Court File No.: C64841

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Appellant
(Applicant)

- and -

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPELLANT, CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

McCarthy Tétrault LLP
Suite 5300,
Toronto Dominion Bank Tower
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673

H. Michael Rosenberg LSUC#58140U
Email: mrosenberg@mccarthy.ca

Charlotte-Anne Malischewski
LSUC#69687F
Email: cmalischewski@mccarthy.ca

Lax O'Sullivan Lisus Gottleib LLP
Suite 2750, 145 King Street West
Toronto, ON M5H 1J8
Tel: 416-598-1744
Fax: 416-598-3730

Jonathan C. Lisus LSUC#32952H
Email: jlisus@counsel-toronto.com

Larissa C. Moscu LSUC#62928W
Email: lmoscu@counsel-toronto.com

M. Fahad Siddiqui LSUC#67001A
Email: fsiddiqui@counsel-toronto.com

Lawyers for the Appellant, Corporation of the Canadian Civil Liberties Association

TO: **ATTORNEY GENERAL OF THE ATTORNEY GENERAL**
Department of Justice The Attorney General
Ontario Regional Office
130 King Street West
Suite 3400
Toronto ON M5X 1K6
Fax: 416-973-0809

Kathryn Hucal
Johnathan Provart
Tel: 416-973-2240
Fax: 416-973-0809
Email: kathryn.hucal@justice.gc.ca

Lawyers for the Respondent

Court File No.: C64841

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Appellant
(Applicant)

- and -

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE APPELLANT
THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

TABLE OF CONTENTS

PAGE

PART I—OVERVIEW

1. This Application challenges the constitutionality of solitary confinement in Canadian prisons, as authorised by ss. 31-37 of *Corrections and Conditional Release Act* (the "***CCRA***").[1] Below, Associate Chief Justice Marrocco (the "Application Judge") concluded that the impugned provisions of the *CCRA* contravene s. 7 of the *Charter of Rights and Freedoms*, are not saved by s. 1, and are of no force or effect. The Respondent has taken no appeal from these holdings, which were stayed for a period of one year to permit Parliament to implement new legislation.

2. Although the Application Judge found that the provisions authorize treatment that causes serious psychological harm, is offside responsible medical opinion, causes and exacerbates serious mental illness, and is contrary to international norms and principles, the Application Judge crafted a remedy that is unconstitutionally narrow. He confined the remedy for breach of s. 7 to independent review of segregation decisions and dismissed the balance of the claims under s. 7, 11(h) and 12. He refused to impose a hard cap at fifteen consecutive days in accordance with international convention and the medical opinion he accepted, or to prohibit the confinement of inmates with mental illness, young inmates, and inmates who are seeking protection.

3. This outcome rests on two core errors. First, the Application Judge erred in holding that the harm caused by the provisions does not engage s.12 because it was not demonstrated that such harm was "inevitable" or necessarily occurs in "every" instance. Section 12 does not require proof that every person confined "must" suffer serious harm. It is enough to show that the statutory scheme in and of itself puts prisoners in the way of serious harm and that many suffer the consequences.

---

[1] S.C. 1992, c. 20 [*CCRA*], Appellant's Book of Authorities [BOA], Tab 1.

4. Second, the Application Judge erred when he concluded that administrative segregation does not constitute double punishment and thus a breach of section 11(h).

5. These errors rest on the finding that the impugned provisions can be administered constitutionally. Although he recognized that ss. 31-37 of the *CCRA* themselves create a real risk of serious harm which actually occurs, the Application Judge concluded that these constitutional deficits could be cured by reading them in the light of the general statement in s. 87 of *CCRA* requiring the Correctional Service of Canada ("Service" or the "CSC") to "take into *consideration* an offender's state of health and health care needs" and a requirement that inmates be monitored for the manifestation of serious psychological damage.

6. A general requirement to "consider" health cannot cure the harm inherent in specific provisions which expressly restrict "considerations governing release" to security. The Application judge failed to recognize that the essential structure of ss. 31-37 needlessly exposes inmates to the risk of serious, irreversible harm. It is not constitutionally sufficient to entrust the mitigation of this risk to a general duty to "consider" the health of the inmate and the vagaries of a policy of "monitoring", which will vary with the experience, vigilance and availability of monitors, the unique circumstance of each inmate and their state of health, and their ability to seek meaningful remedies/justice. Where there is a real risk of great harm, the provisions that create it must also limit it: a statute providing for such severe harms must also include the constitutional limits of those harms. That is the only way this Court can bring the rule of law into Canadian penitentiaries.

PART II—FACTS

A. The Nature of Administrative Segregation

7. The *CCRA*, authorises segregation for both disciplinary and administrative purposes and enumerates specific conditions governing the placement in and release from segregation For the inmate, the conditions of confinement are identical but, administrative segregation is imposed with less due process, is subject to fewer limits, and is not intended to be punitive.

8. Disciplinary segregation is imposed by an independent chairperson after an adversarial hearing concludes that an inmate has committed the most serious of disciplinary infractions, and the duration of the confinement is subject to hard caps.[2]

9. Administrative segregation is imposed by the warden or his delegate on reasonable grounds to believe that isolation is necessary for the purpose of security or the conduct of an investigation.[3] The inmate remains in segregation *indefinitely* until the threat to security or an investigation has passed or less restrictive housing becomes available.[4]

10. The cells are tiny and sometimes windowless. The inmate is locked in for 22 hours. There is no meaningful human contact[5] :

> In the moments when all I had was my stress and depression, I would go deep into my thoughts. I would remember everybody who showed hate to me [...] And I would think; if I could do things over, I would just end my life. The longer I spent isolated, the more I started to feel like I wasn't really human. [...] I started to feel like I was an animal. The days started to run together. I had no way of knowing for how long I would be in

---

[2] *CCRA*, BOA, Tab 1, s. 44(1)(f); *Corrections and Conditional Release Regulations*, SOR 92-620, BOA, Tab 2, s. 27 [*CCRA Regulations*].

[3] *CCRA*, BOA, Tab 1, s. 31(3); *CCRA Regulations*, BOA, Tab 2, s. 6.

[4] *CCRA*, BOA, Tab 1, s. 32.

[5] Decision, Appellant's Appeal Book and Compendium [ABC], Tab 4, at para. 252: the Trial Judge held that segregated inmates' contact with Correctional Service of Canada personnel is "perfunctory". See e.g., Photo of Cell, ABC, Tab 8; Photo of Cell at Collins Bay, ABC, Tab 9; Photo of Meal at Collins Bay, ABC, Tab 10; Photo from Toronto Star, ABC, Tab 11.

segregation. I just wanted to give up on life and I came very close to doing so. On several occasions, I made a noose and planned to take my life, before deciding against it.[6]

11. Many try to escape through suicide, and too many succeed [7]:

> I could hear him through the walls. He was crying and begging to be released. I felt bad for him so when the guards came around, I warned them that I thought he might do something to himself. Then, he started to give stuff away to the people in the cells around him. That's when I knew it was really bad. One night, he strung himself up to the cover of the smoke detector using bed sheets. It took him a long time to die. I could hear him gagging and choking. It felt like forever. The guards didn't come around to cut him down until the next morning... This made me angry and deeply sad.[8]

B. The Legislative Scheme

12. Administrative segregation is authorised by ss. 31-37 of the *CCRA*. Its sole purpose is to "maintain the security of the penitentiary or the safety of any person". The *only* criteria for admission to administrative segregation are set out in s.31(3): the institutional head or their delegate believes that segregation is necessary to protect the security of the institution, another person, the inmate, or the integrity of an investigation. There is no mention of, or reference to, the health of the inmate.[9] Section 32 expressly restricts "considerations governing release" to the admission criteria. Thus, s. 31(3) is the only way in and out of administrative segregation.

13. Sections 85-89 of the *CCRA* govern "Health Care." Section 86 obliges the Service to provide every inmate with essential health care and reasonable access to non-essential mental health care. Although section 87(a) directs the Respondent to "take into *consideration* an offender's state of health and health care needs in all decisions affecting the offender, including...administrative segregation", ss. 31-37 expressly restricts the decisions to admit and release from segregation to considerations of institutional security. Section 87(a)'s direction to

---

[6] Affidavit of J.R., sworn April 20, 2017, ABC, Tab 12, at paras. 25-27, 34-36.

[7] Annual Report of OCI June 26, 2015, ABC, Tab 13; Affidavit of T.N., sworn April 21, 2017, ABC, Tab 14; Affidavit of J.H., sworn April 20, 2017, ABC, Tab 15; Affidavit of J.R., sworn April 20, 2017, ABC, Tab 12.

[8] Affidavit of T.N., sworn April 21, 2017, ABC, Tab 14, at para. 34.

[9] Decision, ABC, Tab 3, at para. 217.

"consider" an inmate's health does not displace the exclusive criteria for admission to or release from segregation in ss. 31-37; nor does it prohibit the placement in segregation of those inmates whose vulnerability to harm is already well-known and now legally established.

14. There is no reported case in which s. 87(a) has been used to release an inmate from segregation. Nor is there any evidence that s. 87 has ever been used in this way.

15. One month before the hearing and after all cross examinations were concluded, the Respondent substantially revised Commissioner's Directive 709 ("CD 709"), which is the Correctional Service of Canada's policy governing administrative segregation. The revisions reduced segregated inmates' time in cell from 23 to 22 hours a day,[10] and deemed a small subset of the most vulnerable inmates inadmissible to segregation – in particular inmates with "serious mental illness with significant impairments", or who are "actively engaging in self-injury which is deemed likely to result in serious bodily harm" or at an "elevated or imminent risk of suicide".[11] The Respondent relied on this package of policy changes to justify the legislation. The Appellant argued that these policies do not rehabilitate the legislative, they in fact entrench the constitutional deficits and the inherently dangerous nature of ss. 31-37 of the *CCRA* as they require the actual occurrence of serious harm before the inmate is removed from segregation.

16. Notably, CD 709 does not refer to s. 87(a). To the contrary, CD 709 reiterates: "the Institutional Head will be the decision maker for the admission to, maintenance in, and release from administrative segregation in accordance with sections 31-37 of the CCRA".[12]

---

[10] Correctional Directive 709, BOA, Tab 3, s. 39(c).

[11] Correctional Directive 709, BOA, Tab 3, s. 19.

[12] Correctional Directive 709, BOA, Tab 3, s. 8.

17. The Application Judge recognized that administrative segregation "waits for the negative psychological effects [of isolation] to manifest in the form of some recognizable observable form of mental decompensation or suicidal ideation before supporting or perhaps removing the inmate".[13] The inmate is only released when it is apparent that debilitating harm has occurred.

C. Administrative Segregation is Solitary Confinement

18. The Application Judge recognized that the United Nations' Mandela Rules "represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined",[14] which "Canada has supported" and "Canada helped draft".[15] They define solitary confinement as "the confinement of prisoners for 22 hours or more a day without meaningful human contact".[16] The Application Judge accepted that Canada's practice of administrative segregation amounts to solitary confinement under the Mandela Rules.[17]

D. Prolonged Segregation Causes Serious Harm

19. The Application Judge accepted that there can be "no serious question" that prolonged administrative segregation is "harmful and offside responsible medical opinion."[18] He accepted the evidence of Dr. Ruth Martin [19] and Dr. Gary Chaimowitz[20]; Kelly Hannah-Moffat;[21] and others.[22] He rejected the Respondent's only medical opinion on point, tendered by Dr. Robert

---

[13] Decision, ABC, Tab 3, at para. 255.
[14] Decision, ABC, Tab 3, at para. 61.
[15] Decision, ABC, Tab 3, at para. 249.
[16] *Mandela Rules,* BOA, Tab 4, Rule 44.
[17] Decision, ABC, Tab 3, at para. 46.
[18] Decision, ABC, Tab 3, at paras. 89, 97, 254.
[19] Decision, ABC, Tab 3, at para. 123; Curriculum Vitae of Dr. R. Martin, ABC, Tab 16.
[20] Decision, ABC, Tab 3, at paras. 124, 245, 248; Curriculum Vitae of Dr. G. Chaimowitz, ABC, Tab 17.
[21] Decision, ABC, Tab 3, at para. 239; Curriculum Vitae of Dr. Hannah-Moffat, ABC, Tab 18.
[22] Curriculum Vitae of Dr. Coyle, ABC, Tab 19; Curriculum Vitae of Juan Mendez, ABC, Tab 20.

Morgan, a Texas psychologist who had no experience with Canadian prisons and had never treated a Canadian inmate.[23]

20. The Application Judge rejected the Respondent's evidence that some segregated inmates will not be harmed.[24] He recognized that administrative segregation imposes psychological stress,[25] which exceeds the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action."[26] He found:

(a) the negative effects of segregation on inmates' mental health include "sensory deprivation, isolation, sleeplessness, anger, elevated levels of hopelessness, the development of previously undetected psychiatric symptoms, including depression and suicidal ideation";[27]

(b) "[s]egregation has repeatedly been linked to appetite and sleep problems, anxiety, panic, rage, loss of control, depersonalization, paranoia, hallucinations, self-mutilation, increased rates of suicide and self-harm, an increased level of violence against others, and higher rates of frustration";[28]

(c) confinement causes "the development and exacerbation of mental illness,"[29]

(d) indefinite confinement will "result in permanent psychological harm";[30]

(e) the harm caused by solitary confinement is recognized "by reputable Canadian medical organizations like the CMA [Canadian Medical Association] and the Registered Nurses Association of Ontario".[31]

(f) "the harmful effects of sensory deprivation caused by solitary confinement could occur as early as 48 hours after segregation"[32];

---

[23] Decision, ABC, Tab 3, at paras. 94-95.

[24] Decision, ABC, Tab 3, at para. 94.

[25] Decision, ABC, Tab 3, at para. 99.

[26] Decision, ABC, Tab 3, at para. 100, citing *New Brunswick (Minister of Health and Community Services) v. G (J)*, [1999] 3 S.C.R. 46, BOA, Tab 5, at para. 59.

[27] Decision, ABC, Tab 3, at paras. 92-93.

[28] Decision, ABC, Tab 3, at para. 238, citing Expert Report of Dr. Hannah-Moffat, ABC, Tab 21.[29] Decision, ABC, Tab 3, at paras. 238 and 240; see also Expert Report of Dr. Martin, ABC, Tab 22.

[29] Decision, ABC, Tab 3, at paras. 238 and 240; see also Expert Report of Dr. Martin, ABC, Tab 22.

[30] Decision, ABC, Tab 3, at para. 252.

[31] Decision, ABC, Tab 3, at para. 96. See also Canadian Medical Association Journal Editorial Advisory Board, ABC, Tab 23; Canadian Medical Association Journal Editorial, Cruel and unusual punishment: Solitary confinement in Canadian Prisons, ABC, Tab 24; Letter of the Registered Nurses' Association of Ontario dated January 25, 2015, ABC, Tab 25; Canadian Medical Association Journal paper, "Segregation and mental health: CMHA Ontario Supports Sapers' Report", ABC, Tab 26.

(g) "solitary confinement can alter brain activity and result in symptoms within days"[33];

(h) the harmful effects of solitary confinement are "foreseeable and expected",[34] even though the "negative psychological effects may not be observable",[35] and "[n]o nurse or doctor currently working with segregated prisoners in Canadian Penitentiaries testified that practice was benign in some or most cases".[36]

21. The Application Judge noted that the Mandela Rules prohibit solitary confinement in excess of 15 days.[37] He accepted the evidence of Professor Juan Mendez, the United Nations Special Rapporteur on Torture, that this limit is a "hard and fast rule for cruel, inhuman and degrading treatment contrary to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987)*", which Canada has ratified.[38] Likewise, the Application Judge noted that the Ashley Smith Inquest recommended a prohibition on administrative segregation beyond fifteen consecutive days.[39]

E. Segregation Particularly Harmful to Young Inmates/Inmates with Mental Illness

22. The Application Judge made several findings about the particularly harmful effects of segregation on young inmates and inmates with mental illness.

23. He found that there was medical consensus that the brains of those aged 18 to 21 "are still maturing",[40] and "continue to develop".[41] He noted that the disagreement between the experts

---

[32] Decision, ABC, Tab 3, at paras. 123, 238 and 240; see also Expert Report of Dr. Martin, ABC, Tab 22.

[33] Decision, ABC, Tab 3, at paras. 126-127; see also "Position Paper on Solitary Confinement"(7 August 2016), ABC, Tab 27, at 1; Cross-examination of Dr. Nussbaum at p. 86, Q. 335-336, ABC, Tab 5.

[34] Decision, ABC, Tab 3, at para. 240.

[35] Decision, ABC, Tab 3, at para. 241.

[36] Decision, ABC, Tab 3, at para. 96.

[37] Decision, ABC, Tab 3, at paras. 51 and 249; see also *Mandela Rules*, BOA, Tab 4, Rule 44.

[38] Decision, ABC, Tab 3, at para. 57.

[39] Decision, ABC, Tab 3, at para. 32.

[40] Decision, ABC, Tab 3, at para. 208; see also Expert Report of Dr. Chaimowitz, ABC, Tab 28; Expert Report of Dr. Martin, ABC, Tab 22. See also Declaration of Ruben C. Gur, Exhibit 2 to the Cross-examination of Dr. Nussbaum, ABC, Tab 29.

[41] Decision, ABC, Tab 3, at para. 208.

pertained only to the development of those "beyond the age of 21".[42] The Application Judge also accepted that "[s]egregation appears to be a significant risk factor for the development of psychiatric symptoms including depression and suicidal ideation, as well as psychiatric symptoms generally", and "[s]egregated prisoners who are already experiencing mental health problems, have a history of suicide attempts, and have high levels of hopelessness, are more likely to report suicidal ideation".[43]

24. The Application Judge agreed that CD 709 creates a "real risk that the Institutional Head will exercise his or her discretion in a way that contravenes s. 87(a)", because it exempts only a "subclass of mentally ill inmates who cannot be placed in administrative segregation", with the result that other mentally ill inmates "not falling within the class described in Directive 709 can be placed in administrative segregation".[44] Notably, the definition of mental illness proposed by the Respondent's own expert[45] is significantly more expansive than the exclusionary provision in CD-709 , which exclude only those inmates with the most serious mental illness.[46]

25. The Application Judge also held that Commissioner's Directive 843 ("CD 843"), which provides for different "watch levels" for inmates with acknowledged suicide risks "without removing the inmate from segregation", "does not reflect" the appropriate consideration of mental health risks.[47] Instead, it impermissibly excludes "the mental health risk" from "the

---

[42] Decision, ABC, Tab 3, at para. 208.

[43] Decision, ABC, Tab 3, at para. 238, citing Expert Report of Dr. Hannah-Moffat, ABC, Tab 21.

[44] Decision, ABC, Tab 3, at para. 219.

[45] Dr. Morgan includes "schizophrenia and other thought disorders, significant mood disorders that include manic and depressed episodes, and significant anxiety disorders". See Expert Report of Dr. Morgan, ABC, Tab 30, at p. 120.

[46] Correctional Directive 709 excludes only those who are certified under provincial mental health legislation, who have a "serious mental disorder with significant impairments", or who are "actively engaging in self-injury or at elevated or imminent risk for suicide", Correctional Directive 709, BOA, Tab 3, s. 11.

[47] Decision, ABC, Tab 3, at para. 222.

decision to release from administrative segregation".[48] New CD 709 will remove only the most severely harmed inmates.[49]

26. CD 709 and 843 and ss31-37 of the *CCRA* constitute an entrenched institutional failure to appropriately balance "the mental health of the inmate administratively segregated".[50]

PART III—ISSUES ON APPEAL

27. This appeal raises the following issues:

(a) Did the Application Judge err in refusing to declare that ss. 31-37 of the *CCRA* violate:

(i) s. 12 of the *Charter*?

(ii) s. 11(h) of the *Charter*?

(b) Did the Application Judge err in determining that limitations could be read into the *CCRA*, such that no remedy is available under s. 52?

(c) Did the Application Judge err in holding that the Appellant lacked standing to challenge Canada's administration of the *CCRA* under s. 24(1) of the *Charter*?

28. The standard of review for questions of law is one of correctness, while errors of fact are reviewed on a reasonableness standard.[51] With one exception regarding the Respondent's expert evidence, discussed below, the Appellant accepts the Application Judge's findings of fact. The analysis turns on the application of law to those facts. The Appellant respectfully submits that all of the issues raised by this appeal should be decided in the affirmative.

---

[48] Decision, ABC, Tab 3, at para. 222.

[49] Decision, ABC, Tab 3, at para. 219.

[50] Decision, ABC, Tab 3, at para. 223.

[51] *R. v. Boutilier*, 2017 SCC 64, BOA, Tab 6, at para. 81.

A. The Impugned Provisions Violate s. 12 of the *Charter*

i. The Application Judge's analysis

29. Section 12 guarantees "the right not to be subjected to any cruel and unusual punishment." Section 12 protects against the harmful *effects* of a treatment or punishment.[52] Whether administrative segregation is considered "treatment" or "punishment,"[53] s. 12 is engaged where it is "so excessive as to outrage standards of decency."[54]

30. The Application Judge recognized that indefinite solitary confinement will "result in permanent psychological harm",[55] and prolonged solitary confinement is "harmful and offside responsible medical opinion".[56] He also recognized that young inmates and inmates with mental illness were particularly vulnerable to these harms.[57]

31. However, he reasoned that the specific provisions in ss. 31-37 should be read in the light of the general health care provisions of the *CCRA* which require the Service to "consider" the inmate's state of health and health care needs. He reasoned that doing so would limit ss. 31-37's imposition of a harmful practice that would not otherwise pass constitutional muster.[58]

32. Ultimately, the Application Judge concluded that s. 12 is not engaged because it is possible to conceive of a hypothetical situation in which the confinement of an inmate in administrative segregation beyond fifteen days would not outrage Canadian standards of

---

[52] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 (per Lamer J. and Dickson CJC, concurring), BOA, Tab 7, at para. 86.

[53] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, BOA, Tab 7, at para. 7; *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.), BOA, Tab 9, at para. 37, aff'd on other grounds [1989] 1 S.C.R. 296.

[54] See also *R. v. Miller and Cockriell*, [1977] 2 S.C.R. 680, BOA, Tab 10, at para. 60 (per Laskin C.J.C.); *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, BOA, Tab 7, at para. 86.

[55] Decision, ABC, Tab 3, at para. 252.

[56] Decision, ABC, Tab 3, at paras. 89, 97, 254.

[57] Decision, ABC, Tab 3, at paras. 208, 219, 222, 223.

[58] Decision, ABC, Tab 3, at para. 260.

decency.[59] Likewise, the Application Judge was not satisfied that young inmates and mentally ill inmates require categorical protection.

33. Rather than grant *Charter* relief, the Application Judge elected to read into ss.31-37 a balancing exercise not even found in s. 87: "[t]he Correctional Service of Canada is therefore required to balance the harms to the inmate caused by continuing administrative segregation against the benefits to safety by maintaining administrative segregation".[60]

ii. The Application Judge's analysis rests on errors of fact and law

34. The Application Judge's analysis rests on two errors:

(a) The Application Judge erred in finding that s. 87 and a *policy* of monitoring can cure the serious harm, or real risk of serious harm created by ss. 31-37.

(b) The Application Judge misdirected himself as to the threshold for a remedy under s. 52. A remedy under s. 52 does not require that *every* inmate experience cruel and unusual punishment or treatment, but rather, that the practice of administrative segregation exposes inmates to a risk of cruel and unusual punishment, which is experienced by some.

(a) It is not possible to effectively monitor inmates for decompensation

35. The refusal to grant a s. 12 remedy rests on the finding that the general obligation to consider the inmate's health care requirements in s. 87 and a policy of monitoring inmates in segregation together prevent a violation of s. 12. He found that the Respondent "can adequately monitor inmates who are in administrative segregation to identify when an inmate's physical and mental health is deteriorating".[61] Thus, he concluded, while the legislative scheme contemplates that inmates will suffer serious harm in solitary confinement, effective monitoring would at least

---

[59] Decision, ABC, Tab 3, at paras. 264-265.

[60] Decision, ABC, Tab 3, at para. 261.

[61] Decision, ABC, Tab 3, at para. 260.

open the possibility of emergency release once the inmate breaks down.[62] The problem is that such monitoring, even if possible, and there was no reliable evidence it is, does not address the risk of serious harm created by ss. 31-37 and does not prevent or minimize the risk of serious harm actually occurring.

36. The Respondent chose not to call any evidence from the hundreds of clinicians in its employ who administer its system of administrative segregation – physicians, psychologists and nurses - and are uniquely qualified to opine on the monitoring of its effects. Instead it relied on the evidence of one psychologist from Texas with limited experience generally and no experience in Canada.[63] The totality of Dr. Morgan's experience actually observing inmates in segregation amounted to two years in Kansas in the 1990s, before he was a psychologist.[64]

37. Dr. Morgan admitted that monitoring *could not* avert catastrophe. In fact, *none* of the experts testified that there was a medically reliable method of monitoring inmates to detect and prevent the harm from prolonged segregation. None of the experts testified that there is a clinically safe way to "balance" the serious harm inherent in prolonged confinement authorised by ss31-37 with institutional security. Dr. Morgan recognized that clinicians "struggle i[n] identifying all of the inmates that won't do well"[65] and "it will not be clear if administrative segregation is or is not contraindicated"[66] since it is not possible to "catch everyone who is going to try to commit suicide"[67] Noting Dr. Morgan's opinion that "negative psychological effects may not be observable", the Application Judge concluded "but I do not accept that these have not

---

[62] Decision, ABC, Tab 3, at paras. 255,262.
[63] Decision, ABC, Tab 3, at para. 259.
[64] Expert Report of Dr. Morgan, ABC, Tab 30.
[65] Cross examination of Dr. Morgan, ABC, Tab 6, at p. 41, lines 14-15.
[66] Expert Report of Dr. Morgan, ABC, Tab 30, at p.11.
[67] Cross-examination of Dr. Morgan, ABC, Tab 6, at p. 43, lines 14-21.

occurred".[68] All of the medical evidence demonstrates that inmates can suffer significant harm without showing signs of decompensation.[69]

38. Prolonged confinement in excess of fifteen consecutive days, like any confinement of people with mental illness or young people, "will always be grossly disproportionate and will always outrage our standards of decency" because it carries both a real risk and a reality of serious harm with no effective ability to balance.[70] This is particularly so given the Application Judge's recognition that the system can accommodate hard caps without threatening institutional safety, and the similar finding by Leask J. of the Supreme Court of British Columbia.[71]

(b) The Respondent's practices offend society's standards of decency

39. Even if the Respondent *could* adequately monitor the occurrence of harm (and it chose not to bring forward any evidence from clinicians in its employ to say so) knowingly exposing inmates to such a risk until it manifests itself is cruel and makes no constitutional sense. Contemporary standards of decency require that the risk be removed or at the very least minimised and not left to the vagaries of "monitoring". This is particularly so when the evidence indicates that caps are achievable and consistent with international standards. Tragic experience and common sense teaches that the manifest variability in institutions, conditions, prisoners, psychiatric conditions, access to justice, and the vigilance, experience, training, competence and availability of monitors offers inadequate protection to this most vulnerable of populations.

---

[68] Decision, ABC, Tab 3, at para. 241

[69] Expert Report of Dr. Martin, ABC, Tab 22, at para. 24; Expert Report of Dr. Chaimowitz, ABC, Tab 17.

[70] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, BOA, Tab 7, at para. 89.

[71] Decision, ABC, Tab 3, at para. 269; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, BOA, Tab 11, at para. 563.

40. Standards of decency can and do change over time. As the Courts' thinking evolves to meet changing standards around capital and corporal punishment so too must they adapt to modern medical knowledge and international consensus regarding treatment of prisoners.[72]

41. In *Carter v. Canada (Attorney General)*,[73] the Supreme Court held that lower courts can depart from higher court rulings where there is a change in circumstances or evidence that fundamentally shifts the parameters of the debate.[74] The *Charter* is to be given a "progressive interpretation"[75] so that it is continuously adapted to new conditions and new ideas. This principle is at the heart of the s. 12 analysis, which is primarily concerned with *society's* standards of decency.

42. The jurisprudence has foreshadowed the conclusion this evidence now compels:

(a) In *R. v. Smith*, Lamer J. recognized it would be grossly disproportionate if the entirety of first time offender's three month sentence was served in solitary confinement.[76] In concurring reasons, Wilson J. (concurring on s. 12) recognized that "*prolonged* periods of solitary confinement were progressively recognized as inhuman and degrading and completely inimical to the rehabilitation of the prisoner ..."[77]

(b) In *R. v. Olson*, in the absence of evidence about the conditions of Mr. Olson's confinement and confined to analysis of his case, this Court hinted that though administrative segregation is not *per se* cruel and unusual punishment, "it may become so if it is so excessive as to outrage standards of decency".[78]

(c) More recently, in 2014, in *R v. Boone*, this Court noted "[a growing recognition over the last half-century that solitary confinement is a very severe form of incarceration, and one that has a lasting psychological impact on prisoners".[79]

---

[72] *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6, BOA, Tab 12, at para. 990.

[73] *Carter v. Canada (Attorney General)*, 2015 SCC 5, BOA, Tab 13.

[74] *Carter v. Canada (Attorney General)*, 2015 SCC 5, BOA, Tab 13, at para. 44; *Bedford v. Canada (Attorney General)*, 2013 SCC 72, BOA, Tab 14, at para. 42.

[75] *Hislop v. Canada (Attorney General)*, 2007 SCC 10, BOA, Tab 15, at para. 144; *Same-Sex Marriage, Re*, 2004 SCC 79, BOA, Tab 16, at paras. 22-23.

[76] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, BOA, Tab 7, at para. 89.

[77] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, BOA, Tab 7, at para. 111.

[78] *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.), BOA, Tab 9, at para. 63.

[79] *R. v. Boone*, 2014 ONCA 515, BOA, Tab 17, at para. 3.

(d) In 2017, in *Ogiamien,* this Court held that "[...] the effect of lockdowns in a correctional facility can give rise to cruel and unusual punishments."[80] Indeed, the Court noted that had if it "[...] agreed with the Application Judge's findings on frequency, duration, and impact [it] might well have deferred to his conclusion".[81] This Court also distinguished lockdowns from the harsher conditions of administrative segregation.[82]

43. Prolonged solitary confinement invariably causes harm, and there is no serious debate that the practice is "offside responsible medical opinion."[83] This is consistent with the recent finding of Leask J. in the Supreme Court of British Columbia.[84]

44. Even if the now recognised devastating effects of solitary confinement are assessed relative to their legislative purpose, as the Application Judge did, he erred in concluding: "I do not believe the current legislative scheme which permits prolonged administrative segregation must inevitably result in the treatment of an inmate which is grossly disproportionate to the safety risk an inmate presents".[85] Any analysis of proportionality must consider the alternatives to segregation, such as placement in prison sub-populations, transfers to other institutions, small shared living environments, or greater meaningful human contact,[86] which led the Application Judge to conclude that "[t]here is evidence which suggests that a cap on the maximum amount of time an inmate can be administratively segregated is possible".[87]

iii. Wrong test applied for cruel and unusual treatment

45. The Application Judge further erred in holding that there was no remedy under ss. 12 and 52 because the abuses of solitary confinement at issue will not *invariably* be "so disproportionate

---

[80] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, BOA, Tab 8, at para. 57.

[81] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, BOA, Tab 8, at para. 57.

[82] *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, BOA, Tab 8, at paras. 49, 81.

[83] Decision, ABC, Tab 3, at paras 89, 97, 254.

[84] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, BOA, Tab 11, at paras. 307-309.

[85] Decision, ABC, Tab 3, at para. 269.

[86] Expert Report of Dr. Coyle, ABC, Tab 31, at paras. 1, 11, 23-28, 48; Expert Report of Dr. Hannah-Moffat, ABC, Tab 21, at pp. 11-12.

[87] Decision, ABC, Tab 3, at para. 268.

to the purpose for which it was made that Canadians would find [them] abhorrent or intolerable".[88] This is simply not the test for a remedy under s. 52, and in setting the bar so high, the Application Judge misdirected himself. Instead, it was sufficient that, as he found, "keeping a person in administrative segregation for an indefinite prolonged period exposes that person to abnormal psychological stress and will if the stay continues indefinitely, result in permanent psychological harm".[89]

46. In *R. v. Nur* the Supreme Court of Canada set out a two-part test for a breach of s. 12:

> In summary, when a mandatory minimum sentencing provision is challenged, two questions arise. The first is whether the provision results in a grossly disproportionate sentence on the individual before the court. If the answer is no, the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on others. This is consistent with the settled jurisprudence on constitutional review and rules of constitutional interpretation, which seek to determine the potential reach of a law; is workable; and provides sufficient certainty.[90]

47. While a narrower analysis might be applied in respect of an individual/specific remedy,[91] the broader focus in *Nur* is consistent with a claim to a remedy under s. 52 which attacks the validity of the statute in all of its possible applications, and with the purpose of providing systemic remedies for systemic concerns. Thus, for example, in *Bedford* the Supreme Court of Canada held that evidence of gross disproportionality in respect of one group – namely, street prostitutes who could benefit from the safety of a bawdy house – was sufficient to support a s. 52 remedy, despite the fact that the effect on other groups – such as prostitutes working out of their own home – was less clear.[92]

---

[88] Decision, ABC, Tab 3, at para. 265.

[89] Decision, ABC, Tab 3, at para. 252.

[90] *R. v. Nur*, 2015 SCC 15, BOA, Tab 16, at para. 77.

[91] See e.g., *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, BOA, Tab 8, at para. 10.

[92] *Bedford*, 2013 SCC 72, BOA, Tab 14, at paras. 134-136.

48. This broader approach is also consistent with the Appellant's status as public interest litigant. The Application Judge acknowledged that it was therefore necessary to consider the circumstances of a hypothetical inmate.[93] However, he selected a hypothetical inmate whose prolonged segregation would merely "increase the inmate's mental health problems".[94] The constitutionally appropriate inmate for this exercise is one whose prolonged segregation causes severe harm – such as permanent mental illness or suicide – harms that are not fanciful, harms the Application Judge recognized, and harms which are in evidence from inmate affiants.[95]

49. A claim by a public interest litigant for a s. 52 remedy under s. 12 cannot be defeated by positing a hypothetical situation in which the treatment would not be grossly disproportionate to its treatment. That is not the appropriate analysis for a s. 52 remedy. As the Supreme Court of Canada recognized in *R. v. Ferguson*, a law that may be constitutional in many of its applications — and indeed found constitutional on a reasonable hypothetical analysis — may be struck down because in *one particular case, or in a few cases*, it produces an unconstitutional result.[96] Section 52 is invoked for *laws* that violate *Charter* rights either in effect or purpose and may be invoked by anyone, even if his or her own *Charter* right has not been infringed.[97]

---

[93] Decision, ABC, Tab 3, at para. 263.

[94] Decision, ABC, Tab 3, at para. 263.

[95] Decision, ABC, Tab 3, at paras. 89, 238, 242. See also Affidavit of T.N., sworn April 21, 2017, at para. 34, 36-37; Affidavit of J.H., sworn April 20, 2017, at paras. 27-28; Affidavit of J.R., sworn April 20, 2017, at paras. 25, 27, 34-36.

[96] *R. v. Ferguson*, 2008 SCC 6, BOA, Tab 19, at para. 38. See also *Greater Vancouver Transportation Authority v. Can. Federation of Students* [2009] 2 S.C.R. 295, BOA, Tab 20, at paras. 85-90.

[97] *R. v. Ferguson*, 2008 SCC 6, BOA, Tab 19, para. 59: "Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties: Big M; see also P. Sankoff, "Constitutional Exemptions: Myth or Reality?" (1999-2000), 11 N.J.C.L. 411, at pp. 432-34; M. Rosenberg and S. Perrault, "Ifs and Buts in Charter Adjudication: The Unruly Emergence of Constitutional Exemptions in Canada" (2002), 16 S.C.L.R. (2d) 375, at pp. 380-82. The jurisprudence affirming s. 52(1) as the appropriate remedy for laws that produce unconstitutional effects is based on the language chosen by the framers of the Charter: see Sankoff, at p. 438." See also *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, BOA, Tab 21, at paras. 38-43.

50. The proper question is whether (a) the impugned provisions impose a grossly disproportionate effect on the individual before the court, *or* (b) if the impugned provisions' reasonably foreseeable application will impose grossly disproportionate effects on others.[98] The impugned provisions will infringe s. 12 if they impose a grossly disproportionate treatment or punishment on at least *some* inmates in reasonably hypothetical or foreseeable cases.[99] No hypotheticals or conjecture are needed here: the Application Judge already made that finding of fact, and it is sufficient to establish the s. 12 breach.[100]

B. Segregation Violates s. 11(h) of the Charter

51. Solitary confinement is harsh and punitive. For prisoners who have done nothing wrong and are segregated for their own protection, solitary confinement constitutes an additional punishment contrary to s. 11(h) of the *Charter*.

52. S. 31(3), authorizes segregation where "allowing the inmate to associate with other inmates would jeopardize the inmate's safety." The Application Judge accepted that the Respondent relies on this provision to segregate inmates who have done nothing wrong, such as LGTBI inmates,[101] and where the "presence of an incompatible inmate results in the involuntary segregation of one of the inmates until an alternative placement or other solution is found".[102]

53. The Supreme Court of Canada has articulated three tests for punishment within the meaning of s. 11(h): for non-criminal proceedings in *Wigglesworth*[103], for sanctions under the

---

[98] *R. v. Lloyd*, 2016 SCC 13, BOA, Tab 22, at para. 22, citing *R. v. Nur*, 2015 SCC 15, BOA, Tab 18, at para. 77.

[99] *R. v. Bowen*, [1988] A.J. No. 1063, [1989] 2 W.W.R. 213, BOA, Tab 23, at paras .96-98 ("*inevitably* result in *some* cases"); *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045, BOA, Tab 7, at paras. 66-67.

[100] Decision, ABC, Tab 3, at para. 252.

[101] Decision, ABC, Tab 3, at para. 180-182; Affidavit of Juan Mendez, ABC, Tab 32, at para. 55.

[102] Decision, ABC, Tab 3, at para. 180-182; Cross-Examination of J. Pyke, ABC, Tab 7, at p. 111, lines 8-13.

[103] *R. v. Wigglesworth*, [1987] 2 SCR 54, BOA, Tab 24.

Criminal Code in *Rodgers*,[104] and for changes to an inmate's incarceration in *Whaling*[105]. Of these three, *Whaling* is the most applicable.

54. The *Whaling* Court applied a functional not formalistic approach to determine whether the consequence had the "effect of adding to the offender's punishment" thereby changing their "settled expectation of liberty.[106] In *Whaling*, the Court was concerned with retrospective changes to parole eligibility. Here, the imposition of an indefinite placement in administrative segregation fundamentally changes the nature of the incarceration beyond that imposed at sentencing.

55. The Application Judge found that administrative segregation does not constitute double punishment because solitary confinement can be reasonably expected of a person being sentenced,[107] and segregation is imposed in "noncriminal", "non-disciplinary prison proceedings".[108] This holding reflects three failures to properly apply the test for a punishment within the meaning of s. 11(h): (a) it misapprehends the punishment, (b) it misapprehends the inmate's expectation of liberty, and (c) it mischaracterizes the requirement of due process. Each of these errors of law is sufficient to reverse the result.

i. Administrative segregation is the most severe punishment in prison

56. The Application Judge erred in failing to consider whether administrative segregation, by its very nature, is punitive in the ordinary sense. According to the Supreme Court of Canada, s. 11 is intended to be read generously in accordance with the "ordinary sense" of the word "punishment."[109] The three traditional attributes of punishment, which have historically guided

---

[104] *R. v. Rodgers*, 2006 SCC 15, BOA, Tab 25.
[105] *Whaling v. Canada (Attorney General)*, 2014 SCC 20, BOA, Tab 26.
[106] *Whaling v. Canada (Attorney General)*, 2014 SCC 20, BOA, Tab 26, at paras. 39, 52, 54.
[107] Decision, ABC, Tab 3, at para. 186.
[108] Decision, ABC, Tab 3, at para. 189.
[109] *R. v. Rodgers*, 2006 SCC 15, BOA, Tab 25, para. 62.

the s. 11(h) analysis apply to the administrative segregation: deprivation of liberty; penalty or unpleasant consequence; and stigmatization or public condemnation.[110] Administrative segregation has all three of these features.[111] Indeed, when inmates are placed in segregation for their own protection, they are subjected to the harshest conditions in the prison, despite the fact that they have been found guilty of no wrongdoing.

ii. Inmates have an expectation of residual liberty and protection from harm

57. The Application Judge erred in his characterisation of an inmate's settled expectation of liberty. People sentenced to terms of imprisonment in federal institutions can expect a certain quantum of liberty, absent a finding of further misconduct. Judges carefully calibrate the sentence with this in mind.[112] The Application Judge himself posited that "it would be open to a person being sentenced to suggest that a lower sentence is appropriate due to the likelihood that he or she will spend a significant portion of their time in custody in segregation for their own protection,"[113]

58. Inmates cannot – and should not - be taken to expect to be confined in a manner that is "offside responsible medical opinion" and which carries real risk of serious harm particularly when there are adequate alternatives available such as caps.

iii. The Application Judge mischaracterized the requirement of due process

59. The Application Judge erred by concluding that a non-disciplinary prison proceeding cannot be punitive for the purposes of s. 11(h). In *Whaling*, the Supreme Court found that "s.

---

[110] *Chu v. Canada (Attorney General)*, 2017 BCSC 630, BOA, Tab 27, at para. 129; *R. v. J. (K.R.)*, 2014 BCCA 382, BOA, Tab 28, at para. 95; *R. v. Cross*, 2006 NSCA 30, BOA, Tab 29, at para. 46.

[111] Decision, ABC, Tab 3, at paras. 77-78, 89, 97, 252, 254.

[112] Arbour Inquiry (1996), ABC, Tab 33.

[113] Decision, ABC, Tab 3, at para. 188.

11(h) does not preclude claims of double punishment where a second proceeding has not taken place" and "may be triggered not only by proceedings that are criminal or quasi-criminal in nature, but also by non-criminal proceedings that result in a sanction with true penal consequences."[114] Indeed, the Court noted that "it would be far more questionable to punish someone without a proceeding than to punish him or her with a proceeding."[115]

60. Under the expanded view of punishment in *Whaling*, it is no answer to rely on the old authority of *Shubley*, in which the majority declined to apply s. 11(h) to disciplinary segregation because it does not impose "true penal consequences". On the contrary, Cory J.'s holding in dissent is much more consistent with the contemporary jurisprudence: "[s]olitary confinement must be treated as a distinct form of punishment".[116]

61. The *Charter* does not permit the Respondent to impose such dangerous treatment – the harshest penalty known to prison discipline – simply because, as a bureaucratic matter, the prison is unable to find alternative housing or solutions for an inmate who has done nothing wrong and simply requires protection.

C. This Court Should Find a breach of s. 7 of the *Charter* and Order Requested Relief

62. The Court should not become mired in technicalities and let form deny justice. Sections 12 and 11(h) of the *Charter* are particularizations of the rights protected under s. 7.[117] Even if this Court does not conclude that prolonged administrative segregation and segregation of those aged 18-21 or with mental illnesses is cruel and unusual for the purposes of s. 12 or double punishment for the purposes of s. 11, it should nevertheless find that these practices contravene s. 7, and it should order the requested relief on this basis.

---

[114] *Whaling v. Canada (Attorney General)*, 2014 SCC 20, BOA, Tab 26, at paras.41-42, 44.
[115] *Whaling v. Canada (Attorney General)*, 2014 SCC 20, BOA, Tab 26, at para. 38.
[116] *R. v. Shubley*, [1990] 1 SCR 3, BOA, Tab 30, at para. 8.
[117] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, BOA, Tab 31, at paras. 34-36.

63. The abuses of solitary confinement here at issue are not only grossly disproportionate, they are also overbroad.[118] As Leask J. of the Supreme Court of British Columbia recently found, the impugned provisions of the *CCRA* are overbroad because they "define segregation overly restrictively and authorize solitary confinement in circumstances where some lesser form of restriction would achieve the objective of the provisions".[119] In support of this conclusion, Leask J. relied on the expert opinion of Professor Andrew Coyle that segregation connotes a continuum of isolation, whereas the Respondent practices solitary confinement, which is the most extreme form.[120] Professor Coyle gave a similar opinion in the case at bar, although the Application Judge did not make specific reference to it.[121]

64. As Leask J. found, until 2012, s. 31 of the *CCRA* called only for the removal of the inmate from the general population, but did not call for "the segregation of the individual" – namely, solitary confinement – and it "could accommodate subpopulations or the segregated inmate otherwise associating with compatible inmates not in the general population".[122] This reasoning holds particularly true for inmates segregated for their own protection. Indeed, where these inmates need to be separated from an incompatible inmate, as per the example contemplated by the Application judge, the imposition of indefinite solitary confinement will be both overbroad and grossly disproportionate in light of historical and hypothetical alternatives, as well as comparative alternatives used in other jurisdictions..

---

[118] *Bedford*, 2013 SCC 72, BOA, Tab 14, at paras. 134-136.

[119] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, BOA, Tab 11, at para. 326.

[120] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, BOA, Tab 11, at para. 331.

[121] Expert Report of Dr. Coyle, ABC, Tab 31.

[122] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, BOA, Tab 11, at para. 334.

65. If this Court will not declare the impugned provisions unconstitutional under ss. 12 and 11(h), it should do so under s. 7 on the basis that they do not bar segregation beyond 15 days or the segregation of inmates who are young, have mental illness, require protection.

D. The Application Judge Erred in his Application of s. 52

66. The Application Judge made two errors when he refused to strike down the *CCRA* pursuant to s. 52. First, he erred by reading limitations into the *CCRA* to conclude that the statute can behave in a constitutional manner. It cannot. The gaps in the *CCRA* are too large to permit such an approach. Second, he erred in relying on *Little Sisters* as authority for not striking down the statute. In *Little Sisters*, the statute was found to be constitutional but not administered as it was intended to be. The opposite is true here: the *CCRA* is being applied as intended, and will always be unconstitutional.

i. The impugned provisions of the *CCRA* cannot behave constitutionally

67. The Application Judge erred by relying on s. 87(a) to find that the *CCRA* could be applied in a constitutionally compliant manner. As described above, s. 87(a) provides: "The Service shall take into consideration an offender's state of health and health care needs (a) in all decisions affecting the offender, including decisions relating to... administrative segregation." Although "health care" in s. 87 includes mental health care, nothing in ss. 31-37 refers to s. 87(a) and, more to the point, s. 32 "Considerations for Release" makes it clear that 'all recommendations' and 'all decisions' 'to release' or 'not to release' 'shall be based on s. 31'. Section 87 is simply a provision of general application that directs the Service to take into consideration essential health care needs. The section does no more than require that those incarcerated do not receive essential health care by virtue of their incarceration.

68. There is no case in which s. 87(a) has been used to compel an inmate's release from administrative segregation.[123] The 19 reported s. 87(a) decisions identify the provision as imposing a "legal obligation to provide a safe and healthy environment for inmates and staff".[124] The jurisprudence is a blend of sentencing decisions directing that medical needs be taken into account and judicial review applications of CSC's decisions denying medication or medical devices, like orthotic slippers or large print books.

69. Under the current statutory regime, at its highest, the reference to administrative segregation is s. 87 means that placing an inmate in segregation should not deprive them of essential health care or disrupt care they were receiving (like receiving chemotherapy or insulin). It cannot be extended to override the express provisions of ss. 31-37 by importing a new 'consideration governing release' to s. 32. The evidence, existing jurisprudence and CD 709 itself demonstrates this to be the case.

70. Notably, CD 709, introduced in August 2017 in direct response to this Application and the case brought by the British Columbia Civil Liberties Association, does not even refer to s. 87(a). It reiterates that "The Institutional Head will be the decision maker for the admission to, maintenance in, and release from administrative segregation in accordance with sections 31-37 of the CCRA." It does not say ""in accordance with section 31-37 *and* s. 87(a)".

71. The Application Judge's approach is contrary to settled principles of statutory interpretation, which state that in the event of inconsistency (which exists here, since s. 32

[123] Decision, ABC, Tab 3, para. 224.

[124] See e.g., *Gates v. Canada,* 2007 FC 1058, BOA, Tab 32, at para. 12.

expressly excludes any "considerations" other than those in s. 31 for the purposes of release) the specific provisions (i.e. ss. 31-37) prevail over general provisions.[125]

ii. *Little Sisters* is no answer to the defects at issue

72. Second, the Application Judge erred by concluding that, in any event, *Little Sisters* precludes a s. 52 remedy. *Little Sisters* does not stand for the proposition that a legislative scheme that is open to maladministration cannot be struck down in its entirety.[126] The Court in *Little Sisters* found that the problems in that case were not the result of an unconstitutional statute. The Court found that the provisions in that case, unlike this one, did not, on their face, create constitutional harm. The problem was the manner in which customs were enforcing the statute.

73. In *Little Sisters*, the Supreme Court of Canada concluded that the appellants' s. 15 rights had been breached because of how the statute was administered, but found that the statute was itself valid.[127] This case is very different from *Little Sisters* because the "standard" to order and maintain an inmate into administrative segregation is *itself* unlawful. This Respondent's practice of placing inmates in segregation is due to its interpreting and applying the statute in accordance with its terms. The authorizing provisions do not contemplate, and in fact exclude, consideration of the harm to the individual when determining whether the enumerated 'grounds' for 'confining' the inmate have passed. The harm is caused by the provisions themselves.

---

[125] *R. v. Lavigne*, 2006 SCC 10, BOA, Tab 33, at para. 42.

[126] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, BOA, Tab 34, at para. 71.

[127] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, BOA, Tab 34, at para. 130.

74. *R. v. Bain*[128] is a complete answer to the argument that s. 52 does not apply. The Crown resisted a challenge to the lack of even-handedness in the selection process for a criminal jury by arguing that its power would be exercised responsibly. As Cory J. explained:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.[129]

75. As Stevenson J. held in his concurring opinion, "I do not think we can rely on professed good intentions to uphold such a disparity".[130]

76. This case is also similar to *Hunter v. Southam*, which *Little Sisters* adopted:

> In *Hunter v. Southam*, s. 10(3) of the *Combines Investigation Act* purported to permit a member of the Restrictive Trade Practices Commission to authorize a search and seizure. The Court held (at p. 164) that a condition precedent to a valid search was the requirement of an authorization – in advance where feasible – by an impartial arbiter. Parliament had vested members of the Restrictive Trade Practices Commission with investigatory functions. They were therefore not impartial in the matter of searches. The Act thus purported to confer on the members a power that could not constitutionally be granted to them, *and nothing that they could do under the Act was capable of curing the statute's wrongful attribution.*[131] (emphasis added)

77. Sections 31 and 32 of the *CCRA* authorize the indefinite confinement of inmates, including vulnerable inmates, in administrative segregation with no prospect for release until they suffer serious harm. The Application Judge found that this is an intrinsic feature of the statute.[132]

---

[128] [1992] 1 SCR 91, BOA, Tab 35.

[129] *R. v. Bain*, [1992] 1 SCR 91, BOA, Tab 35, at para. 8, Cory J. writing for a three-judge plurality, Stevenson J. concurring in the result.

[130] *R. v. Bain*, [1992] 1 SCR 91, BOA, Tab 35, at para. 63. See also *R. v. Appulonappa*, 2015 SCC 59, BOA, Tab 36.

[131] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, BOA, Tab 34, at para. 129, citing *Hunter v. Southam*, [1984] 2 S.C.R 145, BOA, Tab 37.

[132] Decision, ABC, Tab 3, at para. 255.

This is so even though the Respondent could now seek, on a broad-based or an individual discretionary basis, to limit their application to minimize harm.

78. Likewise, in *R. v. Tse*, the Supreme Court held that the warrantless wiretap provision in the *Criminal Code* contravened s. 8 to the extent that it did not require *ex post facto* notice to targets where practicable.[133] While the police *could* have made use of the warrantless wiretapping power in a constitutional manner by simply giving notice, the Supreme Court of Canada struck down the provision in its entirety pursuant to s. 52(1) of the *Charter*.[134]

79. Unlike in *Little Sisters*, where the Court held that Canada "addressed the institutional and administrative problems encountered by the appellants",[135] the Respondent will continue to subject inmates to indefinite administrative segregation for indefinite terms, and will continue subjecting young and mentally ill inmates to the practice.

E. Remedy Under s. 24(1) of the *Charter* is Available to the Appellant

80. If the impugned provisions of the *CCRA* are not invalid under s. 52 because they either authorize unlawful conduct or fail to bar such conduct, then the systemic harms at issue are caused by the Respondent's maladministration, and Appellant is entitled to relief under s. 24(1) of the *Charter*.[136] Though ss. 24(1) and 52(1) remedies are generally not combined,[137] the Supreme Court has indicated that they be combined "in unusual cases where additional s. 24(1) relief is necessary to provide the claimant with an effective remedy."[138]

---

[133] *R. v. Tse*, 2012 SCC 16, BOA, Tab 38.

[134] *R. v. Tse*, 2012 SCC 16, BOA, Tab 38, at para. 102.

[135] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, BOA, Tab 34, at para. 157.

[136] *R. v. Ferguson*, 2008 SCC 6, BOA, Tab 19, at para. 61.

[137] *Guimond v. Quebec* (Attorney General), [1996] 3 S.C.R. 347, BOA, Tab 39, at paras. 19; *Mackin v. New Brunswick*, 2002 SCC 13, BOA, Tab 40, at paras. 80-81; *R. v. Ferguson*, 2008 SCC 6, BOA, Tab 19, at para. 61.

[138] *R. v. Ferguson*, 2008 SCC 6, BOA, Tab 19, at para. 63.

81. The Application Judge erred in his application of the holding in *Ferguson*,[139] which led him to conclude that the Appellant lacks standing to seek a s. 24(1) *Charter* remedy because it is a public interest litigant.[140] If this Court will not grant the s. 52 remedy requested by the Appellant on the basis that the impugned provisions are *capable* of being administered in a constitutional manner, even if they are not, then it must grant injunctive relief under s. 24(1) to prevent future abuses. As stated in *Ferguson*, "[a] court which has found a violation of a Charter right has a duty to provide an effective remedy".[141]

82. It is unrealistic to expect any individual litigant to marshal the resources that the Appellant has expended on this litigation over the course of several years. This is clear from the multitude of individual suits that have failed to mount an appropriate evidentiary record to obtain protection from the harms of prolonged solitary confinement.[142] Nor was it sufficient for the Application Judge to rely on the Respondent to comply with its obligations under the *Charter* and the *CCRA* when the evidence is so clear that it has failed to do so. The result is simply to condemn a marginalized group to a systemic violation of their rights, on the unrealistic view that they must assert their own rights under s. 24(1).

83. In bringing this application, the Canadian Civil Liberties Association is not akin to a labour union trying to assert essentially private claims on behalf of its members or an accused trying to avail himself of his girlfriend's reasonable expectation of privacy.[143] It is an

---

[139] *R. v. Ferguson*, 2008 SCC, BOA, Tab 19.

[140] Decision, ABC, Tab 3, at paras. 21 and 22.

[141] *R. v. Ferguson*, 2008 SCC, BOA, Tab 19, at para. 34.

[142] See e.g., *Labbe v. Canada* (Attorney General), 2005 FC 967, BOA, Tab 41, where the Court explicitly stated the factual record was insufficient at paras. 6-7; *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.), BOA, Tab 9, aff'd on other grounds [1989] 1 S.C.R. 296; *McArthur v. Regina Correctional Centre*, 1990 CanLII 7609, BOA, Tab 42; *Gogan v. Attorney General of Canada*, 2017 ABQB 609, BOA, Tab 43; *Bradley v. Canada*, 2011 NSSC 46, BOA, Tab 44; *Badger v. Canada*, 2017 ABQB 457, BOA, Tab 45.

[143] *R v. Edwards*, [1996] 1 SCR 128 (SCC), BOA, Tab 46; *R. v. Spinelli*, [1995] 10 C.C.C. (3d) 385 (BCCA), BOA, Tab 47, at para. 51.

organization asserting a claim on behalf of the public at large, and this Application is the only way to vindicate the rights of those affected by the practice of solitary confinement.

84. We are past the point of leaving it to Canada to determine the threshold for harm on a case by case basis. The default must be protection, and this compels the imposition of hard limits on the use of administrative segregation.

PART IV—ORDER REQUESTED

85. The Appellant requests a declaration that:

(a) Administrative segregation in excess of 15 days contravenes s. 12 of the *Charter*, or in the alternative, s. 7 of the *Charter*;

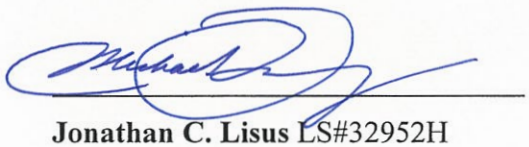
(b) Administrative segregation of persons aged 21 years or younger, or diagnosed with a mental illness contravenes s. 12 of the *Charter*, or in the alternative, s. 7 of the *Charter*;

(c) Administrative segregation of persons for their own protection contravenes s. 11(h) of the *Charter*; and

(d) Ss. 31 to 37 of the *CCRA* are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*; or,

(e) In the alternative, the Respondent is enjoined from subjecting any inmate to administrative segregation for more than fifteen consecutive days, and is enjoined from subjecting inmates aged 21 years or younger, with a mental illness, or requiring protection, for any period of time, pursuant to s. 24(1) of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of April, 2018.



Jonathan C. Lisus LS#32952H
Larissa C. Moscu LS#62928W
M. Fahad Siddiqui LS#67001A
Lax O'Sullivan Lisus Gottlieb LLP

H. Michael Rosenberg LS#58140U
Charlotte-Anne Malischewski LS#69687F
McCarthy Tétrault LLP

Lawyers for the Appellant, the
Canadian Civil Liberties Association

CERTIFICATE

I, H. Michael Rosenberg, lawyer for the Appellant, certify that:

1. an order under sub-rule 61.09(2) is not required; and
2. it is estimated that oral arguments for the Appellant, the Canadian Civil Liberties Association, will require one day.

April 6, 2018

H. Michael Rosenberg
LSO # 58140U

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Badger v. Canada,* 2017 ABQB 457
2. *Bedford v. Canada (Attorney General)*, 2013 SCC 72
3. *Bradley v. Canada*, 2011 NSSC 46
4. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62
5. *Carter v. Canada (Attorney General)*, 2015 SCC 5
6. *Chu v. Canada (Attorney General)*, 2017 BCSC 630
7. *Gates v. Canada,* 2007 FC 1058
8. *Gogan v. Attorney General of Canad*a, 2017 ABQB 609
9. *Greater Vancouver Transportation Authority v. Can. Federation of Students*, [2009] 2 S.C.R. 295
10. *Guimond v. Quebec* (Attorney General), [1996] 3 S.C.R. 347
11. *Hislop v. Canada (Attorney General)*, 2007 SCC 10
12. *Hunter v. Southam,* [1984] 2 S.C.R 145
13. *Labbe v. Canada* (Attorney General), 2005 FC 967
14. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69
15. *Mackin v. New Brunswick*, 2002 SCC 13
16. *McArthur v. Regina Correctional Centre*, 1990 CanLII 7609
17. *New Brunswick (Minister of Health and Community Services) v. G (J)*, [1999] 3 S.C.R. 46
18. *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667
19. *R v. Edwards,* [1996] 1 S.C.R. 128
20. *R. v. Cross*, 2006 NSCA 30
21. *R. v. Wigglesworth,* [1987] 2 SCR 54
22. *R. v. Bain,* [1992] 1 SCR 91

23. *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295
24. *R. v. Boone*, 2014 ONCA 515
25. *R. v. Boutilier*, 2017 SCC 64
26. *R. v. Bowen*, [1988] A.J. No. 1063,
27. *R. v. Ferguson*, 2008 SCC 6
28. *R. v. J. (K.R.)*, 2014 BCCA 382, rev'd 2016 SCC 31
29. *R. v. Lavigne*, 2006 SCC 10
30. *R. v. Lloyd*, 2016 SCC 13
31. *R. v. Miller and Cockriell*, [1977] 2 S.C.R. 680
32. *R. v. Nur*, 2015 SCC 15
33. *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.) aff'd [1989] 1 S.C.R. 296
34. *R. v. Rodgers*, 2006 SCC 15
35. *R. v. Shubley*, [1990] 1 SCR 3
36. *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045
37. *R. v. Spinelli*, 1995 CanLII 1995 (B.C.C.A.)
38. *R. v. Tse*, 2012 SCC 16
39. *R. v. Appulonappa*, 2015 SCC 59
40. *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486
41. *Same-Sex Marriage, Re*, 2004 SCC 79
42. *Trang v. Alberta*, 2010 ABQB
43. *Whaling v. Canada (Attorney General)*, 2014 SCC 20

SCHEDULE "B"
RELEVANT STATUTES

TEXT OF STATUTES, REGULATIONS & BY - LAWS

***Corrections and Conditional Release Act*, S.C. 1992, c. 20**

31 (1) The purpose of administrative segregation is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.

(2) The inmate is to be released from administrative segregation at the earliest appropriate time.

(3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

> (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;
>
> (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or
>
> (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

32 All recommendations to the institutional head referred to in paragraph 33(1)(c) and all decisions by the institutional head to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31.

33 (1) Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall

> (a) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate's case;
>
> (b) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate's case; and
>
> (c) recommend to the institutional head, after the hearing mentioned in paragraph (a) and after each hearing mentioned in paragraph (b), whether or not the inmate should be released from administrative segregation.

(2) A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless

(a) the inmate is voluntarily absent;

(b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

(c) the inmate seriously disrupts the hearing.

34 Where the institutional head does not intend to accept a recommendation made under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to accept the recommendation; and

(b) to give the inmate an opportunity to make oral or written representations.

35 Where an inmate requests to be placed in, or continue in, administrative segregation and the institutional head does not intend to grant the request, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to grant the request; and

(b) to give the inmate an opportunity to make oral or written representations.

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

(i) limitations specific to the administrative segregation area, or

(ii) security requirements.

44 (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:

(a) a warning or reprimand;

(b) a loss of privileges;

(c) an order to make restitution, including in respect of any property that is damaged or destroyed as a result of the offence;...

(d) a fine;

(e) performance of extra duties; and

(f) in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside the penitentiary — for a maximum of 30 days.

***Corrections and Conditional Release Regulations*, SOR 92-620**

20 Where an inmate is involuntarily confined in administrative segregation by a staff member designated in accordance with paragraph 6(1)(c), the institutional head shall review the order within one working day after the confinement and shall confirm the confinement or order that the inmate be returned to the general inmate population.

21 (1) Where an inmate is involuntarily confined in administrative segregation, the institutional head shall ensure that the person or persons referred to in section 33 of the Act who have been designated by the institutional head, which person or persons shall be known as a Segregation Review Board, are informed of the involuntary confinement.

(2) A Segregation Review Board referred to in subsection (1) shall conduct a hearing

(a) within five working days after the inmate's confinement in administrative segregation; and

(b) at least once every 30 days thereafter that the inmate remains in administrative segregation.

(3) The institutional head shall ensure that an inmate who is the subject of a Segregation Review Board hearing pursuant to subsection (2)

(a) is given, at least three working days before the hearing, notice in writing of the hearing and the information that the Board will be considering at the hearing;

(b) is given an opportunity to be present and to make representations at the hearing; and

(c) is advised in writing of the Board's recommendation to the institutional head and the reasons for the recommendation.

(d)

24 (1) The Minister shall appoint

(a) a person, other than a staff member or an offender, who has knowledge of the administrative decision-making process to be an independent chairperson for the purpose of conducting hearings of serious disciplinary offences; and

27 (1) Subject to subsections 30(2) and (3), a hearing of a minor disciplinary offence shall be conducted by the institutional head or a staff member designated by the institutional head.

(2) A hearing of a serious disciplinary offence shall be conducted by an independent chairperson, except in extraordinary circumstances where the independent chairperson or another independent chairperson is not available within a reasonable period of time, in which case the institutional head may conduct the hearing.

Canadian Charter of Rights and Freedoms, **Constitution Act, 1982**

7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11 Any person charged with an offence has the right,

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

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

***United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* entry into force June 26, 1987**

Article 1 For the purposes of this Convention, the term "torture" means any act by which severe pain or
suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16 Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of
cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

The Corporation of the Canadian Civil Liberties Association et al Applicant (Appellant)	and	Her Majesty the Queen as Represented by the Attorney General of Canada Respondent	Court File No.: C64841

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE APPELLANT,
(Returnable September 11-15, 2017)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8

Jonathan C. Lisus LS#: 32952H
Tel: (416) 598-7873
jlisus@counsel-toronto.com
Larissa C. Moscu LS#: 62928W
Tel: (416) 360-3018
lmoscu@counsel-toronto.com
Fahad Siddiqui LS#: 67001A
Tel: (416) 645 3786

MCCARTHY TÉTRAULT LLP
Suite 5300, 66 Wellington Street West
Toronto, ON M5K 1E6

H. Michael Rosenberg LS#: 58140U
Tel: (416) 601-7831
Charlotte-Anne Malischewski LS#: 69687F
Tel: (416) 601-8420

Lawyers for the Applicant,
The Canadian Civil Liberties Association