CRUEL AND UNUSUAL PUNISHMENT:
PRISONERS RIGHTS IN THE 1990%.

by

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ABSTRACT

With the tenth anniversary of the enactment of the Canadian Charter of Rights and Freedom fast approaching, this thesis is intended to evaluate the extent to which s.12 of that document has effectively impacted on prison litigation in Canada. An historical analysis of the prohibition against cruel and unusual treatment or punishment will show an encouraging swing away from the fairly restrictive interpretations of the past. An overview of the Eighth Amendment of the U.S. Constitution, with its similarly worded prohibition against cruel and unusual punishments, will help to evaluate the degree to which the many U.S. prison conditions cases may be usefully applied by Canadian courts. This, along with a general look at prison litigation under Article 3 of the European Convention on Human Rights, will help assess whether the present Canadian judicial approach is still too restrictive, and the risks of that attitude becoming even more conservative.

With this background established, two issues of current interest in prison life will be examined, with the aim of suggesting that existing correctional attitudes to these issues violate s.12. The treatment of prisoners infected with the AIDS virus will be the focus of one chapter. As numbers of those infected with the AIDS virus in general and prison populations continue to rise, it will be asked what might be the most practical approach to controlling this new prison "inmate". The other issue to be considered is that of prison overcrowding, and in particular, the practice of double bunking, placing two people in a cell designed for one. It will be suggested that the existing cases in this area were based on an inadequate assessment of the evidence, and that those decisions have, in any case, been overtaken by the Supreme Court of Canada's developing understanding of s.12. The thesis will conclude by conceding that, despite a more liberated judicial attitude to cruel and unusual treatment or punishment in Canada, not very much has changed in prison litigation. If s.12 is to be more than a paper guarantee of rights and freedoms in the 1990's, a more interventionist approach on the part of the judiciary is clearly mandated.
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Following some preliminary remarks about prisoners' rights, s.12 and judicial attitudes to prison litigation, Chapter One will chart the evolution of the phrase "cruel and unusual treatment or punishment" from its early days in the *Canadian Bill of Rights*\(^1\) to its place in the Charter. An increasingly broad approach to s.12 will be shown, culminating in the decision of the Supreme Court of Canada in *R v. Smith*.\(^2\) More recent indications that this may be as far as the Supreme Court is willing to go, will also be noted.

In light of this potential stagnation in the development of s.12, Chapter Two will provide two comparative perspectives. An examination of the U.S. jurisprudence relating to the Eighth Amendment prohibition of cruel and unusual punishments will show the dangers of allowing too narrow a definition of what constitutes cruel and unusual punishment. Given the particular pressures of a chronically overcrowded prison system, America provides an extremely fertile source of prison jurisprudence, useful to guide Canadian courts faced with a case of first impression. Increasingly, however, this fertility is being systematically sterilised by a "hands-off" judicial approach that demands ever greater proof of harm before the Eighth Amendment will be allowed to be successfully invoked. Article 3 of the European Convention on Human Rights will also be examined. Its role in prison litigation will be compared with that of s.12 of the Charter, with particular attention being placed on the utility of Article 3 being in absolute terms, from which no exceptions are allowed.

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1. R.S.C. 1970, Appendix III, hereinafter referred to as the *Bill of Rights*.
2. [1987] 5 W.W.R. 1
After this comparative overview, Chapter Three will study the recent challenges posed by the arrival of AIDS in prison. An attempt will be made to show ways in which s.12 could be effectively invoked by inmates mistreated because they have the AIDS virus. It will be argued that administrative segregation of such inmates is almost certainly cruel and unusual treatment or punishment. The availability of AIDS education, and the connected provision of condoms and bleach, will provide another example of a situation where current Canadian correctional practices fall far short of what contemporary Canadian society should allow.

Finally, in Chapter Four, the continuing practice of double bunking, placing two people in a cell designed for one, will be surveyed. As a practice that routinely effects many more inmates than does the problems of AIDS infection in prison, it will provide a useful example of how s.12 of the Charter might be helpfully used to improve the day to day life of prisoners. A close examination of Fiche v. Warden of Stony Mountain Institution, the only major Canadian case on double bunking, will itemise the numerous weaknesses in the Trial judge's conclusions. The potential for a wholly different approach, should a similar case come before the Canadian courts today, will also be explored.

The thesis will conclude with a recognition that prison litigation has only rarely been successful. In the Canadian context, however, the Charter offers the hope, and scope, for a new and distinctive approach that is genuinely protective of prisoner's rights. The function of the Charter, according to Dickson J., as he then was,

"...is to provide....for the unremitting protection of rights and liberties".

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3 Judgment of 2nd November 1984, Court No. T- 303-83 (Federal Court-Trial Division)
Clear and interventionist protection of the rights of prisoners, traditionally the most easily forgotten members of society, will do much to show that the Charter is truly fulfilling this function.
INTRODUCTION

"The vilest deeds, like poison weds
bloom well in prison air.
It is only what is good in man that
wastes and withers there.
Pale Anguish keg the heavy gate and
the warder in despair."¹

Correctional officials would doubtless be quick to argue that much has changed since the above was written of prison life in Victorian England. Yet, the steady supply of prison litigation in both Canada and the United States would suggest that all is still not well in North America's penitentiaries. While the U.S. Supreme Court's response to the increasing volume of prison cases has essentially been one of retrenchment, the situation in Canada need not be the same. Central to this thesis will be the argument that s.12 of the Canadian Charter of Rights and Freedoms² has presented, and will continue to present, Canadian courts with the opportunity to take a distinct approach to prison litigation.

At the outset, however, it is important to address a central question in the field of prison litigation; why should society be concerned about the rights of prisoners at all? Prisoners are, after all, in prison because they showed scant regard for the rights of others, whether these rights were property rights or the right to life, or freedom from violent attack. If such individuals were prepared to deprive others of their rights, so the argument goes, then these individuals should have no cause for complaint when, as a result of their behaviour, they find themselves deprived of rights in prison. This fairly simplistic argument certainly has its attractions if one assumes that society wants or needs retribution, without more, for every wrong done.

¹ From "The Ballad of Reading Gaol", by Oscar Wilde.
² Constitution Act 1982, as enacted by the Canada Act 1982, c.11 (U.K.), hereinafter referred to as the Charter
This thesis, however, is founded on the conviction that prisoner’s rights are important and deserving of protection by the Canadian courts. To ignore prisoner’s rights does little more than reduce the state to the same level as the criminal who has originally violated another’s rights. In a supposedly free and democratic society, it is submitted that the state must be seen to espouse higher values than those individuals labelled as criminal. By imprisoning criminals, society is registering its disapproval of those individuals’ disregard for others’ rights. To then tolerate gross infringements of these prisoners’ rights might well be regarded as hypocritical, given that the only reason that these prisoners are in prison is because of society’s concern to protect individual rights.

Winston Churchill once said that one could gauge the sort of society one lived in by the way in which that society treated its prisoners. Society should, therefore, be concerned about the rights of prisoners, since the way such rights are protected is a telling reflection of society itself. The problem of forgetting about prisoners once sentenced is aptly put in a report by the Canadian Bar Association Committee on Imprisonment and Release.

“"The point at which the criminal justice system will have its greatest impact on the individual is the point at which, for the criminal lawyer, the process has run its course. It is simply assumed that the prison sentence, by deterring, giving the prisoner his or her "just desserts," rehabilitating, and incapacitating the prisoner for the duration of the sentence, serves the ends of justice.""  

Societal, and judicial, concern for prisoners’ rights is centrally important if such assumptions about the role, and reality of prison life are to be avoided.

Such rights will, however, be empty ones if prisoners are not given some way of enforcing those rights, if necessary, in the Canadian courts. This thesis proceeds from the proposition that

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3 Michael Jackson, *Justice Behind the Walls: A Report of the Canadian Bar Association Committee on Imprisonment and Release* at p. 1
s. 12 of the Charter is ideally placed to protect these inmate rights. As will be seen, the proscription against cruel and unusual treatment or punishment contained in s. 12 can be traced back to the English Bill of Rights of 1688. The original English proscription against cruel and unusual punishment was intended to continue a pre-existing common law prohibition against excessive punishment in any form. On the basis of this historical precedent, it might be argued that s. 12 is designed to prevent any type of excessive treatment or punishment taking place. The reason for such a proscription, in the case of the English Bill of Rights, was thought to be in order to prevent a repeat of the excessive and draconian treason trials of 1685 - the "Bloody Assize," which followed a failed attempt to overthrow King James II by the Duke of Monmouth. Under Chief Justice Jeffreys, the assize dispensed severe summary justice, often on the most insubstantial evidence, with hundreds eventually executed. Following on from this English background, it is submitted that the reason for s. 12's inclusion in the Canadian Charter may be little different from the reason for its inclusion in the English Bill of Rights. Like its English antecedent, s. 12 has been included to prevent the state, or officials of that state (such as prison staff) from being permitted to use excessive punishment or treatment.

The Eighth Amendment of the U.S. Constitution, which can also be traced back to the English Bill of Rights, is also helpful in developing a theory of what s. 12 is designed to accomplish. The U.S. Supreme Court, in Trop v. Dulles, made clear that the fundamental concept inherent in the Eighth Amendment was the preservation of the dignity of man, and the importance of states adhering to civilised standards of punishment. Punishment, the Court said, would be

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4 In Chapter One, below
5 Anthony Granucci, "Nor Cruel and Unusual Punishments Inflicted: The Original Meaning" 57 Calif. L. Review 839, 847 (1969). He cites a statute of 1553 which stated, in its preface, that "...laws also justly made for the preservation of the Commonwealth, without extreme Punishment or great Penalty, are more often for the most part obeyed and kept, than laws and statutes made with great and extreme Punishments..." (1 MARY, Stat. 1, c.1(1553))
6 ibid, p. 853
7 which is discussed more fully in Chapter Two, below
8 356 U.S. 86 (1958)
9 ibid, pp 100-101
cruel and unusual when it was incompatible with the "evolving standards of decency that mark the progress of a maturing society." While the inclusion of the word "treatment" in s. 12 inevitably results in some technical differences between the Eighth Amendment, and s. 12, it is nonetheless suggested that the underlying rationale identified by the court in *Trop v. Dulles* may be equally applied to s. 12, given the antecedent that s. 12 and the Eighth Amendment have in common.

From a historical perspective, therefore, s. 12's role is to set the standards of decent behaviour to which Canadian society must adhere. It is designed to deter and, where necessary, terminate, excessive use of treatment or punishment. By its very wording, for example, with its reference to "punishment," s.12 makes it clear that the rights of prisoners, who are being punished, should fall within the scope of its terms. But it is, perhaps, in the historical reason for a "cruel and unusual" proscription, that it becomes most clear why prisoners' rights are most appropriately protected by s. 12. The proscription has been aimed at stopping state officials from acting in an excessive way. This is particularly important for prisoners whose only hope of help when mistreated is the courts, given that society is generally unaware of the life prisoners endure.

Having established that prisoners' rights are important, and that, according to a historical theory of s. 12, that section is useful in defending these rights, one final preliminary concern must be addressed.

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10 *ibid*, p. 101. For a further discussion of the role of "cruel and unusual" punishment, see Jackson, *infra*, pp. 84-90
Judicial Deference

As will become obvious, there is a tradition of judges deferring to the opinions and actions of prison administrators. If s. 12 is to be a useful means of protecting prisoners' rights, this judicial deference must come to an end. The problems in America's prisons have been described by the U.S. Supreme Court in Procopier v. Martinez as "complex and intractable" and therefore "not readily susceptible to resolution by decree." This "hands-off" approach is typical of many U.S. prison decisions which have later influenced Canadian courts. In Bell v. Wolfish, which was noted by Nitikman J. in Piche v. Warden of Stony Mountain Institution, the U.S. Supreme Court recognized that prison officials, and not the courts, were the experts in how a prison should be run. Consequently, the operation of prisons was properly a matter for scrutiny by the legislative and executive authorities, rather than the judiciary. As will become clear throughout this thesis, judicial deference to prison administrators has been a feature of both American, and, to a lesser extent, Canadian cases.

11 In Chapter One, footnotes 76-78, and accompanying text. Also in the general attitude of the American courts, as seen in Chapter Two. Judicial Deference has been much discussed in the United States. See, for example, Ellen Lawson, "Extending Deference to Prison Officials Under The Eighth Amendment: Whitley v. Albers", 32 Washington University Journal of Urban and Contemporary Law 231, (1987).


While this list is not exhaustive, it does reflect some of the more interesting articles which the writer has read. It should be noted that this thesis will not discuss, at any great length, these American developments. Since the primary focus of this thesis is Canadian law, where judicial deference seems to be less explicit, and extensive, than in America, an extended examination of U.S. law in this area does not seem appropriate.

13 ibid, pp. 404-405
14 ibid
15 441 U. S. 520 (1979)
16 Judgment of 2nd November 1984, Court No. T-303-83
17 For example, prison psychiatrists, health care visitors, specialist law professors, professors of criminology and prisoners themselves. As was the case in Piche, for example, supra note 15.
involving prisoners' rights. It is important, therefore, to ask why there is this judicial deference, with the aim of suggesting that these reasons are insufficient to justify such deference.

One reason cited is that judges do not think themselves experts in the day-to-day running of prisons. It is certainly true that most judges have had very little experience of the reality of prison life. Indeed some may never even have visited a prison. Judges are concerned with the criminal justice system only up to the point of conviction or acquittal. What happens thereafter is a matter for the correctional authorities. This lack of expert knowledge should not, however, prevent judges from taking a closer look at prison operations. Judges can hear expert evidence on all aspects of prison life. It is not enough merely to defer to the expert testimony of prison administrators, when other people with knowledge of the prison system can also offer a helpful input. In any event, it is inconsistent for some judges to say that they are not experts in prison administration when they are also holding themselves out as experts in other areas (in which they generally have no such expertise). As will later be seen, in Piche, for example, the trial judge made decisions as if he were a medical and psychiatric expert, yet seemed to defer to the expert testimony of some prison witnesses.

Another argument in favour of judicial deference is that if courts interfere too much with prison administration, the day-to-day running of prisons will become impossible. It is submitted that this is a very thin argument, since it would only be in more extreme situations that courts would invoke s.12, and such extreme situations should have no place in the day-to-day life of prison.

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18 See Chapter 4, footnotes 54-55, and accompanying text
19 See, for example, the treatment of prisoners with AIDS, in Chapter Three, and the problems of double bunking, in Chapter Four.
See also Claire Culhane, "Still Barred from Prison" (2nd Ed. 1985), which documents the circumstances leading up to prison disturbances at nine different Federal Institutions. It is clear from this that prisoners' rights continue to be violated as a matter of course in many Canadian prisons.
Also, Michael Jackson, "Prisoners of Isolation" (1983)
Prison officers should doubtless have some flexibility to deal with sudden and potentially explosive problems, but their response must be evaluated against some more objective standard than the opinion of themselves and their superiors. To do less would amount to setting an appropriate standard of behaviour in line with the behaviour itself.

A number of real risks of continuing such judicial deference can also be identified. The practice opens up the possibility of inconsistent approaches to the same problem developing on a prison-to-prison basis. Thus, a prison administrator in one prison may take a restrictive approach to the activities of prisoners, with a frequent use of disciplinary measures, while an administrator in another prison (with the same security rating) may be noticeably more liberal. Judicial deference to the activities of both of these individual administrators would allow both approaches to continue without judicial intervention. The result of this is that two individuals sentenced for identical crimes to identical periods of detention, but sent to these two different institutions, will, in effect, not serve identical sentences because conditions in one prison are noticeably more severe than in the other. A more interventionist judicial approach would serve to encourage more uniform correctional practices and, in particular, to discourage unduly severe practices.

The most extreme risk of judicial deference is that prison officers and administrators will, quite simply, do whatever they like with inmates, knowing that the judiciary is highly unlikely to intervene. Given that examples of extreme restriction of prisoners' rights continue to be documented, such deference clearly stands in the way of properly protecting prisoners' rights in Canada. As will be seen, the Supreme Court of Canada has recognized an ongoing judicial reluctance to challenge the actions and laws of the state, and its officials. For all of the above reasons, it is clear that this traditional deference to Parliament, and its satellites, must change if

20 See Chapter One, footnotes 76-78, and accompanying text
21 Paul Russell, "Cruel and Unusual Treatment or Punishment: The Use of Section 12 in Prison Litigation," 43 Univ. of Toronto Faculty Law Review 185.
prisoners' rights are to be protected by s. 12 of the Charter. Paul Russell puts the problem of judicial deference succinctly.

"When courts defer to parliament, they are deferring to an institution which, from a standpoint of priorities, has placed prisoners' rights near the bottom of the pile." 21

The case of Palmigiano v. Baxter22 provides a further useful analysis of why judicial deference should be avoided, and judicial intervention adopted. The court in that case conceded that prison officials had to have the freedom to make a wide range of decisions but that

"Time has proved, however, that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order.... There is nothing more corrosive to the fabric of a public institution such as a prison than the feeling amongst those whom it contains that they are being treated unfairly." 23

Later in the judgment, the court made another strong point in favour of intervention in saying that,

"...it is coming to be realized that almost all of the ...individuals who are at any one time subject to correctional authority will eventually rejoin the rest of our citizens outside the prison walls; if they are to learn to respect public authority and to participate in the democratic control of that authority as normal citizens, they need to be able to challenge what appears to be arbitrary assertions of power by correctional officials during the course of their confinement." 24

Running throughout this thesis, therefore, is the belief that judicial deference to either Parliament, or prison officials, must be avoided if s. 12 is to develop into a useful protector of prisoners' rights.

22 487 F. 2d 1280 (1st Cir. 1973). Quoted by Michael Jackson, supra note 19, in relation to the McCann appeal at p. 83. For a fuller discussion of the case for judicial intervention, see Jackson, at pp. 82-84
23 ibid, p. 1283
24 ibid, p. 1284
CHAPTER ONE

CRUEL AND UNUSUAL TREATMENT OR PUNISHMENT

Introduction

"As the twentieth century draws to a close, two frequently cited propositions on imprisonment evoke a note of hollow rhetoric. These are that the pains of imprisonment should not exceed what is required for the deprivation of freedom and that persons are sentenced to prison as a punishment and not for punishment. Both propositions are refuted by the daily experience of imprisonment provided within most prison systems."

As the above quote suggests, the realities of prison life are often far removed from bureaucratic theories of how a prisoner should be treated by the prison authorities. In this chapter, it will be argued that where prisoners are subjected to treatment that does exceed what is required for the deprivation of freedom, or to treatment that is clearly for punishment, then this may amount to "cruel and unusual treatment or punishment" under Section 12 of the Canadian Charter of Rights and Freedoms. The focus will be on the Canadian Penitentiary System, a system which is increasingly experiencing the effects of overcrowding, effects felt both by its inmates and its administrators. A review will be made of the criteria which the Canadian courts have developed for deciding whether cruel and unusual treatment or punishment has taken place.

Since paragraph 2(b) of the Canadian Bill of Rights is almost identical to s. 12 of the Charter, certain key cases decided under the Bill of Rights in this area will be examined. It is to these cases that the Canadian courts have turned in developing the factors to be weighed in deciding a case involving s. 12 of the Charter. The case of R. v. Smith will be examined in particular detail, being the first Supreme Court of Canada case to deal in depth with cruel and unusual treatment or punishment.

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1 Andrew Rutherford, Prisons and the Process of Justice (Oxford), 1986, p. 90.
2 Constitution Act, 1982, as enacted by the Canada Act, 1982, c. 11 (U.K.), hereinafter referred to as the Charter.
treatment or punishment under the *Canadian Charter*. In many ways this case represents an important development from earlier decisions under the *Bill of Rights*, both in its approach to what the actual wording of s. 12 requires, and in the tests which a court should use to decide if there has been a breach of s. 12. As will be argued, however, the case fails to provide a clear, unanimous and unambiguous judgment for future courts to follow. In so doing, the Supreme Court has failed to supply prison inmates (amongst others) with clear criteria upon which they may defend themselves when they experience treatment which is beyond what is necessary and acceptable in our modern society. It is to be hoped that when the Supreme Court is again faced with a case involving s. 12, it will take a liberal, and clear, approach - such that prison injustices can be both remedied and discouraged under the *Charter*.

**Historical Development - The Canadian Bill of Rights**

The *Canadian Bill of Rights*, in paragraph 2(b), declares that:

"No law of Canada shall be construed or applied so as to (b) impose or authorize the imposition of cruel and unusual treatment or punishment."

This definition formed the basis for Section 12 of the *Canadian Charter*, which states that

"Everyone has the right not to be subjected to any cruel and unusual treatment or punishment."

These two definitions are practically identical, so that comparisons between cases brought under para. 2(b) of the *Bill of Rights* and those brought under s. 12 of the *Charter* may be validly made. This has received approval in the Supreme Court of Canada in *R v. Smith*. Lamer J., as he then was, said

"the approach taken when interpreting laws under the Canadian Bill of Rights has to some extent guided the judiciary when considering a constitutional challenge to law under the *Charter*."

The *Bill of Rights* came into force in 1960, but, for the first fifteen years of its existence, challenges to particular punishments under paragraph 2(b) received scant attention from the courts, who were uniformly unsympathetic to such challenges. This probably reflected a general reluctance by common law courts to intervene in the administration of the criminal justice system. The following quote by Lord Denning M.R. in describing the English situation might be applied equally well to the Canadian context. He said,

"If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined."

This conservative, "hands-off" approach could still be detected, to some extent, in the first case to examine thoroughly the meaning of paragraph 2(b), *R. v. Miller and Cockriell.* The case involved a challenge to the death penalty provisions in the Criminal Code. The Supreme Court of Canada held that the provisions did not violate paragraph 2(b), although in reaching this conclusion two different interpretations of "cruel and unusual" were made. Mr. Justice Ritchie, who wrote for the majority, stated that

"In my opinion, the words "cruel and unusual" as they are employed in s. 2(b) of the Bill of Rights are to be read conjunctively and refer to "treatment or punishment" which is both "cruel and unusual"."

In taking this literal approach, Ritchie J. was confirming the majority view of the British Columbia Court of Appeal in this case, which was that the litigant must establish both that the treatment or punishment was cruel and that it was unusual. This was a very onerous test for a plaintiff to satisfy, which perhaps reflected the pre-existing reluctance of the courts to interfere with state sanctioned punishment except in the most extreme cases. It should be noted,

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6 Examples of this lack of sympathy are highlighted by Lamer J., *ibid.*, at p. 35.


8 (1975) 24 C.C.C. (2d) 401 (B.C.C.A.); (1977), 70 D.L.R. (3d) 324 (Supreme Court), albeit that the case was not involved with prison law.

9 *ibid.*, (Supreme Court) at p. 345.

10 The majority stated that if it was assumed that the death penalty was cruel, it could not be considered unusual, given its use throughout the history of English and Canadian criminal law.
however, that Ritchie J. decided the case on other grounds, so that his comments relating to the phrase "cruel and unusual" are obiter. He also refused to recognize the legitimacy of U.S. case authority on the scope and meaning of "cruel and unusual punishment", although he recognized that the phrase, which can be found in both the Eighth Amendment of the U.S. Constitution and paragraph 2(b) of the Canadian Bill of Rights could be traced back to a common antecedent, the English Bill of Rights of 1688. He was, nonetheless, satisfied that the Canadian Bill of Rights and the U.S. Constitution differ so radically in their purpose and content that judgments rendered in interpretation of one are of little value in interpreting the other.

Chief Justice Laskin was not prepared to apply such a strict interpretation to the words. He was also willing to look to the various judgments of the U.S. Supreme Court and noted that, in that context, the words "cruel" and "unusual" were

"not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence, to be considered together as a compendious expression of a norm." (my emphasis)

Laskin C.J.C. agreed with this U.S. approach and felt it was "in line with the duty of the Court not to whittle down the protections of the Canadian Bill of Rights by a narrow construction of what is a quasi-constitutional document."

This would suggest that what Ritchie J. was doing in construing "cruel and unusual" conjunctively could amount to a breach of duty of the Court since such construction would inevitably "whittle down" the Bill of Rights protections. Therefore, although Laskin C.J.C.

11 Ritchie J. concluded that the fact that Parliament had retained the death penalty after enactment of the Bill of Rights was strong evidence that Parliament intended that "punishment" would not include the death penalty. He also felt that s. 2 of the Bill of Rights had to be read in light of s. 1.
12 Supra, note 8 (Supreme Court) at p. 345.
13 Ibid., p. 332.
14 Ibid.
agreed with the conclusion reached by Ritchie J., whose judgment took a slightly more liberal approach and, indeed, struck at the very credibility of Ritchie J.'s interpretation.

A third perspective can be found in the judgment of McIntyre J., as he then was, in the British Columbia Court of Appeal. He found the American authority helpful "in seeking principles upon which this matter should be considered in a civilized society." On the definition of "cruel and unusual" he felt that

> [It is permissible and preferable to read the words "cruel" and "unusual" disjunctively so that cruel punishments however usual in the ordinary sense of the term could come within the proscription.]\(^\text{(My emphasis).}\)

Mr. Justice McIntyre also identified the tests which should be applied in deciding if a particular treatment or punishment violated paragraph 2(b). In developing these tests he looked to similar American jurisprudence. A punishment, he suggested, must deter criminal behaviour or serve some other social purpose. If the punishment is "not in accord with public standards of decency and propriety", if it is unnecessary because an adequate alternative exists; if "it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards" or if the punishment is too severe given the crimes involved, then such punishment may well be cruel and unusual.

Chief Justice Laskin, in the Supreme Court, felt that the appropriate standard was

> "whether the punishment prescribed is so excessive as to outrage standards of decency."\(^\text{19}\)

In deciding whether a particular punishment was excessive, Laskin C.J.C. took a similar approach to that taken by McIntyre J. in the Court of Appeal, again based on U.S. authority.\(^\text{20}\)

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15 \text{Supra, note 8 (B.C.C.A.) at p. 465.}
16 \text{Ibid., p. 465.}
17 \text{Ibid., p. 468.}
18 \text{Ibid.}
19 \text{Supra, note 8 (Supreme Court) at p. 331.}
20 and in particular, \text{Furman v. Georgia}, 408 U.S. 238 (1972) per Justice Brennan.
He therefore asked whether the death penalty was arbitrarily imposed; unusually severe such that it degraded human dignity; an unacceptable measure to a large part of the population; or unnecessary because any deterrent effect could have been achieved by some lesser penalty.

As can thus be seen, *R v. Miller and Cockriell*, while examining the meaning of "cruel and unusual treatment or punishment" in considerable detail, did not actually decide upon any one approach. As the later *Bill of Rights* cases have shown, the *courts* have been uncertain how to interpret the above case and have come to as many different conclusions as did the judges in *Miller a ri Cockriell*.

Both *R v. Shand*21 and *Miller and Cockriell*, while demonstrating the *courts*’ varying approaches to cruel and unusual treatment or punishment, were not cases involved with prisons and prisoners. The case of *McCann v. The Queen*22 also carefully considered the meaning of paragraph 2(b). The action was brought by a number of prisoners at the British Columbia Penitentiary seeking a declaration that their continued detention for an unspecified period in solitary confinement amounted to cruel and unusual treatment or punishment. Heald J., in the Federal Court of Canada, was directed to the British Columbia Court of Appeal judgment in *R v. Miller and Cockriell*, the Supreme Court decision having not yet been handed down. He was in general agreement with Mr. Justice McIntyre’s argument that cruel and unusual should be viewed disjunctively. Professor Michael Jackson has suggested that after doing that Heald J. then

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21 (1975), 29 C.C.C. (2d) 199 (Ontario County Court); (1976) 30 C.C.C. (2d) 23 Ont. C.A. Judge Borins, in the County Court, used the tests developed by McIntyre J. in *Miller and Cockriell*. He found that the minimum mandatory sentence for importing narcotics was arbitrary, could not be justified as a general deterrent, and was unnecessary because less severe alternatives were available. He therefore held the minimum mandatory sentence to be cruel and unusual punishment. The Ontario Court of Appeal talked of there being a "core meaning" to the phrase (similar to Laskin C.J.C. in *Miller and Cockriell*). They found that the minimum sentence was not so disproportionate to the offence as to be cruel and unusual punishment.

22 (1975), 29 C.C.C. (2d) 337 (F.C.T.D.)
"proceeded to deal with the terms conjunctively, first characterizing the treatment of the prisoners in the segregation unit as "cruel", then as "unusual"."\(^23\)

On the evidence before him the judge had

"no hesitation in concluding that the treatment afforded them in solitary at B.C. Penitentiary has been cruel . . .

. . . Additionally, I have the view that said treatment was also unusual . . ."\(^24\)

Heald J. then goes on immediately to apply one of Mr. Justice McIntyre's tests — namely whether the treatment served any positive penal purpose. It is suggested that in so doing, Heald J. may inadvertently have been applying the "positive penal purpose" test to the "unusual" element of paragraph 2\(^a\)) only. On this Interpretation — if a punishment did serve a positive penal purpose it would not be unusual; therefore, no matter how cruel the punishment was, if the conjunctive approach is followed then paragraph 2(b) would not have been breached. In spite of favouring McIntyre J.'s disjunctive approach, therefore, Heald J. in practice did seem to be adopting a conjunctive approach. This offers cold comfort to prisoners bringing actions where the behaviour complained of is not sufficiently extreme that even a conjunctive test can be satisfied as was the case in McCann.

A later paragraph in the judgment, however, may offer some hope that Heald J. did intend to treat the positive penal purpose test as applying to both cruel and unusual punishment. He said

"furthermore, even if it served some positive penal purpose, I still think the treatment herein described would be cruel and unusual because it is not in accord with public standards of decency and propriety since it is unnecessary because of the existence of adequate alternatives."\(^25\)

(my emphasis)

On balance, it is submitted that McCann supports McIntyre J.'s disjunctive reading of paragraph 2(b), and any conjunctive approach that might have been implied from a close reading of Heald J.'s judgment is purely fortuitous.

\(^24\) Supra, note 20 at p. 368.
\(^25\) Ibid., p. 365
Mention should be made of one other pre-Charter case that dealt with cruel and unusual treatment under paragraph 2(b). *R v. Bruce, Wilson and Lucas* a case decided after the Supreme Court of Canada had given their judgment in *R v. Miller and Cockriell*, involved three prisoners who had taken hostages because they genuinely thought they were about to be returned to solitary confinement and wished to avoid this at all costs. They argued that such solitary confinement amounted to cruel and unusual punishment or treatment. In light of the Supreme Court judgment in Miller *and Cockriell*, Toy J. chose to follow Laskin C.J.C.'s approach which he suggested involved considering whether the punishment imposed was so excessive as to outrage standards of decency. Mr. Justice Toy, in contrast to Heald J., found that solitary confinement under administrative segregation did not expose people so confined to treatment

"so severe that public decency dictates that the courts should decide that it be stopped."  
He also declined to look at evidence of alternative measures available to the institution since he felt that the Supreme Court of Canada had refused to look to alternatives to the death penalty in *R v. Miller and Cockriell*. Michael Jackson highlights the weakness of this argument. He explains that

"the Chief Justice, while concluding that the appellants in Miller and Cockriell had not sufficiently discharged the onus upon them to prove that life imprisonment was an adequate alternative to capital punishment having regard not just to deterrence but also retributive purposes of punishment, clearly signalled his acceptance of the excessive punishment test."  
Judicial comment in Canada on the meaning of cruel and unusual treatment or punishment under paragraph 2(b) of the *Canadian Bill of Rights* was therefore very far from unanimous. Three main approaches may be extracted from the above cases. Following American authority, "cruel and unusual" may be read disjunctively, the approach proposed by Mr. Justice McIntyre in his

26 (1977) 36 C.C.C. (2d) 158 (B.C.S.C.)
28 *Supra*, note 23 at p. 206.
dissent in *R v. Miller and Cockriell*, and followed (probably) by Mr. Justice Heald in *McCann*. A second approach was that "cruel and unusual" must be read conjunctively, so that both "cruelty" and "unusualness" must be shown, as was suggested, albeit *obiter* by Ritchie J. in *Miller and Cockriell*. The final approach is that of Laskin C.J.C. in *Miller and Cockriell* who argued that while "cruel and unusual" were not strictly conjunctive they should nonetheless be seen as interacting expressions of a norm. Mr. Justice Toy followed this approach in *R v. Bruce, Wilson and Lucas*, and the Ontario Court of Appeal also favoured a core meaning to the phrase in *R v. Shand*.

It is against this background that judicial development of section 12 of the *Canadian Charter of Rights and Freedoms* must be viewed. As will be seen, the diversity of approaches used under the *Bill of Rights* has ensured no consistent approach under s. 12 with even the Supreme Court of Canada unwilling to reach a unanimous conclusion in *R v. Smith*. It will become obvious that the lack of coherency which had characterized judicial opinion under the *Bill of Rights* is still far from being resolved, and that this makes it impossible for potential litigants to be sure of their prospects of success under section 12 of the *Charter*.

**Early s. 12 Charter Cases**

In one of the first s. 12 cases, *Re Maltby et al and Attorney General of Saskatchewan et al*²⁹ remand prisoners alleged that they were subjected to cruel and unusual treatment due to the limited nature of the recreational, social and educational facilities available to them, and by the

use of handcuffs and leg shackles in certain circumstances. Mr. Justice Sirois adopted a position similar to that expounded in England by Lord Denning M.R. when he said that

"Prison officials and administrators should be accorded wide deferrence in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 

Sirois J. would require "substantial evidence" before he would be prepared to intervene in a case involving alleged cruel and unusual punishment. This extreme "hands-off" approach must be a matter of considerable concern to all who wish justice to be done and seen to be done in the penitentiary system. It is submitted that Sirois J. grossly underestimated the relative abilities of the courts and prison authorities when he suggested that

"The unguided substitution of judicial judgment for that of the expert prison administrators on matters such as this would to my mind be inappropriate." (my emphasis)

Surely judicial judgment is guided. The Court receives guidance and submissions from counsel, and often expert witnesses as well. Sirois J. also seemed to be assuming that because one is a prison administrator that that will always make one the best and most objectively qualified to make decisions relating to prison order (and which also recognizes the prisoners' rights). As cases such as McCann have shown, this is not necessarily the case.

In Collin v. Kaplan, a challenge was made under s. 12 to the practice of double-bunking in prisons. The judge, Mr. Justice Dube, did not look to the Canadian Bill of Rights cases at all, but looked instead to the United States. He stated that

"The Charter is in its infancy and there have not so far been any decisions on the matter in Canada"

30 Supra, note 7.
31 Supra, note 27 at p. 164.
32 Ibid.
34 Ibid., p. 124.
and therefore turned to the U.S. Supreme Court case of Rhodes v. Chapman. Quoting from the case, he noted that "cruel and "unusual punishment" should be determined according to "standards of decency that mark the progress of a maturing society." While accepting that he was not bound by this decision he said it would

"be to say the least incautious not to give some thought to the work of our brother jurists to the south, who have worked with their Constitution for many years and applied it to situations that have arisen in the United States, situations that are often similar to our own."

In the present case, the judge found that double celling was not to be recommended but did not amount to cruel and unusual treatment. The case is, however, significant because of its recognition of the utility and weight that may legitimately be given to United States decisions.

A more thorough examination of "cruel and unusual treatment or punishment" was made by Mr. Justice Linden in Re Mitchell and the Queen. Here, the applicant had been found to be a habitual criminal in 1970 and had been sentenced to an indeterminate period of detention. The basis of his action was that

"his continued detention pursuant to that sentence violates his rights to be protected against cruel and unusual treatment or punishment, and not to be arbitrarily detained or imprisoned."

Linden J. noted the three different meanings ascribed to "cruel and unusual treatment or punishment". He agreed with Laskin C.J.C.'s definition of a "compendious expression of a norm". In asking what the "core meaning" of s. 12 was, Linden J. argued that, while Canadian courts had not adopted the question in a particularly uniform way, one recurring theme

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36 Supra, note 33 at p. 125.
37 Ibid.
38 This impliedly gives support to the disjunctive approach of McIntyre J.A. and the core meaning approach of Laskin C.J.C. in Miller since both judges looked to U.S. authority - something that Ritchie J., in propounding conjunctivity, did not do.
40 Ibid., p. 485.
"in Canadian case law dealing with s. 2(b) of the Bill of Rights is resort to American authorities and the "disproportionality principle".\textsuperscript{41}

The judge in this case, in line with the approach of Chief Justice Laskin in \textit{Miller and Cockriell} and Arnup J. in \textit{Shand}, stated that

"the standard to be applied in determining whether treatment or punishment is cruel and unusual is whether the treatment or punishment is so excessive as to outrage standards of decency and surpass all rational bounds of treatment or punishment. The test, thus, is one of disproportionality; is this treatment or punishment disproportionate to the offence and the offender?\textsuperscript{42}

In Linden J.'s opinion the disproportionality test could be satisfied by showing both that the treatment or punishment was unusually severe and excessive because a less severe treatment or punishment would serve the same purpose equally well. A third factor, arbitrary imposition, was a relevant factor, but did not need to be shown where the other two factors above were proven. This does not make it clear whether arbitrary imposition can be substituted for either evidence of unusual severity or of excessiveness.

In the case of \textit{Re Gittens and the Queen},\textsuperscript{43} Mr. Justice Mahoney chose to follow Laskin C.J.C.'s approach in \textit{Miller and Cockriell}. He discounted Ritchie J.'s proposal for a conjunctive reading of the phrase, cruel and unusual, as being clearly obiter. He also felt that the Supreme Court decision in \textit{Miller and Cockriell} "foreclosed" the disjunctive meaning suggested by McIntyre J. in the B.C. Court of Appeal decision in the same case.

Mr. Justice Nitikman, in \textit{Piche et al v. The Solicitor General of Canada},\textsuperscript{44} disagreed with Mahoney J.'s opinion, in \textit{Re Gittens}, that the Ritchie J. conjunctive approach had been obiter.\textsuperscript{45}

\textsuperscript{41} Ibid., p. 502.
\textsuperscript{42} Ibid., p. 505.
\textsuperscript{43} (1982), 137 D.L.R. (3d) 687.
\textsuperscript{44} (1984), 17 C.C.C. (3d) 1 (Fed. T.D.)
\textsuperscript{45} Nitikman J. argued Beetz J. in \textit{Miller and Cockriell} had, by the following quote, offered support for Ritchie J.'s views — showing that they were not obiter, Beetz J. said, "... I do agree with Ritchie J. that... the words "cruel and unusual" in s. 2(b) are to be read conjunctively and refer to "treatment or punishment" which is both cruel and unusual..."
Nitikman J. therefore felt himself bound to follow the allegedly non-\textit{obiter} dictum of Ritchie J., as reflecting the majority view of the Supreme Court of Canada in \textit{Miller and Cockriell}. He found further support for a conjunctive reading of the words by taking a literal approach to their interpretation. As he said,

"If the framers of the \textit{Charter} intended that the terms "cruel and unusual" should be other than conjunctive, I would expect that the section would read "cruel or unusual treatment" even as the balance reads "treatment or punishment."\textsuperscript{46}

On the basis of this very narrow reading of s. 12, Nitikman J. found that the conditions of overcrowding at the Stony Mountain Penitentiary in Manitoba, and in particular the practice of double bunking, did not violate s. 12. This case represented a regressive step on the part of the courts to "cruel and unusual treatment or punishment". The decision in \textit{R v. Smith} can thus be seen as a welcome and realistic development.

\textbf{R v. Smith}

In its first chance to address the guarantee against cruel and unusual punishment or treatment in s. 12 of the Canadian \textit{Charter of Rights and Freedoms}, the Supreme Court of Canada has answered some but left unanswered a number of other questions as to the scope and applicability of s. 12.

\textbf{The meaning of "cruel and unusual"}

It would seem, however, that the question of what the words "cruel and unusual" mean has been resolved in favour of the Laskin C.J.C. view that it be treated as a "compendious expression of a norm". Mr. Justice McIntyre, in his dissenting judgment, noted that a majority of the Supreme Court of Canada in \textit{Miller and Cockriell} were in favour of a conjunctive reading of the

\textsuperscript{46} \textit{Supra}, note 41 at p. 110.
words while Laskin C.J.C. (with Dickson and Spence JJ. concurring) favoured treating the phrase as "a compendious expression of a norm". Referring to that case, McIntyre J. argued that he was "not satisfied that on this question there is a truly significant difference between the views of the majority and the views of the minority. In each view elements of both cruelty and unusualness are involved in a consideration of the total expression. On this basis, I would adopt Laskin C.J.C.'s interpretation of the phrase as a "compendious expression of a norm".\footnote{Supra, note 4 at p. 12.} (my emphasis)

In other words, McIntyre J. seemed to be adopting the phrase, "compendious expression of a norm", as though its meaning was practically the same as the conjunctive approach put forward by Ritchie J. in \textit{Miller and Cockriell}. It is submitted that this view is very difficult to justify. If the majority in \textit{Miller and Cockriell} had felt that there was no significant difference between their conjunctive view and that of Laskin C.J.C. then surely they would have adopted his phrase. They did not do this, instead opting for an approach that required a "rigidly separate assessment of each word". Laskin C.J.C. was clearly trying to avoid this and his approach was much more flexible, in line with pre-existing U.S. authorities. In cases already examined in this paper, it is clear that the Canadian courts have taken either a conjunctive or disjunctive or "compendious expression" approach. There has certainly been no suggestion that somehow the conjunctive interpretation and "compendious expression" amount to the same thing. It is therefore arguable that McIntyre J., in adopting Laskin C.J.C.'s "compendious expression of a norm" phrase, did so on a different basis to that of earlier courts. In other words, these earlier courts had used the phrase on the basis that it had represented the views of Laskin C.J.C., Spence and Dickson JJ., and not on the basis that it represented the views of the whole court. It is submitted that to suggest that that phrase could somehow encompass a whole range of views from a literal conjunctive approach to something short of a disjunctive approach is to wholly misrepresent what Laskin C.J.C. was trying to achieve. It was also something that the majority of the court (Ritchie J. et. al.) were clearly keen to avoid — as evidenced by their choice to
avoid the Laskin wording. It is therefore suggested that McIntyre J.'s reasoning in favour of adopting the "compendious expression of a norm" interpretation is far from sound. This is especially so since it represents a considerable change of direction from his British Columbia Court of Appeal decision in Miller and Cockriell, where he argued in favour of a disjunctive approach and not the fairly restrictive approach he espoused in Smith.

Mr. Justice Lamer (with Dickson C.J.C. concurring) suggested that most courts had abandoned "the debate as to whether "cruel and unusual" should read disjunctively or conjunctively." and had adopted the Laskin approach. As has been seen in this paper, however, this has not been universally the case, with some judges still favouring a clearly conjunctive approach. This observation by Lamer J. should certainly not be taken as suggesting that the "compendious expression" encompasses the divergent disjunctive and conjunctive approaches. Indeed, he made it quite clear that it was with Laskin C.J.C. that he was agreeing in adopting the definition of the phrase "cruel and unusual" as a "compendious expression of a norm".

Madame Justice Wilson also adopted the Laskin concept of "interacting expressions colouring each other". In her understanding of the phrase, this would incorporate punishments that were "so unusual as to be cruel and so cruel as to be unusual". This clearly excludes any question of a conjunctive approach where a punishment no matter how "cruel" would have to be shown to be "unusual" as well. LeDain J. expressed himself "in general agreement with McIntyre J.'s statement of the test for cruel and unusual punishment under s. 12 of the Charter . . . " It is possible that, in saying this, LeDain J. was also agreeing with McIntyre J.'s definition of "compendious expression". On a literal reading of LeDain J.'s words, however, it is probable

48 Ibid.; p. 40.
49 Ibid., p. 51.
50 e.g. Mr. Justice Nitikman in Piche.
51 Ibid.
52 Ibid., p. 58.
that he was agreeing with McIntyre J.'s criterion to be applied in deciding whether a punishment is cruel and unusual. On the actual meaning of the words "cruel and unusual" LeDain J. remained silent. Mr. Justice LaForest concurred with Lamer J. in all material aspects except the question of arbitrariness (to be discussed below).

In conclusion, it can be seen that the words "cruel and unusual" have been defined by the Supreme Court of Canada as a "compendious expression of a norm". This phrase has not, however, been adopted on the same basis by all the judges. A bare majority (Dickson C.J.C., Lamer, Wilson and LaForest JJ.) adopted the phrase on the basis that Chief Justice Laskin had proposed it in Miller and Cockriell. Laskin C.J.C. clearly intended his definition of "cruel and unusual" to be distinct from a conjunctive reading. As he had said, this is

"a reasonable appraisal, in line with the duty of the Court not to whittle down the protections of the Canadian Bill of Rights by a narrow construction of what is a quasi constitutional document." 53

McIntyre J. seemed to adopt the phrase on the basis that there is no "truly significant difference" between a conjunctive reading of "cruel and unusual" and Laskin C.J.C.'s "compendious expression" definition. Such an approach is more restrictive, would tend to "whittle down" s. 12 Charter protections and, as has been suggested, is therefore an unsound interpretation of Laskin's words. LeDain J. may have agreed with McIntyre J. At best he remained silent on the question and there can be no question that he was endorsing the majority view. Chouinard J. took no part in the judgment.

Tests for Cruel and Unusual Punishment or Treatment

No universal view of the appropriate tests to be used can be elicited from R v. Smith. It would seem, however, that a punishment or treatment will be categorized as cruel and unusual if it is grossly disproportionate by being "so excessive as to outrage standards of decency". 54 This is a

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53 Supra, note 8 (Supreme Court) at p. 332.
fairly vague term with little to guide a potential litigant as to what is "outrageous" and what are appropriate "standards of decency". McIntyre J. said that he believed that this did not erect too high a threshold for showing an infringement of s. 12. The problem is that it is very difficult to ascertain the height of that threshold because of the inherent vagueness of the definition. Ultimately it is the judge (or judges) in a particular case who must subjectively decide if standards of decency have been outraged. Beyond general agreement as to this gross disproportionality test, however, the Supreme Court judges outlined specific and differing characteristics to be used in testing for gross disproportionality. Mr. Justice McIntyre, with whom LeDain J. agreed, suggested that

"A punishment will be cruel and unusual and violate s. 12 of the Charter if it has any one or more of the following characteristics;

1. The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;
or

2. The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives, or

3. The punishment is arbitrarily imposed in the sense that it "is not applied on a rational basis in accordance with ascertained or ascertainable standards."55

McIntyre J. pointed out that people in similar situations should be treated in a similar way. In other words, punishment should be imposed

"in accordance with standards which are rationally connected to the object of the legislation".56

It would seem to be clear that for McIntyre J., arbitrary imposition, if proven, would violate s. 12.

Lamer J. stated that the appropriate approach for gross disproportionality was for the court to

"first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what

55 Supra, note 4 at pp. 19-20.
56 Ibid., p. 25.
range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender.  

He added that it is important to look at the effect of the sentence actually imposed. He accepted certain criteria that were utilized in cases under s. 2(b) of the Canadian Bill of Rights as being useful guidelines, which

"without being determinative in themselves, help to assess whether the punishment is grossly disproportionate".  

It would therefore be valid for a court to consider if a particular punishment is necessary to achieve a valid penal purpose, whether that punishment is imposed in accordance with recognized sentencing principles, and if valid alternatives to that punishment exist. On the question of arbitrariness, however, Lamer J. found that this is only a "minimal factor" in deciding whether a treatment or punishment is "cruel and unusual". He did so on the basis that s. 12 was concerned only with the effect of a particular punishment, and any question of the method by which that punishment was imposed was more properly a matter for sections 7 or 9 of the Charter. He further argued that the use of arbitrariness in similar United States cases was for the purpose of ensuring equality under the law. He felt such an argument could not simply be transferred to the Canadian context since other sections of the Charter ensure such equality.

Madame Justice Wilson disagreed with Lamer J.'s efforts to keep arbitrariness and s. 12 mutually exclusive. She conceded that

"Punishments may undoubtedly be cruel and unusual within the meaning of s. 12 without being arbitrarily imposed."  

She pointed out, however, that in at least some cases,

"the arbitrary nature of the legislatively prescribed minimum sentence must inevitably ... result in the imposition of a cruel and unusual punishment".  

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57 Ibid., p. 43.  
58 Ibid., p. 44.  
59 Ibid., p. 52.  
60 Ibid.
For Wilson J., arbitrariness was fundamental to the question of whether a particular punishment is "cruel and unusual". In referring to the minimum sentence imposed in this case, she argued that it was the fact that it "must be imposed regardless of the circumstances of the offence or the circumstances of the offender that results in its being grossly disproportionate in some cases and therefore cruel and unusual." 61

Wilson J.'s approach must therefore be distinguished from Lamer J.'s opinion that arbitrariness is only of minimal importance in a s. 12 action. It is submitted that McIntyre J.'s approach, while accepting that a characteristic of arbitrary imposition may amount to cruel and unusual treatment or punishment, did not give arbitrariness the same level of fundamental importance that Wilson J. gave it. The question of how a future court should treat arbitrariness in a s. 12 action is therefore far from clear as a result of Smith. Wilson, McIntyre and LeDain JJ. all recognized that arbitrary imposition is a criterion that can lead to a finding of cruel and unusual treatment or punishment, though Wilson J. would seem to have regarded arbitrariness with greater weight than McIntyre J. Lamer J. (with Dickson C.J.C. concurring) sees arbitrariness as little more than a "minimal factor". LaForest J. declined to comment on the question of arbitrariness at all, while Chouinard J. took no part in the judgment of the court. Consequently, there is no majority view to be extracted from Smith on the question of arbitrariness.

Of particular interest in the context of prison litigation is the fact that the Court recognized that the standards set by the Charter apply both to a consideration of the purpose and effects of a punishment. McIntyre J., in examining the effect of adding the word "treatment" to the proscription against "cruel and unusual punishment" said that "it brings within the prohibition of s. 12 not only punishment imposed by a court as a sentence but also treatment (something different from punishment)."

61 Ibid., pp. 51-52.
which may accompany the sentence. In other words, the conditions under which a sentence is served are now subject to the proscription.\(^{62}\) (my emphasis)

He could foresee certain circumstances in which the "nature or quality of the treatment" within the prison might amount to cruel and unusual treatment. He gives the example of solitary confinement, as in the case of *McCann*. Lamer J. also stated that if the effect of the sentence is "grossly disproportionate to what would have been appropriate, then it infringes s. 12".\(^{63}\) He highlighted the fact that the effects of sentence could include not only the length of sentence but also the nature and conditions under which it was served. It would also seem clear that long periods of solitary confinement for a relatively minor offence would infringe s. 12. This can be extracted from the example Lamer J. gave of a sentence of 20 years for a first offence against property being grossly disproportionate;

"but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement".\(^{64}\)

*R v. Smith* is therefore highly significant in stating that constitutional challenges may now be made under s. 12 of the *Charter* into the way sentences are served. Allan Manson points out that a substantial body of evidence would be needed to convince a court of the actual conditions of confinement, as was the case in *McCann*.\(^{65}\) Given that the *Charter* provides for remedial measures under s. 24(1) (in a way which the Bill of Rights did not) it is particularly relevant to ask how

"the judiciary will respond to a finding that the factors of incarceration constitute cruel and unusual punishment. In *McCann*, the result was a one-line declaration that the confinement of the plaintiffs in the segregation unit at the British Columbia Penitentiary amounted to cruel and unusual punishment."\(^{66}\)

Manson argues persuasively that given the new powers under s. 24(1), the courts will be required to

\(^{62}\) Ibid., p. 11.

\(^{63}\) Ibid., p. 44.

\(^{64}\) Ibid.


\(^{66}\) Ibid.
"become more creatively involved in redressing constitutional violations in the prison environment".67  

It is certainly to be hoped that this will be the case when an appropriate prison case comes before the courts.

One find feature of R v. Smith of interest to prison litigants relates to the question of whether a treatment or punishment which violates s. 12 could nonetheless be justified under s. 1.68 If this is possible, it effectively leads to a situation where the court condemns a particular practice under s. 12 and then, almost in the same breath, finds that it is acceptable under s. 1. McIntyre J., in R v. Smith, saw the guarantees under s. 12 in absolute terms. LeDain J. agreed, stating that

"a punishment which is found to be cruel and unusual could not be justified under s. 1 of the Charter."69  

Lamer J., on the other hand, did consider whether s. 1 could legitimize a punishment or treatment that had already been held to violate s. 12. It is respectfully submitted that this is a particularly futile exercise. This becomes clear when two factors are considered together. Firstly, the "gross disproportionality" test met with strong approval in R v. Smith. Secondly, the second limb of the test in R v. Oakes70 for the application of s. 1 was described by Dickson C.J.C. as "proportionality", which, inter alia, requires that the provision is the minimum required to achieve the particular purpose. As has been rightly pointed out,

"surely it can never be that something which is grossly disproportionate can at the same time be characterized as proportionate, particularly in terms of minimum impairment."71  

67 Ibid.  
68 S. 1 of the Charter states: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."  
69 Supra, note 4 at p. 53.  
70 24 C.C.C. (3d) 321.  
71 Supra, note 65 at p. 251.
Within the context of litigation over prison conditions, therefore, considerations of cruel and unusual punishment should in the future never be justified by an appeal to s. 1, since such appeal would appear unsound.

Implications of *R v. Smith*

In some ways *R v. Smith* does represent a positive development in the treatment of s. 12. It should certainly benefit prisoners who want to assert their constitutional rights. McIntyre and LeDain JJ.’s clear indication that a violation of s. 12 could never be justified under s. 1 of the *Charter* is very encouraging. Lamer J. found that, in this particular case, the violation of s. 12 could not be saved by s. 1. As has been shown, even if Lamer J. had found s. 1 effective in justifying a s. 12 violation, such an approach would have been highly suspect given the existence of a proportionality test in dealing with both ss. 1 and 12. A prisoner litigant should not, therefore, have to concern himself with rebutting an argument under s. 1. This seems particularly equitable given that the courts already require comprehensive proof before they will invoke s. 12. To add the burdens of a s. 1 argument, and the consequent increased prospects of a failed action, would merely serve to discourage prisoners from asserting their rights.

It would also now seem clear that where the treatment or punishment imposed is grossly disproportionate to the wrong done, this will likely amount to cruel and unusual treatment or punishment. McIntyre J.’s proposed test, which was also generally reflected by Lamer J., that if the punishment goes beyond what is needed to achieve

"a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives . . ."\textsuperscript{72}

is of particular relevance to a prison action. In *McCann*, Heald J. had found that conditions in the Special Correctional Unit at the B.C. Penitentiary served no positive penal purpose and effectively outraged "public standards of decency and propriety", because such conditions were

\textsuperscript{72} *Supra*, note 4 at p. 20.
unnecessary given adequate, less harsh, alternatives. That case, which remains the only successful Canadian prison conditions case under "cruel and unusual" provisions, would probably also be successful, post-Smith, given the similarity of approach. This is particularly so given that Heald J. had taken a conjunctive approach (although saying he was in favour of a disjunctive reading) and the Supreme Court in R v. Smith clearly favoured a less restrictive, easier to prove, definition of "cruel and unusual".

On the face of it, the court in R v. Smith would appear to have unanimously adopted Laskin C.J.C.'s "compendious expression of a norm" test. As has been seen, this phrase has probably been given different shades of meaning by McIntyre and Lamer JJ. This could, however, be turned to prisoners' advantage in future s. 12 cases. Since the Supreme Court were far from unanimous in defining the scope of Laskin's view, an argument could be made for interpreting "compendious expression of a norm" in a more disjunctive than conjunctive way. It is submitted that such a reading is in line with the court's new, expanded role since the enactment of the Charter.

"The Charter as part of a constitutional document should be given a large and liberal construction. The spirit of this new "living tree" planted in friendly Canadian soil should not be substituted by narrow, technical, literal interpretations without regard to its background and purpose; capability for growth must be recognized ..." 74

Chief Justice Laskin had developed his view in Miller and Cockriell because he was anxious

"not to whittle down the protections of the Canadian Bill of Rights by a narrow construction of what is a quasi constitutional document." 75 (my emphasis)

73 Albeit decided under the Bill of Rights, paragraph 2(b).
74 Re Southam Inc. and the Queen (No. 1), 41 O.R. (2d) 113 at p. 123, quoted with approval by Linden J. in Re Mitchell, supra, note 36 at p. 501.
75 Supra, note 49.
Given that this argument applies with even greater force to the Charter, which is a fully constitutional document, a more liberal reading, encompassing a disjunctive approach, would seem perfectly justifiable. At the very least, Smith has laid to rest any question of a conjunctive interpretation, an interpretation which precluded success in Piche.

The traditional deference of the courts to Parliament, and the resulting reluctance to interfere, is also most clearly highlighted in Smith. Lamer J. noted a

"lingering reluctance to interfere with the wisdom of Parliament in enacting the laws that are challenged."\(^{76}\)

He pointed out that under the Charter the courts must

"examine challenged legislation in order to determine whether it infringes a right protected by the Charter."\(^{77}\)

McIntyre J. agreed that

"the enactments of Parliament must now be measured against the Charter and, where they do not come within the provisions of the Charter, they may be struck down."\(^{78}\)

although he said that courts should not take this step when they merely disagreed with a parliamentary decision, since Parliament was better placed than the courts to investigate and formulate social policy. It is to be hoped that the Canadian courts will remain conscious of their powers and duties under the Charter when called upon to examine regulations and directives issued pursuant to the Penitentiary Acts.

It might be argued that it is highly undesirable to put the courts into a position where their decision effectively forces the Government to rearrange its spending priorities, and the way it runs its correctional system. It is equally undesirable, however, to have the correctional system

\(^{76}\) Supra, note 4 at p. 40.
\(^{77}\) Ibid., p. 41.
\(^{78}\) Ibid., p. 22.
run in a way that violates prisoners' fundamental human rights, and it is really immaterial whether this forces the Government to re-prioritize its spending. The courts should not feel uncomfortable in taking decisions that have administrative ramifications since they are clearly mandated to do this under the Charter.

S. 12 Cases since R v. Smith

A number of cases have discussed cruel and unusual treatment or punishment since R v. Smith was decided. In the case of R v. Lyons,\(^79\) the Supreme Court of Canada was called upon to decide, *inter alia*, whether the dangerous offender provisions of Part XXI of the Criminal Code violated s. 12 of the Charter. Once a person had been designated a "dangerous offender", he or she could then be sentenced to a penitentiary for an indeterminate period. The appellant, in this case, contended that the dangerous offender provisions violated s. 12 in that they imposed a punishment that was unusually severe and served no valid penological purpose more effectively than a less severe punishment (namely, a determinate sentence). LaForest J., writing for the majority, referred to Lamer J.'s judgment in *R v. Smith* and concluded from that

"that s. 12 is concerned with the relation between the effects of, and reasons for, punishment. At the initial stage of the inquiry into proportionality, these effects are to be balanced against the particular circumstances of the offence, the characteristics of the offender and the particular purposes sought to be accomplished in sentencing that person in the manner challenged."\(^80\)

Of particular interest is the fact that LaForest J. clearly foresaw the possibility of s. 1 of the Charter being invoked to save a provision that violated s. 12. As he said,

"If . . . the punishment is found to be grossly disproportionate, a remedy must be afforded the offender in the absence of social objectives that transcend the circumstances of the particular case and are capable of justifying the punishment under s. 1 of the Charter."\(^81\)

\(^81\) *Ibid.*
It would, therefore, appear that, despite the incompatibility of the proportionality tests inherent in ss. 1 and 12 (which was discussed earlier), the Supreme Court has accepted that s. 1 can save a s. 12 violation.

LaForest J. identified two analyses that should be used in deciding whether a particular provision was constitutionally valid. In the first analysis, he considered the means used by society to protect itself from criminals while, at the same time, ensuring that the offender is not "subjected to punishment grossly disproportionate to the offence and the circumstances of the individual case."\(^82\)

The second, and equally important, consideration related to the constitutional validity of the actual treatment prescribed, and, in particular, the indeterminate quality of that treatment. \(R v. Smith\) had suggested that the manner in which a sentence was served could now be subject to s. 12 scrutiny. LaForest J., in \(Lyons\), reinforced that view. As he said,

"it is clear that an enlightened inquiry under s. 12 must concern itself first and foremost with the way in which the effects of punishment are likely to be experienced."\(^83\)

Laforest J. also appeared to question the utility of the least restrictive means test that was developed in \(Smith\). He stated that he was

"not sure that that to inquire into the presence or absence of less restrictive means is wholly compatible with the insistence of this court in \(Smith\)...that s.12 redress only punishment that is grossly disproportionate to the circumstances of any given case".\(^84\)

Since this least excessive option test is one that can be fairly easily understood, it is to be regretted that LaForest should question its utility.

\(^{82}\) \textit{Ibid.}
\(^{83}\) \textit{Ibid.}, p. 33.
\(^{84}\) \textit{Ibid.}, p. 35.
One final point of note in Lyons relates to the meaning of the phrase "grossly disproportionate". LaForest J. stated that

"the word "grossly", it seems to me, reflects this court's concern not to hold Parliament to a standard so exacting, at least in the context of s. 12, as to require punishments to be perfectly suited to accommodate the moral nuances of every crime and every offender."

In other words, LaForest J. would want to be convinced of a fairly extreme discrepancy between the prescribed punishment and the individual circumstances of the case. This is a particularly unwelcome development as it inevitably increases the burden of proof on a person alleging a violation of s. 12. In so doing, it restricts the ability of s. 12 to act as a genuinely protective measure for those in the correctional system. Chief Justice Lamer has quoted with approval LaForest J.'s definition of "grossly" in the recent case of R v. Luxton, leaving little room for doubt that this is now the Supreme Court of Canada's view.

In R v. Goltz, the British Columbia Court of Appeal had to decide whether a mandatory minimum sentence of seven days' imprisonment for driving a vehicle while disqualified constituted cruel and unusual punishment. Justice Wood, writing for the Court, stated that the decision in Smith

"makes it clear that duration or quantum alone will not determine the constitutional validity of any given sentence"

He went on to say that he

"would not make light of a sentence of seven days' imprisonment"

He noted what Lamer J. had said in Smith about how a mandatory minimum sentence needed to be grossly disproportionate and not merely excessive to offend against s. 12. He conceded that

85 Ibid., p. 35.
87 (1990) 74 C.R. (3d) 78.
88 Prescribed by s. 88(1)(c) of the B.C. Motor Vehicle Act, R.S.B.C. 1979 c. 288.
89 Supra, note 7; p. 85.
90 Ibid.
a minimum sentence of seven days might easily be seen as far nearer the line between excessiveness and gross disproportionality than a sentence of seven years. Of particular importance is the way in which he dealt with this persuasive argument, in saying that

"it is only upon application of the legal tests established in that case, and not by a comparison with its facts, that one can determine on which side of the line the sentence here under review properly falls."

Applying the tests set out in Smith, the judge found that the mandatory minimum sentence was unnecessary to achieve the valid purposes of the legislation, that valid alternatives existed and there was a certainty that such a punishment would

"in some cases be grossly disproportionate to what would otherwise be appropriate."

The fairly liberal approach to Smith taken by the B.C. Court of Appeal in Goltz can be contrasted with the Ontario case of R v. Kelly, which also considered the decision in Smith. In examining whether a particular punishment was unnecessary because there existed adequate alternatives, Justice Finlayson stated that

"the availability of alternatives goes only to the assessment of whether a total ban is treatment or punishment that is grossly disproportionate to the offence for which an accused stands convicted."

He also supported Lamer J.'s approach to arbitrariness, in saying that

"If the complaint relates to arbitrariness or lack of due process, then the reference points should be ss. 9 and 7 of the Charter."

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91 Ibid., p. 86.
92 Ibid., p. 91.
94 In this case the punishment complained of was a prohibition against carrying a firearm, pursuant to s. 100(1) of the Criminal Code.
95 p. 12 of judgment, supra, note 13.
96 Ibid., p. 15.
Finlayson J. also noted that the prohibition complained of could not be described as unusual because of the existence of similar provisions in Australia, the United States and the U.K. He also felt that the provision complained of was not cruel. After embarking on this conjunctive approach, however, he made it clear that the true test was gross disproportionality, and not a question of the punishment "individually meeting the tests of cruelty and unusualness."\(^\text{97}\)

Of some interest in the above four cases is the fact that all the judgments seem to accept Justice Lamer's approach in Smith without any consideration of the other judgments in that case. As has been seen, Lamer J.'s judgment enjoys only narrow majority support in some areas, and so it is to be regretted that subsequent courts have blindly accepted his opinion on such things as arbitrariness and the use of s. 1 of the Charter. In so doing, they add credibility to areas of Lamer J.'s judgment which may well be unsound.

As the very recent case of Steele v. Warden of Mountain Institution\(^\text{98}\) has shown, the Supreme Court of Canada will only be prepared to find a violation of s. 12 in very specific and extreme circumstances. The case involved a prisoner who had been incarcerated for thirty seven years. His release was conditional on his being successfully treated for tendencies that had led him to commit a sexual offence. The penitentiary system had never provided him with treatment for these tendencies such that there was no prospect of him ever being released. Since this was a case where the period of incarceration had long since become grossly disproportionate to the particular circumstances of the case, the Supreme Court of Canada found that

> "this is one of those rare cases where sentence continuing Steele's detention after thirty seven years in prison violates s. 12 of the Charter."\(^\text{99}\)

\(^{\text{97}}\) Ibid., p. 13.


\(^{\text{99}}\) Ibid., p. 697.
Mr. Justice Cory, who wrote for the whole Court, indicated the reluctance of the courts to find a breach of the Charter. He said,

"It will only be on rare and unique occasions that a court will find a sentence so grossly disproportionate that it violates the provisions of s. 12 of the Charter. The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the Charter."  

(my emphasis)

Such an approach should apply as equally to prison treatment as to sentencing. The use of the words "rare" and "unique" is at odds with a liberal, "living tree" approach to the Charter. Within the prison context, the practice of double bunking, for example, could hardly be described as rare and unique, as that practice is now fairly widespread within the Canadian penitentiary system. Double bunking cases that have already been brought under s. 12 have been unsuccessful, at least partly because the prevailing conditions were not shown to be extreme enough. While it might have been hoped that Smith had introduced a slightly more liberal approach than had been used, for example, by Nitikman J. in Piche, it is clear from Steele that the courts will only rarely find a violation of s. 12.

Conclusion

"The purpose of corrections is to contribute to the maintenance of a just, peaceful and safe society by: . . .

(e) providing a safe and healthful environment to incarcerated offenders which is conducive to their personal reformation . . ."

100 Ibid., p. 697.
102 The Supreme Court of Canada, in Steele, did, however, find a violation of s. 12.
In a system which aims to reform and rehabilitate prisoners, confidence in that system will be increased where inmates know that in cases of mistreatment they may have a remedy under the Charter. The courts must therefore be willing to find violations of s. 12 and provide for a remedy under s. 24(1). This is not to say that the courts should find every complaint about prison conditions in violation of s. 12. Such an approach would clearly strike at the ability of the correctional system to function effectively. Indeed, the Charter, like the American constitution, "does not mandate comfortable prisons". As the cases decided under paragraph 2(b) of the Bill of Rights have shown, it is far from easy to establish a violation of "cruel and unusual treatment or punishment". Considerable evidence of extreme prison conditions in solitary confinement had to be shown in order for McCann to succeed. It is to be hoped that, in the light of R v. Smith, the courts will be a little more willing to look at prison conditions which are clearly unacceptable but perhaps not as extreme as in McCann. The courts' reluctance to be seen to be invoking s. 12 even when, in fact, they do, as evidenced by Steele, certainly does not help engender prisoners' confidence in the protections that the Charter allegedly provides. In the next case to arise involving prison conditions, the Supreme Court of Canada should definitely make very clear exactly what meaning should be given to "cruel and unusual" and also formulate a unanimous set of criteria for determining what sort of conditions are so grossly disproportionate as to "outrage standards of decency". There has been very little legal scrutiny of how prison sentences are served. As Professor Michael Jackson points out, it has simply been assumed that

"the prison sentence, by deterring, giving the prisoner his or her "just desserts", rehabilitating, and incapacitating the prisoner for the duration of the sentence, serves the ends of justice."

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105 Examples of the extreme prison conditions that had been experienced in McCann, see M. Jackson, Prisoners of Isolation, (Toronto) 1983, pp. 47-55.
106 Justice Behind the Walls, supra, note 103 at p. 1.
This perception of the majority of the legal profession, and the public, is often very far from true. It is, perhaps, in exploding the myths about prison conditions by using s. 12 of the Charter liberally, that the Canadian courts can in the future do the most useful good.
CHAPTER TWO

PRISONERS' RIGHTS ABROAD

Introduction

"American authorities are being relied on extensively, perhaps more than in any other area of our law, in Charter interpretation, both judicial and academic. Certain provisions of the Charter parallel or match sections of the U.S. Bill of Rights, and in this area of Canadian life, as in so many others, the American experience is important."¹

"The various sources of international human rights law-declarations, covenants, conventions,... must, in my opinion, be relevant and persuasive sources for interpretation of the Charter's provisions."²

(my emphasis)

As has been seen, the Canadian courts have faced very few challenges to prison conditions under s.12 of the Charter. Novel questions are bound to come before Canada's judges as s.12 litigation increases in frequency and complexity. Over many years, a sophisticated and far reaching jurisprudence has developed under the U.S. Bill of Rights and the European Convention on Human Rights. These are sources of which Canadian courts must inevitably take advantage in tackling such novel questions. The U.S. Bill of Rights is not, however, identical in all respects to the Charter, and thus Canadian courts need to exercise some care in looking to U.S. decisions. As Mr. Justice Dickson, as he then was, stated

² Reference re. Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 at 348. (Also ibid, at p.61)
"American decisions can be transplanted to the Canadian context only with the greatest caution."³

This does not mean a pertinent decision under the *U.S. Bill of Rights* must be avoided, but merely that the Canadian courts be aware of structural, textual, contextual and doctrinal differences between the two documents. As will be seen in a later chapter, the Supreme Court of Canada has recognised the utility of U.S. decisions on the Eighth Amendment in tackling s.12 cases.⁴ It is therefore useful to have an overview of the U.S. approach to cruel and unusual punishment, as proscribed by the Eighth Amendment of the *U.S. Bill of Rights.*

Another useful, and highly developed source will also be examined. This is the jurisprudence that has developed under Article 3 of the European Convention on Human Rights. Those who drafted the Canadian Charter doubtless noted the standards of international human rights, such as set out by the European Convention and the *U.S. Bill of Rights*. In Article 3, s.12 has, if not a "twin", at least a "close relative" well worthy of examination. This is supported by the dictum of Chief Justice Dickson, above, in his dissenting judgment in *Reference re. Public Service Employee Relations Act (Alberta).*⁵

Clearly, therefore, a general discussion of Eighth Amendment and Article 3 case law may be of more than mere academic interest to Canadian courts faced with cases of first impression in the prison field.

The American Development

The Eighth Amendment of the *U.S. Bill of Rights* prohibits the infliction of cruel and unusual punishments. No mention is made of "treatment" as in the phrasing of s.12 of the *Charter*. This

⁴ See Chapter Three, footnotes 11-13, and accompanying text.
⁵ *supra* note 2
obvious difference between the two documents should always be noted by Canadian courts. The addition of the word "treatment" in the Canadian definition inevitably means that the scope of s.12 will always be wider than that of the Eighth Amendment. A particular factual situation that has not been found to be cruel and unusual punishment in the United States might well be cruel and unusual treatment if the case were to be brought in Canada. As D.C. McDonald J. pointed out, in *Soenen v. Director of Edmonton Remand Centre et al*:

"...where the issue in the case is one of "treatment" rather than one of "punishment", no assistance can be derived from American jurisprudence, for the Eighth Amendment prohibits only "cruel and unusual punishments"..."7

Where the act complained of in Canada, however, is properly one associated with "punishment" rather than "treatment", then the U.S. jurisprudence may be of more compelling interest.

**General principles**

In order for individuals to establish that their rights under the Eighth Amendment have been violated, they must show that there has been an "unnecessary and wanton infliction of pain"8 such that the punishment is incompatible with the "evolving standards that mark the progress of a maturing society".9 "Unnecessary and wanton inflictions of pain" include those that are "totally without penological justification".10 In assessing societal attitudes to a particular punishment, courts must look to contemporary opinion, as evidenced by legislation enacted by the elected representatives of the public. As the U.S. Supreme Court said in *Estelle v. Gamble*

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6 (1983), 35 C.R. (3d) 206  
7 *ibid*, p.211  
"The infliction of ...unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation."11 (my emphasis)

Under the broad umbrella of the Eighth Amendment, certain important issues have arisen. The general conditions of confinement under which a prisoner serves his sentence have been the subject of a number of court decisions. The question of medical care of prisoners, and the measures which may legitimately be taken during a prison riot are also issues which the U.S. Supreme Court has had to tackle. All of these issues are, to some extent, interconnected, and, as will be seen, the approach taken by the courts is very much influenced by the particular circumstances of the case. As the U.S. Supreme Court said in Whitley v. Albers12

"The general requirement that an Eighth Amendment claimant allege and prove the unnecessary and wanton infliction of pain should also be applied with due regard for differences in the kind of conduct for which an Eighth Amendment objection is lodged"13 (my emphasis)

What follows, therefore, is an examination of the development of prison conditions cases under the Eighth Amendment with special reference to these kinds of conduct.

An early U.S. Supreme Court case to consider the relationship between the Eighth Amendment and conditions of confinement is Hutto v. Finney.14 The District Court had found conditions in the Arkansas prison system to be primitive in the extreme, to be cruel and unusual, and, in particular, ordered that punitive isolation be limited to a maximum of thirty days.15 The Supreme Court, in upholding the District Court's isolation limit, stated that

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11 ibid, Estelle, at 103
12 supra, note 8
13 supra, note 8 at 319
14 437 U.S. 678 (1978)
15 Mr. Justice Stevens, who delivered the Opinion of the Court, noted that "the routine conditions that the ordinary Arkansas convict had to endure were characterised by the District Court as "a dark and evil world completely alien to the free world"...that characterisation was amply supported by the evidence." (at 437 U.S. 681)
"Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." 16

The Supreme Court went on to say that the District Court was entitled to take note

"...of the inmates' diet, the continued overcrowding, the rampant violence, the vandalised cells, and the "lack of professionalism and good judgment on the part of maximum security personnel" 407 F. Supp. at 277 and 278. The length of time each inmate spent in isolation was simply one consideration among many." 17

Of particular note was the Court's conclusion that

"We find no error in the Court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment." 18

(my emphasis)

In other words, the Supreme Court obviously felt that the totality of prison conditions was germane to establishing an Eighth Amendment violation.

The next major case involving prison conditions, Rhodes v. Chapman, 19 had prisoners alleging that "double celling" 20 was cruel and unusual punishment. The Supreme Court restated the

Inmates were confined in punitive isolation for indeterminate periods of time. "An average of 4, and sometimes as many as 10 or 11 prisoners were crowded into windowless 8' by 10' cells containing no furniture other than a source of water and a toilet that could only be flushed from outside the cell....At night the prisoners were given mattresses to spread on the floor. Although some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning....Prisoners in isolation received fewer than 1,000 calories a day..." (at 437 U.S. 682-683)

16 supra, note 14, at 685
17 supra, note 14, at 687
18 ibid.
20 "Double celling" or "double bunking" is the placing of two inmates in a cell designed for one.
general bases for an Eighth Amendment action and then explained how these operated in the context of a prison conditions case. As they said

"Conditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." 21

The Court went on to note their findings in Estelle v. Gamble 22 that denial of medical care could be cruel and unusual; and in Hutto v. Finney, that conditions in two Arkansas prisons were cruel and unusual,

"because they resulted in unquestioned and serious deprivations of basic human needs." 23

The Court continued that

"Conditions other than those in Gamble and Hutto, alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognised in Gamble." 24

The clear implication is that challenges to conditions of confinement are properly a matter for scrutiny under the Eighth Amendment even though they are not "punishment" in the strict sense of a penalty administered by a sentencing judge or prescribed by statute. It would, furthermore, seem that an objective test is supported by the Rhodes court, rather than a subjective one based on the intentions of prison officials.

In the face of this authority, however, a narrow majority 25 of the US Supreme Court, in Wilson v. Setier, 25 has very recently held that "deliberate indifference" on the part of correctional...
authorities must be shown where the actions complained of are not part of the punishment formally administered by the court. The case involved a prisoner incarcerated in Nelsonville, Ohio, whose complaint alleged that the conditions of confinement in the prison housing him violated the Eighth Amendment. All nine Justices found that there had been no such violation. Justice White, with whom Justices Marshall, Blackman and Stevens concurred, while agreeing in the result, strongly disagreed with the remaining five justices' use of the "deliberate indifference criterion". For present purposes, therefore, the concurring opinion of Justice White will be regarded as the "minority" judgement, and the majority opinion of Justice Scalia, as the opinion of the Court.

In reaching the "deliberate indifference" standard, the Court referred to its judgment in *Estelle v. Gamble*, where it had said that

"deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain ... proscribed by the Eighth Amendment ... Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action ..."  

The Court in *Wilson* emphasised the use of the words "serious" and "deliberate indifference", pointing out their observation in *Estelle* that accidental or negligent medical care would fail to show the necessary culpability. The Court then looked to their decision in *Louisiana ex rel. Francis v. Resweber*, where a prisoner had tried to argue that a second attempt to electrocute him (after the chair had failed to work on the first occasion) was cruel and unusual punishment. The Court held that because this had been an accident, the officials lacked the culpable state of mind which would bring the Eighth Amendment into play.

26 These conditions included overcrowding, excessive noise, insufficient locker storage space, inadequate heating and cooling, improper ventilation, unclean and inadequate restrooms, unsanitary dining facilities and food preparation, and being housed with physically and mentally ill inmates.
28 *supra*, note 10, at 104-105
29 329 U.S. 459, (1947)
The decision of the Supreme Court in *Whitley v. Albers*\(^{30}\) was also cited with approval in *Wilson*. In that case, prison guards tried to quell a riot and in the process a guard shot a prisoner. The inmate argued that this had subjected him to cruel and unusual punishment. The Court had stated that  

"After incarceration, only the unnecessary and wanton infliction of pain ... constitutes cruel and unusual punishment forbidden by the Eighth Amendment"\(^{31}\)

In other words the Court in *Whitley*, and now again in *Wilson*, seemed to be saying that a much higher standard needed to be shown after someone was incarcerated in order to stop that person being mistreated. This is a worrying development, coming as it does from the highest court in the United States. Clearly, people may now be incarcerated as punishment, and also for punishment, at least where the treatment the prisoner receives is not the result of deliberate indifference on the part of prison officials.

On the distinction between punishment and other conduct, the *Wilson* court again agreed with its decision in *Whitley*.

"To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety ... it is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments clause ..."\(^{32}\)

As the minority opinion of the Court in *Wilson* pointed out, this intent requirement might be impossible to apply in many cases. As was stated,

\(^{30}\) supra, note 8  
\(^{31}\) supra, note 8, at 319.  
\(^{32}\) ibid
"Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system."  

The minority also argued that this intent requirement was a departure from precedent, pointing to the fact that lower courts had often looked to objective factors, rather than subjective intent in conditions of confinement cases. The majority, on the other hand, talked of the "concurrence's imaginative interpretation of Estelle v. Gamble," arguing that lower courts have "routinely applied the "deliberate indifference" requirement to claims of prisonwide deprivation of medical treatment" (but not, please note, conditions of confinement cases in general). It is perhaps a measure of the opposite extremes of the majority and minority views that they were both prepared to cite the same case, French v. Owens in support of their two very different views! The majority's approach, furthermore, might allow prison officials to argue that prison conditions which are not "in accord with contemporary standards of decency" nonetheless do not violate the Eighth Amendment because they are caused by insufficient funding or some other factor that does not implicate "deliberate indifference". Justice White concluded compellingly that basic human needs may go unprotected in  

"an unnecessary and meaningless search for "deliberate indifference"

The Eighth Amendment Now

33 supra, note 25, at 4675  
34 Justice White cited the following as proof of the proposition. Tillery v. Owens 907 F.2d 418, 426-428; Foulds v. Corley 833 F.2d 52, 54-55; French v. Owens 777 F.2d 1250, 1252-1254; Hoptowit v. Spellman 753 F.2d 179, 184. (Footnote 1, p.4675)  
35 See footnote 1 of the Opinion of the Court at p.4672.  
36 Justice Scalia cites Tussing v. McCarthy 801 F.2d 1080, 1111-1113; French v. Owens 777 F.2d 1250, 1254-1255. ibid.  
37 777 F.2d 1250 (CA7-1985)  
38 supra, note 25, at 4675
As a result of the judgment in Wilson v. Setter, it is clear that a test of "deliberate indifference" will now play a greater role in Eighth Amendment cases. The extent to which this is true, however, is still a matter for debate.

The majority relied on Louisiana ex rel. Francis v. Resweber, Estelle and Whitley in coming to their decision on conditions of confinement in Wilson. Yet, as the minority pointed out, none of these cases was actually concerned with conditions of confinement. At issue were particular acts or omissions relating to individual prisoners. Whitley was concerned with the shooting of one prisoner, not with conditions in the prison. The challenge in Estelle was to the failure to provide one prisoner with adequate medical care, not the failure to provide medical care generally. The Supreme Court had, therefore, not made intent a prerequisite in conditions of confinement cases but only in individual cases. The majority tried to meet this argument by saying that

"If an individual prisoner is deprived of needed medical treatment, that is a condition of his confinement, whether or not the deprivation is inflicted upon everyone else."\(^39\)

It is submitted that it may very well be a condition (singular) of confinement, but it is certainly not the same as general conditions of confinement, to which all prisoners are subject. As the majority had to concede, all the prisoners in an institution are suffering deprivations. This, they said, was a matter of "greater concern".\(^40\) For the majority to equate a singular action against one individual with generalised actions against all, is not a view that can easily be justified.

\(^39\) In Footnote 1 to the Opinion of the Court, at p.4672.

\(^40\) It is likely that where "deliberate indifference" has to be shown, this could often be inferred anyway where deprivations continue to be inflicted on many prisoners over a prolonged period of time.
Given that the majority's conclusion was reached on a potentially erroneous interpretation of a very select number of cases, it is to-be hoped that many lower courts will disregard this ruling, as they did after the *Estelle* judgment rejuvenated the intent element in Eighth Amendment cases.\(^{41}\)

It must, however, be conceded that, given the composition of the US Supreme Court, there is unlikely to be a change in the *Wilson* approach in the foreseeable future. It is therefore important to note what state of mind will apply in cases challenging prison conditions. In other words, what sort of conduct will be sufficiently "wanton" as to violate the Eighth Amendment? The Court, in *Whitley*, found that wantonness was established where officials acted

"maliciously and sadistically for the very purpose of causing harm."\(^{42}\)

This very high degree of culpability was based on the fact that the guards, in that specific case, had to act quickly and under much pressure, and, additionally, in light of an official concern for the safety of staff and other inmates.

Such mitigating factors were not present in the case of medical care, and so in *Estelle*, the Court had felt that "deliberate indifference" would be sufficient to constitute wantonness. The Court of Appeal in *Wilson* had ruled that prisoners had to show that officials acted with "persistent malicious cruelty".\(^{43}\) The majority of the Supreme Court reversed this, making clear its opinion that prison conditions and medical care should be decided subject to the "deliberate indifference" criteria. There is, therefore, some small consolation to future Eighth Amendment prison litigants; that while they will have to establish "deliberate indifference", they will not usually have to show "persistent malicious cruelty".

\(^{41}\) In footnote 1 to their minority judgment (at p.4675), several such cases are listed see *supra*, note 33.

\(^{42}\) 475 U.S. 320-321, Quoting from *Johnson v. Glick*, 481 F.2d 1028, 1033 (Friendly J.)

\(^{43}\) 893 F.2d 861, 867 (1990)
Another example of the way in which the American courts have been engaging in a process of retrenchment can be found in the case of *Hudson v. McMillan*, 44 which is due to come before the U.S. Supreme Court in the near future. The Court of Appeals for the Fifth Circuit found that Keith Hudson, a prisoner at Louisiana State Penitentiary in Angola, Louisiana, had been repeatedly punched by a prison officer in the mouth, eyes, chest and stomach while another officer restrained Hudson. These blows cracked Hudson's partial dental plate, split his lower lip, loosened his teeth, and caused various bruises on his body. The supervisor of these two officers watched them beat Hudson but merely told them not to have too much fun. The Court held that no force was needed, such that the force was objectively unreasonable. Furthermore, the behaviour of the two prison officers was clearly excessive, resulting in an unnecessary and wanton infliction of pain. Despite these findings, however, the Court found that Hudson had suffered insignificant injury to justify invoking the Eighth Amendment. The only reason, therefore, that Hudson did not succeed before the Court of Appeals was because he was not injured seriously enough.

It should be clear from *Wilson v. Seiter* that a good case for showing deliberate indifference can be made in *Hudson*, since the prison officers certainly acted deliberately, and with malice. The question of the degree of injury, in line with the current U.S. Supreme Court approach, should, therefore, be irrelevant, and it is therefore likely that the Court of Appeal's ruling will be overturned.

44 Court Document No. 90-6531. Information is taken from the Petitioner's Brief.
The European Development

Article 3 of the European Convention on Human Rights\(^45\) states that

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This Article is in absolute terms, with no derogation from it being permitted under Article 15\(^46\) of the Convention.\(^47\) The wording of Article 3 differs in specifics from s.12, but is similar in scope to the Canadian prohibition on cruel and unusual treatment or punishment. Given that the Convention has been developing for nearly forty years, and the Charter for less than ten, it is submitted that the European jurisprudence in this area is of useful comparative value to Canadian judges and academics. In deciding the scope of the word "treatment" in s.12, for example, D.C. McDonald J. in Soenen\(^48\) looked at the European Court of Human Rights approach in Ireland v. United Kingdom.\(^49\)

General Principles

Three main prohibitions in Article 3 can be identified. The prohibition against torture may be described as the most severe treatment or punishment at which Article 3 is focused. Inhuman treatment or punishment is seen as slightly less serious, while treatment or punishment likely to degrade an individual is the least that one must prove in order to show that Article 3 has been

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\(^45\) The European Convention for the Protection of Human Rights and Fundamental Freedoms. Came into force September 3, 1953. Hereinafter referred to as "the Convention".

\(^46\) Article 15 of the Convention states that "(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention...." Paragraph 2 of the Article, however, provides that no derogation from Article 3 (or Articles 2, 4(1) or 7) is allowed under this provision.

\(^47\) This can be contrasted with the position in Canada where, as has been seen, s.12 of the Charter seems to be subject to the provisions of s.1.

\(^48\) supra, note 6

\(^49\) (1978) E.C.H.R. Reports, Series A; Vol. 25, noted in Soenen, ibid, at p.211
reached. It should be noted that these distinctions necessarily overlap. As the Commission pointed out in its 1969 report in Denmark, Norway, Sweden and the Netherlands v. Greece ⁵⁰

"It is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading." ⁵¹

Torture

In the Greek case, the Commission said of "torture" that it was

"...often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment." ⁵²

In order to show that torture had occurred, therefore, it was necessary to show both severe inhuman treatment and a purpose to that treatment.

On the basis of this definition, the Commission in Ireland v. United Kingdom, ⁵³ considered that the so-called "five techniques" ⁵⁴ of sensory deprivation used by the Royal Ulster Constabulary involved aggravated inhuman treatment, causing victims physical and mental harm. Since these techniques were used with the aim of eliciting information, there was clearly also a purpose. The Commission therefore unanimously found that these practices constituted both torture and inhuman treatment. The majority of the European Court, ⁵⁵ however, reached a different conclusion, even though the U.K. Government had not disagreed with this finding by the

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⁵¹ ibid, p.186, paragraph 2.
⁵² ibid.
⁵³ supra, note 49
⁵⁴ The five techniques which were used were; Deprivation of sleep; subjecting to constant intense noise ("white noise"); making suspects stand on their toes whilst standing against a wall; covering their heads with black hoods; and depriving them of adequate food and water.
⁵⁵ Judge Sir Gerald Fitzmaurice delivered a separate opinion, dissenting in part.
Commission. The Court stated that torture was intended by the Convention to be characterised by a

"...special stigma to deliberate inhuman treatment causing very serious and cruel suffering."\(^56\)

The Court made quite clear that they were aware that these techniques had a purpose, and were clearly moving away from the Commission's definition in the Greek case,\(^57\) finding that these methods

"...did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood."\(^58\)

Inhuman Treatment or Punishment

In the Greek case, "inhuman treatment" was defined by the Commission as

"...such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable."\(^59\)

As Ralph Beddard points out, the word "unjustifiable" does not mean that the reason for the particular treatment is relevant, but more that the particular circumstances and identity of the victim should be considered. He illustrates this by saying that

"Punishment which may be suitable for a man may be wholly unjustifiable if used against a child."\(^60\)

\(^56\) supra, note 49, p.66, paragraph 167.
\(^57\) David Bonner has suggested that there may be little difference in the Commissions definition of "torture" in the Greek case, which required a particular purpose, and that of the Court in the Ireland case, since in referring to "deliberate inhuman treatment" (my emphasis), the court seems to have in mind some particular purpose. That said, it is clear that the Commission and the Court have different perceptions of the degree of severity of pain and suffering necessary to constitute torture. See "Ireland v. United Kingdom", (1978) 27 I.C.L.Q. 897, at p.900.
\(^58\) supra, note 56.
\(^59\) supra, note 51.
Degrading Treatment or Punishment

"Treatment or Punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience." 61

This definition by the Commission in the Greek case was later followed and developed by the same body in East African Asians v. United Kingdom.* Conduct of a particular level of severity which tends to lower the victim in rank, position, reputation or character either in his own eyes or in the eyes of others, will amount to degrading treatment. This must be evaluated on the basis that while the reaction of the victim is relevant, a State should not be criticized for conduct to which that individual is unreasonably sensitive.

Such, then, are the general definitions that have been developed under Article 3 of the European Convention. A closer look at certain key cases dealing with the treatment of prisoners will both show how these definitions have been used in practice, and highlight the types of conduct that have been held unacceptable under Article 3.

Treatment of Prisoners

In the Greek case, the European Commission mounted a major investigation into the conditions in which political prisoners, amongst others, were detained by the authorities in Greece. In the appendix to the case, some one hundred and thirty pages of individual examples of ill treatment were categorised in detail.63 As a result, this case provides a ruling that was based on an extreme example of systematic mistreatment of prisoners. In its very extremity, it is perhaps not

61 supra, note 51
62 3 E.H.R.R. 76, No 4403/70, paragraph 189.
63 A practice that was frequently cited was "falanga". This involved the beating of a victim’s feet, which gave rise to incredible pain, and invariably broke the victim’s will. Little external evidence was left by this technique. The Commission singled out this practice as one that definitely amounted to both torture and inhuman treatment.
the best case for providing some sort of "benchmark" against which other, more commonplace, prison practices might be measured.

It is in Ireland v. United Kingdom that more helpful guidance, as to the meaning of Article 3 for prisoners, may be found. The case involved the treatment, by the Royal Ulster Constabulary, of fourteen detainees who were suspected of being members of the Irish Republican Army. The Court found that the five techniques of sensory deprivation were

"...applied in combination, with premeditation and for hours at a stretch; they caused, if not actual bodily injury, at least intense physical and mental suffering to the persons subjected thereto and also led to acute psychiatric disturbances during interrogation. They accordingly fall into the category of inhuman treatment within the meaning of Article 3."

These techniques were also degrading because they were such as

"to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance."

Despite finding inhuman and degrading treatment, however, the Court felt that the five techniques

"did not occasion suffering of the particular intensity and cruelty implied by the word torture ..."

J.E.S. Fawcett persuasively argues that this distinction between inhuman treatment and torture is artificial, and the Court's approach hard to justify. As he said

"Inhuman treatment is itself an extreme, its prohibition being absolute, and it is difficult to see how it can be aggravated or extended. To have found that the use of the five techniques, whatever their combination or direction, was not inhuman treatment, was a possible position: but to describe it as inhuman

64 supra, note 49, p.66, paragraph 167.
65 ibid
66 ibid, p.67, paragraph 167.
treatment, but still call for a higher level of severity to make that inhuman

treatment torture is inexplicable.\textsuperscript{67}

A parallel argument might be made about s. 12 of the Charter. "Cruel" treatment or punishment
may equally be regarded as an extreme, and it is very hard to see how the majority of the Court
in Miller and Cockriell could ever have considered "aggravating or extending" this by insisting
that treatment or punishment be both cruel and unusual. Perhaps the European jurisprudence
merely confirms the Canadian experience, namely that emotive words such as "torture", or in
Canada "cruel", will always require comprehensive proof of the most extreme practices, before
any court ruling favourable to a victim prisoner will be given. In practice, however, it was
unnecessary for the European Court to find that torture had taken place since they had already
found a violation of Article 3, on the basis of inhuman and degrading treatment.

In addition to discussing the treatment of prisoners, the Ireland judgment also looked to the
conditions of detention. The R.U.C. had held a number of people at Ballykinler military camp in

"extreme discomfort and (these people) were made to perform irksome and
painful exercises."\textsuperscript{68}

The court concluded that this practice was "discreditable and reprehensible" but was
insufficiently severe to be categorised even as degrading treatment. Indeed, the trend has been
against finding breaches of Article 3 in most prison conditions cases. The Greek case was
exceptional, as the Commission did find that detainees were often held in conditions contrary to

\textsuperscript{68} supra, note 49, p.70, paragraph 180.
Article 3. This included solitary confinement in very small unclean cells. While solitary confinement, without more, has since been held not violate to Article 3.69

"Complete sensory isolation coupled with complete social isolation can no doubt ultimately destroy the personality; this constitutes a form of inhuman treatment which cannot be justified by the requirements of security."70

This general statement by the Commission was noted again by them in Reed v. United Kingdom.71 Here, a prisoner in the U.K. had been isolated for twelve weeks, the first six of these weeks consisting of contact only with prison officers. While the Commission conceded that a relatively short period of segregation could adversely affect a person's health, this was not so in Reed's case. Reed had alleged that he had been physically assaulted by prison officers, and also continually harrassed by being watched and pushed around. The Commission held that such treatment was insufficiently serious to violate Article 3. The treatment or punishment also has to be put into context. Thus, isolating a prisoner in extreme conditions might be justifiable if that prisoner's behaviour has been consistently troublesome.72

In Soering v. United Kingdom,73 the scope and meaning of Article 3 again came before the European Court. The case involved a West German national who was about to be extradited from the United Kingdom to the United States of America, where he faced trial for capital murder. If convicted he was likely to be sentenced to death and to spend years on death row in

69 No. 6038173, Vagrancy v. The Federal Republic of Germany. Here, a prisoner was kept in solitary confinement but the Commission took note of the fact that he was allowed visitors and was not completely isolated. As discussed by Beddard, supra, note 56, at p.103.
71 No. 7630176, paras. 20-23. Also discussed ibid, at p.332.
72 See, for example, No. 2686/65, Zeidler-Kormann v. Austria, 11 Coll. 1020. Here, a prisoner had been isolated wearing only a straight jacket. The Commission and Committee of Ministers accepted the Austrian authorities explanation that these measures had been applied in stages, in line with the applicants increasingly difficult behaviour. Also noted, supra note 66, at p.333.
Virginia. The question for the Court was whether the U.K. would be in breach of Article 3 if it extradited Soering to the U.S.A. At the centre of this was not so much the extradition itself as the prison conditions and associated mental problems that would be caused by the applicant being incarcerated on death row.

After exhausting his remedies in the U.K., Soering lodged an application with the European Commission, who quickly found that application admissible, though expressing its opinion that Article 3 had not been breached. A measure of the status of this case can be gained from noting that it took less than a year for the application to be processed by both the Commission and the Court. This unusually quick turnover must indicate that the Court felt the issues raised to be of immediate and central importance.

The European Court began its Article 3 analysis by noting that for ill treatment or punishment to fall within the scope of Article 3 it must not fall beneath a minimum level of severity, taking into account all the circumstances of the case. Of relevance to prison conditions cases was the Court's statement that

"In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment ... In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him."

Within the prison context, therefore, the treatment or punishment would have to go beyond the usual experiences of incarceration. While capital punishment, per se, was permitted under Article 2 of the Convention, treatment or punishment leading up to that was properly a

74 The application was lodged with the Commission on July 8, 1988, and judgment was given by the Court on July 7, 1989.
75 ibid, pp.472-473
76 The so called "death row phenomenon" - described by the Court as "a combination of circumstances to which the applicant would be exposed if ... he were sentenced to death". ibid, p.464, para. 81
matter for consideration under Article 3. For Soering's case to come within the terms of Article 3, therefore, the European Court had to be convinced that, if he was returned to Virginia he would be found guilty of capital murder, sentenced to death and then be sent indefinitely to death row. If this stage was satisfied, then the Court could consider whether the years of incarceration which Soering would face on death row would amount to inhuman or degrading treatment or punishment.

Before agreeing to extraditing Soering to the United States, the U.K. government had requested a guarantee from the Attorney of Virginia that if Soering was found guilty he would not be executed. In reply the only commitment that the Prosecuting Attorney was willing to give was to promise to notify the sentencing judge of the U.K. government's wish that Soering not be put to death. It was quite clear, however, that the same Attorney would be requesting a death sentence on behalf of the state of Virginia. In light of this the Court felt that they could not conclude that

"there are no substantial grounds for believing that the applicant faces a real risk of being sentenced to death and hence experiencing the "death row phenomenon"." 77

Article 3 was therefore brought into play, with the Court essentially looking at the conditions of confinement Soering could expect in death row.

The Court found that a condemned prisoner could expect to spend six to eight years on death row before being executed. 78 In addition to having to endure the conditions on death row, including violence and sexual abuse, the prisoner also had to deal with

77 ibid, p.472, para. 98
78 ibid, p.475, para. 106
"the anguish and mounting tension of living in the ever present shadow of death" 79

The Court was not persuaded that the extra security needed for prisoners sentenced to death justified the severe regime 80 operated on death row, especially given the length of time most prisoners could be expected to remain there.

The age and mental state of the applicant at the time of the offence could also be relevant to a determination under Article 3. As the Court stated

"... The applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3" 81

They also felt that the option of Soering being extradited to his native Germany, where there was no death penalty provided a fairer alternative which would serve the

"legitimate purpose of extradition ... by another means which would not involve suffering of such exceptional intensity or duration" 82

The Court therefore found that if the Secretary of State's decision to extradite Soering was implemented, this would breach Article 3.

79 ibid, p.476, para. 106
80 The Court noted the stringent rules and conditions of confinement found on Virginia's death row. Prisoners were allowed about 7-8 hours recreation per week in the summer, and six hours recreation in the winter (weather permitting). Death row inmates were also allowed one hour of out-of-cell time each morning, and could also leave their cells for visits, to go to the library, or prison infirmary. For the remainder of each day, the prisoner was confined in his cell, unless performing a work assignment, such as cleaning duties. "When prisoners move around the prison they are handcuffed with special shackles around the waist." ibid, p.459, para. 63.
81 ibid, p.477, para. 109
82 ibid, p.478, para. 110
Article 3-Now

Soyer highlights one of the great strengths of Article 3 over s.12 of the Charter. As the Court stated:

"Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 in time of war or other national emergency. This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 enshrines one of the fundamental values of the democratic societies making up the Council of Europe". (my emphasis)

The Supreme Court of Canada, in its continuing referral to the possibility of a s.1 justification to a s.12 violation is surely failing to fully protect the "fundamental values" to which Canadian society purports to adhere. The absolute nature of Article 3 of the European Convention on Human Rights is one of its greatest strengths, a strength that the courts in Canada would do well to note.

As has been seen, the European Commission and Court's interpretation of Article 3 has developed very much on a case by case basis. This is in line with their belief that the Convention is a "living instrument" which must flexibly adapt to changes in social attitudes within the countries who adhere to the Convention. To some extent, this may explain why the Court's definition of torture in the Ireland case was noticeably different to that of the Commission in the Greek case. Perhaps the Commission, faced with the extreme and frequent practices of the Greek police, also wanted to make a covert political statement about the Greek rulers of that time. The Court in the Ireland case, on the other hand, might well have been trying to avoid labelling the police of a so-called democratic government as torturers. In the

83 ibid, p.467, para. 88
Canadian context, such political considerations should not play a part, especially since the courts are concerned primarily with the actions of only one country; their own. The Charter, like the Convention, is clearly intended to be a living instrument. While both documents should therefore be flexible, the practical experience, especially in relation to prison cases, is that violations will rarely be found. The European Commission and Court stress that treatment of a certain minimum level must be shown before such treatment contravenes Article 3. Invariably, a major difficulty with this is that insufficient factual evidence can be produced to convince the Court beyond reasonable doubt that something sufficiently serious has taken place that is contrary to Article 3. The Supreme Court of Canada, as has already been noted, also insists upon clear and substantial proof of unacceptable behaviour before it will invoke s.12. In constructing these high standards, the European institutions and the Canadian courts may be trying to deter unfounded allegations by inmates wanting little more than public exposure. In so doing, however, it may also allow institutions such as the police, and prison authorities, to freely violate individual rights, secure in the knowledge that it will only be in the rarest of cases that Article 3, or s.12, will actually be found to be violated. This emphasis on "seriousness" therefore gives too limited a scope to the meaning of Article 3, and in Canada, of s.12.

Comparing Section 12, Article 3, and the Eighth Amendment.

When placed alongside long standing documents such as the U.S. Bill of Rights or the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms is undoubtedly still in its youth. Its youth, however, does not, and should not, make it inferior to its peers in the United States and Europe. Indeed, courts interpreting the Charter are in the favourable position of being able to look to a wealth of case law under the Convention and U.S. Constitution for guidance in cases that have never been before the Canadian courts.

84 See Chapter One, Footnote 74, and accompanying text.
As should now be clear, the judicial approach to "cruel", "inhuman", "unusual" or "degrading" acts under the three documents is very far from identical. At the more conservative end of the spectrum, the U.S. approach under the Eighth Amendment is becoming increasingly more restrictive. Partly because the word "treatment" is not incorporated into the proscription, the U.S. Supreme Court is now clearly of the opinion that "deliberate indifference" on the part of prison officials must be shown in all cases involving conditions of confinement, since such conditions are not part of the punishment formally meted out to inmates. It is unlikely that such a position will be reached in the Canadian courts, since the word "treatment" in s.12 widens the scope beyond the sentence imposed by the court. Even in relation to the word "punishment", it is clear that the Supreme Court of Canada has indicated that the effects of a punishment are properly a matter for consideration under s.12, unlike the method by which officials impose that punishment (in other words, a more subjective analysis of the intent of prison officers). As Lamer J. said in R. v. Smith (1987) 5 W.W.R. 1

"...s.12 is concerned with the effect of a punishment, and, as such, the process by which the punishment is imposed is not, in my respectful view, of any great relevance to a determination under s.12." (my emphasis)

The Canadian approach would therefore seem to discount the need for proving "intent" in those accused of cruel and unusual behaviour. The Supreme Court of Canada has also made clear that the conditions under which a sentence is served, are subject to s.12, rather than being a peripheral question as now seems to be the case under the Eighth Amendment.

Showing intention to cause harm under the European Convention is also considerably less important than under the Eighth Amendment. It would appear that it is only in establishing that "torture" has taken place that the European Court wants to be convinced of deliberate inhuman

85 [1987] 5 W.W.R. 1
86 Ibid., p. 45
87 See Chapter One, Footnote 62 and accompanying text.
treatment. Inhuman or degrading treatment or punishment, which has more relevance to prison conditions cases, do not seem to have this subjective element under the European approach.

Conclusion

It might well be concluded, therefore, that the most conservative and restrictive set of protections are those that exist under the Eighth Amendment. The U.S. requirement for showing "deliberate indifference" imposes an undesirably heavy burden on prison plaintiffs. To a limited extent, Article 3 of the European Convention is next on the "conservative scale" because of its requirement of showing "intent" in relation to torture. Both Article 3 decisions and cases decided under s.12, have made clear that treatment or punishment brings conditions of confinement clearly within their individual prescriptions in a way that the Eighth Amendment seems increasingly unwilling to do. Where s.12 of the Charter clearly falls behind the Convention is in relation to the s.1 justification. Once an applicant has successfully shown that there has been a violation of that Article, that is as far as they have to go. A litigant in a s.12 case who is similarly successful at the s.12 stage still has to prove that the act complained of is not "demonstrably justified in a free and democratic society". The European position in this respect clearly shows that the rights protected under Article 3 are regarded as centrally important rights. The current Canadian position gives out the message that the rights under s.12 are simply not important enough to be treated as absolutes. Perhaps Canadian courts should, in future s.12 cases, be more aware of the strengths of the European approach, and the risks of taking the restrictive road of the Eighth Amendment. Given the signs of retrenchment that cases such as Lyons and Steele highlight, the time has come for the Supreme Court of Canada to consider the best approach for future s.12 litigation to take.
CHAPTER THREE

THE TREATMENT OF PRISONERS INFECTED WITH THE AIDS VIRUS

"I was segregated in a cell with " Beware " signs. They gave me reason to believe I was going to die shortly and it broke me down mentally and emotionally."

"I was then placed in the so called AIDS ward, where I was made to sleep on the floor."

"Once in the AIDS unit, I felt like an animal on display at the zoo.....Basically I am placed on a type of death row and this is where I have been for the last three years."

(Extracts from letters written by prisoners with AIDS)
Introduction

"There are few subjects among the many problems of the day which strike such chords of alarm as does the subject of AIDS...the disease is at this point an incurable killer; thus it generates, understandably, great fear...the disease is incompletely understood by experts and laymen alike; thus it generates more fear through uncertainty. For these reasons, it is not surprising that, in general, people want something to be done about AIDS, but are not sure what that "something" should be." 2

As numbers of those infected with the AIDS virus have increased over the past decade, many new challenges have been faced by the medical and legal professions. There is still much misunderstanding and confusion about the disease, and this is reflected in the inconsistent, and often extreme, reactions of prison administrators, throughout North America, towards prisoners who have contracted the AIDS virus. Prisons contain a large number of people who are especially at risk of contracting the AIDS virus, both through the sharing of needles in intravenous drug use, and through participation in high risk sexual activity. Given this position, it might seem obvious that an enlightened and well educated response on the part of correctional officials would constitute an essential element in the fight to minimise AIDS infection in prisons. Often, however, this has not been the case.

In this chapter two particular aspects of the treatment of prisoners with the AIDS virus 3 will be examined. These aspects, administrative segregation and education about AIDS, have been, and will continue to be, hotly debated in both Canadian and U.S. corrections. Central to the paper is the question of whether these practices go beyond what is legally acceptable, and whether, as a consequence, a legal remedy under the Canadian Charter of Rights and Freedoms might be available. The protection, in s.12, against cruel and unusual treatment or punishment will be the

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2 Per Ackerman, District Judge, in Telepo v. Fauver File No 85-1742
3 For the purposes of this paper, "prisoners with the AIDS virus" should be taken to include those who are HIV seropositive but asymptomatic, those with ARC (AIDS Related Complex), and those suffering from AIDS itself.
particular focus of this chapter. A review of existing s.12 case authority will be made in order to assess the types of criteria which courts have adopted in deciding whether to categorise a specific practice as "cruel and unusual". As has been seen, the courts have been very reluctant to find violations of s.12 in the past. A recognition that s.12 may be of limited help will be qualified by suggesting what should, on public policy grounds, be the approach adopted by corrections in Canada. An examination of whether a particular practice violates s.12 cannot, however, be undertaken in a vacuum. An awareness of what is happening in other jurisdictions will help in evaluating whether Canadian policy and practice goes beyond what is reasonable under the tests developed for s.12. The chapter will end with the suggestion that while the present position in Canada is in many ways less extreme than in the United States, this can easily change. Canadian Corrections should acknowledge that AIDS is a continuing problem and therefore develop a package of measures that will deal with future, and potentially more serious, AIDS related challenges.

Acquired Immune Deficiency Syndrome

Acquired Immune Deficiency Syndrome (AIDS) is a serious and ultimately fatal disease that weakens and eventually destroys the body's immune system, laying it open to attack by all types of infection. The Human Immuno Deficiency Virus (HIV) which gives rise to AIDS has been shown to be transmitted predominantly by sexual contact, by contaminated blood and blood products and by the sharing of dirty needles, most typically seen with intravenous drug users. The number of people suffering from AIDS in Canada is continuing to rise, whilst numbers of those carrying the AIDS virus, but as yet showing no symptoms, remains a matter for speculation.

For example, in figures released by the World Health Organisation, in Update: AIDS Cases Reported (1st February 1991), the number of persons with AIDS in Canada in 1988 was equivalent to 3.6 cases per 100,000 of population. The comparable figure for 1989 is higher, at 3.8 cases per 100,000.
Since the first reports of AIDS in 1981, 4403 cases of AIDS have been reported in Canada. A comparison between Canada and the U.S. of the number of reported cases of AIDS in the general population reveals, for 1989, a figure of 13.9 cases per 100,000 for the United States, and a figure of 3.8 cases per 100,000 for Canada. Clearly, therefore, the impact of AIDS on the general (and, by implication, the prison) population in the U.S.A., in terms of those infected, has been greater than in Canada. As a result, Canada can benefit from the practical experience of those south of the border in developing health care strategies designed to deal with the growing problem of AIDS infection.

Section 12

The scope and meaning of this section of the Canadian Charter has already been discussed. Taking particular note of two cases of the Supreme Court of Canada, R v. Smith and R v. Lyons, it is clear that the situation which faces a potential litigant bringing a section 12 challenge to AIDS-related treatment of prisoners is as follows. The individual must establish that treatment, such as segregation, is grossly disproportionate to the fact that that individual has become infected with the AIDS virus. He will need to show that adequate alternatives exist to his incarceration in isolation, though the decision in Lyons would suggest that he will need to show something more than a mere alternative. Thus, if he can show that segregation does not in fact achieve a valid social aim and is in breach of the "evolving standards of decency" test used in both U.S. and Canadian jurisprudence, he will enhance his chances for success.

6 Constitution Act, 1982, as enacted by the Canada Act, 1982, c.11 (U.K.), hereinafter referred to as the Charter.

7 [1987] 1 W.W.R. 1

8 [1988] 61 C.R. (3d) 1

9 It is recognised that there are both women and men incarcerated in Federal penitentiaries. On the basis, however, that the majority of those incarcerated are male, the designation "he" will be here used. This should not be taken to mean, however, that propositions of law and public policy are directed only at male inmates.
There are currently no cases dealing with s.12 and AIDS in prison. Neither *Smith* or *Lyons* concerned prison conditions, though, as has been seen, they foresaw the possibility of such being the subject of prison litigation. Indeed, the only prison condition case to find cruel and unusual punishment taking place was a case decided under the similarly worded *Canadian Bill of Rights, McCann v. The Queen*, where a vast body of evidence had to be led to ensure success. A prospective litigant in the AIDS field therefore faces an uphill battle, both against an ingrained judicial deference towards prison authorities and against a heavy burden of factual proof. What this chapter advocates, therefore, is that, in the absence of any authority in Canada on the subject of AIDS in prison, the Canadian courts have a positive duty to turn away from an extreme reluctance to intervene and if necessary to look to judicial opinion in the United States. It is only in this way that they will be able to deal in an effective and informed way with the challenges that the AIDS epidemic poses to prisons in Canada.

It is helpful, therefore, to look to decisions of United States courts in this area. This is something that both McIntyre J. and Lamer J. approved of *Smith*. Mr. Justice McIntyre, in referring to gross disproportionality, found U.S. case authority on the Eighth Amendment to be helpful. Quoting from an American case, *Trap v. Dulles*, he said,

"In my view, in its modern application the meaning of "cruel and unusual treatment or punishment" must be drawn from the evolving standards of decency that mark the progress of a maturing society."  

Lamer J. (writing for himself and Dickson C.J.C.) stated that the

"...numerous criteria proposed pursuant to s.2(b) of the Canadian Bill of Rights and the Eighth Amendment of the American Constitution are, in my opinion, useful as factors to determine whether a violation of s.12 has occurred."  

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11 *supra* note 7, p.13, quoting from *Trap v. Dulles* 356 U.S. 86, 101

12 *ibid*, p.44.
In *Smith*, therefore, the Supreme Court of Canada clearly admitted the possibility of referring to cases decided under the Eighth Amendment in a s.12 analysis. These cases have been decided, *inter diu*, on the basis of the similarly worded Eighth Amendment of the U.S. Constitution, which states that

"...excessive bail shall not be required nor excessive fines imposed nor cruel and unusual punishments inflicted."

Using these American cases can be justified on the basis that the historical origins of s.12 of the *Charter* and the Eighth Amendment may be traced back to a common antecedent, the English Bill of Rights of 1689. Further, both the *Charter* and the U.S. Constitution give courts similar powers to review legislation. It is therefore reasonable for a Canadian court to look to the United States for persuasive, albeit not binding, guidance on problems it has not faced before. These American cases will be discussed later in the paper.

Before discussing whether or not violations of s.12 may have occurred (or could potentially occur in the future), certain questions have to be addressed. Firstly, it is important to identify whether any real problem with AIDS actually exists in Canadian penitentiaries. Obviously, if it cannot be shown that there is at least reasonable cause for suspecting that there is a problem, any discussion of legal considerations or public policy questions in this area will be futile. Secondly, the current practices and policies in the Federal and British Columbia correctional systems will be surveyed. For the purpose of a s.12 analysis, however, it will not be enough to evaluate these systems solely on the basis of correctional policies and practices elsewhere in Canada since this would amount to evaluation in purely Canadian terms. Comparison with selected correctional systems in the United States will, therefore, add a wider perspective.

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13 For further discussion of this relationship, see Michael Jackson's book, *Prisoners of Isolation*, pp84-88
It should be acknowledged that these selected U.S. and Canadian correctional systems are not ideally suited for such comparison. In most U.S. systems, for example, overcrowding is an ever increasing problem. This does not take place to nearly the same extent within Canada. The composition of individual prison populations may also vary from institution to institution. In many U.S. prisons, blacks and hispanics form a major part of the inmate population. Something of a parallel can, however, be drawn with Canada, where there is a significant native component to inmate populations. It is submitted, though, that these potential problems in a comparison of U.S. and Canadian corrections should not be overstressed in the context of this chapter. The AIDS disease is prevalent worldwide and can affect anyone regardless of the colour of their skin, or the particular country or prison in which they happen to live. Its main methods of transmission, high risk sexual practices and intravenous drug use, are activities which are both fuelled by basic needs, whether they be sexually motivated or motivated by an addiction to drugs. AIDS, in the means by which it can be transmitted, does, in a sense, equalize those that it affects. A useful, if not perfect, comparison of U.S. and Canadian correctional approaches to AIDS may, thus, be made.

AIDS in Prisons

The first question to be addressed, therefore, is to establish to what extent AIDS is prevalent in Canadian penitentiaries. Here, however, only the Federal and British Columbia correctional systems will be looked at. The Correctional Service of Canada (CSC) does not routinely test all incoming inmates for the AIDS virus. They have, nonetheless, identified sixty-nine HIV infected inmates since 1985. There are currently twenty-six inmates known to be HIV infected in the Federal system, two of whom are in disciplinary dissociation. One inmate has developed full blown AIDS, but he is still in general population. B.C. Corrections has no reliable

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14 Letter from Jacques H. Roy, M.D., Director General, Health Care Services, CSC, Ottawa.
statistics about numbers of HIV positive inmates in their system, since they have no mandatory testing of inmates.\textsuperscript{15} Given this lack of data, it is very difficult to assess the scale of infection amongst prisoners.

One survey, examining the relationship of needle use and sexual activity to HIV seropositivity in prisons in Canada, does, however, exist.\textsuperscript{16} Despite some limitations,\textsuperscript{17} the study does go some way towards indicating whether HIV infection exists in Canadian prisons. The study found that 7.7 percent of the survey group were HIV seropositive. All of these were intravenous drug users and over half reported prostitution as a major source of income before incarceration. This percentage figure seem much higher that the figures noted above for the Federal Correctional system as a whole might suggest.\textsuperscript{18}

Similar studies in the United States have revealed seroprevalence rates ranging from 17 percent in New York State prisons to 0.2 percent in Indiana state prisons.\textsuperscript{19} In New Jersey, the Department of Corrections estimates that between 30 and 50 percent of the prison population is now HIV infected.\textsuperscript{20} These high figures in part reflect the higher incidence of AIDS in the United States. The CSC, for example, reports only eight cases of full blown AIDS since the start of the AIDS epidemic.\textsuperscript{21} The comparable figure for the U.S. is 5411 cases.\textsuperscript{22} Of greater concern is the fact that in 1989 the percentage increase in AIDS cases in U.S. prisons and jails


\textsuperscript{16} The results are of limited use, because the study; "Does not purport to determine prison seroprevalence since neither the entire population of this institution nor a truly representative sample is being tested", ibid, p.168.

\textsuperscript{17} The CSC is currently considering an HIV seroprevalence study which would help reveal the extent of AIDS infection. (Letter from the Director Of Health Services for the CSC) "HIV Infection among Prisoners" by Judy Greenspan, in FOCUS, The AIDS Health Project, Vol. 4, No.6, May 89.

\textsuperscript{18} "AIDS Update", National Prison Project Journal, Fall 1990, p.26

\textsuperscript{19} supra note 14

\textsuperscript{20} "AIDS project presses for Programs behind walls", National Prison Project Journal, Winter 1991, p.3
was for the first time higher than in the general population? Given the lack of empirical data in Canada, it is difficult to predict whether a similar position exists in Canada. What can be seen, though, from the one Canadian survey, and the U.S. figures, is that the trend is for at least some examples of AIDS infection to be found in prison environments.

From the limited information available, therefore, it is clear that some inmates are HIV infected in Canadian prisons. The unknown quantity is the extent to which HIV is transmitted within prison. Without evidence that HIV can be so transmitted, all official measures to prevent such putative infection have little validity. There are currently no studies to suggest whether this occurs in Canada. Evidence from the United States and the United Kingdom, however, suggest clearly that such transmission could take place. As has been seen, the AIDS virus can be spread by contact with infected blood and other "bodily fluids". The sharing of blood contaminated IV drug equipment is thus a good conduit for the disease, as is unprotected sexual activity, such as anal intercourse. In one U.S. study, between 50 and 95 percent of people in prison were thought to be involved in homosexual activity, whether consensual or otherwise? Many prisoners are not admitted homosexuals when they begin their sentences, but pressing sexual urges, especially amongst younger inmates, may lead many to take part in homosexual activity when they have no access to women. A British Report revealed consistent findings that between one quarter and one third of long term prisoners engaged in homosexual sex.

23 ibid, the increase for prisons was 72 %, for the general population, it was 50%. Even allowing for better reporting measures, these figures suggest a high concentration of HIV positive individuals in prisons.
24 U.S. and Canadian prisons contain a number of individuals particularly at risk of contracting the AIDS virus, especially those incarcerated for drugs related crimes. If those inmates have become addicted, it is quite possible that they will continue to use illegal drugs in prison, using whatever IV needles they can obtain, regardless of whether those needles are sterile or not. Furthermore, individuals incarcerated for any length of time may reasonably be expected to give vent to their sexual urges, possibly by engaging in high risk, unprotected sexual activity. Consequently, prisons throughout the world present many opportunities for the spread of HIV infection.
Outbreaks of gonorrhea and other sexually transmitted diseases in prison suggest that HIV could also be passed on sexually in prison. A study done in the New York City Jail System has highlighted conclusively that sexual activity does occur in jails. It traced a marked increase in the incidence of new cases of gonorrhea in prisoners who had been incarcerated for more than a month. Since the incubation period for gonorrhea is less than seven days, these new cases could only have come from inside the prison. In a study done in Maryland, it was found that 0.5 percent of prisoners seroconverted while incarcerated, over a two year period. While this seroconversion rate is low, it does show that HIV can be transmitted in prisons.

Drug use is also ongoing in prisons. In New York City Jails, for example, 50 percent of inmates are estimated to be either former or current drug users. Since needles are not permitted in prison, it is inevitable that inmates will have to share the few needles available. A recent survey of injecting drug users found that 23 percent of those questioned claimed to have injected while last in custody, with three quarters of those saying that they had shared needles or syringes. Of the surveyed sample, 12 percent are now HIV positive.

It is clear, therefore, that Correctional Authorities must strive to prevent transmission of a virus that many studies have shown is increasingly present in prisons. The fact that this evidence comes from prisons abroad should not detract from the fact that it is in prison that this happens, and in many respects what goes on within prison is determined not by which country the prison is in, but by what the basic needs and drives of the inmates are.

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27 Personal Communication with Dr. Diane Rothon, Medical Director, B.C. Corrections.
28 Maryland State Division and John's University 1988. Reported In Focus, supra note 19, at p.4.
30 Survey by Dolan, Donoghue and Stimson of Charing Cross and Westminster Medical School Centre for Research on Drugs and Health Behaviour. Howard Journal of Criminal Justice, August 1990, and discussed ibid at p.5
Such, then, is the evidence which suggests that AIDS does exist to a sufficient extent to justify a survey of two specific aspects of the treatment of prisoners with AIDS. A $s.12$ analysis of each aspect will follow a brief examination of examples and features of that aspect.

**SEGREGATION**

"In the hole of hell I sat alone to die. So I shall. Afraid, I hide among myself, deep in my mind. Still afraid of hell. It is dark as I dig into my mind, searching." $^{31}$

Isolation of prisoners who are found to be have AIDS associated infection from the rest of the prison population has been a common correctional response to the arrival of AIDS in prison. $^{32}$ This isolation can be in the form of solitary confinement in a single cell, or in a prison medical ward with other infected prisoners. Two types of segregation should be distinguished. Sometimes segregation will be justified on the basis that it is necessary to facilitate medical treatment of the prisoner. This argument applies most strongly to prisoners suffering from full blown AIDS. $^{33}$ The other type of segregation is basically administrative in nature. The aim is to prevent the spread of AIDS to other individuals, as well as to protect HIV infected inmates from violent attack from those in the general prison population who find out about that individual's illness. It is a matter of considerable doubt whether either of these types of segregation can really be justified today. For the purposes of this chapter only administrative segregation will be focussed upon. It should be noted, however, that the distinction between


$^{32}$ In America, for example, Alabama, Colorado, Georgia, Idaho, Iowa, Missouri, Nebraska, New Hampshire, Oklahoma, West Virginia and Wyoming all have mandatory testing and segregation. Legal Issues Affecting Offenders and Staff, Washington; National Institute of Justice, U.S. Department of Justice, May 1989.

$^{33}$ Prisoners suffering from the opportunistic infections inherent in full blown AIDS will often need intensive medical treatment which can most easily be offered in a hospital environment. The only treatment that asymptomatic HIV prisoners might require is with AZT, an anti-cancer drug that delays the onset of end stage AIDS. This can be easily administered to individuals in general population, so that medical isolation in such cases would be hard to justify.
medical and administrative segregation is not always that clear. An inmate who was originally isolated for medical treatment may stay in isolation once successfully treated, justified, perhaps, as being necessary for their protection from other inmates (as happened in *Roe v. Faivre*).

**Current Practices - Federal and B.C. Corrections**

B.C. Corrections does not routinely segregate HIV infected inmates, and the CSC states that currently there is no one in segregation in the Federal system. This does not mean that segregation will not take place in the future and, indeed, the author knows of at least two recent instances where HIV positive inmates in Federal Corrections have been kept in some form of isolation approximating to segregation. In one case an HIV infected inmate, Pierre Maltais, has been held in isolation at the High Security Archambault institution in Quebec. Maltais had previously been housed at the Centre Federal de Formation in Laval, where he had been kept in the general population, allowed to participate in a training programme, and allowed access to a physician in Montreal who had some experience of HIV infection. He was transferred from this medium security institution to Archambault as a result of allegedly threatening to bite a guard and so pass on the AIDS virus. Since it has been estimated that it would take an injection of four litres of saliva directly into one's bloodstream to assure transmission of HIV, this alleged threat should not have been treated too seriously. On arrival at Archambault, Maltais was subject to a violent beating by other prisoners, who knew of his HIV status. Since then, he has been in segregation. He alleges that he has been denied access to a telephone, to a low fat diet (despite recurring liver problems), and has been beaten up by guards clad in rubber clothing.

35. *supra*, notes 14 and 15.
37. *ibid*, and also reported in a letter to *PWA-RAG*, a prisoner newsletter distributed in the
38. Alastair Clayton, former head of U.S. Federal Centre on AIDS, as reported in *PWA-RAG*, p.17
He also claims that he has no access to a specialist physician (other than a weekly visit to the Penitentiary doctor).

This example illustrates the kinds of prejudices and dangers that still exist for HIV prisoners in a correctional system that, in practice, has no uniform approach to the treatment of such afflicted inmates. While it would seem that official policy should dictate that segregation no longer takes place in Federal and B.C. penitentiaries, as long as isolated incidents of segregation, such as the one described above, continue to be reported, it is valid to ask whether s. 12 of the Charter might offer a remedy.

The argument that prisoners with full blown AIDS can get better medical attention if they are separated from other inmates is not one that is supported by some experiences in the U.S. In an investigation at Connecticut Correctional Institution at Somers, the conditions under which AIDS inmates were kept were not conducive to their continued health. While HIV inmates were not segregated, as soon as they were medically classified as having AIDS, they were automatically confined in Ward Nine of the prison hospital. Since prisoners were not always unwell, and hence could in theory have returned to the general population, this segregation is clearly as much for administrative as for medical reasons.

"As part of this segregation, the inmates were prohibited from participating in religious services, indoor recreation in the gymnasium, educational or vocational programs, and had no access to the dining hall, barber shop or general library. They ate all meals, served on paper plates, while sitting on their beds, They received their adult visitors wherever space could be found, often in an empty room on the hospital floor or even in the utility closet in the hall."

39 If the above scenario could be shown to be largely true (and corroboration of Maltais's allegations would be difficult) then it might well be possible to construct an argument showing that s.12 had been violated. His treatment certainly seems to be grossly disproportionate, especially since Maltais's only "wrong" would seem to be that he has tested positive for the AIDS virus.

40 supra, note 31, p.49
In addition to having to live with these conditions, the AIDS prisoners had to cope with watching each other die. As one of the lawyers representing the prisoners wrote;

"When we started visiting the inmates in the summer of 1988, four inmates died within the span of three months. Each death had a devastating effect on each of the inmates in the ward."\(^{41}\)

The segregation of the AIDS prisoners resulted in a situation where they were unable to participate in any of the usual prison activities, which would have helped to keep their minds off their illness. They were isolated in one small ward for practically the whole day, and were constantly reminded of the illnesses they faced by the fact that others of their number became seriously and distressingly ill. These conditions were challenged in \textit{Smith v. Meacham}.\(^{42}\) One year after the complaint was filed, a consent judgment was signed, the effect of which was to radically change Connecticut's policy and practice in relation to AIDS and HIV infection. Blanket segregation on the basis of HIV infection is now prohibited, and medical segregation is only to be used for those with end-stage AIDS (in a ward for all terminal illnesses, not just AIDS). Inmates with AIDS related opportunistic infections are treated in the hospital, and once they have recovered are returned to the general population.

The Connecticut experience provides useful guidelines to Correctional officials in Canada. The Connecticut conditions of confinement prior to the decree were clearly not conducive to the improved medical treatment for inmates. From an administrative point of view, this decree has shown that non-segregation of inmates can work successfully. As one of the prisoner's lawyers has noted;

"Since January of 1989, there have been no reported incidents of violence or problems resulting from the integration of inmates with AIDS at CCI-Somers. The prison population, as well as staff members and correctional officers, have in fact become more enlightened about and sensitive to the issues surrounding...

\(^{41}\) ibid, p.50
\(^{42}\) File No. H-87-221 (D.Conn. filed March 6, 1987)
AIDS in prison. A support group for HIV infected inmates has started in the general population.\textsuperscript{43}

The Connecticut approach also helps to discredit the argument that inmates should be segregated for their own protection. This argument is only persuasive as long as guards, inmates and administrators are misinformed about AIDS. Rather than segregating all HIV afflicted inmates, prisons should provide protective custody to those that request it. The provision of informed education to staff and inmates certainly seems to be a way of reducing violent attacks based on fear and ignorance. As J. Michael Quinlan, Director of the U.S. Federal Bureau of Prisons, has stated:

"Eighteen months ago, it was highly likely that a prisoner would be vulnerable to assault or worse if it became known that he or she was infected. That is not as true as it was. People are more understanding of the virus now, they are more tolerant of people who are infected, and life goes on a great deal more routinely when inmates are infected and it becomes known to the institution."\textsuperscript{44}

This is further supported by evidence noted in the recent report of Lord Justice Woolf's inquiry into the prison riots which took place in England in April 1990.\textsuperscript{45} The report notes that a co-ordinated AIDS education programme at Saughton Prison in Edinburgh, which was aimed at both staff and inmates, seemed to show

"...that there was not the same degree of ostracisation of HIV prisoners..."\textsuperscript{46}
as the inquiry had noted when visiting Wandsworth prison in England, where there was no such AIDS education.

A policy of segregation also lulls inmates into a false sense of security by suggesting that all inmates who are HIV positive or suffering from AIDS have been isolated away from the general

\begin{itemize}
    \item \textsuperscript{43} supra, note 31, p.52
    \item \textsuperscript{44} AIDS and the Courts (1990), ed. by Clark C. Abt and Kathleen Hardy, p.109.
    \item \textsuperscript{46} ibid, para.12.362,p.334
\end{itemize}
population. In reality, there is no way that all prisoners infected with the AIDS virus can be detected and isolated. Even with a mass testing programme of all inmates, there is a potential for inaccurate results. Inmates in general population will continue to engage in high risk behaviour, believing themselves to be safe. In Canada, where there is no mandatory HIV testing, the possibility of prejudicial behaviour, and even segregation, may result in inmates who know, or suspect, that they are HIV positive, or have AIDS, to refuse to go to hospital for treatment, at considerable risk to their health, in order that their status will not be discovered. Segregation will therefore only isolate those individuals who voluntarily get tested or admit their status. This will leave a potentially large number of seropositive individuals undiscovered and in general population. One commentator has observed that this would be rather;

"...like removing an ant from your home while leaving the anthill."

From a public policy point of view, therefore, segregation of either HIV afflicted or AIDS afflicted inmates is not a practice that should be considered by corrections officials in Canada. Medical isolation of those in the end stages of AIDS may be justified, but for all others medical treatment can be administered just as effectively in general population. Isolation can hasten the death of those isolated and may precipitate infection amongst a general population who think that it is safe to engage in high risk activities because all infected persons are segregated.

Does segregation violate s.12?

Segregation on the basis solely of HIV status is not the policy in either the Federal or B.C. Provincial Correctional systems. Where it occurs, regardless of policy, however, inmates

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49 supra note 35
should have recourse to s.12 of the Charter. The totality of the conditions in which segregation is served will be relevant to the question of whether the court finds that the segregation is grossly disproportionate. It will not be enough to rely on individual tests set out in Smith, however. As Lamer J. stated in that case,

"...the determination of whether the punishment is necessary to achieve a valid penal purpose, ..., and whether there exist valid alternatives to the punishment imposed, are all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate."

A prospective litigant must therefore try to establish that as many of these guidelines as possible show that segregation is grossly disproportionate. It is submitted that isolation of an inmate who has tested HIV positive is indeed "so excessive as to outrage standards of decency" and hence to be grossly disproportionate. It clearly "goes beyond what is necessary for the achievement of a valid social aim", whether that social aim is to prevent AIDS infection from spreading or to facilitate its treatment. Medical isolation, far from improving an inmate's life expectancy, can be expected to shorten it. Isolation alongside others dying from the disease has been seen to be a traumatic experience. The mere boredom and despair of being left alone to think about one's illness, may also hasten the onset of full blown AIDS. For most infected inmates, isolation should only be needed when they are in the final stages of AIDS and require constant medical attention. For all others, a less excessive option exists, being hospital treatment for opportunistic infections, and then return to general population. Any segregation beyond this point should therefore be considered to be purely administrative in nature.

Evidence would also need to be led that showed that high risk behaviour was ongoing in prison, that such behaviour frequently led to transmission, and that the only way to stop this would be to segregate those who could infect others. Isolation in order to protect an individual with AIDS, or HIV infection, from violent attack is also an excessive option. With proper and thorough education of all inmates, such isolation might not be necessary. If, however, an

50 supra note 7, p.44
inmate feels threatened he should be able to request protective custody, rather than being told that he must be protected. It is certainly true that adequate alternatives do exist to isolation of the individual. The Connecticut experience suggests that an informed education programme can help reduce the need for protective custody. This view is supported by the opinion of J. Michael Quinlan, of the U.S. Federal System.

So far, no Canadian cases have had to deal with the question of segregation of AIDS infected inmates. It is instructive, therefore to look to cases decided under the Eighth Amendment in the United States. A survey of U.S. cases reveals a developing and increasingly understanding approach to AIDS in prison. In the early case of Cordero v. Coughlin 51, prisoners infected with the AIDS virus argued that their segregation, with consequent loss of social, rehabilitative and recreational opportunities violated their rights under the Eighth Amendment. The court rejected this argument, stating both that insufficient facts had been proved, and that the Eighth Amendment only ensured that inmates receive adequate food, clothing, shelter, sanitation, medical care and personal safety. Similarly, in the case of Jarrett v. Faulkner 52, the court reaffirmed a "broad hands-off attitude towards problems of prison administration". 53 As noted earlier, such a hands-off approach is not an acceptable option under the duties the Charter imposes on Canadian courts. The importance of convincing a court by presenting strong evidence, however, can be seen by the above court's reluctance to be involved in anything that they perceive to be less than serious. This is further highlighted in Roe v. Fauver 54, which concerned a woman who was isolated in a hospital room. The judge stated that

"Testimony showed that there is dispute both medically and ethically as to whether other approaches could be devised within a prison setting which would be both more humane and protect all relevant individuals from harm."

52 662 F. Supp 928 (S.D.Ind 1987)
53 ibid, where the court is quoting from Procunier v. Martinez 416 U.S. 396 (1974)
It should be said, though, that it may well be easier to show that segregation is not in accordance with "evolving standards of decency" and hence what is medically and ethically correct since it is not even correctional policy. In other words, neither Federal or B.C. corrections believe that segregation is an appropriate way of dealing with AIDS in prison. Segregation may also cause emotional distress which could be argued to be out of any proportion to any of the social aims of AIDS treatment or prevention. Placing someone in segregation effectively identifies them as having a serious illness, such as AIDS. Emotional distress could be caused by an inmate's family and friends discovering about his illness at a time which was not of his choosing. This argument was accepted in the case of Doe v. Coughlin.

In summary, then, it is submitted that, from both a public policy and legal point of view, segregation of an AIDS infected inmate can only be justified in two distinct circumstances. These are where that inmate is in the final stages of AIDS, and is thus in need of constant medical attention and where an inmate is sexually assaultive and therefore poses a threat to other inmates. In all other cases of segregation, it should be possible to show a breach of s.12. Current Federal and B.C. correctional policies do not sanction segregation as an option. Where it still takes place, therefore, it is clearly not in accordance with the evolving standards of decency which those correctional officials have themselves predetermined.

As long as an atmosphere of discrimination and hostility to AIDS exists in institutions, inmates will be reluctant to come forward for what may be urgently needed treatment. For the majority of institutions, where AIDS programmes may be in the early stages of development, inmates will likely be reluctant to come out of the "HIV closet". The risk to their health, with consequent reduced life expectancy and increased medical costs to the State, makes this a highly

55 697 F. Supp 1234 (1988)
56 Phrase used in letter from Gerald Benoit, a prisoner with AIDS.
undesirable outcome from a public policy point of view. Lord Justice Woolf, in his survey of English prisons, was also clearly of the view that prisoners who felt that they might be HIV positive should feel comfortable about coming forward to be tested. As he said,

"It is in the interests of the prisoner, the prison in which he is serving his sentence and the public that those prisoners who feel they are at risk of being HIV positive identify themselves and co-operate voluntarily with the carrying out of tests. Prisoners must be able to do so with the knowledge that, if the tests prove positive, they will be helped, not hounded."

The key, therefore, to encouraging inmates to come forward for testing and treatment, reducing the need for protective segregation, and generally creating an atmosphere of understanding about HIV and AIDS infection, is an effective education programme.

EDUCATION

"The Correctional Service of Canada considers education to be critical in counteracting misinformation, allaying fears and promoting responsible behaviour."

The CSC began an educational programme for staff and inmates prior to 1985 and this has continued at an "accelerated" level since then. This programme has included distribution of two pamphlets published by Health and Welfare Canada, ongoing training of staff by specialists from the CSC and outside agencies and the recommendation that universal precautions be used in infection control. Two videos, in French and English, about AIDS and Hepatitis B have

57 supra note 45, para. 12.370, p. 335. Lord Justice Woolf had looked at Bristol Prison, where those who were HIV positive were not subject to as many special restrictions as were the HIV inmates in Wandsworth Prison. Special educational initiatives had also been supported at Bristol Prison. As a result, "24 out of the approximately 500 prisoners at Bristol were prepared to voluntarily disclose that they were HIV positive. This compares with Wandsworth, where only 12 of approximately 1,700 prisoners had identified themselves as HIV positive." (para. 12.368, p. 335).

58 supra note 14

59 Entitled "AIDS in Canada: What you should know"; "AIDS, the New Facts of Life"

60 i.e. Staff are advised to proceed on the basis that all inmates could be infected, and to therefore practice good hygiene, and avoid direct contact with bodily fluids.
also been produced this year. Inmates were used as both actors and advisors in this production and the CSC hopes

"...that these hard hitting offender delivered messages will greatly assist our educational and preventive thrust."\textsuperscript{61}

In British Columbia, the current policy acknowledges that

"...understanding and appropriate action is possible primarily through education."\textsuperscript{62}

The policy therefore states that a comprehensive program will be developed, which will include information on transmission control, instructions and precautions to minimize transmission and periodic updates to inform staff and inmates of the latest developments about the disease.

On the face of it, therefore, both the CSC and B.C. Corrections appear to have a fairly developed approach to AIDS education. In practice, the B.C. educational programme is only now being fully implemented, with nurses (who have been specially trained in AIDS education) going into B.C. penitentiaries to speak to inmates.\textsuperscript{63} The more advanced policies of the CSC, however, are only as good as the people implementing them. One prisoner with AIDS, in Dorchester Institution, writes that

"...Health Care Staff did a series of seminars on Aids [sic] and HIV. This was with respect to the various ways that this can be spread. To my dismay the attending nurse had some pretty narrow views on this subject and did not include the environment, [sic] with which we as prisoners live....she did spread a lot of fear."\textsuperscript{64}

\textsuperscript{61} supra note 14
\textsuperscript{63} supra note 27
\textsuperscript{64} Letter from Gerald Benoit, Dorchester Institution.
Public Policy and Education

Any educational programme about AIDS must aim to eradicate rather than cause fear. Clearly the nurse at Dorchester failed in this respect. In assessing what public policy demands of prison administrators in relation to AIDS education, it is pertinent to ask what the relevant health authorities outside prison are doing about educating the public. Education has received high profile publicity in both America and Canada. Prison officials should thus be giving in house education at least as high a profile as outside prison. Clearly, a leaflet shoved under cell doors is far less likely to be an effective way of communicating than regular discussion sessions about the disease. What is needed is a consistent and easily understandable set of educational materials given to every inmate in the Canadian prison system. It is submitted that distributing general AIDS leaflets from Health and Welfare Canada is not enough. A leaflet directly aimed at inmates and officers will be more effective in reducing fear and increasing awareness of high risk activity that could result in infection. Such materials should be backed

65 See Footnote 89, and accompanying text.
66 supra note 59
67 An example of what happens when education is not effectively communicated was highlighted when an inmate at Mission Institution was recently diagnosed as being HIV positive. The doctors at that institution did not have specialised knowledge of AIDS, and failed to make clear to the inmate that he was HIV positive, and did not have AIDS, which was something different. They put him on a course of AZT, which he thought he had been prescribed because he had AIDS. Since he thought that he was facing imminent death, and because of mistreatment by other inmates who had found out that he was HIV positive, he was under considerable stress. The response of the medical staff to this would seem to have been totally inadequate. Rather than offering counselling, and making clear that HIV seropositivity did not mean that he had AIDS, they put him onto a heavy dose of tranquillisers in order to dull his awareness of his situation. At the time of writing, this inmate has now developed AIDS Related Complex, and is still heavily sedated. Personal Communication with John Tremblay, a recently released Federal prisoner who has tested positive for the AIDS virus. Mr. Tremblay was describing the situation of a friend, who was not named, at Mission. It is a measure of the level of ignorance about the disease still present amongst staff and inmates that Tremblay did not take an AIDS test until he was released from prison for fear of how he might be treated had such a test shown him to be infected, while still incarcerated.
68 As happened in a Manitoba Penitentiary just before a prisoner with AIDS was about to be released into general population. As a result, the environment into which he was released was very hostile toward him. Personal Communication with Ms. Claire Culhane supra note 36
up by question and answer sessions, where inmates' specific worries could be addressed. These should preferably be given by outside health care personnel, with experience of counselling and AIDS, since they are likely to be more credible than prison guards. Alternatively, a prisoner could be fully trained in AIDS education and then be responsible for the education of his peers. This approach could be applied equally to prison officers, who might otherwise be sceptical of information supplied to them (by employers who they frequently believe do not have their best interests at heart).

Education needs to be ongoing in order to allow for rapid population turnover in some prisons. It is important to design these programmes in order to attract and hold the attention of inmates who may only be incarcerated for a short time. Since prisons contain a number of individuals involved with drug taking, their incarceration presents an excellent opportunity to reach an "at risk" section of the population which would be difficult to reach outside prison. Education must, further, take account of the reality of prison society. Thus, while educators particularly want to reach those who are IV drug users or engage in homosexual activities, both of these activities occur in secret, and are unlikely to be admitted, because they are forbidden in prison. Creating a confidential environment, where these practices can be discussed frankly, may go some way towards countering this problem. Educators should also not underestimate the level of ignorance about AIDS amongst inmates. As Juan Rivera, a prisoner in New York, writes:

"Many prisoners believe that a cure for AIDS has been developed, but that there is a government conspiracy to keep this secret, particularly from so called undesirables like prisoners." 71

Regular education, together with statistical information, can help prisoners to evaluate such speculative ideas and realise that their future is in their own hands. When someone who

69 For example, AIDS and Prisons-The Facts, a National Prison Project/American Civil Liberties Union Booklet. This contains twenty-six pages of simple questions and answers about, inter alia, transmission, prevention and testing for AIDS.

As suggested by the B.C. Civil Liberties Association, in AIDS Discrimination in Canada (1989), pp24-25.

supra note 19, p.3
prisoners trust works with them persistently, the chances of changing prisoner behaviour is greatly increased. As David Gilbert, another New York prisoner points out;

"The motivations for sexual and drug-using practices are strong and deep, and people will go to great lengths to deny the dangers involved in these practices unless they are presented with positive alternatives."72

It is suggested, therefore, that a co-ordinated, inmate specific, sensitive and persistent educational programme is needed. The CSC would seem to be some way towards achieving this, although the reality in each individual institution may often be different. It is not enough, however, for prison authorities to give verbal or written education about AIDS prevention. They should also provide the means for that prevention.

Condoms and Bleach

Neither the Federal or B.C. Correctional Systems provide condoms or bleach to inmates. The CSC justifies this by saying that

"Since sexual activity constitutes a disciplinary offence under the Penitentiary Service Regulations, the Service, by permitting their [i.e. condoms] use, would be seen to condone prohibited activities and to be implementing contradictory policies."73

B.C. Corrections position, in not providing condoms,

"...has been based on the extremely low incidence rates of known HIV positive cases and the equally low known cases of homosexual activity..."74

As has been seen, the experience of other prison systems, as well as the limited survey findings in Canada, would suggest that the "unknown" rates of HIV positive cases are far higher than officials would like to admit. Known cases of homosexual activity are bound to be low, since participants do not want to be caught and punished for something that they are not allowed to

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72 ibid
73 supra note 14
74 supra note 15
do. To base a policy on two factors that are so hard to investigate seems, at best, to be unwise, and at worst, to be positively dangerous. The Ministry of the Solicitor General further argues that because the majority of homosexual activity;

"...is opportunistic, unplanned, and in some cases, non consensual, the likelihood of condom use would appear to be unlikely." 75

While this might suggest that condoms, if available, would not be much used, it does not justify denying those inmates who want to protect themselves, the choice to do so. Further, there is some evidence to suggest that most sexual activity in prison is consensual. 76 They further cite "security concerns" 77 as a reason not to supply condoms. This ignores the fact that alternatives to condoms for such illegal activities already exist. 78

Public Policy and Condoms

Where the lives of individuals are concerned, it is simply not acceptable for prison administrators and politicians to take a moral stance based on outdated prison rules. An approach based on medical advice, and not on the basis of narrow minded politics, must be undertaken. It is physically impossible to police a prison so thoroughly that no high risk activity will ever take place. Thus, prison officials should admit that sexual activity and drug use are ongoing in their institutions. Providing condoms and bleach need only give out the message that the authorities know that these activities are going on and that they want to provide the means for inmates to protect themselves. If those inmates are caught engaging in illegal activity then they will still be punished.

75 ibid
76 In the New York City Jail system, for example. supra note 27.
77 Being used to conceal and transport contraband (drugs), used as weapons (!), jamming
78 supra note 27.
Canada would not be breaking new ground in making condoms available. Indeed, in Europe there are already sixteen systems in nine countries issuing or selling condoms to prisoners. In the United States, the state jurisdictions of Vermont and Mississippi, as well as the county systems in San Francisco, Philadelphia and Baltimore, now issue condoms in their institutions. The city of New York Correctional system also makes condoms available. None of these condom distribution programmes have had to be abandoned. No serious operational or policy problems have developed, despite thorough efforts to find faults in the plan. Furthermore, requests for condoms in Vermont and Mississippi have been few, at about 10 percent of the prison population.

Provision of condoms has been strongly urged by the Parliamentary Ad Hoc Committee on AIDS, the CSC’s Health Care Advisory Committee, Health and Welfare Canada, the Royal Society of Canada, the British Columbia Medical Association, and the John Howard Society. Clearly there is both strong support, and increasing precedent, for making condoms available. Yet, in the face of this, the CSC stands by Commissioners Directive 821, subsection 16, which prohibits condoms being made available.

While no country currently supplies injection equipment to prisoners, information about cleaning needles and syringes prior to and after use, coupled with the availability of disinfectant, such as bleach, would help reduce the risks associated with drug use, without necessarily approving of it. This policy is already in place in San Francisco jails and is currently being seriously considered in Switzerland and Spain. In Philadelphia jails, educators are permitted to advise inmates that disinfectants containing small quantities of bleach, are available to clean the needles and razors used for tattooing, piercing and IV drugs.

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79 As of May 1990, 16 systems in nine countries including Austria, Denmark, France, Germany, Luxembourg, Netherlands, Spain, Sweden, and Switzerland make condoms available. Recent Report prepared for the Institute of Legal Medicine, Geneva, and noted supra note 14.
80 Ibid
81 The Advocate, 26 February 1991, p.340
A common argument against providing education and condoms is that this is pointless because;

"Prisoners...are risk takers, and lack self control as demonstrated by their penchant for criminal activity."\textsuperscript{82}

It is submitted that this is a weak point of view since there is all the difference in the world between taking a risk of being caught and going to jail, and taking a risk and ending up dead. To suggest that no prisoner can benefit from education and condoms is to unfairly label all prisoners with the characteristics of the least responsible of their number. This is very hard to justify.

That education can change the way people conduct their lives is made apparent by the way that the rate of HIV infection has slowed in the gay community.\textsuperscript{83} Education can also change the way prisoners behave. In \textit{Roe v. Fauver}, a female prisoner with AIDS, but without any recent opportunistic infections, challenged her segregation from all other inmates. As part of the evidence, a number of prisoners testified that the frequency of prison sex, and their behaviour and attitudes had changed as a result of repeated screenings of AIDS information films, informative leaflets and supervised discussion groups. They further testified that they were aware that they lived with prisoners who might be infected but not yet identified, and that they thus avoided risky behaviour.

\textsuperscript{82} \textit{supra} note 48, p.782.
It is unlikely that the education programmes of B.C. and the CSC could be shown to be so inadequate and inappropriate as to amount to treatment that is not in accord with "evolving standards of decency". While it appears that these policies are not always being implemented in the most ideal way, they do at least exist. There is an alternative, however, to poor AIDS education, and that is to institute an educational programme along the public policy lines discussed earlier. The mere fact that some education policies exist, however, will probably make it difficult to argue that the prison authorities were indifferent to their inmates needs, or failed to recognise the valid social aim of preventing unnecessary transmission of AIDS. As was shown with McCann, a heavy burden of proof will be required to satisfy a court that a violation of s.12 has occurred. A potential litigant claiming that AIDS education was inadequate, without raising the question of condoms, will probably fail.

Given the complete lack of Canadian authority, judicial comments from America are helpful in this area of treatment. In Telepo v. Fauver, one of the issues facing the court was the availability of AIDS education to the inmates of two prison facilities in New Jersey. The case can be used, by analogy, to suggest ways in which a litigant in Canada might approach a s.12 challenge to poor education. That case looked at education efforts as part of the overall medical

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84 For the purposes of this portion of the paper, education will also be taken to include the provision of condoms, bleach.

85 "Education" cannot be categorized as "punishment" within the meaning of s.12, but can more easily be described as "treatment". The courts have held that "treatment" is wider in scope than "punishment" and "covers any conduct, behaviour or action towards another and, consequently, any disadvantaging of a person, not just that commonly considered punishment, can be attacked as violating this (s.12) provision", Re Mitchell and The Queen (1983) 6 CCC (3d) 193 (Ont. HC), p.212. The case of Soenen v.Director of Edmonton Remand Centre (1983) 10 WCB 386 (Alta. QB) further makes it clear that some of those principles that courts use in deciding whether a penalty or punishment violates s.12 are "inherently irrelevant" to questions of "treatment".

86 File No. 85-1742, (D.N.J. Jan 9, 1989)
response to AIDS, and whether this caused emotional distress to the inmates. While finding that the plaintiffs had failed to state a serious medical and emotional need, the judge nonetheless stated that

"...assuming that plaintiffs do state a serious medical need in their alleged emotional distress regarding AIDS, then it would seem especially proper to address that need through education." 87

The judge had earlier found that the plaintiff's claims of physical danger from HIV infected inmates were unsupported and he suggested that this might be based on a mistaken understanding of how AIDS spreads.

"If this is so, then the propriety of an educational response may be dramatically demonstrated. And, if education is so clearly appropriate a means to treat plaintiffs' needs, then to deny it may on balance constitute deliberate indifference." 88

While these comments were probably obiter, they do show that a U.S. court was prepared to consider whether inadequate education could constitute deliberate indifference and hence breach the Eighth Amendment. As has been seen the "deliberate indifference" standard as used in the Eighth Amendment is more restrictive (and difficult to prove) than the criteria that "outrage standards of decency" in Canada. Clearly therefore, if inadequate education can meet the high standards required to show a violation of the Eighth Amendment, then it should certainly meet the less onerous criteria of s.12. As such, the reasoning in Telepo could conceivably be used by a Canadian court, and potentially to greater effect.

The Idaho Court of Appeals, in Wilson v. State, 89 put forward a compelling proposition which, it is argued, should be adopted by the Canadian courts. They stated that where laws and regulations of health care for the public at large find a certain practice to be unacceptable (in line with "evolving standards of decency") then that practice or procedure is inappropriate for

87 ibid, p.43
88 ibid, p.44
89 113 Idaho 563, 746 P.2d 1022.
inmates as well. Conversely, if a particular practice or procedure is ongoing outside prison, it should be considered within prison as well. Thus, as AIDS education, as well as the availability of condoms, are features of the fight against AIDS throughout North America, the reasoning in Wilson would suggest that the same should be available in prison in order to avoid a legal challenge.

In the face of evidence from the CSC or B.C. Corrections about all their education efforts, potential plaintiffs should consider leading affidavit evidence from individual prisoners to show that in practice such education has been sporadic, ineffective, or not regularly available. In Telepo, the judge found that the plaintiffs’ affidavits about the extent and availability of education could be compellingly weighed against the evidence of prison officials.

To avoid any question of liability to themselves under s.12, therefore, prison officials should implement a comprehensive AIDS education package for both staff and inmates as an essential element of any AIDS policy in prisons. It helps to protect prison administrators who are afraid that they will be named in court actions. Such actions might allege that they have subjected inmates to cruel and unusual treatment or punishment by failing to do anything to stop inmates contracting AIDS in prison. Education makes all inmates aware of the dangers of participating in high risk activities. If inmates continue to so participate after being informed of the risks, it will be easier to argue that they contributed to their own infection.

A stronger appeal to s.12 may, however, be possible when an education programme is evaluated on the basis that it should include the provision of condoms and bleach. An increasing number of prison systems around the world now recognise the importance of making condoms

90 For example, Seattle had an AIDS awareness week in early April 1991, during which information brochures and complimentary condoms were distributed to the public.

91 As quotes from prisoners like Gerold Benoit show, all is not yet perfect with AIDS education. supra note 64.
available. Yet the CSC and B.C. Corrections refuse to do this. To tell inmates that they should use a condom during sexual activity or sterilise their IV drug kit, without giving them the means to do so, is so inconsistent as to be almost cruei in itself. Since denial of condoms or bleach may result in HIV infection and an individual's ultimate death, especially when such provision is relatively easy, this may well outrage the standards of decency discussed in *R v. Smith*.

The Infection Control Guidelines for B.C. Corrections, for example, state that;

"11.03 - At the minimum, the educational program shall provide
2. Instruction on the proper use of items used for infection control."

Prisoners in B.C. are therefore told how to use condoms and bleach, are told that they should use them, and are then told that they cannot use them because sexual activity is not allowed in prison. This situation is clearly ludicrous.

Leaving inmates in a state of ignorance, or unable to protect themselves, could effectively be sentencing them to death. This is surely of "such character...as to outrage the public conscience". There is a perfectly adequate alternative to letting prisoners unnecessarily risk their lives, and that is to provide ongoing and updated education, as well as making condoms and bleach available. Any reasons advanced against such an approach are trivialised when weighed against a death sentence: The Canadian courts should be willing to declare a violation of s.12 where education and the availability of inmate self protection have been denied. This is what is necessary for the achievement of reductions in HIV transmission, and to which their are no other adequate or realistic alternatives.

92 *supra* note 62
REMEDIES

Section 24 of the Charter allows the courts to develop appropriate and positive remedies where a violation of the Charter is found. In cases of segregation, where a violation of s.12 is found, the court should order that the inmate be immediately returned to general population. If the court is satisfied that the inmate would be attacked if reintegrated, it should order a transfer to another institution (with the inmate’s consent) where the inmates HIV status need not be known. Such an order should also prohibit all future segregations, except in cases of genuine medical necessity.

The court should also order that specific, standardised and inmate specific educational programmes be instigated in all Canadian prisons. This should help prevent the prejudices and discrimination that HIV inmates often have to face. Given the strong support from medical organisations across Canada for the supplying of condoms to prisoners, this is clearly something that should be mandated by the courts. Support and education groups from outside the prison should also be authorised to enter penitentiaries at the request of prisoners and not just the Warden.

Finally, the court should award damages in order to send a clear signal to correctional administrators that segregation, or failing to treat education and prevention seriously, will not be tolerated by the Canadian courts.

93 See, for example, Canada v. Schachter, (unreported) Feb. 16, 1990. Here, the Federal Court of Appeal stated that it was not enough to declare invalid a provision of the Unemployment Insurance Act “because it would not guarantee the positive right conferred pursuant to subsection 5. That positive right can only be guaranteed by the fashioning of a positive remedy” (my emphasis).

94 The plaintiff would have to show actual involvement, or threat of coerced involvement in high risk activity. In Telepo v. Fauver, supra note 85, the plaintiffs submitted affidavits attesting to sexual and drug activity engaged in by inmates other than plaintiffs, but not to their
Conclusion

A balanced and consistent response to AIDS in prisons is long overdue. It does not matter how attractive are a correctional system's AIDS policies. It is only when those policies are actively and consistently put into practice, that they begin to be of any effect. This requires effective education of judges, politicians and prison officials. A policy of segregation is, in most cases, unjustifiable. To isolate someone because they are known to be suffering from HIV infection, ARC, or AIDS, when compounded with the fact that they are likely to be anxious, depressed and in need of support and information, seems to be particularly harsh. Further, to refuse to supply condoms or bleach because of an obsession with prison rules (which are frequently broken anyway) is a policy of intentional blindness. Correctional authorities are perfectly well aware that sexual activity and drug use occur to some extent in prison. As Irene Lambrou suggests, a negative approach to AIDS in prison could be seen to be no more than "...a pretext for oppression and discrimination." 96

Narrow, and uncooperative approaches to treatment may cause some inmates to give up and die sooner than they might in a supportive, non-hostile environment. AIDS is a health problem and should be treated as such. It is spread by conduct that people can usually choose to avoid, 97 but this choice does not absolve correctional authorities, who must recognise that individuals have basic sexual needs, and may also be addicted to drugs.

96 ibid.
97 except sexual assault, rape.
It is to be hoped that Correctional services across Canada will actively respond to the challenges of AIDS in prison. As has been seen, there are strong public policy reasons for avoiding segregation, and instituting an educational programme that also makes condoms and bleach available. Sound public policy, however, is probably an insufficient catalyst for change. The reality of Corrections suggests that it will take litigation, or the threat of litigation, to prompt prison officials to adapt their policies and practices. A challenge to segregation under s.12 of the *Charter* might well be successful. Similar legal challenge to the failure to provide condoms and adequate education, is less likely to succeed. These legal challenges, whatever their outcome, will at least raise public awareness of what is going on, and this in itself might be enough to promote change in the correctional system.

*Lord Justice Woolf states the matter plainly when he says*

"HIV positive prisoners must not and need not become the pariahs of the prison system."98

Imaginative, effective and sensitive programmes for education and prevention must be developed as a matter of urgency. It is not enough to distribute a few leaflets to each prison. Active and personalised education must now be the priority, if prison officials are to avoid the charge of effectively sentencing their inmates to death.

98 *supra* note 45, para. 12.370, p.335
CHAPTER FOUR

DOUBLE BUNKING

Introduction

"Even direct attacks on the symptoms of crowding, through legal challenges to the conditions of confinement, may be foreclosed because of confused standards and muddled doctrine. The courts have provided little guidance for determining when crowding has reached an unconstitutional level of overcrowding. Naturally reluctant to tell states how they should remedy their crowding problems, the courts at times have shown signs of retreating wholesale from the business of adjudicating the issues of prison conditions."  

In America, an increasing overcrowding crisis within the prison system has been recognised by judges, legislators and prison officials. 2 In Canada, on the other hand, prison crowding seems to fluctuate between periods where correctional facilities are filled well beyond capacity and periods where there is spare capacity. 3 While the Federal Correctional system is currently in a period relatively free from overcrowding, this is no guarantee of future prison populations. It is certainly possible that Canadian Corrections will face a shortage of cells, and hence overcrowded prisons, in the foreseeable future. Lessons learnt from America's experiences of crowding may then be invaluable to prison administrators in Canada.

2 Judge Morris Lasker of the Southern District of New York, for example, has stated that "Prisons and jails are overcrowded. That is an obvious fact. Courts can take judicial notice of it. Further, it is a proposition which governors, attorney generals and corrections commissioners are asserting, although in the past they earnestly resisted such allegations". ibid. p.7
3 In Still Barred From Prison (2nd Edition, 1985), Claire Culhane, at pp.113-115, describes conditions of overcrowding that were prevalent in the early years of the last decade. Personal communications with the Headquarters of the CSC, in Ottawa, would suggest that overcrowding, and hence the question of double bunking, is not a major problem at the time of writing. As the current period of prison construction comes to an end, though, it is a matter of time before prison capacity is again put to the test.
The practice of "double bunking", placing two people in a cell designed for one, will be the particular focus of this chapter. This is the most obvious sign that a prison is being operated beyond the cell space needed to house all of the prisoners being sent to that institution. Although prison administrators will argue that the existence of double bunking does not always mean the prison is overcrowded, it is the position of this chapter that the vast majority of double bunking can be equated with an overcrowded institution. Even where an institution has empty cells, however, inmates may have to be double bunked because prison administrators cannot afford to open those cells to inmates, as a result of budgetary constraints. Thus, even though the prison might, on paper, have spare cell space, in practice such space may not be available.

It will be argued that double bunking amounts to cruel and unusual treatment or punishment, and therefore violates s.12 of the charter. In making this proposition, an examination of the American jurisprudence in this area will be undertaken, in order to get a comparative perspective of how a jurisdiction with seriously overcrowded institutions has dealt with double bunking. It will be submitted that there is little to recommend the American approach to Canadian courts, both because of radically different standards of penitentiaries in each country, and because of the different approach to defining "cruel and unusual punishment" in the Eighth Amendment and "cruel and unusual treatment or punishment", in the Canadian Charter. A

4 Also referred to as "double celling" by those in North American Corrections.

5 For example, in a letter from the Ministry of Correctional Services in Ontario, it is stated that "While many inmates share cells, rooms and dormitory areas with others, the term "double bunking" does not describe any particular type of accommodation in Ontario correctional institutions."

6 Prisoners are double bunked when there is a risk that one of those inmates will try to commit suicide, or occasionally when two inmates have expressed a preference for sharing. In these exceptional cases, double bunking takes place despite available single cell capacity for all prisoners.

7 When the present writer visited Kent Institution, Agassiz, B.C., in March 1991, a whole wing of the prison lay empty while most prisoners in Protective Custody were being double bunked. The reason for the empty wing was that there were insufficient resources to allow it to be opened.
close examination of *Piche v. Warden of Stony Mountain Institution*, the major Canadian decision on double bunking, will also be made, with the aim of suggesting that Mr. Justice Nitikman’s approach was unnecessarily narrow, and based on largely irrelevant American case law. It will be argued that *Piche* would be decided differently today, in light of the Supreme Court’s evolving approach to s.12 of the *Charter*. The chapter will conclude with the suggestion that the Canadian courts must avoid mirroring the "confused standards and muddled doctrine" of the United States, and be prepared to intervene to stop double bunking where legislators and administrators have failed to end this practice.

Overcrowding in the United States.

One of the first major challenges to double bunking that came before the U.S. Supreme Court was *Bell v. Wolfish*. At issue in that case was whether it was constitutional to double bunk pre-trial inmates at the Metropolitan Correctional Centre (MCC) in New York City. This institution had been built in 1975 and was viewed by the court as "advanced and innovative" in design. It had been designed on the basis that one detainee would be housed in each cell, yet, as the Court noted, within a matter of months nearly one third of the cells had been set aside for double bunking.

The Court noted that since none of the inmates at the MCC had yet been convicted of a crime, the Eighth Amendment did not apply. The relevant provision, they said, was the due process...
clause of the Fifth Amendment, which prohibited, amongst other things, pretrial detainees from receiving any form of punishment, either because it was imposed by prison officials with the intent to punish, or because it was unnecessary because an alternative, rationally connected, and less excessive measure existed. The Court concluded that the consequences of double bunking and overcrowding at the MCC 14 were simply insufficiently serious to amount to punishment.

In the U.S. Supreme Court case of *Rhodes v. Chapman*, 15 the Court had its first opportunity to deal with the double bunking of convicted individuals at the Southern Ohio Correctional Facility (SOCF). The court had to consider whether the double bunking of prisoners in individual cells of sixty three square feet (designed for one person) was unconstitutional in violation of the Eighth Amendment prohibition on the infliction of cruel and unusual punishments. In deciding what standard needed to be shown to constitute cruel and unusual punishment in confinement conditions, the Court stated that these conditions

"...must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." 16

The Court looked to the totality of the conditions at SOCF, finding that most facilities (such as medical care, food, ventilation, temperature and noise control) were quite adequate. 17 The Court noted that the availability of jobs, education, and social and psychiatric counselling had been reduced as a result of double bunking but felt that these were too minimal considerations to constitute cruel and unusual punishment. Of relevance to the Canadian context are the factors that the District court had looked at when *Rhodes* had been before them. That Court had noted that the inmates of SOCF were serving long terms of imprisonment; that the "design capacity" of SOCF was being exceeded by 38 percent; that studies of prisons had recommended that each

14 See footnote 62, below, and accompanying text. (Nitikman's conclusions)
15 452 U.S. 337 (1981)
16 *ibid* p.347
17 *ibid* p.342-43
inmate have at least 50-55 square feet of living space; that double celled inmates seemed to spend most of their time in their cells with their cellmates; and the fact that double celling at SOCF was not a temporary measure.\textsuperscript{18} Despite these findings, the Supreme Court concluded that

These general considerations fall far short in themselves of proving cruel and unusual punishment, for there is no evidence that double celling under these circumstances either inflicts unnecessary or wanton pain or is grossly disproportionate.\textsuperscript{19}

The majority in \textit{Rhodes} therefore felt that the double bunking, at least under the circumstances of this case, did not violate the Eighth Amendment.

Justice Brennan, with Justices Blackmun and Stevens concurring, clearly felt that the question of whether double bunking caused harmful effects had to be decided in relation to the actual prison in question, rather than in the abstract. Thus, any court ruling on double bunking would be specific to the prison which was the subject of the litigation, rather than provide a general rule in relation to double bunking in any prison. The sorts of evidence which courts could look at, he suggested, would include expert testimony from those in the medical, psychiatric, psychological, penological, architectural, structural, public health fields as well as prisoner specific studies. It would therefore seem clear that a court would be persuaded by evidence of harmful effects in both other prisons and the prison which is the subject of the particular litigation.

As will be seen, these two U.S. cases have been influential, and perhaps too much so, in the development of Canadian double bunking jurisprudence.

\textsuperscript{19} \textit{ibid}, at 348. The Court took note of how "exceptionally modern and functional" the SOCF cells were, noting in particular the toilet, hot and cold running water and the heating and ventilation. They agreed that the size of the cells was a feature that made double celling undesirable. (Footnote 13 to the opinion of the Court.)
Contemporary Double Bunking

It is clear that double bunking is ongoing to a significant extent at present in Federal Corrections. A review of the most recently available statistics on double occupancy in the Federal Correctional System reveals that, as of the end of May 1991, there were 1148 inmates being double bunked. Of this number, Ontario and Quebec regions held the largest number of inmates in double occupancy. The figures show that, despite a supposedly low prison population at present, prisoners are still having to endure double bunking. Millhaven Institution had the largest number of inmates double bunked, most of them in the Reception Area. It is only in the Pacific Region that any double bunking occurs in protective custody? Furthermore, the bunk capacity for double occupancy is 1783 beds, leaving space for over 600 extra inmates still to be accommodated before the Federal Correctional System, according to their own figures, could be said to be overcrowded. It can therefore be said that sufficient double bunking is taking place to make s.12 litigation a distinct possibility.

Double Bunking in Canada

The first case to consider double bunking under s.12 was Collin et al v. Kaplan et al. The plaintiffs sought an interlocutory injunction to prevent the Correctional Service of Canada from authorizing double occupancy of cells in federal penitentiaries, especially Leclerc and Laval in Quebec. Dube J. noted that the average single cell in the Leclerc Institution measured 11 feet 6 inches by 6 feet (about 69.6 square feet). As he pointed out

21 ibid. Ontario had 494 inmates in double bunks; Quebec had 370.
22 ibid. 210 inmates were double bunked in Millhaven’s reception.
23 ibid. As of 29th May 1991, 36 inmates were double bunked in the Protective Custody range of both Kent and RRC Pacific.
24 ibid.
"The problems that double celling will create can easily be imagined, and there may be others as well: the lack of space for personal items, difficulties in maintaining health standards, tension between the two inmates in the event of a conflict of personalities. Additionally, overcrowding will have effects elsewhere in the institution and will overflow into dining rooms, gymnasiums, hallways and so on where space will be at a premium.\textsuperscript{26}

Dube J. also noted the opportunity for homosexual activity, and the potential for increased violence or riots. He conceded, therefore, that double celling was not to be recommended, but that, equally, the court was not responsible for administering Canadian penitentiaries. The plaintiffs would only be successful if double celling constituted "cruel and unusual treatment or punishment".

In the absence of Canadian decisions, the judge looked, albeit rather superficially, to the decision in \textit{Rhodes v. Chapman}.\textsuperscript{27} He noted that the District court in that case had based its order preventing double bunking on five considerations.\textsuperscript{28} Since the U.S. Supreme Court had concluded that these considerations were insufficient to support the lower court's decision and that two of these considerations did not apply in the immediate case,\textsuperscript{29} they held that the allegations of the application were insufficient to prove cruel and unusual treatment or punishment.

\textsuperscript{26} ibid, p.123.
\textsuperscript{27} supra, note 15.
\textsuperscript{28} supra, note 18, and accompanying text.
\textsuperscript{29} Firstly, the Canadian prisoners in \textit{Collin} were serving time in a medium security institution. In Ohio, the prisoners were serving long terms of imprisonment. Secondly, the double celling in Canada was to be "temporary", while in Ohio it was to be a permanent feature of incarceration in that prison.
Piche et al v. The Institutional Head of Stony Mountain Institution.

This case represents the first, and to date only, thorough examination of double bunking in Canada. The action was brought after the warden of Stony Mountain Institution announced that double bunking was to be instituted. Amongst the various declarations that the plaintiffs sought was one declaring that the use of double bunking violated s. 12. A lengthy review of the evidence was made by the trial judge. Given that this is one of the few sources of empirical data on double bunking in Canada, a fairly detailed examination of that evidence will now be made before going on to review the judge's conclusions.

The Prisoners' Experiences

Nitikman J. noted that Frank Piche had described his

"cell as his home and compared it to a home where you can stay by yourself giving you a little privacy".

30

Piche had been double bunked on three occasions. On one of these, he was double bunked with a native Indian who, as a result of a dispute with other natives, was in serious trouble. Piche mediated this problem successfully, but found living with the individual to be difficult.

"They did not get along personally and he was unable to relax and found the lack of privacy in the cell particularly hard to endure ..."

31

Another prisoner, Steven Neufeld, had also been double bunked. As Nitikman J. observed.

"His objection to double bunking includes the limited area provided in the cell, threat to personal safety, increased exposure to health problems such as flu,

30 supra, note 8, p. 53
31 ibid, p. 52
colds, hepatitis infection and body lice. Further, that double bunking is an
invasion of privacy and loss of dignity. There is no relief from the odor of
human excrement to which a cellmate is subjected ..."32

Neither Piche nor Neufeld had had very bad experiences of double bunking, but Michael
Smyth, who was openly bisexual, had a different story to tell. He was double bunking with an
inmate who was also his sexual partner

"They were double bunked approximately 2½ months and during that period
their relationship deteriorated from close friendship to mutual paranoia and
enmity".33

Tensions arose from minor incidents, such as having the television and radio playing at the
same time. Smyth had been classified as a dangerous offender and

"he was aware his cellmate himself had been convicted of a stabbing offence,
resulting in constant fear and distrust between them"34

This fear is one of the most compelling arguments against double bunking - namely the risk of
being incarcerated in a locked room with a violent and dangerous man. In the last month of
Smyth's double bunking, the situation was

"... potentially explosive. On one occasion after an argument he grabbed his
cellmate by the shirt front but stopped himself before a violent outburst"35

One of the other seemingly trivial problems that double bunking created for this inmate was the
fact that his cellmate used Smyth's television and radio without first asking Smyth's permission.
While this can happen whenever two people share, normally such people at least have the

32 ibid, p.55
33 ibid, p.59. It is possible that double bunking was not the sole cause of this breakdown
in relations, but it was certainly a contributory factor.
34 ibid
35 ibid
choice to continue sharing, or leave. Involuntary double celling removes this important ability to choose.

The evidence presented in *Piche* also highlights the problem that double bunking causes in relation to the amount of living space available for each inmate. In reviewing the testimony of another prisoner, David Daher, Nitikman J. noted that

"Much of the floor space is occupied by fixtures and furniture, unoccupied floor space was minimal and two inmates cannot move about in the cell at the same time. At least one inmate must be seated on the bunk or toilet if the other inmate wishes to get up. The close proximity of which over a period of time creates additional stresses beyond the problems of incarceration and overcrowding"  

(my emphasis).

Daher had also become infested with body lice as a result of sharing a cell with a lice infected prisoner.

Raymond Breland, in his testimony, stated that he was double bunched involuntarily after being transferred into protective custody. Prisoners in protective custody were locked in their cells for an average of twenty hours a day, with about four hours out of their cells on the ranges. This compared with those in general population who were locked in their cells for only about nine and a half hours per day. The effect of this close confinement for such a large proportion of every day was "higher tension" than in general population.

Nitikman J. related how

"After the first few days both his cellmate and he ran out of things to say. He constantly feared annoying his cellmate and angering him to violence".

36 *ibid*, p. 62
37 *ibid*, p. 65
38 *ibid*, p. 63
39 *ibid*, p. 65
The Court, in *Piche*, was therefore presented with a substantial amount of testimony from prisoners who had actually experienced double bunking.

Other evidence

In addition to this first hand evidence, the Court also heard the prison officers' point of view. Officer Kenneth Thomson highlighted some of the administrative problems with double bunking.\(^{40}\) If contraband was found in a cell shared by two people it might be difficult to identify the guilty party. If it was necessary to remove an inmate from the cell, the reaction of the second inmate could not be predicted. There thus existed the potential for prison officers having to deal with two, rather than one, difficult inmates. Thomson also noted the potential for increases in tension, and in homosexual behaviour.

The evidence of Dr Harold Shane, a psychiatrist, was also led. He had interviewed several inmates who had been double bunked, as well as studied the affidavits of some of the administrators of the institution. Nitikman J. noted that

"His conclusions were that from a psychiatric point of view his opinion is that double bunking is a damaging, detrimental and dangerous form of incarceration. He feels it creates major problems in terms of the psychological functioning of inmates on a day to day basis. It is his opinion there is a marked potential for violence because of the feelings of the inmates who are exposed to such a process".\(^{41}\)

Nitikman J. obviously had reservations about Dr Shane's evidence since Shane had himself conceded he was an expert on human stress rather than double bunking. He also noted that

\(^{40}\) *ibid*, pp. 67-70

\(^{41}\) *ibid*, p. 72
Shane had only interviewed each inmate once, and had based his conclusions on this limited testimony.

Professor Lemire of the School of Criminology at the University of Montreal did not think that double bunking was the main cause of prison violence, but felt that violent incidents were increased noticeably by the practice.\textsuperscript{42} Dr Linda Murray was called as a medical expert.\textsuperscript{43} She felt that the mental and physical health of inmates was certainly affected by the attendant problems of double bunking. Thus, inadequate ventilation, small cells and generally overcrowded common facilities such as the kitchen and laundry would all pose a health risk. Nitikman J., however, drew attention to the fact that this was her first visit to any penal institution in Canada.

Dr Lawrence Breen’s evidence, as a psychologist, was also extensively noted by the trial judge. Like Dr Shane, Breen had interviewed a number of inmates who had been double bunked. Nitikman J. drew attention to Breen’s finding that

“What he was picking up was really a list of inconvenient things. He was not able to detect any kind of trauma or stress not only of themselves personally but in terms of people they had known who were double bunked”.\textsuperscript{44}

It was Dr Breen’s opinion that if people were under a lot of stress, then this should show itself in some sort of physiological way.\textsuperscript{45} Dr Breen therefore organised medical students to go through the prisoner’s medical records but in the event this evidence was excluded at trial. Also noted was the fact that the sample of inmates being interviewed was biased because they

\textsuperscript{42} ibid, pp. 81-82
\textsuperscript{43} ibid, pp. 83-85
\textsuperscript{44} ibid, p.100
\textsuperscript{45} Such as increased incidence of ulcers, hypertension, high blood pressure, neurodermatitis, inflammation of the skin.
were selected by Mr Neufeld and Mr Piche, being, at different times, chairmen of the inmates committee.

Finally, the evidence of Allan F. Breed was summarised by the judge. Breed was called as an expert in penitentiary administration, having nearly forty years of U.S. correctional experience, latterly as a Director of the National Institute of Corrections in the United States.\footnote{This Institute was created by the U.S. Congress within the Department of Justice, to be the Federal Agency to provide services to federal, state and local corrections throughout the nation. At the time he gave evidence, Breed was a Criminal Justice Consultant. (p.34 of Transcript)} In his report for the Court he stated

"That although any cell at the Stony Mountain Institution that is double occupied will be crowded, the totality of conditions for the general population meet professionally established standards and exceed those found in other well operated institutions. Because of time allowed out of the cell, the excellent employment and recreational programs and the rich supportive services available to inmates, I found the totality of conditions to be safe, fair and humane.\footnote{supra, note 8, p.109-110.}"

Breed went on to state his opinion that the different sizes of cell in use at Stony Mountain and their furnishings met acceptable standards. The smaller cell measured 9 feet 5 inches by 5 feet 5 inches, (54 square feet approximately) while the "larger\footnote{Though only slightly larger.} cell measured 9 feet 6 inches by 5 feet 6 inches (56 square feet \textit{approximately}).\footnote{A simple comparison with the cells used for double bunking in Protective Custody in Kent Institution illustrates how restricted was the space available at Stony Mountain Institution. As at Stony Mountain, Kent has used two sizes of cells for double bunking. One size is 7 ' 6" wide by 11' long. This equals 82.5 square feet. The other size of cell, which was introduced in 1984, is 2.350m wide by 3.825m long, equalling 94.95 square feet. (Letter from Judith Croft, Assistant Warden, Management Services, Kent Institution) While this Chapter argues that double-ceiling should \textit{not}, in principle, be allowed, it is clear that Kent inmates enjoyed considerably more space than those at at Stony Mountain, or the 63 square feet that inmates had in the SOCP in \textit{Rhodes v. Chapman}.} It is submitted that care should be taken with Breed's finding that "acceptable standards" were met since Breed's experience was mainly of the prison system in the United States, and what was acceptable in the U.S. might not be acceptable in Canada.
Nitikman J.'s Conclusions

Mr Justice Nitikman summarised the evidence put before him as showing that

"the complaints raised regarding double bunking were in the main increased tension rising to extreme tension, lack of privacy, arguments, fears of assaults, sexual and otherwise, problems relating to sexual privacy (masturbation), defecation odours by reason of lack of ventilation and lack of space due to the small size of cells".50

The judge found that tension always existed in prison, and that no empirical evidence had been led to convince him that double bunking increased that tension. Noting that protective custody inmates are locked in their cells for twenty hours a day, Nitikman J. seemed to find this acceptable because

"It must be remembered that inmates go to protective custody only at their own request in writing. They may return to general population at any time they so desire - in fact Breland returned to general population and occupied a single cell".51

In saying this, it is suggested that the judge failed to recognise the reality of protective custody (P.C.). Many inmates have to go into P.C. because they are in danger of being attacked if they remain in general population. For such people, return to regular prison life may never be possible during the period of detention. That this is still the experience of Canadian Corrections is made clear by a recent communication from Kent Institution that stated that

"...prisoners are put into protective custody at their own request in writing....Once there, it is usual for him to remain there. Some inmates have been successfully reintegrated into general population, however, this has not happened yet at Kent."52

50 supra, note 8, p. 138
51 supra, note 8, p. 140
52 Letter from Judith Croft, Assistant Warden, Management Services, Kent Institution, B.C..
Nitikman J. therefore failed to address the arguably more serious position of those double bunked in protective custody.

The judge, furthermore, made much of the fact that while some people were double bunking, there were actually single cells available. For purposes of future litigation, proof that single cells were not available when persons were double bunked would be a point on which to distinguish \textit{Piche}, since the judge clearly took the "spare capacity" into account.

The trial judge then went on to criticise Dr Shane's evidence. He had been led as an expert witness in psychiatry, yet the judge found

"a great deal of Dr Shane's evidence an amalgam of philosophical and moral theorising and to that extent highly suspect".\footnote{ibid}

In reaching this conclusion, it might appear to a cynic that Mr Justice Nitikman was himself suddenly an expert in philosophy and morality. He went on to say that

"Despite his conclusion that from a psychiatric point of view double bunking in his opinion is a damaging, detrimental and dangerous form of incarceration, the physical and mental condition of the plaintiff's does not support such a conclusion".\footnote{ibid}

Quite how the judge came to this opinion is not exactly clear. It would appear that he had suddenly also become a medical and psychiatric expert. It is respectfully submitted that the considered opinion of a psychiatrist with years of experience, is to be preferred over the opinion of a legally qualified judge, especially one who was presumably basing his opinion on

\footnote{supra, note 8, p. 141}
\footnote{ibid}
\footnote{ibid}
his observations of those inmates sitting in his court. One commentator's remarks about the attitude of many American judges to crowding cases might equally be applied to this case,

"The subtle psychological and physiological effects of overcrowding not readily discernable are ignored and thus are allowed to exist and develop until they shock the conscience of a judge."\(^{56}\)

This sort of attitude can therefore give rise to inmates suffering serious ill effects that judges will not recognise because they are not obvious enough.

Nitikman J. also made some valid criticisms of Dr Shane's interviewing technique, which was based on a pseudo-random sample with many chances for the participating inmates to confer and collaborate with each other.

"Dr Shane simply asked questions without any effort to even attempt to verify their correctness ... He simply relied on what the inmates told him. He believed them and that was sufficient"\(^{57}\)

On Dr Breen's evidence, Nitikman J. noted that Dr Breen too had dealt with a biased sampling. He further pointed out that Dr Breen had tried to objectively verify or contradict what the inmates had told them by instructing an examination of their medical records. Since the students carrying out that investigation were not available for questioning in Court:

"... I did not admit the evidence ... but the fact is Dr Breen attempted to get objective evidence. Dr Shane did not. I prefer Dr Breen's evidence throughout to that of Dr Shane"\(^{58}\)

Since the medical evidence was not admitted, however, it is difficult to see any difference between Dr Breen's and Dr Shane's evidence. Indeed, Shane's evidence was based on a pseudo

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\(^{57}\) \textit{supra}, note 8, p. 142  
\(^{58}\) \textit{ibid}, p. 143
random sample, Breen's on a totally biased sample. To prefer Dr Breen's evidence on the basis of his better intended methodology seems to be somewhat suspect given that that methodology was never presented in court.

Finally Nitikman J. came to deal with whether double bunking was cruel and unusual treatment or punishment. As has been noted before, Nitikman J. chose to adopt the conjunctive approach of Ritchie J. in Miller and Cockriell. Hence, behaviour which was both cruel and unusual, would have to be shown by the plaintiffs in Piche. The judge then went on the quote from Bell v. Wolfish, where the Court had stated, inter alia, that

"Detainees are required to spend only seven or eight hours each day in their rooms, during most or all of which they presumably are sleeping. The rooms provide more than adequate space for sleeping. During the remainder of the time, the detainees are free to move between their rooms and the common area...

We simply do not believe that requiring a detainee to share toilet facilities and this admittedly rather small sleeping place with another person for generally a maximum period of 60 days violates the constitution."

He then referred to Rhodes v. Chapman, and the U.S. Supreme Court's treatment of the five considerations of the District Court. In that case, the court concluded that

"the Constitution does not mandate comfortable prisons and prisons ... cannot be free of discomfort. Thus, these considerations are properly weighed by the legislative and prison administration rather than a court."

Nitikman J. stated that he was aware of the absence of the word "treatment" in the Eighth Amendment cases but nonetheless while giving "full effect" to such absence said he found the

59 Chapter 1, Footnotes 44-46, and accompanying text.
60 (1977), 70 D.L.R. (3d) 324 (Supreme Court)
61 supra, note 9.
62 Cited pp 158-159 of Piche, 542-543 of Bell v. Wolfish
63 supra, note 15
64 Cited p. 159 of Piche, 348-349 of Rhodes
65 supra. note 8, p. 160
judgments "helpful and deserving of careful consideration". He did not, however, address the fact that Bell v. Wolfish was not concerned with the Eighth Amendment but with the Due Process Clause of the U.S. Bill of Rights (the Fifth Amendment). His reliance on that case therefore is materially unsound. He did not take note of the fact that the American prison system was (and is) in far worse shape than the Canadian system. U.S. courts were bound to be mindful of the fact that an adverse judgment in a datively w w and impressive institution, such as in Rhodes, would have profound implications for the other parts of the U.S. correctional system which were (and are) far less modern and spacious.

It is submitted that Nitikman J. took insufficient notice of the fact that this was a case concerned with "treatment" rather than "punishment". A literal interpretation of the meaning of "treatment" would suggest that this is a broad concept, and not nearly as specific as the meaning of "punishment". Linden J. in Re Mitchell quoted A. D. Gold that "Treatment generally covers any conduct, behaviour or action towards another and, consequently, any disadvantaging of a person, not just that commonly considered punishment, can be attacked as violating this provision."

66 ibid
67 Nitikman J. seemed to take inadequate notice of the fact that American prisoners have had to tolerate exceptionally bad prison conditions. As was clear from Alan Breed’s evidence, many American prisons were so inadequate as to be found illegal under American law, on the basis of overcrowding or other factors. At the time Piche was decided, the American rate of incarceration was nearly double that in Canada.
68 It seems clear that the American judiciary have set their legal standards for prisons solely on the basis of the existing prison conditions in America. For them to apply a foreign standard, for example, from Canada or continental Europe, could result in such a high standard being set that practically all U.S. prisons would be found to be unconstitutional.

The converse of this must therefore also be true. If Canadian Courts set the legal standard for Canadian prisons on the basis of the American standard will result in a very low standard being set against which to evaluate basic Canadian prison conditions.
69 (1983), 42 O.R. (2d) 481
Since the majority of s. 12 cases have been concerned with "punishment" challenges, it must be asked to what extent the rulings in those cases can be transferred to a case involving "treatment".

D. C. McDonald J. in, Soenen v. Director of Edmonton Remand Centre et al, found that treatment was quite distinct from punishment. The tests for finding a violation of s. 12, therefore, were different where "treatment" was concerned. As he said

"As the principle of disproportionality involves deciding whether a form of punishment is excessive and out of proportion to the crimes it seeks to restrain ... it is inherently irrelevant to an issue whether "treatment" is cruel and unusual".

The judge also highlighted the fact that the Eighth Amendment made no reference to "treatment". For the purposes of Canadian courts, he said, the American decisions on cruel and unusual punishments were "a recipe for a different dish". It is submitted that Nitikman J. failed to adequately address this distinction and that he proceeded too far in using American decisions based on a fundamentally different definition.

Nitikman J. also referred to Collin v. Kaplan, and that court's use and approval of American case law. Since he made no comment about how he regarded that case, it would be hard to argue that Dube J.'s judgment in Collin supports in any way Nitikman J.'s approach in Piche.

Nitikman J. then concluded

"that a careful, studied review of the evidence, not only the evidence set out in these reasons, but in all evidence both verbal and by affidavit, has convinced me that while double bunking is admittedly not an ideal situation, that based on the evidence I found to be factually and responsibly correct, I have concluded
that the decision to institute and the institution of double-bunking did not breach the provisions of sec. 12 of the Charter ..."\(^{75}\) (my emphasis)

The Trial judge's analysis of s. 12 is therefore not exactly detailed. It is impossible to gauge what weight he attaches to Collin, or even to the two U.S. cases beyond knowing that they were "helpful and deserving of careful consideration". His treatment of the evidence itself is even less satisfactory. After listing features of each witnesses evidence for 128 pages, making very little comment about its utility during that process, he then went on to make very limited reference to some of the evidence in his conclusion. It is not totally clear which particular evidence he regards as "factually and responsibly correct". It is therefore submitted that this is a fundamentally unsound judgment. One final question, however, falls to be asked: Would a case such as Piche now be decided differently in light of R v. Smith?

After R v. Smith.

Piche was decided in 1984, and thus the s.12 jurisprudence which was available to Mr Justice Nitikman was very limited. It is perhaps not surprising, therefore, that he should have chosen a conjunctive reading of "cruel and unusual". As has been seen, such an approach would not be possible today, given the Supreme Court of Canada's ruling in Smith in favour of a "compendious expression of a norm" interpretation. This observation alone might be sufficient to suggest that a more liberal approach to the scenario in Piche could be expected if it were to arise again.

But, as has been seen, challenges to "double bunking" are likely to be made on the basis that this is "treatment" rather than "punishment". Since Smith was concerned with "punishment", it is important to ask just how far the tests in that case may also be applied to treatment cases.

\(^{75}\) supra, note 8, p. 163
Disproportionality, according to D.C. McDonald J. in Soenen, was clearly not a relevant consideration. Mr Justice McDonald did, however, consider tests suggested by McIntyre J.A. in Miller and Cockriell to be helpful in treatment cases,

"1. Is it not in accord with public standards of decency and propriety? (When this case Miller and Cockriell reached the Supreme Court of Canada, Laskin C.J.C. spoke at p. 183 (C.C.C.) of "outrage" to standards of decency)

2. Is it unnecessary because of the existence of adequate alternatives?

3. Can it not be applied upon a rational basis in accordance with ascertained or ascertainable standards?"

Similar tests were laid out by Mr Justice McIntyre himself in Smith. Lamer J., in that case, also agreed that the existence of adequate alternatives was a relevant consideration, as were questions of the standards of decency being outraged, and the treatment or punishment not being applied according to ascertained standards.

Taking account of the judgments in Smith and Soenen, it is submitted that the plaintiffs' counsel in Piche were right to suggest that three central criteria emerge in dealing with "treatment" situations; decency, necessity, and fairness. It is further submitted that potential plaintiffs should not have to establish each of these tests, but merely one of them. This is clearly what McIntyre and LeDain JJ. envisaged in stating that "one or more of the following characteristics" (my emphasis) needed to be shown for a violation of s. 12 to be established.

Lamer J., on the other hand, had argued that while each of these tests was not determinative alone, it might be helpful in deciding "whether the punishment is grossly disproportionate". It is suggested that Lamer J.'s approach can be distinguished on the basis of his clear connection

76 supra, note 71, p. 219

77 Soenen, ibid, at p. 220, referring to McIntyre J.A. in Miller and Cockriell, at (1975), 24 C.C.C. (2d) 401, 470.

78 See Chapter One, footnote 55, and accompanying text.

79 Or, as he put it, "Whether the punishment is founded on recognized sentencing principles", ibid, p. 44

80 ibid, p.55. McIntyre J., also used the word "or" between each of the 3 tests.
of these tests with "punishment" and "gross disproportionality". It is perhaps possible that one of these tests alone might have satisfied him if he were dealing with the more general term "treatment". At the very least, the satisfaction of two or more of the tests, might perhaps tilt the balance in the plaintiff's favour, even under Lamer J.'s more demanding approach. It can, however, be said that as the Supreme Court of Canada has not yet had to declare the effect of the word "treatment" in s.12, the ruling in R. v. Smith has the potential to support McDonald J.'s approach in Soenen, and has certainly not foreclosed it. On the basis, then, of these three criteria, does the practice of double bunking, at least so far as experienced by the inmates in Piche, violate s. 12?

1. Decency

As has been noted in an earlier chapter, it is not easy to determine what a public standard of decency might be. The best that a judge can do is to look at objective evidence such as that presented by the expert witnesses in Piche. If the practice of double bunking could be described as harmful to inmates' safety and health, then this would go some way to suggesting that it was contrary to standards of decency. In Piche, one of the prison officers made clear that double bunking made the running of a prison more difficult, with the potential for undesirable behaviour. Dr Shane, a psychiatrist, categorically stated that double bunking was "damaging, detrimental and dangerous". Nitikman J. had noted that,

"If one wants to see prison as having some trace of dignity and humanity it is his (Dr Shane's) opinion that double bunking for many individuals is just an intolerable experience."
Dr Shane's opinion, therefore, was clearly that double bunking was not in accordance with standards of decency. The medical evidence of Dr Murray further showed that the mental and physical health of prisoners could potentially be affected by double bunking.46

The court must, furthermore, be able to assess "public standards of decency" according to a Canadian standard. Thus, the evidence of Allan Breed with his extensive experience of American penitentiaries, should be treated with care. Given that Canadian penitentiaries are different from U.S. penitentiaries, in terms of population density and construction, it is submitted that the standards of decency prevailing in Canada may well be higher, and Canadian courts should, as a result be willing to tolerate less alleged ill-treatment of prisoners than their American counterparts. Where the plaintiffs in Piche could have had more success was in having witnesses whose credentials as "experts" were not open to question, which was the problem predictably noted by Nitikman J. It is submitted that had the qualifications of these witnesses been immune from criticism, the kinds of evidence put forward in Piche did show treatment that was contrary to standards of decency.

Empirical data drawn from scientific studies into the effects of overcrowding may help bolster this conclusion. 46 In one such study, the relationship between crowding, stress and blood

44 supra, note 43, and accompanying text.
46 If Nitikman J. was determined to use American authority, it is submitted that he would have been better off if he had referred to the judgment of the Court in Ruiz v. Estelle, 503 F. Supp. 1265 at 1287 (S.D. Tex. 1980), where they noted that "detailed, scientifically exact proof of harm has never been required. Courts have reached conclusions concerning the extent of harm from overcrowding based on common sense reasoning from observable facts, such as population levels, space per inmate, incidence of violence and staffing levels."
Furthermore, the case of Capps v. Atiyeh, 495 F. Supp. 802 (D. Or. 1980) shows that in America at least, expert testimony can establish that overcrowding can be cruel and unusual punishment. In that case, eight expert witnesses, supported by documentary and photographic evidence, successfully established that the prison conditions did violate the Eighth Amendment.

46 Although, on the argument that empirical evidence does not show the negative effects of prison overcrowding, see James Bonta and Paul Gendreau, "Reexamining the Cruel and Unusual Punishment of Prison Life" 14 Law and Human Behaviour 347-372. For a critical comment on this article, see Julian V. Roberts and Michael Jackson, "Boats Against the Current: A response to Bonta and Gendreau", unpublished paper.
pressure was examined. A correlation was found between levels of blood pressure and levels of crowding. Thus, inmates with low blood pressure were found mostly in single cells, and the higher blood pressures were found in inmates living in crowded situations, such as dormitories, where concerns about being attacked, for example in one's sleep, could be expected to exist.

While this study was undertaken in Massachusetts correctional institutions (and is therefore not Canadian in content), its scientific conclusions at least indicate that a prisoner's blood pressure might well be increased by having to endure crowded living quarters. Other empirical data from the United States must be of at least persuasive interest to Canadian courts. Randall Pooler notes that

"Research evaluating the effects of overcrowding on inmate health has proven consistently that densities greater than one inmate per sixty square feet have a significantly higher rate of transmission and contagion levels of diseases, such as tuberculosis, influenza and dysentery. This has led the American Public Health Association to require that sixty square feet be provided as a minimum for each inmate." 88

Thornberry and Call draw attention to a study by Megargee which makes it clear that it is not overcrowding alone that can be problematic. The specific question of double bunking and the effect that that has on individual living space is also important. They state that

"...the association between living space and infractions remained strong when the total population was held constant...A reduction in the number of square feet of living space per inmate corresponded with a significant and substantial increase in both the number and rate of disciplinary infractions." 89

88 supra, note 56, at p.35, and footnotes 233-236 thereto, which cite additional sources.
Expert testimony in many overcrowding cases also clearly points to a link between overcrowding and the mental well-being of inmates. Thus, for example, in *Ruiz v. Estelle*, the Court noted that overcrowding contributed to more depression, suicides and an atmosphere of general hostility. Studies linking violence in prison with overcrowding have also been noted by Pooler as showing

"...that overcrowding results in increased prisoner disturbances, heightened aggression, and prison-wide riots. The degree of overcrowding has been proven to be positively correlated to disruptive behaviour and to have a negative effect on constructive behaviour."

Obviously, if the health records of the double bunked prisoners in *Piche* had been admitted by Nitikman J. and had revealed that prisoners' health was being adversely affected, this would be strongly persuasive in arguing that standards of decency had not been observed.

Even at a more abstract level, double bunking would seem to at least this writer to be indecent. It can hardly be said to be civilized to lock one prisoner in a cell with another prisoner who, for example, is prone to violent outbursts or sexual attacks. Such a prisoner would never be able to relax, being constantly in fear of attack. This is confirmed by the testimony of Smyth, himself a dangerous offender, who was double bunked with a cellmate convicted of a stabbing offence. As was seen earlier, neither were able to relax, leading to an increasingly hostile environment. Nitikman J. had talked about certain levels of tensions being inevitable in prison. It could certainly be argued that such tensions cannot be allowed to extend to a constant fear for one's

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90 503 F. Supp. 1265 at 1287 (S.D. Tex. 1980)
91 For further evidence of the detrimental effects of overcrowding, see "Comment: Prison Overcrowding as Cruel and Unusual Punishment: *Rhodes v. Chapman*", 66 Minnesota Law Review (4-6), 1215 at 1226-1227, (1982) and footnotes 79-82 therein.
92 supra, note 88, p. 36
life, especially in a country where the death penalty, with the attendant fears of death row, no longer exists. Prison authorities still concede today that

"...more disputes do arise when two people are confined to a small space. Also we saw an increase in formal Complaints of a more petty nature."

It could, furthermore, be argued that the lack of privacy to use the toilet in a cell, as was alluded to by much of the prisoner evidence in Piche, also strikes at a double bunked prisoner's ability to maintain some level of dignity. For all of the above reasons, it is submitted that in a future double bunking case it could certainly be argued that the practice is not in accord with standards of decency, especially if supported by stronger expert witnesses (and a more understanding judge) than was the case in Piche.

The Correctional Service of Canada, in Piche, also indicated that double bunking was not normal correctional practice or policy. It could be argued that this policy reflected public opinion on the way prisoners should be treated in Canada, and was further "munition" for plaintiffs arguing that double bunking outraged standards of decency?

2. Necessity

The second proposed test would ask whether double bunking was unnecessary because adequate alternatives existed. This may be harder to prove than the decency test, simply because the court would be called upon to look more at questions of prison administrative questions of what is healthy and "decent" for inmates. Counsel for the plaintiffs put forward two alternatives for the court to consider. As a short term solution they suggested that

93 supra, note 52
94 But it would seem that the position today is that a certain number of cells in the Federal Penitentiary system are designated for double occupancy, given the existence of a regular report of double occupancy capacity in the Federal system supra, note 20.
dormitory accommodations with cubicles might be possible if suitable inmates could be found. This at least would give inmates the illusion of privacy, but unless each cubicle was secure (including the ceiling) the potential for attack, and the consequent fears and stresses that that would cause, would make this option nearly as great a health risk to the inmates as double celling. The study mentioned above, for example, found that blood pressure levels were often particularly high in the dormitory situation. The C.S.C. could also be expected to object to dormitory accommodation on the basis that it might be harder to maintain adequate security control of such an area. This alternative to double celling, therefore, may be tough to justify.

The second alternative that the Piche counsel suggested was to make more use of day parole and full parole to allow for inmates to be "cascaded" down the security ladder, hence freeing up cell space in the higher security prisons. While this is an option that is in the hands of the National Parole Board, the Solicitor General of Canada, with his role with that Board and the C.S.C., could encourage a more active use of parole. For this to be an adequate alternative, it would certainly have to be shown that it was possible. If the Parole Board refused to accelerate parole, therefore, this could be argued to be an alternative that is hardly open to the correctional authorities. It is submitted, therefore, that an argument based on necessity, at least from the experience of Piche, will not easily be won.

The main problem with any necessity argument is—that suggesting that judges require the adoption of certain alternatives, may be putting them into the position of lawmakers. Most solutions for making double bunking unnecessary depend on there being a change of overall correctional policy, a change that should ultimately come from the legislature. If, however, 

95 supra, note 87
96 Vivien Stem, in Imprisoned By Our Prisons: What Needs To Be Done, (Unwin Hyman 1989), suggests, in Chapter 3, interesting and potentially effective ways to reduce the use of prison, such as early release from prison and changes in sentencing practices. Philip Jenkins, in "Prison Crowding: A Cross-National Study", in International Corrections: An Overview, (American Correctional Association 1987), also suggests ways in which to reduce crowding in prison. Of particular interest is the way the French Socialist
the government and prison officials show absolutely no sign of changing things then the courts are mandated by the charter to protect individual rights under s.12, whether or not this causes a change of law or policy.

3. Fairness

The Plaintiffs in Piche argued that double bunking was introduced in a way that was both irrational and unfair. The warden's plan involved placing all newcomers into double bunks, regardless of their age, tendency towards violence or mental and physical suitability for such an experience. The plan basically involved placing all new inmates arbitrarily into double occupancy. As has been seen from recent C.S.C. figures, this practice seems still to be going on. Thus, there is double bunking in the Reception areas of Millhaven, Springhill, RRC in Quebec, and Warkworth in Ontario?

It could be argued that the plan in Piche was unfair simply because it took no notice of the wishes of the prisoner who was to be double bunked. As plaintiffs counsel argued

"Fairness requires at least a basic opportunity to be heard before one's rights or privileges are affected"98

But it is perhaps in relation to those who are double celled in protective custody, that the strongest case for irrational and unfair institution of double celling can be made. The testimony

government of Francois Mitterand managed to reduce the number of inmates from 42,000 to 36,000 within less than six months of coming into office in 1981. This was achieved, inter alia, by releasing most inmates serving under six months in prison. As a long term strategy, though, this would seem to be of limited value, since changes in policy have resulted in a continuing increase in prison population, with the figure for 1987 being 45,000.

97 Since inmates have no real choice as to which prison they are sent, they must also have no choice if the prison to which they are sent happens to have double celling in the reception area, where inmates may be incarcerated for a number of weeks while being introduced to prison.

of Raymond Breland highlights the experiences of double bunking in protective custody. The inmates who go to protective custody do so because they fear for their life, and are often under a great deal of stress. Protective Custody hardly relieves this stress if incarceration is to be in a shared cell, which is locked for some twenty hours a day. Surely the strongest claim to single cells must be from those that have to spend practically their whole day locked up. The authorities, who, even in May 1991 were double celling in protective custody in Kent and R.R.C. Pacific Institutions, run the risk of being accused of taking advantage of the fact that people "choose" to go into protective custody. It is to be hoped that the very recent eradication of double bunking in protective custody at Kent Institution signals the permanent removal of double bunking, at least in protective custody.101

In summary, then, it is possible to construct a fairly compelling argument that double celling is cruel and unusual treatment because it is applied unfairly and irrationally.

Conclusion

"What's so terrible about cramming prisoners into limited space if the only other choice is to spend as much as $100,000 of taxpayers' money to build a cell? Why such tender concern for convict privacy and comfort?

The answer is that crowding threatens management as well as comfort. And sound prison management shapes all criminal justice."

The case history of double bunking in both America and Canada illustrates surprisingly little "concern for convict privacy and comfort". The judgment in Rhodes v. Chapman could hardly be said to have advanced the cause of double bunked prisoners. It was unfortunate that such an important case should have involved a relatively modern and well equipped penitentiary, since

99 supra, note 23.
100 supra, note 52
this gave the majority of the U.S. Supreme Court sufficient scope to avoid ruling that double celling in that case was cruel and unusual punishment. It should, however, be remembered that the District Court had found the conditions of confinement in Rhode to violate the Eighth Amendment, and the judge at that stage of the case had had the chance to view the prison conditions himself. Justice Marshall, in his dissenting opinion in the Supreme Court, put the size of the S.O.C.F. cells into understandable proportions. As he said

"In a doubled cell, each inmate has only some 30-35 square feet of floor space. Most of the windows in the Supreme Court building are larger than that. The conclusion of every expert who testified at trial and of every serious study of which I am aware is that a long term inmate must have to himself, at the very least, 50 square feet of floor space-an area smaller than that occupied by a good sized automobile - in order to avoid serious mental, emotional and physical deterioration. The District Court found that as a fact.434 F. Supp 1007, 1020-1021 (S.O. Ohio 1977)."

As a basis upon which to decide a Canadian double bunking case, therefore, Rhodes v. Chapman leaves much to be desired. It referred to a prison which was atypical of many in America. The majority seemed happy to tolerate conditions which at least one of their number, and both lower courts in that case, found to "go well beyond contemporary standards of decency and propriety". In short, the case sets a standard that is low enough to avoid labelling as unconstitutional many other U.S. prisons which fell below the standard of the SOCF.

As was seen in an earlier Chapter, the approach of the U.S. Supreme Court has, in any case, moved on from the Rhodes decision to an even more conservative approach requiring proof of deliberate indifference. It is thus clear that while the courts in Piche and Collin were probably unwise to rely on the Rhodes decision, such an approach is not even open to Canada's courts today since Rhodes would probably be decided even more narrowly if retried now.

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102 supra, note 15, at 371, and footnotes 3-4 there to.
103 supra, note 15, per Justice Marshall, at 375.
104 In Wilson v. Seter, Chapter Two, Footnote 25, and accompanying text.
The task for a future Canadian court faced with a challenge to double bunking in prison will not be an easy one. The judge cannot safely rely on Rhodes v. Chapman, given the many points of distinction already highlighted. Neither can they look to Collin v. Kaplan or Piche, since both these cases were based on the Rhodes decision, and also, in the case of Piche, on a materially unsound analysis of the evidence, and superficial use of the case law. Even the case of R. v. Smith, with its references only to punishment, might seem to be of limited help.

The key, however, to this future task is to develop the scope and meaning of the word "treatment", within the s.12 proscription. It is submitted that the tests extrapolated from Soenen and Smith provide a useful framework from which to do this. To a greater extent than with prisoners with the AIDS virus, inmates subjected to double bunking need to feel the maximum protective potential of s.12. At least for the prisoner mistreated because he is HIV positive, the public can be expected to have some sympathy for a terminally ill prisoner who is being mistreated. It will thus be a little easier to show that public standards of decency have been outraged. For the ordinary prisoner, "banged-up" with another inmate in a small cell, the public reaction is likely a true reflection of the above quote from the New York Times. Why, indeed, should convicts be ensured privacy and comfort?

A number of recent cases, however, suggest that the Supreme Court of Canada is moving towards a recognition that privacy is a fundamental right that everyone in society is entitled to expect. In R v. Dyment, for example, Mr. Justice La Forest argued that

"Grounded in man's physical and moral autonomy, privacy is essential for the well-being of the individual. For this reason alone, it is worthy of constitutional protection, but it also has profound significance for the public order. The restraints imposed on government from prying into the lives of the citizen go to the essence of a democratic state."  

105 (1988), 45 C.C.C. (3d) 244
106 ibid, p. 254
He added to this by quoting from an official report on Privacy and Computers\textsuperscript{107} that

"...this sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person." \textsuperscript{108}

While Dyment was concerned with s.8 rather than s.12 it is submitted that these general dicta about privacy apply with equal force to s.12 cases, especially given that neither section makes specific mention of a right to privacy.

Clearly, if privacy is a fundamental value of society, then the absence of empirical data about the harmful effects of overcrowding need not be fatal to a s.12 action. If the Supreme Court is willing to say that privacy is "essential for the well being of the individual",\textsuperscript{109} this must include individuals who also happen to be prisoners. Indeed, in the prison society, where so many other rights and freedoms are lost, privacy is an especially valuable right. This clearly come within Le Forest J.'s declaration, in \textit{R v. Wong}\textsuperscript{110} that

"There are...situations and places which invite special sensitivity to the need for human privacy." \textsuperscript{111}

\textit{(my emphasis)}

Having to share one's living quarters with a stranger surely invites such special sensitivity. To carry La Forest J.'s approach to its logical conclusion must equate an invasion of privacy with a breach of contemporary standards of decency.

\textsuperscript{107} Privacy and Computers, The Report of the Task Force established by the Department of Communications/ Department of Justice (1972).

\textsuperscript{108} supra, note 105, at p. 255.

\textsuperscript{109} supra, note 106

\textsuperscript{110} (1990), 60 C.C.C. (3d) 460

\textsuperscript{111} \textit{ibid}, p. 479
At the very least, it must now be open to a future Canadian court to set a standard of decency that will at least be attainable in the more extreme examples of cell overcrowding, and arguably, in any case of double bunking.

Fair and acceptable standards of incarceration inevitably reflect society's commitment to decency. The risk of narrow judgments such as that in Piche is that overcrowding will be allowed to become a norm,\textsuperscript{112} with the possibility of increasingly tense, hostile and dangerous prisons. An editorial in the New York Times puts the consequences of overcrowding into perspective.

"A chaotic prison encourages violence and cruelty. Like a subway car splashed with graffiti, it signals a society's loss of self respect.\textsuperscript{113}"

Decisions of the calibre of Piche operate to erode Canadian society's self respect. In a country that boasts of its correctional system making

"...great strides in forming a close and co-operative relationship with the community it serves...[and being]...more open, more accountable and more clearly embedded in the social fabric...\textsuperscript{114}"

it is clear that there is public authority for a more interventionist approach by the Canadian judiciary. It is to be hoped that Piche signals not the end, but the beginning of a new period of prison litigation that will actually operate to improve the life of the Canadian prisoner, and, by the same token, Canadian Society.

\textsuperscript{112} As is already evident by the CSC designating a capacity for numbers of those who can be double bunked. See \textit{supra}, note 20.

\textsuperscript{113} \textit{supra}, note 100.

CONCLUSION

AN AGENDA FOR CHANGE

"The brutality in here is unreal. One guy was taken out of his cell, stripped, had his handsuffed behind his back, and was told to lay face down on the cold cement while guards spent an hour searching his cell. Another was gassed in the hole because he told guards to lay off when they were beating another guy. Guards refused to take cuffs off another guy so he could eat his meals. He had to put his face in the tray so he could eat....Guards told him they run this prison now and they can do what they want with us." \( ^4 \)

(my emphasis)

This extreme example of prison life in Canada highlights the risks of giving prisoners so little legal redress that prison officers believe that they can get away with whatever behaviour they like. With inmates practically powerless to protect themselves, official prison action will inevitably infringe upon the rights of individual prisoners. As has been shown in this thesis, there does exist, in s.12 of the Charter, a relatively new protection for prisoners who have been mistreated. Section 12 will only be appropriate for this protective task, however, if prisoners can see that it has been successfully used by other prisoners. It is submitted that the experience of s.12 thus far is not likely to engender such inmate confidence. Only one prison conditions case has been successful in Canada. This was McCann v. The Queen,\(^2\) which was decided under paragraph 2(b) of the Canadian Bill of Rights.\(^3\) The first major prison conditions case to be decided under s.12 of the Charter, Piche v. The Solicitor General of Canada,\(^4\) was unsuccessful. The extreme judicial reluctance to intervene in the official prison decision to double bunk, could hardly be said to be a victory for prisoners' rights. Cases decided after

\( ^1 \) Claire Culhane, Still Barred from Prison (2nd Edition, 1985), at p. 52
\( ^2 \) (1975), 29 C.C.C. (2d) 337 (F.C.T.D.)
\( ^3 \) R.S.C. 1970, Appendix III.
\( ^4 \) (1984), 17 C.C.C. (3d) 1 (Fed T.D.)
Piche, although not directly to do with prison conditions, do, however, hold out slightly more hope for the future of s.12 prison litigation.

In R v. Smith, the Supreme Court of Canada showed signs that it recognised the important role of s.12. Their clear move away from the pre-existing conjunctive approach to the phrase "cruel and unusual", widened the scope of s.12 beyond treatment or punishment that was both cruel and unusual. Earlier s.12 judgments, such as in Piche, which had used a conjunctive reading of the phrase, immediately became of questionable validity. Since the Smith decision in 1987, however, it has become obvious that the Supreme Court does not wish to widen the scope of s.12 any further than it has already done.

Of particular concern is the Court's clear acceptance, in R v. Lyons, that a s.12 violation can, nonetheless, be saved by a s.1 justification. It is difficult to conceive of a situation where treatment or punishment would ever be found to be so extreme as to be "cruel and unusual" yet still be demonstrably justified in a free and democratic society. It is submitted that behaviour that is described by words as emotive as "cruel and unusual" can never be acceptable in a democratic society. They are words more properly associated with totalitarian societies where torture and "disappearances" are commonplace. A high priority, therefore, for the next s.12 case to come before the Supreme Court of Canada will be to abandon any question of a s.1 justification. If Canadian courts are in any way serious about protecting individual's rights and freedoms under s.12, they must follow the lead of Article 3 of the European Convention on Human Rights and deal with s.12 in absolute terms.

Another priority is for the Supreme Court to move away from what seems to be an increasingly condescending attitude towards s.12 cases in general. For the Court, in Steele v. Warden of Mountain Institution,\(^5\) to say that it would only be on "rare and unique occasions" \(^6\) that a court
will find a violation of s.12, must give a message to prisoners, amongst others, that unless their case is serious in the extreme, and involves a completely new scenario, they can forget about having any success in Canada's courts. The dangers of courts distancing themselves in this way from official actions are made manifest in the increasingly conservative treatment of prisoners under the Eighth Amendment of the United States Constitution. The Charter mandates the courts to vigorously protect the rights and freedoms contained within it. What was said by the Court in Steele certainly seems to run counter to this, while any further movement towards the current American position would negate much of what the Charter was enacted to achieve. The courts must, therefore, allow s.12 to grow in the 1990's into a powerful, and, if necessary, often used, tool with which prisoners can protect themselves from guards who believe that "they mn this prison now."

Such growth is not unreasonable given the burgeoning number of situations in which s.12 might potentially be used. As should now be clear, the problems and challenges of AIDS in prison are likely to escalate, as the numbers of those in general, and prison, populations continue to increase. The often extreme responses of prison administrators to HIV positive inmates, in the early days of the disease, are even less acceptable today, when knowledge of AIDS is far more extensive than it was in the early 1980's. Blanket segregation of HIV inmates, the failure to provide adequate education and counselling, and the stubborn (and life threatening) refusal to provide condoms and bleach to inmates, are all practices that no decent society should tolerate. A strong implementation of s.12 by the courts in these instances will do much to tackle official ignorance about the disease. Such ignorance, with the attendant ill informed decisions of prison officials, is almost as dangerous as the disease itself. A "hands-off" conservative approach to AIDS in prison may leave many prisoners unnecessarily ill or dying. This is hardly the mark of a civilised society.

6 ibid, p. 697
7 supra, note 1
Section 12 may also help to discourage prison overcrowding. Double bunking, with the accompanying loss of privacy, should properly be viewed as outraging standards of decency. The Supreme Court now seems to consider privacy a fundamental value to which all people are entitled, and this should certainly include prisoners. If Canadian society is truly free and democratic, it must allow its prisoners to retain some shred of human dignity and autonomy. To do less leaves Canadian prisoners no better off than their counterparts in Victorian England. As Oscar Wilde said, when comparing a free man with one in prison,

"He does not sit with silent men
Who watch him night and day;
Who watch him when he tries to weep,
And when he tries to pray;
Who watch him lest himself should rob
The prison of its prey."  

These words still ring true today. For the prisoner segregated only because he has an incurable infection, or the prisoner forced to share a single cell with another inmate, dignity and privacy are ill recognised. The task for the Canadian courts, as this century draws to a close, is to fashion s.12 of the Charter into a genuinely useful protection for the prisoners of this country. Such a distinct approach will do much to encourage social order in the nation's prisons, and signal that Canada is capable of treating all of its citizens with equal care and compassion.

8 Oscar Wilde, "The Ballad of Reading Gaol".


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