ICPA 21st Annual Conference, Buenos Aries, Argentina

Plenary session: External Prison Oversight, Dignity and Human Rights

October 29, 2019

Professor Michael Jackson Q.C. Faculty of Law, University of British Columbia, Canada.

A. Why Oversight?

During the course of my work in Canadian prisons I have been challenged by correctional professionals to justify the need for external oversight of their profession. They point out that neither as a university professor nor as a member of the legal profession are my activities subject to such external oversight. My university has its own internal processes, as does the British Columbia Law Society, for assuring that members of the University community and of the legal profession demonstrate competence, integrity and compliance with all governing laws, rules and policies. So they ask "Why should the professionals who work in corrections be subjected to a level of outside scrutiny beyond that deemed appropriate for other professionals who also work in the public interest?" Are correctional professionals less trustworthy, do they have less integrity and competence than other professionals whose work is supervised by their professional organizations? It is a fair question. A fair response requires answers to three questions related to the subject of this plenary session. " "External Prison Oversight, Dignity and Human Rights".

1. "What is special about corrections?"

2. "Why view correctional law, policy and practice through a human rights lens?"

3. "Where does independent /outside oversight fit into a human rights framework?"

So let me begin with what is it that is special about corrections? I suggest there are four characteristics of the correctional environment that mark it out for special vigilance.

Power

No other system of government activity entails as much power over individual citizens' freedom. Correctional authorities control every element of the lives of those sentenced to imprisonment from the basics of food and shelter, clothing, medical care, access to family and friends, recreation, education, and religious observance. Privacy is a rare commodity even for the most intimate moments and the fundamental values of individuality and autonomy are subordinated to the exigencies of power and control. Many of you are familiar with a speech Winston Churchill made over 100 years ago but its recitation is as compelling today in Canada, in Argentina, in the UK, and everywhere else that people are imprisoned, as it was tin 1910.

> *"We must not forget that when every material improvement has been effected in prisons, when the temperature has been rightly adjusted, when the proper food to maintain health and strength has been given, when the doctors, chaplains and prison visitors have come and gone, the convict stands deprived of everything that a free man calls life. We must not forget that all these improvements, which are sometimes salves to our consciences, do not change that position.*[1]

Accountability

We are accustomed and expect that responsibility and accountability of government increases proportionately with the power that the system is authorized to exercise. The sweeping power and, therefore, the responsibility of the correctional system are unparalleled in free society. The exercise of this power in the form of imprisonment occurs behind walls that are intended to keep prisoners inside but they also keep the community outside. The walls are a forbidding barrier that few other than corrections professionals and prisoners have peered behind either directly or even through the media. The barriers are not just concrete and stone walls or razor-wire fences; they involve security practices that control both behaviour and information. The physical separation and security focus makes prison management largely invisible to the public – in contrast with other powerful systems like the courts that operate in a publicly accessible forum. The accuracy of the information that is disseminated is often difficult to confirm though sources other than the correctional system's own communications.

Indifference and fear

Prisons hold people who have little claim over the attention or compassion of the general community. They have broken the legal code that society depends on for order and safety. Some have committed horrible crimes that generate strong feelings of revulsion and fear.

[1] Winston Churchill, a speech made in House of Commons as Home Secretary, July 20, 1910.The full text of this remarkable speech can be found at http://www.justicebehindthewalls.net/03_voices_01_01_00.html

Except in the aftermath of sensational events in prison, the issue of whether prisoners are treated properly is low on the citizenry's list of priorities and nowhere is it a vote getter that attracts much political appeal.

What we have then is a system of great power operating in a forum that is largely inaccessible by the public and media, with only as much public accountability as it takes on itself. To this we must add a fourth characteristic. The history of the prison, in many jurisdictions, has been marked and marred by a cycle of neglect and abuse leading to horrible events, followed by "reform" with new measures and standards put in place to redress the problems. Almost inevitably the measures prove inadequate or the commitment to them decays over time and a new round of abuse begins. In Canada in every generation since the opening of the first penitentiary in 1835, commissions of inquiry, royal commissions and explosive media stories have documented those failures that lead to promises by governments and correctional authorities that this next time we will get it right. There is an uncomfortable truth, that in an advanced democracy that is Canada, a country that holds dear its reputation for respect for human rights, there can be and, if history teaches us anything, there will be abuses that seem to be encoded in the DNA of imprisonment.

The Canadian experience is hardly unique in this regard and many of you from other jurisdictions gathered here today can point to a similar cycle of failed reform and unfulfilled promises.

This takes me to the second question. Why view correctional policy and through a human rights lens? My answer is that the necessary counterbalance to this cycle to ensure the continued improvement of the conditions of confinement and to guard against the failures and abuse is a complex web of laws, policies and practices underpinned by a culture that at its core is intended to address the fundamental need of us all, both individually and collectively, to have our human dignity respected. Our attempts to institutionalize respect for human dignity in society take many forms but together they are referred to as "human rights." Human rights are those rights to humane treatment that come solely from the fact that we are human beings. They are not privileges, not "earned" or deserved" because of what we have or have not done; they are inherent in nature by reason of our common humanity and cannot be cast aside in the name of populist "tough on crime" ideology.

It is easier to implement respect for human dignity and respect of human rights with those we respect, love or feel safe with, but to be sure that they are predictably and consistently available, they must also be the birthright of those we fear and dislike. Prison is the acid test of our commitment to human rights. If we can maintain our commitment in our prisons we can do it anywhere. If not, then respect for our human dignity becomes conditional and, in the case of prisons, based on the decisions of officials operating with the broadest authority in the darkest places of society. Ultimately the preservation of rights for all citizens depends on our preservation of the rights of those in our prisons.

The concept of prison as an acid test was the centerpiece of Winston Churchill's much quoted speech in 1910:

> *all. A calm and dispassionate recognition of the rights of the accused against the state and even of convicted criminals against the state, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry of all those who have paid their dues in the hard coinage of punishment, tireless efforts towards the discovery of curative and regenerating processes and an unfaltering faith that there is a treasure, if only you can find it in the heart of every person – these are the symbols which in the treatment of crime and criminals mark and measure the stored up strength of a nation, and are the sign and proof of the living virtue in it."*[2]

More recently, the Norwegian criminologist, Nils Christie, suggested that the treatment of prisoners was a mirror of the standards that reign in a society:

> *Punishment can then be seen to reflect our understanding and our values, and is therefore regulated by standards people apply every day for what it is possible and what it is not possible to do to others . . . More than a tool for social engineering, the level and kind of punishment is a mirror of the standards that reign in a society. So the question for each and every one of us is: would it be in accordance with my general set of values to live in a state which represented me in this particular way?*[3]

A human rights framework is not something that needs to be "balanced" against prison discipline and control. Rather, it is something through which prison discipline and control is exercised in a professional manner. Discipline and control that is not consistent with the inherent human dignity, and the rights that give legal meaning to that dignity, is simply the naked exercise of power and as such is inevitably abusive. Legitimate discipline and control is necessary but can only be effective in promoting positive change in the individual and avoid being self-defeating, if it is inherently moral and justifiable. Promoting and respecting human rights is not about being soft, it is about being decent. Respect for human rights is a necessary condition for the exercise of correctional authority.

Andrew Coyle, a former governor in the Scottish prison system and the former Director of the International Center for Prison Studies at King's College, London, has summarized the implications of the international instruments that require States to respect the inherent dignity of the human person. In "A Human Rights Approach to Prison Management" he writes:

> *Men, women and children who are in prison are still human beings. Their humanity extends far beyond the fact that they are prisoners. Equally, prison staff are human beings. The extent to which these two groups recognise and observe their common humanity is*

[2] http://www.justicebehindthewalls.net/03_voices_01_01_00.html

[3] Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style,* 2d enlarged ed., [London: Routledge, 1994] at 185-86)

> *the most important measurement of a decent and humane prison. Where such recognition is lacking there will be a real danger that human rights will be abused.*

Protecting human rights also improves operational efficiency The proper behaviour of staff towards prisoners is the key lesson of this handbook. If staff do not behave in a way which respects the prisoner as a person and which recognises the inherent dignity of the person, then any regard to individual human rights becomes impossible. Staff behaviour and the humane and dignified treatment of prisoners should underpin every operational activity in a prison. This is not merely a question of human rights principles. In operational terms it Nils Christie, *Crime Control as Industry: Towards Gulags, Western Style,* 2d enlarged ed., [London: Routledge, 1994] at 185-86)

> *is also the most effective and efficient way in which to manage a prison. In addition to being an abuse of human rights, a failure to observe this obligation can sometimes have legal consequences for the prison administration.*[4]

Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission and a commissioner with the United Nations Human Rights Commission, in a report prepared for the Canadian Commissioner of Corrections, Ole Ingstrup, (under whose impetus the ICPA was founded) offered what he saw as the best argument for observing human rights in a correctional context:

> *[It] is not merely that [these rules] are required by international convention or domestic law, or even that they are intrinsically more civilizing, but that they actually work better than any known alternatives -- for inmates, for staff and for society at large. By preserving such fundamental social rules within the institutional setting, so the argument goes, one improves the odds of eventually releasing a more responsible person.*[5]

I would hope that there is a consensus of those participating in this conference that an indispensable component in reconciling the goals of public safety and justice must be promoting a culture of respect for the rule of law and human rights and holding correctional authorities accountable for abuses of power.

So to my third question, where does external prison oversight fit into this human rights framework?

One of the hard lessons I have learned from my study of the history of the penitentiary and from my 50 years of being involved in Canadian corrections is that there is often a huge gap between the rhetoric and reality of change. We have repeatedly experienced events in Canadian penitentiaries, often in contradiction to the law, policy and stated values of the prison system, that have been huge disappointments in the quest for the humane treatment of prisoners. While prison is one of the most difficult environments to respect human dignity, that means we must be ever more vigilant to ensure that the values that we depend on for our quality of life are extended to those in prison. I continue to profess and advocate that a

[4] Coyle, A., & Fair, H. (2018). A Human Rghts Approach to Prison Management: Handbook for Prison Staff (3rd Edition). London, UK: Institute for Criminal Policy Research Birkbeck, University of London.p.15

[5] Maxwell Yalden, (December 1997). Human Rights and Corrections: A Strategic Model. Correctional Service of Canada: Working Group on Human Rights. p.40

humane prison is a substantially realizable and necessary goal. The fact that many important steps have been taken during my working life speaks to the fact that this goal is shared by many dedicated correctional administrators and staff. But while the achievements are important we must never lose sight of the gaps between the rhetoric and reality. The goal of living in a humane society cannot be surrendered particularly in our prisons.

There are some inescapable facts in understanding this gap between the rhetoric and the reality. Translating the noble language of international human rights covenants into policies and practices that make sense in their daily work to the men and women who are entrusted with the custody of prisoners is made difficult given entrenched correctional practices that are inherently dignity depriving.

Some years ago I was invited to address line officers, program staff and managers at a medium security federal penitentiary. I suggested to staff at the session that as the front line of the Service's interface with prisoners, their professional mandate embraced more than the protection of the public through informed risk management; it also embraced the protection of human rights to which Canada is committed by international covenant and by its own legislation.

After my presentation, a staff member who I hold in high regard spoke to me informally about the difficulty he faced in accepting the human rights agenda. It was not that he did not understand it, he said; indeed, he understood it all too well. But that understanding did not change the physical conditions of the segregation unit, and it was difficult, if not impossible for him as the manager of that unit to reconcile the reality of men confined for twenty-three hours a day in a small cage, fed through a narrow foods slot, with an elevated sense of human dignity and respect for human rights.

Pierre Allard, then Director of Chaplaincy with the Correctional Service of Canada has also captured another difficulty of translating the language of human rights into staff attitudinal and behavioural change. Speaking about CSC's Mission Statement he writes

> *Having a Mission clearly spelled out has great and many advantages. It also has some dangers. For example, we have committed ourselves to respect the dignity of individuals ... These are nice words but words are not enough. We need to internalize the attitudes that the words call forth. The challenge is to learn to create the quality relationships that are called for by our nice words . . . we need wisdom to work with offenders, to care for them as unique individuals. We must go beyond the nice words.*
>
> *The second value enunciated in the Mission, that the offender has the potential to live as a law-abiding citizen, brings with it the dangers of the weight of evil and what evil will do to us. Being involved with prisoners is touching closely the greed, the jealousy, the hatred, the pride, the violence, and all the other ugly faces of evil. Michael Ignatieff, addressing correctional workers, said: "You people are the bureaucrats of good and evil. Even bureaucrats of good and evil burn out; they lose their way; they wonder what they are doing sometimes" . . . Unless we realize the weight of evil and what it does to us, we cannot be honest in saying that we*

believe that the offender can live as a law-abiding citizen. If we fall into the grips of evil, it is going to lead us to cynicism . . .[6]

The fragility of a correctional service living up to its international and domestic human rights standards is not limited to the difficulties of translating rights language into practice. Many of you at that this conference are aware that for many years Canada has had an enviable reputation for being a leader in the field of corrections, both for its human rights and evidence-based policies, grounded in the 1992 legislative framework of the *Corrections and Conditional Release Act* (*"CCRA"*). This legislation, the first comprehensive rewriting of the federal correctional landscape in over 50 years, was explicitly drafted to give legislative bones to the 1982 Canadian *Charter of Rights and Freedoms,* itself a document that gave domestic effect to international human rights covenants.

However In Canada in the first decades of the 21st century we have seen how easy it is for punitive ideology- divorced from evidence based policies - to become transparent and how quickly the already difficult task of inculcating a culture of respect for human rights can be eroded. Yesterday in his lecture Dr Carlos Mahiques, President of the Federal Court of Appeal for Criminal Matters, spoke of the consequences of repression and exclusion when the criminal justice system focuses narrowly on risk and danger. In Canada in very recent history prisoners have experienced first hand the consequences of the politics of exclusion.

Prior to the 2006 federal election in Canada, the Conservative party, at the urging of police, victim and prison guard associations, made promises to examine the operation of the Correctional Service of Canada. Much of the pressure came through the "club fed" campaign that presented to the public the distorted notion that life for those in our federal prison system was equivalent to a holiday resort. After its election in 2006, the conservative government made no effort to hide their intention to make the operation of the justice system much tougher. Prime Minister Stephen Harper also articulated his disdain of academics and lawmakers who would argue that prisoners do not forfeit their human rights.

Beginning in 2007, as a matter of operational reality at national headquarters, in wardens offices and on the correctional line, the *CCRA* was no longer the measure of good corrections. It was displaced by the "2007 Roadmap to Strengthening Public Safety," a report prepared by a panel of experts and hastily put together without full consultation.[7]

---

[6] Pierre Allard, "Beyond the Words," in *Our Story: Organizational Renewal in Federal Corrections,* [Ottawa: Correctional Service of Canada, at 167-71) I was impressed, as were my Canadian colleagues, with the presentations at yesterday's plenary documenting the collaborative work of the Norwegian and the US States of California and Pennsylvania that show a pathway to learning ways to enhance dignity and safety within a human rights framework.

[7] Correctional Service Canada Review Panel, Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety (Minister of Public Works and Government Services Canada, 2007) ("Roadmap"), online: https://www.publicsafety.gc.ca/cnt/cntrng-crm/csc-scc-rvw-pnl/report-rapport/cscrprprt-eng.pdf

In stark contrast to the *CCRA* process where the fullest consultation took place, the time constraints under which the Panel operated severely limited the ability of non-governmental organizations, offenders, and other citizens (including academics) interested in the future of corrections to fully participate and contribute to the Panel's work.[8]

But the greatest contrast between the underlying framework for corrections that informed the *CCRA* process and that of the Roadmap is that in the Roadmap's rendition of public policy there is no reference to human rights. In an almost 200-page report there was no reference to the *Charter of Rights and Freedoms* or to the common law and *Charter* jurisprudence of the Supreme Court of Canada, which together give Canadian legal content to the international human rights standards set out in the Universal Declaration of Human Rights and other international covenants to which Canada is a signatory. The Roadmap's only references to legal rights are presented in the context of diminishing them. In our response to the Roadmap my colleague Graham and I described the Roadmap as a "Flawed Compass" that had no human rights lodestar.

Although a new Liberal federal government 2015, under the leadership of Justin Trudeau, made commitments to reject the punitive, mean-spirited, rights-depriving policies of the Conservative government in favour of a return to the rehabilitative ideal, building upon collaborative partnerships with community groups and Indigenous peoples, the federal correctional landscape in Canada is still in an unfinished process of recovering from a decade of regression.[9]

It is because human rights protection has to compete with the abusive legacy of the penitentiary, with new forms of penal populism that diminish the humanity of prisoners,

---

[8] A detailed analysis of the shortcomings of the Roadmap, is contained in Michael Jackson and Graham Stewart, *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (2009), online: <http://justicebehindthewalls.net/news. asp?nid=78>.

[9] For an account of the impact of this decade of regression see Michael Jackson, Acceptance Speech for Lifetime Achievement Award from Canadian Prison Lawyers Association 42 Dalhousie Law Journal (2019) 1at 11-15 . Ivan Zinger, Human Rights and Federal Corrections: A Commentary on a Decade of Tough on Crime Policies in Canada, (2016) 58 Canadian Journal of Criminology and Criminal Justice, 609 . For two other accounts, one from the perspective of prison staff, and the other from that of prisoners, see Elizabeth Comack, Cara Fabre, and Shanise Burgher The Impact of the Harper Government's "Tough on Crime" Strategy: Hearing from Frontline Workers, Canadian Centre for Policy Alternatives (2015);

> *According to frontline workers, the Harper government's "tough on crime" strategy and restrictive budgetary measures undermine public safety… The "tough on crime" measures and budget cuts have shifted the orientation from rehabilitation to warehousing prisoners. Reduced access to meaningful programming, along with other cost-cutting measures—charging inmates more for room and board and the use of phones, closing full kitchens in the prisons and trucking in frozen meals, and reducing pay levels for prison work—has heightened prisoners' levels of frustration, creating conditions for unrest and violence within the prisons. … According to frontline workers, the Harper government's "tough on crime" strategy and restrictive budgetary measures undermine public safety.* pp.1-2.

See also Jarrod Shook and Bridget McInnis, More Stormy Weather or Sunny Ways? A Forecast for Change by Prisoners of the Canadian Carceral State, *Journal of Prisoners on Prisons*, Volume 26(1&2), 2017.

and the harsh realities of living and working in a prison environment, that external prison oversight assumes such significance.

B. Oversight in Historical Perspective

Although the subject of external oversight appears for the first time as a subject of a plenary session of this conference, its historical origins lie deep in the genesis of the penitentiary itself, particularly to the blueprint of John Howard and the other European prison reformers of the 1770s.

In John Howard's England of the eighteenth century, because of the decentralization of responsibility for prisons, there were no statutory provisions governing the duties of the keeper of a prison, and the local magistrates rarely placed any limitations on his power. Such basic matters as the program of work and the methods of discipline were left to the untramelled discretion of the keepers. Authority in the prison, 'unbounded by formal rule, was by definition arbitrary, personal and capricious.' [10] In the minds of the prison reformers of the 1770s, the abuses of the prison system - cruelty, unsanitary conditions, inadequate dietary provisions, sexual promiscuity, and corrupt administrative practices - were explained by the absence of rules and the lack of supervision by outside authority.[11]

It was in the context of a continuing crisis caused by burgeoning prison populations and a growing scepticism about the efficacy of existing forms of criminal punishment that the seminal work of John Howard, *The State of the Prisons in England and Wales*, appeared in 1777.[12] Howard first became concerned with the crisis in the prison system after his appointment as a county sheriff. Unlike most sheriffs, however, Howard took seriously his obligation to inspect the prisons, and visited every prison in England and Wales. *The State of the Prisons* contains both the record of his observations and his blueprint for radical change. Deeply etched into that blueprint was the disciplinary regime of solitary confinement. Howard's work was unique in its exhaustive treatment of English penal institutions, and it drew strength from the comparative perspective with which he imbued his proposals for reform of the system. Howard also visited a number of the more famous European penal institutions, and they provided him with much of the program of discipline that was eventually set out in the *Penitentiary Act* in 1779.

In his proposals for reform of the prisons, Howard was insistent that punishment, in order to be effective, must maintain its moral legitimacy in the eyes of both the public and the offender. For Howard the most painful punishments and those that aroused the greatest guilt were those that observed the strictest standards of justice and morality.

---

[10] Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1705-1850* (New York: Pantheon 1978), 15.

[11] Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press,1983). *Prisoners of Isolation* has been re-published on the internet at <http://www.justicebehindthewalls.net/book.asp?cis=760>.p.8

[12] John Howard, *The State of the Prisons in England and Wales* (London: J .M. Dent 1929; first published in 1777).

A critical part of the reformers' answer to abuse of power was to ensure that the authority of rules was enforced by inspection through the superintendency of magistrates and by the democratic overview of the general public. In Bentham's model of the 'Panopticon,' the plan for a penitentiary published in 1791, both prisoners and guards were under the surveillance of inspectors. The model further envisaged free admission of the public to the inspection towers to keep the inspectors themselves under surveillance.[13]

John Howard and his Canadian successors understood clearly that only through rules and the vigilance of outside inspection would penitentiaries fulfil their purpose of legitimizing the pain of imprisonment.

Canada's first Penitentiary Act of 1835 had established a local board of inspectors with a general jurisdiction to superintend the administration of Canada's first penitentiary Kingston Penitentiary.[14] However, an 1848 commission found that the local board of inspectors had proved inadequate to the task of controlling the virtual reign of terror that accompanied the administration of Kingston's first warden. For the first seven years of the penitentiary's operation the warden had relied exclusively upon flogging as the sole punishment for offences of all types. The commissioners reported that many of these floggings were inflicted on children: during his first committal in Kingston, an eleven- year-old whose offences were talking, laughing, and idling was flogged, over a three-year period, thirty-eight times with the rawhide and six times with the cats; another boy whose 'offences were of the most trifling description -such as were to be expected from a child of 10 or 11... was stripped to the shirt, and publicly lashed thirty-seven times in eight and a half months.' The commission referred to these and similar cases as examples of 'barbarity, disgraceful to humanity.' The commission, having 'pointed out how likely the unrestricted and continued exercise of arbitrary power is to degenerate into apathy or tyranny,' recommended that in place of the local board of inspectors there be appointed national inspectors directly responsible to the executive of the government with an expanded authority to make rules and regulations, and with clearly defined duties to visit and inquire into the management of the penitentiary.[15]

The 1868 Penitentiary Act transferred control of the penitentiary from a national five-member board of inspectors to a three-member board of directors. In 1875 the role of outside oversight was again transferred to a single inspector of penitentiaries. For the next twenty years the office of inspector was held by one individual, J.G. Moylan and his was the most powerful voice in Canada in penitentiary reform and administration. In many

[13] *Prisoners of Isolation, p.12* online at http://www.justicebehindthewalls.net/book.asp?cid=765&pid=8182013

[14] Kingston Penitentiary, with multiple later additions to the original limestone building, only closed in 2009 after 180 years of operation

[15] *Prisoners of Isolation, pp.28-31 online at* http://www.justicebehindthewalls.net/book.asp?cid=767&pid=827

regards James Moylan can lay claims to being the Canadian founder of external prison oversight. [16]

In his annual reports, Inspector Moylan set forth those principles of prison discipline, first enunciated by John Howard, directed to the need to control abuse of power and ensure fairness and justice within the prison walls. They merit reciting:

> *It is of paramount necessity that prisoners should realize the fact that the rules are carried out fairly and justly. in order that strict and stern discipline be maintained without exciting constant resistance. They must feel, too, that the officers are simply administering the law, and that in any case of abuse of power on the part of an officer, he will be held to a strict accountability.*
>
> *Experience shows that there is no greater mistake in the whole compass of prison discipline than the studied imposition of personal degradation as part and parcel of the punishment*.[17]

Convicts, he explained in 1883, "are all men having one common human nature" and in prison "must be treated upon the universal principles of human nature and by methods as nearly possible assimilated to those methods of education, influence and restoration, which are used towards those who are out of prison." The very fact of imprisonment, he insisted, was punishment enough, and while confined the convict should be regarded as "the ward of the state, whose duty it is to treat him humanely."[18]

The annual reports of Inspector Moylan reveal not only his commitment to what today would be regarded as human rights principles but his high regard for the work and writing that was emerging from the various International prison congresses that were held during this period .In many ways those congresses are historical precedents for the work being done by the ICPA. Inspector Moylan's tenure however also carries lessons relevant to the contemporary political landscape in some of the limitations of external prison oversight that need to be overcome for it to be an engine for reform. Those limitations are well described in a biography of Moylan:

> *Moylan's achievements were severely circumscribed by penitentiary legislation, distance, and the general indifference of Canadian politicians and the public to penitentiary conditions. The 1875 statute not only replaced the directors with an inspector, but brought that official firmly under the authority of the minister of justice. As the power of the minister increased, that of the inspector and of individual wardens waned.*
>
> *The narrowly defined nature of Moylan's position was driven home when various ministers of justice persistently ignored recommendations for change that were clearly inexpensive and commonsensical. In his annual reports Moylan lamented the government's failure to send a representative to international penal congresses or even to follow the example of the province of Ontario, which sent its officers to observe American penitentiaries. His recommendations*

[16] Dictionary of Canadian biography online at http://www.biography.ca/en/bio/moylan_james_george_13E.html

[17] *Prisoners of Isolation, p.34* http://www.justicebehindthewalls.net/book.asp?cid=768&pid=831

[18] James Moylan, Dictionary of Canadian biography

that regular meetings of the wardens be held and that a system of staff training be instituted were also disregarded. Nor did the department act on his concern for female convicts and his suggestion that a separate women's prison be constructed. On several occasions he was blunt about the shortcomings of prison guards and the damage they were doing to efforts to achieve rehabilitation, but even the expression of these views in his reports failed to move the government or parliament. In these circumstances, few significant reforms were achieved in Canadian penitentiary administration in the last quarter of the 19th century.

As an honest administrator and a humane man alert to new movements in penology, Moylan may have been able to make conditions a little more bearable for many prisoners. But perhaps the final significance of his career is that it demonstrates yet again the inability of one individual, no matter how strategically placed, to make much difference in a system founded on solid pillars of parsimony, prejudice, and apathy.[19]

Canada would have to wait for over 70 years after Inspector Moylan's retirement in 1895 before the establishment of the Officer of the Correctional Investigator and what marks the beginning of the modern era of external oversight.

From the vantage of the lessons that history can teach I will now turn to the recent Canadian experience and the different forms in which external oversight has evolved to advance human rights and uphold human dignity.

C. The Spectrum of Oversight

1. The Courts

As a lawyer and law professor it will come as no surprise that I would start with the courts. While the Canadian experience illustrates the important and some would say indispensable role that they play in animating a human rights agenda, I will be making the case that there are other elements of external oversight that are equally indispensable and act in synergy to holding correctional authorities accountable in the arduous journey to uphold human rights and decency.

It is a reflection of the low visibility of the correctional process and the degraded status of the prisoner that in Canada, as in the United States and Britain, judicial intervention in the administration of the deep end of the criminal justice system is a relatively recent phenomenon in the long history of the penitentiary. In *Prisoners of Isolation* I described the advent of the modern era of judicial intervention:

> *At common law, the person convicted of felony and sentenced to imprisonment was regarded as being devoid of rights. A Virginia court declared just over a century ago that a prisoner 'has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.' This view flowed historically from the old English practices of outlawry and attaint, the c1onsequences of which were that the convicted felon lost all civil and proprietary rights and was regarded in law as dead. The warden of Kingston Penitentiary was properly reflecting the traditional status of the felon when in*

[19] James Moylan Dictionary of Canadian biography

1867 he wrote, 'so long as a convict is confined here I regard him as dead to all transactions of the outer world.

Although the concept of civil death was abolished in most common-law jurisdictions by the end of the nineteenth century, the prisoner continued to be viewed in law as a person without rights. It was this view that provided the original rationale for courts in Canada, the United States, and England to refuse to review the internal decision-making of prison officials. That rationale was later supplemented by the view that 'judicial review of such administrative decisions [would] subvert the authority of prison officials, the discipline of prisoners, and the efforts of prison administrators to accomplish the objectives of the system which is entrusted to their care and management.'The effect of this hands-off approach was to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions.[20]

It is a telling commentary on the state of prisoners' rights in Canada that in my first study on prison discipline, conducted in 1972 at a federal medium security penitentiary, I could cite only a single case in which a Canadian court had ruled that prison disciplinary proceedings, under certain restrictive conditions, could be subject to judicial review.

The implications of a correctional system that was effectively immunized from external oversight was revealed in full force in a series of riots in Canada's maximum-security penitentiaries. In the fall of 1976, the British Columbia Penitentiary experienced the most destructive riot in its hundred-year history. When the smoke cleared, damage of over $1.6 million had been sustained; a whole cell block had been destroyed, with the interior walls dividing the cells completely smashed. In the course of the riot, nine prisoners seized two staff hostages in the penitentiary kitchen. The B.C. Penitentiary riot came just nine months after another major incident in which three prisoners had seized sixteen hostages, both correctional officers and classification staff, and held them for three days. The hostage-taking ended when a tactical squad burst into the room in which the hostages were confined and opened fire, killing one of the hostages and severely injuring one of the prisoners.

As the main dome of the B.C. Penitentiary was being destroyed, another major disturbance broke out three thousand miles away, at Laval Institution in Quebec; a week later Millhaven in Ontario, the newest of the penitentiary estate opened in 1971 erupted. This unprecedented trilogy of riots resulted in the appointment of a House of Commons Sub-Committee to undertake a major inquiry. The Subcommittee's report provided a dramatic account of the crisis that engulfed the Canadian penitentiary system in the mid-1970s.

Seven years of comparative peace in the Canadian penitentiary system ended in 1970 with a series of upheavals (riots, strikes, murders and hostage-takings) that grew in numbers and

[20] *Prisoners of Isolation*, p.82 http://www.justicebehindthewalls.net/book.asp?cid=777

size with each passing year. By 1976 the prison explosions were almost constant; hardly a week passed without another violent incident. [21]

In page after page of the Sub-Committee's report, parliamentarians catalogued the continuing failure of the prison system to either reform prisoners or protect society. In its very first paragraph of a chapter of the report entitled "Justice within the Walls.", the Sub-Committee pronounced judgement on the state of prison justice.

There is a great deal of irony in the fact that imprisonment -- the ultimate product of our system of criminal justice -- itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community -- including a prison community -- according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree -- a situation which is hardly consistent with any understandable or coherent concept of justice.[22]

To redress this situation, the Sub-Committee advocated that two principles be accepted. The first was that the Rule of Law must prevail inside Canadian penitentiaries.

The Rule of Law establishes rights and interests under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative powers. In penitentiaries, almost all elements of the life and experience of inmates are governed by administrative authority rather than law. We have concluded that such a situation is neither necessary for, nor has it resulted in, the protection of society through sound correctional practice. It is essential that the Rule of Law prevail in Canadian penitentiaries.[23]

The second principle was that

Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. The arbitrariness traditionally associated with prison life must be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates. [24]

At the time the House of Commons Sub-Committee report was published, Canadian prisoners who sought redress in the courts faced a Catch-22. The only decisions subject

---

[21] House of Commons Sub-Committee on the Penitentiary System in Canada, *Report to Parliament* [Ottawa: Minister of Supply and Services, 1977] [Chairman: Mark MacGuigan] at 5)
[22] at p.85
[23] at p.86
[24] at p.87

to judicial review under prevailing principles of administrative law were those the courts classified as "judicial" or "quasi-judicial," as opposed to "administrative." Broadly speaking, the decisions of bodies given the authority to administer institutions or agencies, with a broad discretion as to how the statutory mandate should be exercised, were classified as administrative. Decisions affecting privileges or interests, as opposed to rights, were also classified as administrative and not subject to judicial review. Within this scheme of classification, with very limited exceptions, decisions made by correctional officials were deemed administrative and non-reviewable. It was not until 1979 that a historic breakthrough in expanding the scope of judicial review for prisoners came to pass. After tracing the development of a parallel line of jurisprudence in the English courts, in which a general duty of fairness had been acknowledged, Justice (later Chief Justice) Dickson rendered this critique of the legalistic doctrine in which only decisions affecting "rights" could trigger judicial review:

> *There has been an unfortunate tendency to treat "rights" in the narrow sense of rights to which correlative legal duties are attached. In this sense, "rights" are frequently contrasted with "privileges," in a mistaken belief that only the former can ground judicial review of decision-maker's actions . . . When concerned with individual cases and aggrieved persons, there is a tendency to forget that one is dealing with public law remedies which, when granted by the courts, not only set aright individual injustice but also ensure the public bodies exercising powers affecting citizens heed the jurisdiction granted them.*[25]

In the particular context of prison disciplinary decisions, Justice Dickson unequivocally laid the groundwork for the modern theory and practice of judicial review of correctional decisions.

> *In the case at bar, the Disciplinary Board… was obliged to find the facts affecting the subject and exercise a form of discretion in pronouncing judgement and penalty. Moreover, the Board's decision had the effect of depriving an individual of his liberty by committing him to a "prison within a prison." In these circumstances, elementary justice requires some procedural protection. The Rule of Law must run within penitentiary walls.*[26]

A year after *Martineau* the Supreme Court took another significant step in the *Solosky* case, by expressly endorsing the proposition that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken away from him by law"[27] In the same case, the court stated that the courts had a balancing role to play in ensuring that any interference with the rights of prisoners by institutional authorities is for a valid correctional goal; it must also be the least restrictive means available and no greater than is essential to the maintenance of security and the rehabilitation of the prisoner.

I spoke earlier of the synergy of different forms of external prison oversight in the long journey of recognizing respecting human rights. It was an independent parliamentary

---

[25] *Martineau* v. *Matsqui Institution Inmate Disciplinary Board,* [1980] 1 S.C.R. 602
[26] *Martineau at 622*
[27] *Solosky* v. *The Queen,* [1980] 1 S.C.R. 821 at 823

committee that in 1976 articulated that it was “essential that the Rule of Law prevail in Canadian penitentiaries’ and that “Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation”. Three years later, the Supreme Court of Canada placed its judicial imprimatur on the importance of judicial review of prison administrative decisions, in holding correctional authorities to account, with the Court’s unequivocal statement that “The Rule of Law must run within penitentiary walls.

The recognition of a common-law duty of fairness represented the first flag in the expanded role of the judiciary "in mapping the contours of powers, rights and privileges which characterize imprisonment in Canada" The second flag was the enactment of the *Canadian Charter of Rights and Freedoms* in 1982.[28] By constitutionally entrenching human and democratic rights and freedoms, the *Charter* has accelerated both the number and the nature of challenges by prisoners to the process and conditions of their confinement. That the *Charter* would become a lightning rod for prisoners and human rights lawyers is hardly surprising, given that it was conceived as a Canadian response to international human rights standards. As described by the Chief Justice of Canada

> *Since the close of the Second World War, the protection of the fundamental rights and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The Charter conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law -- declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms -- must, in my opinion, be relevant and persuasive sources for interpretation of the Charter 's provisions.*[29]

Of all the sections of the *Charter,* it is section 7, which guarantees that the right to "life, liberty and security of the person" cannot be denied "except in accordance with the principles of fundamental justice," that has been most frequently the subject of prisoner litigation. In their application of section 7, the courts have recognized that the concept of liberty is not an all-or-nothing proposition. A prisoner, despite the loss of the most important form of liberty -- that of moving in society as a free person -- still retains a spectrum of liberty interests within the context of institutional life. Decisions affecting discipline, segregation, and transfer may affect these residual liberty interests and must therefore be made in accordance with "fundamental principles of justice." As with the concept of fairness, the content of these principles depends upon the extent to which the liberty interest is impaired, and therefore the degree of procedural protection must be commensurate and proportionate to that impairment.

---

[28] Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11)

[29] *Reference Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 at 348

While there is a close correspondence in the jurisprudence between the common-law concept of "fairness" and the *Charter* 's "principles of fundamental justice," the constitutional nature of the section 7 guarantee has had a significant impact on enhancing the rights of prisoners to procedural protections.[30]

Although it is not commonly recognized, 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. In assessing the developments in correctional law in Canada since 1982, a strong case can be made that the most significant impact of the *Charter* has been in the development of new correctional legislation, culminating in the *Corrections and Conditional Release Act* in 1992.[31] One of the primary purposes of the *CCRA* was to bring correctional legislation into conformity with the *Charter* to ensure that Canadian correctional authority was exercised within a Charter culture of respect for human and democratic rights and not according to the dictates of administrative convenience. Mary Campbell, a former Director General Corrections and Criminal Justice, Public Safety Canada, has suggested that the enactment of the *CCRA* "marked the pinnacle of reform in the modern era" She highlights the statutory recognition of three principles of corrections which are of particular relevance to the protection of prisoner rights: that "the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders"; that "offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence" ; and that "correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure". In Campbell's assessment, "these statements reflect a truly fundamental, indeed revolutionary turning point in statutory protection of inmates' rights. Just these restatements on their own sent a clear and unequivocal message to all players in the system, whether legislators, judges or correctional authorities" [32]. Because this is not a lawyer's conference and most of you are not law professors I have chosen just a few examples of the way in which the external oversight of the courts plays a powerful role in shaping a principled foundation for the correctional landscape.

Sauve[33]

The Sauvé case involved a constitutional challenge to section 51(e) of the Canada Elections Act, which took away the vote from prisoners serving a sentence of two

[30] For a fuller review see Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons,Sector 1 Ch.3 , Corrections, the Courts and the Constitution* online at http://www.justicebehindthewalls.net/book.asp?cid=10. See also See Debra Parkes, "A Prisoners' *Charter*? Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*" (2007) 40:2 UBC L Rev 629

[31] The genesis of the Corrections and Conditional Release Act 1992 as described in more detail in *Justice behind the Walls,* Sector 1 *Ch.3* online at http://www.justicebehindthewalls.net/book.asp?cid=14&pid=304

[32] Mary E. Campbell, "Revolution and Counter-Revolution in Canadian Prisoners' Rights" [1996] 2 *Canadian Criminal Law Review* 285 at 321).

[33] *Sauvé v. Canada* [2002] 3.S.C.R. 519

years or more. Richard Sauvé, serving a life sentence for first-degree murder, advanced the challenge under section 3 of the *Charter of Rights and Freedoms*, which guarantees "every citizen of Canada… the right to vote". My colleague Professor Efrat Arbel has summarized the competing arguments and the Supreme court's ruling:

> *The government made four arguments in support of the voting ban, arguing that prisoner disenfranchisement: (1) enhanced the general purposes of criminal sanction and promoted civic responsibility, (2) enhanced respect for the rule of law, (3) could be justified by reference to social contract theory, and, (4) was an appropriate moral and punitive response to the commission of serious offences.*
>
> *By a narrow margin of five to four, the Supreme Court of Canada declared section 51(e) of the Canada Elections Act unconstitutional. Rejecting all four of the government's arguments, the majority held that the government "had failed to identify particular problems that require denying the right to vote." It held that objectives like enhancing punishment and promoting civic responsibility could be raised in support of any law, and were too vague to justify overriding a constitutionally protected right. Dismissing the government's claims as "abstract" and "symbolic", the majority held that the government did not satisfy the "vigorous justification analysis required by the Charter." If Parliament "can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons," the majority explained, "judicial review either becomes vacuously constrained or reduced to a contest of 'our symbols are better than your symbols'."*[34]

Chief Justice McLachlin used the evocative phrase "citizen-lawbreakers"[35] to describe prisoners and their relationship to *Charter* rights. The significance of this description is that it emphasizes that in any analysis concerning prisoners' rights, prisoners are to be *primarily* understood as citizens and as members of society, and only secondarily as law breakers. Chief Justice McLachlin describes the importance of the "citizen-lawbreaker" description as follows:

> *The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities."* [36](emphasis added)

---

[34] Efrat Arbel Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment (2015) 4 Canadian Journal of Human Rights.This article provides a thoughtful analysis of the implications of *Sauve* beyond the voting rights context.

[35] *Sauvé,* at para. 40.

[36] Sauvé, at para. 47.

The crucial point made by Chief Justice Mclachlin is that even after conviction and imprisonment, an offender remains a rights-bearing individual. The connection between the individual and their human rights is not severed by a finding of criminal guilt and a sentence of imprisonment. Consequently, prisoners' rights include the majority of the most robust rights listed in the *Charter*, including freedom of conscience and religion, freedom of thought, equality rights, the right to life, liberty and security of the person, language rights, and a considerable list of other legal rights.

Chief Justice McLachlin in *Sauvé* subscribes to a vision of prisoners' rights that sees human rights as inherent to every individual, both those that abide by the laws and those that do not. "Charter rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside".[37] Not only is denying prisoners their rights suspect because it effectively removes them from *Charter* protection, it is also suspect because such a blanket denial of rights "runs counter to our constitutional commitment to the inherent worth and dignity of every individual".[38] Therefore, while a prisoner may be legitimately deprived of some *Charter* rights for the purposes of imprisonment,

> *it is another thing to say that a particular class of people for a particular time will completely lose a particular constitutional right. This is tantamount to saying that the affected class is outside the full protection of the Charter. It is doubtful that such an unmodulated deprivation,…is capable of justification…*[39]

A second concern that the court in *Sauvé* raises with regard to depriving prisoners of their rights it that it is "bad pedagogy". The Federal Government in seeking to justify denying federal prisoners the right to vote had argued that it sent an "educative message" about the importance of respect for the law to prisoners and to the citizenry at large. However, Chief Justice McLachlin in *Sauvé* held that denying prisoners rights

> *is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law. .. [It]is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity.*[40]

Inglis [41]

The *Inglis* case arose from a 2007 decision by British Columbia Corrections to cancel a program at Alouette Correctional Centre for Women, which permitted mothers to have their babies with them while they served sentences of provincial incarceration of less than

---

[37] *Sauvé*, at para. 14.
[38] *Sauvé*, at para. 35
[39] *Sauvé*, at para. 46.
[40] *Sauve*, paras 30 and 38
[41] *Inglis v British Columbia (Minister of Public Safety)*, 2013 BCSC 2309,

2 years.[42] The mother child program had been in place since 1973. BC Corrections asserted that the program was cancelled because of a concern about the safety of the infants although it became clear in the course of the court hearing that no evaluation of the risks and benefits of the program had been made before cancellation. Brent Merchant, the Provincial Director of Corrections, testified that the decision to cancel was made not because of a specific problem or review but because he arrived at the opinion that "the mandate of Corrections does not include babies".[43]

The lawyers for the women bringing the case produced extensive evidence supporting the benefits and the importance of the mother/child program including, a psychologist with extensive experience in corrections explaining the extensive research on the importance of the mother child attachment in early childhood, a physician with a background in obstetrics and addiction and the prison physician at Alouette during the pendency of the program. Even experts retained by the government agreed on the central proposition of the womens' case: that it benefits an infant to form a secure attachment with the parent.

I also gave evidence that mother and child programs have a long history in many jurisdictions arounld the world and while not universal they are an important element of contemporary correctional systems. Similar mother child programs to the one in British Columbia were available in modern prisons including the United States, Europe, Australia, and New Zealand federal institutions for women in Canada. With the adoption of both international human rights instruments, particularly conventions recognizing the rights of childen and of women-centric correctional programs, new mother child units are being introduced and there are calls for both increasing and enriching the scope of existing programs.

The Supreme Court of British Columbia ruled that the Provincial government's decision to close the program was unconstitutional and violated the plaintiffs' equality rights, as well as their rights to security of the person. Justice Ross, found that the decision to end the program was not made with due consideration of the best interests of children or the constitutional rights of mothers, nor was the cancellation due to any legitimate fears about potential harm. In fact, the evidence showed that the program was beneficial to mothers, babies, and the prison environment as a whole.

My Canadian colleague Professor Lisa Kerr maintains that Justice Ross's decision in *Inglis "*stands as one of the most significant prisoner rights cases in Canadian history". because " while the structure of the case was a classic setting for judicial deference to be offered to prison administrators— in that it concerned risk assessment, resource allocation, and daily penal operations—the lack of evidence supporting risk could not counter the extensive evidence indicating the benefits of the program".[44]

---

[42] In Canada, offenders sentenced to a term of less than two years serve that in provincial or territorial prisons which operate under legislative and policy regimes distinct from the federal regime.These regimes are however subject to the same constitutional standards of the *Charter of Rights.*

[43] *Inglis,* para 182

[44] Lisa Kerr, Contesting Expertise In Prison Law (2014) 60 McGill LJ 43 at 85

In terms of the legal analysis of this evidence, Justice Ross stated that the "starting point" is the principle that an incarcerated person retains all of her civil rights, other than those expressly or impliedly taken from her by law.[45] As explained by Professor Kerr:

> *The principle of retained rights requires asking an empirical question, namely what rights are compatible with incarceration, and delivering upon their protection. Justice Ross, informed by a significant evidentiary record, found that the program was clearly compatible, given that it had been working for decades in both the province and the federal system*.[46]

> *Justice Ross noted that the evidence did indicate some possibility of harm to infants, but she contextualized that possibility by noting that there was a risk of harm to infants in virtually any environment, including foster care as well as with relatives in the community. In this sense, Justice Ross did not allow the prison to be an entity sealed off from ordinary society, but considered it as just one institutional space on the spectrum of environments that a child, and particularly a child of an incarcerated person, may come to experience. By broadening the spectrum of risk to consider facts beyond prison walls, the prison defendant lost its most reliable litigation trump card. Justice Ross applied family law concepts, spurred by evidence in developmental psychology on the benefits of mother-infant attachment. The defendant argued that family law is not applicable to the jail context and that it was not obliged to consider or to attempt to maximize the best interests of the children. Justice Ross rejected the notion that the jail was responsible only for the positive content of corrections law. Rather, Corrections was responsible for applying the multiple sources of domestic and international law, all of which make clear that the best interests of the child apply to state actions. Justice Ross rejected the compartmentalization of the punishment context and the law that applies there.*[47]

I will defer to later in this paper the most recent and in many ways the most significant Canadian experience on the role of judicial oversight, that of subjecting the conditions of segregation/solitary confinement to the domestic and international standards on human rights protection.[48]

---

[45] As I earlier explained this principle predates the *Charter* and was first endorsed by the Supreme court in 1980 in *Solosky v The Queen*.

[46] Kerr at p.97

[47] Kerr, at pp.88-89

[48] For my North American colleagues at this conference I feel it may be necessary to include this footnote explaining the divergence in the trajectory of judicial intervention/oversight in the US and Canadian courts over the past 40 years. In the US the prisoner rights wave of litigation regarding the conditions of confinement that occurred in the federal courts in the 1960s and 70s, which lawyers such as myself relied upon by in our efforts to challenge Canadian courts to play a larger role in prison oversight, has been partially eclipsed by new forms of judicial deference During this same period Canadian courts have adopted a growing appreciation of the importance of judicial intervention. Professor Lisa Kerr in her analysis of developments in both the US and Canada has described the contraction of judicial oversight in the US:

> *"In the middle of the twentieth century, United States federal courts began to articulate and apply constitutional standards to both federal and state prison systems. Particularly in the 1960s, American courts began to disavow a historical "hands off" doctrine, which held that matters of prison conditions and administration were exempt from judicial review and constitutional law. Over the subsequent twenty years, the federal judiciary decided many cases that recognized individual*

2. Ombuds /Inspectorate offices

Howard Sapers and Ivan Zinger, the former and present Correctional Investigator of Canada, who are both participants in this conference in Buenos Aires, in an earlier

---

> *prisoner rights, and, at times, granted extraordinary remedies that subjected entire state prison systems to oversight and intervention on matters of infrastructure, conditions, and basic policies. While there was no official constitutional change to explain these developments, the emergence of prisoner law in the United States was connected to the Civil Rights Movement and the reforms initiated by the Warren Court. Prisoners were able to latch on to the radical extensions of citizenship rights and democratization that characterized legal change in that period…*
>
> *Once the reform period arrived, it operated intensely. In their detailed study of this period, Malcolm Feeley and Edward Rubin remark that "the entire conditions- of-confinement doctrine was articulated in little more than a decade, after 175 years of judicial silence on its subject matter." The early cases gave rise to evidence about the qualitative features and actual effects of imprisonment, heard in United States federal courts for the first time. Neutral experts emerged in the form of court-appointed receivers and special masters, who would collect data, oversee the implementation of court orders, and report back to federal judges as to progress made and the need for specific further reforms…*
>
> *The first intensive wave of reform did not last long. There was soon a sense that the courts had gone far enough. In 1980, James Jacobs ob served that "the luster of the prisoners' right movement seems to be fading." The larger society had shifted to the "culture of control" caused by high levels of crime, and had experienced the social and political transformations associated with the policies of mass incarceration. Whatever the causes, a shift in judicial attitude and political atmosphere began to constrain prisoner litigation in the United States. Feeley and Rubin point to cases decided between 1979 and 1991 as the key indicators of change. At the legislative level, the 1996 Prison Litigation Reform Act, aimed at curtailing prisoner litigation and limiting the scope of judicial intervention in prison administration even for constitutional claims, was the culmination of the new atmosphere. For now, courts tend to yield to the unchallenged expertise of prison administrators. There are many possible explanations, including, perhaps, a reluctance to encounter the complex and distressing reality of life inside penal institutions. The point here is to see that modern United States courts—rather than using the ancient tools of denying legal standing or flatly rejecting the idea of law-governed prisons—deploy notions of expertise and deference as a means of bypassing prisoner claims.*
>
> *For now, courts tend to yield to the unchallenged expertise of prison administrators. There are many possible explanations, including, perhaps, a reluctance to encounter the complex and distressing reality of life inside penal institutions. The point here is to see that modern United States courts—rather than using the ancient tools of denying legal standing or flatly rejecting the idea of law-governed prisons—deploy notions of expertise and deference as a means of bypassing prisoner claims*Kerr, at pp.64-74

According to Professor Sharon Dolovich, a US expert in prison law, this is still where things stand. It is unknown whether the new Roberts Court, with its Trump-appointed additions of Justices Gorsuch and Kavanaugh, will revisit the standards governing Eighth Amendment prison conditions claims, or what changes they will make if they do. But for those concerned to ensure that state punishment comports with the basic values of "dignity, civilized standards, humanity and decency" embraced by decisions of the Court, the early signs are not promising.

conference in 2010 dedicated to the issue of external prison oversight, provided this review of the history and function of ombuds offices and the circumstances that led to the establishment of the Canadian office:

> *The word ombudsman is Swedish and refers to a representative or agent of the people. In 1809, Sweden became the first country to establish a Parliamentary ombudsman's office with the responsibility to investigate citizen complaints against public officials. More than a century passed before the idea was taken up by another Scandinavian country, Finland, which created an office in 1919. During the last four decades, there has been explosive growth in the spread of ombudsman schemes, particularly in Western Europe and the Americas.*[49]
>
> *The establishment of specialized prison Ombudsman offices is relatively recent, but it continues to gain popularity around the world. Scotland and Northern Ireland are examples of jurisdictions that have recently established a specialized prison Ombudsman office. Many countries view such an office as one of the most effective models of external oversight to address prisoners' complaints and grievances. The specialized expertise and close working relationship with correctional authorities and stakeholders make prison Ombudsman offices oversight bodies capable of unbiased investigations and timely resolution of offender complaints. Historically, most prison Ombudsman offices have been created as a direct result of well-publicized serious human rights violations and to address the chronic inability of internal prison complaint and grievance mechanisms to fairly and effectively respond to offenders' complaints. Canada is no exception in this regard. In 1971, Kingston Penitentiary experienced one of the bloodiest riots in its history. Five correctional officers were taken hostage and a group of prisoners were brutally tortured—two of the prisoners died, thirteen others were seriously injured, and part of Kingston Penitentiary was destroyed. Following the riot, many of the inmates implicated* in the *disturbance were transferred to Millhaven Penitentiary. Subsequently, correctional staff at Millhaven Penitentiary assaulted eighty-six offenders involved in the riot, causing injuries of various degrees. A Royal Commission of Inquiry, chaired by Justice Swackhamer, was appointed to examine these tragic events, and it made strong recommendations to improve the management and operations of the Canadian Penitentiary Service, as it was then known. The Office of the Correctional Investigator (OCI) was established in 1973 pursuant to Part II of the Inquiries Act, in response to Justice Swackhamer's sweeping recommendations for strengthening the accountability and oversight of the federal correctional system. The Office was finally entrenched into legislation on November 1, 1992, with the enactment of the Corrections and Conditional Release Act (CCRA).*[50]

The present legislative framework provides the OCI with broad authority to identify, define and investigate a wide range of problems brought forward by, or concerning, federal inmates or parolees, provided only that such problems result from the conduct of Correctional Service of Canada (CSC) staff and representatives.

> *Such conduct may include everything from board policy initiatives to everyday, operational decision making by staff on the institutional ranges. The Office can initiate an inquiry on*

---

[50] Howard Sapers and Ivan Zinger The Ombudsman as a Monitor of Human Rights in Canadian Federal Corrections (2010) 30 Pace L.Rev. 1512, at 1517-18

the basis of a complaint or on its own initiative. The Correctional Investigator has complete discretion in deciding whether to conduct an investigation and how to carry out that investigation.

The Office addresses the vast majority of inmates' complaints at the institutional level, through discussion and negotiation. When a resolution is not reached at the institution, the matter is referred to regional or national headquarters, depending upon the area of concern, with a specific recommendation for further review and corrective action.

Whenever a matter has not been adequately addressed, the Office's findings and recommendations are presented to the Commissioner of Corrections. That report provides comprehensive information supporting the Office's conclusions and recommendations. If at this level the Commissioner, in the opinion of the Correctional Investigator, fails to address the matter in a reasonable and timely fashion, it is referred to the Minister of Public Safety and eventually may be detailed within an Annual or Special Report.

The Correctional Investigator is, above all, an Ombudsman. This involves a fundamental balancing of authority and functions, which has long characterised the Ombudsman approach. Legislation arms the Office with the operational tools and discretion to carry out thorough investigations on a broad range of offender problems. Nevertheless, the Correctional Investigator may only recommend solutions to offender problems. Recommendations may be directed toward local institutional staff and management, the regional correctional authorities and the national headquarters. Recommendations may be made directly to the Commissioner of Corrections and the responsible Minister and, ultimately, to both Houses of Parliament.[51]

While acknowledging the importance of the OCI's role in resolving individual prisoner problems, in this presentation I want to focus on the significance of this form of external oversight in raising the profile and animating reform of the many systemic problems of the contemporary Canadian prison. The annual reports of the OCI, which are required to be tabled by the federal Minister of Public Safety before both Houses of Parliament, have over the years become the most visible public record of the full spectrum of human rights challenges that imprisonment engages. Supplementing these reports are a series of special reports that have highlighted human rights issues of great importance that would otherwise be far from the public horizon of concern,

The 2017-18 Annual Report, (the latest one published at the time of writing this presentation) is illustrative both of the range of issues and the critical importance of independant external oversight. The report addressed the basic principles of human rights protection, the causes of a major riot in one of Canada's oldest penitentiaries, Openness, Transparency, and Accountability in Corrections, Deaths in Custody, Healthcare in Corrections, and Indigenous Corrections.[52]

Speaking to the need to reaffirm the basic principles applicable to corrections, in the backgrounder that accompanied the release of his latest Annual Report Ivan Zinger in

[51] Sapers and Zinger at.15,19-20

[52] Office of the Correctional Investigator Annual Report 2017-18 https://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-18-eng.aspx; https://www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20172018-eng.pdf

his opening message urges the new Commissioner of Corrections, Anne Kelly, to enhance openness, transparency, and accountability in federal corrections. The report recommends a "back-to-basics" approach to corrections, which recognizes the following:

- Corrections is in the business of Human Rights.
- All rights, except those necessarily restricted as a consequence of incarceration, are retained.
- People are sent to prison as punishment, not for punishment.
- Correctional policy and practice respect diversity and no discrimination based on gender, ethnicity, culture, etc.
- The goals of corrections include safe and humane custody, offender rehabilitation and community reintegration.
- Balance between institutional and community corrections investments.
- Commitment to evidence-based and best practices key to maintaining balance between security and rehabilitation.[53]

Anatomy of a riot

The Annual Report's analysis of the December 2016 riot in the 110-year-old medium security section of Saskatchewan, the most serious riot in recent Canadian history, speaks clearly and loudly to the case for independent oversight. The report's contextual analysis of the precursors to the outbreak of violence, related to unresolved legitimate issues of the adequacy of food services, stands in stark contrast to the CSC's National Board of Investigation conclusion that it was a random and unpredictable event. The OCI case study and analysis of the riot deserves a place in the literature of understanding prison violence. I have set out some of the key passages from the report as they pertain to the issue of the compelling and continuing need for external oversight in a prison system that claims to uphold fundamental human rights.

> *My investigation into the deadly riot at Saskatchewan Penitentiary in December 2016, a full account of which is featured as a special focus in this report, is a case study in prison violence. It is equally a demonstration in public transparency and organizational accountability. The findings and conclusions of CSC's internal National Board of Investigation (NBOI) and report into the riot — to the effect that it was a random, spontaneous, unpredictable and unforeseen event — raised a series of red flags with my Office. These concerns coalesced around the adequacy and appropriateness of CSC investigating itself in the aftermath of a serious incident. That the Service could convene and investigate this incident, which left one inmate murdered, two seriously injured after being assaulted and several others sustaining injuries from shotgun pellets used to quell the riot, without mentioning or coming to terms with the fact that the ranges that incited or instigated riot were overwhelmingly occupied by Indigenous inmates (85%) is perplexing to say the least. More troubling perhaps, the silence on the Indigenous composition and gang dynamics behind the Sask. Pen. riot was allowed to stand uncorrected in the public record of these events.*

[53] Backgrounder to 45th Annual Report to Parliament, https://www.oci-bec.gc.ca/cnt/comm/presentations/presentationsAR-RA1718info-eng.aspx

CSC's internal investigation concluded that the Saskatchewan Penitentiary riot was a spontaneous and random event that could not have been predicted or prevented. The Office's review of the causes and catalysts of the riot concluded otherwise. For example, food quantity and quality issues were contributing factors to the riot, contradicting CSC's claim that the riot was unrelated to food services.

CSC's investigation was superficial and self-serving:

1. *The Board interviewed only one inmate and relied mostly on Management's interpretation of events for its frame of reference.*
2. *The underlying Indigenous composition and gang dynamics of the riot were ignored by the National Board of Investigation (NBOI).*
3. *Little attention, rigour, or insight is brought to bear on identity or understanding the riot's underlying triggers, causes, or catalysts.*

The acts and omissions that led to these oversights serve as further reminders that the Service lacks sufficient and dedicated senior leadership (Deputy Commissioner level) to maintain sustained focus on Indigenous issues in federal corrections. This must be addressed. I have also recommended to the Minister of Public Safety that additional assurance measures are required to enhance the integrity and credibility of investigations mandated by law into serious incidents in federal prisons, inclusive of major disturbances (riots) resulting in injury or death, suicides in segregation and use of force interventions leading to serious bodily injury or death.

As my report on the Sask. Penitentiary riot demonstrates, there are systemic weaknesses in the means and manner in which the Service investigates itself in the aftermath of a serious incident. The findings, lessons learned and recommendations that emerge from its National Board of Investigation (NBOI) exercise rarely match the seriousness of the incidents under review — major disturbances, assaults, riots, serious bodily injury and deaths in custody. These reports are not shared publicly; even internally, circulation seems unnecessarily restrictive.

In fact, the NBOI process, which is intended to promote wider learning, prevention and improvement through peer and investigative review, has become seriously compromised. Conclusions that reflect poorly on the Service are contained. Though findings from the NBOI process are not intended to be used in disciplinary proceedings, the bar that has been established to protect their integrity has now become a barrier to fully investigating the underlying causes of recurring incidents.

These issues are systemic. The impulse to contain bad news runs deep. Internal reviews, investigations and audits focus almost exclusively on policy compliance — even the preventable deaths of Ashley Smith and Matthew Hines failed to raise issues of managerial responsibility or corporate accountability. At the national level, there are not enough senior management eyes looking at decidedly high-risk activities and interventions: use of force, complex mental health cases, suicidal and self-injurious behaviour, to name but a few. The Service continues to assume the risk of running prisons without 24/7 health care coverage. There are only a handful of resources at national headquarters dedicated to conducting national-level reviews of use of force interventions. It is not clear how or if CSC leadership can be assured that the more than 1,200 recorded

use of force incidents that occurred last year were all managed lawfully, in accordance with principles of proportionality, restraint and necessity.[54]

CSC's internal grievance system

Particularly relevant to one of the questions I posed the very beginning of this presentation - why is not sufficient for a correctional system to rely upon its own internal complaints system? - is the 2017-18 Report's commentary on CSC's internal grievance system:

> *While external oversight provides public assurance, it does not guarantee that human rights violations are always detected, remedied or prevented. The rule of law that follows a person into prison must also be internalized. In nearly every aspect of correctional performance, CSC's internal monitoring mechanisms and review frameworks are nowhere as transparent, rigorous or effective as they should be. As a recent internal audit reminds once again, the internal inmate complaints and grievance system is broken, ineffective, dysfunctional, and, in my opinion, likely beyond repair or salvage. For grievances that reached national headquarters (NHQ) for a final decision, the average response time was 217 working days for "high priority" cases, and 281 working days for "routine priority" grievances. National reviews maintained the institutional decision in 97.9% of all cases. Chronic backlogs persist and even the unreasonably protracted response times laid out in CSC policy (not law) are not met 45% of the time. This is not a system that can be relied upon to provide assurance or feedback on CSC operations in real-time.*[55]

This issue of the effectiveness of CSC's internal grievance system has been a recurring issue since the inception of the system in 1973. In 1989-90, the OCI's Annual Report had these highly critical comments to make about the system, sixteen years after its inception:

> *The effectiveness and credibility of any levelled redress mechanism is dependant upon a combined front-end process which is capable, in a participative fashion, of thoroughly and objectively reviewing the issue at question. It also requires a final level within the process which has the courage to take definitive and timely decisions on those issues which are referred to its attention for resolution. At the present time, the Service has a grievance process which at the front-end does very little to encourage offender participation. This in turn seriously compromises the objectivity and the thoroughness of its review. In addition, the final level of the process sometimes has shown itself to be unable to make timely and definitive decisions.*
>
> *I feel the difficulties with the current grievance process are not directly related to its structure or its existing procedures but rather to the lack of commitment and acceptance of responsibility on the part of the CSC's senior management for its operation. An improvement in the effectiveness and credibility of the process will only happen when those responsible for its operation decide to make it work.*[56]

Despite recent changes to the grievance system designed to streamline and improve timely responses, the indictment in the latest Annual Report that the system is "broken,

[54] Annual Report 2017-18
[55] Annual Report 2017-18
[56] Annual Report 1989-90

ineffective, dysfunctional, and, in my opinion, likely beyond repair or salvage" is a full and fair answer to the question "why independent oversight".

Healthcare in Corrections

A theme that has been a focus of annual reports is the adequacy of healthcare in corrections. In his most recent annual report the Correctional Investigator addresses the application of the Mandela rules to healthcare delivery.

> *In my last Annual Report (2016-17), I called on the Service to conduct a compliance review of its health care services, policies, practices and procedures against the most widely respected and comprehensive collection of international prison human rights standards, the revised United Nations Standard Minimum Rules for the Treatment of Prisoners (now known as the Mandela Rules). The Mandela Rules state that clinical decisions may only be taken by the responsible health-care professionals and may not be overruled or ignored by non-medical prison staff. Though a review of the Mandela Rules was purportedly conducted and completed, in response to an Office request for an update, CSC provided no documentation, report or findings to corroborate its claim that CSC health care services are compliant with the Mandela Rules. Saying or believing that the Service is compliant with domestic or international rules and standards is different from demonstrating it. As with many other activities within CSC, transparency would go a long way towards ensuring that health care standards behind bars are demonstrably met.*[57]

The 2017-18 Annual Report explains, in the context of delivery of health services, the importance of adherence to the Mandela rules;

> *There are many areas of correctional health care practice that give rise to clinical role conflicts or ethical dilemmas, where clinical independence and professional autonomy may be impaired or impeded, or where health care providers may feel compelled to follow correctional authority rather than health care rules. Some practical examples of dual loyalties of health care staff include:*
>
> - *Assessing inmates as medically or mentally (un)fit to participate in work or to extend solitary confinement placements, either for disciplinary or administrative purposes.*
> - *Applying, removing, adjusting or monitoring physical restraints to prevent self-injurious behaviour.*
> - *Conducting body cavity searches where there are no medical indications for such actions.*
> - *A restrictive National Drug Formulary that may limit physician prescribing and treatment options.*
> - *Informed versus implied or compelled consent to treatment.*
> - *Post-use of force health care assessments.*
>
> *The issues of concern here relate less to health care professionalism/performance and more to the governance of health care staff. The fact of the matter is that CSC health services are not fully independent or separate from the rest of the organization. Health care personnel working in federal penitentiaries are employed by CSC not the Health Ministry. This situation*

[57] Annual Report 2017-18

necessitates robust accountability and rigorous oversight duly exercised at the national level.[58]

Indigenous over-representaion in Corrections

Indigenous overrepresentation in Canadian prisons casts the darkest shadow of injustice in Canadian society. For good reason therefore It has been the focus of the Correctional Investigator's annual and special reports. It is also an issue where the synergy of different forms of external oversight, in this case academic writing, the courts and the reports of the OCI can be seen.

Over 40 years ago In 1988 I authored a report for the Canadian Bar Association, titled "Locking Up Natives in Canada," in which I provided this account:

> *[A]lmost ten per cent of the federal penitentiary population is native (including 13 per cent of the federal women's prisoner population) compared to about two per cent of the population nationally....Even more disturbing, the disproportionality is growing. In 1965 some 22 per cent of the prisoners in Stony Mountain Penitentiary were native; in 1984 this proportion was 33 per cent. It is realistic to expect that absent radical change, the problem will intensify due to the higher birth rate in native communities…*
> *Prison has become for young Native men the promise of a just society which high school and college represents for the rest of us. Placing this in a historical context, the prison has become for many young Native people the contemporary equivalent of what the Indian residential school represented for their parents*.[59]

In 1999, the Supreme Court of Canada in the *Gladue* case cited this passage as a "disturbing account of the enormity of the disproportion." [60] The Court issued this call to action: "These findings cry out for recognition of the magnitude and gravity of the problem and for responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system."[61]

In the decade between "Locking up Natives" and *Gladue*, the overrepresentation deepened. By 1997 "Aboriginal peoples constituted closer to three per cent of the population of Canada and amounted to 12 per cent of all federal inmates. Later in its

[58] Annual Report 2017-18

[59]Michael Jackson, "Locking up Natives in Canada," a Report by the Canadian Bar Association,1988, reprinted in [1989] 23 *UBC L Rev* 215-300.As elsewhere in the world there have been changes in the language when referring to indigenous populations. At the time of the release of my report 'Natives' was the accepted term. The Canadian Constitution 1982 uses the language 'Aboriginal peoples'. The now commonly accepted reference is to 'Indigenous peoples'. Since the release of "Locking up Natives" there has been a virtual avalanche of documentation. See Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba*, vol. 1, *The Justice System and Aboriginal People* (1991), pp. 431-73; Canada, Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (1996) *Honouring the Truth, Reconciling for the Future* : Summary of the final report of the Truth and Reconciliation Commission of Canada.(2015)

[60] *R v Gladue*, [1999] 1 SCR 688 at para 60
[61] at para 64

judgment the Court referred to the "staggering injustice" these figures represented.[62] In the 20 years since *Gladue*, the figures have only worsened and so it is not surprising that when the Supreme Court of Canada revisited *Gladue* in its 2012 decision in *Ipellee* it did not try to conjure up the next gradation in the scale of injustice.[63]

In the 2017 – 2018 annual report the OCI provides these latest grim figures

> *In the ten-year period between March 2009 and March 2018, the Indigenous inmate population increased by 42.8% compared to a less than 1% overall growth during the same period. As of March 31, 2018, Indigenous inmates represented 28% of the total federal in-custody population while comprising just 4.3% of the Canadian population. The situation continues to worsen for Indigenous women. Over the last ten years, the number of Indigenous federally sentenced women increased by 60%, growing from 168 in March 2009 to 270 in March 2018. At the end of the reporting period, 40% of incarcerated women in Canada were of Indigenous ancestry.*

But as the reports of the Correctional investigator have demonstrated the systemic discrimination of indigenous offenders does not stop at the prison door. This is how Howard Sapers described the situation inside the walls in addressing parliamentarians in 2006 in the tabling of his Annual Report:

> *While the Correctional Service is not responsible for the social conditions and policy decisions which help shape its offender population, it is responsible for operating in compliance with the law and ensuring all offenders are treated fairly. It is therefore with grave concern I am underscoring today that the Correctional Service of Canada falls short of this standard by allowing for systemic discrimination against Aboriginal inmates.*[64]

In 2018, in the *Ewart* case, the Supreme Court, in the context of the legislative mandate in the *CCRA* to " to pursue substantive equality in correctional outcomes by respecting the unique needs of equity-seeking groups, and in particular those of Indigenous persons",[65] cited the Correctional Investigator's special report *Spirit Matters*[66] documenting the manifold ways in which indigenous prisoners experience longer, deeper and more intensive forms of imprisonment. This reflects the important role the Correctional Investigator's reports play in informing public and judicial discourse

> *Numerous government commissions and reports, as well as decisions of this Court, have recognized that discrimination experienced by Indigenous persons, whether as a result of overtly racist attitudes or culturally inappropriate practices, extends to all parts of the criminal justice system, including the prison system.*
>
> *Recent reports indicate that the gap between Indigenous and non-Indigenous offenders has continued to widen on nearly every indicator of correctional performance. For*

---

[62] at para 88

[63] *R v Ipeelee*, 2012 SCC 13.

[64] Annual Report of the Correctional Investigator, 2007–2008,
online: <http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20072008-eng.aspx>.

[65] *R v Ewert* 2018 SCC 30 [2018] 2 SCR 165 para 55

[66] *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Final Report* (2012)

example, relative to non-Indigenous offenders, Indigenous offenders are more likely to receive higher security classifications, to spend more time in segregation, to serve more of their sentence behind bars before first release, to be under-represented in community supervision populations, and to return to prison on revocation of parole.(Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act: Final Report (2012); Canada, Office of the Correctional Investigator, *Annual Report 2015-2016* (2016), at pp. 43-44; Canada, Office of the Auditor General, *2016 Fall Reports of the Auditor General of Canada: Report 3 — Preparing Indigenous Offenders for Release — Correctional Service Canada* (2016).[67]

While the judgements of the Supreme Court have played a pivotal role in identifying how the Canadian correctional system deals with the overrepresentation and systemic discrimination of indigenous offenders, the Court's intervention is intermittent - in this case with the three landmark cases *Gladue, Ipellee* and *Ewart,* spanning two decades. By contrast, the Correctional investigator's annual reports, supplemented by special reports, bring the need for action on this matter before parliamentarians and the correctional authorities on a regular basis. While he does not carry a big stick and does not have the enforcement powers that a declaration or judgement of the Supreme Court does, it is the consistent and persistent message of his reports that demands a remedial response.

D. Solitary Confinement - A Case Study of Synergy

I have chosen this issue not just because the Correctional Investigator has been a powerful voice in moving it to centre stage but also because it best illustrates my point regarding the necessary synergy of multiple forms of external oversight in addressing some of the most abusive forms of imprisonment, forms which, if not by intent, certainly in effect trample on the most essential elements of human dignity and decency.

The interrelationship of these issues and the calls for action to address them has in Canada been the subject of intersecting ombuds reports, academic writing, parliamentary inquiries, royal commissions of inquiry, human rights commissions, NGO reports and court interventions

In April 1994, a series of events began to unfold at the Prison for Women (P4W) in Kingston, at the time Canada's only federal penitentiary for women, that exposed to public view and scrutiny, in a manner unprecedented to that point in Canadian history, the often distant relationship between the rule of law and operational realty. The event started with an attempted escape in which some correctional officers were assaulted as a result of which a male emergency response team from the adjacent Kingston Penitentiary came into the women's prison The videotaped strip searching of women prisoners by this male emergency response team shocked and horrified many Canadians, including correctional staff, when it was shown a year later on national television. The strip search and the subsequent long-term segregation of the prisoners became the subject of both a special

[67] Ewart at para 60

report by the Correctional Investigator and a report by the Commission of Inquiry conducted by Justice Louise Arbour.

The OCI's investigation of the events also included reviews of the CSC's own internal investigation and its videotape of the ERT intervention. On February 1995, given the gravity of the human rights violations, Ron Stewart, the then Correctional Investigator, issued a Special Report, which concluded the following: the force used was excessive; the involvement of an all-male ERT was degrading and dehumanizing to the women involved; the conditions of confinement were punitive and inconsistent with legislative provisions governing administrative segregation; and, the internal investigation conducted by the CSC was at best incomplete, inconclusive and self-serving.[68]

Following the tabling of the special report before Parliament in April 1995, Justice Louise Arbour of the Ontario Court of Appeal (and later a Justice of the Supreme Court of Canada) and UN High Commissioner of Human Rights) was appointed to conduct a commission of inquiry with broad ranging powers. Her report of the Commission of Inquiry into Certain Events at The Prison for Women, released in 1996 was scathing and unflinching in its condemnation of the Correctional Services lack of compliance with the rule of law.[69]

In her report, Justice Arbour addressed each stage of "The Events," including the strip search by the male Institutional Emergency Response Team (IERT), the body cavity searches carried out after the women were segregated, the transfer to the male Regional Treatment Centre, and the subsequent long-term segregation of the women. She also addressed the manner in which the CSC carried out its internal investigation and edited its report, noting in particular the inaccurate and misleading description of the IERT intervention. Her findings in each of these areas that the administration at P4W violated the relevant law and policy were integral elements of her conclusion that the CSC's culture did not respect the rule of law.

With regard to the strip searching of the women by a male emergency response team, she found this to be in clear violation of the relevant law or policy. She went on to say:

> *The process was intended to terrorize, and therefore subdue. There is no doubt that it had this intended effect in this case. It also, unfortunately, had the effect of re-victimizing women who had had traumatic experiences in their past at the hands of men. Although this consequence was not intended, it should have been foreseen.*
>
> *I find that the conditions in which the inmates were left in their cell at the completion of the IERT intervention were, frankly, appalling and I see nothing in the evidence to indicate that these conditions were genuinely dictated by a serious security. concern.*[70]

[68] Ron Stewart, Office of the Correctional Investigator, Special Report February 14, 1995.
[69] Louise Arbour,*Commission of Inquiry into Certain Events at the Prison for Women in Kingston* [Ottawa:Public Works and Government Services Canada, 1996
[70] Arbour pp. 87-8

After the initial events the women involved in the attempted escape were kept in administrative segregation for 8 to 9 months:

> *The prolonged segregation of the inmates and the conditions and management of their segregation was again, not in accordance with law and policy, and was, in my opinion, a profound failure of the custodial mandate of the Correctional Service. The segregation was administrative in name only. In fact it was punitive, and it was a form of punishment that courts would be loathe to impose, so destructive are its consequences . . .*
>
> *The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation . . .*
>
> *If the segregation review process was designed to prevent endless, indeterminate segregation, by imposing a periodic burden on the prison authorities to justify further detention, it proved to be a total failure in this case. … In many instances, the reasons advanced for maintaining the segregation status would have been entirely unacceptable to trigger segregation in the first place.*
>
> *Eight or nine months of segregation, even in conditions vastly superior to those which existed in this case, is a significant departure from the standard terms and conditions of imprisonment, and is only justifiable if explicitly permitted by law. If it is not legally authorized, it disturbs the integrity of the sentence . . .*
>
> *In this instance, this prolonged period of segregation was aggravated by the conditions that prevailed in the Segregation Unit at the Prison for Women at the time. The physical layout of the cells created the worst possible environment. .. For most of their time in segregation, these women had virtually no access to any form of external stimuli. Apart from the painful deprivation of human contact which segregation necessarily entails, they had no access to television and were limited for a time to a communal radio (only introduced in September) and some sparse reading materials.*
>
> *There were no programs available to them, and they were left idle and alone in circumstances that could only contribute to their further physical, mental and emotional deterioration. ..The bitterness, resentment and anger that this kind of treatment would generate in anyone who still allows herself to feel anything, would greatly overweigh the short-term benefits that their removal from the general population could possibly produce.*
>
> *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 Service is delinquent in the way it discharges its legal mandate*.[71]

Justice Arbour saw the events at the Prison for Women not simply as examples of individual deviations from law and policy, but as systemic failures demonstrating the

[71] Arbour, pp. 141-2

absence of a culture that respected the rule of law or individual rights: "The Rule of Law is absent although rules are everywhere." [72]

Justice Arbour made a separate body of recommendations concerning segregation and the legal and administrative regime to bring its management into compliance with the law and the Canadian *Charter of Rights and Freedoms*. She recommended that the management of administrative segregation be subject preferably to judicial oversight but alternatively to independent adjudication. These recommendations were unambiguously related to her general findings that "the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service" and her judgment that "[t]here is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control."[73]

Failing a willingness to put segregation under judicial supervision, Justice Arbour recommended that segregation decisions be made initially at the institutional level, but that they be subject to confirmation within five days by an independent adjudicator who should be a lawyer and who would be required to give reasons for a decision to maintain segregation. Thereafter, segregation reviews with an independent adjudicator would be conducted every 30 days[74].

Justice Arbour specifically addressed the unique and valued role and the limitations of a prison ombudsman to foster a culture of human rights within CSC:

> *Of all the outside observers of the Correctional Service, the Correctional Investigator is in a unique position both to assist in the resolution of individual problems, and to comment publicly on the systemic shortcomings of the Service. Of all the internal and external mechanisms or agencies designed to make the Correctional Service open and accountable, the Office of the Correctional Investigator is by far the most efficient and the best equipped to discharge that function. it is only because of the Correctional Investigator's inability to compel compliance by the Service with his conclusions, and because of the demonstrated unwillingness of the Service to do so willingly in many instances, that I recommend greater access by prisoners to the courts for the effective enforcement of their rights and the vindication of the Rule of Law*[75]

[72] Arbour,p.181

[73] Arbour,p.198. Her preferred oversight model would permit the institutional head to segregate a prisoner for up to three days to diffuse an immediate incident. After three days, a documented review would take place. If further segregation was contemplated, the administrative review could provide for a maximum of 30 days in segregation, no more than twice in a calendar year, with the effect that a prisoner could not be made to spend more than 60 non-consecutive days annually in segregation. After 30 days, or if the total days served in segregation during that year already approached 60, the institution would have to apply other options, such as transfer, placement in a mental health unit, or forms of intensive supervision, with all to involve interaction with the general population. If these options proved unavailable, or if the Correctional Service thought that a longer period of segregation was required, it would have to apply to a court for this determination Arbour, p.191

[74] Arbour, p.192

[75] Arbour,p.194

The Arbour recommendations for making administrative segregation, as the most intrusive and historically the most abused form of imprisonment, subject to independent external review, already had an imprint in the Canadian literature of imprisonment. Over a decade before, in my 1983 book *Prisoners of Isolation: Solitary Confinement in Canada* I described the historical European and American origins of solitary confinement regimes, their adoption in Canada and the genesis of the first Canadian court challenge to the conditions of solitary confinement in the bastille–like BC Penitentiary where in the *McCann* case in 1976 a federal Court judge found those conditions to be cruel and unusual treatment. My objectives in writing the book was not only to expose the serious injustices and abuses of power taking place in segregation units in Canadian penitentiaries but also to bring about fundamental changes in the law to ensure that these injustices would no longer be tolerated. My critique of existing law and practice focused on three interrelated areas: the criteria justifying segregation, the process through which prisoners were segregated and their segregation reviewed, and the conditions under which prisoners were held in segregation. To encourage the creation of a principled and fair process through which segregation decisions were made and a system of checks and balances to protect against the abuse of the involuntary segregation power, I drafted a "Model Segregation Code."[76]

Independent adjudication was the linchpin in the Model Segregation Code. That role exists to ensure that there is a factual basis to justify segregation measured against specific criteria; to assess the reliability of confidential information which cannot be disclosed to the prisoner; to ensure that the prisoner receives a fair hearing and is able to present an answer and defence to any allegations made against him; and to ensure compliance with the time constraints placed upon segregation and with the law regarding the conditions of segregation.

Although some of the language in the Model Segregation Code found its way into the 1992 *CCRA,* albeit in a much diluted form, its central feature of independent adjudication was not adopted. The findings of the Arbour Report regarding the conditions and effects of segregation, post *CCRA,* replicated many of the elements that I had observed in the pre *CCRA* regime in the BC Penitentiary. It is not therefore surprising that Justice Arbour's' recommendations for independent adjudication, including judicial supervision, while building upon my Model Code, were more rigorous.

Unfortunately, in the case of independent adjudication of segregation, neither the Model Segregation Code, nor Justice Arbour's recommendations led to changes in Canadian law. Despite further recommendations from CSC's own Task Force on Segregation, the Working Group on Human Rights, a Parliamentary Sub-Committee reviewing the operation of the *CCRA*, and a report of the Canadian Human Rights Commission, the Commissioner of Corrections steadfastly rejected independent adjudication, convinced, in the face of all competing views, that enhanced internal review was sufficient to achieve fairness and compliance with the rule of law and better met CSC's operational needs.

---

[76] *Prisoners of Isolation,* Appendix A, http://justicebehindthewalls.net/resources/model_code/model_segregation_code.pdf
61 *Prisoners of Isolation*, p. 207

The 2006 the Canadian Journal of Criminology and Criminal Justice devoted a special issue to prison oversight and human rights. In my article, *The Litmus Test of Legitimacy*, after reviewing the history of the attempted reform initiatives, I concluded:

> *It remains my conviction, based on 30 years of research, that independent adjudication of segregation is necessary to ensure a fair and unbiased hearing ... That it is also the conviction of Justice Arbour, the Task Force on Segregation, the Working Group on Human Rights, the Parliamentary Sub-Committee on the CCRA, and the CHRC would seem to all but guarantee the CSC's recognition that it merits space in the correctional legal landscape. In the face of CSC's unremitting resistance, will it now be left to judicial intervention to bring this about? .... If it comes to pass that only through a court judgment will the CSC's administration of the most restrictive form of imprisonment be brought into the gravitational orbit of a culture of rights rather than responding to the CSC's operational concerns, this will provide confirmation of Justice Arbour's pessimistic conclusion that "Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts..."*[77]

As I will soon describe this pessimistic prediction has proven true.

Ashley Smith -A Preventable Death

In 2007, 13 years after the Arbour Report, in one of the new women's institutions opened to replace the old Prison for Women, under a supposedly reformed regime of women-centric corrections, Ashley Smith, a 19-year-old girl, died in a bare segregation cell. When the videotape of her last moments was seen on national television it horrified the nation. Like the incident at the Prison for Women, the death of Ashley Smith became the subject of a special report by the Correctional Investigator, Howard Sapers. Mr. Sapers provided this bleak summary of Ashley Smith's last moments.

> *On October 19, 2007, at the age of 19, Ms. Smith was pronounced dead in a Kitchener, Ontario hospital. She had been an inmate at Grand Valley Institution for Women (GVI) where she had been kept in a segregation cell, at times with no clothing other than a smock, no shoes, no mattress, and no blanket. During the last weeks of her life she often slept on the floor of her segregation cell, from which the tiles had been removed. In the hours just prior to her death she spoke to a Primary Worker of her strong desire to end her life. She then wrapped a ligature tightly around her neck cutting off her air flow. Correctional staff failed to respond immediately to this medical emergency, and this failure cost Ms. Smith her life…*
>
> *With misinformed and poorly communicated decisions as a backdrop, Ms. Smith died - wearing nothing but a suicide smock, lying on the floor of her segregation cell, with a*

[77] The Litmus Test of Legitimacy: Independent Adjudication and Administrative *Segregation,* (2006) 48 Canadian Journal of Criminology and Criminal Justice, 157, p. 191

ligature tied tightly around her neck - under the direct observation of several correctional staff.[78]*.*

There can be no dispute that Ashley Smith was a difficult, disturbed and challenging prisoner. After a stormy experience with the New Brunswick social agencies and youth authorities she was sentenced to closed custody at age 16 after which she incurred 50 additional criminal charges, many of which were related to her response to incidents in which correctional or health professionals were attempting to prevent or stop her self-harming behaviours. As a result she spent extensive periods of time isolated in the "Therapeutic Quiet Unit" (i.e., segregation) at that facility. In January 2006, still on segregation status at the youth facility, Ms. Smith turned 18 years of age. Unfortunately, Ms. Smith's challenging behaviours continued and she found herself once again in criminal court in October 2006 for offences committed against custodial staff. The presiding judge gave Ms. Smith an adult custodial sentence for the new offences. Because the merged adult sentence was more than two years, Ms. Smith was transferred to Nova Institution for Women - a federal penitentiary - on October 31, 2006. Her year in federal custody proved to be as turbulent as her previous incarceration:

> *While in federal custody over 11.5 months, Ms. Smith was involved in approximately 150 security incidents, many of which revolved around her self-harming behaviours. These incidents consisted of self-strangulation using ligatures and some incidents of head-banging and superficial cutting of her arms. Whenever attempts to negotiate the removal of a ligature failed, staff would (on most occasions) enter Ms. Smith's cell and use force, as required, to remove it. This often involved the use of physical handling, inflammatory spray, or restraints. Ms. Smith was generally non-compliant with staff during these interventions.*[79]

Like the incidents at the Prison for Women in 1994, the Correctional Investigator found that what happened to Ashley Smith in 2007 at Grand Valley should not be understood as regrettable but isolated individual lapses in an otherwise robust correctional system. What happened in 2006, as in 1994 "reflected systemic issues that contributed to the environment that permitted the individual failures to manifest themselves - with fatal consequences". As he noted "sadly, these systemic concerns are well known to the Correctional Service and have been the subject of previous comment from this Office".[80]

The Correctional Investigator identified serial and cumulative problems with Ms. Smith's treatment, starting with the failure to respond to her mental health needs, reflecting a stunning and ultimately fatal gulf between the rhetoric and reality of CSC's new mental health strategy:

> *Ms. Smith had significant mental health issues. This fact was well known to the Correctional Service prior to Ms. Smith's arrival at the Nova Institution for Women. In addition, the Correctional Service knew that: Ms. Smith had been in a segregated status*

[78] *A Preventable Death*, Report of the Correctional Investigator , June 2008, released to the Public March 3, 2009, online at http://www.oci-bec.gc.ca/rpt/oth-aut/oth-aut20080620-eng.aspx, paras 5 an 32
[79] *A Preventable Death,* para17
[80] *A Preventable Death,* paras 15 and *86*

since 2003 at the Miramichi Youth Detention Centre, with no significant periods in open population; …

Confinement had had a detrimental effect on Ms. Smith's overall well-being;

Despite this information, the Correctional Service placed Ms. Smith on administrative segregation status - under a highly restrictive, and at times, inhumane regime - and maintained her on this status during her entire period of incarceration.

In addition, despite having Ms. Smith in its custody for over 11 months, and despite having access to previous mental health records, the Correctional Service never made any advancements in its treatment of Ms. Smith. A concrete, comprehensive treatment plan was never put into place for this young woman, despite almost daily contact with institutional psychologists. [81]

A second failure of law and policy was the manner in which Ms. Smith was shuttled from one institution to another, a total of 17 times in less than a year. Section 87 of the CCRA requires that all decisions (including transfer decisions) taken by the Correctional Service take into con-sideration the health status of an inmate. More specifically, CSC's own policy documents (Commissioner's Directive 843 - Prevention, Management and Response to Suicide and Self-Injuries), clearly prohibits the transfer of inmates considered imminently suicidal or self-injurious to an institution other than a treatment facility, unless the psychologist managing the case deems the transfer a necessity to re-duce or eliminate an inmate's potential for suicide or self-injury. The Correctional Investigator concluded that Ms. Smith's transfers were made with no proper consideration of these requirements and

Given that Ms. Smith's mental health needs went unaddressed, that she was actively involved in self-injurious behaviour, and that she was almost constantly on suicide watch, it is my conclusion that the sheer number of transfers to which she was subjected were not only inappropriate, but beyond comprehension.[82]

Ashley Smith's continuous administrative segregation status was a third feature of her imprisonment that the Correctional Investigator found to be in violation of relevant law and policy as well as compounding her inhumane confinement:

I find that the regime put into place to manage her behaviours was overly restrictive. She had very little positive human contact. She was provided with very few opportunities for meaningful and purposeful activity. She spent long hours in a cell with no stimulation available - not even a book or piece of paper to write on.[83]

CSC's decades-old resistance to independent adjudication of segregation has been justified by the Commissioner because the system's robust form of internal review. According to correctional authorities "The legislation and policy surrounding segregation

[81] *A Preventable Death,* paras 22-24
[82] *A Preventable Death,* para 61
[83] *A Preventable Death,* para 38

is very rigorous. Decision-makers are held to the highest standards of accountability."[84] *A Preventable Death* exposed how easily that system had been subverted in Ashley Smith's case.

.

> *… There is a legal requirement for the Correctional Service to review all cases of inmates who are placed on administrative segregation status at the 5-days, 30-days, and 60-days marks. The purpose of these reviews is to closely examine the impact of segregation on the inmate, to determine whether continued placement on this status is appropriate, and to carefully explore and document possible alternatives to continued segregation.*
>
> *…*
>
> *The required regional reviews were never conducted because each institution erroneously "lifted" Ms. Smith's segregation status whenever she was physically moved out of a CSC facility (e.g., to attend criminal court, to be temporarily admitted to a psychiatric facility, or to transfer to another correctional facility). This occurred even though the Correctional Service had every intention of placing Ms. Smith back on segregation status as soon as she stepped foot back into a federal institution. This totally unreasonable practice had the effect of stopping and starting "the segregation clock", thereby negating any review external to the institution on the continuation of the placement in segregation. This in turn assisted in reinforcing the notion that segregation was an acceptable method of managing Ms. Smith's challenging behaviours.*[85]

The Correctional Investigator clearly identified the consequences of CSC's resistance to the concept of independent adjudication and how it contributed to Ashley Smith preventable death:

> *I believe strongly that a thorough external review of Ms. Smith's segregation status could very likely have generated viable alternatives to her continued and deleterious placement on such a highly restrictive form of confinement. There is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care. An independent adjudicator - as recommended by Justice Arbour - would have been able to undertake a detailed review of Ms. Smith's case and could have caused the Correctional Service to rigorously examine alternatives to simply placing Ms. Smith in increasingly restrictive conditions of confinement. At that point, if it had been determined that no immediate and/or appropriate alternatives to segregation were available for Ms. Smith, the independent adjudicator could have caused the Correctional Service to expeditiously develop or seek out more suitable, safe and humane options for this young woman.*[86]

One of the recommendations in *A Preventable Death* addressed independent adjudication:

> *I recommend that the Correctional Service immediately implement independent adjudication of segregation placements of inmates with mental health concerns. This review should be completed within 30 days of the placement and the Adjudicator's decision should be forwarded to the Regional Deputy Commissioner. In the case of a*

---

[84] Correctional Service Canada, *Response to the Coroner's Inquest Touching the Death of Ashley Smith* **(**Ottawa, December 2014)

[85] *A Preventable Death* paras 41-43

[86] *A Preventable Death,* para 93

> *female inmate, the Adjudicator's decision should be forwarded to the Deputy Commissioner for Women.*[87]

In light of the history I have described, CSC's response to this recommendation, in August 2009, was not surprising. In its publicly released response CSC stated:

> CSC does not support the recommendation. However, CSC will be exploring other options that may lead to a revised review process of these segregation placements.[88]

Following the release of *A Preventable Death* an inquest was convened by the Coroner's office of the Province of Ontario into the death of Ashley Smith. The jury in the Ontario Coroner's Inquest heard extensive evidence from Canadian and international experts on the practices around segregation and the treatment of prisoners with mental illness.[89] After concluding that Ashley Smith's death was a homicide, the jury made 104 recommendations including 11 specifically addressing segregation. These included that, in accordance with the Recommendations of the United Nations Special Rapporteur's 2011 Interim Report on Solitary Confinement, indefinite solitary confinement should be abolished and that long term segregation not exceed 15 days.[90]

In its 2014 response to the jury's recommendations CSC objected to the use of the term 'solitary confinement' to characterize the Canadian regime of segregation.

> *To be clear, the term solitary confinement is not accurate or applicable within the Canadian federal correctional system. Canadian law and correctional policy allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives. Administrative Segregation in the federal corrections system is not intended to be a form of punishment. It is an interim population management measure resulting from a carefully considered decision made by the Institutional Head to facilitate an investigation or to protect the safety and security of individuals and/or the institution.*
>
> For these reasons, there are various aspects of the Jury recommendations in the section entitled Segregation and Seclusion that the Government is unable to fully support without causing undue risk to the safe management of the federal correctional system..[91]

In its response, CSC noted that it was currently engaged in a "Segregation Renewal Strategy" that will ostensibly reduce the length and number of segregation placements, prevent unwarranted admissions and motivate offenders for release from segregation

---

[87] A *Preventable Death*, Recommendation 10

[88] Correctional Service Canada, *Correctional Service of Canada (CSC) Response to the Office of the Correctional Investigator's Deaths in Custody Study, the Correctional Investigator's Report: A Preventable Death and the CSC National Board of Investigation into the Death of an Offender at Grand Valley Institution for Women*, August 17, 2009, http://www.csc-scc.gc.ca/publications/rocidcs/grid2-eng.shtml

[89] Office of the Chief Coroner, Province of Ontario, *Inquest Touching the Death of Ashley Smith, Jury Verdict and Recommendations*, December 2013

[90] Recommendations 27 –29

[91] Correctional Service Canada, *Response to the Coroner's Inquest Touching the Death of Ashley Smith* **(**Ottawa, December 2014)

when risk can no longer be substantiated. According to the Service, “this strategy is intended to reframe the thinking about how segregation is used in CSC and strengthen oversight and decision-making. The goal of the strategy is to reduce the reliance on segregation by creating better options and finding more innovative alternatives for safe reintegration.”

In my book *Justice behind the Walls* I described the term "administrative segregation" as providing “benign semantic camouflage for the most intensive form of imprisonment”. The federal government in its response to the jury recommendations had now added to the lexicon of euphemisms for segregation the term “interim population management measure.” Most of the segregated prisoners who I have interviewed over the past 40 years would respond with equal measures of disbelief and anger that their experiences could be so characterized. The Correctional Investigator’s response, in more measured tones, was equally critical.

In his 2014-15 Annual Report Howard Sapers commented on the adequacy of CSC’s response to the Ashley Smith Inquest recommendations and also provided his assessment of the issues and challenges facing CSC in its management of administrative segregation together with his recommendations for reform.

> *The response itself, both in form and content, is frustrating and disappointing…*
> *Though it refers to its response as meaningful, comprehensive and encompassing, this is not a widely held view. Public and stakeholder commentary both on the day of release and since has not been favourable.*
>
> *On many fronts, the response simply misses the mark. It is largely retrospective and backward-looking covering familiar territory rather than committing to a more reform-minded correctional agenda. It fails to support core preventive, oversight and accountability recommendations issued by the jury*
>
> *For more than 20 years, the Office has extensively documented the fact that administrative segregation is overused. .. On April 1, 2014, there were 749 offenders in administrative segregation. There is no escaping the fact that administrative segregation has become the most commonly used population management tool to address tensions and conflicts in federal correctional facilities.. It is so overused that nearly half (48%) of the current inmate population has experienced segregation at least once during their present sentence.*
>
> *Administrative segregation is also commonly used to manage mentally ill offenders, self-injurious offenders and those at risk of suicide. Inmates in administrative segregation are twice more likely to have a history of self-injury and attempted suicide, and 31% more likely to have a mental health issue. 68% of inmates at the Regional Treatment Centres (designated psychiatric hospitals) have a history of administrative segregation, further evidence that the CSC uses segregation to manage behaviours associated with mental illness.*
>
> *The over-reliance on segregation is not uniform; certain incarcerated groups are more affected than others, including federally sentenced women with mental health issues,*

Aboriginal and Black inmates. Aboriginal inmates continue to have the longest average stay in segregation compared to any other group.

In the last ten years, the Office has made 31 separate recommendations to strengthen th administrative segregation governance and accountability framework including:

- *Independent adjudication of administrative segregation placements*
- *Enhanced due process;*
- *Prohibit segregation for those who are seriously mentally ill, self-injurious or Suicidal;*
- *Disallow indefinite segregation;*
- *Create alternatives (intermediate mental health care units) to segregation to meet least restrictive criteria;*
- *Prohibit double-bunking (placing of two inmates in a cell designed for one) in administrative segregation;*
- *Develop alternatives to reduce use of segregation for younger offenders.*

Segregation is the most onerous and depriving experience that the state can legally administer in Canada; it is only fitting that safeguards should match the degree of deprivation. The system desperately requires reform not "renewal." As Canada's prison Ombudsman, I will continue to advocate for significant, meaningful and lasting reforms to the administrative segregation operational and legal framework.

I recommend that the Government of Canada amend the Corrections and Conditional Release Act to significantly limit the use of administrative segregation, prohibit its use for inmates who are mentally ill and for younger offenders (up to 21 years of age), impose a ceiling of no more than 30 continuous days, and introduce judicial oversight or independent adjudication for any subsequent stay in segregation beyond the initial 30 day placement. [92]

Back to the Courts

it was in 2015 that the now decades-old reform initiatives to reform the abuses and preventable deaths caused by a system of indefinite segregation without independent oversight migrated to the courts of Canada.[93] in January two cases were initiated challenging the constitutionality of the federal administrative segregation regime of the *CCRA;* the one in British Columbia Supreme Court by the BC Civil Liberties Association together with the John Howard Association of Canada and the other in the Ontario Superior Court by the Canadian Civil Liberties Association. [94] The cases challenged the

[92] Annual Report of the Correctional Investigator 2014-15

[93] The BC Civil Liberties Association (BCCLA) had filed an earlier challenge in March 2011on behalf of an Indigenous woman, Bobby Lee Worm, who was held in solitary for four years under an extreme regime of segregation that applied only to women, called the "Management Protocol." Based upon my own interviews with an indigenous woman who spent six years under the protocol I have described this regime as 'a purgatory of segregation' because many of the behavioural standards set in the Protocol were virtually impossible to meet. Five months after the filing of the pleadings, in May 2011 CSC announced that it had cancelled the Protocol. CSC offered a settlement to Ms. Worm, ending the litigation avoiding any judicial ruling on the legality of the regime. For details of this case, see Lisa Kerr, "The Origins of Unlawful Prison Policies" (2015) Canadian Journal of Human Rights, Vol. 4, No. 1, 91–119.

[94]

segregation regime on the basis of multiple violations of the *Canadian Charter of Rights and Freedoms..* The legal arguments centered on the extensive evidence of the debilitating psychological effects of indefinite segregation, particularly but not limited to persons with mental illness, the lack of procedural fairness of the admission and review process, the absence of any form of truly independent review and the denial of substantive equality in the treatment of indigenous and women offenders.

Of great significance and building upon the reports of the UN Special Rapporteur on Torture, in November 2015, after the filing of the court challenges, the UN General Assembly unanimously adopted the revised Standard Minimum Rules for the Treatment of Prisoners (the 'Mandela Rules') which included the prohibition of indefinite and prolonged solitary confinement and solitary confinement of prisoners with mental or physical disabilities when their conditions would be exacerbated by such. Of particular importance the Rules provided a definition of solitary confinement [95]

> *For the purpose of the rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.*[96]

The competing arguments in BCCLA judicial challenge was summarized by the trial judge, Justice Leask:

> *The plaintiffs contend that ss. 31-33 and 37 of the Corrections and Conditional Release Act, S.C. 1992, c. 20 (the "CCRA"), authorizing administrative segregation are contrary to ss. 7, 9, 10, 12 and 15 of the Canadian Charter of Rights and Freedoms. They say that the impugned provisions permit indeterminate and prolonged solitary confinement, as that term is understood in international law and accepted worldwide by virtually every organization or professional group conversant with the issue. Segregation, especially when endured for extended periods, has significant adverse effects on the physical, psychological, and social health of inmates; there is no independent oversight of placements in what has been described by the Supreme Court of Canada as a "prison within a prison" The plaintiffs further allege that the impugned provisions have a disproportionate impact on Aboriginal inmates and those with mental illness.*
>
> *The Attorney General of Canada (the "Government") responds that administrative segregation as it is practised in federal correctional facilities is not solitary confinement since inmates have daily opportunity for meaningful human contact. Moreover, the psychological effects of segregation on inmates remain the subject of ongoing and vigorous scientific debate. The Government submits that maintaining institutional security and inmate and staff safety is a complicated task, and that administrative segregation is a necessary tool when no other reasonable alternatives exist. The length of placements is not indeterminate as alleged but, rather, determined by the time required to eliminate the safety or security issue that triggered its use. Accordingly, the Government contends that*

[95] United Nations Economic and Social Council: Commission on Crime Prevention and Criminal Justice, Twenty fourth session Vienna, 18-22 May 2015 E/CN.15/2015/L.6/Rev.1 *Standard Minimum Rules for the Treatment of Prisoners*, Rules 43 and 45

[96] Rule 44

> *the plaintiffs have failed to establish that the impugned provisions are unconstitutional on their face or in their application, and that their claims must therefore be dismissed.*[97]

As can be seen it was a central part of the government's legal defence and its evidence that administrative segregation in Canada did not fall within the definition of solitary confinement as defined by the international instruments. In rejecting this argument Justice Leask found "that administrative segregation as currently practiced in Canada conforms to the definition of solitary confinement found in the Mandela Rules. In particular, I find as a fact that inmates in administrative segregation are confined without meaningful human contact".[98] In support of this finding Justice Leask referenced the evidence of Dr. Craig Haney, that the core harmful feature of segregation is the reduction of meaningful social contact and that the routine interactions between CSC staff and segregated inmates do not constitute meaningful human contact:

> *I mean in the context of solitary confinement contact that is not mediated by bars and fences and tray slots and security glass where people interact the way you and I have interacted, the way we're all of us used to interacting with each other in a meaningful and authentic way.*
>
> *Oftentimes it includes being able to collaborate on purposeful activity in a classroom or in vocational training, in a job, where the activity is social in nature, where it is as normal as possible within a prison setting, but it is meaningful and it is not bound by the very thick psychological barrier that exists between prisoners and staff, which despite the good intentions of many staff members, is virtually insurmountable…*
>
> *And so that – these kinds of pro forma routine rote interactions that take place that are essentially life maintenance functions. A nurse has to come by. There's pill call. Food has to be delivered. People have to check on whether or not somebody is harming themselves. These things are part and parcel of what happens in order to maintain life in these units. This is not meaningful social interaction.*
>
> *Of course it needs to take place in order for people to survive these places, but psychological survival is another matter entirely and those kinds of rote routinized interactions are not meaningful social interaction to sustain someone psychologically.*[99]

Another major dispute addressed in Justice Leask's judgement was whether independent adjudication was a necessary feature of a fair process to comply with the *Charter's* requirement that decisions that affected liberty and security of the person must be made in accordance with principles of fundamental justice. To assist the court in the resolution of this and other legal issues the lawyers for the BC Civil Liberties Association asked that I prepare an expert opinion report based upon my 45 years of research into the operations of the Correctional Service of Canada, particularly in the area of segregation. In that report I made extensive references to the annual and special reports of the Correctional Investigator. Given that the Correctional Investigator is appointed by the Canadian federal government it might surprise you to find that both in the context of my report and other

---

[97] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, paras 2-3
[98] *British Columbia Civil Liberties Association v. Canada*, para 137

[99] *British Columbia Civil Liberties Association v. Canada, para 133*

evidence the lawyers for the government objected to the admissibility of the Correctional Investigator's reports. Justice Leask gave short shrift to their arguments and in the process succinctly explained the importance of an Ombuds office in laying an informed foundation for resolving these important issues.

> *The Office of the Correctional Investigator ("OCI") serves as ombudsman for federally sentenced inmates. Among its statutory responsibilities are the investigation of individual or systemic concerns relating to corrections, and the preparation of annual and special reports. To enable performance of these duties, the OCI has full access to all of CSC's facilities, records and staff.*
>
> *The plaintiffs seek the admissibility of numerous OCI reports pursuant to either the public records exception to the rule against hearsay or the principled approach. The Government objects to their admissibility on both grounds.*
>
> *I refer to OCI reports throughout these Reasons. For the most part, the particular facts or statistics I cite were put to the Government's witnesses in cross-examination and accepted by them as accurate. Where this was not the case, I am satisfied the reports are nonetheless admissible pursuant to the principled approach to hearsay. They are necessary because the Correctional Investigator is not a competent or compellable witness pursuant to s. 189 of the CCRA. They are also reliable because they are compiled by the OCI in the discharge of a public duty on the basis of data maintained by CSC.*[100]

As he stated In his judgement Justice Leask referred to the OCI reports throughout his judgement. He made similar references to my expert report "as one of the leading Canadian experts in his field". Counsel for the Government agreed that Professor Jackson's opinion is "very important" and "should be given considerable respect and weight".[101]

I should state that ever since the inception of the Office of the Correctional Investigator in 1973 I have maintained a professional working relationship with the Office, both of us operating in our different spheres; in my case of academia, human rights advocacy and in the case of the Office of the Correctional Investigator as a prison ombudsman. Justice Leask's summary of the history and failure of internal reform of the segregation system in his judgment demonstrates an important example the synergy of different forms of oversight and its fruition in constitutional litigation.

> *An early proponent of independent adjudication was Professor Jackson, who began advocating for the appointment of independent adjudicators in the early 1970s based on his study of the disciplinary process at Matsqui Institution. In the mid-1970s, the MacGuigan Report recommended that independent chairs preside over disciplinary hearings but it stopped short of endorsing the same for the segregation review boards it was recommending be established, suggesting that the efficacy of the new boards first be tested before being found wanting. Professor Jackson's subsequent research concluded that despite the enhanced procedural protections, abuse of discretionary power continued*

[100] *British Columbia Civil Liberties Association v. Canada* paras 12-14
[101] *British Columbia Civil Liberties Association v. Canada* para 15

in segregation decisions partly due to the absence of a rigorous and independent process of review.

Even after the CCRA came into force in 1992, Professor Jackson's next study of prison decision-making revealed that the new legislation had achieved little in limiting the abuses of segregation. Among the shortcomings in the segregation review process he observed were the lack of reference to the legislative criteria for segregation, and of any critical line of inquiry directed to whether the information available to the SRB [Segregation Review Board] established legal justification for segregation or whether there were reasonable alternatives. In addition, there was no compliance with some of the procedural requirements, such as that the inmate receive any documentation to be relied upon at the five-day hearing three days in advance.

Professor Jackson was, and remains, of the view that locating the decision-making power in an independent adjudicator would enable more rigorous analysis than the present system…[102]

For at least the past 10 years, the OCI has been critical of CSC for failing to adopt some form of independent adjudication. For example, in the Annual Report of the Office of the Correctional Investigator 2004-2005 [2004-2005 Annual Report], the OCI reviewed the history of calls for independent adjudication, beginning with Justice Arbour's report in 1996 and ending with the PSEPC's 2004 recommendation that CSC implement a model of independent adjudication. It recommended that the CSC "immediately adopt the independent adjudication model for administrative segregation proposed by the Department of Public Safety and Emergency Preparedness Canada": 2004-2005 Annual Report at 24.

In its report into Ms. Smith's death, A Preventable Death, the OCI identified numerous ways in which her continuous placement in administrative segregation was in violation of relevant law and policy. It also identified how the involvement of an independent adjudicator could have led to a different outcome for Ms. Smith

More recently in its 2014-2015 Annual Report, the OCI recognized that CSC had, over the years, accepted some of its recommendations regarding administrative policy changes to the segregation framework but had "consistently and repeatedly rejected any call to strengthen oversight and accountability deficiencies".[103]

Rule 45 of the Mandela Rules states that solitary confinement shall be subject to independent review.

CSC has to this day rejected independent adjudication.

There is clearly much overlap in the reasons for independent adjudication advanced by these knowledgeable parties over the years but some themes emerge. Independent adjudication would:

a) ensure an objective consideration of the facts measured against the legislative criteria for segregation free of institutional pressures and bias;
b) cause CSC to more rigorously examine alternatives to segregation;

---

[102] *British Columbia Civil Liberties Association v. Canada* paras 357-60
[103] *British Columbia Civil Liberties Association v. Canada* paras 375-7

c) *increase the level of accountability of the institution and provide inmates with an opportunity to present their case to an individual not affiliated with the institution, thus increasing the perception of fairness;*
d) *ensure compliance with time limits and other legislative and policy requirements of administrative segregation;*
e) *avoid the situation whereby all placement reviews are conducted by individuals who are part of the culture and hierarchy of the CSC, and therefore deferential to other decision-makers; and*
f) *address the failure of repeated attempts at internal reform to ensure procedural fairness*

It is Professor Jackson's opinion, based on his decades of research and experience, that independent adjudication is necessary to ensure both compliance with the procedural and substantive legal provisions of the CCRA, the Regulations and CDs, and the fair balancing of the rights and interests of inmates with the exigencies of institutional administration. In his expert report, he states:

> *The principal lesson to be drawn from my review of the history of segregation over the last 40 years is that neither fairness nor the necessary balance of interests and rights can be achieved without the importation of a system of independent adjudication. That review has also shown that providing correctional managers with assessment tools and procedural guides for how to conduct a segregation review in non-legally binding policy documents (particularly when it includes boilerplate language) has not translated into changes in operational practice.*[104]

On the basis of this and other evidence Justice Leask concluded that

> *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.*[105]

In the Ontario challenge to the administrative segregation regime brought by the Canadian Civil Liberties Association, Justice Marrocco, while echoing Justice Leask's concerns with the absence of fair reviews, was satisfied that CSC could provide the necessary measure of independent review within the Service.[106] Based upon a much fuller evidentiary record and a much more extensive analysis Justice Leask disagreed stating:

> *I find myself in respectful disagreement with Mr. Justice Marrocco in Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 as I believe that the evidence led*

[104] *British Columbia Civil Liberties Association v. Canada* paras 379-82-
[105] *British Columbia Civil Liberties Association v. Canada* para 410
[106] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras 171-6

before me and summarized above demonstrates that CSC has shown an inability to fairly review administrative segregation decisions.[107]

Although both the BC Supreme Court and the Ontario Supreme Court found the administrative segregation regime unconstitutional, and concurred that the evidence that established that indefinite segregation under the conditions in Canadian federal prisons caused serious psychological harm, there were many differences in the two court's analysis. A common feature however was that, following judicial precedents previously established in this type of constitutional litigation, the declarations of invalidity were suspended for one year to give the government an opportunity to introduce new legislation that would address the constitutional infirmities identified in the judgements.

The federal government appealed the BC and Ontario decisions to the respective provincial courts of appeal. Both the BC and Ontario Courts of Appeal upheld the lower court decisions that the administative segregation provisions of the *CCRA* infringed the *Charter*, but with reasons for judgment that depart in significant ways from one another and from the approaches taken at trial. This is not the place to go into these jurisprudential differences. For those who are interested in understanding more about the differences in the courts' reasoning and findings together with the complexities of Canadian *Charte*r jurisprudence, my colleague Professor Lisa Kerr has provided an excellent succinct analysis.[108] Both appeal court judgements are now before the Supreme Court of Canada who will hear the case in 2020.

Solitary confinement has also been the subject of other litigation proceedings. Paralleling the challenges the BC Civil Liberties Association and the Canadian Civil Liberties Association two class-action cases were initiated in which prisoners held in administrative segregation sued for damages for breaches of their Charter rights. In *Brazeau*[109] Justice Perell of the Ontario Superior Court, based upon an extensive record, accepted that "administrative segregation as practiced by CSC is a form of solitary confinement, that it is harmful and may cause psychiatric injuries, and that the harms of administrative segregation are amplified for people who suffer from mental illness".[110] Following the findings made in the BCCLA and CCLA cases Justice Perell found that the legislation violated s. 7 of the Charter by failing to provide for an adequate review process for placements in administrative segregation, particularly the absence of any independent review mechanism. This first finding of a Charter violation affected the entire class comprising 2000 prisoners. Justice Perell further found that there was cruel and unusual punishment for the mentally ill inmates placed involuntarily into administrative segregation for longer than 30 days, or placed voluntarily into administrative segregation for more than 60 days.

---

[107] *British Columbia Civil Liberties Association v. Canada,* para 409

[108] Lisa Kerr The End Stage of Solitary Confinement 55 C.R. (7th) 382.Professor Kerr's article also contains an analysis of some of the other contexts in which the conditions of solitary confinement have had a direct impact on sentencing.

[109] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888

[110] *Brazeau,* para 156

The distinctive feature of these class actions is that they are not limited to seeking relief in the form of declarations of unconstitutionality of the *CCRA* administrative segregation regime but claimed monetary damages. Justice Perell held that damages payable by the Canadian government to the whole class were justifiable, based upon the need for vindication and deterrence. Justice Perell quantified the Charter damages as $10,000 for each of the estimated 2,000 class members, totalling $20 million This amount was not to be divided up between the class members but was to be distributed in the form of additional mental health or program resources for structural changes to penal institutions. He justified his damages award by the finding that:

> *[424] For decades, academic research, commissions, inquiries, inquests, court cases, domestic and international organizations, and the Correctional Investigator have recommended that the Correctional Service change its policies and practices with respect to the treatment of seriously-ill inmates placed in administrative segregation. The vindication of the Class Members' Charter rights requires that the Federal Government be directed to do what it ought to have done for decades.*
>
> *[425] None of these Charter damages are for compensatory purposes, which is a function that will be left to the individual issues trials. The funds are to remedy to the harm caused to society which has suffered from the Correctional Service's failure to comply with the Charter and also its failure to comply with the spirit of the Corrections and Conditional Release Act and its purpose of rehabilitating mentally ill inmates to return to society rather than worsening their capacity to do so by the harm caused by prolonged solitary confinement.*[111]

Not surprisingly the initiation of the litigation in British Columbia and Ontario, even before the trial judgements were released had already had its impact on CSC's corporate focus.[112] The combination of the unremitting criticism by the Correctional Investigator, increased media attention and the eyes of two provincial Supreme Courts on CSC's use

---

[111] *Brazeau*, paras 424-5. This award of damages was without prejudice to the individual class members in further proceedings pursuing damages based upon for their own particular experiences in segregation.

[112] After the Arbour Report in 1994 CSC had commissioned a Task Force on Segregation, in which both I and legal counsel of the Office of the Correctional Investigator participated. The interim audits of the Task Force, prior to the release of its final report, brought about significant changes to CSCs operational practice and compliance with procedural requirements. While acknowledging this progress, the Task Force warned about the difficulties of sustained change if CSCs corporate focus changed to other priorities.

> *On the one hand, the CSC has demonstrated that, given the necessary corporate will, leadership, and resources, it can significantly improve its ability to comply with the basic procedural requirements of the law… Since the CSC's focus could easily shift to other areas in the future, the Task Force believes it critical that mechanisms be put in place to ensure that recent progress is sustained. Consequently, the Task Force recommends that a Segregation Advisory Committee be created with membership from inside/outside the CSC to continue to shape an effective and compliant administrative segregation process within a fixed time frame. (Task Force on Administrative Segregation: Commitment to Legal Compliance, Fair Decisions and Effective Results* [Ottawa: Correctional Service of Canada, March 1997, p.18

That recommendation was never implemented by the Commissioner; nor was another key recommendation relating to independent adjudication.

of segregation had a demonstrable impact on reduction in the use of segregation. In the four years from the time of the initiation of the litigation to the date of the judgements CSC dramatically decreased its resort to segregation, halving the number of segregated prisoners and significantly reducing the average time spent in segregation. Dr. Zinger suggested this explanation:

> *Today [November 2018) there are about 400 inmates in administrative segregation. The Correctional Service of Canada should be commended for having reduced, by half, the number of segregated inmates in the last four years. The average length of time in segregation has also been reduced significantly and now stands at about 22 days on average.*
>
> *However, as I mentioned, the law pertaining to administrative segregation has not changed since 1992. So, how did the Correctional Service of Canada reduce segregation by half when the current provisions already and clearly state that the placement in segregation should take place when all other alternatives have been exhausted and as a last resort?*
>
> *For me, the answer is clear. The answer is: discretion. For years, the CSC has used segregation as a population management tool. Only sustained corporate focus, brought on by litigation and a growing public concern for this practice, domestically and internationally, has brought the CSC more into compliance with the law, the current CCRA.*[113]

Bill C-83, Reform or rebranding?

In response to the courts' judgements that the administrative segregation provisions of the *CCRA*, notwithstanding the reduction in the number of segregated prisoners, was unconstitutional, the federal government introduce legislation in 2018 amending the *CCRA.* In introducing the new legislation Public Safety Minister Goodale claimed the bill "will eliminate segregation and establish a fundamentally different system focused on rehabilitative programming and treatment. Its new approach will allow us to separate inmates when necessary to maintain safety, while at the same time ensuring that those inmates receive mental healthcare, programming, and meaningful, face-to-face human contact." In place of administrative segregation the legislation introduces into the lexicon of Canadian imprisonment "structured intervention units".[114]

These units, which involve the reconfiguration of existing segregation units, are part of a new regime that would allow prisoners to be allowed a minimum of four hours outside their cells per day with at least two hours of human contact, The legislation sets out the purpose and structure of the units

> *32.1 The purpose of a structured intervention unit is to*
> *(a) provide an appropriate living environment for an inmate who cannot be maintained in the mainstream inmate population for security or other reasons; and*

[113] Evidence of Dr.Ivan Zinger, Correctional Investigator of Canada, Standing Committee on Public Safety and National Security, November 20,2018 . At the time of the passage of new legislation in June 2019 the number had been further reduced to just over 300.

[114] Bill C-83- An Act to amend the Corrections and Conditional Release Act, Ch.27 Statutes of Canada, 2019

(b) provide the inmate with an opportunity for meaningful human contact and an opportunity to participate in programs and to have access to services that respond to the inmate's specific needs and the risks posed by the inmate.

33.An inmate's confinement in a structured intervention unit is to end as soon as possible.

36(1) The Service shall provide an inmate in a structured intervention unit

(a) an opportunity to spend a minimum of four hours a day outside the inmate's cell; and
(b) an opportunity to interact, for a minimum of two hours a day, 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.[115]

The legislation, however, provides no caps on the length of time a person can be detained in the unit beyond the vague promise that it is "to end as soon as possible". As originally drafted the decision to place a prisoner in a structured intervention unit is made by the warden and not an independent adjudicator and is subject to only internal review by the Commissioner with no provisions for independent outside review.

When first announced the legislation was heavily criticized for being a reform in name only, designed to get around the court judgements and reconfigure the regime of segregation units sufficiently to take them out of the of the definition of solitary confinement as defined by the Mandela Rules. The Canadian Bar Association in its submission to the House of Commons Committee on Public Safety and National Security considering the legislation expressed the opinion that the provisions were "too vague and do not provide the necessary procedural safeguards to address any abuse of this new configuration of conditions of confinement."[116] What was seen as a particular glaring omission was that no temporal limit was placed on how long someone could be kept in one of the new units and that the admission and review process lacked what was seen as the indispensable quality of independent review.

The Correctional Investigator has in his annual reports commented on the existence of so-called alternatives to administrative segregation which in practice amount to what he he has characterized as 'segregation lite", a separate range or block of cells with very restricted living conditions and absent any of the procedural protections, however flawed, that exist under the *CCRA* with administrative segregation. In his evidence before the Standing Committee, Dr. Zinger had this to say of the new structured intervention units:

> *As correctional investigator, I welcome the intent of Bill* C-83, *which proposes to eliminate the use of solitary confinement as defined by the United Nations in the newly revised Nelson Mandela rules—that is, less than 22 hours in cell. I am concerned, however, that this bill as it stands may not lead to the intended and laudable outcome and may even*

[115] Sections 32-6.

[116] Submission of Canadian Bar Association to Standing Committee on Public Safety and National Security House of Commons, November 18, 2018

result in an increase in the use of restrictive confinement. Indeed, the structured intervention units, or SIUs, which would replace administrative and disciplinary segregation as we know it may simply become "segregation lite".

I am specifically concerned that the bill fails to provide for independent or external oversight of SIU placements and eschews the need for procedural safeguards of any kind. Eliminating solitary confinement is one thing, but replacing it with a regime that imposes restrictions on retained rights and liberties with little regard for due process and administrative principles is inconsistent with the Corrections and Conditional Release Act as well as the charter.

Whenever rights and liberties are deprived, there is a corresponding obligation to provide safeguards proportionate to the degree of the deprivation. SIUs are, by design and intent, restrictive confinement environments, even if they allow for more out-of-cell time than current administrative segregation. The simple fact of the matter is that an inmate housed in an SIU would have not the same rights as other inmates or be able to exercise those rights, due to what the bill itself concedes are "limitations specific to the Submission of structured intervention unit or security requirements". In effect, Bill C-83 proposes a softer version of segregation without any of the constitutional protections. The bill is uniformly short on specifics and places too much discretion and trust in correctional authorities to replace segregation with an unproven and not well-conceived correctional model. [117]

Other critics, most notably Independent Senator Kim Pate, were more skeptical about the governments real purpose in introducing the legislation. In Sen. Pate's words "Rather than ending segregation, Bill C-83 rebrands administrative segregation as "structured intervention units". [118]

Senator Pate's intervention requires further elaboration in the context of the spectrum of external oversight. Prior to her appointment as an independent Senator Kim Pate in her role as Executive Director of the Elizabeth Fry Society had been an impassioned advocate for human rights for all prisoners but particularly incarcerated women. Together with the Correctional Investigator she had played a pivotal role in the Arbour commission and more recently in the Ashley Smith inquiry. Her a voice and advocacy for human rights became amplified by her appointment to the Senate and her ability to convince fellow senators to conduct their own ongoing independent inquiry of the state of Canada's federal penitentiaries.[119] The knowledge gained through that inquiry gave the Senators a greater ability to conduct their own evaluation of Bill C-83

Thus when Bill C 83 was reviewed by the Canadian Senate a raft of amendments were proposed. Most significantly, Superior Court oversight would be required for any prisoner

---

[117] Evidence of Dr.Ivan Zinger,Correctional Investigator of Canada, Standing Committee on Public Safety and National Security, November 20,2018

[118] Senator Kim Pate Solitary by another name is just as cruel: November 16, 2018 https://sencanada.ca/en/sencaplus/opinion/solitary-by-another-name-is-just-as-cruel-senator-pate/

[119] Senate Standing Senate Committee on Human Rights, *Interim Report for Study on the Human Rights of Federally-Sentenced Persons: The Most Basic Human Right is to be Treated as a Human Being (1 February 2017 – 26 March 2018)* https://sencanada.ca/content/sen/committee/421/RIDR/Reports/RIDR_Report_Prisioners_e.pdf

kept in a structured intervention unit for more than 48 hours, When the bill moved back to the House of Commons, while the House rejected the proposal to have superior court oversight it did strengthen the original internal review process by way of requiring an 'independent external decisionmaker" separate from the institution and the Commissioner. [120] This decision maker will review each case 60 days after a prisoner has been placed in a unit and would continue to review that case. The external decisionmaker can also intervene if the person has not received their requisite time outside their cell. Whether this form of external review will prove effective to prevent the abuses of the past will depend very much upon the independence and abilities of those appointed to the position.

A further additional feature of the new regime, announced in September 2019, is the appointment of a Structured Intervention Unit (SIU) Implementation Advisory Panel to be chaired by Dr. Anthony Doob, professor emeritus of criminology at the University of Toronto. The eight-person panel will help monitor and assess the implementation of SIUs established by Bill C-83.[121] Professor Doob is one of the most respected voices on the Canadian criminal justice system. His appointment along with that of another member, Ed McIsaac, the former long serving and distinguished executive director of the Office of the Correctional investigator, augers well that this committee will take its responsibilities very seriously.[122]

Even as amended and now passed into law, the legislation contains no caps on the duration of time that imprisonment can be kept in the new units; the oversight process is not at the initial placement stage; nor does the prisoner have the right to appear before the independent external decision-maker or the right to counsel although the prisoner is to be given an opportunity to make written representations.

The new units are just now being opened and so the question remains to be determined, and it will likely be ultimately determined by a court, whether this is a reformed system that will bring an end to the abuse of human rights that administrative segregation regime has wrought, or a rebranding. It will be equally likely that the early warning signs feared by many as the inherent defects in the new regime will be documented by the Correctional Investigator pursuant to his office's ongoing ombuds oversight.

Adam Capay and Provincial Corrections; Out Of Oversight, Out of Mind

So far my focus has been on federal corrections. However, as recent experience in the Province of Ontario demonstrates, external oversight is equally important to safeguard the human rights of thousands of prisoners – most of whom are on remand awaiting trial - in provincial institutions. Paul Dube, the Ombudsman of Ontario, in another presentation

[120] Sections 37.6-7

[121] https://www.canada.ca/en/public-safety-canada/news/2019/09/government-appoints-expert-advisory-panel-to-monitor-new-correctional-system.html
A similar recommendation for an external advisory committee made some 23 years before by CSC's own Task Force on Segregation but never implemented might have accelerated substantive reform.

[122]

at this conference will be describing in more detail his work and his report *Out Of Oversight, Out of Mind* addressing the abuses of segregation in Ontario. For the purposes of my presentation I feel it is necessary to relate the circumstances that gave rise to his report as they demonstrate an uncomfortable truth, that in an advanced democracy that is Canada, a country that holds dear its reputation for respect for human rights, there can be and, if history teaches us anything, there will be abuses that seem to be encoded in the DNA of imprisonment.

As has happened before in Canadian history it was the air of publicity given to an individual case that precipitated reform. In his executive summary to his report Mr. Dube describes the impetus for his inquiry and subsequent developments.

> *In October 2016, the Chief Commissioner of the Ontario Human Rights Commission was visiting the Thunder Bay Jail when she discovered Adam Capay, 24, who was awaiting trial on a murder charge. He had been in segregation for more than 1,500 days – four years and counting – yet the Ministry had neglected to include his placement in the statistics it had provided to the Commission regarding segregation placement durations. He was living in a Plexiglas-fronted cell under bright lights, which never dimmed. Shortly after hearing about this case, I sent investigators to Thunder Bay to look into his circumstances. What they found was greatly concerning, and together with the high volume of complaints we had received, confirmed that the use of segregation remained a serious systemic issue. Accordingly, I asked our Special Ombudsman Response Team to begin identifying the issues and drafting an investigation plan.*
>
> *While this planning process was ongoing, the government announced it would "begin an overhaul" of the use of segregation The Ministry appointed Howard Sapers, the former Correctional Investigator of Canada, to examine the use of segregation and recommend comprehensive reforms to the broader correctional system. The stated targets of the review included reducing the number of people in segregation and the length of those placements, improving the conditions of confinement for segregated inmates, developing appropriate alternative placements for vulnerable inmates, and improving oversight of inmates and correctional institutions.*[123]

As with the case of Ashley Smith the case of Adam Capay makes for chilling reading. He was charged with murder in connection with the June 3, 2012 stabbing death of another prisoner inside a provincial jail. Mr. Capay prior to his incarceration already had serious personal challenges, summarized by one expert as an "extremely impaired medical and social background." Mr. Capay was in a "significantly disturbed state of mind" and was likely suffering from a mental disorder at the time of the killing. The attack, which was captured on video, was unprovoked and had no obvious or logical motivation. The nature of his four and a half years of confinement awaiting trial is described by Justice Fregeau of the Ontario Superior Court:

---

[123] Paul Dube, Ombudsman Ontario, *Out of Oversight, Out Of Mind* https://www.ombudsman.on.ca/resources/reports-and-case-summaries/reports-on-investigations/2017/out-of-oversight,-out-of-mind#Executive%20Summary

Between June 4, 2012, and December 6, 2016, the accused was held in segregation for a total period of 1,647 days, primarily at the Thunder Bay Jail (1,505 days) with the exception of four periods of time totaling 142 days when he was temporarily transferred to the Kenora Jail.

The accused spent 847 days in Block 1 of the Thunder Bay Jail. Block 1 consists of a range of seven cells with a bunk bed in each cell. The cells are separated from each other by solid walls. Each cell has bars on the front of the cell with Plexiglas over the bars. The cells are situated within a slightly larger locked area that is enclosed by bars, known as the day area. There is a shower and two telephones in Block 1. There is no television or radio, and the lights are kept on 24 hours a day. On occasions when the accused was let out of his cell into the day area, he was always alone.

The accused spent 237 days in Block 10 of the Thunder Bay Jail. Block 10 is a single cell in the isolation area. It is adjacent to Block 11 with the cells separated by a solid wall. Block 10 is encased in Plexiglas with a solid metal door beyond the Plexiglas. There is no day area, shower, television, or radio in Block 10. The toilet cannot be flushed from inside the cell, and the lights are kept on 24 hours a day.

The accused spent 274 days in Block 11. Block 11 is also part of the isolation area. Each cell in Block 11 is encased in Plexiglas with a solid metal door beyond the Plexiglas. There is no day area. There is a shower located in the area between the Plexiglas and the solid metal door. Correctional officers take the inmates out of their cells one at a time to shower or to search the inmates' cells. There is no fixed telephone in Block 11. Inmates use a telephone that is brought into their cells on wheels. There is no television or radio in Block 11. Inmates cannot flush the toilets from inside the cells in Block 11. The inmate must ask a correctional officer to flush the toilet as required. The lights are kept on 24 hours a day.

There is a separate yard at the Thunder Bay jail for inmates who are in segregation. The segregation yard is an outdoor area surrounded on all sides by concrete walls. Within that area there is a "caged in" space covered by a solid roof. There is no recreational or exercise equipment in the segregation yard. On occasions when the accused was let out of his cell into the segregation yard, he was always alone.[124]

I was called to give expert evidence in Mr.Capay's trial. I told Justice Fregeau that in terms of the deprivation of anything that was conducive to meaningful human interaction, including 24 hour light, no natural light, no access to radio or television, and an inability to flush the cell toilet, these conditions were shocking and as bad as any I had seen or read about.[125] The conditions of Mr. Capay's confinement were harsher than the conditions in the BC penitentiary in the 1970s that had drawn the condemnation of Justice Heald of the Federal Court in 1975 and more restrictive than the conditions in which the women who had been confined in segregation in 1992 at the Prison for Women, that had drawn the condemnation of Justice Arbour.

Another Canadian corrections expert, Professor Hannah-Moffat, was equally blunt in her assessment of the treatment of Mr. Capay The length of time the accused was in segregation, the egregious conditions of his confinement, the lack of any meaningful

[124] *Capay* at paras 16-23
[125] *Capay* at para 343

oversight or review, and the lack of any attempt to mitigate the negative effects of segregation led her to conclude as follow:

> *As far as I'm concerned, this does get to the level of torture, definitely cruel and unusual, completely unacceptable when you're talking about pre-trial custody and by all standards inhumane and I don't know of any western democracy or in many of the countries in Europe and even South American institutions...that would tolerate this for...protracted periods of time.*[126]

Correctional officials were aware of Mr. Capay's mental health issues throughout his 4 years of segregation and his self-harming behaviour, including pushing a pencil through his right cheek and through his foreskin, slashing his forearm with a razor blade, and banging his head against his cell door repeatedly causing himself to bleed. Yet, between June 2012 and December 2016, Mr. Capay had a total of 10 hours of contact with a psychiatrist and three meetings with the psychologist totaling 80 minutes.[127]Justice Fregeau concluded:

> *In my opinion, the very limited time that Dr. Stambrook and Dr. Schubert were able to devote to the accused over the four and one-half year period that he was detained in segregation precluded them from providing the accused with any meaningful therapeutic mental health treatment.*[128]

Mr. Capay received segregation reviews pursuant to provincial law, but Justice Fregeau called the process "meaningless" at both the "institutional and regional levels."

> *Provincial law and Ministry policy provide a mechanism for independent and impartial review of the accused's detention in segregation, including 5 day and 30 day reviews at the institutional level and 30 day reviews external to the institution and institutional decision makers at the regional level*
>
> *The unchallenged evidence as to quality of the segregation review process during the four and one-half years the accused was detained in continuous segregation has been reviewed at length. It is obvious that the segregation review process in the case of the accused was meaningless at the institutional and regional levels.*
>
> *Professor Jackson and Professor Hannah-Moffat, experts in Canadian correctional law and policy, both commented on the quality of the review process in this case. Professor Jackson testified that:*
>
> > *When you look at these reviews and you see from month to month, from year to year, they're exactly the same. There may be a handwritten notation a little bit different, but there's no change in the risk. There's no change in the reasons why he's there. There's no recognition that he's getting better, that he's getting worse. A few notations that he's harming himself, that he's hearing things, but you have a sense that in June 2012 until sometime in 2016, time stopped. He was kind of*

[126] *Capay* at para 412
[127] *Capay* at paras 40-43
[128] *Capay* atpara 402

> *trapped in a place and a space that never changed …„people are filling out forms. They're checking boxes, but it's as if Adam Capay's disappeared.*
>
> *Professor Hannah-Moffat found that the explanations for continued segregation set out in the reviews that were conducted consisted of only a simple one or two line comment reiterating generic reasons noted on the previous reviews. Professor Hannah-Moffat observed that there was no change in the quality of the reviews between 2013 and 2015, despite the accused having been in segregation for almost three years. She found it to be "egregious and shocking" that these reviews contained no discussion of alternatives or measures that corrections could have attempted in order to mitigate the impact of segregation, such as Indigenous programming, psychiatric treatment, or educational opportunities. Professor Hannah-Moffat opined that the reviews of the accused's segregation over a period of four and one-half years provided no "meaningful oversight" of his continued detention in segregation.*[129]

Mr. Capay's state of mind at the time of the killing promised to be the key issue at trial, as his only defence would be that he was not criminally responsible by way of mental disorder. However, and this dramatically brought into high relief the debilitating effects of solitary confinement, due to those effects, Mr. Capay was in no position to lead evidence supporting that defence.

Dr. John Bradford, one of Canada's leading forensic psychiatrists, testified that Mr..Capay's time in segregation, especially the initial period of near total isolation, had a more serious effect on the accused than it would on many other individuals given his pre-existing conditions, including ADHD, antisocial personality disorder, and history of depression and anxiety. Segregation compounded past traumas and either exacerbated pre-existing PTSD or triggered its development, resulting in Mr.Capay having "chronic and severe" PTSD that "will persist over time as a lasting effect of Mr. Capay's prolonged segregation."[130] Dr. Bradford also explained that segregation had resulted in the accused developing "significant cognitive impairments," including the permanent loss of memory with respect to the period of time prior to and during the initial period of segregation.[131]

On the crucial evidence of Mr. Capay's state of mind at the time of the offence, had Mr. Capay been promptly assessed following the June 3, 2012 assault, this would have preserved and generated the medical information crucial to issues of criminal responsibility, including biochemistry results to determine the level of prescribed and non-prescribed medication in his system, professional mental status observations and neurological testing. Instead, he was placed in complete isolation for several months, "creating a complete vacuum of evidence relating to his mental health status during that period of time."[132]

Dr. Bradford testified that the best alternative to the missing physiological data and contemporaneous psychiatric observation would be the accused's memory of the events

[129] *Capay* at paras 383-88
[130] *Capay*, para 226
[131] *Capay*, para 227
[132] *Capay*, para 260

leading up to the incident and his subjective state of mind at the time. While this would be difficult to obtain from anyone four years after the fact, Dr. Bradford testified that the difficulty is increased in Mr.Capay's case because his memory has been profoundly impaired by his time in segregation, in particular because of the intense isolation in the period immediately following the offence.[133]

Dr. Bradford reported that there is "considerable evidence" that the accused was in a "seriously altered or disturbed state of mind, which would support a finding that he was not criminally responsible, or at the very least, [would] have a substantial impact on his culpability short of that finding." However he concluded "the effects of segregation, in particular, on Mr. Capay's memory, impair the ability to determine today the etiology, nature and severity of the altered or disturbed state of mind that the evidence indicates he was in at the time the offence was committed.".[134]

Mr. Capay's legal counsel argue that his treatment during the four years of segregation violated his rights under the Canadian *Charter,* 7 and 9 and 12. Section 7 guarantees the right not to be deprived of liberty and security of the person except in accordance with fundamental principles of justice. Their argument was that the four and one-half years that he was held in segregation deprived him of liberty and security of the person and that the effects of segregation have prejudiced his ability to make full answer and defence and his right to a fair trial. Section 9 prohibits arbitrary detention or imprisonment and section 12 prohibits the imposition of cruel and unusual treatment or punishment.

They further argued that because of how Mr Capay had been treated at the hands of state authorities, and how his ability to obtain a fair trial, including raising a defence of not criminally responsible because of mental disorder, had been indelibly prejudiced, the only appropriate remedy for these *Charter* breaches was to enter a stay of proceedings, which under Canadian law would effectively end the prosecution.

On 28 January 2019 Justice Fregeau, recognizing that "a stay of proceedings as a remedy for the violations of *Charter* rights. particularly in a first degree murder case, is the most drastic remedy that a criminal court can grant"[135] granted the stay of proceedings. Justice Fregeau held:

> *The accused, a young, mentally ill, Indigenous man, was detained in continuous segregation in deplorable conditions for 1,647 days. He was confined to his cell for more than 23 hours per day for extended periods of time. He was subjected to near total isolation during the initial three month period of segregation during which time his mental health deteriorated dramatically. The accused received no substantive mental health treatment or Indigenous programming or support during the four and one-half years that he was in segregation.*

[133] *Capay*, para 262
[134] *Capay*, para 268-9
[135] *Capay*, para 486

The treatment of the accused was, in my opinion, outrageous, abhorrent, and inhumane. It is a shocking and intolerable violation of s. 12 of the Charter [136]

Continuously detaining the accused in segregation without adhering to the segregation review policy and in the absence of a proper evidentiary basis that the accused was a risk to the safety or security of the institution or other inmates was unlawful and therefore arbitrary.[137]

I am persuaded on a balance of probabilities that the accused's right to make full answer and defence and his right to a fundamentally fair trial have been breached. This breach is a result of his inability to fully and fairly advance a defence of not criminally responsible or alternative defences to the first degree murder charge.[138]

State misconduct has resulted in the loss of the accused's memory of the assault ..and of the time period immediately prior to the assault. …The accused's memory loss will also inhibit his ability to properly instruct counsel, to respond to evidence called by the Crown, to testify in his own defence, and to advance other defences to the charge of first degree murder.[139]

The impact on trial fairness in these circumstances is permanent. The Charter breaches directly and significantly impact the vital issue of the accused's state of mind at the time of the offence. In my opinion, there would be ongoing prejudice to the accused if forced to proceed to trial[140]*.*

Justice Fregeau, in granting the remedy of a stay of proceedings and the impact of the state misconduct on the integrity of the justice system, provided a compelling justification for external prison oversight.

Experts with decades of experience in the field of corrections and segregation were shocked and incredulous when describing the conditions in which the accused was segregated for four and one-half years. The accused has suggested that this case is not simply about state misconduct, but that it represents the worst state misconduct that decades of expert experience has ever seen. That submission, in my opinion, has a great deal of merit. As noted by the Supreme Court in Babos, at para. 35:

> *At times, state conduct will be so troublesome that having a trial - even a fair one - will leave the impression that the justice system condones conduct that offends society's sense of fair play and decency.*

The breaches of the accused's Charter rights have been found to be prolonged, abhorrent, egregious, and intolerable. It is against this factual backdrop that prejudice to the integrity of the justice system must be considered.

---

136 *Capay*, para 414-5
137 *Capay*, para 464
138 *Capay*, para 432
139 *Capay*, para 499
140 *Capay* ,paras 495-6

I accept the accused's submission that the evidence heard in this application demonstrates a disturbing pattern of disregard for policy, procedure, and inmates' rights within the Ontario correctional system.[141]

In listening to the evidence on this application, I was disturbed by the contrast in the demeanour of the expert witnesses on the one hand and the Ministry witnesses on the other. As previously noted, all experts were demonstrably appalled by the state's treatment of the accused over the span of four and one-half years. By contrast, with the exception of Mr. Lundy, I did not observe a single note of contrition or regret during the testimony of the correctional witnesses who were largely responsible for detaining the accused in segregation under abhorrent conditions for four and one-half years.

The review and oversight of segregation decisions, in the form of consistent, meaningful segregation reviews at the institution and regional levels based on current, accurate, and reliable information, is designed to ensure that segregation decisions are scrutinized both within the institution and at the regional level. That oversight was simply non-existent in this case.[142]

Adam Capay's case and the adverse publicity, like other shocking events in the history of the Canadian penitentiary had a galvanizing effect. Both the Minister Of Community Safety and Correctional Services and the Premier denounced his treatment. "[Adam Capay's] conditions are completely unacceptable in this day and age in the Province of Ontario. … That is something that should never occur again" "[I]t's extremely disturbing… It shouldn't have happened. It's unacceptable. The status quo is unacceptable…"[143].

Paralleling the investigations initiated by Ontario's Ombudsman, the Ontario government appointed Howard Sapers, the former Correctional Investigator of Canada, as an Independent Advisor On Corrections Reform to lead an independent review team. Mr. Sapers' interim report focused on the use of segregation in Ontario's adult correctional facilities and his final report examined correctional practices more generally and drafted a new Corrections Act for Ontario. The draft legislation, which includes a 15 day camp on segregation in accordance with the Mandela rules, while passed by the provincial Liberal government has yet to be proclaimed into law by the new Conservative government.[144]

I will leave it to Howard Sapers himself in his presentation on solitary confinement to explain the intersection of independent prison oversight and the politics of correctional reform.

---

[141] *Capay* ,paras 514-6
[142] *Capay* ,paras 520-21
[143] David Orazietti, former Minister of Community Safety and Correctional Services, November 23, 2016; Kathleen Wynne, Premier of Ontario, October 31 2016
[144] Ontario Correctional Services and Reintegration Act, May 2018
Howard Sapers, building upon his expertise as Correctional Investigator and Indepependant Advisor on Correctons reform in Ontarion, has also been involved in the drafting of amendments to the Yukon Territory's *Corrections* Act which more than any other Canadian correctional legislation would align correctional services in Yukon with the *Mandela Rules* regarding solitary confinement. See https://www.yukon-news.com/news/yukon-liberals-table-proposed-amendments-to-territorial-corrections-act/

E. NGOs and Prison Oversight

I have already spoken of how in the Canadian experience NGOs have played a significant role in advancing a human rights agenda. The Elizabeth Fry Society, John Howard Society and the BC and Canadian Liberties Association have brought pressure on governments resulting in public commissions of inquiry, special inquiries of the Correctional Investigator and in litigation challenging solitary confinement. Apart from these high profile interventions a much less recognized but equally important contribution NGOs make to external prison oversight is in their less visible advocacy on behalf of prisoners on a day-to-day basis. Because it is a group with which I am associated I want to profile the work of one Canadian organization, West Coast Prison Justice Society and Prisoners Legal Services

Operating in my home province of British Columbia, Prisoners Legal Services (PLS) is the only full-time legal aid office in Canada dedicated to providing legal services to prisoners. In 2018-19 PLS assisted prisoners with a total of 3,226 issues, including 1,408 issues for provincial prisoners and 1,749 issues for federal prisoners. These included disciplinary hearings, involuntary transfers to higher levels of security, parole, post-suspension, detention, solitary confinement, human rights and health care. [145]

The significance of this work of PLS to the advancement of a culture of respect for human rights in the prison has been well captured by the American sociologist James Jacobs in his study of the work in the 1970s of the similarly named Prison Legal Services at Stateville, the Illinois maximum-security institution. Commenting on the cumulative import of the intrusion of lawyers into the decision-making process in the prison he concludes:

> *It is not victory in great judicial decisions that constitutes Prison Legal Services' [a public-interest group which provides lawyers for inmates] greatest impact on Stateville. It is the PLS members' daily presence at the prison, their persistent questioning of the rules, their relentless demands to see files and records, and the fear they invoke in the hearts of many of the prison staff that has the most profound effect on the day to day administration of the prison. Somehow the prison authorities must find a way to accommodate these lawyers and law students who so doggedly camp on the doorstep.*[146]

While PLS staff lawyers' and advocates' style with CSC and BC Corrections is not designed to "invoke fear in the hearts of prison staff", their work has played a similar role in holding the Canadian and Provincial correctional authorities accountable to the rule of law.

PLS has been one of the legal pioneers in expanding the remedial toolbox for prisoners by utilizing both the provincial and federal human rights complaint process. Covering a

---

[145] Prisoners Legal Services operates under the supervision of the West Coast Prison Justice Society of which I am the President. Funding comes from the British Columbia legal aid program together with grants from the Law Foundation of British Columbia.

[146] James B.Jacobs, Stateville: *The Penitentiary in Mass Society* (Chicago: University of Chicago Press 1977), 123

wide range of issues this has proved a productive alternative to litigation PLS has been successful in resolving both individual and systemic issues that would otherwise have proven resistant to resolution. Perhaps the most far-reaching of these human rights human complaints has been in relation to the treatment of transgender prisoners. Other human rights complaints in which PLS has been involved include some of the most intractable problems facing contemporary corrections.

As the reports of the Correctional Investigator demonstrate the adequacy of health care, particularly mental health care, for prisoners is an issue which has come to the forefront in recent years and PLS has been active in raising the profile of this issue on a number of fronts in their dealings with federal and provincial corrections' officials and the health profession. As part of their proactive approach PLS has written to CSC and the Provincial Health Services Authority with proposed guidelines for medical professionals working in prisons so they would be in compliance with the Mandela Rules.

In 2016 PLS spearheaded a Prison Mental Health Project to improve the treatment of federal and provincial prisoners with mental disabilities. With the funding provided from the grant by the BC Law Foundation, in 2017 the West Coast Prison Justice Society and PLS hosted a conference focusing on best practices for supporting prisoners' mental health and alternatives to solitary confinement. The conference drew nearly 250 attendees, including over 100 federal and provincial correctional staff who included physicians, counsellors, nurses, psychologists, wardens, correctional officers, mental health coordinators and more. The conference was also attended by community-based practitioners, students, lawyers, advocates and others.

Some of you may associate prison legal advocacy with ill-informed intrusion by outsiders who do not understand the administrative difficulties of managing a contemporary prison. The work done by organizations such as PLS in activities such as the 2017 conference resulted in the lawyers and advocates at PLS developing stronger relationships with CSC, BC Corrections and Provincial Health Services Authority and opening avenues for continuing dialogue with each about prisoners' mental health and alternatives to the use of segregation.

While the work of external prison oversight often involves criticism of bad correctional practices an equally important part of the work is to provide models for best practices consistent with human rights standards. Two recent research reports prepared by West Coast Prison Justice Society and PLS illustrate this aspect of the work.

A 2016 report *Solitary - A Case For Abolition*, builds upon the research and advocacy PLS has done in this area, assembles the extensive research on the history and effects of long-term solitary confinement, including a review of the international human rights norms, including the Mandela Rules, and drawing upon PLS's own case files, makes a compelling case for its abolition.[147]

[147]West Coast West Coast Prison Justice Society, *Solitary- A Case For Abolition* https://prisonjustice.org/wp-content/uploads/2019/06/Solitary-confinement-report-2019.pdf.

The report was designed to serve as a blueprint for the Canadian and BC governments to implement law reform of solitary confinement. The Project was intended to provide government and corrections with the alternatives necessary to be able to eliminate the need for solitary confinement, especially for prisoners with mental disabilities. It was also hoped that the report could be used to assist lawyers to bring *Charter* challenges to the use of solitary confinement in Canada. That purpose was quickly achieved when the report was relied upon in my own expert report and filed as an exhibit in the BC Supreme Court in the British Columbia Civil Liberties Association's successful challenge to the CCRA's segregation regime.

The most recent report, *Damage/Control: Use of Force and the Cycle of Violence and Trauma in BC's Federal and Provincial Prisons.* was published in June 2019. The use of force in the federal correctional system has been a consistent theme in the Correctional Investigator's annual reports and *Damage Control* , which extends also to the use of force in the BC corrections system, makes an important contribution to the dialogue. The report reviews some of the recent high-profile use of force incidents that have been the subject of reports by the Correctional Investigator, analyzes the federal and provincial law and policy governing the use of force by correctional officers, in light of interviews with over 100 federal and provincial prisoners, and makes 87 recommendations for change.[148]

The following passages explains why the report was prepared and the contribution it hopes to make to constructive change in both the practices and culture of corrections.

> *Both federally and provincially, use of force has been the subject of ongoing complaints from PLS clients. It has also been a longstanding area of concern for the Office of the Correctional Investigator, which reviews every CSC use of force incident and, as such, plays a critical oversight function. Further, recent policy changes, public reports and PLS's own consultations with CSC and BC Corrections indicate that corrections agencies themselves recognize that force can lead to serious problems for prisoners and prisons.*
>
> *PLS has heard from many federal prisoners who have been OC-sprayed, cell-extracted, forcibly placed in Pinel restraints and subject to other traumatic practices in response to desperate acts of self-injury. These cases demonstrate the need for more intensive interventions by compassionate and well-trained mental health staff that support prisoners who struggle with self-harm, rather than punitive responses from officers that exacerbate their distress and cause further harm. This is backed up by research on self-harm, which finds that focusing on trying to prevent people from self-harming is likely to increase harm in the long run, since it intensifies feelings of powerlessness and makes it more likely people will self-harm more seriously and in secret and that they will attempt suicide.*
>
> *This report is also about the need to listen to prisoners, whose stories make clear that force is not only an isolated incident of physical violence but also a psychological event with long-term implications for their wellbeing, their relationships to their environment, and their relationships to other people.*

[148] West Coast West Coast Prison Justice Society, *Damage/Control: Use of force and the Cycle of Violence and Trauma in BC's Federal and Provincial Prisons* https://prisonjustice.org/wp-content/uploads/2019/06/use-of-force-report.pdf

> *This report is designed to bring prisoners' stories to the forefront and highlight the way even "justified" uses of force can create environments of mistrust, trauma and fear. It argues that eliminating acts of force, as far as possible, is to the benefit of BC Corrections and CSC, as well as to the people in their custody, and is particularly urgent when it comes to the treatment of vulnerable prisoners. It builds on what recent policy changes by both BC Corrections and CSC implicitly seem to acknowledge — that force by officers is a problem rather than a solution, and that it is the source of other problems, including increased mental health concerns among and tensions between prisoners and corrections officers.*[149]

Because the report was prepared not as a blunt instrument to beat up on correctional officers, PLS, through its access to use of force videos, was able to work with BC Corrections, bringing up cases of inappropriate force to the attention of the Provincial Director. It also allowed PLS to scrutinize BC Corrections' internal review practices around use of force and focus the Provincial Director's attention on her office's oversight mechanisms. These two things together have helped to push BC Corrections to adopt a new use of force policy that names trauma-informed practices as an explicit objective and codifies new oversight mechanisms.

As a final demonstration of the synergy of external prison oversight, following the publication of *Damage Contro,* BC Corrections has since contracted Howard Sapers, the former Correctional Investigator of Canada, to conduct a further review of its use of force practices, and I am reliably informed that he is using the report as a launching off point for his work. In this way his extensive experience as Canada's prison ombudsman, his most recent experience as the Independent Advisor on Corrections reform in Ontario will be informed by the experiences of prisoners given voice in *Damage Control* and the evidence-based recommendations advanced in the report.

The final project I will mention relates back to my earlier discussion on the recent legislative reforms of segregation. Again with a grant from the Law Foundation of British Columbia the Prisoner Isolation Monitoring Project is to allow PLS to monitor the changes to CSC's use of isolation in light of Bill C-83 and emerging case law.

This project is particularly important one. As I have earlier explained one of the great fears of those who have long advocated for the end of solitary confinement and for the need for independent adjudication in cases where there are serious intrusions on the residual rights of prisoners to liberty and security of the person, is that 'reforms' introduced in response to court challenges may result in changes in the language of imprisonment rather than its substance. The introduction in Bill C-83 of structured intervention units in place of segregation units, with what may turn out to be less than a robust form of independent review, is one that requires the closest examination to ensure that the abuses of the past are not carried forward under the semantic camouflage of new labels. Through this grant PLS will be able to play an important oversight role in monitoring developments.

---

[149] *Damage Control*. pp.9-10

The way in which PLS has both fulfilled the day to day provision of legal services to prisoners and also used that experience in bringing to bear the stories of prisoners in advocating for changes in law, policy and correctional practice is an example of the contributions of nonprofit human rights organizations to external prison oversight.

F. Academic /Peer Prisoner Oversight

My final part in this review of the spectrum of external prison oversight is one that is perhaps the least appreciated but the one closest to the trajectory of my career as a legal academic and lawyer. A central part of that career has been to harness the resources of the academy and the scholarship of imprisonment to the experiences and voices of prisoners who are the real experts in the deep end of the criminal justice system. As I have documented in this paper the work of academics has played an important role in providing a principled and evidence-based foundation that has informed the work of the Correctional Investigator, commissions of inquiry, government task forces and the decisions of the courts. Of particular importance is academic work that is grounded in the experiences of prisoners themselves and which is guided by a human rights framework.[150] That importance is well captured in a recent edition of the Journal of Prisoners on Prisons in a special edition devoted to the recent Canadian experience when human rights were sacrificed to a tough on crime agenda :

> *As a prisoner-written, academically-oriented, and peer-reviewed nonprofit journal based upon the tradition of the penal press, the JPP brings the knowledge produced by prison writers together with academic arguments to enlighten public discourse about the current state of carceral institutions. As such, the editors of this special issue are of the belief that part of the Government of Canada's promised review of criminal justice laws, policies, and practices should involve direct input from prisoners who, having experienced recent penal reforms first-hand, are well-positioned to assess their impact upon their lives and what changes are needed moving forward.*[151]

In one of the first plenary sessions at this 2019 ICPA conference entitled Changing Correctional Culture: the University of California/Norway Partnership regarding Humanity Dignity and Safety to US Prisons we heard from Professor Brie Williams, and Heidi Steward, Deputy Director of the Oregon Department of Corrections how correctional authorities can work collaboratively in harnessing the resources of the Academy in support of developing best practices based upon a human rights framework.

---

[150] The issues raised by an aging prison population is one that the Correctional Investigator has addressed in a special report, Aging and Dying in Prison: An Investigation into the Experiences of Older Individuals in Federal Custody https://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20190228-eng.aspx and is now the subject of a recent book by my Canadian colleague Professor Adeline Iftene *Punished for Aging: Vulnerability, Rights, and Access to Justice in Canadian Penitentiaries* (University of Toronto Press, August 2019))

[151] Jarrod Shook and Bridget McInnis, More Stormy Weather or Sunny Ways? A Forecast for Change by Prisoners of the Canadian Carceral State , *Journal of Prisoners on Prisons*, Volume 26(1&2), 2017.

Conclusion

At the conclusion of the last class in my seminar on Penal Policy I read some paragraphs from my final chapter of *Justice Behind the Walls.* I offer them here with some contemporary references:

The cords that link a sentence of imprisonment to the practice of justice must not only be girded with the steel of the law but must also be subject to the most careful scrutiny, because it is at precisely this juncture that the greatest strains will occur. What happened to Ashley Smith and Adam Capay and so many other prisoners should not be seen as the correctional equivalent of mental fatigue in the otherwise robust metallurgy of modern corrections, but instead as a flaw encoded in a system that in every generation has trampled on human rights.

It takes vigilance and courage, both individual and collective, to ensure that human rights are protected at those points where they become most vulnerable. Within Canada, within Argentina and throughout this world, that vulnerability is nowhere more evident than inside prisons.

Based upon the Canadian experience I maintain that the full spectrum of external independent oversight is a critical part of any correctional system seriously committed to a human rights agenda and the necessary subject of a plenary session at one of the most significant international conferences on corrections.