# Ontario Supreme Court deals blow to Canada's solitary confinement/torture policy, but says 15 day limit is ok

By Patrick White, in *Globe and Mail*, Mar 28, 2019

Ontario's top court has ruled that placing inmates in solitary confinement for more than 15 days constitutes cruel and unusual punishment, a resounding legal defeat of Correctional Service Canada's long-standing practice of isolating prisoners for weeks, months and even years at a time.

The landmark decision sets a cap of 15 days on solitary placements, the first time a Canadian court has imposed a specific limit on solitary confinement. It will come into force by April 13, the court ruled, a tight deadline for an unwieldy government entity that oversees 43 prisons, 23,000 offenders and a $2.4-billion annual budget.

"With this decision, the Court of Appeal has brought to an end a sorry chapter in the administration of Canada's prisons," said Michael Rosenberg, who served as co-counsel on the case for the Canadian Civil Liberties Association (CCLA), which launched the challenge of solitary confinement four years ago. "This is a significant win for the CCLA and for the administration of justice more generally."

A spokesman for Public Safety Minister Ralph Goodale said his office is reviewing the decision. As of Thursday, the Correctional Service held 322 prisoners in administrative segregation – an internal designation for solitary confinement – down from about 800 in 2014.

The decision is the latest development in a years-long legal push to curtail solitary confinement prompted by the deaths of Ashley Smith, Edward Snowshoe and other prisoners. The Globe and Mail has reported extensively on the prevalence and effects of solitary confinement, beginning with a 2014 investigation into the death of Mr. Snowshoe, who took his own life after 162 consecutive days in segregation.

The CCLA said it expects an appeal.

The appeal court opinion overturns a lower court ruling that found solitary confinement could cause serious psychological harm to inmates, but that those harms could be avoided if staff followed existing laws requiring close monitoring of prisoners' health.

Writing for a three-judge panel, Justice Mary Lou Benotto largely sided with arguments from the CCLA, stating that the Correctional Service's use of prolonged administrative segregation can cause permanent harm that no level of medical monitoring can prevent.

"Legislative safeguards are inadequate to avoid the risk of harm," she wrote. "In my view, this outrages standards of decency and amounts to cruel and unusual treatment."

The CCLA had also sought a prohibition on housing young and mentally ill inmates in segregation, but was unsuccessful.

The decision from Ontario Superior Court Justice Frank Marrocco 15 months ago was a partial victory for the CCLA. Justice Marrocco struck down a portion of the law governing solitary confinement on the grounds it violated Section 7 of the Charter of Rights and Freedoms because it did not provide for independent review of segregation decisions.

But Justice Marrocco rejected the CCLA's argument that the practice constituted cruel and unusual punishment, a Section 12 violation. He countered that the potential harms of prisoner isolation were not "inevitable" and could be avoided through proper administration of the laws on monitoring inmates' health.

In its appeal factum, the CCLA argued that Justice Marrocco erred in ruling that harm must be inevitable to engage Section 12.

Crown lawyers contended that the existing laws contained adequate safeguards to protect inmates against the potential harms of being in solitary.

The Marrocco decision was the first of several recent judgments that have unravelled legislation governing solitary confinement over the past 15 months. In January of last year, a B.C. court also ruled that a portion of the law governing solitary violated the Charter. And earlier this week, federal inmates won a class-action lawsuit against the Correctional Service, in which a judge found that the practice of isolating seriously mentally ill inmates breached Section 12.

None of those demanded such drastic and immediate action from the Correctional Service as the Court of Appeal decision released on Thursday morning.

"Usually, courts give governments months or a year to fix problems before a declaration of invalidity becomes active," said Noa Mendelsohn Aviv, equality director for the CCLA. "With this short timeline, the court is saying this is enough, this is intolerable, this cannot continue."

Last year, the federal government introduced Bill C-83 to address the legal shortcomings of the current legislation by replacing administrative segregation with the use of a new housing option called structured intervention units. Under the new regime, isolated inmates would be allowed to spend upward of four hours a day outside their cells, including two hours of programs and services. It is unclear if the same cells would be used.

"We continue to work to pass Bill C-83, which will eliminate segregation and establish a fundamentally different system focused on rehabilitative programming and treatment," said Scott Bardsley, a spokesman for Mr. Goodale. "Its new approach will allow us to separate inmates when necessary to maintain safety, while at the same time ensuring that those inmates receive mental-health care, programming and meaningful human contact."

Bill C-83 is currently in the Senate, and has come under considerable criticism from correctional officers and prisoner-rights advocates alike.

The union representing correctional officers has said solitary confinement is a vital tool for separating dangerous prisoners from staff and the general prison population.

Senator Kim Pate, former executive director of the Canadian Association of Elizabeth Fry Societies, a group supporting incarcerated women, has panned the bill, saying it is solitary confinement by a different name and lacks some of the oversight mechanisms that currently protect inmates in segregation.

“After the decisions of the court this week, I think it behooves the government to withdraw its bill and start again,” she told The Globe.

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