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by Garrett Zehr | March 7, 2018

Recent landmark court decisions in cases challenging solitary confinement in Canadas federal penitentiariescouldreverberate beyond Canadian prison walls. In twocases launched by prison justice and civil liberties organizations, federal courts found solitary confinement as it is practiced today to be unconstitutional. The rulings would force significant changes in the Canadian penal systembut incarcerated people and their advocates will have to wait until their impact is felt. The courts granted the federal government a year to make law and practice conform to the rulings. And in a move that surprised some advocates, Canadas Liberal government gave notice, two weeks ago, of its plans to appeal.

The rulings in both casesapplyto Canadian federal penitentiaries, which hold all people serving sentences of two years or more for any type of offense. With about 15,000 of the nations 40,000incarcerated people, the federal prison systemin Canada holds a far higher proportion of the total prison population than the federal system in the United States (which holds less than 10 percent of the total 2.2 million U.S. prisoners).

The most significant decision came from a judge in British Columbia, who ruled in January that sections of the Corrections and Conditional Release Act are unlawful for failing to provide a process for independent review of solitary placements by an entity from outside the correctional system, and for depriving individuals the right to legal counsel at review hearings. Perhaps most significantly, the court found indefinite solitary unconstitutional as well.

We were thrilled with the decision, said Caily DiPuma, acting litigation director with the British Columbia Civil Liberties Association, one of the organizations that launched the court case. We sort of feel that it is groundbreaking. The court here issued the strongest prohibition of the practice of solitary confinement in common law history, she said in an interview with Solitary Watch.

The 162-page ruling sets a decisive tone by opening with a quote from Canadas Office of the Correctional Investigator, a long-time advocate for reforming Canadas solitary practices: Segregation has been described as the most onerous and depriving experience that the state can legally administer in Canada.

The judgment concludes that the law violates the Canadian Charter of Rights and Freedoms, Canadas constitutional bill of rights. Specifically, it infringes on Section 7, which guarantees that everyone has the right to life, liberty, and security of the person, as well as section 15, which guarantees the right to equal protection and equal benefit of the law without discrimination. The judge ruled that the solitary regime discriminates against Indigenous people and individuals who have mental health issues, both groups that have been significantly over-represented in solitary.

The court made some critical findings, not only about the laws violating sections 7 and 15 of the Charter but around the kind of things the Correctional Service of Canada would have to do in order to rectify the situation, said DiPuma, referring to the agency responsible for managing Canadas federal prisons. For example, the court ruled that any constitutional regime would require time limits to create the pressure to ensure that decisions about alleviating a prisoners segregation were made and implemented promptly. The court said a 15-day limit would be a defensible standard.

The courts findings represent a departure fromearlier decisions on prison issues, according to some legal observers. The decision breaks sharply from the deference that courts have almost invariably shown to prison administrators in the not-so-distant past, wrote Lisa Kerr, assistant professor at Queens University Faculty of Law and an expert in prison law, in an op-ed. The idea that prisoners retain any legal rights at all while incarcerated is relatively new. For much of the 20th century, the hands-off doctrine meant that judges would not intervene in matters of prison administration, she wrote.

In December, an Ontario judge similarly ruled that the federal solitary confinement laws were unconstitutional,though that decision did not go as far as the BC case. The Ontario Superior Court judge declared that the current regimes lack of independent review of decisions to keep individuals in solitary was unconstitutional, but unlike in BC, did not find that an independent reviewer must come from outside the Correctional Service of Canada.

While the Ontario court did recognize many of the harms caused by the practice, including that the harmful effects of sensory deprivation caused by solitary confinement could occur as early as 48 hours after segregation, the judge did not find that this met the threshold of cruel and unusual punishment.

The applicants in that case had been seeking a ban on solitary for young people and individuals with mental illness as well as its use as a form of protective custody, and a proposed limit for everyone else of 15 daysall measures the court rejected. The Canadian Civil Liberties Association (CCLA) is now appealing the Ontario decision, arguing that the Court did not go far enough to impose safeguards. The appeal argues that the legislation violates section 12 of the Charter, which protects against cruel and unusual punishment, a finding that the BC case had also rejected.

It is the British Columbiaruling that the federal governmentplans to appeal.The cabinet minister responsible for overseeing Canadian prisons declined an interview request, but did provide a statement regarding its decision to appeal. Ralph Goodale, the Minister of Public Safety and Emergency Preparedness, cited the two different court rulings, and said it was only prudent to appeal as we begin to seek judicial clarity on the issue.

While the matters unfold before the courts, litigants from both the cases in BC and Ontario have written to the federal government asking them to end the court fight and begin making changes to laws and practices without further delay.Not one but two provincial superior courts have spoken, affording the federal government an opportunity to change course, wrote both the civil liberties groups involved in the litigation. We request the opportunity to discuss next steps with the Attorney General and Minister of Justice, and the Minister of Public Safety and Emergency Preparedness, with a view to avoiding unnecessary litigation and proceeding with a Parliamentary solution.

The Liberal government of Prime Minister Justin Trudeau has had a mixed record on the issue of solitary confinementfar more progressive than even the previous presidential administration in the United States, but still not up to the standards set by the international community, or by the court in British Columbia.

A bill introduced by Liberals in Parliament last June, for example, proposes a number of changes to the solitary confinement law, includinga limit of 21 consecutive days in solitary, which would be reduced to 15 days following a period of 18 months after the legislation passed. However, a senior prison official could extend the time beyond 15 days in individual cases. With regard to independent review, the proposed legislation does not require that the review be from someone outside the prison agency. There is also no ban on solitary for certain vulnerable groups, such as those with mental illness.

Soon after Prime Minister Justin Trudeau was elected in 2015, he had directed his government to implement a series of recommendations around solitary, which was to include a ban on prolonged solitary of more than 15 days and an upper limit of 60 days total per year.Trudeau instructed Justice Minister Jody Wilson-Rayboud that one of her top priorities would be to implement recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness.

The commitment refers to recommendations that came out of the inquest into the 2007 death of a young woman with mental illness who spent more than 1000 days in solitary and died of self-strangulation as prison guards watched from outside her cell. Ashley Smiths death and the inquest that followed, which was very critical of conditions in Canadian prisons, marked a significant moment in the Canadian publics awareness of the issue of solitary and fueled the push for reform. Several other high-profile cases helped keep attention focused on the issue, including that of Edward Snowshoe, a young indigenous man who killed himself in 2010 after 162 days in solitary.

Canadas average daily number of people held in solitary has fallen to under 400 people, from a high of 800 several years ago, according to Correctional Investigator Ivan Zinger. And though there are still thousands of admissions to solitary each year, the average length of stay has fallen from 44 days to 26 days. However, Zinger is concerned that some units that are supposed to offer alternatives to solitary are still highly restrictive, with limited out-of-cell time and little access to programming. He favors legislative reforms of the kind that could be forced by the court decisions.

However, even if the government were to abandon appeals and immediately begin implementing the minimum requirements set out in therulings, some critics are arguing that the proposed changes to do not go nearly far enough.

We will continue to advocate for the Government of Canada to abolish the use of segregation to ensure the well-being and safety of women prisoners and the communities they will inevitably return to, said the Canadian Association of Elizabeth Fry Societies, which works for the rights and well-being of women and girls in the justice system, in a press release following the BC decision.

The complete abolition of solitary also has the vocal support of at least one Canadian politician.What the factual record before the judge shows is that no amount of segregation is safe, wrote Kim Pate, a Canadian Senator and former executive director of the Elizabeth Fry Societies. Why not declare segregation per se an unconstitutional practice amounting to cruel and unusual punishment contrary to our constitution?

Senator Pate also released a statement supporting abolition from Ashley Smiths mother, Coralee Cusack-Smith:Our family cannot believe that the lawyers and the judge are not ensuring an end, not just a limitation, to the use of segregation. Would any of them want to spend even one day in isolation or segregation? she said. Anything but a ban on the use of segregation dishonours Ashleys memory, not to mention the memory of all those who have died since; and it does a disservice to prisoners everywhere.

While the issue winds its way through the courts and the debate continues about whether it represents sufficient reform, advocates are also looking at the impact of the decision beyond Canadian federal prisons.

The precedent set by the court cases do not apply to Canadas provincial jails and remand centres, which is where individuals are held while awaiting trial and where people serve jail sentences of less than two years. These institutions are under the jurisdiction of each Canadian province, with their own laws regarding solitary. There is, however, hope that the recent federal court cases will put pressure on the provincial governments toinstitute reforms as well.

Its our expectation that the provinces are going to see the writing on the wall and see that they are similarly bound by the Charter, says DiPuma. If they dont, then I fully expect legal challenges.

There is also hope that the court cases will have an influence outside Canadas borders.I think the BCCLA case is incredibly significant for Canada, but it is also is going to have resonance in the United States said Amy Fettig, Deputy Director of the National Prison Project with the American Civil Liberties Association, in an interview with Solitary Watch. The use of solitary in U.S. federal and state prisonsis, of course, far more widespread and draconian than in Canada. Indefinite solitary confinement is not uncommon, and all solitary placements are determined by prison staff, with no outside, independent reviews permitted.

Fettig specifically noted how the U.S. Constitutions Eighth Amendment, which prohibits cruel and unusual punishment, isbased in part onevolving standards of decency, which are influenced by other jurisdictions. In addition, she compared the finding that Canadas solitary regime discriminates against Indigenous peoples to the experience of black and brown individuals in American prisons. Up until now there has never been a successful race-based claim in the United States, Fettig said. Certainly, the findings of the judge [in British Columbia] resonate with the problems of disproportionate impact.

Beyond the precedent set by the Canadian court cases, Fettig and other advocates hope that changes in Canadas prisons will create momentum for reform by politicians and prison officials internationally. Having Canada be part of the fray, and be so successful, is really important for the movement globally, she said.The Canadian decisions send a message to the United States that civilized societies dont tolerate the use of solitary confinement.

Garrett Zehr is a Toronto-based legal aid lawyer practicing criminal defense and international human rights law, and a proud union member.

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Wow! This article really brings home the significance of the isuue of Solitary Confinement and how groundbreaking the BC Supreme Court case decision is on a global constitutional and human rights level.

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