

Reflections on 40 Years of Advocacy to End the Isolation of Canadian Prisoners

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For over forty years, Michael Jackson has acted as an impassioned advocate for prisoners' rights. This article focuses on the author's experience as a vocal critic of the practice of solitary confinement in Canada's maximum-security penitentiaries. Reflecting on his years as a practitioner and professor of criminal and Aboriginal law, the author approaches solitary confinement as the ultimate exercise of state authority. Beyond the conditions and contexts of solitary confinement as a punitive measure, the article examines the reports conducted by government bodies and other agencies, raising questions about the failure to limit or otherwise reform the practice of solitary confinement in Canadian federal prisons. The author discusses the progress made both from a correctional law and human rights perspective.

Depuis plus de 40 ans, Michael Jackson défend avec ardeur les droits des prisonniers. Cet article porte principalement sur son expérience à titre de critique du recours à l'isolement cellulaire dans les prisons à sécurité maximale canadiennes. À partir de son expérience en tant qu'avocat et professeur de droit pénal et de droit autochtone, M. Jackson considère l'isolement cellulaire comme l'exercice ultime de l'autorité de l'État. Allant au-delà des contextes et des conditions de l'isolement cellulaire comme mesure punitive, l'article analyse de façon comparative des rapports produits par des organismes gouvernementaux et d'autres organisations. L'auteur aborde les progrès réalisés tant du point de vue du droit correctionnel que de celui des droits de la personne.

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*My home is hell in one small cell
That no man wants to own,
For here I spend my life condemned
A man the world disowns.*

*Within these walls that never fall.
The damned all come to know.
The row of cells - the special hell,
Called Solitary Row.²*

I. Introduction

Forty-one years ago I first entered the gates of the Canadian penitentiary. Since that day I have spent a significant part of my professional career bearing witness and exposing the darkest places in this country to legal and public scrutiny. In doing so I have researched and written about imprisonment, advocated for reform, litigated against abuse of human rights and have done my fair share of ranting and railing against injustice. I would have hoped at this point that my reflections might be what Stan Cohen referred to as one of the “good stories” of corrections, a story of steady progress and advancement under difficult circumstances. Whilst not always agreeing with our government’s definition of the nature of justice in the correctional and Aboriginal context, for most of my career I have subscribed to Martin Luther King’s reflection “that the arc of history is long but it bends towards justice.” In this conference and in this paper I have reflected back on developments over the last four decades around the practice of solitary confinement in Canadian federal penitentiaries. While that history contains significant elements of progress it also illustrates a deep core of governmental resistance and recalcitrance to a human rights agenda. Recent developments in the Canadian Government’s approach to criminal justice which include lengthening and deepening the use of imprisonment severely challenges the historical trajectory of the arc of justice. We are in danger of bending justice out of shape. I have always believed that the practices around solitary confinement are a litmus test of the legitimacy of state punishment and in these reflections I explain why those who are concerned with issues of human rights must demand and demonstrate the greatest vigilance.

II. *McCann v The Queen*, 1974 – 1975

Jack Emmett McCann was kept in solitary confinement in the special

² Jack McCann, "My Home is Hell" in Jackson, *Prisoners*, *supra* note 1 at 69.

correctional unit of the British Columbia Penitentiary from July 23, 1970 until August 14, 1972, a total of 754 days. In May 1973 he escaped from the penitentiary. During his brief period of freedom he contacted a reporter for the Vancouver Sun and asked him to publicize the conditions under which men were kept in the special correctional unit for months and years at a time. After his recapture and return to the penitentiary on June 1, 1973 he was again placed in solitary confinement, where he remained until May 9, 1974. In the fall of 1973 I received a letter from Jack McCann with a handwritten statement of claim in the Trial Division of the Federal Court of Canada in which he claimed that he was “being held arbitrarily in solitary confinement and being subjected to cruel and unusual treatment and punishment.”³

Thus began *McCann v The Queen*, the centerpiece of my 1983 book, *Prisoners of Isolation*.⁴ During the *McCann* case some four weeks of evidence was given, much of it given by prisoners relating to the effects of solitary confinement. There has been some debate in the literature about whether the testimony of prisoners in litigation or interviews conducted outside of the courtroom by human rights advocates like myself constitutes “scientific” data that can compete with “hard data” generated by responses to “objective physiological and psychological inventories”, but no one who was present in the courtroom who heard the *McCann* plaintiffs could doubt who the real experts on the experience of solitary confinement are.⁵

Melvin Miller told the court that after a time in solitary he would see holes in the cement wall start to move around the cell; that in solitary, “except when you have visits, you never get to see the grass or the sun. The only way you know it’s raining is by the sound of the rain on the roof.”⁶ Miller described the effect solitary had on him:

If I put myself back to the circumstances I’m afraid I’m going to offend you. I’m afraid you won’t understand. How in hell do you cope with loneliness in a god-damned

³ Prisoners confined in administrative segregation in the British Columbia Penitentiary were held in what was officially called the special correctional unit (SCU). Because of its location atop one of the cell blocks it was known as “the penthouse”. The cells measured 11 feet by 6½ feet and consisted of three solid concrete walls and a solid steel door with a five-inch-square window which could only be opened from outside the cell. Inside the cell there was no proper bed. The prisoner 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 two 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. The cell was illuminated by a light that burned twenty-four hours a day. The hundred-watt bulb was dimmed to twenty-five watts at night. One of the expert witnesses described the physical space as “one step above a strip cell... a concrete vault in which people are buried”. *Ibid.*

⁴ *McCann v The Queen*, [1975] FC 272, 1975 CarswellNat 29 [*McCann*].

⁵ Julian Roberts & Michael Jackson, “Boats against the Current: A Note on the Effects of Imprisonment” 15 *Law & Hum Behav* 557.

⁶ Jackson, *Prisoners*, *supra* note 1 at 67.

cell 23½ hours a day with the light burning on you. You get severe headaches. You feel hate, frustration. I can't say just how fucking bad this is and the effects it has on other prisoners. You see people slash themselves and the guards say he's just looking for attention. Beat me, break my arms, I can handle that. But how do you cope with insanity? You have no idea in the world the effects it has on you. I've known of men who beat their heads against the wall. You don't have anything. You don't know how long you'll be there. You have no reasons... I've been down [from the Special Correctional Unit (SCU)] for 20 days and I can still see that goddamn light.⁷

At the time of the trial Jack McCann had probably spent more time in solitary than any other prisoner in the Canadian penitentiary system. This is how he described his feelings about his years in solitary confinement.

All you live on in SCU is bitterness and hatred. For some guys that's not enough. Their hatred reaches the point when they have to see blood, even if it is their own... Up there I have fears of losing my sanity, fears of losing my friends, fears of myself. There is no physical fear, I can put up with that.⁸

Jack McCann gave evidence that in 1967 on three successive days other prisoners slashed themselves. He was given the job of cleaning up the blood in their cells. McCann "begged and pleaded to be let out of solitary".⁹ Yet another prisoner slashed himself. McCann could take no more and he set himself on fire in his cell. He described to the court what he saw as the flames engulfed him: "I remember watching the space beneath the door get bigger. I thought I could crawl beneath it and be free... I wanted to get out - I don't care if I die, I never want to go back to that position again."¹⁰

Dr. Stephen Fox, a psychologist and expert witness called by the prisoners in the McCann trial, in commenting on the effects of solitary on McCann, said, "self-immolation, setting yourself on fire... is as far into it as I can imagine anyone can go, into total insanity, of reduction to nothing, the hopelessness, the meaninglessness, the violence, the cycle of destruction."¹¹

Dr. Richard Korn, himself a former prison warden, explained to the court the way prisoners experience time in solitary:

Free men spend time. Prisoners do time. Doing time is a specific activity, a calling, an art. Time itself is a force, it has its own action. Offenders are hit with their time and the word for a prison sentence is a jolt. Prison time is almost palpable. It not only has force, it has mass and weight. Too heavy a sentence can suffocate... [In SCU] time stops and begins to crush and you have that suffocation, you have the tiny space, the relative inaction, and that crushing experience and then the mind begins to play its tricks to save itself... One of the ways they keep alive is by fantasies of retaliation which is a very human thing to do. You see yourself as a victim of

⁷ Jackson, *Prisoners*, *supra* note 1 at 67.

⁸ *Ibid* at 68.

⁹ *Ibid*.

¹⁰ *Ibid* at 68-69.

¹¹ *Ibid* at 69.

overwhelming forces. You are deprived of autonomy... These men, deprived of self-determination and feeling abused, can keep themselves alive only by fantasies and feelings of fury which, in a way, sets them up for going back and among other things severely endangers the staff. So in process and experience and in consequence, it is a catastrophe and an unnecessary one.¹²

There were two prisoners in the Penthouse that every one of the plaintiff prisoners referred to although they were not witnesses at the trial in person. Both were men suffering from mental illness; Jacques Bellemaire believed that there was a machine in his cell trying to get him. He too, like Jack McCann, set fire to his cell trying to rid himself of its presence. Five days after my last interview with Jacques Bellemaire he hung himself in solitary confinement. Tommy McCaulley, who before being placed in segregation had a reputation as a standup, well-respected and adjusted convict, was reduced to a screaming dervish who would smash his head against the steel door and concrete walls of his cell screaming for hours on end. I often heard those screams on my visits to the BC Penitentiary. In my interviews with him he was too incoherent to give me instructions to add him as a plaintiff but his screams, like the ghost of Jacques Bellemaire, echoed in that federal courtroom.

The terror of life in the solitary confinement unit of the BC Penitentiary was not limited to the machine imagined by Jacques Bellemaire. Dr. Fox explained to Mr. Justice Heald how Tommy McCaulley's insanity and Jacques Bellemaire's suicide were the living and dying proof to other prisoners of their own vulnerability. In his chilling words:

When McCaulley becomes insane to your face, they are McCaulley, that is all there is to it. There is not one of them who will tell you anything different. This is a fact. Each one of them is part of McCaulley, and it was a part of them that had gone to that place where McCaulley is, exactly to that place where McCaulley is, where all rationality has left them and they have come back from that place only by some freak accident of their own prior upbringing. But there is not one of them that does not hear their own voices screaming when McCaulley screams. They are McCaulley's insanity and in them is McCaulley's insanity. When he becomes insane and moves towards death, like Bellemaire did, when they see insanity approaching self-extinction, they know that part of them is moving to that place and they have to live with their own insanity and it is in front of them... When the blood runs in front of their cells, it is their

¹² *Ibid* at 75. See also *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 66th Sess, UN Doc A/66/268, (2011) at para 65 [*Torture*], where Juan Mendez, the UN Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, in his 2011 report on solitary confinement summarised the findings of research studies:

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.

blood... when they see death approach, it is their death that approaches.¹³

In *Prisoners of Isolation* I described how the segregation unit is different from the rest of the penitentiary in ways that go beyond the physical differences in the cells, the denial of access to work and hobbies, and the restrictions on exercise. "The separation from the ordinary prison world. In segregation the worst things about prisons -the humiliation and degradation of the prisoners, the frustration, the despair, the loneliness, and the deep sense of antagonism between the prisoners and the guards - are intensified. The distinctiveness of SCU is palpable."¹⁴

There is a perverse symbiotic relationship between guards and prisoners in SCU. The guards, by perceiving the prisoners as the most dangerous and violent of men, can justify to themselves the intensity of the surveillance and the rigours of detention. Prisoners, by responding to that perception of dangerousness with acts of defiance, have at least one avenue of asserting their individuality and their autonomy, of manifesting their refusal to submit. The tread wheels of the nineteenth-century penitentiaries are no longer with us, but in segregation units we have created a psychological treadmill put into motion and maintained by ever increasing hostility and recrimination.

Phil Scraton, in his presentation at the Ending the Isolation conference, provided a contemporary analogue for what prisons experience in long-term segregation. He compared placement in segregation to the process of rendition whereby states who avowedly respect the rule of law send prisoners who they suspect of terrorism to states which have abysmal human rights records for interrogation and torture. In both the places of segregation and rendition prisoners find themselves beyond the rule of law in a world in which terror in the name of the law become state sanctioned.

III. The Model Segregation Code, 1983

My purpose in writing *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 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 was reviewed, and the conditions under which prisoners were held in segregation. To encourage the creation of a principled and fair process to protect against the abuse of the involuntary segregation power, I drafted a "Model Segregation

¹³ Jackson *Prisoners*, *supra* note 1 at 73-74.

¹⁴ *Ibid* at 53.

Code".¹⁵ This Code articulates substantive criteria which, in a principled system of corrections, would justify segregation. It further 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 seventy-two hours without a hearing providing that written reasons for the order are given to the prisoner within twenty-four hours. At the end of the seventy-two-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 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. Except under very limited circumstances, segregation would be terminated after a ninety-day period.¹⁶

Independent adjudication is the linchpin in the Model Segregation Code and 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, 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

¹⁵ *Ibid* at 245.

¹⁶ My recommendation for a 90 day limit on segregation has proven to be a conservative and indeed modest proposal. Juan Mendez, The UN Special Rapporteur on Torture and Other Cruel Inhumane and Degrading Treatment or Punishment, in his 2011 report has recommended that "prolonged solitary confinement, in excess of 15 days, should be subject to an absolute prohibition". *Torture*, *supra* note 12 at para 88.

will be better achieved through an independent adjudicator.

IV. The *Corrections and Conditional Release Act*, 1992

A comparison between the current Canadian federal legislative and administrative framework and the regime in place when I began my inquiry into prison justice in 1972 reveals significant changes. The enactment in 1992 of the *Corrections and Conditional Release Act (CCRA)*¹⁷ changed the legal landscape of federal correctional law with the intention of bringing the federal legislative regime into conformity with the *Canadian Charter of Rights and Freedoms*.¹⁸ The current 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.

If, as I have maintained, 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 *Corrections and Conditional Release Regulations* provide that authority.¹⁹ 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 have advocated over the years. It is important, therefore, to understand the principal differences between the current legislative framework and the Model Segregation Code.

The first difference is that the criteria for segregation in the *CCRA* are much more broadly based than those set out in the Model Segregation Code. The omnibus ground for segregation contained in the *CCRA*, section 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

¹⁷ *Corrections and Conditional Release Act*, SC C 1992, c 20 [CCRA].

¹⁸ For an analysis of the history of the *CCRA* see Michael Jackson, *Justice Behind the Walls* (Vancouver: Douglas & McIntyre, 2002) at 62, online: <justicebehindthewalls.net/book.asp?cid=14> [Jackson, *Justice*].

¹⁹ *Corrections and Conditional Release Regulations*, SOR/92-620, [CCRR].

population will jeopardize the security of the penitentiary or the safety of any person”²⁰ - while loosely based upon a provision in the Model Code, significantly weakens the original language.²¹ One of my gravest concerns with the broad sweep of section 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 *Application to Canadian Penitentiary Service Regulations*.²²

The second significant difference between the CCRA provisions and the Model Segregation 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 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 ninety days.

V. Justice Behind the Walls, 1993-2001: Segregation Twenty Years after *McCann*

When I began my work at Matsqui and Kent in 1993, for what was to become *Justice Behind the Walls: Human Rights in Canadian Prisons*, 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?

One of the prisoners I interviewed while writing *Justice behind the Walls* was Donald Oag. 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. 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:

²⁰ CCRA, *supra* note 17 at s 31(3)(a).

²¹ 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 Segregation Code, a term designed to refer to escape risks.

²² *Application to Canadian Penitentiary Service Regulation*, CRC 1985, c 1333. Under the pre-1992 *Penitentiary Act*, segregation was authorized where the warden was satisfied that it was necessary “for the maintenance of good order and discipline in the Institution or the interests of inmate”. See Jackson, *Prisoners*, *supra* note 1 at 43.

When I interviewed Donnie Oag I found a man who, after some nine months of continuous solitary confinement in which time he had received only a single visit, 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.²³

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.²⁴ He stated:

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.²⁵

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

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.²⁶

“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.”²⁷

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

²³ Jackson, *Prisoners*, *supra* note 1 at 45.

²⁴ Jackson, *Justice*, *supra* note 18 at 340-41.

²⁵ Interview with Donald Oag by Michael Jackson Kent Institution, (February 22, 1994) in Jackson, *Justice*, *supra* note 18 at 341.

²⁶ *Ibid.* In a presentation at the Ending the Isolation conference at the University of Manitoba, Phil Scraton captured the way in which time stops in segregation when he referred to the image of looking at a clock and seeing no information.

²⁷ *Ibid.*

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.²⁸

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 agony, 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. 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 suicide watch, with the light on twenty-four hours a day.

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 a shotgun. In Kent, although there was an exercise yard, at thirty feet long and fifteen 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 twenty-foot walls with a ceiling of thick mesh wire. Even when the sun was sufficiently high to permit its penetration to the floor of the courtyard, its rays served more to remind those below of their exile than they did to warm their bodies. Segregation had removed them from summer itself.²⁹

²⁸ *Ibid* at 342.

²⁹ Photos of the Kent segregation unit including the exercise yard can be viewed online: Justice Behind the Walls <justicebehindthewalls.net/04_gallery_01_02.html>.

My study of administrative segregation at Matsqui and Kent in the 1990s demonstrated that new architecture, a new corps of correctional staff, and new correctional legislation had achieved little in limiting the abuses of segregation. I took no comfort in arriving at this conclusion. Because I am a reformer, not an ethnographer, it is important to grapple with the questions it raises. 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*, fault lines existed in all three areas. 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 in a "prison within a prison."

VI. The *Arbour Report*, 1996

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 reality. 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.³⁰ Justice Arbour's report contained the clearest indictment of the Correctional Service of Canada's (CSC) 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.³¹

³⁰ At the time of inquiry, Louise Arbour was a justice of the Ontario Court of Appeal. Her subsequent career followed a distinguished trajectory. She was appointed Chief Prosecutor for the International War Crimes Tribunal, then appointed to the Supreme Court of Canada and following her retirement from that court became the UN High Commissioner for Human Rights.

³¹ Solicitor General of Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) at 39, online: Canadian Association of Elizabeth Fry Societies <www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.

The women involved in the April 22 incident remained in segregation from that date until December 1994 or January 1995.³² 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:

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, 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 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.³³

This deprivation of basic amenities replicated the conditions I observed in the BC Penitentiary 20 years earlier. The regime of reducing prisoners to a Hobbesian state of brutish nature to demonstrate that they are under the total control of their jailers has long been a cornerstone of the customary law of segregation units. What Justice Arbour found was that at the P4W, customary law had little difficulty maintaining its ascendancy over the provisions of the CCRA.

Justice Arbour concluded her review with an assessment of the impact of prolonged segregation on the prisoners at the P4W:

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 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

pdf> [Arbour Report].

³² 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 *ibid* at 25-28.

³³ *Ibid* at 77.

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 outweigh 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.³⁴

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 thirty 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 sixty non-consecutive days annually in segregation. After thirty days, or if the total days served in segregation during that year already approached sixty, the institution would have to apply other options, such as transfer, placement in a mental health unit, or forms of intensive supervision, all of which involved 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.³⁵

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 would be conducted every thirty days.³⁶

These recommendations for the administrative segregation process 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 judgement that "there is nothing to

³⁴ *Ibid* at 81-82.

³⁵ *Ibid* at 105.

³⁶ *Ibid* at 105 and 135.

suggest that the Service is either willing or able to reform without judicial guidance and control.”³⁷

A. The Task Force on Administrative Segregation, 1996-1997

Following the release of the *Arbour Report* the new Commissioner of Corrections established a Task Force on Segregation. 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 initial audits and visits to federal institutions by the Task Force yielded these significant findings on the state of compliance with the law and policy on segregation:

The findings of the preliminary assessment (Phase I) 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 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. 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 compliance and to support effective decision making were not in place.³⁸

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 electronic filing system (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.

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

³⁷ *Ibid* at 108.

³⁸ Public Safety Canada, *Commitment to Legal Compliance, Fair Decisions and Effective Results: Reviewing Administrative Segregation* at 12, online: <www.publicsafety.gc.ca/lbrr/archives/hv%208395.a6%20t37%201997-eng.pdf> [emphasis added].

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".³⁹

B. Enhanced Internal Review or Independent Adjudication?

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 our 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.

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.

³⁹ *Ibid* at 18.

In response, I argued that the role of an independent adjudicator is not to replicate the hard won knowledge and experience of correctional administrators, nor would the presence of an independent adjudicator undermine or straitjacket the authority of wardens and staff to manage their institutions decisively at times of crisis. Rather, 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.

The Task Force vigorously debated the relative merits of an enhanced internal segregation review process and a system of independent adjudication. Members from within the CSC developed a model for enhancing the internal review process, including a legal education initiative, the development of better alternatives to segregation, and the establishment of regional Segregation Review Boards.

The external members of the Task Force supported the development of these initiatives, which would improve the CSC's ability to make fair and effective segregation decisions. The enhancement of this internal ability through legal education 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 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.

From our debate emerged a consensus that the Task Force recommend that the CSC 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.⁴⁰

VII. The Path of Resistance

Bree Carlton described in her presentation at the Ending the Isolation conference how solitary has been used in Australia as a response to prisoners'

⁴⁰ Jackson, *Justice*, *supra* note 18 at 375-94.

resistance movements. In Canada the path of resistance has taken the form of intransigence to reform movements. 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. The Working Group had been established by the Commissioner after the *Arbour Report* under the chairmanship of Max Yalden, former Chief Commissioner of the Canadian Human Rights Commission. Its mandate was:

[T]o review the 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.⁴¹

In reviewing the necessary balance between internal and external mechanisms to ensure compliance with human rights obligations, this report specifically identified the recommendation of the Task Force on Segregation that there be an experiment in independent adjudication.⁴²

Notwithstanding the accumulated weight of support in the trilogy of the recommendations contained in the reports by Justice Arbour, the Task Force on Segregation, and the Working Group on Human Rights, in the spring of 1998 the Commissioner announced that there would be no implementation or an experiment on independent adjudication along any of the lines set out in those reports. Instead the CSC proposed to initiate an enhanced system of regional oversight.⁴³

A. The CCRA Five-Year Review, 2000

On May 29, 2000, the House of Commons Standing Committee on Justice and Human Rights tabled the report of its subcommittee formed to conduct a comprehensive review of the provisions and operations of the CCRA. 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

⁴¹ Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (Ottawa: Correctional Service of Canada, 1997) at 4.

⁴² 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, *ibid* at 33.

⁴³ See Jackson, *Justice*, *supra* note 18 at 375-94.

advanced democracies with which Canada compares itself.”⁴⁴

A Work in Progress devoted a chapter to the issue of “Fair and Equitable Decision Making” in which it specifically addressed the case for independent adjudication of administrative segregation. At an appearance before the Sub-committee on behalf of the Canadian Bar Association, I had reviewed the history of this issue, citing evidence in *Prisoners of Isolation* and the more recent recommendations of the *Arbour Report*, the Task Force on Administrative Segregation and the Task Force on Human Rights. The Sub-committee, after reciting this history and commending the 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.”⁴⁵ In the words of the Sub-committee:

[T]he 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... 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... 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.⁴⁶

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.”⁴⁷ 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.

The response from both the Correctional Service and Government of Canada to these recommendations can be characterized most charitably as underwhelming. This was their response:

The Government proposes an Enhanced Segregation Review process that includes external membership. This model will attempt to balance independent adjudication

⁴⁴ 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) para 6.2.

⁴⁵ *Ibid* at para 5.36.

⁴⁶ *Ibid* at paras 5.35-5.38.

⁴⁷ *Ibid* at para 5.40.

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.⁴⁸

Consider the 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. In 1998, the 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. The CSC and the federal government's response was to pilot a proposal for an enhanced segregation review process that included external membership.

B. The Pilot Enhanced Segregation Review Process, 2001 – 2002

In October 2001, the CSC began piloting new segregation review boards. Once a month for five months at five institutions (one in each of the five regions of the 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.

I have described elsewhere why based upon its design and duration the CSC's pilot was neither capable nor intended to test the value of the segregation review process recommended by the Parliamentary Sub-committee. It also failed to reflect the experiment on independent adjudication recommended by the Task Force on Segregation.⁴⁹ It came therefore as no great surprise when on the conclusion of the pilot CSC determined that there was no added value to an enhanced segregation process co-chaired with someone outside of CSC and therefore it would not proceed with a system-wide implementation of the pilot model, let alone a real model of independent adjudication.

⁴⁸ Government of Canada, *Response to the Report of the Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights* (Ottawa: Government of Canada, 2000) at 18.

⁴⁹ A detailed analysis of the pilot can be found in Michael Jackson, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation" (2006) 48 Can J Crim & Crim J 157 at 180-85 [Jackson, "Litmus Test"].

C. Canadian Human Rights Commission Report, 2004

On January 28, 2004, 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*.⁵⁰ It 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. One of them addressed independent adjudication of segregation:

It is recommended that: 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.⁵¹

Plainly put, the Canadian Human Rights Commission made it clear that it was not enough for the 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; it was not to be. 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, the CSC now took the evasive position that its hands were tied by the existing legal framework; e.g. as the scheme for administrative segregation is set out in the Act and Regulations, it was outside the purview of the CSC's policy framework.

In the face of the CSC's "we can't do anything" strategy in April 2004 the Corrections and Criminal Justice Directorate of the Department of Public Safety and Emergency Preparedness unambiguously pointed the way ahead:

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...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.⁵²

⁵⁰ Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights and Correctional Services for Federally Sentenced Women* (Ottawa: Canadian Human Rights Commission, 2004), online: <www.chrc-ccdp.ca/sites/default/files/fswen.pdf>.

⁵¹ *Ibid* at 5.2.2.

⁵² Corrections and Criminal Justice Directorate, Public Safety and Emergency Preparedness Canada, *Issue*

But even this was not enough. In February 2005, the CSC filed its Action Plan in response to the Report of the Canadian Human Rights Commission and the Corrections and Criminal Justice Directorate action plan:

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.⁵³

The passage I have emphasized provides the key to understanding the CSC's latest strategy of resistance to implementation of independent adjudication. Quite apart from whether it addresses the 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 justice and cannot be subordinated to the CSC's operational problems. That the senior management of the CSC in 2005 would advance this argument is an ominous reflection of the very problem Justice Arbour identified a decade ago - the CSC's "lack of commitment to the ideals of justice".⁵⁴

VIII. The Litmus Test of Legitimacy, 2006

The Canadian Journal of Criminology and Criminal Justice dedicated a 2006 special issue to prison oversight and human rights. In my article, "The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation", in reviewing much of this history, I concluded in this way:

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 that 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 judicial intervention to bring this about? The legal argument would be that independent adjudication is one of the fundamental principles of justice under s. 7 of the Charter and that the current legislative scheme deprives prisoners of their right to institutional liberty in violation of those principles. If it comes to pass that only through a court judgment will the Service's administration of the most restrictive form of imprisonment be brought into the gravitational orbit of a culture

Paper: Independent Adjudication of Administrative Segregation Decisions by CSC (Ottawa: PSEPC, 2004) at 4.

⁵³ Correctional Service Canada, *CSC Action Plan in Response to the Report of the Canadian Human Rights Commission* (2004) at 16, online: <www.csc-scc.gc.ca/publications/fsw/gender4/CHRC_response_e.pdf> [emphasis added].

⁵⁴ *Arbour Report*, *supra* note 31 at 108.

of rights rather than responding to the CSC's operational concerns, this will provide confirmation of Justice Arbour's pessimistic conclusion that "[u]ltimately, 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."⁵⁵

A. The Roadmap to Strengthening Public Safety, 2007

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.

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'."⁵⁶

After the 2006 election the government made no effort to hide their intention to make the operation of our justice system much tougher. The Prime Minister also articulated his disdain of academics and others who use "statistics" and lawmakers who recognize that prisoners do not forfeit their human rights.

It was in this political context that on April 20, 2007, the Minister of Public Safety, announced the appointment of a panel charged with the task of reviewing the operations of the CSC. 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 the CSC over many years.

Six months after its appointment on October 31, 2007, the Review Panel presented its 170 page final report entitled *A Roadmap to Strengthening Public Safety*, which contained 109 recommendations.⁵⁷ 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

⁵⁵ Jackson, "Litmus Test", *supra* note 49 at 191 [emphasis added].

⁵⁶ Speech for the Minister of Justice and Attorney General of Canada, Vic Toews, QC, Canadian Professional Police Association, April 3, 2006, Ottawa, Ontario, cited in Michael Jackson & Graham Stewart, "A Flawed Compass: A Human Rights Analysis of the Roadmap to Strengthening Public Safety" (24 September 2009), at 4, online: Justice Behind the Walls <justicebehindthewalls.net/news.asp?nid=78>.

⁵⁷ CSC Review Panel, *Report of the Correctional Service of Canada Review Panel: A Roadmap to Strengthening Public Safety* (Ottawa: Minister of Public Works and Government Services Canada, 2007) at 4, online: <www.publicsafety.gc.ca/cnt/cntrng-crm/csc-scc-rvw-pnl/report-rapport/cscrprprt-eng.pdf> [*Roadmap*].

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.⁵⁸ Informed observers raised serious concerns about the entire process and the degree to which the Panel was intended to give expert advice or just confirm the Government’s already announced intentions.

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 highlighted the problems, both of constitutional law, correctional policy and practice, their recommendations create and aggravate.⁵⁹ 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 *Canadian Charter of Rights and Freedoms* 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 makes 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 Report*. 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. This was my indictment of the *Roadmap* in *A Flawed Compass*:

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

⁵⁸ CSC’s use of “transformation”, while it might fit into what the late Stan Cohen referred to as one of the “good stories” that correctional administrators like to tell about “progress” in corrections, is more than ironic given the use of the term “transformative justice” by restorative justice advocates to describe the fundamental changes that are needed to be made to develop alternatives to imprisonment and a punitive response to conflict. Anthony J Nocella, “An Overview of the History and Theory of Transformative Justice” (2011) 6:1 Peace & Conflict Review 42, online: <www.review.upeace.org/pdf.cfm?articulo=124&ejemplar=23>.

⁵⁹ Michael Jackson & Graham Stewart, “A Flawed Compass: A Human Rights Analysis of the *Roadmap to Strengthening Public Safety*” (24 September 2009), online: Justice Behind the Walls <justicebehindthewalls.net/news.asp?nid=78>.

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.⁶⁰

The complete 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 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.⁶¹

The use by CSC and the Panel of "voluntary" to describe this population is a cruel euphemism. These offenders are seeking protection from other offenders, a protectorate that is part of CSC's statutory mandate. Their placement in segregation is typically not the offenders' choice but CSC's failure to provide adequate alternatives.

The clear implication of the Panel's analysis is 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 is that the *Roadmap* makes no reference whatsoever to any of the previous work that I have documented in the preceding pages. There is no reference to *Prisoners of Isolation* or *Justice Behind the Walls* (which might be explained by the disdain the Harper government, and evidently the Panel, holds for academics and prisoners' rights advocates); but neither is there any mention of the *Arbour Report* or CSC's own Report of the Task Force on Segregation, even

⁶⁰ *Ibid* at 40.

⁶¹ *Roadmap*, *supra* note 57 at 23-24.

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* has nothing more to contribute to the continuing debate than the need to increase the rigour of conditions in voluntary segregation.

B. Segregation Redux, 2007 – Present

At the very same time the Panel was minimising the conditions within segregation, Ashley Smith, 19 years old, strangled herself to death after more than a year of continuous segregation in federal prisons. The omission of any discussion in the Panel report of the important issues associated with segregation reveals the one-dimensional view the Panel has of their roadmap to public safety; a roadmap in which principles of fundamental justice, fairness and human rights are left by the wayside.

More than ironically, as the *Roadmap* panel was considering what it believed to be the markers for transformation, CSC had already undertaken a new pathway in the long history of segregation in what was in the euphemistic language of corrections referred to as a “special management protocol” for those women identified as the most disruptive to institutional order. Although physically based in the architecture of the new women’s institutions, the conditions of confinement under the protocol were more stringent than those of men imprisoned in the highest form of security, the Special Handling Unit, and in terms of the intensity of surveillance and the degree of control over the prisoner’s movement and activities, eclipsed the regime in the old-style solitary confinement units in either the Prison for Women or the BC Penitentiary. Many of the behavioural standards set in these protocols were virtually impossible to meet. It is like a purgatory of segregation where every time a prisoner takes a step forward and moves to a lesser level of restrictive segregation, they are so closely scrutinized that they end up moving back up a level because nothing but excellent behaviour would allow them to continue on the path of lesser restrictions.

As described in other presentations at the Ending the Isolation conference, following the initiation of a court challenge, the special protocol has officially been discontinued, although serious questions arise as to the reality of its operational disappearance. Rene Acoby, the first young Aboriginal woman subjected to the “protocol”, rendered her indictment of the latest iteration of the segregation regime that was operating when the *Roadmap* was being drafted, stating:

One need only look at the durations the women have spent on the Management Protocol to deduce it is not a successful OR humane model of confinement. I find

it reprehensible that the group of women who designed the Management Protocol with the “special needs of women offenders taken into consideration” cannot even meet with us. Perhaps they don’t want to confront the ghosts of women their brilliant Protocol has reduced the women to.⁶²

This prisoner’s reference to the “ghosts of women” has now taken on an added ghastly significance. Although not a protocol case, the grave concerns that the CSC has not found an appropriate way to manage the custody of women with the most severe behavioural problems and mental health challenges has been brought into the sharpest relief as a result of the release of a special report of the Correctional Investigator (CI) on the death of 19 year old Ashley Smith at Grand Valley Institution in 2007. This CI report raises profound questions as to the strength of the CSC’s commitment to a culture of respect for the human rights of offenders and demonstrates why this particular incident cannot be so easily dismissed as an isolated breakdown in an otherwise robust system. Many important changes in corrections, particularly with respect to human rights, were motivated by tragic and horrible failures. The death of this 19 year old in federal custody powerfully illustrates the fatal flaw of the Panel’s vision for corrections: by pointing to larger issues that can only be redressed by a roadmap that places human rights protection at the centre, not the periphery, of institutional transformation.

Along with other systemic breaches relating to transfers, the use of force, and the provision of mental health services, the CI identified how Ashley Smith’s continuous administrative segregation status was in violation of relevant law and policy as well as compounding her inhumane confinement:

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. 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. 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... 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

⁶² Rene Acoby, “On Segregation” (2011) 20:1 Journal of Prisoners on Prisons 89 at 92.

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.⁶³

I have long maintained that independent adjudication is a necessary part of any equation of reform of segregation regimes. In his report the CI’s conclusions bear witness to the consequences of the CSC’s recalcitrance 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.⁶⁴

Like many of you I have struggled with understanding how what happened to Ashley Smith could have happened in a Canadian prison. Although I have lived through the death of prisoners in solitary I knew and I have literally begged others, speaking to them through a food slot in a segregation cell, not to take that ultimate step, I did not ever meet Ashley Smith. Yet the circumstances of her death and the responses of correctional managers to her noncompliant and self-destructive behavior have caused me to question what the CSC has learned from the lessons of history.

More than 30 years after *McCann*, 13 years after the *Arbour Report* and 10 years after the Task Force on Segregation, a 19 year old girl died in a bare segregation cell. For those who would argue that the inhumane and deplorable conditions endured by segregated prisoners in the BC Penitentiary in the 1970s and in the Prison for Women in the 1990s can safely be consigned to the lessons of history, Ashley Smith’s preventable death stands as the latest indictment of the failure of the CSC to take those lessons seriously.

I have referred to an Aboriginal woman prisoner’s account of the Special

⁶³ Correctional Investigator of Canada, *A Preventable Death* (Ottawa: Office of the Correctional Investigator, 2008), online: <www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20080620-eng.aspx> [emphasis added].

⁶⁴ *Ibid* at para 93.

Management Protocol for High-Risk Women. No longer officially in existence, its afterlife is not hard to find. Days before this conference I visited Rene Acoby who was in segregation again. I told her about this conference and I asked her what she would have said to you about the effects of segregation had she been able to be here; she replied:

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 state of despair and loneliness. Because they don't think that you have feelings.

This contemporary statement voiced from a high-security interview room in which prisoner and professor are separated by a glass barrier - so much in contrast to the collegial comfort of Robson Hall Faculty of Law, University of Manitoba - 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.

C. The Receding Prospect of a Correctional Culture of Respect for Human Rights?

A large part of my motivation in writing *A Flawed Compass* was my concern that the Roadmap and the transformation agenda signaled a retreat from what had always been the very difficult task of entrenching a culture of rights within the correctional system. Some of the Roadmap's recommendations for diminishing the rights and privileges of prisoners have now found their way into amendments to the CCRA, but beyond the legislative changes there has been a much more pervasive and disturbing shift in the climate within correctional institutions. Those of us who go into these institutions, as lawyers, advocates or community support, have seen and felt the shift. Not surprisingly correctional staff and managers, taking their cues from the political class, see their mandate as toughening up prison regimes

in the name of prisoner accountability, exercising greater control of prisoner movement in the name of public safety, generating greater intrusion on visits with the use of so-called non-intrusive search procedures of ion-scanning and drug dogs in the name of drug interdiction. Long confinement to cells has become the new normal in maximum-security institutions like Kent, which are now run more like the super max Special Handling Unit. In a recent visit with my law students at Matsqui, a medium security institution, prisoners described the hardening of staff attitudes and confrontational behaviour, how prisoner movement, access to the yard, the gym and other recreational opportunities were now more restricted than they used to be at maximum security, and routine strip searching after visits casts a long shadow over the few hours of sharing with loved ones the window of life outside prison. Justin Piché, in his presentation at the Ending the Isolation conference, read from an essay in the *Journal of Prisoners on Prisons* by a prisoner who had spent years in solitary confinement who wrote, "I've counted every brick of these walls in the cell, and it seems that every time that I count them one is missing."⁶⁵ The federal prison is closing in on itself and many of the hallmarks of what was thought to be liberalization are now in jeopardy, if not already jeopardized.

This pervasive systemic impact of the new political climate that is pushing the federal correctional system down a deeply regressive re-militarized path is reflected in the Correctional Investigator's 2011 report on the unauthorized use of force at Kent Institution.⁶⁶ Howard Sapers analyzed the way in which two exceptional searches were managed by members of an armed tactical team that was operating outside of both law and policy. The team "basically assumed control of a maximum security facility and followed their own rules... [that] resulted in serious human rights breaches, in the form of inappropriate, unwarranted and dangerous use of force, serious infringements to privacy and dignity and unnecessary physical and mental deprivation over several days."⁶⁷ Mr. Sapers saw this disregard of law and policy in the larger context:

Other changes in policy, procedure and climate have contributed to the kind of challenging environment and escalated response witnessed at Kent Institution in January 2010. Correctional officers now carry inflammatory chemical agents as routine standard issue, the result of a protracted labour challenge first initiated by correctional officers at Kent Institution. As this case illustrates, dynamic security principles and practices have been eroded, replaced by static modalities that rely on electronic gates and barriers and remote detection and surveillance technologies. Front-line staff, especially in higher security institutions such as Kent, have moved from positions of direct observation and interaction with inmates to more secure

⁶⁵ Justin Piché & Karine Major, "Prisoner Writing in/on Solitary Confinement: Contributions from the *Journal of Prisoners on Prisons*, 1988-2013" (2014) 3:2 Can J Hum Rts 1 at 26.

⁶⁶ Office of the Correctional Investigator, *Unauthorised Force: an Investigation into the Dangerous Use of Firearms at Kent Institution between January 8 and January 10* (March 21, 2010), online: <www.oci-bec.gc.ca/cnt/rpt/oth-aut/oth-aut20110321-eng.aspx>.

⁶⁷ *Ibid* at para 126.

command posts or security bubbles.⁶⁸

It is in the context of a political and operational shift, in which there is an underlying attitude that prisoners have less entitlement to human rights, and that the human rights movement has been a “con” and has compromised public safety, that we must consider the implications for the use and abuse of segregation. If correctional staff can confidently believe, citing the *Roadmap*, that the conditions in segregation are too soft, and that there needs to be a hardening of attitudes and regimes in the name of public safety, segregation can be reimagined not as a human calamity for the prisoner that, if prolonged, endangers the staff and ultimately the public but as a useful, necessary and merited part of the armory of modern corrections for the recalcitrant prisoner.

If segregation is viewed by correctional staff and administrators as a normalized and necessary part of the carceral continuum, then whatever restraints the law now places on segregation, the return to a “casual attitude” to compliance with the law that Justice Arbour, the Task Force on Segregation, and *Justice Behind the Walls* documented, can be rationalized, as operational realities in keeping with the new political climate. In this way the customary law of prisons, in which security and administrative convenience trump fairness, reasserts its dominance.⁶⁹

I have already pointed out that segregation units are separated from the rest of the prison by more than additional sets of locked doors, writing that in segregation “the worst things about prisons – the deep sense of antagonism between the prisoners and the guards – are intensified.”⁷⁰ If confrontation on the ranges in general population is ramped up, if deep skepticism about the importance or utility of human rights in correctional operations is seen as in keeping with the political temper of the times, the predictable way in which this will be played out and amplified in segregation units leaves little to the imagination.

In such a climate the reports of the CI and that of the UN Special Rapporteur on Torture can be treated dismissively by Government; it becomes even more important that advocates of human rights - within and without the academy - must tenaciously and creatively use our collective energies and strategies so that the living voices and the ghosts of all those who have suffered the pains of isolation, some of whom have been heard during this conference, are never forgotten.

⁶⁸ *Ibid* at para 135.

⁶⁹ The concern that segregation is increasingly being seen as a normalized part of imprisonment is reinforced in the recent extension of the carceral continuum in the form of subpopulations and what the Correctional Investigator has referred to as “segregation lite”. This was an issue that was first addressed in the 1997 Task Force on Segregation and is addressed in Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2011 - 2012* (Ottawa: Office of the Correctional Investigator, 2012), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20112012-eng.aspx>. These developments are further explained in Ivan Zinger’s paper in this volume.

⁷⁰ Jackson, *Justice*, *supra* note 18 at 291.