Feature

Canadian prisons face new legal challenges over mental health

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For the **Mandela Rules** see https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf

A set of five new Canadian judicial rulings have sharply censured the solitary confinement of many people with mental illnesses in Canada's federal prisons, which employ 248 psychologists and 43 psychiatrists. A sixth ruling has also condemned similar practices in prisons operated by the provincial government in Ontario, Canada's most populous province.

All these rulings seek to end the solitary confinement of people with mental illnesses in Canadian prisons while firmly restricting its use for all other prisoners, on the basis that it inflicts mental health harms that often cannot be diagnosed until after the damage is already done.

Jennifer Metcalfe, director of Prisoners' Legal Services, a Vancouver-based advocacy group, says her group has received 773 calls from inmates in prisons operated by Canada's federal government over the past year and 661 calls from inmates in prisons operated by British Columbia's provincial government. She has heard numerous reports of "prisoners being held in separate confinement units locked up 22 or 23 h per day for weeks" despite having been diagnosed with severe mental illnesses.

Most of these prisoners have suffered "what the United Nations considers to be either torture or cruel treatment," Metcalfe states, citing the UN Standard Minimum Rules for the Treatment of Prisoners, also known as the Nelson Mandela Rules. These prohibit solitary confinement "in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures", and stipulate that solitary confinement should be used for no more than 22 h per day for no more than 15 consecutive days for all other prisoners, subject to independent review. "Prison administrations shall not sanction any conduct of a prisoner that is considered to be the direct result of his or her mental illness or intellectual disability," the Rules stress.

In February 2017, the Canadian College of Family Physicians endorsed the Mandela Rules. Metcalfe is now pressing the Canadian Medical Association, the Canadian Psychiatric Association, and the Canadian Association of Psychologists to also endorse them. Canadian judges, she notes, have relied on the Rules extensively in their recent rulings against the governments of Canada and Ontario.

Litigation efforts to reshape Canada's solitary confinement regime began to deliver results in December 2017, when Ontario Superior Court judge Frank Marrocco ordered the Canadian government to provide independent review within 5 working days for all prisoners in solitary confinement. In reaching this ruling, Marrocco bluntly rejected evidence from an American psychologist who served as the Canadian government's sole clinical witness in support of its solitary confinement practices, which are loosely overseen by numerous psychologists and psychiatrists.

Michael Rosenberg, the Toronto-based lawyer who argued the case against the government on behalf of the Canadian Civil Liberties Association, notes that Marrocco pointed out in his ruling on the government's practice of solitary confinement that "no nurse or doctor currently working with segregated prisoners in Canadian Penitentiaries testified that practice was benign in some or most cases."

Marrocco's ruling was swiftly reinforced in January 2018, when British Columbia Supreme Court judge Peter Leask echoed Marrocco's finding while similarly rejecting evidence from clinical experts who defended the Canadian government's practices. "The main body of scientific opinion on the subject of solitary confinement is that it is psychologically harmful to inmates", Leask ruled. The causal link between solitary confinement and suicide "was a matter of common sense" he added. Another ruling against the Canadian government followed in March, 2019, when Ontario Superior Court judge Paul Perell ordered the government to pay CAD$20 million in damages to inmates who underwent solitary confinement.

Additionally, in March 2019, Ontario Court of Appeal judge Mary Lou Benotto ruled that solitary confinement beyond 15 days is cruel and unusual punishment or treatment. She imposed a 15-day limit on the practice with no exceptions. Benotto also found that, in principle, it would be cruel and unusual punishment or treatment to subject mentally ill inmates to any period of solitary confinement, but she called for additional evidence to identify the clinical requirements for exclusion. "This was a landmark decision that changed the conversation on solitary confinement in Canada", says Rosenberg. The Canadian government is seeking to appeal Benotto's ruling to Canada's Supreme Court.

Lawyers for the Canadian government have attempted to deter each of these judicial rulings by arguing that the government has drafted new prison administration legislation that will address all the legal complaints against solitary confinement. However, some observers doubt the new legislation will bring the government into compliance with Canada's Charter of Rights. Ivan Zinger, a lawyer and psychologist who serves as the government's Correctional Investigator, has warned lawmakers that, although the government's proposed legislation might mean that "clinical decisions could not be overruled or ignored by non-medical prison staff", it "eschews the need for procedural safeguards of any kind", and "may even result in an increase in the use of restrictive confinement."

Segregated inmates spend 23 h per day alone in their cells furnished with only a bed and a toilet, the Correctional

Investigator noted in a 2015 report, and “the majority of interactions with correctional staff, nurses, and psychologists are conducted through the food slot of the segregation cell door.”

In a ruling on April 26, 2019, the Ontario Court of Appeal rejected the federal government’s claims about its new legislation and ordered it to establish a solitary confinement review system fully independent from prison administrators by June 17. If the government does not comply, it will no longer have a legal basis for any use of solitary confinement whatsoever, explains lawyer Michael Rosenberg.

Scott Bardlsey, a spokesperson for Canada’s Ministry of Public Safety, says that the use of solitary confinement has been halved since 2014, and prison officials are now working “to recruit and train new staff, make the necessary infrastructure changes and establish the external independent review process.” The new law proposed by the government will involve hiring approximately 950 new staff, in part to help better manage prisoners’ mental health needs, Bardsley claims.

The new batch of court rulings decreeing an end to Canada’s solitary confinement practices addresses a deep-rooted historical problem: between 1965 and 1980, 70% of the beds in Canadian psychiatric hospitals disappeared during a wholesale “deinstitutionalisation” process, in which prisons in effect became substitute homes for large numbers of people with mental illnesses. Partly as a consequence, the prevalence of mental health issues in Canada’s federal prisons is now estimated to be 2 to 3 times higher than the norm for the general population. In this context, solitary confinement has long been a principal punishment method to “manage behaviours associated with mental illness”, the Correctional Investigator charges. To back that statement, the investigator notes that 69% of prisoners flagged with mental health issues in maximum security federal prisons had been in long-term solitary confinement in the preceding 6 months in 2015, with an average stay of 81 days.

Judicial censure of the government’s practices has been escalating for decades. In 1996, a federal investigation headed by Louise Arbour, an Ontario judge who went on to serve on Canada’s Supreme Court and, afterwards, as chief prosecutor of war crimes before the International Criminal Tribunals for Rwanda and UN High Commissioner for Human Rights, found that the systematic use of prolonged solitary confinement was “not in accordance with law and policy” and “was a form of punishment that courts would be loath to impose, so destructive are its consequences.”

In 2010, British Columbia Supreme Court judge Mark McEwan found “cruel and unusual treatment” in the use of solitary confinement in a Vancouver-area prison. “The integrity of the judicial process is seriously undermined by a system that allows the time spent in pre-trial detention to be a lawless interval during which the remanded inmate’s psychological integrity is threatened”, McEwan wrote.

In 2013, the jury in an Ontario coroner’s inquest found that the suicide in federal custody of a young woman with a mental illness (who was originally detained for throwing crabapples at a postal worker) was actually a homicide in which federal prison guards were ordered not to intervene. The jury delivered 104 recommendations, including abolishing indefinite solitary confinement and prohibiting placing female inmates in solitary confinement for more than 15 days and for more than 60 days in a calendar year.

In 2013, after the Ontario Human Rights Commission investigated the case of a woman who alleged she was placed in segregation for approximately 210 days and experienced brutal treatment because of her gender and mental health disabilities, the government of Ontario agreed to prohibit the use of segregation for any individuals with mental illness, except as a last resort. But 4 years later, the Commission alleged that Ontario had failed to meet these legally binding commitments. In 2018, the Ontario government was legally ordered to abide by its 2013 commitment.

Alongside the salvo of lawsuits against the federal government over its solitary confinement practices, the governments of Canada’s three most populous provinces—British Columbia, Ontario, and Quebec—have also been sued for their use of solitary confinement in their provincial jails. A September 2018 ruling against the Government of Ontario described the treatment of Adam Capay, a young Indigenous man with severe mental illness who was held in solitary confinement for 1647 days as a “shocking and outrageous” violation of the Canadian Constitution. Capay was charged with killing a fellow prisoner. “The evidence establishes that the correctional officials did not consider any mitigating measures to alleviate the impact of segregation on this mentally ill accused,” Judge John Fregeau ruled. “The treatment of the accused was, in my opinion, outrageous, abhorrent, and inhumane.” In his ruling, Fregeau noted that Capay had been seen three times by a psychologist and 31 times by a psychiatrist for sessions amounting to just over 10 hours between June 4, 2012, and Dec 6, 2016. Capay was held in solitary confinement because of his mental health problems throughout this period. Despite this, however, Fregeau noted that Capay received “no substantive mental health treatment” according to testimony from John Bradford, a forensic psychiatrist.

After assessing Capay and closely reviewing his clinical file, Bradford testified that key clinical needs to alleviate profound harms stemming from Capay’s prolonged solitary confinement were disregarded by prison officials and clinicians alike. Fregeau stayed the murder charge against Capay on the basis that the murder charge against him very

possibly stemmed from psychotic behaviour on Capay's part that resulted from actions taken by prison officials and clinicians. "The absence of physiological data and contemporaneous psychiatric observation and assessment, or even the opportunity for laypersons to interact with Mr Capay and to observe his interactions with others, is a significant constraint on any assessment of criminal responsibility today," Bradford concluded. His testimony, severely questioning the actions of prison clinicians and officials, was not challenged in court.

Paul Webster

Profile

Martha Wadsworth: battling social injustice for the sake of youth mental health

Poverty in childhood sets the stage for many mental health problems, in both young people and adults—yet it affects different people in diverse ways. Why do some individuals facing challenges early in life succeed and thrive, whereas others who face the same early trials fall prey to mental health problems and ongoing challenges? This conundrum arose early for Martha Wadsworth, currently Professor of Psychology and co-director of the Clinical and Translational Science Institute Community Engagement Research Core at Pennsylvania State University (PA, USA), and set her on her research journey pulling together the strands of social justice education, cultural identity, and the biology of stress to try to understand and address the complexities of paediatric psychology in the face of poverty.

Growing up poor was part of Wadsworth's own life and set the scene for her later research interests. She was born in a small town in western Massachusetts (USA) to parents who desired to but could not afford to go to college themselves. Wadsworth's father died when she was 4 years old, leaving her mother with the difficulties of raising seven young children with very little money, but she became an early role model for her daughter, challenging traditional gender roles and managing to send all of her children to college. A chance class in psychology sparked her interest in the developmental trajectories of psychopathology, and investigating the possible reasons for people setting out on different paths in childhood.

"I always knew I wanted a career that involved helping people, especially children and families facing economic adversity", she says. "Undergraduate gender studies courses opened my eyes to powerful social forces such as male privilege and economic injustice and set me on a quest to learn more about how social inequalities shape our lives, and how science can be brought to bear on the need to prevent youth mental health problems."

Her PhD dissertation showed that young people use a wide array of strategies to cope with poverty-related stress that have consequential mental health implications. After this, her studies expanded to the family system, to better understand the developmental pathways to mental health and the role that parents often play in protecting their children from poverty-related stress while simultaneously struggling with the same stress themselves.

Wadsworth's research involves searching for protective factors that can be harnessed in prevention and treatment of mental health problems with children and families in poverty. She is most proud of developing the Adaptation to Poverty-related Stress Model, which has served as the basis for several programmes aimed at building strengths and preventing mental health problems in children and adults living in poverty. This model of how low-income families cope with and adapt to psychosocial stress shifted the focus of research and intervention away from deficits that need to be fixed and onto familial and cultural strengths that can be leveraged to promote positive mental health. She has also reframed maladaptive coping and other behaviours that individuals often adopt in the face of extreme stress as functional adaptations that stem from living in inhospitable environmental conditions. Other studies that she has worked on include one that examined relationships between family-level poverty-related stress and psychological symptoms, and showed that family-based coping interventions can promote resiliency and break the cycle of economic stress.

But Wadsworth acknowledges that doing such complex intervention work has many challenges; the social justice approach to preventing mental health problems in children and families is not mainstream psychology yet. Wadsworth has also struggled with a bad case of imposter syndrome. "I lacked a lot of the cultural capital and knowledge of the hidden curriculum of academia that more affluent students came to college with. It was often hard to relate to wealthy, well travelled, culturally experienced peers." Entering the professional world did not lessen her feelings of being an imposter, but perhaps strengthened her belief that diversity in academia is important, and wider viewpoints are needed. Her main inspiration, apart from her mother, was her college mentor George Albee, one of the fathers of primary prevention and former president of the American Psychological Association. He was the first academic to

For more on the **adaptation to stress model** see Wadsworth ME et al. *Am J Community Psychol* 2011; **48:** 257–71

For more on the **study of maladaptive coping** see Wadsworth ME. *Child Dev Persp* 2015; **9:** 96–100

For more on the **study of resiliency processes** see Wadsworth ME and Santiago CDC. *J Fam Psychol* 2008; **22:** 399–410