# Prolonged Solitary Confinement Deemed Unconstitutional

## A Revolutionary Road in Recent Canadian Jurisprudence

Administrative segregation in Canada is defined as "the confinement of a prisoner for 22 hours or more per day without meaningful human contact. Prolonged solitary confinement is defined as any period of solitary confinement in excess of 15 days." [1] In 2015, "the United Nations approved revisions to the "Standard Minimum Rules for the Treatment of Prisoners" which are also referred to as the Nelson Mandela Rules." The Mandela Rules "prohibit solitary confinement in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures." [2] These rules were formed under an international convention; thus, the rules are non-binding in Canada. [3] Although they are not legally binding, Canadian jurisprudence have certainly indicated that the rules are deserving of respectful consideration in our Courts. [4]

In Canada, the use of solitary confinement is still a common practice among both federal and provincial institutions. When utilized properly, solitary confinement can be a necessary and an effective tool. When used improperly, "segregation can have profoundly negative impacts on inmate health and welfare . . . and is an independent risk variable for inmate suicide." [5] Legal scholar, Debra Parkes who studies societal injustices in the criminal justice and corrections explains that through reports of deaths in custody, "periodically the public catches glimpses of the inhumanity of solitary confinement."[6] The tragic death of Ashley Smith is one example that symbolizes a great societal failure of how ill equipped the prison system is to adequately treat and stabilize complex mental health cases. Ashley displayed serious psychiatric symptoms when she was held in solitary confinement and was given little treatment. Ashley was also subjected to

constant light without basic amenities which worsened her mental health symptoms and increased her self-harming behaviour. [7] During Ashley's 13 months in custody, the *Correctional Service of Canada* transferred her more than a dozen times between seven different institutions which allowed for her continued isolation in administrative segregation. [8] In 2007, Ashley was so tortured that she hung herself in front of prison guards who failed to intervene.

We have reached a pivotal point in history. The law is evolving very quickly, and the current jurisprudence seems to suggest that Canada courts have had enough with prolonged solitary confinement. In BCCLA *and JHSC v. Attorney General of Canada* [9] the *British Columbia Supreme Court* ended indefinite solitary confinement in federal prison across Canada ruling the practice unconstitutional. In their decision, the Court declared:

> Sections of the *Corrections and Conditional Release Act* that allow for indefinite solitary confinement are of no force or effect because it violated s. 7 of the *Charter of Rights and Freedoms* in that they permit prolonged, indefinite solitary confinement, fail to provide an independent review of segregation placements and deprive prisoners of the right to counsel at segregation review hearings. The Court further held that the laws violate s. 15 of the *Charter* to the extent that the laws authorize any period of administrative segregation for the mentally ill or disabled, and to the degree that the regime discriminates against Indigenous prisoners. [10]

In a recent decision, the *British Columbia Court of Appeal* allowed the "federal government more time to implement new policies and ordered new conditions in the meantime to limit the violation of inmates' constitutional rights." [11]

A revolutionary road is emerging in recent caselaw, but the practice of solitary confinement continues to be prevalent. The jurisprudence indicates that Courts are prepared to give remedies to prisoners who have had their *Charter Rights* violated. For example, in *R. v. Hamm,* [12] the Alberta Queen's Bench called for Mr. Hamm's immediate release from solitary confinement. [13] Mr. Hamm suffered from severe and persistent mental illness for over a decade and had

significant factors that contributed to the destabilization of his illness. [14] Mr. Hamm brought a successful *Habeas Corpus* application and the judge ordered his returned to general population. In the courts reasoning, the institution did not provide inmates with reasons for their detention and the institution had not explained why alternatives were not adequate. [15]

In a very recent Ontario case, Adam Capay spent a total of 1647 days in solitary confinement in Kenora and Thunder Bay awaiting trial on a murder charge. [16] Mr. Capay was being kept alone in his cell for 23 hours a day with the lights never turned off. Mr. Capay brought an application pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* seeking a stay of proceedings as a remedy for alleged violations of his rights under ss. 7, 9, 12, and 15 of the *Charter*. [17] The judge held that the "violations were so "prolonged, abhorrent, egregious and intolerable" that staying the murder charge was the only appropriate solution." [18] The judge stated, "in my opinion, this is the clearest of cases in which no remedy short of a stay is capable of redressing the prejudice caused to the integrity of the justice system as a result of the multiple and egregious breaches of the accused's *Charter* rights." [19] The Ontario Human Rights Commissioner, Renu Mandhane spoke on this matter, stating that, "It all points to a lack of alternative facilities or treatments for prisoners with serious mental health issues." [20]

In a recent Ontario case, Mr. Prystay was placed in administrative segregation and he remained in segregation for 13.5 months while on remand. [21] Mr. Prystay demonstrated good behaviour in segregation, and correctional officers recommended he be returned to general population every month, but management refused, focusing on his past behaviour. [22] Mr. Prystay brought an application for a stay of proceedings or sentence reduction under s. 24(1) of the *Charter* alleging

indefinite placement in administrative segregation breached his rights under ss. 7 and 12 of *Canadian Charter of Rights and Freedoms*. [23] The Court found that the Mr. Prystay's placement in administrative segregation constituted cruel and unusual punishment and the length of time he spent in segregation was excessive and had adverse effects on his physical and mental health. The Court determine that a stay was not an appropriate remedy. [24] The appropriate remedy was enhanced credit of 3.75 for each day served. [25]

In attempt to reconcile the harm done, civil action has been one available remedy to prisoners who have been tortured from prolonged use of solitary confinement. In a recent ruling, the "*Ontario Superior Court* held that *Correctional Service of Canada* violated the *Charter* rights of thousands of inmates due to it's over its use of administrative segregation. [26] Justice Paul Perell found that "those who were involuntarily placed in administrative segregation for more than 30 days, or voluntarily for more than 60, experienced a systemic breach of their rights under the *Charter of Rights and Freedoms*." [27] He ordered "Ottawa to pay $20 million for placing mentally ill inmates in solitary." [28]

[1] *R v Chan,* 2019 ONSC 1400 at para 85.

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *R v Roberts,* 2018 ONSC 4566 at para 32.

[6] Debra Parkes, "Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic" (2017) 32:2 CJLS 165 at 166.

[7] Breese Davies, "Ending segregation a fitting legacy for Ashley Smith" (25 October 2017) Online: Thestar.com <https://www.thestar.com/opinion/commentary/2017/10/25/ending-

segregation-a-fitting-legacy-for-ashley-smith.html>.

[8] *Ibid.*

[9] *BCCLA and JHSC v Attorney General of Canada,* 2018 BCSC 62.

[10] "We won! BC Supreme Court ends indefinite solitary confinement in federal prisons across Canada" (17 January 2018) Online: The British Columbia Civil Liberties Association <https://bccla.org/2018/01/bc-supreme-court-ends-indefinite-solitary-confinement-federal-prisons-across-canada/>.

[11] Kathleen Harris, "Court orders new rules for holding prisoners in solitary confinement" (07 January 2019) Online: CBC News <https://www.cbc.ca/news/politics/court-ruling-solitary-confinement-goodale-1.4968577>.

[12] *R v Hamm,* 2016 ABQB 440.

[13] *Ibid* at 11.

[14] *Ibid* at 11.

[15] *Ibid* at 95.

[16] David Reevely, "Ontario Jails' Love of Solitary Confinement Shows What a Disaster They Are" (4 May 2017) online: Ottawa Sun <http://ottawasun.com/2017/05/04/ontario-jails-love-of-solitary-confinement-shows-what-a-disaster-they-are/wcm/16a72c42-bb24-49e8-a6ae-a75e68f0d7ac>.

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

[20] Renu Mandhane, "Four years in solitary for northern Ontario inmate shocks human rights commissioner" (20 Oct 2016) online: CBC News <http://www.cbc.ca/news/canada/thunder-bay/segregation-thunder-bay-jail-1.3812454>.

[21] *R v Prystay,* 2019 ABQB para 17.

[22] *Ibid* at para 61.

[23] *Ibid* at para 4.

[24] *Ibid* at para 161 & 162.

[25] *Ibid* at para 165.

[26] Paolo Loriggo, “Ottawa ordered to pay $20M for placing mentally ill inmates in solitary” (26 March 2019) online The Canadian Press <https://www.nsnews.com/ottawa-ordered-to-pay-20m-for-placing-mentally-ill-inmates-in-solitary-1.23770807>.

[27] *Ibid.*

[28] *Ibid.*