinement.

General Concern:

Judicial findings have now confirmed the serious harms that can flow from solitary confinement. Consequently, we have seen the judicial concerns about duration and indeterminacy. In this context, it is surprising to see the repeated use in Bill C-83 of “as soon as practicable”. One would have thought that specific short timelines would have been chosen to ensure that solitary confinement would, as the Bill asserts, “end as soon as possible”.

Conclusion:

Bill C-83 is an effort to replace the current CCRA segregation regime with a new SIU regime. This may be laudable. But now that we have serious Canadian judicial rulings on solitary confinement, its harms and its consequential violations of Charter standards, the question is whether Bill C-83 meets those tests. As outlined above, it is my opinion that it fails in many respects.

Professor Allan Manson  
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