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LEGISLATIVE SUMMARY



Bill C-83: An Act to amend the Corrections and Conditional Release Act and another Act

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Lyne Casavant
Maxime Charron-Tousignant

Legal and Social Affairs Division
Parliamentary Information and Research Service

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-83: AN ACT TO AMEND THE CORRECTIONS AND CONDITIONAL RELEASE ACT AND ANOTHER ACT

1 BACKGROUND

Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act,¹ was introduced by the Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness, in the House of Commons on 16 October 2018.

On 23 October 2018, after second reading, the bill was referred to the House of Commons Standing Committee on Public Safety and National Security for study. On 29 November 2018, the Committee made more than 30 amendments to the bill² and tabled a report with two recommendations.³ Moreover, nine other amendments were adopted at report stage in the House of Commons on 26 February 2019.⁴ The bill passed third reading on 18 March 2019. The purpose of the bill is to strengthen the federal correctional system in a number of ways. These include:

- ending administrative segregation and disciplinary segregation;
- creating “structured intervention units”;
- allowing the use of body scanners as a way to prevent the introduction of illegal substances into federal correctional institutions;
- setting out a series of factors that must be taken into account when making any decision affecting an Indigenous offender;
- supporting the professional autonomy and independence of health care professionals;
- establishing a network of patient advocates; and
- facilitating victims’ access to the audio recordings of certain Parole Board of Canada hearings.

One of the objectives of the proposed amendments regarding administrative segregation is to respond to the 2017 decision of the Ontario Superior Court of Justice in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* and the 2018 decision of the Supreme Court of British Columbia in *British Columbia Civil Liberties Association v. Canada (Attorney General)*.⁵ According to these two decisions, which are under appeal and will be examined in greater detail below, certain practices related to the administrative segregation of federal inmates violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (the Charter).⁶

It is important to note that Bill C-83 was introduced more than a year after Bill C-56, An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act, was tabled in the House of Commons on 19 June 2017.⁷ Bill C-56,

which has only passed the first reading stage, proposes to limit the use of administrative segregation and to implement an independent external review process in cases where administrative segregation is maintained beyond certain periods. **Further to an amendment adopted at report stage in the House of Commons, Bill C-83 now provides that an independent external decision-maker determines, at the end of the review process, whether an inmate should remain in a structured intervention unit.**

Lastly, it should be noted that Bill C-83 also makes a change in terminology to a provision of the English version of the *Criminal Records Act* (clause 37).

1.1 INMATE SEGREGATION IN CANADIAN FEDERAL PENITENTIARIES

In Canada, two types of confinement are currently used to isolate⁸ inmates from the general (or mainstream) inmate population. The first type, disciplinary segregation, is used in the case of a serious disciplinary offence.⁹ Under section 44(1)(f) of the *Corrections and Conditional Release Act* (the Act),¹⁰ an independent chairperson appointed pursuant to the *Corrections and Conditional Release Regulations* (the Regulations) may impose disciplinary segregation on an inmate found guilty of this type of offence for a maximum of 30 days with or without restrictions on visits with family, friends and other persons from outside the penitentiary. When an inmate has been convicted of more than one serious disciplinary offence,¹¹ and the sentences are to be served consecutively, the maximum period of segregation is a total of 45 days (section 40(2) of the Regulations). Disciplinary segregation can only be imposed as a punishment for a serious disciplinary offence, by an independent chairperson following a disciplinary hearing. Details on the appointment of independent chairpersons, disciplinary hearing procedures and notice to inmates of disciplinary charges requirements, as well as guidance regarding sanctions, are provided for in the Regulations and Commissioner's Directive 580.

The second type of confinement, known as administrative segregation, is provided for in sections 31 to 37 of the Act. This type of segregation can be either voluntary (requested by the inmate) or involuntary (imposed by Correctional Service Canada [CSC]). Unlike disciplinary segregation, administrative segregation is not considered a punishment. According to the Act, it is a measure of last resort that can be taken only when the institutional head is satisfied that there is no reasonable alternative. The purpose of this type of segregation "is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates" (section 31(1) of the Act). There are only three grounds that can justify confining an inmate in administrative segregation. These are set out in section 31(3) of the Act:

- The inmate poses a threat to the security of the institution or the safety any person.
- The inmate could interfere with an investigation that could lead to a criminal charge or a serious disciplinary offence.
- The inmate's safety would be at risk if the inmate were not segregated.

The conditions of confinement for inmates in administrative segregation are identical to those of inmates in disciplinary segregation. Under section 37 of the Act,

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 contrast to disciplinary segregation, the Act does not prescribe a maximum duration of voluntary or involuntary administrative segregation. CSC is simply required by law to return the inmate to the general inmate population at the earliest appropriate time (section 31(2) of the Act). CSC is also required to regularly conduct hearings to review involuntary administrative segregation cases.

Section 33 of the Act deals in general terms with the initial and regular reviews that are required in cases of involuntary administrative segregation. The requirements for such reviews are set out in sections 19 to 23 of the Regulations. Pursuant to section 20 of the Regulations, the institutional head must review, within one working day after the confinement, the case of an inmate who has been involuntarily confined in administrative segregation and must confirm the confinement, or order that the inmate be returned to the general inmate population. Within five working days, a segregation review board, made up of CSC personnel, must review the case. The board is then required to review the case every 30 days for as long as the inmate is confined in administrative segregation (section 21 of the Regulations). The Regulations also provide for the review of all cases of administrative segregation (voluntary or involuntary) by the head of the region, or by the staff member in the regional headquarters who is designated by the head of the region, at least once every 60 days in order to determine whether the inmate should remain in administrative segregation.

Cases of inmates confined in administrative segregation voluntarily by a designated staff member must also be reviewed by the institutional head within one working day after the confinement to confirm the confinement or order the release of the inmate to the general inmate population (section 23 of the Regulations).

Under the Act, all inmates in administrative segregation must be visited at least once every day by a registered health care professional (section 36(1) of the Act). Furthermore, the institutional head must visit the administrative segregation area at least once every day and, upon request, meet with individual inmates confined in this area (section 36(2) of the Act).

Guidance for the use of administrative segregation can also be found in Commissioner's Directive 709¹² and the Administrative Segregation Guidelines.¹³ These offer more information about the purpose and process of administrative segregation, procedural safeguards, as well as the review and appeals process.

In particular, it is provided that, upon placement in administrative segregation, an inmate shall be informed of the right to legal counsel without delay and shall have a reasonable opportunity to challenge their segregation status. In addition, a mental health professional, or other mental health staff under the supervision of a mental health professional, shall provide a written opinion on the inmate's mental health status within the first 25 days of the inmate's placement in administrative segregation and once every subsequent 60 days.

1.1.1 QUESTIONING INMATE SEGREGATION

Inmates placed in segregation ("solitary confinement") are deprived, to various degrees, of human contact and recreational activities, making the conditions of incarceration in segregation more stringent than for inmates in the general population. As a result, segregation is often considered an extreme form of incarceration, "a prison within a prison."

Since the 1970s, various reports and studies have raised concerns regarding the impact of solitary confinement on the inmates, and compliance and procedural fairness issues. These publications include the following:

- Michael Jackson, *Justice behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary* (1974);¹⁴
- The Honourable Louise Arbour, *Commission of Inquiry into certain events at the Prison for Women in Kingston* (1996);¹⁵
- CSC, Task Force on Administrative Segregation, *Commitment to Legal Compliance, Fair Decisions and Effective Results* (1997);¹⁶
- CSC, Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* (1997);¹⁷
- House of Commons, Standing Committee on Justice and Human Rights, Subcommittee on Corrections and Conditional Release Act, *A Work in Progress: The Corrections and Conditional Release Act* (2000);¹⁸
- Canadian Human Rights Commission, *Protecting their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003);¹⁹ and
- *Coroner's Inquest Touching the Death of Ashley Smith* (2013).²⁰

More recently, the use of administrative segregation has been called into question by two decisions: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* and *British Columbia Civil Liberties Association v. Canada (Attorney General)*. In both cases, the plaintiffs alleged that the administrative segregation provisions of the Act violated certain Charter rights and asked that a declaration of invalidity pursuant to section 52 of the Charter be granted. It is important to note that these cases are not identical and that sometimes distinct arguments were put forward.

In *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, the Ontario Superior Court of Justice found, in its 18 December 2017 decision, that a high degree of procedural fairness is required in involuntary segregation decisions.²¹ In particular, the Court found that the provisions of the Act concerning the review of decisions beyond five working days do not ensure sufficient procedural safeguards under section 7 of the Charter.²² In its decision, the Court held that the institutional head is the authority that both makes and reviews decisions. However, the Court suspended its declaration of invalidity for 12 months. **On 17 December 2018, the Court of Appeal for Ontario extended the suspension of the declaration of invalidity to 30 April 2019.**²³

The Attorney General of Canada did not contest the declaration of invalidity ordered by the Superior Court under section 7 of the Charter. However, on 28 March 2019, the Court of Appeal for Ontario ruled on new arguments and found that placement in administrative segregation for more than 15 consecutive days infringed section 12 of the Charter.²⁴ This provision protects individuals against cruel and unusual treatment or punishment. This new declaration of invalidity was to take effect 15 days from the date of the release of this judgment. On 9 April 2019, the Attorney General of Canada filed an application for leave to appeal to the Supreme Court of Canada, as well as a motion for a stay of execution of the Ontario Court of Appeal's decision.²⁵ The Supreme Court issued a decision on 11 April 2019, approving an interim stay.

In *British Columbia Civil Liberties Association v. Canada (Attorney General)*, the Supreme Court of British Columbia concluded, in its 17 January 2018 decision, that administrative segregation is a form of solitary confinement that places federal inmates at significant risk of serious psychological harm, self-harm and suicide, particularly for those with mental health problems.²⁶ The Court also found that the provisions in question contravened sections 7 and 15 of the Charter. Among the reasons cited in paragraph 609 of its decision, the Court held that these provisions on administrative segregation

- authorize prolonged, indefinite administrative segregation (including for persons with mental health problems and persons with disabilities);
- authorize the institutional head to serve as both judge and prosecutor of his or her own cause;
- provide only for internal review;
- deprive inmates of the right to counsel at segregation hearings and reviews; and
- discriminate against Indigenous inmates.

In this case as well, the Court suspended its declaration of invalidity for 12 months. **On 7 January 2019, the Court of Appeal for British Columbia responded to the government's application to extend this suspension of invalidity by granting an extension to 17 June 2019.²⁷ At the time of writing, no ruling on the merits of the appeal had yet been made by the Court of Appeal for British Columbia.**

2 DESCRIPTION AND ANALYSIS

Bill C-83 contains **43** clauses. The following description examines certain aspects of the bill but does not review each of its provisions. Amendments whose main purpose is to modernize or update the terminology used in the Act are not covered in detail.

Changes to the bill include amendments to sections 4 and 101 of the Act (as amended), which set out the principles that guide CSC and the Parole Board of Canada. Specifically, section 4(c) requires the CSC to use the “least restrictive” measures consistent with the protection of society, staff members and offenders, while section 101(c) states that the Parole Board of Canada make the “least restrictive” consistent with the protection of society.²⁸ This principle is also reiterated in section 28 of the Act (as amended), stating that the penitentiary in which a person is confined shall provide the least restrictive environment for that person, taking into account the factors specified in the Act.

Another change is the addition to section 4(g) of the Act (as amended) of the following factors that CSC’s correctional policies, programs and practices must respect and be responsive to: religious differences, sexual orientation, gender identity and expression, and the special needs of visible minorities.

2.1 ELIMINATION OF THE USE OF ADMINISTRATIVE SEGREGATION AND ITS REPLACEMENT BY STRUCTURED INTERVENTION UNITS

Clause 10 of the bill replaces the provisions of the Act concerning administrative segregation with provisions on the creation of “structured intervention units” (**new** sections 31 to 37.**91**). The use of administrative segregation is thus replaced by these new structured intervention units. However, some of the new provisions described below are similar to what is currently provided for in administrative segregation.

It should be noted that several aspects of this new system will need to be accompanied by corresponding commissioner’s directives and regulations. As a result, it is difficult to assess in detail how structured intervention units will differ from administrative segregation.

2.1.1 STRUCTURED INTERVENTION UNITS (CLAUSE 10)

Under new section 31 of the Act, a structured intervention unit (SIU) is a penitentiary or any area in a penitentiary designated as such by the CSC Commissioner (the Commissioner). According to the government, an SIU will “provide the necessary resources and expertise to address the safety and security risks of inmates who cannot be managed safely within the mainstream inmate population.”²⁹ New section 32(**1**) of the Act reflects these objectives by stipulating two specific purposes, which are to

(a) provide an appropriate living environment for an inmate who cannot be maintained in the mainstream inmate population for security or other reasons; and

(b) provide the inmate with an opportunity for meaningful human contact and an opportunity to participate in programs and to have access to services that respond to the inmate's specific needs and the risks posed by the inmate.

New section 32(2) provides that the “opportunity to interact through human contact” is not mediated or interposed by physical barriers such as bars, security glass, door hatches or screens. If such interactions are mediated or interposed, CSC must record them (new section 32(3)).

As mentioned earlier, pursuant to the Act, the current purpose of administrative segregation is “to maintain the security of the penitentiary or the safety of any person *by not allowing an inmate to associate with other inmates.*” [Authors’ emphasis]

2.1.2 TRANSFER PROCEDURE AND GROUNDS FOR TRANSFER (CLAUSES 7 AND 8)

The bill makes several amendments to allow for the transfer of inmates to the new structured intervention units.

First, clause 7 of the bill amends section 29 of the Act with respect to transfers. Currently, only transfers to another penitentiary, provincial correctional facility or hospital are possible under this provision. The amended version of section 29 of the Act now makes it possible to transfer inmates, within the same penitentiary, to another area with a different security classification, as well as to a structured intervention unit. Moreover, clause 8 adds section 29.1 to the Act, in order to allow the Commissioner to assign a security clearance to each penitentiary or to any area in a penitentiary.

The bill adds new section 29.01(1), which allows a “staff member who holds a position lower in rank than that of institutional head and who is designated by the Commissioner” to authorize, in accordance with the relevant regulations, the transfer of a person into an SIU. New section 34 of the Act states that a transfer to an SIU can be made only if the **designated staff member** is satisfied that there is no reasonable alternative to the inmate's confinement in a structured intervention unit and the Commissioner believes on reasonable grounds that

(a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the safety of any person or the security of a penitentiary and allowing the inmate to be in the mainstream inmate population would jeopardize the safety of any person or the security of the penitentiary;

(b) allowing the inmate to be in the mainstream inmate population would jeopardize the inmate's safety; or

(c) allowing the inmate to be in the mainstream inmate population would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence.

These grounds are very similar to those set out in section 31(3) of the Act with regard to administrative segregation (see previously).

Moreover, CSC maintains a record of every instance in which an inmate is authorized to be transferred into an SIU indicating the reasons for granting the authorization and any alternative that was considered. The authorization for transfer and the reasons for it are provided orally to the inmate no later than one working day after the day on which the transfer was authorized, and in writing no later than two working days after the day on which the transfer was authorized (new sections 34(2) and 34(3)).

2.1.3 INMATE RIGHTS AND THE OBLIGATIONS OF THE CORRECTIONAL SERVICE OF CANADA (CLAUSE 10)

New section 35 of the Act states that an inmate in an SIU has the same rights as other inmates, except for those that cannot be exercised due to limitations specific to the structured intervention unit or security requirements. This provision is more or less identical to the content of section 37 of the Act regarding administrative segregation.

Moreover, new section 36 of the Act specifies the periods **each day (between 7:00 a.m. and 10:00 p.m.)** during which an inmate must be given the opportunity to spend time outside his or her cell and interact with others, including to participate in programs. However, new section 37 of the Act provides for certain exceptions, including if the inmate refuses to avail themselves of the opportunities available under section 36, if the inmate does not comply with reasonable instructions, or in the prescribed circumstances, and those circumstances must be limited to what is reasonably required for security purposes **(including natural disasters, fires, riots and work refusals under section 128 of the *Canada Labour Code*)**. **CSC also maintains a register of instances that an inmate refused or was not given such an opportunity (new section 37(2)).**

While an inmate is confined in such a unit, CSC must provide for the ongoing monitoring of the inmate's health, including a visit at least once every day by a registered health care professional (new section 37.1 of the Act). It should be noted that the current wording of section 36(1) of the Act also provides for a daily visit by a registered health care professional in the case of administrative segregation. **Under new section 37.11, if it is determined that confinement in an SIU is negatively impacting the inmate's health, the inmate's case shall be referred to the sector of the CSC that administers health care.**

2.1.4 REVIEW OF THE DECISION TO CONFINE AN INMATE IN A STRUCTURED INTERVENTION UNIT (CLAUSE 10)

The bill provides several procedures for reviewing the decision to confine an inmate in an SIU. These procedures are derived from new section 33 of the Act, which provides that confinement in an SIU is to end as soon as possible (section 31(2) of the Act already provides that administrative segregation is

to end “at the earliest appropriate time”). Many of the details of the review procedures that will apply remain unknown since they will be prescribed by regulation. This makes it difficult to assess whether sufficient procedural safeguards will be provided to inmates to address the concerns raised by the Ontario Superior Court of Justice and the Supreme Court of British Columbia in their respective decisions, cited above.

The following section of this Legislative Summary provides a summary of the procedures for reviewing the decision to maintain an inmate in an SIU or to transfer an inmate into an SIU.

2.1.4.1 REVIEW PROCEDURES

Decisions made by the institutional head, the Commissioner, “the committee” (described below) and the independent external decision-maker must be based on the criteria and factors set out in new sections 37.41 or 37.82. Under these provisions, an inmate should remain in an SIU only if there are reasonable grounds to believe that a return to the mainstream inmate population would jeopardize the safety of the inmate or any other person or the security of the penitentiary or would interfere with an investigation that could lead to a criminal charge or a charge of a serious disciplinary offence. A review of the decision to maintain an inmate in an SIU or transfer an inmate into an SIU takes place in the following circumstances:

- The institutional head determines, within five working days that begins on the first working day on which the inmate is confined in the SIU, whether an inmate should remain in an SIU (new section 29.01(2)).
- The institutional head also reviews the decision to maintain an inmate in an SIU in the following circumstances (new section 37.3):
 - as soon as practicable after a registered health care professional recommends, for health reasons under new section 37.2, that the inmate not remain in the SIU or that the conditions of confinement be altered;
 - within 30 days after the inmate is confined in the SIU (but not before the institutional head makes their initial determination, which must be made within five working days) (new section 29.01(2)); and
 - as soon as practicable in any of the prescribed circumstances.
- If the institutional head does not alter the conditions of confinement or return the inmate to the mainstream inmate population, in accordance with the recommendations of a registered health care professional, another (senior) registered health care professional shall provide advice to a committee consisting of staff members who hold a position higher in rank than that of the institutional head. This committee will determine whether the inmate’s conditions of confinement should be altered or whether the inmate should remain in the SIU (new sections 37.31 and 37.32).

- The Commissioner determines whether an inmate should remain in an SIU within 30 days after the institutional head's determination under section 37.3(1)(b); the Commissioner also makes such a determination in the circumstances prescribed by regulation and every 60 days after the Commissioner's last determination that the inmate should remain in the SIU (new section 37.4).
- CSC also reviews the decision in the prescribed circumstances (new section 37.5).
- An independent external decision-maker decides, in certain circumstances, whether an inmate should remain in an SIU (in accordance with the procedure and manner set out in new sections 37.6 to 37.9):
 - within 30 days after each of the Commissioner's determinations under section 37.4 that the inmate should remain in an SIU (new section 37.8);
 - as soon as practicable after the committee established under new section 37.31(3) determines that an inmate should remain in an SIU or an inmate's conditions of confinement should not be altered (new section 37.81);
 - if, for five consecutive days or for a total of 15 days during any 30-day period, it has been determined that CSC has not taken all reasonable steps to provide the inmate with the opportunity to spend a minimum of four hours a day outside the inmate's cell or to interact with others for a minimum of two hours a day (under new section 36(1)), the independent external decision-maker may make any recommendation to CSC that they consider appropriate; if, within seven days of receiving the recommendations, CSC fails to satisfy the independent external decision-maker that it has taken all reasonable steps to remedy the situation, the independent external decision-maker shall then direct CSC to remove the inmate from the SIU and provide a notice of the direction to the Correctional Investigator (new section 37.83); and
 - an independent external decision-maker may, in the prescribed circumstances, make a prescribed determination or review as to whether the inmate should remain in an SIU (new section 37.9).

2.1.5 UPDATE OF THE CORRECTIONAL PLAN (CLAUSE 3)

Under new section 15.1(2.1) of the Act (clause 3), an offender's correctional plan must be updated as soon as possible after the decision is made that they must remain in a structured intervention unit. This update must provide for a continuation in the delivery of correctional programs and in preparation for reintegration into the mainstream inmate population **as soon as practicable**.

2.2 ELIMINATION OF THE USE OF SEGREGATION AS A DISCIPLINARY MEASURE (CLAUSES 11 AND 40)

Clause 11 simply eliminates the use of segregation for disciplinary purposes from the array of possible disciplinary sanctions. In addition, pursuant to clause 40, inmates subject to disciplinary segregation cease to be subject to it on the appropriate

effective date. However, it should be noted that, when an inmate commits a serious offence that contravenes an Act of Parliament, CSC can always inform the appropriate police force so that an investigation can be carried out.³⁰

2.3 BODY SCAN SEARCHES (CLAUSES 12, 15, 18 AND 21)

Clause 12 of the bill authorizes a new type of search using body scanner technology to prevent the introduction of illegal substances into federal correctional institutions.³¹ This type of search (defined in amended section 46 of the Act) is conducted using a prescribed body scanner. However, the applicable procedure shall be prescribed by regulation. In cases prescribed by regulation and required for security purposes, the bill provides that inmates, visitors and officers may be subject to a body scan search. According to the government, these scanners, which are similar to those used at airports, are being used in several provincial correctional facilities.³² In addition, this technology would be less invasive than some other control methods, such as strip searches.

The introduction of this new technology seems to be in response to the problems of ion scanners. In June 2018, the House of Commons Standing Committee on Public Safety and National Security tabled a report in which it provided an overview of the situation.³³ The report specifies in particular that “ion scanners are *one of several tools* used for preventing drugs from entering institutions.” [Emphasis in the original] The report also notes the findings of a review by the Office of the Correctional Investigator (OCI) indicating that these devices may be “oversensitive and unreliable, and often produce ... ‘false positive’ results.” In its 2016–2017 annual report, the OCI recommended that CSC conduct an evaluation of the use and reliability of ion mobility spectrometry devices.³⁴ In response to this recommendation, CSC concluded, in its March 2018 report, that “the Ion Scanner, when used within the context of the law and applicable policies, results in positive impacts on the drug interdiction activities within the institutions.”³⁵ In its report, CSC also concluded that ion mobility spectrometry devices “are the only reliable technology,” while specifying that these devices can “also produc[e] false positives and contamination may be an issue.”³⁶

2.4 DETENTION IN DRY CELL (CLAUSE 16)

Clause 16 amends section 51 of the Act regarding the applicable search procedure when the institutional head has reasonable grounds to believe that an inmate has ingested or is concealing contraband in a body cavity. The bill removes the option of using X-rays, leaving only the possibility of confining the inmate in a dry cell (i.e., without any plumbing) in the expectation that the contraband will be expelled. New section 51(2) of the Act provides that the inmate shall be visited by a registered health care professional at least once a day.

2.5 SYSTEMIC AND BACKGROUND FACTORS AFFECTING INDIGENOUS PEOPLES OF CANADA (CLAUSES 1 AND 23 TO 25)

Clauses 23 to 25 amend sections 79 to 84.1 of the Act pertaining to “Aboriginal Offenders.” This part of the Act is renamed “Indigenous Offenders.” Clause 23 replaces or adds the following definitions in section 79 of the Act:

- The definition of “aboriginal,” referring to Indian, Inuit or Métis, is replaced by that of “Indigenous peoples of Canada.” This new definition states that the term has the meaning assigned by the definition of “aboriginal peoples of Canada” in section 35(2) of the *Constitution Act, 1982*.³⁷ It should be noted that clause 1 adds the definition of “Indigenous” to section 2(1) of the Act (applicable to Part I of the Act), which “in respect of a person, includes a First Nation person, an Inuit or a Métis person.”
- The definition of “aboriginal community” is replaced by that of “Indigenous governing body.” This definition now refers explicitly to the rights recognized and affirmed by section 35 of the *Constitution Act, 1982*.
- **The definition of “Indigenous organization” is added, meaning an organization with predominately Indigenous leadership. This terminology is used solely in section 81 of the Act (as amended) with respect to certain agreements for the provision of correctional services to Indigenous offenders.**³⁸

These new definitions apply to new sections 79.1 to 84.1 of the Act, which pertain in particular to agreements for the provision of correctional services for Indigenous offenders and to the transfer or conditional release of offenders into Indigenous communities. This new terminology is repeated in the other provisions of this part of the Act.

In addition, new section 79.1(1) of the Act sets out factors that are to be considered in any decision affecting an Indigenous offender:

- (a) systemic and background factors affecting Indigenous peoples of Canada;
- (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender’s involvement in the criminal justice system; and
- (c) the Indigenous culture and identity of the offender.

However, these factors are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous inmate (new section 79.1(2)).

These criteria are similar to the sentencing principles set out in section 718.2(e) of the *Criminal Code*, which the Supreme Court has interpreted on various occasions (particularly in *R. v. Gladue*³⁹).

2.6 ACCESS TO HEALTH CARE (CLAUSES 5, 26 TO 28 AND 30)

Clause 5 adds section 19.1 to the Act, which provides that a quality of care review be conducted without delay if a registered health care professional advises CSC that they have reasonable grounds to believe the death of an inmate is from a natural cause. This review is to be performed by a registered health care professional, who then provides a report to the Commissioner. A copy of the review report is then to be given to the Correctional Investigator.

The definition of “health care” set out in section 85 of the Act is amended by clause 26, which adds that such care may also be provided by persons acting under the supervision of registered health care professionals.

Section 86 of the Act pertaining to CSC’s obligations to provide health care is amended by clause 27. While the current version of section 86(1)(b) specifies that CSC must provide “reasonable access to non-essential mental health care that will contribute to the inmate’s rehabilitation and successful reintegration into the community,” the new wording refers to “non-essential health care.” However, it should be noted that CSC’s obligation to provide essential health care remains unchanged.

Moreover, clause 28 adds sections 86.1 to 86.4 to the Act. New section 86.1 of the Act states that CSC must support the professional autonomy and clinical independence of registered health care professionals in the provision of patient-centred care (medical care, dental care and mental health care) and ensure that their rights are respected.

Lastly, clause 30 adds section 89.1 to the Act. This new provision requires CSC to provide patient advocacy services in order to help patients better understand their rights and responsibilities related to health care. The addition of these types of services was one of the recommendations made in the Coroner’s Inquest into the death of Ashley Smith.⁴⁰

2.7 VICTIMS’ ACCESS TO AUDIO RECORDINGS OF CERTAIN PAROLE BOARD OF CANADA HEARINGS (CLAUSE 34)

Section 140(13) of the Act entitles a victim (or a person who suffered harm, damage or economic loss as the result of an act of an offender), on request, to listen to an audio recording of certain Parole Board of Canada hearings (with some exceptions⁴¹). The hearings in question are those provided for in sections 140(1)(a) and **140(1)(b)**, which are the first review for day parole and the reviews following an application for full parole. However, the current wording of section 140(13) of the Act limits this right to persons who did not attend these hearings. Clause 34 amends this provision by no longer limiting this right to the persons concerned who were absent from these hearings.

2.8 REVIEW AND REPORT, AND COMING INTO FORCE (CLAUSES 40.1 AND 41)

Clause 40.1 provides that a comprehensive review of the provisions enacted by Bill C-83 must be undertaken by a parliamentary committee at the start of the fifth year after the day on which this section comes into force.

Clause 41 contains three sets of provisions that come into force on days to be fixed by order of the Governor in Council. The other clauses (clauses 1, 2, 4 to 6, 8, 9, 13, 17, 19, 20, 23 to 27, 31(3) and 32, and following) therefore come into force on the date of Royal Assent.

NOTES

1. [Bill C-83, An Act to amend the Corrections and Conditional Release Act and another Act](#), 1st Session, 42nd Parliament.
2. House of Commons, Standing Committee on Public Safety and National Security [SECU], [Twenty-eighth Report](#), 1st Session, 42nd Parliament, 29 November 2018.
3. SECU, [Twenty-ninth Report](#), 1st Session, 42nd Parliament, 29 November 2018.
4. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 26 February 2019.
5. [Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen](#), 2017 ONSC 7491 (CanLII); and [British Columbia Civil Liberties Association v. Canada \(Attorney General\)](#), 2018 BCSC 62 (CanLII).
6. [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 7 protects the right to life, liberty and security of the person, while section 15 protects equality rights.
7. [Bill C-56, An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act](#), 1st Session, 42nd Parliament.
8. It is important to note that the terminology used to refer to the physical and social isolation of inmates from the general inmate population varies across jurisdictions. Moreover, different terms are used to refer to different types of isolation. For example, “disciplinary segregation” is commonly used when the removal of the inmate from normal daily contact with other inmates is a form of punishment for breaking prison rules, while “administrative segregation” is used when an inmate is isolated because he or she is deemed to be a risk for the safety of other inmates, prison staff or themselves and “protective custody” is used to refer to the isolation of an inmate who is believed to be at risk in the general prison population (e.g., former police officer, child abusers, etc.). Other terms are also used in different jurisdictions, such as “temporary confinement” and “restrictive or secure housing unit.”

The term “solitary confinement” is generally applied in international fora to capture various forms of segregation including the segregation justified for security and disciplinary reasons. While there is no universally agreed-upon definition of the term “solitary confinement,” definitions provided by the Istanbul Statement on the Use and Effects of Solitary Confinement and the United Nations Standard Minimum Rules on the Treatment of Prisoners (Mandela Rules) are frequently cited. See United Nations Office of Drugs and Crime, [The United Nations Standard Minimum Rules for the Treatment of Prisoners \(the Nelson Mandela Rules\)](#).

The term “solitary confinement” is not found in the Canadian federal correctional system. Correctional Service Canada [CSC], in its *Response to the Coroner’s Inquest Touching the Death of Ashley Smith*, noted:

[T]he term solitary confinement is not accurate or applicable within the Canadian federal correctional system. Canadian law and correctional policy allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives.

See CSC, [Response to the Coroner’s Inquest Touching the Death of Ashley Smith](#), Ottawa, December 2014.

9. The disciplinary system for offenders incarcerated in federal penitentiaries is set out in sections 38 to 44 of the *Corrections and Conditional Release Act* [CCRA], sections 24 to 41 of the *Corrections and Conditional Release Regulations* [Regulations], and sections 57 to 59 of Commissioner’s Directive 580. See [Corrections and Conditional Release Act](#), S.C. 1992, c. 20; [Corrections and Conditional Release Regulations](#), SOR/92-620; and CSC, “Discipline of Inmates,” *Commissioner’s Directive*, No. 580, 26 October 2015. The purpose of the system is to “encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates’ rehabilitation and successful reintegration into the community.” The exhaustive list of disciplinary offences is provided in section 40 of the CCRA, while the penalties that may be imposed on inmates convicted of these types of offences are set out in section 44.
10. The CCRA sets out the responsibilities of the CSC in Part I, the Parole Board of Canada in Part II, and the Office of the Correctional Investigator of Canada [OCI] in Part III. The Act provides the authority for the administration of federal penitentiaries and the management of sentences of imprisonment of two years or more. It also set out the definitions and eligibility for conditional releases of federal inmates into the community.
11. When determining the category of offence, the institutional head or a delegated authority review each reported offence and, depending on the seriousness of the alleged conduct as well as any aggravating or mitigating factors, will lay a charge of a minor or serious disciplinary offence. See CSC, “Discipline of Inmates,” *Commissioner’s Directive*, No. 580.
12. CSC, “[Administrative Segregation](#),” *Commissioner’s Directive*, No. 709, 1 August 2017.
13. CSC, “[Administrative Segregation Guidelines](#),” *Guidelines*, No 709-1, August 2017.
14. Michael Jackson, “[Justice behind the Walls: A Study of the Disciplinary Process in a Canadian Penitentiary](#),” *Osgoode Hall Law Journal*, Vol. 12, No. 1, May 1974, pp. 1–103. See also Professor Jackson’s website, [Justice Behind the Walls](#).
15. Government of Canada, [Commission of inquiry into certain events at the Prison for Women in Kingston / the Honourable Louise Arbour Commissioner](#), 1996.
16. CSC, “Independent Adjudication,” Chapter H in [Commitment to Legal Compliance, Fair Decisions and Effective Results](#), Task Force Report, March 1997. It should be noted that the task force did not recommend immediate implementation of independent adjudication, but that the CSC evaluate its potential benefits through a limited experiment.
17. CSC, [Human Rights and Corrections: A Strategic Model – Report of the Working Group on Human Rights](#), December 1997.
18. House of Commons, Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, [A Work in Progress: The Corrections and Conditional Release Act](#), Third Report, 2nd Session, 36th Parliament, May 2000.
19. Canadian Human Rights Commission, [Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women](#), December 2003.

20. CSC, "[Verdict of Coroner's Jury – The Coroners Act – Province of Ontario](#)," *Coroner's Inquest Touching the Death of Ashley Smith*, 2013 [Verdict of Coroner's Jury]. See also Howard Sapers, Correctional Investigator of Canada, [A Preventable Death](#), 20 June 2008.
21. *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 (CanLII), para. 146.
22. *Ibid.*, paras. 146–156 and 272–273.
23. [Canadian Civil Liberties Association v. Canada \(Attorney General\)](#), 2018 ONCA 1038 (CanLII), para. 13.
24. [Canadian Civil Liberties Association v. Canada \(Attorney General\)](#), 2019 ONCA 243 (CanLII).
25. Supreme Court of Canada, [Attorney General of Canada v. Corporation of the Canadian Civil Liberties Association](#), Docket 38574.
26. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 (CanLII), para. 247.
27. [British Columbia Civil Liberties Association v. Canada \(Attorney General\)](#), 2019 BCCA 5 (CanLII), para. 39.
28. The principle of "least restrictive" measures was removed from the CCRA on 13 June 2012 with the coming into force of the [Safe Streets and Communities Act](#), S.C. 2012, c. 1. This legislation uses less specific language, providing that the measures taken with respect to inmates and decisions concerning their conditional release be limited to "only what is "necessary and proportionate to attain the purposes of this Act." Bill C-83 (as amended) proposes wording that is similar to the original language in force before 13 June 2012.
29. Public Safety Canada, "[New Bill: An Act to amend the Corrections and Conditional Release Act and another Act](#)," Background, 16 October 2018.
30. Details about the procedure to follow are set out in Commissioner's Directive 581. See CSC, "[Violations of the Law by Inmates](#)," *Commissioner's Directive*, No. 581, 20 April 2004.
31. House of Commons, [Debates](#), 1st Session, 42nd Parliament, 18 October 2018, 1020 (Ralph Goodale, Minister of Public Safety and Emergency Preparedness).
32. *Ibid.*; and House of Commons, [Debates](#), 1st Session, 42nd Parliament, 18 October 2018, 1550 (Kevin Lamoureux, Parliamentary Secretary to the Leader of the Government in the House of Commons).
33. SECU, [Interim Report: Use of Ion Mobility Spectrometers by the Correctional Service of Canada](#), Twenty-Fifth Report, 1st Session, 42nd Parliament, June 2018.
34. OCI, [Annual Report of the Office of the Correctional Investigator 2016–2017](#), Recommendation 10.
35. SECU, Twenty-Fifth Report (2018), "Appendix D," p. 16.
36. *Ibid.*
37. According to section 35(2) of the *Constitution Act, 1982*, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada." See Part II of the [Constitution Act, 1982](#), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
38. It should be noted that new section 83(1.1) provides that CSC can seek advice from an Indigenous spiritual leader or elder "when providing correctional services to an Indigenous inmate, particularly in matters of mental health and behaviour."
39. [R. v. Gladue](#), [1999] 1 SCR 688.

40. Verdict of Coroner's Jury (2013), Recommendation 22.
41. The bill adds a new exception to section 140(13) of the CCRA where the privacy interests of any person clearly outweigh the interest of the victim or person referred to in section 142(3) (new section 140(13)(b) of the CCRA).