Expert Report of Professor Michael Jackson, Q.C.

***British Columbia Civil Liberties Association and the John Howard Society of Canada v. Attorney General of Canada,* SCBC Vancouver Registry No. S-150415**

1. I have been asked to provide an expert report in relation to the above action. I certify that I am aware of my duty under Rule 11-2 of the British Columbia Supreme Court Civil Rules to assist the Court and not to be an advocate for any party. I have given this report in conformity with that duty. If I am called on to give further testimony it will also be in conformity with that duty.

Qualifications

2. A copy of my current curriculum vitae is attached as **Appendix 1**.

3. I hold a LL.B. from Kings College, London and a LL.M. from Yale Law School (1966). I qualified as a Solicitor of the Supreme Court of Judicature (United Kingdom) in 1969 and Barrister and Solicitor (Member of the Bar of British Columbia) in 1985. I was appointed Queens Counsel in the Province of British Columbia in 1999. I was Professor of Law at the University of British Columbia from 1970-2014. Since 2014, I have been Emeritus Professor of Law.

4. In 1993, I was awarded the Bora Laskin National Fellowship in Human Rights; in 2006, I was the inaugural recipient of the UBC Alumni Association's Award for Distinguished Research by a faculty member; and in 2009, I was the inaugural recipient of the Ed McIsaac Human Rights in Corrections Award.

5. For over the past 40 years I have conducted research in the area of correctional law, policy and practice in Canadian prisons. In addition to my academic publications which are detailed below, I have contributed to the field in a number of roles. I have given expert evidence on matters of correctional standards, policy and practice before the Superior Courts of British Columbia, Alberta and Ontario and the Federal Court of Canada; I have been a member of committees of the Canadian Bar Association on Imprisonment and Release and have given evidence both as a member of the CBA and as an individual academic before committees of the House of Commons and the Senate; I have been an adviser to royal commissions and commissions of inquiry including the Royal Commission on Aboriginal Peoples and the Commission of Inquiry into Certain Events at the Prison for Women in Kingston (the Arbour Inquiry); a consultant to the Correctional Service of Canada and the Auditor General of Canada and a member of government task forces and committees on issues of correctional law, policy and practice. Of particular relevance to this report, I was a member of the Correctional Service of Canada's 1997 Task Force on Administrative Segregation. From 1998-2006, I was a member of the Commissioner's Forum, an independent advisory group to the federal Commissioner of Corrections. I am also the President of the West Coast Prison Justice Society, which supervises the operation of Prisoners Legal Services, a prisoner-focused legal clinic. Prisoners Legal Services is funded by the Legal Services Society of British Columbia. Part of its work involves assisting segregated prisoners with mental disabilities who have been placed in segregation. I

have also appeared as counsel in cases involving correctional law at all levels of courts, including the Supreme Court of Canada.

6. My principal academic publications in the area of correctional law and policy are:

a. *Justice Behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary*[1]

In 1972, I conducted an intensive study at Matsqui Institution, then the principal medium security institution in the Pacific region. This study, the first of its kind in Canada, looked at how Wardens' Courts were conducted. My findings and recommendations for reform of the disciplinary process, principally the appointment of independent adjudicators to preside over disciplinary hearings, have been reflected in subsequent legislation and policy directives.

b. *Prisoners of Isolation: Solitary Confinement in Canada*[2]

Prisoners of Isolation charts the history of the Penitentiary as an institution of punishment, the role of solitary confinement as the foundation of penitentiary discipline, first in Europe, then in America, and the influence of this history on the Canadian penitentiary. The book looks back at the Canadian experience with solitary confinement in the Prison of Isolation, established in Kingston Penitentiary in 1894, and traces the use of solitary into the 20th century, culminating in the regime established at the B.C. Penitentiary in the 1960s-70s in the infamous "Penthouse". The centerpiece of the book is an analysis of the evidence and arguments presented to the Federal Court in the landmark case of *McCann v. The Queen*, which successfully challenged the conditions in the Penthouse as cruel and unusual punishment. The book also contains my *Model Segregation Code*, designed to subject the use of solitary confinement to the Rule of Law.

c. *The Right to Counsel in Prison Disciplinary Hearings*[3]

This article is based on my second research study of prison disciplinary hearings, conducted in 1983 at two federal institutions.

d. *Justice Behind the Walls: A Report of the Committee on Imprisonment and Release*[4]

---

[1] Michael Jackson, "Justice behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary" *Osgoode Hall Law Journal* (1974), 12:1-103

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

[3] Michael Jackson, "The Right to Counsel in Prison Disciplinary Hearings" (1986) 20 U.B.C.L.R. 221 ("*The Right to Counsel in Prison Disciplinary Hearings*")

[4] *Justice Behind the Walls: A Report of the Committee on Imprisonment and Release* (Canadian Bar Association, Committee on Imprisonment and Release, 1988)

The second of the trilogy of publications with this title was written for the Canadian Bar Association as a response to the recommendations of the working papers of the Correctional Law Review for new federal legislation to replace the *Penitentiary Act.*

e. *Justice behind the Walls: Human Rights in Canadian Prisons*[5] (hereafter "*Justice Behind the Walls 2001"*)

My third study of prison decision-making began in 1993 and continued over the next seven years. During this period, first at Matsqui and then at Kent Maximum Security, I sat as an observer at disciplinary court hearings, segregation review and visit review hearings, case management meetings, meetings between staff and management, and meetings of management and inmate committees. I interviewed prisoners, correctional staff and managers and, with the permission of the prisoners involved, reviewed official correctional files. This book is available both in hardcopy and on my website in an internet edition which contains additional chapters and case studies.

f. *The Litmus Test of Legitimacy*: *Independent Adjudication and Administrative Segregation*[6]

This article tracks the literature and initiatives relating to reform of administrative segregation and specifically as it relates to Independent adjudication.

g. *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety 2009*[7]

This report, co-authored with Graham Stewart, is a critique of the 2007 report of the expert panel appointed by the federal Minister of Public Safety to make recommendations on the future of Canadian corrections. The principal basis for the critique is that the *Roadmap* is inconsistent with fundamental human rights principles, makes no reference to the work of previous royal commissions and inquiries or to the jurisprudence of the Supreme Court of Canada on the *Charter of Rights and Freedoms* as it applies to prisoners, and disregards the empirical best evidence and research of what works in corrections.

---

[5] Michael Jackson, *Justice behind the Walls: Human Rights in Canadian Prisons* (Toronto: Douglas & McIntyre, 2002), http://justicebehindthewalls.net/ *Justice Behind the Walls 2001* is published in both hardcopy and online editions. The online edition contains material that is not found in the hardcover edition. In this opinion I have provided parallel cites to both editions except where the material only appears in the online one.

[6] Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" *Canadian Journal of Criminology and Criminal Justice* (2006), 48:157 ("*The Litmus Test of Legitimacy*")

[7] *A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety* (2009), http://justicebehindthewalls.net/news.asp?nid=78

h. *Ending the Isolation: Reflections on 40 years of Advocacy*[8]

This article reviews much of my work in the field of administrative segregation and the current state of reform and the most recent developments in both the judicial, legislative and international human rights fora.

Nature and Basis of Expert Opinion

7. I have been retained by the law firm of Farris, Vaughan, Wills & Murphy LLP, to provide expert evidence in this matter. A copy of my retainer letter is attached as **Appendix 2** to this report.

8. To better organize the flow of my report, I have changed the order of the questions set out in the retainer letter to be as follows and addressed several of them in an integrated way:

Questions

1. Please describe any literature, sources, reports, codes or other materials which are generally recognized and applied by Canadian and international prison administrators, government officials, and other experts in the field of corrections, as reflective of appropriate standards and best practices for the treatment of prisoners and the administration of correctional institutions and, particularly, with respect to the use of administrative segregation. Please exclude from this collection any rules, principles or provisions which apply directly to the parties to these proceedings as a matter of law, such as those contained in the *CCRA* and the Canadian Charter of Rights and Freedoms (the "*Charter*").

2. Based upon your knowledge and experience, please:

   a. provide an historical narrative regarding the implementation of the Rule of Law in Canada's correctional institutions, including an analysis of the federal system of corrections;

   b. describe the historical and legislative context out of which the administrative segregation provisions of the *CCRA* emerged; and

   c. describe the practical effects upon prisoners of legal regimes which rely upon broad and unfettered grants of discretion upon correctional officials rather than upon provisions which precisely define the nature of correctional authority in clear rules of positive law.

3. Please describe the history of attempts to reform either or both of the legislative provisions regarding administrative segregation and the correctional practice regarding administrative segregation.

[8] *Ending the Isolation Human Rights and Solitary Confinement, Canadian Journal of Human Rights* (2015), 4:57

4. *(formerly 6)* What are the sound principles, practices and standards in the development and operation of administrative segregation decisions and reviews based upon your experience, as well as upon the existing literature, standards and sources which are generally recognized and applied by domestic and international prison administrators, government officials and other experts in the field of Corrections, and more specifically but without limitation:

    a. Is it necessary and appropriate to have administrative segregation decisions reviewed by an independent and impartial tribunal rather than by senior correctional officers and staff?

    b. Is there a need to clearly specify to inmates and staff the type of conduct which will result in administrative segregation and, if so, what problems, if any, have historically been created by framing the grounds for such segregation in terms similar to those set out in s. 31(3) of the *Corrections and Conditional Release Act*?

    c. Is it necessary and appropriate to accord inmates faced with administrative segregation the right to be represented by counsel at review hearings and, if so, to be specifically advised as to the existence of that right?

5. *(formerly 7)* In your experience, are administrative segregation decisions and reviews under the current Canadian law and practice conducted in accordance with sound correctional principles, practices and standards so as to achieve the legitimate purposes which they are designed to serve? If not, why not?

6. *(formerly 4)* Based upon your knowledge and experience, as well as upon the existing literature, standards and sources which are generally recognized and applied by domestic and international prison administrators, government officials, and other experts in the field of Corrections, what are the sound principles, practices and standards in relation to the provision of living conditions for inmates in administrative segregation, without limitation, the following:

    a. indoor and outdoor exercise;
    b. double bunking;
    c. periods of lock-down;
    d. cell sizing and design;
    e. visitation with family members and friends;
    f. access to reading materials, television and radio
    g. work, education and recreation;
    h. food and taking meals; and
    i. any other factor that may be relevant.

7. *(formerly 5)* In your opinion, do the conditions of confinement experienced by inmates in administrative segregation in federal penitentiaries accord with sound

principles, practices and standards? If not, what is the nature and degree of the departure from such standards?]

8. What effects upon inmates have you personally observed to have resulted from breaches of sound correctional principles, practices and standards in the context of administrative segregation decisions and reviews and conditions of confinement?

Sector 1. Standards and Best Practices for the Treatment of Prisoners and the Administration of Correctional Institutions and, Particularly, with Respect to the Use of Administrative Segregation (Question 1)

9. In this first Sector of my report, you have asked me to describe any literature, sources, reports, codes or other materials which are generally recognized and applied by Canadian and international prison administrators, government officials, and other experts in the field of corrections, as reflective of appropriate standards and best practices for the treatment of prisoners and the administration of correctional institutions and, particularly, with respect to the use of administrative segregation. You have asked me to exclude from this collection any rules, principles or provisions which apply directly to the parties to these proceedings as a matter of law, such as those contained in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*] and *Canadian Charter of Rights and Freedoms* (the "*Charter*").

10. The documents and materials referred to in this Sector are those which I have considered and relied upon in preparing my opinion. I am of the view that they constitute authoritative works, studies and standards, which are reflective of best practices, decency and expertise in the field of Corrections, and which are generally and widely regarded as such by the world's leading experts in the field. These sources do not constitute a selection of materials which I believe to be supportive of any particular position, but rather a collection of materials of which I am aware which are relevant to the issues upon which I have been asked to comment.

A. International Manuals, Handbooks

A Human Rights Approach for Prison Management: Handbook for Prison Staff[9]

11. The Handbook was first published in 2002 by the International Center for Prison Studies[10] and is now in its second edition. Its principle author was Dr. Andrew Coyle, one of the most respected international experts on prison management. Dr. Coyle has 25 years' experience at a senior level in the prison services of the United Kingdom. He is the author of a number of

[9] Andrew Coyle, *A Human Rights Approach for Prison Management: Handbook for prison staff* (London: King's College, International Center for Prison Studies, 2nd ed. 2009) ("*A Human Rights Approach for Prison Management*"). It is available online in Arabic, English, French, Portuguese, Russian, Spanish and Turkish. Printed versions are also available in Albanian, Amharic, Chinese and Japanese. The English online version can be accessed at handbook_2nd_ed_eng_8.pdf

[10] Founded in a 1997 and originally based at based at King's College, University of London, in November 2014, the Centre merged with the Institute for Criminal Policy Research at Birkbeck, University of London. The Centre's purposes include conducting research on prisons and imprisonment; developing and disseminating knowledge about how imprisonment should be used; and contributing to improved policy and practice in prisons across the world. http://www.prisonstudies.org/

books and articles on issues concerning criminal justice and has extensive international experience on prison matters, having visited prison systems in many countries as an expert consultant for bodies such as the United Nations and the Council of Europe. The relevance of the Handbook to the subject matter of this opinion is perhaps best explained in its introduction:

> The topics covered in the handbook demonstrate the complexity of prison management and the wide range of skills that are required from those whose task it is to direct prisons. The issues covered in the handbook show that there is a common set of factors which, when taken together, constitute a model for good prison management. However it is not sufficient to consider these topics in a vacuum. It is also important that they should be grounded in a set of clear principles. Since it is intended that this handbook should have application in every prison system in the world, it is essential that the set of principles which is to be used as a reference point should be applicable in every country. They should not be based on a particular culture or on the standards which are accepted in one country or region. The handbook meets this requirement by taking the relevant human rights international standards as its starting point for each chapter.
>
> These standards have been agreed by the international community, usually through the United Nations. The main human rights instruments, such as the *International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights*, are treaties which are legally binding on all states which have ratified or acceded to them. Most of them contain references to the treatment of people who are deprived of their liberty.
>
> In addition, there are a number of international instruments that deal specifically with prisoners and conditions of detention. The more detailed standards that are set out in these principles, minimum rules or guidelines provide a valuable complement to the broad principles contained in the legal treaties. These include: the *Standard Minimum Rules for the Treatment of Prisoners* (1957); the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (1988); the *Basic Principles for the Treatment of Prisoners* (1990) and the *Standard Minimum Rules for the Administration of Juvenile Justice* (1985)…
>
> The legitimacy of this handbook on good prison management comes from its solid grounding in these international human rights standards, which are recognized around the world.
>
> …
>
> The International Centre for Prison Studies carries out all its practical prison management projects within the context of human rights. It does so for two reasons. The first is that this is the right thing to do. The handbook demonstrates in many chapters the importance of managing prisons within an ethical context which respects the humanity of everyone involved in a prison: prisoners, prison staff and visitors. This ethical context needs to be universal in its application and the international human rights instruments provide this universality.

> There is also a more pragmatic justification for this approach to prison management: it works. This approach does not represent a liberal or soft approach to prison management. The members of the handbook advisory group and others involved in writing this handbook have worked in some of the most problematic prisons in the world. They are convinced that this style of management is the most effective and safest way of managing prisons. Time and again staff of the Centre have found that first line prison staff in different countries, from a variety of cultures, respond positively to this approach. It relates the international standards to their daily work in a manner which is immediately recognizable.
>
> What this approach underlines is that the concept of human rights is not merely another subject to be added to the training curriculum. Rather, it suffuses all aspects of good prison management and is integral to it.[11]

Making Standards Work: An International Handbook on Good Prison Practice[12]

12. This handbook is published by Penal Reform International ("PRI") an international non-governmental organization. Founded in London, UK, in 1989, PRI has members in five continents and in over 80 countries. The rationale for this Handbook and its relevance to this opinion, is explained in the preface to the first edition, published in 1995:

> **The reasons**
>
> 1. The **United Nations** has been concerned with the humane treatment of all human beings, including those who are imprisoned. It has created and adopted a number of international legal instruments to protect and guarantee human rights and fundamental freedoms. The application in practice, however, of these instruments falls far short in many, perhaps most, countries.
>
> 2. **Penal Reform International (PRI)** is mandated *inter alia* to seek 'to achieve penal reform, recognizing diverse cultural contexts, by promoting the development and implementation of the human rights instruments with regard to law enforcement, prison conditions and standards...'.
>
> 3. PRI has, therefore, initiated a project, **'Making Standards Work'**, which has as its aim (i) the improved implementation of internationally recognized standards of prison treatment by making them better known, (ii) strengthening international contact between those concerned with these matters and (iii) stimulating exchanges of national experience.
>
> **The objectives**
>
> 4. The first objective of the project has been to draw up a Handbook on good prison practice.

---

[11] *A Human Rights Approach for Prison Management*, pp. 7-9 (emphasis added)

[12] Penal Reform International, *Making standards work: an international handbook on good prison practice*, 2nd ed. (London: Astron Printers Ltd., 2001) ("*Making Standards Work*"), http://www.penalreform.org/resource/making-standards-work-international-handbook-good-prison-practice/

5. The Handbook attempts to present an overview of the UN rules on prison conditions and treatment of prisoners and explain concretely their value and meaning for prison policies and daily practice. The Handbook is meant for use by all those working with prisoners or responsible for their care and treatment in any way.

The process

6. The Handbook has come into being in four stages in order that it should have an international character and relevance. In the first stage its general content and format were established at a small international conference held in The Netherlands in November 1993 by 20 experts from different parts of the world. In stage two a drafting group, consisting of eight experts, who were able to work intensively together, formulated preliminary texts based on the conclusions of the 1993 conference. In the third stage a large and world-wide conference, held in The Netherlands in November 1994, discussed these texts and made suggestions for improvements. In the final stage the drafting group finalized the texts in response to proposals of the latter conference.[13]

Since it was first published in 1995, *Making Standards Work* has been used all around the world. It has been translated into over 15 languages and it is also available on the internet. As a tool for reform, *Making Standards Work* has proved to be an invaluable resource to both governmental and non-governmental organizations world-wide.

Human Rights Watch

13. The non-governmental organization "Human Rights Watch" is dedicated to the protection of human rights around the world, including those of prisoners. It has authored several reports on the use of solitary confinement. In conjunction with the American Civil Liberties Union, in 2012 it published *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*,[14] which describes the conditions under which young people under the age of 18 are confined in solitary in the prisons and jails in both state and federal prisons in the US and recommends the prohibition of the practice for juveniles.

B. International Law Standards

14. International law standards relating to the human rights of prisoners include the following:

a. Standard Minimum Rules for the Treatment of Prisoners (the "SMRs")[15]

---

[13] *Making Standards Work*, p. 1

[14] *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States*, https://www.hrw.org/sites/default/files/reports/us1012ForUpload.pdf

[15] *Standard Minimum Rules for the Treatment of Prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977 ("*Standard Minimum Rules for the Treatment of Prisoners*")

15. Sixty years ago, the First UN Congress on the Prevention of Crime and the Treatment of Prisoners (Tokyo, Japan) adopted the Draft Standard Minimum Rules for the Treatment of Prisoners, which two years later in 1957 were adopted by the UN Economic and Social Council (Ecosoc), a principal UN organ under the UN Charter. Apart from one amendment in 1977 that added an extra rule, the SMRs have remained as originally drafted. The Rules have been a leading force for the improvement of conditions of detention for persons deprived of liberty. They have influenced national legislation and prison rules in many countries. They have also played an important role in assisting international bodies in interpreting key human rights provisions. Even though the Rules are not of themselves legally binding, they have been invoked by the UN Human Rights Committee, the European and Inter-American Courts of Human Rights and the African Commission on Human and Peoples' Rights, when they have had to decide if detained or imprisoned persons have been treated with respect for their humanity and inherent human dignity and have not been subjected to torture or cruel, inhuman or degrading treatment or punishment.

16. The first comprehensive review of the SMRs was initiated in December 2010 when the UN General Assembly adopted a resolution which included a request to the Commission on Crime Prevention and Criminal Justice to establish: "an open-ended intergovernmental expert group… to exchange information on best practices, as well as national legislation and existing international law, and on the revision of existing United Nations standard minimum rules for the treatment of prisoners so that they reflect recent advances in correctional science and best practices, with a view to making recommendations to the Commission on possible next steps." Following a series of reports by expert intergovernmental committees, in May 2015, the UN Commission on Crime Prevention and Criminal Justice recommended to the UN Economic and Social Council the approval of a draft resolution for adoption by the General Assembly the first major revision of the Minimum Rules.[16]

17. On 17 December 2015, a revised version of the SMRs were adopted unanimously by the 70th session of the UN General Assembly.[17]

18. The revised Rules will be known as the "Nelson Mandela Rules" to honour the legacy of the late President of South Africa, Mr. Nelson Rolihlahla Mandela, who spent 27 years in prison the first 18 of which were in solitary confinement.

19. The need for revision of the 1955 rules is reflected in several of the preambular paragraphs of the new rules:

> *Aware* that the Standard Minimum Rules for the Treatment of Prisoners have been the universally acknowledged minimum standards for the detention of prisoners and that they have been of significant value and influence, as a guide, in the development of correctional laws, policies and practices since their adoption by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in 1955,

[16] United Nations Economic and Social Council: Commission on Crime Prevention and Criminal Justice, Twenty-fourth session Vienna, 18-22 May 2015 E/CN.15/2015/L.6/Rev.1
[17] UN Resolution GA/11745, http://www.un.org/press/en/2015/ga11745.doc.htm

...

Taking into account the progressive development of international law pertaining to the treatment of prisoners since 1955, including in international instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol thereto,

Recalling the United Nations standards and norms in crime prevention and criminal justice related to the treatment of prisoners and to alternatives to imprisonment adopted since 1955, in particular the procedures for the effective implementation of the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners, the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) and the basic principles on the use of restorative justice programmes in criminal matters,

20. In understanding the role of the SMRs, the document's preliminary observations are helpful:

Preliminary observation 1

The following rules are not intended to describe in detail a model system of penal institutions. They seek only, on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of prisoners and prison management.

Preliminary observation 2

1. In view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations.

2. On the other hand, the rules cover a field in which thought is constantly developing. They are not intended to preclude experiment and practices, provided these are in harmony with the principles and seek to further the purposes which derive from the text of the rules as a whole. It will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.

21. Of particular relevance to the subject of my expert report, the new rules are more prescriptive in relation to the use of solitary confinement. While many of the original SMRs remain in place, the revised Rules contain substantive and significant new guidance for prison

management on eight thematic areas, including healthcare in prisons, investigations of deaths in custody, disciplinary measures, professionalization of prison staff, and independent inspections. In particular, the revised Rules introduce for the first time in international standards a limitation on the use of solitary confinement. Rule 31 previously provided only that "Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences."[18] The new Rule 43 provides:

> ***Rule 43***
>
> 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> (a) Indefinite solitary confinement;
>
> (b) Prolonged solitary confinement;
>
> (c) Placement of a prisoner in a dark or constantly lit cell;
>
> (d) Corporal punishment or the reduction of a prisoner's diet or drinking water;
>
> (e) Collective punishment…
>
> ***Rule 44***
>
> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
>
> ***Rule 45***
>
> 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
>
> 2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

[18] *Standard Minimum Rules for the Treatment of Prisoners*, Rule 31

b. Basic Principles for the Treatment of Prisoners[19]

22. 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*, 14 December 1990, GA 45/111, which states:

> 1. All prisoners shall be treated with the respect due to their inherent dignity and value as human beings....
>
> 5. Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants.[20]

c. European Prison Rules[21]

23. The first attempt to set such standards in Europe was made in 1973 with the introduction of the European Standard Minimum Rules for the Treatment of Prisoners by Resolution (73) 5 of the Council of Europe. They sought to adapt to European conditions the United Nations SMRs for the Treatment of Prisoners, which were initially formulated as far back as 1955.

24. In 1987, the European Prison Rules were thoroughly revised to allow them, in the words of the Explanatory Memorandum "to embrace the needs and aspirations of prison administrations, prisoners and prison personnel in a coherent approach to management and treatment that is positive, realistic and contemporary."[22]

25. In 2006, the Rules were further revised. Like its predecessors, the latest formulation is informed both by earlier prison standards and by the values of the European Convention on Human Rights. Since 1987, however, there have been many developments in prison law and practice in Europe. Evolutionary changes in society, crime policy, sentencing practice and research, together with the accession of new member states to the Council of Europe, have significantly altered the context for prison management and the treatment of prisoners. Key factors in this evolution have been the ever growing body of decisions of the European Court of Human Rights (ECtHR) that have applied the European Convention for the Protection of Human Rights and Fundamental Freedoms to the protection of fundamental rights of prisoners as well as

---

[19] *Basic Principles for the Treatment of Prisoners*, Adopted and proclaimed by United Nations General Assembly resolution 45/111 of 14 December 1990, http://www.un.org/documents/ga/res/45/a45r111.htm ("*UN Principles for the Treatment of Prisoners*")

[20] *UN Principles for the Treatment of Prisoners*, Principle 5

[21] *European Prison Rules*. Council of Europe, Committee of Ministers, Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules, Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, https://wcd.coe.int/ViewDoc.jsp?id=955747 ("*European Prison Rules (2006)*")

[22] *European Prison Rules*, Adopted by the Committee of Ministers on 12 February, 1987 at the 404th Meeting of the Ministers' Deputies

the standards for the treatment of prisoners that are being set by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). These developments led the European Committee on Crime Problems (CDPC) to entrust the Council for Penological Co-operation (PC-CP) with the task of bringing the Rules into line with best current practice.[23]

26. The present Rules address questions the Rules of 1987 did not consider. They seek to be comprehensive without burdening member-states with unrealistic demands. It is recognized that the implementation of these Rules will require considerable efforts by some Council of Europe member States. The Rules offer guidance to member states that are modernizing their prison law and will assist prison administrations in deciding how to exercise their authority even where the Rules have not yet been fully implemented in national law. The Rules refer to measures that should be implemented in "national law" rather than to "national legislation", as they recognize that law making may take different forms in the member States of the Council of Europe. The term "national law" is designed to include not only primary legislation passed by a national parliament, but also other binding regulations and orders, as well as the law that is made by courts and tribunals in as far as these forms of creating law are recognized by national legal systems.

27. The 2006 Rules have several provisions that address solitary confinement:

> 43.2 The medical practitioner or a qualified nurse reporting to such a medical practitioner shall pay particular attention to the health of prisoners held under conditions of solitary confinement, shall visit such prisoners daily, and shall provide them with prompt medical assistance and treatment at the request of such prisoners or the prison staff.
>
> 43.3 The medical practitioner shall report to the director whenever it is considered that a prisoner's physical or mental health is being put seriously at risk by continued imprisonment or by any condition of imprisonment, including conditions of solitary confinement.
>
> ...
>
> 60.5 Solitary confinement shall be imposed as a punishment only in exceptional cases and for a specified period of time, which shall be as short as possible.

d. Special Rapporteur Reports

28. Special Rapporteurs play an important role in the international law arena for the protection of human rights.[24] Of particular importance to this opinion are the special reports of

[23] Commentary to *European Prison Rules (2006)*

[24] "Special rapporteurs are in charge of holding inquiries into violations and to intervene on specific issues or urgent situations. They therefore play an important role in the protection of human rights. They are independent, sit individually and cannot be appointed more than six years. Their mission is to study and draft a report on a country's situation about a human right issue." UN's Special Rapporteurs

the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In a number of reports, the Special Rapporteurs have specifically addressed the application of international human rights norms to the practice of solitary confinement. The Interim Report of Manfred Nowak on July 28, 2008 contains the following preface:

> In section IV, the Special Rapporteur examines the use of solitary confinement. The practice has a clearly documented negative impact on mental health, and therefore should be used only in exceptional circumstances or when absolutely necessary for criminal investigation purposes. In all cases, solitary confinement should be used for the shortest period of time. The Special Rapporteur draws attention to the Istanbul Statement on the Use and Effects of Solitary Confinement, annexed to the report, as a useful tool to promote the respect and protection of the rights of detainees.
>
> …
>
> **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.
>
> ...

Policy implications

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 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.[25]

29. In August 2011, Juan Mendez, the current UN Special Rapporteur of the Human Rights Council on Torture and other cruel, inhuman or degrading treatment or punishment, released a comprehensive report with his findings based on the accumulating evidence of the harmful effects of solitary and recommending limitations on its use.[26] In his summary the Special Rapporteur writes:

In the present report, submitted pursuant to General Assembly resolution 65/205, the Special Rapporteur addresses issues of special concern and recent developments in the context of his mandate.

The Special Rapporteur draws the attention of the General Assembly to his assessment that solitary confinement is practised in a majority of States. He finds that where the physical conditions and the prison regime of solitary confinement cause severe mental and physical pain or suffering, when used as a punishment, during pre-trial detention, indefinitely, prolonged, on juveniles or persons with mental disabilities, it can amount to cruel, inhuman or degrading treatment or punishment and even torture. In addition, the

[25] Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other cruel, inhuman or degrading treatment or punishment, (July 28,2008) A/63/175, www.un.org/disabilities/images/A.**63.175**.doc

[26] Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other cruel, inhuman or degrading treatment or punishment, (August 5, 2011) A/66/268, http://www.un.org/ga/search/viewm_doc.asp?symbol=A/66/268

use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

The report highlights a number of general principles to help to guide States to re-evaluate and minimize its use and, in certain cases, abolish the practice of solitary confinement. The practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He further emphasizes the need for minimum procedural safeguards, internal and external, to ensure that all persons deprived of their liberty are treated with humanity and respect for the inherent dignity of the human person.

30. Because of both the importance of the Special Rapporteur's 2011 report in the contemporary debate around the use of solitary confinement and its extensive reference to the international standards and commentary, I have set below relevant passages from the Mendez report:

C. Definition

25. 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.

26. 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. Of particular concern to the Special Rapporteur is prolonged solitary confinement, which he defines as any period of solitary confinement in excess of 15 days. He is aware of the arbitrary nature of the effort to establish a moment in time which an already harmful regime becomes prolonged and therefore unacceptably painful. He concludes that 15 days is the limit between "solitary confinement" and "prolonged solitary confinement" because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible.

D. Legal Framework

…

General Assembly

28. In 1990, the General Assembly adopted resolution 45/111, the Basic Principles for the Treatment of Prisoners. Principle 7 states that efforts to abolish solitary

confinement as a punishment, or to restrict its use, should be undertaken and encouraged.

29. In the same year, the General Assembly adopted resolution 45/113, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. In paragraph 67 the Assembly asserted that "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including... solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned".

United Nations treaty bodies

30. The Human Rights Committee, in paragraph 6 of its General Comment No. 20, noted that prolonged solitary confinement of the detained or imprisoned person might amount to acts prohibited by article 7 of the International Covenant on Civil International level General Assembly and Political Rights. In its concluding observations on Rwanda, the Human Rights Committee recommended that "The State party should put an end to the sentence of solitary confinement..." (CCPR/C/RWA/CO/3, para. 14).

31. The Committee against Torture has recognized the harmful physical and mental effects of prolonged solitary confinement and has expressed concern about its use, including as a preventive measure during pretrial detention, as well as a disciplinary measure. The Committee has recommended that the use of solitary confinement be abolished, particularly during pretrial detention, or at least that it should be strictly and specifically regulated by law (maximum duration, etc.) and exercised under judicial supervision, and used only in exceptional circumstances, such as when the safety of persons or property is involved (A/63/175, para. 80). The Committee has recommended that persons under the age of 18 should not be subjected to solitary confinement (CAT/C/MAC/CO/4, para. 8).

32. The Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has pointed out that prolonged solitary confinement may amount to an act of torture and other cruel, inhuman or degrading treatment or punishment and recommended that solitary confinement should not be used in the case of minors or the mentally disabled (CAT/OP/PRY/1, para. 185). The Subcommittee has also recommended that a medical officer should visit prisoners held in solitary confinement every day, on the understanding that such visits should be in the interests of the prisoners' health. Furthermore, prisoners held in solitary confinement for more than 12 hours should have access to fresh air for at least one hour each day (CAT/OP/PRY/1, para. 184). In view of the condition of solitary confinement, the Subcommittee has pointed out that beds and proper mattresses should be made available to all inmates, including prisoners held in solitary confinement (CAT/OP/HND/1, para. 227 (a), and CAT/OP/PRY/1, para. 280).

…

European Court of Human Rights

34. The European Court of Human Rights considers the rationale given by the State for the imposition of social and physical isolation. The Court has found violations of article 3 of the European Convention on Human Rights where States do not provide a security-based justification for the use of solitary confinement. In circumstances of prolonged solitary confinement, the Court has held that the justification for solitary confinement must be explained to the individual and the justification must be "increasingly detailed and compelling" as time goes on.

35. Through its jurisprudence, the European Court of Human Rights emphasizes that certain procedural safeguards must be in place during the imposition of solitary confinement, for example, monitoring a prisoner's physical well-being, particularly where the individual is not in good health and having access to judicial review.

36. The level of isolation imposed on an individual is essential to the European Court of Human Rights' assessment of whether instances of physical and mental isolation constitute torture or cruel, inhuman or degrading treatment or punishment. A prolonged absolute prohibition of visits from individuals from outside the prison causes suffering "clearly exceeding the unavoidable level inherent in detention". However, where the individual can receive visitors and write letters, have access to television, books and newspapers and regular contact with prison staff or visit with clergy or lawyers on a regular basis, isolation is "partial", and the minimum threshold of severity - which the European Court of Human Rights considers necessary to find a violation of article 3 of the European Convention on Human Rights - is not met. Nevertheless, the Court has emphasized that solitary confinement, even where the isolation is only partial, cannot be imposed on a prisoner indefinitely.

31. In assessing the impact of solitary confinement with reference to international human rights' norms, the Special Rapporteur reviews the importance of the conditions of confinement, which include the physical conditions (cell size, presence of windows and light, and access to sanitary fixtures for personal hygiene), the prison regime under which it is operated (access to outdoor exercise and programming, access to meaningful human contact within the prison, and contact with the outside world). Of particular relevance to this opinion, the Report specifically addresses the issue of prolonged or indefinite solitary confinement:

57. The use of prolonged or indefinite solitary confinement has increased in various jurisdictions, especially in the context of the "war on terror" and "a threat to national security". Individuals subjected to either of these practices are in a sense in a prison within a prison and thus suffer an extreme form of anxiety and exclusion, which clearly supersede normal imprisonment. Owing to their isolation, prisoners held in prolonged or indefinite solitary confinement can easily slip out of sight of justice, and safeguarding their rights is therefore often difficult, even in States where there is a strong adherence to rule of law.

58. When a State fails to uphold the Standard Minimum Rules for the Treatment of

> Prisoners during a short period of time of solitary confinement, there may be some debate on whether the adverse effects amount to cruel, inhuman or degrading treatment or punishment or torture. However, the longer the duration of solitary confinement or the greater the uncertainty regarding the length of time, the greater the risk of serious and irreparable harm to the inmate that may constitute cruel, inhuman or degrading treatment or punishment or even torture.
>
> 59. The feeling of uncertainty when not informed of the length of solitary confinement exacerbates the pain and suffering of the individuals who are subjected to it….

32. The Report reviews the research on psychological and physiological effects of solitary confinement, which I understand from counsel will be the subject of other expert reports in this case:

> **H. Psychological and physiological effects of solitary confinement**
>
> 62. 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. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement - social isolation, minimal environmental stimulation and "minimal opportunity for social interaction". Research further shows that solitary confinement appears to cause "psychotic disturbances," a syndrome that has been described as "prison psychoses". Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis and self-harm (see annex for a comprehensive list of symptoms).
>
> 63. Some individuals experience discrete symptoms while others experience a "severe exacerbation of a previously existing mental condition or the appearance of a mental illness where none had been observed before". 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.
>
> **I. Latent effects of solitary confinement**
>
> 64. There is a lack of research into the latent effects of solitary confinement. While the acute effects of solitary confinement generally recede after the period of solitary confinement ends, some of the negative health effects are long term. The minimal stimulation experienced during solitary confinement can lead to a decline in brain activity in individuals after seven days. One study found that "up to seven days, the [brain activity] decline is reversible, but if deprived over a long period this may not be the case".
>
> 65. 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.

33. In his report the Special Rapporteur, in considering when solitary confinement amounts to torture and other cruel, inhuman or degrading treatment or punishment prohibited by article 7 of the International Covenant on Civil and Political Rights, torture as defined in article 1 of the Convention against Torture or cruel, inhuman or degrading punishment as defined in article 16 of the Convention, emphasizes the contextual nature of the inquiry.

71. The assessment of whether solitary confinement amounts to torture and other cruel, inhuman or degrading treatment or punishment should take into consideration all relevant circumstances on a case-by-case basis. These circumstances include the purpose of the application of solitary confinement, the conditions, length and effects of the treatment and, of course, the subjective conditions of each victim that make him or her more or less vulnerable to those effects. In this section, the report discusses a few circumstances where the use of solitary confinement constitutes torture and other cruel, inhuman or degrading treatment or punishment.

…

74. Where the physical conditions of solitary confinement are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals who are subjected to the confinement, the conditions of solitary confinement amount to torture or to cruel and inhuman treatment as defined in articles 1 and 16 of the Convention, and constitute a breach of article 7 of the Covenant.

75. The use of solitary confinement can be accepted only in exceptional circumstances where its duration must be as short as possible and for a definite term that is properly announced and communicated. Given the harmful effects of indefinite solitary confinement, its potential use to extract information or confession during pretrial detention, and the fact that uncertainty prevents the use of remedies to challenge it, the Special Rapporteur finds that indefinite imposition of solitary confinement violates the right to due process of the concerned individual (article 9 of the Covenant, articles 1 or 16 of the Convention, and article 7 of the Covenant).

76. The Special Rapporteur asserts that social isolation is contrary to article 10, paragraph 3, of the International Covenant on Civil and Political Rights, which states that "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation" (General Assembly resolution 2200 (XXI), annex). Long periods of isolation do not aid the rehabilitation or re-socialization of detainees (E/CN.4/2006/6/Add.4, para. 48). The adverse acute and latent psychological and physiological effects of prolonged solitary confinement constitute severe mental pain or suffering. Thus the Special Rapporteur concurs with the position taken by the Committee against Torture in its General Comment No. 20 that prolonged solitary confinement amounts to acts prohibited by article 7 of the Covenant, and

consequently to an act as defined in article 1 or article 16 of the Convention. For these reasons, the Special Rapporteur reiterates that, in his view, any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, depending on the circumstances. He calls on the international community to agree to such a standard and to impose an absolute prohibition on solitary confinement exceeding 15 consecutive days.

77. With respect to juveniles, the Declaration of the Rights of the Child and the Preamble of the Convention on the Rights of the Child state that, given their physical and mental immaturity, juveniles need special safeguards and care, including appropriate legal protection. Article 19 of the Convention on the Rights of the Child (General Assembly resolution 44/25) requires States Parties to "take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence…" In its General Comment No. 8, the Committee on the Rights of the Child indicated that "There is no ambiguity: 'all forms of physical or mental violence' does not leave room for any level of legalized violence against children" (CRC/C/GC/8, para. 18). Paragraph 67 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly in resolution 45/113 of 14 December 1990, states that "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including... solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned" (see also CRC/C/GC/10, para. 89). Thus the Special Rapporteur holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman or degrading treatment and violates article 7 of the International Covenant on Civil and Political Rights and article 16 of the Convention against Torture.

78. The right of persons with mental disabilities to be treated with humanity and with respect for the inherent dignity guaranteed under article 10 of the Covenant should be interpreted in light of the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, adopted by the General Assembly on 17 December 1991 (resolution 46/119, annex). Given their diminished mental capacity and that solitary confinement often results in severe exacerbation of a previously existing mental condition, the Special Rapporteur believes that its imposition, of any duration, on persons with mental disabilities is cruel, inhuman or degrading treatment and violates article 7 of the Covenant and article 16 of the Convention.

34. In the final section of the Special Rapporteur's Report entitled "Conclusions and Recommendations" he recommends that where solitary confinement can be justified within the international human rights norms, it must be subject to minimum procedural safeguards and in this context, the Special Rapporteur urges States to apply a set of guiding principles and procedural safeguards. Since I will be referring to these conclusions and recommendations at various points in my opinion, I have again for the Court's ease of reference set them out below:

Conclusions

...

80. Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 or article 16 of the Convention against Torture. In addition, the use of solitary confinement increases the risk that acts of torture and other cruel, inhuman or degrading treatment or punishment will go undetected and unchallenged.

81. Considering the severe mental pain or suffering solitary confinement may cause when used as a punishment, during pretrial detention, indefinitely or for a prolonged period, for juveniles or persons with mental disabilities, it can amount to torture or cruel, inhuman or degrading treatment or punishment. The Special Rapporteur is of the view that where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment**.**

Recommendations

...

86. States should abolish the use of solitary confinement for juveniles and persons with mental disabilities. Regarding disciplinary measures for juveniles, the Special Rapporteur recommends that States should take other measures that do not involve the use of solitary confinement. In regard to the use of solitary confinement for persons with mental disabilities, the Special Rapporteur emphasizes that physical segregation of such persons may be necessary in some cases for their own safety, but solitary confinement should be strictly prohibited.

87. Indefinite solitary confinement should be abolished.

88. It is clear that short-term solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment; it can, however, be a legitimate device in other circumstances, provided that adequate safeguards are in place. In the opinion of the Special Rapporteur, prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition.

89. The Special Rapporteur reiterates that solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. He emphasizes that when solitary confinement is used in exceptional circumstances, minimum procedural safeguards must be followed…. In this context, the Special Rapporteur urges States to apply the following guiding principles and procedural safeguards**.**

Guiding principles

90. Throughout the period of detention, the physical conditions and prison regime of the solitary confinement, and in particular the duration of confinement, must be proportional to the severity of the criminal or disciplinary infraction for which solitary confinement is imposed.

91. The physical conditions and prison regime of solitary confinement must be imposed only as a last resort where less restrictive measures could not achieve the intended disciplinary goals.

92. Solitary confinement must never be imposed or allowed to continue except where there is an affirmative determination that it will not result in severe pain or suffering, whether physical or mental, giving rise to acts as defined in article 1 or article 16 of the Convention against Torture.

93. All assessments and decisions taken with respect to the imposition of solitary confinement must be clearly documented and readily available to the detained persons and their legal counsel. This includes the identity and title of the authority imposing solitary confinement, the source of his or her legal attributes to impose it, a statement of underlying justification for its imposition, its duration, the reasons for which solitary confinement is determined to be appropriate in accordance with the detained person's mental and physical health, the reasons for which solitary confinement is determined to be proportional to the infraction, reports from regular review of the justification for solitary confinement, and medical assessments of the detained person's mental and physical health.

Internal safeguards

94. From the moment that solitary confinement is imposed, through all stages of its review and decisions of extension or termination, the justification and duration of the solitary confinement should be recorded and made known to the detained person. Additionally, the detained person should be informed of what he or she must do to be removed from solitary confinement. In accordance with rule 35 of the Standard Minimum Rules for the Treatment of Prisoners, the detained person must receive this information in plain language that he or she understands. This information must additionally be provided to any legal representative of the detained person.

95. 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. Any change in the factors that justified the imposition of solitary confinement should immediately trigger a review of the detained person's solitary confinement. All review processes must be documented.

96. Persons held in solitary confinement must be provided with a genuine opportunity to challenge both the nature of their confinement and its underlying justification through a process of administrative review. At the outset of the imposition of solitary

confinement, detained persons must be informed of their alleged criminal or disciplinary infraction for which solitary confinement is being imposed and must immediately have an opportunity to challenge the reasons for their detention. Following the imposition of solitary confinement, detained persons must have the opportunity to file a complaint to prison management through an internal or administrative complaints system.

97. There shall be no limitations imposed on the request or complaint, such as requiring evidence of both mental or emotional suffering and physical suffering. Prison officials have an obligation to address all requests or complaints promptly, informing the detained person of the outcome. All internal administrative findings must be subject to external appeal through judicial processes.

External safeguards

98. Detained persons held in solitary confinement must be afforded genuine opportunities to challenge both the nature of their confinement and its underlying justification through the courts of law. This requires a right to appeal all final decisions by prison authorities and administrative bodies to an independent judicial body empowered to review both the legality of the nature of the confinement and its underlying justification. Thereafter, detained persons must have the opportunity to appeal these judgements to the highest authority in the State and, after exhaustion of domestic remedies, seek review by regional or universal human rights bodies.

99. Individuals must have free access to competent legal counsel throughout the period in which they are held in solitary confinement. Where necessary to facilitate complete and open communication between a detainee and his or her legal counsel, access to an interpreter must be provided.

100. There should be a documented system of regular monitoring and review of the inmate's physical and mental condition by qualified medical personnel, both at the initiation of solitary confinement and on a daily basis throughout the period in which the detained person remains in solitary confinement, as required by rule 32, paragraph 3, of the Standard Minimum Rules for the Treatment of Prisoners. Medical personnel monitoring detained persons should have specialized training in psychological assessment and/or the support of specialists in psychology. Additionally, medical personnel must be independent and accountable to an authority outside of the prison administration. Preferably, they should belong to the general national health structure. Any deterioration of the inmate's mental or physical condition should trigger a presumption that the conditions of confinement are excessive and activate an immediate review.

101. Medical personnel should additionally inspect the physical conditions of the inmate's confinement in accordance with article 26 of the Standard Minimum Rules for the Treatment of Prisoners. Relevant considerations include the level of hygiene and cleanliness of the facility and the inmate, heating, lighting and ventilation of the cell,

suitability of clothing and bedding, adequate supply of food and water and observance of the rules concerning physical exercise.

35. Since the publication of the 2011 report of the Special Rapporteur, its influence has been felt in an increased focus on the practice of solitary confinement especially in the United States where there are estimated to be 100,000 prisoners so confined.[27] The recent Executive Order of President Obama prohibiting the use of solitary confinement on juveniles mirrors one of the recommendations in the report of the Special Rapporteur.[28]

e. Reports of the Correctional Investigator

36. Partly in response to the report of the Swackhamer Commission, addressing the causes of the 1971 riot at Kingston Penitentiary and the lack of any effective grievance and oversight mechanisms, the Office of the Correctional Investigator ("**CI**") was created by an Order-in-Council under Part II of the *Inquiries Act*, R.S.C. 1970, c. I-13. The Order-in-Council mechanism, which allowed a quick response in the aftermath of the Kingston riot, was intended to be a temporary measure until legislation could be drafted. However, it was not until 1992, 19 years later, that the mandate of the CI found its place in correctional legislation in the *CCRA*.

37. The CI is mandated by Part III of the *CCRA* as an Ombudsman for federal offenders. The primary function of the Office is to investigate and bring resolution to individual offender complaints. The Office as well, has a responsibility to review and make recommendations on the Correctional Service's policies and procedures associated with the areas of individual complaints to ensure that systemic areas of concern are identified and appropriately addressed.[29]

38. Under the *CCRA*, the CI is required, within three months after the end of each fiscal year, to submit to the Minister a report of the activities of the office of the CI during that year, and the Minister is required to lay every such report before each House of Parliament within the first 30 days on which that House is sitting after the day on which the Minister receives it. Under the legislation, the CI may also, at any time, make a special report to the Minister referring to and commenting on any matter within the scope of the CI's function, powers and duties where, in the opinion of the CI, the matter is of such urgency or importance that a report should not be deferred until the time provided for the submission of the next annual report to the Minister.[30] In this opinion in addition to referring to his Annual Reports, I will referring to several of the CI's special reports that address, *inter alia*, the use of segregation. The first involved the 1992 strip searching and long-term segregation at the Prison for Women that precipitated a commission of inquiry led by Justice Louise Arbour, the second is the 2007 report on the death of Ashley Smith and a third released in 2015 reviews the trends in segregation use over the last ten years.

---

[27] Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison. The Liman Program, Yale Law School Association of State Correctional Administrators, August 2015.

[28] https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html. This order adopts the recommendations of the US Department of Justice's Report and Recommendations concerning the Use of Restrictive Housing http://www.justice.gov/restrictivehousing

[29] *CCRA*, s. 167(1)

[30] *CCRA*, ss. 192-93

39. One of the six thematic priorities of the annual reports of CI has been conditions of confinement, especially the policies and practices associated with administrative segregation. In my own academic work I have relied upon the annual and special reports of the CI as barometers of systemic issues arising from use of administrative segregation and as a resource for principled, fair and effective correctional operations.

A preliminary note on definitions

40. My letter of instructions refers to the term "administrative segregation," which is the term used in the relevant federal correctional legislative and policy documents and the Notice of Civil Claim. Many of the documents and instruments to which I have previously referred use the term "solitary confinement." Solitary confinement, largely as a result of its depiction in literature and movies, conjures up a set of images linked to windowless, subterranean dungeons, and cruel and oppressive jailers. The term as it is used in documents relating to human rights standards is a more complex, nuanced and less visceral concept. I have found the most useful and comprehensive description to be that I have previously cited from the 2011 report of the Special Rapporteur: For ease of reference I have set that description out here again

> 25. 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.
>
> 26. 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.[31]

41. The US Department of Justice in a January 2016 report, reflecting both US and Canadian "disfavour" of the term, solitary confinement, offered this definition of its preferred term, "restrictive housing":

> The most recognizable term for inmate segregation-"solitary confinement"-is disfavored by correctional officials, in part because it conjures a specific, and in some cases misleading, image of the practice. Not all segregation is truly "solitary," at least in the traditional sense of the word. Many prison systems, including the Bureau, often house two segregated inmates together in the same cell, a practice known as "double-celling." To avoid this confusion, the Report adopts the more general terms, "restrictive housing" and "segregation."

[31] Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (July 28,2008) A/63/175

For the purposes of this Report, we define "restrictive housing" as any type of detention that involves three basic elements:

- Removal from the general inmate population, whether voluntary or involuntary;
- Placement in a locked room or cell, whether alone or with another inmate; and
- Inability to leave the room or cell for the vast majority of the day, typically 22 hours or more.

Even this definition, however, leaves substantial room for variation. Restrictive housing takes many forms, and an inmate's experience in segregation can vary considerably depending on certain external factors, such as length of stay, conditions of confinement, and degree of social isolation, as well as factors specific to each inmate, such as age and psychological resiliency. As this Report makes clear, it is not enough to say that an inmate is in "restrictive housing" (or "solitary confinement," for that matter); it is just as important to know the details of the placement.[32]

42. As I will later describe the Canadian federal government in its latest public statement is more emphatic in asserting unequivocally, without resort to definitions, "that the term solitary confinement is not accurate or applicable within the Canadian federal correctional system."[33]

Sector 2. Historical Review of Rule of Law in Corrections, Historical and Legislative Context of the Administrative Segregation Provisions of the *CCRA* and History of Reform of Legislative and Administrative Practice regarding Segregation (Questions 2, 3, 4 and 5)

2. Based upon your knowledge and experience, please:

   a. provide an historical narrative regarding the implementation of the Rule of Law in Canada's correctional institutions, including an analysis of the federal system of corrections;

   b. describe the historical and legislative context out of which the administrative segregation provisions of the *CCRA* emerged; and

   c. describe the practical effects upon prisoners of legal regimes which rely upon broad and unfettered grants of discretion upon correctional officials rather than upon provisions which precisely define the nature of correctional authority in clear rules of positive law.

[32] US Department of Justice, Report and Recommendations Concerning the Use of Restrictive Housing, p. 3 http://www.justice.gov/restrictivehousing\

[33] Deputy Minister Steering Committee Responding to the Recommendations from the Coroner's Inquest into the Death of Ashley Smith in Federal Custody, Ottawa December 2014

3. Please describe the history of attempts to reform either or both of the legislative provisions regarding administrative segregation and the correctional practice regarding administrative segregation.

4. What are the sound principles, practices and standards in the development and operation of administrative segregation decisions and reviews based upon your experience, as well as upon the existing literature, standards and sources which are generally recognized and applied by domestic and international prison administrators, government officials and other experts in the field of Corrections, and more specifically but without limitation:

   a. Is it necessary and appropriate to have administrative segregation decisions reviewed by an independent and impartial tribunal rather than by senior correctional officers and staff?

   b. Is there a need to clearly specify to inmates and staff the type of conduct which will result in administrative segregation and, if so, what problems, if any, have historically been created by framing the grounds for such segregation in terms similar to those set out in s. 31(3) of the *Corrections and Conditional Release Act*?

   c. Is it necessary and appropriate to accord inmates faced with administrative segregation the right to be represented by counsel at review hearings and, if so, to be specifically advised as to the existence of that right?

5. In your experience, are administrative segregation decisions and reviews under the current Canadian law and practice conducted in accordance with sound correctional principles, practices and standards so as to achieve the legitimate purposes which they are designed to serve? If not, why not?

43. Because of the way in which these questions are intertwined in the history of Canadian corrections, I have addressed them in this report compendiously to avoid repetition.

A. The Implementation of the Rule of Law in Canadian Corrections

44. The most significant developments in Canadian corrections in the last 40 years have been (a) the transition from penitentiary regimes in which broad discretionary powers were conferred on prison administrators, largely unregulated by law and judicial review, to correctional regimes subject to the rule of law with administrative and judicial oversight and review, and (b) the transition from the prisoner being a non-person without legal rights, outside the protection of the law, to a person with legal rights subject to the protection of the rule of law.

45. In *Prisoners of Isolation*, I summarized how, in the nineteenth century, a prisoner sentenced to imprisonment by a court of law was regarded by the law as a person largely outside a framework of legal rights.

> At common law, the person convicted of felony and sentenced to imprisonment was regarded as being devoid of rights. A Virginia court declared just over a century ago that a prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State" (*Ruffin v. Commonwealth*, 62 Va. 790 (1871)). This view flowed historically from the old English practices of outlawry and attaint, the consequences of which were that the convicted felon lost all civil and proprietary rights and was regarded in law as dead. The warden of Kingston Penitentiary was properly reflecting the traditional status of the felon when in 1867 he wrote, "So long as a convict is confined here I regard him as dead to all transactions of the outer world."[34]

46. Although by the end of the nineteenth century the concept of "civil death" had largely disappeared, the legislative framework governing penitentiaries in Canada was concerned mainly with assigning responsibilities for the management of institutions. Within this framework, the distribution of prisoners' entitlements was as austere as the regime under which prisoners served their sentences.

47. The contours of the legislative landscape of imprisonment, dominated by the *Penitentiary Act*, remained relatively unchanged throughout the twentieth century, until the enactment of the *CCRA* in 1992. In the most critical areas affecting the lives of prisoners, the *Penitentiary Act* in its various amended forms said very little about the legal regime, delegating to the Governor-in-Council (in practical terms, the Cabinet) the power to make regulations. Thus it was left to the regulations to set out what constituted a disciplinary offence and to establish the criteria under which a prisoner could be placed in segregation. But under the pre-1992 legal regime, even the combination of provisions in the *Penitentiary Act* and the *Penitentiary Service Regulations* represented only a small part of the labyrinth of rules governing the lives of prisoners. Under these *Regulations,* the Commissioner of Penitentiaries was delegated the authority to issue directives "for the organization, training, discipline, efficiency, administration and good government of the service and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries."[35] Prior to 1992, it was within the multi-volumed binders of Commissioner's Directives that the official rules of prison justice were fleshed out. In a way symbolic of the extent to which prisoners remained outside the protective umbrella of the law, Canadian courts ruled that the Commissioner's Directives did not have the force of law, in contrast to the provisions of the *Penitentiary Act* and the *Penitentiary Service Regulations*.[36]

48. The statutory framework in which responsibility for the conditions of confinement and the treatment of prisoners was broadly delegated to penitentiary officials was buttressed by the reluctance of the courts in Canada (as in the United States and England) to review the decisions of prison officials in response to challenges by prisoners to inhumane conditions or unfair treatment. The court's role was to enforce legal rights; since prisoners were seen as persons without rights, their complaints were necessarily beyond the ken of the courts. This rationale for

---

[34] *Prisoners of Isolation*, p. 82

[35] *Penitentiary Service Regulations* 1962, S.O.R./62-90, s. 29.3

[36] *Regina v. Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud* (1969), 2 D.L.R. (3d) 545 (ONCA); *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118

what has been called the "hands-off" doctrine was later supplemented by an additional argument, that "judicial review of such administrative decisions [would] subvert the authority of prison officials, the discipline of prisoners, and the efforts of prison administrators to accomplish the objectives of the system which is entrusted to their care and management."[37]

49. In *Prisoners of Isolation*, I suggested that the effect of this hands-off approach was "to immunize the prison from public scrutiny through the judicial process and to place prison officials in a position of virtual invulnerability and absolute power over the persons committed to their institutions."[38]

50. An unprecedented trilogy of riots in federal penitentiaries in 1975 resulted in the appointment of an all-party House of Commons Sub-Committee to undertake a major inquiry into the federal penitentiary system. In its landmark report, described throughout this Report as the "MacGuigan Report," the Sub-Committee pronounced judgment on the state of prison justice:

> There is a great deal of irony in the fact that imprisonment - the ultimate product of our system of criminal justice - itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community - including a prison community - according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice."[39]

51. The principal effect of correctional regimes that grant correctional authorities broad discretionary authority, unconstrained by clear legally defined rules, is a pervasive sense of the arbitrariness of such authority. The 1977 Parliamentary Sub-Committee, in recognition of this reality, recommended in its Report to Parliament that two principles be accepted. The first was that the Rule of Law must prevail inside Canadian penitentiaries.

> 414. The Rule of Law establishes rights and interests under law and protects them against the illicit or illegal use of any power, private or official, by providing recourse to the courts through the legal process. The administrative process, however, may or may not protect these things, or may itself interfere with them, depending on the discretion of those who are given statutory administrative powers. In penitentiaries, almost all

---

[37] Note "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts" [1963] 72 Yale Law Journal 506 at 509

[38] *Prisoners of Isolation* at p. 82. Cited with approval in *May v. Warden of Ferndale Institution*, 2005 SCC 82, para. 24

[39] House of Commons Sub-Committee on the Penitentiary System in Canada, Standing Committee on Justice and Legal Affairs, *Report to Parliament* (Ottawa: Minister of Supply and Services, 1977) (the "MacGuigan Report"), p. 85

> elements of the life and experience of inmates are governed by administrative authority rather than law. We have concluded that such a situation is neither necessary for, nor has it resulted in, the protection of society through sound correctional practice. It is essential that the Rule of Law prevail in Canadian penitentiaries.
>
> 415. Through serious criminal activity a wrongdoer loses his claim and his right to remain within and associate with the law-abiding community. Under no circumstances, however, can he be allowed to lose his claim or his right to justice. An individual may withdraw himself from the wider social order through grave misconduct, but not from the order of reason that constitutes justice. Both the *responsibilities* and the *protection* of the individual that inhere in the concept of justice must prevail in every place and every situation under the flag of Canada.[40]

52. The second principle was that:

> Justice for inmates is a personal right and also an essential condition of their socialization and personal reformation. It implies both respect for the person and property of others and fairness in treatment. <u>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.</u>[41]

53. To bring the Rule of Law into prison, the Sub-Committee made a series of recommendations: that the Commissioner's Directives be consolidated into a consistent code of regulations having the force of law for both prisoners and staff; that independent chairpersons be appointed in all institutions to preside over disciplinary hearings; and that an inmate grievance procedure be established in which prisoners had a substantial role. With these legislative and administrative reforms in place, the Sub-Committee envisaged a vital but focused role for the courts:

> 417. ... It should then lie with the courts to ensure that those individuals and agencies involved in the management and administration of the revised system adhere to general standards of natural justice and due process of law as they substantially exist elsewhere in the criminal justice system....
>
> 418. We suggest that it would be both reasonable and appropriate to proceed in such a way as to allow a much greater scope for judicial control over official activity and the conditions of correction in a reformed penitentiary system than is now feasible. Assuming that the system is definitive in its commitment, clear in its intentions, and effective in its prescription, then the nature of the task remaining to be done by the courts in ensuring that the Rule of Law prevails within penitentiaries should not be disproportionate to what they do outside prison walls on an on-going basis. Abuse of power and denial of justice are always possible under any system, no matter how well

[40] MacGuigan Report, p. 86
[41] MacGuigan Report, p. 87 (emphasis added)

> conceived or organized it may be. These things are felt no less keenly in prison than elsewhere, and their consequences in a penitentiary setting are often far more severe.[42]

54. Two years after the MacGuigan Report, the Supreme Court of Canada, in its landmark judgment of *Martineau v. Matsqui Institution Inmate Disciplinary Board*,[43] laid the legal foundation for the contemporary practice of judicial review of correctional decisions, based on the duty to act fairly. Justice Dickson, in his concurring judgment, echoed the clarion call of the Parliamentary Sub-Committee that "the rule of law must run within penitentiary walls."[44]

55. The enactment of the *Charter* in 1982, in constitutionally entrenching human and democratic rights and freedoms, led to the federal government, as part of its general review of the criminal law, to review federal legislation pertaining to corrections. To address the need for new correctional legislation that would incorporate the values of the *Charter* and work out the appropriate balance between correctional authority and prisoners' rights as mandated by the *Charter*, the Solicitor General of Canada established the *Correctional Law Review* ("CLR"). The Working Papers prepared by this body were eventually to establish the framework for the enactment of the current 1992 *CCRA*.

56. In Working Paper #2 (the "Framework paper"), the CLR emphasized the "critical importance" of firmly grounding all matters affecting prisoners' rights in rules of positive law as opposed to mere operational guidelines (e.g. Commissioners Directives) to be applied at the discretion of corrections staff:

> This latter point is of critical importance not only in terms of protecting inmate rights, but also in making any limitations on individual rights which may be justified in the corrections context. In terms of limitations on constitutional rights, as noted previously, the *Charter* states in its section 1 limitation clause that any limitations must not only be reasonable and demonstrably justified in a free and democratic society, but *prescribed by law* as well.
>
> This phrase has been interpreted to mean that the limitation must be laid down by a rule of law in a positive fashion and not by mere implication.[45]

57. The CLR elaborated upon this point in their Working Paper No. 5, *Correctional Authority and Inmate Rights*:

> Of major significance to rights of inmates is the first principle of our correctional philosophy which states that inmates retain all the rights of a member of society, except for those that are necessarily removed or restricted by the fact of incarceration… The view that an individual in prison does not lose "the right to have rights" is recognized in

---

[42] MacGuigan Report, p. 87
[43] *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602 [*Martineau*]
[44] *Martineau*, p. 622
[45] *Influences on Canadian Correctional Reform: Working Papers of the Correctional Law Review 1986 to 1988* (Ottawa: Solicitor General of Canada, re-published 2002) ("Working Papers of the CLR"), pp. 86-87 (emphasis in original)

> Canadian law. Even before the *Charter*, in *R. v. Solosky*, the Supreme Court of Canada expressly endorsed the view that inmates retain rights, except for those necessarily limited by the nature of incarceration or expressly or impliedly taken away by law. Moreover, the Supreme Court endorsed the "least restrictive means" approach which recognizes that any interference with inmate rights by institutional authorities must be for a valid correctional goal and must be the least restrictive means available.
>
> In effect, the "retained rights" principle means that it is not giving rights to inmates which requires justification, but rather, it is *restricting* them which does. Undoubtedly, some individual rights of inmates, such as liberty, must be limited by the nature of incarceration, in the same way that the rights of non-inmates in open society must be limited in certain situations. The important point, however, is that it is limitations on inmate rights which must be justified, and that the only justifiable limitations are those that are necessary to achieve a legitimate correctional goal, and that are the least restrictive possible.[46]

58. The CLR's recommendations for legal regulation of staff discretionary authority further explained the necessity of such legal regulation to the legitimacy and fairness of the correctional regime in the eyes of both prisoners and staff:

59. Legislative rules help to accomplish other goals: to clearly set out the individual rights of inmates in the corrections context, and to provide guidance to staff in how to carry out their functions. Inmates should be aware of and understand the restrictions which may be lawfully imposed on them, as well as the rights and responsibilities they have, and staff must be aware of their legal responsibilities and duties and the extent of their powers. Uncertainty in the law is not conducive to either a fair or effective correctional system. It is therefore in the interest of both staff and inmates that the law clearly define inmate rights and staff powers.[47]

60. The Working Papers of the CLR were 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*. In the context of the *Charter,* a significant part of the balancing process in the area of corrections revolves around the extent to which a restriction of a limitation on a *Charter* right can be demonstrably justified under s. 1. As described by the CLR:

> Two central criteria must be satisfied to establish that a limit is reasonable and justified under section 1. First, the objective to be served by any measure limiting a *Charter* right (for example, security of the institution) must be sufficiently important to warrant overriding a constitutionally protected right of freedom. Second, the party invoking section 1 (in the corrections context, this would be the government for the correctional authorities) must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test that has three components:

---

[46] Working Papers of the CLR, p. 188
[47] Working Papers of the CLR, p. 187

1. the measure must be fair and not arbitrary, carefully designed to achieve the objective and rationally connected to it;

2. the means should impair the right in question as little as possible; and

3. there must be a proportionality between the effects of the limiting measure and the objective - the more severe the negative effects of a measure, the more important the objective must be.

This proportionality test shows that protection of inmate rights must be balanced against the important and legitimate institutional and security concerns of penitentiaries and the community; concerns that in several respects relate to human life and safety. Such factors play an important role when it comes to the question of the extent to which inmate rights may be restricted or limited by the nature of incarceration. The answer to this question is complex and depends not only on security concerns but also on the nature of the particular right or interest at stake, the limit in question, and the impact on the inmate.

Of major significance in balancing the various factors involved is the recognition that prison practices and programs vary in degree of intrusiveness on inmate rights, and that as the level of intrusiveness increases, the objective must be increasingly important and protections and safeguards must correspondingly increase. Finding the proper balance necessary to protect inmate rights while maintaining a safe, secure institution through a sliding scale approach is one of the primary concerns of this paper.[48]

61. The CLR applied this balancing test in the areas of prison discipline, segregation, transfer, search, visiting, and correspondence.

62. One of the principal conclusions reached by the CLR was that the provisions defining the nature and scope of prisoners' rights and the extent of staff powers should be placed either in the legislation or regulations and should not be left to the Commissioner's Directives, which should be limited to setting out operational policy. There were several reasons for this; accessibility and certainty of the rules relating to prisoners' rights and staff powers, the development of these rules through the democratic process and the necessity for any provision which limits fundamental rights and freedoms to be "prescribed by law," rather than contained in non-legally binding Commissioner's Directives.

63. Informed by the above findings and recommendations of the CLR, Parliament enacted the current *CCRA* in 1992. Compared to the pre-1992 regime, significant substantive changes were introduced. The *CCRA* gives statutory recognition of three principles of corrections which are of particular relevance to the protection of prisoner rights: that "the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders" (s. 4(d)); that "offenders retain the rights and privileges of all members of society, except those rights and privileges that are necessarily removed or restricted as a consequence of the sentence" (s. 4(e)); and that "correctional decisions be made in a forthright and fair manner, with access by the offender to an effective grievance procedure" (s. 4(g)). In the area of search powers, the

[48] Working Papers of the CLR, pp. 194-95

CCRA replaced the very broad and untrammelled power to search contained in the *Penitentiary Service Regulations* with a detailed set of provisions which distinguished among routine, investigative, and emergency search powers, establishing threshold criteria for each and differentiating among non-intrusive, strip and body cavity searches. The statutory scheme was specifically structured to reflect the jurisprudence of the Supreme Court on the interpretation of the *Charter* guarantee against unreasonable search. The *CCRA* also marks a legally significant shift in prison visiting, from the pre-1992 regime, in which visiting was a privilege, to one in which prisoners have a right to maintain contact with the community, subject to reasonable limits.

64. In many other areas, the *CCRA* did not alter either the substance or the procedure of decision-making affecting prisoners. However, it did change these from their previous status as policy guidelines in the Commissioner's Directives to legally binding provisions of the legislation and regulations, which is significant in increasing not only their visibility but also their enforceability. There are other provisions in the *CCRA* which enlarge the scope of prisoners' rights as they had been recognized by the courts under the *Charter*. The best example of this is the recognition of a prisoner's right to be represented by counsel at a hearing of a serious disciplinary offence. The Federal Court of Appeal in *Howard v. Stony Mountain Institution*,[49] while recognizing a right to counsel as a principle of fundamental justice within s. 7 of the *Charter*, had ruled that this right was dependent upon such factors as the complexity of the case and the capacity of the particular prisoner. The *CCRA* removed these limitations and gave the prisoner an unqualified right to counsel.

65. Significantly, the *CCRA* also moved beyond what the courts had established as baseline entitlements under the *Charter* in relation to Aboriginal prisoners. One of the principles in the *CCRA* is that "correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and be responsive to the special needs of women and aboriginal peoples... as well as to the needs of other groups of offenders with special requirements."[50] In implementing this general principle, the *CCRA* specifically recognizes that "aboriginal spirituality and aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders" and authorizes the Solicitor General to "enter into an agreement with an aboriginal community for the provision of correctional services for aboriginal offenders."[51]

B. The history of attempts to reform either or both of the legislative provisions regarding administrative segregation and the correctional practice regarding administrative segregation including the historical and legislative context out of which the administrative segregation provisions of the CCRA emerged.

Administrative Segregation in the 1970s

66. My own research over a period of almost 45 years has provided many examples of systemic abuses where discretionary correctional authority is not constrained by clear, legally binding rules and the effect this has on further undermining prisoners' respect for the law. A

[49] *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642 (FCA)
[50] *CCRA*, ss. 4(g) and 151(3)
[51] *CCRA*, ss. 83(1) and 81(1)

particular focus of my research has been on administrative segregation regimes. In my 1974 article, "Justice Behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary" and later in my 1983 book, *Prisoners of Isolation: Solitary Confinement in Canada*, I documented what I saw as the abuse of the discretionary power to place prisoners in administrative segregation on the vaguest of criteria and described prisoners' sense of injustice as a result of their experiences. In *Prisoners of Isolation*, I reviewed the evidence of prisoners held in administrative segregation in the BC Penitentiary which in 1975 was placed before the Federal Court of Canada in *McCann v. The Queen*.[52] Under s. 2.30(I)(a) of the *Penitentiary Service Regulations*, segregation (then labelled "dissociation") was authorized on the vaguest of criteria – "the maintenance of good order and discipline in the institution." Since these words are no more than a restatement of the overall responsibility of the head of the institution, they really provided no guidelines or criteria for the drastic restraint placed on a prisoner's liberty by confining him in segregation. Not only were there no articulated criteria within s. 2.30 against which to measure the detention or release of segregated prisoner, but the evidence given by the warden and the head of security at the BC Penitentiary concerning the reasons for detention and release for the plaintiffs did not reveal any consistent standards. Rather, the evidence suggested that the decision to place a man in solitary was made on the basis of rumours, hunches, and intangible feelings based on the prisoner's past reputation or his present attitude.

> The B.C. Pen's head of security testified that he received a weekly report from the officer in charge of the Penthouse, which he forwarded to the Inmate Training Board. That board met weekly to review the report, and any comments made about a particular prisoner were entered in that prisoner's file to constitute what was termed at the trial "the running score." There was, however, no formal monthly review of each case. Jack McCann, for example, was confined in solitary from July 1970 until August 1972. For much of that time, his running score indicated that he was "quiet and co-operative." The July, August, September, October, November, December, and January reports of 1970-71 all used that terminology. However, Mr. McCann was not released, and his behaviour was even seen as having a dark underside; a January 1971 entry said he was "quiet and co-operative but his attitude might belie the mental activity which could take a devious route"[53]

67. In *Prisoners of Isolation*, I quoted the expert evidence of Dr. Richard Korn, a former US warden, which characterized the prisoners' experience of injustice and arbitrariness:

> Dr. Richard Korn compared the process by which a prisoner enters the general prison society with that involved in entering SCU [the segregation unit]: "He enters the general prison society as a result of a hearing in a court of law. The charges are specific, he has an opportunity to present his own case, to cross-examine witnesses, all of the rights and amenities that are provided under the presumption of innocence... In general if a prisoner has had a fair trial, he will accept the process of getting to prison." The process of entering administrative dissociation is bereft of these features of due process. In recounting their experiences with entering dissociation under section 2.30, all of the

[52] *McCann v. The Queen*, [1976] 1 F.C. 570 (FCTD) [*McCann*]
[53] *Prisoners of Isolation*, p. 58

> plaintiffs expressed their sense of injustice and of the illegitimacy of the process. Dr. Korn described the process of admission to and release from SCU as "highly capricious, arbitrary and in its design and effect... [it] is mystifying and to me fails to satisfy any human criterion of predictable process."[54]

68. Several months after the *McCann* trial began, the Solicitor General established the Study Group on Dissociation, under the chairmanship of James Vantour, to review the use of both punitive and administrative dissociation. The Study Group presented its report a week before Mr. Justice Heald handed down his decision. The Study Group recognized that prolonged segregation "enhances the inmate's anti-social attitude and, in general, constitutes a self-fulfilling prophecy."[55] The Study Group also pointed to the Canadian Penitentiary Service's lack of compliance with existing law, regulations, and policy dealing with dissociation.

> The failure to pay strict attention to the [Commissioner's] Directives reflects the philosophy of the Canadian Penitentiary Service toward dissociated inmates.
>
> ...
>
> We agree with the claims of many inmates that those in dissociation are "forgotten" or "ignored."
>
> ...
>
> This means that [a prisoner] may be deprived of privileges to which he is entitles according to the *Penitentiary Service Regulations*....
>
> We encountered many situations in which regulations were ignored by staff in charge of dissociation facilities.[56]

69. The Study Group, in its proposals for reform of administrative segregation, recommended the establishment of a Segregation Review Board chaired by the Director (warden) of the institution. The Segregation Review Board would review a prisoner's case within five working days of the warden's decision to segregate, and at least once every two weeks thereafter. The Board would be required to develop a plan to reintegrate the prisoner into the population as soon as possible, to monitor that plan during subsequent reviews, to maintain written records on the substance of each review, and to forward such reports to the Regional Classification Board. The Study Group did not recommend changes to the broad criteria justifying segregation, nor did it address the issue of independent adjudicators for the Segregation Review Boards, despite recommending that disciplinary hearings be run by Independent Chairpersons.

---

[54] *Prisoners of Isolation*, pp. 56-57

[55] *Report of the Study Group on Dissociation*, 1975 (Ottawa: Solicitor General of Canada), 24

[56] *Report of the Study Group on Dissociation*, pp. 16–17. This theme of prisoners in segregation being forgotten is a recurring one in the literature of segregation. In the most recent study in 2010 to which I return later "Several inmates in the men's segregation units, particularly in the Prairies Region but also in Warkworth Institution, spoke of their perception that when they are placed 'back here' they are forgotten..." Dr. Margo Rivera, *Segregation Is Our Prison within the Prison: Operational Examination of Long-Term Segregation and Segregation Placements of Inmates with Mental Health Concerns in the Correctional Service of Canada*, May 4, 2010

70. Independent adjudication and a reformed disciplinary and administrative segregation process were the subjects of further recommendations by the House of Commons Sub-Committee on the Penitentiary System in Canada in its 1977 MacGuigan Report. The Sub-Committee endorsed both the concept of Independent Chairpersons for disciplinary hearings and the Study Group's recommendation that a Segregation Review Board be set up in each institution to review cases after five days and every two weeks thereafter. On the question of independent adjudication, the Sub-Committee had this to say:

> 436. We have debated with ourselves whether such an internal review provides adequate protection for inmates, and in particular whether the chairman of the Review Board should be the same kind of independent person we recommend for Disciplinary Boards.
>
> 437. Our present conclusion is that the proposal we have described, which is based upon the thorough study of the Vantour Committee, should not be judged and found wanting until it has been tried. The adequacy of the protections should be reconsidered after two years of experience.[57]

71. It was not until the MacGuigan Report was filed that the Canadian Penitentiary Service began implementing the Vantour Committee's recommendations regarding the appointment of independent chairpersons to Disciplinary Boards and the establishment of Segregation Review Boards - a full two years after those recommendations had first been made.

Administrative Segregation in the 1980s

72. In a recurring theme of governmental response to calls for reform of administrative segregation, despite the recommendations of the House of Commons Sub-Committee, the Service did not conduct an internal evaluation of the new segregation review process after two years. However, as part of my 1983 study of the disciplinary process at Matsqui and Kent Institutions, I reviewed a series of cases of prisoners who had been placed in administrative segregation.[58] In this way, I hoped to assess whether the "new, reformed" process had been successful in ensuring that segregation decisions were made fairly and that prisoners were not subject to inhumane and degrading conditions. During this pre-1992 period, the power to place a prisoner in administrative segregation continued to rest in the broadly worded authority of the *Penitentiary Service Regulations,* although Commissioner's Directives now provided a much more detailed decision-making structure. Written reasons had to be given within 24 hours of a prisoner's placement in segregation and the placement confirmed by the warden on the following working day; a hearing before a Segregation Review Board consisting of an assistant warden and two other staff members had to take place within three days of the prisoner's segregation; a weekly review by the Board was required for the first two months of segregation and a monthly review thereafter. In addition, monthly reviews were required by Regional Headquarters for prisoners segregated for more than 60 days and by National Headquarters for prisoners segregated for more than 90 days. The prisoner was given the right to appear before the Review

[57] MacGuigan Report, p. 92
[58] Michael Jackson, "The Right to Counsel in Prison Disciplinary Hearings", (1986) 20 U.B.C.L.R. 221

Board at his initial review and at the subsequent monthly reviews. After spending 30 days in segregation, he was, subject to his co-operation, to be given a psychological assessment. On their face, these reforms provided significant enhanced review protections, indeed in terms of frequency of review greater protections than those included in the most recent 2015 Commissioners Directive.

73. In *Justice behind the Walls 2001*, I cite from my 1983 study examples of the continuing abuse of discretionary power in the pre-*CCRA* federal administrative segregation practise despite these changes in the Commissioners Directives providing greater procedural protections. The Isabelle case is illustrative of the very different perspectives that correctional administrators and independent adjudicators bring to the practice of justice behind prison walls. Although this particular case study is now over 30 years old, the abuse of discretionary power it reveals remains, in my opinion, a systemic problem under the current legal regime as will become evident later in my report.

74. Mr. Isabelle was placed in segregation at Kent Institution on July 26, 1983. He was told only that he was being detained "pending a security investigation." Three days later, he was charged with doing "any act with intent to escape" and "damaging government property." He remained in segregation until August 22, when he appeared before the Independent Chairperson for a disciplinary hearing on these charges. The primary evidence relied upon by the institution was a partially completed plexiglass key, three sets of wire cutters, and a 3/8" drill bit - all discovered in a heating pipe in an area to which many prisoners had access - and the presence of a plexiglass shelf in Mr. Isabelle's cell, one corner of which had been cut out. The institution's claim was that the key had been cut from the shelf and that Mr. Isabelle was responsible for this. Mr. Isabelle said he had not cut the key and denied any knowledge of it or the other tools. He testified that he had found the shelf in a washroom with a piece already missing from it and had made no effort to hide this shelf in his cell. The Independent Chairperson acquitted Mr. Isabelle on both charges, finding Mr. Isabelle's account credible, particularly in light of the shelf being in open sight and there being no evidence to link Mr. Isabelle to the items discovered in the heating pipe.

75. Mr. Isabelle was not released from the segregation unit, however. Staff expressed great displeasure with his acquittal, since they saw this prisoner, who had arrived at Kent Institution from the Special Handling Unit, as a serious escape risk. They had planned to use his conviction on the charge of intent to escape to support an application for his transfer back to the Special Handling Unit.

76. Mr. Isabelle's case was reviewed by the Segregation Review Board on September 2, 12 days after his acquittal. At the hearing, he asked why he had not been released to the population. He was informed that the institutional preventive security officer was still investigating the case and the plexiglass key and shelf had been sent to the RCMP crime lab for further analysis. The Board stated that, until this RCMP analysis was received, Mr. Isabelle was to remain in segregation. He protested that it could take months for the RCMP to complete an analysis, given the low priority the case would have. And even if they confirmed that the key had been cut from the shelf, he argued, that did not show he was the person responsible for making the key. As he had told the Independent Chairperson, he had found the shelf in the

washroom with the piece already missing, and the Chairperson, in acquitting him of the charge of damaging government property, had believed him.

77. Following each review, the Segregation Review Board forwarded its recommendation to the warden. In response to the Board's review on September 2, the warden made the following comments.

> As Mr. Isabelle was found not guilty, we would have to have some rather compelling reason to keep him in segregation. It is agreed to keep him in segregation pending the next review where above factors should be taken into consideration.

78. The next review was conducted on September 9, and the written record of that meeting stated:

> The situation has now been reviewed by the warden and it was decided that there was not sufficient justification to proceed with this matter. Accordingly Isabelle has been interviewed by the Head of the Living Unit and advised of the behavioural expectations the living unit staff have for him. He has agreed that he will abide by these expectations. The Segregation Review Board recommends that Isabelle be released from H Unit to the Induction Unit pending cell space in general population.

79. Accordingly, after almost seven weeks in segregation, and almost three weeks after he had been acquitted of the charges, Mr. Isabelle was released from H unit. Nearly a month later, on October 7, he was released from the Induction Unit, where he had been double-bunked, and returned to a single cell in the general population.

80. This case reveals how the same facts are viewed in a quite different manner by an independent adjudicator and correctional administrators. The Independent Chairperson concluded that Mr. Isabelle was not responsible for damaging government property and that there was no evidentiary basis connecting him to the key or the other items secreted in the heating pipe. The Segregation Review Board disbelieved the prisoner's story, resulting in a further three weeks of segregation after his acquittal on the charges. Had an independent adjudicator been involved in the segregation review process, the institution's argument for continuing segregation would have been given short shrift.

81. Mr. Isabelle's return to the general population proved fleeting. At approximately 8:00 a.m. on October 13, two prisoners slipped through a window in the institutional schoolroom and, under cover of heavy fog, made their way to the perimeter fences of Kent, where they snipped their way through to the outside using wire cutters. They were recaptured later that day. Mr. Isabelle and two other French-Canadian prisoners had been in the schoolroom at the time of the escape, although they had not attempted to utilize the escape route.

82. One week later, on October 20, a pair of pliers went missing from the electrical shop. A massive search was conducted; every prisoner was strip-searched, and all areas accessible to prisoners were checked. The pliers were not found. The warden informed the Inmate Committee that until the pliers were found, all programs would be put on hold.

83. Less than an hour after this meeting, five French-Canadian prisoners were taken from the population and placed in segregation. Among the five were Mr. Isabelle and the two other prisoners who had been in the schoolroom during the escape the week before. None of the five worked in the electrical shop. The five prisoners were told they were being placed in segregation for a review of their security classifications. Subsequently, they were informed by staff that they were suspected of being involved in an escape plot.

84. On October 25, the Segregation Review Board met, and following this review three of the five prisoners were released from segregation. The reasons for their release were similar and are reflected in the following excerpt from the minutes:

> [Prisoner D] was segregated because of his suspected involvement in an escape plot with four other inmates. Prisoner D was interviewed by the Board at his request. During this interview he stated that he was not involved in any escape plot and that he in fact had passed up the opportunity to escape when two other inmates had escaped on 13th October. He also emphasized that he was working toward transfer to lesser security and that he was not intending to escape with only four and a half years left in his sentence. The Board was of the unanimous opinion that there is a strong possibility that prisoner D was not involved in any escape plan at this time. It was recommended that he be given the benefit of the doubt and that he be released to the general population.

85. Mr. Isabelle, at his review, also submitted that he was not involved in an escape plot and had proved this by not escaping with the two prisoners from the schoolroom. He pointed out that he was within five months of his parole eligibility date and hoped to receive a recommendation for transfer to lesser security. He was not about to do anything to jeopardize his chances before the Parole Board after serving almost five years of a 15-year sentence, he said. Yet despite the similarity of Mr. Isabelle's arguments to those of other prisoners, he was not released from segregation. The reasons are contained in the minutes of the Review Board:

> Isabelle was segregated because of suspicion that he and four other inmates were involved in an escape plot. Isabelle was recently released from segregation after charges linking him to possession of escape tools (wire cutters and a Folger Adams key blank) were dismissed by the Independent Chairperson at institutional court. Prior to his release, he was counselled by the head living unit officer as to the expectations that would be put on him by living unit staff. Despite this counsel, there are serious indications that Isabelle may have been involved in an escape plan. Due to the above circumstance, the members of the Segregation Review Board unanimously recommend that Isabelle be held in segregation until a transfer to another maximum-security institution can be effected. Hopefully such a move will diffuse any plot that he is involved in at this time.

86. Thus, the primary reason for keeping Mr. Isabelle in segregation was the staff's belief that he had been trying to escape earlier in the year, notwithstanding the dismissal of those charges in disciplinary court. Mr. Isabelle remained in segregation for another two weeks, until November 10. On that date the Segregation Review Board reconsidered his case, and the minutes reflect the results:

> Isabelle was segregated because of suspicion that he was involved in an escape plot. However, despite past indications of this type of activity, there is no solid evidence to presently indicate his involvement in an escape plot. The Board recommends that the option of releasing Isabelle to the Induction Unit pending decision on transfer to another maximum-security institution be considered by the warden. It is proposed to have Isabelle remain in Induction until transferred.

87. That proposal was accepted by the warden. Mr. Isabelle was transferred to Induction where, because of overcrowding, he was required to double-bunk.

88. In Mr. Isabelle's case, suspicion is layered upon suspicion to yield "serious indications" that a prisoner is involved in an escape plot, and yet three weeks later the suspicion evaporates to reveal "no solid evidence" of any such involvement. However, the case does not end here. Mr. Isabelle requested that he be released from Induction back into the general population. Since the institution had conceded there was no case against him, he argued, there was no justification for keeping him there, particularly since he was double-bunked, was confined to the unit most of the day, and had no access to the work or hobby programs available to the rest of the population. His argument went unheeded.

89. Mr. Isabelle was joined in the Induction Unit in late December and early January by first one, then the other prisoner who had escaped from the schoolroom in October. Both had been placed in segregation at the time of their recapture and remained there until their conviction on criminal charges arising from the escape. As in the case of Mr. Isabelle, the warden had decided that the two escapees would be transferred to another maximum security institution. However, unlike Mr. Isabelle, both escapees were released from Induction into the general population prior to their transfers being effected.

90. When these two prisoners left the Induction Unit, Mr. Isabelle renewed his efforts to be allowed to return to the population. His argument at this point seemed overwhelming, and no doubt an independent adjudicator would have seen it that way. Here were two prisoners who had recently been convicted of criminal charges of escape. They were viewed by the institution as sufficiently serious threats to the good order of Kent to justify their transfer to other maximum security prisons. One of them had also served time in a Special Handling Unit. In light of these facts, how could the warden justify releasing them back into the general population but keeping Mr. Isabelle in the Induction Unit? How could he conceivably be more of an escape risk than two prisoners who had actually escaped?

91. I was mystified by the administration's continued refusal to release Mr. Isabelle to the population. Indeed, I found the inherent arbitrariness in the three cases so blatant that I asked the warden if there was some factor I was missing which would explain the different treatment afforded Mr. Isabelle. His response was that his staff continued to express serious concerns about Mr. Isabelle and, in his view, Mr. Isabelle was a risk if left in the general population. The basis for that staff concern went back to preventive security sources, he said, and was ultimately a judgement call.

92. This is what Mr. Isabelle had to say about the warden's judgement call in a letter he sent to me shortly before he was transferred from Kent's Induction Unit to another maximum security penitentiary:

> All I ask is to be treated fairly, like everybody else here. Some guys actually do things here, like escape on the street, or stabbing or fighting, and they get back in the population. But me, I don't do anything and get here on suspicion over nothing. It is cruel and unusual punishment and it's got to end somewhere.[59]

The Model Segregation Code 1983

93. My own reform objectives in writing my 1983 book *Prisoners of Isolation* was not only to expose the serious injustices and abuses of power taking place in segregation units in Canadian penitentiaries but also to bring about fundamental changes in the law to ensure that these injustices would no longer be tolerated. My critique of existing law and practice focussed on three interrelated areas: the criteria justifying segregation, the process through which prisoners were segregated and their segregation reviewed, and the conditions under which prisoners were held in segregation. To encourage the creation of a principled and fair process through which segregation decisions were made and a system of checks and balances to protect against the abuse of the involuntary segregation power, I drafted a "Model Segregation Code."[60]

94. The first part of the Model Code in setting out what criteria would justify segregation in a principled system of corrections, addresses question 4(b) in my letter of instructions:

> Is there a need to clearly specify to inmates and staff the type of conduct which will result in administrative segregation and, if so, what problems, if any, have historically been created by framing the grounds for such segregation in terms similar to those set out in s. 31(3) of the *Corrections and Conditional Release Act*?

95. At the time I drafted the Code, under the *Penitentiary Service Regulations* there were no legally binding criteria for segregation beyond "the maintenance of good order and discipline" or "the best interests of an inmate." In *Prisoners of Isolation*, building upon the evidence placed before the Federal Court of Canada in *McCann* and my own research, I explained the limitations of any reform agenda that did not provide greater specificity in the criteria for segregation:

> The failure of the 1975 Vantour Study Group Report on Dissociation to bring about any change in an arbitrary process is not in the least surprising in light of the Report's refusal to require greater specificity in the criteria for administrative segregation. Without such criteria a review process, however elaborate, will fail to render an unprincipled decision any more principled or fair. So long as the review is of a decision that can be made without reference to principled criteria and without any factual underpinning, the process will remain illegitimate in the minds of those on whom it is imposed.[61]

---

[59] *Justice behind the Walls 2001*, pp. 297-302
[60] *Prisoners of Isolation*, Appendix A, http://justicebehindthewalls.net/resources/model_code/model_segregation_code.pdf
[61] *Prisoners of Isolation*, p. 207

96. The Model Code would justify segregation on several bases. First, it would authorize segregation to facilitate an investigation of allegations that the prisoner is implicated, on reasonable and probable grounds, in specified serious criminal or disciplinary offences, where there is a substantial likelihood that either the offence will be continued or the prisoner will intimidate potential witnesses to the offence. The code thus recognizes the legitimate institutional interest in empowering prison administrators to segregate prisoners pending an investigation under certain circumstances. However, because this is an exceptional power not granted to law enforcement authorities outside of prison, and because segregation pending investigation has been abused within the penitentiary system, the Model Code places time constraints on this basis for segregation, coupled with an obligation on the investigating authority to exercise all due diligence in completing the investigation. Thus, segregation for investigative purposes is to be limited to two weeks' duration, subject to an extension upon demonstration by the authorities to an independent adjudicator that they have exercised such due diligence and that further time is required to complete the investigation. Upon such demonstration, there is a one month limit on the basis that, given the relatively focussed nature of investigations into offences committed in prisons and the accessibility of people to be interviewed, a month is a reasonable length of time for the completion of the investigation and the laying of charges.

97. The Model Code next deals with the situation in which charges, of either a criminal or a disciplinary nature, have been laid against a prisoner. Outside of a prison context, the detention of a person charged with an offence pending trial is specifically dealt with in the *Criminal Code.* The Model Segregation Code seeks to tailor the justifications for pre-trial detention in the larger criminal justice system to the special circumstances of prison life. Thus, pre-trial segregation is permitted under the Model Code in the case of charges involving actual or threatened violence, wilful destruction of property, or disobedience to orders, where there is a substantial likelihood that the offence will be continued or repeated.

98. The Model Code contemplates a further basis for segregation in a situation where investigations have been completed but no formal disciplinary or criminal charges have been laid. This is intended to deal with cases in which the primary evidence against the suspect comes from prisoner informants whose safety will be jeopardized if they are required to give evidence in a formal hearing. This exceptional power to restrict a prisoner's institutional liberty in the absence of any charge is unknown to our criminal justice system outside of prison walls; its justification in a prison context must therefore be predicated upon a compelling correctional necessity. The Model Code proceeds on the assumption that such a compelling necessity can be made out in circumstances where the institution has credible information that a prisoner has committed, attempted to commit, or plans to commit acts which represent a serious and immediate threat to the physical security of the institution or the personal safety of the staff or prisoners. The code would seek to prevent the abuse of this exceptional power by circumscribing it with the requirement that the threat be serious and immediate, that it be established beyond a reasonable doubt, and that it be so established to the satisfaction of an independent adjudicator.[62]

[62] I would point out that the 1983 Model Segregation Code focused on cases of what are now referred to as "involuntary segregation" where prisoners are placed in segregation based upon their behavior or perceived threat to institutional security or personal safety. It does not address cases where segregation is used to protect prisoners from

99. The Model Segregation Code also contains a segregation review process designed to ensure a fair and independent application and review of the criteria in individual cases. It proposes a process which would permit the warden to order segregation for up to 72 hours without a hearing providing that written reasons for the order are given to the prisoner within 24 hours. At the end of the 72 hour period, a full hearing must be held, at which time the institution's case would be presented to an independent adjudicator in the presence of the prisoner unless there is a substantiated claim of the need to maintain confidentiality of particular evidence, in which case the adjudicator would summarize that evidence for the prisoner. The prisoner would have the right to cross-examine witnesses, save those to whom confidentiality was extended, and to present evidence on his own behalf, including the calling of witnesses. The prisoner would have the right to be represented by counsel at the hearing. The adjudicator would be required to provide detailed written reasons for the decision. If continued segregation was authorized, further reviews would be required every week, subject to the same procedural requirements. At these reviews an onus would be placed on the institution to develop a plan to reintegrate the prisoner into the population, and the adjudicator would monitor that plan at any subsequent reviews. Because of my concern over the effects of the indefinite long term segregation I had witnessed in the BC Penitentiary and in Kent, my Model Code imposed a time limit on its duration. Except under very limited circumstances, segregation would be terminated after a 90 day period.

100. The third part of the Model Code addresses the conditions of segregation, particularly the fact that even though the *Penitentiary Service Regulations* provided that a segregated prisoner should not be deprived of any privileges or amenities, in most segregation units very few privileges and amenities were provided. This deprivation was based on an enormous qualification in the *Regulations*: "except [those privileges and amenities] that cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof" (s. 2.40(2)). The reality in 1975 at the British Columbia Penitentiary, and at Kent Institution ten years later, was that this qualification was used to justify discriminatory and debilitating treatment of segregated prisoners. As I will describe later in this opinion, it has remained the operational reality in segregation units.

101. The Model Segregation Code attempts to deal with this problem by setting out in affirmative terms the rights and privileges to which segregated prisoners are entitled and the specific bases upon which restrictions of these rights can be authorized. Where a prisoner is deprived of a right or privilege to which he is normally entitled, that deprivation must be reviewed at a segregation review hearing by an independent adjudicator and can only be continued with that adjudicator's written authorization. Similarly, the adjudicator is empowered to make findings regarding alleged violations of the Model Code in relation to the rights and privileges of segregated prisoners and may issue written directions to the warden to remedy those violations. In the event that there is non-compliance with these directions, the adjudicator is required to prepare a report detailing the nature and extent of the violations, the directions issued, and the circumstances of non-compliance; a copy of that report is to be provided to the warden and the prisoner and also forwarded to the Solicitor General.

---

violence or threats of violence from other prisoners. The reason for this limited focus was because it was in the cases of involuntary segregation that the greatest abuse had been demonstrated.

102. The Model Segregation Code also requires that when a prisoner has been in segregation for more than 30 days, the adjudicator shall hear the evidence of two psychiatrists or psychologists on the effects of such continued segregation on the prisoner. One of these psychiatrists or psychologists is to be nominated by the warden and the other by the prisoner, although provision is made for a joint nomination. Where the adjudicator determines, based upon the expert evidence or other evidence, that continued segregation will cause the prisoner substantial psychological or physical harm, the adjudicator shall order the prisoner released into the general population.

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

104. Independent adjudication in the Model Segregation Code has four intersecting justifications. First, the issues surrounding involuntary segregation are such that the interests of prisoners and correctional administrators are in conflict and facts and allegations are often in dispute; fairness requires an independent and unbiased decision-maker. Second, the recommendations of the Study Group on Dissociation failed to bring about real change, and there is a continuing issue of non-compliance with the law when segregation decisions are left with correctional administrators. Third, the potential for abuse and the potentially debilitating effects of long-term segregation require that limits be placed upon segregation in the form of specific criteria for placement, review, and the length of time for which segregation can be maintained; effective application and enforcement of these limits requires an independent adjudicator. Fourth, there is a need for a process to ensure that the rights and privileges of prisoners in segregation are respected, and this will be better achieved through an independent adjudicator.

Reforms in the 1980s

105. The Commissioner's Directives dealing with administrative segregation were revised and streamlined in 1987. Segregation was authorized pursuant to s. 40(1) of the *Penitentiary Service Regulations* when no other reasonable alternative existed and:

a. there are grounds to believe that the inmate has committed, attempted to commit, or plans to commit acts that represent a threat to the security of the institution or the safety of individuals;

b. the presence of an inmate in normal association would interfere with the investigation of a criminal or serious disciplinary offence;

c. there is reason to believe that an inmate's presence in normal association represents a risk to the good order of the institution; or

d. there is concern for the inmate's safety.[63]

106. The new directive seemed to identify criteria for segregation with greater specificity than the generic "good order and discipline" set out in the *Regulations.* However, there was only the appearance of change. Most significantly, clause (c) replicated the "good order of the institution" rationale. Granting prison officials this broad-based power made it unnecessary for them to give much consideration to the more focussed criteria of clauses (a) and (b). Predictably, the new directive brought about no substantive change in the resort to the power to segregate prisoners. In *Justice behind the Walls 2001*, I illustrate through several case studies the continuity of customary law governing administrative segregation in the years preceding the enactment of the 1992 *CCRA*.[64] Of particular importance, the provisions in the *Penitentiary Service Regulations* that a segregated prisoner is not considered under punishment bore no relationship to the harsh realities of deprivation in the segregation unit at Kent Institution.

The CCRA 1992

107. As I have previously described the enactment in 1992 of the *CCRA* changed the legal landscape of federal correctional law with the intention of bringing the federal legislative regime into conformity with the 1982 *Charter of Rights and Freedoms.*[65] A comparison between the current legislative and administrative framework and the regime in place when I began my inquiry into prison justice in 1972 reveals significant changes. Of greatest significance, many pre-1992 features of the administrative segregation process were elevated from policy and procedures set out in Commissioner's Directives to legally binding provisions in the *CCRA* or the *Corrections and Conditional Release Regulations*, SOR/92-620 [*CCR Regulations*].

108. The 1992 *CCRA* framework for segregation sets out detailed, structured review and accountability mechanisms involving the 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.

109. If, as I have maintained in my research, a critical part of preventing the abuse of segregation power is to circumscribe that power with legally binding rules, it would seem that the *CCRA* and the *CCR Regulations* provide that authority. Senior officials at National Headquarters, while acknowledging that the new provisions did not go as far as my Model Segregation Code, suggested shortly after the enactment of the legislation in 1992 that I should take satisfaction from the fact that many features in the *CCRA* reflected ideas and proposals I

---

[63] CD 590

[64] *Justice behind the Walls 2001*, pp. 297-309, http://justicebehindthewalls.net/book.asp?cid=116 et seq.

[65] For an analysis of the history of the *CCRA* see *Justice behind the Walls 2001*, Sector 1, Chapter 3, p. 62, http://justicebehindthewalls.net/book.asp?cid=14&pid=304

have advocated over the years. It is important, therefore, to understand the principal differences between the current legislative framework and the Model Segregation Code.

110. The first difference - and this is significant to one of the questions I have been asked in my instructions - is that the criteria for segregation in the *CCRA* are much more broadly based than those set out in the Model Code. While s. 31(3)(b) tracks the language of the Model Code in allowing for investigative segregation pending an investigation of a criminal charge or a serious disciplinary offence, this power is not limited to cases where the charge involves actual or threatened violence, attempted escape or offences where there is a substantial likelihood of a repetition or a continuation of the offence; neither are there any specific time limits on the duration of this form of segregation to ensure that the investigations are conducted in a timely manner.

111. The omnibus ground for segregation contained in s. 31(3)(a) - "that (i) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and (ii) the continued presence of the inmate in the general inmate population will jeopardize the security of the penitentiary or the safety of any person" - while loosely based upon a provision in the Model Code, significantly weakens the original language. Under the *CCRA*, the burden of proof is reduced from the Model Code's "beyond a reasonable doubt" to "reasonable grounds to believe"; the need for proof of the immediacy of the jeopardy or threat is omitted, and that threat or jeopardy can be to the "security" of the institution rather than to the more narrowly drafted "physical security" of the institution in the Model Code, a term designed to refer to escape risks. One of my grave concerns with the broad sweep of s. 31(3)(a) was that it would become the general ground for segregation, providing little improvement over the "good order and security of the institution" contained in the old *Penitentiary Service Regulations*.

112. The second difference between the *CCRA* provisions and the Model Code is that under the *CCRA*, segregation decisions continue to be made and reviewed by correctional administrators with no element of independent decision-making. The third difference is that neither the *CCRA* nor the *CCR Regulations* specify the specific rights and privileges of segregated prisoners; the legislation continues the approach of the old *Penitentiary Service Regulations,* which declare that prisoners in segregation have the same rights, privileges, and conditions of confinement as the general population, except those that cannot reasonably be given owing to limitations specific to the administrative segregation area or security requirements. This is identical to the pre-1992 legal regime which supported the continuation of inhumane and debilitating conditions in segregation units. Although the Commissioner's Directives do set out some affirmative entitlements of prisoners to specific services, they are not as extensive as those set out in the Model Segregation Code. Furthermore, because there is no role for independent adjudication, there are no mechanisms built into the legal and administrative structure of the segregation process to ensure respect for and compliance with those entitlements, as exist in the Model Segregation Code. Rather, prisoners must rely on the internal grievance process and the general avenues for external review provided by the Correctional Investigator or the courts.

113. The final difference between the *CCRA* provisions and the Model Segregation Code is that the *CCRA* places no limitation on how long a prisoner can be confined in administrative segregation. The Model Segregation Code would, except under exceptional circumstances, limit this to a period of 90 days.

Administrative Segregation in 1990s: Segregation 20 Years After McCann

114. When I began my work at Matsqui and Kent in 1993, for what was to become *Justice behind the Walls 2001*, part of 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. Had the new legislative regime resulted in a principled and fair process? If not, did the fault lie with a failure to respect and implement the law or with deficiencies in the law itself?

115. An important component of my research was observing segregation review hearings at both Matsqui and Kent institutions and interviewing correctional staff and prisoners regarding segregation. What I observed and documented was the persistence of the pre-*CCRA* customary law and a pattern of noncompliance with the *CCRA.* I wrote:

> The segregation review processes at Kent and Matsqui had several elements in common. Neither institution referred to the legislative criteria for segregation, nor was a conscious critical line of inquiry directed to whether the evidence or information available to the Board established legal justification for segregation or whether there were reasonable alternatives to segregation. In addition, there was no compliance with the legislative requirement that a prisoner receive, at least three working days prior to each review, a written copy of any documentation to be used. In no case I observed between 1993 and 1996 was a prisoner given documentation over and above the typically minimal segregation notice received when he was first placed in segregation or the notices provided following the thirty- or sixty-day reviews. Any information given to prisoners regarding the reasons for their segregation was conveyed at the segregation review and was given orally. The only exceptions to this were in cases of men being considered for involuntary transfer; they received a progress summary detailing the grounds for the recommended transfer.[66]

116. In a number of case studies I documented how the broad criteria for segregation under s. 31(3) of the *CCRA* provided no substantive limitation on administrative authority and that prisoners continue to be segregated based upon broadly based and unsubstantiated allegations and suspicions. One of these case studies involved the mass segregation of 11 offenders in what was unofficially described by the staff as "Operation Big Scoop," which based on the following analysis I concluded was done "in blatant violation of the law."

> I would first observe that at no time during any of the discussions and meetings surrounding Operation Big Scoop was there any specific mention of, or reference to, s. 31(3). There are a number of possible reasons for this. The first might be that the law is so well etched in peoples' minds that it requires no articulation but is referentially

[66] *Justice behind the Walls 2001*, pp. 322-23, http://justicebehindthewalls.net/book.asp?cid=127

incorporated into any decision through institutional osmosis. A second reason, much less charitable, might be that in situations of perceived institutional crisis the law is not a primary consideration. A third possible explanation is that the law is so broadly written it enables an institutional decision-maker to use segregation in accordance with his or her best judgement, with the law's requirements seen principally as procedural ones, in terms of providing notice and a review system. Based upon my participation in Operation Big Scoop, the second and third explanations came closest to representing the operating reality in Matsqui Institution.

Regardless of which reason best explains what happened, was the segregation of the thirteen men justified by s. 31(3)? …

[31(3)(a)], requires that the institutional head believes on reasonable grounds that the prisoner has acted, attempted to act, or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and the continued presence of that prisoner in the population would jeopardize such security or safety. This ground is very generally worded and has been subject to serious criticism for not providing substantive control on segregation decisions. But even given its very broad contours, it still requires the presence of reasonable grounds directed to actions, actual or intended, that jeopardize the security of the institution or personal safety. A number of the prisoners targeted in Operation Big Scoop were believed to be involved in extortion, which does fall within the parameters of jeopardizing the safety of any person. A number of other prisoners, however, were identified as being involved in drugs, absent any extortion or trafficking. This allegation lacks the link with jeopardizing personal safety and is not clearly referable to jeopardizing the security of an institution. It could be argued that "security" refers to "dynamic security," and that anything that raises the tension in an institution therefore constitutes an interference with institutional security. This certainly underpins Warden Brock's biorhythm theory. If the security of the institution is given this very broad meaning, however, then almost any action, actual or intended, of any prisoner could be brought within s. 31(3)(a).

But even assuming that we give the term "security" this almost meaningless interpretation - meaningless in the sense that it places no real limitations or constraints on institutional decision-making - there is still the question of reasonable grounds. Could it be said that the information-gathering process reflected in the tracking meeting, upon which the warden relied, constituted reasonable grounds? Would a judge, contemplating the issue of a search warrant or determining the legality for a police arrest, find reasonable grounds to believe that an offence had been committed and that relevant evidence was located in a particular place, based upon a process in which a group of police officers swapped information about their perceptions of suspects, without identifying whether this information was based upon direct observation, reliable informant information, or simply general reputation? The unequivocal answer is that such a process would not constitute reasonable grounds under the existing jurisprudence. It no more provides reasonable grounds to justify segregation under the *CCRA*.

> Leaving that point aside, s. 31(3) also requires that if the institutional head has reasonable grounds, he must still be "satisfied that there is no reasonable alternative to administrative segregation." In the case of Operation Big Scoop, there was no consideration given to this question.[67]

The Case of Donald Oag - Segregation 20 Years After McCann

117. One of the prisoners I interviewed while writing *Justice behind the Walls 2001* was Donald Oag.[68] When I saw him in February 1994, save for a four month break when he was transferred to Mountain Institution, he had been in segregation at Kent for the last four years. The rationale was that his safety in the general population was endangered as a result of his providing information to the institution about an escape attempt by other prisoners. I had first met Mr. Oag in 1973 when he was in solitary confinement in the BC Penitentiary, and he became one of the plaintiffs in the *McCann* case. In *Prisoners of Isolation*, I described my first interview with Mr. Oag:

> When I interviewed Donnie Oag, I found a man who, after some nine months of continuous solitary confinement, appeared almost as a disembodied spirit. His face was ashen, his voice not much above a whisper. I saw on him the marks of his isolation; terrible scars across his neck and on his wrists and arms - the frightful evidence of his suicide attempts.[69]

118. Following the completion of the *McCann* trial, I did not see Mr. Oag again until February 22, 1994. I asked Mr. Oag to describe the changes he had seen in prison conditions since 1973. He prefaced his response by saying that he was "not an expert on prison generally, but only on the prison within a prison," because he had spent so much of his sentence in segregation, and the little time he had spent in open population had always been in maximum security.

> Segregation is a physical and a mental thing; back then it was more physical, now it is more mental. At one time when I was in the "Chinese cell" back east in Millhaven after the riot, I was chained up for long periods of time with no clothes on. They would come in and dump buckets of cold water on me during the night just to wake me up. They would say, "We aren't afraid of you, you f-ing son of a bitch, because you aren't ever getting out of here." You don't see that stuff going on any more.... Since I've been in segregation at Kent they've gassed a few guys, but as far as I know they give them a shower after. When they use gas they bring a medical nurse or somebody from the hospital to check it out. Back years ago they didn't do that.[70]

119. I asked Mr. Oag why he was not coming out of his cell to take his daily hour of exercise.

---

[67] *Justice behind the Walls 2001*, Sector 2, Ch,3 pp. 111-39, http://justicebehindthewalls.net/book.asp?cid=25

[68] The following material is from *Justice behind the Walls 2001*, pp. 339-51, http://justicebehindthewalls.net/book.asp?cid=133

[69] *Prisoners of Isolation*, p. 45, http://justicebehindthewalls.net/book.asp?cid=773&pid=847

[70] *Justice behind the Walls 2001*, p. 341, http://justicebehindthewalls.net/book.asp?cid=133&pid=490

> If you know you are going to spend a long time in the hole and you keep on hoping that you will get out and keep thinking about what you are missing, it slowly drives you mad. Alternatively, it makes you so angry and desperate that you either run into problems with the guards or you take it out on yourself, which is what I used to do by slashing up. Now what I do is to withdraw from the world as you know it, so that the world is like wrapped in a fog, you can't see it and so you forget about it. Then it becomes possible to do the time because the world really stops.[71]

120. "Every time you do this you always lose something," Mr. Oag said, "and when you do come back into the world [the general population in a maximum-security prison], you never quite recover what you had before."

> Every time you're locked up you have to withdraw again. If I was to sit in my cell and contemplate everything what I'm missing and even the yard, I would be going crazy and I'd slash. A guy just hung himself here two cells from me a little while ago. Killed himself. So you have to let those things go. Just to keep your sanity when you are locked up. It's hard to explain. But the more you are locked up, especially coming back and being locked up again, when you're released it's harder to come back because it's harder to adjust. You can't talk to people like you could years ago. You can't carry on a conversation about everything because you've let those things go just to survive in here. I guess it's like being in a coma and you are aware of things going on but you're not there.[72]

121. Twenty-one years after his experiences in the Penthouse, in September 1994, after being transferred for a few months to Mountain institution, he was back in segregation at Kent Institution, in another strip cell without personal possessions, canteen or tobacco, Mr. Oag once more faced the despair of being treated as a non-person. To compound his distress, he found himself in a cell next to one of the men with whom he had personal issues from years before. Death threats were made against him and other prisoners kept up a constant verbal bombardment, urging Mr. Oag to kill himself. To encourage him, the food server threw razor blades through the food slot of the door of his cell. On September 12, 1994, Mr. Oag slashed the veins in his arms using one of these blades. He was taken to the prison hospital and then transported to Chilliwack Hospital via ambulance. He was returned to Kent the next day and placed in the cell from which he had been carried the day before. The blood had not yet been cleaned up, the razor blade was still imbedded in the floor, and Mr. Oag was placed on a suicide watch, with the light on 24 hours a day.

122. Mr. Oag remained locked in segregation for the rest of 1994 and the whole of 1995. The continuing rationale was that his safety was endangered in the general population. He was still there on June 3, 1996, when I attended the 30 day review of the Segregation Review Board. Over the course of his long segregation at Kent, his security classification had been reduced to "medium," and his case management team had recommended his transfer to either William Head

---

[71] *Justice behind the Walls 2001*, p. 341, http://justicebehindthewalls.net/book.asp?cid=133&pid=490
Professor Phil Scraton has captured the way in which time stops in segregation when he referred to the image of looking at a clock and seeing no information.

[72] *Justice behind the Walls 2001*, pp. 341-42, http://justicebehindthewalls.net/book.asp?cid=133&pid=490

or Mountain Institution. The wardens at both institutions had refused the transfer, and therefore Mr. Oag remained in maximum security segregation. The harassment by other prisoners never abated, and he lived in continual fear for his life. The only relief from 24 hour lock-up was his weekly visit with his friend, supplemented by the private family visits finally approved after his return to Kent. In recent months, he had also been given the job of cleaning up the yard, which he did in the evening after all other prisoners had taken their exercise.

123. The institution's psychologist told the Board that Mr. Oag's case was being reviewed by the Regional Health Centre ("RHC") with a view to his going there for an individualized program, the purpose of which would be "to detoxify him from segregation." Mr. Oag was only eight months away from his statutory release date, and the idea behind this plan was that once "detoxification" had been effected, he might be transferred to a medium or minimum-security institution for the last few months before his release to the street. The psychologist emphasized, however, that the RHC had not yet agreed to the plan. Mr. Oag told the Board he was not going to get his hopes up, because he had previously been recommended for lower security by Kent staff only to be refused by the other institutions. He was trying to focus his attention on his relationship and his life after prison; he said he had put in an application to the warden for permission to marry his friend in a ceremony in the chapel at Kent and was hoping that this could take place within the next few months.

124. When I interviewed Mr. Oag later in June 1996, he reviewed the events of the previous two years without acrimony or indignation, though he had just cause for both. The prisoners against whom he had given his information were now either in general population at Kent or on the street, yet he remained in solitary confinement. He had not asked for or expected any reward for bearing witness against his fellow prisoners, but neither did he deserve to spend four years in solitary confinement because he had taken a stand to protect a potential victim. If he had himself participated in the escape plan, he said, he would have been treated better than he was after trying to prevent it.

125. When I had taken up the cause inscribed in Jack McCann's handwritten writ in 1973, challenging the conditions of solitary confinement in the BC Penitentiary as cruel and unusual punishment, my purpose had been to end its practice. Twenty-three years later, I heard no talk that 638 days in segregation was cruel and inhumane, no talk that it denied Donnie Oag his basic human dignity. In place of the language of respect for human rights, what I heard about was the need to "detoxify" Mr. Oag from his experience. Two years of solitary confinement was transformed from a systemic issue of injustice and abuse of human rights, calling out for redress, to an individual issue of psychological toxicity, which cried out for nothing more than decontamination through further correctional treatment.

126. It should not be thought that Mr. Oag's unrelieved segregation did not cause real concern among some staff at Kent. The institution's psychologist told me that each time a plan was developed for getting Mr. Oag out of segregation and into the population of another institution, only for that plan to be rejected by the wardens of those other institutions, he found it more difficult to face Mr. Oag in an interview or at the Segregation Review Board. As he put it, he was "embarrassed" that the correctional system was treating Mr. Oag in this uncaring manner, given what he had sacrificed to protect an innocent life. Other individual staff did what they

could to help Mr. Oag and were not shy about voicing their disagreement with his extended stay in segregation. But these voices were never strong enough to have an impact on the decision of the Segregation Review Board. The "Review of Inmate's Segregated Status" form, month after month, contained the same thin lines:

> You were involuntary transferred from Mountain. You have remained in segregation due to incompatibles. Your P.F.V.s [private family visits] have been approved. You were not approved for transfer to William Head or Mountain Institutions. (Review of Inmate's Segregation Status, Kent Institution, May 3, 1996)

127. Many of Mr. Oag's review notices also contained a further comment: "You waived your right to be seen by the Segregation Review Board." This waiver represented Mr. Oag's judgement that nothing he could say would alter the bottom line of the Review Board's decision - that he be maintained in segregation. That indeed was the literal bottom line in every one of Mr. Oag's notices: "The Board recommends your seg. status be maintained for your protection."

128. In *Justice behind the Walls 2001*, I wrote that there were compelling reasons to see Mr. Oag's case as a measure - if not the litmus test - of the reality of change in the legal and administrative regime governing segregation. In the 1970s, Mr. Oag spent 682 days in solitary confinement in the BC Penitentiary, where his case was reviewed every 30 days by an internal board that saw no alternative but to maintain his segregation for "the good order and discipline" of the institution. As of June 19, 1996, he had spent 638 days in segregation in Kent Institution, where his case was reviewed every 30 days by an internal board who could see no other alternative but to maintain his segregation "for his own protection." Although legal reforms now gave Mr. Oag a right to appear in person before the Board, the reality was that his appearances never made a difference to the Board's decision; Mr. Oag in fact elected to waive his right to appear, because it generated only frustration.

129. The conditions of Mr. Oag's confinement had marginally improved over those two decades. In the 1990s he was permitted to have a television in his cell, though this was a mixed blessing. While the TV alleviated the crashing boredom of his isolation, the images it brought were a constant reminder of a world from which he was dissociated. In the BC Penitentiary, his access to exercise had taken the form of walking up and down the tier in front of his cell, at all times under the surveillance of a guard armed with shotgun; in Kent, although there was an exercise yard, at 30 feet long and 15 feet wide, it was little more than an extension of a cell. A prisoner, whether walking around its perimeter or pacing back and forth, got little sense of movement beyond pursuing his own shadow. Indeed, shadows were the only things to pursue, given that the yard was dominated by 20 foot walls with a ceiling of thick mesh wire.[73]

130. In the BC Penitentiary, Mr. Oag had lived under a regime in which physical deprivation was aggravated by abuse and harassment perpetrated by guards. Official harassment and abuse

[73] There is a photo of the segregation yard at http://justicebehindthewalls.net/04_gallery_01_02.html. Since Mr. Oag's experiences in segregation, a larger exercise yard with views beyond the chain-link fences has been constructed for K unit and construction on a second similar one for J unit began in 2015 and has now been completed.

had not loomed large in Mr. Oag's experience of segregation at Kent. However, this was small comfort, given that his fellow prisoners more than took up the slack.

131. My study of administrative segregation at Matsqui and Kent in the 1990s as documented in *Justice behind the Walls 2001* and illustrated by Mr. Oag's experiences demonstrated that new architecture, a new corps of correctional staff, and new correctional legislation had achieved little in limiting the abuses of segregation. In the book I posed the question "Why had so little changed? Are the fault lines in the substantive and procedural provisions of the correctional legislation itself; in their administration by correctional officials; or in a lack of effective enforcement of the legislative framework?" In Mr. Oag's case, and in most of the other case studies that form the basis for *Justice behind the Walls 2001*, fault lines existed in all three areas. It is my opinion that this remains the case in 2016.

132. Legislative provisions should have prevented Mr. Oag's long-term segregation after his return from Mountain Institution. Section 4(d) of the *CCRA* provides that "the Service use the least restrictive measures consistent with the protection of the public, staff members and offenders." This principle is reflected in s. 28, which sets out criteria for the selection of the penitentiary a prisoner is to be confined in and provides that "the Service shall take all reasonable steps to ensure that the penitentiary in which the person is confined is one that provides the least restrictive environment for that person."[74] In addition to the general principle enshrined in s. 4 and the criteria for transfers set out in s. 28, there is a further provision of the *CCRA* dealing specifically with administrative segregation which is relevant to Mr. Oag's case. His segregation was based upon s. 31(3)(c): that the institutional head believed on reasonable grounds "that the continued presence of the inmate in the general inmate population will jeopardize the inmate's own safety." That ground for segregation, like the others, is subject to the further qualification that "the institutional head is satisfied that there is no reasonable alternative to administrative segregation." In Mr. Oag's case, correctional authorities at Kent, including the institutional head, were satisfied that there was a reasonable alternative to segregation, in the form of a transfer to a medium-security institution. Again, when the wardens of those institutions refused to accept the transfer, the politics and preferences of correctional administrators formed the unacceptable basis for concluding there was no reasonable alternative to segregation.

133. The provisions in the existing correctional legislation which should have prevented Mr. Oag's extended segregation would seem to pinpoint lack of effective enforcement of the law as the real problem in this case. Had a legal challenge been mounted following his reclassification to "medium security," Mr. Oag's rights might well have been respected. In my judgement, however, the issue of enforcement is linked to the larger issue of the sufficiency of the existing legal framework for segregation.

134. Earlier I identified the principal differences between my recommendations for a Model Segregation Code and the regime under the *CCRA.* There are two vital elements of my Segregation Code that are not included in the *CCRA* which would have prevented the abuses

[74] The least restrictive measures principle was replaced in 2012 with new language that 4**(c)** "the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act." *CCRA*, s. 4(c)

evident in Mr. Oag's case. The first element relates to the nature of the decision-maker in the segregation process; the second relates to the limitations on the duration of segregation.

135. Mr. Oag's continued segregation in the 1990s resulted from the deadlock between the wardens of Kent Institution, William Head Institution, and Mountain Institution on the appropriateness of transferring him to medium security, even though he was deemed a medium-security prisoner. At many other points during Mr. Oag's long segregation it was precisely such institutional pressures that perpetuated his segregation.

136. Under the procedures in the Model Segregation Code, there would have been a legal requirement to formulate a plan for presentation to the independent adjudicator early on in the segregation. Once that plan was approved by the independent adjudicator, subsequent reviews would be required to document the steps taken to implement it. Such a procedure would avoid situations in which plans are not implemented for reasons that, although understandable in the context of institutional life - a change in assignment of case management officer, staff members taking annual leave - are simply not legitimate reasons for maintaining a prisoner in long-term segregation.

137. Locating the decision-making power in an independent adjudicator would also provide a trigger absent under the existing procedures. Segregation Review Board discussions were often unfocussed and shapeless, particularly in cases of long-term segregation, where the very existence of a lengthy segregation almost fatalistically provided the evidence of its future inevitability. In many cases the decision to maintain segregation emerged not as a decision but as a fait accompli. In other cases, prisoners were left with vague promises that the institution would "try to do something" - to overcome the resistance of other institutions to accepting a prisoner; to ensure that a progress summary required for a transfer application was completed before the next review; to see that the institutional preventive security officer visited the prisoner to try to resolve problems of incompatibility. In these and myriad other situations, the prisoner was, in fact, "sloughed off." Under the Model Segregation Code, the independent adjudicator at Segregation Review Board hearings would have both the legal authority and the obligation to "do something."

138. The second feature of the Model Segregation Code that would have made a difference to Mr. Oag's case is the 90 day limitation I proposed on the overall duration of segregation. Operationally, this would have meant that Kent Institution had no more than 90 days from the time Mr. Oag was first segregated to find an alternative placement for him. This would have created some urgency in presenting his case for transfer to another institution, and it would have put the decision about transferring Mr. Oag into a framework in which the "least restrictive alternative" was recognized as a legal imperative, not seen as an administrative option. In the absence of both time constraints on the duration of administrative segregation and the other protections contained in the Model Segregation Code, Donnie Oag finally left Kent Institution on statutory release on February 8, 1997, straight from his cell in segregation, having spent the last 1,000 days of his sentence, with one short break, in a "prison within a prison."

The Arbour Report, 1996

139. In April 1994, a series of events unfolded at the Prison for Women (P4W) in Kingston that exposed to public view and scrutiny, in a manner unprecedented in Canadian history, the relationship between the Rule of Law and operational realty. 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.[75] 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.[76]

140. The women involved in the April 22 incident remained in segregation from that date until December 1994 or January 1995.[77] 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. As I have stated, the *CCRA* mandates that administratively segregated offenders receive the same rights, privileges, and conditions of confinement as the general inmate population, with the exception of those that can only be afforded in the company of other inmates, and those that cannot reasonably be provided because of security concerns or the limitations of the segregation area. Justice Arbour described how distant from that legal mandate was the operational reality at the Prison for 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,

---

[75] At the time of inquiry Louise Arbour was a justice of the Ontario Court of Appeal. She retired from the Court to become Chief Prosecutor for the International War Crimes Tribunal. She was then appointed to the Supreme Court of Canada and following her retirement from that court became the UN High Commissioner for Human Rights.

[76] *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) [Commissioner: Louise Arbour] p. 39 ("Arbour Report"), www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.pdf

[77] 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 Report, pp. 22-28.

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 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 facecloths...

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...[78] (emphasis added)

141. Justice Arbour was especially critical of the Segregation Review process at the P4W.

It is difficult to discern any indication in the segregation review process or otherwise, that any assessment was made of whether the statutory requirements for continued segregation were met.

... There is little, if any, consistency in the reasons for continued segregation recorded in the segregation review documents. Nor do the reasons advanced in the segregation reviews specifically address the question of whether or how those reasons relate to the statutory standards.

Throughout the segregation reviews, there is repeated reference to the significance of the outstanding criminal charges to the ongoing segregation of these women. In a number of instances, the outstanding charges are identified as the significant, and in some cases the only reasons for the continued segregation. This is so notwithstanding that it was conceded, as it must be, that the existence of such outstanding charges cannot by itself justify continued segregation.

The Regulations contemplate that an independent assessment of whether the statutory requirements for continued segregation have been met will occur every 60 days at the Regional Headquarters. The evidence raises a serious question as to whether such independent reviews occurs...

It is apparent that the person conducting the review at the Regional Headquarters is heavily influenced by the judgement of the institution as reflected in the paper or electronic record of the segregation review. Indeed, there was evidence that insufficient attention was paid even to that record.[79] (emphasis added)

---

[78] Arbour Report, p. 77
[79] Arbour Report, p. 79

142. Justice Arbour's findings regarding the failure of segregation reviews to address the statutory standards and the deferential nature of regional reviews parallel my observations at Kent and Matsqui during the same period. Similarly, justifying segregation on the basis of outstanding charges reflected the persistence of the customary law at both institutions, notwithstanding the provisions of the *CCRA*.

143. Justice Arbour concluded her review with an assessment and indictment of the impact of prolonged segregation on the prisoners at the P4W.

> 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 lability 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.... Their behaviour has been 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 [are] 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....[80]
>
> 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

[80] Arbour Report, pp. 80-81

> 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.[81]

144. As I will later address, Justice Arbour's description of the "the bitterness, resentment and anger that this kind of treatment would generate in anyone who still allows herself to feel anything" accurately reflects what many of the prisoners I have interviewed over the last 40 years have told me are the effects segregation had on them.

145. 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 30 days in segregation, no more than twice in a calendar year, with the effect that a prisoner could not be made to spend more than 60 non-consecutive days annually in segregation. After 30 days, or if the total days served in segregation during that year already approached 60, the institution would have to apply other options, such as transfer, placement in a mental health unit, or forms of intensive supervision, with all to involve interaction with the general population. If these options proved unavailable, or if the Correctional Service thought that a longer period of segregation was required, it would have to apply to a court for this determination.[82]

---

[81] Arbour Report, pp. 81-82
[82] Arbour Report, p. 105

146. Failing a willingness to put segregation under judicial supervision, Justice Arbour recommended that segregation decisions be made initially at the institutional level, but that they be subject to confirmation within five days by an independent adjudicator who should be a lawyer and who would be required to give reasons for a decision to maintain segregation. Thereafter, segregation reviews with an independent adjudicator would be conducted every 30 days.[83]

147. Justice Arbour's recommendations for subjecting the administrative segregation process to judicial supervision and a limit of 30 consecutive days, while building upon my Model Segregation Code, were more rigorous. These recommendations were unambiguously related to her general findings that "the facts of this inquiry have revealed a disturbing lack of commitment to the ideals of justice on the part of the Correctional Service" and her judgment that "[t]here is nothing to suggest that the Service is either willing or able to reform without judicial guidance and control."[84]

The Task Force on Administrative Segregation, 1996-97

148. Following the release of the Arbour Report, a new Commissioner of Corrections established a Task Force on Administrative Segregation. The mandate of the Task Force was to address the recommendations and issues raised by the Arbour Report, including those related to independent adjudication; to examine the extent to which the Arbour findings at the Prison for Women were applicable to other institutions; and to ensure both that all staff members and managers were knowledgeable about legal and policy requirements and also that measures were in place to ensure continuing compliance with these. Members of the Task Force were drawn from both within and outside the Correctional Service. The outside membership consisted of the legal counsel of the Office of the Correctional Investigator and two consultants. I was one of them. The Task Force visited every segregation unit within the federal penitentiary system and its initial audits yielded these findings on the state of compliance with the law and policy on segregation:

> The findings of the preliminary assessment (Phase 1) confirmed Madam Justice Arbour's findings that the CSC did not fully appreciate the obligation to rigorously comply with legislative and policy provisions in its management of administrative segregation.…
>
> In the opinion of the Task Force, the above compliance issues provided sufficient evidence <u>of a casual attitude towards the demands of the law by CSC staff members and managers to justify Madam Justice Arbour's assertion that the CSC has a culture that does not respect the "Rule of Law"</u>. That is not to say that CSC staff members and managers went out of their way to act in violation of the law; but it is to say that they did not go sufficiently out of their way to ensure full understanding of and compliance with it. The Task Force concluded that review mechanisms required to ensure legal

[83] Arbour Report, pp. 71, 105 and 135
[84] Arbour Report, p. 108

> compliance and to support effective decision-making were not in place.[85] (emphasis added)

149. Based on these findings the Task Force launched several initiatives to address the areas of non-compliance. All wardens were required to submit detailed action plans outlining the steps they intended to take to deal with the deficiencies identified at their institution. Changes were made to the OMS to enable staff to document decisions taken at key stages in the administrative segregation review process. The Task Force also issued an administrative segregation process checklist to staff and management and a handbook to be given to all segregated prisoners.

150. A comprehensive national legal compliance audit was conducted by the Task Force in early 1997, to ensure that the operation of all segregation units was now in compliance with the basic legal procedural requirements and that deficiencies had been addressed. Yet audit results showed that the Service failed to measure up to even this expectation especially in maximum security institutions where intrusiveness can be the most severe. The Task Force provided this assessment:

> On the one hand, the CSC has demonstrated that, given the necessary corporate will, leadership, and resources, it can significantly improve its ability to comply with the basic procedural requirements of the law. On the other hand, considering the scope of the compliance audit, which was directed only to compliance with the basic procedural requirements of the law, and the fact that it was conducted at a time when full attention was being given to the issue of segregation, the CSC's performance falls short of full compliance.
>
> Since the CSC's focus could easily shift to other areas in the future, the Task Force believes it critical that mechanisms be put in place to ensure that recent progress is sustained. Consequently, the Task Force recommends that a Segregation Advisory Committee be created with membership from inside/outside the CSC to continue to shape an effective and compliant administrative segregation process within a fixed time frame.
>
> This action, coupled with other recommendations related to an enhanced segregation review process and experimentation with independent adjudication, will contribute to public confidence that the CSC is maintaining its corporate commitment to respect the "Rule of Law".[86] (emphasis added)

151. I have emphasized the passage above because it has been a theme of my research over the last 40 years that in the wake of high profile incidents involving segregation, the Correctional Service of Canada has periodically responded by introducing policy reforms that are poorly implemented and that over time any commitment to change wanes in the face of other administrative priorities, and the systemic issues of abuse of segregation are re-established.

---

[85] *Task Force Report on Administrative Segregation: Commitment to Legal Compliance, Fair Decisions and Effective Results* (Ottawa: Correctional Service of Canada, March 1997) ("*Task Force on Administrative Segregation*") at pp. 12-13

[86] *Task Force on Administrative Segregation*, pp. 17-18

152. 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 its 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.

153. The CSC members' argument had several strands. Under existing law, the warden was the person held accountable for the security of the institution and the safety of staff and prisoners. The decision to segregate a prisoner involved critical issues of safety and security. The staff's understanding of the dynamics of an institution and the personalities of the prisoners was integral to making the right decision in a situation where the wrong decision could be fatal; no outsider, however well-educated in the law, could provide an adequate substitute for correctional experience and understanding. Furthermore, transferring decision-making for segregation from institutional managers to outside adjudicators would have a corrosive effect on institutional morale and add to existing staff dissatisfaction with the independent adjudication of disciplinary hearings. The final strand to the argument was that the Service, having been made aware of the extent of its non-compliance with the law and the deficiency of its existing procedures, should be given the opportunity to put its own house in order.

154. Task Force members from outside the Service set out the competing arguments. There was first the compelling historical record, which demonstrated that the Service's efforts to reform itself had consistently failed. The Arbour Report documented the latest chapter in that history. Second, principles of fairness require that the legislative criteria for a decision that affects the institutional liberty of a prisoner and consigns him to "a prison within a prison" be applied free from the pressure of institutional bias, with an objective weighing of the competing interests of prisoners and prison administrators. Principles of fairness had underpinned the introduction of independent adjudication for serious disciplinary offences and were no less compelling in the case of administrative segregation.

155. As a member of the Task Force I argued that the role of an independent adjudicator is not to replicate the hard-won knowledge and experience of correctional administrators. Neither would the presence of an independent adjudicator undermine or straightjacket the authority of wardens and staff to manage their institutions decisively at times of crisis, maintaining a precarious balance of control and security. 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.

156. In the working paper that I prepared for the Task Force, I acknowledged that my Model Segregation Code was designed to deal with cases of involuntary segregation and that since that Code was drafted in 1983, there has been a significant increase in the population of prisoners who are in various forms of segregated status for their own protection, and in most cases at their

own request. In evaluating the role of independent adjudication in these types of cases, I suggested that it is important to identify not only the common elements they share with involuntary cases, but the main distinctions as well. As for those distinctions, typically the reasons for voluntary segregation are not embedded in disputed factual allegations. To the extent that there are disputed facts, it is often the prisoners who assert that their lives or safety are threatened and the correctional administration who believes that their fears may not be justified or are exaggerated - the reverse of the situation that exists in involuntary cases.

157. What is critical to the resolution of these cases is not so much the adjudication of disputed facts, but the development of creative and realistic plans for the reintegration of the prisoner, either through a negotiated return to the population of the parent institution; transfer to a special needs unit; or transfer to the population of another institution, together with effective mechanisms for the implementation of these plans. The primary challenge here is to develop creative alternatives to segregation and ensure that the necessary resources are available.

158. Even though these voluntary cases do not usually involve the disputed factual allegations which underlie involuntary segregation cases, I suggested that this does not resolve the question of the need for an independent adjudicator to review these cases. Voluntary cases, like involuntary cases, raise common issues of ongoing compliance with the law. One of the problems with the current system is that the resolution of cases of voluntary segregation often lack any sense of urgency; cases drift from review to review, with case management priorities focused on other prisoners in the population, whose problems are less overwhelming than those in segregation. Members of the Task Force observed several segregation reviews where prisoners had sat for many months awaiting the preparation of documentation for transfers or responses on a completed transfer package. The annual reports of the Correctional Investigator have highlighted the general issue of non-compliance with meeting the statutory time frames for transfers and the problem is particularly acute for those prisoners who are in segregation. I suggested that the independent adjudicator can be more vigilant in requiring compliance with statutory time frames. I referred to case studies drawn from my own research to illustrate how, under prevailing operational reality, justice was mediated by institutional politics and convenience rather than by the law.

159. A further important issue of compliance revolves around the conditions of confinement. Although the *CCRA* provides that prisoners in administrative segregation shall be given the same rights, privileges and conditions of confinement as the general population, the Task Force found (as had my own previous research) that the reality was quite different: "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."[87] 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 400. 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. This

[87] *Task Force on Administrative Segregation*, p. 50

confirmation has important implications for the issue of independent adjudication. Just as independent adjudicators are not likely to allow administrative convenience to overshadow the requirements of justice, so also would they be less likely to permit the abridgement of the Service's lawful requirements regarding programming for administrative convenience or ill-defined security considerations.

160. The Task Force spent many hours debating 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; I developed the ideas for independent adjudication first put forth in my Model Segregation Code, revising the model to recognize the important distinctions between involuntary and voluntary cases. 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. As the Chairman of the Task Force, Dan Kane, noted in his introduction to the report, "The fact that consensus was achieved out of views that were so disparate, yet passionately held, testifies to the value of open and honest discussion."[88]

161. The enhanced internal model for segregation review recommended by the Task Force had eight elements, including a legal education initiative, improved procedures for segregation review hearings, the development of better alternatives to segregation, and the establishment of regional Segregation Review Boards. The legal education initiative came both from recommendations in the Arbour Report and from feedback received by the Task Force that correctional staff and managers received insufficient training in administrative law and the principles enshrined in the *Charter of Rights and Freedoms*. In the Task Force's view, and based upon its interviews with Native Brotherhoods across the country, this legal education needed to include training on the distinct constitutional and legal rights of Aboriginal people and, more specifically, on their access to spiritual and cultural possessions and ceremonies and to the spiritual and cultural support provided by Elders and Native Liaison officers. The most critical part of the enhanced segregation model was directed to improving the conduct of segregation review hearings, and CSC's Legal Services developed a 12-step procedural guide for these hearings which was appended to the report of the Task Force. The Task Force also recommended that the chairperson of the Segregation Review Board undergo specialized training through a formal certification program such as those adopted in some jurisdictions in the United States.[89]

162. The external members of the Task Force supported the development of these initiatives, which would improve the Service's ability to make fair and effective segregation decisions. The enhancement of this internal ability through legal education and certification in the conduct of hearings could serve as a model in other decision-making areas that affected the rights and liberties of prisoners. But the limitations of these initiatives were clear: they assumed that training in the substantive and procedural requirements of the law would be enough to ensure fairness. However, if fairness requires an objective balancing of competing interests - those of

[88] *Task Force on Administrative Segregation* p. 2

[89] The specialized training through a formal certification program has never materialized.

prison administrators to manage a safe and secure institution and those of prisoners not to suffer the loss of their institutional liberty except in strict accordance with the criteria and procedures set out in the law - how could fairness be achieved, and be seen to be achieved, where decisions were made by the correctional administrators themselves? Even assuming the CSC could demonstrate through training and education that it had developed a corporate culture which respected the Rule of Law, the issue of bias would continue to cast a long shadow over the substantive justice of the process.

163. The model of independent adjudication I developed for the Task Force was designed to build upon and be integrated into the CSC initiatives. In voluntary cases, the initial decision to segregate would remain with the warden. The 5-day review would be chaired by the warden or deputy warden, which would elevate the importance of the segregation decision. The 30-day review would be chaired by an independent adjudicator, and the institution would be responsible for developing and presenting at the hearing a plan to reintegrate the prisoner. The adjudicator's role would be to ensure that a plan had been developed and that all reasonable alternatives to segregation had been explored. Where the plan for reintegration involved a negotiated return to the population of the parent institution, requiring the assistance of the Inmate Committee, the Native Brotherhood, or an Elder, the hearing should include these parties. If the plan involved a transfer to another institution, the adjudicator would ensure that the necessary progress summaries were prepared and that transfer time frames were complied with. If the transfer was rejected, the adjudicator could order the convening of a regional segregation/transfer board chaired by the Deputy Commissioner of the region or a delegate with the legal authority to order a transfer.

164. In involuntary cases, the warden would also retain the initial authority to segregate the prisoner. However, here the independent adjudicator would conduct the 5-day review as well as any subsequent 30-day reviews. In an involuntary case, the burden is on the institution to demonstrate that there are grounds justifying segregation and that there are no reasonable alternatives. Because this position is likely to be contested, independent adjudication is required early in the process. Furthermore, where the institution's case for segregation is based on an ongoing investigation, the independent adjudicator could establish a reasonable time frame for the completion of the investigation. At the 30-day review, the onus would be on the institution to demonstrate a continuing need for segregation and to present a plan for reintegration. Subsequent reviews would monitor the implementation of the plan.

165. An integral part of the experiment the Task Force proposed would be to determine how the best blend between an enhanced segregation review process and independent adjudication could be achieved. In identifying the contours of the experiment, the Task Force considered a number of issues, including the authority of the adjudicator.

166. In both my original Model Segregation Code and the model I developed for the Task Force, as well as in Justice Arbour's model, the independent adjudicator has the final legal authority. However, to enable the experiment with independent adjudication to be implemented immediately, indeed fast-tracked, the Task Force agreed it would have to be done within the framework of the existing law, under which the warden retains ultimate legal authority to make segregation decisions. The results of the experiment would thus be relevant in determining

whether it was necessary to change the law so that the adjudicator was given the power to make decisions rather than just recommendations. The Task Force recommended that the experiment with independent adjudication take place in four institutions, two of which would have independent adjudicators and two of which, for comparative purposes, would not. It was recommended that the enhanced internal review process be initiated in all institutions.

167. The Task Force also recommended that it would be important to develop evaluation criteria for the experiment in order to enable CSC to determine the legal, policy and operational implications for the best blend of internal and external review. This evaluation should be performed by CSC and outside participants. The evaluation criteria should address both the issues of fairness and effectiveness

168. It was the Task Force's considered view that the proposed model of reform, encompassing an enhanced internal review process and an experiment with independent adjudication within the existing framework of the law, would contribute to the development of a fair and effective segregation process. In keeping with the clarion call of both the 1977 Report to Parliament and Justice Arbour's 1996 report, it would also encourage the development of a correctional culture and operational practice that respected the Rule of Law.[90]

Implementation of the Task force Recommendations

a. The Experiment on Independent Adjudication

169. The Report of the Task Force, with the recommendation for a fast-tracked experiment with independent adjudication was filed with the Commissioner of Corrections at the end of March 1997. Later that year, Commissioner Ingstrup received the report of the Working Group on Human Rights. Like the Task Force on Segregation, the Working Group had been established by the Commissioner in response to the Arbour Report. Under the chairmanship of Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission, it had been given a mandate "to review CSC systems for ensuring compliance with the rule of law in human rights matters; to provide a general strategic model for evaluating compliance within any correctional context; and to present recommendations concerning the Service's own ability to comply and to effectively communicate such compliance."[91] In reviewing the necessary balance between internal and external mechanisms to ensure compliance with human rights obligations, the Working Group's report specifically identified and supported the recommendation of the Task Force on Segregation that there be an experiment in independent adjudication.[92]

---

[90] For a more detailed discussion of the Task Force recommendations see *Justice behind the Walls 2001*, Sector 4, Chapter 4, pp. 275-94, http://justicebehindthewalls.net/book.asp?cid=148 et seq.

[91] Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (Ottawa: Correctional Service of Canada, 1997) [Chairman: Max Yalden] at p. 4

[92] The Working Group Report concluded:

> Since, in Canada, administrative segregation may affect inmates' liberties even more than disciplinary segregation, which has an upper limit of 30 days, and given the fact that institutional authorities may have a vested interest in the outcome of their decisions, we believe the [Task Force] recommendation should be pursued. (Human Rights and Corrections at p. 33)

170. Notwithstanding the accumulated weight of support in the reports of Justice Arbour, the Task Force on Segregation, and the Yalden Working Group on Human Rights, in early May 1998 Commissioner Ingstrup decided there would be no experiment with independent adjudication. Instead, the Service would proceed with an enhanced internal review initiative that comprised the provision of further training to managers and staff on the proper use of segregation, development of more alternatives to the use of segregation and the appointment of a senior staff member in each region to monitor the segregation review process and report progress to the regional deputy commissioner.[93]

171. When it was suggested to me - as a Task Force member - by senior CSC officials in Ottawa that this regional oversight model was a form of "independent" review - in the sense that the new position was located outside of any institution - my disappointment crystallized into a deepening skepticism about the Service's commitment to reform. The regional oversight model was and is a worthwhile initiative. As part of an enhanced segregation review process, it could make a valuable contribution. But the essential thrust of both the Arbour recommendations and the Task Force on Segregation's analysis was that a decision which drastically curtails the rights and liberties of a prisoner should be made by a person who is independent from the pressures and biases which drive institutional and regional decision-making. The appointment of a new regional official who would inevitably be part of the culture and hierarchy of the Service entrenches, rather than redresses, exactly the kind of bias against which independent adjudication is directed.

172. In response to the decision Todd Sloan and I, as external members of the Task Force, also identified the crucial difference and relationship between independent adjudication and regional oversight:

> The independent adjudication model requires a case-by-case review of segregation decisions in the institution at the time these decisions are being made. Independent adjudication is built into the process at the front end to achieve fairness and effectiveness. The external oversight model, whether in the form of audits or reviews, involves a retrospective assessment of a body of cases to ensure that they have been decided fairly and effectively. In other words, in the first model the features of independent review are brought to bear on the case at the decision point; in the second, these features are applied after the fact, with a view to correcting errors that have been made in the past and/or to making recommendations to prevent these errors in the future… Seen in this way, independent adjudication of segregation cases and oversight through regional or national reviews become part of a continuum of review mechanisms.[94]

173. Cognisant of the fact that "CSC's focus could easily shift to other areas in the future" the Task Force had also recommended "that a Segregation Advisory Committee be created with membership from inside/outside the CSC to continue to shape an effective and compliant

---

[93] For a more complete account of events leading to the rejection of the Task Force's recommendation on independent adjudication see *Justice behind the Walls 2001*, Sector 4, Chapter 4, pp. 385-90, http://justicebehindthewalls.net/book.asp?cid=165 et seq.

[94] See *Justice behind the Walls 2001*, p. 387, http://justicebehindthewalls.net/book.asp?cid=165&pid=537

administrative segregation process within a fixed time frame." That recommendation, like independent adjudication, was not implemented.

b. Implementation of the Enhanced Segregation Review Process

174. The Task Force in introducing its recommendations for an enhanced internal review process, identified the importance of the role of the chairperson of the segregation review board and the need for specialized training:

> The role of the SRB chairperson is critical to the effectiveness and perceived fairness of the segregation process. Chairpersons have the primary responsibility for ensuring that basic procedural requirements, as defined by the *CCRA/CCRR* and CSC policies, are continuously being administered in compliance with the law. They play a critical role in ensuring that each institution maintain full compliance with the requirements of the law and CSC policies. The chairperson must demonstrate an ongoing knowledge of the law, policies and procedures to effectively manage the Board's decision-making responsibilities. They must be respectful of Aboriginal rights and privileges. They must understand the need to balance the legitimate safety and security of the institution with the need to adequately protect and maintain the rights of the segregated inmate.
>
> The Task Force recommends that the chairperson of the SRB undergo specialized training in the context of a formal certification program.
>
> This program should focus on administrative law and *Charter* principles, and knowledge of the *CCRA/CCRR* and CSC policy. Some jurisdictions in the United States have adopted such certification programs. Re-certification would be required on a regular basis.[95]

175. To provide both correctional staff with a better understanding of the segregation process in the context of the *Charte*r and the *CCRA* and CSC policy, the Task Force undertook the following steps:

- an information package was given to staff that provided an overview of the administrative segregation process in the context of the *Charter*, the *CCRA/CCRR* and CSC policy;
- a second information package responded to the *most frequently asked questions* that were being raised by staff about the administrative segregation process;
- an *Administrative Segregation Checklist* was drafted that staff could use as a reference to ensure that they were carrying out their legal responsibilities at the key stages of the administrative segregation process; it also contained examples of *best practices* being used in institutions across the country;

[95] *Task Force on Administrative Segregation*, pp. 24-25

- a model *Inmate Handbook* was created that could be used by staff to inform segregated inmates about their rights and privileges and the rules and procedures of the segregation unit; and

- initial changes were made to some OMS screens that enabled staff to accurately document information at the time of placement.[96]

176. Of most significance, a very detailed twelve-step procedural guide for conducting segregation review board hearings, prepared by CSC's Legal Services Department, was annexed to the Task Force Report as the operational basis for future segregation reviews.

177. To give some indication of just how detailed this was, including some of the boilerplate language that was to be used, I have set out below the first 8 of these 12 steps. As I will later describe, the recent 2015 reforms introduced by CSC, while announced as new initiatives, are in many respects recycled versions of the 1997 Task Force recommendations that were never properly implemented.

> Step 1 – Preparations for Hearing
>
> ...
>
> **Before commencing the hearing, activate the tape recorder.**
>
> Every SRB Hearing should be recorded on audio tape. This serves as a record of accuracy for the hearing in case there are any questions of irregularities. If the hearing is not taped, one person should be appointed to take minutes, which should detail, as much as possible, the procedure followed during the hearing and summarize what was said.
>
> The record of each hearing should be retained for a period of at least two years after the decision is rendered, as required for serious disciplinary hearings (CCRR 33(2)). On request, an inmate should be given reasonable access to the record of the hearing (CCRR 33(3)).
>
> Step 2 – Proper Notice
>
> The Segregation Review Board must conduct a hearing within five working days after the inmate's confinement in administrative segregation, and at least once every 30 days thereafter (CCRR 21(2)).
>
> The inmate must receive notice of the hearing and sufficient details of all the information that the Board will be considering at the hearing. This notice and information must be given to the inmate at least three working days before the hearing, and it must be in writing (CCRR 21(3)).

[96] *Task Force on Administrative Segregation*, p. 59

The administrative segregation placement form must detail the substantive reasons why the inmate poses a risk to the safety of a person, the security of the institution or might interfere with an investigation.

Staff members must document, on the placement form, the specific and verifiable reasonable grounds for placement, in other words the "face of the record" should be able to justify the placement to any "reasonable person".

Any supporting documentation, such as observation reports, should accompany the placement form so that the Warden's one-day review can properly consider whether a reasonable alternative exists; whether segregation is the "last resort" and the least restrictive measure consistent with the risk. Potential reintegration plans should be developed at this point.

Notice of the time, place and date of the SRB hearing may be included on the placement form. Any reports or other information that are going to be considered at the hearing must be shared with the inmate as soon as practical. A record must be made of what was shared and when it was shared with the inmate, either in hard copy or in a summary format (subject to CCRA s. 27(3).

Step 3 – Composition of Board

The Board should consist of a core group - the Chairperson, the Unit Manager responsible for the administrative segregation unit, the IPSO, and a case management officer and may include one or more other participants as required (psychologist, member of the Program Board, the Elder, etc.). The Chairperson should be at the Deputy or Assistant Warden level. The institutional head must designate, by name or position in institutional standing orders, the persons who may be members of the SRB (CCRR 21(1)).

All persons who are present at the hearing should identify themselves by name, position and their role at the hearing.

...

The Chairperson of the SRB must be "certified" through education, training and experience in the conduct of administrative review hearings, for example, through successful completion of a program of national competency standards including legal awareness, the conduct of a hearing and administrative decision-making.

Step 4 – Purpose of the Board

Explain to the inmate the general purpose of the Segregation Review Board.

A statement explaining the purpose of the SRB should be read out loud to all the participants at the beginning of the hearing:

> "The purpose of this Segregation Review Board is to conduct review hearings of cases where inmates are involuntarily confined in administrative segregation. This Board makes recommendations to the institutional head as to whether or not you should be released from administrative segregation at this time."

...

Step 5 – Checklist of Procedural Safeguards

Review the checklist of procedural safeguards orally to see if the appropriate requirements have been fulfilled.

Inmate Rights

- Has the inmate's language preference been accommodated?
- Has the inmate been advised of his or her right to be present at the hearing?
- Was the inmate given an opportunity to attend the SRB hearing?
- Was the inmate given a reasonable opportunity to retain and instruct legal counsel without delay? (CCRR 97(2))
- Was the inmate given information regarding procedural rights, privileges, and the routine in segregation? (CD 590 s. 22)
- Was the inmate given written notice of the reasons for segregation within one working day after the inmate's confinement? (CCRR 19)
- Was the inmate given written notice of the hearing at least 3 working days before the hearing? (CCRR 21(3))
- Did the inmate receive sufficient detail in writing of the information that the Board will consider at least 3 working days before the hearing? (CCRR 21(3))
- What are the reasons for any irregularity? Explain fully.

Requirements of Institutional Head

- Did the institutional head review the order to place the inmate in segregation within one working day after the inmate's confinement? (CCRR 20)
- Has the inmate received daily visits by a registered health care professional?
- Did the institutional head, or delegate (CCRR 6(e)), visit the segregation area daily? (CCRA s. 36(1))

- Was the inmate given a daily opportunity to request a meeting with the institutional head or delegate during the daily visit? (CCRA 36(2), CCRR 6(e))

Procedural Requirements of the Board

- Is the hearing being held within 5 working days of the inmate's placement in segregation? (CCRR 21(2)(a)) or,

- Is the hearing being held at least once every 30 days after the placement? (CCRR 21(2)(b)) or,

- Is the hearing being held in addition to the routine 5/30 day reviews/

Step 6 – Proceeding with the Hearing Requirements

If the procedural safeguards have been respected, then the Board may continue with the next step of the hearing.

If any of the inmates' rights have been violated, or if any of the procedural safeguards have not been fulfilled, the decision-maker must consider whether such infringements affect the fairness of the proceedings in a significant enough way to warrant the granting of an extraordinary remedy. Re-scheduling of the hearing until the safeguards have been met is one possible remedy and another is recommending the inmate's release from segregation as a result of a high degree of unfairness in the process.

Inmates must have received copies of all written reports and collected information to be used at the SRB hearing, no later than three working days before the hearing.

If additional information becomes available after the 3-day notification and before the hearing, the Chairperson of the SRB must ensure that the inmate is given reasonable time to consider the information. The inmate should be given the opportunity to decide if he or she requires additional time to review the documentation. If an adjournment is requested, the adjournment period should not be for more than three working days, unless specifically requested by the inmate.

Step 7 – Issues to be Considered

Announce the specific issues to be considered.

The Chairperson of the SRB should describe the circumstances which gave rise to the inmate's confinement in segregation (the placement form), and must indicate that the Board will determine whether there are adequate grounds to justify keeping the inmate in segregation. This is similar to a court reading a charge to an accused. The inmate must know the case against him or her. More specifically, the inmate must be fully aware of the information the Board will consider and must have a fair opportunity to respond to the allegations and information.

Other issues include potential reasonable alternatives to segregation and the measures being taken to return the inmate to the general inmate population at the earliest appropriate time (CCRA s. 31).

Step 8 – Procedure to be Followed

Announce the procedure that the hearing will follow.

The Board should conduct the hearing in a predetermined and orderly manner. The procedure to be followed must be clearly described so that all participants will know when they will have a chance to speak or make representations.

It must also be made clear to all persons present that the Board will follow an inquisitorial model, which means that Board members may ask questions and make inquiries in order to elicit information from the participants. The strict rules of procedure and evidence that apply to a court of law do not apply to SRB hearings, although there is a duty on the part of Board members to adhere to the principles of fairness. The decision-maker must act in good faith, without ulterior purpose, improper motives or irrelevant considerations

The Board should announce the different stages of the hearing: grounds for placement, case management input, health care needs, and so on.

The inmate must have a reasonable opportunity to make representations, explain or clarify information, and answer the charges and allegations made against him or her at each stage of the hearing.

The Board must ensure that the information and evidence being considered is relevant, timely and adequate. The information must be credible and reliable.[97]

178. Following the release of the Task Force report, in January 1998 legal training workshops were held in each of the five CSC regions on the law regarding segregation led by a member of the Task Force and a lawyer from CSC's Legal Services division.[98] The seminar was attended by unit managers who had responsibilities for conducting segregation reviews. In anticipation of the seminars a draft Administrative Segregation Handbook had been prepared by CSC as a response to the recommendations of the Task Force that the law, policy and procedural guidelines relating to segregated prisoners be combined into a single comprehensive resource. The Handbook, 52 pages in length with several appendices, covered a number of topics; it sets out the legal framework within which administrative segregation is set, explains the legal justifications for segregation and the procedures governing placement in segregation; describes the cycle of hearings and reviews (5-day, 30-day and 60-day) and the responsibilities of CSC staff involved in hearings and reviews; sets out principles which determine prisoner entitlements

[97] Annex 1: Guide for Conducting SRB Hearings. As I will explain later in the report these procedural guidelines are more detailed than those contained in Annex C to the new 2015 CD.

[98] In my capacity as a member of the Task Force and for the purposes of my ongoing research, I attended the workshop held in the Pacific region.

while in administrative segregation and provides an overview of the Segregation Module in the Offender Maintenance System (OMS) which constitutes the official segregation record. The Segregation Module was specifically designed to take into account the policy and procedural changes introduced following the Task Force Report and incorporate a series of screens through which entries are made at every stage of the segregation process, designed to ensure compliance with the law and policy. Copies of the Administrative Segregation Handbook were distributed at the workshop to all correctional managers.[99]

179. In *Justice behind the Walls 2001*, I described the very limited impact that the Administrative Segregation Handbook and the 12-step guide had on the actual conduct of segregation review practices at institutions in the Pacific region.

> The Draft Administrative Segregation Handbook, a copy of which was given to all staff attending the training workshops, sets out guidelines for Segregation Review Board hearings. These include the following:
>
> > The hearing should be recorded on audio tape, to ensure an accurate record is available... A statement explaining the purpose of the Segregation Review Board should be read out loud to all participants at the beginning of the hearing. The procedural safeguards checklist should be reviewed (out loud) to ensure that appropriate requirements have been fulfilled. The chairperson should describe circumstances giving rise to the inmate's placement in Administrative Segregation, and indicate that the SRB would decide whether there are adequate grounds to justify keeping him or her there, based on those grounds. (Draft Administrative Segregation Handbook, Annex A, December 1997)
>
> In the segregation review hearings I observed in May 1998, none of these guidelines was followed.[100]

180. In March 2001, I returned to Kent to observe a series of five-day reviews held following an assault on a staff member by a prisoner. Again, none of the guidelines set out in the Administrative Segregation Handbook were observed at the reviews. Procedural safeguards were not reviewed to ensure that prisoners had received both three days' notice of the hearing and written information; there was no tape recording of the hearing; and the chairperson did not describe the circumstances leading to each prisoner's segregation.[101]

Enhanced Segregation Review: The Case of Gary Weaver 1999

181. In *Justice behind the Walls 2001*, I devote a chapter to the experiences of a prisoner, Gary Weaver, who in the course of conducting research for the book I met in 1994 when he was in

---

[99] To my knowledge the workshops have not been replicated since and it is unlikely that any correctional managers who today chair segregation reviews would have been participants. The specialized training through a formal certification program has never materialized.

[100] *Justice behind the Walls 2001*, pp. 425-26, http://justicebehindthewalls.net/book.asp?cid=180&pid=575

[101] *Justice behind the Walls 2001*, p. 429, http://justicebehindthewalls.net/book.asp?cid=183

segregation at Kent.[102] In the chapter I describe his experiences in segregation both in the provincial youth system and later as an adult in the federal penitentiary system. When Mr. Weaver was transferred to William Head Medium Security Institution in 1998 I agreed to represent him before the Parole Board of Canada in his application for temporary absences passes.[103] When early in February 1999, just days after he had completed his first pass, he was placed in administrative segregation based on allegations that he had participated in the stabbing of another prisoner, I again agreed to represent him in challenging the lawfulness of his segregation, culminating in a *habeas corpus* petition before the BC Supreme Court. In April 1999, Mr. Weaver was released from segregation just days before the case had been set down for hearing, by which time Mr. Weaver had spent 80 days in segregation. The Department of Justice filed no documents in response to the lengthy affidavits filed in support of the petition but argued successfully before the BC Supreme Court that given Mr. Weaver's release from segregation the case was now moot.

182. Since Mr. Weaver's segregation in 1999 occurred two years after the Commissioner of Corrections had received the recommendations of the Task Force on Segregation and a year after correctional officials, including those at William Head, participated in a workshop specifically addressing the legal requirements of segregation review, I use it in *Justice behind the Walls 2001* as a report card on how well, in the absence of independent adjudication, the CSC can ensure that its officials comply with the law.

183. In *Justice behind the Walls 2001*, I described Mr. Weaver's 60 day segregation review:

> On April 8, 1999, Mr. Weaver appeared before the Segregation Review Board for his second thirty-day review. The Board was chaired by Unit Manager Cawsey. At the outset, Mr. Weaver requested that the hearing be tape-recorded so that there was an accurate record of the proceedings. His request was in accordance with the policy set out in the Administrative Segregation Handbook provided to participants, including Mr. Cawsey, at a regional legal education workshop held in January 1998. The policy states, "Hearings should be recorded on audio tape, to ensure an accurate record is available. The audio tape should be retained for at least two years" (Administrative Segregation Handbook, December 1997, Annex A: Detailed Timelines and Procedures). According to Mr. Weaver's sworn statement, Unit Manager Cawsey rejected Mr. Weaver's request, "because basically what we are doing is some little things." Mr. Cawsey then informed Mr. Weaver that the Board had to "get some administrative stuff out of the way" and proceeded to ask him if he had received visits from Health Care and had access to showers, phone calls, and visits. When Mr. Weaver sought to raise the issue of his innocence in the assault on Mr. Caziere, arguing that therefore there was no

---

[102] *Justice behind the Walls 2001* Sector 5, Chapter 3, pp. 515-71, http://justicebehindthewalls.net/book.asp?cid=223 et seq.

[103] William Head was not one of my research sites for *Justice behind the Walls 2001* so representing Mr. Weaver did not involve any conflict of interest. In those institutions where I was conducting research I had made it clear to both correctional staff and prisoners that I would not undertake any legal representation of prisoners during my research and arising from that research at those institutions.

basis for his segregation, he was advised by Mr. Cawsey, "That's for you to deal with with your lawyer."[104]

184. When I later met with Mr. Cawsey at William Head to discuss Mr. Weaver's case I observed in his bookcase the yellow binder that contained the Administrative Segregation Handbook that was distributed at the legal education workshop earlier that year. When I asked him whether he used it, he indicated that as a very experienced correctional administrator he did not need to consult a guidebook to know how to run segregation reviews.

185. I concluded that Mr. Weaver's segregation experience demonstrated the same faultlines identified by the Arbour Report, the Task Force on Segregation's report, and my own analysis of correctional practices. As I describe in *Justice behind the Wall 2001* Mr. Weaver's segregation involved serial violations of the *CCRA*, including denial of his legal right to contact a lawyer without delay and failure to provide Mr. Weaver with any of his personal cell effects until 45 days after he was placed in segregation. Correctional managers at William Head failed to conduct segregation reviews in accordance with the *CCRA.* The written sharing of Information given to Mr. Weaver before his 5-day, 30-day, and 60-day reviews contained none of the information relevant to a consideration of whether it was reasonable to believe that lawful grounds existed for his segregation. The inadequacy of the sharing process at William Head reflected practices at both Kent and Matsqui prior to the Task Force on Segregation. The conduct of the 5-day, 30-day and 60-day reviews also demonstrated failure to fulfil the legislative mandate of the *CCRA.* There was no attempt at any of these reviews to relate the information and evidence to the legal criteria for segregation. The Chairperson of the Segregation Review Board in each case announced at the beginning of the hearing that Mr. Weaver would be maintained in segregation. No consideration was given to the information Mr. Weaver attempted to provide to the Board, drawn from the RCMP's and the CSC's own security intelligence investigations, which pointed to his innocence of any wrongdoing. Similarly, the decisions of the Warden of William Head that Mr. Weaver be maintained in segregation were made without reference to the legal standards of s. 31(3).[105] The only visible signs of enhancement of the segregation review process at William Head institution were formal entries on the offender management system and completion of the template Administrative Segregation Checklist. I concluded that there had had been no substantive change to the pre-Task Force customary law and practices regarding segregation.

The CCRA Five-Year Review, 2000

186. In March 1999, during the time Gary Weaver was in segregation in William Head, I appeared in Ottawa on behalf of the Canadian Bar Association ("CBA") before the Sub-Committee of the House of Commons Committee on Justice and Human Rights. The Sub-Committee was charged with the legislatively mandated Five-Year Review of the *CCRA*. The centrepiece of my presentation was the importance of independent adjudication in administrative segregation cases. I reviewed the history of this issue, and presented the CBA's position that, in light of the recommendations of Justice Arbour and the Commissioner's failure

[104] *Justice behind the Walls 2001*, p. 562, http://justicebehindthewalls.net/book.asp?cid=245
[105] *Justice behind the Walls 2001*, pp. 568-71, http://justicebehindthewalls.net/book.asp?cid=249

to implement the experiment on independent adjudication as recommended by the Task Force on Segregation, the *CCRA* be amended to provide for independent adjudication of administrative segregation.

187. On May 29, 2000, the House of Commons Standing Committee on Justice and Human Rights tabled the report of its subcommittee, "*A Work in Progress*." The report specifically identified the importance of maintaining Canada's commitment to respecting the rights of prisoners.

> The Sub-committee believes, it is essential that correctional authorities respect offenders' rights, particularly since the principles and provisions incorporated in the CCRA "derive from universal human rights standards supported by all the advanced democracies with which Canada compares itself."[106]

188. *A Work in Progress* devoted a chapter to the issue of "Fair and Equitable Decision Making" in which it specifically addressed and accepted the case for independent adjudication of administrative segregation. The Sub-Committee, after reciting the history, including the recommendations of the Arbour Report, the Task Force on Segregation and the Yalden Working Group on Human Rights, and commending CSC for taking steps to enhance and monitor the segregation review process, agreed in their report that these initiatives are "a complement to, and not a replacement for, the independent adjudication of actions affecting the residual rights and freedoms of inmates". In the words of the Sub-Committee:

> 5.29 Instead of accepting recommendations from these three groups that some form of independent adjudication become part of the administrative segregation review process, the Correctional Service has taken steps to enhance the system already in place. Since 1997, it has undertaken a national initiative, with the results mentioned earlier in this chapter. This undertaking included the following elements:
>
> - the provision of training and reference documentation to managers and operational staff on the proper use of administrative segregation;
> - the development of alternatives to administrative segregation;
> - a focus on the successful reintegration of long-term administrative segregation inmates into the general inmate population; and
> - the appointment of senior level employees in each Correctional Service region to monitor all aspects of the administrative segregation review process and report to regional deputy commissioners.

---

[106] Sub-Committee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, *A Work in Progress: The Corrections and Conditional Release Act* (Ottawa: Public Works and Government Services, 2000) (*"A Work in Progress"*) para. 6.2, http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=%201031714&Language=E&Mode=1&Parl=36&Ses=2

5.30 The Correctional Service is to be commended for the initiatives it has undertaken. Although these efforts at enhancement go a considerable distance to satisfy, in part, the proposal made by the Task Force on Administrative Segregation, they do not go all the way. They do not, however, approach the recommendation on independent adjudication made by the Arbour Commission Report, or even the recommended limited experiment with independent adjudication made by both the Task Force on Administrative Segregation and the Working Group on Human Rights.

…

5.34 The Sub-committee believes there is a place for administrative segregation in the collection of techniques available to the Correctional Service for the effective management of the prison population and the fair administration of sentences of imprisonment meted out by the criminal courts. It must, however, be resorted to in the context of the duty to act fairly and the principles set out in section 4 of the Act, described in the introduction to this chapter. These principles are the residual rights of offenders, resort to the least restrictive carceral alternative, and a fair decision-making process.

5.35 The impact of administrative segregation on inmates has been graphically described by Madam Justice Arbour in the extract from her report quoted earlier in this chapter. As well, the physical and program constraints on administratively segregated inmates are severe. This was obvious to the Sub-committee in each of the segregation units it visited during its penitentiary tours. It must also be recognized, however, that the inmate population being managed by the Correctional Service in its administrative segregation units is a difficult one, posing serious challenges on a day-to-day basis.

5.36 Since 1997, the Correctional Service has taken important steps to enhance and monitor the segregation review process, find alternative approaches, and effectively reintegrate long-term administratively segregated offenders back into the general prison population. These enhancement and monitoring efforts should be continued and extended by the Correctional Service. They are, however, a complement to, and not a replacement for, the independent adjudication of actions affecting the residual rights and freedoms of inmates.

5.37 Administrative segregation removes inmates from normal daily contact with other offenders. It has the effect of making their access to programs, employment, services and recreation more difficult than it is for inmates in the general prison population. It has a dramatic impact on their residual rights. It makes the conditions of incarceration more stringent than they are for other inmates.

The Sub-committee's Position

5.38 For these reasons, the Sub-committee believes there is a need for the insertion of an independent decision-maker who will take into account all factors related to administrative segregation cases. It is not necessary for all segregation decisions to be

> made by this independent adjudicator. The Sub-committee believes that the Correctional Service should continue its efforts to develop alternatives to administrative segregation and find ways to safely reintegrate long-term administratively segregated inmates.

189. The Sub-Committee recommended that the independent adjudication process kick in at the thirty-day review for involuntary cases because this is the maximum period of segregation allowed as a punishment imposed by the Independent Chairperson for a serious offence and "there is little or no difference in the stringency of living conditions to which inmates administratively or punitively segregated are subject."[107] For voluntary segregation cases review by independent adjudicator should begin at 60 days. The Sub-Committee further recommended the *CCRA* be amended to specify not just the authority but also the criteria for the appointment of Independent Chairpersons.

> 5.71 The additions to the functions to be performed by independent chairpersons proposed by the Sub-committee demonstrate the importance it attributes to this position. The duty to act fairly is not just a series of procedural rules applicable to decision-makers. It also imposes an obligation on policy-makers to ensure that decision-makers exercising adjudicative authority do so in a fair and unbiased manner, indeed, in the absence of even an appearance or apprehension of bias.
>
> 5.72 One way for policy-makers to do this is to provide a clear statutory basis for the independent exercise of adjudicative functions. Including the process and criteria in the Act for the appointment of independent chairpersons will enhance their authority, provide permanence to the functions they perform, and make their adjudicative functions more open and transparent to those who want to scrutinize them.[108]

190. The response from both the Correctional Service and Government of Canada to these recommendations of a parliamentary committee can be characterized most charitably as underwhelming. That response was this:

> The Government proposes an Enhanced Segregation Review process that includes external membership. This model will attempt to balance independent adjudication with the promotion of appropriate operational accountability by the Correctional Service of Canada. This model will be implemented on a pilot basis in all regions and detailed independent evaluation will be undertaken. The development of the pilot may be guided by a Steering Committee comprised of internal and external members.[109]

191. Let me put this in the context of the historical record:

- In 1997 the Task Force on Segregation recommended a pilot project of independent adjudication for administrative segregation, a recommendation endorsed by the Working Group on Human Rights.

---

[107] *A Work In Progress*, para. 5.40
[108] *A Work in Progress*, paras. 5.71-5.72
[109] Response to the Report of the Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, p. 18

- In 1998 CSC rejected this recommendation.

- In the face of that rejection, in 2000 the Parliamentary Sub-Committee on the *CCRA*, having reviewed the historical record, and having been sufficiently satisfied of the need for independent adjudication, recommended immediate implementation - not of a pilot - but a full model of independent adjudication.

- CSC and the federal government's response was to pilot a proposal, not for the model of independent adjudication recommended by the Parliamentary Sub-Committee but for an enhanced segregation review process that included external membership.

The Pilot Enhanced Segregation Review Process, 2001-2002

192. In October 2001 CSC began piloting new segregation review boards. Once a month for five months at five institutions (one in each of the five regions of CSC) four to five cases were reviewed by a pilot review board. The key differences between the pilot review boards and regular reviews was that the board, instead of being chaired by a unit manager was co-chaired by the deputy warden and a community member. The co-chairs had shared responsibility and accountability for making recommendations to the Warden on placement, maintenance and release. As with the regular reviews the Warden retained ultimate decision-making authority.

193. CSC's pilot was not intended to test the value of the segregation review process recommended by the Parliamentary Sub-Committee; neither did it reflect the experiment on independent adjudication recommended by the Task Force on Segregation. This is made clear by a CSC's own description of the pilot:

> The focus of the enhanced segregation review process was on creating structure and process that could result in the best balance as envisioned in the Government's response to the recommendation of the Parliamentary Sub-committee. The goal was to make recommendations that enhanced the review process currently in place…[110]

194. The key differences between the pilot review boards and regular reviews were these. First, the board, instead of being chaired by a unit manager was co-chaired by the deputy warden and a community member. The five community members included a former BC Supreme Court judge, a former independent chairperson, a former warden, and a criminology professor. The co-chairs had shared responsibility and accountability for making recommendations to the Warden on placement, maintenance and release. As with the regular reviews the Warden retained ultimate decision-making authority.

195. A second difference was an enhanced role for parole officers at the review boards. The parole officer was responsible for formally presenting a synopsis of each case before the board, along with the relevant documentation. This included the reasons for placement in segregation, the history of previous reviews, the basis for reasonable grounds to justify continued segregation, and the institution's exploration of alternatives to segregation. This in comparison to regular

[110] The Administrative Segregation Review Process (2002):3

reviews where typically the discussion of the case between the unit manager and the parole officer is informal and abbreviated and oftentimes, in the case of long term cases, is "taken as read" because of previous discussions, including those outside the formal review process. The third distinct feature was the presence of the Regional Segregation Oversight Manager, whose position was established as part of the initiatives taken after the Task Force on Segregation, who was present mainly to provide administrative support, policy expertise and guidance, particularly on the status of reintegration plans that involved transfers to other institutions. All other facets of the administrative segregation review process remained the same. The external evaluation of the pilots was completed in March 2003. The evaluation was done on the basis of reviewing questionnaires that were completed during the pilot process and telephone interviews with participants carried out a year later.

196. The March 2003 external evaluation of CSC's pilots assessed the results of their evaluation on issues of the perceived fairness of the reviews and actual differences in the outcomes of the segregation reviews. It noted that while the participation of an external member on the segregation review board resulted in a more disciplined and open segregation review hearing process, the recommendations and decisions from the pilot review boards were generally consistent with those taken in the current review process. On the issue of the perception of fairness, which has always been the principal argument for independent adjudication, the external evaluation concluded:

> In general, most interviewees felt that there is some value added in having a Community Member as part of the hearing. Having an outsider participating in or co-chairing the boards brings transparency and openness, contributes to increased discussion, and increases the perception of fairness. In some cases, it was felt that the presence of the CM ensured or maintained procedural fairness and reinforced a disciplined approach. Inmates' participation often increased, at least at first, and they took the opportunity to tell their story to an outsider…
>
> Overall, in the ERB process the documented information was much more detailed and descriptive… In many cases, reasons leading to segregation, as well as the inmate's history, were better documented. There was a more detailed description of alternatives to segregation, including mediation and transfers to alternate institutions, but re-integration plans tended to be the same as those resulting from the institutional hearings. Rationales and recommendations were generally supported with factual arguments, and justifications for dismissing other alternatives were often adequately substantiated.[111]

197. As to the role of the community co-chairs ("CM"), the evaluation reported:

> There was a general consensus about the contribution made by the CM. All felt that the CM's presence increased the level of accountability of the institution, and forced staff to produce information that was of an enhanced quality and provide more thorough explanations. Inmates were given an opportunity to present their cases to an individual

[111] Evaluation of the Enhanced Segregation Review Board Process (2003):12, 15, 20

> not affiliated with the institution, and the CM also validated CSC's efforts to find alternatives to segregation.[112]

198. On the issue of actual differences in the outcomes of the segregation reviews, the evaluation concluded that the resulting recommendations and alternatives tended to be the same as those found in the regular institutional segregation hearings. There was no evidence to indicate that the enhanced boards contributed to reducing the number of cases in segregation status. Systemic barriers to reintegration, particularly in cases of voluntary segregation, remained focused on factors such as available bed space in institutions, and incompatibility issues. The intractable nature of the increasing number of voluntary cases was addressed by the evaluators:

> … a contentious and significant issue that emerged throughout our evaluation is the strong opinion that the number of segregation cases has become a growing problem in recent years. Voluntary cases, in particular, are becoming more and more difficult to resolve, either because the inmate does not want to re-integrate (due to the fear of incompatibles), or because alternatives cannot be actioned quickly, leading to longer stays in segregation. The solution to these systemic problems will not likely be addressed by a segregation review board, whether an ERB or an IRB.
>
> There is general agreement that long waits for transfers (either intra- or inter-regional) are a major factor hindering the implementation of recommendations. Even if a recommendation for a transfer is made and accepted by an inmate, it can take weeks or months before that transfer takes place, increasing pressure on the inmate held in segregation as well as on staff. Lack of bed space is often identified as a major problem. Priority of transfers has also been mentioned as a significant issue.
>
> In any case, even though there is a recognition that these systemic problems must be addressed by CSC, this will not likely be accomplished by a segregation review board process, whether institutional or enhanced.[113]

199. As I will describe, it is principally this last conclusion that has reinforced CSC's subsequent decision not to proceed with system-wide implementation of the pilot model, let alone a real model of independent adjudication. However, before moving to a consideration of CSC's current position on independent adjudication, it is necessary to analyse some of the features of the pilot model that limit its usefulness in drawing definitive conclusions on the value of independent adjudication.

200. The first limitation was the scale and duration of the pilot. The pilot involved just 89 case reviews over five months at five institutions. As the evaluators cautioned:

> Since the pilot was run for only a few months (and included a limited number of cases), positive aspects which may have been seen in the long term were not realized. Furthermore, those external to the institution as well as those new to such a process were

[112] Evaluation of the Enhanced Segregation Review Board Process (2003):18
[113] Evaluation of the Enhanced Segregation Review Board Process (2003):21

> faced with a steep learning curve. Any benefit that could have been obtained after this learning curve could, therefore, not be seen due to the limited life of the pilot.[114]

201. As an external observer to three of the four pilot reviews conducted at Kent Institution I can speak to the importance of this caveat. The community member appointed for the pilot at Kent was Justice Stuart Leggatt, a retired BC Supreme Court judge who before his appointment to the bench had as a Member of Parliament been part of the 1977 Sub-Committee on the Penitentiary System in Canada. Justice Leggatt therefore brought considerable knowledge of the realities of prison life to his role as a community co-chair. Even so, at the first two reviews he expressed his reluctance to question the judgment of his institutional co-chair on the critical issue of the reliability and credibility of confidential information supporting the institutional case for continued segregation. Only at the third review did he begin asking more probing questions of the institutional participants in the face of prisoners' challenges to the reliability of this information. One of the asserted advantages of independent adjudication is providing a process and forum to address this issue. However, the short duration of the pilot made it impossible to even begin to develop a procedural framework different from a regular review for the independent evaluation of confidential information where its reliability was determinative to the review.

202. In other areas also, such as exploring new avenues for resolving inter-prisoner conflict using mediators from community agencies, the limited duration of the pilot meant that just as the community member gained confidence, based on a developing understanding of the dynamics of the institution, and was in a position to exercise independent judgment, in contrast to just keeping the institutional players on their toes, the pilot terminated.

203. One other and significant limitation of the pilot was that a different set of four to five cases were selected for each monthly review. While this was understandable to ensure a representative sample of the mix of involuntary and voluntary cases, what it meant was that the community co-chair did not see whether re-integration plans agreed to at a review, as an acceptable alternative to segregation, were in fact implemented. One of the most important advantages of independent adjudication under my Model Segregation Code is that once a re-integration plan has been approved at a review, subsequent reviews would then monitor that plan to ensure that it was implemented, with the independent chairperson having the authority to issue orders and further directions where there is unreasonable and unjustified delay in implementation. At Kent in the pilot project there were several cases where Justice Leggatt was assured that prisoners' continued segregation would be terminated within the month through inter-regional transfers. These transfers did not in fact take place because the receiving institutions had not responded within the statutory time-frames to the transfer requests. Yet this administrative dropping of the ball had no legal consequences nor was it the subject of a further review before the pilot review board to ensure future compliance with the re-integration plan or the development of a new plan.

204. The external evaluation was also tasked with estimating the national cost of implementing the piloted model for segregation cases heard at 30 days or more (i.e. 30, 60 or 90

[114] Evaluation of the Enhanced Segregation Review Board Process (2003):8

days). It put the cost at approximately $3.4 million annually. This estimate was based on the number of cases heard in 2002.[115]

Canadian Human Rights Commission Report, 2004

205. In December 2003 the Canadian Human Rights Commission issued a Report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women.*[116] The Report presents an extensive review of how women prisoners are adversely affected by the federal corrections system and makes 19 separate recommendations on how this problem can be resolved. The Report in Recommendation 6(a) addressed independent adjudication of segregation:

> In her report, Justice Arbour made a series of recommendations relating to judicial supervision of segregation or review of segregation decisions by an independent adjudicator. These were echoed by the Correctional Service's own Task Force on Administrative Segregation and, more recently, by the Office of the Correctional Investigator. Unfortunately, the Correctional Service has not adopted these recommendations, nor does it appear that reasonable efforts have been made to develop approaches to segregation or alternatives to it that reflect the needs and characteristics of women offenders.
>
> **Recommendation No. 6**
>
> It is recommended that:
>
> (a) the Correctional Service of Canada implement independent adjudication for decisions related to involuntary segregation at all of its regional facilities for women. The impact of independent adjudication on the fairness and effectiveness of decision making should be assessed by an independent external evaluator after two years.[117]

206. Plainly put the Canadian Human Rights Commission made it clear that it was not enough for CSC to have conducted the pilot; it needed to implement a full model of independent adjudication. Many of those supporting independent adjudication hoped that this latest endorsement by the Canadian Human Rights Commission would be the final push that convinced CSC that this was an idea whose time had come. Further rounds of consultation were scheduled to consider yet again options to reduce the use of long term segregation, including beefed-up regional review boards to review prisoners segregated for more than 90 days. However, in response to the renewed call to introduce independent adjudication, CSC now took the position that its hands were tied by the existing legal framework; i.e. as the scheme for administrative segregation is set out in the Act and Regulations, it was outside the purview of CSC's policy framework, and a decision on whether to re-examine the issue of independent adjudication would

---

[115] Evaluation of the Enhanced Segregation Review Board Process (2003):8

[116] Canadian human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women,* December 2003 http://www.chrc-ccdp.ca/sites/default/files/fswen.pdf

[117] p. 45

need to be considered by the Department of Public Safety and Emergency Preparedness ("PSEC"). This ignored the reality that if the Service accepted the recommendations of the Human Rights Commission and the previous recommendation of the Parliamentary Sub-Committee, this would provide the necessary impetus for PSEC to propose a relatively simple amendment to the CCR regulations to authorize independent adjudication. In the face of CSC's "we can't do anything strategy" in April 2004 the Corrections and Criminal Justice Directorate of PSEC, which operates as a separate unit from CSC, prepared an Issue Paper reviewing the now well-rehearsed history:

> Since the Arbour Report, CSC has maintained its need to retain management accountability for segregation, and instead offered to "enhance" existing practices… While CSC acknowledge the need to ensure respect for the rule of law, the need to use the least restrictive measure and to ensure procedural fairness in the review process, attempts to achieve these through operational enhancements to administrative segregation processes over the past eight years have not yielded sufficient, sustained or the desired results…The continuing reliance on the use of segregation as a result of systemic problems, such as bed-space availability and incompatibility issues, is due in part to the inherent difficulties in balancing the competing interests of inmates legal rights against operational management issues.
>
> Given that previous operational enhancements to the review process have not been successful in reducing the use of administrative segregation, the implementation and testing of models of independent adjudication for administrative segregation decisions should be envisaged to address the concerns relating to the respect of the rule of law, the use of least restrictive measures, and procedural fairness.[118]

207. Based on this analysis the Directorate proposed the following action plan:

> It is recommended that independent adjudication be piloted in selected CSC facilities using a model based on recommendations made by Professor Michael Jackson in his book *Justice Behind the Walls*, and the Sub-committee on the Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights.
>
> It is proposed the adjudication of all inmates in administrative segregation – both voluntarily and involuntarily – be conducted by an independent chairperson (appointed as part of the inmate disciplinary process) every 30 calendar days.
>
> The proposed model is an attempt to address the concerns raised by outside experts on the need for independent oversight of CSC decisions concerning placements in the harsh environment of segregation (often characterized as a 'prison within a prison'), against CSC's need to retain some form of accountability over the management of inmates and their placement in segregation.
>
> The proposed model would provide CSC with time (30 days) to explore all available options to avoid continued segregation of the offender before decisions would be subject

[118] Issue Paper (2004):4

> to external review by an independent adjudicator who is familiar with the institutional environment and the conditions of segregation.[119]

208. Following yet another further round of consultations, in February 2005 CSC filed its Action Plan in response to the Report of the Canadian Human Rights Commission. This is CSC's response to Recommendation 6(a):

> CSC's shares the concern of long stays and possible overuse but situates this within operational realities which must be addressed first:
>
> - Outdated infrastructure
> - Lack of alternatives
> - Difficulties with transfers
> - Management of long-term cases, including those who refuse to leave segregation
>
> Members discussed the issues and concluded that the proposed PSEPC model for independent adjudication does not respond to the CSC concerns and, based on experience with the enhanced review pilot, would not resolve the concerns identified by external bodies. Members decided to generate alternate models while continuing to focus attention on the operational context concerns.
>
> At present, CSC will continue with internal measures to address segregation concerns. In the past, as a means to address some of the issues raised in these reviews, while maintaining its accountability for segregation placements, CSC has tested a number of initiatives, such as an "enhanced" internal review model, enhanced segregation review pilots and a revised regional review process. Out of these initiatives have come lessons learned and best practices which are being used as a basis to improve performance.
>
> In the case of women, the length of time that they spend in segregation is generally short, though there are some exceptional cases. The DCW and her staff regularly review the use of segregation and work closely with the women's institutions to develop alternatives for the small number of women whose stay in segregation exceeds 60 days.
>
> **Action:**
>
> Independent adjudication is outside the current legislative framework. However, CSC and PSEPC will jointly develop options.[120] (emphasis added)

209. The passage I have underlined provides the key to understanding CSC's latest strategy of resistance to implementation of independent adjudication. Simply put "independent adjudication does not respond to the CSC concerns." Those concerns and priorities center on the challenges in finding and implementing effective re-integration solutions to the increasing number of long

---

[119] Issue Paper (2004):4-5

[120] Correctional Service Canada, *CSC action plan in response to the report of the Canadian Human Rights Commission* (2004) ("*CSC Action Plan*"), pp. 16-17, http://www.csc-scc.gc.ca/publications/fsw/gender4/CHRC_response_e.pdf

term voluntary segregation cases that typically require inter-regional transfers, coupled with and compounded by the fact that some prisoners refuse to reintegrate due to the fear of incompatibles. Relying on the evaluation of the pilot project CSC contends that the involvement of the community co-chair did not generate any new reintegration solutions to address these systemic problems and neither would independent adjudicators. In other words implementing independent adjudication will not resolve CSC's operational problems.

210. As I have explained earlier, the limited design and duration of the 2002 pilot does not support any such conclusion as to how a real model of independent adjudication would work. But quite apart from this important point there is a familiar problem with CSC's position, one that takes us back to the common rationale that has linked the succession of recommendations that independent adjudication be introduced: fairness demands it. Quite apart from whether it addresses CSC's concerns regarding population management, the concept that decisions that restrict a prisoner's residual liberty by confinement in a prison within a prison should be made by a decision-maker free from institutional biases and institutional pressures is a concept of fairness and cannot be subordinated to CSC's operational problems. That the senior management of CSC in 2005 would advance this argument is an ominous reflection of the very problem Justice Arbour identified a decade earlier. It is best captured in a paper written by Todd Sloan of the Office of the Correctional Investigator:

> In our view the essence of the matter, as so eloquently stated by Madam Justice Arbour is the notion of a "commitment to the ideals of justice". For when all the imputations of responsibility have been argued; when all the specifics of the Correctional Service's actions before and **since** the Arbour commission are addressed; when all the pro's and cons of potential effectiveness of internal and external remedies have been analyzed; this phrase, and its implications remain....
>
> For our purposes, we believe that the issue becomes <u>whether some form of independent adjudication of the decisions affecting significant human rights and statutory entitlements will further the entrenchment of justice in the care, custody and reintegration of federal offenders</u>.[121] (emphasis in original)

The Litmus Test of Legitimacy, 2006

211. The 2006 Canadian Journal of Criminology and Criminal Justice devoted a special issue to prison oversight and human rights. In my article, *The Litmus Test of Legitimacy*, after reviewing the history that I have included in this opinion report, I concluded:

> It remains my conviction, based on 30 years of research, that independent adjudication of segregation is necessary to ensure a fair and unbiased hearing ... That it is also the conviction of Justice Arbour, the Task Force on Segregation, the Working Group on Human Rights, the Parliamentary Sub-Committee on the CCRA, and the CHRC would seem to all but guarantee the CSC's recognition that it merits space in the correctional legal landscape. In the face of CSC's unremitting resistance, will it now be left to

[121] Sloan, T. Shifting the Orbit, Human Rights, Independent Review and Accountability in the Canadian Corrections System (Ottawa: Office of the Correctional Investigator, 2007), pp. 26-27

> judicial intervention to bring this about? .... If it comes to pass that only through a court judgment will the CSC's administration of the most restrictive form of imprisonment be brought into the gravitational orbit of a culture of rights rather than responding to the CSC's operational concerns, this will provide confirmation of Justice Arbour's pessimistic conclusion that "Ultimately, I believe that there is little hope that the Rule of Law will implant itself within the correctional culture without assistance and control from Parliament and the courts..."[122] (emphasis added)

The Roadmap to Strengthening Public Safety, 2007

212. With the arrival of a new government in Ottawa in 2007 any hope that there would be greater control from Parliament that might enhance the rights of prisoners in segregation evaporated. Prior to the 2006 federal election the Conservative party, at the urging of police, victim and prison guard associations made promises to examine the operation of the Correctional Service of Canada. Much of the pressure came through the "Club Fed" campaign that presented to the public the distorted notion that life for those in our federal prison system was equivalent to a holiday resort.

213. In a 2006 speech to the Canadian Professional Police Association then Minister of Justice, later Minister of Public Safety, Vic Toews, acknowledged and agreed with the "Club Fed" rhetoric when he said:

> I believe that it is time to get tough when it comes to incarcerating violent offenders, and I applaud the efforts that have been made to put an end to what has been referred to as "Club Fed".[123]

214. After the 2006 election Prime Minister Harper made clear his government's intention to make the operation of the criminal justice system much tougher, blaming Canada's soft on crime approach on "a generation of lawmakers who embraced the bizarre notion that the rights of criminals outweigh the rights of law-abiding citizens."[124]

215. It was in this political context that On April 20th, 2007, the Minister of Public Safety, announced the appointment of a Panel charged with the task of reviewing the operations of the Correctional Service of Canada. The mandate of the Panel was to provide the Minister of Public Safety with advice on a broad range of complex topics that have been problematic for CSC over many years.

---

[122] *The Litmus Test of Legitimacy*, p. 191

[123] Correctional Service Canada Review Panel, *Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety* (Minister of Public Works and Government Services Canada, 2007) ("*Roadmap*"), http://www.ps-sp.gc.ca/csc-scc/report-rapport/table_of_contents-eng.aspx

[124] Michael Jackson and Graham Stewart, *"A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety Report"*, September 2009 (*"A Flawed Compass")*, p. 5 citing: National Post, An address by Stephen Harper, the Prime Minister of Canada. Delivered Friday, January 25, 2008, http://www.justicebehindthewalls.net/resources/news/flawed_Compass.pdf

216. Six months after its appointment October 31, 2007, the Review Panel presented its 170 page final report entitled "*A Roadmap to Strengthening Public Safety*",[125] containing 109 recommendations. The report was almost immediately endorsed by the Minister, and within months the government announced that over $120 million had been allocated to fast-track the changes recommended and the stage was set for what was to be termed the "Transformation Agenda" which has since become the policy framework for many of the developments in the federal correctional system.

217. Because of the lack of any public knowledge or debate and the absence of any critical response from within the correctional establishment, I together with Graham Stewart, the former executive director of the John Howard Society of Canada, authored and published our 2009 report, "A Flawed Compass" a 200 page critique of the process through which the Panel made its recommendations, and the problems, both of constitutional law, correctional policy and practice their recommendations create and aggravate.[126] We argued that the fundamental flaw in the *Roadmap* is that its discussion under the key area of "offender accountability" and its recommendations for changes in the *CCRA* demonstrate a lamentable and unacceptable ignorance and/or misunderstanding of the legal history of Canada's correctional legislation, the pivotal role of the *Charter of Rights* and the recommendations of other commissions of inquiry and task forces that call for greater commitment from CSC to promoting a culture of respect for human rights within Canadian prisons. For many of those involved in the history of human rights and corrections in Canada, it was almost unbelievable that a *Roadmap* for the 21st century made no mention of the *Charter of Rights and Freedoms*, CSC's Mission Statement, no reference to leading Supreme Court of Canada judgments dealing with prisoners' rights, nor the recommendations of the Arbour Commission. Nowhere is there any mention of CSC's own 1997 report of the Working Group on Human Rights, and that report's major recommendation that CSC must adopt a human rights strategy as the centrepiece of its strategic planning. We summarized our critique in this way:

> To its great discredit the Panel makes no mention of Canada's international human rights obligations or of the application of the *Charter* to Canadian prisons, and has no regard for or apparent awareness of the well-documented record of how difficult it has been to entrench a culture of respect for rights within CSC. Instead of a clarion call for greater vigilance in protecting human rights we find a virtual open invitation to CSC to dismantle the existing legal and administrative framework and redefine the definition of rights by introducing an ill-conceived hierarchy of rights and conditions of confinement dependent upon how well prisoners participate in their correctional plan. The *Roadmap* undermines the fundamental nature of Canada's human rights commitments and puts Canada on a path out of step with the relevant international and domestic human rights norms.[127]

218. Of particular relevance to my opinions in this report, the absence of any focus on human rights is revealed in the *Roadmap*'s limited discussion of segregation. The only problem the Panel thought deserving of any discussion was the rise in the number of prisoners who are

---

[125] *Roadmap*
[126] *A Flawed Compass*
[127] *A Flawed Compass*

considered to be in "voluntary segregation." This is the contribution that the *Roadmap* offered in the ongoing discourse about segregation:

> The Panel has heard that another factor contributing to this rise has been the fact that, while in segregation, offenders maintain living conditions that are almost identical to those elsewhere in the penitentiary, without having to resolve the issues that brought them to segregation.
>
> …
>
> Furthermore, CSC policy prohibits double-bunking in segregation. A single cell can be considered to be another advantage over the offender's circumstances in the general population.
>
> The Panel is concerned that if the living conditions in segregation continue to equal or exceed those found in other parts of the penitentiary and there are no viable alternatives to placement in the penitentiary, more offenders will seek voluntary segregation. The Panel believes that offenders may not see any benefit to engaging in their correctional plan, thereby allowing them to be isolated from the level of intervention necessary for their rehabilitation.
>
> …
>
> Without having any incentives to provide to offenders who are working to rehabilitate, the Panel believes that the current environment of voluntary segregation diminishes offender responsibility and accountability.[128]

219. The clear implication of the Panel's analysis was that the conditions of confinement for those prisoners in "voluntary" segregation are too soft and need to be toughened up to discourage prisoners from checking into or remaining in segregation. What is remarkable about this very limited focus of the *Roadmap*'s discussion of segregation is that it makes no reference to any of the previous work that I have documented in the preceding pages of this opinion. There is no reference to *Prisoners of Isolation* or *Justice behind the Walls 2001*; no mention of the Arbour Report or CSC's own Report of the Task Force on Segregation, even though the Task Force devoted considerable attention to the issue of voluntary segregation and the challenges it presented for CSC. Every other report that has looked at segregation has addressed the human rights implications of the conditions of confinement as central to its deliberations. Yet the *Roadmap* contributed nothing to the continuing debate other than the need to increase the rigour of conditions in voluntary segregation.

Ashley Smith: The Report of the Correctional Investigator, 2008

220. What makes the minimal discussion of segregation in the *Roadmap* even more remarkable is that at the very same time the Panel was writing its report Ashley Smith, a 19 year women died alone in her segregation cell after more than a year of continuous segregation in

[128] *Roadmap*, 23-24

federal prisons. The Report of the Correctional Investigator documented the abuse of administrative segregation as a contributing factor in Ashley Smith's death and the Coroner's Inquest arising from her death in custody represents the most recent round in the long history of recommendations that seek to place procedural and substantive limits on the use of segregation.

221. 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:

> 38. 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.
>
> 39. 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.
>
> …
>
> 41. 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.
>
> …
>
> 43. The required regional reviews were never conducted because each institution erroneously "lifted" Ms. Smith's segregation status whenever she was physically moved out of a CSC facility (e.g., to attend criminal court, to be temporarily admitted to a psychiatric facility, or to transfer to another correctional facility). This occurred even though the Correctional Service had every intention of placing Ms. Smith back on segregation status as soon as she stepped foot back into a federal institution. This totally unreasonable practice had the effect of stopping and starting "the segregation clock", thereby negating any review external to the institution on the continuation of the placement in segregation. This in turn

> assisted in reinforcing the notion that segregation was an acceptable method of managing Ms. Smith's challenging behaviours.[129]

222. As I have made clear in this report it has long been my opinion that independent adjudication is a necessary part of any equation of reform of segregation regimes. In his report the Correctional Investigator conclusions identified the consequences of CSC's resistance 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.[130] (emphasis added)

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

> I recommend that the Correctional Service immediately implement independent adjudication of segregation placements of inmates with mental health concerns. This review should be completed within 30 days of the placement and the Adjudicator's decision should be forwarded to the Regional Deputy Commissioner. In the case of a female inmate, the Adjudicator's decision should be forwarded to the Deputy Commissioner for Women.[131]

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

> CSC does not support the recommendation. However, CSC will be exploring other options that may lead to a revised review process of these segregation placements.[132]

---

[129] Correctional Investigator of Canada, *A Preventable Death*, (2008) (*"A Preventable Death"*), paras. 38-39, 41, 43, http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx

[130] *A Preventable Death*, para. 93

[131] *A Preventable Death*, Recommendation 10

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

The Rivera Report, 2010

225. As part of its response to the Correctional Investigator's Report and its own internal Board of Inquiry on Ashley Smith's death in custody, CSC committed to conducting an operational examination of long-term segregation and segregation placements of inmates with mental health concerns by April 2010, using a representative sampling methodology and an external review process. The External Review Board consisted of two members "who were not employees of the Correctional Service of Canada and who had clinical and operational knowledge of both mental health service provision and the correctional environment."[133] The executive summary of the Review Board's report, authored by Dr. Margo Rivera, describes its mandate:

> The External Review Board was mandated by the Correctional Service of Canada (CSC) to provide a description of inmates, both men and women, who had been in administrative segregation for long time periods with particular attention to inmates for whom there may be mental health concerns. Strategies on how to reduce the number of inmates spending time in long-term administrative segregation are to be outlined as well as expected outcomes associated with each proposed strategy ...
>
> Specifically, the reviewers were mandated to examine the conditions of long-term's administrative segregation regarding all male inmates who were segregated for 60 days or more in five men's medium security institutions in the Prairies and Ontario regions and all female inmates segregated for 30 days or more in all the federal women's institutions.[134]

226. The review board reviewed both by file review and interviewed 78 men and 6 women and a total of 143 staff from all institutional regional and national levels of CSC that function directly with administrative segregation units. The review board also interviewed the Correctional Investigator and his staff at a joint meeting.[135] Based upon her review Dr. Rivera identified the systemic impediments to appropriate correctional treatment for offenders placed in segregation, particularly those with mental health issues and made a series of recommendations.

227. There are a number of comments I would make regarding the Rivera Report that are relevant to my opinion report. It is the most recent "official" report of the conditions in a number of federal medium security segregation units. Its significant contribution is that it identifies many of the same systemic problems with the conditions in segregation units as were identified by the 1997 CSC Task Force on Segregation, demonstrating the failure of reform

---

[133] The two members were Dr. Margo Rivera, a clinical psychologist with the College of Psychologists of Ontario who has cross appointments as assistant professor in the Department of Psychiatry and adjunct professor in the Department of Psychology at Queens University, and Yvette Thériault, a registered psychologist with the College of Psychologists of New Brunswick and a private practitioner and criminal justice consultant.

[134] Margo Rivera, *Segregation Is Our Prison Within The Prison: Operational Examination of Long-Term Segregation and Segregation Placements of Inmates with Mental Health Concerns in the Correctional Service of Canada*, May 4, 2010 ("Rivera Report"), p. 5

[135] Rivera Report, p. 5

initiatives to bring about substantive change in the conditions of administrative segregation within the federal system.

228. However the report also has significant limitations in light of the scope of the mandate of the Review Board. The first limitation is that the review was confined to the segregation units of medium security institutions. As was demonstrated by the 1997 Task Force on Segregation and confirmed by my own research and experience, the most debilitating conditions of confinement and lack of effective programming are to be found in the segregation units of maximum security institutions.

229. There are several reasons for this. The very nature of maximum security and its prisoner population gives rise to more incidents in which segregation is seen as the necessary response. The regimes in maximum security segregation units have historically been characterized by greater hostility between prisoners and staff. There are fewer program opportunities in maximum security. Also in maximum security prisons where the alternative to segregation is a transfer, this will require transfer to another maximum security institution in another region of the country which typically takes longer than an inter-regional transfer of a segregated prisoner, resulting in longer stays in segregation. In light of this it is concerning that maximum security institutions were excluded from the Rivera mandate.

230. The second major limitation is that the reviewers were not asked to address and therefore the report is understandably silent both on the role of independent adjudication in the admission and review process of segregation and the need to impose strict time restrictions on the duration of segregation.

231. In her report Dr. Rivera made policy and operational recommendations to reduce the use of administrative segregation, particularly for prisoners with mental health issues; improve material conditions and quality of life for prisoners in segregation; expand the correctional and mental health programming and services in segregation; provide greater access to services for aboriginal offenders; better training for staff and more coordination by correctional managers charged with the administration of segregation units; and a range of alternatives to segregation. Since the focus of the Rivera Report is on the conditions of confinement I will review most of its findings and recommendations later in this report in response to questions 6 and 7 in my letter of instructions regarding the living conditions in segregation. However, there are parts of the Rivera Report that relate to another question I have been asked – "what problems, if any, have historically been created by framing the grounds for such segregation in terms similar to those set out in s. 31(3) of the Corrections and Conditional Release Act". Dr. Rivera describes how this allows administrative convenience to drive segregation practice as a management tool rather than its legal foundation as the least restrictive measure.

> "We are supposed to be looking for the least restrictive alternatives, but these days we seem to put more offenders in segregation for less," commented one regional staff member. Placing an inmate on segregation status, either because he is creating trouble or perceives himself to be in trouble should be - but does not seem to be - the practice of last resort in the men's medium-security institutions that the ERB visited. Radically re-thinking the rationale for segregating offenders may well be a necessary prelude in the

> direction of decreasing segregation numbers. Both offenders and staff at all levels of CSC noted that some offenders are currently placed in segregation for offences that do not necessarily merit segregation. Though the reviewers have no systematic proof that this is the case, enough people, including both staff and offenders, gave us examples of segregation placements that were not necessary to render it a concern worth examining and addressing.[136] (emphasis added)

232. To respond to this problem of the overuse of segregation as an easily accessible management tool Dr. Rivera framed the first of her recommendations as a "challenge" to existing CSC practice:

> **1. Recommendation**: Challenge the practice of solving a wide range of management problems in federal prisons by segregating inmates who are in trouble or causing trouble. The best strategy for decreasing the numbers of federally-sentenced inmates confined in segregation units is decreasing significantly the numbers of individuals initially placed in segregation. To meet this goal, policy change, staff re-training, and creative and forceful leadership will all be necessary.[137]

233. This was coupled with other recommendations designed to both narrow the criteria for admission to segregation and encourage the development of less intrusive and more creative alternatives to conflict resolution:

> **4. Recommendation:** Limit the reasons for segregating inmates to the more serious behaviours that endanger life, rather than a wide range of infractions that could be consequenced while the individual remains in general population.
> …
>
> **6. Recommendation:** Make mediation, rather than segregation, the preferred method for coping with individuals who behave aggressively towards others or threaten others. Change the current practice of immediately segregating such individuals, instead making use of correctional staff, operations and interventions managers, Elders, staff psychologists, and any other front-line or management personnel who know the individuals involved to engage in conflict resolution.
>
> **7. Recommendation:** Change Administrative Segregation policy so that no one can be admitted to a segregation cell until an interventions staff member who has a relationship with the offender - for example, a mental health nurse, Elder, or psychologist - can be involved directly in the process. Secure individuals in their cells or another cell temporarily for safety when necessary rather than place an offender on segregation status immediately.[138]

234. The development of less intrusive and more creative alternatives to segregation was one of the recommendations of the 1997 Task Force on Segregation that as Dr. Rivera's report

[136] Rivera Report, p. 68
[137] Rivera Report, p. 77
[138] Rivera Report, p. 78

confirms has found little traction in CSC practice. As I will later describe, neither has her challenge to change CSC customary practices of too ready to resort to segregation as a management tool through staff re-training, and creative and forceful leadership.

The Case of Edward Snowshoe, 2010

235. Two years after the release of *A Preventable Death* and while Dr. Rivera was reviewing the conditions, including the adequacy of mental health services in segregation units, and therefore at a time when CSC segregation policies were under intense scrutiny, Edward Snowshoe, a 22-year old aboriginal man from the Northwest Territories, hanged himself in a segregation cell in Edmonton Institution. Although not receiving the same degree of public visibility as Ashley Smith's death in custody, the case of Edward Snowshoe is an important one in understanding CSC's ability to reform its segregation practices without independent oversight. The circumstances leading to Mr. Snowshoe's segregation and his death in custody are set out in the Public Fatality Inquiry conducted by Alberta Provincial Court Judge James Wheatley:[139]

> On May 8, 2007 he received a sentence of five years, five months and twelve days in his first federal sentence and had a statutory release date of December 26, 2010, and a warrant expiry date of October 19, 2012. His sentence was served at various federal facilities but for the purposes of this report, most notably at Stony Mountain, a medium security institution, and latterly at the Edmonton Institution, a maximum security institution. While in custody at Stony Mountain Institution he attempted suicide on three occasions in November 2007, September 2008 and February 2009. Following a major depressive episode in August 2009 there was a self harm incident in 2010 which resulted in him being placed in observation on a suicide watch. On March 1, 2010 he is involved in an incident where he brandished what appeared to be a jail-made weapon which later was found to be a stabbing weapon made out of a juice box turned inside out and, as a result of this incident, he was placed in segregation on March 2, 2010. A decision is made to transfer him to Edmonton Institution, a maximum security institution as a result of this incident. On July 15th he is transferred from Stony Mountain to Edmonton Institution arriving on July 16th. He is once again placed into segregation and remained in segregation until his death. <u>In total he was in segregation in Stony Mountain for 134 days and Edmonton Institution for 28 days for a total of 162 days consecutive with the exception of the one day out when he was being transported from Stony Mountain to Edmonton Institution.</u>[140] (emphasis added)

236. Judge Wheatley's findings of the manner in which segregation reviews were conducted in 2010 reflects the "casual" attitude towards compliance with the law that was described by the Task Force on Segregation in 1997. Replicating what took place in the Ashley Smith case, when Mr. Snowshoe was transferred from Stony Mountain to Edmonton institution his segregation time clock, used to determine legally mandated reviews, was reset to zero:

---

[139] *Report to the Minister of Justice and Attorney General, Public Fatality Inquiry*, June 4, 2014, https://open.alberta.ca/dataset/d8bedb35-398a-4e24-befa-bef1d49531de/resource/2736fe62-60e2-4179-b919-eb4febbb93ed/download/2014-fatality-report-Snowshoe.pdf ("Snowshoe Report to the Minister")

[140] Snowshoe Report to the Minister, p. 2

> [I]t would appear that when Mr. Snowshoe was transferred from Stony Mountain Institution to Edmonton Institution a new segregation system was commenced starting with a new five-day review, five days after his transfer rather than a continuation of the clock so that when his five-day review was committed at Edmonton he in fact had been in segregation for something like 139 days. It should have been before the Regional Segregation Oversight Committee and should have been in segregation hearings chaired by at least an assistant warden from his sixtieth day onward.
>
> …
>
> The report for the five-day segregation review at Edmonton Institution was completed by the assigned parole officer who had never met with him. Mr. Snowshoe was given notice of it and did not attend. Although a statement of the juice box knife incident is recorded in that report there is no mention in that report to the first segregation board of any of the three suicide attempts or the self harm attempt and that report notes that there was one prior segregation placement at Stony Mountain with no note as to the fact that that placement was for 134 days. The report also states under *Health Care*, *Mental Health* and *Access to Psychological Counselling* that he was not seen by a staff psychologist but would be seen in the future and that "there are no concerns that would preclude his continued placement in administrative segregation at this time".
>
> It is clear that a case of anyone in segregation over thirty days must be reviewed by a Regional Segregation Oversight Manager within 60 days. That Regional Segregation Review Board must be chaired by an assistant deputy commissioner and must be reviewed within 120 days of segregation and every sixty days following that. This was never done.
>
> It must also be noted that his initial segregation was confirmed by an assistant warden on her last day of work before leaving on a one-year absence.[141]

237. In *Justice behind the Walls 2001*, I have described the great distance between CSC policy and operational reality in the review and management of segregated prisoners. A full decade after the book's publication Judge Wheatley's description of the management of Mr. Snowshoe's case reveals the gulf that still remains:

> The Inquiry heard evidence that within an institution there is an internal parole officer assigned to every prisoner. It is that person's responsibility to provide the liaison and reporting function in respect of each prisoner....
>
> The Inquiry heard evidence that the parole officer assigned to Mr. Snowshoe did not in fact meet with him any time during the five days before his five-day review but did attend the five-day review and it would appear that nothing in respect of his mental health history was brought to the attention of the five-day review even though it would appear that everyone sitting on the five-day review board had full access to the OMS which flagged those incidents. The parole officer in question left on vacation at the conclusion

[141] Snowshoe Report to the Minister, p. 3

> of the five-day review and there was not a formal process for someone picking up his caseload. The Inquiry heard evidence that this is done on an informal basis of a sort of a buddy system where another parole officer would be available only if there was an emergency situation. It would appear that the original parole officer's buddy name appears on the segregation log book once during the period of time that Mr. Snowshoe was in custody at the Edmonton Institution but that officer could not state with any certainty as to whether or not he had ever met with Mr. Snowshoe.[142]

238. Judge Wheatley's further findings on the degree of non-compliance with CSC policies regarding psychological services for segregated prisoners conveys more of this gulf between rhetoric and reality:

> The Inquiry heard evidence that a nurse had done a health evaluation of Mr. Snowshoe and had sent that document on to the psychology department for follow-up. No follow-up was done although one initial attempt was made to interview Mr. Snowshoe which he had refused. Nothing was done to attempt to set up psychological communication with him even though the psychology department had been advised by the admitting nurse of the prior suicides and self harm incidents The correctional manager doing the initial recommendations for segregation made no reports to others including correctional officers under his administration of the prior suicide attempts or self harm incidents although he did make a point in all of his reports to advise of the prior incident with the juice box knife.
>
> The cell Mr. Snowshoe was held in had a single observation through a mail slot. Within that segregation unit there were two full observation cells available and one was fully available during the period that Mr. Snowshoe was there. Only cursory attempts to try to establish a mental health or psychological process with Mr. Snowshoe were made during his 28 days at Edmonton Institution.
>
> …
>
> It would appear that despite the OMS having flags of suicide and self harm incidents of Mr. Snowshoe that these flags were not observed or dealt with any degree of care or alertness by numerous people involved with Mr. Snowshoe while at the Edmonton Institution even though the existence of his conditions were flagged at the first incident by the admitting nurse. Ordinary correction officers on the block were not aware of his suicides and felt that they were not entitled to access the OMS which would have certainly alerted them to this situation. Despite the alert as to the suicide condition efforts to set up any kind of psychological communication with him were of a cursory and practically non-existent nature. Just asking someone if they need help doesn't cut it when there is a clear history of psychological need.[143]

---

[142] Snowshoe Report to the Minister, p. 4
[143] Snowshoe Report to the Minister, pp. 3-4

239. Judge Wheatley's conclusionary statement is a single sobering sentence that "Edward Christopher Snowshoe fell through the cracks of a system and no one was aware of how long he had been in segregation even though that information was readily available."[144]

240. Arising from this conclusion there is an obvious question that presses to the surface of my examination of the history of CSC's initiatives to reform the segregation regime. In light of the clear requirements of the *CCRA* and Commissioners Directives, in light of the recommendations of the Task Force in Segregation, in the wake of the report of the Correctional Investigator on the death of Ashley Smith and in the midst of a comprehensive review of conditions in segregation by Dr. Rivera, how could this have happened? The Task Force in 1997 had warned that CSC's commitment to reform might wane when its focus moved to other operational priorities but to the time when Mr. Snowshoe was in segregation in both Stony Mountain and Edmonton the use of segregation system was under the most intensive supervision by CSC senior managers in over a decade.

241. Part of my answer is that under the existing regime in the implementation of law and policy and compliance with the existing protections built into the law there is no role for independent review. It is my opinion that under a system of independent adjudication such as that advanced in the Model Segregation Code and by Justice Arbour it is inconceivable that Edward Snowshoe's case would have fallen so far from compliance with the law. In my opinion Edward Snowshoe's death in segregation, like Ashley Smith's, was another in a growing history of preventable deaths.

The Ashley Smith Coroner's Inquest Jury Recommendations, 2013

242. The jury in the Ontario Coroner's Inquest into the death of Ashley Smith heard extensive evidence from Canadian and international experts on the practices around segregation and the treatment of prisoners with mental illness.[145] It made 104 recommendations including 11 specifically addressing segregation. The recommendations regarding segregation that I have set out below reflect several of the recommendations of both the Arbour Report and the 2011 Report of the Special Rapporteur.

> 27. That, in accordance with the Recommendations of the United Nations Special Rapporteur's 2011 Interim Report on Solitary Confinement, indefinite solitary confinement should be abolished.
>
> 28. That 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.
>
> 29. That until segregation and seclusion is abolished in all CSC-operated penitentiaries and treatment facilities:

[144] Snowshoe Report to the Minister, p. 4
[145] The writer was one of those experts.

a. CSC restricts the use of segregation and seclusion to fifteen (15) consecutive days, that is, no more than 360 hours, in an uninterrupted period;

b. That a mandatory period outside of segregation or seclusion of five (5) consecutive days, that is, no less than 120 consecutive hours, be in effect after any period of segregation or seclusion;

c. That an inmate may not be placed into segregation or seclusion for more than 60 days in a calendar year; and

d. That in the event an inmate is transferred to an alternative institution or treatment facility, the calculation of consecutive days continues and does not constitute a "break" from segregation or seclusion.

30. That conditions of segregation be the least restrictive as possible for inmates and determined on a case by case basis-female inmates in segregation should, as much as possible, have access to programs, activities, and facilities and have contact with other inmates, staff, visitors, and non-governmental organizations, such as CAEFS.

31. That, as a mandatory duty, the Institutional Head will visit all inmates in segregation, seclusion, or medical observation at least once every day, in addition to meeting with individual inmates upon their request. This meeting is not to be accomplished through the food slot under any circumstance, and:

a. that, on days when the Institutional Head is away, the visit will be conducted by the highest authority; and

b. that any such authority must report in writing to the Institutional Head the findings and outcomes of such visits.

32. That, as a mandatory duty, a mental health professional will visit all inmates in segregation, seclusion, or medical observation at least once every day, in addition to meeting with individual inmates upon their request. This visit will pay particular attention to both the mental and physical health of such inmates, with a focus on assessing the inmate's tolerance to segregation. This meeting is not to be accomplished through the food slot under any circumstance.

33. That a sub-roster team of frontline staff is dedicated to complex high needs female inmates in the segregation unit, with a minimum of one (1) to two (2) consistent staff at all times. Such a team will ensure comprehensive and consistent support for the inmate.

34. That CSC repeal its existing Review of Offender's Segregated Status Working Day Review policies and replace them with five (5) and ten (10) day reviews that are administered by way of consecutive calendar days. This review will focus on the

inmate's needs and behaviours with the goal of returning the inmate to the general population.

35. That CSC amend its current policies to ensure that female inmates held in "seclusion" or "mental health observation" are recognized as being on "segregation status" and are therefore entitled to all relevant reviews.

36. That CSC make every effort to ensure that female inmates, including those in segregation or observation cells, have access to, and the opportunity to meet in private with, the RA-IA, Office of the Correctional Investigator, Citizens Advisory Committee, non-governmental organizations and community agencies.

37. That, for the purposes of monitoring and tracking, the Institutional Head will notify the following bodies once any inmate has been placed in segregation or seclusion, and that they will also be responsible for conducting a yearly review.

(a) Women Offender Sector;

(b) Mental Health Services Branch;

(c) Office of the Correctional Investigator;

(d) RHQ-Members of the Regional Complex Mental Health Committee; and

(e) NHQ-Members of the National Complex Mental Health Committee.[146]

243. There are no jury recommendations regarding independent review of segregation decisions, perhaps because the jury members optimistically assumed that under their recommendations no one would be kept in segregation long enough, (that is beyond 15 days consecutively or beyond 60 days in a calendar year) to require a review. However, it remains my opinion that even with strict time limitations in place, there is still a need for independent adjudication to both ensure that the criteria for segregation are met and that the time restraints are respected. This is reflected both in my Model Segregation Code and Justice Arbour's report, who as I have described, also recommended limits on time in segregation, but explicitly coupled this with independent review.[147] Strict time limitations and independent adjudication are also a major component of the recommendations of the 2011 report of the Special Rapporteur on Torture and are now included in the 2015 Mandela Standard Minimum Rules.

The Federal Governments response to the Jury Recommendations, 2014

244. In December 2014 an Inter-departmental Deputy Minister Steering Committee announced its detailed response to the Jury recommendations. I have set out below the relevant sections addressing the recommendations on segregation. They reflect the most recent official

[146] Office of the Chief Coroner, Province of Ontario, *Inquest Touching the Death of Ashley Smith, Jury Verdict and Recommendations*, December 2013
[147] *supra*, p. 47

statement on many the issues I have discussed in this opinion report. Key to its response is the Government's rejection of the accuracy or applicability of the term "solitary confinement" to the Canadian federal regime:

> The use of administrative segregation, especially for women offenders and those with mental health issues, is an area of offender management that has raised significant issues.
>
> It is a generally held belief that long term segregation produces adverse effects and worsens overall mental health and psychological functioning. Although research on the subject is not conclusive, the Government accepts that long periods in administrative segregation is generally not conducive to healthy living or meeting the goals of the correctional planning process.
>
> CSC believes that administrative segregation should only be used when there are no reasonable alternatives and for the shortest period of time that is necessary, in accordance with a fair, reasonable and transparent decision-making process that is based on a review of all the relevant information.
>
> …
>
> The Jury recommendations on this issue urged CSC to reduce its use of segregation, improve administration and oversight of the segregation process, and minimize the use of restraints to control self-injurious behaviour in favor of better therapeutic practices.
>
> The Coroner's Jury also recommended that "indefinite solitary confinement" be abolished and that long term segregation not exceed 15 days. They also wanted to see restrictions placed on the number of periods that offenders can spend segregated, including a requirement of no more than a cumulative total of 60 days in a calendar year.
>
> To be clear, the term solitary confinement is not accurate or applicable within the Canadian federal correctional system. Canadian law and correctional policy allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives.
>
> Administrative Segregation in the federal corrections system is not intended to be a form of punishment. It is an interim population management measure resulting from a carefully considered decision made by the Institutional Head to facilitate an investigation or to protect the safety and security of individuals and/or the institution.
>
> The purpose of administrative segregation is to maintain the security of the penitentiary or of any persons by not allowing an inmate to associate with other inmates when he or she meets the legislative requirements outlined in the CCRA (CCRA, 1992. C. 31, s. 3). These requirements emphasize that an inmate is to be released from administrative segregation at the earliest appropriate time.
>
> Segregated inmates are entitled to all the rights and privileges of other inmates within the physical limitations of the segregation unit. There is frequent interaction with others,

> including staff and visitors, as well as structured contact with peers. Members of the institutional Citizens Advisory Committees also have access to all offenders in the segregation unit. Inmates are routinely provided with their personal effects, which can include books, television, hobby materials and other personal items.
>
> Every inmate's confinement in administrative segregation is guided by regularly scheduled reviews that must conform to strict time frames (including reviews after 24 hours, 5 days, 30 days, etc.), rules for the sharing of information, the safeguarding of rights, and avenues for filing complaints and grievances as well as the right to contact legal counsel. The legislation and policy surrounding segregation is very rigorous. Decision-makers are held to the highest standards of accountability.
>
> For these reasons, there are various aspects of the Jury recommendations in the section entitled Segregation and Seclusion (Recommendations 27 through 37) that the Government is unable to fully support without causing undue risk to the safe management of the federal correctional system. For other elements of these and related recommendations, CSC has implemented a variety of improvements that will continue to evolve going forward, especially the review, oversight and support mechanisms for segregated offenders and those engaging in self-injurious behaviour. However, CSC will continue to explore other alternatives to the use of segregation.[148] (emphasis added)

245. The federal government in its response to the jury recommendations has now added to the lexicon of euphemisms for segregation the term "interim population management measure." Most of the segregated prisoners who I have interviewed over the past 40 years would respond with equal measures of disbelief and anger that their experiences could be so characterized.

246. In understanding this latest characterization of the segregation process by CSC the observations of criminologist David Garland are helpful. In *Punishment and Modern Society: a Study in Social Theory,* Professor Garland writes:

> It is a characteristic of bureaucratic organizations that they operate in a passionless, routinized, matter of fact kind of way. No matter in what field of social life they operate, whether in health care or social work or punishment - bureaucracies strive to act *sine ira ac studio* (without anger or enthusiasm), performing their tasks with studied neutrality and objectivity.[149]
>
> [T]he aggression and hostility implicit in punishment are concealed and denied by the administrative routines of dispassionate professionals, who see themselves as "running institutions" rather than delivering pain and suffering. Similarly, the language of punishment has been stripped of its plain brutality of meaning and reformulated in

---

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

[149] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990) ("*Punishment and Modern Society"*) pp. 183-84

> euphemistic terms, so that prisons become "correctional facilities", guards become "officers", and prisoners become "inmates" or even "residents".[150]

247. Over the course of my research I have on a number of occasions been struck with the dissonance between statements by senior CSC officials in Ottawa with the realities of what I have found in my observations and interviews inside Canadian penitentiaries.[151] The federal government's response to the jury recommendation fits squarely into that experience. The rejection of the applicability of the term solitary confinement to the Canadian segregation context is not well-founded in the context of the definitions found in the reports of the Special Rapporteur and other international standards literature and 'the actual conditions in segregation units. As I set out earlier in this opinion the 2011 Report of the Special Rapporteur defined solitary confinement in this way.

> 26. 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 <u>as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day</u>.[152]

248. The essential elements of the Special Rapporteur's definition of solitary confinement are "the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day." In my experience and in the documented record of the administration of segregation units in federal prisons that definition fits the quotidian reality for many if not most segregated prisoners. CSC's position that segregation does not represent physical and social isolation is based upon its formulaic recitation that:

> Segregated inmates are entitled to all the rights and privileges of other inmates within the physical limitations of the segregation unit. There is frequent interaction with others, including staff and visitors, as well as structured contact with peers. Members of the institutional Citizens Advisory Committees also have access to all offenders in the segregation unit. Inmates are routinely provided with their personal effects, which can include books, television, hobby materials and other personal items.[153]

249. I have previously documented the repeated findings of task forces and inquiries that this does not represent the operational reality. While it is fair to say that the conditions for most federal prisoners held in segregation in Canada today do not approach the extremes of social and physical isolation of regimes in many other countries identified in the reports of UN special rapporteurs, and indeed some of the earlier historical regimes Canadian prisoners have experienced, administrative segregation in its contemporary form, remains one of social and physical isolation qualitatively different from other forms of imprisonment.

---

[150] *Punishment and Modern Society*, p. 235
[151] See for example *Prisoners of Isolation*, pp. 173-74
[152] 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) A/66/268
[153] *Response to the Coroner's Inquest Touching the Death of Ashley Smith*

250. CSC's dismissive response to the need for greater restraints on the use of indefinite administrative segregation in line with the recommendations of the Special Rapporteur's report is also based upon its statement of the model of decision-making set out in the *CCRA* and the Commissioners Directives. According to CSC "The legislation and policy surrounding segregation is very rigorous. Decision-makers are held to the highest standards of accountability." Yet this assurance must compete with the historical and contemporary record, reflected over the last 20 years from the Arbour Report to the recent reports on the death of Ashley Smith and Edward Snowshoe, that both rigour and accountability in compliance with the law remain necessary but unfulfilled legislative and policy goals.

251. In our report *A Flawed Compass*, Graham Stewart and I described the historical cycle of abuse/reform of which the history of administrative segregation is a prime example:

> What we have then is a system of great power operating in a forum that is inaccessible by the public and media, with only as much public accountability as it takes on itself, characterized by a cycle of neglect and abuse leading to horrible events, followed by "reform" with new measures and standards put in place to redress the problem. Almost inevitably the measures prove inadequate or the commitment to them decays over time and a new round of abuse begins. Commissions of inquiry, royal commissions and explosive media stories have documented those failures beginning with the Brown Commission that castigated the cruel administration of Kingston Penitentiary in the 1840s and most recently – almost 150 years later - the Arbour Commission...

252. The question I will now address is whether CSC's most recent reforms to the latest round of abuse reflected in the Correctional Investigator's *A Preventable Death* report and Judge Wheatley's Fatality inquiry are proven adequate to address the historic and systemic issues that have given rise to the abuse of segregation. In answering this question the cautionary words of Justice Arbour should also be remembered:

> The absence of the Rule of Law is most noticeable at the management level, both within the prison and at the Regional and National levels. The Rule of Law has to be imported and integrated, at those levels, from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously.
>
> …
>
> This dual characteristic of the role of legal norms in a penal institution was amply demonstrated throughout this inquiry. On the one hand, the multiplicity of regulatory sources largely contributed to the applicable law or policy being often unknown, or easily forgotten and ignored. On the other hand, despite this plethora of normative requirements, one sees little evidence of the will to yield pragmatic concerns to the dictates of a legal order. The Rule of Law is absent, although rules are everywhere.
>
> …
>
> The Service would be well advised to resist the impulse to further regulate itself by the issuance of even more administrative directions. Rather, the effort must be made to bring

home to all the participants in the correctional enterprise the need to yield to the external power of Parliament and of the courts, and to join in the legal order that binds the other branches of the criminal justice system.[154]

253. In its response to the jury recommendations CSC sets out what it describes as "significant changes to its policies and practices surrounding the use of administrative segregation" since Ashley Smith's death in 2007. These changes, with some further additions have now been incorporated in a new Commissioners Directive on Administrative Segregation that came into effect on October 13, 2015.

Segregation Practices

....

- An increased level of authority requiring the Deputy Warden to chair the Institutional Segregation Review Board at the 60-day review and subsequent reviews,

…

- That an inmate readmitted to administrative segregation following release for reasons such as court, outside hospital, temporary absence, or transfer, even if it is for a period exceeding 24 hours, and is returned to segregation for the same reason as before, will be considered as a continuation of segregation placement. This ensures that Regional Segregation Reviews are conducted based on the total accumulated days in segregation,

…

- Formalization of the National Long-Term Segregation Review Committee (NLTSRC) which is comprised of senior managers at the regional and national levels, from both operations and mental health.

…

Following an inmate's placement in administrative segregation, a parole officer must meet with the inmate within two working days to explore his or her reintegration options. If the inmate remains in administrative segregation after the required fifth-working day review, the parole officer, in consultation with other case management team members, including the assigned correctional officer or primary worker, must develop a Reintegration Action Plan consistent with the inmate's individual Correctional Plan that will remain focused on measures to help facilitate release from segregation.

…

154 Arbour Report, pp. 99-100

Segregation Review

When an inmate is placed in administrative segregation during regular business hours, with the exception of emergency situations, a consultation will occur with the members of the Case Management Team prior to the placement to ensure that all options other than placement in administrative segregation have been explored and utilized if appropriate. Consultation will normally include the parole officer and health care professionals and may also include the Elder, chaplain, or other relevant staff as necessary.

…

In the event of placement in administrative segregation outside of normal working hours, the Institutional Head will review the placement decision within one working day of the placement to either confirm the placement or order the release of the inmate from administrative segregation.

The Institutional Segregation Review Board will conduct a hearing within five working days of an inmate's placement in administrative segregation, or following any readmission, and again within 30 calendar days of the inmate's admission. Subsequent hearings are held at least once every 30 calendar days from the date of the previous 30-day review.

Within the first 25 days of an inmate's initial placement in administrative segregation and at least once every 60 days thereafter - or before if necessary, a psychologist will provide a written psychological assessment of the inmate's current mental health status, with a special emphasis on the risk for self-injury. This is shared with the Institutional Segregation Review Board to assist with the decision-making process. Copies are also provided to the inmate and placed on file.

Prior to any Institutional Segregation Review Board, the parole officer will consult with the health care professionals assigned to the case to obtain information on any health issues that may impact the inmate's segregation status, and how any health needs can be accommodated. This information will be provided to the Segregation Review Board to be considered and documented in their recommendation concerning release from administrative segregation.

A Regional Segregation Oversight Manager (RSOM) is also designated by the Deputy Commissioner in each region. The RSOM acts as a third party to provide objective oversight and monitor for compliance with segregation policies. RSOM's conduct a review of each segregation case at least once within the first 60 days of admission to ensure that all policy requirements are met and to determine if placement in administrative segregation is still justified. Each inmate is provided with a written record of this review within five working days.

A Regional Segregation Review Board (RSRB) is held to review the case of every inmate who has reached 120 days in administrative segregation. The Board will also review any case specifically referred by the RSOM to determine if continued segregation is required.

The region's Assistant Deputy Commissioner of Correctional Operations chairs the RSRB and can direct the Institutional Head to take recommended action to resolve an inmate's segregation status. If required, the RSRB will hold another review at least once every 60 days after the 120-day review. The timeframe between the initial 60-day review, the 120-day review and every subsequent review will not exceed 60 days.

CSC's National Headquarters (NHQ) reviews the results of annual regional administrative segregation audits and analyzes overall trends. Regional action plans are monitored and followed up by RSOM's. Further, Segregation is an activity in the Compliance and Operational Risk Report (CORR) process whereby self-audits are conducted by all sites and results reported to EXCOM.

As part of CSC's National Population Management Strategy, the National Long-Term Segregation Review Committee (NLTSRC) was established in 2009 to provide advice on resolutions to long-term segregation cases. The NLTSRC is chaired by a senior executive from the Correctional Operations and Programs Sector and meets at a minimum on a quarterly basis to review the case status and release planning of inmates who have been segregated for 180 days and more, as well as offenders with significant mental health needs that have been in segregation for 120 days and more. The focus is on developing alternatives and strategies to reduce the number of long-term segregation cases by facilitating release from administrative segregation at the earliest appropriate time.

Key Segregation Initiatives

An Independent External Review Board on the Operational Examination of Long-Term Segregation and Segregation Placement of Inmates with Mental Health Concerns was convened in 2010 and made several recommendations on how CSC could improve its management of administrative segregation. CSC has since undertaken an initiative to identify newly admitted offenders who may be at risk of becoming segregated early in their sentence. A screening tool called the Risk of Administrative Segregation Tool is in the final stages of being developed by the Research Branch. The tool could assist in identifying offenders who would be the most likely to benefit from efforts to divert them from being placed in segregation.

In addition, a Segregation Intervention Strategy was implemented by CSC in 2011 at several men's institutions to encourage and support segregated inmates to change problematic behaviour so they can safely return to the institutional population. A research project is being conducted to determine the effectiveness of the strategy and to assess the potential benefits of expanding it to other sites.

Furthermore, CSC is developing a Segregation Renewal Strategy in order to reduce the number and length of segregation placements, prevent unwarranted admissions, and to motivate offenders for release from segregation when risk can no longer be substantiated. This strategy is intended to reframe the thinking about how segregation is used in CSC and strengthen oversight and decision-making. The goal of the strategy is to reduce the

reliance on segregation by creating better options and finding more innovative alternatives for safe reintegration. Research is being planned to complement the strategy and further investigate areas of concern such as the effects of long-term segregation.

Notwithstanding the above, given the ongoing importance of this issue, CSC will further consult with external experts and other jurisdictions internationally, to develop options that will be presented to the Minister of Public Safety and Emergency Preparedness by June 2015.[155]

The Correctional Investigators 2014-15 Annual Report

254. The Correctional Investigator in his latest 2014-15 Annual Report has both commented critically on the adequacy of CSC's response to the Ashley Smith Inquest recommendations and also provided his assessment of the issues and challenges facing CSC in its management of administrative segregation together with his recommendations for reform.

CSC's Response to the Ashley Smith Inquest

CSC's long-awaited response to the inquest into the death of Ashley Smith was finally released on December 11, 2014, nearly one year after the verdict and 104 recommendations were delivered by the Ontario Coroner,[156] and fully seven years after Ashley died in a segregation cell at Grand Valley Institution for Women in October 2007.[157]

The response itself, both in form and content, is frustrating and disappointing. Organized thematically around five 'pillars' previously announced by the Minister of Public Safety in an interim response **(**Mental Health Action Plan for Federal Offenders) in May 2014, the response fails to specifically address individual jury recommendations. This approach makes it difficult to know which recommendations are endorsed and supported versus those that have been rejected, ignored or supported only in part.

CSC claims that a thematic response was called for given that the jury's 104 recommendations covered a wide spectrum of issues. Though it refers to its response as meaningful, comprehensive and encompassing, this is not a widely held view. Public and stakeholder commentary both on the day of release and since has not been favourable.

On many fronts, the response simply misses the mark. It is largely retrospective and backward-looking covering familiar territory rather than committing to a more reform-minded correctional agenda. It fails to support core preventive, oversight and accountability recommendations issued by the jury.[158]

---

[155] *CSC Response to Smith Inquest*
[156] http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx%20-%20fn16
[157] http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx%20-%20fn17
[158] Annual Report of the Correctional Investigator 2014-15, pp. 15-16 http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx

255. The 2014-15 Annual Report devotes a section to the issue of Administrative Segregation:

> For more than 20 years, the Office has extensively documented the fact that administrative segregation is overused. With an average daily inmate population of just over 14,500 the CSC made 8,300 placements in administrative segregation in 2014-15. On April 1, 2014, there were 749 offenders in administrative segregation. There is no escaping the fact that administrative segregation has become the most commonly used population management tool to address tensions and conflicts in federal correctional facilities. During the reporting period, 27% of the inmate population experienced at least one placement in administrative segregation. It is so overused that nearly half (48%) of the current inmate population has experienced segregation at least once during their present sentence.
>
> Administrative segregation is also commonly used to manage mentally ill offenders, self-injurious offenders and those at risk of suicide. Inmates in administrative segregation are twice more likely to have a history of self-injury and attempted suicide, and 31% more likely to have a mental health issue. 68% of inmates at the Regional Treatment Centres (designated psychiatric hospitals) have a history of administrative segregation, further evidence that the CSC uses segregation to manage behaviours associated with mental illness.
>
> The over-reliance on segregation is not uniform; certain incarcerated groups are more affected than others, including federally sentenced women with mental health issues, Aboriginal and Black inmates. Aboriginal inmates continue to have the longest average stay in segregation compared to any other group.[159]
>
> In the last ten years, the Office has made 31 separate recommendations to strengthen the administrative segregation governance and accountability framework including:
>
> - Independent adjudication of administrative segregation placements
> - Enhanced due process
> - Prohibit segregation for those who are seriously mentally ill, self-injurious or suicidal
> - Disallow indefinite segregation
> - Create alternatives (intermediate mental health care units) to segregation to meet least restrictive criteria
> - Prohibit double-bunking (placing of two inmates in a cell designed for one) in administrative segregation
> - Develop alternatives to reduce use of segregation for younger offenders.

[159] Annual Report of the Correctional Investigator 2014-15, p. 26

- Eliminate points of suspension in segregation cells.

Over the years, CSC has accepted a few recommendations regarding staff training and it has made minor administrative policy changes to the segregation framework. It is now moving forward with the creation of intermediate mental health care capacity, which may provide some much-need alternatives to administrative segregation for inmates with mental health issues. However, CSC has consistently and repeatedly rejected any call to strengthen oversight and accountability deficiencies.

Most recently, in its December 2014 response to the Ashley Smith inquest, the Service stated that it could not fully support several aspects of the jury's ten recommendations that would place restraints on its use of segregation and seclusion "without causing undue risk to the safe management of the federal correctional system." Although it accepted that administrative segregation is "generally not conducive to healthy living," CSC specifically rejected core jury recommendations calling for:

1. Abolishment of indefinite solitary confinement.

2. Prohibition on placements in conditions of long-term segregation, clinical seclusion, isolation or observation.

3. Restriction on the use of segregation and seclusion to 15 consecutive days, in accordance with international standards.

4. Prohibition on segregation for more than 60 days per year.

In its response, CSC noted that it is currently engaged in a "Segregation Renewal Strategy" that will ostensibly reduce the length and number of segregation placements, prevent unwarranted admissions and motivate offenders for release from segregation when risk can no longer be substantiated. According to the Service, "this strategy is intended to reframe the thinking about how segregation is used in CSC and strengthen oversight and decision-making. The goal of the strategy is to reduce the reliance on segregation by creating better options and finding more innovative alternatives for safe reintegration." To this end, as the Service indicated in its response to the Ashley Smith inquest, the Minister intends to propose a number of regulatory amendments dealing with administrative segregation that relate to offenders with mental health disorders. CSC has committed to amend its policy framework to reflect the intent of these regulatory changes during the first quarter of 2015. I encourage the Service and Minister to make this work a priority.[160]

256. The Correctional Investigator addressed what he characterized as "one of the most disturbing elements in the evolving administrative segregation framework."

> [It] is used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system. For the reporting period, there were

[160] Annual Report of the Correctional Investigator 2014-15, p. 29

> only 209 placements in disciplinary segregation (or 2.5% of the total segregation placements) compared to 8,309 placements in administrative segregation. The disparity in procedural safeguards between administrative and disciplinary segregation helps explain the discrepancy. Disciplinary segregation has significant procedural safeguards, including sharing information with offenders, holding hearings before an external Independent Chair Person (ICP) and meeting a higher burden of proof ("beyond reasonable doubt"). Although there are procedural safeguards for administrative segregation, these are internally administered by the CSC. Disciplinary segregation also has an upper maximum limit of 30 days whereas administrative segregation does not. In fact, the average length of stay in administrative segregation is more than twice that of disciplinary segregation.
>
> The *CCRA* stipulates that CSC must rely upon the disciplinary process to address minor and serious disciplinary infractions. However, it appears that circumventing the disciplinary process to isolate, contain, separate, control, manage or even punish has become common. It is easier to deal with tensions and conflicts by placing an offender in administrative segregation than to lay formal disciplinary charges and face the prospect of a hearing before an external ICP.[161]

257. Confirming what my own research and other reports have documented, the Correctional Investigator highlights the illusory difference between administrative and punitive segregation and voluntary and involuntary segregation:

> There is also little doubt that administrative segregation is viewed by those who suffer from mental illness as punitive. In September 2013, the Office released an investigative report that looked at federally-sentenced women who chronically self-injured in prison (Risky Business). The women reported to the Office that they saw no difference between administrative segregation, disciplinary segregation, suicide watch or clinical isolation or seclusion. They perceived these placements, regardless of their name or purpose, as punishment for their self-injurious behaviour. Further, as the Office's prison suicide investigation noted, segregation was found to be an independent factor that elevated the risk of suicide.
>
> The legal distinction between voluntary and involuntary administrative segregation is largely illusory and increasingly unhelpful. There is nothing "voluntary" about voluntary segregation – many inmates who seek refuge in administrative segregation do so because they fear for their personal safety. Most inmates who voluntarily request administrative segregation would return to the general inmate population if the risk to their physical integrity was removed and their safety assured by the CSC.[162]

258. Summarizing the consistent findings of his Office and based upon the collective experience of its investigations, the 2014-15 Annual Report concludes:

---

[161] Annual Report of the Correctional Investigator 2014-15, pp. 30-31
[162] Annual Report of the Correctional Investigator 2014-15, p. 31

> Segregation is the most onerous and depriving experience that the state can legally administer in Canada; it is only fitting that safeguards should match the degree of deprivation. The system desperately requires reform not "renewal." As Canada's prison Ombudsman, I will continue to advocate for significant, meaningful and lasting reforms to the administrative segregation operational and legal framework.
>
> 9. I recommend that the Government of Canada amend the *Corrections and Conditional Release Act* to significantly limit the use of administrative segregation, prohibit its use for inmates who are mentally ill and for younger offenders (up to 21 years of age), impose a ceiling of no more than 30 continuous days, and introduce judicial oversight or independent adjudication for any subsequent stay in segregation beyond the initial 30 day placement. (emphasis in original)

259. The 2014-15 Annual Report was completed prior to the introduction of the new Commissioner's Directive on Administrative Segregation although clearly Mr. Sapers, on the basis of CSC's renewal agenda, was concerned that it would not address the systemic flaws that his Office and others had identified.

The New Commissioner's Directive ("CD") 709, October 2015

260. The New Commissioner's Directive on Administrative Segregation together with a set of administrative segregation guidelines came into effect on October 13, 2015.[163] My assessment of these most recent changes in policy and practice is informed by my experience of official announcements of Canadian correctional authorities in which new initiatives, on careful analysis, prove to be recycled reform attempts that previously have been inadequate to effect substantive change. Such is the case with CSC's latest initiatives. The "key initiatives" in relation to increased level of authority to chair the Institutional Segregation Review Board, a Regional Segregation Oversight Manager, a Regional Segregation Review Board to review the case of every inmate who has reached 60 days in administrative segregation, a National Long-Term Segregation Review Committee to provide advice on resolutions to long-term segregation cases, can be traced back to recommendations of the 1997 Task Force in Segregation and in one form or another have been previously tried as policy mechanisms to reduce the use of segregation.

261. Of greater significance than the recycling of past recommendations, these "new" initiatives, in the context of the Task Force on Segregation's analysis, are examples of enhancing CSC's own internal administrative tools. As such they are useful and important. What they do not address, with one exception with which I will shortly deal, is the second pillar of a reform agenda that includes external independent adjudication and oversight. Nor do they address the third pillar of substantive reform that would place limitations on the amount of time a prisoner can spend in segregation, a feature that dates back to my Model Segregation Code, the Arbour Report and has most recently emerged as a cornerstone of the international literature and the new Mandela Standard Minimum Rules.

---

[163] Commissioner's Directive 709 2015/10/13 http://www.csc-scc.gc.ca/acts-and-regulations/709-cd-eng.shtml. The Administrative Segregation Guidelines were reissued with only minor changes in May 2016.

262. The one area where an element of external review has been introduced in the new Commissioner's Directive is with respect to "offenders with mental health disorders who have been designated as acute or high need intermediate care cases." That the new Commissioner's Directive would have a particular focus on offenders with mental health disorders is understandable given that the pressure and momentum for change has come from the tragedies involving these offenders, and were the subject of the jury recommendations in Ashley Smith's case. The reasons for and the nature of the changes are set out in the Federal Government's 2014 response document:

> For an inmate with a mental health issue, the implications of placement in administrative segregation, and the considerations surrounding his or her release from segregation, add a further and important dimension to the case.
>
> For this reason, and with due regard to the Jury recommendations, the Minister of Public Safety and Emergency Preparedness intends to propose a number of amendments to the section of the CCRR dealing with Administrative Segregation that relate specifically to offenders with mental health disorders who have been designated as acute or high need intermediate care cases. These include:
>
> - the addition of a mental health professional as a permanent member of the Institutional Segregation Review Board;
> - that offenders with mental health disorders who have been designated as acute or high need intermediate care cases can engage an advocate to assist them with the institutional segregation review process;
> - the obligation for an added executive regional review of all cases of inmates with mental health disorders who have been designated as acute or high need intermediate care cases for the purpose of identifying any practical alternatives to administrative segregation; and,
> - adding a new step in the segregation review process to provide for an external review of all cases of an offender with mental health disorders who have been designated as acute or high need intermediate care cases. This step will assess management plans and strategies to help minimize time spent in administrative segregation.
>
> CSC will be proceeding to amend the Commissioner's Directives to reflect the intent of these regulatory amendments during the first quarter of 2015.[164]

263. As I earlier mentioned the new CD came into effect in October 2015.[165] It builds upon the Response document and supplements it in important ways. It requires that the five-day segregation review be chaired by the deputy warden and that the 30 day and subsequent reviews

---

[164] *CSC Response to Smith Inquest*

[165] Correctional Service Canada Commissioner's Directive Number 709, in effect as of October 13, 2015 ("CD 709"), http://www.csc-scc.gc.ca/politiques-et-lois/709-cd-eng.shtml

be chaired by the warden. The directive does however allow for a delegation of the warden's authority to the deputy warden with the approval of the regional deputy commissioner and it remains to be seen whether this delegation becomes the standard way of proceeding.[166] A regional project officer responsible for segregation is required to conduct a review at least once within the first 45 days from the date of admission to administrative segregation to ensure that all policy requirements are met, to determine whether admission in segregation continues to be justified, and whether options exist intra or inter-regionally to resolve the segregation status; a regional segregation review board must review the case of every inmate who has reached 60 days and every 30 days thereafter; and there is also enhanced National Headquarters oversight with the chair of the National Long-Term Segregation Review Committee lying with the Director General, Security, and the Assistant Deputy Commissioner, Correctional Operations, or Assistant Deputy Commissioner, Integrated Services, reviewing cases where an offender has spent over 60 days in segregation.

264. As was promised there are now more detailed requirements with a particular focus on offenders with mental health problems.

> 7. Before an inmate is admitted to administrative segregation, a consultation will normally occur with the members of the Case Management Team to ensure that the admission is justified and that all alternative options have been considered. Consultation will minimally include the Parole Officer and health care professionals and may also include the Elder, Chaplain, or other relevant staff as necessary.
>
> ...
>
> 9. During the health care consultation, and normally prior to the admission into administrative segregation, the case will be reviewed to determine whether referral to mental health services (acute psychiatric hospital care, intermediate mental health care, or primary care) is appropriate.…
>
> 12. Without delay, upon admission to administrative segregation, an inmate will be:
>
> …
>
> f. informed of the right to engage an advocate to assist with the institutional segregation review process in the case of inmates with acute or high (elevated/substantial) level of mental health needs.
>
> ...
>
> 22. Prior to the fifth-working-day review, a mental health professional, or other mental health staff under the supervision of a mental health professional, will provide written comments concerning any mental health issues that may impact the inmate's segregation status and how his/her mental health needs can be accommodated. If mental

[166] This is likely as the responsibilities of wardens requires that they spend a significant part of the time away from their home institution attending regional and national meetings.

> health issues are identified, this comment will include consideration of mental health services, including whether a referral to acute psychiatric hospital care or intermediate mental health care is an appropriate alternative to segregation.
>
> ...
>
> 25. Prior to all Institutional Segregation Review Boards, the Parole Officer will consult with health care professionals to obtain information on any health issues that may impact the inmate's segregation status and how his/her health needs can be accommodated. The outcome of the consultation will be considered and documented in the Institutional Segregation Review Board recommendation.
>
> 26. A mental health professional must be present as a permanent member of the Institutional Segregation Review Boards.
>
> ...
>
> 39. The Institutional Head must consider the inmate's state of mental and physical health and health care needs when making segregation decisions. These considerations are to be documented in all decisions and a plan must be developed to address health care needs.
>
> 40. When an inmate has been identified as having an acute or high (elevated/substantial) level of mental health need, the chair of the Institutional Segregation Review Board will request, within one working day of the hearing, a review by the Regional Complex Mental Health Committee to assist in identifying any practical alternatives to administrative segregation.
>
> 41. When the Institutional Segregation Review Board has determined that a review by the Regional Complex Mental Health Committee is required, as above, it will be conducted within 30 days of the request.
>
> 42. In cases where the Institutional Segregation Review Board is still unable to identify alternatives to administrative segregation for cases reviewed by the Regional Complex Mental Health Committee, an expert determined by the Regional Complex Mental Health Committee will conduct an external review and make recommendations to the Institutional Head for management strategies to minimize time spent in administrative segregation.[167] (emphasis added)

265. It is in this last underlined section that the only reference to any requirement for external review appears. It is clearly designed to be an exceptional vehicle for responding to offenders with acute or high mental-health needs where the institutional resources for finding "management strategies to minimize time spent in segregation" have been exhausted. The recognition of the very limited role of external review in the new CD is further attenuated by

[167] Commissioner's Direction No. 709, Administrative Segregation, in effect 2015-10-13

limiting the external expert review mandate to one of making recommendations and providing that CSC's own mental health committee will determine who the expert should be.

266. This conception of a limited scope for external review is consistent with CSC's long-held position that external review only has value where it demonstrably assists its management strategies. In the new CD the Correctional Service of Canada holds steadfast to its position that its own internal correctional expertise can fulfill the requirements of segregation. What is missing again is any acceptance of and integration of a system of external review as a necessary element of reform to both ensure compliance with the procedural and substantive legal provisions of the *CCRA*, the *CCRA* Regulations and Commissioner's Directives, and to ensure a fair balancing of the rights and interests of offenders and the exigencies of institutional administration.

267. An integral part of the new CD are Administrative Segregation Guidelines, which has four annexes. Annex A to the Guidelines contains a "Segregation Assessment Tool" that requires a correctional staff member to answer sequentially questions relating to the legal requirements for admission to segregation and a procedural safeguards checklist for both admission and review. Completion of the Segregation Assessment Tool is clearly intended to be a significant procedural and substantive prerequisite in the admission and review process. Some of the language used in the Segregation Assessment Tool to describe the seriousness of the prisoner's behaviour or the nature of the threat to personal safety or institutional security that can justify segregation under s. 31(3) seems to be derived from my Model Segregation Code. I have therefore carefully considered whether the new Administrative Segregation Guidelines, together with other elements of the new CD represent, albeit in a policy framework rather than legal amendments to the *CCRA* and *CCRA* Regulations, a referential incorporation of those provisions of the Model Code that were drafted to address the open ended and ill-defined nature of the criteria for segregation. To better understand the comparison I have set out some of the questions that have to be answered in the Segregation Assessment Tool.

268. Dr. Rivera in her report had suggested that "[c]reating a more complex process for admission to segregation might be an effective part of developing new policy that results in the placing of fewer inmates in segregation."[168] If this is in fact CSC's agenda they certainly have succeeded in creating a layer of complexity for staff members navigating this assessment tool.

[168] Rivera Report, p. 69

Section 1: Reason for Admission		
2. What is the reason for the administrative segregation admission to be assessed?	31.3(a)	Question 3 becomes "Has the inmate acted or does the inmate intend to act in a manner that jeopardizes the security of the institution and/or the safety of other individuals?"
	31.3 *(b)*	Question 3 becomes "Will allowing the inmate to associate with other inmates interfere with an investigation that could lead to a criminal charge or a charge under subsection 41 (2) of a serious disciplinary offence?"
	31.3(c)	Question 3 becomes "Will allowing the inmate to associate with other inmates jeopardize the inmate's own safety?"
3. Has the inmate acted or does the inmate intend to act in a manner that jeopardizes the security of the institution and/or the safety of other individuals? OR Will allowing the inmate to associate with other inmates interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence? OR Will allowing the inmate to associate with other inmates jeopardize the inmate's own safety?	Yes	If response to question 2 was 31.3(a), question 4 becomes "Has the inmate acted or does he/she intend to act in this manner?" If response to question 2 was 31.3(b), the user goes directly to Section 2 ("Establishing the Facts"). Questions 11-13 in Section 3 ("Risk Assessment") become optional. If response to question 2 was 31.3(c), question 5 becomes "If the inmate has requested admission in segregation, has explicit information been provided regarding the nature of the threat?"
	No	Tool Result becomes "Segregation not Recommended".
4. Has the inmate acted or does he/she intend to act in this manner? (only applicable if user selects *CCRA* 31(3)(a) as reason for admission)	The inmate has acted in this manner.	The outcome does not depend on the response selected for this question; however, a response is mandatory if the reason for admission is 31.3(a).
	The inmate intends to act in this manner.	
5. If the inmate has requested admission in segregation, has explicit information been provided regarding the nature of the threat? (only applicable if user selects *CCRA* 31(3)(c) as reason for admission)	Yes	User continues to question 8
	No	Tool Result becomes "Segregation not Recommended".

6. Select the specific behaviour demonstrating that the inmate has acted or inmate intends to act in a manner that jeopardizes the security of the institution and/or the safety of other individuals. (only applicable if user selects *CCRA* 31(3)(a) as reason for admission)	Credible threats	If one of these options is selected, the user continues to the "Establishing the Facts" section.
	Inciting a riot/ disturbance	
	Safety risk to others	
	Physical fight	
	Contraband seizure	
	Safety risk to himself/ herself	Tool Result becomes "Segregation not Recommended". Question 7 becomes mandatory (the behaviour must be specified and described).
	Other	
	Free text field	Mandatory to comment. If no text is entered, Tool Result becomes "Segregation not Recommended".

269. The first major difference between how s. 31(3) of the *CCRA* is incorporated into the Assessment Tool and the substantive limits imposed by the Model Code is the justificatory standard. The Model Code requires that correctional officers provide compelling justifications for their perception that a prisoner's actions, attempts or intentions jeopardize safety and security. Such a standard is embedded in the Code's reference to notions of reasonable and probable grounds, substantial likelihood and proof beyond a reasonable doubt. But s. 1 of the Tool is devoid of such justificatory standards. The next section of the assessment tool is a fact finding inquiry.

Section 2: Establishing the Facts		
8. Was the behaviour witnessed by staff?	Yes	User continues to the "Risk Assessment" section and the tool instructs the user to document these facts in a Statement/Observation Report.
	No	At least one of the responses to the questions in the "Establishing the Facts" section (questions 8, 9 and 10) must be YES or the tool result will become "Segregation not Recommended".
9. Was the behaviour reported by multiple sources?	Yes	User continues to the "Risk Assessment" section and the tool instructs the user to document these facts in a Statement/Observation Report.
	No	At least one of the responses to the questions in the "Establishing the Facts" section (questions 8, 9 and 10) must be YES or the tool result will become "Segregation not Recommended".

10. Was the behaviour brought forward to staff by source(s) believed to be reliable?	Yes	User continues to the "Risk Assessment" section and the tool instructs the user to document these facts in a Statement/Observation Report.
	No	At least one of the responses to the questions in the "Establishing the Facts" section (questions 8, 9 and 10) must be YES or the tool result will become "Segregation not Recommended".

270. This section does ask correctional officers to consider the strength of the evidence against a prisoner and the reliability of that evidence. Yet, unlike the Model Code, it does not specify standards for the reliability of evidence. The major concern is that the section may be satisfied by answering "yes" to only one of the three questions posed. If question 8 is answered in the affirmative, then the user moves directly to the Risk Assessment section without having considered other (potentially conflicting) sources of evidence. This structure might promote and perpetuate the customary bias favouring staff evidence and discounting the prisoner's evidence.

271. A third component of the new tool is Risk Assessment.

Section 3: Risk Assessment		
11. Severity of the threat that "will actualize if the inmate is not segregated?	High	Question 12 becomes "Does the threat that may actualize if the inmate is not admitted to segregation include serious bodily injury, incitement of others to compromise the safety/security of the institution, or major destruction of property?"
	Moderate	Question 12 becomes "Does the threat that may actualize if the inmate is not admitted to segregation include non-serious bodily injury or minor destruction of property?"
	Low	Tool Result becomes "Segregation not Recommended".
12. Does the threat that may actualize if the inmate is not admitted to segregation include serious bodily injury, incitement of others to compromise the safety/security of the institution, or major destruction of property? OR Does the threat that may actualize if the inmate is not admitted to segregation include non-serious bodily	Yes	User continues to question 14.
	No	Question 13 becomes "Review severity rating or comment on why the severity is high or moderate".
13. Review severity rating or comment on why the severity is high or moderate.	Free text field	Mandatory to comment. If no text is entered, Tool Result becomes "Segregation not Recommended".
14. What is the likelihood that the threat will actualize if the inmate is not segregated?	High	User continues to question 15.
	Moderate	User continues to question 15.
	Low	Tool Result becomes "Segregation not Recommended".

15. Is the behaviour ongoing?	Yes	User continues to question 18.
	No	At least one of the responses to question 15, 16 or 17 (substantiating the rating of high or moderate level of likelihood) must be YES or the tool will instruct the user to review the level of likelihood and consider setting it to LOW.
16. Is the inmate threatening more or similar behaviour?	Yes	User continues to question 18.
	No	At least one of the responses to question 15, 16 or 17 (substantiating the rating of high or moderate level of likelihood) must be YES or the tool will instruct the user to review the level of likelihood and consider setting it to LOW.
17. Is there reliable information that indicates the intention and imminence of similar behaviour in the future?	Yes	User continues to question 18.
	No	At least one of the responses to question 15, 16 or 17 (substantiating the rating of high or moderate level of likelihood) must be YES or the tool will instruct the user to review the level of likelihood and consider setting it to LOW.
18. Will the continued placement outside of segregation compromise the security of the institution, the safety of another person and/or an investigation?	Yes	User continues to question 19
	No	Tool Result becomes "Segregation not Recommended".
19. Is an admission to administrative segregation the only option to contain the behaviour in question?	Yes	User continues to question 20.
	No	Tool Result becomes "Segregation not Recommended".

272. This important section also suffers from a lack of justificatory standards. Three risk levels are available: high, moderate and low. A user need not justify the proposed ranking nor provide evidence in support of that ranking. Question 12 does press the user to consider the immediacy and seriousness of the risk, which accords with standards employed in the Model Code. But, again, no justification or details need be provided for the classification.

273. There is a final troubling issue. The tool is intended to be used both before admission to segregation and before mandated segregation reviews. However if the Tool is being used to review segregation, then sections 1 (Reason for Admission) and 2 (Establishing the Facts) become optional rather than mandatory. The analysis moves directly to section 3 – Risk Assessment. Bypassing sections 1-2 is problematic because later sections do not explicitly revisit the statutory grounds for initial admission. Thus the Risk Assessment analysis is conducted without the statutory grounds firmly in mind. But initial and extended segregation must ultimately be grounded in s. 31(3) of the *CCRA*, which is referenced only in section 1 of the Tool. This is made explicit in the Model Code.

274. The completion of the Segregation Assessment Tool while a necessary prerequisite to admission and segregation review is the first step in the process. Under the CD the completed document must then be shared with the prisoner and considered by the segregation review board

along with any submissions of the prisoner and it is that board that makes recommendations to the warden who under the *CCRA* has the final decision-making authority.

275. Annex C contains these instructions on "How to Run an Institutional Segregation Review Board":

> At the start of the hearing, the Chairperson will introduce, by name and title, the members in attendance at the ISRB to the inmate. The Chairperson will ensure that all in attendance at the hearing are aware that they may ask questions and make inquiries in order to elicit information.
>
> The purpose of the review should be explained to the inmate. A statement describing the purpose of the ISRB could be read out loud to all the participants to accomplish this.
>
> > "My name is (*name here*). I am the Chairperson of the Segregation Review Board today. Present are the following staff members who will have an opportunity to ask questions of you and vice versa (*introductions*). You will also have an opportunity to make a verbal presentation to the Board prior to deliberations. Note the Institutional Segregation Review Board makes a recommendation regarding your release or maintenance in segregation while decision-making authority rests with the Institutional Head. You will receive written notification of the Institutional Head's decision within two working days of this Institutional Segregation Review Board hearing."
> >
> > "The purpose of the Institutional Segregation Review Board is to examine the reasons/circumstances justifying your admission in administrative segregation under the authority of the *Corrections and Conditional Release Act* and to determine whether or not alternatives to your continued admission exist which would see you released from segregation. The Institutional Segregation Review Board will discuss and obtain your input on the likely Reintegration Action Plan for resolving your segregation status in the timeliest fashion possible. To date, you have accumulated *X* number of days in segregation. Do you understand what I have said or have any questions before we begin?"
>
> The Board should conduct the hearing in a predetermined and orderly manner. The procedure to be followed should be clearly described so that all participants will know when they will have a chance to speak or make representations. The Chairperson should have the hearing recorded on audio recorder if requested by the inmate.
>
> The strict rules of procedure and evidence that apply to a court of law do not apply to ISRB hearings, although there is a duty on the part of Board members to adhere to the principles of fairness. The Chairperson and the decision maker must act in good faith, without ulterior purpose, improper motives or irrelevant considerations.[169]

[169] CD 709, Annex C

276. This boilerplate language mirrors the instructions that were part of the Administrative Segregation Handbook that was circulated after the Task Force on Segregation.

277. Annex C also identifies the issues to be considered at the segregation review and further articulates its function:

> **ISSUES TO BE CONSIDERED**
>
> The Chairperson should provide a verbal synopsis as to when and why the inmate was admitted in administrative segregation. Indicate the number of days that the inmate has been in administrative segregation to this review date. Specify under what status the inmate is segregated [i.e. (date) under what section of the CCRA]. Indicate if there has been any change in that status and if so, why there was a change.
>
> The ISRB will discuss the incident and possible link with inmate factors, including Aboriginal social history, mental or physical health. When possible, systemic or individual adjustments should be sought as an alternative to segregation to manage the risk. The Board must ensure that the information and evidence being considered is relevant, timely and adequate. The information must be credible and reliable.
>
> ISRB members will discuss the reasons for admission and continued status of the inmate in administrative segregation. They will discuss whether there are any viable alternatives for the inmate. For Aboriginal inmates, culturally appropriate alternatives and restorative options will be considered. The Board will discuss the inmate's Reintegration Action Plan and progress towards this plan. There must be a documented, clearly defined, time framed plan of action being taken by the Case Management Team to transfer the inmate out of administrative segregation.
>
> The Board should also discuss any specific security issues with the inmate. This may be related to institutional behaviour or disciplinary offences. Any special needs regarding operational routine, requirements or association with other inmates should also be discussed.
>
> The inmate should be given the opportunity to ask any relevant questions to the Chairperson, or through the Chairperson, to other participants. ISRB members may address questions to the inmate or other participants. Other staff members, Board members or persons with relevant information may be asked to make representations. If the inmate is absent from the hearing, and has submitted written representation, this information must be considered by the ISRB.
>
> When all representations have been made, the inmate is given the opportunity to present his/her case and to provide evidence to the extent allowed by the Chairperson. Board members may ask questions.
>
> The inmate may be given the opportunity to call witnesses if he/she requests to do so and the Chairperson agrees that it is reasonable and necessary in order to resolve a disputed

fact or opinion in a fair manner. Board members may ask questions to these witnesses. An advocate may assume this role on behalf of the inmate.

Final submissions by the inmates should be permitted, as well as submissions by any other person who has a right to participate in the hearing, including an advocate.

…

RECOMMENDATION

…

The function of the Board is to determine whether there are sufficient grounds to justify the inmate's admission and retention in administrative segregation (subsection 31(3) of the CCRA) and whether at the time of the review the inmate still needs to be confined in administrative segregation. Recommendations to the Institutional Head must be based on the considerations set out in section 31 of the CCRA.

In arriving at its recommendation, the Board should consider the relevant facts of the case, the result provided by the Segregation Assessment Tool, as well as any statutory, regulatory and policy considerations related to the inmate's admission in administrative segregation. The recommendation will fully consider the relevant individual static and dynamic factors of the inmate raised during the Case Management Team consultation, including mental and physical needs and Aboriginal social history. The recommendation to the Institutional Head should articulate the reasons for the recommendation.

The quality of the decision-making process is enhanced by giving detailed reasons that provide a basis for future decision making and reviews. The reasons for the recommendation must be clear, organized and provide justification that supports the recommendation.

The recommendation is usually given to the inmate verbally, after a short period of deliberation by the ISRB. Written notification of the Institutional Head's decision resulting from each review must be given to the inmate within two working days of the hearing.[170]

278. CD 709 defines the role of the Institutional Head upon receipt of the recommendations of the segregation review board.

15. The Institutional Head will ensure that the rationale provided in decision reports to admit an inmate to segregation:

    a. clearly details the evidence being relied upon and includes an explanation of why that evidence is credible and persuasive

[170] CD 709, Annex C

b. fully considers and addresses the inmate's responding submissions

c. is written in a manner that is justified (focusing on relevant factors and evidence) and transparent (clearly stating the basis for the decision reached), and in plain language (the result clearly derives from the reasons provided).

279. Annex D under the heading "Total Accumulated Days in Segregation – Continuous Status" addresses the practice revealed in both the Ashley Smith and Edward Snowshoe inquests where a prisoner in segregation in one institution who is transferred to another institution and again placed in segregation has the segregation review clock for segregation reviews reset to zero. The Annex specifies the situations in which the purposes of segregation reviews this will be seen as a continuation of segregation status.[171]

280. From these extracts it is clear that the new Commissioner's Directive, read together with the Administrative Segregation Guidelines, are intended to be a self-sufficient administrative code. It is also clear to me that correctional service officials have given a great deal of thought and time in the development of this code. The problem with the CSC code is that the issues I have identified in the Assessment Tool and how far it departs from the Model Segregation Code run through to the subsequent stages involving the Segregation Review Board and the Warden, specifically the low threshold of the justificatory standard and its lack of specificity. But the overarching and fundamental problem is the absence of independent assessment and judgment in the balancing of the competing interests and the weighing of issues of credibility and reliability of information. It is one thing to assert in Annex C that:

> The role of the ISRB Chairperson is critical to the effectiveness and fairness of the administrative segregation process. Chairpersons have the primary responsibility to ensure that basic procedural requirements are continuously being administered in compliance with the law. The Chairperson must demonstrate an ongoing knowledge of the law, policies and procedures to effectively manage the ISRB's responsibility to provide the Institutional Head with a recommendation as to whether or not the inmate should be released or maintained in administrative segregation. They must understand the need to balance the legitimate safety and security requirements of the institution with the need to respect and maintain the rights of segregated inmates.[172] (emphasis added)

281. It is, however, quite another to accomplish this. I have no doubt that wardens and correctional managers, as experienced correctional practitioners, feel confident that they can effectively manage segregation in compliance with the law. Before the introduction of independent chairpersons of disciplinary boards, they had that same confidence in relation to disciplinary hearings. The introduction of independent adjudication to the disciplinary process was not based upon a questioning of professional competence in management of correctional institutions but upon the demonstrable problems arising from inherent biases of correctional

[171] Administrative Segregation Guidelines Annex D. For example "Following a release from segregation for the purpose of transfer, the inmate is admitted to segregation within 24 hours after his/her arrival, regardless of the time spent travelling".
[172] Administrative Segregation Guidelines, Annex C

managers in the adjudication of issues that affect the institutional liberty of prisoners, that make it impossible to ensure either the appearance or the reality of fairness. As I have long maintained, principles of fairness require that the legislative criteria for a decision that affects the institutional liberty of a prisoner and consigns him to "a prison within a prison" be applied free from the pressure of institutional bias, with an objective weighing of the competing interests of prisoners and prison administrators. Principles of fairness had underpinned the introduction of independent adjudication for serious disciplinary offences and are no less compelling in the case of administrative segregation.

282. As have earlier emphasized the role of an independent adjudicator is not to replicate the hard-won knowledge and experience of correctional staff and administrators. An assessment tool along the lines of the one in Annex A to the new CD should remain an important part of the process. The difference with a model of independent adjudication under the Model Segregation Code as recommended by Justice Arbour in 1996 and the Parliamentary Committee in 2000, is that at segregation reviews independent eyes and ears would be evaluating all the relevant information, both that presented by correctional staff and managers and prisoners, assessing its credibility, and making the final decision rather than issuing a recommendation to the Warden.

283. The principal lesson to be drawn from my review of the history of segregation over the last 40 years is that neither fairness nor the necessary balance of interests and rights can be achieved without the importation of a system of independent adjudication. That review has also shown that providing correctional managers with assessment tools and procedural guides for how to conduct a segregation review in non-legally binding policy documents (particularly when it includes boilerplate language) has not translated into changes in operational practice. The best evidence of this is the experience with the 1997 Task Force on Segregation recommendations on enhancing the internal segregation review process. Earlier in this report I summarized those recommendations but it may be helpful to repeat them here:

> The enhanced internal model for segregation review recommended by the Task Force had eight elements, including a legal education initiative, improved procedures for segregation review hearings, the development of better alternatives to segregation, and the establishment of regional Segregation Review Boards. The legal education initiative came both from recommendations in the Arbour Report and from feedback received by the Task Force that correctional staff and managers received insufficient training in administrative law and the principles enshrined in the *Charter of Rights and Freedoms*. In the Task Force's view, and based upon its interviews with Native Brotherhoods across the country, this legal education needed to include training on the distinct constitutional and legal rights of Aboriginal people and, more specifically, on their access to spiritual and cultural possessions and ceremonies and to the spiritual and cultural support provided by Elders and Native Liaison officers. The most critical part of the enhanced segregation model was directed to improving the conduct of segregation review hearings, and the CSC's Legal Services developed a twelve-step procedural guide for these hearings which was appended to the report of the Task Force. The Task Force also recommended that the chairperson of the Segregation Review Board undergo specialized training through a

formal certification program such as those adopted in some jurisdictions in the United States.[173]

284. I also described in some detail how the comprehensive twelve-step procedural guide for conducting segregation Review Board was supplemented by the development of a series of tools, including an administrative segregation checklist, and an administrative segregation handbook. This suite of tools, guidelines and handbooks were as comprehensive than those set out in the Administrative Segregation Guidelines annexed to CD 709. Based on my own observations and research those new tools and guides had little impact on the actual practices of segregation review.

285. It is my opinion that the "new" CSC code in CD 709 will not bring about substantive change in limiting the kinds of behavior and threats that have previously justified segregation nor will it achieve the desired balance the legitimate safety and security requirements of the institution with the need to respect and maintain the rights of segregated inmates.

286. I would also comment that while a number of Dr. Rivera's recommendations are incorporated in the CD and the segregation guidelines they are reflected in a weaker, permissive rather than mandatory form. For example Dr. Rivera recommended that CSC:

> **6. Recommendation:** Make mediation, rather than segregation, the preferred method for coping with individuals who behave aggressively towards others or threaten others. Change the current practice of immediately segregating such individuals, instead making use of correctional staff, operations and interventions managers, Elders, staff psychologists, and any other front-line or management personnel who know the individuals involved to engage in conflict resolution.
>
> **7. Recommendation:** Change Administrative Segregation policy so that no one can be admitted to a segregation cell until an interventions staff member who has a relationship with the offender - for example, a mental health nurse, Elder, or psychologist - can be involved directly in the process. Secure individuals in their cells or another cell temporarily for safety when necessary rather than place an offender on segregation status immediately.[174]

287. These recommendations are translated in the Commissioner's Directive in this form:

> 7. Before an inmate is admitted to administrative segregation, a consultation will normally occur with the members of the Case Management Team to ensure that the admission is justified and that all alternative options have been considered. Consultation will minimally include the Parole Officer and health care professionals and may also include the Elder, Chaplain, or other relevant staff as necessary.

---

[173] *supra*, para. 161, *Justice Behind the Walls 2001*, p. 381, http://justicebehindthewalls.net/book.asp?cid=159
[174] Rivera Report, pp. 77-78

> 8. When an inmate is admitted to administrative segregation outside regular business hours, the consultation with the Case Management Team, including the Elder where feasible, will occur prior to finalizing the first-working-day review.

288. On its face the language of "normally occur", "may also include" and "where feasible" is a weak translation of Dr. Rivera's challenge for change. The CD provisions are permissive rather than mandatory in relation to requiring consultation with individuals outside the case management team who have a relationship with the offender. A failure to comply with this consultation will not preclude admission to segregation under the segregation tool.

289. In forming my opinions as to the realistic expectation that the new CD will bring greater fairness and an objective balancing of institutional and prisoners' interests to the segregation admission and review process I have posed this question: "Are there significant differences in the correctional environment in 2016 from those in the post-Arbour and post-Task Force on Segregation years that would inspire more or less confidence in CSC's ability to reform itself without independent adjudication, without greater specificity in the legal criteria for segregation and without time limits on the duration of segregation?"

290. As I have earlier described in my critique of the 2007 *Roadmap to Strengthening Public Safety*, which has provided the basis for CSC's current Transformation Agenda, over the last decade the contemporary correctional climate has been characterized by a hardening and deepening of the face of imprisonment and a weakening of any commitment to correctional strategies that have the protection of human rights as their centerpiece. The *Roadmap*'s only recommendations in relation to segregation was toughening the conditions in voluntary segregation to make them less attractive. It was in this climate that the tragedies of Ashley Smith and Edward Snowshoe could take place. While the recent change in the federal government has brought with it public ministerial statements of a commitment to the values that underpin human rights and the *Charter*, this does not necessarily result in a change in correctional practice. One of the wardens I interviewed for *Justice behind the Walls 2001* likened the Correctional Service of Canada to a battleship that is not so easily turned around. Using that analogy, this report has shown that even when distress signals are sent up and a change in direction is clearly defined, be it the Arbour Report, the Task Force on Segregation, the reports of the Correctional Investigator and the many other reports, turning around and charting a new route has proved difficult and has met with considerable resistance.[175]

291. In the case of changes to segregation practices this resistance has spanned both Liberal and Conservative federal governments. However, the legislative and policy changes that have been introduced in the criminal justice and correctional systems over the last decade have reinforced the view within the correctional community that the pendulum has swung too far in recognizing the rights of prisoners to the detriment of public safety and the rights of victims. In *A Flawed Compass* I wrote that "[t]here are those who now think that human rights talk is out of

---

[175] "Policy-makers are in little motor torpedo boats or ski-doos, and they can just do pirouettes and figure-8's in three minutes. The Service is like a battleship. It's moving at full steam; to turn it around is going to take a long time." Warden Ken Peterson, Mission Institution, *Justice behind the Walls 2001*, p. 90, http://justicebehindthewalls.net/book.asp?cid=20&pid=317

fashion, as if such discourse was a fad of fetish of liberal-minded people and had no place in a 'get tough on crime and criminals' world."

292. I would not want to leave the impression with the court that the changes in the CD are insignificant and will have no impact on practice. The historical experience shows that in the aftermath of high profile crises where public attention is focused on CSC practices, there are short term improvements. This was the experience in 1997 after the Arbour Report and the Report of the Task Force on Segregation. Prior to the Task Force the numbers of prisoners in segregation in some institutions was at an all-time high. The series of audits conducted by the Task Force, the subsequent improvements in documenting the admission and review process through the Offender Management System and the review of long-term segregation at National Headquarters under the eyes of the Commissioner of Corrections (who left no doubt that he expected change after Arbour), did bring about reductions in the number of prisoners admitted to segregation and the length of time they spent there. In *Justice behind the Walls 2001* I acknowledged and described the extent of this reduction at Kent Institution.[176]

293. The Parliamentary Sub-Committee conducting the five-year review of the *CCRA* in its report in 2000 also commented on the reduction in the numbers of prisons in long-term segregation in the period following the Task Force on Segregation Report:

> 5.19 Since 1997, the Correctional Service has undertaken a national initiative to control the growth of administrative segregation and reduce it by the safe and secure reintegration of long-term administratively segregated inmates into the general prison population. In the summer of 1997, there were 163 inmates who had been administratively segregated for more than 120 days. By June 1998, this had been reduced to 98 inmates. As of May 31, 1999, this population was 144, and more recent data indicated it was in the vicinity of 125 inmates. Most of this population is made up of inmates who have voluntarily sought administrative segregation or are placed there for their own protection.
>
> 5.20 The Correctional Service has told the Sub-committee that since 1997 it has reduced the administrative segregation cell capacity by 20%.[177]

294. However, as with previous waves of reform, the effects are often transitory and what I have described as the customary law of segregation, re-asserts itself. In understanding the longer term impacts of policy changes to segregation practices, the report released in May 2015 by the Correctional Investigator, "Administrative Segregation in Federal Corrections: 10 Year Trends", is instructive.[178]

> For more than 20 years, the Office of the Correctional Investigator has extensively documented the fact that administrative segregation is significantly overused. Segregation is the most austere and depriving form of incarceration that the state can

---

[176] *Justice Behind the Walls 2001*, pp. 426-28, http://justicebehindthewalls.net/book.asp?cid=182
[177] *A Work in Progress*, paras 5.19-5.20
[178] Office of the Correctional Investigator, *Administrative Segregation in Federal Corrections 10 Year Trends*, May 28, 2015 ("*10 Year Trends*"), http://www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20150528-eng.aspx

legally administer in Canada. Today's Statistical Report highlights just how often the practice is used in federal corrections. With an inmate population of just over 14,500 the Correctional Service of Canada (CSC) made 8,300 placements in administrative segregation in last fiscal year.

In releasing his report, Mr. Howard Sapers, Correctional Investigator of Canada, said "There is no escaping the fact that administrative segregation has become overused as a population management tool to address tensions and conflicts in federal correctional facilities." During the reporting period, 27% of the inmate population experienced at least one placement in administrative segregation. "Segregation is so frequently used that half (48%) of the current inmate population has experienced segregation at least once during their present sentence," Sapers added.

Administrative segregation is commonly used to manage mentally ill offenders, self-injurious offenders and those at risk of suicide. The report found that inmates in administrative segregation are twice more likely to have a history of self-injury and attempted suicide, and 31% more likely to have a mental health issue. 68% of inmates at the Regional Treatment Centres (designated psychiatric hospitals) have a history of administrative segregation. Sapers stated that "this is further evidence that the CSC uses segregation to manage behaviours associated with mental illness."

The Statistical Report shows that over-reliance on segregation is not uniform; certain incarcerated groups are more affected than others, including federally sentenced women with mental health issues, Aboriginal and Black inmates. Aboriginal inmates continue to have the longest average stay in segregation compared to any other group.

The Office continues to advocate for significant, meaningful and lasting reforms to the administrative segregation framework. Sapers called for the Government of Canada to limit the use of administrative segregation, prohibit its use for mentally ill inmates and for younger offenders (up to 21 years of age), impose an initial limit of no more than 30 days, and introduce judicial oversight or independent adjudication for any length of stay in segregation beyond 30 days.

Segregated inmates spend 23 hours a day alone in their cells (furnished with a bed and a toilet – no table or chair). The segregated inmate eats all meals alone in the cell, is permitted to take an hour of outdoor exercise per day (weather permitting and with other compatible inmates if possible), is given the opportunity to shower every second day and has limited access to the phone and programs.

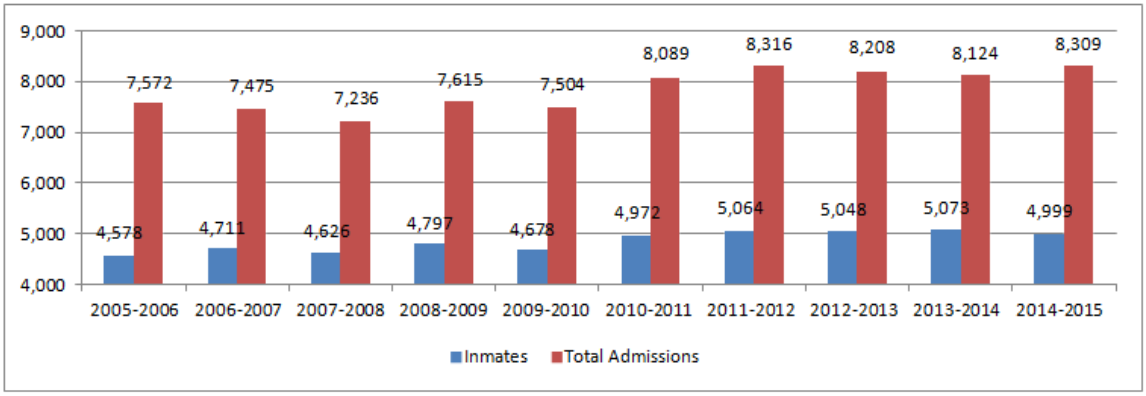
The majority of interactions with correctional staff, nurses and psychologists are conducted through the food slot of the segregation cell door. Sapers observed that "the Canadian experience is such that segregated inmates have almost no human contact or meaningful social interaction."[179] (emphasis added)

---

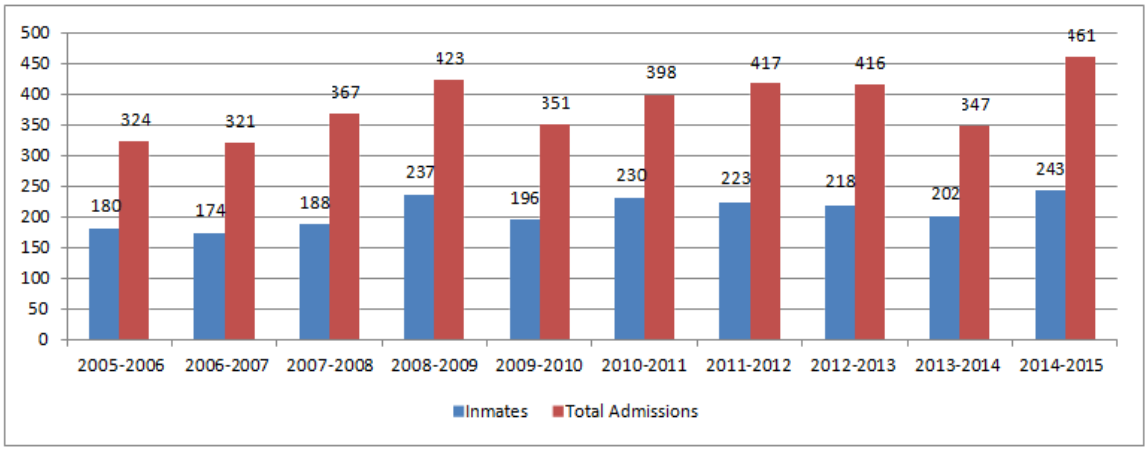
[179] Office of the Correctional Investigator, *Office of the Correctional Investigator Releases Administrative Segregation in Federal Corrections: 10 Year Trends, Federal Corrections Overuses Segregation to Mange Inmates,* May 28, 2015, http://www.oci-bec.gc.ca/cnt/comm/press/press20150528-eng.aspx

295. The Report, in a series of graphs reproduced below, shows that over the last decade the numbers of admissions to segregation have fluctuated but with a generally upward trend although the average length of time spent in segregation has declined. 2014-2015 saw the highest number of federally sentenced women admissions for the last 10 years.

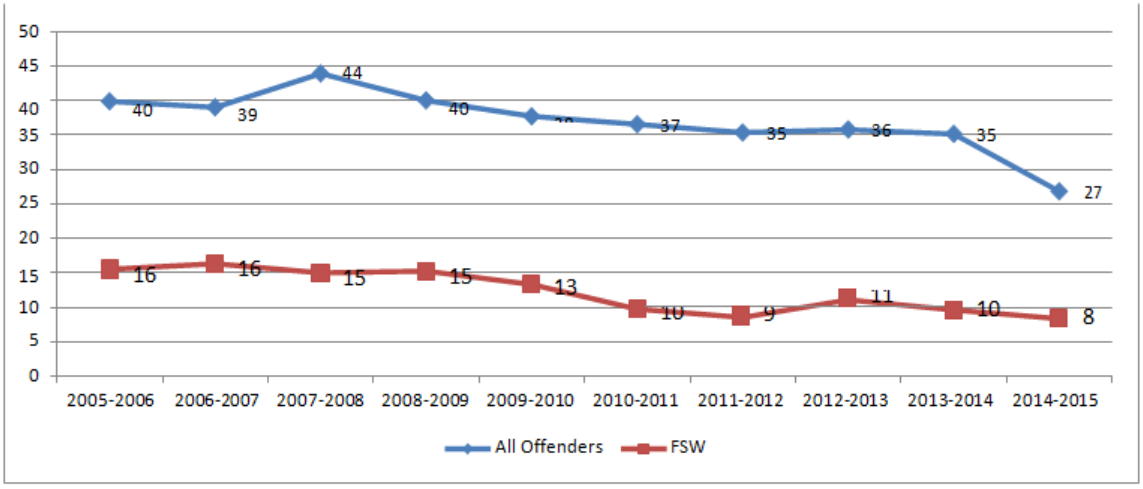
Graph 1: Total Admissions to Segregation – 10 Years



Graph 2: Total FSW Admissions to Segregation – 10 Years



Graph 6: Average Length of Stay in Segregation – All Offenders and FSW



296. Given the amount of public attention and scrutiny most recently focused on CSC's use of segregation, both in the wake of the Ashley Smith and Edward Snowshoe inquests (and by a number of lawsuits that have been filed), it would be expected that, as happened after the Arbour Report and the Report of the Task Force on Segregation, there would be reductions in both the number and duration of segregation placements. Although I have not at the time of writing this report seen any official release of the latest figures, an article in the Globe and Mail on December 21, 2015 reported that "Since March, CSC has reduced its total solitary population by 34 per cent, according to Chris Hill, Director of Security Operations, Procedures and Monitoring. The number of inmates who have spent more than 60 days in solitary has declined by 52 per cent since May…"[180]

297. In my opinion what remains problematic in CSC's latest attempts to enhance its internal segregation regime, in the context of my understanding of sound principles, practices and standards, is the continuing resistance to the idea that independent external review should be woven into the legal fabric of the segregation admission and review process, not as an exceptional measure to assist management strategies, but as an integral element of a fair and effective system of corrections. Based upon my review of developments since her report in 1996, I share Justice Arbour's conclusion that "The Rule of Law has to be imported and integrated… from the other partners in the criminal justice enterprise, as there is no evidence that it will emerge spontaneously."[181]

298. CSC's resistance extends in my opinion to the related concept that there should be time constraints imposed upon the length of segregation, having regard to the debilitating effects of long-term and indefinite segregation on all prisoners, including those who do not have acute or high mental-health needs. Although the Commissioner's Directive is replete with references to 5, 30, 45, and 60 day reviews, there is no overall limit on the amount of time an offender can

[180] Patrick White, "Solitary confinement at federal prisons in decline: Correctional Service Canada", *The Globe and Mail*, December 22, 2014
[181] Arbour Report, p. 99

spend in segregation. Time constraints limiting long-term segregation are now integrated into the Revised Standard Minimum Rules for the Treatment of Prisoners (the "Nelson Mandela Rules") and are a necessary part of sound correctional principles, practices and standards.

299. It is my opinion, in light of the history of the failure of CSC's repeated initiatives designed to address the abuses of segregation and reform the system from within, that in the absence of a system of independent external review and oversight together with prescriptive time limits on the length of segregation, these latest initiatives will have only limited impact in addressing the problems I have documented in this report.

300. It is also my opinion that beyond amendments to the Commissioner's Directives there needs to be amendments to the *CCRA* and *CCRA* regulations so that the substantive and procedural framework for administrative segregation is embedded in the law and not just policy directives. This is consistent with the conclusions of the Correctional Law Review in their original recommendations for the drafting of the new statutory framework in 1992. The Correctional Law Review recommended that provisions defining the nature and scope of prisoners' rights and the extent of staff powers should be placed either in the legislation or regulations and should not be left to the Commissioner's Directives, which should be limited to setting out operational policy. There were several reasons for this; accessibility and certainty of the rules relating to prisoners' rights and staff powers, the development of these rules through the democratic process and the necessity for any provision which limits fundamental rights and freedoms to be "prescribed by law", rather than contained in non-legally binding Commissioner's Directives.[182]

Decision of the Alberta Court of Queens Bench in Hamm v. Canada

301. One of the effects of the new Commissioner's Directive and the administrative segregation guidelines, segregation assessment tool is likely to be that there will be a more elaborate paper trail in respect to the initial placement and subsequent review of segregation decisions. However in light of the historical experience there is good reason to believe that a more elaborate documentary record does not translate into substantive change in institutional behavior. As I have described, in each successive reform of the segregation process there is the appearance of change in the increasingly onerous procedural hurdles, but these have not resulted in more robust and substantive inquiries into the justification for segregation.

302. In understanding the extent to which history is likely to repeat itself in the wake of the most recent commissioners directive, I have found instructive the recent decision of the Court of Queen's Bench of Alberta, the subject of which is the segregation of four prisoners, three of whom were aboriginal, in June 2016 at Edmonton Maximum Security Institution, eight months after the introduction of the new CD 709. As I have also earlier described it is at the deep end of the security matrix - in maximum security institutions - that has proven to be the most challenging for CSC to match segregation practice with law and policy. I have utilized the reasons for judgment as a case study and as the most recent authoritative account of segregation practice under the procedures set out in the new 2015 Commissioners Directive, including the

[182] Correctional Law Review Working Paper No. 5, *Correctional Authority and Inmate Rights*, p. 53

Administrative Segregation Guidelines. I have refrained from including any part of Justice Veit's legal analysis on the law of procedural fairness as this is clearly in the domain of legal counsel. Justice Veit's reasons contain not only the most detailed account of the segregation review process that I have found in the recent literature but also a chronological narrative tracking the initial segregation, the five day segregation reviews and subsequent reviews. This is comparable to the analytic framework of my own research findings in *Justice behind the Walls 2001* and the analysis undertaken by Justice Arbour in her Report. The facts as set out in the judgment of Justice Veit are as follows.[183]

> *Events relating to the placement in solitary confinement*
>
> [17] The applicants are all inmates serving penitential sentences at Edmonton Institution, "the Max". Each was placed in solitary confinement at approximately 9:00 on June 28, 2016 on the order of the Deputy Assistant Warden. The justification to the placement for the applicant Keepness was set out in a document which was provided to him on June 29. That document is a model that was repeated for each applicant, with individual variations as set out below:
>
> > At 15:00 hours (presumably on June 27 because that hour is later than the time admitted into segregation) the Correctional Manager of Unit-6 received information from various creditable believed reliable sources that inmate Keepenss, Badger, Tobin, Hamm and Johnson, on C-Unit from Unit-6 were going to seriously harm or assault Correctional Officers.
> >
> > During the course of the investigation it was determined that the noted inmates were talking about assaulting an officer. It is believed they were going to assault officers as a group when they had their behind barriers reinstated on 2016-06-30. Inmate Keepness (Hamm, Tobin, Johnson) amongst the group wanted to make a point on the unit and he was going to do that by seriously harming an Officer.
> >
> > There was no indication that the subject had weapons or what their method of assault would be towards Officers. However, the investigation revealed that Keepness alongside the other inmates picked three particular Officers to assault. The plan was developed within the last seven days. The inmates noted they would stab the guards, teach them a lesson not to "fuck" with us. The Warden was briefed of the situation and segregation placement was approved.
> >
> > The investigation remains ongoing.
> >
> > ...
> >
> > All reasonable alternatives have been considered prior to making the decision to place Inmate Keepness in administrative segregation. The following list, while not exhaustive, is alternatives that were taken into consideration prior to this decision.

[183] *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 [*Hamm*]

> Cell confinement is not a viable due to the nature of the severity of the assault, possible serious harm or death of an Officer.
>
> Mediation: Mediation at this time is not a viable option due to the pre planned assault towards an Officer.
>
> Change of cell/range/unit: Cell, unit or range changes are not viable options. The intent to harm officers is deemed serious and it is deemed that risk would not be managed if cells were changed.
>
> ...
>
> RECOMMENDATION
>
> Segregation recommended as the presence of Keepness in the open population could interfere with the ongoing investigation into this incident or result in a risk to the safety of staff or others.
>
> ...
>
> Consideration of Aboriginal Social History was taken into account for [Keepness's] placement into Segregation.
>
> Inmate Keepness mental health needs were taken into consideration prior to his placement in segregation. An OMS/RADAR review of the Offenders immediate needs Alerts, Flags and Needs was completed. There has not been an identified need for mental health intervention.
>
> All factors relevant to the case were considered in rendering a decision.

[18] With respect to Mr. Hamm, the general outline of the segregation placement was set out in exactly the same words as for Mr. Keepness, but the time admitted into segregation was 09:00. The following additional comments were also made:

> Inmate Hamm was notified of his segregation placement. Shortly after the decision, inmate Hamm was overheard giving detailed instructions to the remaining inmates on how to effectively barricade cell doors as he also stated "they will never get in this cell". Inmate Hamm continued to talk to inmate Keepness stating "we should make up a claim stating guards are making racial comments towards us". Inmate Keepness agreed and said "make up a 3rd level grievance with the same info on it so it goes directly to Ottawa". At 1703 hours Inmate Hamm stated to the inmates on the range "it's all fun and games until someone gets murdered".... Inmate Hamm is not an Aboriginal offender and has no aboriginal social history factors to impact this decision.

[19] With respect to Mr. Tobin, the general outline of the segregation placement was set out in exactly the same words as for Mr. Keepness, but the time admitted into segregation was 09:00.

...

ii) The Five Working Day Review

[22] The placement of each of the applicants in solitary confinement was confirmed at a hearing on July 7, 2016.

[23] The July 7th Review relating to Keepness took a total of approximately 12 minutes. The Deputy Warden who conducted the review had, prior to the Review, been advised that - as it was the Fifth Working Day Review - i.e. as a short period of time had elapsed, "the Reintegration Action Plan has not yet been completed. If Keepness remains in Segregation, a RAP will be completed and included in the synopsis for segregation for his Institutional (30 day) Review". The consultation with security intelligence officers stated that Keepness "played an active role in the noted incident and that due to the nature of the incident Keepness would be best suited to remain in Segregation until further investigation had occurred. Keepness does not have any listed incompatibles at Edmonton Institution". The report went on to state that Mr. Keepness "has adjusted satisfactorily to prior segregation admissions over the short-term, but he claimed to experience distressing mental health symptomology after serving almost a year in segregation in 2012.... Should he remain in segregation, he will be seen daily by a health professional and approached to participate in a 25 day mental health assessment for segregation review. Should staff become aware of mental health concerns, they should refer Mr. Keepness to Mental Health Services". In the section of the report dealing with mental health, the report stated that Mr. Keepness had made a request to speak with a mental health professional for counselling and had been informed that if he needed to speak to psychology, "to make a request and they will come and see him".

[24] At the commencement of the hearing, Keepness was told that the reason for his segregation had been converted from 31(3)(b) – investigation – to 31(3)(a) – "security of the penitentiary or the safety of any person"; in other words, the Deputy Warden confirmed that the investigation was finished and the words of subparagraph (a) were invoked. No other information was ever provided to Keepness about the reason for his continued detention in segregation.

[25] Early in the Review, during a run through of a check list of matters which had been dealt with prior to the Review, Mr. Keepness stated that he was never asked to be involved with the investigation process: this was disputed by the institution. No proof was offered by the institution of Keepness' refusal to be interviewed; since the institution indicated that a guard had been the source of the invitation to be interviewed, one expects that there would be audio-video evidence available to the institution to confirm its position.

[26] At approximately three minutes and 30 seconds into the review, after the discussion about Keepness' involvement in the pre-Review process, the Deputy Warden told Mr. Keepness words to this effect: "that is neither here nor there. We are going to maintain you in segregation – that is we will make a recommendation to maintain you in segregation..."

[27] Despite this apparent conclusion by the Deputy Warden, Keepness returned to the issue of the basis for segregation. He told the Deputy Warden that an affidavit (Keepness was wrong in referring to the handwritten and signed statements, both dated June 27, 2016 as affidavits because they had not been sworn or affirmed before a Commissioner for Oaths) had been submitted from an inmate who acknowledged to the applicants that he had told their correctional manager of the existence of a plot to harm guards because he wanted out of the placement on Unit 6 and back to a 96 bed unit and he wanted to bring a television with him. The Deputy Warden did not deal with that submission or the written recantation from the inmate in question, repeating that he was satisfied with, and the decision would be made, on the information which had been provided to him. (approximately 7:12 into the hearing).

[28] The Review then went on to deal with Mr. Keepness' next placement, i.e. the plan for moving Mr. Keepness out of segregation.

[29] At approximately 9 minutes into the hearing, the discussion returned to the issue of what Mr. Keepness insisted was a groundless decision to place him in segregation. The Deputy Warden told him words to the effect, "there is only so much information we are required to give you on these types of investigation". The Deputy Warden then informed Mr. Keepness of his right to make a rebuttal to any subsequent placement chosen by the institution.

[30] Shortly before the termination of the hearing, Keepness told the Deputy Warden that the segregation placement terminated the only program he had participated in during his 8 years of imprisonment, 4 of which he has spent in the "hole".

[31] Insofar as the July 7th hearing for Mr. Hamm is concerned, the Board was not explicitly provided with the psychiatric assessment of Mr. Hamm set out in the Summary, above. However, one must assume that the psychiatric report in question was available to the institution. No information was provided to the Review Board about why that report was no longer valid. The information set out in the Summary, above, was available to the Review Board.

[32] The hearing in relation to Mr. Hamm took a total of approximately 20 minutes. Prior to the hearing, an updated synopsis of the case had been provided to the Deputy Warden which included the following information about Hamm's prior segregation history:

> Hamm has prior segregation periods at Saskatchewan Penitentiary and the Regional Psychiatric Center during this sentence. Some of his prior placements have been for alleged custodial aggression and others for his own safety.

[33] No proof of "the incident" which led to the segregation decision was given; indeed, the Deputy Warden kept telling Mr. Hamm that the hearing was not focussed on "the incident", but rather was focussed on the institution's obligation to get Mr. Hamm out of solitary as soon as possible. Mr. Hamm repeatedly told the Board that the incident was baseless and the applicants had statements from another inmate to that effect. Mr. Hamm told the Board that, given his upcoming mandatory release date, it was nonsensical that he would put that benefit at risk by participating in "the incident".

[34] The consultation with Security Intelligence Officers as of June 29th elicited the following information concerning Mr. Hamm: "due to Hamm's current behaviour he is not suitable for return to a unit at this time. An investigation regarding the circumstances of Hamm's segregation placement is ongoing."

...

[38] In each case, no comprehensive assessment regarding the inmate's state of mental health was made available to the Review board.

...

[50] During the *habeas corpus hearing*, the inmates each presented the 30 day Review of their solitary confinement; unfortunately only portions of the documents were entered into evidence as a result of once sided copying of two-sided documents. In relation to the applicant Keepness, the review includes the following comments:

> Due to the nature of the incident, the CMT believes that Segregation is currently the most suitable placement for Keepness until further investigation has occurred. Keepness had, of course been told, at the July 7 Fifth Working Day Review that the investigation was complete. The review also stated: "At this time [Keepness] has not been accepted at Saskatchewan Penitentiary and Stony Mountain Institution. Consultation has been forwarded to RHQ for transfer to Kent.

[51] In relation to the applicant Hamm, the review includes the following comments:

> The plan to alleviate segregation status is to transfer HAMM to another maximum security institution. SMI MSU agreed to take HAMM. As HAMM is not willing to transfer on voluntary basis, this will be an involuntary transfer.
>
> It is hoped that HAMM will be on the next flight or Regional Bus to SMI MSU. I order inmate HAMM be maintained in Segregation as the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person, and allowing the inmate to associate with other inmates may jeopardize the security of the penitentiary or the safety of any

> person. (This is the same conclusion that the 30 day Review has reached for each of the applicants.)
>
> Mental and Physical health needs were considered in making this decision. Based upon the information reviewed, there appear to be mental or physical health needs/concerns in this case at this time. Psychology has been working with HAMM and will follow up with him upon return to the institution from court.

[52] In relation to applicant Tobin, the 30 day review which apparently was signed on July 27, 2016, in other words long after the institution told the inmates on July 7 that the investigation was complete, still contains the following comment:

> The CMT will be able to make a decision on Tobin's segregation status once the investigation into the planned assault against officers has been completed.

303. Before dealing with Justice Veit's analysis, I would compare this description of the segregation process with those I have set out earlier in this opinion. The distinguishing feature of the 2016 process is that the paperwork placed before the 5 day and 30 day review boards is more elaborate; the common feature is that the segregation review board does not engage in a substantive analysis of how the information before it justifies the initial or continuing segregation, in particular it does not address any submissions made by the offender disputing the facts upon which any decision should be made. This is particularly noticeable in the description of the 5 day review. Paralleling what I observed in *Justice Behind the Walls 2001*, the 5 day reviews were not seen as an occasion in which the institution's information was to be assessed, the prisoner's submissions evaluated and a decision rendered on the principal issue of whether applying the legal criteria segregation was justified. Notably the Deputy Warden who chaired the 5 day review "kept telling Mr. Hamm that the hearing was not focused on 'the incident', but rather was focused on the institution's obligation to get Mr. Hamm out of solitary as soon as possible." As in the case studies in *Justice Behind the Walls 2001*, the Deputy Warden privileged the information provided by his staff, accepted that assertions of its reliability were valid and did not see the hearing as an occasion in which the prisoner could challenge that assessment. Also as in *Justice Behind the Walls 2001*, there is a demonstration of the malleability of the legal criteria enabling the segregation review board to shift back and forth between justifying segregation on the basis of a continuing investigation and jeopardy to security and safety.[184]

304. Justice Veit's analysis of the five day segregation review identifies the same problematic features of CSC's post 2015 reformed segregation review process that I have documented in my earlier research.

> [73] … The Review in relation to these applicants was not substantive in relation to the basis for segregation. In each case, the review dealt principally, almost exclusively, with the inmate's input into the next placement… As the Keepness and Hamm hearings illustrate, the institution was not willing to explain and justify its decision to maintain the

[184] The similarities to the case study of Gary Weaver's segregation reviews, described in paras. 181-85, are particularly striking.

> inmates in segregation. It would not deal with the issue raised by both Keepness and Hamm with respect to the recantation of an inmate who had provided information to the institution. It did not respond to Keepness' argument that in his relatively lengthy history as a prisoner, he had never before had a serious problem with a jailer. It did not respond to Hamm's argument that, given the short time he has left in his sentence and the fact that he is serving the last weeks of his sentence in Edmonton where his mother and his daughter reside, it is unreasonable to conclude that he would put his immediate future at risk by participating in such a plan.

305. In *Justice Behind the Walls 2001*, I have described how in many segregation reviews (and other decisions such as involuntary transfers) the reliability of information provided by confidential prisoner informants is a live issue. I have maintained that segregation review boards customarily operate on a presumption, and in many cases effectively an irrebuttable presumption, that the assessment of reliability by the institution's security intelligence officers is the basis for decision-making. I also described how the indices of reliability that are used by the courts in the criminal justice process are not observed in institutional decision-making and that the correlative risk of wrongful segregation placements (and involuntary transfers) is magnified.[185] One of the important roles I have advanced for independent adjudicators is the assessment of reliability utilizing the same indices of reliability that have been developed by the courts although applied in the context of the penitentiary. Justice Veit in her analysis of the segregation placements before her gave careful scrutiny to the institution's claim that segregation was based upon "reliable information" and concluded:

> [81] In the totality of the evidence on this application, I am unable to conclude that the institution had available reliable and credible information that these applicants were planning a serious assault on three identified guards.

306. In my analysis of the Segregation Assessment Tool annexed to the new Commissioner's Directive I suggested (para. 271) that its structure "might promote and perpetuate the customary bias favoring staff evidence and discounting the prisoner's evidence." It seems to have done so in the cases before Justice Veit.

307. In the case studies in *Justice Behind the Walls 2001*, I have described how decisions of the segregation review board were conclusionary in nature rather than providing findings of fact with reasons which applied the legal criteria to those facts. Justice Veit made the same assessment:

> [86] The institution has essentially provided conclusions, rather than reasons, for its actions.....

308. A key component of the segregation review process is the assessment and development of alternative to segregation alternatives. Justice Veit had this to say of the Segregation Review Board's examination of this part of the review:

---

[185] *Justice Behind the Walls 2001*, pp.469-471, http://justicebehindthewalls.net/book.asp?cid=194&pid=599

> [97] As to the original placement in segregation on June 28, 2016, that placement was said to be to allow further investigation of an allegation that each of the inmates was going to participate in a serious physical assault of named guards on June 30.
>
> [98] The institution has not explained why separating these inmates, at least Keepness and Tobin, from all the other alleged co-conspirators would not have allowed an investigation into
>
> the allegations to be undertaken. Neither of those applicants had any incompatibles at the Edmonton Institution. As the Deputy Warden made it clear during the Hamm 5th Working Day Review, the institution does not have to give reasons for moving an inmate from one unit to another; moving Keepness and Tobin could apparently have been done with ease.
>
> [99] The institution has not explained why it could not deny the "behind barriers" exercise on June 30 when the assault was alleged to have taken place. It apparently has the option of removing such privileges without any particular process; it is not clear why removing the opportunity to harm the guards would not have dealt with the immediate concern.
>
> [100] The institution has not explained why moving the three guards in question to another range or unit would not have dealt with the allegations. The alleged complaints which formed the basis for the plan to harm the guards focussed only on one shift of guards and related to specific complaints – lack of toilet paper, racist remarks. There was no investigation by the institution about the underlying basis for the complaints; one solution to the problem may have been to deal with the underlying complaints.
>
> [101] The institution has not explained why segregation, and eventual removal to another institution outside Alberta was reasonable when Hamm was within a few months of his statutory release into the community on October 22, 2016 and while he was serving the last portion of his sentence in Edmonton where his mother and his daughter reside.
>
> [102] Overall, the institution has not explained why, given the serious nature of solitary confinement, it chose that method to deal with the administrative problem which it faced....

309. It is my opinion that an independent adjudicator is better placed to ensure that this kind of rigorous inquiry is conducted in segregation reviews. As I have gone to pains to explain it is not that the independent adjudicator would be expected to develop alternatives, but rather to ensure that the institution, if it is making a case for segregation, has the onus of demonstrating rather than asserting that there are no reasonable alternatives.

310. In my analysis of the new Commissioner's Directive, I have described how the segregation assessment tool and the guidelines for conducting segregation reviews have provisions setting out additional protections for prisoners with acute or high (elevated/substantial) level of mental health need and requiring that for aboriginal prisoners

review boards take into account aboriginal social history. Justice Veit had this to say of how well CSC's practice in the cases before her met these requirements:

> [87] The institution has also failed to provide adequate information to the Review Board concerning the mental health and aboriginal issues raised by the segregation decisions in relation to these applicants.
>
> ...
>
> [103] In light of the serious pre-existing segregation histories of all the applicants and the pre-existing serious mental health issues of two of the applicants and the mental health issues of the third, it was unreasonable to make a segregation placement without a full mental health assessment of each inmate.
>
> [104] In particular, in relation to inmate Hamm, it was unreasonable for the institution to have relied on a psychologist's statement to the effect that a psychiatric diagnosis was no longer applicable. In relation to inmate Tobin, it was unreasonable for the institution to have placed an inmate who had been requesting to see a psychiatrist and who had been previously prescribed psychotropic medications which had been discontinued into solitary confinement without making a current, thorough, assessment of his mental health.
>
> ...
>
> [105] As is not surprising given the general statistics concerning aboriginals in federal institutions, three of the four original applicants are aboriginal; indeed, if one chose to count the original applicants who subsequently discontinued their applications, 5 of the original 6 applicants are aboriginal.
>
> [106] Given this disproportionate – on the basis of population – representation of aboriginals in the penitentiary system, one might expect that each federal correctional institution would have an array of programs designed with the aboriginal offender in mind, i.e. to take into account the "Gladue" factors which may have contributed to the inmate's criminality and designed to deter aboriginal inmates from future criminal conduct, to assist them in their rehabilitation, to promote in them a sense of responsibility for their criminal actions and an acknowledgement from them of the harm they have done to their victims and to the community, and to devise options for reparation from the aboriginal offenders for the harm done to their victims or to the community. Nevertheless, each individual aboriginal inmate, their victims, and the community, deserve some assessment of how indigenous culture and spirituality may affect that inmate; for example, some of these aboriginal applicants have a greater pre-incarceration connection with aboriginal cultural and spiritual values than others. It would not be surprising, indeed it would be encouraging, if different institutions focussed on different aspects of or mechanisms for assisting aboriginal inmates. Given Parliament's focus on the objectives of the sentencing system, and thus of the correctional system, in relation to aboriginal offenders, it is unreasonable for a correctional institution to deny transparency

> in relation to its decisions concerning whether, and how, and where, aboriginal offenders should be further deprived of liberty.

311. In *Justice Behind the Walls 2001*, I concluded, based upon my observation of many Segregation Review Boards over a period of years both before and after the Task Force on Segregation that the manner in which they were conducted did not fulfill the pre-requisites of the *CCRA*. I wrote:

> The legal model of segregation review envisages a process in which correctional administrators review each case against legal criteria to determine whether there are initial grounds to justify segregation and whether those or other grounds exist to justify continuing it. Part of the latter inquiry requires the Board to satisfy itself that there are no reasonable alternatives to segregation. The legislation clearly places the burden upon the correctional authorities to justify, on a continuing basis, detention in a prison within a prison. But the model of the law is one thing; the model of operational reality is another. That reality often reshapes the review so that there is a presumption, in some cases irrebuttable, that the prisoner will be retained in segregation.[186]

312. Summarizing her assessment of the segregation review process at Edmonton Maximum-Security Institution in 2016, at a time when CSC's attention was again clearly focused on the increasing calls for substantive reform, Justice Veit's conclusion does not provide much comfort in the success of CSC's latest reform initiatives:

> [96] On considering the statutory framework as a whole, as indicated above, I conclude that the Segregation Review was intended by Parliament to be a serious, robust, assessment of whether segregation was warranted and inevitable; the Reviews conducted in this case were merely perfunctory.

Right to Counsel

313. In question 4(c) I have been asked "Is it necessary and appropriate to accord inmates faced with administrative segregation the right to be represented by counsel at review hearings and, if so, to be specifically advised as to the existence of that right?"

314. The new CD 709 requires that when taken to segregation a prisoner, without delay, must be informed of his/her right to legal counsel pursuant to subsection 97(2) of the *CCRR* and given an opportunity to contact counsel.[187] The CD also provides that a prisoner must also be informed of the right to engage an advocate to assist with the institutional segregation review process in the case of inmates with acute or high (elevated/substantial) level of mental health needs.[188] The Administrative Segregation Guidelines in Annex C provide further detail regarding the role of the advocate.

---

[186] *Justice Behind the Walls 2001*, p. 324, http://justicebehindthewalls.net/book.asp?cid=128&pid=481
[187] CD 709, para. 12(a)
[188] CD 709, para. 12(f)

> All inmates assessed with acute or high (elevated/substantial) mental health needs will be permitted the opportunity to engage an advocate to assist them with the ISRB process. Advocates can include any person who, in the opinion of the Institutional Head, is acting or will act in the best interest of the inmate.
>
> CSC must provide the inmate with the opportunity to engage an advocate. Any member of the Case Management Team and/or a mental health professional can assist the inmate in selecting a suitable advocate as well as facilitating contact with said advocate.
>
> The role of the advocate is primarily to provide the inmate with support and guidance throughout the ISRB; however may also speak on behalf of the inmate should he/she so wish. The advocate may ask questions during the ISRB in addition to or on behalf of the inmate and assist in explaining and clarifying any information that the inmate does not understand. Should the inmate not be present at the ISRB, the advocate does not attend the hearing on behalf of the inmate. In such circumstances, the inmate will be given the opportunity to contact the advocate prior to the hearing for assistance with submitting written comments as well as following the ISRB to discuss concerns and/or the outcome of the hearing.[189]

315. It is my opinion that the CD's restriction of the right to engage an advocate to only prisoners with acute or high mental health needs, as well as the scope of the advocate's role, is too narrowly drawn. Based upon my observations of segregation review hearings the assistance of legal counsel is a necessary element to ensure both the fairness and integrity of the proceedings in all cases.

316. While the need for an advocate is most clearly made out in the cases of prisoners with acute or high mental health needs, arising from a cluster of problems including limited capacities to (a) understand the process, (b) challenge the allegations or factual foundation upon which their segregation is being justified, (c) control their behavior so that the hearing can be conducted without disruption, and (d) constructively help in the development of alternatives to segregation, these and other issues arise in a much broader spectrum of cases in which the assistance of and representation by an advocate is necessary.

317. To better understand the need for and role of legal counsel it may be helpful for the court that I set out the sequence of issues that typically arise during the course of segregation review. In the case of an involuntary segregation where the prisoner is disputing the justification for segregation, counsel's role arises very early in the process to ensure that all relevant information that the institution will be relying upon is provided to the prisoner so that he can make full answer and defense at the segregation review. This involves not only evaluating that information and requesting further details where there is insufficient detail, but in many cases where the institution seeks to withhold confidential information under the provisions of the *CCRA,* to ensure that the grounds for withholding are made out and that the gist of information that is provided is sufficient to enable the prisoner to make an answer to the case against them. Counsel's role will include hearing and reviewing the prisoner's response and any information

[189] CD 709, Annex C

that challenges the institution's information, so this could be presented effectively at the segregation review. It has been my experience that at the five day segregation review very limited weight is given to the prisoner's account and the institution's information is taken to be presumptively reliable. In many cases prisoners are told that there is an ongoing investigation, and that further information will be shared in due course.[190]

318. The lack of sufficient detail in the information provided to the prisoner, itself a product of the open-ended nature of s. 31(3), together with the fact that the prisoner's response, in light of the institution's information, is met with some skepticism by the review board, results in prisoners often responding angrily to what they view as their unjustified segregation, which may only reinforce the institution's belief that segregation is justified.

319. If at the five day review continued segregation is approved, the role of counsel may require further work on preparing a more complete rebuttal to the institution's case than is possible at a five day review, pressing the institution to complete any ongoing investigations, and helping the prisoner develop viable alternatives to segregation that would avoid the need for further segregation, even before the 30 day review is scheduled.

320. In *Justice Behind the Walls 2001*, I provide a number of case studies of segregation review reflecting the dynamics of segregation review, particularly the nature of the institutional biases that privilege the correctional authority's own sources of information and the predictable response with which this is met by prisoners. These case studies also further illustrate the importance of independent adjudication, not as a replacement for, but as a necessary complement to correctional expertise in the segregation review process.

321. One of these case studies involved events that took place in July 1997, months after the Task Force on Segregation had visited Kent institution and completed its audits and provided its action plans for improving compliance with the procedural aspects of the law and policy regarding segregation. The segregation of a large number of prisoners resulted from a major incident in the outside exercise yard which left one prisoner dead and another seriously injured. Those prisoners believed to be either directly or indirectly involved in the death were segregated. The institution was locked down but prisoners in one of the general population units, angered by the length of the lockdown and the cancellation of all visits, smashed their cells and kicked out the windows resulting in a group of them also been taken to segregation. Both the institutional preventive security officers ("IPSO's") and the RCMP were called in to investigate. I was present at the 5 day and 30 day reviews arising from these incidents and in *Justice behind the Walls 2001* I documented my observations and my conclusions on the problematic features of the process.

July 17: The Five-day Reviews - Clearing the Legal Hurdles

On July 17, Mike Csoka conducted fourteen five-day reviews, all involving prisoners allegedly involved in either the incident in the exercise yard or the smash-up in A unit - by far the largest number of such reviews done at one sitting during my five years of

[190] The facts *in Hamm* illustrate this scenario.

research at Kent.… A number of prisoners were extremely angry and still pumped up from the previous Monday's smash-up. Although there were security officers posted outside the room, Mr. Csoka conducted the review without reinforcements; he kept his cool even when subjected to considerable verbal abuse. His handling of the cases portrayed a correctional practitioner with confidence in his position and authority, ready to do a tough job under difficult circumstances. In a correctional context, he was the proverbial man for all seasons.

But how well did this second marathon measure up to the standards of the law and due process? Each review followed the same format under Mr. Csoka's chairmanship. He began by asking the prisoner whether he had received seventy-two hours' written notice of the review and had agreed to come to the review. Each one had. In several cases, he prefaced these questions with the comment: "But first there is some legal stuff to go over." This was revealing, since it implied that the legal requirements were procedural hurdles which, having been cleared, allowed the real business - the exercise of administrative discretion unconstrained by law - to get underway.

Having cleared these legal hurdles, Mr. Csoka informed each prisoner that he would remain in segregation pending an investigation, in some cases of his involvement with the incident in the yard and in the others with the destruction of property in A unit. This signalled to prisoners that the determination for continued segregation had already been made; whatever they said would make no difference to this outcome. Mr. Csoka was up front about this, a quality much respected by prisoners. However, the legal function of the five-day review is to consider whether there are continuing grounds for segregation, not simply to announce this determination to the prisoner.

The following exchange from the review of prisoner Glen Rosenthal (taken from my notes) captures the nature of Mr. Csoka's review process:

> **MC:** Mr. Rosenthal, we are going to maintain you in segregation pending the investigation of your involvement in the yard.
>
> **GR:** I would like to request specific information about what has been alleged against me regarding my involvement in the yard.
>
> **MC:** I can't tell you that. It's up to the IPSOs. They're the ones doing the investigation with the RCMP.
>
> **GR:** So I'm in seg for allegations but you can't tell me what they are?
>
> **MC:** That's right.

Mr. Rosenthal and several other prisoners complained bitterly about the conditions in segregation: specifically, they had been given no change of clothes. Prisoners brought down after the smash-up on Monday were still in the coveralls they had been given when they were taken out of their cells. They had no underwear, and their cells were bare except for bedding. Mr. Rosenthal asked Mr. Csoka why Kent was not complying with

the *CCRA* provisions requiring that a prisoner admitted into segregation be given the same rights, privileges, and conditions of confinement as the general inmate population. Mr. Csoka's response was that prisoners receive their effects only after the five-day review. Mr. Rosenthal asked, "Where in the *CCRA* does it say that prisoners in segregation are not entitled to all their rights in the first five days?" Mr. Csoka said the recent audit done as part of the Task Force on Administrative Segregation had approved the practice of not giving prisoners their effects until after the five-day review; however, Mr. Rosenthal still wanted to know where in the law this was authorized. The segregation staff had told him and other prisoners that they would get their clothes and tobacco only when they started to behave themselves. Mr. Rosenthal questioned, "Where does it say in the *CCRA* that you can use our rights as behaviour modification?" (In her report the previous year, Madam Justice Arbour had given her unequivocal answer that this was not legally permissible.)

Mr. Rosenthal inquired whether the five-day review was being tape-recorded. When told it was not, he asked how the review was documented. Mr. Csoka said the clerk was keeping a record. Mr. Rosenthal questioned this: "She hasn't written down anything that I have said, so how is she keeping a record?" Mr. Csoka explained that the clerk wrote down only the reasons for segregation. Mr. Rosenthal's characterization of this was: "So none of what went on here is on record. It's like it never happened."

… [Another prisoner] Mr. Whitmore was told by Mr. Csoka that he would be maintained in segregation pending the investigation of the incident in the yard. When Mr. Whitmore questioned why that required him to be segregated beyond five days, he was given the additional information that the IPSOs and the RCMP had asked that he be kept there until the investigation was complete. When Mr. Whitmore asked what the particular allegations were against him, he was advised, as were the other prisoners who asked this question, that this information was not available to him. He protested angrily, saying the institution must know from the videotape that he had taken a baseball bat out of a prisoner's hands and thrown it over the fence, and that he had tried to calm things down rather than incite matters. He and some of the other prisoners had got everyone to lock up without further problems. "We did your job for you," he thundered, "and now we look like goofs."… Mr. Whitmore's five-day review, like the other hearings that day, did not conform to the basic requirements of the law. When he was first placed in segregation and at the five-day review, Mr. Whitmore was told he would be maintained in segregation pending the completion of investigations into the incident in the yard. This is not a sufficient ground under the *CCRA*. An ongoing investigation justifies segregation under s. 31(3)(b) only if that investigation could lead to a criminal charge or a serious disciplinary offence and - this is critical - if the continued presence of the prisoner in the general population would interfere with that investigation. This interference could be caused by intimidation of other prisoners the police or the IPSOs want to interview or by the destruction of evidence.

The five-day review of Mr. Whitmore's case should have addressed these issues, and Mr. Whitmore should have received notice in writing of whatever information the

institution had to support his segregation. Yet all he and the other prisoners were provided with was a segregation notice containing the following:

> You have been placed in segregation pending investigation into your involvement in the recent sports field incident. All alternatives to segregation were explored, as none were found, your placement in segregation was actioned. You will be seen by the Segregation Review Board on July 17, 1997. (Five-Day Review of Offender's Segregation Status, Kent Institution, July 17, 1997)

The five-day reviews of Jimmy Whitmore and the other thirteen inmates illustrate more than the continuing issue of non-compliance with the *CCRA* requirements for administrative segregation; they also underline why independent adjudication is crucial to the justice of both the process and the result. The current provisions of the *CCRA* assume that correctional administrators are capable of conducting the review of segregation cases fairly and impartially. Yet a close examination of the situation in the aftermath of Christian Grenier's murder reveals the fallacy of this assumption.

Based on a review of the videotape evidence and the observations of correctional officers, a small group of prisoners were identified as the primary participants in the melee. Given that the authorities already knew of the ongoing power struggle between the prisoners in A unit and C unit, it does not take a Ph.D. in Correctional Administration to recognize that the institution needed to get matters under control, and quickly. This was accomplished effectively by lock-down, which contained the situation and enabled the investigation to begin. However, the problems which gave rise to the hostilities remained, so opening up the units and returning the prison to normal routine presented a real risk of renewed conflict and further violence by way of retaliation or pre-emptive strike. The segregation of prisoners identified by video and other evidence as primary players in the assault and murder is justified during the initial period of investigation, during which the institution explores the conditions under which the lock-down can be ended. In these initial stages, it may be reasonable to segregate individuals whose activity on the videotape is ambiguous but who could well be implicated in the assaults by virtue of their close relationship with other participants. For some of these prisoners, immediate segregation may be justified because of a reasonably based fear that, even in a lock-down situation, their presence in the general population may be a source of further disturbance. For others, while their presence is no threat to the security of the institution during a lock-down, their presence in the general population thereafter may undermine the prison's return to normal operations because of the prisoners' willingness to carry on the war or their vulnerability to retaliation by the other side.

There is no doubt that these are very difficult judgement calls, with a heavy premium on "getting it right." "Getting it wrong" could result in another body in the yard. Kent Warden Brenda Marshall, together with senior staff including Mike Csoka, the IPSO, and experienced correctional supervisors, determined which prisoners should be immediately and subsequently segregated to both contain the war zone and prevent further conflict. After the smash-up in A unit, they segregated the prisoners directly involved, to prevent further damage to the institution and a further delay in ending the lock-down of the

general population. None of these decisions were taken lightly, and they were made in good faith based on the best information available to the warden and her staff.

The segregated prisoners were then entitled to a five-day review. The Segregation Review Board was chaired by the person who was simultaneously Co-ordinator of Case Management and acting unit manager of Segregation and who the previous week had also been acting as deputy warden. Mike Csoka, in all of these capacities, played a central role in developing correctional strategies following the killing and subsequent smash-up. It defies reason, correctional or otherwise, to expect him to conduct these five-day reviews with an open mind, unbiased by the previous decisions and the flow of information to which he had been privy. When he announced to the prisoners that they would remain in segregation pending completion of the investigation, he was, from his senior administrator's perspective, stating the obvious. That is the way things work in a maximum security institution after a major incident, especially one involving a killing. From Mr. Csoka's perspective, you would have to be from Mars to expect anything different. In that sense, the five-day reviews were conducted only because they were required by the *CCRA*, not because any decision other than maintaining the prisoners' segregation might be reached.

Under these circumstances, there is clearly no possibility that the review contemplated by the *CCRA* can be carried out. A "review" requires a consideration of the facts measured against the lawful grounds for segregation, and a determination whether, in light of any reasonable alternatives, continued segregation is justifiable. A "review" requires an evaluation by someone whose mind is not already made up on the issue. This fatal flaw in the current form of review cannot be side-stepped by the assertion that the Segregation Review Board simply makes a recommendation which is then referred to the warden for the ultimate decision. In the cases we are considering here, and indeed in most cases of a similar nature, the warden is part of a collective decision-making process in which the five-day reviews are an element.[191]

August 14: The Thirty-Day Reviews - A Legal Milestone?

… The thirty-day reviews were chaired by Unit Manager Wallin, who had been asked to take on this responsibility at the last moment. All of the prisoners attended their reviews except for Mr. Makichuk. Under new procedures, each prisoner's CMO was supposed to be at the review, together with the IPSO; however, at the August 14 reviews, none of the prisoners' CMOs were present, and neither was the IPSO, despite the fact that information he had collected was critical to the reviews. Because Mr. Wallin had had no time to prepare in advance, at the beginning of each review he consulted the bare-bones summary on the prisoner's index card. Although the prisoners had been given three days' notice that the hearing would be conducted, they were provided with no written information regarding their cases. It could hardly be maintained that there was no information to share. During the month since the Grenier killing, there had been a constant flow of information between prisoners and the administration regarding the

[191] *Justice behind the Walls 2001*, pp. 397-99, http://justicebehindthewalls.net/book.asp?cid=170 et seq.

climate in the population and the risks associated with the release of the segregated prisoners. The national investigation had been completed two weeks earlier, and senior management had been debriefed by the investigation team. This new information was the basis on which the Segregation Review Board should have assessed the justification for continued segregation of the prisoners. The information should also have been reduced to writing and shared with the prisoners. The thirty-day review should be a significant milestone for the gathering of evidence and its assessment against the legal criteria. However, the August thirty-day reviews bore none of these markings.

In several cases, when prisoners inquired when they would be released now that the national investigation was over, they were told that the RCMP investigation was ongoing and they would be maintained in segregation pending its completion and the IPSO's assessment of their risk. After informing Shawn Preddy of this, Mr. Wallin asked him whether he had been questioned by the RCMP. Mr. Preddy said no; in fact, nobody from either outside or inside the institution had questioned him about the incident in the yard…

There was one obvious question which occurred to me during the hearings and which was voiced by several prisoners. Why was the Board maintaining their segregation at this stage pending an assessment by the IPSO of their risk if released to the population? There had been more than enough time to do this assessment, and one primary purpose of the thirty-day review should have been to consider it.

The thirty-day reviews of these prisoners, like the five-day reviews, utterly failed to fulfil the purposes of a review as envisaged by the *CCRA*. Prisoners had not been given the legally required written information about their cases; there was no review or assessment of the available evidence, and no inquiry was directed to the legal grounds for segregation. While it could not be said, as in the five-day reviews, that the thirty-day reviews were conducted by a chairperson who had prejudged the issue, they were conducted by a chairperson who (through no fault of his own) was totally unprepared for the hearing.

The legislative purpose of the thirty-day reviews had also been undermined by the musical chairs played over the previous month in key management positions. For two weeks after the death of Christian Grenier, Mike Csoka (in his various capacities), IPSO Jim Farrell, and Warden Brenda Marshall were the principal institutional figures to and through whom information flowed. All three were there during the national investigation and had participated in the debriefing. Following that, the warden went on a week's annual leave. Mike Csoka and Jim Farrell went on three weeks' leave, and Unit Manager Lin Wallin and IPSO Wayne Culbert, who had been on annual leaves of absence themselves during the critical period and missed the national debriefing, returned to their positions. Claude Demers, acting unit manager of segregation, had been absent for six weeks previous to that. Deputy Warden Doug Richmond was in the institution for only part of the two weeks following the murder, and he too missed the national debriefing. These comings and goings resulted in people making decisions without being in possession of the entire picture.

> Correctional staff, like all workers, are certainly entitled to their holidays. July and August, for obvious reasons - good weather, kids out of school - are the prime months for annual leave. But the law is not supposed to go on holiday. In July and August of 1997, Kent maintained the skeletal framework of segregation review, but the reviews did not meet the legal standards of a fair and effective process.
>
> It is worth examining how these thirty-day reviews could have been conducted with the benefit of independent adjudication. The administration would have been compelled to prepare a written review of all information it believed would support the case for continued segregation. That information would have been shared with prisoners, subject to any justifiable statutory claims for exemption. Given the completion of the national investigation, the institution would have been able to justify continued segregation for investigatory purposes only if it could show that the release of prisoners to the population would interfere with the ongoing RCMP investigation - something I very much doubt it could have shown. This institution's case for continued detention would have focussed primarily on the belief that the release of prisoners would endanger their safety. In support of its position, the administration would have presented information collected from other prisoners that the release of the men believed to be involved in Christian Grenier's death would result in retaliation against those men….
>
> An independent adjudicator fully briefed on the volatility of the situation would likely have concluded that the institution had reasonable grounds to believe the release of the segregated prisoners, at this juncture, would pose a serious risk to both their safety and the security of the institution. However - and this is extremely significant - the independent adjudicator would then turn the legal inquiry towards alternatives to segregation and the development of a plan for reintegration. Within that framework, consideration would be given to the proposals of the prisoners for mediation. Over the past month, prisoners had suggested, to me and others, a number of scenarios for a mediated settlement of the dispute between the two units.... In this case, in fact, the process of mediation could have been started shortly after the five-day review, with some reasonable expectation that a plan be developed and presented at the thirty-day review.[192]

322. Especially in the absence of independent adjudication it is easy to see how representation by counsel would have invigorated the segregation review process, providing a focused argument applying the facts to legal criteria, speaking to the required urgency for the completion of investigations, the timely sharing of reliable information that the institution believed justified continuing segregation, and a plan for reintegration that took seriously the prisoners' proposals for mediation. As illustrated by this case study, counsel's role would also extend to challenging the conditions of segregation where there was demonstrable non-compliance with the applicable law and policy. It is those conditions of confinement to which the next part of my report is directed.

---

[192] *Justice behind the Walls 2001*, pp. 411-14, http://justicebehindthewalls.net/book.asp?cid=175&pid=568

323. In my opinion it is necessary and appropriate to accord prisoners faced with administrative segregation the right to be represented by counsel at review hearings and, if so, to be specifically advised as to the existence of that right.

Sector 3. The Conditions of Confinement (Questions 6 and 7)

324. In questions 6 and 7 you have asked me to identify "the sound principles, practices and standards in relation to the provision of living conditions for inmates in administrative segregation," whether the conditions of confinement experienced by prisoners' administrative segregation in federal penitentiaries accord with those sound principles, practices and standards, and if not, what is the nature and degree of the departure from such standards?

325. From my review of the literature there is a consensus, one shared by the Correctional Service of Canada, that where administrative segregation is necessary and justified, the conditions of confinement should approximate as closely as possible to those in the general population in order to reduce the potentially harmful effects of isolation.

326. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, in his 2008 report states:

> 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 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....[193]

327. In its 1997 report the Task Force on Administrative Segregation wrote:

> Segregation or separation of inmates must occur in an environment that restricts their association with other inmates and their legal rights, to the least extent possible; that facilitates their return to a more open population, to the greatest extent possible and as soon as possible; and that maximizes the provision of programs and services which are necessary to achieve early release from this restricted environment and successful release into the community;[194]

328. Canadian penitentiary and corrections legislation has long incorporated these normative statements. The problem has been that the qualified nature of its incorporation has resulted in

---

[193] Interim Report of the Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, (July 28,2008) A/63/175

[194] *Task Force on Administrative Segregation*, p. 47

conditions of confinement in segregation that far from being the least restrictive are the most restrictive, and far from maximizing have minimized programs and services. Prisoners frequently refer to being in segregation to like "being on another planet."

329. Section 2.30(2) of the former Penitentiary Service Regulations which was in force from 1962 until 1992, stated:

> An inmate who has been dissociated is not considered under punishment unless he has been sentenced to such and he shall not be deprived of any of his privileges and amenities by reason thereof, except those privileges and amenities that,
>
> (a) can only be enjoyed in association with other inmates, or
>
> (b) cannot reasonably be granted having regard to the limitations of the dissociation area and the necessity for the effective operation thereof

330. In *Prisoners of Isolation*, I described how the qualification in subsections (a) and (b) of the Regulations resulted in an operational reality in the BC Penitentiary segregation unit that was an almost complete deprivation of the privileges and amenities in general population:

> The cells measured 11 feet by 6½ feet and consisted of three solid concrete walls and a solid steel door with a 5-inch-square window which could only be opened from outside the cell. Inside the cell, there was no proper bed. The prisoners 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 2 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. One of the expert witnesses described the physical space as "one step above a strip cell... a concrete vault in which people are buried."
>
> The cell was illuminated by a light that burned 24 hours a day. The 100-watt bulb was dimmed to 25 watts at night. The light was too bright to permit comfortable sleep and too dim to provide adequate illumination... 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...
>
> The 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 limited to walking up and down the 75-foot corridor in front of their cells. Exercise was taken under the continuous supervision of an armed guard who patrolled on the elevated catwalk. For the rest of the day prisoners were locked up in the cells.

> Prisoners spoke to visitors through a screen and conversations were monitored by the staff. Standard procedure governing the movement of prisoners from the unit to the visiting area decreed that they be handcuffed to a restraining belt around their 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 or had any physical contact with their visitors.[195]

331. The 1975 Report of the Study Group on Dissociation acknowledged the system wide operational failure to observe the law and policy in relation to segregation.

> The failure to pay strict attention to the [Commissioner's] directives reflects the philosophy of the Canadian Penitentiary Service toward dissociated inmates.... This means that [a prisoner] may be deprived of privileges to which he is entitles [sic] according to the Penitentiary Service Regulations....
>
> ... We encountered many situations in which regulations were ignored by staff in charge of dissociation facilities.[196]

332. The Study Group made a series of recommendations on staffing, living conditions and routine in segregation units. All prisoners in segregation should be entitled to the same amenities as all other prisoners so far as was reasonable, except for the privilege of association. To the study group this meant that basic cell conditions should not differ from general population cells in size, furnishings, lighting, or temperature; prisoners should have adequate exercise time and should maintain library, correspondence, visiting, canteen, and smoking privileges. The study group recommended that because of the risk that hobbycraft tools might be used for weapons, decisions regarding access to hobby materials should be made on an individual basis.[197]

333. In the earlier parts of my report I have described through case studies drawn from my own research how implementation of other recommendations of the Study Group to improve the segregation review process, including the introduction of formal review boards, more frequent reviews and requirements for development of reintegration plans, made little difference to the systemic problems of unfairness and arbitrariness in segregation. That same research also revealed that while progress was made in improving the conditions of confinement in segregation measured against the barbaric conditions of the BC Penitentiary, the normalization of the rights and privileges of segregated prisoners to those in general population was not reflected in the new institution that replaced the BC penitentiary in 1980, Kent Maximum Security Institution, referred to by the then Solicitor General as the "Cadillac of the Canadian penitentiary system." *In Justice Behind the Walls 2001*, I included a case study "My Home Is Hell" that describes the inhumane and degrading conditions in the segregation unit at Kent and their impact on prisoners.[198]

---

[195] *Prisoners of Isolation*, pp. 48-49, http://justicebehindthewalls.net/book.asp?cid=772
[196] *Report of the Study Group on Dissociation*, pp. 16-17
[197] *Report of the Study Group on Dissociation*, pp. 36-37
[198] *Justice behind the Walls 2001*, pp. 305-09, http://justicebehindthewalls.net/book.asp?cid=119 et seq.

334. Earlier in this report, I explained that my 1983 Model Segregation Code contained provisions designed to address the *de facto* denial of privileges and amenities in segregation units by setting out in affirmative terms the rights and privileges to which segregated prisoners were entitled, the specific bases upon which restrictions of these rights can be authorized, and the important role an independent adjudicator would play in ensuring compliance with the law.[199]

335. The 1992 *CCRA* continues the approach of the old *Penitentiary Service Regulations*, in mandating that prisoners in segregation "have the same rights, privileges, and conditions of confinement as the general population, except for those that can only be enjoyed in association with other inmates or cannot reasonably be given owing to limitations specific to the administrative segregation area or security requirements."[200] This sweeping exception is almost identical to the pre-1992 legal regime which supported the continuation of debilitating conditions in segregation units.

336. Given the continuation of the same language in the *CCRA* with its sweeping exception and since the legislation did not result in the building of new or redesign of existing segregation units that would normalize segregation to the conditions in general population, it is not surprising that in the years after the *CCRA* there remains a vast difference between the conditions in segregation and general population. The omnibus nature of "limitations specific to the administrative segregation area" means that segregated prisoners have less access to exercise, telephone calls, open visiting with family members and friends, spiritual guidance, work, education, correctional programming and mental health services. Typically segregated prisoners receive all their meals and in many cases, depending on operational requirements, are interviewed by staff through a food slot in their solid doors.

337. In previous sections of this report I cited from the 1996 report of Justice Arbour on the conditions in segregation at the Prison for Women in which she described the litany of deprivations experienced by prisoners during a nine month period in segregation.

> 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....
>
> > ... In the period immediately 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

[199] *supra*, paras 100-01

[200] *CCRA*, s. 37. An inmate in administrative segregation shall be given the same rights, privileges and conditions of confinement as the general inmate population, except for those rights, privileges and conditions that: (a) can only be enjoyed in association with other inmates; or (b) cannot reasonably be given owing to: (i) limitations specific to the administrative segregation area, or (ii) security requirements.

> 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.[201]

338. These deprivation of basic amenities in 1994 replicated the conditions I observed at Kent Institution in H unit in 1983 and in the BC Penitentiary a decade earlier.

339. The Task Force on Segregation, as part of its mandate to review the segregation regime following the Arbour Report, sent to all segregated prisoners a survey questionnaire. Prisoners were asked the following question: "Compared to when you were in the general population, how much access have you had to the following services, when needed, while in segregation?" A list of 32 items followed, each with the option to respond "Less", "More", "Same", "Does not Apply" and a space for narrative comments. The questionnaire was distributed to all segregated prisoners in late November and early December, 1996 and results were tabulated based on the 397 valid responses received by January 9, 1997. Of this number, 393 were from male offenders, including 88 Aboriginal offenders, and 4 were from women offenders. The Report of the Task Force summarized the results as follows:

> *Visits by Staff / Spiritual and Health Care Support*
>
> ...
>
> As part of the segregation review process, inmates are generally seen at least once per month by their CMO and institutional psychologist, and daily by a health care professional.
>
> Access in excess of these regular contacts normally occurs through an inmate request, which in many institutions would mean less ready access than in the general inmate population. Spiritual support while in segregation was of concern to a large proportion of the respondents, and is an issue that needs further attention. As inmates do not have access to religious services while in segregation, and chaplains in many institutions do not visit the segregation area regularly, spiritual support to segregated inmates is limited.
>
> *Visits and Correspondence*
>
> ...
>
> Due to limitations in the physical structure, staffing and security issues in many segregation units, access to telephone calls is limited to a set number of calls per month per inmate (excluding legal calls). Many institutions do not permit open visits or Private Family Visits (PFVs) for most inmates in segregation. Over the course of the past few

[201] Arbour Report, p. 77

months, institutions have moved to evaluating PFVs on a case-by-case basis or reserving the open visits area for groups of segregated inmates.

Access to Programs, Education and Recreational Activities

...

This was the area where the greatest concerns were raised by the respondents. For the most part, books, TV and radio are the only distractions available to inmates for the 23 hours each day that they are in their cells. The variety of books available, and access to TV and radio (particularly when the segregated inmates do not have one in their personal effects) were also of concern. Very few institutions permit hobbycraft in segregation. At the time of the first on-site visits, very little recreation equipment was available to inmates in their one hour of exercise. The second on-site visits indicated that efforts had been made to offer recreation equipment (basketball hoops, weights, baseball gloves, etc.) and consideration was being given to some "passive" hobbies such as painting and drawing.

With respect to programming, cell studies is the most common activity, but depends on the anticipated length of stay of the inmate in segregation and whether or not the inmate is expected to transfer out of the institution. Although a few institutions have initiated some programs in segregation (Alcoholics Anonymous, Breaking Barriers, etc.), it is an area that still needs improvement.

Services /Cell Effects

...

One of the most common concerns across the country was food - the temperature of the food, the amount provided and the hours it was served. Access to canteen and cigarettes is an issue primarily because inmates in segregation receive a lower rate of pay than when they are working in the general inmate population. Although they may have the same access to the canteen and most of the same items, their purchasing power may be reduced as a result of their segregation.

Showers are subject to operational routine, so inmates do not have the opportunity to determine when, how often and how long they may shower. Similarly, laundry services in segregation are often limited to certain days of the week, or are provided by a unit cleaner, which in many institutions differs from the ready access to laundry machines in the general inmate population.

Access to Aboriginal Culture

...

The majority of respondents indicated that they were not permitted to have their ceremonial objects in segregation, and where there was access, that staff did not show

> respect for these items. In addition, most institutions do not provide Aboriginal inmates in administrative segregation with access to cultural ceremonies such as sweat lodges. There was also indication that Elders are not visiting the segregation area on a regular basis.
>
> This is an area of concern. The response to the inmate questionnaire in this area confirmed that there is a need to increase the level of access to Aboriginal cultural items and spirituality while in segregation.
>
> *Other Support Systems*
>
> ...
>
> In general, the respondents felt that there was little support available to them while in segregation. The audit confirmed that in some institutions, there is little involvement by the Inmate Committee in segregation cases.
>
> The main concerns communicated through the inmate survey were those relating to the day-to-day routine of the segregation unit and contacts with various parties. While some access has been limited due to operational and security requirements (i.e., telephone calls, showers, laundry, visits, etc.) in accordance with Section 37 of the CCRA, other areas were identified where improvements could be made to provide similar access as in the general inmate population. Of primary concern is hobbycraft and recreation equipment, programs and educational services, Aboriginal culture and spiritual support. The results of this survey and observations made by the audit teams have led the Task Force to conclude that the role of the Segregation Review Board must encompass the ongoing review of conditions of confinement, so as to ensure that they are in compliance with the law and that they respond to individual needs as defined in the segregated inmate's reintegration and/or Correctional Plan.[202]

340. The comprehensive survey conducted by the Task Force in Segregation in 1997 has not been replicated to account for any changes in the conditions in segregation since then. In 2007, the Research Branch of CSC published a "Profile of Offenders in Administrative Segregation," but this did not include any interviews with segregated prisoners or any on-site visits to segregation units and does not address the issue of conditions.[203] However the literature review confirmed the negative correctional impacts on prisoners because of the restrictive conditions in segregation:

> Although the rights and privileges to which offenders in segregation are entitled include access to programming, the very nature of the segregation environment can impose limits on such opportunities while in custody. Furthermore, since many offenders can remain in segregation for significant periods of time, most notably those in voluntary segregation, their ability to address the goals of their correctional plan may be greatly impeded.

---

[202] *Task Force on Administrative Segregation*, pp. 51-53

[203] Shauna Bottos, "Profile of Offenders in Administrative Segregation: A Review of the Literature, Research Branch Correctional Service Canada" (September 2007), http://www.csc-scc.gc.ca/research/b39-eng.shtml

> Research has shown that program completion is inextricably linked to an offender's ability to move from higher to lower levels of security classification... and that participation in correctional interventions influences the likelihood that parole will be granted...[204]

341. The most recent report on the conditions in segregation is the 2010 report of Dr. Margo Rivera that was commissioned by CSC as part of its response to the Report of the Correctional Investigator into the death of Ashley Smith. Earlier in this report I have referenced the Rivera Report in relation to her findings and recommendations as they relate to the issues of the criteria and process for admission to segregation. In this part of my report I will be dealing with her findings and recommendations as they relate to the conditions of confinement.

342. Based upon her interviews with correctional staff, administrators and prisoners in several federal men's and women's institutions, Dr. Rivera identified the impediments to appropriate correctional programs and treatment for offenders placed in segregation, particularly those with mental health issues and the limited access of aboriginal prisoners to aboriginal cultural and spiritual services. The significance of the Rivera Report is that in many areas it identifies the same systemic problems with the regimes and conditions in segregation units as were identified by the 1997 CSC Task Force on Segregation, demonstrating the institutional barriers to fundamental change in the operation of administrative segregation within the federal system. I would also observe that the Rivera Report almost certainly understates these institutional barriers as Dr. Rivera's interviews and observations were confined to the segregation units of medium security institutions and as I noted earlier the most debilitating conditions of confinement and lack of effective programming are to be found in the segregation units of maximum security institutions.[205]

343. With this caveat I have set out the Rivera findings on three important elements of the conditions of confinement in the medium security institutions she reviewed in the Ontario and Prairie regions. Given that the commissioning of the Rivera Report was precipitated by the Correctional Investigator's report on the death in segregation of Ashley Smith her report has a particular focus on mental health services.

> <u>Mental Health Services</u>
>
> One of the psychiatrists in a men's institutions expressed his concerns about the level of mental health services offered in his institution. "Most of the offenders I see have abuse histories, attachment problems, and lots of experience of trauma. I am here once a week and I see 26 men, mostly for medication review. They need meds, but they need therapy more than meds. They need supportive therapy on a regular basis, which we know works for addictions as well as other psychological problems. They could use behavioral counselors and skill building groups like they have in the women's institutions, groups to teach them how to manage and understand their emotions.

---

[204] Profile of Offenders in Administrative Segregation, p. 18
[205] *supra*, paras. 228-29

> Access to the inmates in segregation and inappropriate placed interview them privately if they could not be escorted off the unit were identified as significant problems by psychologists in most of the men's institutions.
>
> Staff in both men's and women's segregation units stressed the need for better services for those inmates who do not meet the criteria for admission to a psychiatric treatment center, mostly those who are diagnosed with significant personality disorders accompanied with severe self-injury and other dysfunctional behaviors. Some recommended an adequately staffed mental health unit.
>
> The correctional staff indicated need for a higher level of knowledge regarding mental health and a higher staff inmate ratio for dealing with inmates who have mental health problems. Some saw the need for pro-active interventions with inmates who present with dysfunctional and self-injurious behaviors and therefore thought that they need to learn how to intervene before the behaviors occurred. They also stressed the need for consistency through a dedicated staff roster, as they thought inmates with mental health concerns were particularly affected by inconsistency.
>
> For the prevention of admission to the segregation unit, staff spoke of the need for complex needs units for offenders who are intellectually and behaviorally low functioning, have fetal alcohol spectrum disorder, brain injuries, or impaired communication and relationship problems – all of which require ongoing interventions other than psychiatric treatment.
>
> Many staff members in the women's institutions and regional and national staff responsible for the women's sector indicated that the capacity to offer more effective mental health services for the more seriously dysfunctional offenders in long-term segregation would require a review of the infrastructure of the women's institutions. Putting in more staff to deliver more services, without considering the infrastructure limits was, in their view, counterproductive and likely to create further problems due to increased and unreasonable expectations.
>
> ….
>
> Several staff members in the men's institutions, not only but including psychologists, believe that the suicide observation cells are not adequate for inmates who are suffering from suicidal depression and that there is a need for padded cells preferably in a healthcare area rather than in the administrative segregation unit. One of the purposes of such a location would be to employ a therapeutic framework around suicide watch rather than a watch that emphasizes mainly static security.[206]

344. Dr. Rivera looked beyond mental health services to the broader question of correctional programming in segregation. Here again the picture painted was one that, apart from an in-cell studies program at Saskatchewan Penitentiary, was little changed from the decade before when the Task Force on Segregation conducted its survey.

---

[206] pp. 44-46

Correctional programming

"Programming? You cannot have programming in seg". The first response of most of the male offenders interviewed by the External Review Board to the question of whether they had participated in any part in any programming while segregated was an emphatic negative. It did not happen; it was not possible. Only when further probed if it were possible to have programming delivered individually or in small groups of compatibles like your yard group, would you like that? Would you participate? did some of the offenders light up with interest and speak about their concerns about doing "dead time", wasting months in which they could be accomplishing something. Most segregated men interviewed indicated that they did not participate in any programming while in segregation with the occasional exception of cell studies. Most did not think it possible, as there would not be large enough numbers of compatible inmates in the segregation unit to make delivering group programming possible.

In Saskatchewan Penitentiary, almost every inmate in long-term segregation was assigned the job of cell studies. "It makes a world of difference," said one inmate to the reviewers, "to be busy and to have some money to buy things of the canteen. It makes doing time much better." Most offenders on this unit was successful at completing the lessons with the assistance of an on-site teacher dedicated to the segregation unit, even those who had never been successful in a school setting previously. This teacher communicated with the students through the cell bars daily, talking to them about their assignments, tutoring them when asked, and generally offering an encouraging presence. Inmate spoke enthusiastically about their educational accomplishments, and the lively and supportive interactions between the teacher and has students were observed by the reviewers while revisiting the segregation unit.

Unfortunately, in the other men's institutions, there was usually a long waiting list for cell studies. At Warkworth institution, for example, only two of the men long-term in segregation were completing an educational program, and the only contact these two had with a teacher was when their lessons were picked up weekly. Under the circumstances, only those with relatively high literacy skills and the capacity to manage their school work on their own could participate successfully in the cell studies program even if it had been more available.

… Inmates in segregation in men's institutions have limited access to work except for the work of unit cleaner or cell studies.[207]

345. A third element of Dr. Rivera's review was the provision of aboriginal services, which had been the subject of particular attention and a set of recommendations by the Task Force on Segregation.

[207] pp. 50-53

Aboriginal Services

In the men's institutions, access to Aboriginal services is more limited for inmates in long-term segregation compared to general population of these institutions. In Saskatchewan Penitentiary, Stony Mountain, and Warkworth Institution, the Aboriginal offenders in general population have access to the Pathways program. In Collins Bay and Joyceville Institutions, Aboriginal resources are more limited and contact with an Elder is infrequent. However, even in the institutions in which there are relatively more Aboriginal resources for men in general population, inmates in long-term segregation have limited access to these resources, as they cannot participate in the group programming, and the Elders rarely visit the segregation unit. The elders at Warkworth Institution spoke to the reviewers about their limited access to the segregation unit. The Aboriginal Liaison Officer in one of the penitentiaries in the Prairies Region, where there is a large Aboriginal population, also noted that roadblocks are frequently placed in his way when he attempts to get the segregated offenders out of their cells and involved in Aboriginal activities, such as smudging and healing circles, individually or in small compatible groups.

There were only three Elders available to be interviewed at all the institutions, both men's and women's, during the Review Board visits, one from Stony Mountain Institution and two from Warkworth Institution. The Elders who were interviewed spoke to the reviewers about the process of referral from segregated inmates for their services, declaring that inmates would tell them they had made requests for services which Elders never received. They also spoke about the difficulty in accessing the inmates in segregation. "It is never the right time. We can go to seg more than once and they are too busy to let us in. Then we get busy with other offenders and don't have time to keep returning."

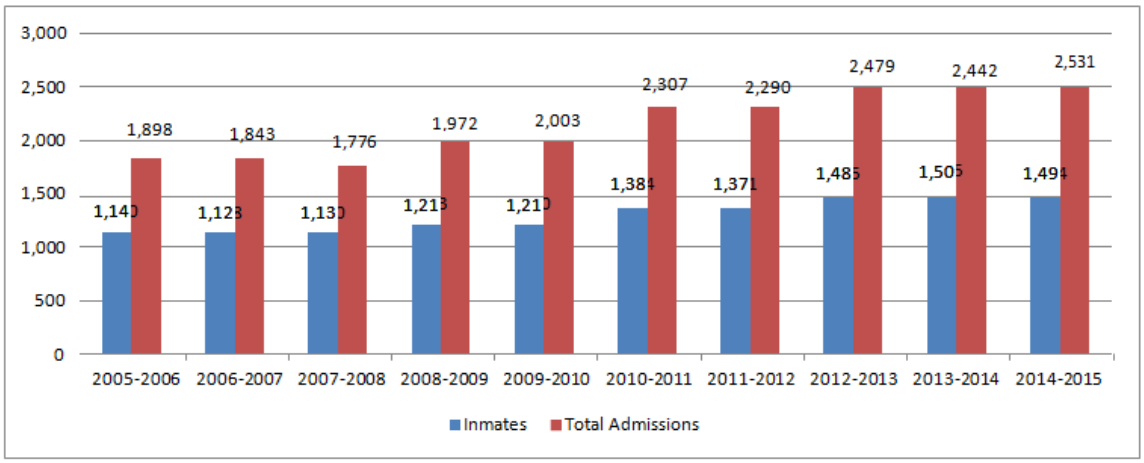
Several inmates in the men's segregation units, particularly in the Prairies Region but also in Warkworth Institution, spoke of their perception that when they are placed "back here" they are forgotten, including by those who deliver aboriginal services. Some blame the correctional staff for this, believing that their request to see an Elder and not passed on in a timely fashion and that the aboriginal liaison officers and the Elders are frequently sent away when they arrive at the segregation unit because their presence interferes with the unit routine. Others believe that the Elders do not like to visit the segregation unit because the atmosphere is "bad medicine". The reviewers met several men who had been actively involved in aboriginal programming, including one showing leadership in traditional singing and dancing, who no longer participate in aboriginal activities of any sort while in segregation.[208]

346. The Rivera findings regarding the inadequacy of aboriginal services assume special significance in light of the overrepresentation of aboriginal prisoners in segregation units. The Correctional Investigator in his 2015 report on the 10 year trends in segregation documented this upward trend. The report showed that the percentage of aboriginal offenders segregated had

[208] pp. 46-48

grown 31% between 2005-2015 compared to a growth of 1.9% for the non-Aboriginal segregation population and that aboriginal offenders consistently have an average length of stay in segregation that is greater than for non-aboriginal offenders.

Graph 3: Total Aboriginal Admissions to Segregation – 10 Years



347. In her report Dr. Rivera provided a body of policy recommendations to reduce the use of administrative segregation, particularly for prisoners with mental health issues; improve material conditions and quality of life for prisoners in segregation; expand the correctional and mental health programming and services in segregation; provide greater access to services for aboriginal offenders; better training for staff and more coordination by correctional managers charged with the administration of segregation units; a dedicated staff roster for segregation units selected for skill set rather than strictly by seniority and developing better alternatives to segregation.[209]

348. A number of the recommendations related to revisions to the Commissioner's Directive and changes in the everyday running of segregation units, in order to normalize and humanize segregation and reduce the isolation experienced by prisoners. For example:

> 16. Offer segregated male inmates a shower every day rather than every other day.
>
> 17. Revise the CD related to segregation to ensure that cell effects follow the inmate to segregation within 24 hours. Add a box to the OMS record regarding segregation admission to tick off: "Inmate has received cell effects." Ensure that all inmates who are in segregation for more than a short time have access to a television to decrease isolation and increase stimulation.

349. In light of the Rivera Report's findings that the experience of segregated prisoners continues to be one of deprivation in relation to correctional programming and services - which confirmed much of what the Task Force on Segregation had found over a decade earlier - how has the Correctional Service of Canada responded and how has it addressed the issue of

[209] pp. 77-89

conditions of confinement in the new Commissioner's Directive and the Administrative Segregation Guidelines?

350. In December 2014 as part of its Response to the jury recommendations of the Ashley Smith coroner's inquest and as part of the Government's argument that solitary confinement does not exist in Canada, we find this statement:

> Segregated inmates are entitled to all the rights and privileges of other inmates within the physical limitations of the segregation unit. There is frequent interaction with others, including staff and visitors, as well as structured contact with peers. Members of the institutional Citizens Advisory Committees also have access to all offenders in the segregation unit. Inmates are routinely provided with their personal effects, which can include books, television, hobby materials and other personal items.

351. It is difficult to understand how this confident "no problem" statement can be made on the basis of any objective reading of the findings of the Rivera Report.

352. Commissioner's Directive 709 contains some provisions that relate to prisoners' "needs". In an earlier draft of the directive that was circulated to stakeholders, the word "entitlements" was used which given the language of s. 37 of the *CCRA* – "the same rights, privileges and conditions of confinement" would be more accurate than what now appears in the final text.

> 12. Without delay, upon admission to administrative segregation, an inmate will be:
>
> ...
>
> (e) provided with those items and services which meet his/her individual needs, as outlined in GL 709-1 - Administrative Segregation Guidelines, Annex A, notwithstanding exceptional circumstances that can be justified in accordance with section 37 of the CCRA

353. In Annex A of the Administrative Segregation Guidelines which contains the Segregation Assessment Tool, the following questions have to be answered by the staff member completing the tool.

INMATE'S NEEDS: REVIEW

Question	**Options**
Health Care, Mental Health and Access to Psychological Counselling	
1. What is the outcome of the consultation with health care professionals regarding any physical and mental health issues that may impact the segregation status?	Enter details.

Question	Options
2. Are there any concerns in relation to the inmate's mental and/or physical state that would preclude his/her continued placement in administrative segregation and/or concerns of adverse effects of segregation on the inmate?	Yes
	No
3. Detail these concerns and indicate the plan to address the issues. (Only required if response to question 2 was "YES".)	Enter details.
4. If there are no concerns, indicate that there are no concerns and how it is evidenced (date, type of review, supporting documentation, etc.). (Only required if response to question 2 was "NO".)	Enter details.
5. Has the inmate made a request to speak with a mental health professional for counselling?	Yes
	No
6. What was the result of this request? (Only required if response to question 5 was "YES".)	Enter details.
7. Are the inmate's health care needs met during the daily health care staff visits to administrative segregation?	Yes
	No
8. Does the inmate report at the hearing that he/she requires health care attention?	Yes
	No
9. Has there been any follow-up? (Only required if response to question 8 was "YES".)	Yes
	No
10. Is any follow-up required in this area?	Yes
	No
Access to Correctional Programs or Interventions	
11. What correctional programs or interventions are being accessed by the inmate while in segregation?	Enter details.

Question	Options
12. If the inmate has refused available programs or interventions, indicate which ones and why. (These may include educational self-study programs, individual or group programs.)	Enter details.
Access to Case Management Services	
13. Has the inmate been seen by his/her Parole Officer?	Yes
	No
14. If not, explain why. (Only required if response to question 13 was "NO".)	Enter details/explanation.
15. Indicate frequency of meeting.	Enter details.
Access to Spiritual Support	
16. Has the inmate requested to see the Chaplain, Elder, Aboriginal Liaison or other appropriate spiritual advisor?	Yes
	No
17. Has this occurred?	Yes
	No
18. At what frequency?	Enter details.
Exercise	
19. Has the inmate been given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or to exercise indoors where the weather does not permit exercising outdoors?	Yes
	No
20. If weather did not permit outdoor exercise and the institution's administrative segregation area does not allow for indoor exercise, what was done?	Enter details or N/A.
21. Has the Segregation Log (CSC/SCC 0218) been reviewed for confirmation?	Yes No

Question	Options
Visits	
22. Does the inmate receive visits?	Yes
	No
23. Has the inmate met with the Inmate Committee members or peer support?	Yes
	No
24. Does he/she wish to?	Yes
	No
Showers	
25. Is the inmate provided the opportunity to shower at least every second day?	Yes
	No
26. If not, explain why. (Only required if response to question 25 was "NO".)	Enter details/explanation.
27. Has the Segregation Log (CSC/SCC 0218) been reviewed for confirmation?	Yes
	No
Personal Effects	
If, at the fifth-working-day review, the decision is made to retain the inmate in administrative segregation, the inmate is entitled to receive his/her personal effects within the following three working days. Once the inmate has received his/her personal effects, this heading is no longer required in further reviews.	
28. At the time of this review, has the inmate received his/her personal effects?	Yes
	No
	No, as this is the first or fifth-working-day review.
29. If not, explain why.	Enter details/explanation.

354. It takes a careful reading of this document to understand that neither of the two recommendations on conditions of confinement that I cited from Dr. Rivera's Report have been incorporated. Segregated prisoners' "needs" remain at a shower every other day rather than every day and the CD has not been revised to ensure that cell effects follow the prisoner to segregation within 24 hours. The standard is that personal cell effects can be deferred for up to three days after the five segregation review. Since the "days" for the purposes of the *CCRA* means "working days", the result is that cell effects can be delayed until eight working days after the initial segregation. In real time this means that if a prisoner is segregated on a weekend, which is not uncommon, and the five-day review is held at the end of the following week a prisoner could wait until the middle of the next week to get his effects. A common complaint by prisoners is that cell effects are often delayed until well after their five-day reviews.[210] The new CD is not well calculated to change this reality and is a far cry from Dr. Rivera's 24 hour recommendation.[211]

355. There is a further layer of the Commissioner's Directive that also addresses the conditions of confinement. In Annex C of the Administrative Segregation Guidelines - "How to run an institutional segregation Review Board," the following appears under the heading of "Inmate's Needs":

> Prior to the case discussion, the ISRB Chairperson will lead a review to ensure that the inmate's needs, where possible, have been addressed.
>
> This will include examination of any physical or mental health care requirements. Parole Officers are required to consult with the health care professionals to obtain pertinent and available inmate information. This information must be documented in all segregation review boards. Physical or mental health care requirements should be examined particularly in relation to their impact on the administrative segregation admission. It is sufficient for a mental health professional, or other mental health staff under the supervision of a mental health professional to review the inmate's file, and to advise the Parole Officer whether there are mental health issues. If the mental health professional believes that the inmate has current and significant mental health needs and there is no current mental status assessment available on file, a new mental health assessment is required. If the mental health professional assesses the inmate as having significant mental health issues which would require referral for mental health services (acute psychiatric hospital care, intermediate mental health care, primary care), it must be identified and a plan initiated to provide this level of care to the inmate.
>
> Discussion should examine the inmate's access to correctional programs or interventions. Any needs should be identified.
>
> Discussion should examine the inmate's access to case management services. Has the inmate been seen by his/her Parole Officer? If not, explain why. Following an inmate's

[210] See the case study of Gary Weaver, *supra*

[211] In *Hamm*, Justice Veit commented on the fact that the 5 day reviews took place in real time 9 days after the initial segregation: "The institution was, of course, aware that even the Fifth Working Day Review means that an inmate can, as did the inmates in this case, actually serve 9 days in solitary confinement prior to the Review" (para. 102).

> admission in administrative segregation, a Parole Officer will meet with the inmate within two working days to explore reintegration options.
>
> Discuss any changes or action relative to the inmate's Correctional Plan.
>
> Discussion should examine the inmate's access to spiritual support. Has the inmate requested to see the Chaplain/Aboriginal Elder or other appropriate spiritual advisor? Has this occurred and at what frequency?
>
> Has the need for exercise and showers been met? Did the inmate receive basic personal effects on admission (such as bedding and toiletries)?
>
> Does the inmate have any sources of support available? Does he/she receive visits? Has the inmate met with the Inmate Committee members or peer support? Does he/she wish to?
>
> If, at the fifth-working-day review by the SRB, the decision is made by the Institutional Head to maintain the inmate in administrative segregation, within the following three working days the inmate must receive his/her authorized personal effects. At the time of this review, has the inmate received his/her personal effects? If not, explain why. If this issue has been resolved, it can be indicated and does not need to be repeated in future reviews.

356. Quite apart from not accepting Dr. Rivera's recommendations, the overarching question is whether these provisions cumulatively will change the reality that prisoners in segregation have historically not received the full benefit of the rights and privileges to which they are entitled. Under the Commissioner's Directive, the rights recognized are procedural ones, particularly the right to counsel, the right to have an advocate at the segregation review if they fit within the class of acute or level of mental health needs and the right to be informed of his right to have access to an elder or spiritual advisor as well as to spiritual practices. All other matters so critical to alleviating the inherent isolation of segregation and humanizing the conditions of confinement are characterized as "needs".

357. While the Administrative Segregation Guidelines require notations as to whether these needs are being met, and require that this issue be the subject of inquiry at the segregation review hearing, in contrast to my Model Segregation Code, there is no detailed provision for enforcement if the needs have not been met beyond the inmate grievance system or directions from the chairperson to correctional staff. However, the Administrative Segregation Guidelines in Annex C do provide, albeit elliptically, that:

> If any of the inmate's rights have been violated, or if any of the procedural safeguards have not been fulfilled, the Chairperson must consider whether such infringements affect the fairness of the proceedings in a significant enough way to warrant the granting of an extraordinary remedy. Re-scheduling of the hearing until the safeguards have been met is one possible remedy.

358. This provision seems designed to cure defects such as failure to allow the prisoner to consult counsel and does not address the issue of enforcement of other matters relating to the conditions of confinement, which do not affect the fairness of the segregation review process.

359. The language of "extraordinary remedy" is novel in its appearance in Commissioner's Directives and would seem to be a faint reference both back to my Model Segregation Code and one of Justice Arbour's recommendation regarding the need to provide an extraordinary remedy for prisoners who experienced illegal conditions of confinement such that the nature of their sentence of imprisonment had been rendered harsher than that imposed by the court.[212]

360. When reading the language of extraordinary remedy and indeed in reviewing other parts of the administrative segregation guidelines there seems to be, as there was with the provisions of the *CCRA*, aspects of my Model Segregation Code that have been incorporated. However, as with the *CCRA* administrative segregation provisions, they are reflected in a much weaker form and lack the essential element of independent adjudication that anchored the Model Code. Earlier in this report I explained how the Code sought to address the reality of *de facto* deprivation of rights and privileges. In order to understand the differences between the Model Segregation Code and the new Commissioner's Directive:

> The Model Segregation Code attempts to deal with this problem by setting out in affirmative terms the rights and privileges to which segregated prisoners are entitled and the specific bases upon which restrictions of these rights can be authorized. Where a prisoner is deprived of a right or privilege to which he is normally entitled, that deprivation must be reviewed at a segregation review hearing by an independent adjudicator and can only be continued with that adjudicator's written authorization. Similarly, the adjudicator is empowered to make findings regarding alleged violations of the Model Code in relation to the rights and privileges of segregated prisoners and may issue written directions to the warden to remedy those violations. In the event that there is non-compliance with these directions, the adjudicator is required to prepare a report detailing the nature and extent of the violations, the directions issued, and the circumstances of non-compliance; a copy of that report is to be provided to the warden and the prisoner and also forwarded to the Solicitor General.[213]

361. The importance of having independent adjudication built into the legal and administrative structure of the segregation process is to ensure respect for and compliance with a prisoners' rights and privileges and also their right to access correctional services and programming that are mandated under the *CCRA* as part of their correctional plan. Changing the conditions of confinement in segregation so they better accord with sound correctional principles and practices and human rights protections may be, in the face of the historical record, the biggest challenge to

---

[212] As a means of preserving the integrity of a sentence which can be threatened by illegality, a provision should be enacted to give effect to the following principle: If illegalities, gross mismanagement or unfairness in the administration of a sentence renders the sentence harsher than that imposed by the court, a reduction of the period of imprisonment may be granted, such as to reflect the fact that the punishment administered was more punitive than the one intended. Arbour Report, p. 101

[213] *Justice behind the Walls 2001*, p. 313, http://justicebehindthewalls.net/book.asp?cid=122&pid=475

the Correctional Service of Canada. It is my opinion that independent adjudication must be a central part of meeting that challenge.

The "Deep Custody" Report

362. In addressing the issue of "sound principles, practices and standards in relation to the provision of living conditions in administrative segregation, a recent 2015 study conducted on the use of segregation in the prison system in England and Wales is instructive, not only on this issue but several others that are relevant to my opinions. The study, "Deep Custody: Segregation Units and Close Supervision Centres in England and Wales"[214] was conducted by Dr. Sharon Shalev of the Centre for Criminology at Oxford University and an international authority on the practice of solitary confinement, together with Dr. Kimmet Edgar of the Prison Reform Trust, a British NGO with a long history of prison reform. According to the authors, the study set out to examine how segregation units and close supervision centres are used; describe the skills and views of staff who work there; to explore prisoners' perceptions of fair processes and their treatment; and to profile good practice.[215]

363. The report's findings are based on a survey, distributed to all prisons in January 2014 and on visits to 15 prisons, including 14 segregation units of 4 close supervision centres, during which correctional managers, correctional officers and prisoners were interviewed and segregation review hearings were observed. The Forward to the report, written by Lord Wolff, one of Britain's most distinguished jurists, highlights the relationship of the issues surrounding the practice of solitary confinement to the administration of justice.

> In my report on the disturbances at Strangeways prison and elsewhere I was seeking to achieve a prison system imbued with justice and fairness. Security, control and justice in prisons must be set at the right level and achieve the right balance. A balance that would mean that fairness and justice did not stop at the prison door, but instead permeated the whole system.
>
> The way prisoners are treated in segregation can frequently be a barometer for their general treatment in an establishment. The prison service principles of decency must surely apply especially to segregation units and close supervision centers. These are that: prisoners should not be punished outside of prison rules; promised standards within the prison are delivered; facilities should be clean and properly equipped; there should be prompt attention to proper concerns; prisoners should be protected from harm; prisoners' time should be actively filled and prisoners should be fairly and consistently treated by staff.
>
> …

[214] Dr. Sharon Shalev and Kimmett Edgar, "Deep Custody**:** Segregation Units and Close Supervision Centres in England and Wales", Prison Reform Trust, 2015 ("*Deep Custody*"), http://www.prisonreformtrust.org.uk/Portals/0/Documents/deep_custody_111215.pdf

[215] *Deep Custody*, p. v

> ... The complexity of segregation brings many challenges to already beleaguered prison staff and prisoners who for whatever reason, cannot manage or be managed in, the main body of an establishment. Segregation, though it may sometimes be necessary, must not be prolonged or indefinite. Care must be taken to avoid, as far as is possible, the damage to mental health that exclusion will bring. Equally, care should be taken to avoid the use of segregation as a holding operation for people who should be transferred swiftly and...[216]

364. *Deep Custody* contains a nuanced description of the complexity of the issues presented by the management of and living in segregation units:

> Segregation units are complex places, where some of the prison's most challenging individuals are confined alongside some of its most vulnerable people, within a small, enclosed space.
>
> On any given day, a segregation unit may contain a combination of people with multiple and complex needs, including some at risk of self harm, some who pose a risk to others, or who may be both at risk and a risk to others, and people with literacy problems, particular mental health needs, or physical illness.
>
> Staff working in segregation units must balance the needs and risks presented by each of the individuals held in the units with those of others and with the needs of the institution more widely. They are expected to do so with limited resources. It is a difficult task which requires special skills.
>
> From the prisoner's perspective, being segregated means being cut off from the prison society as well as society at large and being subjected to various restrictions and deprivations. This form of confinement, especially when continued for a prolonged time, may adversely affect health and wellbeing. In some cases, these effects may be long-term or even permanent.
>
> In addition to this, segregation beds are limited in number and are among the prison's most expensive to run. They require higher staffing levels than the general population, a factor which, at a time of budget cuts, can be difficult to deliver.
>
> In short, segregation units contain some deep contradictions and tensions, and the manner and nature of their use can be highly contentious. This was evident from our observations and from what our interviewees: prisoners, officers, managers and support staff told us.[217]

365. One of the challenges in understanding comparative studies on the use of segregation is to ensure that the study is of practices that are indeed comparable and relevant to the Canadian regime. *Deep Custody* is helpful in this regard because the authors use as part of their framework for analysis the definition of solitary confinement used by the Special Rapporteur on

---

[216] *Deep Custody*, p. iii
[217] *Deep Custody*, p. 1

Torture, to which I have referred earlier in this opinion (para. 30) and conclude that segregation units in the UK meet that definition and therefore should be managed in conformity with the relevant international human rights standards, including the new UN Standard Minimum Rules (the Mandela Rules and the European Prison Rules.[218] In several respects the findings of *Deep Custody* conclude that the conditions in the segregation units they studied did not meet those standards.

366. The subject matter of *Deep Custody* extended to what the English system refers to as close supervision units ("CSCs"). These have been in operation since 1998 and were established to manage "highly disruptive and high risk prisoners who have demonstrated... violent and/or highly disruptive behaviour."[219] The study explains the differences between segregation and close supervision units

> There are important differences between the functions, conditions and provisions in segregation units and CSCs. For segregated prisoners, 'regime' can mean as little as half an hour out of cell per day, with very limited activities. For CSC residents, the regime can include some association and access to activities. Prisoners can be removed to segregation by a governor's decision, whereas CSC selection is a multi-disciplinary, central process, informed by psychological input. While periods of segregation must be reviewed every two weeks with the aim of reintegrating the person to normal location, prisoners in the CSC system typically spend years away from the main population. The common ground for segregation units and CSCs stems from the fact that both are forms of involuntary separation from the main population. In this sense, they function for the prison service as a 'continuum of exclusion' whereby prisoners who could not be managed in segregation units (and often those who have spent repeated and continuous periods in segregation) may be housed in a CSC (PSI 42/2012). For these reasons, this study examined both segregation units and CSCs. Throughout the report, where relevant, we distinguish between the two to highlight their similarities and differences.[220]

367. The Canadian federal system has no "close supervision centers" designated as such. In terms of the regime described in *Deep Custody* some of the features are comparable to the Special Handling Unit, located in Quebec which is Canada's only super maximum-security institution. There are also within some maximum security institutions designated ranges which under various names provide for a more intensive movement and association restrictions than those normally prescribed for maximum security prisoners. The Office of the Correctional

---

[218] *Deep Custody*, p. 143: Rule 37 of the revised UN SMR (the Mandela Rules) requires authorisation by lawof: "(d) Any form of involuntary separation from the general prison population, such as solitary confinement, isolation, segregation, special care units or restricted housing, whether as a disciplinary sanction or for the maintenance of order and security, including promulgating policies and procedures governing the use and review of, admission to and release from any form of involuntary separation."
Solitary confinement has three characteristics: social isolation, reduced sensory input and activity, and an increased control of prisoners. These characteristics are manifested in segregation units in England and Wales. The Mandela Rules provide a definition: "For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days."
[219] *Deep Custody*, p. 6
[220] *Deep Custody*, pp. 1-2

Investigator has referred to some of these units as "segregation lite" due to their approximation to the limited prisoner access to out of cell activities that characterizes segregation units.[221] Neither the Special Handling Unit nor these special ranges are the subject of my opinion and in drawing upon the *Deep Custody* report I have confined myself to its descriptions of and findings with reference to segregation units and not close supervision units.

368. Although the labels are different, the system in England and Wales, like the Canadian federal system, provides for both disciplinary and administrative segregation. Under Prison Rule 55(e), a prisoner found guilty of a disciplinary offence may be awarded cellular confinement in segregation unit for a maximum of 21 days. Prison Rule 45 also provides for what we referred to as administrative segregation for reasons of good order or discipline ("GOoD") or the prisoners own protection ("OP").[222] As in the Canadian federal system there are no legally prescribed limits on the length of this form of segregation except that it should be "for the shortest period of time consistent with the reason for separation in the first place" and must be reviewed not less than once every 14 days.[223] In the *Deep Custody* study, the most commonly cited reason for imposing segregation was GOoD under Rule 45 which the study found accords with the national figures.[224]

369. The GOoD basis for segregation harkens back to the pre-*CCRA* regime which I have previously criticized on the basis that it lacks the essential elements of specificity required to control correctional discretion. Recognizing that this definition is quite broad, the Prison Service Order on Segregation[225] lists examples of situations in which segregation under GOoD could be appropriate, including: a planned breach of security; a prisoner inciting others; a risk to staff, other prisoners or prison property; a dirty protest;[226] cases pending a police investigation; or efforts to manage the prisoner's behaviour on normal location have been unsuccessful.[227]

370. The authors of *Deep Custody* expressed cautious skepticism on whether recent policy changes in September 2015 which, require the reasons for continuing segregation to provide a clear justification for the prisoner's continuing segregation; reference the specific circumstances of the case; avoid the use of generic phrases and jargon and be understandable to the prisoner

---

[221] Ivan Zinger, "Segregation in Canadian Federal Corrections: A Prison Ombudsman's Perspective," presented at Ending the Isolation: An International Conference on Human Rights and Solitary Confinement (University of (University of Manitoba, March 22-13, 2013). Currently many institutions run separate units with movement and association restrictions. Known as alternative housing arrangements, secure living environments, special needs units, mental health units, intensive support units or gang ranges. These units operated outside the boundaries of the administrative segregation law, yet have many segregation-like conditions of confinement. Segregation-like units do not have appropriate level of procedural safeguards/oversight.
http://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20130322-23-eng.aspx

[222] *Deep Custody*, pp. 5-6

[223] *Deep Custody*, p. 6

[224] *Deep Custody*, p. 15

[225] Prison Service Order on Segregation (PSO 1700, revised 2007)

[226] The dirty protest (also called the no wash protest) was part of a five year protest during the Troubles by Provisional Irish Republican Army ("IRA") and Irish National Liberation Army ("INLA") prisoners held in the Maze Prison (also known as "Long Kesh") and a protest at Armagh Women's Prison in Northern Ireland. In *Deep Custody*, it is used more generally to mean where a prisoner has chosen to defecate or urinate in a cell without using the facilities provided.

[227] *Deep Custody*, p. 16

taking into account any learning disability or speech, language or communication impairment,[228] would in practice change the open ended nature of the good order and discipline justification for segregation:

> Five of the 30 prisoners segregated under GOoD in our study had been segregated for over 42 days, four of whom had been held for over 84 days. We analysed these prisoners' interviews to explore in more detail the reasons for their segregation under GOoD. The small sample calls for caution in interpreting the results, but our analysis gave us some cause for concern that the revised wording of the segregation policy may still be too wide and allow for lengthy periods in segregation.[229]

371. *Deep Custody* addressed the adequacy of two of the procedural safeguards built into the Prison Rules, the Prison Service Order on Segregation, that have particular relevance to the Canadian context and to the opinions expressed in my report. The one is the segregation safety screen and, the second, the independent monitoring board:

> PSO 1700 requires that an initial segregation safety screen be completed for all prisoners in the segregation unit, regardless of their status, within two hours of their placement there. This includes instances when the prisoner is there awaiting adjudication or transfer (for longer than two hours).[230]
>
> In a number of cases we found that the screen was largely a box ticking exercise: in a few cases a nurse literally ticked the boxes without even seeing the prisoner; elsewhere, the screen was filled out retrospectively. In one prison we watched a nurse take eight forms to a table and fill them in one by one with no prisoner present. In another prison, following the award of CC days at an adjudication hearing, a nurse from the prisoner's 'sending' residential wing was asked to come down to the segregation to sign the safety screen as she knew the prisoner. This is good practice. However, we observed the nurse first sign the form, certifying that the prisoner could be segregated, and only then go to see the prisoner (very briefly). One nurse explained: "You have to fill that out on the form. What I always do is put, 'no concerns **at this time**', because if he does something a couple of hours later, I'm covered" (interviewee's emphasis).
>
> Health staff very rarely raised objections to segregation, and we were told that on the few occasions that they do, uniformed staff would sometimes override their decision due to operational considerations (for example, nowhere else to place the individual). This chimes with the findings of a 2004 national survey of GPs who also work in prisons (Pearce, Gray and Marx 2004). Referring to the safety screen form, one GP told the researchers that, "You don't even know what you're looking for." Another explained that, "I defer to people who have experience." Our findings, more than a decade later,

---

[228] *Deep Custody*, p. 16
[229] *Deep Custody*, p. 17
[230] *Deep Custody*, p. 27. PSO 1700: Segregation Healthcare staff must assess the physical, emotional and mental well being of the prisoner and whether there are any apparent clinical reasons to advise against the continuation of segregation (*Deep Custody*, p. 95)

may indicate that efforts to simplify the health screen, as articulated by PSI 17/2006, have not gone far enough.[231]

Many health care workers misconstrued their role, thinking that the form required them to pass people as 'fit' for segregation. The policy is clear that the purpose of the safety screen is rather to raise concerns about how segregation will affect individuals and to alert managers to factors that might increase a person's vulnerability to the harm of segregation. In two prisons, nurses told us that they deferred to custody staff in assessing the risk to the prisoner.

…

A manager we interviewed said this:

> The algorithm [screen] is woolly, at best. Everyone knows the damaging effects of segregation. I'm surprised the General Medical Council isn't challenging the use of segregation and the high risk it places individuals in. If the GMC said no to segregation, then governors would not use it. But doctors sign up to it.[232]

372. The *pro forma* completion of the segregation safety screen is consistent with my own research in *Justice behind the Walls 2001* on the manner in which mental health professionals conducted psychological assessments of prisoners in segregation prior to every 30 day review. Under the new 2015 CD 709, the segregation assessment tool is intended to provide, prior to any decision to segregate, a more rigorous screening for prisoners which must involve health care professionals. This is intended, *inter alia*, to focus greater attention on prisoners with mental health problems and identify alternatives to segregation. I have expressed earlier in this opinion, when analyzing the new CD and Justice Veit's findings in the *Hamm* case, some skepticism whether, in the absence of independent review, a screening instrument that needs to be completed in a time sensitive framework consistent with operational requirements is likely to bring about substantive change in segregation practice. The findings in *Deep Custody* further deepen my skepticism.

373. Under the English system there is provision for an Independent Monitoring Board ("IMB"). Given the importance I have attached in this opinion to independent adjudication as an essential element of a fair and effective segregation process, the findings on how the English system works are instructive.

> The IMBs are an important safeguard against inappropriate placements in the segregation unit. Their role in the segregation unit, as set out in PSO 1700, includes:
>
> > *The representatives of the Independent Monitoring Board satisfy themselves that they are confident that the establishment has followed the laid down procedures*

[231] *Deep Custody*, pp. 27-28
[232] *Deep Custody*, p. 96

> *in regard to segregation of prisoners and that decisions in individual cases are reasonable in light of the available facts. (PSO 1700 section 6)*

As noted above, a member of the prison's IMB must be informed of segregation placements within 24 hours, and visit the prisoner within 72 hours of their segregation. Where possible, they should also 'aim to attend' the segregation review boards (the process of authorising continued segregation beyond the initial 72 hours) and must lodge in writing any objection to the prisoner's continuing segregation (PSO 1700).

As well as monitoring the use of segregation in their respective prisons, each IMB submits an annual report, where they can detail issues regarding the operation, caseload and conditions in segregation. In 2012 it was reported that concerns regarding segregation featured in 26% of IMB annual reports nationally, including:

> *Issues regarding the use, misuse and potential abuse of a resource that is subject to such stringent regulation. Many Boards indicated their belief that, however well run the facility, it is over-used - used too frequently - stays for individual prisoners are too long - used when other strategies should be tried - not always used as a last resort - exit plans are insufficiently developed or implemented.*

…

In most of the prisons we visited, an IMB member attended segregation reviews as required. However, and with few exceptions, they contributed very little, potentially raising questions about their effectiveness as a check/safeguard against inappropriate use of segregation.

As well as observing segregation reviews, we asked prisoners whether they saw an IMB member since being segregated, and whether they found them helpful. The responses, as below, gave us some cause for concern.

In total, only nine of those interviewed felt that the IMB had been helpful to them. 6% were unsure how helpful the IMB had been (including at least one individual who was still awaiting their response to his complaint).

The few prisoners who said they found the IMB helpful tended to state that the IMB had helped them by intervening with management on their behalf, or by simply checking that the prisoner was doing ok.

Among those who were unsure were some who felt there were structural constraints that limited the contribution the IMB could make. For example, one prisoner described a lack of confidentiality:

> *Um, dunno. Haven't really talked about problems, but do get a chance to talk to them - but it's personal - even if you whisper people can hear, it's different to talk through door not face to face… would like to talk to people but privacy [is] a problem.*

Others felt that the IMBs were too close to prison staff and yet others explained that they don't really speak to the IMBs because they didn't think that the IMBs could - or would - do anything for them.

> *They never really have any solutions, or they say they can't do anything about it. (Prisoner)*

A clear majority – 66% of the prisoners interviewed felt that the IMB had not been helpful. Some had bitter experiences:

> *I won't speak to them. They are useless. When I came to jail they were on the case, they'd do what they can. Now they don't do anything. They got too close to staff. If you're independent, you don't work for the jail. Every day they come by, I say 'I'm ok, move on'.*
>
> *I have no faith in them. When I was in the segregation in X, they came to my cell and said 'any issues?' so I explained my issue and she (the IMB) turned around and said to me: 'you need to think long and hard about why you're here'. Since then, I haven't spoken to them.*
>
> *I remember being in a body belt, in a strip cell. They used to throw in the food and I'd have to crawl to eat it… and the Board of Visitors, as they were called then, would pop their head and say how are you? well, how do you think I am? Now they're called the IMB but it's still the same. They come every week. I speak to them now, but I don't really have any problems they can help with… I wouldn't know what to talk to them about.*
>
> *Independent my bollocks. Some have good intentions, but no problem gets resolved.*

As well as monitoring the legitimacy of segregation reviews and placements, the IMBs are often the main 'outsiders' that a prisoner can access when segregated, and as such they have an important role to play in safeguarding the segregated individual. <u>What prisoners and staff told us and what we observed during our visits may indicate a breakdown of trust or a lack of clarity as to the role of the IMBs and they work that they do. Either way, the implication is that, as things currently stand, the role of the IMBs in segregation units may not be defined - and carried out - to its full potential.</u>[233] (underlined emphasis added)

374. It will be apparent that the model of independent adjudication that I have advanced in my writings and the model endorsed by the various commissions of inquiry and parliamentary committees to which I have referred, is quite different from the English. In the model I have proposed, the role of the independent adjudicator goes beyond observing, monitoring and commenting on the appropriateness or reasonableness of segregation decisions; the independent adjudicator is embedded in the process as the decision-maker with a legal mandate to ensure that

[233] *Deep Custody*, pp. 28-30

all procedural protections have been observed; that segregation is justified under the legal criteria; that timelines are observed; that all alternatives have been fully explored; that reintegration plans are developed and implemented; and that all the rights and privileges of prisoners in segregation are respected.

375. Therefore, in my opinion, the findings in *Deep Custody* on how the IMBs' function do not support any argument that providing for independent adjudicators as an integral part of the Canadian segregation process would contribute "very little… raising questions about their effectiveness as a check/safeguard against inappropriate use of segregation."[234]

376. *Deep Custody* reported on the importance of Segregation Review Boards and how well they fulfilled their functions.

> ***Segregation review boards***
>
> The reintegration to normal location of prisoners segregated under GOoD (either at the prison or, if the prisoner is awaiting transfer, at the receiving prison) depends on the outcome of segregation review boards. These reviews are held, first, within 72 hours of the prisoner's initial segregation and thereafter at least once every 14 days. Reviews are chaired by a governor and attended by healthcare, an officer who knows the prisoner and, where possible, a member of the IMB and the prisoner ("unless there are security concerns that make this impracticable").
>
> The desired outcome of reviews, according to the PSO, is for:
>
> > *Prisoners return to normal location as soon as the Review Board feel that it is appropriate and safe (for the prisoner, staff and other prisoners) to do so.*
>
> …
>
> As part of our prison visits we attended reviews. At the best reviews, there was multi-disciplinary input, the prisoner was engaged and his point of view was valued, and the review thoroughly discussed his situation and options. The worst reviews were no more than a very brief form-filling exercise with little substantive review and, in at least one prison, prisoners did not participate in their reviews.
>
> Where prisoners did take part in their review, many reported frustration with what they saw as a seemingly futile process, and its failure to result in any changes:
>
> > *I remember when they started those reviews. I find them a complete waste of time. Some people go to try to get some information. They have already decided what is going to happen. They have all these people round that table. But if they're going to do something, they'll do it. You walk in, you get two minutes. And they just say, 'No change.'*

[234] *Deep Custody*, p. 29

> *The thing I find hard is you don't know what's happening with GOoD. You get a review, and they just remand it. All he says is, 'We're waiting to hear from Security.'*
>
> *They try to listen. I was given time to talk. I think your [the researchers] presence in the review made a difference. Last time, he kept cutting me off. As I said, it had all been decided before. I try and talk as much as I can. I thought the review was meant to be my chance to give my side, but that doesn't happen.*
>
> *I felt like I've been manipulated in my reviews. It's, 'Shut up. Answer my question or you're going back to your cell'.*
>
> We were concerned that a member of the IMB, and representatives from Health and Mental Health did not always attend reviews and when they did, with few exceptions, they contributed little to the discussion. Further, because segregated prisoners had access to few, if any, programmes and activities, those prisoners who were segregated because they were perceived to be too disruptive or violent had little opportunity to demonstrate change. The reviews therefore provided one of the main avenues for them to put forward the case for their return to normal location. Coupled with prisoners' perceptions of reviews as an inadequate agent of change, this raises concerns about the function of segregation reviews as an effective safeguard.[235]

377. These findings are consistent with my own studies. Under the prevailing limited programming opportunities in federal segregation units, a prisoner can do little to satisfy the segregation board that any risk he posed has been alleviated.

378. In the longest section of *Deep Custody* under the heading "conditions, provisions, regime and support" the report examined the physical elements of segregation units in the context of international standards. It concluded:

> To sum up the section on regimes and provisions: segregation units mostly offered the most basic 'regime': 20-60 minutes exercise in a barren yard, a short phone call, and a shower. In cell provisions were in most cases minimal - at best including a kettle, radio and TV, books and limited number of hobby materials (e.g. drawing pencils) and at worst including nothing at all. Programme provision was also minimal, with many of the units visited offering no programmes at all.[236]

379. The Report particularly criticized a new 2011 policy reducing the minimum requirements that previously required, in accordance with international standards, 60 minutes of open-air exercise, to a total minimum of 60 minutes of out of cell activity daily of which at least 30 minutes must be in the open air. It found this policy change as one area that "fall[s] short of international standards."[237] A second area that was the subject of criticism was the practice in

---

[235] *Deep Custody*, pp. 109-11
[236] *Deep Custody*, p. 52
[237] *Deep Custody*, p. 41. The European Prison Rules stipulate: Rule 27.1 - Every prisoner shall be provided with the opportunity of at least one hour of exercise every day in the open air, if the weather permits. Rule 27.2 - When the

some segregation units to reduce the availability of showers to twice-weekly. The report found it "difficult to understand what might be gained from policies which make it more difficult for individuals to maintain good personal hygiene, and such policies go against the grain of principles and standards of good prison practice."[238] Paralleling the observations in Dr. Rivera's report on Canadian segregation units, *Deep Custody* "saw very little evidence that segregated prisoners were encouraged to pursue education while segregated. This is an area in which segregation units could improve."[239]

380. An important section of *Deep Custody* addresses the culture of segregation units, its relationship to the experience of segregation, the possibility of changing that culture to alleviate the negative effects of segregation and the elements required for that change to take place.

> The physical design and fixtures, daily regime and in-cell provisions previously discussed constitute only one aspect of the makeup of a segregation unit, if a very important one. Another aspect of daily life in a segregation unit, and one which greatly influences the way in which both prisoners and staff 'experience' the unit and the maintenance of order within it, relates to the ethos, atmosphere, relationships and interactions inside it.
>
> …
>
> ***Culture and ethos***
>
> …
>
> > *The way prisoners are treated in segregation can frequently be a barometer to their general treatment in an establishment. The fairness and personal example that staff demonstrate can have a profound influence on prisoners.*
> >
> > *(HMIP Report of Full Announced Inspection of HMP Durham 5-14 February 2001)*
>
> …
>
> Prison segregation units often develop their own subculture within the wider prison culture, their own 'way of doing things'. Several factors contribute to this: their location in a separate unit or wing within the prison; the limited regime offered to prisoners who are considered to be difficult to manage; the smaller size of the team of officers working in the unit, and the coercive aspect of their operation.
>
> Historically, some of the most notorious examples of highly negative staff cultures within which abuse and violence flourished and arbitrary treatment, beatings and lack of accountability were common place, took place in segregation units, in some case

---

weather is inclement, alternative arrangements shall be made to allow prisoners to exercise. The UN Standard Minimum Rules (Mandela Rules) similarly stipulate: Rule 23 (1) - Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

[238] *Deep Custody*, p. 42

[239] *Deep Custody*, p. 47

involving several officers. In one such unit, for example, the Chief Inspector of Prisons (HMCIP) reported, more than a decade ago, that:

> *… We believe from these indications that there was a pattern of verbally abusive behaviour [in the prison]. Additionally, we were told many times that when in the segregation unit, prisoners could hear screaming, shouts of 'Don't kick me' and verbal insults shouted by staff, such as 'Vermin to exercise'.… The survey of prisoners further confirmed this unacceptable state of affairs. For example, one respondent wrote: 'The way some screws speak to you by saying stuff like get the fuck in your cage. I won't have them talk to me like that and I use abuse back and then we get nicked and punished. Another prisoner said: The staff are very rude and threatening to inmates in general – they talk to us like dogs, threats made all the time, people are afraid to complain. People like myself who try are labelled troublemakers. This prison is very bad.*

But even the most deeply imbedded cultures can change, and the most degrading environments transformed. One segregation unit, previously condemned by HMCIP as a place where the treatment of prisoners was "inhuman and reprehensible", had undergone a "radical transformation…. it was renamed the care and separation unit and the entire staff replaced. It was clear to us that this was not just a cosmetic change." The unit was redesigned and it was now clean "beyond recognition". The crucial change, however, was in staff culture and:

> *... in the ethos of the unit with a strong emphasis on care as stipulated in its new title. […] The ethos was still developing. The new staff had been subject to, at best, scepticism from some colleagues but had persisted in their task. They saw their role as working with prisoners to try to get them back on to normal location as soon as possible. Unusually, in our experience, their interest in their prisoners did not stop when prisoners left the unit. (HMCIP 2012)*

…

The change in the physical and relational, or moral (Liebling, 2004), environments of segregation units was evident from our visits. As discussed in the previous chapter, in the majority of units we visited, physical environments - though not without shortcomings, were by and large decent if austere. Observing daily interactions and speaking to both prisoners and staff, it was clear that there had also been a noticeable shift in the culture and ethos of segregation units from being punitive places to a growing focus on individual needs and problem solving. When asked whether segregation units have changed over the years, and if so how, a couple of the managers we interviewed described a growing focus on individual needs:

> *[It] means more care and separation and less segregation. We still need to use it right. Now, the prison service does more of meeting individual needs. Before, we would segregate them until it suited us to move them back.... There's a lot more care in segregation units. It's not just a punitive measure. Now we are a lot*

more alert to mental health. There's not enough training to identify it and raise it with the mental health team. But [we] don't just define it as a behaviour problem. (Manager)

…

But how do prison staff get 'cues' on the ethos of a unit and the behaviours expected of them? Where do these cues come from? Official guidelines? Unofficial chats with colleagues? Management? How are cues on how to shape their expectations communicated to those who live in segregation units - the prisoners? Does the name of a unit reflect attitudes and practices? Does it dictate them? Are, for example, 'segregation units' necessarily different to 'care and separation' units? How do officers and managers working in a segregation unit answer the question: 'what do we do here', and what makes a segregation unit what it is?

These are difficult questions to answer, but observations from our visits suggested that segregation units where the culture appeared to be more positive and supportive than in others had some of the following characteristics and practices:

- Transparency (for example, a detailed, plainly written and illustrated induction booklet for prisoners, informing them of the unit's rules, of what is expected of them and what they are entitled to, is handed out to all newly arrived prisoners; New officers are similarly provided with an induction booklet, ensuring that the unit's aims and purposes are understood and adhered to by all; a statement of purpose and expectations posted on the wall for prisoners, staff and visitors to see)

- Pride and hope (for example, all areas of the unit are kept immaculately clean; inspiring quotations and or drawings on the walls)

- Professionalism and a non-judgmental approach (for example, 'drawing a line' under the event that resulted in the prisoner's segregation, or indeed behaviour in the unit; making sure that prisoners receive their entitlement, regardless of what they may have done.)

- A sense of serving a positive purpose (for example, one segregation unit provided tailored activities; two had a violence reduction programme; whole prison commitment to low and short use of segregation)

- Shared responsibility among staff and engagement with the prisoner (for example a 'complex cases' review to share input on individuals; reviews held on time and are well attended; the wing manager maintains responsibility for every segregated prisoner in GOoD reviews - "We are piloting a system of risk assessment that involves staff plus the service user.").

- Treating prisoners as individuals (for example, engaging daily and addressing their individual needs and concerns; offering extra support during difficult times-

for example following a self-harm episode or following a life event such as a death in the family or a special anniversary; engaging in light hearted - but respectful, banter.)

- Respect for diversity and concern for equality (for example, a sign pointing to the direction of Mecca; daily menu includes symbols and illustrations to adjusted for use by prisoners with LDs.)

- Maintaining a good balance between security and individual needs (for example, imposing as few restrictions as necessary for ensuring order and security.)

- Preference for problem-solving / de-escalation over punishment (for example, officers attempt to de-escalate first and take pride in low use of force).

- Staff working together as a team (for example, officers are especially selected for work in the unit; training days; policies understood and implemented by all; good daily hand-over).

- Daily entitlements are provided to the prisoner in a timely and respectful manner (for example, cell bells are rarely used, and answered promptly when they are; promises are followed up).

- Decency, which includes the following principles:
  - prisoners should not be punished outside of prison rules
  - promised standards within the prison are delivered
  - facilities should be clean and properly equipped
  - there should be prompt attention to proper concerns
  - prisoners should be protected from harm
  - prisoners' time should be actively filled
  - prisoners should be fairly and consistently treated by staff.[240]

381. The authors of *Deep Custody* found that the state of staff prisoner relationships was integrally related to the issue of culture and ethos. Though I have written about this in some of my work, because the focus in most studies on segregation is understandably on its effects on prisoners, the discussion in *Deep Custody* of the importance of staff attitudes and behavior is a welcome and an important contribution to the literature.

> Segregation units combine social isolation, reduced sensory stimulation and inactivity. Coupled with their mission statement, the challenges posed by some of the prisoners housed in them, and the increased controls imposed on prisoners, these characteristics make them potentially very toxic environments. Those who occupy segregation units - prisoners and staff, need to coexist within these environments, and relationships and daily interactions take on a particular intensity in segregation. As Richard Sparks, Anthony Bottoms and Will Hay aptly put it,

[240] *Deep Custody*, pp. 63-67

> *[Prisoners and staff] share the same physical and social space. They cannot sustain a state of submerged warfare all the time. They develop familiarities. They banter. There are acts of concern and kindness. It is a situation marked by contradictions. (at p.196)*[241]

To some extent, as well as prisoners, segregation staff were also isolated from the rest of the prison, in the sense that units were often separated from the wings and segregation staff made a team of their own….

The pressures of the environment and work in segregation meant that working there could be hard on staff too. One manager explained that segregation units were:

> *... very damaging for staff. When you speak to former segregation staff, they really describe the release of pressure, the intensity drops. There is something about that environment that is potentially damaging for staff and certainly puts more pressure on them. (Manager)*

…

The environmental intensity of segregation units means that the 'care' aspect of the role of officers becomes all the more meaningful and consequential for segregated prisoners. As noted by Sara Tait in concluding her study of prison officers, the concept of 'care'

> *carried important positive effects; alleviating to some extent the psychological distress caused by imprisonment: feelings of powerlessness, isolation, and worthlessness.*[242]

For officers, developing and maintaining empathy for someone when your job is to lock them up in their cell for 23 hours a day may be particularly challenging. When this someone is also behaving in a disruptive - or distressed - manner, the task of caring for them and their every day needs is made even more difficult.

As discussed in the previous section, the punitive nature of segregation units of the past had meant that relationships between prisoners and staff tended to be more adversarial, with some staff believing their role to be one of inflicting more punishment and making life even harder for the segregated prisoner. This was illustrated by an anecdote which one prisoner recounted about how, in the past, officers would give a prisoner a cigarette, in the full knowledge that they had no way of lighting it. Now, in contrast, as one officer related, there was more emphasis on care - not just because that is the professional response, but also because it contributes to the security of the unit:

> *more emphasis on caring for prisoners and trying to get to the root of their problems as opposed to strictly for punishment. Treating him decently and*

[241] Sparks, Bottoms and Hay (1996) Prisons and the Problem of Order, Clarendon

[242] Sarah Tait (2008) 'Care and the prison officer: beyond "turnkeys" and "care-bears"', Prison Service Journal, Vol. 180, November 2008

> *hopefully he'll feel more at ease and then we'll be safer. [A prisoner] ... has just assaulted a member of staff and he was treated professionally. No point in us taking revenge. In the past, that might have happened.*

This description largely resonates with what we observed during our visits and with what prisoners told us. Prisoner-staff relationships were a key strength of many of the segregation units we visited. By and large, relationships - though limited in number and scope - were positive, with many prisoners being complimentary, or at least not negative, about officers, and officers (mostly) expressing some empathy towards prisoners and an understanding of their predicament.[243]

382. In the course of my own research in Canadian prisons, I have also found many examples of correctional managers and officers who have demonstrated caring and empathic responses to prisoners in segregation.[244] For example in a chapter in *Justice behind the Walls 2001*, I have described the ways in which the chairman of the segregation review board "showed compassion and empathy" in his conduct of segregation reviews. However, this human and humane response did not change the fact that in my opinion those reviews were not conducted in accordance with the *CCRA* and that they contributed to the prisoners' sense of the unfairness of the process.

383. The hopeful message of the authors of *Deep Custody* that change in the toxic nature of segregation units is possible through changes in the culture and a more positive caring and supportive role of the correctional staff, has to be assessed in the context of the state of contemporary Canadian corrections. Earlier in this opinion, I have described what I regard as a regression in principled and evidence-based corrections in the wake of a more punitive federal government approach to crime and punishment. I identified the 2007 report, "The Roadmap to Strengthening Public Safety," which became the basis for CSC's "Transformation Agenda" as a move away from a *Charter* based human rights approach to corrections and how the cumulative effects of amendments to the *Criminal Code* and the *CCRA* together with associated policy changes has seen "a hardening and deepening of the face of imprisonment.[245] In his latest Annual Report the Correctional Investigator, Howard Sapers, writes:

> The past five years have seen an unprecedented number of sentencing and policy reforms. Taken together, their cumulative effect has profoundly changed the discourse and practice of criminal justice in Canada, and has contributed to the erosion of some long-standing evidence-based correctional principles and practices. I remain particularly concerned that concepts such as the least restrictive measure and retained rights have been eroded or replaced with more ambiguous language, such as "proportionate and necessary measures." Amendments to the *Corrections and Conditional Release Act* now make it clear that the sentence is to be managed according to the "nature and gravity of the offence" and the "degree of responsibility of the offender." Public safety, instead of

---

[243] *Deep Custody*, pp. 69-71

[244]. Sector 4 Ch 5, p. 398, and pp. 417-8, http://justicebehindthewalls.net/book.asp?cid=170 and http://justicebehindthewalls.net/book.asp?cid=177

[245] *supra*, paras. 284-85. For a succinct summary of these amendments and policy changes see Post-Sentence Issues in the Federal Correctional System 2014 Address of Howard Sapers, Correctional Investigator, May 2014, http://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20140523-eng.aspx

being an outcome of a fair and balanced system, has become the dominant principle, overshadowing all other equally valid purposes such as rehabilitation and safe reintegration.[246]

384. The common theme of many of my most recent interviews with prisoners is that the relationships between staff and prisoners in medium and maximum institutions have deteriorated taking on more adversarial and militaristic forms that they see as regressive and which highlight the gulf between the keeper and the kept.

385. This hardening of the correctional arteries has been underway for a decade. As the events leading to the death of Ashley Smith so compellingly show the hardening has extended to segregation units and is the very antithesis of a change in the direction, using the words of *Deep Custody*, "on caring for prisoners and trying to get to the root of their problems as opposed to strictly for punishment." As I have previously stated, the new Liberal government's mandate letters while giving rise to quiet optimism in forging a new direction, do not so readily translate to a reciprocal change of correctional culture and ethos deep inside segregation units.

Sector 4. The Effects of Segregation and Broad and Unfettered Correctional Discretionary Authority (Questions 7 and 2(c))

7. What effects upon inmates have you personally observed to have resulted from breaches of sound correctional principles, practices and standards in the context of administrative segregation decisions and reviews and conditions of confinement?

2.(c) describe the practical effects upon prisoners of legal regimes which rely upon broad and unfettered grants of discretion upon correctional officials rather than upon provisions which precisely define the nature of correctional authority in clear rules of positive law

386. From my own experience and research I have observed prisoners in segregation having an array of problems including:

a. difficulty separating reality from their own thoughts;

b. confused thought processes;

c. perceptual distortions;

d. paranoia;

e. psychosis;

f. difficulty coping with social interactions with both staff and other prisoners; and

[246] 2014-15 Annual Report of the Office of the Correctional Investigator, 2014-15 at p. 4 http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx**.** For a succinct summary of the amendments and policy changes see Post-Sentence Issues in the Federal Correctional System 2014 Address of Howard Sapers, Correctional Investigator, May 2014, http://www.oci-bec.gc.ca/cnt/comm/presentations/presentations20140523-eng.aspx**.**

g. self-harm and suicide.

Prisoners of Isolation

387. My first interviews with and observations of prisoners in segregation demonstrating this array of problems dates back to the early 1970s when I began my work in Canadian penitentiaries. As part of a landmark case challenging the conditions in the solitary confinement unit of the BC Penitentiary, euphemistically referred to as "the Penthouse", because of its location on the very top of the Penitentiary, I interviewed a group of prisoners who had spent months and in some cases years in the unit. The record of my interviews and their evidence at the subsequent trial of *McCann v. the Queen* is contained in my book *Prisoners of Isolation*.[247] All of the prisoners experience some of the problems and two of them exhibited almost all of the problems that I have identified in the previous paragraph.

388. The plaintiffs in *McCann* all referred to Jacques Bellemaire. They testified that while in segregation Mr. Bellemaire he developed a delusion that there was a "machine" in his cell which was trying to get him. Andy Bruce recounted an incident in which Mr. Bellemaire, while out of his tier on exercise, came to Mr. Bruce's window and told him that a "machine" had held him while Mr. Bruce was slashing his arms with razor blades. Mr. Bruce asked him to show him the cuts and Mr. Bellemaire pointed to various places on his arms. As Bruce put it, "I guess they were there to him but there was nothing there that I could see." The terror of Mr. Bellemaire's delusions became so overwhelming that he set fire to his cell in order to rid himself of the "machine". Mel Miller gave evidence that he had written to the Solicitor General stating that Mr. Bellemaire was not fit to be in solitary confinement. He testified that he had shown his letter and the Solicitor General's reply to the director, and that he had told the psychiatrist that unless Mr. Bellemaire was released he would die in solitary.

389. I interviewed Jacques Bellemaire in May 1974. Mr. Bellemaire spoke little English and I arranged to interview him again with a French interpreter. He told me of the machine in his cell that was trying to destroy him. On the two occasions that I saw Mr. Bellemaire he appeared to be a man utterly without hope. Whereas the lawsuit was seen by other prisoners as a prospect for change, its initiation seemed to offer no comfort to Jacques Bellemaire. Five days after my last interview with him, Mr. Bellemaire hanged himself in solitary confinement. Jack McCann testified that just before Mr. Bellemaire hanged himself he told Mr. McCann, "the machine says I am dying today."

390. The other prisoner I interviewed in 1974 in the solitary confinement unit who also showed symptoms of mental illness was Tommy McCaulley. The other prisoners testified that Mr. McCaulley was quite normal when he had been in the general population, but that after long periods in segregation he had gone over the edge of sanity, making it virtually impossible for the other prisoners to talk with him. They gave evidence that he would smash his fists on the steel door of his cell and scream at the guards for hours on end. On occasions when I was in the unit I heard Mr. McCaulley screaming: when I walked back to the main gate of the penitentiary five stories below I could still hear his screams and his banging. The guards in the segregation unit

[247] Prisoners of Isolation, pp. 47-71, http://justicebehindthewalls.net/book.asp?cid=772 et seq.

told me that Mr. McCaulley would lose control completely and would smear himself and his cell with feces. The psychiatrist at the penitentiary, Dr. Muthanna, gave evidence at the *McCann* trial that Mr. McCaulley was psychotic and that he exhibited symptoms of schizophrenia and autistic behavior with disturbance of effect and thought disorder. Dr. Muthanna agreed that Mr. McCaulley was in great need of psychiatric help and that the facilities in the segregation unit for people in his state were "atrocious". He conceded that he could not think of anything less adequate for Mr. McCaulley than solitary confinement.

391. When I interviewed Mr. McCaulley I was not able to communicate with him and could make no sense of his conversation. I concluded that he was so out of touch with reality that he could not properly instruct counsel with regard to his participation in the lawsuit.

392. In my further research in federal prisons in the 1980s I continued to encounter segregated prisoners who exhibited the kinds of effects I have listed above. One such example is described in my 1986 article *The Right to Counsel in Prison Disciplinary Hearings.* Mr. Peters who had suffered some brain injury following an unsuccessful attempt to hang himself while in custody, was placed in segregation at Kent for his own protection. He was subsequently charged with disciplinary offenses, including assault of correctional officers. He sought the assistance of counsel to represent him and counsel, after speaking with him wrote to the institution:

> I spoke to Mr. Peters by telephone on 22nd September and frankly I am concerned about the state of his mental health. He was unable to communicate with me the nature of his charges, but did instruct me that he wished me to represent him at the hearing of these offences. I understand that Mr. Peters has been in segregation since the end of July and perhaps his present confused state is a result of his continued isolation. In any event, I am concerned about his ability to properly defend himself in these matters…[248]

393. I interviewed Mr. Peters on several occasions while he was in segregation, both disciplinary and administrative, and it was clear to me that his time in segregation aggravated his paranoia and his ability to cope with social interactions with both staff and other prisoners and increased his risk for further self-harm.

Justice behind the Walls 2001: Human Rights in Canadian Prisons

394. During the many years of my research for this book I interviewed and observed many mentally ill prisoners who were housed in the segregation unit of Kent institution and other prisoners who developed symptoms of mental illness while segregated. In the book, I described some of these cases.

> In *Prisoners of Isolation*, I wrote that the worst fear of prisoners in segregation was that they would be driven over the edge of sanity, that their worst experiences were having to see and hear the anguish of prisoners who had already been pushed into a place from which they might never return. At the May 9, 1994, Segregation Review Board hearing at Kent, two prisoners appeared perilously close to this brink. John Soane had been placed in segregation in December 1993 following his transfer from Mission Institution,

[248] *The Right to Counsel in Prison Disciplinary Hearings*, p. 243

> based upon allegations of his involvement in drug trafficking…. His continued stay in segregation arose because of a problem with incompatibles in the protective custody open units. I had interviewed Mr. Soane earlier in May… and at that time he was extremely agitated, relating his history in disconnected fragments….
>
> At the Segregation Review Board hearing, Mr. Soane proceeded to deny his involvement in the alleged activities that had brought him to Kent. He voiced frustration at being told by staff that they did not know what was going on with his case and could not comment on the validity of the allegations made by the Mission authorities…. Although Mr. Soane's account was understandable, he stuttered repeatedly and quite deliberately avoided any eye contact….
>
> After Mr. Soane left the room, Ms. Shadbolt asked the psychologist, Mr. Katz, if the stuttering was part of an act to impress the Board. Mr. Katz responded, "What you are seeing is pressured speech, which is the effect of segregation." After Mr. Soane's review, I spoke to Mr. Katz, and he readily conceded that long-term segregation was having a very negative impact on Mr. Soane. His role at the segregation review was, however, limited to bringing this to the Board's attention; he had no authority to recommend release from segregation.
>
> The second prisoner close to the edge reviewed on May 9 was Mr. Smith. Mr. Smith had taken an overdose of heroin at the Regional Psychiatric Centre (RPC) with the intention of killing himself after having made previous attempts at slashing. The incident was logged by the RPC as drug-related, and Mr. Smith was transferred to Kent, where he was placed in segregation. He had been there since February 22. Mr. Smith said he wanted to go back to the RPC. Ms. Shadbolt reported that RPC staff felt the treatment program would be too intense for him right then, but efforts would be made to get him back there as soon as possible. Mr. Smith hardly participated in the review, answering questions in an impassive and abbreviated manner.
>
> After the hearing, I asked Mr. Katz why a man who had tried to kill himself had been transferred out of the RPC - the place he clearly ought to be - into the segregation unit at Kent. Mr. Katz said that the RPC saw this as a drug-related case and, in a climate of zero tolerance, transfer was justifiable. He acknowledged that Mr. Smith was very depressed and agreed that segregation was not the appropriate place for him.[249]

395. Mr. Smith was one of many prisoners during the years spanning my research and since then, continuing to the present time of writing this report, who exhibited mental health problems and spent long periods in administrative segregation rather than in an appropriate treatment center.

396. Based on my own observations and interviews with prisoners in segregation units in federal penitentiaries, it is my opinion that the use of segregation for extended periods of time in

[249] *Justice behind the Walls 2001*, pp. 326-27, http://justicebehindthewalls.net/book.asp?cid=129

breach of sound correctional principles, practices and standards has a detrimental impact on their mental well-being.

Impacts of Unfettered Correctional Discretionary Authority

397. Over the past 40 years I have interviewed a great many prisoners who have experienced long-term segregation. In some of these interviews prisoners have addressed what they see as the arbitrariness of unfettered correctional discretionary authority and its impact on their lives.

398. In *Prisoners of Isolation* I discussed the difficulty those of us who have never experienced imprisonment have in understanding the non-physical effects of segregation.[250]

> The task of understanding the effects of dissociation is also complicated by a tendency to focus on the physical conditions of confinement. This tendency is part of our general perception of imprisonment as above all else a physical punishment. The tendency is compounded among those who gravitate to the study and practice of criminal law because the law is concerned primarily with physical harms to the person, to property, or to public order. In the world of lawyers, therefore, the points of reference for crime and punishment are primarily physical. However, in the world of letters there is a rich literature which conceives of crime and punishment in ways that focus on the psychological dimensions of suffering. As I will endeavour to show, Dostoevsky is a surer guide than Glanville Williams in understanding what it is that we do, in the name of the criminal law, when we send men to the solitary-confinement cells.[251]
>
> The plaintiffs faced another great difficulty in presenting their evidence. They were talking about events quite beyond the experience of the man who was being asked to pass judgment on those events. Hermann Hesse has eloquently captured their dilemma:
>
> > To express in words something that refuses to be put into words... what gives these experiences their weight and persuasiveness is not their truth... but their reality. They are tremendously real, somewhat the way a violent physical pain or a surprising natural event, a storm or earthquake, seem to us charged with an entirely different sort of reality, presence, inexorability, from ordinary times and conditions[252]

399. One of the major themes that unites my interviews with prisoners who have been able to articulate the impact of their experience in segregation, has been well captured by Justice Arbour in her summary of the impact of the arbitrariness that the prisoners at the Prison for Women experienced during their nine months of segregation. Justice Arbour described, "The bitterness,

---

[250] Book is in hardcopy and online and in all footnotes I have given dual cites.

[251] *Prisoners of Isolation*, p. 64, http://justicebehindthewalls.net/book.asp?cid=775, cited with approval by Cory J. in *Winters v. Legal Services Society*, [1999] 3 S.C.R. 160 at para. 66. The reference to Glanville Williams is a reflection of the provenance of my legal education. Glanville Williams was at the time I went to law school in England and for many years thereafter Britain's foremost scholar of criminal law and author of the most cited textbook, *Criminal Law-The General Part.*

[252] *Prisoners of Isolation*, p. 66. The quote is from Hermann Hesse, *Magister Ludi (The Glass Bead Game)* (New York: Bantam Books 1970), 365

resentment and anger that this kind of treatment would generate in anyone who still allows herself to feel anything…"[253]

400. Earlier in my report I described the questionnaire that the Task Force on Segregation sent to every segregated prisoner regarding the conditions of their confinement. The questionnaire had space for comments. At the time Glen Rosenthal responded to the questionnaire, he had served a year in segregation at Edmonton Maximum Security institution 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 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

[253] Arbour Report, p. 82

> 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.[254]

401. In preparing for an international conference in 2013 on Solitary Confinement at the University of Manitoba Law School, I interviewed an aboriginal woman who has spent many years in segregation under the now rescinded Special Management Protocol for Women, which was perhaps the most intensive form of segregation that any Canadian prisoners have experienced in recent years. I asked her what she would say to the participants in the conference about her experiences if she were able to be there.

> 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.[255]

402. This statement reveals one of the most damning aspects of long-term segregation. The experience 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.

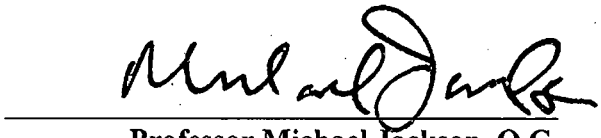
403. Based on my experience over the past 45 years, it is my opinion that correctional regimes which fail to subject correctional discretion to clearly defined and legally prescribed limits generate in prisoners a powerful and toxic mix of bitterness, resentment and anger that

---

[254] *Justice behind the Walls 2001*, pp. 383-84, http://justicebehindthewalls.net/book.asp?cid=160

[255] *Ending the Isolation: An Introduction to the Special Volume on Human Rights and Solitary Confinement*, 4 Canadian Journal of Human Rights, 57 (2015) p. 85

undermines respect not only for correctional authority but also for lawful society to which most prisoners will return.



Professor Michael Jackson, Q.C.

September 21, 2016

Appendix 1

THE UNIVERSITY OF BRITISH COLUMBIA
Curriculum Vitae for Faculty Members

Date: September 2016

1. **SURNAME**: Jackson **FIRST NAME**: Michael **NAME**:

2. **DEPARTMENT/SCHOOL**

3. **FACULTY**: Law

4. **PRESENT RANK**: Professor Emeritus **SINCE**: July 2014

SPECIAL PROFESSIONAL QUALIFICATIONS

Member of Law Society of B.C.
Queens Counsel

PUBLICATIONS

BOOKS

Prisoners of Isolation: Solitary Confinement in the Canadian Penitentiary, 330 pages (Toronto: University of Toronto Press, 1983). Online at www.justicebehindthewalls.net

Justice Behind the Walls: Human Rights in Canadian Prisons, 636 pages (Vancouver: Douglas & MacIntyre, 2002). Online at www.justicebehindthewall.net

JOURNALS

R. v. Beales, 1972 U.B.C. Law Rev. 125-137

Justice Behind the Walls, A Study of the Disciplinary Process in a Canadian Penitentiary, 1974, 12 Osgoode Hall Law Review, 1-103

Cruel or Unusual Punishment or Treatment? Charter Edition, U.B.C. Law Review, (1982), pp. 189-212.

The Articulation of Native Rights in Canada (1984) 18 U.B.C Law Review 255-287

The Right to Counsel in Prison Disciplinary Hearings, 20 U.B.C. Law Rev. 221-283 (1986)

Locking up Natives in Canada, 23 U.B.C. Law Rev. 215-300 (1989)

A New Agenda for Human Rights Activists: The Collective Rights of Native People, (1989). 22 International Journal of Intercultural and Transdisciplinary Research, 19.

Boats Against the Current: A Note on the Effects of Imprisonment, with Julian V. Roberts, 15 Law and Behaviour 557 (1991)

In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities, 1992 U.B.C. Law Review, Special Edition on Aboriginal Justice, 147-238.

The Sentencing of Dangerous and Habitual Offenders in Canada 1997, 9 Federal Sentencing Reporter 1997, 256

The Psychological Effects of Administrative Segregation, 43 Canadian Journal of Criminology and Criminal Justice, 109 (2001).

A Model of Scholarship, (2005) 38 U.B.C. L. Rev. 315 – 327.

The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation, (2006) 48 Canadian Journal of Criminology and Criminal Justice, 157-223

Reflections on 40 Years of Advocacy in the Isolation of Canadian Prisoners, (2015) Canadian Journal of Human Rights 57

OTHER PUBLICATIONS

The Rights of Native People in Canada, in Ronald St. J. MacDonald, ed., The Practice of Freedom in Canada, Canadian Essays on Human Rights and Fundamental Freedoms (Toronto, Butterworths, 1979), pp. 268-288

A Model Disciplinary Code and Commentary, in A Working Paper Relating to the Protection of the Rights of Persons Confined in Penal Institutions, ed. By Hofley et al. (Ottawa, Solicitor General of Canada, 1977), pp. 62-83.

Sentences That Never End: The Report on the Habitual Criminal Study, (Vancouver, University of British Columbia Law School, 1982.

A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements, A Commissioned Paper for the Royal Commission on Aboriginal Peoples, 1994.

Co-Author, *Bridging the Cultural Divide: A Report on Aboriginal Peoples and Criminal Law Justice in Canada; Royal Commission on Aboriginal Peoples, 1996*

Commitment to Legal Compliance: Fair Decisions and Effective Results, Report of the Task Force on Segregation, Correctional Service of Canada,1997

A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety, 2009, 199 pages (Translated by Government of Canada into French)

RECENT CONFERENCE PROCEEDINGS

Reflections and a Lament, Keynote Address at Conference on the 20th Anniversary of the CCRA (16 pages) June 2012

Working Behind Prison Walls 2012 Keynote Address Forum of Canadian Ombudsman/Association of Canadian College and University Ombudspersons Edmonton, September 2012 (21 pages)

A Reimagined and Transformed Legal Landscape, CLEBC Indigenous Legal Orders and the Common Law Conference November 2012 (19 pages)

Solitary Confinement : The Trajectory of Cruelty in Canada, International Society for the Reform of Criminal Law,June 2014 (50 pages)

AWARDS AND DISTINCTIONS

Bora Laskin National Fellowship in Human Rights 1992-3

UBC Alumni Award for Distinguished Resesrch 2006

McIssac Award for Human Rights in Corrections 2009

George Curtis Award for Teaching Excellance 2010

MEMBERSHIP ON COMMITTEES

Member and Co-Chair of CBA Special Committee on Imprisonment 1985-

Member of Commissioner of Corrections Forum 1997-2002

President, West Coast Prison Justice Society 1994-

CONSULTANCIES

Royal Commission on the Donald Marshall Jr. Prosecution, 1989

Manitoba Aboriginal Justice Inquiry 1991

Law Reform Commission of Canada, 1993

Royal Commission on Aboriginal Peoples, 1995-7

Justice Louise Arbour, Commission of Inquiry on Incidents at Prison for Women, 1996

Member of Task Force on Segregation 1997

Co-chairperson, National Committee on Use of Computers,
Correctional Service of Canada, 2006 – 2007

Office of the Auditor General of Canada 2014-6 (External Consultant on Audits of Territorial and Federal Correctional Systems)

EXPERT EVIDENCE

Re Moore v R. (1984) 10 C.C.C.(3d) 306 Ontario High Court

Piche v. Warden of Stony Mountain Penitentiary (1985) Federal Court of Canada [1984] F.C.J. No.1008

Re Blake, (1994) Manitoba Court of Queens Bench;

Sauve v. Canada (1995) Federal Court of Canada [1996] 1 F.C. 857; evidence cited with approval by McLachlin C.J. [2002] 3 S.C.R. 519

Re Gill, (2002) B.C. Supreme Court.

Re Ivan Johnny (2004) B.C. Supreme Court.

Trang et al. v. Director of Edmonton Remand Centre et al (2004), Alberta Court of Queen's Bench [**2010] A.J. No. 31**

McLennan v. The Queen (2005) ABQB 486 Alberta Court of Queen's Bench

R v Anderson et al [2005] B.C.J. No.2341 B.C. Supreme Court

Currie v. Alberta (Edmonton Remand Centre), 2006 ABQB 858

Re West (2013) B.C. Supreme Court

Inglis et al v British Columbia (Minister of Public Safety), 2013 BCSC 2309

Ontario's Coroner's Inquest Touching the Death of Ashley Smith, 2013

Appendix 2

25th Floor
700 W Georgia St

Vancouver, BC
Canada V7Y 1B3

Tel 604 684 9151
Fax 604 661 9349

www.farris.com

Reply Attention of: Joseph J. Arvay, Q.C.
Direct Dial Number: (604) 661-9338
Email Address: jarvay@farris.com

Our File No.: 36717-1

April 15, 2015

VIA EMAIL – jackson@allard.ubc.ca

Professor Michael Jackson, Q.C.
University of British Columbia
Peter A. Allard School of Law
Allard Hall, Room 463
1822 East Mall
Vancouver BC V6T 1Z1

Dear Professor Jackson:

Re: *British Columbia Civil Liberties Association and the John Howard Society of Canada v. Attorney General of Canada*
SCBC Vancouver Registry No. S-150415

I am writing to follow up on your email exchange and telephone call with Alison Latimer.

I confirm that we are counsel for the British Columbia Civil Liberties Association and the John Howard Society of Canada, the plaintiffs in this proceeding. The case concerns a constitutional challenge to the provisions of the *Corrections and Conditional Release Act* ("*CCRA*") that authorize administrative segregation in federal penitentiaries.

We write to confirm your willingness to provide your expert evidence on behalf of the plaintiffs for the trial of this action and the terms on which you will do so.

We wish to obtain your expert evidence in this litigation by way of affidavit evidence. Specifically, we ask you to answer the following questions and, where necessary, to do so with reference to your research and other literature that you may rely upon:

1. Please describe any literature, sources, reports, codes or other materials which are generally recognized and applied by Canadian and international prison administrators, government officials, and other experts in the field of corrections, as reflective of appropriate standards and best practices for the treatment of prisoners and the administration of correctional institutions and, particularly, with respect to the use of administrative segregation. Please exclude from this collection any rules, principles or provisions which apply directly to the parties to these proceedings as a matter of law, such as those contained in the *CCRA* and the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

2. Based upon your knowledge and experience, please:

   a. provide an historical narrative regarding the implementation of the Rule of Law in Canada's correctional institutions, including an analysis of the federal system of corrections;

   b. describe the historical and legislative context out of which the administrative segregation provisions of the *CCRA* emerged; and

   c. describe the practical effects upon prisoners of legal regimes which rely upon broad and unfettered grants of discretion upon correctional officials rather than upon provisions which precisely define the nature of correctional authority in clear rules of positive law.

3. Please describe the history of attempts to reform either or both of the legislative provisions regarding administrative segregation and the correctional practice regarding administrative segregation.

4. Based upon your knowledge and experience, as well as upon the existing literature, standards and sources which are generally recognized and applied by domestic and international prison administrators, government officials, and other experts in the field of Corrections, what are the sound principles, practices and standards in relation to the provision of living conditions for inmates in administrative segregation, without limitation, the following:

   a. indoor and outdoor exercise;

   b. double bunking;

   c. periods of lock-down;

   d. cell sizing and design;

   e. visitation with family members and friends;

   f. access to reading materials, television and radio;

   g. work, education and recreation;

   h. food and taking meals; and

   i. any other factor that may be relevant.

5. In your opinion, do the conditions of confinement experienced by inmates in administrative segregation in federal penitentiaries accord with sound principles, practices and standards? If not, what is the nature and degree of the departure from such standards?

6. What are the sound principles, practices and standards in the development and operation of administrative segregation decisions and reviews based upon your experience, as well as upon

the existing literature, standards and sources which are generally recognized and applied by domestic and international prison administrators, government officials and other experts in the field of Corrections, and more specifically but without limitation:

a. Is it necessary and appropriate to have administrative segregation decisions reviewed by an independent and impartial tribunal rather than by senior correctional officers and staff?

b. Is there a need to clearly specify to inmates and staff the type of conduct which will result in administrative segregation and, if so, what problems, if any, have historically been created by framing the grounds for such segregation in terms similar to those set out in s. 31(3) of the *Corrections and Conditional Release Act*?

c. Is it necessary and appropriate to accord inmates faced with administrative segregation the right to be represented by counsel at review hearings and, if so, to be specifically advised as to the existence of that right?

7. In your experience, are administrative segregation decisions and reviews under the current Canadian law and practice conducted in accordance with sound correctional principles, practices and standards so as to achieve the legitimate purposes which they are designed to serve? If not, why not?

8. What effects upon inmates have you personally observed to have resulted from breaches of sound correctional principles, practices and standards in the context of administrative segregation decisions and reviews and conditions of confinement?

If you are relying on any facts or assumptions you should make them clear in your opinion.

We have already provided you with a copy of the Notice of Civil Claim filed in this matter. If there are any other documents that you believe would be necessary or helpful to your investigation, please advise, and we will attempt to provide them.

We ask you to include with your expert opinion a copy of your current *curriculum vitae* as an attachment to your expert opinion and to include a narrative description of how your expertise relates to the issues posed by this request for a report in particular in the body of your opinion.

Your affidavit should also contain the following statement pursuant to the British Columbia Supreme Court Civil Rules:

> "I certify that I am aware of my duty as an expert witness to assist the court, and not to be an advocate for any party. I have given this affidavit in conformity with that duty. If I am called on to give further testimony, it will also be in conformity with that duty."

It is essential not only that you insert this statement into your report, but that you understand the reason for its inclusion in the Rules. While you are retained by one party to this lawsuit, your professional duty is to provide impartial advice and your honestly held opinions. There is nothing improper in considering arguments and suggestions from counsel, but you must not adopt any such suggestions or include anything in your report unless it reflects your honestly held opinion.

As well, if you become aware of facts that cause you to change your opinion, you must advise us as soon as possible, and a supplementary opinion report will likely be required.

We confirm that due to our clients' financial constraints, expert witnesses in this action will not be paid at this time. At the end of the trial, we will seek an order that costs of the trial, including any fees payable to expert witnesses, be borne by the Crown. If the Court finds in favour of our clients' claim, there is every likelihood that these costs will be paid. If the Court rules against our clients, then there is still a chance that these costs will be ordered, but there is certainly no guarantee that this will occur. I hope that this arrangement is acceptable to you.

This matter is confidential. Please do not discuss this matter, except with our office. There is nothing in this retainer that would prevent you from corresponding in a general way with the defendant or their counsel on unrelated matters. However, we would suggest that you refrain from doing so unless it is absolutely necessary. If you receive communication from any adverse parties or their counsel or from anyone else with respect to this lawsuit or a similar Canadian lawsuit, we would ask that you contact us immediately before responding.

Because you will be retained by the plaintiffs in this lawsuit, all of your dealings with the plaintiffs and their legal counsel are privileged and strictly confidential and you are not at liberty to communicate with any other party or person about those dealings or the services you are providing.

Your file, including all of your notes, working papers and correspondence, will be privileged and not subject to disclosure until such time as the Rules require us provide them to the defendant. At that time privilege is lost. For that reason, it is important that you do not put your opinions into written form until we have had an opportunity to discuss them.

It is the practice of some experts to retain early drafts of their reports, and it is the practice of other experts to routinely dispose of such drafts as they are revised. If it is your practice to dispose of such drafts upon revision, you are entitled to do so. However, please bear in mind that any early drafts that you retain in your file will be subject to disclosure and you may be cross-examined on them.

Thank you for your willingness to work on this important matter and for assisting us in preparing these materials as soon as possible. The hearing of this case has yet to be set down. It is possible that you will be asked to submit to a cross-examination prior to or at the hearing. If that occurs, we will endeavour to find a time and place that is convenient to you.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Joseph J. Arvay, Q.C.*

** A Law Corporation*

JJA/jh