Legal Analysis / L'analyse juridique

Administrative Segregation as Cruel, Inhuman or Degrading Treatment: The Relationship Between Section 12 of the Canadian Charter and the International Covenant on Civil and Political Rights' Article 7

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This legal analysis compares the Canadian Charter Section 12 provisions regarding "cruel and unusual treatment or punishment" to the International Covenant on Civil and Political Rights' (ICCPR) Article 7 regarding "cruel, inhuman, and degrading treatment or punishment" in the context of administrative segregation in the Canadian prison system. These deceptively similar legal concepts are integral to the Canadian government's contemporary policy on administrative segregation (also known as solitary confinement) and thus their relationship warrants investigation. The cases of BCCLA, CCLA, Capay, and Reddock, occurring between 2018 and 2019, are selected and analyzed to show that the use of international expert evidence and decisions of justices construct a S. 12 which more closely resembles the norms of solitary confinement established in the ICCPR's Article 7, which may improve the conditions and rights of incarcerated persons. Furthermore, the analysis suggests how profoundly international expert evidence can affect the outcome of domestic legal cases.

Dans le contexte de l'isolement carcéral dans le système pénitentiaire canadien, cette analyse juridique compare l'article 12 de la Charte canadienne des droits et libertés concernant « les traitements ou les peines cruels et inhabituels » avec l'article 7 du Pacte international relatif aux droits civils et politiques (ICCPR), concernant « les traitements ou les peines inhumains, cruels et inhabituels. » Ces phénomènes juridiques faussement similaires

font partie intégrante de la politique contemporaine du gouvernement canadien sur l'isolement carcéral (aussi connu comme l'isolement cellulaire), et leur relation mérite donc d'être étudiée. Les cas BCCLA, CCLA, Capay et Reddock, se produisant entre les années 2018 et 2019, sont sélectionnés et analysés pour montrer que l'utilisation de témoignages d'expert.e.s internationaux.ales et les décisions des juges construisent un article 12 de la Charte qui ressemble davantage aux normes de l'isolement carcéral établies dans l'article 7 du ICCPR, ce qui a le potentiel d'améliorer les droits et les conditions des personnes incarcérées. Par ailleurs, l'analyse suggère que les témoignages des expert.e.s internationaux.ales peuvent avoir une incidence profonde sur le résultat des affaires juridiques nationales.

Introduction:

Cruel and Unusual Punishment's Domestic and International Nature

The Canadian Charter of Rights and Freedoms offers cruel and unusual punishment its own section within legal rights: Section 12. S. 12 reads that "everyone has the right not to be subjected to any cruel and unusual treatment or punishment" (Constitution Act [1982], at part 1). Prior to the Charter, the 1789 United States Bill of Rights' 8th Amendment read more restrictively, prohibiting "… cruel and unusual punishments inflicted [emphasis added] (Bianco and Canon 2017, A11)."[2] The historical root of this legal principle came from the 1688 English Bill of Rights which addressed both "… illegal and cruell Punishments inflicted" and "… cruell and unusuall punishments inflicted" (At sec. 10). Notably, both earlier sources did not include the interpretation of "treatment'' as the Charter does. Similarly, the 1966 International Covenant on Civil and Political Rights' (ICCPR) Article 7 states "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation (1966)." The specific use of "or'' and the inclusion of the adjectives "inhuman" and "degrading" advance a broader array of interpretations for the legal principle.

Canada acceded to the ICCPR in 1976, six years before the creation of the Charter. Thus, Canadian jurisprudence and the Charter are not completely insulated from how the

[2] Self-Location: Settler Law as a Settler

I am a Settler of German, Irish, Scottish, and English descent. I am a Political Science major at Simon Fraser University.My connection to a place is not as deep as it is broad; I have moved 16 times from childhood to adulthood. My patrilineal ancestry, Wegenast and Giesbrecht, came to Stó:lō territory in the early 1950s from Germany, having lived between 100-200 years prior on the Black Sea as German Lutheran and Mennonite Settlers in Romania (now modern day Moldova). My matrilineal ancestry, Fischer and Flack, comes from multigenerational Settlers, some coming to Turtle Island from Western Europe during the 16th and 17th centuries, with others as recent as the 19th Century from Ireland. This matrilineal ancestry coincides with American imperialistic and genocidal expansionism from east to west across Turtle Island and countless Indigenous Nations' territories. I was born on Chinook territory. I was raised across Stó:lō, Lummi, Tsuut'ina, Siksika, Stoney,

international community and other jurisprudential traditions outside Canada interpret what cruel and unusual treatment or punishment constitutes (2019 ONSC 535, at para. 152). Indeed, Canada is beholden to many international treaties that affect and have the opportunity to guide the path of Canadian jurisprudence. What, then, is the relationship between s.12 of the Charter and the ICCPR's Article 7 regarding incarcerated persons facing administrative segregation? I argue this relationship has become closer with the use of international expert evidence in Canadian jurisprudence, thus expanding Canadian interpretation towards the international views on solitary confinement and administrative segregation. The current application of s. 12 follows a particular path may provide some protections for incarcerated persons—and thus some connection to Article 7. Nonetheless, s. 12 is not without its flaws; divergent interpretations may for potentially too narrow or broad interpretation within Canadian jurisprudence. I will be using the terms of solitary confinement and administrative segregation interchangeably to match their reference in international law and Canadian jurisprudence contexts. For the purposes of this paper, they should be understood as the same practice.

This area of research is important because it reveals human rights issues that incarcerated persons face in the Canadian state. Within the settler colonial state of Canada, the carceral state and institution disproportionately affects Indigenous and racialized peoples. This paper uses administrative segregation to bring attention to unconstitutional aspects of the Canadian prison system from an international human rights perspective. Changing interpretations of "cruel and unusual treatment or punishment" towards cruel, inhumane, and degrading treatment (CIDT) will move carceral administration further away from isolationist methods towards just, rehabilitative, and decolonial methods of prevention and healing. The organization of this paper is as follows: I begin with a literature review. I then problematizes. 12's current interpretations in Canadian jurisprudence by presenting the current international interpretation of CIDT. In this section I reveal how Canadian interpretation is moving closer to international CIDT interpretation, as well as how expert evidence from international actors and scholars contributes to further CIDT developments. Following that, I analyze recent Canadian court decisions concerning administrative segregation and their use of international expert evidence. I provide a brief subsection on case selection and methodology for the use of the segregation and post-segregation cases. Finally, possible critiques of the proposed thesis, the analysis of the evidence, and research limitations are entertained.

Kootenay, Peigan, Hul'qumi'num, and Te'mexw territories. I have spent most of my adult life living on unceded Songhees, Esquimalt and W̱SÁNEĆ territories, with a brief stint living and learning on the unceded Squamish, Tsleil-Waututh, and Musqueam territories.

Canadian legal analyses are inseparable from settler colonialism and Indigenous genocide through assimilatory and eliminatory policy and law. Ultimately, any discussion about European Settler law on stolen land should inspire caution and critique.

Literature Review: Bringing Together Domestic and International Legal Contexts

Section 12 Analysis and Tracks

As legal scholar Deborah Parks has suggested, s. 12 jurisprudence regarding incarcerated persons has "had remarkably little impact in litigation concerning conditions of confinement" (Parks 2007). This changed with two landmark s. 12 challenges in 2018: British Columbia Civil Liberties Association v. Canada (Attorney General) and (BCCLA) and Canadian Civil Liberties Association v. Canada (CCLA). Since then, s. 12 analysis made a dominant appearance across cases regarding administrative segregation. Kerr and Berger note that s. 12 runs along two tracks: the severity track and the methods track. They note the importance of clear distinction between these two tracks to avoid analytic confusion and failure of s. 12 challenges (Berger and Kerr 2020, 2, 7). The methods track asks if the treatment or punishment in question "is intrinsically cruel and unusual" and is thus "in its very nature, constitutionally offensive." The severity track measures the degree of treatment or punishment against normative standards to determine whether the extent to which it is applied makes it "grossly disproportionate" and thereby cruel and unusual (Berger and Kerr 2020, 5-6). The 2008 Supreme Court of Canada's (SCC) judgement in R. v. Ferguson affirmed the test for cruel and unusual punishment as a sanction "'so excessive as to outrage the standards of decency' and disproportionate to the extent that Canadians 'would find the punishment abhorrent or intolerable'" (2008 SCC 6, at para. 14). Challenges to confinement most often appeal to the methods tracks, though in practice s. 12 analysis blends the two tracks and applies them imperfectly. As a result, these legal principles leave room for a wide range of conclusions and decisions (Berger and Kerr 2020, 6). [11]

Colton Fehr notes the historic conjunctive use of "cruel and unusual" in the English Bill of Rights and American Bill of Rights is problematic. As seen in the Alberta Court of Appeal's ruling in R. v. Hills, the requirement that treatment or punishment must be cruel and unusual creates the potential of too narrow an interpretation of s. 12, which goes against the direction of s. 12 jurisprudence (Fehr 2021, 235-238). An amendment to s. 12 to adjust the wording to mirror ICCPR Article 7 's "cruel, inhuman or degrading treatment or punishment" could mitigate the potential of narrower interpretations. In the 2017 Ontario Court of Appeal case, Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services), Justice Laskin noted that "to establish violation of s. 12 a claimant need not show separately that the treatment is both cruel and unusual" (2017 ONCA 667, at para. 8). This ruling and interpretation discards some of the literal textualist reading of the s. 12 conjunction seen in Hills, returning focus to the methods and severity tracks.

Ogiamien set key precedent for the BCCLA and CCLA cases (collectively, the segregation cases). Thus, a brief examination of the case's outcome is warranted. Ogiamien features the application of s. 12's two-step test of prison conditions which asks (i) what is the treatment of incarcerated persons "under 'appropriate' conditions" and (ii) to what extent does the treatment depart "from the benchmark?" (2017 ONCA 667, at para. 10). In Ogiamien the Court determined that frequent lockdowns were not a violation of incarcerated persons' s. 12 rights because they did not far exceed the "treatment under ordinary living conditions" (2017 ONCA 667, at para. 68). This decision bore great relevance to the segregation cases because understandings of administrative segregation in relation to ordinary living conditions and the practice's inherently and grossly negative effects on incarcerated persons became points of contention in BCCLA and CCLA. Despite Ogiamien's clarification, the severity track remained mixed with the methods track in both segregation cases.

International Treaties and Standards

International law through legally binding treaties influences domestic courts. In Ng v. Canada for instance, the SCC prohibited the extradition of incarcerated persons to states that would violate Article 7 of the ICCPR (Smith 2016, 64). Hathaway's quantitative analyses of countries' treaty ratification and human rights records reveals that nations with ICCPR ratification "appear to have better average civil liberties and fairer trails" than those without its ratification (2002, 1978). However, Hathaway also notes that human rights treaties do not necessarily make state practices better or worse, but that the "pervasive culture of human rights and processes of norm internalization tend to affect states regardless" of ratification (2002, 2002). In Canadian jurisprudence, the focus on treaties is largely dependent on the relatability of legal concepts and their ease of application into domestic law.

States' fears that binding international law could impose superiority over a state's judicial sovereignty continues in contemporary conversations around domestic legal orders and international customary law (Harrington 2007, 220-221). Waters claims that "as the debate over the role of foreign and international law in domestic courts matures, it is time to move beyond discussions of 'foreign authority' and to examine these issues through a series of narrower lenses" (2007, 632). In the same vein, this paper considers the ICCPR's expansion into Canada's legal sphere and its subsequent effects on jurisprudence and s. 12 analysis. Waters' assertion that "some uses of foreign or international legal sources may prove to be perfectly legitimate and well within the ambit of the judiciary's traditional role, while other, more ambitious techniques may give us pause," rings true in contemporary conversation on solitary confinement and the treatment of incarcerated persons (Waters 2007, 632). Though here, the expanding Canadian legal definition of administrative segregation to something intrinsically "cruel, inhuman, and degrading" hints at ICCPR art. 7's profound influence on domestic law.

Domestic and International Intersections.

Is there a clear path of communication between domestic constitutionalism and international treaty obligations? Canadian courts' mandates include interpreting the Charter, but what about the ICCPR? Harrington notes that while the Charter does not directly incorporate the ICCPR into domestic jurisprudence, "Canada's periodic reports to... the UN Human Rights Committee, clearly show that Canada relies on the Charter to meet its Covenant obligations" (Harrington 2007, 233). Smith argues that "inevitably, less recourse is available for the aggrieved individual at [the] international level than at [the] national level (Smith 2016, 69)." Thus, the Charter will have to make do and require the transfer of treaty obligations and international interpretation to shift and influence Canadian judges' interpretations and methods of analysis in s. 12 cases. The UN Human Rights Committee's interpretation of treaty obligations through "concrete cases of alleged violation" are rarely referenced in Canadian jurisprudence and case law, which Harrington attributes to either the lack of legislated mandate to do so or the judicial choice "not to 'communicate' with... the UN Human Rights Committee..." (Harrington 2007, 233).[26]

Additionally, there is an important intersection between Canadian court cases that use international expert evidence and the reports of the Human Rights Council since

> "the work of the Council is supported by a range of special procedures (rapporteurs) — private individuals, serving in their individual capacity to monitor compliance with human rights in different states through official visits, conceptualize potential developments in human rights, consider claims of violations of rights and freedoms, and articulate and address concerns" (Harrington 2007, 71).

As will be seen across the cases selected for this research, the reports and expert evidence of Argentine lawyer and professor, Juan E. Méndez and other experts in international law appeared frequently in recent s. 12 jurisprudence. Therefore, the reports of special rapporteurs should be considered under the banner of "international interpretation" of human rights treaties and their articles, similar to Human Rights Committee case decisions.

Expert Evidence and Special Rapporteurs: Expanding CIDT and Applying ICCPR Article 7 to Charter Section 12

The concept of CIDT is normalizing and becoming a part of Canadian jurisprudence. Article 7 of the ICCPR is affecting s.12 of the Charter by broadening interpretations of treatment and punishment with its principle of "cruel, inhuman, and degrading treatment". Canada's courts and public are increasingly adopting this definition as the standard of unacceptable treatment in administrative segregation. Whether this shift began in the Canadian public's changing

standards of decency or in judicial interpretation is a matter of debate. Nonetheless, its impacts on incarcerated persons and carceral methods are far reaching. In exploring this, it is first integral to lay out the international community's contemporary definition of what constitutes CIDT relative to administrative segregation in the Canadian cases. Over the last decade, both special rapporteur reports and ICCPR interim reports have expanded upon the context of CIDT to relate directly to administrative segregation. I chose these sources because they display the international community's understandings, interpretations, and expectations regarding human rights across international and domestic contexts.

Juan E. Méndez's 2011 Report to the UN General Assembly as the Special Rapporteur of the Human Rights Council is crucial for understanding Canada's shift towards the CIDT standard. Méndez's report helped expand CIDT and art. 7 to cover administrative segregation and as a result, had particular importance for the segregation cases and subsequent segregation jurisprudence in Canada.[28] In the 2011 interim report, Méndez unraveled solitary confinement's history and its definition as 22 to 24 hours of physical isolation. He concluded that that "the social isolation and sensory deprivation that is imposed by some States does, in some circumstances, amount to cruel, inhuman and degrading treatment and even torture" (Méndez 2011, 7-8). Méndez also established a direct connection to ICCPR art. 7, stating that "prolonged solitary confinement of the detained or imprisoned prison"—being more than 15 consecutive days—might violate the ICCPR (2011, 9). Importantly, Méndez reported that the health risks of solitary confinement, including anxiety, depression, and self-harm increased after "each additional day spent in such conditions" (17-18). In short, Méndez's report allowed ICCPR art. 7 to touch upon Canadian administrative segregation.

The UN Human Rights Committee has consistently voiced concern over Canadian prison conditions even after 2018 segregation cases (UNHRC 2015 and UNHRC 2021). . The Concluding observations on the sixth periodic report of Canada in UNHRC 2015 shows the Committee's concern for the "many cases of administrative or disciplinary segregation," commenting on the length of segregation and its use on incarcerated persons with mental illnesses. It recommended that Canada:

> (i) use alternative means of detention,
> (ii) ensure segregation is a "last resort for as short a time as possible"
> (iii) prohibit the practice's use on those with mental illnesses (UNHRC 2015).

It must be noted that Article 7 is not considered in this part of the report, but Article 10 — specific guidelines for incarcerated persons' treatment, differentiated unconvicted and juvenile treatments, and the penitentiary system's goal as rehabilitation—is the key focus (ICCPR 1966, at art. 10). In 2021, the UN Human Rights Committee asked Parliament to respond to reports

that Canada's 2019 adjustments to the Corrections and Conditional Release Act (CCRA) following the segregation cases had "not been effective at addressing the use of prolonged solitary confinement within the prison system" (UNHRC CCPR/C/CAN/QPR/7 2021, 4). The report cautiously questioned Canada's adherence to ICCPR arts. 7 and 10. Unlike its 2015 Concluding Observations, this report directly connected Canadian prison conditions to art. 7 just as the Méndez Report had in 2011. The omission of art. 7 in the 2015 Report suggests a level of inconsistency in the UN's treatment of Canadian administrative segregation standards. I suspect the shift between reports is due to the segregation cases' use of s. 12—at least in the CCLA case—which then increased art. 7's relevance.

Analyzing Jurisprudence: Administrative Segregation, Section 12, and the ICCPR

Many elements of the segregation and post-segregation cases are similar relative to s. 12 and art. 7. These cases are: British Columbia Civil Liberties Association v. Canada (Attorney General), Canadian Civil Liberties Association v. Canada, R. v. Capay, and Reddock v. Canada (Attorney General). Almost all cases reference the ICCPR and other international treaties and agreements including the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT), and the Mandela Rules. Likewise, almost all cases reference the 2011 Méndez Report, with some cases having him directly provide expert evidence. These cases are important because they show the application and non-application of s. 12, make reference to international law and treaty obligations, and reveal the current reasoning for whether administrative segregation procedures are CIDT. These four cases clarify the relationship between s. 12 and art. 7 and how well s. 12 measures up to international interpretations of CIDT.

Methodology and Case Selection

This analysis looks at s. 12 challenges related to administrative segregation across Canada between 2018 and 2020. In reference to the literature review, analyzing these particular cases shows how the Courts and the ICCPR interact and how international law communicated through expert evidence testimonies influences domestic courts. It also considers the severity and methods tracks in order to better understand how s. 12 jurisprudence and Canada's judicial system are developing.

As seen in the 2017 Ogiamien case, a two-step test guides Judges' interpretations of cruel and unusual treatment or punishment by asking what appropriate treatment is under ordinary conditions and the extent to which additional measures depart from those conditions. But does this entirely explain administrative segregation's infringement of s. 12? These cases were selected because they show some variation in interpretation of s. 12 infringement. BCCLA did not infringe s. 12, whereas CCLA, Capay, and Reddock did. They also vary in their impugned

legislation and officials, and in remedy. The selected cases are both chronologically and substantively similar. Their substantive similarity is significant because it allows for a deeper analysis of the relationship between the ICCPR and the Charter. This depth will provide a background for future research that asks how Canadian courts interpret s. 12 and international law.

Future cases will determine whether this period of s. 12 infringement for incarcerated persons was a progression for future use of s. 12 or if it was a unique, one-time occurence. Due to the limitations of this paper and breadth of each case, I was unable to add additional cases like the 2019 Ontario Supreme Court case Brazeau v. Attorney General (Canada), and the 2020 Ontario Superior Court of Justice case Francis v. Ontario, both of which dealt with administrative segregation in class-action cases akin to Reddock.

British Columbia Civil Liberties Association v. Canada (Attorney General)

Justice Leask of the BC Supreme Court examined s. 12 considerations for administrative segregation in the 2018 BCCLA case. The impugned laws were the CCRA ss. 31-33 and 37 regarding prolonged administrative segregation which the British Columbia Civil Liberties Association and John Howard Society argued infringed Charter ss. ss. 7, 9, 10, 12, and 15 (2018 BCSC 62, at para. 2). The case directly references ICCPR art. 7 by citing the 2011 Méndez Report and considers UNCAT arts. 1 and 16, and the Mandela Rules (2018 BCSC 62, at para. 58). This case comes up short in terms of understanding the relationship between s. 12 and art. 7 because s. 12 was not found to be infringed. However, this does show some of the logic of Canadian jurisprudence to not include s. 12. From the expert evidence provided, Justice Leask notes that s. 31's administrative segregation "is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm" (2018 BCSC 62, at para. 247). Yet, Justice Leask emphasizes that the plaintiffs "argue that certain conditions experienced by inmates placed in administrative segregation are" unconstitutional, not that the practice itself constitutes a s. 12 infringement (2018 BCSC 62, at para. 533-534). Likewise, Justice Leask agreed with the federal government in that administrative segregation was a form of s. 12 "treatment," but asserted that "cruel and unusual" was a high threshold that the plaintiffs did not meet (2018 BCSC 62, at para. 527).

Differentiating from the other cases I have selected, Justice Leask notes that "the plaintiffs focused their submissions on s. 7 of the Charter." This led to the s. 52 invalidation of those impugned CCRA sections pursuant to s. 7 and s. 15 which were based on administrative segregation's effects on the mentally ill and disabled, and discrimination against incarcerated Aboriginal peoples (2018 BCSC 62, at para. 609). The lack of a s. 12 foundation in this case should not detract from the important work of a s. 15 foundation. The deaths of Ashley Smith and Edward Snowshoe in administrative segregation are critical examples of the

disproportionate impacts of administrative segregation on Indigenous Peoples (White 2020). An example of the determining preference of other Charter rights is the West Coast Women's Legal Education and Action Fund's work in BCCLA as an intervenor. Notably, their written submission focuses substantively on ss. 7 and 15 infringements and makes no mention of s. 12 (WCWLEAF 2018). This case was appealed in the BC Court of Appeal, where Justice Fitch upheld the s. 7 infringement but found no s. 15 infringement (Imrie 2020).

Canadian Civil Liberties Association v. Canada

The CCLA case was similar to BCCLA as it was based on the CCRA's ss. 31-37 uses of administrative segregation; primarily being argued was that the sections infringed ss. 12 and 11(h), with the appeal to the Ontario Court of Appeal including a s. 7 infringement (2019 ONCA 243, at para. 3). This case specifically frames "prolonged administrative segregation"—that which exceeds 15 consecutive days—as causing "foreseeable and expected harm which may be permanent and which cannot be detected through monitoring until it has already occurred," thus "outraging the standards of decency" (2019 ONCA 243, at para. 5). While the Ontario Court of Appeal case does not explicitly mention the ICCPR, Justice Benotto notes that the application judge used Méndez's expert evidence on the basis of , his expertise as "a professor of human rights law" and his six-year role as the United Nations Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (2019 ONCA 243, at paras, 26-29). As previously stated, his 2011 interim report as special rapporteur is integrally tied to ICCPR art. 7.

The result was that CCRA ss. 31-37 infringed s. 12 because the sections did not protect against the grossly disproportionate treatment of prolonged administrative segregation (2019 ONCA 243, at para. 19). The infringement did not pass the reasonable objective stage of s. 1 analysis because the practice's objective "to ensure the safety of persons in and the security of the penitentiary" through the use of reasonable alternatives and done in the shortest amount of time was not being practiced. Ultimately, Justice Benotto rhetorically asks whether s. 1 can ever justify a s. 12 breach (2019 ONCA 243, at para. 122-124).[50] In CCLA, Justice Benotto applied the Ogiamien two-step test by questioning the severity of the punishment relative to ordinary prison conditions. Nonetheless, Kerr and Berger (2020) state that his answer also leaned towards the methods track in viewing the practice as inherently cruel and having harmful effects on incarcerated persons (16).

Finally, a s. 52(1) remedy was given to take away the force and effect of administrative segregation through the impugned CCRA sections (2019 ONCA 243, at para. 139-140). The CCLA case most mirrors art. 7 because it follows international interpretation that considers prolonged solitary confinement as CIDT. The harmful effects of administrative segregation were what determined the practice's infringement of s. 12. Importantly, the Attorney-General of

Canada, David Lametti, sought to appeal both the BCCLA and CCLA cases to the SCC. However, Lametti discontinued the appeal in April 2020 allowing the lower courts' decisions to stand (White 2020).

R. v. Capay

The Capay case was a criminal case heard in the Ontario Superior Court of Justice in 2019 by Justice Fregeau. Capay, from Lac Seul First Nation, spent 1,647 days "continuously held in segregation in a cell by himself" despite suffering from serious childhood trauma and mental illness (2019 ONSC 535, at paras. 4, 8-14, 39. He sought a s. 24(1) stay of proceedings for his first-degree murder case due to his claim that his detention in administrative segregation violated his ss. 7, 9, 12, and 15 rights (2019 ONSC 535, at paras. 484, 487). The policy governing administrative segregation practices in this case was Ontario's Ministry of Correctional Services Act, Regulation 778, s. 34 (2019 ONSC 535, at para. 143). Arguing for a s. 12 infringement, Professor Stephen Toope provided expert evidence revealing that Capay's confinement was CIDT under international law. The Crown agreed that correctional officers had subjected Capay to CIDT (2019 ONSC 535, at para. 361). Justice Fregau concluded the treatment was "outrageous, abhorrent, and inhumane" and stayed proceedings on the grounds that Capay's confinement violated his s. 12, 7, 9, and 15 rights and a trial would amount to "ongoing prejudice to the accused" (2019 ONSC 535, at paras. 415, 496, 534-535).

In his decision, Justice Fregeau cited ICCPR arts. 7 and 10 and Canada's accession to other international treaties that "set out limits on the use of segregation and the standards for the conditions to which segregated inmates may be subjected" (2019 ONSC 535, at paras. 151-153). Other treaties referenced were UNCAT, the Convention on the Rights of Persons with Disabilities, and the Mandela Rules (2019 ONSC 535, at paras. 154-157). Professor Toope described Canada as "legally bound to the terms of" the ICCPR and UNCAT, stating that ICCPR arts. 7 and 10 "collectively create an obligation to ensure prisoners are protected against torture and cruel, inhuman or degrading treatment or punishment" (2019 ONSC 535, at paras. 180-181). Some key differences in this case were the substantive connections to art. 7 and the clear s. 12 infringement. While it should be noted that this is an extreme and obvious case that looks specifically at government correctional officers' infringing an incarcerated individual's s. 12 rights, it also shows the current and potentially horrific outcomes under Canadian administrative segregation legislation. As an individual case, the framing towards a s. 24(1) remedy fits better than one under s. 52(1) considering the Crown could argue that most cases are dissimilar to Capay. Yet the staying of a first-degree murder charge is not insignificant; ultimately, Ontario did not appeal the case (Affleck and Barrison 2021).

Reddock v. Canada (Attorney General)

The Reddock case was heard by Justice Perell in the Ontario Superior Court of Justice in 2019. Reddock sued the federal government under the Class Proceedings Act (1992) for the Correctional Service of Canada's maladministration of administrative segregation in federal penitentiaries which he claimed infringed "inmates' rights" pertaining to ss. 7, 9, 11(h), and 12 of the Charter. Notably, the case's 8,934 Class Members were "prisoners who [had] spent more than fifteen consecutive days in administrative segregation" (2019 ONSC 5053, at paras. 2-3, 6-7). In Reddock, Justice Perell takes into account the BCCLA and CCLA cases, which at the time the federal government was planning to appeal to the SCC (2019 ONSC 5053, at para. 5). In connection to the ICCPR, Justice Perell notes Canada is "bound by the provisions of both the [UNCAT] and the [ICCPR]" and Professor Méndez provided expert evidence directly relating to his 2011 Report connecting solitary confinement to art. 7 2019 ONSC 5053, at paras. 119-120).

The Reddock decision regarding s. 12 infringement directly called upon the CCLA decision in stating "that the maximum time after which segregation constitutes cruel and unusual treatment on a class-wide basis is fifteen days" and that anything prolonged now outrages the standards of decency and is a s. 12 infringement (2019 ONSC 5053, at paras. 285-287). Justice Perell answers the question Justice Benotto asks in CCLA, responding that "in the context of current moral norms, once it has been established that treatment is cruel and unusual, it cannot ever justify a s. 12 breach," and thus the s. 12 infringement in Reddock fails s. 1 justification (2019 ONSC 5053, at para. 301). The s. 24(1) remedy meant $500 per Class Member—a base level compensatory award—and the "base level of Charter damages" was a $20 million value (2019 ONSC 5053, at paras. 396-397). The case was appealed to the Ontario Court of Appeal, which unanimously upheld Justice Perell's decision (Tétrault 2021).

Summary of Case Analysis

What is clear after the BCCLA and CCLA cases is the shift and effect on Capay and Reddock, showing similar or increasing ICCPR reference and administrative segregation being defined as CIDT. Thus, the reference of international treaties establish a link between international law and the Charter. The use of international expert evidence establishes the extent of influence and substantiveness of international interpretation in Canadian courts. Notably, there were no references in any of the cases to relevant Human Rights Committee cases seeking to adjudicate ICCPR articles. If Human Rights Committee cases were being drawn up by Canadian courts, plaintiffs, applicants, or intervenors, they could create a connection and, if accepted, substantiate international interpretations of art. 7 to s. 12. This connects with Harrington's observation of the ICCPR's lack of incorporation into the judiciary.

Another element that differentiated the BCCLA case from the other cases was that the plaintiffs and intervenors focused the case on ss. 7 and 15 more heavily than they did s. 12. While the BC Supreme Court still denied there was s. 12 infringement, future incarcerated persons' cases

should be careful to select and support specific Charter section infringements. While BCCLA had the expert evidence and connection to the ICCPR, the plaintiffs did not adequately argue that administrative segregation was in itself cruel and unusual punishment vis a vis the methods track. Capay and Reddock also show the importance of s. 24(1) remedy for those who have been aggrieved by the now impugned practice of prolonged administrative segregation.

How do these cases help build understanding of the relationship between the Charter's s. 12 and the ICCPR's art. 7 regarding incarcerated persons facing administrative segregation? It is clear that most of the cases analyzed show a general agreement that administrative segregation is not constitutional as per s. 12. There is a clear connection between the ICCPR through the evidence presented by international experts in each case. These cases show that there is room in Charter interpretation for international perspectives; Canada has international obligations to incarcerated persons and this gives Canadian judges space to consider jurisprudence beyond the Charter in their decisions. The specifics of s. 12 analysis and tracks across these cases also shows that Canada's legal system faces frequent muddying of the severity and methods tracks. This uncertainty can alter s. 12's understanding domestically, making it harder to align with art. 7 of the ICCPR.

Critiques and Responses

Could s. 12 be developing on its own as Canadian society begins seeing administrative segregation as outraging the standards of decency? I posit that while the psychological expert evidence revealing the negative effects of administrative segregation indeed outrages Canadian standards of decency, they are connected well to the development of solitary confinement as CIDT in the international legal context. The work of international legal scholars citing art. 7 such as professors Méndez and Toope thread the definition of an abhorrent practice. Future research might do well to compare post-case legislative action against courts' s. 12 analysis results, as well as comparing the legislation (i.e., Bill C-83) against interpretation of ICCPR Article 7 and the Human Rights Committee's reports on Canada. This paper faced substantial limitations given the lengthy expert evidence posed with each lower court case. Other data I would have liked to have included were additional factums and written submissions from intervenors and Human Rights Committee cases concerning CIDT and incarcerated persons. While it is clear that the latter data had relatively little effect on the cases, it would be interesting if future plaintiffs were to consider utilizing Human Rights Committee cases to hold Canada accountable to its ICCPR obligations. Courts' responses to plaintiff's use of international cases would also be enthralling.

The slower development of s. 12 analysis and its relationship to art. 7 of the ICCPR regarding administrative segregation might also be this way due to the use of other Charter claims in defense of incarcerated persons. Parkes notes that most incarcerated persons' cases have

taken the route of s. 7 to protect their rights to life, liberty, and security of person (Parkes 2007, 642). Indeed, the BCCLA case follows more closely to Canadian judicial norms because it was deemed a s. 7 infringement at both the BC Supreme Court and BC Court of Appeal. Conversely, the CCLA case breaks ground with maintaining the claim and decision of a s. 12 infringement, while also connecting back with a s. 7 infringement.

There is also the argument that these cases misrepresent incarcerated persons' rights because all of these cases are very similar in their result. To respond, these cases are indeed very specific in that they only regard the treatment of solitary confinement and administrative segregation. Similarly, and connecting to Parkes, s. 12 has not seen as much use as s. 7 when regarding incarcerated persons' rights. These are recent developments that must be expanded upon as future jurisprudence on s. 12 interpretations and incarcerated persons' rights develop.

Conclusion

The Canadian segregation cases and their successor cases show that when plaintiffs and applicants prioritize s. 12 and supplement their cases with expert evidence that connects Charter violations to international law and treaties, jurisprudence begins to build more substantive s. 12 protections for incarcerated persons. Notably, human rights bodies and special rapporteurs can be utilized to help expand concepts of CIDT to be applied by s. 12 analysis. It is important not to interpret this as Justices transposing international law directly onto s. 12 interpretation; in some cases, mention of the ICCPR and other international laws and norms could be superficial recognition of treaty obligations.

The Charter and s. 12 would directly connect with the ICCPR if Canadian courts were to also include reference or dialogue between the Human Rights Committee's cases regarding Article 7 and Article 10. A Charter s.12 that more closely resembles ICCPR art. 7 would better protect all Canadians—incarcerated or otherwise—from "cruel, inhuman or degrading treatment or punishment." This follows a similar vein to Parkes consideration of "the role that litigation might play in ending this human rights crisis, as well as the relationship of prisoner rights litigation to broader, anti-carceral social movements" (Parkes 2017, 166). Future research should look at whether the legislation enacted by Bill C-83, the Act to Amend the Corrections and Conditional Release Act (2019), and other affected legislation captures the outcomes of administrative segregation cases and Canada's commitment to the ICCPR.

As of Bill C-83's royal assent, it now stands that the amended CCRA "eliminate[s] the use of administrative segregation and disciplinary segregation" and provides guidelines for the use of "Structured Intervention Units" (SIUs) to prevent the negative effects of administrative segregation (S.C. 2019 c.27). Nonetheless, reports in April 2022 found that solitary confinement has continued in the form of SIUs; from November 2019 to August 2021 1,732 incarcerated

persons were in SIUs, with 55% exceeding 30 days and 22.5% between 60 and 552 days, as well as 30% of persons not receiving 4 hours outside of isolation, and 10% meeting torture standards (CBC News 2022). It would seem that the Human Rights Committee's fears of SIUs continuing solitary confinement under a new name are true. As it currently stands, administrative segregation in Canada compares relatively close to solitary confinement's definition in international treaties and CIDT, but s. 12 and art. 7 could be more closely aligned. If s. 12 and Article 7 were one and the same, then administrative segregation as solitary confinement, SIUs, and any related form of administrative segregation would be unconstitutional and more humane methods of correctional justice and rehabilitation would be at the forefront of legislation. Until s. 12 and Article 7 align, we will likely continue to see repeated forms of administrative segregation that come in different names yet garner the same harmful results.

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