**Submission to the Standing Senate Committee on Legal and Constitutional Affairs:**
**Review of Bill S-230, *An Act to amend the Corrections and Conditional Release Act***

December 14, 2023

## Introduction

The BC Civil Liberties Association (BCCLA) fully supports Bill S-230, and its goals of addressing a number of problems within the correctional system, including the treatment of people with mental disabilities, the overuse of restrictive forms of confinement, the overincarceration of marginalized groups, and the lack of meaningful remedies for violations of prisoners' legal rights.

The BCCLA's primary interest in the Bill is its relation to restrictive forms of confinement, and particularly solitary confinement. In considering this Bill, it is important to look back at the judicial decisions that struck down the previous administrative segregation regime. These decisions provide useful guidance to understand what is required to respect the rights of incarcerated individuals when they are subjected to restrictive conditions of confinement.

## Background

In 2015 the BC Civil Liberties Association and John Howard Society of Canada filed a legal challenge to the Federal Government's use of solitary confinement in the form of administrative segregation in its prisons. The case alleged that solitary confinement amounts to cruel and unusual punishment that leads to suffering and deaths, deprives people of fundamental procedural protections, and is especially discriminatory against people who struggle with mental health, people with disabilities, and Indigenous people.

Following a 9-week trial in the summer of 2017, the BC Supreme Court issued a judgement calling for the end of the practice of long-term solitary confinement.[1] In 2019 the British

[1] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 ("BCCLA 1")

Columbia Court of Appeal affirmed that administrative segregation was unconstitutional.[2] At the same time the Canadian Civil Liberties Association (CCLA) was pursuing a similar challenge, which was also successful and affirmed by the Ontario Court of Appeal in 2019.[3]

Following these decisions Bill C-83 was passed, thereby eliminating administrative segregation and introducing Structured Intervention Units (SIUs) in its place. At the time we warned that the requirements set out in the case law would not be fully met by this new regime. Today we can see that these warnings were well founded, as solitary confinement persists.

The Mandela Rules provide the following definition of solitary confinement, which has been largely adopted by Canadian courts:

> Rule 44
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> 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.[4]

It is critical to understand that solitary confinement is not a place, or a classification, but rather a condition of being deprived of meaningful human contact. As the Ontario Court of Appeal put it "The distinguishing feature of solitary confinement is the elimination of meaningful social interaction or stimulus."[5] Any time a prisoner receives two or fewer hours of meaningful human contact in a day this amounts to solitary confinement, wherever it takes place.

Solitary confinement continues to occur in Structured Intervention Units throughout the country. The minimum requirements set out in s. 36 of the *Corrections and Conditional Release Act* allow for solitary confinement, as only an offer of two hours of meaningful human contact per day is mandated. However, we know that even these standards are often not met.[6]

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[2] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228

[3] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491; *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243 ("CCLA 2")

[4] The United Nations Standard Minimum Rules for the Treatment of Prisoners

[5] CCLA 2, para 1

[6] Structured Intervention Unit Implementation Advisory Panel 2021-22 Annual Report, Table 15; Annual Report of the Correctional Investigator 2021-2022, page 17 "The data also suggests that CSC is not fully compliant with its legislated obligations to offer four hours of time out-of-cell and two hours of meaningful human interaction."

Solitary confinement also continues in other ways, such as through lockdowns, modified routines, isolation for mental health reasons, and responses to COVID-19.[7]

This is why it is important to look back on the requirements outlined by the courts to create a constitutionally compliant regime. It is also important to remember that these requirements represent *minimum* standards and should not be seen as limiting more ambitious efforts at reform.

**Prolonged Solitary Confinement**

In his decision following the BCCLA trial, Justice Leask found that administrative segregation amounted to prolonged solitary confinement, which violated prisoners' s. 7 *Charter* rights. He found that the regime was overbroad because it allowed for isolation in cases where that was not necessary to achieve institutional and personal safety and security.[8] In essence, he found that alternatives to prolonged solitary confinement existed.

One alternative was the "treatment approach." Justice Leask noted that "in the case of inmates with mental illness, the most obvious – and far less impairing – alternative to administrative segregation is treatment."[9] He went on to say that "[t]here is no reason why CSC cannot treat mentally ill inmates as a health problem, not a security problem."[10] Finally, Justice Leask stated that:

> Of primary importance is for the Government and CSC to recognize the size and importance of the mentally ill, cognitively impaired, and potentially self-harming and suicidal contingent in Canada's penitentiaries. There needs to be a recognition that this is a serious health issue. CSC should evaluate its incoming inmates to assess these aspects of their health. In my view, this will involve a need for more medically trained staff, more facilities for treatment and, of course, substantially increased funding.[11]

These concepts are addressed by ss. 3, 4 and 6 of Bill S-230, which seek to identify those in need of treatment and then to provide options for the treatment approach to be implemented. These provisions would go a far way to prevent the use of solitary confinement for those suffering from mental illness. Similarly, ss. 8 to 10 of the Bill would

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[7] West Coast Prison Justice Society, "Solitary by Another Name: the Ongoing use of Isolation in Canada's Federal Prisons" (2020)
[8] BCCLA 1, para 336
[9] BCCLA 1, para 593
[10] BCCLA 1, para 595
[11] BCCLA 1, para 523

create alternatives to incarceration for other vulnerable groups, who are still disproportionately impacted by solitary confinement.

If solitary confinement is to be used though, Justice Leask held that a time limit must be imposed so as not to violate s. 7 of the *Charter*. Similarly, in the CCLA case, the Ontario Court of Appeal found that a strict 15 day time limit was required under s. 12.

Bill S-230 does not address the issue of a time limit. While judicial authorization is required after 48 hours, it is not clear that judicial oversight will continue beyond that point, and there is no cap on how long the authorization may last.

It is also not clear that the Bill applies to all forms of solitary confinement that continue in CSC. Based on its definition of "structured intervention unit," the Bill does not seem to address cases of solitary confinement when it is applied to the mainstream population as a whole, such as through lockdowns, modified routines, or potentially even overly restrictive general movement routines. The BCCLA is concerned that prolonged solitary confinement will continue even with the passing of this Bill.

**Independent Review**

Returning to the BCCLA trial decision, Justice Leask found that the administrative segregation regime permitted the warden to be the judge in his or her own cause, creating an apprehension of bias, or even actual bias.[12] He then went through a lengthy discussion of decades of calls for independent review of segregation placements, noting along the way CSC's extraordinary efforts to prevent this from happening.[13]

Justice Leask goes on to discuss in detail the experiences of a number of prisoners related to the segregation review process, concluding that in that process "limited weight is given to the inmate's account, and the institution's information is taken to be presumptively reliable."[14] Justice Leask notes that this problem is contributed to by CSC's organizational culture of deference, both on the part of senior administrators to front line staff, and regional and national offices to wardens and correctional managers.[15]

The grievance process and habeas corpus were considered as alternative forms of review, but both were rejected as ineffective.[16] Justice Leask concluded by finding that a reviewer

[12] BCCLA 1, para 355
[13] BCCLA 1, paras 356-382
[14] BCCLA 1, para 387
[15] BCCLA 1, para 387-389
[16] BCCLA 1, para 397

must be independent of CSC and have the authority to release a prisoner from segregation, and that the review should happen as soon as possible and no later than after five days.[17]

In response to these findings, and similar ones in the CCLA case, the Independent External Decision Maker (IEDM) review process was put in place for SIUs. While IEDMs certainly represent an improvement over the previous review process, they have not been empowered sufficiently to create a truly fair process. The process is not timely, as it can take up to 90 days for the first review to take place.[18] The IEDM decisions are not always followed. As the Correctional Investigator puts it: "compliance with Independent IEDMs removal orders has been challenging."[19] The only remedy the IEDMs can direct is removal from the SIU, which often means a return to the mainstream population of a maximum-security prison. This can lead to prisoners refusing to leave the SIU because the conditions there are actually more favourable than the alternative.[20]

Bill S-230 seeks to address these problems by requiring a review by a superior court after 48 hours of confinement in a SIU. Given CSCs longtime intransigence on this issue, it is unlikely that efforts to reform the IEDM process will ever provide an adequate solution. The BCCLA believes that judicial oversight is necessary in order to create a *Charter* compliant review process.

**Remedies**

The BCCLA strongly supports the proposal to allow sentence reductions for violations of prisoners' rights. The two court cases discussed so far did not address remedies for future rights violations, other than to point out that the grievance process and *habeas corpus* are not sufficient.[21] To that point, meaningful remedies are extremely hard to come by for people in prison. This is part of the reason that abuses are so common.

We can also look to the solitary confinement class actions that resulted in significant financial payouts.[22] The BCCLA suggests that it would behoove Canada to provide for remedies to mitigate the harms of solitary confinement and other rights violations. After all, one of the purposes of the damages provided in those cases was deterrence of future breaches.

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[17] BCCLA 1, para 410
[18] Structured Intervention Unit Implementation Advisory Panel 2021-22 Annual Report
[19] CI Report 2021-2022, page 16
[20] CI Report 2021-2022, page 16
[21] BCCLA 1 397
[22] See e.g. *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184