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News Release

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Opportunity Missed to Abolish Segregation Despite It Being Ruled Damaging, Discriminatory and Unconstitutional

Canadian superior courts have now twice, in as many months, confirmed that the use of administrative segregation in Canadian prisons is unconstitutional and that it has long-term negative consequences for those subjected to its often torturous conditions. Yesterday, British Columbia Supreme Court Justice Peter Leask reiterated the December 18, 2017, Ontario court finding that administrative segregation is solitary confinement by another name, a practice recognized internationally as a violation of human rights that can amount to torture.

The Court recognized the often devastating impact of segregation on prisoners, yet stopped short of calling all forms of segregation unlawful. The court accepted evidence that segregating prisoners places them at "significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior. … [Permanent] harm is most commonly manifested by a continued intolerance of social interaction, which has repercussions for … [one's] ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison."

Mr. Justice Leask also recognized that Indigenous Peoples, especially Indigenous women, and those with mental health issues are significantly overrepresented in segregation and therefore segregation also violates their equality rights pursuant to section 15 of the Canadian Charter of Rights and Freedoms. Disappointingly, Justice Leask rejected the argument that the practice of segregation discriminates against women. Senator Kim Pate points out, "Paradoxically, although the Court relied on numerous inquiries, human rights investigations, inquest and related reports that consistently exposed and condemned unlawful and discriminatory practices by corrections

in respect of women prisoners, in this decision, the judge apparently accepted the evidence presented by the Correctional Service of Canada. She notes that "Most every other consideration of the treatment of women prisoners — including the most recent reports of the Auditor General of Canada have reached the opposite conclusion and have documented the discriminatory treatment of women prisoners. Moreover, despite the reality that it was data regarding the overrepresentation of Indigenous women in segregated maximum security units in federal prisons for women upon which the Court apparently relied to conclude that Indigenous women are discriminated against and that segregation is isolation, the Court failed to grasp the fundamentally gendered nature of that discrimination. This is not only incredibly disappointing, but rather incomprehensible."

Senator Pate expresses frustration that by failing to centre the experiences of incarcerated women, the court missed the fact that, for women classified as maximum security, their conditions of imprisonment are so isolating that they amount to segregation." She comments, "This decision fails to condemn the discriminatory and severe conditions that all maximum security women endure in Canada."

To illustrate the dangerousness of segregation for women, she refers to the death of Ashley Smith on October 19, 2007, in Grand Valley Prison for Women, which was ruled a homicide by the coroner's jury. Coralee Cusack-Smith, Ashley's mother, observed, "The lawyers and judge talked about the travesties of how Ashley and other women with mental health issues were treated. They then used that information to find that those with mental health issues were more likely to be segregated and that it is discriminatory, but they never pointed out that until the full exposure of what happened to Ash during the inquest into her death, the correctional services [of Canada] did not identify her as having mental health issues." Although the judge recognized that segregation of even a few days can cause irreparable harm, including mental health deterioration, by focusing the discrimination analysis on those who are already labelled as mental health risks, he missed the opportunity to condemn segregation for all, particularly women.

Ashley's mother also criticized the decision for failing to prohibit segregation outright, remarking that a 15-day cap is easily avoided: "Our family cannot believe that the lawyers and the judge are not ensuring an end, not just a limitation, to the use of segregation. Would any of them want to spend even one day in isolation or segregation or any of the other names they use? Would they want their parent or child or anyone else they love to be subject to it? Don't they get it yet? As long as they [Correctional Service Canada (CSC)] can use it, they will. We know of prisoners who are still being moved from prison to prison and being segregated in each prison and the clock is restarted at each prison. A 15-day maximum for each of the 17 moves Ashley experienced would have meant 255 days in segregation for Ashley… Anything but a ban on the use of segregation dishonours Ashley's memory, not to mention the memory of all those who have died since; and, it does a disservice to prisoners everywhere."

Senator Pate warned that although the judgment ruled that segregation must be overseen by a body independent of CSC in light of institutional bias in decision making, non-judicial oversight can be easily compromised. Nearly 22 years ago, following the Commission of Inquiry into Certain

Events at the Prison for Women in Kingston, Louise Arbour concluded that such oversight should be judicial in nature. "Certainly the notion of an independent decision maker with authority to release individuals from segregation is a step in the right direction, but Louise Arbour knew then that to be effective, such oversight should rest with the judiciary. Yet her model was rejected by the government." The oversight model directed by Justice Leask would rely on third-party, not judicial, review. Senator Pate comments that "decades of decision making about prisons reveals that too many third parties, such as those who adjudicate serious disciplinary charges within prisons, hired by corrections often experience challenges exercising their authority in a truly independent manner. Now, more than ever, we need models of correctional oversight that are not so easily compromised."

For Senator Pate, who has devoted nearly four decades to documenting and advocating for youth, men and women in prisons — particularly those subjected to the most restrictive correctional regimes, the judgment marks an important step toward ending segregation and all other forms of isolation and ensuring Charter and human rights protections for prisoners. However, it is also a very disappointing reminder of how much work needs to be done and how far away we still are from such realities. "Independent oversight of CSC decisions with respect to segregation, other forms of isolation and other failures to adhere to the law is essential," said Senator Pate. "By not insisting on a role for the courts in these decisions, the BC Supreme Court has missed an opportunity to correct the injustices experienced by so many prisoners. Mr. Justice Leask seemed to clearly understand that mental health issues should not be treated as, nor trumped by, security issues. It is unfortunate this case will not result in an end to the use of segregation nor in the judicial oversight of CSC policies and decision making that interfere with the integrity of sentences."

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