A Qualitative Study Comparing Canadian and International Legislation Governing Administrative Segregation in Correctional Facilities

by

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B. A., Elizabethtown College, 2016

Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of
Master of Arts

in the
School of Criminology
Faculty of Arts and Social Sciences

SIMON FRASER UNIVERSITY
Summer 2018

Approval

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Date Defended/Approved:	August 10, 2018

Abstract

Administrative segregation, also known as solitary confinement, is a procedure used in correctional facilities to remove certain inmates from the general prison population. This is a controversial method since it can lead to mental and physical harm and sometimes even resulting in suicide. Canadian cases, such as the death of Ashley Smith, have shown the several issues involving the use of administrative segregation. Further, the UN Nelson Mandela Rules define separate confinement lasting longer than 15 days as torture. This qualitative study examined the federal and provincial legislation of Canada governing administrative segregation. Additionally, a review of the legislation involving administrative segregation from six European countries (Germany, Austria, Switzerland, France, England, and Ireland) as well as Australia and New Zealand was conducted. The findings in the international statutes helped to establish recommendations for the Canadian legal system regarding the procedure of administrative segregation in correctional facilities.

Keywords: administrative segregation; Canadian legislation; corrections; prison; prisoners

Acknowledgements

The completion of this thesis would have not been possible without the support and help of many people. First and foremost, my deepest gratitude and appreciation to my senior supervisor, Simon Verdun-Jones, whose support and guidance cannot be measured. Thank you for your patience and always answering my questions when I hit a roadblock. I cherish our conversations about a broad spectrum of topics, especially Europe, whenever I met with you in your office.

Secondly, I would like to thank my second supervisor, Tamara O'Doherty, for all her time and support. Thank you for sitting on my committee and your guidance throughout the writing process. Your advice greatly impacted this thesis and what it is now.

To Peter Burns, who acted as the external examiner for my thesis, thank you for taking your time and being interested in my paper. Your knowledge of the topic is impressive and your comments regarding my thesis were immensely helpful.

To my family and friends, thank you for always listening when I was trying to explain my problems even though the whole system confused you or I did not know the correct German words to answer your questions. Thank you for your unlimited support and understanding even with more than 8000 km between us. Thank you to my sister, Angela, who helped when I had questions about the Swiss legal system. Thank you to all the friends who listened when I was rambling about my topic and did not know when to stop. Thank you to all the other criminology students, who ate unhealthy food with me or took a coffee break, when I spent hours at the library writing my thesis.

Table of Contents

List of Charts

List of Tables

Chapter 1.

Introduction

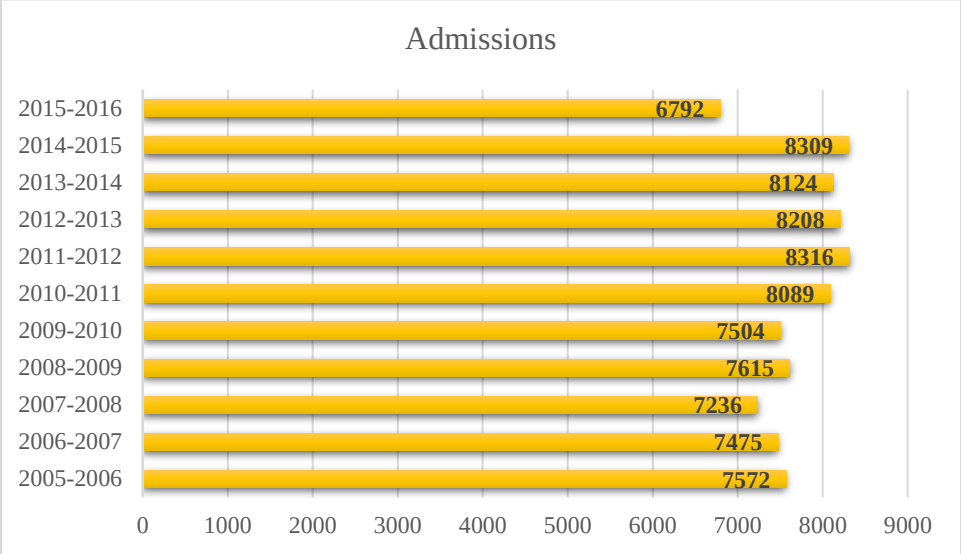
1.1. Research Overview and Rationale

The seventh principle of the United Nations *Basic Principles for the Treatment of Prisoners* (1990) states that "efforts addressed to the abolition of solitary confinement as a punishment, or to the restriction if its use, should be undertaken and encouraged." In the Canadian correctional system, administrative segregation is not supposed to be applied as a measure to punish prisoners and therefore does not receive the same public attention as solitary confinement (Correctional Service Canada, 2017a; John Howard Society of Ontario, 2017). Administrative segregation is a method to separate an inmate from the general prison population to secure the safety of the inmate, other people, or the facility. However, many vulnerable individuals are often segregated and do not receive the adequate support to ease their experience in administrative segregation (Bromwich & Kilty, 2017; Haney, 2018; Smith, 2006). Cases such as Ashley Smith, who committed suicide in administrative segregation, show the problems of segregating inmates if no adequate follow-up protocol is available (West Coast Prison Society, 2016, p. 18). The governments have the responsibility to protect inmates and by placing them in segregated areas without social interactions and other activities besides a one-hour walk outside, certain inmates are being psychologically harmed (Butler, Johnson, & Griffin, 2014; Correctional Service Canada, 2016; Sapers, 2016; West Coast Prison Society, 2016).

According to Correctional Service Canada (2016), 780 inmates were in administrative segregation in federal institutions in April 2014. In April 2015, 663 inmates were placed in administrative segregation, while 454 inmates were placed in administrative segregation in March 2016. A report by the Office of the Correctional Investigator (2015) provided the numbers of admissions to administrative segregation over the last ten years. In this report, the lowest number of admissions to administrative segregation was in 2007 with 7,236 admissions, while the highest number of 8,316 was recorded in 2011 Chart 1). However, the numbers of admissions reached a new low in

2015 with 6,792 total admissions to administrative segregation (Harris, 2017). Even though the trend shows decreasing numbers, administrative segregation remains an issue (*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018).

Chart 1. Total admissions to administrative segregation (2005-2016)



The case of *Cardinal v Director of Kent Institution* (1985) was one of the first British Columbia Supreme Court trials regarding administrative segregation in Canada, in which two inmates placed in administrative segregation argued that they were not removed from segregation even though the Segregation Review Board recommended their removal to the Director, who refused to follow the recommendation. The Court decided that it was an unfair procedure and stated that inmates have to be released from administrative segregation if the Review Board recommends it. In 2018, the decision of the Supreme Court of British Columbia ruling indefinite administrative segregation unconstitutional kept the issue in the media and it remains a topic of critical discussion (*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018).

The procedure of administrative segregation needs to be clearly stated in legislation so that everyone involved in the process has a guideline they can follow and that will provide the legal basis for access to justice for inmates who feel they have been treated unfairly. Therefore, a set definition of administrative segregation, a characterization of inmates admissible to administrative segregation, and the description of the review board should be included in legislation to establish a standard for administrative segregation. Correctional officers need to know whom they have to inform

if there is a possible case of placing an inmate in administrative segregation. Before modifying the legislative requirements in Canada, other countries and their legal approach to administrative segregation should be considered. Therefore, it is important to examine the information found in the various statutes and regulations that address administrative segregation. This information can be beneficial in reforming and improving the institutional treatment of Canadians subjected to administrative segregation.

1.2. Current State of Research

The extant research mainly focuses on solitary confinement or administrative segregation in maximum security prison complexes with an American approach (Kapoor, 2014; Kupers et al., 2009; Lanes, 2011: Shalev, 2013). However, recent studies have been conducted specifically with respect to administrative segregation in the Canadian legal system. Leslie-Maaike Helmus (2015) developed a risk assessment tool to identify the need for placements in administrative segregation. The factors of age, previous sentences, previous segregation, length of sentence, previous violence, and adaptability were included in the tool and provided the most accurate predictions of placements in administrative segregation. Furthermore, Parkes (2017) provided an overview of the case law involving prisoners and solitary confinement, including administrative segregation. The movement to abolish solitary confinement in the Canadian correctional system was also explained with a focus on how lawyers can positively influence the release of inmates from solitary confinement by taking cases to the courts. However, to understand the issues surrounding administrative segregation in the Canadian legal system, the legal framework and the rules have to be examined. Examining the legislation and regulations regarding administrative segregation will give an overview of the areas that need improvement and provide a broad outlook on different approaches to the process of administrative segregation.

1.3. Structure of the Thesis

The introductory chapter provides a definition of administrative segregation and the issues regarding the term in an international context, as in many other countries and international organizations the term solitary confinement is used. Furthermore, international standards with a focus on the *Nelson Mandela Rules* are explained as well

as the international obligations Canada has regarding torture. Leading Canadian cases are described to probe the critical issues in Canada. Lastly, the research on the effects of administrative segregation on vulnerable inmates is examined.

The methodology chapter addresses the research objectives and specific questions. This chapter also explains the theoretical framework of this thesis. Additionally, the research methods used in this thesis are described, and the reasons for using these methods are examined. Which specific laws, regulations, and policies are chosen for the content analysis are further explained as well as the limitations of this method.

The findings chapter lists the regulations at the federal and provincial levels. Other countries' regulations and policies are another part of this chapter so as to examine the differences in a global spectrum. In this chapter, the differences and similarities are further studied to provide a comparison between Canada and the other countries.

The conclusion chapter summarizes the findings in the previous chapter and compares the sections of the regulations and acts with respect to maximum time, the information process, and the reasons for segregating an inmate. Furthermore, the last chapter includes recommendations regarding administrative segregation in Canadian correctional institutions which are built on the findings in Canadian and international regulations. Furthermore, possible future directions for this area of research are examined.

Chapter 2. Background Information

This chapter provides the necessary background to understand the issue of administrative segregation in Canada within an international context. Firstly, a definition of the term “administrative segregation” is provided. Appropriately, this is followed by an explanation of the *Standard Minimum Rules for the Treatment of Prisoners* adopted by United Nations and their definition of solitary confinement. Furthermore, the description of three Canadian cases assists to exemplify the issues with administrative segregation in Canadian correctional institutions. These cases are followed by the summary of reports and recommendations by correctional investigators, ombudsmen, and legal society groups to further illustrate the problems of administrative segregation and the alterations that have already been made. Additionally, an overview of the research on the effects administrative segregation can have on vulnerable inmates is provided to show the importance of the legislative changes and recommendations. This chapter concludes with the case law regarding challenges of administrative segregation in Canadian courts.

2.1. Definition

Administrative segregation is universally known as solitary confinement, and its idea originated in Pennsylvania in the 1770s (West Coast Prison Justice Society, 2016, p. 12). The Eastern State Penitentiary in Philadelphia is regarded as the first prison to use solitary confinement, where the people in charge thought that it would be beneficial for inmates to spend extended periods just by themselves without any other contact than an occasional visit by a correctional officer (Mann, 2015). Nowadays, most prisons use administrative segregation as a method for different reasons besides punishment: as a safety measure for prisoners who pose a high risk for escaping, harming themselves, disrupting the prison system as a whole, or hindering an ongoing investigation (Correctional Service Canada, 2017a; Francis, 2005, pp. 8-9). Furthermore, certain prisoners (e.g. child molester) can also decide to spend time in a segregated cell if they have valid reasons regarding their safety with the general prison population (Francis, 2005, p. 9; Smith, 2006, p. 442). CSC (2017a) explicitly states that administrative segregation in Canadian correctional institutions is not used to punish inmates but as an overall safety measure contrary to many people’s belief. However, a disciplinary court

can sentence a prisoner to disciplinary segregation as a punishment for a misdemeanour against the prison's rules (Francis, 2005, p. 9). People perceive segregation as only being applied to inmates in maximum-security prisons or extremely dangerous offenders, although the reality is that many segregated inmates are vulnerable and may suffer under the circumstances of segregation. The term solitary confinement is often used to combine all types of segregated confinement, regardless of the reasoning behind an individual's segregation from the general prison population. The media uses administrative segregation and solitary confinement interchangeably, which is confusing in a Canadian context since solitary confinement is explicitly not the equivalent of administrative segregation (CSC, 2017a).

The exact definition of administrative segregation in CSC policy (2017b) is "the separation of an inmate to prevent association with other inmates, when specific legal requirements are met, other than pursuant to a disciplinary decision". In administrative segregation, a prisoner's rights remain the same, and they are not allowed to be kept in segregation longer than needed (CSC, 2017a). An inmate's stay in administrative segregation is ordered by the institutional head and needs to be reviewed by the Segregation Review Board throughout the segregated period to ensure the inmate's safety and to determine the point when the inmate can return to the general prison population or a transfer to another facility is possible (CSC, 2016). According to the *Administrative Segregation Guidelines* (2017d), the Institutional Segregation Review Board (ISRB) must hold hearings for every administrative segregation case and make recommendations to continue or terminate the placement. The ISRB must include a mental health professional. Optional are the institutional head, the deputy warden, the assistant warden, the manager, correctional manager, and the parole officer. Additional members can be requested by the Chairperson and the inmate; for example, psychologist or a security intelligence officer. The deputy warden chairs the fifth-working-day review, while the institutional head chairs the 30-day review. The Regional Segregation Review Board (RSRB) must review inmates, who have spent 38 days in administrative segregation, and continues the reviews once every 30 days after the first review (CSC, 2017b). The RSRB reviews the history of Indigenous inmates, gender, mental and physical health conditions, and makes recommendations to the Regional Deputy Commissioner on the placement of the segregated inmate. Furthermore, the Regional Deputy Commissioner reviews every case of an inmate who has spent 40 days

in administrative segregation and for which they have received the RSRB's recommendations (CSC, 2017b). The Regional Deputy Commissioner informs the inmate of the RSRB's review within five days of the review and can recommend the institutional head to terminate the placement in administrative segregation. CSC (2017a) assures that female inmates, Indigenous peoples, or other special needs inmates receive the necessary resources according to their requirements. In addition, CSC also asserts that general differences between gender, cultures, ethnicities, and languages are met with the needed respect. To ensure that both the physical and mental state of a segregated inmate is healthy, they receive a daily visit by a professional health care provider and a member of the institution to review the condition of the segregated cell. However, the latest *Annual Report* by the Office of the Correctional Investigator (2017) stated, that there are still issues regarding the conditions of administrative segregation; namely, unclean segregated cells without a natural light source or ventilation.

2.2. The United Nations Standard Minimum Rules for the Treatment of Prisoners

The General Assembly of the United Nations adopted the *Standard Minimum Rules for the Treatment of Prisoners*, also known as the *Nelson Mandela Rules*, in December 2015. The UN acknowledges the many different penal systems existing but put forward a set of rules which are acceptable guidelines and methods regarding the humane treatment of prison inmates and the general management of penal institutions (United Nations General Assembly, 2015, p. 1). Prison systems in every country should follow these rules as closely as possible to guarantee the appropriate treatment of their prison population. Besides rules on general accommodation and basic human rights, such as the access to health services, there are also rules pertaining to administrative segregation (the UN General Assembly uses the term solitary confinement). Rules 36 through 46 cover “Restrictions, discipline, and sanctions” (United Nations General Assembly, 2015, p. 11). Rule 37 and 38 include that the decision to impose segregation on a prisoner must be reviewed by an authoritative administration or by a court and must include a process for monitoring the prisoner’s segregated stay to find methods to mitigate the impact segregation can have on both their mental and physical health. The use of confinement as a form of sanction is addressed in Rule 43 which prohibits

"indefinite" and "prolonged solitary confinement" (p. 13). This rule is followed by another important provision regarding administrative segregation, Rule 44, which states:

> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days. (p. 14)

Therefore, inmates in administrative segregation have to be released from segregation after 15 days to ensure the correct treatment of the inmate. This means that a segregation placement which is longer than 15 days can be defined as a type of torture. Furthermore, the UN Human Rights Council stated, in a previous report, that solitary confinement exceeding 15 days should be banned overall (Méndez, 2011, p. 23). Lastly, Rule 45 contains a restriction on using confinement for inmates who have mental health problems and could be negatively affected by this placement (United Nations General Assembly, 2015, p. 14). To ensure the application and implementation of these rules is a difficult matter, as enforcement of International law is notoriously problematic: indeed, Canada, a long-standing member of the General Assembly, continued to segregate inmates for longer than 15 days even after the *Nelson Mandela Rules* were released (Crawford & Foisy, 2017; Dubé, 2017; Harris, 2016).

2.3. Canadian Cases

The following cases were chosen to portray the problems with administrative segregation in Canadian correctional facilities. After 11 months in solitary confinement at the Grand Valley Institution for Women in Kitchener, Ontario, Ashley Smith committed suicide by strangulation in October 2007 (West Coast Prison Society, 2016, p. 18). During Smith's stay in segregation, pepper spray and a taser were used, and she had to go through 17 transfers between eight institutions (federal and provincial correctional facilities, hospitals, and treatment centres) in less than a year before she committed suicide (Office of the Correctional Investigator, 2008, p. 5). Even though she was constantly monitored as a result of her suicidal tendencies, Smith successfully used a piece of cloth to strangle herself (Office of the Correctional Investigator, 2008, p. 3). It took the correctional officers almost an hour before opening the segregated cell to determine her death as they were ordered not to intervene (Moshenberg, 2011). Smith's death was deemed preventable because of her well-known history of self-harm and

mental-health issues (Office of the Chief Coroner Ontario, 2013). The jury verdict and recommendations of the Ontario Coroner's Inquest (2013) also included the recommended limitation of 30 days in segregation. This was before the Nelson Mandel Rules were adopted and, therefore, did not meet the UN's current standard. However, in a response to the Coroner's Inquest and the included recommendations (2013), the CSC did not address which recommendations it acknowledged and commented only on certain aspects of the Inquest instead of stating which recommendations were accepted (CSC, 2014).

Another case of suicide, following the placement of an individual in administrative segregation is that of Christopher Roy in Matsqui Institution in British Columbia in June 2013. After 60 days in segregation, he committed suicide by hanging (Ministry of Public Safety and Solicitor General, 2016; West Coast Prison Society, 2016, p. 20). Roy was not informed how long his time in segregation would last, and even though the prison staff members noticed that the state of his mental health worsened, he was denied any entertaining materials, such as books or blank pages to write on (Sterritt, 2016). The British Columbia Coroner's Inquest contained jury recommendations regarding a limitation on the numbers of days in administrative segregation for inmates with mental health issues or a self-harm history (Ministry of Public Safety and Solicitor General, 2016). Further recommendations include the employment of a Registered Psychiatric Nurse in every segregation ward and that prisoners in this ward should be assessed on a daily basis. Regular staff members should also be educated in basic psychology to improve their understanding of and reaction to mental health problems of these inmates and to lessen the negative outcomes (Ministry of Public Safety and Solicitor General, 2016).

The Ministry of Community Safety and Correctional Services was forced to investigate several cases of extended placements in segregation after information about the case of Adam Capay emerged (Dubé, 2017, p. 5). Capay spent more than four years in segregation at the Thunder Bay District Jail, a provincial correctional centre in Ontario (Dubé, 2017, p. 27; Prokopchuk, 2017). The Ontario Ombudsman's Report by Paul Dubé (2017) found terms such as "protective custody, general population, and secure isolation" (p. 27) in Capay's incarceration records, despite his permanent placement in segregation for over four years. This false information was the outcome of an incorrect entry in the jail's computer system by responsible staff members, which was only

revealed by the investigation conducted for the Ombudsman Report (2017, pp. 27-28). This case shows that the system is not adequate enough for the Ontario Correctional Services to actually monitor prisoners' segregated placements to ensure the limitation of 15 days is complied with (Dubé. 2017, pp. 29-30).

2.4. Reports and Recommendations

Every Verdict at Inquest by the coroner following a death in a correctional facility contains an overview of the case, the coroner's comments, evidence examined, the jury's verdict, and possible recommendations. The Coroners examine only the cases within their province or territory and therefore the recommendations are directed at the province or territory the Coroner is appointed for (Canadian Medical Protective Association, 2016). Most of these recommendations emerging from the coroner inquests are similar, as many cases with a fatal outcome show parallels. Coroners are not the only agency making recommendations: ombudspersons of the provinces and the Correctional Investigator of Canada publish reports with their recommendations, too. However, the CSC or the involved department/ministry can decide in what manner they want to follow these recommendations and if they even want to implement these recommendations and make changes within the prison systems. In the case of Ashley Smith's death, the CSC acknowledged the Verdict of Coroner's jury's recommendations. While Prime Minister Justin Trudeau tasked the Minister of Justice with the job of effectuating these recommendations, CSC has only taken slow steps in the direction of changing the current system yet (Correctional Service Canada, 2016; West Coast Prison Society, 2016, p. 19).

The Office of the Federal Correctional Investigator (2015) conducted a review of the numbers of inmates in administrative segregation in federal corrections from 2005 to 2015. During ten years, the number of days spent in administrative segregation showed a positive progress of decreasing numbers from an average of 40 days to 27 days (p. 8). Male offenders were placed longer in administrative segregation than female offenders from 2013 to 2014 (p. 9). Both numbers of Indigenous and Black inmates placed in administrative segregation have increased from 2005 to 2015, but in the last three years showed signs of stagnation (pp. 4-5). Segregated women were more likely than men to have committed self-harm before being placed in administrative segregation (p. 9). Inmates with a history of administrative segregation were more likely to self-harm than

inmates who did not spend time in confinement (p. 13). Regarding the risk and need level of inmates, individuals who spent time in administrative segregation were more likely to be assessed on the high risk and high need levels, compared to inmates without a history of confinement (p. 16). Additionally, inmates with a segregation history were more likely to be evaluated as being more difficult to reintegrate than those without a history of administrative segregation (p. 17). Inmates with behavioural issues were more likely to have spent time in administrative segregation than those without such issues (p. 19). Similar results were found regarding cognitive issues, intervention issues, mental health issues, mental abilities issues, and sexual behaviour issues; inmates with segregation history compared with inmates without segregation history were more likely to have these issues (pp. 20-22). This report gave an informative overview of the characteristics of inmates who have spent time in administrative segregation over a ten-year period.

The former Federal Correctional Investigator, Howard Sapers, published his recommendations in the Annual Report of the Office of the Correctional Investigator for 2015-2016. Since his annual report reviewed the overall situation of federal prisons, his recommendations addressed a variety of problems. In relation to administrative segregation, Sapers (2016) recommended the abolition of the long-term administrative segregation of inmates with mental health issues and to provide an independent advocate at treatment centres (p. 17). He pointed out that three out of 13 suicides were committed while in administrative segregation from 2011 to 2014. Furthermore, Sapers stated that administrative segregation will remain a controversial topic in the media as well as in corrections. He continued with the prediction that the problems surrounding administrative segregation would only be solved “through legal intervention – via the courts and/or by amendments to the *Corrections and Conditional Release Act*” (Sapers, 2016, p. 68). Sapers also explained the decreasing number of segregated inmates in 2016 with the implemented policy changes and a growing pressure for resolutions from several agencies on the CSC.

In his Ontario Ombudsman Report, Dubé (2017) stated that Ontario lacks an appropriate tracking system for segregated inmates and their time spent in confinement, as well as a specific definition for the term “segregation” which results in not knowing if prisoners are a part of the segregation review process or not (p. 59). Furthermore, he criticized the reviewing process of segregated inmates owing to the many mistakes and

contradictory descriptions in these reviews, and the delayed provincial oversights. After reviewing the correctional system of Ontario, Dubé (2017) made several recommendations addressing the Ministry of Community Safety and Correctional Services of Ontario to follow these recommendations to improve the system of administrative segregation within their 26 prisons (p.7). These recommendations included a clear definition of what segregation implies, what a break from segregation means, sufficient training and resources for involved staff members, and that these definitions are made applicable to all correctional institutions in Ontario (pp. 23-30). He also recommended to change the procedure of data collection and establish a system between different facilities to ensure that the tracking of actual days in segregation are accurate, maybe even developing an automatic tracking system which could facilitate the staff's work to focus on other issues (pp. 31-35). The computer system should be updated to inform the responsible facility's employees and managers when a review for a segregated inmate is due (p. 38). To ensure the fulfillment of Ontario's open-data initiative, the Ministry of Community Safety and Correctional Services should also provide the public with the anonymized data about administratively segregated inmates (pp. 41-42).

Referring to the treatment of mentally ill inmates in administrative segregation, Dubé recommended that the Ministry of Community Safety and Correctional Services compile data on segregated individuals with mental health issues, determine when they were last visited by a healthcare professional, and see if a treatment procedure exists for these inmates (p. 42). He also strongly advised the Ministry to establish a system with better documentation of the reasons for placing an inmate in administrative segregation and what alternatives were discussed for the inmate instead of segregation during the Segregation Decision/Review procedure (pp. 48- 49). The report mentioned separate housing and programmes as alternatives for vulnerable prisoners (p. 9). Dubé criticised the lack of alternatives to segregation in certain correctional facilities and if none are available, the segregation reviews become limited in their purpose (p. 55).The Ministry should also revise the review process and incorporate reviews after five and 30 days and have committee meetings every week (p. 52). He also encouraged the Ministry to reform the review system to adequately monitor placements in administrative segregation (p. 56). Lastly, Dubé urged the Ministry to follow these recommendations immediately, and within six months of his report's release, they should inform him of their

progress and then give a report to him every sixth month until Dubé is content with their process of revising and implementing policies and rules (pp. 61-62). The Deputy Minister of the Ministry of Community Safety and Correctional Services responded to the report and agreed to most of the recommendations (p. 67). Furthermore, the Deputy Minister assured that changes and the explorations of other options regarding the tracking of segregated inmates would be made.

Besides the reports by the Ontario Ombudsman and the Federal Correctional Investigator, prison-activist groups have also examined the issues of administrative segregation in Canada. The West Coast Prison Justice Society (2016) published a report on the use of administrative segregation in prisons in British Columbia. In 2015, amendments were made to the *Correction Act Regulation* (BC Reg 58/2005). Section 17 was changed to remove the subsection on mental illness and therefore the person in charge does not have the authority to place an inmate in administrative segregation based on mental illness (West Coast Prison Society, 2016, p. 42). Nonetheless, inmates with mental health issues are still administratively segregated for reasons other than their mental disabilities (West Coast Prison Society, 2016, p. 42). However, the prisons are required to give these inmates access to a mental health professional and ensure daily psychological assessments by a trained staff member (West Coast Prison Society, 2016, p. 43). In their report, West Coast Prison Society (2016) found many problems regarding administrative segregation in British Columbia and therefore issued 39 recommendations with the final goal of abolishing administrative segregation in Canadian provincial and federal prisons (pp. 96-100). They further recommended limiting administrative segregation to consecutive 15 days and 30 days in a whole year, if segregation remains a method within the prison system, and should not be used on inmates with mental health issues and inmates younger than 21 years. Segregated inmates should be able to interact with other people on a daily basis and have options to be mentally stimulated with reading and writing material. Inmates on suicide watch should not be placed in administrative segregation, and if they receive visits by a mental health professional, these visits should be outside of the segregated cell.

Similar to the Dubé report (2017), the West Coast Prison Society report also recommended the development if an efficient tracking system for inmates in administrative segregation so as to have an overview of the accumulated number of days they spend in confinement and that an independent body supervise the

segregation process. Additionally, a documentation system has to be established to provide demographic information about the segregated inmate, the reasoning for their placement in administrative segregation, and possible alternatives for an inmate to not be segregated again. British Columbia Corrections should publicize information about suicides and deaths in administrative segregation and that prisons in British Columbia should be inspected by an independent body to ensure the adherence of the policies regarding administrative segregation. West Coast Prison Justice Society strongly encouraged CSC and British Columbia to implement the *Nelson Mandela Rules*, especially the limits of days in administrative segregation and that federal and provincial ministries should recruit the help and opinions of experts in the fields of mental health and human rights to revise policies for administrative segregation. As of the date of this study's completion, the Canadian government is appealing the decision of *British Columbia Civil Liberties Association v Canada (Attorney General)* (2018) regarding indefinite administrative segregation, even though CSC has mandated a revised limit of 15 days in administrative segregation (Harris, 2016; Mehler Paperny, 2018; Meuse, 2017). Interestingly enough, the reports published by the ombudsperson regarding correctional facilities in British Columbia did not include any recommendations and just a few comments on administrative segregation policies. In the report on the issues with inspections of prisons in British Columbia (2016), the Office of the Ombudsperson mentioned that administrative segregation had to be inspected to ensure the compliance with the appropriate rules and guidelines, and the report criticized the fact that correctional institutions were inspected only once within a period of three years (p. 20). Lastly, the report on the safety issues in British Columbia prisons by Laurie Throness (2014), the Parliamentary Secretary for Corrections, recommended alternative treatments for inmates with mental health disabilities as he did not deem administrative segregation to be the most effective method for this part of the prison population (p. 18).

2.5. Research on the Impact of Administrative Segregation on Vulnerable Inmates

Many studies examining segregation placements in prison settings have found conflicting results concerning the effects of administrative segregation on an inmate's mental health. Some studies found that there is no difference in an inmate's mental health between a placement in the general population or administrative segregation

(Jackson, 2001; Kaba et al., 2014; Morgan et al., 2016; O'Keefe, Klebe, Stucker, Sturm, & Leggett, 2010; Sánchez, 2013; Zinger, Wichmann, & Andrews, 2001). The information found in the literature regarding the mental health issues of administrative segregation should guide the development of recommendations to improve the Canadian situation.

Kaba et al. (2014) conducted a study on inmates in the New York City jail system from 2010 to 2013 and examined their tendencies to self-harm. The results showed that inmates who were placed in segregation were more likely to harm themselves than inmates in the general population. However, it is important to mention that self-harming had often occurred even before their placement in confinement. Unsurprisingly, mental health problems were highly associated with self-harming acts. These results supported the findings in the research by Lanes (2009), who conducted his study on the male prison population within the Michigan prison system and compared 132 inmates with a history of self-harm during their stay in prison and 132 inmates without any acts of self-harm during their time in prison. Lanes found that the period of non-self-harming behaviour was significantly shorter with respect to inmates who were in administrative segregation than with inmates in the general population. Furthermore, the study by Miller and Young (1997) examined 30 male inmates in a federal prison in Kentucky and found that the psychological distress symptoms were significantly higher with prisoners placed in segregation. These studies showed that administrative segregation can affect an inmate's mental health.

Another study found that prisoners who were placed in segregation at any point during their sentences showed higher rates of misconduct after such placement (Medrano, Ozkan, & Morris, 2017). Medrano et al. (2017) examined over 1200 capital inmates in the Texas prison system and concluded that segregation might not be an effective deterrent punishment for inmates who committed misconduct, which was expected with inmates sentenced with capital punishment. Solitary confinement was considered to be more harmful when capital inmates were segregated. Zinger et al. (2001) conducted a study with 60 prisoners in three correctional institutions located in Ontario and their results showed that the mental health of inmates in administrative segregation was poorer than that of inmates in the general prison population. They compared 60 prisoners who were either placed in administrative segregation for 60 days or were part of the general prison population. With written psychological tests and interviews, the participants' mental health was evaluated and repeated for the first time

after 30 days and the last time after 60 days. However, Zinger et al. (2001) did not find any significant deterioration of segregated inmates' mental health after 60 days. Martel (2006) examined inmates of Canadian prisons, who spent an average of 80 days in administrative segregation and found another sign of the impact confinement can have on prisoner's mental health. Her results showed that segregation might affect an inmate's conception of time as they spent almost 24 hours by themselves for long periods. The only way to make sense of the vast amount of hours is to manipulate their perception of time unconsciously. This can be harmful to inmates' psychological well-being as well. Additionally, Butler et al. (2014) found a variety of procedures, including evaluations and treatments, regarding mentally ill inmates in administrative segregation in super-maximum-security facilities in several states of the United States of America. Certain states do not have any guidelines for the placement in solitary confinement of mentally ill inmates. Without clear guidelines, which have to be followed, there is no standard procedure for inmates with mental health issues in solitary confinement. Therefore, the general treatment of segregated mentally ill inmates depends on the state providing any guidelines to the correctional facilities.

Different results were found in the study by Morgan et al. (2016), who performed a meta-analytical review of 34 studies with a focus on administrative segregation. Their analysis indicated that administrative segregation might not affect an inmate's mental health more negatively than a placement in the general population. However, they also concluded that it might not be an effective procedure for suppressing future violent behaviour or antisocial attitudes. Additionally, O'Keefe et al. (2010) found that the deterioration of an inmate's mental health may not only be caused by administrative segregation. Their study examined the mental health of more than 300 inmates in the correctional institutions of the state of Colorado for a year in 2010. O'Keefe et al. (2010) concluded that being in the prison setting might influence the psychological state of inmates, regardless of a placement in administrative segregation or the general population. Furthermore, their results did not find a significant difference in the level of mental-health deterioration between inmates living with mental-health issues and those without problems when they are placed in administrative segregation.

These studies show the several issues surrounding administrative segregation and mental health. To understand the impact administrative segregation can have on an inmate's mental health, the general prevalence of mental health issues among inmates

in Canadian prisons has to be explained. According to the CSC (2013), alcohol and substance abuse disorder and antisocial personality disorder show the highest rates for male offenders, who were examined for mental health issues when they arrived at a federal correctional facility. It is important to mention, that more than 35% of these cases were also diagnosed with another mental disorder. Almost half of the 588 cases with a diagnosed disorder had an alcohol and substance use disorder and antisocial personality disorder, while almost every third case had an anxiety disorder. Borderline personality disorder and mood disorders were found in approximately 17% of the 588 cases. The inmates had the lowest rates with respect to pathological gambling (6.5%), primary psychotic (4%), and eating disorder with less than one percent (CSC, 2013). For female federal inmates, the numbers were even higher (CSC, 2012). They assessed 88 female offenders and found that 94% had a psychiatric disorder, 85% were diagnosed with more than one disorder, and 80% had an alcohol and substance use disorder with Indigenous female offenders showing higher numbers for the latter than non-Indigenous inmates. Further, 83% show symptoms of antisocial personality disorder, 69% had major depressive episodes, and 52% had a posttraumatic stress disorder (CSC, 2012). Simpsons, McMaster, and Cohen (2013) examined the literature regarding mentally ill inmates in Canadian prisons and found that the number of serious mental illnesses (e.g. depression, schizophrenia, psychotic disorder, mood disorder) triples within the prison system compared to the general Canadian population (p. 503). In addition, the yearly rate of suicides within Canadian federal prisons was 3.7 to 7.4 times higher than in the general Canadian population from 1996 to 2010. The disproportionate number of Indigenous inmates in Canadian correctional facilities might be an explanatory factor for the higher numbers of serious mental disorders (p. 504). Four percent of the general population in Canada is Indigenous and 20% of the federal prison population is Indigenous. The high number of mentally ill inmates in the general prison population affects the use of administrative segregation and these vulnerable inmates should not face a placement in a segregated cell, but instead should receive adequate mental health support to improve their circumstances.

Martel (2001) examined twelve women with a history of administrative segregation in correctional facilities in the region of the Canadian Prairies and focused on the women's experience while and after they were segregated. The majority of participants were Indigenous and reported that their segregation cells were in the

basement, while Caucasian inmates were placed in segregated cells in a level above them and in better conditions. Six participants were held in administrative segregation in both provincial and federal prisons. The time spent in administrative segregation varied from two days up to more than four years, albeit not consecutive. Three women who were included in the study mentioned daily self-harm while they were in administrative segregation and gave the rationale for their actions as “needing to feel alive,” which could only be achieved through pain. Many of the interviewed inmates had experiences of harassment by both male warders and prisoners and some women did not receive the adequate sanitary products. This is supported in the findings of Shaylor (1998), where the experience of black women held in solitary confinement in a prison in California were examined. As found in other studies on segregated inmates, most of the participants felt like the time was going slower and they had nothing to do in their cells. Martel (2001) also found that female inmates had more difficulties than male inmates with dealing with the loss of human interactions and social support while they were segregated. Furthermore, some participants reported that they were treated differently after they were released from segregation, especially by the prison staff, as the inmates were constantly asked about their well-being. For the women with experience of abuse, the time spent in administrative segregation influenced their mental health, as they felt as vulnerable as in the past. The participants also stated that they withdrew themselves from the general prison population after their release from segregation, as they were not used to social groups anymore and experienced panic attacks and social anxiety.

In a report by Wichmann and Taylor (2004), the profiles of segregated female inmates in Canadian federal facilities were studied. From 1997 to 2000, 175 female inmates were placed in involuntary administrative segregation and one quarter had an Indigenous background. Forty women were held both in voluntary and involuntary administrative segregation, and almost 18% were of Indigenous descent. A small number of two Indigenous women was found in the fourteen inmates who were only in administrative segregation because they requested it. Furthermore, more than 60% of women involuntarily segregated had a history of substance abuse, while more than 45% of both involuntarily and voluntarily segregated women had difficulties with substance abuse. Emotional issues were found in 70% of female inmates, who had spent time in both voluntary and involuntary administrative segregation, while the more than half of women in either voluntary or involuntary segregation had emotional difficulties. This

study was conducted by the research branch of the CSC to examine the situation of female offenders in the federal prison system and the overall conclusion was that there was a difference between female inmates in administrative segregation and in the general prison population. Wichmann and Taylor (2014) recommended to decrease the numbers of admissions of female inmates to administrative segregation.

2.6. Challenges and Case Law

The use of administrative segregation in the Canadian correctional system has been challenged in the courts by both human rights groups and prisoners since the 1970s (Jackson, 2015; Parkes, 2017). In certain cases, the inmates are challenging their stay in administrative segregation or the improper treatment during their placement (*Bacon v Surrey Pretrial Services Centre (Warden)*, 2010; *Bradley v Canada (Correctional Service),* 2011; *Kelly v B.C. (Ministry of Public Safety and Solicitor General) (No. 3),* 2011); in other cases, advocacy groups in the interest of inmates are fighting for the abolition of administrative segregation (*British Columbia Civil Liberties Association v Canada (Attorney General),* 2018; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen,* 2017).

James Bacon (a member of the Bacon Brothers), who was awaiting trial in British Columbia on "one count of first degree murder and one count of conspiracy to commit murder", applied for *habeas corpus* with *certiorari* to be removed from administrative segregation to the general prison population in *Bacon v Surrey Pretrial Services Centre (Warden)* (2010). Justice McEwan ruled the treatment of Bacon cruel and unusual and stated the following:

> The respondent is in breach of s. 12 of the Charter in arbitrarily placing the petitioner in solitary confinement, in failing to appropriately mitigate his circumstances in solitary confinement, and in unlawfully denying him the other rights to which he was entitled, significantly threatening his psychological integrity and well-being. (para. 353)

In *Bradley v Canada (Correctional Service)* (2011), an inmate, Bradley, challenged the order of his placement in administrative segregation, which continued for more than 80 days. None of the staff members involved in making the decision of the placement provided any affidavits and the presented evidence was criticized for not being signed. Justice Bourgeois ruled that the placement of the applicant James Bradley

in administrative segregation was unlawful. Bourgeois' summarized the decision as follows:

> I want to finally address the lack of any material in relation to the 60-day review of Mr. Bradley's segregation. The Respondent's brief indicated that the review was undertaken on November 21, 2011. No material has been filed, from November 21 to date, as to document the outcome of that decision other than I know that Mr. Bradley is still in involuntary administrative segregation. There is nothing before this Court to address whether the decision made on November 21 during that review was reasonable. It is the Crown's obligation to establish that the decision made was lawful. It has provided nothing. (para. 35)

Litigation also includes the issue of inadequate access to religious services. In Kelly v B.C. (Ministry of Public Safety and Solicitor General) (No.3) (2011), an Indigenous inmate argued that he did not receive any visits by a 'Native Liaison' person nor the Indigenous literature he requested on multiple occasions while he was placed in administrative segregation; however, when he requested a Chaplain and Christian literature, both were provided. Kelly complained that he faced discrimination regarding his Indigenous faith and the British Columbia Human Rights Tribunal agreed with him. The Tribunal member, Enid Marion, provided the following reason for the decision:

> In summary, the evidence was conclusive that, despite making requests at each of the Centres, Mr. Kelly was not provided access to an Aboriginal spiritual advisor or Aboriginal spiritual literature while housed in segregation at any of the Centres. There was, instead, only the "illusion of access." While each of the Centres had retained the services of an Aboriginal spiritual advisor, the evidence established that for Mr. Kelly, as a segregated Aboriginal inmate seeking to access an Aboriginal spiritual advisor, there was in actuality a denial of service. (para. 385)

A case launched by an advocacy group is Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen (2017). The Corporation of the Canadian Civil Liberties Association (CCLA) argued for a maximum of 15 days in administrative segregation, banning the placement in administrative segregation of inmates who are younger than 21 years and have mental health issues (see Appendix A for more information on this case). Furthermore, CCLA sought an independent review system for administrative segregation orders. Associate Chief Justice Marrocco of the Ontario Superior Court ruled that the placement of an inmate in administrative segregation reasoned by the fifth working day review unconstitutional. Morrocco, A.C.J.S.C. gave the government 12 months to change the review system and stated the following:

> The appropriate remedy is a declaration that the current provisions of the Corrections and Conditional Release Act sections 31-37do not authorize administrative segregation after the fifth working day as it does not have sufficient procedural protections to ensure that continued administrative segregation does not deprive inmates of liberty or security of the person in a manner inconsistent with the principles of fundamental justice. (para. 273)

The most recent case challenging the use of administrative segregation is British Columbia Civil Liberties Association v Canada (Attorney General) (2018) (see Appendix B for more information on this case). The British Columbia Civil Liberties Association (BCCLA) and the John Howard Society of Canada (JHS) argued, in the B.C. Supreme Court, for the abolition of all forms of administrative segregation in federal correctional facilities Canada. During the hearings, academic and governmental experts, such as psychiatrists and psychologists with expert knowledge on segregation, spoke on the effects of administrative segregation on an inmate's mental health. The overall conclusion was that mentally-ill inmates should not be placed in administrative segregation, even though the experts disagreed on the adequate research methods applied in studies examining the impact of administrative segregation. Furthermore, several wardens of Canadian correctional facilities were questioned during the hearings. Their opinion on a maximum of 15 days of administrative segregation was that it would be possible albeit difficult in certain cases. Mr. Pyke, a warden in Ontario, supported his statement with an example of "an inmate who had killed another inmate inside the institution. Between the police investigation and the need to manage the safety of the inmate from retaliation and other risks, 15 days would be an exceedingly tight timeframe". While the use of administrative segregation per se was not ruled unconstitutional, Justice Leask ruled that indefinite administrative segregation was unconstitutional by virtue of s. 7 of the Charter. Justice Leask stated the following:

> While I agree that the salutary effects of short-term administrative segregation in terms of enabling CSC to remove inmates from the general population in order to maintain safety and security within the institution balances favourably against some limitation of inmates' s.7 rights, that balance shifts dramatically in the case of prolonged and indeterminate segregation. Given the severity of the harms – and corresponding rights infringement – as has been discussed, the deleterious effects of the impugned provisions in those circumstances substantially outweigh their salutary effects. (para. 599)

2.7. Conclusion

A placement in administrative segregation can have an immense impact on an inmate's mental health and can sometimes even end in an inmate's death. Therefore, the procedure and the several steps involved in administrative segregation placements have to be specifically defined and explained in the relevant legislation. By making the law more precise, it will not only improve the situation for the people involved in the application of administrative segregation, but also for inmates challenging the law. The *Nelson Mandela Rules* set out prison guidelines for countries to follow and set a maximum of 15 days during which an inmate can be placed in administrative segregation. However, reports have shown that these *Rules* are not always followed and certain areas of the Canadian correctional system need improvement regarding administrative segregation. Reviewing the current legislation of Canada and other countries should assist in developing evidence-based recommendations for enhancement of the Canadian system and in preventing malpractice.

Chapter 3. Methodology

Recent cases of inmates committing suicide while being held in administrative segregation and several court challenges by human rights groups to abolish this practice have shown the importance of the topic in the Canadian legal system. To understand the problems in Canada and establish recommendations, it is helpful to gain an overview of other countries and their application of administrative segregation. A qualitative approach, based on information obtained from Canadian and international legislation and regulations, was used for this study. The Canadian federal Acts and regulations, which were acquired from the website of the *Canadian Legal Information Institute* (CanLII), were referenced to determine the changes in the past 20 years. The Canadian provincial Acts and regulations, which were also acquired from CanLII, provided the different applications of administrative segregation on a provincial level. The legislation from the other eight countries, obtained from each country's individual governmental website, provided a comparison with the Canadian system as well as a basis for suggesting alternatives.

The theoretical framework for this thesis is that of legal positivism as it focuses on the existence of the laws regarding administrative segregation within the Canadian legal system and international legislation and based on these laws develops recommendations for law reforms in Canada. Legal positivism can be described as the opposition of natural law theory, which connects the morality with the law, while legal positivism splits morality from the law (Bix, 2000, pp. 1613-1615). The most notable legal positivists are Thomas Hobbes, Jeremy Bentham, and John Austin (Gardner, 2001, p. 200). In a series of lectures about jurisprudence, Austin (1832) famously explained legal positivism as follows:

> The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it, or though it vary from the text, by which we regulate our approbation and disapprobation. (p. 157)

Hans Kelsen, also a legal positivist, stated that “legal norms were confused with moral rules” (Halperin, 2011, p. 50). While there are several overlays and crossings of law and morals, and certain connections can be drawn, these interactions could also be

seen as a “coincidence” and these relations are not essential to the concept (Hart, 2016, pp. 460-461). In practice, the separation of law from morality can be seen in rulings of court cases, when a judge has to put the law above moral views and make a decision which might be received as amoral (Atria, 1999, p. 548). Instead of discussing the moral implications of the laws governing the use of administrative segregation, the actual laws have to be reviewed in a descriptive manner to construct an overview of the legal framework. Hart (2016) stated that it is sometimes more beneficial for changes to happen if cases with controversial outcomes are being discussed so that there is a greater understanding of what the law is (pp. 462-463). Changes of laws can only be accomplished if the existing laws are being understood stripped from the morality of a society or a ruler: especially, in the current state and climate of political discussions, where emotions are often involved in the justification and explanation of an opinion, which also find their way into the legal discourse (Van Bavel, 2017). The discussion of the validity of administrative segregation in Canadian prisons is usually emotional and the moral arguments concerning this legislation and the accompanying regulations is a common practice, which might not be the most effective way to encourage governments to change the laws.

When changes in legislation and regulations are reviewed, it is important to recognize that the law in books might not reflect the law in practice. “Drafting and enacting a new law is one thing, implementing it is another” (Dietrich, Hasse, & Kvatskhava, 2002, p. 3). The law in action is developed with the help of legal conversations which are mistakenly convoluted with the conversations about the law in books and legal academics have to be careful to detect legal norms changes to prevent an increasing distance between the old law in books and the empirically-tested law in action (Halperin, 2011, pp. 56-60). This discrepancy between the two laws can be seen in the reports conducted by federal correctional investigators and the legislation and regulations in force when these reports were written. In the Annual Report by the Office of the Correctional Investigator (2017), the decreasing number of inmates in administrative segregation was explained by four changes within the correctional system without any changes in the legal framework: “referrals to mental health services, earlier review of cases, increased use of inter-regional transfers and creation of additional subpopulations” (p. 40). However, in the Annual Report a year prior, Sapers (2016) criticized how the Gladue factors were not applied in a consistent manner in cases

regarding separating Indigenous inmates, even though the CSC changed their framework to include the *Gladue* factors when making decisions (p. 45). These factors involve the consideration of the social history of an Indigenous inmate when an administrative segregation placement is reviewed as an option for an inmate. Lastly, the use of administrative segregation instead of disciplinary segregation was criticised in the *Annual Report 2014-2015* (Office of the Correctional Investigator, 2015, p. 31).Inmates are being placed in administrative segregation as a method of “circumventing the disciplinary process to isolate, contain, separate, control, manage or even punish” (p. 31), although the *Corrections and Conditional Release Act* states that a disciplinary procedure has to be followed in cases of violations within the correctional facility.

3.1. Research Objectives and Questions

At the beginning of this study's conceptualization, the primary objective was to determine the problems involving administrative segregation in the Canadian federal and provincial correctional system. However, to evaluate Canada's legislation, other countries' rules regarding administrative segregation have to be examined and therefore legislation from eight different countries (six Europeans, Australia, and New Zealand) were obtained. The sections from both Canadian and international legistlation provided the information concerning administrative segregation.

The eight countries were selected based on their similarities to Canada in both cultural and legal terms. Therefore, England, Ireland, Australia, and New Zealand were included in the international sample, while the United States of America was not selected as most research on solitary confinement and administrative segregation is conducted with an American focus and the issues within the American system are well-known (Lanes, 2011; O'Keefe, 2008; Sánchez, 2013). With the ability to speak both German and French, the researcher was able to review the legistlation from Germany, Austria, Switzerland, and France in their original versions as most countries do not provide an English translation of their documents.

The objectives of this thesis are to review the existing regulations for administrative segregation in Canada and the changes in the policies during the last 20 years, compare them with international regulations, and develop recommendations for an improved situation. Abolition of all types of administrative segregation in Canada is

unfortunately not a viable option in the foreseeable future, even though recent court decisions give some hope for reform (*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018). To achieve these objectives, the following research questions guided this study:

- What are the current federal and provincial regulations and policies in Canada?
- What are the major changes in regulations for administrative segregation in Canada in the past 20 years? Have they improved the situation for certain inmates?
- Do other countries have similar regulations? And if not, how do they differ?

3.2. Research Methods

A review was conducted of the Acts and regulations regarding corrections and prisons in which administrative segregation or similar measures were mentioned. These legal documents are the principles every other guideline or policy should be based on. Clear and reliable sources are necessary for individuals to understand whether their rights might be infringed or where the law is being incorrectly applied. In each document, a review was conducted of the sections defining or explaining the process of administrative segregation, with the aim of finding similarities or a consensus how administrative segregation should be applied.

3.2.1. Data Selection

This data set consists of the current Canadian federal legislation, the *Corrections and Conditional Release Act* and the *Corrections and Conditional Release Regulations*, obtained from CanLII. Additionally, every Act and regulation of each province and territory for correctional services was included, unless they did not contain any information on administrative segregation. For Alberta, the *Corrections Act* and the *Correctional Institution Regulation* are reviewed. The *Correction Act Regulation* of British Columbia and the *Correctional Services Regulation* of Manitoba were included in the selection. For Saskatchewan, *the Correctional Services Act* and *the Correctional Services Regulations 2013* were selected. The *General* regulations of Ontario and the *Act respecting the Québec correctional system* and the *Regulation under the Act respecting the Québec correctional system* were reviewed. New Brunswick's *General*

Regulation and Prince Edward Island's *Correction Services Act Regulations* were selected for the sample. Furthermore, the *Correctional Services Act* and the *Correctional Services Regulations* of Nova Scotia were included in the review. For the territories, Nunavut's *Corrections Act*, Yukon's *Corrections Regulation*, and the *Corrections Act* of the Northwest Territories were reviewed. The legislation mentioned above were all obtained from CanLII.

For the international legislation, Germany's *Prison Act* (*Strafvollzugsgesetz*) as well as the *Code of Criminal Procedure* (*Strafprozessordnung*) were reviewed. For Austria, the *Prison Act* and the *Detention Regulation* (*Anhalteordnung*) were selected, while the *Swiss Criminal Code* (*Schweizerisches Strafgesetzbuch*) was selected for Switzerland. While the *Swiss Criminal Code* is available in all four official languages of Switzerland – German, French, Italian, and Romansh – the German version was reviewed as this is the researcher's mother tongue. The *Code of Criminal Procedure* (*Code de procédure pénale*) is the reviewed legislation for France, while the *Prison Rules 1999* for England and the *Prison Rules 2007* for Ireland were selected for review.

For New Zealand, the *Corrections Act 2004* is reviewed. The *Standard Guidelines for Corrections in Australia* is the only federal guideline regarding administrative segregation. The selection for each state is as follows:

Western Australia: *Prisons Act 1981*

Northern Territories: *Correctional Services Act*

South Australia: *Correctional Services Act 1982*

Queensland: *Corrective Services Regulation 2017*

Victoria: *Corrections Regulations 2009*

Tasmania: *Corrections Regulations 2008*

New South Wales: *Crimes (Administration of Sentences) Act 1999*

3.2.2. Data Analysis

The sections, subsections, and paragraphs containing information about administrative segregation and its procedure from each country, province, and state were analyzed to find common patterns. The documents were uploaded to NVivo 11, a

qualitative data analysis software, and various terms and keywords were searched. The keywords for the English documents were: administrative segregation, solitary confinement, association, removal, segregated, confined, isolation, and holding cell. The keywords for the German documents were the translations of English keywords: *Isolationshaft, Einzelhaft, Isolierung, Absonderung, Freiheitsentzug*, *spezielle Massnahmen*, and *Entzug*. For the French documents, the keywords were *detention à l'isolement, isolement, confinement solitaire, confinement,* and *ségrégation.* The sections found with these keywords were selected for the analysis. This analysis informed the process of making recommendations for the reform of the Canadian system.

3.3. Limitations

At the beginning, it was expected that every country has the same basic legal structure regarding the operation of correctional services, including administrative segregation. However, it became apparent that not every country has a federal Act or regulations regarding the correctional system. Even though federal prisons exist in Australia, a federal statute does not overlook these correctional facilities, but the legislation of the state, where the federal prisons are located, is responsible for them. In Switzerland, administrative segregation is regulated under the Swiss Criminal Code instead of a separate statute. Another issue occurs when obtaining information from sources in different languages: namely, the different translations of the documents relating to administrative segregation or even solitary confinement. In German, solitary confinement has two different translations (Einzelhaft and Isolationshaft), even though the first one is used in a legal context. The English documents were also inconsistent with the term administrative segregation. Therefore, some legislation was analyzed even though solitary confinement was the term used; however, the definitions were similar to the Canadian version of administrative segregation. Another limitation of reviewing legislation is the possibility of amendments, while the study is being conducted, and hence the need for ongoing revision of the data. Lastly, only reviewing legislation poses a limitation as well, as including a review of the actual application of the law concerning administrative segregation might have different results.

Chapter 4. Findings

This chapter features the sections and paragraphs regarding administrative segregation from Canadian provincial and federal Acts and regulations. Furthermore, it includes a review of the legislation involving administrative segregation (in most of these cases called solitary confinement) from six European countries (Germany, Austria, Switzerland, France, England, and Ireland) as well as Australia and New Zealand. The findings are based on the examination of the legal provisions concerning the procedure of administrative segregation, including the changes in the sections in the federal *Act* and regulation within the last 20 years.

4.1. Canada

In comparison to the other studied countries in this paper, Canada is the only one with a federal-provincial split of jurisdiction over corrections. Prisoners with a sentence shorter than two years are the responsibility of the provinces, while offenders sentenced to two years or more (up to life sentences) are under the federal jurisdiction (Public Safety Canada, 2015). The CSC is overlooking the offenders in federal correctional facilities with the *Corrections and Conditional Release Act* and *Corrections and Conditional Release Regulations.* The provinces and the territories have their own acts and regulations for their penal systems, which are discussed later in this chapter.

According to the CSC's Status Report (2016), 360 out of 14,515 inmates were in administrative segregation in Canadian correctional federal institutions as at August 9, 2016 (p. 5). The segregated inmates were 354 males and 6 females; 136 were indigenous. Out of 360 inmates, 205 were placed in segregation owing to safety and security concerns, 142 inmates were endangered, and 13 were a risk to an ongoing investigation (CSC, 2016, p. 6). CSC published a *Status Report on Administrative Segregation* at the end of 2016 to answer certain concerns surrounding administrative segregation and to provide information about the steps CSC planned to take to adjust the policies in accordance with the recommendations discussed above. Even though the *Nelson Mandela Rules* (2015) established a limitation of 15 days in segregation, this report listed a maximum of 30 days for inmates, who are disciplinarily segregated, and

45 days for segregated inmates who are sentenced to another segregated placement while they are already spending time in segregation.

The report also provided information regarding the process and oversight of administrative segregation on three levels: institutional, regional, and national (CSC, 2016, p. 3). At the institutional level, the oversights start before placement into administrative segregation with a consultation of the inmate; then the first day is reviewed, followed on the second day with considerations of possible reintegration into general prison population, and on the fifth day, the board reviews the segregation. On day 25, the inmate's mental health is assessed, followed by a plan to reintegrate the inmate into the general prison population on day 27 and a second and third segregation review board on day 30 and day 60. The regional oversight starts on day 45 with a segregation review board, a segregation review board on day 60, and a committee regarding mental health without a specific day. Finally, the national oversight starts after day 60 and is concerned with long-term segregations.

Additionally, the federal law requires a daily visitation by a warden and a health-care professional, and contact with a lawyer, interpreter, Office of the Correctional Investigator, and support in case of a grievance (CSC, 2016, p. 3); the CSC also requires possible contact with correctional and parole officers, mental-health professionals, the manager of assessment and interventions, the chaplain, other providers of spiritual support, and an advocate for individuals with special needs (CSC, 2016, p. 3). Furthermore, the law requires adequate clothing and food, sleep material, room for exercising, items for personal hygiene, entertainment material such as a television, possible visits, and material for correspondence (CSC, 2016, p. 3); the CSC requires that the facilities provide segregated inmates with employment, books and magazines, the *Administrative Segregation Handbook for Inmates* (CSC, 2016, p. 3).

The CSC's Status Report concluded that the investigation into the system has shown positive progress regarding the segregation renewal strategy. The positive points include that the CSC requirements are in accordance with the legal requirements and that there is an updated list of responsibilities explained in the *Commissioner's Directive* (CSC, 2017b) and the *Administrative Segregation Guidelines* (CSC, 2017d); all levels of segregation were required to have Segregation Review Boards to oversee the situation; and every case must be reviewed separately (CSC, 2016, p. 16). Furthermore, no

complaints were made by either staff members or prisoners about the reduction of administrative segregation in regards to safety. Both the mental-health support system and the reintegration of inmates into general prison population were considered adequate by the report. However, certain issues were found regarding the national monitoring method. This method needs to integrate the exact numbers of admissions and complaints made by inmates. Furthermore, the procedure for allowing advocates for segregated inmates with special health needs to be improved. The CSC raised another concern regarding removing the differentiation between voluntary and involuntary segregation; namely, the CSC may not be able to establish an effective offender profile without distinguishing between involuntary and voluntary segregation (CSC, 2016, pp. 12-16). However, since every placement in administrative segregation has to be confirmed by the CSC, regardless of involuntary or voluntary segregation, the distinction between these two statuses has been eliminated without any negative responses by the correctional institutions (CSC, 2016, p. 13).

At the beginning of August 2017, CSC implemented the above-mentioned changes to the policy regarding administrative segregation and mental health (Hampshire, 2017). Accordingly, certain inmates – serious mentally ill individual, inmates committing self-harm with a high risk of fatal outcome, and suicidal prisoners - are no longer allowed to be placed into administrative segregation (CSC, 2017c). Furthermore, it is required that inmates in administrative segregation receive crucial, personal articles when they are placed into confinement, daily access to a shower, and at least two hours per day where they can leave their solitary cell. This news followed the promises made by the Ontario government to implement strict minimums for administrative segregation placements among other changes within the provincial prison system, while the CSC's use of indefinite adminisrative segregation was deemed unconstitutional in the Supremce Court trial in British Columbia (Crawley, 2017; *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018; Meuse, 2017). In the conclusion for *British Columbia Civil Liberties Association v Canada (Attorney General)* (2018), Justice Leask stated the following:

> I find as a fact that administrative segregation as enacted by s.31 of the *CCRA* is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal,

> hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree. (para. 247)

4.1.1. Federal Level

Section 31 of the *Corrections and Conditional Release Act* (SC 1992, c 20) defines administrative segregation as the removal of an inmate from associations with the general prison population with the objective to ensure the safety of the facility or the people within the facility. Subsection 31(3) states that the institutional head can place an inmate in administrative segregation for three reasons: a) the safety of the facility or if a person is endangered; b) possible tampering of an ongoing investigation by letting an inmate interact with other inmates; c) the inmate's own safety is endangered. If the inmate is placed in administrative segregation involuntarily, the head of the facility must designate a person(s) to review the case (subsection 33(1)). To review the case, the responsible person has to hold a hearing of the prisoner's case, schedule hearings during the remainder of the administrative segregation and, after each hearing, make recommendations to the head of the facility to continue or end the segregation (subsection 33(1)(a)(b)(c)). Under section 34, the head of the facility has to meet with the segregated inmate and summarize the grounds for not removing them from administrative segregation and give the prisoner the option to object, orally or written, to the decision. The same protocol has to be followed in a case where the inmate requests the placement in administrative segregation and the head of the facility does not allow it (section 35). According to section 36, a registered healthcare professional has to visit a segregated inmate at least once a day, while the head of the facility has to visit the segregated area once a day and visit inmates by request. Under section 37, administrative segregated inmates have the same rights and terms of imprisonment as any other inmate as long as it does not involve the interaction with other inmates or breaches the administrative segregation conditions.

The *Corrections and Conditional Release Regulations* (SOR/92-620) impose additional requirements on the management of administrative segregation. Section 19 states that the head of the institution or another authoritative person has to inform an inmate, who is in administrative segregation against their will, about the grounds of the

confinement in less than 24 hours after their being placed in administrative segregation. Furthermore, the head of the facility has to review the direction within one day after the segregation and decide whether to release the inmate from administrative segregation (section 20). The Segregation Review Board, consisting of the person or people mentioned in section 33(1) of the *Corrections and Conditional Release Act*, has to be notified of the involuntary administrative segregation (section 21(1)). Section 21(2) states that the Segregation Review Board has to hold a hearing within five days after the segregation order and at least once a month if the inmate is not removed from segregation. The inmate involved in a Segregation Review Board hearing needs to be informed at least three days ahead of the hearing, has the right to object at the hearing, and to receive the reasons for the Board's the recommendations to the head of the facility (subsection 21(3)). Section 22 states that the head of the region or an authoritative staff member of the regional headquarters has to review the case of an inmate held in administrative segregation at a minimum of every 60 days to decide if the segregation is still justifiable. Lastly, section 23 specifies that a voluntarily segregated inmate's case has to be reviewed within one day of the order by the head of the facility and decide whether the inmate should be removed from administrative segregation. The case of *Cardinal v Director of Kent Institution* (1985) showed that, even though the Segregation Review Board recommended the removal of two inmates from administrative segregation, the Director did not follow this recommendation. Without the *Corrections and Conditional Release Act* and the *Corrections and Conditional Release Regulations* stating clear rules and steps regarding the review process, it would be a difficult matter to argue an inmate's case for unfair treatment.

4.1.1.1. Recent Changes to Policy

To examine the development of administrative segregation in Canada, it is helpful to compare older and current statutes. The *Corrections and Conditional Release Act* was given Royal Assent in June 1992 and was only amended 20 years later in June 2012. Regarding administrative segregation, changes have mostly occurred to the wording of the sections. Section 31 and section 37 were amended, with the former receiving the most changes as it includes the purpose, the duration, and the reasons for segregating an inmate. Section 31(1) added that the purpose of administrative segregation is to ensure the safety of the people and the correctional facility, while in the *Act* prior to the amendments, the purpose was to "keep an inmate from associating with

the general population" (s. 31(1), 2012). The changes emphasize the CSC's new approach to administrative segregation and underline that the primary reason to segregate an inmate is for security and not as punishment. Subsection 31(2) was simplified by changing the wording from stating that the Service has to strive to release the inmate from administrative segregation as immediately as possible to “the inmate is to be released from administrative segregation at the earliest appropriate time” (*Corrections and Conditional Release Act)*. Subsection 31(3) changed the format of the subsection. Previously, the statement that the institutional head should only order a placement in administrative segregation if there are no other options for the inmate, used to be listed after 31(3)(a)(b)(c), while now it is written before these subsections. Furthermore, the current *Act* combined two subsections from the older version to state that the institutional head has to believe, based on conclusive reasons, that the safety of the people or the facility is at risk if the inmate is not segregated by either the inmate interacting negatively with other inmates or because of their own threatening actions. Previously, the inmate’s actions and the association of the inmate with the general prison population was under two different subsections (31(3)(a)i, ii). Furthermore, “presence of the inmate” was changed to “inmate to associate” in the subsections 31(3)(b)(c). Section 37 removed the word privilege from the statement about the inmate’s rights while being segregated. This is a small change, but this was possibly amended because of questions regarding which privileges a person in a correctional facility actually has. The sections of the *Corrections and Conditional Release Regulations* concerning administrative segregation have not been amended since the *Regulations* were implemented in October 1992.

4.1.2. Provincial Level

Each Canadian province and territory has its own legislation and regulations regarding administrative segregation in its institutions. It is necessary to have an overview of the different regulations as certain provinces do not even provide any information regarding their use of administrative segregation or the maximum number of days permitted in administrative segregation is not clear (Table 1). As an example, Québec has a maximum permitted period of 72 hours for administrative segregation on suspicion of possession of contraband items under section 36, however, there are no regulations for administrative segregation in general (*Regulation under the Act*

respecting the Québec correctional system, CQLR c S-40.1, r 1). This is problematic as these provincial correctional institutions are responsible for the welfare of their inmates and, if there are no clearly stated regulations, then it is more difficult to guarantee the adequate treatment of inmates – and especially vulnerable individuals in these facilities. It might also make correctional officers' work more difficult as they do not have any regulations they can refer to or no specific guidelines they can follow in cases where they consider the option of administrative segregation for an inmate.

Table 1 Maximum days in administrative segregation

Provinces	**Maximum time**
Alberta	Does not have administrative segregation
British Columbia	72 hours/15 days
Manitoba	No maximum
New Brunswick	No maximum
Newfoundland and Labrador	Does not have administrative segregation
Northwest Territories	No maximum
Nova Scotia	No maximum
Nunavut	No maximum
Ontario	No maximum
Prince Edward Islands	No maximum
Quebec	72 hours
Saskatchewan	No maximum
Yukon	72 hours/15 days

Administrative segregation is not included or defined in the *Corrections Act* of Alberta (RSA 2000, c C-29), while the *Correctional Institution Regulation* (Alta Reg 205/2001) only mentions disciplinary segregation with a maximum of 14 days under section 46, which is used as a punishment and not as administrative segregation. British

Columbia recently repealed and amended certain sections of its *Correction Act Regulation* (BC Reg 25/2005). Short-term separate confinement has a maximum of 72 hours and can be ordered if there are reasons to believe that the inmate is at risk of being harmed by others or by themselves, or puts other people or the institution in danger (section 17). The inmate has to be informed about the reason for the separation within 24 hours of the short-term confinement order. Under section 18, long-term separate confinement can increase the period up to 15 days, which can be renewed several times (section 18). However, the responsible person has to review the situation before extending the administrative segregation, and the inmate has to be notified how long they have to be separated and the reasons for the prolonged confinement. Furthermore, under section 19, the inmate can also request administrative segregation if they are being endangered by others or themselves, and with the approval of the responsible person be separated from the general prison population. The responsible person can end any of the segregations at any reasonable time (section 20).

Manitoba uses preventive segregation as a term with the same requirements as administrative segregation in the CSC (*Correctional Services Regulation,* Man Reg 128/99). Under section 20(2), no maximum period is stated but, after seven days, the case must be reviewed by the responsible person (designated by the facility head) of the facility and, during the first 60 days, a review is needed every fortnight and, after the first 60 days have passed, a review is needed within 30 days. The segregated inmate has the right to a hearing, and the designated person(s) reviewing the segregation have to advise the facility head to either continue or terminate the segregation (section 20(3)(4)). The inmate can object to the advice under subsection 5. The head of the facility has to visit a segregated inmate every day, while a nurse has to visit the inmate once a week (section 21(1)). In Saskatchewan, the regulations do not state any maximum period for holding inmates in administrative segregation but do indicate that every placement must be reviewed every 21 days (*The Correctional Services Act*, 2012, SS 2012, c C-39.2). Reviews of administrative segregation have to be conducted by a panel, which has been determined by the director of the prison and used to give directions to either remove or keep an inmate in administrative segregation (section 59 and 60). Under section 61, the inmate can make objections to the placement in administrative segregation to the facility's director within five days after the order is made and has to state the reasoning for the appeal. *The Correctional Services Regulations 2013* (RRS c C-39.2 Reg 1) does

not add any different information with respect to how administrative segregation has to be managed compared to *The Correctional Services Act* discussed above.

Ontario also does not have a maximum period for detaining inmates in administrative segregation: however, every case must be reviewed by the Superintendent every five days and, if they are segregated for longer than 30 days, the reasons must be reported to the Minister (*General,* PRO 1990, Reg 778, s.34). Section 193 of the *Act respecting the Québec correctional system* (CQLR c S-40.1) establishes the powers of the regulations and states that administrative segregation should only be applied to inmates who are believed to possess contraband items. Furthermore, regulations should define reasons for administrative segregation and inmates who might be placed in administrative segregation; determine the personnel with the authority to apply administrative segregation; the time and conditions of administrative segregation; set out rules which have to be followed including rights of segregated inmates; and determine the review procedure by the responsible people (s.193.6(a)-(e)). Section 31 of the *Regulation under the Act respecting the Québec correctional system* (CQLR c S-40.1, r 1) further defines drugs, medications, and weapons as included in contraband items. Under s.32, the inmate has the right to raise an objection to the placement and has to be informed by the manager about the reasons for the confinement immediately. The facility director has to review the placement if the inmate requests it or wishes to object to it (s. 33). The manager's decision to place an inmate in administrative segregation has to be approved or declined by the facility director before the placement ends under s. 34. An inmate in administrative segregation is not allowed to spend an hour outside, which is a right in the general prison population (s. 35). Section 36 states that the inmates are removed from the separated cell as soon as they release the contraband or after 72 hours. It can be renewed for another 24 hours if there are reasons to believe that the inmate has swallowed medicine to prolong the expulsion of the contraband. However, this is not the definition of administrative segregation the federal regulation has established and is only used in cases of contraband possession, which most other acts or regulations do not consider.

New Brunswick's *General Regulation* (NB Reg 84-257) only states that the administrative segregation must be reviewed by the superintendent every 24 hours to decide if the placement has to be extended (section 20). Nova Scotia does not have any regulations regarding maximum periods for detaining people in administrative

segregation (*Correctional Services Act,* SNS 2005, c 37, s. 75). However, the *Correctional Services Regulations* (NS Reg 99/2006) state that inmates in close confinement have to be reviewed within 24 hours of the placement and the superintendent has to order the removal or continued detention of the inmate in close confinement (s. 80). The superintendent has to review the case every five days and, if the confinement continues for more than ten days, the Executive Director has to approve it (s. 80). Prince Edward Island does not have any maximum number of days permitted in administrative segregation, but provincial regulations state that the Centre Manager must be informed within the first 48 hours after the placement (*Correctional Services Act Regulations,* PEI Reg EC616/92, s. 15). Newfoundland and Labrador do not even mention administrative segregation in the *Correctional Services Act* (SNL 2011, c C-37.00001) or *Prisons Regulations* (CNLR 993/96).

The regulations of the Territories vary like the Provinces' regulations. Nunavut stated in its *Corrections Act* (RSNWT (Nu) 1988, c C-22) that it has administrative segregation, but they do not have a specific maximum number of days for it. However, under section 22, inmates segregated for longer than five days have the right to at least one hour of exercise a day outdoors. In the *Corrections Act* of the Northwest Territories (RSNWT 1988, c C-22), it provides that inmates can be placed into administrative segregation if there are reasons to believe that they need protection from themselves or other inmates (s. 22). The inmates also have the right to at least one hour of daily outdoor exercise, if they have been segregated for more than five days (s.22.3). Yukon has the same regulations as British Columbia (maximum of 72 hours short-term separate confinement and maximum of 15 days long-term separate confinement), including voluntary segregation requested by the inmate, and does not use the term administrative segregation (*Corrections Regulation,* YOIC 2009/250, s.20, 21, 22).

The federal legislation provides a more in-depth description of the procedure of administrative segregation, which has seen small adjustments over the last two decades. However, the provincial legislation regarding administrative segregation differ in several factors such as maximum days in segregation, procedure, and the management of it. The legal definitions of administrative segregation also vary among the provinces, with Newfoundland and Labrador not even referring to it.

4.2. International Regulations

4.2.1. Europe

Every European country has laws and regulations regarding prisons and the treatment of inmates. However, the Council of Europe established the *European Prison Rules* in 1987, which are recommendations for members of the European Union on how to manage a correctional facility and the treatment of inmates. In 2006, the Council of Europe published the recommendations to the existing *Prison Rules*, provided a commentary on these recommendations, and lastly a revision of the *Prison Rules*. Rule 60.5 states that solitary confinement should only be used as a punishment in particular cases and for the shortest period that is appropriate. The commentary regarding this *Rule* provides more information on solitary confinement, lists the different conditions of solitary confinement in prisons (e.g. cell without lights), and repeats the statement that solitary confinement should not be used as a punishment (p. 79). Furthermore, the revision chapter emphasizes the notion of avoiding segregating prisoners whenever possible, especially with respect to vulnerable individuals, as the results of solitary confinement can be harmful to these people (p. 125). The *European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (CPT, 1992) established that solitary confinement should be as short as possible as it could lead to prisoners being treated inhumanely. Regulations concerning solitary confinement in European correctional facilities are applied in circumstances that are similar to those that apply to administrative segregation in Canada: namely, if the inmates seem to be dangerous to either themselves or the general prison population. Nevertheless, each country differs on how their regulations define solitary confinement, what the inmates are allowed to do during their stay in solitary confinement, and what reasons might lead to the placement of an inmate in a segregated cell.

4.2.1.1. Germany

The solitary confinement of several members of the Red Army Faction in the Stammheim Prison in the 1970s are the most prominent cases of segregated inmates in Germany (Moghadam, 2012). Amnesty International criticized the conditions of the inmates, and the term solitary confinement (*Isolationshaft*) was used to describe their treatment (Weiss, 1976). Two German terms are used when solitary confinement is

discussed: *Isolationshaft* and *Einzelhaft*. Both are translated into solitary confinement, but only *Einzelhaft* is defined in the German *Prison Act* (German: *Strafvollzugsgesetz*). Even though the prisons in Germany are run exclusively by the 16 federal states (*Bundesländer*), they are subject to the federal law, the *Prison Act* (Bundesamt für Justiz, 2108). Every state has its own legislation governing the penal system, but the sections regarding solitary confinement were taken from the federal *Act* and thus do not differ from the following definition of *Einzelhaft* in the Prison Act. *Einzelhaft* refers to any form of deprivation of liberty in which a prisoner is separated from all other prisoners and, therefore, has the same basic definition as administrative segregation. Section 88 of the *Prison Act* includes a provision that safety measures may be taken if a risk exists that an inmate might escape, act violently against other people or property, or self-harm or commit suicide. Six precautions can be ordered if there are reasons as a result of the inmate's behaviour or mental state to believe that one of these risks is present: a) deprivation or withholding of articles; b) observation at night time; c) segregation from other prisoners; d) deprivation or restriction of outdoor exercise; e) detention in a specially-secured cell containing no dangerous objects; and f) shackles. Any of these measurements should only be applied as long as they are required in case of any danger, and therefore administrative segregation has no maximum number of days set by the regulations. Additionally, Section 89 of the *Prison Act* establishes that any form of solitary confinement, including administrative segregation, with a total duration of more than three months a year requires the consent of the supervisory authority. In the German *Code of Criminal Procedure* (German: *Strafprozessordnung*), Section 119 describes administrative segregation for accused inmates in pre-trial detentions, who may be placed in a segregated cell to prevent the risk of flight, tampering with evidence, or repetition of the offence. However, Rule 99 of the *European Prison Rules* states that untried inmates must have the same rights as sentenced inmates regarding communication with family and visitations, which is often not the case in pre-trial detentions (Open Society Justice Initiative, 2011).

4.2.1.2. Austria

The federal government is responsible for offenders in incarcerated in Austrian prisons and the Federal Ministry of Justice has the supreme authority for the correctional service (Republic of Austria, 2016, p. 9). The Austrian *Prison Act* (German: *Strafvollzugsgesetz*), Article 125 deals with solitary confinement and defines it as

applying to a prisoner, who for whatever reason, is separated from the general prison population in their cell during day and night. A ‘suitable’ prison staff member has to visit the segregated inmate at least once a day, if they do not receive any other visitors. An inmate may only be placed in solitary confinement against their will for more than four weeks continuously on the orders of the enforcement court (a unique court in Austria), which has to make the final decision at the request of the prison director (Article 16 para. 2(7)). The enforcement court must also determine the duration of the solitary confinement if the court orders placement into solitary confinement. Solitary confinement for more than six months is only possible at the request of the inmate and with the consent of the prison doctor. Article 5 (1) in the Austrian *Detention Regulation* (German: *Anhalteordnung*) establishes that inmates have to be placed in solitary confinement if a) a risk exists of an inmate acting violently against others; b) it is requested by the court for an inmate with a pending criminal process; c) an inmate poses a risk of infection or their appearance or behaviour considerably burdens other inmates. Article 5 (2) states that inmates are placed in solitary confinement if deemed necessary by the circumstances of their offence or otherwise in the interests of other inmates. Lastly, Article 5 (3) lists the reasons for a detaining an inmate in solitary confinement: a) the inmate requests the placement; b) if it seems necessary to maintain orders and guarantee safety during sleep time at night; c) as disciplinary measurement; d) if it is necessary for organizational reasons at short notice; e) the inmate is endangering their life or health through self-harm.

4.2.1.3. Switzerland

While Riadh Ben Aissa made Canadian headlines for bribery and money laundering, it was his conditions in detention pending trial in a Swiss prison that caught more attention in Switzerland. The former manager of SNC-Lavalin, a Canadian engineering and construction company, was arrested in Switzerland in 2012 (Financial Post, 2015). He was accused of using Swiss bank accounts for money laundering resulting in SNC-Lavalin making profits through contracts with Libyan companies during Muammar Gaddafi’s dictatorship (Seglins & Nicol, 2014). While the approach was ultimately unsuccessful, he brought legal actions against Switzerland for inhumane treatment and torture he endured during his time in prison (Humanrights.ch, 2014; The Canadian Press, 2014).

The Swiss jurisdiction over corrections differs from Germany and Austria with the cantons (equivalent to American states) having the responsibility for offenders in prisons. However, the federal government oversees the cantonal penal systems and the penal law is federally governed (Bundesamt für Justiz, 2010). Similar to Germany, Article 78 of the *Swiss Criminal Code* (German: *Schweizerisches Strafgesetzbuch*) established the requirement for solitary confinement (German: *Einzelhaft*), which is defined as uninterrupted separation from the general prison population. It can only be ordered a) for a maximum of one week at the beginning of the sentence to initiate the execution of the sentence; b) to protect the inmate or third parties; c) as a disciplinary sanction. Article 90 further details solitary confinement as a measure to be taken for inmates with serious mental disorders and/or addictive substance dependency and can be justified by three reasons: a) as a method for temporary therapy; b) for protecting other inmates of the facility or third parties; c) as a disciplinary measure. Solitary confinement is also often applied in detention pending trials to prevent the risk of flight, tampering with evidence, or repetition of the offence (Swiss Center of Expertise in Human Rights, 2015). The regulations do not indicate any maximum of days the inmate can be placed in a segregated cell. As Switzerland is a federal confederation, every canton (similar to American states or Canadian provinces) has its regulations regarding solitary confinement, even the cantons without a correctional facility, but they all rely on the *Swiss Criminal Code*.

4.2.1.4. France

The correctional system is the responsibility of the federal government and the Ministry of Justice has the authority over correctional services (Kazemian & Andersson, 2012, p. 2). The *Code of Criminal Procedure* (French: *Code de procedure pénale*) regulates how prison inmates should be managed. Particularly, Article R57-7-62 states that solitary confinement (French: *detention à l'isolement*) cannot be used as a disciplinary measure and that the inmate has to be alone in the cell. It can be either requested by the inmate or ordered for protective or security reasons. While in solitary confinement, the inmate is allowed to receive information, see visitors, have written and oral correspondence, practice worship, and use their prison account. However, they cannot take part in walks or other collective activities to which the general prison population is entitled. Instead, inmates in solitary confinement have the right to at least one hour of daily walking in the open air. According to Article R57-7-63, a list of inmates

placed in solitary confinement is communicated daily to the team of the institution's outpatient and outpatient unit. A doctor examines every segregated inmate at least twice each week or more often if it is necessary. Regarding the inmate's health, the doctor might make recommendations to release an inmate from solitary confinement. The procedure to place an inmate in solitary confinement is explained in Article R57-7-64. The inmate has to be informed by letter of their placement in solitary confinement, the reasons for it, the procedure, and how much time they have until they are placed in solitary confinement. The time between notification and the placement has to be at least three hours, and they are allowed to consult the procedure, in the presence of their lawyer, if they request it. The head of the institution may decide not to disclose any information or documents, containing material that could endanger the safety of people or the prison, to the inmate and his lawyer. An interpreter is available to assist an inmate who does not understand French.

Article R57-7-65 states that, in case of emergency, the head of the institution may decide to place an inmate temporarily in solitary confinement, if this is the only way to maintain the safety of the inmates and the institution. Temporary placement in solitary confinement cannot exceed five days. At the end of a period of five days, if no decision is made to extend the period of solitary confinement made under the conditions provided above, the confinement shall be terminated. Article R57-7-66 regulates the duration of confinement and an inmate can be placed in solitary confinement for a maximum of three months, which can be repeated once. The head of the institution has to inform the Interregional Director about the decision for both the placement and possible extension. Article R57-7-67 states that, after six months, the Interregional Director of Prison Services may extend the solitary confinement for up to three months and has to be approved by the prison director. This can be renewed once for the same duration. Furthermore, R-57-7-68 establishes that the Minister of Justice may extend the confinement for a maximum of three months when the inmate has spent one year in solitary confinement since the initial decision. Segregation cannot be extended beyond two years, except for the cases where solitary confinement is the only way to ensure the safety of individuals or the institution.

According to Article R57-7-70, an inmate who requests their placement in solitary confinement or the extension of their solitary confinement shall send the head of the institution a written and reasoned request. If the inmate is unable to submit a written

request, their request shall be a written statement by a third person and signed by the inmate. After the doctor's examination, the head of the institution forwards the inmate's request and the doctor's report to the interregional director of the penitentiary services. The head of the institution decides the duration of the placement in solitary confinement for a maximum of three months, which can be repeated once for the same period. After six months, the Interregional Director of Prison Services can extend the isolation for up to three months, which can be renewed once for the same duration. When the detainee has been in solitary confinement for one year from the initial decision, the Minister of Justice may extend the isolation for a maximum of three months. Solitary confinement cannot be extended for more than two years – except if solitary confinement is the only solution that adequately ensures the security of the inmate. The inmate joins the general prison population as soon as the inmate asks for it (Article R57-7-72). When the responsible person decided to remove the inmate from segregation without the consent of the inmate, the steps in Article R57-7-64 have to be taken.

4.2.1.5. England

The use of solitary confinement in English prisons became a topic of national and international interest during the time of the conflict in Northern Ireland between the late 1960s and the end of the 1990s (Conway & Abrams, 1985; Matthews, 2006, p. 184). The case of Bobby Sands was one of the most prominent cases of solitary confinement of an Irish Republican Army (IRA) member in the United Kingdom (Morrison, 2011). Because the IRA members did not receive political status, the inmates began to protest by not wearing their prison uniforms, which resulted in them being removed from associating with other inmates (Conway & Abrams, 1985; *McFeeley and others v The United Kingdom,*1984). The conditions of solitary confinement led to a hunger strike by the inmates and several inmates did not survive the hunger strike, including Sands, who died in 1981 (Beresford, 1987, pp. 61-70; Conway & Abrams, 1985). Adrian Grounds and Ruth Jamieson (2003) interviewed 18 Republican ex-inmates from Nothern Ireland, who had experienced the above-mentioned protests and strikes during their time in prison. Their findings showed that the ex-inmates' experiences had long-lasting consequences and many struggled with psychological issues after being released. Furthermore, during their time in prison, some inmates suppressed their psychological issues and were not able to confide in their family members when they received visits. Overall, a majority of the interviewed ex-inmates reported mental health issues such as

depression, posttraumatic stress disorder, and alcohol addiction since they were released from prison.

According to the *Annual Report* for 2016-17 conducted by the Her Majesty's (HM) Chief Inspector of Prisons for England and Wales, at least five male inmates committed suicide while they were placed in solitary confinement, which is applied under the term, segregation, in the United Kingdom but is not allowed as a method of punishment. Further, the prison jurisdiction is split into England and Wales, Scotland, and Northern Ireland and Her Majesty's Prison Service is responsible for the administration (Silvestri, 2013, p. 18). The *Prison Rules 1999* legislate how prisons should be managed. Rule 45(1) states that an inmate can be removed from association with the general prison population, if this is necessary to maintain order, discipline, or for the inmate's interest. However, a member of the Board of Visitors or the Secretary of State has to approve if the inmate stays longer than three days in segregation, which can be extended for one month and then repeated on a monthly basis (Rule 45(2)). If the inmate is younger than 21 years, the maximum period is fourteen days, which can be renewed for the same amount of days without a limit. Paragraph 3 stipulates that the Governor can decide to remove the inmate from segregation if there are reasons to believe that the inmate should not be separated anymore. The Governor must end the segregation of an inmate when a medical officer recommends this owing to medical reasons.

Rule 46(1) addresses close supervision centres, in which an inmate is transferred for either maintaining order, discipline, or ensuring third people's safety and has to be ordered by the Secretary of State. According to Rule 46(5), "a close supervision centre is any cell or other part of a prison designated by the Secretary of State for holding prisoners who are subject to a direction given under paragraph (1)." As with the previous Rule, 46(2) states that the maximum is one month with the possible renewal for the same period for an unlimited time. The Secretary of State can cease the segregation of an inmate and transfer them back to the general prison population or keep them in close supervision centres but with association with other inmates (Rule 46(3)). In accordance with Rule 46(4), medical reports must be considered in the Secretary of State's decision to remove the inmate from segregation. Temporary confinement is established in Rule 48. Paragraph (1) states that the Governor can temporarily place a rebellious or violent inmate in a special cell. However, this cannot be

ordered as a punishment, and the inmate has to be released as soon as they stop showing any violence. Temporary confinement cannot exceed 24 hours without the instruction of a Board of Visitors' member or the Secretary of State, and the instructions have to include the reason for the segregation and the time the inmate should stay in the special cell (Rule 48(2)).

4.2.1.6. Ireland

In Ireland, the corrections are under the jurisdiction of the federal government. The Minister for Justice and Equality is politically responsible for the penal system in Ireland (Irish Prison Service, 2018). The *Prison Rules 2007* constitute the regulations overseeing the conditions of Irish correctional institutions. Rule 62 sets out the steps involved to remove an inmate from association or activities to maintain order. If there are reasons to believe that good order or the security of inmates, staff and facility is in danger as a result of an inmate being part of the general prison population, the Governor can order the removal of an inmate from participating in structured activities, communal recreation, and interacting with other inmates (Rule 62(1)(2)). The inmate has to be notified with a letter of this order, and the segregation should not be longer than needed to guarantee the safety and security of third parties (Rule 62(3)(5)). Paragraph (4) states that the Governor has to review the situation every seven days, inform the inmate of any result of the reviews, and cease the segregation at the earliest time possible. The Governor has to track any changes, keep a file with the reasons for the order, the estimated time of the removal, and the reviews regarding the inmate in segregation (Rule 62(6)). The prison doctor has to be notified by the Governor of any segregation order, examine the inmate immediately, review the inmate constantly, and inform the Governor of any medical circumstances influencing the stay in segregation (Rule 62(7)). A report of the segregation order has to be submitted to the Director General by the Governor if the segregation is longer than 21 days and any further extension of the placement has to be approved by the Director General (Rule 62(9)). Rule 63 regulates the task to protect vulnerable inmates. Paragraph (1) states that the Governor can order the segregation, or the inmate can request their separation from the general prison population, if the inmate believes they are at risk of being harmed by other inmates. They can still engage in activities with other segregated inmates if the Governor regards the participation as being helpful to the inmate’s conditions (Rule 63(2)). Furthermore, the Governor has to register the names of segregated inmates under this Rule, the start

of the segregation, the reasons of the vulnerability of the inmates, the inmate's perspective, and the end of the segregation (Rule 63(3)).

Another rule regarding segregation is Rule 64, which regulates the placement of inmates in special observation cells for no longer than 24 hours and states that it cannot be used as a punishment. The Governor can order this placement if it is crucial to prevent an inmate from harming themselves or others, and every other available method to prevent this behaviour is insufficient (Paragraph (2)). The prison doctor has to visit the inmate and immediately advise the Governor on this decision (Rule 64(3)). Every 15 minutes, a prison officer has to monitor an inmate who is placed in a special observation cell (Rule 64(4)). According to paragraph (6), an inmate should not stay longer than 24 hours in these cells; however, the Governor can repeat the 24 hours of segregation a maximum number of four times in consultation with the prison doctor. The Director General must be informed of the reasons for these extensions and approve it in written form (Rule 64(7)). An inmate in a special observation cell needs to receive clothing if the Governor deems the inmate's prison clothes to constitute a means of harming themselves or damaging the facility (Rule 64(8)(9)). Paragraph (10) and (11) state that every inmate in one of these cells has to be visited by the Governor and the prison doctor at least once a day. The Governor needs to keep a file with the order of placement in the cell, the start of the placement, the reasons for it, the estimated end of the placement, every visit to the inmate in the cell, every request for a doctor visitation, psychologist, chaplain, or legal adviser by the inmate and the Governor's decision regarding the requests, other important events during the placement, and comments the Governor deems relevant to the placement of the inmate in the special observation cell (Rule 64(12)).

4.2.2. Australia and New Zealand

4.2.2.1. Australia

Australia is more complicated than the other countries discussed above since it does not have a federal regulation regarding correctional institutions; instead each state has its own regulations and the correctional services are under the jurisdiction of the states and not the federal government (Australian Government, 2018, p. 2). This is a stark contrast to other countries with the states' responsibilities for the penal system but

still relying on the federal legislation or Canada's federal-provincial split of jurisdiction. However, the *Standard Guidelines for Corrections in Australia* establishes some recommendations for states to include in their regulations. These guidelines state that inmates, who are in segregation owing to the need to maintain the security and order of the facility, have to be treated with the least restrictive methods regarding the reasons for their placement (1.82). A member of the prison administration has to inspect a segregated inmate every day, and a member of the medical department should visit the inmate as often as possible if every day is not possible. The medical staff member can order the officer in charge to remove the inmate from segregation for mental or physical reasons (1.85). Furthermore, the guidelines also acknowledge the importance of psychological support for inmates. Guideline 2.23 states that an inmate at risk of self-harming themselves or committing suicide should be placed in segregation as the last possible option and be constantly surveilled. These are the few guidelines regarding administrative segregation and, therefore, the states' regulations can vary on their applications of segregation.

In Western Australia, the *Prisons Act 1981* Article 43 and the *Prisons Regulations 198*2, Division 8, define administrative segregation as separate confinement and it is applied to uphold the order or safety of the facility. The chief executive officer orders the segregation in written form, informs the Minister of this order, and cannot place the inmate longer than 30 days in separated confinement. Segregated inmates should have at least one hour a day to exercise and be in the open air. The *Correctional Services Act* of the Northern Territories states that the General Manager can remove an inmate from the general prison population, if the inmate is: a threat to another inmate or the prison staff, could self-harm or commit suicide; is threatened by another inmate; or disturbs the order of the prison (section 41). However, section 78(2)(b) mentions separation as means to recognize a misconduct and therefore can also be used as a punishment. South Australia manages its correctional facilities with the *Correctional Services Act 1982*. Section 36 states that the chief executive of the prison can order the separation of an inmate from the general prison population if there are grounds to believe that a) the inmate could interfere with an ongoing investigation, b) the inmate's safety is at risk, c) other inmates have to be protected, d) or to maintain good order in the prison. Those inmates segregated for reason a) cannot be separated from the general population for longer than 30 days, while there is no maximum period for

inmates segregated for the other reasons. Segregation orders have to be made in written form and delivered to the inmate in less than 24 hours after the order was made. The chief executive can allow the inmate to have contact with other inmates where it is helpful to the inmate and the chief executive can also end the segregation at any time. The Minister has to receive a report on the segregation by the chief executive, if the inmate is separated for longer than five days, and evaluate the circumstances to decide to continue or end the segregation.

The *Corrective Services Regulation 2017* of Queensland defines administrative segregation as separate confinement under section 4. The chief executive is responsible for providing an inmate in a segregated cell with access to piped water, a toilet, a shower (without interacting with other inmates), and the inmate needs to be able to exercise in the open air at least two hours a day. In Victoria, the *Corrections Regulations 2009* section 27 states that the Secretary can direct the separation of an inmate from the general prison population, if there are grounds to believe that the safety of the inmate or others is threatened or to maintain good order. However, there is no maximum period an inmate can spend in segregation. The Secretary has to submit a written order within 24 hours after an urgent oral order for separation. A medical and mental health staff member has to be consulted by the Secretary before the order is given. However, in Tasmania, the *Corrections Regulations 2008* do not define administrative regulations and only have a paragraph (section 7) on separate treatment. There is no information about the reasons, maximum of days, or steps taken to place an inmate in separate confinement.

In New South Wales, section 10 of the *Crimes (Administration of Sentences) Act 1999* states that an inmate can be placed in segregated custody to ensure the security of the facility, other inmates or staff, or to maintain good order. The Governor of the prison has to inform the Commissioner in case of a segregation order. According to section 12, a segregated inmate should be isolated from the general prison population unless the Commissioner deems the contact with certain inmates as being helpful to their particular circumstances. The inmate should receive information about their rights to review the placement in administrative segregation from the governor of the prison (section 14). The Commissioner has to receive a report of the segregation order by the prison's governor in less than 15 days after the order, and the Commissioner has seven days to review the order, including a decision to either agree with the segregation

placement or remove the inmate from segregation (section 16). The prison's governor needs to file another report with the Commissioner during the first three months after the order was given and again within the next three months. The Commissioner has seven days after each report to review and decide on any possible actions.

Section 17 states that there is no maximum period for an inmate to be placed in segregated custody and Commissioners can end the placement at any time they deem appropriate. After the Commissioner approves of a segregation resulting in the inmate being placed in separated custody for a total of six months or more, the Commissioner has to inform the Minister in writing about the reasons for the approval, if the inmate will spend six months or more in segregation (section 18). Furthermore, after 14 days in segregation, an inmate can send a written application to the Review Council to review their case. The inmate has to explain their reasoning for applying, and the Chairperson of the Review Council can revoke the segregation order (section 19 and 20). The Review Council consists of three "judicially qualified" people (designated by the Governor), two Corrective Services officers (designated by the Commissioner), and at least three community members (section 195).

4.2.2.2. New Zealand

Similar to some of the discussed European countries, New Zealand's penal system is under the jurisdiction of the Department of Corrections and the Ministry of Justice establishes the policies for the Justice department including the correctional services (Department of Corrections, 2017, p. 7). The last statute relevant to this review of administrative segregation is the Corrections Act 2004 of New Zealand. Section 57 defines segregation as the removal of an inmate from associations with other inmates. If the safety of other people is in danger or the good order of the facility is at risk, the prison manager can order the segregation of an inmate under section 58. After the order is imposed, the inmate and the chief executive have to be informed of the reasons for being placed in segregation. The chief executive can terminate the segregation at any time, but the inmate has to be released into the general prison population after 14 days, unless the chief executive orders the continuation of the segregation. If the inmate is placed for more than 14 days, the chief executive has to review it at least once a month. To extend the segregation placement for longer than three months, the Visiting Justice has to make the order and cannot exceed more than three additional months. Under

section 59, the prison manager can order an inmate to be segregated to fulfill an inmate's request to be placed in segregation or as a result of an inmate being threatened by another inmate. If the inmate requests the segregation, written consent has to be given by the inmate who may end the segregation at any time. If the inmate is removed from general prison population because of risk by another inmate, both the chief executive and the inmate have to be informed in written form. The chief executive can end the segregation at any time but has to order the continuation of segregation after 14 days and cannot exceed three months. Owing to physical or mental-health issues, the health centre manager of the facility can advise the prison manager to order the segregation of an inmate (section 60). Both the inmate and the chief executive have to be notified of the order, and it can only be terminated by the prison manager or the chief executive. The healthcare manager has to recommend the removal of the inmate from segregation to the prison manager if there are no grounds to believe that the inmate's physical or mental health is still at risk. Self-harming segregated inmates must be visited by a health professional at least twice a day, while any other segregated inmate has to be visited once a day.

Chapter 5. Conclusions

The review of Acts and regulations from Canada and several different countries was undertaken to examine the issue of administrative segregation in the Canadian correctional system. The review of the individual sections and paragraphs provides a basis to compare the international legislation to the Canadian and suggest future directions to enhance the understanding of the issues involving the procedure of administrative segregation in Canadian correctional facilities.

5.1. Comparison

The Acts and regulations were compared with respect to four main points: maximum time, procedure, reasons for placement in administrative segregation, and visits. The focus on these four topics was established during the analysis of the material and most legislation had some information on them. Reviewing the statutes on their information on the maximum time an inmate can be placed in administrative segregation is important because of the *Mandela Rules* and the ruling in the case *British Columbia Civil Liberties Association v Canada (Attorney General)* (2018) earlier this year, when Justice Leask stated that *indefinite* administrative segregation violates s. 7 of the *Charter*.

5.1.1. Maximum Time

Table 2. Maximum days in administrative segregation

Countries	**Maximum time**
Australia	varies in each state
Austria	> 6 months need consent of doctor and inmate
Canada	No maximum
England	No maximum
France	2 years
Germany	no maximum
Ireland	21 days (possible extension)
New Zealand	6 months
Switzerland	no maximum

The *Mandela Rules* explicitly set a limitation of 15 days for an inmate to spend in segregation; however, most legislation does not include a specific number of days for which an inmate can be placed in administrative segregation (Table 2). In the few cases where a maximum number of days is established, there are often options to expand the stay in segregation by informing the person in charge. On a federal level, neither the *Corrections and Conditional Release Regulations* nor the *Corrections and Conditional Release Act* provide any information on the maximum number of days of administrative segregation. British Columbia and Yukon have two forms of administrative segregation and, therefore, two maximums for placements. Short-term separate confinement has a maximum of 72 hours, while long-term separate confinement has a first limit of 15 days, which then can be renewed several times. Canadian legislation, both federal and provincial, lacks protection for inmates by setting a maximum number of days: it may be argued that this deficit amounts to torture. In the *Convention against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment* (1984), the UN defined torture, under article 1 paragraph 1, as:

> Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

The CPT (1992) stated that an inmate in solitary confinement, regardless of the reasons for the confinement, should be held for the shortest possible time as it could lead to prisoners being treated inhumanely (p. 15). Additionally, in the interim report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment to the UN General Assembly, Méndez (2011) defined solitary confinement lasting longer than 15 days as prolonged solitary confinement and therefore 15 days should be the maximum of days an inmate should be held in confinement (p. 9). He concluded that after 15 days, the negative impact of solitary confinement on an inmate's mental health might be irreparable. Based on the UN definition of torture in article 1, solitary confinement can be labeled as torture if the conditions of the segregation are so inadequate and harsh that it results in the inmate's mental and physical health to deteriorate: in such circumstances, the elements of torture are all present (Méndez,

2011, p. 20). Further, prolonged administrative segregation violates s. 7 of the *Charter*, which guarantees the right to life, liberty, and security. In *British Columbia Civil Liberties Association v Canada (Attorney General)* (2018). Justice Leask listed four points for his reasoning to rule *indefinite* administrative segregation (longer than 15 days) as a violation of s. 7 of the *Charter*:

> a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
>
> b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
>
> c) the impugned laws authorize internal review; and
>
> d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and review (para. 609).

In Ireland, inmates placed in special observation cells are not allowed to be held there for longer than 24 hours; however, the Governor can order another 24 hours for a maximum of four times. The maximum of 30 days can be ordered in Western Australia, while in New Zealand three months cannot be exceeded for inmates segregated as a result of endangerment by another inmate. Besides these examples, none of the other countries nor states provided any limitations on the maximum number of days that may be spent in administrative segregation. This supports the notion that the *Mandela Rules* are not being complied with; it also demonstrates that no legal basis exists to challenge a long-term placement in administrative segregation. Legislation ought to establish a maximum of days during which an inmate can be segregated; otherwise inmates' rights can be violated and there is no ground to object it as there are no statutes to follow.

5.1.2. Procedure

According to the *Corrections and Conditional Release Act,* the person in charge has to make recommendations whether or not to end the administrative segregation to the institutional head after hearings. The Segregation Review Board has to review the case within five days (*Corrections and Conditional Release Regulations,* SOR/92-620, s. 21). On a provincial level, Manitoba presents a more complex procedure because, after seven days, the case must be reviewed by the responsible person of the facility and, during the first 60 days, a review is needed every fortnight and, after the first 60 days

have passed, a review is needed within 30 days. In Saskatchewan, a panel conducts the reviews every 21 days. The Superintendent reviews cases every five days in Ontario. In his Ontario Ombudsman Report, Dubé (2017) critisised the system in Ontario correctional facilties, which should track the placement and review cases of inamtes in administrative segregation. However, the case of Adam Capay, who spent more than four years in administrative segregation showed that the system needed to be changed to ensure that the conditions are not inhuman for the segregated inmates (Dubé, 2017, p. 27; Prokopchuk, 2017). In New Brunswick, the Superintendent has to review the case every 24 hours and decide to continue the segregation, while in Nova Scotia, the Superintendent must review the case every five days and, after ten days, the Executive Director has to confirm the placement. In France, a doctor visits an inmate at least twice a week and can make recommendation on the placement. In England, a member of the Board of Visitors or the Secretary of State has to confirm that the inmate stays longer than three days in segregation, which can be extended for one month and then repeated on a monthly basis and that the governor can decide to remove the inmate from segregation.

In Ireland, the Governor has to review the situation every seven days, inform the inmate of any result of the reviews, and end the segregation at the earliest time possible. The Governor must track any changes, keep a file with the reasons for the order, the estimated time of the removal, and the reviews regarding the inmate in segregation. The prison doctor has to be notified by the Governor of any segregation order, examine the inmate immediately, review the inmate constantly, and inform the Governor of any medical circumstances influencing the stay in segregation. The Irish procedure has many steps and people involved to ensure that the inmate in administrative segregation is constantly reviewed and not forgotten. This is a possible model that other countries could adopt.

5.1.3. Reasons for Administrative Segregation

The *Corrections and Conditional Release Act* states that the reasons for administrative segregation is to maintain the security of the facility and the people, including the segregated inmate, or to prevent potential tampering with an ongoing investigation by the inmate. In Quebec, administrative segregation is only applied when contraband items are involved and therefore does not correspond with the established

definition of administrative segregation. In the Northwest Territories, if there are grounds to believe that an inmate will be harmed by others or themselves, they can be placed into administrative segregation.

In Germany, the reasons for administrative segregation could be that a risk exists that an inmate might escape, act violently against other people or property, or self-harm or commit suicide. In several Australian states, maintaining good order is also a reason for administrative segregation. If administrative segregation is continued, the legislation should state that it cannot be used on inmates with mental-health issues or a history of self-harm. It is understandable that prisons want to separate certain individuals from the general prison population, but vulnerable people need to be protected and not further harmed. Early 2018, the Ontario government followed the order of the Human Rights Tribunal of Ontario to abolish the use of administrative segregation on mentally ill inmates within their provincial correctional facilities (Perkel, 2018). Even though it will take time to see actual changes in the prisons, this shows the willingness of the province to improve the situation for vulnerable inmates.

5.1.4. Visits

The institutional head has to meet with the inmate to explain the reasons for not removing them from administrative segregation (*Corrections and Conditional Release Act,* SC 1992, c 20, s. 34). Furthermore, a health-care professional has to visit the inmate once a day. In Manitoba, the institutional head has to visit the inmate at least once a day and a nurse visits once a week. In Austria, a staff member has to visit the inmate placed in administrative segregation at least once a day. Segregated inmates in France are allowed to welcome visitors. In New Zealand, a self-harming segregated inmate has to be visited by a health professional at least twice a day, while any other segregated inmate has to be visited once a day. If inmates must be segregated, a daily visit by a health professional is necessary to examine their physical and mental state. Also, visits by family members should be made possible to help with the situation as social contact in administrative segregation is scarce. Without meaningful social contact, administrative segregation “becomes a prison within a prison” (Jansen, 2016).

5.2. Discussion

Legal positivism as a theoretical framework for a thesis removes the questioning of the morality of the laws and opens up the possibility of focusing on the existence of the laws governing the use of administrative segregation. Discussing a topic such as administrative segregation can be emotional, but to understand the *status quo* of the rules, the existing laws have to be reviewed without evaluating their moral implications. Legal positivism helps to simplify the analysis of different legislation, but to remove all morality of a law can also be dangerous. If a law does not include any morality, then the people executing that law cannot be questioned on their actions. During the Nuremberg Trials, the approach of natural law theory was adopted to prosecute several men who committed war crimes during the Nazi regime in Germany (Topally, 2015). Without considering the morality of the laws, these trials would have had a different outcome as the accused men had argued that they only followed the laws and, therefore, were not guilty of the crimes (Stimson, 1947). However, the objective of this thesis is to review the current laws and develop recommendations, which legal positivism enables, while a naturalist approach possibly changes this objective as the focus would shift to discussion of the morality of these laws. Legal positivism allows the focus to remain on the review of the written laws. However, including reports and case law gave an overview of how these laws are being applied and implemented in correctional facilities as well as in court.

Every legislation which was reviewed and that included administrative segregation also stated the reasons for the placement. However, most statutes do not provide information on a limitation on the number of days that an inmate can be placed in administrative segregation. If the legislation does provide information, then in most cases, the placement can be extended from several days to unlimited times, as can be seen in England. Regarding the procedures, Ireland has the most detailed legislation compared to the other reviewed countries. This is a good example that can be followed concerning the steps involved in an administrative segregation. However, just because something is stated in statutes does not mean it is also applied in the same manner in a real-life scenario. Reports by the Correctional Investigator show that not every written law will be implemented (Office of the Correctional Investigator, 2015; Sapers, 2016). It is important to set a maximum number of days for administrative segregation, but for

these limitations to work alternatives to segregation have to be developed. The *Administrative Segregation Guidelines* (2017d) list other options to administrative segregation including changing the unit, transferring to another facility, meditation between inmates, and admission to a mental health institution. For some inmates, these alternatives might not solve the problem fast enough and, therefore, the establishment of other options needs to continue to ensure the safety of these inmates.

Regarding inmates with psychological issues, it is difficult to define what psychological disorders or difficulties should exclude a placement in administrative segregation. How poor does an inmate's mental health have to be to consider them unsuitable for administrative segregation? In Canadian federal correctional facilities, inmates with serious mental disorders, suicidal tendencies, or self-harming behaviours with a risk of fatal outcome can no longer be placed in administrative segregation (CSC, 2017c). Furthermore, even if an inmate does not have a history of mental health issues, this does not mean they should not receive psychological support while they are being segregated. Therefore, visits by mental health professionals and doctors should be mandatory for inmates in administrative segregation to ensure both their physical and psychological health are in a good state, as required by the *Corrections and Conditional Release Act* (S. 34).

5.3. Future Directions

More research is required to better understand the issues of administrative segregation. For future research, the functioning policies regarding administrative segregation of particular correctional institutions could be examined. By only reviewing the legislation, the actual practices occurring within the prison system were not evaluated. Examining actual practices could lead to a more complete understanding of the critical issues that are raised by the use of administrative segregation. This research has shown that the various statutes do not correspond on a provincial level in Canada: therefore, a deeper delve into the policies might give a better overview. Future research could also consider the views of correctional officers and healthcare professionals within correctional institutions. By examining the opinions of people who are actually involved in the process and the first-hand experience of an inmate being placed in administrative segregation, research could further deepen the understanding of why administrative segregation is still applied and possibly supported by the institutional authorities. Future

research should also clearly separate administrative segregation and solitary confinement as these are two different measures and, especially in the Canadian legal system, do not have the same definition.

The request by various groups, including Amnesty International, scholars, and human rights organisations, to limiting the use of administrative segregation has become stronger as many believe that the drawbacks of the practice tremendously outweigh the benefits of this practice (Jackson, 2015; Murphy, 2014; Parkes, 2017; West Coast Prison Society, 2016). Certain human rights groups and legal societies (British Columbia Civil Liberties Association and West Coast Prison Society) have called for a complete abolition of administrative segregation in Canadian prisons owing to the alleged violations of the Canadian *Charter of Rights and Freedoms* (Perrie & Bally, 2017; West Coast Prison Society, 2016). Additionally, research has found that administrative segregation can cause the deterioration of the mental health of an inmate during or after their placement in segregation, possibly leading to self-harm and, in the worst-case scenario, even suicide (Kaba et al., 2014; Lanes, 2009; Miller & Young, 1997). Furthermore, not every inmate with mental-health disabilities receives adequate treatment while being in administrative segregation. The *Nelson Mandela Rules* (United Nations General Assembly, 2015) established a limit of 15 days in administrative segregation as a response to ongoing violation against human rights and the mistreatment of inmates by placing them in administrative segregation. Unfortunately, the Correctional Service Canada (CSC) did not immediately follow the *Nelson Mandela Rules* by revising their policies regarding this issue and some Canadian correctional facilities still force their inmates to spend more than 15 consecutive days in administrative segregation. Many difficulties arise when international law has to be enforced in countries and it often takes time to implement the changes. The *Nelson Mandela Rules* stated that more than 100 countries have issues with their prison population, thus the revision of all these countries and their correctional facilities a complicated and time-consuming procedure. However, two important court decisions regarding administrative segregation in federal prisons were published at the end of 2017 and beginning of 2018: The Superior Court in Ontario deemed the reviewing process of administrative segregation unconstitutional, while the British Columbia Supreme Court found the placement in *indefinite* administrative segregation to be unconstitutional (*British Columbia Civil Liberties Association v. Canada (Attorney*

General), 2018; *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017). Court challenges need to continue to improve the system and have to exceed the federal level. Provincial legislation need to be challenged as well; many aspects of the application of administrative segregation in provincial correctional facilities must be amended.

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Appendix A.

Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen [2017] ONSC 7491

In December 2017, the Ontario Superior Court of Justice released its decision in the *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen* (2017). The Corporation of the Canadian Civil Liberties Association (CCLA) argues that the use of administrative segregation according to ss. 31-37 of the *Corrections and Conditional Release Act* violate ss. 7, 11, and 12 of the *Charter of Rights and Freedoms*. The Government responded that segregating inmates is necessary to maintain the order of the facility.

Associate Chief Justice Frank Marrocco stated in the decision of the court, that administrative segregation as it is applied in federal prisons is equal to solitary confinement as it is defined in the *Nelson Mandela Rules*. Experts from both the applicant and the respondent provided affidavits regarding the use of administrative segregation within the Canadian correctional system. Justice Marrocco emphasized the issues concerning the review system of inmates placed in administrative segregation, especially the importance of an independent review for these cases. However, he did not rule administrative segregation for more than 15 days unlawful, which the CCLA asked for.

In his conclusion, Justice Marrocco ruled the placement of an inmate in administrative segregation reasoned by the fifth working day review unconstitutional and stated that the review system needed to be changed as it is not just to have the institutional head being both the investigator and judge for cases of inmates in administrative segregation. The Government received twelve months to effectuate these changes.

Appendix B.

British Columbia Civil Liberties Association v Canada (Attorney General) [2018] BCSC 62

In summer 2017, the hearings for the case *British Columbia Civil Liberties Association v Canada (Attorney General)* [2018] BCSC 62 started in Vancouver. The British Columbia Civil Liberties Association (BCCLA) and the John Howard Society of Canada (JHS) challenged the use of administrative segregation in Canadian federal prisons. They argued that ss. 31-33 and 37 of the *Corrections and Conditional Release Act* violate ss. 7, 9, 10, 12, and 15 of the *Canadian Charter of Rights and Freedoms*. However, the Government stated that administrative segregation does not violate these rights as the inmates placed in segregation are able to have human contact and that the impact of segregation on an inmate's mental health is still being researched. Furthermore, administrative segregation is necessary to maintain the safety and security of the facilities, inmates, and staff.

In his statement for the reasons of his decision, Justice Peter Leask included the history of solitary confinement, the international law regarding segregation, and the use of administrative segregation in the Canadian correctional system. Experts for both the plaintiffs and the Government gave their statements on the effects of administrative segregation on mental health. The experts did not agree on the studies and the research methods used in examining the impact of segregation and therefore did not find a consensus regarding this issue. Justice Leask stated that the use of administrative segregation in Canada is a form of solitary confinement and therefore inmates are vulnerable to psychological harm while being placed in segregation. Justice Leask concluded his statement ruling the use of indefinite administrative segregation in federal Canadian prisons unconstitutional and that it violates ss. 7 and 15 of the *Charter.* S. 7 is violated because the head of the institution is both the "judge and prosecutor" (para. 609) of an administrative segregation placement, the reviews of segregation cases are internally managed, and the inmates have their right deprived by not getting a lawyer during segregation reviews and hearings. S. 15 is violated because administrative segregation is allowed in cases of inmates with mental health disabilities and the

procedure can lead to discriminating Indigenous inmates. However, the Government appealed the ruling in February 2018 (Mehler Paperny, 2018).