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Solitary Confinement : The Trajectory of Cruelty in Canada

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Introduction

Forty two years ago I first entered the gates of the Canadian penitentiary. Since that day I have spent a significant part of my professional career bearing witness and exposing the darkest places in this country to legal and public scrutiny. In doing so I have researched and written about imprisonment, advocated for reform, litigated against abuse of human rights and done my fair share of ranting and railing against injustice. I have always believed that the practices around solitary confinement are a litmus test of the legitimacy of state punishment and in this paper I will explore the role and limited success of the prohibition on cruel and unusual punishment or treatment norm in subjecting the practice of solitary to domestic and international human rights standards.

First a cautionary word about the language of "solitary confinement". In the popular imagination, based largely on the inventory of movies and TV series, most recently in "Orange Is the New Black", the words conjure up filthy light-less vaults were prisoners are confined with restricted diets and minimal or no contact with the outside world except for the surveillance of abusive guards. While such conditions have indeed existed and do exist in different prisons around the world the practice of solitary encompasses a broader range of conditions, characterized by the common element of the prisoner being isolated from the general population of the prison. As described by Juan Mendez, the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in his most recent report:

> *There is no universally agreed upon definition of solitary confinement. The Istanbul Statement on the Use and Effects of Solitary Confinement defines solitary confinement as the physical isolation of individuals who are confined to their cells for 22 to 24 hours a day. In many jurisdictions, prisoners held in solitary confinement are allowed out of their cells for one hour of solitary exercise a day. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, generally monotonous, and often not empathetic.*

> *Solitary confinement is also known as "segregation", "isolation", "separation", "cellular", "lockdown", "Supermax", "the hole" or "Secure Housing Unit (SHU)", but all these terms can involve different factors. For the purposes of this report, the Special Rapporteur defines solitary confinement as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day.*[1]

The Canadian landscape of solitary

In the Canadian federal system, prisoners sentenced to 2 years or more serve their sentences in federal institutions. The 1992 *Corrections and Conditional Release Act,* like many prison systems, provides for two forms of segregation.[2] The first is entitled disciplinary segregation. This can be imposed as a sanction after a prisoner has been found guilty of a serious disciplinary offence in a hearing before an independent chairperson. Segregation is the most severe form of punishment that can be administered as a disciplinary sanction. However it is limited to a maximum of 30 days, which can be increased to a maximum of 45 days for multiple convictions.[3]

The second form of segregation is administrative segregation. Its purpose is to keep a prisoner from associating with the general population. It can be used whenever the institutional head has reasonable grounds to believe that the continued presence of the prisoner in the general population jeopardizes the security of the penitentiary or the safety of any person, including the prisoner's own safety or would interfere with a serious investigation. In all cases, the institutional head must be satisfied that there is no alternative but to segregate the prisoner, and must ensure that the prisoner is returned to the general population as soon as possible. Unlike disciplinary segregation there are no legislative limits to the duration of administrative segregation although it is subject to periodic review. Because the time in administrative segregation can extend to months, even years, it represents the most powerful form of carceral authority. Because the conditions of confinement are the closest thing to solitary confinement it is also the most intensive form of imprisonment. Historically it has been the most abused. It is because of this abuse that it has been the subject of extensive criticism in commissions of inquiry, the reports of ombunds offices, academic literature and has been the focus of a recurring line of litigation centered on the cruel and unusual punishment prohibition.

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1 Interim Report of the UN Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (August, 2011) Solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf paras 25-26

2 The pre-1992 legislation used the term "dissociation"; post-1992 the term used is "segregation". The two terms are synonymous and are used interchangeably in this article. Both before and after 1992 prisoners refer to segregation as "the hole".

3 The Canadian provincial and territorial prison systems also recognize a similar distinction between disciplinary and administrative segregation. Most of the provincial systems limit disciplinary segregation to a maximum of 15 days. Like the federal system administrative segregation can be of indefinite duration.

McCann v The Queen 1976

Jack Emmett McCann was kept in solitary confinement in the special correctional unit of the British Columbia Penitentiary from 23 July 1970 until 14 August 1972, a total of 754 days. In May 1973 Jack McCann escaped from the penitentiary. During his brief period of freedom he contacted a reporter for the *Vancouver Sun* and asked him to publicize the conditions under which men were kept in the special correctional unit for months and years at a time. After his recapture and return to the penitentiary on 1 June 1973 he was again placed in solitary confinement, where he remained until 9 May 1974. In the fall of 1973 I received a letter from Jack McCann with a handwritten statement of claim in the Trial Division of the Federal Court of Canada in which he claimed that he was 'being held arbitrarily in solitary confinement and being subjected to cruel and unusual treatment and punishment' in violation of the Canadian Bill of Rights.[4] Thus begun *McCann v The Queen*, the centerpiece of my 1983 book, *Prisoners of Isolation: Solitary Confinement in Canada*.

Prisoners confined in administrative segregation in the British Columbia Penitentiary were held in what was officially called the special correctional unit.(SCU). Because of its location atop one of the cell blocks it was known as 'the Penthouse.' The cells measured 11 feet by 6½ feet and consisted of three solid concrete walls and a solid steel door with a five-inch-square window which could only be opened from outside the cell. Inside the cell there was no proper bed. The prisoner slept on a cement slab four inches off the floor; the slab was covered by a sheet of plywood upon which was laid a four-inch-thick foam pad. Prisoners were provided with blankets, sheets, and a foam-rubber pillow. About two feet from the end of the sleeping platform against the back wall was a combination toilet and wash-basin. An institutional rule required that the prisoner sleep with his head away from the door and next to the toilet bowl to facilitate inspection of the prisoners by the guards. Failure to comply with this rule would result in guards throwing water on the bedding or kicking the cell door. There were no other furnishings in the cell. The cell was illuminated by a light that burned twenty-four hours a day. The hundred-watt bulb was dimmed to twenty-five watts at night. One of the expert witnesses described the physical space as 'one step above a strip cell... a concrete vault in which people are buried.', a description that most closely resembles the solitary confinement archetype of movies. [5]

Prisoners were confined in their concrete vaults for 23½ hours a day. They were allowed out of their cells briefly to pick up their meals from the tray at the entrance to the tier and for exercise. That exercise was not in the open air. It was limited to walking up

4 *Prisoners of Isolation* p.48 online at http://justicebehindthewalls.net/book.asp?cid=772&pid=843 S.2. of the Canadian Bill of Rights provided : Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared. and in particular no law of Canada shall be construed or applied so as to ...(b) impose or authorize the imposition of cruel and unusual treatment or punishment.

5 Photos of the Penthouse taken after the McCann judgment can be viewed at http://justicebehindthewalls.net/04_gallery_01_01.html

and down the seventy-five-foot corridor in front of their cells. Exercise was taken under the continual supervision of an armed guard who patrolled on the elevated catwalk which ran the whole length of the tier and which was screened from the corridor by a wire-mesh fence. For the rest of the day prisoners were locked up in their cells. They had no opportunity to work; no hobby activities were deemed suitable by security for the special correctional; unit; no television programs, no movies, no sports, and no calisthenics were permitted. Prisoners did have a radio panel, although its reception was restricted to two channels. Andy Bruce gave evidence that when he was in one of the observation cells of the unit (reserved for psychiatric cases) the radio was manipulated by the guards in the central control area and was left on for hours with nothing but static; or it was turned to the international band so that the only programs received were in languages foreign to the prisoners.

Prisoners were denied all but the most limited personal effects; they were permitted to keep only those letters, books, and magazines that could be contained in one cardboard box. Canteen items were also restricted; prisoners were not allowed to have any items in metal or glass containers. Prisoners could not go to the library. Their privileges were limited to choosing from a sparse collection of paperbacks that were brought into the unit. Prisoners only had cold water in their cells. Twice a week they were given a cup of what was supposed to be hot water for shaving, but which, they testified, was usually lukewarm. They were not permitted to have their own razors, and one razor was shared among all the prisoners on the tier.

Prisoners in the unit were subject to a more restrictive visiting regime than the rest of the population. Prisoners spoke to visitors through a screen and conversations were monitored by the staff. No open visits were allowed, and prisoners never had an opportunity for personal contact with their families or for uncensored conversation with their visitors. Standard procedure governing the movement of prisoners from the unit to the visiting area decreed that they be handcuffed to a restraining belt around the waist and that leg-irons be placed on them. Upon returning from the visit, prisoners were subjected to skin-frisks, even though they may never have left the sight of the escorting officer nor had any physical contact with their visitors.

During the *McCann* case some four weeks of evidence was given, much of it given by prisoners relating to the effects of solitary confinement. Melvin Miller told the court that after a time in solitary he would see holes in the cement wall start to move around the cell; that in solitary, 'except when you have visits, you never get to see the grass or the sun. The only way you know it's raining is by the sound of the rain on the roof.' Miller described the effect solitary had on him.

> *If I put myself back to the circumstances I'm afraid I'm going to offend you. I'm afraid you won't understand. How in hell do you cope with loneliness in a god-damned cell 23½ hours a day with the light burning on you. You get severe headaches. You feel hate, frustration. I can't say just how fucking bad this is and the effects it has on other prisoners. You see people slash themselves and the guards say he's just looking for attention. Beat me, break my arms, I can handle that. But how do you cope with insanity? You have no idea in the world the effects it has on you. I've known of men who beat their heads against the wall.*

> *You don't have anything. You don't know how long you'll be there. You have no reasons ...I've been down [from SCU] for 20 days and I can still see that goddamn light.*[6]

At the time of the trial Jack McCann had probably spent more time in solitary than any other prisoner in the Canadian penitentiary system. This is how he described his feelings about his years in solitary confinement.

> *All you live on in SCU is bitterness and hatred. For some guys that's not enough. Their hatred reaches the point when they have to see blood, even if it is their own ...*
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> *Up there I have fears of losing my sanity, fears of losing my friends, fears of myself. There is no physical fear, I can put up with that.*[7]

Jack McCann gave evidence that in 1967 on three successive days other prisoners slashed themselves. He was given the job of cleaning up the blood in their cells. McCann 'begged and pleaded to be let out of solitary.' Yet another prisoner slashed himself. McCann could take no more and he set himself on fire in his cell. He described to the court what he saw as the flames engulfed him: 'I remember watching the space beneath the door get bigger. I thought I could crawl beneath it and be free ...I wanted to get out -I don't care if I die, I never want to go back to that position again.'[8]

Dr. Stephen Fox, a psychologist and expert witness called by the prisoners in the McCann trial, in commenting on the effects of solitary on McCann, said, 'self-immolation, setting yourself on fire ...is as far into it as I can imagine anyone can go, into total insanity, of reduction to nothing, the hopelessness, the meaninglessness, the violence, the cycle of destruction.'[9]

Dr. Richard Korn, himself a former prison warden, explained to the court the way prisoners experience time in solitary:

> *Free men spend time. Prisoners do time. Doing time is a specific activity, a calling, an art. Time itself is a force, it has its own action. Offenders are hit with their time and the word for a prison sentence is a jolt. Prison time is almost palpable. It not only has force, it has mass and weight. Too heavy a sentence can suffocate ...*
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> *[In segregation] time stops and begins to crush and you have that suffocation, you have the tiny space, the relative inaction. and that crushing experience and then the mind begins to play its tricks to save itself. ….*
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> *One of the ways they keep alive is by fantasies of retaliation which is a very human thing to do. You see yourself as a victim of overwhelming forces. You are deprived of autonomy... These men, deprived of self-determination and feeling abused, can keep themselves alive only by fantasies and feelings of fury which, in a way, sets them up for going back and*

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6 *Prisoners of Isolation*, at 67
7 *Prisoners of Isolation*, at 68
8 *Prisoners of Isolation*, at 68-9
9 *Prisoners of Isolation*, at 69

> *among other things severely endangers the staff. So in process and experience and in consequence, it is a catastrophe and an unnecessary one.*[10]

There were two prisoners in the Penthouse that every one of the plaintiff prisoners referred to although they were not witnesses at the trial in person. Both were men suffering from mental illness; Jacques Bellemaire believed that there was a machine in his cell trying to get him. He too, like Jack McCann, set fire to his cell trying to rid himself of its presence. Five days after my last interview with Jacques Bellemaire he hanged himself in solitary confinement. Tommy McCaulley, who before being placed in segregation had a reputation as a standup, well-respected and adjusted convict, became reduced to a screaming dervish who would smash his head against the steel door and concrete walls of his cell screaming for hours on end. I often heard those screams on my visits to the BC Penitentiary. In my interviews with him he was too incoherent to give me instructions to add him as a plaintiff but his screams, like the ghost of Jacques Bellemaire, echoed in that federal courtroom.

The terror of life in the solitary confinement unit of the B.C. Penitentiary was not limited to the machine imagined by Jacques Bellemaire. Dr. Fox explained to Mr. Justice Heald how Tommy McCaulley's insanity and Jacques Bellemaire's suicide were the living and dying proof to other prisoners of their own vulnerability. In his chilling words:

> *When McCaulley becomes insane to your face, they are McCaulley, that is all there is to it. There is not one of them who will tell you anything different. Each one of them is part of McCaulley, and it was a part of them that had gone to that place where McCaulley is, exactly to that place where McCaulley is, where all rationality has left them and they have come back from that place only by some freak accident of their own prior upbringing. But there is not one of them that does not hear their own voices screaming when McCaulley screams. They are McCaulley's insanity and in them is McCaulley's insanity. When he becomes insane and moves towards death, like Bellemaire did, when they see insanity approaching self-extinction, they know that part of them is moving to that place and they have to live with their own insanity and it is in front of them . . . When the blood runs in front of their cells, it is their blood . . . when they see death approach, it is their death that approaches.*[11]

In *Prisoners of Isolation* I described how the Segregation unit is different from the rest of the penitentiary in ways that go beyond the physical differences in the cells, the denial

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10 *Prisoners of Isolation*, at 75 . Juan Mendez, the UN Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, in his 2011 report on solitary confinement summarised the findings of research studies:
"Studies have found continued sleep disturbances, depression, anxiety, phobias, emotional dependence, confusion, impaired memory and concentration long after the release from isolation. Additionally, lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction. Intolerance of social interaction after a period of solitary confinement is a handicap that often prevents individuals from successfully readjusting to life within the broader prison population and severely impairs their capacity to reintegrate into society when released from imprisonment."
solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf para 65

11 Prisoners of Isolation, supra, at 73-4

of access to work and hobbies, and the restrictions on exercise. “The separation from the ordinary prison world. In segregation the worst things about prisons -the humiliation and degradation of the prisoners, the frustration, the despair, the loneliness, and the deep sense of antagonism between the prisoners and the guards -are intensified. The distinctiveness of SCU is palpable.”

Professor Phil Scraton in a presentation at a recent conference has provided a contemporary analogue for what prisons experience in long-term segregation. He compared placement in segregation to the process of rendition whereby states who avowedly respect the rule of law send prisoners who they suspect of terrorism to states which have abysmal human rights records for interrogation and torture. In both the places of segregation and rendition prisoners find themselves beyond the rule of law in a world in which terror in the name of the law become state sanctioned.

The legal argument in McCann

The argument traced the historical origins of the cruel and unusual punishment or treatment norm section 2(b) to the English Bill of Rights of 1689. The plaintiffs submitted that since the similar, albeit narrower, prohibition on cruel and unusual punishment contained in the Eighth Amendment to the United States Constitution also has its historical roots in the same English source, American judicial decisions on the Eighth Amendment were relevant in any enquiry into the proper meaning to be given section 2(b) of the Canadian Bill of Rights.

This was not the first time that this argument had been raised. In *R.* v.*Miller and Cockriell*, a case dealing with the relationship between the death penalty and section 2(b), Mr. Justice Robertson, in a majority judgment of the British Columbia Court of Appeal, later approved by a majority of the Supreme Court, suggested that the Canadian courts should not rely upon American decisions on the Eighth Amendment because of the differences between the US Constitution and the Canadian Bill of Rights and the different approaches used by American and Canadian courts in statutory interpretation based on different conceptions of judicial review.[12] The plaintiffs submitted that such a wholesale rejection of the relevance of U.S. decisions was far too sweeping. Mr. Justice McIntyre, in his dissent in *Miller and Cockriell*, dealt with the argument that the American cases on cruel and unusual punishment were not relevant to judicial determination of the meaning of section 2(b):

> *The differences between the American constitutional system and our own are many and obvious. They need no precise definition here. It does not follow, however, that all judicial attitudes and expressions emanating from the United States are inapplicable in Canada. Furthermore. it is not true, that in dealing with the concept of cruel and unusual punishment we are borrowing from the United States. The rejection of cruel and unusual punishment was declared in English law in the 17th century ...and is said to find its roots in Magna Carta. The English Bill of Rights of 1688 declared in s. 10: that excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishment inflicted.*

12 (1975) 24 CCC (2d) 401 (BCCA).

> *In doing so the Bill recited that the Lords and Commons were making the declaration 'for the vindicating and asserting [of] their ancient rights and liberties.' This principle as part of the law of England became the law of what is now a part of Canada after the British conquest of the French colonies in North America and was thus known in Canadian jurisprudence even before the revolution which led to the creation of the United States of America. Framers of the United States Constitution in the Eighth Amendment provided 'excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishment inflicted ...' They were then adopting English law which had become or was to become Canadian law and consideration of this question and its mention in the, Canadian Bill of Rights involves the introduction of no foreign concept into our Canadian system.*[13]

At the time of the *McCann* case, the leading American case on the Eighth Amendment was *Furman* v. *Georgia*,[14] which dealt with the constitutionality of the death penalty. Although all nine justices wrote separate opinions, the plaintiffs in *McCann* argued that the opinion of Justice Brennan, one of the majority striking down the death penalty, was particularly relevant because it contained a careful review of previous decisions of the Supreme Court and sought to draw from them the principles that had been developed by the court in interpreting the Eighth Amendment. It was the Brennan judgement that commended itself to Mr. Justice McIntyre and heavily influenced his reasoning in *Miller and Cockriell.*

Justice Brennan, drawing upon the decision of the Supreme Court in*Trop v. Dulles*,[15] saw the unifying principle of the Eighth Amendment in this way:

> *The basic concept underlying the [clause] is nothing less than the dignity of man While the State has the power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards.*
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> *At bottom, then, the cruel and unusual punishments clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual' therefore if it does not comport with human dignity*.[16]

Justice Brennan derived from the jurisprudence of the Supreme Court a set of principles to test whether a challenged punishment comports with human dignity.

> *The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering ...Even though 'there may be involved no physical mistreatment, or primitive torture' (Trop v. Dulles), severe mental pain may be inherent in the infliction of a particular punishment….*

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13 at 461
14 (1972) 92 S. Ct. at 3726
15 Trop v. Dulles, 78 S. Ct. 590 (1958)
16 92 S. Ct. at 2743

> *The barbaric punishments condemned by history, punishments which inflict torture such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like are of course attended with acute pain and suffering. But when we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as non-humans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the clause that even the vilest criminal remains a human being possessed of common human dignity*.

A second principle which Mr. Justice Brennan felt to be inherent in the Eighth Amendment is that the State must not arbitrarily inflict a severe punishment. A third principle was that 'a severe punishment must not be unacceptable to a contemporary society... ' The question is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the court's task is to review the history of a challenged punishment and to examine society's present practices in respect to its use.

The final principle identified in Mr. Justice Brennan's judgment is that a severe punishment must not be excessive:

> *Punishment is excessive under this principle, if it is unnecessary. The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive ...Although the determination that a severe punishment is excessive may be grounded in the judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment.*[17]

Having identified four principles, Justice Brennan went on to explain their interrelationship.

> *These are, then, four principles by which we may determine whether a particular punishment is 'cruel and unusual.' The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous, punishment of the type that the clause has always prohibited. Yet it is unlikely that any State at this moment in history would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such punishment. Nor finally, is it likely that this Court would have to consider a severe punishment that is patently unnecessary. No State today would inflict a severe punishment knowing that*

17 92 S. Ct at 2447

> *there was no reason whatsoever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle*.[18]

At the time of the McCann trial, as part of the rising tide of the civil rights movement. Courts in the United States had applied the 'cruel and unusual punishment' clause of the Eighth Amendment primarily in relation to the conditions of prison life, particularly in relation to segregation. In *Jordan v. Fitzharris*[19] prisoners challenged the conditions of solitary confinement in Soledad Prison in California. The conditions under review in that case - the use of a 'strip' cell in which prisoners were kept naked - were, in physical and sanitary terms, worse than those in the BC Penitentiary, but to the extent that the period of time spent in the cell was only twelve days and the relevant regulations limited it to sixty consecutive days, they were less severe. In finding that the conditions violated the Eighth Amendment, Chief Judge Harris described the effects that this type of solitary confinement had on prisoners.

> *[It] results in a slow burning fire of resentment on the part of the inmates until it finally explodes into open revolt, coupled with violent and bizarre conduct. Requiring man or beast to live, eat and sleep under the degrading conditions pointed out in the testimony* creates a condition that inevitably does violence to elemental concepts of decency.[20]

Novak v. Veto challenged the conditions of solitary in a Texas prison which, like those in Soledad, were physically more debilitating than those in the British Columbia Penitentiary, although they were imposed for a much more limited time. Circuit Judge Tuttle stated that implicit in the decisions of the Supreme Court on the Eighth Amendment is the notion that embedded in this society are certain standards of human decency:

> [*These standards] put a limit on the kind of punishment we will inflict on anyone regardless of his offence. Though we may be dealing here with some of the most incorrigible members of our society (although not solely), how we treat these individuals determines, to a large extent, the moral fibre of our society as a whole and if we trespass beyond the bounds of decency, such excesses become an affront to the sensibility of each of us.*[21]

While many of the American cases had focused on the physical and sanitary conditions in solitary-confinement units, increasing attention was paid to the psychological effects of the solitary regime, an issue that was central to the evidence and arguments in *McCann*. In *Sostre v. McGuinnis*, Judge Feinberg, addressing the issue of long-term solitary confinement, stated:

> *In this Orwellian age, punishment that endangers sanity, no less than physical injury by the strap, is prohibited by the Constitution. Indeed, we have learned to our sorrow in the*

18 92 S. Ct at 2748
19 257 F. Supp. 674 (1966)
20 at 680
21 453 F. (2d) 661 (1971) at 676

> *last few decades that true inhumanity seeks to destroy the psyche rather than merely the body.*[22]

The argument in *McCann* sought to apply the principles developed by Justice Brennan in *Furman v. Georgia* (as they had come to be applied in the American prison cases on solitary), and those articulated by Mr. Justice McIntyre in *Miller and Cockriell*.

Mr. Justice Brennan's first principle was that 'the punishment (or treatment) must not be so severe as to be degrading to the dignity of human beings.' The plaintiffs cited the evidence of their expert witnesses that solitary confinement in SCU was 'an attempt to crush the human spirit,' was designed 'to reduce the individual to that condition where there is no conceivable human resistance, where they represent essentially nothing' and 'to break their morale ...to break them down psychologically and make them submissive.' They cited their own evidence that they were reduced to self-mutilation and self-immolation, that they were forced to live with the imminent threat of their own insanity and death made manifest by the presence among them of men who were driven insane, of men who did indeed kill themselves on solitary row. They submitted that all this evidence amply demonstrated that their treatment was, in design and effect, degrading to the dignity of human beings.

Mr. Justice Brennan's second principle held that 'a severe punishment must not be unacceptable to a contemporary society' and must 'accord with public standards of decency and propriety.' He suggested that the task of the court is to review the history of the challenged punishment. There is support for this approach in the judgment of Chief Justice Laskin in *Miller and Cockriell* where, in addressing the question of the relevant tests for the application of section 2(b), he stated that:

> *...there are social and moral considerations that enter into the scope and application of Section 2(b). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there still may be a question (to which history, too, may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency.*[23]

The *McCann* argument reviewed the historical origins of solitary confinement and its eventual abandonment as a general penal practice. The plaintiffs pointed specifically to the 1892 codification of criminal law which provided that 'the punishment of solitary confinement or of the pillory shall not be awarded by any court.'[24] They argued that

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22 442 F. (2d) 178 (1971) at 208. In *Hutto v. Finney*, 98 S. Ct. 2565 (1978), the first case in which the Supreme Court had to consider the Eighth Amendment in relation to administrative segregation, the court stated, 'The Eighth Amendment's ban ...proscribes more than physically barbarous punishments ...It prohibits penalties ...that transgress today's broad and idealistic concepts of dignity, civilized standards, humanity and decency' (at 2570).
For a review of the US cases in this period see *Prisoners of Isolation*, pp.92-96 online at http://justicebehindthewalls.net/book.asp?cid=778&pid=870

23 (1977) 31 CCC (2d) at 183

24 See *Prisoners of Isoation*,p.97, online at http://justicebehindthewalls.net/book.asp?cid=779&pid=872

Parliament had specifically outlawed the punishment of solitary confinement as being inconsistent with evolving standards of decency as they had developed to that point. How could it be said that these standards now permitted penitentiary officials, under the guise of an ambiguous regulation, to impose that which was so clearly rejected nearly one hundred years ago?

The third principle identified by the American cases was that the punishment must not be arbitrarily inflicted. According to Mr. Justice McIntyre's restatement of the test, a punishment will conflict with section 2(b) 'if it cannot be applied on a rational basis in accordance with ascertained or ascertainable standards.' The plaintiffs in *McCann* submitted that they had described a system of decision-making in which men were confined in SCU, not necessarily because of what they had done, but because of what their reputations and attitudes were perceived to be by prison officials who could and did rely upon intuition rather than on any reasoned judgment based on proved facts. The only consistent theme which could be derived from that evidence, reinforced by the evidence of their treatment in SCU, was the tyrannical theme of arbitrariness.

The fourth principle was that the punishment or treatment must not be excessive. In Mr. Justice Brennan's formulation, solitary confinement would be excessive if it served no legitimate penal purpose or if it went beyond what was necessary to achieve a legitimate penal purpose. Mr. Justice McIntyre's restatement separated the discrete elements of Mr. Justice Brennan's principle: solitary confinement would violate section 2(b) of the Bill of Rights if it served no legitimate penal purpose, if it was unnecessary because of the existence of adequate alternatives, or if it was excessive and out of proportion to the evils it sought to restrain. Professor Berger has referred to these refinements of Mr. Justice Brennan's excessiveness test as the 'social purpose test,' the 'necessity test,' and the 'disproportionality test.'[25] The evidence in the *McCann* case from both the plaintiffs' and the defendants' witnesses demonstrated that solitary confinement in the British Columbia Penitentiary under the conditions prevalent in the SCU served no legitimate penal purpose. Dr. Korn defined the regime as cruel: 'Cruelty is the infliction of pain either gratuitously or by intent without ...effective regard to the welfare of the person on whom it is being inflicted ...it is suffering to no useful end to either party.' When asked whether solitary confinement as practised at the British Columbia Penitentiary served a penal purpose, he replied that it served no reasonable or rational penal purpose in terms of deterrence, long-range control, treatment, or reformation.[26]

The McCann argument conceded that for the stated purpose of administrative segregation, the 'maintenance of good order and discipline in the institution,' it was legitimate in certain situations to dissociate prisoners from the general population. However, the evidence in the *McCann* case showed clearly that the effects of solitary

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25 Stan Berger, 'The Application of the Cruel and Unusual Punishment Clause under the Canadian Bill of Rights,' 24 McGill Law Journal 161 (1978). See also Michael Jackson, Cruel and Unusual Treatment or Punishment, Charter Edition U.B.C.L.R.189 (1982)

26 Prisoners of Isolation, pp.98-9

confinement in SCU engendered such feelings of hatred and rage in those subjected to it that it undermined and threatened the very objective it was supposed to further. The plaintiffs argued that the legitimate purpose of dissociating prisoners could be accomplished through an alternative regime that did not have the debilitating features of solitary confinement. The plaintiffs' experts were asked to inform the court of what the 'adequate alternatives' might be, specifically for the purpose of laying an evidentiary foundation for this part of the 'cruel and unusual' test. The regime put forward by Dr. Korn included several important components. Within a physically secure perimeter, prisoners would retain all their rights and privileges. Dissociated prisoners would be entitled to have visits from other prisoners within the secure perimeter, subject to the visitors being carefully frisked; they would also be allowed to receive visits from people in the 'free world.' They would have access to therapists of their choice in order to develop the trust that was totally lacking in their relationships with the prison psychiatrist in SCU. The cells would be larger. Prisoners would be permitted more personal effects, because prisoners subjected to this extreme form of confinement need more rather than less reinforcement of their sense of identity. There would be no constant illumination in the cells, and prisoners would not be required to arrange their bodies in any particular way during sleep.

Dr. Korn commented on his proposed regime as compared to that of SCU: 'What I couldn't understand in the BC Penitentiary is the gratuitous cruelty, the unnecessary cruelty. I can understand rigour when it is necessary but what I can't put together is the unnecessary aspect of it ...the tininess of the cell, the threadbare character of the articles.' Dr. Korn found the twenty-four-hour illumination primitive; the requirement that the prisoners sleep with their heads by the toilet so that their heads were visible to the guards he characterized as 'gratuitous and shocking.' In Dr. Korn's regime, prisoners would exercise under the sky. As he put it, even 'condemned men walk in the yard.'[27]

The McCann judgment 1976 and the Window of Contempt

Mr. Justice Heald ruled that confinement of Jack McCann and the other plaintiffs in SCU did constitute cruel and unusual punishment or treatment within the meaning of section 2(b) of the Bill of Rights. He based this conclusion in part on the plaintiffs' experts, Dr. Korn, Dr. Fox, and Dr. Marcus, who “had no hesitation in describing it as cruel treatment.”[28] Those experts common conclusion that the regime in SCU was cruel was related to the primary test of whether the punishment degraded the dignity of the prisoners as human beings. Justice Heald added that 'when the expert evidence is considered along with the evidence of the plaintiffs themselves, I have no hesitation in concluding that the treatment afforded them in solitary at the BC Penitentiary has been cruel.' He concluded, based on the evidence of the expert witnesses and the admission of the director of the penitentiary, that the treatment served no positive penal purpose. “Furthermore, even if it served some positive penal purpose, I still think the treatment would be cruel and unusual because it is not in accord with public standards of decency

27 *Prisoners of Isolation*,pp.99-100,
28 (1976) 29 CCC (2d) 337 at 368 and 370

and propriety, since it is unnecessary because of the existence of adequate alternatives… which would remove the 'cruel and unusual' aspects of solitary while at the same time retaining the necessary security aspects of dissociation.'[29]

Vindication in the courts does not easily translate into transfer into significant changes to deeply enchenched customary practices in the penitentiary. In *Prisoners of Isolation* I described the mean and minimalist way in which the Correctional Service of Canada implemented the *McCann* judgment:

> *Within a week of Mr. Justice Heald's decision, prisoners being held in SCU were moved out and placed in a range of cells in the B- 7 block. These cells were the same as others in the cell block; they had open bars instead of the solid doors of the SCU cells, and they were equipped with standard beds and built-in desk-bookcases. Dragan Cernetic, director of the penitentiary, said that the change was made 'to live up to the spirit of the judgment.' The press were invited in to see the new cells and to tour the special correctional unit. However, by April 1976, after a hostage-taking incident by prisoners in segregation and in the face of increasing hostility of the guards to the move (who demanded that the director resign), the prisoners were moved back to the special correctional unit, the name of which had now been changed to the super-maximum unit (SMU). The only change that had been made to the unit was that the five-inch-square window in the steel doors had been enlarged to eighteen inches by thirty inches. Only two changes were made in the regime of the unit: the light in the cell was turned off from midnight until 6:00 A.M., and prisoners now exercised in the central control area instead of the corridor outside the cells. This move was viewed as constituting 'fresh air' exercise, since the roof of the central control area was, at its extreme ends, open to the outside. There were no other changes. An editorial in The Vancouver Sun entitled 'The Window of Contempt' reflected the views of prisoners on the extent to which the penitentiary had responded to the spirit of Mr. Justice Heald's decision…*
>
> *By the end of 1976, other changes had been made to the cells: a metal table-and-stool combination was placed at the back of each cell, and a raised metal bed-frame was bolted to the wall to replace the concrete sleeping platform. However, the new enlarged opening in the door which in May had been obstructed by nothing other than three bars was now covered by a heavy steel-wire grill. Prisoners regarded this 'improvement' as worse than the original small five-by-five-inch opening. Now the little outside light that came in through the window on the other side of the catwalk was glimpsed not only through the wire mesh separating the corridor from the catwalk but also through the steel wire grill over the 'window' in the cell door. It was light as distorted as the existence to which the prisoners were condemned. Beneath the 'window' of the cell, there was a slot which could be closed from the outside and which was used to pass meals to the prisoners. The result of this change was that now even the brief respite from solitude formerly provided by coming out of their cells to pick up their meals at the end of the corridor was gone. Exercise periods were still no more generous; exercise was taken in the central control area, usually under the surveillance of at least three or four guards. In 1977, open -air exercise facilities were constructed at great expense on the roof of the*

29 at 370

> *'penthouse.' These facilities consisted of elaborate cages, the sides of which were made of heavy metal, steel mesh, and wired glass. The combination of steel mesh and wired glass was a mirror image of the view the prisoners had from within their cells. Many prisoners refused to exercise in them rather than endure this distorted view of what the outside offered.*[30]

But the *McCann* judgment, beyond its imprint in law reports, in the larger historical context was a catalyst for change. In a major parliamentary inquiry following riots in three of Canada's maximum-security penitentiaries, including the BC Penitentiary, a year after the *McCann* judgment, prisoners referred to the judgment as a demonstration of the illegitimacy of carceral power. In their submissions to the committee prisoners cited the non-implementation of the decision as the clearest evidence of the lack of commitment to the rule of law on the part of correctional officials. In addition to playing a role in galvanizing support for the issue of prisoners' rights the case may have played his most important role in influencing the decision to close the British Columbia Penitentiary. For almost fifteen years, successive Solicitors General had paid lip service to the idea of phasing out the nineteenth century bastille. In 1980 the British Columbia Penitentiary was closed for good. It was the only penitentiary ever to be found by a court to be operating in violation of the Canadian Bill of Rights. Although other factors were also at work the *McCann* judgment and the illegitimacy it stamped on the British Columbia penitentiary was likely an important determinant in the final decision to close "The Pen".

The Demise of the Hands off doctrine

In 1975 in preparing the legal argument on cruel and unusual I had relied heavily on the strong current of the US jurisprudence on judicial intervention in bringing the Constitution behind prison walls. Developments in the decades after *McCann* made such an exercise in comparative jurisprudence decidedly less attractive to Canadian prisoners. Not only would the US experience the rise of "mass incarceration" unprecedented in its history, including the exponential expansion of Supermax prisons in almost every state and the federal system, but this was ominously accompanied by both judicial and legislative restrictions on judicial intervention. At the legislative level, the 1996 Prison Litigation Reform Act (PLRA), aimed at curtailing prisoner litigation and limiting the scope of judicial intervention into prison administration even for constitutional claims, was the culmination of what American commentators have seen as a return to keeping judicial 'hands off' the field of prison administration.[31]

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30 Prisoners of Isolation, pp.140-2 online at http://justicebehindthewalls.net/book.asp?cid=785

31 For a comparative study of the US and Canadian experience See Lisa Kerr, The Chronic Failure to Control Prisoner Isolation in US and Canadian Law Queens Law Journal forthcoming

The Prison Litigation Reform Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (PLRA). The PLRA contains extraordinary limits on prisoner litigation in federal courts.The PLRA requires administrative exhaustion of internal remedies, limits actions to those with showings of physical injury, caps attorney's fees, and discourages repeat filings by jailhouse lawyers. The PLRA has been very effective in reducing the number of prisoner claims. For discussion of the legislative history and impact of the law, see Margo

The intensification of imprisonment and the retreat from constitutional protection of prisoners' rights in the US in the post-McCann era is more than ironic in a comparative context because in Canada the trajectory of protection arced quite differently. In the wake of riots in 1976 the House of Commons Sub-Committee on the Penitentiary System in Canada articulated the principled framework within which the Penitentiary should and must operate. The first principle was that "It is essential that the Rule of Law prevail in Canadian penitentiaries". The second principle was that:

> *"Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. … 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.*[32]

Two years later in 1979 the Supreme Court of Canada added its imprimatur to the rule of law clarion call. Cutting the Gordian knot that had bedeviled Canadian administrative law, in which decisions were divided into those characterized as "judicial" and "administrative" with almost every decision of a prison official being classified as administrative and therefore non-reviewable by the courts, the Supreme Court in articulating the common law duty to act fairly opened to judicial scrutiny decisions that had hitherto been beyond the ken of the court.[33] Justice Dickson in a sentence I have recited in every case I have argued before the Supreme Court since wrote: "the Rule of Law must run within penitentiary walls*".* Subsequent decisions of the Supreme Court of Canada contributed to the lexicon of correctional law. A year after *Martineau* the Supreme Court took a 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

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Schlanger and Giovanni Shay, "Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act," (2008) 11 U. Pa. J. Const. L. 139 – 154.

For an excellent analysis of the US experience see Malcolm Feeley and Edward Rubin, *Judicial Policy Making and the Modern State: How the court's Reformed America's Prisons,* (Cambridge University Press, 1998). The authors see *Wilson v. Seiter*, 501 U.S. 294, as the signal of a "true retrenchment." *Wilson* holds that conditions must be specifically imposed as punishment in order to be covered by the Eighth Amendment, or must be the result of wanton behavior by correctional officials. As Feeley and Rubin conclude, the *Wilson* reasoning could preclude conditions of confinement suits on the ground that the conditions are: "the result of an insufficiently trained staff, an insufficiently funded operational budget, an insufficiently large physical plant, or any of the other insufficiencies that genuinely bedevil state prison systems." p. 48

During the time that supermax prisons were being built in the US, the use of administrative segregation also expanded within ordinary high security prisons, in special wings known as "special housing units" or SHU. Approximately 80,000 prisoners are thought to be in long-term solitary, with 25,000 in supermax and the remainder in SHU. In the US, guards' unions and prison administrators justify supermax and other forms of administrative segregation as a means to control prison violence and disrupt gang hierarchies. See Lisa Kerr, The Chronic Failure to Control Prisoner Isolation

32 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 86-7.

33 *Martineau v.Matsqui Institution Inmate Disciplinary Board* [No 2] [1978] 1 S.C.R. 118 . For a review of these developments see Justice Behind the Walls Sector 1, Chapter 3 online at http://justicebehindthewalls.net/book.asp?cid=10

See also David P. Cole and Allan Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review* [Toronto: Carswell, 1990] at 46ff.).

those expressly or impliedly taken away from him by law".[34] 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.

The Supreme Court of Canada laid another important milestone in correctional law in a trilogy of cases decided in 1985. In *Cardinal and Oswald, Miller,* and *Morin,* which involved challenges by prisoners to their confinement in administrative segregation and their transfer to the Special Handling Units, the highest level of security in the federal penitentiary system - the Canadian Supermax - the court ruled that prisoners have a right not to be deprived, unlawfully or unfairly, of the relative or "residual" liberty they retain as members of the general prison population; and that any significant deprivation of that liberty -- such as being placed in administrative segregation or a Special Handling Unit -- could be challenged through *habeas corpus.* [35]

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".[36] The second flag was the enactment of the *Canadian Charter of Rights and Freedoms*[37] in 1982.

More so than any individual case decided in the post-Charter era there is a strong argument to be made that the most significant impact of the *Charter* has been in the development of new federal correctional legislation, culminating in the *Corrections and Conditional Release Act* (*"*the *CCRA"*) in 1992. Standing almost as the polar opposite of the U.S. 1996 *Prison Litigation Reform Act* on the axis of protecting the human rights of prisoners, the enactment in 1992 of the *CCRA* changed the legal landscape of Canadian correctional law with the specific intention of bringing the federal legislative regime into conformity with the *Charter.* Based on the working papers of the Correctional Law Review the *CCRA* was designed to provide a comprehensive, coherent and principled legislative framework which would embody the modern philosophy of corrections and incorporate the rights and guarantees of the *Charter* by articulating within a legally binding framework the critical balance between correctional authority and prisoners' rights as mandated by the *Charter.*[38]

Disturbingly, such is the power of the customary law associated with the prison's ultimate power to infringe on human dignity, that the history of administrative segregation has proven resistant to the restraints embodied in *CCRA*, the *Charter* and the prohibition against cruel and unusual punishment or treatment. That history shows

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34 *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at 823

35 *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662 . The cases

36 *Cole and Manson* at 40

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

38 For a detailed analysis of the genesis of *the Corrections and Conditional Release Act 1992* see *Justice behind the Walls*, Sector 1, Chapter 3 online athttp://justicebehindthewalls.net/book.asp?cid=14&pid=304

that the rule of law still struggles to find traction behind the security fences of the contemporary Canadian prison.

The Model Segregation Code and the 1992 CCRA

Based loosely on some of the provisions of the "Model Segregation Code" I developed in 1983 after the *McCann* case as part of *Prisoners of Isolation*[39] the *CCRA* framework for segregation sets out detailed, structured review and accountability mechanisms involving a Segregation Review Board, the Warden, and Regional Headquarters. There are requirements for hearings at which a prisoner has the right to make representations; to make that right effective, the prisoner must be given three days' advance written notice of the hearing and the information that the Board will be considering at the hearing. There is a further requirement that a plan be developed to resolve the situation that led to the segregation and, in cases of extended segregation, that a plan be developed within sixty days which addresses in detail the schedule of activities regarding a prisoner's case management services and his access to spiritual support, recreation, psychological counselling, administrative education and health care services.

The significant differences between the *CCRA* provisions and my Model Code are that under the *CCRA* the criteria for segregation in the *CCRA* are much more broadly based and the *CCRA* places no limitation on how long a prisoner can be confined in administrative segregation where the Model Segregation Code would, except under exceptional circumstances, limit this to a period of ninety days. The final difference is that under the *CCRA* segregation decisions continue to be made and reviewed by correctional administrators with no element of independent decision-making. Under the Model Code, and indeed its lynchpin, independent decision-making by persons appointed from outside the correctional hierarchy was an essential part of the process.[40]

As part of the research for my 2001 book *Justice Behind the Walls: Human Rights in Canadian Prisons* when I began my work in 1993 at two federal institutions, Matsqui and Kent, my agenda was to assess the reality of change in the use of segregation and in the conditions under which prisoners in segregation were confined since the 1970s.Had the new legislative regime resulted in a principled and fair process in compliance with the *Charter* entrenched injunction against the imposition of cruel and unusual punishment or treatment? In *Justice Behind the Walls* I have documented through case studies based on my own observations and interviews with prisoners, correctional officers and administrators the many ways in which compliance with the law and respect for human dignity remain unfulfilled.[41] That my observations and conclusions that the new regime of administrative segregation remained resistant to the rule of law were not born of a human rights professor's and lawyer's scepticism for

39 The Model Code can be found as Appendix A to *Prisoners of Isolation* online at http://justicebehindthewalls.net/05_resources_pop.asp?filename=resources/appendices/Appendix_B.
40 For further development of the differences see Justice behind the Walls online at http://justicebehindthewalls.net/book.asp?cid=123&pid=476
41 *Justice behind the Walls* Sector 4 Chs. 2 and 3
online at http://justicebehindthewalls.net/book.asp?cid=124

correctional authority was to be indelibly confirmed by a series of events that took place 2000 miles from the Fraser Valley institutions in which my research was centered.

Cruel and not so unusual in the Prison for Women 1994

Twenty years after *McCann* in April 1994 and two years after the enactment of the *CCRA* a series of events unfolded at the Prison for Women (P4W) in Kingston, Ontario that exposed to public view and scrutiny, in a manner unprecedented in Canadian history, the relationship between the Rule of Law and operational realty in segregation units. The videotaped strip searching of women prisoners by a male emergency response team shocked and horrified many Canadians 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 report by the Correctional Investigator and a report by the Commission of Inquiry conducted by Justice Louise Arbour.[42] Justice Arbour's report contained the clearest indictment of the CSC's general attitude regarding non-compliance with the law:

> *. . . Significantly in my view, when the departures from legal requirements in this case became known through this inquiry's process, their importance was downplayed and the overriding public security concern was always relied upon when lack of compliance had to be admitted. This was true to the higher ranks of the Correctional Service management, which leads me to believe that the lack of observance of individual rights is not an isolated factor applicable only to the Prison for Women, but is probably very much part of the CSC's corporate culture.* [43]

The women involved in the April 22 incident remained in segregation from that date until December 1994 or January 1995.[44] The Arbour Report traces the conditions of their confinement, the reasons given by the CSC for its necessity, the segregation review process through which it was maintained, and the impact of the segregation on the women.

> *On April 27, 1994, the warden's order that the inmates in segregation were to get nothing without specific direction from her, was forcefully repeated in the segregation log, and even more stringently interpreted than in the days before the IERT attendance. The resulting regime of denial continued for an extended period of time . . .*
>
> *. . . Mattresses were not reintroduced in segregation at the Prison for Women until May 10th. Restrictions on the availability of clothing continued for some period of time, and even included the failure to comply with Unit Manager Hilder's direction that women be provided with street clothes prior to attending in court. In the period immediately*

42 At the time of inquiry Louise Arbour was a justice of the Ontario Court of Appeal. Her subsequent career followed a distinguished trajectory She was appointed Chief Prosecutor for the International War Crimes Tribunal, then appointed to the Supreme Court of Canada and following her retirement from that court became the UN High Commissioner for Human Rights.

43 Commission of Inquiry into Certain Events at the Prison for Women in Kingston [Ottawa:Public Works and Government Services Canada, 1996] [Commissioner: Louise Arbour] at 56-7

44 The incident that precipitated the search and the subsequent segregation was an assault on staff and what was alleged to be an escape plot, See Arbour, at 25-28

> *following April 27th, toilet paper was restricted to "one or two squares" per inmate. Underwear was denied, even in the circumstance of an inmate who required the use of a sanitary pad with vaginal cream. Regular cleaning of the segregation area, garbage removal and laundry was very slow to resume. At the Prison for Women, showers were not regularly provided in the initial weeks. Phone calls (including calls to the Correctional Investigator) were denied, as were specific requests for cigarettes, ice and face cloths . .*
>
> *While there was some attempt to suggest that the basis of the overall regime was grounded in security concerns, most witnesses who testified appeared to concede that there was little in the way of specific security justifications for the deprivations noted above . . .*[45]

This deprivation of basic amenities replicated the conditions documented in the B.C. Penitentiary 20 years earlier in the evidence in the *McCann* case. The regime of reducing prisoners to a Hobbesian state of brutish nature to demonstrate that they are under the total control of their jailers has long been a cornerstone of the customary law of segregation units. What Justice Arbour found was that at the P4W, customary law had little difficulty maintaining its ascendancy over the provisions of the *Charter* and the *CCRA.*

Justice Arbour found that the harmful effect of prolonged segregation was recognized the P4W own psychologists:

> *It is not surprising that the prolonged deprivation and isolation associated with the segregation of these inmates was seriously harmful to them. In October of 1994, the prison's psychologists advised the prison staff of the psychological ill effects being suffered by the women. Their report read:*
>
> > *Many of the symptoms currently observed are typical effects of long-term isolation and sensory deprivation. One thing which seems to have increased the deprivation in this current situation is the new grillwork which has been put up on the cells. The following symptoms have been observed:*
> >
> > - *perceptual distortions*
> > - *auditory and visual hallucinations*
> > - *flashbacks*
> > - *increased sensitivity and startle response*
> > - *concentration difficulties and subsequent effect on school work*
> > - *emotional distress due to the extreme boredom and monotony*
> > - *anxiety, particularly associated with leaving the cell or seg area*
> > - *generalized emotional liability at times*
> > - *fear that they are "going crazy" or "losing their minds" because of limited interaction with others which results in lack of external frames of reference*
> > - *low mood and generalized sense of hopelessness*
> >
> > *Part of this last symptom stems from a lack of clear goals for them. They do not know what they have to do to earn privileges or gain release from segregation. At the present time there is no incentive for positive behaviour. Their behaviour has been*

45 Arbour, at 132

> *satisfactory since their return from RTC but has not earned them additional privileges, nor have they been informed that their satisfactory behaviour will result in any change of status.*
>
> *If the current situation continues it will ultimately lead to some kind of crisis, including violence, suicide and self-injury. They will become desperate enough to use any means to assert some form of control of their lives. The constant demands to segregation staff is related to needs for external stimulation and some sense of control of their lives*.

The segregation of these inmates continued for between two and a half to three months after these observations were made.[46]

Justice Arbour concluded her review with an assessment of the punitive impact of prolonged segregation at the P4W on the integrity of the sentence of imprisonment:

> *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 . . .*
>
> *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 . . .*
>
> *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.* [47]

While Justice Arbour was not called upon, as was Justice Heald in *McCann,* to render a declaratory judgment on whether the conditions of confinement in administrative segregation constituted cruel and unusual punishment or treatment, there is little doubt that based on both the pre-and post-Charter jurisprudence on the tests for cruel and unusual "that the punishment or treatment is so excessive as to outrage standards of

46 Arbour, at 139-40
47 Arbour, at 141-43

decency, such that the effect of that punishment or treatment is grossly disproportionate to what would have been appropriate"[48] - the nine-month segregation of the women as described by Justice Arbour did constitute cruel and unusual punishment or treatment.

Justice Arbour made a separate body of recommendations concerning segregation and the legal and administrative regime she deemed necessary 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. Her preferred 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 thirty 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 sixty non-consecutive days annually in segregation. After thirty days, or if the total days served in segregation during that year already approached sixty, 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.[49]

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 would be conducted every thirty days.[50]

These recommendations for the administrative segregation process 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 judgement that "there is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control" (Arbour at 198).

Following the release of the Arbour report correctional service of Canada set up a special Task Force on Administrative Segregation charged with addressing the recommendations and issues raised by the Arbour Report and examining the extent to which the Arbour findings at the Prison for Women were applicable to other institutions.

48 The post-*Charter* cases are reviewed at pp. of this paper
49 Arbour, at 191
50 Arbour, at 192 and 255-56

I have dealt elsewhere with the findings and recommendations of the Task Force[51] but for the purpose of understanding the conditions and effects of segregation it may be useful in this paper to recount one aspect of the Task Force's work.

The *CCRA* provides that prisoners in administrative segregation shall be given the same rights, privileges and conditions of confinement as the general population, except for those rights, privileges and conditions that can only be enjoyed in association with other prisoners or cannot reasonably be given owing to limitations specific to the administrative segregation area or security requirements. The Task Force found that "the operational reality has been that inmates, their advocates or program staff have had to demonstrate why they should be provided the same rights, privileges and programs. The legal reality is that the CSC has to demonstrate why they should not be provided".[52] To get a more informed picture of the national situation, the Task Force distributed a questionnaire to all segregated prisoners in late 1996 and received responses from almost four hundred. The purpose of the questionnaire was to determine whether prisoners had the same, less, or more access to rights, privileges, and services while in segregation. The responses confirmed that, under current practice, administrative convenience and security considerations had all but eclipsed legal programming requirements.

At the time prisoner Glen Rosenthal responded to the questionnaire, he had served a year in segregation at Edmonton Max after being attacked by another prisoner. In addition to checking off the list of questions, he offered these reflections:

> *In the course of completing this survey I have found it extremely difficult to convey the reality of living in this segregation unit for nearly a year. I have spent fifteen years in many different prisons and have found myself in the segregation units of most of them at one time or another. Never have I experienced anything remotely comparable to what I am experiencing now. It is one thing to be locked in a cell for a year, and that of itself is bad enough. Add to that the fact that you have no idea how long it will continue . . . And add to that the fact that your health has deteriorated to the point where you doubt you will ever be healthy again . . . You can't sleep more than three or at best four hours at a time. You are constantly getting awoken by music blasting, barriers clanging open and shut. You are always tired. You have gone from a hundred and fifty pounds to a hundred and ninety pounds and every muscle in your body is either knotted or atrophied. The warden told you he would transfer you to B.C., so your wife moved there six months ago and you have watched your marriage fall apart one piece at a time since then. You have been wearing stinking rags for so long you don't notice it anymore. You look older, fatter, disgusting to yourself when you look in the mirror. Your self-esteem is sub-zero . . .*
>
> *You want to complain about the rags you get for clothes but you know the cleaners will spit in your food or urinate in your coffee if you do. You want to complain about the guard who miscounted your phone calls for the month, only giving you one or two, but you know next month you won't get any if you do. You want to complain about not being transferred but you know that this will piss somebody off and you will never get out. You*

51 *Justice behind the Walls* Sector 4 Ch.4 online at http://justicebehindthewalls.net/book.asp?cid=148 Task Force on Administrative Segregation: Commitment to Legal Compliance, Fair Decisions and Effective Results [Ottawa: Correctional Service of Canada, March 1997]

52 Task Force on Administrative Segregation p. 50

can't bear the thought of people you love seeing you in this condition so you don't take any visits. Your life is so static there is nothing, absolutely nothing left to write to anyone about. Your once passionate and hopeful phone conversations with your wife turn into a string of uncomfortable silences and misdirected frustrations. But she is the only one who will listen, and then one day there is no one. You spend twenty hours a day on your back, somewhere between waking and sleeping, trying to keep your mind out of the dark places but you can't. Your mind seems full of thoughts that don't belong there. You can't carry a conversation anymore because you are afraid one of them will slip out. You don't tell anyone because you are even more afraid of the medication they might think you need.

I don't use words like "afraid" easily. I have always identified myself with being up to whatever challenge came my way, and so far I have. I have never faced a challenge that threatens who and what I am more than this last year in this segregation unit. It is no exaggeration to call this cruel and unusual punishment. Though the circumstances here are likely more the product of indifference than malice, it is no less insidious and destructive. My health is gone, my life has fallen apart, parts of me that words can't describe will not recover from this. And I did nothing wrong. All this is happening to me because the machine isn't working and no one seems obliged to fix it.[53]

One of the Task Force's mandates was to review the recommendations of Justice Arbour for judicial supervision or independent adjudication of segregation decisions and to make recommendations for improving the effectiveness of the segregation review process. In our initial meetings, a clear division of opinion on the issue of independent adjudication emerged between members from within the ranks of the Service and those drawn from outside. The CSC members argued vigorously that the necessary reforms could be achieved through "enhancing" the existing internal model of administrative decision-making, in which the Segregation Review Board, chaired by institutional managers, made recommendations and the warden had the ultimate authority.

In response I argued that independent adjudication of segregation decisions is necessary to ensure a fair and unbiased hearing, compliance with the statutory framework, protection of prisoners' rights and privileges while segregated, and the implementation of re-integration plans to ensure that the correctional authorities, in administering the sentence, use the least restrictive measures.The role of an independent adjudicator is not to replicate the hard won knowledge and experience of correctional administrators, nor would the presence of an independent adjudicator undermine or straitjacket the authority of wardens and staff to manage their institutions decisively at times of crisis, maintaining a precarious balance of control and security. Rather, independent adjudication is designed to safeguard another kind of precarious balance, one likely to be upset at times of crisis and emergency: the balance between correctional discretion involving the most intrusive form of imprisonment - administrative segregation – and the rights of prisoners to the full protection of the law.

The Task Force vigorously debated the relative merits of an enhanced internal segregation review process and a system of independent adjudication. Members from within the Service developed a model for enhancing the internal review process,

53 *Justice behind the Walls*, pp.383-4 online at http://justicebehindthewalls.net/book.asp?cid=160

including a legal education initiative, the development of better alternatives to segregation, and the establishment of regional Segregation Review Boards. From our debate emerged a consensus that the Task Force recommend that the Service reform the segregation process along parallel paths, one path being the enhancement of the internal review process and the other an experiment with independent adjudication.[54]

Systemically related to the correctional authorities operational imperative to maintain power and control over its most intrusive form of imprisonment the recommendation for independent adjudication of administrative segregation that I had first advanced in the Model Segregation Code, as amplified by the Arbour report and reinforced by CSC's own task force has been steadfastly resisted. That resistance has been maintained by CSC despite its subsequent endorsement by a CSC appointed Working Group on Human Rights, a Parliamentary Sub-Committee in its 5 year review of the *CCRA*, the Canadian Human Rights Commission and the Correctional Investigator.[55]

The post-Charter Cruel and Unusual litigation on Administrative Segregation

While there has clearly been a vigorous and ongoing critique of the process and conditions of administrative segregation in commissions of inquiry, parliamentary committees, human rights commissions, Correctional Investigator's reports, task forces, and the academic literature, the issue has only been the subject of litigation in the post-charter era in just a handful of cases. The first case was one brought by Clifford Olson, convicted of multiple counts of first degree murders of young and adolescent children, who as the most reviled prisoner in the prison population, for his own protection was confined in a separate wing of Kingston Penitentiary isolated from other prisoners. Mr. Olson represented himself and unlike McCann did not adduce any evidence on the effects of segregation nor on the alternatives to long-term isolation. In its 1987 decision, the Supreme Court of Canada upheld the Ontario Court of Appeal's finding that "segregation to a prison within a prison is not, per se cruel and unusual treatment."[56]

The opinion of Brooke J.A. in its statement of the relevant principles bridges the transition from the pre-Charter jurisprudence under the *Canadian Bill of Rights,* including *McCann* to the first post *Charter* cases that had raised the cruel and unusual prohibition in relation to mandatory minimum sentences.

> *The most recent discussion of the meaning and application of s. 12 of the Charter is in Smith v. The Queen* [1987] 1 S.C.R. 10]. *Relevant to consideration here, Lamer J. said, in reviewing the authorities, at p. 14*
>
> > *It was not until 15 years after the enactment of the Canadian Bill of Rights that a more in depth analysis of the protection afforded by s. 2(b) was undertaken. The only decision finding a treatment or punishment to be cruel and unusual under*

54 For a more detailed discussion of the Task Force recommendations see *Justice behind the Walls* , Sector 4, Chapter 4 online athttp://justicebehindthewalls.net/book.asp?cid=149

55 A detailed history of the history of this resistance can be found in Michael Jackson, the Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation, (2006) 48 Canadian Journal of Criminology and Criminal Justice 157

56 R. v. Olson, [1989] 1 S.C.R. 296, affirming R. v. Olson, [1987] O.J. No. 855 (C.A.).

the Canadian Bill of Rights was McCann et al. v. The Queen et al. In this judgment, Heald J., of the Trial Division of the Federal Court, declared that the prison conditions to which certain prisoners were subjected in the solitary confinement unit of the British Columbia penitentiary amounted to cruel and unusual treatment or punishment. In his view, the treatment served no "positive penal purpose", and even if it did, "it [was] not in accord with public standards of decency and propriety". Furthermore, in his opinion, there existed "adequate alternatives" to the treatment.

At p. 26 Lamer J. said:

> *The limitation at issue here is s. 12 of the Charter. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J.C. in Miller and Cockriell [[1977] 2 S.C.R. 680] where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J.C. in Miller and Cockriell, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.*

In his dissenting opinion, McIntyre J. observed at pp. 6-7 of the dissent:

> *This broadening process has been advanced, I suggest, in the Charter by the inclusion of the word "treatment" in s. 12, which was not in the original formulation of the prohibition in the English Bill of Rights, nor in the Eighth Amendment to the American Constitution. The addition of treatment to the prohibition has, in my view, a significant effect. It brings within the prohibition in s. 12 not only punishment imposed by a court as a sentence, but also treatment (something different from punishment) which may accompany the sentence. In other words, the conditions under which a sentence is served are now subject to the proscription. It becomes clear, then, that while the barbarous punishments of the past which called into being the prohibition of some three centuries ago are mercifully unlikely to recur, the prohibition is saved from any suggestion of obsolescence by the addition of the word "treatment". There are conditions associated with the service of sentences of imprisonment which may become subject to scrutiny, under the provisions of s. 12 of the Charter, not only on the basis of disproportionality or excess but also concerning the nature or quality of the treatment. Solitary confinement as practised in certain circumstances affords an example: see McCann et al. v. The Queen et al. Section 12 might also be invoked to challenge other kinds of treatment, such as the frequency and conditions of searches within prisons, dietary restrictions as a disciplinary measure, corporal punishment, surgical intervention including lobotomies and castration, denial of contact with those outside the prison, and imprisonment at locations far distant from home, family and friends, a condition amounting to virtual exile which is particularly relevant to women since there is only one federal penitentiary for women in Canada. I offer no opinion as to what a court would decide in respect of any of these examples of treatment should a challenge be made. I merely note that there exists a field for the exercise of s. 12 scrutiny in modern penal practice. It has not become obsolete.*

Later, at pp. 8-9 he writes:

> *How then is this compendious expression of a norm to be defined? There is no problem of definition nor of recognition of cruel and unusual treatment or punishment at the extreme limit of the application, but of course the day has passed when the barbarous punishments of earlier days were a threat to those convicted of crime. In my view, in its modern application the meaning of "cruel and unusual treatment or punishment" must be drawn "from the evolving standards of decency that mark the progress of a maturing society", Trop v. Dulles (1958), 356 U.S. 86 at p. 101. A definition which satisfies this requirement and fits modern conditions is again supplied by Laskin C.J.C. in Miller and Cockriell, supra. After observing that the words could not be limited to the savage punishments of the past, he said at p. 688 S.C.R.:*
>
> *"That is because there are social and moral considerations that enter into the scope and application of s. 2(b). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(b), but I doubt whether a more precise one can be found."*
>
> *I would adopt these words as well and say, in short, that to be "cruel and unusual treatment or punishment" which would infringe s. 12 of the Charter, the punishment or treatment must be "so excessive as to outrage standards of decency". While not a precise formula for cruel and unusual treatment or punishment, this definition does capture the purpose and intent of s. 12 of the Charter and is consistent with the views expressed in Canadian jurisprudence on this subject. To place stress on the words "to outrage standards of decency" is not, in my view, to erect too high a threshold for infringement of s. 12.*

I think it is fair to say that the same tests applicable with respect to punishment are applicable with respect to treatment.[57]

In applying these tests to Mr.Olson the Ontario Court of Appeal posed the question "whether or not the continued confinement of the appellant in administrative or protective segregation at Kingston Penitentiary is treatment that is so excessive as to outrage standards of decency". In concluding that it did not Mr. Justice Brooke found that:

> *"most right-thinking people would agree that segregation from the general population in a prison is in the circumstances specified in the regulations necessary and acceptable.*
>
> *The appellant is a dangerous man. He has been convicted of 11 counts of first degree murder and, prior to that, has a lengthy criminal record. [There]are good reason to fear for the protection of the staff and other inmates and, of course, to fear that the appellant's life may be taken if he is allowed into the general population. Segregation to a prison within a prison is not, per se, cruel and unusual treatment. However, undoubtedly for the appellant, like anyone else, it may become so if it is so excessive as to outrage standards of decency. In my view, having regard to all of the evidence presented, such a case has not been made out. The appellant has the continued*

57 [1987] O.J. No. 855 (C.A.).

> *attention of his case management team, the Segregation Review Board, the director and those above him. He is continually observed and his health is protected. There does not appear to be any adequate alternative. There is no prison in Canada that I have been told about where he can be confined without being segregated from the general population."*

Bacon v. Surrey Pretrial Services Centre(Warden) 2010

In 2009 Jamie Baker, an alleged leader of one of British Columbia's criminal gangs, following charges of first-degree murder and conspiracy to commit a gang associated murder, was remanded to the Surrey Pretrial Centre. Unlike the BC Penitentiary and the Prison for Women, Surrey Pretrial is a modern institution built in the 1990s. As a remand center it is part of the BC provincial correctional system governed by the BC *Corrections Act*. Under that legislation and its associated regulations, like the federal *CCRA,* there is authority to place a prisoner in segregation for a disciplinary offense which is limited to 30 days for a single offense but also in administrative segregation, referred to as "separate confinement". initially for 15 days but which can be extended, upon review by correctional officials for further periods of 15 days without any limit on the total amount of time spent cumulatively in such confinement. Also very similar to the federal system, the grounds for placing a prisoner in administrative separate confinement are endangering or likelihood of endangering himself or herself or another person, jeopardizing the management, operation or security of the institution or risk of serious harm if not confined separately.

Mr. Baker spent the period from June 2, 2008 to July 9, 2009 in the Segregation "2" unit, and the Medical Isolation Unit. Mr. Baker's separate confinement was accompanied by a series of other exceptional restrictions on visits, telephone access and mail. In his *habeas corpus* he claimed *inter alia* that the deprivation of liberty he has suffered was not only been unlawful, but that it amounted to cruel and unusual treatment in violation of s. 12 of the *Charter*

As in *Olson*, the correctional authorities sought to justify Mr. Bacon's segregation both on the basis of the prisoner's need for protection, arguing that release to general population could result in his assault or murder due to the nature of his crimes and his criminal associations. They also argued that separation was required to protect the integrity of the criminal prosecution being brought against Mr. Bacon. Unlike the *Olson* case but, like *McCann,* Justice McEwan of the BC Supreme Court had before him an extensive evidentiary record, including Mr. Bacon's own description of the conditions and effects of his confinement supplemented by expert evidence. Different from both the *Olson* and *McCann* judgments, however, in *Bacon* Justice McEwan provides a detailed review of the relevant international human rights norms and Canadian commentary relating to solitary confinement as part of his contextual analysis and application of the jurisprudence on cruel and unusual punishment.

The conditions of separate confinement of Mr. Bacon was described in the affidavit of Dr. Craig Haney, an American expert who had visited prisons in the United States, Canada, Cuba, England, Hungary and Russia and had written extensively about

imprisonment, particularly solitary confinement. Justice McEwan accepted his evidence "to assist the Court in placing the treatment the petitioner has received in context".

> *40. The conditions under which Mr. Bacon has been housed in the Segregation Unit at Surrey Pretrial are very harsh and truly severe. Those conditions – including the deprivations and restrictions to which he was and currently is subjected – are equivalent in most respects to those imposed the most severe solitary or "supermax"-type facilities with which I am familiar in the United States. The Segregation Unit that I saw at Surrey Pretrial is not an appropriate place in which to confine pretrial prisoners for any considerable period of time.*
>
> *41. Specifically, the so-called "Seg II" – where Mr. Bacon was originally confined and where, as I understand it, he could be returned if prison officials decide to move him back there – was truly horrendous. It was filthy and smelly the day I toured, and the air was dank in Mr. Bacon's former cell as well as in the larger unit itself that contained several additional cells. As we toured this unit, several seemingly disturbed prisoners peered out at us from their cells, and made a number of bizarre, inappropriate comments as we passed through.*
>
> *42. The cell in which Mr. Bacon now lives is a standard size prison cell – approximately 80 square feet in dimension. It contains a bunk, a locker for his property, a small desk and chair, and a combination toilet and sink unit. Although there is technically a "window" in the cell, it has been covered over with a white film and Mr. Bacon cannot see out of it (or, as a result, tell whether it is night or day). Mr. Bacon is required to eat all of his meals in his cell, within a few feet of the toilet. In addition, there is a shower in one corner of his cell, obviating the need to take him to another area of the unit for this purpose. Mr. Bacon has been given access to a television in his cell – a practice that is also relatively common in many supermax prisons in the United States – which provides a way to pass idle time but hardly substitutes for meaningful social contact or interaction. Mr. Bacon has no access to "programs" or organized activities in which to engage. He remains inside this cell for nearly every hour of every day.*
>
> *43. In fact, Mr. Bacon's contact with the outside world – with anyone other than his parents – has inexplicably been restricted to mail correspondence. Such a restriction is extraordinary in my experience. Even prisoners placed in long-term solitary or "supermax" type confinement in the United States as punishment for serious disciplinary infractions are typically permitted to have non-legal phone calls, non-legal visits, or both.*
>
> *44. Mr. Bacon is limited to a single hour of out-of-cell time per day. This kind of severely restricted movement is practiced only by the harshest disciplinary segregation units with which I am familiar in the United States. In addition, this "hour out" comes at random times during the day and he is given no warning when it will occur. Mr. Bacon also indicated that he is the only inmate in the entire facility who is not allowed to have a phone card or to make phone calls to anyone other than his legal counsel. On a number of occasions, he has been prevented from making these phone calls until late in the evening, after his lawyers have left their offices.*
>
> *45. In addition, Mr. Bacon stated that the "23-hour lockup" to which he is being officially subjected really amounts to 24 hours a day because he has nothing to do during this one hour of out-of-cell time. Of course, like other prisoners in harsh isolation units, Mr. Bacon is denied the opportunity to participate in programs or activities that involve groups of prisoners. In addition, however, I can attest from personal observation that the "yard" or outdoor exercise area to which he is given access for one hour each day is*

> *hardly that. Instead, it is a tiny space – I would estimate no more than about twice the size of Mr. Bacon's cell – made of concrete, enclosed on all sides by the walls of the remand, with a metal grate overhead, and it lacks any exercise equipment of any kind. The day I toured it was dirty, had a foul smell in the air, and there were blotches of a dark, sticky substance on the concrete floor that stuck to the soles of my shoes. It was not adequate for meaningful outdoor "exercise" of any kind.*
>
> *49. Neither the "Medical Isolation" unit in which Mr. Bacon is currently housed nor the "Seg II" in which he was previously kept appear to me to be set up to adequately accommodate prisoners housed in long-term solitary confinement. The kind of structural and procedural modifications that must be made for a unit where prisoners are kept isolated from others on a long-term basis have not been built into this facility. There is no adequate outdoor exercise space provided, or any alternative indoor exercise when weather prohibits prisoners from going outdoors. There is no adequate space for confidential interviews to occur. (The day I interviewed Mr. Bacon, we sat in a makeshift space provided inside what appeared to be a staff member's office.) There is nowhere for inmates to have confidential telephone calls with their attorneys. In addition to the ad hoc or makeshift nature of some aspects of the physical environment in these units, there is a similar quality to the institutional routines that are followed there. Thus, Mr. Bacon reported that he is never sure when he will get his hour out, be permitted to return telephone calls from legal counsel, receive his mail, and so on. Because prisoners in segregation are so highly dependent on staff for even these most mundane aspects of their day-to-day existence, this kind of unpredictability is especially problematic. Moreover, the facility does not appear to provide for the careful medical and psychological monitoring of prisoners whose physical and mental health needs must be addressed differently and scrutinized more proactively because of the special risks posed by their solitary confinement status. The staff does not appear to have been given specialized training concerning the potential negative psychological effects of long-term isolation, and there is no procedure in place whereby the mental health status of each prisoner is checked routinely, frequently, and carefully.*

As to the effects of separate confinement Jamie Bacon described these in his own affidavit. As summarized by Justice McEwen:

> *[101] The petitioner said that he does not believe that he can maintain his sanity in the present conditions. He feels that the isolation of his confinement is destroying him. He said that the days all seem the same, that he feels powerless, and that there are some days when he has difficulty controlling feelings of rage. He said he is not sleeping well. He said he feels the concrete through his mat, and that if he sleeps on his side, his hands and shoulders go numb – which frequently wakes him up. When he lies on his bed during the day, his back is constantly in pain – the result of pre-existing injuries that are not being treated. He said he is eating badly because he has no access to a refrigerator or cooked food. He said he has problems with his vision which prevents him from being able to read for any length of time without getting a severe headache*.
>
> *[102] The petitioner said he feels that his memory is deteriorating. He said he has problems focusing and loses control of his thoughts. He said he finds himself daydreaming and has difficulty concentrating. He said he has difficulty following through with any tasks such as letter writing. He said he can only write a few pages and then must put his writing away. He said he often finds on re-reading that the letters make no sense. He said that he sometimes finds himself laughing at nothing.*

> *[103] He said that in segregation, with the exception of the time he took to shower, he was locked down effectively 24 hours a day. He was confined in a cell where the light was never turned off, and during the time he was in a cell with a video monitor he knew he was constantly being filmed.*
>
> *[104] In medical isolation, the petitioner has a shower in his cell, but there is nothing for him to do on his hour out, once he has taken out his garbage and obtained clean clothes. He said that he finds himself not wanting to go out of his cell at all. He said he is now uncomfortable around other people. He said he does not want to talk to guards. He said he starts to panic when he hears keys in his door. He said he does not even want to meet with counsel because he is forced to think about the situation he is in. He said this makes him angry and that it may take him hours to calm down afterwards.*
>
> *[105] The petitioner said he fears that if these conditions persist, he will not be in any frame of mind to face his trial. He said he could serve whatever time he must in ordinary remand, but that he cannot tolerate the isolation the respondent has imposed on him. He believes that the police have created an unwarranted aura of fear about him and said that he has no concerns for his personal safety if he were on a regular living unit. Guards have told him that he is the first prisoner that they have seen at Surrey Pretrial who has no telephone calls except to counsel, and is restricted to parental visits only. He said that some are sympathetic to him, but that some seem to take pleasure at how he is being treated. He said he is constantly being told to get used to the situation because it is not going to improve. He believes that the respondent is part of a conscious effort to break him, in collaboration with the police*.

In his review of the *McCann* case, Justice McEwen found that many features of the harsh physical conditions under which the *McCann* plaintiffs had been segregated in the early 1970s in the BC penitentiary, were replicated in Mr. Bacon's confinement at Surrey Pretrial in 2009 and in several instances the regime under which Mr. Bacon was confined was more onerous.[58] Having summarized how the plaintiffs' evidence in *McCann* "described the hate, frustration and resentment that they felt, the paranoia and hallucinations, the difficulties in concentrating and controlling their emotions, the suicide attempts and self-harming behaviour", Justice McEwen concluded on the basis of the evidentiary record before him:

> *[303] In this case the risk of psychological harm is manifest. On their own the physical conditions under which the petitioner has been held compare, in Prof. Haney's view, to some of the worst conditions in the United States and elsewhere. Such conditions have been condemned by the international community. The petitioner's report of his deteriorating psychological condition, verified by staff, reflects what one might expect under those circumstances, and under the additional deprivations that have been imposed.*

As a advocate of reform it is not with any satisfaction that I can characterize Justice McEwan's summary of his findings as the most damning indictment of the abuse of

58 "Unlike Mr. Bacon, the McCann plaintiffs were given pillows, could spend 40 minutes per day walking up and down a corridor that was approximately 75 feet long. They were allowed out of their cells three times per day to pick up their meal trays. There were no restrictions on visits." Bacon para 304

correctional authority to be found in Canadian case law or that they reflect many of the findings of the Arbour Report regarding the absence of the rule of law.

> *[291] The petitioner's incarceration on remand has the following features:*
>
> *(a) he has been assessed as physically at risk from others and a risk to others and is accordingly treated as an inmate who must be kept away from at least a segment of the prison population;*
> *(b) he has been deemed to be so dangerous that he cannot be permitted ordinary contact with family and friends, or other inmates;*
> *(c) he has been held on a basis that renders recourse to due process within the institution meaningless, even if it were available;*
> *(d) he is subjected to numerous inconsistent and unpredictable deprivations that at times reflect the thoughtless application of rules, and at times appear to reflect nothing more than petty exercises of power; and*
> *(e) he has found medical treatment nearly impossible to access on any reliable basis.*
>
> *[292] The petitioner is kept in physical circumstances that have been condemned internationally. He is locked down 23 hours per day and kept in the conditions Professor Haney described as "horrendous". These conditions would be deplorable in any civilized society, and are certainly unworthy of ours. They reflect a distressing level of neglect. On top of this, the petitioner is only allowed out at random times. He is denied almost all human contact. His treatment by the administration and the guards is highly arbitrary and further accentuates his powerlessness.*
>
> *[259] There has been no systematic attempt to mitigate the petitioner's circumstances on the basis that, despite being housed in segregation, he was entitled to the standard of treatment of an ordinary remand prisoner. Rather he was treated as a prisoner who was being perpetually punished: the only practical effect of the distinction between "separate confinement" and "segregation" was that by applying the semantic fiction of "separate confinement" for "protective" purposes the deprivations could go on indefinitely.*
>
> *[260] As bad as this was, the petitioner's initial placement in "seg" was immediately exacerbated by the imposition of further isolating deprivations*
>
> *[309] The petitioner's circumstances at the time he was remanded into custody were such that temporary segregation was within the range of options the prison administration was entitled to exercise. Thereafter the rationale for continued segregation appears to be that resource constraints and the police assessment of the dangers posed by the petitioner to witnesses and the case they were assembling against him justify the way he has been treated. The respondent either ignored or misunderstood her statutory mandate and allowed herself to view her responsibilities in terms that identified, quite inappropriately, with the police. These errors have had the effect of rendering the petitioner's incarceration worse than it would have been if he were actually being punished. His treatment has also been significantly worse than if it were limited only to solitary confinement, as bad as that is on its own.*

Before considering the legal implications of the combined effects of solitary confinement and the unlawful additional deprivations in relation to visits, telephone access, and mail,

Justice McEwan reviewed the extensive material tendered by Mr.Bacon's counsel respecting international norms for the treatment of prisoners, and the Canadian experience as reflected in the *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*.

> *[272] There are numerous published articulations of a general principle that prisoners should be treated with respect, and in a manner that acknowledges the inherent dignity of the human person. It is antithetical to international norms to say that imprisonment implies an absence of rights mitigated only by the discretionary allocation of privileges. The concept that prisoners retain their human rights and fundamental freedoms subject to lawful incarceration is found in the United Nations' Basic Principles for the Treatment of Prisoners,[59], which states that "all prisoners shall be treated with the respect due to their inherent dignity and value as human beings."*
>
> *[273] In line with the principle that prisoners retain their human rights, torture, and cruel, inhuman, or degrading treatment are prohibited. Article 7 of the United Nations' International Covenant on Civil and Political Rights[60] (the "ICCPR") provides that no one "shall be subjected to torture or cruel inhuman or degrading treatment or punishment".*
>
> *[274] The prohibition against torture applies not only to the infliction of physical pain but also to mental suffering. It has been specifically considered in Canada in Suresh v. Canada (Minister of Citizenship and Immigration), [61]…The Court considered the ICCPR in Suresh, where the fact situation involved the potential for deportation to torture. The Court commented on the impact international law has on the interpretation of domestic Constitutional rights:*
>
> > *76 The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the Charter. To paraphrase Lord Hoffmann in Rehman, supra, at para. 54, states must find some other way of ensuring national security.*
>
> *[276] The United Nations' Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[62] to which Canada is a signatory, defines torture in a manner that applies to mental as well as physical suffering: Article 1 …It also provides that the party states are equally obliged to prevent acts of cruel inhuman or degrading treatment, short of those that amount to torture: Article 16*.

Justice McEwan reviewed the commentary, particularly those of the UN Special Rapporteur on Torture on the application of the international norms to the issue of solitary confinement, its effects and the policy implications:

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59 14 December 1990, GA 45/11
60 23 March 1976, GA 2200
61 2002 [2002] 1 S.C.R. 3
62 10 December 1984, GA 39/46

[277] There are several definitions of "solitary confinement" but the consensus is that it is the act of physically isolating prisoners by confining them alone in their cells for 22 or more hours per day.[63]

[278] The international community recognizes that the effects of solitary confinement may extend not only to matters of an inmate's health and well-being, but, with respect to pre-trial incarceration, to prejudice to due process itself….

[279] The Interim Report of Manfred Nowak the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment to the 63rd session of the United Nations on July 28, 2008 …includes the following description of the effects of solitary confinement touching particularly on its use in remand:

The effects of solitary confinement

It has been convincingly documented on numerous occasions that solitary confinement may cause serious psychological and sometimes physiological ill effects. Research suggests that between one third and as many as 90 per cent of prisoners experience adverse symptoms in solitary confinement. A long list of symptoms ranging from insomnia and confusion to hallucinations and psychosis have been documented. Negative health effects can occur after only a few days in solitary confinement, and the health risks rise with each additional day spent in such conditions.

Individuals may react to solitary confinement differently. Still, a significant number of individuals will experience serious health problems regardless of the specific conditions, regardless of time and place, and regardless of pre-existing personal factors. The central harmful feature of solitary confinement is that it reduces meaningful social contact to a level of social and psychological stimulus that many will experience as insufficient to sustain health and well-being.

The use of solitary confinement in remand prisons carries with it another harmful dimension since the detrimental effects will often create a de facto situation of psychological pressure which can influence the pre-trial detainees to plead guilty.

When the element of psychological pressure is used on purpose as part of isolation regimes such practices become coercive and can amount to torture.

Finally, solitary confinement places individuals very far out of sight of justice. This can cause problems even in societies traditionally based on the rule of law. The history of solitary confinement is rich in examples of abusive practices evolving in such settings. Safeguarding prisoner rights therefore becomes especially challenging and extraordinarily important where solitary confinement regimes exist.

Solitary confinement harms prisoners who were not previously mentally ill and tends to worsen the mental health of those who are. The use of solitary confinement in prisons should therefore be kept to a minimum. In all prison systems there is some use of solitary confinement – in special units or prisons for those seen as threats to security and prison order. But regardless of the specific circumstances, and whether solitary confinement is used in connection with disciplinary or administrative segregation or to prevent collusion in remand prisons, effort is required to raise the level of meaningful social contacts for prisoners. This can be done in a number of ways, such as raising the

63 Quoting the definition from The Istanbul statement on the use and effects of solitary confinement, adopted December 9, 2007 at the International Psychological Trauma Symposium. I have set this out earlier at p.1

> *level of prison staff-prisoner contact, allowing access to social activities with other prisoners, allowing more visits, and allowing and arranging in-depth talks with psychologists, psychiatrists, religious prison personnel and volunteers from the local community. Especially important are the possibilities for both maintaining and developing relations with the outside world, including spouses, partners, children, other family and friends. It is also very important to provide prisoners in solitary confinement with meaningful in-cell and out-of-cell activities. ... Furthermore, when isolation regimes are intentionally used to apply psychological pressure on prisoners, such practices become coercive and should be absolutely prohibited.*
>
> *As a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort*.

The *Bacon* judgment referenced the Special Rapporteur's 2008 and 2009 statements condemning the use of solitary confinement and the need for judicial supervision:

> *[280] The weight of accumulated medical and psychological evidence, to date, points to the serious and adverse health effects of the use of solitary confinement: from insomnia and confusion to hallucinations and mental illness. The key adverse factor of solitary confinement is that socially and psychologically meaningful contact is reduced to the absolute minimum, to a point that is insufficient for most detainees to remain mentally well functioning. Given the uncertainty as to the length of isolation, pre-trial detainees may be affected even more negatively than other detainees by the long-term isolation.*
>
> *[281] The bottom line in terms of human rights is clear: States have a positive obligation to respect all human rights of any person deprived of his/her liberty, except for those which are restricted by a court decision. Also, the courts have to apply a proportionality test to all restrictions they impose. Moreover, since humiliating and degrading treatment and punishment are strictly forbidden under international law, any State must ensure that the conditions of detention facilities in their entirety do respect the dignity of the person — this is also with a view to the fact that rehabilitation and re-integration should be the ultimate aim of any penitentiary system.*

In identifying Canadian norms Justice McEwan relied heavily on the findings of the 1996 Arbour Report, citing passages that I have earlier set out dealing with the impact of prolonged segregation, the demonstrated absence of respect for the rule of law in corrections and the need for independent and judicial oversight.[64] On the issue of the importance of the rule of law in protecting prisoners' rights, Justice McEwan cited Justice Arbour's scepticism about the correctional authorities ability and willingness to implant a culture of respect for rights:

> *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. ... One must resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better. When a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner. Indeed, it is*

64 *Bacon*, paras 283-290

> *always more important that the vigorous enforcement of rights be effected in the cases where the right is the most meaningful.*
>
> *Respect for the individual rights of prisoners will remain illusory unless a mechanism is developed to bring home to the Correctional Service the serious consequences of interfering with the integrity of a sentence by mismanaging it. The administration of a sentence is part of the administration of justice. If the Rule of Law is to be brought within the correctional system with full force, the administration of justice must reclaim control of the legality of a sentence, beyond the limited traditional scope of habeas corpus remedies.*[65]

Having provided a context grounded in the international and Canadian commentary on applicable human rights standards the *Bacon* judgment also provided a comprehensive review of the cruel and unusual jurisprudence, including, *McCann* and *Olson*.

> *[301] Charter jurisprudence respecting s. 12 has largely developed in minimum sentence cases, and in cases dealing with "punishment" rather than "treatment". The "cruel and unusual" threshold is described as treatment grossly disproportionate to what would have been appropriate, or so excessive as to outrage standards of decency.*[66] *Such expressions, no doubt meant to deter casual resort to s. 12, are tempered by other judicial expressions as to the limitations of such language. It is clear that these thresholds are not to be equated with standards derived from opinion polls or with standards that reflect the odium attached to particular individuals.*[67] *In United States of America v. Burns, the Supreme Court made the following observations:*
>
> > *..the phrase "shocks the conscience" and equivalent expressions are not to be taken out of context or equated to opinion polls. The words were intended to underline the very exceptional nature of circumstances that would constitutionally limit the Minister's decision in extradition cases. The words were not intended to signal an abdication by judges of their constitutional responsibilities in matters involving fundamental principles of justice*
> >
> > [*302] In R. v. Olson*[68] *the Supreme Court held that in the case of a notorious sentenced serial killer, "segregation to a prison within a prison is not, per se cruel and unusual treatment." In Burns, however, at paras. 122-123 the Court observed that psychological trauma is a relevant harm to be considered in a s.12 analysis*.
> >
> > [307] *[n McCann] Heald J. found that the conditions in the segregation unit constituted cruel and unusual treatment or punishment, in that the treatment served "no positive penal purpose".*[69] *Heald J. went on to say that the treatment was "cruel and unusual" because it was not in accord with public standards of decency and propriety, and because the existence of adequate alternatives made it unnecessary*.

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65 Arbour pp.182-3, cited in Bacon ,para 287

66 see R. v. Smith, [1987] 1 SCR 1045 at para. 54,; R. v. Goltz, [1991] 3 SCR 485 at 499;; and R. v. Ferguson, 2008 SCC 6, [2008] 1 S.C.R. 96 at para. 14.

67 United States of America v. Burns, 2001 SCC 7; [2001] 1 S.C.R. 283 at para. 67 (quoting S. v. Makwanyane, 1995 (3) SA 391

68 (1987), 62 O.R. (2d) 321 (C.A.)

69 McEwan pointedly noted that the petitioner's remand incarceration has no "penal purpose", a proposition with which the respondent agrees).

In *Bacon* the counsel for the Surrey Pretrial Centre relied upon several Alberta cases that had unsuccessfully challenged the conditions in the Edmonton Remand Centre as cruel and unusual. In *Munoz*, complaints included being shackled in the exercise yard, being double-bunked in administrative segregation and the loss of gymnasium privileges. In *Chan* the treatment included frequent transport while restrained, wearing a baby-doll [a rip and fire-proof sack-like garment], disciplinary segregation, strip searches and unauthorized applications of physical force.in both cases the courts while accepting the treatment went "beyond hard time" ruled that "it did not amount to treatment that would outrage standards of decency".[70]As noted by Justice McEwan in *Chan* the court addressed the harsh treatment during sentencing, and applied the remedy of enhanced credit.[71]

In commenting on the reluctance of the courts post *McCann* to condemn solitary confinement Justice McEwan made these trenchant observations on the different approach from other issues involving prisoners 'rights, particularly the judgment of the Supreme Court in *Sauve.*

> *[313] While there is a growing sense internationally, as well as in Canada, that locking a person down for 23 hours per day is an inappropriate way to treat any human being, the courts remain tethered to the standard of "gross disproportionality" articulated in R. v. Smith, and referred to in R. v. Chan and elsewhere.*[72]
>
> *[314] This reluctance to condemn solitary confinement outright is not entirely characteristic of the approach taken by the courts to inmates' rights in other contexts.*

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70 In *Munoz v. Alberta (Edmonton Remand Centre*), 2004 ABQB 769 at para. 78; *R. v. Chan*, 2005 ABQB 615. In aggregate, the complaints that had merit went beyond hard time and are a reason for enhanced credit. In my view, while his time has been beyond typical hard time in some respects, his treatment in remand, viewed globally, does not amount to treatment that would "outrage standards of decency".para 205.

71 *Bacon*, para 312

72 Most recently the Nova Scotia Court of Appeal in *R. v. Marriott,* 2014 NSCA 28 considered an argument that a sentence was unfit because, *inter alia* of the conditions of segregation that the appellant had experienced after sentencing prison, including periods in disciplinary segregation constituted cruel and unusual punishment.The Court rejected the argument, which in contrast to *Bacon*, was based on a very limited evidentiary record. The Court, citing *Olson,* stated that segregation to a prison within a prison is not, *per se*, cruel and unusual treatment but may become so if so excessive as to outrage standards of decency. Distinguishing *Bacon* Oland J noted "All of the cases on whether s. 12 rights were breached as a result of segregation are heavily fact-specific; the conditions, duration and reasons for segregation must all be considered. Moreover, it is essential that there be a proper evidentiary record for the proper consideration of a *Charter* issue" (para 38). In the case of the appellant Oland J. held

> *I do not doubt that the appellant found his periods of disciplinary and administrative segregation personally very difficult, and even harsh. He was a young man with no adult offences before the attempted murder and property damage pursuant to the prison riot; it was his first time in prison. Not everything was done in strict accordance with time lines in the legislation and subordinate legislation, and he had to wait for responses to his complaints. However, it appears that with regard the administrative segregation which followed his sentencing, the institution officials made decisions "which reflect their special knowledge and expertise with matters relating to institutional safety and security." Based on the record before me, I cannot agree that this segregation amounted to a breach of s.12. (*para 44)

One may compare Sauve v. Canada (Civil Electoral Officer),[73], where, unmediated by the sort of operational and resource considerations that go into the analysis of a particular standard of treatment, the Court, at para. 47, was not hesitant to comment on the general rights of incarcerated persons:

> *[47] 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. Other Charter provisions make this clear. Thus s. 11 protects convicted offenders from unfair trials, and s. 12 from "cruel and unusual treatment or punishment".*
>
> *[58] Denial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law... It countermands the message that everyone is equally worthy and entitled to respect under the law – that everybody counts... It is more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them.*

[315] If one substitutes "arbitrary treatment" or "treatment beyond hard time" or "cruel and unusual treatment" into the first and last line of paragraph 58 above the result is a completely unobjectionable statement of constitutional and carceral theory. The undoubtedly correct proposition that incarcerated persons retain their rights other than those taken away for reasons that are clearly justified, has atrophied into the operational use of "privileges" to describe such rights (see s. 2 of the Correction Act Regulation). This shift reflects and abets a mentality, obvious throughout the respondent's treatment of the petitioner, that all is denied that is not granted in the discretion of the prison administration. This is a fundamental affront to the concept of human dignity. On the level of "pens" and "inhalers" or the placement of television sets, it is not a question of catering to trivial complaints, but of recognizing the psychologically corrosive effect that having no autonomy over even the smallest things can have on a person.

On the record before him Justice McEwan had little difficulty in distinguishing the Alberta cases and *Olson* in light of Mr. Bacon's long "unmitigated segregation" in the context of serial violations of his rights in relation to access to mail, telephone and visits.

> *[316] The unlawful imposition of such deprivations cannot, in a legal sense, be characterized as anything less than "unusual" treatment. The respondent's*

73 [2002] 3 S.C.R. 519

acknowledgment (see para. 312 herein) that long periods of solitary confinement without mitigating or compensating efforts by correctional authorities may qualify as "cruel and unusual" treatment is instructive in light of her actual treatment of the petitioner. As we have seen, he has not only suffered long periods of unmitigated segregation but has been subjected to unlawful additional deprivations known to cause psychological harm. These have been, and have been observed to be causing psychological distress. That is cruelty by any measure.

[317] The rationale for any reticence on the part of the courts to declare treatment that is "beyond hard time" to be cruel and unusual falls away in the petitioner's case. The petitioner's incarceration started with an essentially arbitrary consignment to separate confinement. The conditions of his confinement were radically exacerbated almost at once when he was cut off from any outside contact. The importance of such contact to the mental health and well-being of any person is hardly controversial. Indeed, even the respondent's submission accepts that whether or not solitary confinement, in itself, is cruel and unusual punishment depends on what "compensating efforts are made by the correctional authorities".

[318] The respondent has characterized certain small enhancements as ameliorative, applying the standards of segregation. This is clearly an inappropriate standard, as the respondent acknowledges elsewhere, when she insists that the petitioner is not being punished but protected. The respondent's submission pays scant heed to the requirements of the petitioner's psychological health. Rather, as we have seen, her position seems to be that keeping him "safe" requires an either/or choice between physical safety and psychological integrity. If that is true because resources are lacking, it simply means that the government has to do better. Discretion over expenditures stops where treatment falls below a constitutional minimum.

[319] In any case, whether driven by obedience to police directives, or by resource limitations, or both, the unlawful blanket deprivations added to the petitioner's solitary confinement in this case constitute cruel and unusual treatment in breach of s. 12 of the Charter.

The *Bacon* judgment is a landmark on a number of levels beyond its damning indictment of the BC correctional authorities and their virtual abdication of their custodial mandate to law enforcement imperatives. It picks up on several of the issues that were first raised by the evidence and argument in the *McCann* case on the psychological harms of solitary but goes well beyond the *McCann* judgment in recognizing that psychological integrity is fundamental to human dignity and must be considered as part of the calculus of cruel and unusual punishment or treatment. In doing so Justice McEwan recognized the realities and exigencies of correctional management, but that constitutional imperatives cannot be subordinated to expediency and resource limitations. This is best reflected in his response to the argument made by the BC Attorney General relation to the correctional necessity in Mr. Bacon's case of a choice or balancing between psychological integrity and physical safety.

[295] The respondent placed great emphasis on her duty to keep the petitioner "safe" as if that were primarily a duty to deliver a live body to the courts when required to do so. Her submission included the following observations:

> *13. The dominant theme of [petitioner's counsel's] submissions has been concern for Mr. Bacon's psychological well-being during his pre-trial detention. With reference to various international materials and opinion evidence on the effects of "solitary confinement" she has invited the court to establish constitutional standards of prison administration that are geared to maintaining inmates' psychological health. In the Respondent's submission, however, the equally compelling consideration that must be balanced in the analysis is Mr. Bacon's physical safety. The separate confinement in issue in these proceedings is for fundamentally protective - not in any sense punitive - purposes. While the various international pronouncements cited by [petitioner's counsel] are instructive as to the policy arguments for minimizing, generally, the use of "solitary confinement" in penitentiaries and correctional facilities, they are of limited assistance with respect to the exceptional situation of a person detained pending trial whose need for social interaction within the institution is in direct opposition to his physical security of the person, and who is prepared to risk his life to assert his wishes.*

[296] This sets up a manifestly false dichotomy. Inhumane treatment cannot be justified on the basis of a choice between physical safety and psychological integrity. The submission strongly implies that for a certain class of inmate deemed unsuitable for release into the general population, the only alternative is to keep them alive in circumstances that threaten their psychological health and safety. This is so far from the imaginable range of ameliorative options (small secure courtyards attached to separated cells, video links as a substitute for direct visits, etc.) that it can only be read as a rationalization of resource limitations that are assumed but unspoken.

The *Bacon* judgment recognized both the importance but also the limitations of judicial intervention in the management of risk and resources in holding custodial authorities to a constitutional standard.

> *333] Despite the respondent's several breaches of the petitioner's right to be treated humanely and respectfully, responsibility for the actual management of the petitioner's incarceration – assuming the application of appropriate standards – must remain with her. "The Court cannot take responsibility for the assessment of the risks actually posed by and to the petitioner, or for the specific allocation of resources available to the administration of the institution, assuming they meet an adequate standard."*
>
> *[334] It is absolutely clear, however, that in her treatment of the petitioner, the respondent and the Corrections Branch have seriously lost sight of their responsibility to the judicial branch of government. Courts, even as represented at the attenuated level of "telephone" JJP's, place prisoners in the safekeeping of the jailer in the faith that the responsible Minister will provide facilities that will physically meet a constitutional standard, and that he or she will provide staff trained to respect the fundamental rights of those whose safekeeping is entrusted to them.*
>
> *[336] While the question of whether the petitioner must remain separated or may be released into the general population must remain with the respondent, he must not be kept in separate confinement without being offered "privileges" equivalent to those of a general population inmate. Careful consideration must be given to whether or not it is*

> *possible to create settings that include contact with other inmates who do not pose the concerns that justify separation from other parts of the prison population. The petitioner must have the same amount of time out as a general population inmate. He must not be subject to unreasonable and petty deprivations that reflect the notion that where one is placed dictates how one is treated. He is entitled to know what he may expect in respect of things like time at the gym (and when it will occur). He is entitled to be treated equivalently to a general population inmate in all material respects. He is entitled to an explanation if it is impossible to offer these conditions, and an opportunity to address such decisions as they are made. It should go without saying that resource issues can never justify a sub-constitutional level of treatment. If that is all that is available, then that must change. The courts cannot place inmates in a facility where they know their rights will be abused.*

The Special Management Protocol

As I have described the segregation units within which Mr. Bacon was confined where not inside the walls of 19th or early 20th century bastille's, like the BC Penitentiary or the Prison for Women, making the point that modern architecture is no substitute for a culture of respect for human rights nor high-security electronic doors and video surveillance a sufficient protective shield against cruel and unusual punishment. The Prison for Women has been closed and in its place five new regional women's facilities have been built within a policy framework, entitled "Creating Choices", that promised a new women-centric human rights regime. Initially the new institutions had no maximum-security units but these have now been constructed, with segregation units in all of the new facilities. Accompanying the new max units CSC had undertook in 2003 a new pathway in the long history of segregation in what was in the euphemistic language of corrections referred to as a "special management protocol" for those women identified as the most disruptive to institutional order. Although physically based in the architecture of the new women's institutions, the conditions of confinement under the protocol were more stringent than those of men imprisoned in the highest form of security, the Special Handling Unit, and many of the behavioural standards set in these protocols were virtually impossible to meet. It is like a purgatory of segregation where every time a prisoner takes a step forward and moves to a lesser level of restrictive segregation, they are so closely scrutinized that they end up moving back up a level because nothing but excellent behaviour would allow them to continue on the path of lesser restrictions. As described by Lisa Kerr:

> *[T] he Protocol is imposed on the basis of an overall assessment of the level of risk posed by a prisoner, determined by reference to convicted offences, institutional conduct and psychological assessments. It states that it will apply to a woman classified as maximum security who "commits an act causing serious harm or seriously jeopardizes the safety of others." She faces three steps of graduated restrictions, which she must move through in order to be released back to maximum security. There is no fixed time frame for the program: the only mention of time is that it will take a minimum of 6 months to "successfully complete the steps of the Protocol to ensure she no longer jeopardizes the safety and security of the institution." In practice, women have spent years on the program, deprived of peer contact and programs, often unable to make any movements within the prison*

without three guards in attendance and the use of handcuffs and shackles.

The terms of the Protocol present a maze of demanding behavioural standards and multiple discretionary tripwires that can return a woman to lower levels of progress. Vague policy language allows penal officials to control the process at all times. There is said to be "zero tolerance for any aggressive behaviour (physical or emotional)." A woman can be transitioned off Step Three only once she "has maintained positive participation for a period of 3 months" and "if her risk is considered assumable." If "behaviour deteriorates" at any time "to the extent that administrative segregation is justified," the woman can be returned to Step One. Women on Management Protocol must adhere to strict standards of "pro-social" behaviour; even a bout of perceived depression can negatively affect the capacity for her to graduate to the next "step" of the protocol.[74]

Rene Acoby, the first Aboriginal woman subjected to the 'protocol', has described her experience of this highly restrictive regime which in several cases, including hers, was continued for years:

It was during my fourth year, when I was the first federal female to be placed on the "Management Protocol" for a fight that allegedly involved a weapon. The Management Protocol was developed for "high risk women that pose a significant threat to the security of the Institution". The Union of Canadian Correctional Officers had been urging CSC to construct a Special Handling Unit for Women. However, the Management Protocol was developed "as an alternative to a S.H.U for women".

Although the Management Protocol states that "all policies, procedures, and legal entitlements of the Administrative Segregation Commissioner's Directive will be adhered to", this is not the case. The Management Protocol and the Administrative segregation directive overlap and contradict bothpolicies, procedures, and entitlements. For example, the Admin. Seg. Directive states that inmates retain the same privileges and entitlements as those in the general population, with the exception of security requirements. The Management Protocol states that all items/ privileges will be considered based on risk assessments. CSC officials have used this guideline in the Protocol to control items such as toilet paper, basic hygiene items (soap, toothpaste, etc) and rights such as confidential legal calls and the right to contact family. Some Institutions take the "observation" aspect of the Protocol literally by posting female guards to observe women take a shower and during recreation.

Given that CSC claims the Federal institutions for women do not have the proper infrastructure to house/manage women on the Protocol, plans have been made to expand upon the "security requirements". In one Institution, a Plexiglas interview room was built to accommodate "safe interactions" between state and Management Protocol women. Management officials have advised the Protocol women there are plans to build more of the Plexiglas/ secure interview rooms for each of the Protocol women. These newly developed interview rooms conjure up macabre images of the new female "Hannibal" that CSC is essentially propagating. One need only look at the durations the women have spent on the Management Protocol to deduce it is not a successful OR humane model of confinement. I find it reprehensible that the group of women who

74 Lisa Kerr, Designing Legal Controls for Changing Modes of Solitary Confinement. 2014 forthcoming.

> *designed the Management Protocol with the "special needs of women offenders taken into consideration" cannot even meet with us. Perhaps they don't want to confront the ghosts of women their brilliant Protocol has reduced the women to.*[75]

Despite the criticism of both non-governmental organizations such as Elizabeth Fry and the government appointed Correctional Investigator, (both of whom had been involved in the call for a public inquiry about events at the Prison for Women that led to the Arbour Commission), the management protocol was not rescinded until shortly after the BC Civil Liberties Association initiated a lawsuit in 2010 claiming that the protocol was not authorized under the *CCRA* and in effect was an extra legal-form of imprisonment and represented cruel and unusual punishment or treatment.

Ashley Smith: A Preventable Death

Rene Acoby's reference to the "ghosts of women" has now taken on an added ghastly significance. Although not a protocol case, the grave concerns that the Correctional Service of Canada has not found an appropriate way to manage the custody of women with the most severe behavioural problems and mental health challenges has been brought into the sharpest relief as a result of the release of a special report of the Correctional Investigator, the federal prisoner ombudsman, on the death of 19-year-old Ashley Smith at Grand Valley Institution in 2007 in segregation. The circumstances of her death, while they have become familiar to many Canadians as result of a highly publicized coroner's inquest, require reciting for an international audience:

The horror of her death are described by the Correctional Investigator in these few damning words:

> *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.*[76]

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

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75 Journal of Rene Acoby. 2008 (written contemporaneously in crayon and from memory) now published in Journal of Prisoners on Prison, special issue, Criminalizing Women -Past and Present, Vol 20, No.1 2011

76 A Preventable Death, Report of the Correctional Investigator , June 2008, released to the Public March3,2009, online at http://www.oci-bec.gc.ca/rpt/oth-aut/oth-aut20080620-eng.aspx

"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.[77] 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.*
>
> *In the space of less than one year, Ms. Smith was moved 17 times amongst and between three federal penitentiaries, two treatment facilities, two external hospitals, and one provincial correctional facility.*

Along with other systemic breaches relating to transfers, the use of force, and the provision of mental health services, the Correctional Investigator identified how Ashley Smith's continuous administrative segregation status was 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.*
>
> *What is most disturbing about the Correctional Service's use of this overly-restrictive form of segregation is the fact that the Correctional Service was aware - from the outset - that Ms. Smith had spent extensive periods of time in isolation while incarcerated in the province of New Brunswick, and that confinement had been noted as detrimental to her overall well-being. Despite this knowledge, the Correctional Service's response to Ms. Smith's significant needs was to do more of the same.*
>
> *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*

77 This summary is taken from "A Preventable Death".

> *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.*[78]

I have long maintained that independent adjudication is a necessary part of any equation of reform of segregation regimes. In his report the Correctional Investigator conclusions bear witness to the consequences of CSC's recalcitrance to this concept:

> *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.*[79]

More than 30 years after the *McCann* case, 13 years after the Arbour Report, 10 years after the Task Force on Segregation, a 19 year old girl dies in a bare segregation cell. For those who would argue that the cruel and unusual conditions endured by segregated prisoners in the B.C. Penitentiary in the 1970's and in the Prison for Women in the 1990's can safely be consigned to the lessons of history, Ashley Smith's preventable death stands as the latest indictment of the failure of the Correctional Service of Canada to take those lessons seriously.

Ashley Smith's case is not an isolated case where vulnerable and problematic prisoners are placed in solitary as a management technique in Canadian prisons and self-harm, sometimes to the point of death. As I have described earlier the memory of Jacques Bellemaire hanging himself in the Penthouse haunted the minds of Jack McCann and his brothers in solitary. In his 2009 annual report, the Correctional Investigator recommended "that prolonged segregation of offenders at risk of suicide or serious self-injury and offenders with acute mental health issues be prohibited"[80] We have seen how in *Bacon* Justice McEwan made extensive reference to the international human rights commentary that has developed around the use of solitary confinement. In August 2011 the new UN Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Juan Mendez, released another report with his findings based on the accumulating

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78 A Preventable Death, Report of the Correctional Investigator, 2008, paras. 38-43 (emphasis added) online at http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx

79 A Preventable Death, para. 93

80 Annual Report of the Correctional Investigator,2009-10 online at http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20092010-eng.aspx

evidence of the harmful effects of solitary and recommending limitations on its use. In his 2011-12 Annual Report the Correctional investigator reviewed the Special Rapporteur's findings and with the gravamen of those findings reissued his 2009 recommendation:

> *The extremely restricted conditions of confinement that prevail in segregation units can exacerbate symptoms of mental dysfunction. Though I recommended a complete prohibition of prolonged segregation of offenders with acute mental health concerns in my 2009-10 Annual Report, this recommendation has yet to be acted on by the CSC.*
>
> *I am not alone in registering my concerns about this unsafe practice. Indeed, even some of the most notorious 'supermax' facilities in the United States are rethinking their approach to solitary confinement, saving money, lives and sanity in the process.[14] This is in keeping with the evolution of broader international human rights doctrine, norms and standards. In August 2011, the UN Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment reported on the effects of prolonged or indefinite solitary confinement.[81] Among other findings and recommendations, Special Rapporteur Juan E. Méndez noted:*
>
> *Solitary confinement is a harsh measure, which may cause irreversible psychological and physiological harm, including anxiety, depression, anger, cognitive and perceptual distortions, paranoia and psychosis, self-mutilation and suicide attempts.*
>
> 1. *Solitary confinement is found contrary to the essential aims of the penitentiary system, which is to rehabilitate and reintegrate offenders into society.*
> 2. *Prolonged solitary confinement in excess of 15 days should be subject to an absolute prohibition, and indefinite solitary confinement should be abolished.*
> 3. *Solitary confinement of persons with known mental disabilities of any duration is found to be cruel, inhuman or degrading treatment, and, as such, violates international law.*
> 4. *States are urged to prohibit the imposition of solitary confinement as punishment or a disciplinary measure. It should be used only in very exceptional circumstances, as a last resort, for as short a time as possible.*
> 5. *A documented system of regular review of the justification for the imposition of solitary confinement should be in place. The review should be conducted in good faith and carried out by an independent body. Additionally, medical personnel monitoring an inmate's mental or physical condition should be independent and accountable to an authority outside of the prison administration.*
>
> *To be certain, there are fundamental differences between solitary confinement and disciplinary and administrative segregation as practiced in Canada.[16] However, since the Correctional Service has a positive duty to protect vulnerable persons in its care and custody, it would be well-advised to take note of the Special Rapporteur's findings and recommendations. The emerging expert consensus is that there are harmful*

81 Interim Report of the UN Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (August, 2011)

> *impacts of depriving environments, such as segregation, on mental health functioning. This recognition is consistent with Canada's domestic and international human rights obligations prohibiting cruel, unusual or discriminatory treatment or punishment.*
>
> *3. I once more recommend, in keeping with Canada's domestic and international human rights commitments, laws and norms, an absolute prohibition on the practice of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation.*[82]

In May 2012, having received evidence relating to the Ashley Smith and other cases. Canada was criticized by the UN Committee Against Torture for its use of "solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness." The Committee recommended that Canada "limit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review," and "abolish the use of solitary confinement for persons with serious or acute mental illness."[83].

In December 2013 the jury in the coroner's inquest into the death of Ashley Smith rendered a verdict of homicide, not suicide, and made 147 recommendations.They included:

> *15. Female inmates with serious mental health issues and all self injurious behaviors serve their federal terms of imprisonment in a federally operated treatment facility, not a security key focus prison-like environment*
>
> *27. In accordance with the recommendations of the United Nations Special Rapporteur's 2011 Interim Report on Solitary Confinement indefinite solitary confinement should be abolished.*
>
> *28. There should be an absolute prohibition on the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation, or observation. Long-term should be defined as any period in excess of 15 days.*[84]

In April 2014 the federal Public Safety Minister, Steven Blaney, as an initial response to the jury recommendations announced an agreement in principle with the Royal Ottawa health care group to provide two beds for mentally ill female offenders. Prime Minister Stephen Harper defended the limited capacity of the Ontario pilot project, saying the

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82 Annual Report of the Correctional Investigator, 2011-12 online at http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20112012-eng.aspx#sIA

83 Concluding observations of the Committee Against Torture, held on 21 and 22 May 2012 (CAT/C/SR.1076 and 1079).

84 Chief Coroner Province of Ontario, Inquest Touching the Death of Ashley Smith Jury Verdict and Recommendations, December 2013 online at http://www.csc-scc.gc.ca/publications/005007-9009-eng.shtml

initiative is "one of several things" the government is doing to improve the handling of mentally ill federal inmates.[85]

Despite what many would regard as a minimalist first response to the horror of Ashley Smith's death there are other signs that there is emerging a mobilization of legal, social and political attention to solitary confinement both in Canada and the United States. In assessing the impact of litigation in the United States directed against the extreme forms of isolation in super max facilities. Lisa Kerr has recently written:

> *American litigation did not result in a ban on extreme forms of solitary. Even the Madrid court, which found conditions that "hover on the edge of what is humanly tolerable," did not find such conditions to violate the US Constitution.[86] Litigation has, however, generated knowledge and discomfort about the effects of the practice, and the mobilization of social and political attention to solitary confinement can now be seen in several American quarters. Physician and journalist Atul Gawande might properly be credited with mobilizing popular attention with his widely read 2009 New Yorker piece.[87] In 2012, experts testified before the United States Senate's Judicial Committee, with Senator Dirk Durbin leading a push for national law reform on these issues.[88] At the state level, several states have passed legislation that includes some restrictions or review of the use of solitary confinement for the mentally ill. States as diverse as Maine,*

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85 The Globe and Mail. May 1,2014, http://www.theglobeandmail.com/news/politics/critics-pan-federal-response-to-ashley-smith-inquest/article18370530/

86 As described by Lisa Kerr "The pivotal case in the American jurisprudence on solitary confinement and mental health is *Madrid v. Gomez*, a systemic attack on administration at the Pelican Bay Special Housing Unit (SHU) in California. Pelican Bay, opened with little public attention in 1989, housed prisoners in near-constant cellular confinement, in single cells with no windows. Doors opened electronically, to limit the need for officer-prisoner contact. Prisoners ate meals alone in their cells. On rare occasions that they were released from their cells, they would be placed in a slightly larger cement yard. In the trial challenging the constitutionality of various dimensions of the SHU at Pelican Bay, a former federal warden described the conditions as "virtual total deprivation, including, insofar as possible, deprivation of human contact."86
The trial judge in *Madrid*, Chief Judge Thelton E. Henderson, found in a lengthy 1995 opinion constitutional violations as to health care and use of force, along with due process violations in the process used to transfer prisoners to Pelican Bay. In addition, the mentally ill were ordered removed from Pelican Bay, on the basis of the Eighth Amendment protection against cruel and unusual punishment, which requires that American prisons meet the "serious medical needs" of prisoners. A "serious medical need" in the area of mental health was defined in Madrid as: "a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or cope with the ordinary demands of life within the prison environment and manifested by substantial pain or disability".Judge Henderson recognized that for seriously mentally ill prisoners, placement in the isolated and punitive conditions at Pelican Bay was "the mental equivalent of putting an asthmatic in a place with little air to breathe."86 The court backed away from a more comprehensive holding by stating that the record did not show a "sufficiently high risk to all inmates of incurring a serious mental illness from exposure to conditions in the SHU to find that the conditions constitute a per se deprivation of a basic necessity of life." *Madrid*, 889 F. Supp 1146 (N.D. Cal. 1995) at 1267. Lisa Kerr, The Chronic Failure to Control Prisoner Isolation in US and Canadian Law, Queens Law Journal, forthcoming

87 Atul Gawande, "Is Long-Term Solitary Confinement Torture?" The New Yorker (March 2009).

88 Subcommittee on the Constitution, Civil Rights, and Human Rights of the United States Senate's Judiciary Committee, "Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences," 158 Cong. Rec. D617-01, 2012 WL 2326847 (Cong. Rec.) (June 19, 2012). A second hearing has now taken place.

> *Colorado and Mississippi have elected to drastically reduce their reliance on solitary and have drafted new classification and release policies. … Prison administrators in Mississippi "eventually welcomed the changes demanded by the plaintiffs in a series of class-action lawsuits, which cleared the way for the changes to be put into effect in an atmosphere of strong collaboration." Kupers describes how expert witnesses in the Mississippi litigation became consultants to the prison, and how enhanced collaboration followed between custody and mental health staff. Another significant reform influence has been charismatic leadership, in Colorado by the late Commissioner Tom Clements, and in Maine by Commissioner Joseph Ponte. While American cases did not produce a legal rule to abolish or seriously constrain solitary, legal process has mobilized adjacent reforms and generated public knowledge.*[89]

In Canada it must be hoped that the cumulative effects of judicial intervention such as *McCann and Bacon,* of public scrutiny through inquiries like that of the Arbour Report and the reports of the Correctional Investigator and the informed recommendations of citizens such as the Ashley Smith inquest, together with the international focus brought to bear by reports of the UN Special Rapporteur will, adapting the words of Charles Dickens 180 years ago, rouse "slumbering humanity to stay a punishment "immeasurably worse than any torture of the body; whose ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh, and whose wounds are not on the surface and extort few cries that human ears can hear.[90]

Last Friday I visited three women in the maximum security unit of Fraser Valley Institution in Abbotsford. One of the women, René Acoby, whose words I have

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89 Kerr, The Chronic Failure to Control Prisoner Isolation in US and Canadian Law, Queens Law Journal, forthcoming,

Earlier this year not only in New York but here in Canada there was a renewed focus on the issues of solitary confinement as a result of the consent judgment entered in response to a lawsuit brought against the State of New York where the State agreed to what the press described as "sweeping reforms intended to curtail the widespread use of solitary confinement, including prohibiting its use in disciplining prisoners under 18." On closer analysis the restrictions which also prohibited imposing solitary confinement as a disciplinary measure for inmates who are pregnant, and limiting to 30 days the punishment for those who are developmentally disabled, were quite modest but Taylor Pendergrass, the lead lawyer in the case for the New York Civil Liberties Union, said "In doing so, New York becomes the largest prison system in the United States to prohibit the use of disciplinary confinement for minors and was "at the vanguard" of progressive thinking about how to move away from "a very punitive system that almost every state has adopted in one form or another over the last couple of decades". http://www.nytimes.com/2014/02/20/nyregion/new-york-state-agrees-to-big-changes-in-how-prisons-discipline-inmates.html

http://www.nytimes.com/2014/02/21/opinion/new-york-rethinks-solitary-confinement.html

90 In 1842 Charles Dickens visited the Cherry Hill Penitentiary in Philadelphia where prisoners were kept in twenty-four-hour solitary confinement and were assigned work to be performed within their own cells. In his American Notes he wrote:

> *I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh, because its wounds are not on the surface and it extorts few cries that human ears can hear; therefore I denounce it as a secret punishment which slumbering humanity is not roused to stay.*

Charles Dickens's denunciation was read in 1975 to the federal court judge who was asked to declare the continuing use of solitary confinement in the British Columbia Penitentiary cruel and unusual punishment. See *Prisoners of Isolation*, online at http://justicebehindthewalls.net/book.asp?cid=765&pid=822

previously quoted on conditions under the special management protocol, had just recently been released after spending a month in segregation. On an earlier occasion I had asked Ms. Acoby what she would say to people at conferences like this about the effects of segregation had she been able to be here.

> *You are always reminded that you have no control over your life. The anxiety that you have you don't show it because you know that by showing it some people will take advantage of it and might find some gratification in your struggle of what you're going through. So everything you experience -the isolation the loneliness - you keep it inside. That's the hard part because as a woman you're expected by society to show that vulnerability, but you just feel that you can't. Because you don't have a history of showing emotions, when you do reach out you are accused of "trying to manipulate" so you learn not to even try and reach out because no one is going to believe you are in that that the state of despair and loneliness. Because they don't think that you have feelings.*

The experience of segregation, appropriately translated in French at the front of the segregation unit as "isolement", is both dehumanizing and demonizing. Prisoners who cope with the isolation by suppressing their feelings and hiding their vulnerability are judged by their custodians as being less than human and meriting the intensity and rigor of their confinement. When prisoners try and assert some control over their lives, whether by acting out against their custodians or, like Ashley Smith, against their own bodies, having been demonized and being viewed as beyond the pale of a common humanity, the institutional response is not the removal of the source of their anguish but its intensification.

One of the other women I visited was, like over 50% of the women in the maximum security unit, an Aboriginal woman. She has a history of self harm, and in her case the scars are clearly to be seen on the surface of her arms. She had been placed in segregation last week because of a concern that she might self-harm again when a search of her cell found several items of contraband that could be used for this purpose. She claimed that she had no such intention, but to no avail. She asked only that should be allowed to bring her ukulele to segregation because strumming its strings had helped her in the past deal with the stress and anxiety of imprisonment and had been recognized by the institution as part of her coping mechanisms. Her frustration at being unjustifiably segregated had resulted in her swearing at correctional officers. She was told that each incident of swearing would result in her losing her ukulele for 24 hours. Two days later this young woman spent her 21st birthday alone in a segregation cell. While the conditions and length of her confinement on this occasion might not meet the legal tests of cruel and usual punishment when I left the prison that day I had to wipe away my tears.