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## **Out of Sight, Out of Mind: Bill C-83, Solitary Confinement, and Mental Health**

**LYDIA DOBSON\***

This article investigates the recently passed Bill C-83, which aims to reduce harms caused by segregating people with mental health issues. In order to assess the capacity of the Bill to support meaningful change, the history of mental health institutions and correctional facilities in Ontario is first explored, followed by an analysis of recent cases on segregation and mental health in the province. Next, legislative oversight for federal prisons and provincial jails is described, followed by an overview of ongoing reforms. Here, a distinction between federal prisons and provincial jails is made in order to explore the different legislation governing each of these spaces and the complexities that arise from multiple systems of governance. Finally, the practical implementation of Bill C-83 is considered within these legal frameworks, and the resultant consequences are suggested in light of academic research on prison law policy and reform.

*“The degree of civilization in a society can be judged by entering its prisons.”*  
Fyodor Dostoevsky

IN DECEMBER OF 2018, AN INQUEST INTO THE DEATH of Cas Geddes commenced. Geddes, who suffered from paranoid schizophrenia, was detained by police for uttering threats and taken to the Ottawa-Carleton Detention Centre (OCDC) after no beds could be made available in the city’s mental health facility. As is often the case, when people living with mental health issues are deemed dangerous and are unable to be properly supported by existing social services, police resort to incarceration as a preventative measure to diminish the risk that may be presented by the individual. Geddes was placed in administrative segregation (or solitary confinement)<sup>1</sup> shortly after his arrival to OCDC, despite an existing Ontario Human Rights Tribunal Order prohibiting the use of segregation for prisoners with diagnosed mental health issues.<sup>2</sup> In the

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\* Lydia Dobson is a prison abolitionist and founding member of the Toronto Prisoners’ Project and the Criminalization and Punishment Education Project. She holds a Masters in Sociology from Carleton University and is currently completing her third year of the JD program at Osgoode Hall Law School. As will become clear, there have been significant developments in the regulation of the use of solitary confinement in Canada, particularly since 2013. The research for this article was largely completed by the spring of 2019, however updates on the status to the two key Bills explored here are included, as well as an update on a significant decision of the Ontario Court of Appeal.

<sup>1</sup> The terms “(administrative) segregation” and “solitary confinement” will be used interchangeably throughout this article, despite “segregation” being the more widely accepted legal term. This is done intentionally in an effort to resist the capacity for similar conditions of confinement to be re-branded under different legal names. This decision was inspired by a question that arose in a legal conference on the issue, attended by a person who had been incarcerated for many years: part way through a discussion on “segregation,” he asked whether the experts at the table were talking about solitary confinement. If we cannot speak in terms accessible to those impacted by them, we should question and adjust how we use them.

<sup>2</sup> Ontario Human Rights Commission, Public Statement, “Segregation and mental health in Ontario’s prisons: *Jahn v Ministry of Community Safety and Correctional Services*” (25 August 2020), online: <[www.ohrc.on.ca/en/segregation-and-mental-health-ontario-s-prisons-jahn-v-ministry-community-safety-and-correctional](http://www.ohrc.on.ca/en/segregation-and-mental-health-ontario-s-prisons-jahn-v-ministry-community-safety-and-correctional)> [perma.cc/9GGL-BD5J].

hours following Geddes' release from solitary confinement into the general population of the jail, he died by suicide.<sup>3</sup> Sadly, Geddes' death is representative of an ongoing trend of human rights violations in Ontario carceral institutions.<sup>4</sup> Although past policy reforms have led to more frequent mental health assessments for those in segregation, this added procedural layer has not substantially changed the numbers of people with mental health issues being placed into segregation.<sup>5</sup> Rather, as some have argued, reforms of this nature may actually facilitate legitimization of the use of solitary confinement for prisoners with mental health issues.<sup>6</sup> Recent publicity on this and other major cases in Canada<sup>7</sup> has seen increased public pressure for more drastic alternatives to segregation.<sup>8</sup> To this end, a federal Bill (C-83), which received Royal Assent on 21 June 2019, amends the *Corrections and Conditional Release Act* to "eliminate" the use of administrative and disciplinary segregation.<sup>9</sup> While some experts have declared that the amendments could, if implemented properly, "end solitary confinement in Canada,"<sup>10</sup> others have doubted their capacity for change, deeming the new reforms as having created conditions of confinement which are simply "solitary by another name."<sup>11</sup>

This article seeks to determine the capacity of the recently passed Bill C-83 to reduce harms caused by segregating people with mental health issues and to examine the potential consequences of the implementation of the Bill. In order to achieve this, the history of mental health institutions and correctional facilities in Ontario is first explored, followed by an analysis of recent cases on segregation and mental health in the province. Next, legislative oversight for federal prisons and provincial jails is described, followed by an overview of ongoing reforms. Here, a distinction between federal prisons, which house those who have received a sentence of two years or longer, and provincial jails, which are used to detain people awaiting trial or serving a sentence of less than two years, is made in order to explore the different legislation governing each of these spaces. Notably, the majority of prisoners who are held in provincial jails (as was

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<sup>3</sup> Blair Crawford, "Mentally ill Geddes 'thrown in with the wolves' at Ottawa jail, inmate tells inquest," *Ottawa Citizen* (12 December 2018), online: <[ottawacitizen.com/news/local-news/geddes-thrown-into-the-wolves-at-ottawa-jail-inmate-tells-inquest](http://ottawacitizen.com/news/local-news/geddes-thrown-into-the-wolves-at-ottawa-jail-inmate-tells-inquest)> [perma.cc/DXR6-2QTW].

<sup>4</sup> Howard Sapers et al, "Segregation in Ontario: Independent Review of Ontario Corrections" (March 2017), online: <[www.mcscs.jus.gov.on.ca/english/Corrections/IndependentReviewOntarioCorrections/IndependentReviewOntarioCorrectionsSegregationOntario.html#seguse](http://www.mcscs.jus.gov.on.ca/english/Corrections/IndependentReviewOntarioCorrections/IndependentReviewOntarioCorrectionsSegregationOntario.html#seguse)> [perma.cc/U856-4E97].

<sup>5</sup> See Appendix A which outlines the reforms to the mental health oversight of persons in solitary confinement introduced in 2013, and which are still in effect today. Note that Geddes' death occurred under this regime. Ongoing reports from OCDC demonstrate that the use of segregation has not, however decreased. See "Ottawa-Carleton Detention Centre Quarterly Reports" (7 September 2018), online: <[www.mcscs.jus.gov.on.ca/english/Corrections/OCDCTaskForceReportback.html](http://www.mcscs.jus.gov.on.ca/english/Corrections/OCDCTaskForceReportback.html)> [perma.cc/EW9A-B3X2].

<sup>6</sup> Justin Piché, "Bill C-83: The End of the Line for Segregation in Federal Penitentiaries in Canada?" *Tracking the Politics of Criminalization and Punishment in Canada* (22 November 2018): <<http://tpcp-canada.blogspot.com/2018/11/bill-c-83-end-of-line-for-segregation.html>> [perma.cc/335G-VU76].

<sup>7</sup> The Adam Capay case, Brazeau class action, and Christina Jahn decisions will be discussed in the following section of this article, elaborating on these circumstances.

<sup>8</sup> Piché, *supra* note 6.

<sup>9</sup> C-83, *An Act to amend the Correctional and Conditional Release Act and another Act*, SC 2019, c27.

<sup>10</sup> Lisa Kerr, "If implemented properly, new bill may end solitary confinement in Canada," *Globe and Mail* (18 October 2018), online: <[www.theglobeandmail.com/opinion/article-if-implemented-properly-new-bill-may-end-solitary-confinement-in/](http://www.theglobeandmail.com/opinion/article-if-implemented-properly-new-bill-may-end-solitary-confinement-in/)> [perma.cc/3JYP-9FLK].

<sup>11</sup> Kim Pate, "Solitary by another name is just as cruel," *Globe and Mail* (16 November 2018), online: <[sencanada.ca/en/sencaplus/opinion/solitary-by-another-name-is-just-as-cruel-senator-pate/](http://sencanada.ca/en/sencaplus/opinion/solitary-by-another-name-is-just-as-cruel-senator-pate/)> [perma.cc/BWD8-4VV9].

Geddes) are on remand, meaning that they are legally innocent and awaiting trial.<sup>12</sup> Finally, the practical implementation of Bill C-83 is considered within these legal frameworks, and the resultant consequences of these processes are suggested in light of academic research on prison law policy and reform. Specifically, Bill 6, a transformative Bill for Ontario-based jail governance, is assessed alongside the overlapping reforms of Bill C-83, impacting federal Ontario-based prisons.

## I. MENTAL HEALTH AND SOLITARY CONFINEMENT

In the early 1980s, a trend in deinstitutionalization of psychiatric and mental health facilities took place across Canada. Although not without its own shortcomings, under the framework of institutionalization, people diagnosed with mental health issues were far less likely to be criminalized.<sup>13</sup> Scholars have long since documented deinstitutionalization and the “displacement of mental health cases into the criminal justice system.”<sup>14</sup> Rather than providing services that could support people living with mental health issues, government funds have been increasingly directed towards carceral institutions used for punishment.<sup>15</sup> The result is high rates of mental health issues within Canadian prisons and jails.<sup>16</sup> For example, in 2016, OCDC reported that 50 per cent of women and 28 per cent of men entering the jail had been flagged with mental health alerts.<sup>17</sup> For the growing population of prisoners<sup>18</sup> with mental health issues, the use of solitary confinement is a pressing concern.<sup>19</sup> Legal frameworks governing solitary confinement in Ontario provide broad discretion with limited oversight.<sup>20</sup> In provincial jails, for

<sup>12</sup> For statistical data on remand facilities across Canada and an analysis of the causes and implications of the high rates of pre-trial detention see: Statistics Canada, “Adult and Youth Correctional Statistics in Canada, 2017/2018” (9 May 2019), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.html](http://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.html)> [perma.cc/V8YH-MGZA].

<sup>13</sup> Many of the institutions which have long since been shut down continue to face litigation for abuses of mentally ill persons which took place within them. See, e.g. Carol Goar, “Ugly secret of Ontario psychiatric hospitals won’t stay hidden,” *Toronto Star* (13 December, 2013), online: <[www.thestar.com/opinion/commentary/2013/06/07/ugly\\_secret\\_of\\_ontario\\_psychiatric\\_hospitals\\_wont\\_stay\\_hidden\\_goar.html](http://www.thestar.com/opinion/commentary/2013/06/07/ugly_secret_of_ontario_psychiatric_hospitals_wont_stay_hidden_goar.html)> [perma.cc/2QG9-DMLF].

<sup>14</sup> Sara Johnson, “Custodial Remand in Canada,” Statistics Canada – Catalogue no. 85-002-XIE, Vol 23, no 7 (2001), online: <[publications.gc.ca/Collection-R/Statcan/85-002-XIE/0070385-002-XIE.pdf](http://publications.gc.ca/Collection-R/Statcan/85-002-XIE/0070385-002-XIE.pdf)>.

<sup>15</sup> For carceral expansion see the blog created by Professor Justin Piché, “Tracking Carceral Punishment in Canada,” online: <[tcp-canada.blogspot.com](http://tcp-canada.blogspot.com)> [perma.cc/5CYK-QUXC]. The blog investigates a myriad of issues, inclusive of those related to mental health and punishment in Canada. For decreased funding of psychiatric facilities see e.g. Cheryl Forchuk et al, “Housing, income support and mental health: Points of disconnection” (2007) 14:5 Health Research Policy and Systems 2.

<sup>16</sup> Sandy Simpson, “Mental Illness and the Prison System,” Centre for Addition and Mental Health (2019), online: <[www.camh.ca/en/camh-news-and-stories/mental-illness-and-the-prison-system](http://www.camh.ca/en/camh-news-and-stories/mental-illness-and-the-prison-system)> [perma.cc/BNQ8-SB2H].

<sup>17</sup> Note that mental health alerts do not confirm a diagnosed illness. Rather, they are used to trigger a diagnostic process. See Ottawa-Carleton Detention Centre Quarterly Trends Analysis (6 June 2017), online: <[www.mcscs.jus.gov.on.ca/english/Corrections/OttawaCarletonDetentionCentreTaskForce/OCDCtaskForce-QuarterlyTrendsAnalysis.html](http://www.mcscs.jus.gov.on.ca/english/Corrections/OttawaCarletonDetentionCentreTaskForce/OCDCtaskForce-QuarterlyTrendsAnalysis.html)> [perma.cc/TVQ4-XLWF].

<sup>18</sup> Advocates for prison abolition tend to use the term “prisoner” in place of “inmate” because the latter has its origins in institutionalized psychiatric facilities and implies that people have an inherent quality in need of fixing. The term prisoner is used in place of inmate to reject this ideology.

<sup>19</sup> Diane Kelsall, “Cruel and usual punishment: solitary confinement in Canadian prisons” (2014) 186:18 CMAJ 1345.

<sup>20</sup> Acts governing use of segregation are explored in more detail in the following section. Federal and provincial legislation on administrative and punitive segregation agree on these points.

example, anything that “in the opinion of the Superintendent” constitutes a safety concern is sufficient to justify segregating prisoners.<sup>21</sup> Under these regimes, people with mental health issues are more likely to experience segregation.<sup>22</sup> Despite a large body of empirical data that clearly indicates that solitary confinement is detrimental to mental health, segregation is a common response to for prisoners at risk of self-harm.<sup>23</sup> As the report of Howard Sapers, then Ontario’s Independent Advisor of Corrections Reform noted, “[t]hose who have been flagged as having potential or confirmed suicide risk or mental illness are disproportionately placed in segregation, and once there tend to stay longer than the rest of the segregated population.”<sup>24</sup> Further troubling are statistics that show that the average number of days spent in segregation for both prisoners who have been flagged with mental health alerts and those who are at risk of suicide was fifteen or higher.<sup>25</sup> According to what is known as the “Mandela Rules” provided by the United Nations, anything more than fifteen days of segregation amounts to torture or cruel, inhuman, or degrading treatment.<sup>26</sup> Although the Canadian state was a member of the General Assembly of the United Nations, which adopted the Mandela Rules, the rules yield no binding consequence should Canada directly contravene them. Unfortunately, a lack of meaningful oversight of incarceration in Canada has meant that many issues around the use of segregation have not investigated until tragedies occurred. Some of the major cases on solitary confinement that have shone the public spotlight on Ontario institutions are provided below in order to situate the introduction of Bill C-83 within the contemporary socio-legal political landscape.

## II. A DECADE OF ABUSE

Domestic and international pressures to address the ongoing harms of solitary confinement in Ontario have been mounting for several years now. Starting with the tragic death of Ashley Smith, major legal battles against the use of solitary confinement for prisoners with mental health issues have frequented media headlines.<sup>27</sup> In this section, an overview of recent leading cases and their impacts are discussed to provide an understanding of the path that has led towards the introduction of Bill C-83 and the support for and opposition to it. For clarity, Appendix B provides a timeline of these events.

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<sup>21</sup> *Ministry of Correctional Services Act*, RSO 1990, c M-22 at s 34.

<sup>22</sup> Rachelle Laroque, “Segregation Literature Review,” Independent Review of Ontario Corrections (January 2017), online:

<[www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/Segregation%20Literature%20Review%20ENGLISH%20FINAL.pdf](http://www.mcscs.jus.gov.on.ca/sites/default/files/content/mcscs/docs/Segregation%20Literature%20Review%20ENGLISH%20FINAL.pdf)> [perma.cc/T42A-3DE9].

<sup>23</sup> Sapers, *supra* note 4 and Ottawa Detention Quarterly, *supra* note 17.

<sup>24</sup> Sapers, *supra* note 4.

<sup>25</sup> *Ibid.*

<sup>26</sup> For a more fulsome explanation on the Mandela Rules, see Part III Federal and Provincial Legislative Reforms, also see *The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* online: <[www.unodc.org/documents/justice-and-prison-reform/Nelson\\_Mandela\\_Rules-E-ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf)> [perma.cc/3DA4-EYSR].

<sup>27</sup> Although this article uses the Ashley Smith Inquest as a starting point to analyze ongoing issues of segregation and mental health in Canada, this issue has been tackled by scholars and activists for many years prior to the Smith Inquest. See Michael Jackson, “Reflection on 40 Years of Advocacy to End the Isolation of Canadian Prisoners” (2015) 4:1 Cdn J Hum Rts 57.

Ashley Smith was a youth when she first became incarcerated in a Nova Scotia correctional facility.<sup>28</sup> Ashley suffered from mental health issues that were exacerbated by long stays in solitary confinement and was eventually sent to Grand Valley Institution, a federal prison in Ontario.<sup>29</sup> While in a segregation there, Ashley died by suicide, as prison guards watched through a camera.<sup>30</sup> They had been instructed not to enter the room until she was no longer breathing.<sup>31</sup> News of this event became public, sparking national media attention and an inquest into her death.<sup>32</sup> In 2013, the inquest rendered 104 recommendations, including banning indefinite solitary confinement.<sup>33</sup>

As the inquest into Ashley Smith's death was concluding, a legal proceeding in a different matter was brought against an Ontario jail. Christina Jahn, a woman living with mental health issues and suffering from cancer, was subjected to more than 200 consecutive days in solitary confinement.<sup>34</sup> The Ontario Human Rights Commission (OHRC) intervened in her claim against Ontario's Ministry of Community Safety and Correctional Services (MCSCS), seeking a consent order for public interest remedies.<sup>35</sup> Due to Jahn's eventual settlement with MCSCS, many of the intimate details of her experience are not in the public record. However, a lengthy consent order has been made public, which states the terms that outline how segregation may be lawfully exercised.<sup>36</sup> In the consent order, there are notable provisions that indicate that the segregation of prisoners with mental health issues is prohibited and that no more than sixty aggregate days of segregation is allowed in a 365-day period.<sup>37</sup>

Public attention to these and other events led to an independent review of Ontario Corrections, concluding in what is now known as the Howard Sapers Report. In this 2017 report, several recommendations, echoing those of the Jahn Settlement and Ashley Smith Inquest, are provided. Most prominent of these recommendations are three points found in Recommendation 3.1 prohibiting the use of segregation for mentally ill prisoners, prohibiting placement in segregation for more than fifteen days, and limiting aggregate days to no more than sixty in a one-year period.<sup>38</sup>

Given the publicity of the Ashley Smith Inquest, the Jahn Settlement, and the Howard Sapers Report, it would seem reasonable to conclude that the use of segregation for prisoners with mental health issues in Ontario has since been eradicated. Unfortunately, however, at the provincial level the Jahn Settlement Order was violated in 2017, which led to a subsequent 2018 order. Shortly thereafter, Bill 6 was introduced at the Ontario legislature and Bill C-83 was

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<sup>28</sup> Jennifer Kilty & Rebecca Bromwich, "Introduction: Law, Vulnerability, and Segregation: What Have We Learned from Ashley Smith's Carceral Death?" (2017) 32:2 CJLS 157 at 158.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Coroner's Inquest Touching the Death of Ashley Smith (19 December 2013). Note that due to procedural conflicts the first inquest did not begin until 2011, and was eventually terminated.

<sup>34</sup> Segregation and mental health in Ontario's prisons: Jahn v Ministry of Community Safety and Correctional Services, Ontario Human Rights Commission, online: <[www.ohrc.on.ca/en/segregation-and-mental-health-ontario-s-prisons-jahn-v-ministry-community-safety-and-correctional](http://www.ohrc.on.ca/en/segregation-and-mental-health-ontario-s-prisons-jahn-v-ministry-community-safety-and-correctional)> [perma.cc/G7B2-G4SX].

<sup>35</sup> *Ibid.*

<sup>36</sup> "Appendix A" depicts the oversight of segregation for mentally ill prisoners at ODCD, resulting from this order.

<sup>37</sup> Public Interest Remedies: Schedule A in the matter of: *Christina Nadine Jahn v Her Majesty the Queen in Right of Ontario, As Represented By The Minister Of Community Safety And Correctional Services* 24 September 2013.

<sup>38</sup> Sapers, *supra* note 4.

introduced into Parliament.<sup>39</sup> Since the introduction of these two Bills, an inquest into the death of Cas Geddes, a stay of proceedings for Adam Capay, and a class action brought forward by the Canadian Civil Liberties Association (CCLA), have been at the forefront of media attention.

As the introduction of this article describes, Geddes was diagnosed with paranoid schizophrenia when he was held in solitary confinement at OCDC, where he died by suicide in February of 2017.<sup>40</sup> A few months later, the public learned that Adam Capay, a youth at the time he was first imprisoned, had been held in solitary confinement in a federal prison in Ontario for more than four years.<sup>41</sup> Less than a month later, in March of 2019, an Ontario Court of Appeal decision in *Canadian Civil Liberties Association v Canada (Attorney General)*, (CCLA) condemned the use of segregation for prisoners with mental health issues. Although the court declined to issue a specific remedy on mental health,<sup>42</sup> it did make an important declaration that “administrative segregation longer than 15 consecutive days as provided for in ss. 31-37 of the *Corrections and Conditional Release Act* violates s. 12 of the *Charter* and cannot be justified under s. 1.”<sup>43</sup> As a caveat to the Court’s conclusion, it accepted the Attorney General’s request for a further extension of time to allow the legislative process with respect to Bill C-83 to conclude.<sup>44</sup> This was significant because it was the first instance where the Ontario Court of Appeal had explicitly acknowledged the harms of fifteen consecutive days of segregation, in agreement with the well-established Mandela Rules, mentioned briefly above and discussed more fully in the following section.

### III. FEDERAL AND PROVINCIAL LEGISLATIVE REFORMS

As the above cases illustrate, both federal prisons and provincial jails in Ontario are experiencing substantial pressures to reform or abolish solitary confinement in its current form, particularly for prisoners with mental health issues. Arguably, one of the barriers to actualizing change in Canadian carceral institutions is the existence of parallel but disparate legislative powers governing them. In this section, differing approaches to legislative reform in federal and provincial institutions in Ontario are contrasted against the backdrop of international law.<sup>45</sup>

As outlined in the introductory section, federal prisons operate to incarcerate those sentenced to more than two years and provincial jails are used to house those awaiting trial or who are sentenced to less than two years on incarceration. The majority (69 per cent) of those detained in Ontario jails are held on remand, awaiting trial.<sup>46</sup> The notable results of this two-

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<sup>39</sup> Bill C-83, *supra* note 9.

<sup>40</sup> Crawford, *supra* note 3.

<sup>41</sup> Patrick White, “Judge issues stay in case of Adam Capay, who spent years in solitary confinement,” *Globe and Mail* (28 January, 2019), online: <[www.theglobeandmail.com/canada/article-judge-issues-stay-in-adam-capay-case/](http://www.theglobeandmail.com/canada/article-judge-issues-stay-in-adam-capay-case/)> [perma.cc/N4RN-SLAK].

<sup>42</sup> 2019 ONCA 243 at para 66. An appeal by the Attorney General of Canada to the Supreme Court of Canada was subsequently abandoned.

<sup>43</sup> *Ibid* at para 150.

<sup>44</sup> *Ibid* at para 47.

<sup>45</sup> Jails hold those serving less than two years, but they also hold all prisoners awaiting sentencing which means that all prisoners spend time in a jail. All prisoners in Canada will spend time in a jail, but not all will be incarcerated in a prison. This means that legislation which might abolish segregation in prisons while the practice may legitimately remain in jails. While the reverse is also true, the gap is less for jail reform as many persons in jails will never enter a prison.

<sup>46</sup> Statistics Canada, “Adult and Youth Correctional Statistics in Canada, 2017/2018” (9 May 2019), online: <[www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm](http://www150.statcan.gc.ca/n1/pub/85-002-x/2019001/article/00010-eng.htm)> [perma.cc/C2ZC-SKEJ]. The approach

tiered system of incarceration are present in myriad ways. In addition to the complexity in addressing conditions of confinement presented by the separate and distinct laws governing them, many organizations working with prisoners and prisoners themselves are acutely aware of the lack of resources made available in jails on the basis that people in them are not in need of rehabilitation due to the uncertainty of their guilt.<sup>47</sup> Despite such differences, a commonality shared by both federal and provincial detention is the use of solitary confinement as a tool for regulation of prisoners. The legislative controls governing these processes are outlined below, with particular attention to Bill C-83.

The recently adopted Bill C-83 amends the federal *Correctional and Conditional Release Act (CCRA)*,<sup>48</sup> which provides rules on the use of segregation in federal prisons. The provincial *Correctional Services and Reintegration Act (CSRA)*<sup>49</sup> and regulations of the *Ministry of Correctional Services Act (MCSA)*<sup>50</sup> establish a similar but distinct set of discretionary powers on the use of segregation in Ontario jails. Bill 6, the *Correctional Services Transformation Act*,<sup>51</sup> which repeals existing powers over segregation in the MCSA and CSRA in order to substantially limit its use, received royal assent on 7 May 2018.<sup>52</sup> However, since the Conservative government came into power in June of 2018, the Bill has not been listed with forthcoming Ontario Proclamations, meaning that it is not scheduled to come into force and could remain dormant for up to ten years.<sup>53</sup> As such, Bill 6 is on the cusp of implementing reforms that could see a significant reform of solitary confinement as it exists in Ontario today while newly implemented reforms of Bill C-83 are being introduced across Ontario-based prisons. Interestingly, these parallel Bills adopt very different and, in some ways, conflicting approaches to segregation reform.

It is important to note that both Bill C-83 and the Bill 6 emerged following years of advocacy that saw the development and adoption of the Mandela Rules by the United Nations in 2015. The purpose of this set of rules is to set a minimum standard of treatment for prisoners internationally. In addition to minimum standards on the use of solitary confinement, food provision, medical treatment, conditions of climate, and administration of records and overcrowding are outlined by these rules in order to prevent harms that have been established as a direct result of incarceration. Specifically, Rule 45(2) prohibits the use of solitary confinement

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adopted in this article sees all usage of solitary confinement as harmful, regardless of a verdict of guilt or innocence. While the disparity in the number of people found guilty and on remand is helpful to providing context to the division between federal and provincial institutions, it is not meant to assert that the degree to which a person has become criminalized renders them more or less deserving for what the Mandela Rules have deemed to be torture or cruel, inhumane, or degrading treatment.

<sup>47</sup> Speight et al, “Jail Accountability and Information Hotline Quarterly Report” (March 2019), online: <[https://cp-ep.org/wp-content/uploads/2019/09/Jail-Hotline\\_Q2-Report\\_Final.pdf](https://cp-ep.org/wp-content/uploads/2019/09/Jail-Hotline_Q2-Report_Final.pdf)> [perma.cc/SN2H-CKC7] at 15.

<sup>48</sup> *Corrections and Conditional Release Act* SC 1992, c 20 at s 31.

<sup>49</sup> *Correctional Services and Reintegration Act*, 2018, SO 2018, c 6, Sched 2.

<sup>50</sup> *Ministry of Correctional Services Act* RSO 1990, c M-22 at s 34.

<sup>51</sup> Bill 6, *Correctional Services Transformation Act*, 2018, SO 2018, c 6.

<sup>52</sup> Appendix B provides a helpful overview of the federal and provincial legislative reform timelines that will be discussed in this section.

<sup>53</sup> Bills passed by the Ontario Legislature may require proclamation by the Lieutenant Governor before coming into effect, even after royal assent is received. This is true of Bill 6. Currently, Bill 6 has no listed date to receive proclamation. Bills essentially sit in limbo for up to ten years before action is required, meaning that although Bill 6 has received royal assent, it may not come into effect for several years. Critics have suggested that the Ford Government is influencing this delay. For Ontario forthcoming proclamations see: Ontario Proclamations, online: <[www.ontario.ca/laws/proclamations](http://www.ontario.ca/laws/proclamations)> [perma.cc/3DEN-TLK2].



for prisoners “with mental or physical disabilities when their conditions would be exacerbated by such measures.”<sup>54</sup> While Canada is a member of the General Assembly, which adopted this set of rules in 2015, counsel for the Attorney General of Ontario later took the position with respect to solitary confinement that: “It’s not that they’re irrelevant, they are relevant, and they are a source of information ... that you can look to, to assist you in determining what you conclude are the constitutional obligations.”<sup>55</sup> In other words, the Canadian state is in agreement that such minimum standards should exist, but objects to being held accountable to meeting them. No domestic or international tribunal exists to enforce the Mandela Rules, which allows Canada and Ontario to symbolically agree to these standards without accountability.

Following recommendations made by the Howard Sapers Report, Bill 6 (the *Correctional Services Transformation Act*) takes a radically different approach than federal Bill C-83 to solitary confinement in Ontario jails. The Bill overturns pre-existing discretionary powers of jail staff by setting hard deadlines on the amount of time a prisoner can be placed in solitary confinement, setting the cap at fifteen days, in compliance with the Mandela Rules and the Ontario Court of Appeal decision in *CCLA*.<sup>56</sup> The number of allowable aggregate days in a 365-day period is set at sixty, following the Jahn Settlement agreement and the Howard Sapers’ Report recommendations.<sup>57</sup> In further compliance of these recommendations, Bill 6 prohibits the use of segregation for prisoners with mental health issues.<sup>58</sup> The Bill 6 definition of segregation remains the same as it previously was: “any type of custody where an inmate is highly restricted in movement and associate with others for 22 hours or more a day.”<sup>59</sup> This definition might have been trivial but for the introduction of Bill C-83, which hinges its reforms on the number of hours spent in solitude.

Unlike Bill 6, which approaches the ongoing harms of solitary confinement by limiting discretion of its use, Bill C-83 attempts to address the issue by changing the way that solitary is experienced, without providing a hard limit on the frequency or overall duration of its application. Rather, Bill C-83 introduces what are called “structured intervention units” in place of solitary confinement cells.<sup>60</sup> One of the central features of these units is that prisoners must spend at least four hours a day outside of them, two of which must allow for social interaction.<sup>61</sup> While this does mark a welcomed improvement to the twenty-two hours of solitary confinement permitted prior to the implementation of Bill C-83, it is quite a leap to suggest, as the government does, that the remaining twenty hours no longer constitutes solitary confinement. Despite language in the Mandela Rules and as defined by the *CCLA* decision, which defines solitary confinement as twenty-two hours a day of confinement, it is well-established that the harms to mental health resultant from solitary confinement are predicated on sensory deprivation, and such harms are not removed by providing two fewer daily hours of sensory

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<sup>54</sup> Mandela Rules, *supra* note 26 at 45(2).

<sup>55</sup> Sunny Dhillon, “UN solitary-confinement rules aren't binding in Canadian prisons, Attorney-General lawyer says,” *Globe and Mail*, (31 August 2017), online: <[www.theglobeandmail.com/news/british-columbia/un-solitary-confinement-rules-dont-apply-to-canadian-prisons-attorney-general-lawyer-says/article36142330/](http://www.theglobeandmail.com/news/british-columbia/un-solitary-confinement-rules-dont-apply-to-canadian-prisons-attorney-general-lawyer-says/article36142330/)> [perma.cc/MFP2-ZPAB].

<sup>56</sup> Bill C-83, *supra* note 9.

<sup>57</sup> Sapers, *supra* note 4 and Bill C-83, *supra* note 9.

<sup>58</sup> Bill 6, *supra* note 51 at s 65(3)(c), (d).

<sup>59</sup> *Ibid* at Part I.

<sup>60</sup> Bill c-83, *supra* note 9 at s 31.1(1).

<sup>61</sup> *Ibid* at s 36.

deprivation.<sup>62</sup> It is the absence of sensory stimulation for prolonged periods of time that erodes mental health and is known to cause “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations and self-mutilations.”<sup>63</sup> Although two less hours a day experiencing sensory deficit may partially mitigate the severity of harms caused by solitary confinement, it does not eradicate them.<sup>64</sup> As such, while Bill C-83 may provide the potential for solitary confinement to cause slightly less harm to mental health, the scope of how much less harm, if any less at all, has yet to be fully assessed.

Unlike Bill 6 which strictly prohibits solitary confinement of prisoners with mental health issues, the confinement of mentally ill prisoners alone in “structured intervention units” for twenty hours a day is allowable under Bill C-83 with the provision that prisoners are visited daily by a registered health care professional.<sup>65</sup> More specifically, section 37.1(2) states that mental health assessments, performed by a registered health care professional, will take place “within 24 hours after the inmate’s transfer into the structured intervention unit” and a visit to the inmate will occur “at least once every day by a registered health care professional.”<sup>66</sup> Should the outcome of a mental health assessment be that “confinement of an inmate in a structured intervention unit is having detrimental impacts on the inmate’s health,” the institutional head determines whether conditions in the unit should be altered or whether the inmate should remain in the unit.<sup>67</sup> Should the institutional head decide that the prisoner must remain in the unit, despite the ongoing harms, this decision will then be reviewed by an external committee, consisting of a staff of the Service, who will be provided information by a different healthcare professional that they may opt to reject.<sup>68</sup> In the event that the committee determines that a prisoner should remain in the unit or that the conditions of confinement in the unit should not be altered, an independent external decision maker shall be appointed to make a final determination.<sup>69</sup> The only qualification for this decision maker is that they have “knowledge of administrative decision-making processes in general.”<sup>70</sup> All this is to say that should a mental health professional find that a prisoner is experiencing mental health harms so significant that they must be taken out of a structured intervention unit, a multi-layered bureaucratic process will begin. At no point in this process is any action required that would *treat* the harms caused by solitary confinement. Rather, a healthcare professional, many of whom are barely able to complete daily tasks due to such heavy workloads,<sup>71</sup> must advocate to the institutional head on behalf of the prisoner that they be removed from circumstances which are well-established to cause harms to mental health. For the duration of this decision-making process, the prisoner will continue to be held in the structured intervention unit/solitary cell.

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<sup>62</sup> Laura Dellazizzo et al, “Is mental illness associated with placement into solitary confinement in correctional settings? A systematic review and meta-analysis” (2020) 29:4 Int J Mental Health Nursing 576.

<sup>63</sup> Craig Haney, “Mental Health Issues in Long-Term Solitary and “Supermax” Confinement” (2003) 49:1 Crime and Delinquency 124 at 130.

<sup>64</sup> *Ibid.*

<sup>65</sup> Bill C-83, *supra* note 9 at s 37.1 (1) & (2).

<sup>66</sup> *Ibid* at s 37.1(2).

<sup>67</sup> *Ibid* at s 37.11, 37.2, 37.3.

<sup>68</sup> *Ibid* at s 37.31(1) and 37.1(3).

<sup>69</sup> *Ibid* at s 37.81.

<sup>70</sup> *Ibid* at s 37.6(2).

<sup>71</sup> Martha Paynter, “Nurse: we should support prisoners’ demands for better healthcare,” *Halifax Examiner* (24 August 2018), online: <[www.halifaxexaminer.ca/province-house/nurse-we-should-support-prisoners-demands-for-better-health-care/](http://www.halifaxexaminer.ca/province-house/nurse-we-should-support-prisoners-demands-for-better-health-care/)> [perma.cc/PZ84-T76G].

An inherently worrisome feature of Bill C-83 is that the Commission “may designate a penitentiary or any area in a penitentiary to be a structured intervention unit.”<sup>72</sup> The critique that Senator Pate and other prisoners’ rights advocates have advanced is that structured intervention units will likely be the exact same units that were previously named solitary confinement cells.<sup>73</sup> With absolutely no required changes to the cells, it is unclear what will differentiate them. Had Bill C-83 included requirements for these units (windows, access to literature, TV and radio, size requirements, access to lighting options, et cetera) there may have been some optimism around the statutory amendments.

While Bill C-83 has the potential to alter how prisoners experience solitary confinement in Canada, it falls short of meeting recommendations of the Howard Sapers Report and distorts the length of time that is spent in structured intervention units such that the decision of the Ontario Court of Appeal in *CCLA* and the requirements set out by the UN in the Mandela rules appear to have been met since prisoners spend two fewer hours daily in solitary confinement. Yet, Bill C-83 only requires the review of solitary confinement in structured intervention units after thirty days, double the maximum set by the Mandela rules and the decision by the Ontario Court of Appeal in *CCLA*.<sup>74</sup> Further, the shift towards *monitoring* mental health does not *prevent* the harms that are caused by placing prisoners with mental health issues in solitary confinement. Rather, it retroactively engages prisoners in what could become a lengthy battle to be removed from solitary confinement conditions actively causing harms to mental health.

As evidenced by the experiences of Cas Geddes, Ashley Smith, Christina Jahn, and Adam Capay,<sup>75</sup> prisoners who complain of mental health concerns or exhibit potentially violent forms of distress caused by mental health issues are known to be placed in segregation as a response. The result is a cyclical effect of exacerbating the underlying mental health issues causing the use of segregation by implementing terms of segregation. In addition to removing prisoners from solitary confinement, an effective reform must also treat their mental health and the effects caused by prolonged solitary confinement.<sup>76</sup> Daily visits by healthcare professionals<sup>77</sup> only react to harms directly caused by segregation without providing treatment or preventing them from occurring. The only “treatment” required by the Bill is the removal of prisoners from solitary confinement should the potentially lengthy process, outlined through ss 31-37, be successful. Given the large body of data regarding the severe harms to mental health caused by solitary confinement, and international rules limiting its use, this can hardly be considered treatment.

Although Bill C-83 does not dramatically alter the conditions of solitary confinement or the broad powers of correctional staff to implement it, correctional officers’ unions have raised concerns that without the power to completely isolate prisoners, instances of violence will rise.<sup>78</sup>

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<sup>72</sup> Bill C-83, *supra* note 9, s 31.

<sup>73</sup> Pate, *supra* note 11.

<sup>74</sup> Bill C-83, *supra* note 9, s 37.4.

<sup>75</sup> It must be noted that Black, Indigenous, and racialized people are far more likely to experience criminalization, incarceration, and solitary confinement while incarcerated. The cases selected in this article are those which have received the most public attention. With the exception of Adam Capay, all are white. The correlation between receiving public attention for harms experienced while incarcerated and being white is acknowledged.

<sup>76</sup> This may include behavioural therapy, medication, or gradual, supported reintegration. However, it must be noted that treatment of mental health in Ontario prisons and jails is sorely lacking.

<sup>77</sup> Bill C-83, *supra* note 9 at 37.1(2).

<sup>78</sup> Glenda Luyems, “Violence in prisons will rise with the end of solitary confinement, warns guards’ union,” *Vancouver Sun* (21 October 2018), online: <[vancouver.sun.com/news/local-news/violence-in-prisons-will-rise-with-the-end-of-solitary-confinement-warns-guards-union](http://vancouver.sun.com/news/local-news/violence-in-prisons-will-rise-with-the-end-of-solitary-confinement-warns-guards-union)> [perma.cc/E3A3-BXLL].

However, Bill C-83 maintains these powers through the provision that the institutional head, as well as the internal committee, have the right to supersede decisions with respect to mental health concerns should removal from solitary confinement “jeopardize the safety of the inmate or any other person or the security of the penitentiary” or “interfere with an investigation that could lead to a criminal charge.”<sup>79</sup> As such, correctional staff have the power to override mental health concerns and implement solitary confinement through the use of structured intervention units where safety is of concern.<sup>80</sup>

On its face, Bill C-83 falls short of meeting recommendations made by the Howard Sapers’ Report, the Ashley Smith Inquest, the Jahn Settlement, the Adam Capay stay order, and the *CCLA* decision, in which the Ontario Court of Appeal, as noted earlier, clearly articulates that “administrative segregation longer than 15 consecutive days ... violates s. 12 of the *Charter*.”<sup>81</sup> As Public Safety Minister Ralph Goodale suggested prior to the Bill’s passage, the Liberal government believes Bill C-83 meets the Ontario Court of Appeal orders by eliminating solitary confinement altogether.<sup>82</sup> As discussed earlier, the approach of the Bill misses the mark by reorganizing solitary confinement into structured intervention units, which are likely to perpetuate existing problems, particularly for people with mental health issues. While the Bill provides for less time to be spent in these units, reducing hours from twenty-two to twenty, this decrease is not likely to dramatically reduce the negative impacts of solitary confinement on mental health. Rather, it skirts the legal definitions of solitary confinement which have been named by the Mandela Rules and the *CCLA* decision to be twenty hours. Drawing from contemporary literature on topics of solitary confinement and mental health, the following section of this article investigates potential consequences of Bill C-83’s future implementation.

#### IV. POTENTIAL CONSEQUENCES OF BILL C-83

In a critique of *CCRA* oversight of the use of segregation in women’s prisons in Canada, Lisa Kerr highlights instances where strict readings of the Act’s provisions around discretionary powers over the administration of segregation have been applied as a tool to legitimize internal institutional policies that conflict with the Act’s overarching goal of supporting rehabilitation.<sup>83</sup> In this section, Bill C-83 is considered in light of Kerr’s analysis of the limitations of the Act in providing meaningful oversight of its administrative applications of solitary confinement to internal prison policies. While Kerr’s work reveals the limitations of legislation, the work of Debra Parkes, a leading scholar in Canadian prison law and solitary confinement, highlights the failure of Canadian courts in addressing the harms of segregation for mentally ill prisoners, effectively ignoring UN obligations under the Mandela Rules.<sup>84</sup> Parkes’ work on the topic will

<sup>79</sup> Bill C-83, *supra* note 9 at s 37.41(1).

<sup>80</sup> While the position of guards and the CSC with respect to safety is relevant, I have opted not to specifically highlight these positions in detail because their voices are already centred and privileged in conversations around legislation that impacts the mental health of prisoners, who have been stripped of agency or control over their own circumstances of incarceration.

<sup>81</sup> *CCLA*, *supra* note 42.

<sup>82</sup> Editorial Board, “Ottawa now has even more reasons to fix solitary confinement,” *Toronto Star* online: <[www.thestar.com/opinion/editorials/2019/04/01/ottawa-now-has-even-more-reasons-to-fix-solitary-confinement.html](http://www.thestar.com/opinion/editorials/2019/04/01/ottawa-now-has-even-more-reasons-to-fix-solitary-confinement.html)> [perma.cc/9AZ7-GL6H].

<sup>83</sup> Lisa Coleen Kerr, “The Origins of Unlawful Prison Policies” (2015) 4:1 *Cdn J Hum Rts* 89 at 93.

<sup>84</sup> Debra Parkes, “Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic” (2017) 32:2 *CJLS* 165 at 167.

inform the analysis of Bill C-83 in light of the recent *CCLA* decision. Finally, the work of Anthony Doob and Cheryl Webster, analyzing political influence over prison policies in Canada, is considered to discern potential broader outcomes.<sup>85</sup>

Kerr's analysis of segregation protocols developed under the *CCRA* prior to the Bill C-83 amendments suggests the importance of assessing the extent to which those responsible for the Act's implementation may manipulate its language to support policies that conflict with the overarching goal of limiting the use of segregation. Kerr also warns that the space that the *CCRA* is implemented within—prisons and jails—must also be considered for their inaccessibility to public scrutiny.<sup>86</sup> Given that the Bill C-83 amendments will see mandatory reforms from the use of segregation (twenty-two hours per day) to “structured intervention units” (twenty hour per day), it is inevitable that these institutions will be required to modify existing protocols. The discretion contained in sections 31 and 34 of Bill C-83 suggests that deeply troubling outcomes are possible. For example, as noted earlier section 31 provides that the Commissioner “may designate a penitentiary or any area in a penitentiary to be a structured intervention unit.”<sup>87</sup> Many prisons and jails in Canada are several decades old and struggling to manage overcrowding and understaffing problems.<sup>88</sup> Providing such discretion on the space that can be deemed a “structured intervention unit” may even regress the current state of segregation cells. While it is entirely possible that structured intervention units will be the exact same units previously used as solitary confinement cells, it is also possible that new or restructured jails and prisons may use even smaller or less appealing spaces as “structured intervention units,” which more conveniently accommodate four hours of daily release. Similarly troubling are the continued discretionary powers afforded in decisions regarding the use and continued application of solitary confinement for prisoners, which require reassessment only after thirty days, should mental health assessments not give rise to further administrative action.

For prisoners with mental health issues, Bill C-83 does little to improve conditions. Instead of preventing the many known harms resulting from placing those with mental health issues into solitary confinement, the Bill increases visitation by health care professionals, with very little obligation on such professionals or correctional staff to take positive action.<sup>89</sup> Action is required by staff members only if they believe confinement in a structured intervention unit is having detrimental effects, such as a prisoner committing an act of self-harm, refusing to interact socially, a drug overdose, or some other medical emergency.<sup>90</sup> But this required “action” consists only of referring the prisoner's case to those responsible for administering health care. Although monitoring of mental health is increased, it does not necessarily increase the medical care required to improve it. Rather, health care professionals are likely to observe as the harms of solitary confinement take effect on prisoners, without support for action until one of the medical emergencies listed above has already occurred.

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<sup>85</sup> Anthony Doob & Cheryl Webster, “Maintaining our Balance: Trends in Imprisonment Policies in Canada” in Karim Ismaili, Jane Sprott & Kim Varma, eds, *Canadian Criminal Justice Policy: Contemporary Perspectives* (Toronto: Oxford University Press, 2015).

<sup>86</sup> Kerr, *supra* note 83 at 92.

<sup>87</sup> Bill C-83, *supra* note 9 and s 37.11.

<sup>88</sup> Valérie Ouellet et al, “Overcrowding, understaffing and 'culture of violence' rampant at notorious Ontario jail: lawyer” (2017), online: <[www.cbc.ca/news/canada/emdc-systemic-issues-adam-kargus-anthony-george-1.4427044](http://www.cbc.ca/news/canada/emdc-systemic-issues-adam-kargus-anthony-george-1.4427044)> [perma.cc/VG2L-NPG4].

<sup>89</sup> Bill C-83, *supra* note 9 at s 37.1(2).

<sup>90</sup> *Ibid* at s 37.11.

Given the trend of Correctional Service of Canada's apparent (CSC) reluctance to take action, Parkes has criticized courts for taking a "hands off" approach to correctional decision-making, particularly in the matter of mental health and segregation.<sup>91</sup> Parkes describes the 1975 decision, *McCann v The Queen*, as a pivotal moment where the Federal Court first acknowledged harms resultant from solitary confinement, yet does little to advance change. Specifically, the court ruled that extended use of solitary confinement constituted cruel and unusual punishment in contravention of section 2(b) of the *Canadian Bill of Rights*. Several important factors should be considered in reflecting on this case. First, no subsequent legal reforms followed from the decision. While the court felt it should give practical guidance with respect to institutional practices, the decision did not render a specific piece of legislation or policy in contravention of the *Bill of Rights*, only actions undertaken at the institution. Secondly, the decision reacted to the harms that prisoners experienced well after such harms had taken effect and forever changed their lives, exemplifying the reactive nature of courts which often does little to prevent harm. Notably, the prisoners in this case experienced decades of abuse while in solitary confinement and a plethora of horrific suicides occurred before any acknowledgement took place.<sup>92</sup> The harms that were endured by these prisoners were addressed far too late, with many having suffered irreversible harms to mental health. Finally, the prisoners in this case were only able to access legal support and resources on a *pro bono* basis following a very public escape by one prisoner who leaked information with respect to his inhumane treatment to the media. For the majority of prisoners, financial resources to access legal support will entirely prevent any meaningful action or remedy.

Decades later, BobbyLee Worm, an Indigenous woman incarcerated at the age of nineteen who experienced years of solitary confinement was successful in a claim against the institution she was held in. As Parkes explains, however, despite a settlement which abolished the protocol that had enabled Worm's prolonged solitary confinement, young Indigenous women at the institution continued to experience the same result.<sup>93</sup> Although courts, in this case, did react to policies enabling the use of solitary confinement, there was no continued oversight to monitor compliance. Similarly to the *McCann* decision, Worm faced extreme harms before the court acknowledged wrongdoing. Additionally, had it not been for the availability of *pro bono* legal resources, Worm would not have had access to any remedy at all. Such a "hands off" approach by the courts is especially problematic considering Kerr's work which establishes that internal policies of correctional institutions are often not reflective of the *CCRA* mandate. The result is that many prisoners continue to experience the harms resultant from solitary confinement, despite legal decisions which have attempted to eradicate its harmful use.

Parkes also discusses more recent cases where applications of *habeus corpus* were brought to prevent the harms of solitary confinement. Specifically, in the *Bacon v Surrey Pretrial Services Centre (Warden)* decision a BC Superior Court deemed the conditions of solitary confinement to be "significantly threatening to psychological integrity" and "deplorable in any civilized society, and certainly unworthy of ours."<sup>94</sup> Unfortunately, however, the Court refused to characterize segregation as cruel and unusual punishment *per se*.<sup>95</sup> The recent *CCLA* decision

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<sup>91</sup> Parkes, *supra* note 84.

<sup>92</sup> *McCann v The Queen*, [1976] 1 FC 570.

<sup>93</sup> Parkes, *supra* note 84 at 178.

<sup>94</sup> 2010 BCSC 805.

<sup>95</sup> *Ibid* at 174.

exemplifies a similar pattern in judicial reluctance to address mental health in Canadian prisons. Here, the Court states:

In principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness.<sup>96</sup>

As Parkes demonstrates, the reluctance of courts to address mental health and segregation directly results in severe ongoing harms. The implementation of Bill C-83 continues this trend by ignoring the known harms caused by solitary confinement and instead placing minimal restrictions upon its use.

These minimal restrictions, coupled with a “hands off” approach to implementation and oversight, yield the result that Parkes’ 2017 research warns Canadian legal professionals about. Parkes suggests legal professionals ought to be cautious of legal decisions sparking legislative reforms to solitary confinement, following trends in American reforms in the 1970s, which saw “states buil[d] new solitary confinement units that met the minimum standards for space, light, and other amenities required by courts.”<sup>97</sup> Such action is arguably exactly the situation that Bill C-83 has created by implementing only the minimum standards required to absolve government of accountability, while still not addressing the overarching harms caused by lacing people with mental health issues in solitary confinement. In doing so, the Bill threatens to put much of the work of lawyers advocating against solitary confinement for prisoners with mental health issues to waste. This is because in preparing the evidentiary record, the many expert reports compiled for cases like the *CCLA* class action and *Bacon* relied on practices of segregation that permit twenty-two hours of solitary confinement per day. As noted, Bill C-83 permits twenty hours/day in “structured intervention units,” with two mandatory hours of socialization, and this may well require the gathering of new data and analyses. This exemplifies the sort of challenges that Parkes describes in Canadian jurisprudence to completely abolish segregation for mentally ill prisoners.

Doob and Webster describe the shift in policies since the federal election of Harper’s Conservative government in 2006 as one following a punitive vision of criminal justice.<sup>98</sup> The inclination of Conservative governments towards tough on crime and pro-punishment initiatives is an important consideration when assessing broader political implications of Bill C-83, particularly at the Ontario Legislature. Ford’s Conservative government in Ontario, among many other cuts, has not renewed Howard Sapers’ contract, leaving the position on jail oversight vacant. As discussed above, the proclamation of Bill 6, which would set a cap of fifteen days on segregation, has also been indefinitely shelved. No information is available on when the Lieutenant Governor might address it. Now that Bill C-83 is federal law, the logic it applies (of structured intervention units rather than solitary confinement cells) could be utilized by the Ford administration as justification to repeal the forthcoming reforms of Bill 6, effectively reversing a decade of advocacy for reform in this area. Further, Bill C-83 provides a similar justification for

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<sup>96</sup> *CCLA*, *supra* note 42 at para 66.

<sup>97</sup> Parkes, *supra* note 84 at 173.

<sup>98</sup> Doob & Webster, *supra* note 85 at 314.

other provinces struggling to address issues of solitary confinement and mental health by redefining solitary cells as “structured intervention units” used for only twenty hours/day.

## V. CONCLUSION

The parallel, yet distinct, layers of federal and provincial oversight of Ontario carceral institutions complicate advocacy aimed at preventing the harms resulting from segregating prisoners with mental health issues. Bill C-83 reforms create a dangerous precedent in which solitary confinement “under another name” (structured intervention units) is permitted to hold prisoners with mental health issues for otherwise unacceptable periods of time.<sup>99</sup> Furthermore, the Bill conflates monitoring and responding to harms to mental health caused by solitary confinement with preventing or treating it. If such logic is applied to oversight of mental health in prisons more broadly, research and evidence suggests that increased harms will follow.<sup>100</sup> In this crucial moment of prisoners’ justice reform, Bill C-83 threatens to undo many years of advocacy efforts and research predicated on the definition of solitary confinement as isolation for twenty-two hours, particularly in Ontario where the positive reforms of Bill 6 were on the cusp of being adopted. The *CCLA* decision will play a pivotal role in the future of solitary confinement in Canada, especially for those living with mental health issues. However, given the recent passage of Bill C-83, many of the arguments relied on by the *CCLA* are at risk of challenge, particularly given the Minister of Public Safety’s view that solitary confinement has been entirely eradicated.<sup>101</sup> As such, it is proposed here that while Bill C-83 has the potential to reduce some of the harms to mental health caused by solitary confinement, it threatens to follow American trends in solitary confinement reforms and undo many years of advocacy by reorganizing similar conditions under another name and falsely concluding that solitary confinement has been eliminated.

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<sup>99</sup> Bill C-83, *supra* note 9.

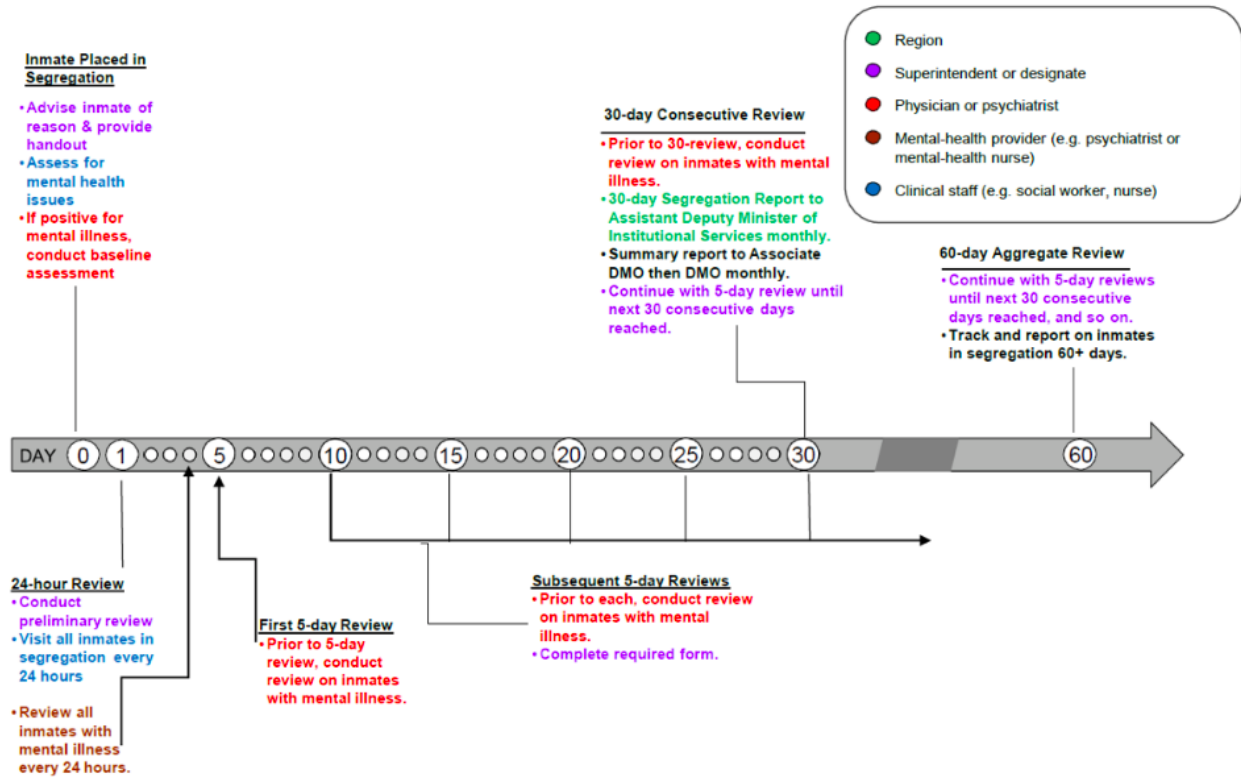
<sup>100</sup> Dellazizzo et al, *supra* note 62 and 63.

<sup>101</sup> Haney, *supra* note 82.



## APPENDIX A

### Current Psychiatric Oversight Measures for Prisoners in Solitary Confinement in Ontario Jails



## APPENDIX B

### Timelines of Major Events Leading to Bill C-83

\*grey squares represent provincial level actions, white squares represent federal level action

