

Legal Analysis / L'analyse juridique

| Charter Rights in Prison: A Legal Analysis & Prediction

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Cases regarding prisoners' rights have been difficult for prisoners and prisoner advocates to win as courts tend to be deferential to prison officials. Two cases from Ontario and British Columbia have been granted leave to appeal and will be jointly heard before the Supreme Court of Canada regarding the use of administrative segregation in prisons. Throughout this paper, the author attempts to forecast the outcome of this upcoming case by analyzing how courts determine which Charter rights can be justifiably violated once an individual is imprisoned. An initial prediction is made based on the thesis that the main factor contributing to these determinations is the presence of inherent limitations. However, evidence of an alternative, stronger factor is found, thus leading to a new prediction for the outcome of the upcoming Supreme Court case. Based on an analysis of decisions made during previous Supreme Court prisoners' rights cases, the varying levels of emphasis on empirical evidence is the strongest factor influencing courts decisions on which rights can be justifiably violated once imprisoned. Based on these findings, the author makes a new prediction that the outcome of the upcoming Supreme Court segregation case will be a success for the claimants. These findings highlight the importance of prisoners' accessibility to adequate resources especially when compared to the expansive resources available to the government to gather impactful empirical evidence.

Pour les prisonnier.ière.s et leurs défenseur.euse.s, les procès concernant les droits des détenu.e.s demeurent difficiles à gagner puisque les tribunaux ont tendance à s'en remettre aux responsables pénitentiaires. Deux affaires judiciaires en particulier qui traitent de l'isolement administratif, à savoir en Colombie-Britannique et en Ontario, ont accédé à la Cour suprême du Canada. Dans le cadre de ce travail de recherche, l'auteure a pour objectif de prédire le jugement ainsi que les conséquences qui s'en suivront de ces deux dossiers judiciaires en analysant la façon dont les tribunaux décident ce qui constitue un droit ou liberté qui peut être violé de manière justifiable à l'égard des personnes emprisonnées. Le pronostic initial se fonde sur l'hypothèse que les jugements se basent principalement sur la

présence des limites intrinsèques. Pourtant, il existe aussi des preuves qui laissent entendre une autre possibilité qui est nettement plus convaincante, ce qui amène à une tout autre prévision par rapport à l'aboutissement de ces dossiers parvenus à la Cour suprême du Canada. Le présent document est ancré dans une analyse de la jurisprudence de la Cour suprême portant sur les droits des détenu.e.s. La conclusion est donc la suivante : le degré d'importance accordé aux preuves empiriques est en fait le facteur le plus déterminant concernant les décisions judiciaires sur les droits et libertés des détenus qui peuvent être enfreints de façon légitime. En s'appuyant sur ces conclusions, l'auteure prévoit de nouveau le succès des requérant.e.s, soulignant l'importance de l'accès aux ressources suffisantes pour les aider à recueillir des preuves empiriques solides, surtout par rapport aux vastes ressources que dispose le gouvernement.

Introduction

In 2019, two cases were heard at the Courts of Appeal in both Ontario and British Columbia regarding Charter violations arising from the administrative segregation of prisoners in federal prisons. These two cases have since been granted leave to appeal and will be jointly heard before the Supreme Court. Cases regarding prisoners' rights in Canada have consistently been difficult for prisoners and prisoner advocates to win. Courts tend to be deferential to government and prison officials with regard to a prisoner's Charter rights being violated (Iftene 2017). Therefore, there have been certain rights, such as s.7 rights, that have been justifiably infringed due to the fact that an individual was imprisoned. Although prisoners do not enjoy the same liberty rights as the general population, they do retain residual liberty rights within the prison population (Parkes 2007). This leads to the question: how do the courts determine which rights can and which rights cannot be justifiably violated with imprisonment. This paper argues that the main factor contributing to these determinations is the presence of inherent limitations in certain Charter rights. Therefore, I make an initial prediction that the upcoming segregation case will result in an unsuccessful outcome for the claimants, the British Columbia Civil Liberties Association (BCCLA) and the Canadian Civil Liberties Association (CCLA). The presence of inherent limitations transfers burden from the government onto the claimant to prove that a violation of their rights was unjustified.

This paper predicts the Supreme Court will decide the segregation case using the patterns of decision making from previous, relevant Supreme Court cases. This paper will start with a summary of three key papers that discuss prisoners' Charter rights and past prisoners' rights litigation. It will then discuss the methods of analysis used to answer the research question. Finally, it will discuss the results of the analysis and, based on this paper's findings, will make a final prediction of how the Supreme Court will decide the segregation case.

Review of key papers

There have been various pieces of literature discussing prisoners' rights litigation, however, few focus primarily on the Supreme Court decisions regarding prisoners' rights. Given this paper focusses on the Supreme Court's approach to prisoners' rights, my research will contribute to the literature by outlining the patterns that can be seen in various Supreme Court prisoners' cases. This will assist future claimants in learning from the mistakes of previous prisoners' cases where claimants have failed to receive their desired outcome. Prisoners are very vulnerable to the abuses of state power. As this often happens out of view from the public, prisoners are adversely affected by the indifference of the public (Parkes 2007). Therefore, it is greatly important to understand the ways in which the Supreme Court makes decisions on prisoners' rights cases. Further, my research will contribute to the literature by providing a prediction for a case that has not yet been heard, based on a pattern of Supreme Court decisions.

Lisa Kerr's (2019) paper focusses on the path taken by litigation regarding prison segregation and on the most current cases heard in Ontario and British Columbia. Kerr (2019) outlines courts' movement away from the acceptance of solitary confinement in prisons and towards the final stages of the unconstitutional use of solitary confinement. This path is demonstrated through the discussions of various cases such as *R v Capay* and *R v Ugbaja* in which the fairness of trials and the judicial process was impacted by the use of administrative segregation. These cases, along with other instances and expert medical literature presented before the courts, have led courts to widely accept that there are negative health effects caused by solitary confinement (Kerr 2019).

Kerr (2019) refers to *R v Capay*, a case that resulted in a stay of proceedings because the defendant was kept in isolation which damaged their psychological integrity and memory of the instance in question. She uses this case to demonstrate the additional harmful effects of solitary confinement on the pursuit of justice. Further, Kerr (2019) uses *R v Ugbaja*, a case in which the claimant was kept in segregation and the official documents were found to be false and misleading, to demonstrate the lack of regulations on the prison's use of administrative segregation. Kerr (2019) then goes on to discuss the most recent prison segregation cases heard in Ontario and British Columbia. She discusses the details of similarities and differences between the decisions made in both provinces at both the trial court level and the appeals court level. Kerr's (2019) piece of literature effectively identifies the path that the courts have taken towards acknowledging the harms of solitary confinement.

In Debra Parkes' (2007) paper, an account of past prisoners' rights litigation in Canada is presented in detail. Parkes (2007) first discusses the general change in the courts' approach to prisoners' rights cases. In the early half of the 20th century the courts took a hands-off approach to prisoners' litigation and often deferred to prison officials. Many prison decisions were seen as

administrative and made at the discretion of the prison officials. However, after widespread prison riots throughout the 1970's, the House of Commons created the MacGuigan Report, stating the Rule of Law must prevail in Canadian prisons (Parkes 2007). Then, with the Charter came explicit guarantees of freedoms. Parkes (2007) notes that the Canadian Charter did not have prisoner-specific rights such as in South Africa's Charter. However, the statement that rights are held by every individual, recognises that prisoners are included in the Charter and that Charter rights can be used to impact the lives of those in prison (Parkes 2007).

Parkes (2007) goes on to discuss various Charter rights, such as s.7, s.2, and s.12, in terms of a prison context and the various prisoners' rights cases that have been brought to court. This piece of literature is helpful in explaining and establishing the context for prisoner's rights cases. However, few cases mentioned throughout the paper were heard at the Supreme Court level. Thus, this is a gap that this research will help address.

Adelina Iftene's (2017) paper offers a detailed look at s.7 of the Charter and the elements required to bring forward a s.7 challenge. It does so in the context of arguing that the treatment of aging prisoners could be a s.7 violation. Iftene (2017) discusses the evolution of how s.7 has been implemented by the courts. At first, s.7 only applied to matters on criminal justice regarding physical liberty being threatened by imprisonment. Then, it slowly came to apply in contexts outside the area of administration of justice, including matters such as the personal choices of medical treatment and where to live (Iftene 2017). Iftene (2017) emphasises the court's reliance on social science evidence to evaluate the three principles of fundamental justice: arbitrariness, overbreadth, and gross disproportionality. Arbitrariness refers to an action or piece of legislation that has no relationship to its objective. Overbreadth points to a law or action that is broader than it needs to be in order to achieve its objective. Finally, gross disproportionality makes reference to a law or action that has effects on rights that are too extreme. The analysis of these three principles is conducted with regard to the connection between the objective of the legislation and its effects, which violate Charter rights (Iftene 2017).

Iftene (2017) goes on to discuss the lack of access to resources for the medical needs of aging prisoners as an argument for a violation of a positive right under s.7. This argument, in the context of administrative segregation, would be parallel to the argument of a lack of access to effective mental health treatment in segregation. I agree that this is a strong argument and it is echoed in the Supreme Court of British Columbia's decisions on the matter as well. Iftene (2017) discusses the finding that those with mental illness were often being sent to segregation as a way of dealing with difficult behaviours. She describes this as an example of a direct connection between the legislation and the deprivation. Additionally, those whose mental health has been harmed after segregation would likely not behave well when reintegrated into the general prison population, a result contrary to the objective of segregation (Iftene 2017).

Iftene (2017) also discusses the dysfunctionality of the grievance process within prisons and the barriers opposing any efforts to bring forward a Charter challenge. Grievances are often filed by prisoners but due to the significant delay or halting of the process, many prisoners never receive a reply (Iftene 2017). I believe this paper will be very helpful for my research as it outlines the inefficiencies of the internal procedures and the court's tendencies of deference upon grievances reaching the point of a court hearing, a negative outcome for prisoners. My research will contribute to the work done in Iftene's (2017) piece of literature by analyzing a broader range of Charter rights in terms of the prison context.

My research will add on to the work of Kerr (2019). The foregoing analysis will assess the pattern of Supreme Court decisions on a variety of prisoners' rights cases and will expand on Kerr's (2019) discussion of the Ontario and British Columbia segregation cases by making a prediction on the outcome of the Supreme Court case.

Theory

My thesis argues that the main factor in the Supreme Court's determinations of which Charter rights are justifiably violated when imprisoned, is the presence of an inherent limitation. When the Supreme Court hears a Charter rights case, they first determine if a violation has occurred. If so, they then turn to the Oakes test to determine if the violation was justified. Using this test, the government has the burden of proving that the infringement was justified by addressing its every step. First, the government must prove that their objective is pressing and substantial. Second, they must pass the proportionality test by proving that the means they chose to use were rationally connected to the objective, that means were minimally impairing to the Charter rights in question, and that the benefits of the means were proportional to the negative effects (Iftene 2017). However, certain rights have inherent limitations, where the language of the right itself justifies violations in certain circumstances.

Some Charter rights with inherent limitations include s.7 by stating that everyone has "the right to life, liberty and security of the person *except in accordance with the principles of fundamental justice*" (Canadian Charter, 1982, s7). Further, s.8 has an inherent limitation in stating that, everyone has "the right to be secure against *unreasonable* search or seizure" (Canadian Charter, 1982, s8). Rights with inherent limitations transfer the burden on to the claimant to prove that a violation was not justified. As prisoners, it can be difficult to get access to the courts. They often lack the same resources available to the general public, such as frequent communication with their lawyers (Iftene 2017). Additionally, prisoners now also have the onus of proving that their right was not only violated but that it was not justified. Therefore, my initial prediction for the upcoming Supreme Court segregation case is that the claimants will be unsuccessful as the burden will be on the claimants to prove a violation was unjustified.

Method of analysis

In order to answer how the Supreme Court determines which Charter rights are justifiably violated once an individual is imprisoned, I will conduct a comparative case study analysis using four contributing factors in Supreme Court decisions. To do so, I will analyze the decisions made in three cases, *Sauve v Canada*, *Weatherall v Canada*, and *Ewert v Canada*. There are many prisoners' rights cases that have not reached the Supreme Court, such as *R v Capay* and *R v Ugbaja*, that have not been included in this paper. Further, there have been prisoners' rights cases that regarded a specific instance as a violation, such as *R v Shubley* and *Cunningham v Canada*, that have also not been included. In order to ensure comparability between cases, only cases that have been decided by the Supreme Court and are not regarding specific, individual situations have been chosen for analysis. *Sauve v Canada* discusses prisoners' right to vote, while *Weatherall v Canada* discusses the use of cross-gender searches and frisks in prisons, and *Ewert v Canada* discusses the use of risk assessment tools on Indigenous prisoners. These three cases may not be the only cases that fit these criteria but they have been identified as three prominent cases that allow for a detailed analysis of the Supreme Court's opinions on Charter rights in prison.

When stating a claimant's success or defeat in a particular case, a determination is set forth based on whether the court did not find the right to be violated or if the court deemed a right violated but found it was justified. Both are instances of the claimant being unsuccessful. In order to understand and compare the decisions made in each of these cases, four factors have been identified that contribute to the outcomes of the cases. The four factors are as follows: whether or not there is an inherent limitation in the Charter right in question, whether the alleged violation is a substantive or a procedural issue, whether there is an emphasis on empirical evidence, and the presence of interveners and factums.

These four factors were identified to explain the differences in the outcomes of the three selected cases. Inherent limitations are a possible explanation as the burden is placed on the claimants to prove a violation is unjustified. The difference between substantive or procedural issues can be a contributing factor given that challenging the constitutionality of a piece of legislation may be more or less difficult than challenging the constitutionality of an action or practice. The emphasis on empirical evidence is another contributing factor as claimants have more difficulty gathering the necessary resources and empirical evidence in comparison to the government. Finally, the presence of interveners is a contributing factor as found by previous research, such as the work of Morton and Allen, which demonstrated the influence that interveners such as the Women's Legal Education and Action Fund (LEAF) can have on the outcomes of cases (Morton & Allen 2001).

I will examine the decisions of the court for each of the three cases and will evaluate the various factors of each case in accordance with the four factors listed. Then, I will compare the

factors of the segregation cases to the factors of the three selected cases in order to make a prediction on the outcome of the Supreme Court segregation case. My thesis predicts that the presence of an inherent limitation is the deciding factor in this decision. If this factor is the only, or the largest difference between the cases, my thesis will be supported. If there are other prominent differences that arise while considering the factors, they would represent alternative reasons for the court's decisions, thus refuting my thesis.

Limitations

A limitation to this method of analysis is present in the number of interveners and factums. Factums were unavailable for all interveners in *Weatherall v Canada* as this case was heard in 1993. This was an unexpected limitation but had this case been removed from the analysis, the overall research would have suffered. Therefore, *Weatherall v Canada* remains in the analysis despite this limitation. Further, no publications were found on the case that provided any information as to which parties the interveners supported. This limitation occurred again for one intervener in *Sauve v Canada* and one intervener for the British Columbia Court of Appeal segregation case. Due to this limitation, there are certain gaps in the information for the fourth factor. However, analysis and predictions will be done using the information available.

Results & discussion

Factors	Sauve v Canada (sec.3 & sec. 15)	Weatherall v Canada (sec. 7, sec. 8, & sec.15)	Ewert v Canada (sec. 7 & sec.15)	BC and Ontario Segregation (sec. 7, sec. 12, & sec.15)
Presence of inherent limitation	No inherent limitations	Sec. 7 & 8- inherent limitations Sec. 15 – no inherent limitations	Sec. 7 – inherent limitations Sec. 15 – no inherent limitations	Sec. 7 & 12 – inherent limitations Sec. 15 – no inherent limitations
Substance or procedural issue	Substantive issue	Procedural issue	Procedural issue	Substantive and procedural issues
Emphasis on empirical evidence	No emphasis on empirical evidence	Emphasis on empirical evidence	Emphasis on empirical evidence	Emphasis on empirical evidence
Number of interveners	For claimants: 4 For government: 2 Unknown: 1	Unknown: 6	For claimants: 10 For government: 0	For claimants: 6 For government: 1 Unknown: 1

In *Sauve v Canada* the claimants brought forward a s.3 and s.15 Charter challenge to s.51 of the Canada Elections Act which denied the right to vote to anyone imprisoned for a sentence of more than two years. In a five to four decision, the court found that s.3 was violated and that it was not saved under s.1 of the Charter. The government conceded that the legislation violated s.3, and therefore, the courts turned to the Oakes Test [6]. The Majority found that the government failed to establish a rational connection between denying the right to vote and their objectives to enhance civic responsibility and respect for Rule of Law and to enhance the general purposes of criminal sanctions [53]. After determining the s.3 violation was unjustified, the Majority found it unnecessary to consider the s.15 challenge [63].

However, as it was a closely split decision, it is important to also consider the Dissenting opinion. The Dissent found that the violation of s.3 was justified because they had differing philosophies from the Majority. The Dissent preferred to defer to the government's view that a denial of the right to vote would enhance the value of the right to vote [68]. In considering the

s.15 challenge, they also found there was no violation, as being imprisoned did not constitute an analogous or enumerated ground. This was based on the understanding by the Dissent that being imprisoned is not due to a stereotypical, presumed group characteristic, but rather because of a serious criminal offense being committed [195].

In considering the first factor of the case, the Charter rights that were challenged had no inherent limitations. S.3 includes the words “every citizen” and s.15 states “every individual is equal under and before the law” (*Canadian Charter*, 1982, s3 & s15). For the next factor, *Sauve v Canada* deals with a substantive issue as s.51 of the Canada Elections Act is a law that is being challenged rather than an action. With regard to the third factor, this case did not exhibit an emphasis on empirical evidence as the issue at hand was more philosophical in nature. As noted by the Dissent, the expert testimonies heard were primarily concerning legal and political philosophies rather than social science evidence. Thus, the evidence was more abstract and symbolic in nature [101;102]. With regard to the final factor, this case had seven interveners, four of which supported the claimants, two of which supported the government, and one of which is unknown.

In *Weatherall v Canada* the claimants brought forward a s.7, s.8, and s.15 Charter challenge against the cross-gender frisks and unannounced searches of male prisoners. The claimants argued that this was an invasion of their privacy and that frisks and searches by female guards could result in inappropriate touching and prisoners being seen undressed. The court came to a unanimous decision that none of the challenged rights had been violated. The court determined that prisoners can not hold a reasonable expectation to privacy as surveillance and searching are necessary aspects of the prison institution. Frisks and patrolling are conducted to ensure prisoners’ safety and to ensure they are not engaging in activities that are detrimental to the good order and security of the prison. Further, the court concluded that the possibility of inappropriate occurrences was minimized by the special training guards received in order to ensure prisoners’ dignity and that searches were conducted professionally.

The court also found that s.15 was not violated. The fact that female prisoners were not subject to cross gender searches was not discrimination, but rather different treatment constituted by the historical trend of violence against women. Further, if s.15 had been violated the court found that it would be justified considering the government’s objectives of employment equity, rehabilitation, and the security of the institution.

In regards to the first factor of this case, whether there are inherent limitations or not, s.7 and s.8 both have inherent limitations. S.7 includes “except in accordance with the principles of fundamental justice” and s.8 includes the word, “unreasonable” (*Canadian Charter*, 1982, s7 & s8). S.15, however, does not have an inherent limitation. For the second factor, whether the case deals with a substantive or procedural issue, this case discussed a procedural issue as it was relevant to the actions of the prison guards rather than a law. In considering the third factor,

whether there is an emphasis put on empirical evidence, this case did exhibit emphasis on empirical evidence as the courts pointed to the number of times an inappropriate sighting had actually occurred. Further, the court referred to the proven historical trend of violence against women with regard to s.15. For the final factor, factums for this case were unavailable and thus, there is not enough information available to determine which party each intervener supported.

In *Ewert v Canada* the claimants brought forward a s.7 and s.15 challenge against the prison's use of five risk assessment tools on Indigenous people. The claimant argued that given there was no research confirming that the assessment tools would apply to Indigenous people, the use of these tools violated s.7 rights as they led to adverse affects from decisions made based on the tools' results [4;19]. The Supreme Court made a seven to two decision that neither s.7, nor s.15 had been violated. The court determined that the claimant had failed to prove on a balance of probabilities that the use of these risk assessment tools resulted in inaccurate results when applied to Indigenous prisoners, therefore constituting a violation of the principles of fundamental justice [70]. The court also found that s.15 was not violated because there was a lack of evidence proving that the tools overestimated the risk of Indigenous prisoners or that the results led to harsher punishments for Indigenous prisoners [79].

In regards to the first factor, s.7 does have inherent limitations while s.15 does not. As for the next factor, this case deals with a procedural issue as it is regarding the actions of the prison rather than a law. As for the third factor, this case has a heavy emphasis on empirical evidence. The burden was placed upon the claimant to prove that the risk assessment tools resulted in inaccurate results for Indigenous prisoners, a fact the claimant failed to prove. When considering the final factor at last, this case had ten interveners, all ten in support of the claimants.

British Columbia & Ontario Courts of Appeal

The segregation cases brought forward in both the Ontario and British Columbia Courts of Appeal had similar outcomes yet were decided based on different reasons. The claimants in both cases argued that the use of administrative segregation, as permitted through the *Corrections and Conditional Release Act (CCRA)*, constituted solitary confinement and was thus, unconstitutional. In both Ontario and British Columbia, the Courts of Appeal found the use of administrative segregation unconstitutional.

In British Columbia the court determined that s.7 of the Charter had been violated for three reasons. The first reason was because the *CCRA* allows prolonged and indefinite segregation for anyone [145]. Expert testimonies before both trial courts demonstrated that prolonged segregation, meaning more than fifteen consecutive days, posed the risk of serious and possibly permanent psychological harm. It was also discussed that this harm would be much greater for a prisoner with mental illness [90]. The second reason the British Columbia court found s.7 was violated was due to the fact that the *CCRA* allowed for internal segregation review

hearings [145]. The court found that procedural fairness had not been met as internal reviews allow the institutional head to be both the judge and prosecutor at the hearings. It is not possible for the institutional head to be impartial and unbiased in such a situation, thus, external review is necessary [174;192]. The third reason found by the British Columbia Court of Appeal was that the *CCRA* deprives prisoners of their right to counsel at segregation review hearings [145]. The *CCRA* requires that prisoners have the opportunity to consult with counsel but it does not state that counsel can be present at review hearings [202]. Given the decision's significant effect on prisoners, the important role of counsel during hearings, and the prison's tendency to over-rely on administrative segregation, the deprivation of counsel at the hearings was determined to be a violation of s.7 [206].

The British Columbia Court of Appeal then turned to s.15 which they found had not been violated. In regards to Indigenous prisoners the *CCRA* requires that Indigenous social history and culturally appropriate alternatives are considered when deciding whether to release the prisoner or continue segregation [211]. Additionally, when considering prisoners with mental illnesses, the *CCRA* requires that the state of health and the health care needs of the prisoner are considered [220]. Thus, the individualized assessment and decision-making process does not create discriminatory distinctions or perpetuate disadvantages, meaning s.15 was not violated [236; 237].

In the Ontario Court of Appeal, the government did not challenge the trial court's decision that s.7 had been violated due to inadequate review processes (Kerr 2019). Therefore, the court focussed on the s.12 Charter challenge. The threshold for cruel and unusual punishment is the point in which the effects of the punishment are considered to be grossly disproportionate or to outrage the standards of decency [59]. The court found that the foreseeable and expected negative psychological harm that is caused by prolonged segregation constitutes cruel and unusual punishment. Further, they found that various safeguards in the *CCRA* were inadequate and ineffective at preventing grossly disproportionate treatment [114;115]. As a result, the court then turned to the Oakes Test. It was decided that the s.12 violation is not justified as the severe negative effects of prolonged segregation are not minimally impairing [126].

In considering the first factor, s.7 and s.12 have inherent limitation, while s.15 does not. S.12 has an inherent limitation found in the words "cruel and unusual" (*Canadian Charter*, 1982, s12). Upon analysis of the second factor, these cases deal with a mix of procedural and substantive issues. The cases are with regard to the laws that allow solitary confinement as well as to the actions of the prison officials providing inadequate conditions that harm prisoners. In regards to the third factor, these cases have a heavy emphasis on empirical evidence. The expert testimonies, demonstrating the severe psychological harm of prolonged segregation, formed the basis for many of the courts' decisions. Finally, the British Columbia and Ontario Courts of Appeal

had a combined total of eight interveners, six supporting the claimants, one supporting the government, and one unknown.

When appealing the case to the Supreme Court, the government will likely continue to argue that the negative effects of segregation are the result of a maladministration of staff rather than of the *CCRA* itself, and that the nature of s.12 is fundamentally individual and requires specific evidence regarding an individual. In both the British Columbia and Ontario cases, the government argued that the *CCRA* does not violate s.7, s.12, or s.15, but rather that any instance in which a violation occurred was due to staff conducting incorrect administration of the Act (Kerr 2019). With regard to s.7 and s.12, the British Columbia and Ontario Court of Appeal respectively, rejected the government's argument. However, in British Columbia, the court agreed with the argument brought by the government with regard to s.15. Therefore, the decisions regarding s.7 and s.12 will likely be the decisions the government will challenge in the Supreme Court. Based on the forgone analysis, if the Supreme Court were to decide on the s.15 challenge, they would likely find it is not violated as s.15 has shown to be a difficult challenge to win across the previous prisoners' rights cases.

Alternative reasoning & counterargument

In applying the patterns present in each factor individually, the predicted outcome of the segregation case varies depending on which factor is most influential. Based on the first factor of analysis, the segregation case shows the presence of inherent limitations, similarly to *Weatherall* and *Ewert*. Thus, if the first factor were the most influential the outcome would be a failure for the claimants. If the second factor were the most important it would lead to an undetermined prediction given the segregation case is a mix of substantive and procedural issues. If the fourth factor were the most significant it would also lead to an undetermined prediction as the number of interveners has not shown a consistent relationship with the outcomes of the cases and there were limitations to the availability of information for this factor. *Ewert v Canada's* interveners all supported the claimants but the claimants were still unsuccessful, while most of *Sauve v Canada's* interveners supported the claimants yet it led to a success. Finally, if the third factor were the most influential the outcome would be a claimant success as empirical evidence was heavily emphasized. This emphasis is common among the segregation cases, *Weatherall* and *Ewert*. However, the evidence supports the claimants' arguments in the segregation cases while, in *Weatherall* and *Ewert*, the evidence worked against the claimants resulting in their unsuccessful outcomes. This is an unexpected finding that arose out of the research. Although the presence of inherent limitation is a strong determining factor, this research has found an emphasis on empirical evidence to be an even stronger factor. To restate my thesis in light of this finding, the strongest factor in the Supreme Court's determinations of which Charter rights are justifiably violated when imprisoned, is the emphasis on empirical evidence. The Ontario and British Columbia Courts of Appeal referred to well-established evidence presented by expert

testimonies throughout their reasonings. Therefore, my prediction is that the Supreme Court decision will result in a claimant success, given that the emphasis on empirical evidence is the strongest factor.

This finding demonstrates that the strongest determining factor is the emphasis on empirical evidence. This factor is likely so influential due to the gap in the resources available to the government and the resources available to the claimants. As prisoners, there are many barriers to obtaining legal advice, such as limited opportunities to call lawyers or difficulties having a lawyer present in review hearings. These barriers can make it more difficult for the claimants to gather the necessary empirical evidence when compared against the expansive resources the government has to gather empirical evidence. In *Ewert* and *Weatherall*, the claimants were unsuccessful, but in the segregation cases the claimants were successful at the Court of Appeal level. This demonstrates empirical evidence as the strongest determining factor since the support of empirical evidence can result in a different outcome.

Conclusion

This paper set out to determine how the Supreme Court decides which Charter rights are justifiably violated when an individual is imprisoned and to make a prediction on the outcome of the upcoming Supreme Court segregation case. My initial thesis was that the presence of inherent limitations was the main factor in the Supreme Court's decision-making process. However, the analysis of the four factors, whether there is an inherent limitation, whether the case deals with a substantial or procedural issue, whether there is an emphasis on empirical evidence, and the presence of interveners and factums, brings up an alternative factor with significant impact, an emphasis on empirical evidence. Therefore, based on the forgone analysis, my initial prediction for the outcome of the segregation case has changed. My final prediction is that the claimants will be successful in the Supreme Court case based on the well-established evidence from expert testimonies and studies as well as the general acceptance of this evidence in the lower courts. Therefore, although the presence of inherent limitations is a strong factor for Supreme Court outcomes on prisoner rights cases, the support from empirical evidence has a stronger impact.

This paper provides a starting point from which future research, focussing primarily on the role of evidence in prisoners' rights cases, can be done. Further investigation should take a look at the accessibility of evidence to prisoners and prisoner advocates, specifically in contrast to the abilities and resources available to the government. As prisoners face many barriers before their cases can be heard in courts, the availability of necessary information and context is essential to their success. Therefore, the patterns outlined in my research from various Supreme Court prisoners' cases can assist those bringing future cases forward by allowing them to learn from the mistakes of previous prisoners' cases. Further, my research contributes to existing

literature by focussing on Supreme Court decisions and making a prediction on an upcoming case that has yet to be heard. As prisoners are often subject to rights infringements outside of the view of the public, it is important for future claimants to be well informed of the most significant factors contributing to Supreme Court decisions on prisoners' rights.

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