

Contesting Unmodulated Deprivation: *Sauvé v Canada* and the Normative Limits of Punishment

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*Despite a pressing need for judicial guidance on the legalities of administrative segregation, Canadian courts have yet to outline clear, comprehensive principles by which to assess its deployment. While some courts have rebuked the Correctional Service of Canada for the improper use of administrative segregation in specific cases, the regulation of the practice more broadly has proven elusive. This article turns to the Supreme Court of Canada's prisoner voting rights decision in *Sauvé v Canada* for guidance in this regard. Since its release in 2002, *Sauvé* has been applied largely in cases involving political rights, and rarely in cases involving conditions of confinement. The recent trial level decision in *Bacon v Surrey Pretrial Services Centre*, however, suggests that *Sauvé*'s significance extends beyond the voting rights context. Building on *Bacon*, this article posits that *Sauvé* outlines a "statement of constitutional and carceral theory" that can be cited to scrutinize the law and practice of administrative segregation. It illustrates this claim by analyzing the Management Protocol, a corrections protocol in effect between 2003-2011 that authorized prison wardens to subject maximum-security women to an extreme solitary confinement regime. The Protocol was designed and administered in highly objectionable ways, revealing a clear gap between the progressive ideals of prisoner rights protection as articulated in *Sauvé*, and the record of their enforcement in the daily administration of corrections. Applying *Sauvé* to the Management Protocol, this article highlights the decision's potential to critique and contest the improper use of administrative segregation when it results in unmodulated rights deprivations.*

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*Malgré un besoin urgent d'indications jurisprudentielles en matière d'isolement préventif, les tribunaux canadiens n'ont pas encore défini de principes généraux clairs pour évaluer son déploiement. Bien que les tribunaux aient reproché au Service correctionnel du Canada son usage irresponsable de l'isolement préventif dans certains cas précis, la réglementation plus générale de cette pratique s'est avérée difficile à instaurer. Cet article examine l'affaire *Sauvé c. Canada* qui portait sur le droit de vote des prisonniers pour obtenir quelque indication à cet égard. Depuis sa publication en 2002, l'arrêt *Sauvé* est souvent appliqué aux causes qui concernent les droits civils et politiques, mais rarement à celles portant sur les conditions de détention. Cependant, *Bacon c. Surrey Pretrial Services Centre* est une décision de première instance qui suggère que l'importance de *Sauvé* dépasse le cadre des droits de vote. S'appuyant sur *Bacon*, l'auteur postule que *Sauvé* expose une théorie constitutionnelle et carcérale qui peut être utilisée pour examiner à fond le droit et la pratique de l'isolement préventif. Il illustre son propos en analysant le Protocole de gestion propre au Service correctionnel, qui a été en vigueur entre 2003-2011 et qui autorisait les directeurs de prisons à assujettir les femmes des établissements à sécurité maximale à un régime d'isolement cellulaire extrême. Le Protocole a été conçu et administré de façon fortement contestable, révélant un écart flagrant entre les idéaux progressifs de la décision *Sauvé* en matière de protection des droits des prisonniers et l'application de ce précédent juridique dans l'administration quotidienne des services correctionnels. En appliquant les principes de *Sauvé* au Protocole de gestion, l'article souligne le potentiel de cette décision pour l'examen du recours abusif à l'isolement préventif lorsqu'il a pour effet de priver des personnes de leurs droits d'une manière sauvage.*

I. Introduction

At the time of her sentencing for an assault committed while in prison, S.L.N., a First Nations woman, was twenty-eight years old. She had a chaotic and abusive upbringing, suffered from fetal alcohol syndrome and various forms of addiction, and was involved in the criminal justice system from a very young age.² In 1999, when she was 17 years old, she was tried and convicted in adult court of second-degree murder, which she had committed at age 15, and was sentenced to life in prison.³ Between 2000 and 2005, she was incarcerated at several federal institutions, wherein she committed violent offences against fellow inmates, prison officials, and staff.⁴ In 2005, after committing an assault against a staff member in Joliette Institute in Québec, S.L.N. was placed on the Management Protocol, an extreme corrections protocol implemented by the Correctional Service of Canada (CSC).⁵

The Management Protocol authorized prison wardens to subject maximum-security women involved in violent or disruptive incidents to a tightly regulated solitary confinement regime.⁶ The Protocol was designed and administered in highly objectionable ways, and used to implement extreme periods of unmitigated prisoner isolation far exceeding all recommended maximums, often lasting several years at a time. The Protocol was also disproportionately applied to Aboriginal women, despite stated commitments in Canadian law to remedy systemic disparities in the treatment of Aboriginal inmates. S.L.N., for example, was placed on the Management Protocol continuously between 2005 and early 2010, and maintained on its most stringent level for more than two years.⁷ During this time, she had only minimal social interaction and next to no access to vital rehabilitative programming, an experience the British Columbia Supreme Court described as “intensely repressive and difficult” and “capable of inflicting great damage”.⁸

The Management Protocol was introduced under the administrative segregation provisions in the *Corrections and Conditional Release Act* (CCRA).⁹ It was implemented and applied without due regard for established principles of prisoner rights protection outlined in Canadian law. The Protocol received

² *R v SLN*, 2010 BCSC 405 at paras 15, 31 and 56, [2010] BCWLD 4535 [SLN].

³ *Ibid* at para 19.

⁴ *Ibid* at paras 20-29.

⁵ *Ibid* at paras 36-37.

⁶ *Ibid* at paras 41-42. Deputy Commissioner for Women, *Secure Unit Operational Plan*, (Ottawa: Office of the Deputy Commissioner for Women, 2003), online: Correctional Services Canada <www.csc-scc.gc.ca/text/prgrm/fsw/secureunitop/secure-unitop-2003-eng.shtml>.

⁷ *SLN*, *supra* note 2 at paras 44 and 48-49.

⁸ *Ibid* at paras 42 and 63.

⁹ *Corrections and Conditional Release Act*, SC 1992, c 2 [CCRA]. For a description of the Management Protocol see Deputy Commissioner for Women, *supra* note 6.

little public attention during the initial years of its operation, but gained increasing notoriety as a result of litigation advanced by the British Columbia Civil Liberties Association¹⁰ and through the work of journalists,¹¹ prison activists,¹² and prison scholars.¹³ Telling the story of the Protocol from its introduction in 2003 to its dissolution in 2011, Lisa Kerr makes clear that it amounted to a substantial revision of Canada's solitary confinement regime, and resulted in serious violations of prisoner rights.¹⁴ The existence and implementation of the Management Protocol thus reveals a clear gap between the progressive ideals of prisoner rights protection as articulated in Canadian law, and the actual record of their enforcement in the daily administration of corrections.¹⁵ This lack of congruency – aptly exemplified in the case of S.L.N. – demonstrates that something is awry.

In particular, although the Protocol was rescinded in May 2011,¹⁶ both the legislative framework and disciplinary ethos that enabled its operation remain in effect, and are ongoing sources of rights violations in Canadian prisons.¹⁷ Despite a pressing need for judicial guidance on solitary confinement,

¹⁰ In March 2011, the British Columbia Civil Liberties Association filed a constitutional challenge to the Management Protocol under the *Canadian Charter of Rights and Freedoms* on behalf of BobbyLee Worm, also seeking damages in tort. See *BobbiLee Worm v Canada (AG)*, (Notice of Civil Claim, plaintiff) (4 March 2011), online: British Columbia Civil Liberties Association <bccla.org/wp-content/uploads/2012/03/20110303-BCCLA-Legal-Case-BobbyLee-Worm.pdf> [BCCLA]. The lawsuit was eventually settled out of Court in May 2013, see British Columbia Civil Liberties Association, *Worm v Canada* (12 February 2013), online: <bccla.org/our_work/worm-v-canada/>.

¹¹ See e.g., Marion Botsford Fraser, "Life on the Instalment Plan: Is Canada's penal system for women making or breaking Renée Acoby," *The Walrus* (March 2010), online: <thewalrus.ca/life-on-the-instalment-plan/>.

¹² *Ibid.* Fraser interviews Kim Pate and Michael Jackson, who criticized and attempted to reform the Management Protocol throughout its tenure. The Office of the Correctional Investigator was also vocal in its critique of the Management Protocol, and condemned the program as counterproductive and punitive, not corrective. See Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2008-2009*, (Ottawa: Office of the Correctional Investigator, 2009) at 32, online: <www.oci-bec.gc.ca/cnt/rpt/pdf/annrpt/annrpt20082009-eng.pdf> [Correctional Investigator, *Annual Report 2008-2009*].

¹³ See Lisa Kerr, "The Origins of Unlawful Prison Policies" (2015) 4:1 Can J Hum Rts 89.

¹⁴ *Ibid.*

¹⁵ The "gap" between the ideals of prisoner rights protection set out in doctrine and those applied in practice has been well canvassed by prison scholars. See Debra Parkes, "A Prisoners' Charter? Reflections on Prisoner Litigation Under the *Canadian Charter of Rights and Freedoms*" (2007) 40:2 UBC L Rev 629 [Parkes, "Prisoners' Charter?"] (reviewing nearly 25 years of *Charter* litigation by prisoners and arguing that prisoners are often treated by courts and legislatures as temporary outcasts from a meaningful form of rights protection).

¹⁶ The Correctional Service of Canada rescinded the Management Protocol on May 1, 2011, see Deputy Commissioner for Women, *supra* note 6.

¹⁷ The depth and severity of these violations is captured by the story of Ashley Smith, a teenager held under administrative segregation in conditions of extreme deprivation for nearly four years, who died by self-inflicted strangulation on October 19, 2007, despite guards watching her on video monitors. The Ontario coroner conducted an inquest into Ms. Smith's death. On December 19, 2013, the coroner's jury returned a verdict that the death was a homicide. For the verdict and recommendations, see Office of the Chief Coroner of Ontario, *Inquest-Touching the Death of Ashley Smith: Jury Verdict and Recommendations*, (Toronto: Queens Printer for Ontario, 2013), online: Canadian Association of Elizabeth Fry Societies <www.caefs.ca/wp-content/uploads/2014/01/A.S.-Inquest-Jury-Verdict-and-Recommendations1.pdf>.

Canadian courts have yet to outline clear, comprehensive principles by which to assess the legalities of its deployment.¹⁸ While some courts have rebuked CSC for the improper use of solitary confinement in specific cases,¹⁹ the regulation of the practice more broadly has proven elusive.²⁰

This article turns to the Supreme Court of Canada's landmark decision in *Sauvé v Canada*, in which the Court struck down Canada's prisoner

¹⁸ The need for judicial guidance on this issue was recognized by the Supreme Court of British Columbia in *SLN*, *supra* note 2 at paras 64-65. Noting that it was not appropriate for "this Court to wade headlong into such a large, complex, and specialized matter and purport to have the answer," the Court noted the need for the issue "to be examined carefully" and stated its hope "that it can be moved forward effectively and soon." The Court further emphasized that a "proper balance must be struck which will address institutional security and safety as well as the humane and supportive treatment of those persons who are inmates." The Ontario Court of Appeal considered the legalities of solitary confinement in *R v Olson* (1987), 62 OR (2d) 321, 38 CCC (3d) 534 [*Olson*], and held that segregation "is not, per se, cruel and unusual treatment," but left open the possibility that segregation could be "so excessive as to outrage the standards of decency." The Supreme Court of Canada affirmed this decision in *R v Olson*, [1989] 1 SCR 296, 47 CCC (3d) 491. For an interesting treatment of the anomalous character of *R v Olson* see Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill L J 43. The Supreme Court of Canada has also described solitary confinement as a "prison within a prison" in several cases. See *R v Miller*, [1985] 2 SCR 613 at 637, 52 OR 585, stating, "[i]n my view there should be judicial input into the decision to confine someone to 'a prison within a prison'"; *Martineau v Matsqui Disciplinary Board*, [1980] 1 SCR 602 at 622, 50 CCC (2d) 353, stating, "the board's decision had the effect of depriving an individual of his liberty by committing him to a 'prison within a prison.' In these circumstances, elementary justice requires some procedural protection. The rule of law must run within penitentiary walls." Notably as well, some cases have considered limited constitutional rights claims relating to administrative segregation. See *McArthur v Regina Correctional Centre*, Chief Executive Officer (1990), 83 Sask R 128, 56 CCC (3d) 151 (SKQB), finding that the continued segregation of an inmate for his unpredictable behavior and violence towards staff members and other inmates did not violate the *Charter's* s 12 prohibition against cruel and unusual treatment); *Dégario v Canada* (1997), 141 FTR 142, [1997] FCJ No 947 (FCTD), finding no violation of an inmate's constitutional rights due to transfer from one segregation unit to another within the same penitentiary.

¹⁹ See *Saint-Jacques v Canada (Solicitor General)* (1991), 1 Admin LR (2d) 162, 45 FTR 1 (FCTD), finding CSC liable in damages for the tort of false imprisonment for placing an inmate in administrative segregation without justification; *Brandon v Canada (Correctional Service)* (1996), 131 DLR (4th) 761, 105 FTR 243 (FCTD), finding CSC liable in damages in the tort of false imprisonment for placing an inmate in segregation for 28 days over and above his 40 day segregation order without justification; *R v Hill* (1997), 148 DLR (4th) 337, 36 BCLR (3d) 211 (BCCA), finding prison officials were negligent in failure to review an inmates segregation order on a timely basis. See also *Coumont v Canada (Correctional Services)*, [1994] 77 FTR 253, FCJ No 655 (FCTD), finding that CSC was not negligent in keeping an inmate in protective segregation; *Caron v Canada* (1999), 172 FTR 181, CarswellNat 1388 (WL Can), (affirmed 2001 FCA 173, [2001] 283 NR 380), finding that the CSC was not negligent for placing an inmate into administrative segregation for refusal to participate in the institution's rehabilitation programs.

²⁰ The complexities of regulating the practice are aptly captured by the Supreme Court of British Columbia's decision in *Bacon v Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805, [2010] 11 Admin LR (5th) 1 [*Bacon*]. In *Bacon*, the Court considered whether the administrative segregation of a pre-trial detainee violated the *Charter's* s 12 prohibition against cruel and unusual punishment. After a detailed review of the evidentiary record, the Court concluded that the petitioner's treatment violated his s 12 *Charter* rights. The Court granted the petitioner individual relief, but did not strike down the enabling legislation, opting instead to "make no comment on the constitutionality of the *Correction Act* and the *Correction Act Regulation*" (*Bacon*, at para 338). Given evidence that the Act and the Regulations had been "seriously misinterpreted, misapplied, or ignored," the Court reasoned that an assessment of their constitutionality would not be appropriate (*Bacon*, at para 338). The Court further emphasized that the respondent "would have to make a much stronger attempt to adhere to the laws that bind her before any question of the constitutionality of their provisions could be meaningfully addressed" (*Bacon*, at para 338).

disenfranchisement laws, for guidance in this regard.²¹ Since its release in 2002, *Sauvé* has been applied largely in the political rights context, and rarely in cases involving improper conditions of confinement.²² The recent trial level decision in *Bacon v Surrey Pretrial Services Centre (Warden)*, however, suggests that *Sauvé*'s significance extends beyond the voting rights context.²³ Building on *Bacon*, this article posits that *Sauvé* may be read as outlining a "statement of constitutional and carceral theory" that can be effectively cited to scrutinize the law and practice of solitary confinement.

The article suggests that *Sauvé* outlines two broad normative principles. First, *Sauvé* prescribes that punishment must not be administered in an unmodulated manner so as to effectively treat inmates as "temporary outcasts" from Canadian rights protection.²⁴ While the deprivation ushered by the voting ban in *Sauvé* differs markedly from the deprivations ushered by a solitary confinement order, the Court's focus on the "unmodulated" nature of the rights violation offers useful guidelines by which to evaluate the legalities of the practice. Specifically, *Sauvé* may be cited to distinguish between segregation practices that limit *Charter* rights and are more likely to be constitutionally permissible, and segregation practices that effectively deny *Charter* rights and are more likely to attract constitutional scrutiny. Second, *Sauvé* emphasizes that corrections protocols should not be imposed to intensify the marginalization of Aboriginal inmates in Canadian prisons.²⁵ It further cautions against the social cost of implementing punishment policies that treat Aboriginal inmates as "unworthy outcast[s]".²⁶ This article suggests that in light of these two principles, *Sauvé* can and should be cited more frequently to scrutinize the law and practice of solitary confinement and condemn its use where it results in unmodulated rights deprivations like those imposed through the Management Protocol, and where it further exacerbates inequalities between Aboriginal and non-Aboriginal inmates.

The article begins with an overview of the Management Protocol to

²¹ *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 SCR 519 [*Sauvé*]. For a thoughtful analysis of this decision, see Debra Parkes, "Prisoner Voting Rights in Canada: Rejecting the Notion of Temporary Outcasts" in Christopher Mele & Teresa A Miller, eds, *Civil Penalties, Social Consequences* (New York: Routledge, 2005) [Parkes, "Prisoner Voting"].

²² Canadian courts have applied *Sauvé* for the principle that inmates retain their rights except those denied by the fact of incarceration. See *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6, [2010] 19 Alta LR (5th) 36, involving an application by former inmates of a remand centre under the *Charter of Rights and Freedoms*, allowing the claim in part, and applying *Sauvé* for the principle that an inmate cannot be "deemed to forfeit all of his civil rights" at para 943. Explaining *Sauvé*'s limited application, Parkes notes that it "cannot be ignored that the case concerned the quintessential civil and political right, the right to vote, rather than a right that would have implicated the prison's quest for 'good order' and institutional security, as do many other *Charter* cases." See Parkes, "Prisoners Charter", *supra* note 15 at 672.

²³ *Bacon*, *supra* note 20.

²⁴ *Sauvé*, *supra* note 21 at para 40.

²⁵ *Ibid* at paras 48-60.

²⁶ *Ibid* at para 48.

provide context for discussion. It proceeds with a detailed analysis of the *Sauvé* decision, and demonstrates the extent to which the Protocol failed to comply with the *Sauvé* principles. The article suggests the Management Protocol strayed from the *Sauvé* principles in both its design and implementation: it did nothing to bring federally sentenced women within the protective umbrella of the *Charter*, and in fact defeated some of the rights protections they previously enjoyed. The Protocol also applied to further marginalize Aboriginal inmates, perpetuating the very cycle *Sauvé* sought to disrupt. Applying the *Sauvé* principles to the Management Protocol, the article highlights *Sauvé*'s potential to critique the improper use of solitary confinement in Canadian prisons.

II. The Management Protocol

A. Legal Framework

The *Corrections and Conditional Release Act* (CCRA) outlines two distinct types of segregation regimes: disciplinary segregation and administrative segregation.²⁷ Disciplinary segregation can be imposed for serious disciplinary offences following a hearing before an independent decision-maker, and is subject to a thirty day maximum.²⁸ Administrative segregation, in contrast, is not subject to such constraints and may be applied indefinitely.²⁹ The CCRA empowers institutional heads to segregate inmates for various reasons, including a "reasonable belief" that: an inmate has acted, attempted, or intends to act in a manner that threatens the safety of the institution or any person within it; allowing an inmate to associate with others could interfere with an investigation; or allowing the inmate to associate with others would jeopardize the inmate's safety.³⁰ Since administrative segregation often subjects inmates to extreme isolation for twenty-three hours per day over lengthy periods of time, it is better described as solitary confinement.³¹ Indeed, as several critics

²⁷ The administrative segregation provisions are outlined in ss 31-37 of the CCRA, *supra* note 9. The disciplinary segregation provisions are outlined in ss 44 of the CCRA. For a comprehensive treatment of the history of segregation in Canadian law, see Michael Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983).

²⁸ CCRA, *supra* note 9, s 44(1)(f). See also *Corrections and Conditional Release Regulations*, SOR/92-620, s 40.

²⁹ CCRA, *supra* note 9, s 31(2) prescribes only that inmates are to be "released from administrative segregation at the earliest appropriate time" but does not delineate any specific time limits on segregation. The CCRA does establish minimal limits on segregation. For example, s 37 of the CCRA proclaims that an "inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that (a) can only be enjoyed in association with other inmates; or (b) cannot be enjoyed due to (i) limitations specific to the administrative segregation area; or (ii) security requirements." In addition, s 4(c) of the CCRA requires the CSC to only use measures that "are limited to only what is necessary and proportionate to attain the purposes of this Act."

³⁰ CCRA, *supra* note 9, s 31(3).

³¹ See *Bacon*, *supra* note 20 at para 6 (noting that administrative segregation is "a form of solitary confinement").

have noted, the term “administrative segregation” belies the punitive nature of the isolation imposed through this form of punishment.³²

While the legislative and regulatory frameworks governing administrative segregation provide for ongoing review, they do not establish clear limits on how long inmates can be held in solitary confinement, stipulating only that an inmate “is to be released from administrative segregation at the earliest appropriate time.”³³ The absence of well-defined maximums permits CSC officials to subject inmates to isolation for indefinite periods, despite clear recommendations from national and international sources that solitary confinement must be used with restraint. The United Nations Special Rapporteur on Torture, for example, has stated that solitary confinement amounts to torture when used for more than 15 days at a time.³⁴ In her 1996 *Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston*, Louise Arbour recommended that the CCRA be amended to ensure that inmates are not subject to prolonged periods of isolation, and recommended that “the practice of long-term confinement in administrative segregation be brought to an end.”³⁵ Arbour suggested that inmates be placed in segregation for a maximum of 30 days at a time, and no more than 60 non-consecutive days in a calendar year.³⁶ Notwithstanding these recommendations, CSC continues to subject inmates to prolonged bouts of isolation lasting well beyond these proposed maximums. Various commissions of inquiry, government reports,

³² See Michael Jackson, *Justice Behind The Walls: Human Rights In Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 287 [Jackson, *Justice Behind*] (noting “the very term ‘administrative segregation’ provides apparently benign semantic camouflage for the most intensive form of punishment”). See 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 135, online: Canadian Association of Elizabeth Fry Societies <www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.pdf> [Arbour Report] (stating “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”).

³³ CCRA, *supra* note 9, s 31(2).

³⁴ *Interim Report of The Special Rapporteur Of The United Nations Human Rights Council*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011).

³⁵ *Arbour Report*, *supra* note 32 at 135. In 1994, former Supreme Court Justice Louise Arbour, who at the time was serving as a justice on the Ontario Court of Appeal, conducted an inquiry into events occurring at the Prison for Women in Kingston, Ontario. The *Arbour Report*, released in 1996, documented a culture of non-compliance with the rule of law within the prison. It identified as particularly contentious the prolonged use of solitary confinement against female prisoners, and especially against female Aboriginal prisoners.

³⁶ *Ibid* at 135. Despite these recommendations, according to the Office of the Correctional Investigator, between 2006-2011 inmates held in segregation were isolated for an average time of 40 days. See Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2012-2013* (Ottawa: Office of the Correctional Investigator, 2013) at 29, online: Office of the Correctional Investigator <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20122013-eng.aspx> (noting that Aboriginal offenders are over-represented in segregation placements and maximum security populations). See also Office of the Correctional Investigator, *Segregation in Canadian Federal Corrections: A Prison Ombudsman Perspective* (Ottawa: Office of the Correctional Investigator, March 2013), online: <www.oci-bec.gc.ca/cnt/comm/presentations/presentations20130322-23-eng.aspx> [Correctional Investigator, *Segregation*] (noting that roughly 16.5% of segregated offenders were held in isolation for over 120 days).

and expert investigations have criticized the CCRA for this practice.³⁷

B. Operation and Implementation

Introduced under the administrative segregation provisions of the CCRA, the Management Protocol authorized prison wardens to subject women to an enhanced regime of solitary confinement when certain conditions were met.³⁸ The Protocol applied only to women classified as “maximum-security” who committed acts “causing serious harm or seriously jeopardizes the safety of others” or who were judged to be disruptive or resistant to conventional punishment.³⁹ Between 2005 and 2011, seven women were placed on the Protocol, most of whom were Aboriginal, a fact Howard Sapers, the Correctional Investigator of Canada, identified as “particularly troublesome”.⁴⁰

There were three different levels to the Protocol. Level one subjected women to “the highest degree of deprivation and isolation”, including segregation for up to twenty-three hours per day, with severe restrictions placed on mobility, exercise, and basic amenities.⁴¹ Levels two and three were heavily regulated but involved “somewhat lesser levels of isolation and the provision of somewhat more by way of amenities and interaction, with a view to reintegration or return to the general population.”⁴² The Protocol required women to “earn” their way back to less restrictive conditions through compliance with complex and severely onerous institutional rules. Noting the Protocol’s erratic and opaque application scheme, Kerr explains:

The terms of the Protocol presented a maze of demanding behavioural standards for women to navigate. Multiple discretionary tripwires could return a woman to lower levels of progress...Vague language allowed penal officials to control the process at all times. There were no specific or achievable criteria required for release, for example, two weeks without a minor or serious disciplinary offence as defined by the CCRA. Rather, the policy refers to “assumable risk” and “zero tolerance”, ensuring that

³⁷ See Correctional Investigator, *Annual Report 2008-2009*, *supra* note 12 at 16 (noting that “prolonged periods of deprivation of human contact adversely affect mental health and are counterproductive to rehabilitation”); United Nations Committee Against Torture, *Concluding Observations: Canada*, UNCATOR, 48th Sess, UN Doc CAT/C/CAN/CO/6, (2012), at para 19 (expressing concern at Canada’s use of prolonged solitary confinement, and recommending that Canada “limit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with the possibility of judicial review” and “abolish the use of solitary confinement for persons with serious or acute mental illness”). See also Correctional Services Canada Task Force on Administrative Segregation, *Commitment to Legal Compliance, Fair Decisions and Effective Results* (Ottawa: Correctional Services Canada, 1996 - 1997); Correctional Services Canada Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (Ottawa: Correctional Services Canada, 1997); House of Commons Standing Committee on Justice and Human Rights, *A Work in Progress: the Corrections and Conditional Release Act* (May 2000) (Chair: Paul DeVillers).

³⁸ Deputy Commissioner for Women, *supra* note 6. For more details, see Kerr, *supra* note 13 at 98-101.

³⁹ *Ibid*, Deputy Commissioner for Women. See also *SLN*, *supra* note 2 at para 41.

⁴⁰ Correctional Investigator, *Annual Report*, *supra* note 12 at 31-32.

⁴¹ *SLN*, *supra* note 2 at para 42.

⁴² *Ibid*.

decisions would be made on a purely discretionary and *ad hoc* basis. Under these conditions, women typically had no idea what was required to graduate to the next Step or to be released. They had to abide by strict standards of behaviour, unusual even for the prison context, and particularly difficult with the mounting mental health effects of segregation. Even a bout of perceived depression could negatively affect an individual's capacity to graduate to the next Step of the Protocol.⁴³

Paradoxically, the Management Protocol created a system that drove inmates to exhibit the kind of behaviour the Protocol was designed to address.⁴⁴ It imposed a "zero tolerance" policy for aggressive behaviour, and often resulted in women being isolated for lengthy periods of time and reprimanded for actions that would not otherwise warrant segregation if they were held in the general prison population.⁴⁵ The Management Protocol thus created what the British Columbia Civil Liberties Association described as a "Catch-22", whereby women placed on the Protocol were "rendered increasingly incapable of satisfying the Management Protocol's zero-tolerance requirement given the adverse, physical, psychological and social effects of extended and indefinite solitary confinement."⁴⁶ While the Protocol contained formal checks and balances to prevent misuse or excessive application, these were rarely utilized.⁴⁷ Instead, the Protocol was applied without much if any oversight, and administered in highly problematic ways, notwithstanding significant criticism from various stakeholders.⁴⁸ In fact, the Protocol strayed

⁴³ Kerr, *supra* note 13 at 99-100.

⁴⁴ See BCCLA, *supra* note 10 at para 18. See also Kerr, *supra* note 13 at 99-101.

⁴⁵ *Ibid*, BCCLA, at paras 12 and 18.

⁴⁶ *Ibid* at para 18. It is well established that prolonged periods of solitary confinement can drive prisoners towards aggressive and anti-social behavior, including psychosis, depression, violence, and self-harm. For further analysis of the harmful psychological effects of solitary confinement see Stuart Grassian, "Psychiatric Effects of Solitary Confinement" (2006) 22:3 JL & Pol'y 325; Craig Haney, "Mental Health Issues in Long-Term Solitary and 'Supermax' Confinement" (2003) 49:1 Crime & Delinquency 124; Craig Haney & Mona Lynch, "Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement" (1997) 23 NYU Rev L & Soc Change 477; Stuart Grassian & Nancy Friedman, "Effects of Sensory Deprivation in Psychiatric, Seclusion and Solitary Confinement" (1986) 8 Int'l J L & Psychiatry 49.

⁴⁷ *Ibid*, BCCLA, at para 43 (stating, "[a]s the policy is described and written, it suggests that inmates will be subject to this program for limited periods of time. The policy setting out the protocol also stipulates that there will be checks and balances and means whereby statuses can be reviewed and monitored. Whether this is how matters actually take place is another question"). For further discussion of the Management Protocol's unlawful application see also Kerr, *supra* note 13.

⁴⁸ In its 2008-2009 report, for example, the Correctional Investigator condemned the Protocol as counterproductive and ineffective, declared it to be a "step in the wrong direction" and recommended that it be rescinded. See Correctional Investigator, *Annual Report 2008-2009*, *supra* note 12 at 8, 16, 31, 57, and 75. See also House of Commons, *Subcommittee on International Human Rights of the Standing Committee on Foreign Affairs and International Development*, 39th Parl, 1st Sess, No 1 (5 June 2007) at 1125 (Evidence given by Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies) online: <www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3011354&Language=E&Mode=1> (stating that the Protocol's application "underscores that discriminatory and torturous treatment can occur and is in fact occurring as we speak in Canada"); House of Commons, *Standing Committee on the Status of Women*, 40th Parl, 3rd Sess, No 54 (8 February 2011) at 1125 (Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies), online: <www.parl.gc.ca/HousePublications/

from the *CCRA* so significantly that critics have condemned it as unlawful.⁴⁹

Remarkably, the Protocol was first introduced only several months after the Supreme Court of Canada released *Sauvé v Canada*. And yet, the contrast between the Protocol and the *Sauvé* decision is astounding. *Sauvé* remains one of the Court's most progressive prisoner rights decisions. As Debra Parkes has argued, with the release of the *Sauvé* decision, the Court made clear that prisoners "do not hold attenuated, weaker versions of the rights enjoyed by other Canadians" and are "unequivocally full rights holders under the *Charter*".⁵⁰ In the analysis that follows, I analyze the Management Protocol by reference to *Sauvé*, to illuminate the gap between the principles outlined in *Sauvé* and the Protocol's application.

III. The *Sauvé* Framework

A. Overview and Legal Findings

Released in 2002, *Sauvé v Canada* involved a constitutional challenge to section 51(e) of the *Canada Elections Act*, which disenfranchised prisoners serving a sentence of two years or more.⁵¹ Richard Sauvé, serving a life sentence for first-degree murder, advanced the challenge under section 3 of the *Charter of Rights and Freedoms*, which guarantees "every citizen of Canada... the right to vote".⁵² He was joined by a group of Aboriginal plaintiffs who argued that prisoner disenfranchisement violated both their section 3 voting rights and their section 15 equality rights due to the marked overrepresentation of

Publication.aspx?Language=E&Mode=1&DocId=4938193&File=0> (stating that for women placed under the management protocol, prison "is becoming the greatest risk factor for those women and for public safety"). In a letter dated March 2011 to then Minister of Public Safety Vic Toews, a coalition comprised of prominent Canadian rights groups condemned the Protocol's discriminatory application and noted "its methods constitute cruel and unusual punishment," see Letter from the Canadian Association of Elizabeth Fry Societies et al to the Honourable Vic Toews (31 March 2011), online: <www.caefs.ca/wp-content/uploads/2013/04/2011-BCCLA-Letter-Toews-Solitary-Confinement.pdf>. In addition, as Kerr explains, the Protocol was also subject to internal critique from CSC, which she suggests "reveals an increasing appreciation of the dysfunctions of the Management Protocol, while still marking a clear resistance to moving away from the main features of the program," see Kerr, *supra* note 13 at 107.

⁴⁹ See generally Kerr, *supra* note 13.

⁵⁰ Parkes, "Prisoner Voting", *supra* note 21 at 243 and 246.

⁵¹ *Canada Elections Act*, RSC 1985, c E-2.

⁵² *Canadian Charter of Rights and Freedoms*, s 3 [*Charter*]. Prior to 1993, s 51(e) of the *Canada Elections Act*, RSC 1985, c E-2 barred "every person undergoing punishment as an inmate in any penal institution for the commission of any offence" from voting in provincial and federal elections (Parkes, "Prisoner Voting", *supra* note 21). In *Sauvé v Canada (Attorney General)*, [1993] 2 SCR 438, 153 NR 242, the Supreme Court of Canada affirmed an earlier ruling made by the Ontario Court of Appeal which struck down the wholesale prohibition on prisoner voting rights as unconstitutional. In response, the federal government enacted s 51(3) of the *Canada Elections Act*, which disenfranchised only dangerous offenders serving prolonged sentences of 2 years or more. The revised provision disqualified "every person who is imprisoned in a correctional institution serving a sentence of two years or more," cited in *Sauvé*, *supra* note 21 at para 2.

Aboriginal peoples in Canadian prisons.⁵³

The governing framework for interpreting *Charter* claims prescribes that once a claimant establishes that a *Charter* rights violation has taken place, the burden shifts to the government to prove that this violation can be “demonstrably justified in a free and democratic society” under section 1 of the *Charter*.⁵⁴ The two-stage process recognizes that certain *Charter* rights may be subject to lawful limitation where such limitation is constitutionally justified. In this case, since the government conceded that the voting ban violated the plaintiffs’ section 3 voting rights, the decision centered on the section 1 analysis.⁵⁵ The government made four arguments in support of the voting ban, arguing that prisoner disenfranchisement: (1) enhanced the general purposes of criminal sanction and promoted civic responsibility, (2) enhanced respect for the rule of law, (3) could be justified by reference to social contract theory, and, (4) was an appropriate moral and punitive response to the commission of serious offences.⁵⁶

By a narrow margin of five to four, the Supreme Court of Canada declared section 51(e) of the *Canada Elections Act* unconstitutional.⁵⁷ Rejecting all four of the government’s arguments, the majority held that the government “had failed to identify particular problems that require denying the right to vote.”⁵⁸ It held that objectives like enhancing punishment and promoting civic responsibility could be raised in support of any law, and were too vague to justify overriding a constitutionally protected right. Dismissing the government’s claims as “abstract” and “symbolic”, the majority held that the government did not satisfy the “vigorous justification analysis required by the *Charter*.”⁵⁹ If Parliament “can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons,” the majority explained, “judicial review either becomes vacuously constrained or reduced to a contest of ‘our symbols are better than your symbols’.”⁶⁰

⁵³ *Sauvé*, *supra* note 21 at para 5.

⁵⁴ *Charter*, *supra* note 52, s 1.

⁵⁵ The s 1 test is outlined in *R v Oakes*, [1986] 1 SCR 103, 24 CCC (3d) 321, as supplemented by subsequent case law, prescribes that a violating law will only be upheld under s 1 if it relates to a pressing and substantial legislative objective that warrants overriding a constitutionally protected right, and if the means chosen for its implementation are reasonable, proportionate, and impair the right as minimally as possible. The core point of disagreement between the majority and dissent revolved around the degree of deference owed to the legislature under the s 1 analysis. For further discussion, see Christopher P Manfredi, “The Day the Dialogue Died: A Comment on *Sauvé v Canada*” (2007) 45:1 Osgoode Hall LJ 105.

⁵⁶ *Sauvé*, *supra* note 21 at paras 21-22.

⁵⁷ *Ibid*. The majority opinion, authored by McLachlin CJC, struck down the law on grounds that it contravened the right to vote guaranteed by s 3 of the *Charter* in ways that could not be ‘saved’ by s 1, at paras 1-62. The dissenting opinion, authored by Gonthier J, held that while the voting ban violated the plaintiffs’ s 3 rights, it could be upheld under s 1 of the *Charter*. The dissent further held that the voting ban did not violate the plaintiffs’ equality rights, at paras 189-206.

⁵⁸ *Sauvé*, *supra* note 21 at para 26.

⁵⁹ *Ibid* at paras 22-23.

⁶⁰ *Ibid* at para 23.

The majority drew specific conclusions with respect to each of the government's claims. First, it held there was no evidence that prisoner disenfranchisement enhanced criminal sanction or promoted civic responsibility.⁶¹ Rather, the majority reasoned that disenfranchisement was more likely to communicate the "unacceptable message" that prisoners – or to use the Court's words, "citizen law breakers" – were less valued members of the community.⁶² Second, the majority held that disenfranchisement did not promote respect for the rule of law, but rather undermined it by communicating the harmful message that while everyone is bound to obey the law, not everyone can participate in its making. Denying any subsection of the Canadian public the right to vote would weaken the government's claim to representative democracy, and thus erode the very basis of its right to punish law-breakers.⁶³ As the majority explained, both the right of the state to impose punishment and the obligation of the prisoner to accept punishment "are tied to society's acceptance of the criminal as a person with rights and responsibilities."⁶⁴

The majority made a similar point in dismissing the government's third argument. It reasoned that social contract theory establishes a "vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it",⁶⁵ which was not only "enshrined in the *Charter*" but also stood "at the heart of our system of constitutional democracy."⁶⁶ While the social contract requires citizens to obey the law, failure to do so does not nullify the citizen's "continued membership in the self-governing polity".⁶⁷ To deny prisoners the right to vote would be to fail to grasp the essence of these principles as embodied in the *Charter*.⁶⁸ Finally, the majority rejected the government's claim that disenfranchisement was a legitimate form of moral punishment. Emphasizing that prisoners are full and valued members of the Canadian constitutional polity, the majority cautioned that such symbolic punishment "countermands the message that everyone is equally worthy and entitled to respect under the law – that everybody counts."⁶⁹ Thus, finding that disenfranchisement per section 51(e) of the *Canada Elections Act* served no legitimate penal purpose and could not be justified by reference to any valid overriding policy objective, the majority struck down the voting ban, and held that prisoner disenfranchisement was not a constitutionally permissible form

⁶¹ *Ibid* at para 38.

⁶² *Ibid* at para 40.

⁶³ *Ibid* at para 34.

⁶⁴ *Ibid* at para 47.

⁶⁵ *Ibid* at para 31.

⁶⁶ *Ibid*.

⁶⁷ *Ibid* at para 47.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* at para 58.

of punishment.⁷⁰

B. Normative Principles

As Parkes explains, because the government advanced what can only be described as normative arguments in support of its position, the Court in *Sauvé* “subjected the normative arguments for prisoner disenfranchisement to close scrutiny.”⁷¹ Quite apart from the majority’s statements on the rule of law or the mechanics and morality of disenfranchisement, *Sauvé* also outlined broad normative parameters for what permissible punishment should look like in a constitutional polity committed to prisoner rights protection. These principles have application beyond the context of this case. Indeed, as the recent trial level decision in *Bacon v Surrey Pretrial Services Centre (Warden)* suggests, *Sauvé* outlines a “statement of constitutional and carceral theory” that is applicable outside the voting rights context.⁷²

As briefly noted above, *Sauvé* outlines two broad normative principles. First, it suggests punishment will not be constitutionally permissible if it treats prisoners as “temporary outcasts” from Canadian rights protection.⁷³ According to *Sauvé*, punishment that temporarily exempts prisoners from constitutionally protected rights has “no place in a democracy built upon principles of inclusiveness, equality and citizen participation.”⁷⁴ While *Sauvé* recognizes that limiting certain *Charter* rights through incarceration is both justifiable and necessary, it is also clear that inmates retain their residual *Charter* rights while incarcerated. Indeed, the principle that convicted felons are sent to prison as punishment not for punishment runs throughout the majority’s analysis in *Sauvé*, reflecting the core ideas emphasized by Correctional Law Review Working Group, a group tasked with revising the CCRA to ensure constitutional compliance after the *Charter* came into force. The Working Group’s operational statement establishes the “retained rights” principles as a cornerstone of its correctional philosophy, and states that “inmates retain all of the rights of a member of society, except those that are necessarily removed or restricted by the fact of incarceration.”⁷⁵

The majority further held that punishment will only be permissible if it is not imposed arbitrarily, serves a legitimate penal purpose, and is applied

⁷⁰ *Ibid* at paras 49-51.

⁷¹ Parkes, “Prisoners’ *Charter*?”, *supra* note 15 at 242.

⁷² *Bacon*, *supra* note 20 at para 315.

⁷³ *Sauvé*, *supra* note 21 at para 40.

⁷⁴ *Ibid* at para 41.

⁷⁵ The Working Group’s recommendations further make clear that inmates should be entitled to *Charter* rights while in prison, and that the “the only justifiable limitations [on inmate rights] are those that are necessary to achieve a legitimate correction goal, and that are the least restrictive possible.” See *Criminal Law Review Working Paper No 5*, at 5-6, cited in Jackson, *Justice Behind*, *supra* note 32 at 64.

in ways that bring inmates within the “protective umbrella of the *Charter*”.⁷⁶ It held that while “Parliament may limit constitutional rights in the name of punishment” it cannot simply decide that a “particular class of people for a particular period of time will completely lose a particular constitutional right.”⁷⁷ The Court explained that subjecting inmates to such “unmodulated deprivation” would be “tantamount to saying that the affected class is outside the full protection of the *Charter*.”⁷⁸

This principle is helpful in assessing the legalities of solitary confinement, and in scrutinizing the Management Protocol. The Court’s statements that unmodulated deprivations effectively remove inmates from *Charter* protection are instructive, and direct the focus of analysis to the *nature* of the deprivation at hand. This approach is consistent with the courts’ assessments of solitary confinement to date. In *R v Olson*, for example, the Ontario Court of Appeal ruled that solitary confinement “is not, per se, cruel and unusual treatment”, but also indicated that the legalities of the practice will hinge on whether it is “so excessive as to outrage the standards of decency”.⁷⁹ In *Bacon*, the British Columbia Supreme Court similarly held that “whether or not solitary confinement, in itself, is cruel and unusual punishment depends on what ‘compensating efforts are made by the correctional authorities’.”⁸⁰ The Court reasoned that, “long periods of solitary confinement without mitigating or compensating efforts by correctional authorities may qualify as ‘cruel and unusual’ treatment” and further emphasized that where additional deprivations are imposed, the treatment amounts to “cruelty by any measure”.⁸¹ In light of these statements, *Sauvé’s* focus on the unmodulated nature of the deprivation can be cited to distinguish between segregation practices that limit *Charter* rights and segregation practices that usher their effective denial.

By subjecting prisoners to extreme isolation orders resulting in effective denials of prisoner rights, the Management Protocol marshaled a form of punishment to the unmodulated deprivations deemed unconstitutional in *Sauvé*. Inmates placed on the Protocol were forced to endure conditions of unmitigated deprivation. S.L.N., for example, was placed on the Protocol between 2005 and early 2010, and maintained at its most stringent stage for more than two years.⁸² During this time, she was isolated for twenty-three hours a day, had limited access to medical and psychiatric treatment, was unable to move within the prison without three guards in attendance and the

⁷⁶ *Sauvé*, *supra* note 21 at para 37.

⁷⁷ *Ibid* at para 46.

⁷⁸ *Ibid*.

⁷⁹ *Olson*, *supra* note 18.

⁸⁰ *Bacon*, *supra* note 20 at para 317.

⁸¹ *Ibid* at para 316.

⁸² *SLN*, *supra* note 2 at para 44.

use of handcuffs and shackles, and disallowed from participating in the very programs designed to encourage her rehabilitation.⁸³ The British Columbia Supreme Court recognized that this extreme deprivation did little to advance S.L.N.'s rehabilitation, and cautioned that the Protocol is "entirely capable of inflicting great damage on those to whom it is applied."⁸⁴

BobbyLee Worm, another First Nations woman, was kept on the Management Protocol for almost four years, and held in conditions of extreme isolation with minimal access to rehabilitative services, medical treatment, or Aboriginal programming.⁸⁵ As a result of her time on the Management Protocol, Ms. Worm showed "significant signs of psychological deterioration attributable to being segregated for an extended period of time."⁸⁶

Renée Acoby, another First Nations woman, was placed on the Management Protocol from its introduction in 2003 until its cancellation in 2011. She was also subject to unmitigated isolation, and oppressive conditions of confinement. Describing the punitive conditions imposed on Acoby during her time on the Protocol, journalist Marion Botsford Fraser writes:

Some aspects of the daily reality of the Protocol seem absurd, picayune. According to Acoby, she has in the past had to earn her way to more than ten squares of toilet paper, and has been required to clean her cell with a face cloth and hand soap until she earned the privilege of a mop, a broom, and real cleaning fluids. For several months at a time, she says, meals were brought to her cell in paper cones, "like Dixie cups." She has been prohibited from brushing her teeth more than once a day. And she has been told that she must not use profane language for thirty days. (Her response was to swear a blue streak for several days, until the condition was withdrawn.)⁸⁷

In addition to this routine humiliation, Acoby was also never informed of how long she would spend on the Management Protocol, and thus forced to contend with, what Michael Jackson describes as, the "ultimate horror".⁸⁸ Jackson explains:

People cannot tolerate a situation in which there seems to be no escape... If Acoby feels there is no escape and, knowing her own limitations, fears she cannot put together a month or two of good behaviour without some infraction that sends her back to the previous phase, then she is in a situation where there is inescapable pain and inescapable punishment.⁸⁹

The nature and severity of the punishment imposed by the Management

⁸³ *Ibid.*

⁸⁴ *Ibid* at para 63.

⁸⁵ *BCCLA*, *supra* note 10.

⁸⁶ *Ibid* at para 22.

⁸⁷ Fraser, *supra* note 11.

⁸⁸ *Ibid* (interviewing law professor Michael Jackson about Ms Acoby's time on the Protocol).

⁸⁹ See also *Arbour Report*, *supra* note 32 at 103 (stating, "prolonged segregation is a devastating experience, particularly when its duration is unknown at the outset and when the inmate feels that she has little control over it").

Protocol was fundamentally unmodulated. The Protocol did not comply with the retained rights principle, and temporarily outcast the women placed upon it from the sphere of constitutional protection contrary to the principles set out in *Sauvé*.

The second normative principle outlined in *Sauvé* provides that punishment should not be imposed to further marginalize Aboriginal inmates. The majority makes clear that policies that perpetuate the marginalization of disadvantaged populations cannot be tolerated in a corrections system that values the inherent worth and value of every individual. These statements may similarly be read for their normative value, and help illuminate the problem of Aboriginal over-incarceration outside the context of sentencing.⁹⁰ *Sauvé* warns against “the cost of silencing the voices of incarcerated Aboriginal peoples” since doing so would send the wrong message that Aboriginal peoples are less valued in Canadian society.⁹¹ It further cautions against implementing punishment protocols that communicate to “an Aboriginal person suffering from social displacement” that he or she is “an unworthy outcast” and prescribes that

⁹⁰ See *R v Gladue*, [1999] 1 SCR 688, 133 CCC (3d) 385 (identifying the overrepresentation of Aboriginal people in Canadian prisons as a “crisis in the Canadian criminal justice system” and outlining a framework through which to address this problem); *R v Ipeelee*, 2013 SCC 13, [2012] 1 SCR 433 (clarifying the application of the *Gladue* framework). Despite attempts to address Aboriginal over-incarceration, the problem persists. In a report released in 2012, the Office of the Correctional Investigator reported that while Aboriginal peoples comprise roughly 3.8% of the Canadian population, roughly 23.2% of the total inmate population serving federal sentences is of Aboriginal descent. That same report documented a 37.3% increase in the incarcerated Aboriginal population over the last decade. The report further concluded that the disparity between Aboriginal and non-Aboriginal offenders “continues to widen on nearly every indicator of correctional performance,” given that Aboriginal peoples are more likely to be classified as high risk, are over-represented in maximum security institutions and under-represented in community supervision populations, serve disproportionately more of their sentence behind bars before first release, are more likely to return to prison on revocation of parole, and are disproportionately involved in institutional security incidents, use of force interventions, segregation and self-injurious behaviour. As the Report further indicates, Aboriginal women are consistently overrepresented in Federal prisons as compared with Aboriginal men. For example, between 2001-2002 and 2011-2012, the federally incarcerated Aboriginal women population increased by 85.7%. See Canada, Correctional Investigator of Canada, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act, Final Report* (Ottawa: Public Works and Government Services Canada, 2012), online: <www.oci-bec.gc.ca/cnt/rpt/pdf/oth-aut/oth-aut20121022-eng.pdf> [Correctional Investigator, *Spirit Matters*]. See also Public Safety Canada, *Corrections and Conditional Release Statistical Overview: Annual Report 2011* (Ottawa: Public Safety Canada, 2011). As numerous critics have argued, this staggering rise in incarceration rates speaks of only one dimension of discrimination experienced by federally incarcerated Aboriginal women. See Patricia Monture-Angus, “Considering Colonialism and Oppression: Aboriginal Women, Justice and the ‘Theory’ of Decolonization” (1999) 12 *Native Studies Review* 63; Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Sumach Press, 2000); Mary Ellen Turpel, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” (1993) 6 *CJWL* 174. For an analysis of the intersections between Aboriginal women’s experience as gendered and racialized subjects, see Patricia Monture-Angus, “Aboriginal Women and the Application of the Charter” in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 131-51.

⁹¹ *Sauvé*, *supra* note 21 at para 48 and 60. The Court’s statements gain particular significance when viewed against the history of Aboriginal disenfranchisement in Canadian law, and the fact that Aboriginal peoples were denied the right to vote until 1960 specifically because they were regarded as less valued members of Canadian society. See Canadian Human Rights Commission, *Human Rights in Canada: A Historical Perspective*, online: <www.chrc-ccdp.ca/en/browseSubjects/votingRights.asp>.

corrections policies should be applied to recognize and attend to the fact that “Aboriginal peoples in prison have unique perspectives and needs.”⁹²

As noted above, the Protocol was disproportionately applied against Aboriginal women, which is perhaps not surprising given that Aboriginal women are disproportionately classified as maximum-security offenders.⁹³ Critics have long pointed to core problems with the Custody Rating Scale used to classify a prisoner’s security level.⁹⁴ Studies suggest that the Custody Rating Scale classification scheme often labels non-violent Aboriginal women as requiring maximum-security incarceration because of factors like substance abuse, a history of family violence, or mental incapacity or imbalance, all of which elevate risk classification.⁹⁵ For example, in a study assessing the underlying assumptions and existing practices of classification and assessment in federal women’s prisons, Kelley Hannah-Moffat and Margaret Shaw conclude that the risk-based classification scheme fails to adequately consider minority ethno-cultural and female populations.⁹⁶ Indeed, the Custody Rating Scale has proven ill equipped to address the specific circumstances of Aboriginal women.⁹⁷ As Allison Campbell notes, the “very structure of the security classification system causes Aboriginal women to receive a higher score on the [Custody Rating Scale], although it likely has little to do with

⁹² *Sauvé*, *supra* note 21 at para 48 and 60.

⁹³ See Correctional Investigator, *Spirit Matters*, *supra* note 90 at para xiii. See also Aboriginal Corrections Policy Unit, Public Safety Canada, *Marginalized: the Aboriginal Women’s Experience in Federal Corrections* by Mandy Wesley (Ottawa: Public Safety Canada, 2012) at 33, online: <www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/mrgnlzd-eng.pdf> (indicating that Aboriginal women tend to be segregated more frequently and for longer periods of time than non-Aboriginal women); Canadian Association of Elizabeth Fry Societies, *10th Anniversary of the Arbour Commission Report* (2006) at 3, online: <www.caefs.ca/wp-content/uploads/2013/04/10th-Anniversary-of-the-Arbour-Commission-Report.pdf> (pointing to the “over-representation of Aboriginal women in maximum security” and stating that as of 2006, although Aboriginal women accounted for only 3% of the female population of Canada, accounted for 46% of the women classified as maximum security).

⁹⁴ See Commissioner’s Directives 505, Security Classification of Inmates, cited in Allison Campbell, *Federally Sentenced Women and Security Classification* (2006) at 2, online: Prison Justice <www.prisonjustice.ca/politics/security_classification.pdf>. For an interesting analysis of the “conceptual gridlock” underpinning the debate about gender and risk assessment classification, see e.g. Kelly Hannah-Moffat, “Gridlock or Mutability: Reconsidering ‘Gender’ and Risk Assessment” (2009) 8:1 *Criminology and Public Policy* 209.

⁹⁵ See *Arbour Report*, *supra* note 32. See also Native Women’s Association of Canada, *Federally Sentenced Aboriginal Women Offenders: An Issue Paper* (June 2007), online: Labrador and Aboriginal Affairs Office <www.laa.gov.nl.ca/laa/news/pdf/nwac-federally.pdf>.

⁹⁶ Kelly Hannah-Moffat & Margaret Shaw, *Taking Risks: Incorporating Gender and Culture into the Classification and Assessment of Federally Sentenced Women in Canada* (March 2011) at vii, online: Government of Canada <www.publications.gc.ca/collections/Collection/SW21-66-2001E.pdf>.

⁹⁷ The problems with the Custody Rating Scale persist notwithstanding that the Scale is designed to be gender responsive. For a critique of gender responsive penal policies, see Kelly Hannah-Moffat, “Sacrosanct or Flawed: Risk, Accountability and Gender-Responsive Penal Politics” (2010) 22:2 *Current Issues in Criminal Justice* 193 (arguing *inter alia* that gender responsive penalty is “situated within a narrow politics of difference that posits an essentialist characterization of women as relational, thereby resurrecting past debates about the politics of difference”). See also Joane Martel, “Women in the ‘hole’: The Unquestioned Practice of Segregation” in Kelly Hannah-Moffat & Margaret Shaw, eds, *An Ideal Prison? Critical Essays on Women’s Imprisonment in Canada* (Halifax: Fernwood Publishing, 2000) 130 (analyzing the gendered impact of solitary confinement).

their risk to society.”⁹⁸ Calling the integrity of this classification scheme into question, Campbell argues:

The simple fact that over one-third of women classified as maximum-security are Aboriginal calls into question the basis and assumptions on which the CSC’s perception of risk is evaluated... Aboriginal women and men come into conflict with the law already distrustful of a system that in many ways was put in place to continue to colonize and oppress them. They come to this system already well versed in how to subvert it, to resist it, to challenge its authority over their lives. Aboriginal women in the criminal justice system are more likely to be classified as maximum security because of the violence they experience outside the prison walls, and because of their resistance strategies inside them.⁹⁹

As Campbell concludes, because of its failure to consider criteria relevant to the specific circumstances of female Aboriginal offenders, the security classification system often yields skewed assessments that further marginalize Aboriginal women in Canadian prisons.¹⁰⁰

The Management Protocol was applied based on criteria that have long been recognized as disadvantageous to Aboriginal women, and without sufficient regard for their specific circumstances and needs. Since women placed on the Protocol were also largely denied the opportunity to partake in Aboriginal programming, the Protocol only compounded and further exacerbated existing disparities in the Canadian criminal justice system. It is here that the incongruence between the core principles outlined in *Sauvé* and the Management Protocol’s application becomes most clearly visible. By subjecting Aboriginal inmates to extreme bouts of deprivation and isolation for years at a time, and restricting their access to ordinary group-based rehabilitative programs and Aboriginal programming, the Protocol sent a clear message to inmates like S.L.N., BobbyLee Worm and Renée Acoby that they were temporarily cast out from Canadian rights protection.

The stories of the women placed on the Management Protocol reveal that the Protocol did nothing to bring inmates within the protective umbrella of the *Charter*, and in fact ousted some that previously had access to *Charter* protection. The punishment marshaled by the Protocol was unmitigated and punitive, and resulted in the effective denial of *Charter* rights. The Protocol was also applied without due regard to the unique needs of the Aboriginal women placed upon it. To this extent, the Management Protocol bears a strong resemblance to the unmodulated forms of deprivation placed outside the scope of constitutional legitimacy by *Sauvé*.

⁹⁸ Campbell, *supra* note 94 at 6.

⁹⁹ *Ibid* at 5.

¹⁰⁰ *Ibid*. See also Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (Ottawa: Canadian Human Rights Commission, 2003), online: <www.chrc-ccdp.ca/sites/default/files/fswen.pdf> (analyzing the treatment of federally sentenced women, and urging for a move away from a “one-size-fits-all” approach to corrections).

That the Management Protocol was implemented so soon after the release of the *Sauvé* decision, and in apparent non-compliance with its terms, points to a troubling gap between the progressive stance on prisoner rights outlined in this decision, and the subordination of these rights in the daily administration of corrections. This gap can be attributed to a range of factors, for example, limited legal aid funding for prison litigation,¹⁰¹ ineffective accountability and oversight,¹⁰² or a tendency among Canadian courts to renege responsibility to monitor prisoner rights and defer instead to prison officials.¹⁰³ To date, *Sauvé's* potential in bridging this gap and addressing core problems with the law and practice of administrative segregation has not been effectively realized, despite a pressing need for judicial guidance in this regard. The core principles outlined in *Sauvé* – that punishment must not be applied in an unmodulated manner to exclude inmates from rights protection or to further marginalize Aboriginal offenders – have clear application outside the voting rights context. These principles may be read as foundational to the broader “statement of constitutional and carceral theory” outlined in this decision, and cited to scrutinize the unmodulated implementation of solitary confinement regimens like those imposed through the Management Protocol.

IV. Conclusion

In the wake of sweeping reforms which are scaling back protections for prisoners in Canada, the gap between *Sauvé's* progressive stance on prisoner rights protection and the record of their enforcement has widened. The use of solitary confinement is growing, with reports of more than 8,700 admissions

¹⁰¹ For an analysis of legal aid barriers in federal settings see Department of Justice Canada, *Study of the Legal Services Provided to Penitentiary Inmates by Legal Aid Plans and Clinics in Canada* (Ottawa: Department of Justice Canada, Research and Statistics Division, 2002), online: <www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr03_la10-rr03_aj10/rr03_la10.pdf> (documenting difficulties prisoners experience in accessing legal services, and examining approaches for addressing these difficulties). See also Debra Parkes et al, “Listening to their Voices: Women Prisoners and Access to Justice in Manitoba” (2009) 26 Windsor Yearbook of Access to Justice 85 (analyzing how limited legal aid funding creates access to justice barriers in provincial settings).

¹⁰² For discussion of these barriers see Debra Parkes & Kim Pate, “Time for Accountability: Effective Oversight of Women’s Prisons” (2006) 48 Can J Crim & Crim Jus 251; Ivan Zinger, “Human Rights Compliance and the Role of External Prison Oversight” (2006) 48 Can J Crim & Crim Jus 127. For an analysis of the history of independent adjudication in the context of administrative segregation see Michael Jackson, “The Litmus Test of Legitimacy: Independent Adjudication and Administrative Segregation” (2006) 48 Can J Crim & Crim Jus 157.

¹⁰³ For an example of this tendency see *R v Shubley*, [1990] 1 SCR 3, 52 CCC (3d) 481. See also Parkes, “Prisoners’ Charter?”, *supra* note 15 at 658 (stating that “the *Shubley* majority shows a substantial degree of deference to the Ontario government’s characterization of the internal discipline process”); Allan Manson, “Solitary Confinement, Remission and Prison Discipline” (1990) 75 Crim Rep (3d) 356 at 357 (stating that the majority’s decision “not to inquire more carefully into the factors of imprisonment does not do justice to the expanded function of the judiciary in the post-*Charter* era”); Kerr, *supra* note 18 (describing patterns of judicial deference to prison administrators in Canada and suggesting that penal law has been slow to adapt to modes of legal analysis established under the *Charter*).

to segregation cells in federal penitentiaries in 2012, an increase of about 700 inmates in a five-year period.¹⁰⁴ These figures are especially alarming given that Aboriginal inmates are disproportionately subjected to solitary confinement, and account for roughly 31% of all segregation cases.¹⁰⁵ In the midst of this regression, it is important to take heed of Louise Arbour's resounding call to "resist the temptation to trivialize the infringement of prisoners' rights as either an insignificant infringement of rights, or as an infringement of the rights of people who do not deserve any better."¹⁰⁶ As Arbour reminds, "[w]hen a right has been granted by law, it is no less important that such right be respected because the person entitled to it is a prisoner."¹⁰⁷ Resisting the temptation to trivialize the infringement of prisoner rights is a necessary step to ensure *Charter* compliance in corrections policy. When the legalities of solitary confinement practices next come before the courts, a more robust integration of *Sauvé's* normative principles can serve a useful tool in ensuring the *Charter's* protective reach more effectively permeates the prison walls.

¹⁰⁴ Correctional Investigator, *Segregation*, *supra* note 36.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Arbour Report*, *supra* note 32 at 101.

¹⁰⁷ *Ibid.*