SMOOTHING THE ROAD TO REFORMING SOLITARY CONFINEMENT: ACCESS TO JUSTICE AND LAW REFORM

Bailey Fox[*]

I. INTRODUCTION

On January 17, 2018 the British Columbia Civil Liberties Association ("BCCLA") posted on their website: "We Won! BC Supreme Court ends indefinite solitary confinement in federal prisons across Canada."[1] This statement referred to the January 2018 British Columbia Supreme Court's decision in *British Columbia Civil Liberties Association v Canada (Attorney General)*,[2] where Justice Leask found that solitary confinement as practiced in Canada violates the *Canadian Charter of Rights and Freedoms*' section 7 guarantee to life, liberty and security of the person,[3] section 12 right against

[*] Juris Doctor, 2019 (Osgoode Hall Law School). The Author wishes to thank Professor Daniel Sheppard for his Test Case Litigation seminar and for his helpful comments in developing and improving this paper. Thanks also to the participants of the Windsor Review of Legal and Social Issues' Canadian Law Student Conference for their useful comments. Finally, thanks to both peer reviewers and editors for their feedback and careful editorial work.

[1] British Civil Liberties Association, "We won! BC Supreme Court ends indefinite solitary confinement in federal prisons across Canada" (27 January 2018), online: *BCCLA* <bccla.org/2018/01/bc-supreme-court-ends-indefinite-solitary-confinement-federal-prisons-across-canada/>.

[2] 2018 BCSC 62 [*BCCLA*].

[3] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 7 [*Charter*] (section 7 of the *Charter* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). See also Department of Justice, "Section 7 – Life, liberty and security of the person" (last modified 17 June 2019), online: *Charterpedia* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art7.html> ("[s]ection 7 of the *Charter* requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process").

cruel and unusual punishment,[4] and section 15 equality guarantee.[5] But what exactly was won? Who won it and *how* did they achieve this success? Perhaps most importantly, how meaningful is this legal victory?

The BCCLA litigation coincided with a similar challenge brought by the Canadian Civil Liberties Association ("CCLA") in Ontario, *Corporation of the Canadian Civil Liberties Association v Canada (Attorney General)*.[6] This case was decided in December 2017 by Associate Chief Justice Morrocco of the Ontario Superior Court ("ONSC"). Both cases challenged the constitutional validity of sections 31–37 of the *Corrections and Conditional Release Act* ("*CCRA*"),[7] which outline the provisions authorizing Correctional Services Canada's ("CSC") use of administrative segregation. The CCLA and BCCLA submitted that sections 31–37 should be of no force and effect per section 52(1) of the *Charter*[8] to the extent of their constitutional infirmities.[9] While both Ontario and British Columbia courts found that the impugned sections violated section 7, the decisions diverged with respect to both legal analysis and remedy.

---

[4] *Charter*, *supra* note 3, s 12 (section 12 reads: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment"). See also Department of Justice, "Section 12 – Cruel and Unusual treatment or punishment" (last modified 17 June 2019), online: *Charterpedia* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html> (section 12 prohibits treatment or punishment that is "grossly disproportionate" in the circumstances; in other words, one that would "outrage our society's sense of decency" such that Canadians would find it "abhorrent or intolerable").

[5] *Charter*, *supra* note 3, s 15 (section 15(1) reads: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability"). See also Department of Justice, "Section 15 – Equality rights" (last modified 17 June 2019), online: *Charterpedia* <www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html>.

[6] 2017 ONSC 7491 [*CCLA* ONSC].

[7] *Corrections and Conditional Release Act*, SC 1992, c 20 [*CCRA*]. For the version of the legislation in place at the time of the BCCLA and CCLA trials, see: <www.canlii.org/en/ca/laws/stat/sc-1992-c-20/160279/sc-1992-c-20.html>.

[8] See *Constitution Act,* 1982, s 52(1), being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 ("the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect," s 52(1)).

[9] See *BCCLA*, *supra* note 2 at para 602; *Corporation of the Canadian Civil Liberties Association v Canada (AG)*, 2017 ONSC 7491 (Factum of the Applicant) at para 227 [*CCLA* factum].

As the trial level decisions make their way through the appellate process, and while Parliament has reformed the *CCRA*'s solitary confinement regime,[10] these court challenges remain important studies in how changing dynamics in *Charter* litigation—from the law of standing to the evidentiary records—can act as a catalyst for prisoner's rights reform more broadly.

For the purposes of the current litigation, the CCLA and BCCLA represent a larger community advocating for reform of solitary confinement practices. This movement has only gained momentum as Canadians grapple with the devastating consequences of solitary confinement, such as Ashley Smith's tragic death in a segregation cell while CSC officers watched and failed to intervene.[11] While the prison reform movement is diverse—with some advocates working towards prison abolition and others towards prison reform—a common call among the movement is for the independent review of CSC's decisions to segregate a prisoner.[12] Yet systemic barriers including judicial deference to prison administrators' expertise, the confines of existing legal doctrines, and individual-centred litigation, have traditionally stymied such reform efforts. Therefore, a precondition for prison reform is replacing the traditional deferential paradigm undergirding prisoners' rights cases to one governed by the rule of law and human rights.

Recognizing litigation's performative potential and the capacity of legal procedure to shape substantive outcomes, this article explores how developments in the laws of both standing and evidence can help facilitate successful law reform efforts. Specifically, expanded public interest standing and a corresponding increase in legislative and social fact evidence allows claimants to counter the complex, systemic factors reinforcing rights-deficient regimes and increases the potential transition to a human rights-based paradigm.

---

[10] See *Canadian Civil Liberties Association v Canada*, 2019 ONCA 243; *British Columbia Civil Liberties Association v Canada (AG)*, 2019 BCCA 228. See also *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27 (the Act received Royal Assent in June 2019 and sections of it came into force in November 2019).

[11] Solicitor General of Canada, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Canada Communication Group C Publishing, 1996) at 102–03 [*Commission of Inquiry (Prison for Women)*].

[12] Michael Jackson, "Reflections on 40 Years of Advocacy to End the Isolation of Canadian Prisoners" (2015) 4:1 Can J Hum Rights.

However, the extent of this success may be tempered by available remedies and shifts in institutional settings.

In what follows, I examine how procedural changes in the trial context (one theatre of justice) can change the administration of justice in other contexts, namely prisons. Investigating the impact of expanded opportunities through procedural reform for the prospect of successful law reform litigation is anchored in two recent solitary confinement cases. First, I provide an overview of prisoner rights litigation and its limited success up until now. Next, I discuss the new public interest standing doctrine and how it may enable successful systemic *Charter* challenges. Finally, I examine the effectiveness of expanded evidentiary records in meeting the complexity of the claim. The impact of these two changes as seen in the solitary confinement cases is the possibility for fuller representation and successful systemic change.

II. HOW DID WE GET HERE? PRISON LITIGATION FROM 1970s – PRESENT

Solitary confinement as a prison population management tool is as pervasive in Canada as the calls to limit or abolish its use.[13] According to CSC, the practice serves a variety of purposes, from crisis management to rehabilitation or punishment.[14] While the history of solitary confinement dates back to the rise of the modern penitentiary, CSC's administrative segregation regime is governed by sections 31–37 of the *CCRA*.[15] This statutory scheme was enacted in 1992 with the intent of aligning federal corrections with *Charter* rights.[16] The regime at the time of the *CCLA* and *BCCLA* litigation (before the 2019 reforms), permitted a prisoner to be placed in "administrative segregation"[17] based on the

[13] Debra Parkes, "Solitary Confinement, Prisoner Litigation, and the Possibility of a Prison Abolitionist Lawyering Ethic" (2017) 32:2 CJLS 165 at 168.
[14] See *Ibid* at 169. Up until 2019, the *CCRA* called the practice of solitary confinement "administrative segregation". After 2019 legislative changes, the *CCRA* now uses the term "Segregated Intervention Units".
[15] See *BCCLA*, *supra* note 2 at paras 16–22 (short history).
[16] Jackson, *supra* note 12 at 64.
[17] The *CCRA*, *supra* note 7, uses the term "administrative segregation" to semantically differentiate the practice from "solitary confinement" as referred to in international

very broad grounds of acting "in a way that jeopardizes the security of the penitentiary."[18] The statutory regime distinguished "administrative segregation" from the "disciplinary segregation" permitted under section 44(1)(f) of the *CCRA*.[19] While there was a 30-day limit on "disciplinary segregation", there were no statutory limits on the amount of time a prisoner can spend in "administrative segregation". Within the pre-2019 administrative segregation scheme, there was little oversight because the Warden was both the final decision maker and the individual responsible for reviewing decisions to administratively segregate a prisoner.[20] These statutory defects created a system that was both overused and abused. However, human rights-based challenges to solitary confinement preceded the *Charter* and have continued since—demonstrating the polycentric nature of the issue and the intractability of certain barriers to achieving meaningful reform.

One of these underlying barriers is that courts have traditionally refrained from assessing prison conditions, extending significant deference to an institution's operational needs as represented by prison officials (who have 'insider' expertise).[21] This deference stems from an underlying conflict between institutional security and human rights in prisoners' rights cases. This archetype assumes that rights and security are mutually exclusive and that rights may be derogated from based on security concerns. A particularly blatant example is *R v Aziga*, a 2008 ONSC case where the judge held that courts "ought to be extremely careful not to unnecessarily interfere with the administration of detention facilities."[22] Departing from general *Charter* principles, the judge further stated that unless prisoners can show a "manifest violation" of a constitutional right, "it is not generally open to the courts to question or second

documents. The Courts in *BCCLA* and *CCLA* rejected any distinction in terms. This paper uses "segregation" and "confinement" interchangeably. See *CCLA* ONSC, *supra* note 6 at para 46 and Parkes, *supra* note 13 at 167.

[18] *CCRA*, *supra* note 7, s 34(1)(a).

[19] *Ibid*, s 44(1)(f) (this provision was repealed as part of November 2019 legislative reforms).

[20] See *BCCLA*, *supra* note 2 at paras 345–46.

[21] Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 at 43 [Kerr, "Contesting Expertise"].

[22] *R v Aziga* (2008), 78 WCB (2d) 410, 2008 CanLII 39222 at para 34 (Ont Sup Ct).

guess the judgment of institutional officials."[23] This raising of the standard of proof is one example from jurisprudence that stereotypes prisoners as dangerous and less entitled to rights protections.[24]

However, some recent cases demonstrate a repudiation of the "'hands-off' approach that Canadian courts had often taken in prison litigation."[25] In the 2010 case of *Bacon v Surrey Pretrial Services Centre (Warden)*, a British Columbia Superior Court judge found an individual's pre-trial solitary confinement conditions to be cruel and unusual punishment contrary to section 12 of the *Charter* and issued a writ of *habeas corpus*.[26] Most recently, in *Hamm v Attorney General of Canada (Edmonton Institution)*,[27] self-represented prisoners who had been segregated were successful in their *habeas corpus* application. *Bacon* and *Hamm* demonstrate judicial willingness to transcend the artificial divide between the length of a sentence (under judicial purview) and the experience of punishment (beyond judicial gaze) and constitutionally assess solitary confinement conditions. Yet the conditions for such judicial 'activism' are not always present and, even if they are, successes are limited in both quantity and scope.

The history of litigation against solitary confinement shows at least two barriers to achieving systemic change through litigation. The first is the individual nature of the claims. As Lisa Kerr states, "much prisoner litigation has been highly individualized and limited in scope."[28] The individual's unique situation limits both the scope of the legal issues considered and the appropriate remedy. For example, while both *Bacon* and *Hamm* recognize serious constitutional deficiencies with solitary confinement practices, the cases are resolved on established legal principles, and provide individual remedies. The constitutional validity of the segregation system itself was necessarily outside the scope of the cases. [29] Second, prisoners do not have meaningful access to

---

[23] *Ibid.*
[24] See also *R v Farell*, 2011 ONSC 2160 at para 47.
[25] Parkes, *supra* note 13 at 173.
[26] *Bacon v Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805.
[27] 2016 ABQB 440.
[28] Kerr, "Contesting Expertise", *supra* note 21 at 53.
[29] Lisa Kerr, "Easy Prisoner Cases" (2015) 71 SCLR 235 at 235.

counsel and courts. Given prisoners' restricted liberty and lack of access to legal aid funding, many litigants challenging their discreet treatment are self-represented.[30] These barriers are mutually causal and reinforcing—individual and under-resourced claims lack the capacity to challenge the presumptive constitutionality of the *CCRA* itself.

Yet the lack of systemic change cannot be blamed simply on the inherent limits of any one case. To understand this inertia, one must look past the courts and look instead at CSC. Professor Michael Jackson has chronicled the multiple investigations and reform initiatives, all of which have recognized the need for solitary confinement reform. The Arbour Commission (1996); the Task Force on Administrative Segregation (1997); the *CCRA* five-year review (2000); the Canadian Human Rights Commission Report (2004); and the Ashley Smith Inquiry (2008), have all concluded that independent review is a necessary feature of administrative segregation.[31] Yet none of the recommendations to limit or independently review solitary confinement have been implemented, demonstrating CSC's reticence to implant the Rule of Law within the correctional culture.[32] This institutional inertia is supported by CSC's internal prioritization of operational concerns, including population management and prison guard safety. These safety concerns map onto political "tough on crime" policies creating a landscape where the prison door is slammed shut to nonpartisan prison reform efforts.[33]

In sum, there are three mutually-enforcing barriers that prevent solitary confinement reform in Canada. First, courts typically defer to prison administrators, whose deference is undergirded by assumptions of administrator expertise and prisoner stereotyping. Although judges have been increasingly willing to rescind this deference, judicial assessment of the regime's *Charter* compliance is limited by the cases' individual scope. Second, narrow judicial

---

[30] Parkes, *supra* note 13 at 173.
[31] Jackson, *supra* note 12.
[32] See *Commission of Inquiry (Prison for Women)*, *supra* note 11 at 100.
[33] For a discussion on the impact of "tough on crime" policies on solitary confinement, see Jarrod Shook & Bridget McInnis, "More Stormy Weather or Sunny Ways? A Forecast for Change by Prisoners of the Canadian Carceral State" (2017) 26:1&2 J Prisoner & Prisons 269 at 275–78.

remedies and unexecuted report recommendations have failed to counteract CSC's powerful resistance to change. Finally, the controlling narrative of prison safety expressed by CSC and sanctioned in courts counteracts compelling individual narrative about the harms of solitary confinement, prevents the full application of *Charter* rights, and resists reform efforts. The subsequent sections will examine how changes to public interest standing and evidentiary strategies have disrupted this dynamic, creating the possibility for *Charter*-based solitary confinement reform.

III. BREAKING DOWN STANDING BARRIERS: FROM PRIVATE TO PUBLIC

A notable feature of the recent solitary confinement cases is that they were brought by organizations with public interest standing, as opposed to individuals with private claims. The question is whether, and in what way, public interest standing impacted the success of the *Charter* challenges. Both the CCLA and BCCLA relied on a recent broadening of the public interest standing doctrine to initiate the constitutional challenge. Behind this expansion of the common law rules for standing lies a different paradigm shift—from legal process confined by private law strictures to procedure aligned with the exigencies of public law and *Charter* litigation.[34] Public interest standing has the potential to give voice to previously underrepresented groups in court. These shifts are especially promising for *Charter* claims challenging a legislative scheme that adversely impacts this particular marginalized group.

The laws of standing—one instance of a judge's 'gatekeeping role'[35]—articulate "*who* is allowed bring *what* issues before the court."[36] Per the traditional common law rule, access to a courtroom is contingent on the litigant having a direct stake in the claim.[37] This concept of private standing aligns with

---

[34] Dana Philips, "*Public Interest Standing, Access to Justice, and Democracy under the Charter*: Canada (AG) v Downtown Eastside Sex Workers United Against Violence" (2013) 22:2 Const Forum Const 21 at 25–26.
[35] Jane Bailey, "Reopening Law's Gate: Public Interest Standing and Access to Justice" (2011) 44:2 UBC L Rev 25 at 256.
[36] Philips, *supra* note 34 at 25 [emphasis in original].
[37] *Ibid*.

the traditional conception of judges as arbiters of private, discreet disputes. There are three primary rationales for a strict approach to standing: First, this model understands the judicial role as compensating individual harm suffered under a legally cognizable claim.[38] Private standing therefore corresponds with the adversarial process and ensures an adequate factual record for the resolution of disputes. Second, it prevents a flooding of legal disputes and, third, the "mere busybody" is blocked from bringing frivolous claims.[39] Given the courts' limited personnel and financial resources, there is good reason to monitor and potentially restrict legal claims. Yet these restrictions were developed based on an image of the litigant as an autonomous individual, abstracted from social, institutional, and legal constraints, with the capacity to bring a legal claim.[40]

Yet the strong logic for restricting private standing is weakened in the context of systemic *Charter* challenges. In constitutional litigation, the "unquestioned assumptions about what makes for an appropriate adversarial context … [fail] to serve the highest *Charter* ideals."[41] In other words, private standing and its ideal litigant do not meet the needs of *Charter*-based litigation. Individual-based private standing precludes the vindication of *Charter* rights through litigation for marginalized individuals with limited funding nor the luxury of time.[42] Beyond the resource restraints, it is difficult for private standing to accommodate collective representation. That is, individual-focussed litigation impedes representation of all relevant voices and fails to reflect the autonomy exercised through communal association.[43] Further, systemic claims often require a systemic approach, and court resources may be best preserved when such claims are brought by an organization with the capacity to do so. Strict private standing requirements limit collective representation in litigation, precluding access to justice for the vulnerable and ultimately undermining the principle of legality.

---

[38] Janet Walker & Lorne Sossin, *Civil Litigation* (Toronto: Irwin Law, 2010) at 53–54.
[39] Russell Binch, "The Mere Busybody: Autonomy, Equality and Standing" (2002) 40:2 Alta L Rev 367 at 368.
[40] *Ibid* at 371.
[41] Philips, *supra* note 34 at 28. See Iacobucci, "The *Charter*, Twenty Years Later" (2002) 21 Windsor YB Access Just 3 at 18 (the *Charter* and democracy).
[42] Bailey, *supra* note 35 at 258.
[43] Binch, *supra* note 39 at 383.

Recognizing these limits, Canadian standing law has evolved to accommodate public interest standing. Chief Justice Laskin first recognized the possibility of public interest standing in *Thorson v Canada*, a 1975 case challenging the constitutionality of legislation with broad public impact but no particular effect on a subset of society.[44] Mr. Thorson was granted public standing because to deny standing would be to isolate the legislation from judicial review.[45] *Thorson*, together with the pre-*Charter* cases of *McNeil v Nova Scotia*, *Canada v Borowski*,[46] and *Finlay v Canada*[47] (post-*Charter*) crafted a three-part framework for granting public interest standing. The Court held that a party could pursue a claim in the absence of direct individual impact and in the public interest if:

> 1. There is a serious issue as to the invalidity of the legislation or public action;
> 2. The plaintiff is affected directly by or has a genuine interest in the validity of the legislation or public action; and
> 3. No other reasonable and effective means is available for bringing the matter before the court.[48]

As explained by Justice Le Dain in *Finlay*, each element of the framework parallels the policy concerns with extending standing beyond those with private right to sue. The question of serious justiciable issue addresses concerns about the court's proper role.[49] The plaintiff's genuine interest requirement should screen out frivolous claims and protect judicial resources.[50] Finally, establishing that no other means are available to bring the claim preserves the appropriate adversarial context for resolving disputes.[51] But the third branch of the test also

---

[44] *Thorson v Canada (AG)*, [1975] 1 SCR 138, 43 DLR (3d) [*Thorson* cited to SCR].
[45] *Ibid* at 163 (the Attorney General had declined to challenge the law's validity).
[46] See *McNeil v Nova Scotia (Board of Censors)*, [1976] 2 SCR 265, 55 DLR (3d) 632 and *Canada (Minister of Justice) v Borowski*, [1981] 2 SCR 575, 130 DLR (3d) 588.
[47] [1986] 2 SCR 607, 33 DLR (4th) 321 [*Finlay* cited to SCR].
[48] Lorne Sossin, "The Justice of Access: Who Should have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007) 40:2 UBC L Rev 727 at 728–29.
[49] *Finlay*, *supra* note 47 at 632.
[50] *Ibid* at 633.
[51] *Ibid* at 633–34.

reflects a judicial concern, especially acute at the dawn of the *Charter*-era, that courts not overstep their judicial role and enter the legislature's domain. Therefore, the third branch also serves a limiting role; up until the Supreme Court's 2012 decision in *Canada v Downtown Eastside Sex Workers*[52] it was applied rather narrowly, with judges exercising a great deal of discretion when granting public interest standing.[53]

The possibility of a discretionary grant of public interest standing did not mean that courts shed the private law paradigm at the heart of the common law of standing. Since *Finlay*, "some judges have directly rebuffed public interest litigation…designed to challenge regressive legislative measures."[54] The starkest example is *Canadian Council of Churches v Canada*, a 1992 case where the Supreme Court of Canada denied public interest standing to an organization challenging legislative changes to the *Immigration Act*.[55] Although the organization had a long history of working with refugees, the Court held that the third branch of the test was not met since individual refugees *could* bring the claim.[56] *Churches* demonstrates how the third branch was narrowly construed and maintained a continued preference, in the abstract, for impacted individuals to bring a claim—even if those individuals' socio-economic circumstances mean they lack the capacity to bring such a claim.

DESW significantly expanded the test for public interest standing, a paradigmatic shift recognizing the exigencies of constitutional litigation. Writing for the Court, Justice Cromwell recognized that the purpose of public interest standing is not only upholding the principle of legality but promoting access to justice for disadvantaged groups.[57] Justice Cromwell therefore rejected treating the three factors as "hard and fast requirements". Instead, he adopted a flexible, holistic, and purposive approach.[58] The Court reworded the

---

[52] *Canada (AG) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*DESW*].
[53] For a critique of this jurisprudence, see Bailey, *supra* note 35 and Sossin, *supra* note 48.
[54] Bailey, *supra* note 35 at 257.
[55] *Canadian Council of Churches v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 236, 88 DLR (4th) 193 [*Canadian Council of Churches* cited to SCR].
[56] *Ibid* at 255–56.
[57] *DESW*, *supra* note 52 at paras 32, 51.
[58] *Ibid* at para 20.

third branch so instead of requiring *no* other reasonable means, the inquiry is broader and asks if the proposed action is *a* reasonable and effective means.[59] Expanding the reasonable and effective means element of the test represents a reworking of the discretionary inquiry so it is better poised to assess the systemic nature of the claim, its associated costs, and the broad interests it engages. Justice Cromwell emphasized that the prospect of alternative and individual-based proceedings are inadequate alternatives to sweeping claims brought by organizations acting as public interest litigants.[60] Within this third branch, the Court noted that the extent of the organization's capacity and skill in properly presenting the claim should be considered. This consideration ensures that organizations bringing a claim have the competency to do so and assuages the judicial concern for maintaining an adversarial and evidence-based process. The result is a public interest standing doctrine which simultaneously provides access to justice and collective representation for marginalized groups—especially important in the context of systemic *Charter* claims—while maintaining an appropriate gate around access to courts.

DESW's transformative potential for public interest litigation, generally, and prisoner rights litigation especially, is remarkable as seen in recent solitary confinement challenges. As Dana Philips notes, public interest standing is no longer "the exception (which it has always been) [but] … the rule."[61] Past solitary confinement litigation has been limited in scope because individuals not only lack the resources to bring a claim, but the facts of their specific case may undermine broad law reform efforts. This barrier was partly overcome in *CCLA* and *BCCLA* since the public interest litigants are organizations with the capacity to mount an extended *Charter* challenge, but in doing so could represent the broad community impacted by the scheme. While the CCLA advanced its suitability for public interesting standing based on the *DESW* three-part framework in its factum,[62] standing was implicitly recognized in the decision and is discussed only with respect to remedy.[63] A similar dynamic is seen in the

---

[59] *Ibid* at para 37.
[60] *Ibid* at paras 66–69.
[61] Philips, *supra* note 34 at 31.
[62] *CCLA* factum, *supra* note 9 at paras 155–60.
[63] *CCLA* ONSC, *supra* note 6 at paras 13–14.

BCCLA Notice of Application and decision. Up until *DESW*, obtaining public interest standing was sporadic and contested and yet, in 2017, the CCLA's or BCCLA's status as public interest litigants was a non-issue.

The non-controversial nature of standing in these cases could be due to issue-specific factors, including the confined nature of incarceration. Yet the Attorney General did not challenge the organizations' standing and neither decision discusses the parties' standing, suggesting that *CCLA* and *BCCLA* are less likely one-offs and better considered the result of a fundamental shift to a public standing doctrine governed by public law concerns. In emphasizing access to justice and the exigencies of *Charter* claims, the Court in *DESW* shed an individual-based, restrictive approach to standing. Instead, public interest standing promotes broader representation in *Charter* litigation and facilitates access to justice for marginalized groups. While it is fundamentally a procedural mechanism, public interest standing likely enhances the quality of law reform litigation since it allows for diverse representation (beyond the individual litigant with a private claim) during litigation.

IV. BEYOND THE STANDING ROADBLOCK: WHAT WILL THE COURT HEAR?

Reforming public interest standing increases the possibility for successful law reform litigation inasmuch as it provides access to a form of collective representation. Yet standing is a precondition to trying the case on its merits, and access to a courtroom does not guarantee an ideal legal outcome. Once the gate has been opened to a systemic challenge, an extensive evidentiary record is necessary for representing prisoners' experiences and counteracting complex institutional forces reinforcing the status quo.[64] Where the plaintiff is an organization not directly impacted by the law, evidentiary records serve as a powerful platform to communicate the harmful experiences of solitary confinement and counteract administrators' expertise.

[64] Alan N Young, "Proving a Violation: Rhetoric, Research and Remedy" (2014) 67:1 SCLR 617 at 622–23.

The laws of evidence straddle the space between legal process and outcomes in an adversarial trial system. Applying evidentiary rules is another instantiation of the judge's gatekeeping role. Since all litigation is concerned to varying degrees with questions of law, fact, or remedy, the rules of evidence are conventionally understood as guiding the presentation of proof before the court.[65] Doctrines such as relevance and reliability define what of the party-curated proof is admissible and, in turn, how to best arrive at the truth while maintaining trial fairness. While evidence is valued in that it guides and founds judgment, there is an important element of procedural justice to it as well: the process of producing and testing evidence at trial is the bridge between the litigant's experience and the cognizable legal claim. In this sense, evidence is independently valued as a platform that gives voice and, consequently, a measure of respect and dignity to affected parties. In the context of *Charter* adjudication, therefore, evidentiary records can be said to serve two distinct yet intertwined purposes. Not only do records assist in determining whether a right has been limited and if that limitation is justified, but it is the process of hearing—if not accepting—what it is to experience a rights violation.

Like with standing, evidentiary rules and procedures have their origins in the private law system and fact-based *Charter* litigation has developed within existing "laws, rules, and norms of traditional litigation."[66] However, as *Charter* litigation invariably concerns complex questions of social policy, categories of relevant knowledge have expanded beyond the adjudicative facts[67] at the core of most private disputes and extends to legislative and social fact evidence.[68] Legislative facts refer to the law's legislative purpose and background while

---

[65] Sidney N Lederman, Alan W Bryant & Michelle Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 4th ed (Markham: LexisNexis Canada) at 3 [*Sopinka*, *Lederman & Bryant*].

[66] Michael Da Silva, "Trial Level References: In Defence of a New Presumption" (2012) 2:2 West J Legal Studies 1 at 6.

[67] Michelle Bloodworth, "A Fact is a Fact is a Fact: *Stare Decisis* and the Distinction Between Adjudicative and Social Facts in *Bedford* and *Carter*" (2014) 32:2 NJCL 193 at 198 (adjudicative facts are defined as case-specific questions concerning the immediate circumstances of the parties directly involved).

[68] *R v Spence*, 2005 SCC 71 at para 64.

social facts capture the social, economic, and cultural context.[69] Since courts are unwilling to take "judicial notice of controversial [social] facts,"[70] robust evidentiary records are expected practice in constitutional litigation.[71]

The law of evidence also distinguishes between the information tendered by expert and lay witnesses.[72] The modern rule for lay evidence is guided by the principle of helpfulness: courts will receive lay witness testimony where the witness has personal experience and where the evidence is a "compendious statement of facts."[73] In *Charter* adjudication, lay witnesses are more likely to speak to adjudicative facts. While lay opinion evidence is generally uncontroversial as a matter of admissibility, the admissibility of expert evidence is subject to significant academic and judicial scrutiny. Expert evidence is inherently risky since it is possibly faulty, often contested, and involves specialized information that is outside the scope of judicial expertise.[74] For broad *Charter*-based claims, experts are called to testify on matters of legislative and social fact. The combination of lay witnesses speaking to adjudicative facts and expert witnesses to legislative and social fact evidence creates a strong factual matrix for the adjudication of systemic *Charter* claims. But the dichotomy also institutionalizes anxiety over findings of legislative and social fact evidence tendered through expert testimony.[75]

Recent Supreme Court cases show this turn towards empirics and expertise, as well as a third trend, deference to trial level findings for both adjudicative and legislative facts. Both *Canada v Bedford*[76] and *Carter v Canada*[77] relied on voluminous records at trial to not only successfully

---

[69] Roslyn Mounsey, "Social Science Evidence as Proof of Legislative Fact in Constitutional Litigation: A Proposed Framework for a Reliability Analysis" (2014) 32:2 NJCL 127 at 129.
[70] Da Silva, *supra* note 66 at 9.
[71] Young, *supra* note 64 at paras 622–23.
[72] Da Silva, *supra* note 66 at 11.
[73] *R v Graat*, [1982] 2 SCR 819 at 841, 144 DLR (3d) 267. See also *Sopinka, Lederman & Bryant supra* note 65 at 770–75.
[74] Young, *supra* note 64 at 645.
[75] *Ibid* at 629.
[76] *Canada (AG) v Bedford*, 2013 SCC 72 [*Bedford* SCC]. See also *Bedford v Canada*, 2010 ONSC 4264 at para 84 [*Bedford* ONSC].
[77] *Carter v Canada (AG)*, 2015 SCC 5 [*Carter* SCC]. See also *Carter v Canada (AG)*, 2012 BCSC 886 [*Carter* BCSC].

invalidate *Criminal Code* provisions, but overturn relatively recent Supreme Court precedent.[78] Notably, the Supreme Court held in *Bedford* and confirmed in *Carter* that it would no longer distinguish on appeal between trial level findings of legislative versus adjudicative fact, but apply the same standard of review—palpable and overriding error.[79] This deference, in combination with large records of social and legislative fact have the impact of reimagining the trial judge's role from adjudicator of discrete disputes to commissioner of inquiry.[80] This in turn emphasizes the import of trial level findings for litigants, as the judge's assessment of empirical data and witness' experience will continue to inform appellate review.

The significant scope of expertise tendered and relied on in *Carter* and *Bedford* demonstrate a shift in relative import of types of evidence in broad and systemic *Charter* claims, a shift away from adjudicative facts and towards expert representations of social and legislative facts. Nevertheless, the particular circumstances of individually named plaintiffs remained a relevant aspect of the trial record and the Supreme Court's legal analysis.[81] However, adjudicative facts in the traditional sense of the term are not available in *Charter* challenges brought by organizations granted public interest standing, as in the recent solitary confinement cases. In this context, neither the CCLA nor the BCCLA are directly impacted by the provisions of the *CCRA* they are challenging. The impact of public interest standing on the growing evidentiary record should be interrogated: as these two procedural changes collide, will the distinction between adjudicative and social and legislative facts collapse? It may seem antithetical to the traditional administration of justice to argue and decide a case absent adjudicative facts and based entirely on empirical or expert evidence. It also means that organizations without direct experience are developing a case that is potentially not reflective of prisoners' experience or wishes.

---

[78] See *Bedford* ONSC, *supra* note 76 at para 84; *Carter* BCSC, *supra* note 77 at para 114.
[79] *Carter* SCC, *supra* note 77 at para 109; *Bedford* SCC, *supra* note 76 at para 48.
[80] Young, *supra* note 64 at 622.
[81] *Carter* SCC, *supra* note 77 at paras 14–18, 56 ("we conclude that the prohibition on physician-assisted dying infringes the right to life, liberty and security of Ms. Taylor and of persons in her position" at para 56).

Perhaps, however, the potential of public interest standing for collective representation can be realized through the broad record. Reflecting on prison reform efforts in America, Keramet Reiter notes the "growing importance of … 'multi-method' approaches to reform litigation."[82] This concept captures the extensive empirical scholarship, investigative reporting, and collective prisoner action necessary to pressure the state to confront the human rights violations perpetrated by solitary confinement practices.[83] Reiter highlights how a constitutional challenge to solitary confinement practices must account for complex institutional factors enforcing the current regime through a multi-faceted record. This record includes a diversity of prisoner voices whose testimony gives the court extensive and diverse—yet relevant—adjudicative facts. But when the claim is brought by public interest litigants, prisoners serve as experiential witnesses (a form of expert) without bearing the reputational and financial burden of an applicant. The litigation becomes the vehicle through which marginalized voices can be heard, and these narratives inform judicial consideration of the *Charter* claim.

The BCCLA's evidentiary record demonstrates how the BCCLA, as public interest litigants, successfully aggregated diverse expertise at trial, and in so doing, overcame barriers to a successful *Charter* challenge. As Kerr writes, "the evidentiary record is the means by which counsel can insist that constitutional adjudication not mirror conjecture and stereotyping."[84] The record in *BCCLA* included extensive expert testimony on the psychological and social impact of solitary confinement. Yet there was an additional layer of expertise from eight lay witnesses—including prisoners who had experienced segregation and relatives of prisoners who had committed suicide while segregated—who testified to their treatment.[85] Prisoners' voices are present throughout Justice Leask's reasons, as he drew on their experience to reinforce findings that solitary confinement places prisoners at serious risk of

[82] Keramet Reiter, "Lessons and Liabilities in Litigating Solitary Confinement" (2016) 48:4 Conn L Rev 1167 at 1172.
[83] *Ibid* at 1187.
[84] Kerr, "Contesting Expertise", *supra* note 21 at 76.
[85] *BCCLA*, *supra* note 2 at para 9.

psychological and physical harm.[86] The decision demonstrates the possibility of transcending the artificial divide between sentencing and experience, a success due at least in part to the important role of lay witnesses who collectively provide adjudicative facts regarding the solitary confinement system. Since the case challenged the constitutionality of the administrative segregation scheme as opposed to an individual's particular detention experience, the claim was not governed by an ethos of punishment but rather one of rights.

The extraordinary range of expert and lay witnesses also had the effect of rescinding judicial deference to CSC expertise. Previous cases have shown a judicial unwillingness to interfere with prison policy, reflecting the notion that prison officials are equipped with relevant knowledge and expertise which is inaccessible to courts. The expanded record undermines and inverts that assumption by taking judges inside "an isolated and difficult environment where authority is exercised on a politically powerless population"[87]—the prison. Within Justice Leask's section 7 analysis is a corresponding rebuttal of CSC expertise and assumption that security and rights are mutually exclusive: he concludes that inasmuch as indefinite solitary confinement causes psychological and physical harm, it actually undermines the institutional security and individual safety it is meant to promote.[88] The decision is a marked departure from previous prisoner rights jurisprudence because instead of deferring to prison administrator's expertise, Justice Leask interrogates the CSC's purported objectives against extensive lay and expert testimony and section 7's exacting standards. Such evidence also supported Justice Leask's conclusion that independent review of decisions to segregate a prisoner is a necessary element of a constitutionally adequate scheme.[89] Constitutionalizing independent review is especially notable, given CSC's chronicled resistance to implementing this policy. That the BCCLA, an organization not itself impacted

---

[86] See e.g. *BCCLA*, *supra* note 2 at paras 276–309 (draw on both prisoner and expert testimony to find that administrative segregation causes psychological harm); see also paras 398–408 (use of Mr. Blair, a former prisoner's testimony, as a "case study" for demonstrating the inadequacies of the current review system).
[87] Kerr, "Contesting Expertise", *supra* note 21 at 64.
[88] *BCCLA*, *supra* note 2 at paras 328, 336.
[89] *Ibid* at para 410.

by the *CCRA*, could present a record replete with both experience and expertise had the effect of undermining CSC's assumed expertise.

However, the reasoning and result in the application brought by the CCLA in Ontario is a reminder that the possibility of such a paradigm shift is contingent on factors beyond standing. The CCLA's record was more narrowly construed and more dependent on traditional expert evidence with only three prisoners affidavits filed.[90] Therefore, unlike the *BCCLA* decision, there is almost a complete lack of prisoner voice in Associate Chief Justice Morrocco's reasons. Notably, Morrocco only referred to the affidavits to confirm Warden Pike's evidence that prisons are "environments where there is an ever-present possibility of violence."[91] Unlike the *BCCLA* case, absent from the *Charter* analysis is an extended engagement with social and legislative facts or an evaluation of individuals' confinement experience. Without this assessment, the analysis became something more like a battle of the experts.[92] While Morrocco accepted evidence that administrative segregation causes harm, he continues the tradition of deference to CSC expertise. This is reflected in a much more limited remedy, as he found that internal CSC review would redeem a constitutionally infirm scheme.[93] The result is a more hollow victory: continued stereotyping of prisoners as violent and deference to CSC expertise, which tempers the recognition that indefinite solitary confinement offends section 7. While many factors contribute to divergent outcomes, the lack of the prisoner voice and reliance solely on experts stunted the record's capacity to meet the complex systemic barriers enforcing the current system. This caution is especially notable given the recent appellate deference to trial level findings of legislative and social fact[94] because the relative strength of the record will continue to impact the appeal process. Contrasting *BCCLA* with *CCLA* shows that extensive expertise on its own, without prisoner participation or voice, may not lead to successful law reform.

---

[90] *CCLA* ONSC, *supra* note 6 at paras 62, 139.
[91] *Ibid* at para 139, 141.
[92] *Ibid* at para 62 (the assessment of competing expert testimony is seen throughout the decision).
[93] *Ibid* at paras 171–76.
[94] See *Carter* SCC, *supra* note 77; *Bedford* SCC, *supra* note 76.

In summary, a voluminous record is the means by which public interest litigants can counteract institutional forces reinforcing the current regimes, achieving successful substantive legal outcomes. In fact, in the prison litigation context, the twin dynamic of public interest standing and robust records creates the opportunity for the prisoner to become an expert in a way that counteracts conjecture. This is because the challenge shifts the context away from punishment and refocuses it on the harmful impact of indefinite solitary confinement. The record is a means of providing additional and equally legitimate voices that meet and perhaps undermine administrators' expertise. The result is litigation where judges have heard prisoner experience, as confirmed by expertise and data. This knowledge facilitates the invalidating of unconstitutional schemes notwithstanding the complex social and institutional barriers.

V. THE ROAD STOPS HERE?

While standing and evidence are imperative to litigation success, other procedural and contextual matters can restrict the extent of successful litigation outcomes and the social movement's overall success. As Reiter notes, "too many attempts to reform … solitary confinement … ignore [the] lessons of history."[95] The history of prisoner reform litigation, especially in the US but also in Canada, has taught social movements to be wary of the limits of constitutional remedies, the persistence of harmful solitary confinement practice, and the unintended consequences of litigation. This section briefly outlines these concerns.

Constitutional remedies serve a variety of purposes and are restrained by several factors. Broadly speaking, courts have the jurisdiction to award section 24(1) remedies for individual rights violations or to strike down unconstitutional provisions pursuant to section 52(1).[96] The purpose of the *Charter*'s two remedial provisions differ: while section 24(1) hopes to "repair the harms of the past" caused by unconstitutional government action against

[95] Reiter, *supra* note 82 at 1188.
[96] *Charter*, *supra* note 3, ss 24(1), 52(1); see also Kent Roach, "Enforcement of the *Charter* — Subsections 24(1) and 52(1)" (2013) 62 SCLR 473 at 476.

individuals, a section 52(1) declaration of invalidity is prospective, "vindicat[ing] the right" and preventing future rights violations.[97] There is therefore a temporal aspect to remedies, and applications seeking a declaration of invalidity pursuant to section 52(1) are typically future-oriented. As in the solitary confinement cases, the objective is lasting legislative reform, but this comes at the expense of individual reparation. Since *Charter* litigation necessarily involves the government, remedies represent a complicated and potentially controversial meeting of courts, government, and social movements.

While cases brought by individuals challenging their confinement circumstances narrows the scope of available remedies, remedies available to public interest litigants may be restricted by the nature of public interest standing. As was argued by the Attorney General and accepted by the Ontario Superior Court, public interest litigants do not have access to section 24(1) remedies since "only a party alleging an infringement of its own *Charter* rights can resort to section 24(1)."[98] The significance of such a finding is that it maintains the distinction between a law's validity and its administration. As established in *Little Sisters Book Art Emporium v Canada*, the possibility that a facially valid provision will be applied in a constitutionally valid manner (even if systematically maladministered) saves these provisions from invalidation pursuant to section 52(1).[99] This distinction restricts the scope of judicial review and the power of public interest litigants to bring certain claims. If public interest litigants do not have access to section 24(1) remedies, then—based on *Little Sisters*—the claim may fail altogether, but even successful systemic claims do not have the capacity to redress harms suffered by individual prisoners under the existing scheme.[100] The collective voice and extensive representation achieved through public interest *Charter* challenges comes at the expense of individual remedy.

---

[97] See *R v Ferguson*, 2008 SCC 6 at para 61; see also Roach, *supra* note 96 at paras 9–11; *CCLA* ONSC, *supra* note 6 at para 19.
[98] *CCLA* ONSC, *supra* note 6 at para 16.
[99] *Little Sisters Book Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69.
[100] *BCCLA*, *supra* note 2 (in the context of section 10(b) Justice Leask notes: "I recognize that this issue would normally arise in cases where an individual plaintiff seeks a s. 24(1) remedy" at para 437).

Beyond the limited remedies available, the history of prison reform litigation warns advocates to be wary of unintended consequences and not to overestimate the judiciary's institutional power. Reiter shows how solitary confinement litigation, while shining light on rights-abusive practices, has led to the growth of "super max" prisons, meaning the same practice persists but in cleaner and brighter form.[101] A *Charter* challenge may lead to superficial reform, so solitary confinement as practiced in Canada continues to fall below human rights standards. Further, once "the old law [is] jettisoned" through a court process, the reform effort shifts to the legislature where "the playing field [is] more clearly political, the ideological battle of experts sharpened."[102] Parliamentary processes are governed by an alternate institutional culture: while courts are guided by principles of neutrality, legislatures are inherently partisan. Further, the role of the citizen and expert are conceived of and received differently in Parliament as compared to the courts. Sonia Lawrence describes how the change in institutional venue undermined the *Bedford* litigation success: while the litigation gave voice to competing conceptions of prostitution, these perspectives were quickly eroded in Parliament and replaced by a neo-liberal narrative that obscures causal structural problems.[103] It is especially worrisome that such a dynamic could recur in the prisoners rights context given the particularly marginalized voices of prisoners and the force of CSC institutional preferences. A later study may examine this dynamic as 2019 legislative reforms to the *CCRA*'s solitary confinement regime are implemented.

If the prospect of law reform through litigation is diminished because of remedy and politics, how valuable is the procedural justice achieved through public interest standing and extensive evidentiary records? Legal processes and outcomes depend on their broader context. Just as changes to standing and evidence changed with the needs of *Charter* adjudication, what meaningful success looks like for reform movements depends on the specific socio-political contexts giving rise to the need for reform. Litigation may be successful both in

---

[101] Reiter, *supra* note 82 at 1188–89.
[102] Sonia Lawrence, "Expert-Tease: Advocacy, Ideology and Experience in *Bedford* and Bill C-36" (2015) 30:1 CJLS 5 at 6.
[103] *Ibid*.

the legitimacy it confers on the litigants through recognizing the legal claim's validity and in feeding reform efforts in other forums. From this perspective, changes in legal process mean that legal institutions are venues where marginalized communities have voice, where collective representation can meet and perhaps overcome systemic barriers that have in the past prevented redress for ongoing rights violations.

Below the legal technicalities of litigation is often a marginalized community trying to achieve recognition in law and society of their equal stake in the polity, basic dignity, and redress for previous harms. A solitary confinement regime guided by an ethos of human rights as opposed to punishment is often the result of a complex confluence of actors and events, and of shifting paradigms and principles. Movements gain momentum in multiple forums, with law being just one of those realms; what happens at these sites impacts the outcomes elsewhere or, at the very least, contributes energy and notoriety to reform efforts. Recent legislative reform to the solitary confinement regime demonstrates how litigation does not operate isolated from other law-making arenas, as evidenced by the recent legislative reform to the *CCRA*'s solitary confinement regime.[104] Therefore, reformulations of the principles guiding judicial gatekeeping and procedural reforms promote access to justice by increasing the potential for successful litigation outcomes and promoting reform efforts outside of the courtroom. Reorganizing the principles founding standing doctrine and evidence strategies so they recognize the exigencies of *Charter* litigation contributes to a successful human rights paradigm shift in the law.

---

[104] *An Act to amend the Corrections and Conditional Release Act and another Act*, SC 2019, c 27 (the Act received Royal Assent in June 2019 and sections of it come into force in November 2019). See also Lisa Kerr, "If implemented properly, new bill may end solitary confinement in Canada" (18 October 2018), online: *Globe and Mail* <www.theglobeandmail.com/opinion/article-if-implemented-properly-new-bill-may-end-solitary-confinement-in/>.

VI. CONCLUSION: THE LONG AND WINDING ROAD

This article has demonstrated the complex legal, social, and political landscape the BCCLA and CCLA confronted in achieving litigation success. Successfully adjudicating prisoners' rights was facilitated by two paradigm shifts in the law: the development of a robust public interest standing doctrine supported by access to justice principles and the ability to present large records reflecting the experience of indefinite solitary confinement and serious psychological impact. While the objective may be law reform, questions of standing precludes and dictates those of evidence and ultimately outcome. As seen in the recent solitary confinement cases, public interest litigation facilitates the bringing of systemic claims that are representative of the impacted community. But of course, outcomes are defined not only by who is in court but by what the court hears. A mix of extensive social and legislative fact evidence and prisoner participation as lay witnesses has been shown to meet and rebut the polycentric forces reinforcing a rights ignorant solitary confinement regime. In combination, these largely procedural changes could transform the administration of justice within prisons. Even if a narrow menu of remedies and shifting institutional sites limit the potential for ultimate success, the procedural justice achieved gives collective voice to a marginalized group, further fueling calls to end indefinite solitary confinement.