Court File No.: 38574

**IN THE SUPREME COURT OF CANADA**
(COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

Applicant
(Appellant)

- and -

**CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

Respondent
(Cross-Appellant, Respondent)

- and -

**ATTORNEY GENERAL OF ONTARIO**

Intervener
(Intervener)

# MEMORANDUM OF ARGUMENT OF THE RESPONDING PARTY, CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
# APPLICATION FOR LEAVE TO APPEAL AND CROSS-APPEAL

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## PART I - OVERVIEW

1. The Court of Appeal for Ontario ("**ONCA**") concluded that Canada's practice of prolonged administrative segregation constitutes cruel and unusual punishment, contrary to s. 12 of the *Charter*. In so doing, the Court of Appeal accepted the medical evidence that solitary confinement exposes inmates to serious harm, which cannot be prevented by screening or monitoring, and which can take effect in as little as 48 hours. The Court of Appeal also followed the international consensus, embodied in the United Nations' Nelson Mandela Rules, that solitary confinement for more than 15 days contravenes the *Convention Against Torture* and must be strictly prohibited.

2. The Attorney General of Canada ("**Canada**") does not dispute the findings of harm in the ONCA and at first instance before Marrocco A.C.J. (the "**Application Judge**"). However, Canada seeks leave to appeal because it insists that sound prison management requires discretion to subject inmates to solitary confinement without any limits. Canada continues to challenge the decision of the ONCA while at the same time claiming that it has enacted legislation eliminating segregation entirely. According to Canada, inmates requiring isolation will now be housed in structured intervention units that permit greater time out of cell and ensure meaningful human contact, thereby addressing the concerns raised in the jurisprudence.

3. Canada's interpretation of its new legislation would beg the question of mootness. However it is apparent that this legislation continues to authorize the extreme isolation of inmates, including the most restrictive forms of solitary confinement. Canada cannot have it both ways. If Canada says that the new legislation addresses the concerns raised in the courts below, then it cannot resist a finding of mootness. On the other hand, if this Court decides to hear the appeal, it should do so on the basis that Canada intends to continue solitary confinement, including prolonged solitary confinement, under a different name. The CCLA prefers this latter view and argues that the findings in this matter should apply with equal force to Canada's new legislative regime.

4. Nevertheless, this Court should decline to hear either of the issues on which Canada seeks leave to appeal. The CCLA agrees that the limits on Canada's use of prolonged solitary confinement are a matter of public importance. However, there is no reason to question the correctness of the ONCA's determination that prolonged solitary confinement is a brutal practice that is grossly disproportionate in its effects, regardless of its purpose. In so doing, the ONCA followed this Court's jurisprudence under s. 12 of the *Charter*. Furthermore, Canada's challenge to the brevity of the 15-day stay of the ONCA's decision is moot because

that stay is spent, and the ONCA's order remains suspended by this Court's interim, interim order.

5. This Court should, however, grant the CCLA leave to cross-appeal on the finding that subjecting inmates to administrative segregation for their own protection breaches s. 11(h) of the *Charter* by subjecting them to a second punishment for the same offence. Administrative segregation exposes inmates to the same conditions as disciplinary segregation, which is the harshest punitive sanction available for the contravention of prison rules. Yet inmates requiring protection have done nothing to merit a more severe punishment. It is unacceptable that Canada orders indefinite solitary confinement for inmates in need of assistance, often on account in innate characteristics such as LGBTI identity. This appeal offers the Court an opportunity to revisit a dated precedent and incrementally adapt the scope of s. 11(h) to circumstances where it is urgently needed.

6. This Court should also grant the CCLA leave to cross-appeal on the dismissal of its application for a declaration that subjecting mentally ill inmates to solitary confinement contravenes s. 12 of the *Charter*. The ONCA accepted that, as a matter of principle, inmates with mental illness should be excluded from administrative segregation but it did not consider the evidence sufficient to identify a bright line. The CCLA disagrees with this view of the evidence, but in any event, the appropriate course was to issue a declaration under s. 12 of the *Charter* so that Parliament could propose a legislative solution. This is a matter of enormous public importance on which courts have disagreed.

7. Finally, it is inappropriate for Canada to seek costs on this appeal as a means of discouraging the CCLA from advocating for some of the most marginalized members of society on an issue of significant public interest. The CCLA was successful in the courts below, forced Canada to amend its unconstitutional statute, and received no costs. However, the extensive collateral proceedings in this Court have already placed significant strain on *pro bono* counsel's resources, and the CCLA requests an interim costs order, in any event of the cause, to ensure that it can continue to vigorously represent the public interest in this Court.

## PART II - FACTS

8. Segregation is the harshest treatment authorized by law. Whether for disciplinary or administrative purposes, the conditions of confinement are the same. However, 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 is subject to hard caps.[1] By contrast, administrative segregation is a population management tool, ordered without any due process, maintained without any independent review, and without any limit on duration.[2]

## A. Administrative segregation houses prisoners in deplorable conditions

9. Segregation cells are tiny – some smaller than 50 square feet – and sometimes windowless. T.N.'s bed "was made of cinderblock filled with cement and wrapped in steel plate. The walls are steel plate, too".[3] And "[t]he cells do not have any air control so the walls sweat. There are often bugs and I remember them biting my legs".[4] J.H. deposed that "[t]he walls are made of steel. They are filthy. There is dirt and rust everywhere. In some places, the rust is so bad that it has eaten through the first sheet of metal in the wall".[5]

10. Segregated inmates are locked in their cells for all, or substantially all of their days. J.R. deposed that "I spent about twenty-three hours of every day in my cell, sometimes more. Some days, I never left my cell at all"[6] and that "there were long periods in which I did not see the outdoors".[7] T.N. remembered that "I often went an entire month or more without getting outdoors. The guards paid lip service to our entitlement to exercise time, but the reality was such that it was generally not an option".[8]

11. There is no meaningful human contact in segregation.[9] In profound isolation, T.N. went on hunger strikes.[10] He deposed to peeling pieces of steel from his cell to cut himself: "[j]ust about everyone I know in Administrative Segregation eventually starts to cut himself".[11] He wondered "how much more torture

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[1] *Corrections and Conditional Release Act,* S.C. 1992, c. 20 ("***CCRA"***), s. 44(1)(f); *Corrections and Conditional Release Regulations,* SOR 92-620, s. 27 ("***CCRA Regulations***").

[2] *CCRA,* ss. 31(3) and 32; *CCRA Regulations,* s. 6.

[3] Affidavit of T.N., sworn April 21, 2017, at para 22, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[4] Affidavit of T.N., sworn April 21, 2017, at para 22, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[5] Affidavit of T.N., sworn April 21, 2017, at para 22, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[6] Affidavit of J.H., sworn April 20, 2017, at para 19, Exhibit B to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[7] Affidavit of J.H., sworn April 20, 2017, at para 19, Exhibit B to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[8] Affidavit of J.R., sworn April 20, 2017, at para 45, Exhibit C to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[9] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 ("***CCLA SCJ***"), at para. 252**.**

[10] Affidavit of T.N., sworn April 21, 2017, at paras. 36-37, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record,.

[11] Affidavit of T.N., sworn April 21, 2017, at para 32, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record,.

[he] could withstand before giving up the fight" and killing himself.[12]

12. J.R. deposed to the toll of segregation:

> 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 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.[13]

13. In vain, J.R. pleaded for relief, scrawling transfer requests like this one:

> I need help I am going through a mental breakdown. I have less than one year till warrent [sic] expire [sic] but I feel like the walls are closing in. I have a strong case of depression I'm one step towards suicide and one step towards assaulting somebody. I'm impulsive I have serious anxiety issues …I would like to go as soon as possible I need help professional help.[14]

14. Too many choose suicide, as T.N. deposed:

> 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.[15]

**B. Administrative segregation causes significant harm**

15. The Application Judge rejected the Respondent's evidence that some segregated inmates will not be harmed by administrative segregation.[16] On the totality of the expert evidence, the Application Judge accepted that there is "no serious question" that prolonged administrative segregation is "harmful and offside

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[12] Affidavit of T.N., sworn April 21, 2017, at paras. 36-37, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

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

[14] Application for Transfer of J.R., dated May 11, 2016, Exhibit D to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[15] Affidavit of T.N., sworn April 21, 2017, at para 34, Exhibit A to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record; Affidavit of J.H., sworn April 20, 2017, at para 19, Exhibit B to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record; Affidavit of J.R., sworn April 20, 2017, at para 45, Exhibit C to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[16] *CCLA SCJ*, at para. 94.

responsible medical opinion."[17] In this regard, the Application Judge 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";[18]

(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";[19]

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

(d) indefinite confinement will "result in permanent psychological harm";[20]

(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".[21]

(f) "the harmful effects of sensory deprivation caused by solitary confinement could occur as early as 48 hours after segregation"[22];

(g) "solitary confinement can alter brain activity and result in symptoms within days"[23];

(h) the harmful effects of solitary confinement are "foreseeable and expected",[24] even though the "negative psychological effects may not be observable",[25] and "[n]o nurse or doctor currently working with segregated prisoners in Canadian Penitentiaries testified that practice was benign in some or most cases".[26]

16. Administrative segregation is authorised by ss. 31 to 37 of the *Corrections and Conditional Release Act* ("***CCRA***"). Its sole purpose is to "maintain the security of the penitentiary or the safety of any person", and confinement may be sustained for as long as the institutional head deems necessary. Section 32 of the *CCRA* expressly states that inmates can only be released from segregation once the conditions for admission

[17] *CCLA SCJ*, at paras. 89, 97, 254.
[18] *CCLA SCJ*, at paras. 92-93.
[19] *CCLA SCJ*, at para. 238.
[20] *CCLA SCJ*, at para. 238, 240.
[21] *CCLA SCJ*, at para. 96..
[22] *CCLA SCJ*, at paras. 123, 238 and 240.
[23] *CCLA SCJ*, at paras. 126-127.
[24] *CCLA SCJ*, at para. 240.
[25] *CCLA SCJ*, at para. 241.
[26] *CCLA SCJ*, at para. 96.

are no longer satisfied. There is no mention of, or reference to, the health of the inmate.[27]

17. The Application Judge recognized that administrative segregation subjects inmates to solitary confinement and "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".[28] The inmate is only released when it is apparent that debilitating harm has occurred.

## C. Canada administers solitary confinement without due process and contrary to international law

18. The Application Judge found 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",[29] which "Canada has supported" and "Canada helped draft".[30] These rules create a minimum floor, in the form of an international standard, for the treatment of prisoners. They define solitary confinement as "the confinement of prisoners for 22 hours or more a day without meaningful human contact".[31] The Application Judge held that Canada's practice of administrative segregation amounts to solitary confinement under the Mandela Rules.[32]

19. The Application Judge noted that the Mandela Rules prohibit solitary confinement in excess of 15 days.[33] 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*", which Canada has ratified.[34]

20. The Application judge accepted that there is no independent review of placements in the solitary

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[27] *CCLA SCJ*, at para. 217.

[28] *CCLA SCJ*, at para. 255.

[29] *CCLA SCJ*,, at para. 61.

[30] *CCLA SCJ*, at para. 249.

[31] United Nations Standard Minimum Rules for the Treatment of Prisoners, A/Res/70/175, ("***Mandela Rules***"), Rule 44, Exhibit H to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[32] *CCLA SCJ*, at para. 46.

[33] *CCLA SCJ*, at paras. 51 and 249; see also *Mandela Rules*, Rule 44, Exhibit H to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[34] *CCLA SCJ*, at para. 57. Likewise, at para. 32, the Application Judge noted that the Ashley Smith Inquest recommended a prohibition on administrative segregation beyond fifteen consecutive days.

confinement scheme called administrative segregation. The *CCRA* and its regulations provide that the institutional head orders or confirms admissions to segregation. The institutional head then either chairs the review of that decision or appoints the reviewers from among his or her subordinates. Because the institutional head sits in judgment of his or her own decision, the Application Judge found that the review process lacks independence.[35]

21. The Application Judge noted that CSC orders administrative segregation under s. 31(3)(c) of the *CCRA* for inmates who require protection despite having done nothing wrong. As the Application Judge found, LGBTI inmates, for example, may require protection because of their immutable characteristics.[36] In other cases, 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.[37]

## D. The Application Judge struck down the impugned provisions as contrary to s. 7 of the *Charter*

22. The Application Judge held that independent review within five working days was a constitutional floor to guard against the abuse of administrative segregation that was manifest on the record.[38] Accordingly, the Application Judge declared that ss. 31 to 37 of the *CCRA* contravene s. 7 of the *Charter*, are not saved by s. 1, and are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*.

23. Additionally, the Application Judge found that CSC was using administrative segregation without due regard to the health and wellbeing of inmates, "[d]etaining a person until they have manifested psychological harm".[39] However, he concluded that the "ambiguity" and "inconsistency" in the legislation could be resolved by requiring CSC to take into consideration the inmate's mental health under s. 87(a) of the *CCRA* when making decisions about administrative segregation.[40]

24. On this interpretation of the *CCRA*, the Application Judge found that the impugned provisions did not necessarily contravene s. 12 of the *Charter*. In support of his conclusion, the Application Judge

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[35] *CCLA SCJ*, at para. 155.

[36] *CCLA SCJ*, at para. 180-182; see, for example, *Boulachanis v. Canada (Attorney General)*, 2019 FC 456, at para. 1, discussing the administrative segregation of a trans inmate.

[37] *CCLA SCJ*, at para. 180-182; Transcript of the Cross-Examination of J. Pyke, dated June 21, 2017, Q. 366-367, Exhibit D to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.

[38] *CCLA SCJ*, at paras. 156 and 272-73.

[39] *CCLA SCJ*, at paras. 224 and 256.

[40] *CCLA SCJ*, at paras. 222 and 225.

imagined a hypothetical situation in which administrative segregation beyond 15 days could be justified to preserve security.[41] However, this finding did not adequately account for the emotionally cruel impact of isolation on an individual. The finding also depended on the Application Judge's view that "the Correctional Service of Canada can adequately monitor inmates who are in administrative segregation to identify when an inmate's physical and mental health is deteriorating".[42] The Application Judge held that "[i]f effective monitoring is possible and I believe it is and if section 87 (a) is applied as the Corrections and Conditional Release Act requires, then 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 the inmate presents".[43]

25. The Application Judge also found that the segregation of inmates for their own protection did not contravene s. 11(h) of the *Charter* because segregation does not infringe the inmate's settled expectation of liberty: "[i]n terms of an inmate's reasonable expectations, a person who is being sentenced and who is in danger inside a penitentiary because, for example, he or she is an informant, a crown witness or otherwise incompatible with the other inmates in the general prison population must reasonably be expected to know that there is a likelihood of placement in administrative segregation".[44]

26. Canada took no appeal from the Application Judge's declaration of constitutional invalidity pursuant to s. 7 of the *Charter*, which is now settled law, despite the fact that Canada continues to resist its entry into force. Over the last 18 months, Canada has extended the suspension of this declaration three times and is presently relying on an emergency interim order from this Court.

### E. The ONCA barred prolonged administrative segregation as contrary to s. 12 of the *Charter*

27. On the CCLA's appeal, the ONCA accepted the Application Judge's findings regarding the harm caused by administrative segregation.[45] However, the ONCA broke with the Application Judge on s. 12 of the *Charter*, finding that the Application Judge had erred in accepting that Canada can monitor inmates to remove them from segregation before they suffer harm.[46] As the Court of Appeal explained, "[t]he

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[41] *CCLA SCJ*, at paras. 264-265 and 269.
[42] *CCLA SCJ*, at paras. 260 and 269.
[43] *CCLA SCJ*, at para. 269.
[44] *CCLA SCJ*, at para. 186.
[45] *Canadian Civil Liberties Association v. Canada,* 2019 ONCA 243 ("***CCLA ONCA***"), at para. 5.
[46] *CCLA ONCA*, at para. 119.

evidence is that prolonged administrative segregation causes foreseeable and expected harm and that monitoring only detects harm once it has already occurred – it does not predict or prevent it".[47]

28. As the ONCA found, "[t]he practical effect of monitoring combined with a proper application of s. 87(a) is that it allows the CSC to remove an inmate from administrative segregation only after they have detected decompensation *which has already occurred*. In other words, monitoring, while effective at identifying inmates who have suffered harm, is ineffective at preventing it".[48] Ultimately, the ONCA concluded that "the application judge's error in relying on the effectiveness of monitoring undermines his conclusion that ss. 31-37 do not breach s. 12 insofar as they permit prolonged segregation".[49]

29. Having established the real risk of serious harm to which all segregated inmates are exposed, the ONCA turned to the test for a breach of s. 12 of the *Charter*, finding that "the application judge's approach was problematic in that he engaged the wrong comparative analysis by comparing the actual treatment to the purpose for the treatment".[50] The ONCA found that the analysis should focus on the effect, rather than the purpose of the impugned treatment.[51] The ONCA concluded that the effect of administrative segregation beyond 15 consecutive days constitutes a breach of s. 12 of the *Charter*, which is not saved by s. 1 of the *Charter*.[52]

30. However, the ONCA dismissed the claim under s. 11(h) of the *Charter* on the basis that "there is no change to the system of administrative segregation under the [*CCRA*] that results in changes to the length of an inmate's incarceration".[53] In the result, the ONCA read down the impugned provisions to make clear that they did not authorize administrative segregation after 15 days, but did nothing further for inmates segregated for their own protection. Recognizing the grave consequences of the s. 12 breach, the ONCA suspended its decision for only 15 days.[54]

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[47] *CCLA ONCA*, at para. 71 [original emphasis].
[48] *CCLA ONCA*, at para. 79 [emphasis in original].
[49] *CCLA ONCA*, at para. 81.
[50] *CCLA ONCA*, at para. 96.
[51] *CCLA ONCA*, at para. 92, citing *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077.
[52] *CCLA ONCA*, at para. 119.
[53] *CCLA ONCA*, at para. 142, citing *Whaling v. Canada (Attorney General)*, 2014 SCC 20.
[54] *CCLA ONCA*, at para. 1150

## F. Canada purports to have legislated an end to segregation

31. October 16, 2018, Canada introduced Bill C-83: *An Act to amend the Corrections and Conditional Release Act and another Act*, which eliminates all segregation. Inmates placed in isolation will be housed in new structured intervention units, where they are supposed to receive at least four hours a day out of cell including at least two hours a day of meaningful human contact.[55] The Hansard demonstrates that the Minister of Public Safety and Emergency Preparedness took pains to emphasize that, in his view, Canada is making a material break from segregation:

> There are going to be daily visits from health care, and they are going to be able to assess the offender. Actually, what is significant in Bill C-83 is that health care, when they assess the offender, if they believe that the conditions of confinement or that the inmate should actually be removed from the SIU and placed elsewhere, they can make that recommendation to the institutional head.[56]

32. Bill C-83 received royal assent on June 20, 2019. As discussed in separate submissions on Canada's motion before this Court for a stay of the Application Judge's declaration of constitutional invalidity, Parliament rejected the Senate's proposed amendment to comply with the Application Judge's articulation of a constitutional floor. Bill C-83 is unconstitutional because it does not provide an independent fifth working day review with authority to release the inmate, even in circumstances where the inmate is held in solitary confinement. However, once proclaimed into force, Bill C-83 has have the effect of ending the legislative scheme of "administrative segregation."

33. The CCLA has asked this Court to lift its emergency suspension of the Application Judge's declaration of constitutional invalidity and declare the impugned provisions of the *CCRA* to be of no force or effect. The CCLA has also asked this Court to order Canada to comply with its promise to implement an independent fifth working day review of segregation placements. As the CCLA has argued, no legislative vacuum will result. Either Canada will proclaim into force Bill C-83, or it will rely on its purported authority under s. 28 of the *CCRA* to determine appropriate housing for prisoners. In either case, lifting the emergency suspension will make clear that this Court does not condone Canada's continued breach of its *Charter* obligations.

34. The CCLA has also asked this Court to lift its emergency stay of the ONCA's order capping administrative segregation at 15 days, and has presented new evidence that the Commissioner of the

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[55] *Bill C-83,* s. 36(1).

[56] Senate, Standing Committee on Social Affairs, Science and Technology Evidence, 42-1 (8 May 2019) at 16:15 (Hon Ralph Goodale).

Correctional Service of Canada ("**CSC**") was ready to comply with that order immediately before it was suspended.[57] There is no evidence to explain why Canada now requires until November 30, 2019. As the ONCA recognized, prolonged solitary confinement causes profound harm, and that harm is unnecessary. The Court should also make clear that the ONCA's order applies to subsequent provisions, including those that place inmates in structured intervention units where they may be denied their entitlements and held in conditions that approximate administrative segregation.

## PART III - ISSUES

35. The applications for leave to appeal and cross-appeal raise four issues:

(a) Should Canada be granted leave to appeal from the finding of the ONCA that ss. 31 to 37 of the *CCRA* breach s. 12 of the *Charter*?

(b) Should Canada be granted leave to appeal from the decision of the ONCA to suspend its declaration of invalidity for 15 days?

(c) Should the CCLA be granted leave to cross-appeal from the dismissal of its application for a declaration that the detention of prisoners in administrative segregation for their own protection contravenes s. 11(h) of the *Charter*?

(d) Should the CCLA be granted leave to cross-appeal from the dismissal of its application for a declaration that subjecting prisoners with mental illness to solitary confinement contravenes ss. 12 or 7 of the *Charter*?

36. The CCLA agrees that the limits on Canada's use of extreme isolation are a matter of public importance. However, there is no reason to doubt the correctness of the ONCA's decision on s. 12 of the *Charter*, and for that reason, Canada's appeal is not one that ought to be decided by this Court.[58] The first question should be answered in the negative and leave to appeal should be denied. Furthermore, the stay ordered by the ONCA has long since expired and the suspension of the ONCA's order rests in the hands of this Court. Because the issue is moot, the second question should be answered in the negative and leave

[57] Email exchanges between C. Latimer and A. Kelly, dated April 8 and 11, 2019, Exhibit F to the Affidavit of C. Vincent, dated June 25, 2019 Respondent's Record.

[58] *Supreme Court Act*, R.S.C., 1985, c. S-26, s. 40(1).

to appeal should be denied. However, there is reason to doubt the correctness of the ONCA's decision on s. 11(h) of the *Charter* and mentally ill inmates, such that the third and fourth questions should be answered in the affirmative, and leave to cross-appeal should be granted on these issues.

## PART IV - ARGUMENT

### A. The appeal is not moot if Canada intends to continue prolonged solitary confinement

37. The simplest answer to Canada's application for leave to appeal, based on its own arguments, would be mootness.[59] None of Canada's arguments against mootness is persuasive. Rather, it is the argument that Canada does not make that may carry the day: this appeal is not moot because Canada will continue to subject inmates to prolonged solitary confinement (albeit under a new name), despite the introduction of a new legislative regime and the constitutional rulings by appellate courts. Nevertheless, Canada's concerns with the brevity of the stay ordered by the ONCA are moot, and leave to appeal should be denied on this issue.

38. Canada argues that this appeal is not moot because its remedial legislation, Bill C-83, is not yet law.[60] Since the time that Canada delivered its written submissions, however, Bill C-83 received royal assent. Canada's argument therefore fails. If Canada is to be believed, its new legislation does away with segregation entirely, replacing it with structured intervention units that will isolate inmates in significantly less oppressive conditions.

39. It seems odd, therefore, that Canada has expended such effort to appeal a decision that ostensibly concerns the sins of the past. However, Canada argues that this Court should hear the appeal because it faces class action liability for its long abuse of solitary confinement. In support of its argument, Canada cites the recent decision in *Brazeau v. Canada*, which granted summary judgment to a class of seriously mentally ill inmates who were subjected to prolonged solitary confinement, at times because of their disabilities.[61]

40. If Canada insists on defending the brutal treatment of gravely ill inmates, it should do so in the *Brazeau* proceeding, and on an appropriate factual record. Canada has appealed the summary judgment decision in *Brazeau* to the ONCA, and there is no reason for this Court to pre-empt that process. Canada strongly opposed relief under s. 24(1) of the *Charter* in the matter at bar, and its liability for *Charter* damages in other

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[59] *Borowski v. Canada (Attorney General*), [1989] 1 SCR 342, at para. 16.

**[60]** Memorandum of Argument of the Attorney General of Canada, at paras. 47-48.

[61] *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888, at para. 469.

proceedings does not answer the argument from mootness.

41. If this Court decides to hear an appeal in this matter, it should do so on the basis that the ONCA's decision applies to inmates being held in conditions of extreme isolation that amount to solitary confinement, including inmates who are denied their entitlements in the structured intervention units created by Bill C-83. The CCLA accepts that Canada's change in nomenclature does not deprive the decisions in this matter of their force, and they continue to apply wherever inmates are subjected to close confinement and the deprivation of meaningful human contact.

42. Sadly, Bill C-83 creates a real danger that CSC will do little more than change the name on the segregation unit, despite its protestations to the contrary. Bill C-83 continues to authorize the denial of inmates' entitlements in unspecified "prescribed circumstances" that are "reasonably required for security purposes".[62] In these circumstances, there is nothing that prevents Canada from holding inmates in their cells for 24 hours a day with no meaningful human contact. If this Court wishes to hear an appeal from the ONCA's decision, it should be on the basis of the sins of the future, not the sins of the past.

43. However, Canada does not even argue that there is any continuing effect to the 15-day suspension of the ONCA's declaration of constitutional invalidity, which has long since expired. There is no lasting public importance to this aspect of the ONCA decision, which depends entirely on its determination that immediate action was needed to prevent further harm to a vulnerable population. In any event, the ONCA's suspension has been extended by an interim, interim order from this Court. Leave to appeal from the ONCA's spent suspension should not be allowed because the issue is moot.

### B. Nevertheless, there is no reason to doubt the correctness of the ONCA's holding on s. 12 of the *Charter*

44. The ONCA correctly concluded that prolonged solitary confinement is a barbaric practice that can no longer be countenanced in a free and democratic society. The serious risk of enormous harm to inmates is well established in evidence, and there is no way to guard against it by screening or monitoring.[63] The effects of this practice speak to its cruelty, but the real tragedy is that Canada waited so long to acknowledge that administrative segregation is unnecessary and legislate it out of existence.

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[62] *Bill C-83*, s. 37(1)(c).

[63] *CCLA ONCA*, at para. 5, 71.

45. All inmates in administrative segregation are exposed to unacceptable harm. At the very least, inmates are exposed to a real risk of unacceptable harm. In this regard, Canada does not dispute the Application Judge's findings about the harm caused by prolonged segregation. All of the evidence suggests that this is a very dangerous practice that seriously hurts people. In challenging the decision of the ONCA, Canada asks this court to condone its continued use of prolonged solitary confinement in spite of the devastating human toll.

46. The ONCA was entitled to conclude that that *effect* of prolonged solitary confinement was so grossly disproportionate to the alternative, being confinement in the general prison population, that the *purpose* was irrelevant.[64] In so doing, the ONCA signaled that prolonged solitary confinement should be relegated to the dustbin of history, together with other outmoded instruments of corporal punishment, like the lash, which were once used to maintain order in the prison.

47. In reaching its holding on gross disproportionality, the ONCA relied on this Court's decision in *Smith*, which explained that "a punishment is or is not cruel and unusual irrespective of why the violation has taken place".[65] The Court of Appeal for British Columbia recently followed the ONCA's decision on this point, finding that prolonged administrative segregation is grossly disproportionate.[66] As the ONCA noted, to the extent that Canada wishes to justify cruel and unusual punishment in any given circumstances, that falls to s. 1 of the *Charter*.[67]

48. The ONCA acknowledged Canada's argument that "administrative segregation is a rational way to prevent potential death, injury, or jeopardy to security", and found that the impugned provisions of the *CCRA* authorize but do not require prolonged administrative segregation.[68] However, the Court concluded that the safeguards in the *CCRA* were inadequate to bar the unacceptable harm caused by placements in administrative segregation that lasted longer than 15 days.[69]

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[64] *CCLA ONCA*, at paras. 89-92 and 97-99.

[65] *CCLA ONCA*, at para. 92, citing *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077.

[66] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, at para. 169. The analysis proceeded under s. 7 of the *Charter*, as the Court of Appeal acknowledged that the question of whether administrative segregation for longer than 15 days contravenes s. 12 of the *Charter* was not before it: see para. 95.

[67] *CCLA ONCA*, at para. 126.

[68] *CCLA ONCA*, at para. 109.

[69] *CCLA ONCA*, at para. 113.

49. Canada has argued before this Court that it requires prolonged segregation to manage its prisons and the ONCA's order should therefore be stayed.[70] Canada's position simply confirms what was apparent to the ONCA: Canada will continue to use prolonged solitary confinement until it is ordered to stop.

### C. There is reason to doubt the correctness of the ONCA's holding on s. 11(h) of the *Charter*

50. At one point or another, all of the inmate affiants were involuntarily placed in administrative segregation for their own protection. These inmates had done nothing to merit an additional sanction. Indeed, inmates often need protection because of their immutable characteristics, such as gender identity or status as a former police officer.[71] These inmates are subjected to solitary confinement because that is how Canada choses to accommodate their need for protection. A cry for help is met with the harshest sanction available to prison discipline.

51. This treatment is expressly authorized by s. 31(3)(c) of the *CCRA*. However, it is contrary to s. 11(h) of the *Charter* because it has the effect of significantly increasing the offender's punishment without any further offence. The consequence of requiring separation from some or all other inmates cannot be indefinite solitary confinement. Canada's abuse of solitary confinement is a matter of public importance that calls out for this Court to continue to expand the s. 11(h) jurisprudence. As Perell J. recently held in *Brazeau*, "this possibility of indeterminacy of administrative segregation for the safety of an inmate, who may himself or herself have done nothing wrong, is shocking, unusually severe, and degrading to human dignity and worth".[72]

52. Canada argues that administrative segregation is not punishment: "the additional 'punishment' is said to be a change in the conditions of imprisonment for the purpose of protecting the inmate's safety and not for the purpose or principles of sentencing".[73] However, the ONCA acknowledged that "the scope of 'punishment' in the context of s. 11(h) has expanded over the years".[74] The ONCA recognized that it was necessary to consider whether "from a functional rather than a formalistic perspective, the harshness of the punishment has been increased".[75]

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[70] Memorandum of Argument of the Attorney General of Canada, at para. 2.
[71] *CCLA SCJ*, at para. 182.
[72] *Brazeau v. Attorney General (Canada),* 2019 ONSC 1888, at para. 378.
[73] *CCLA ONCA*, at para. 140.
[74] *CCLA ONCA*, at para. 139.
[75] *CCLA ONCA*, at para 141.

53. As this Court held in *Whaling*, "s. 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."[76] The identification of true penal consequences does not turn on the manner in which the sanction is imposed. As Professor Hamish Stewart notes, though the consequence in *Whaling* was "not punitive in its purpose, [it] was punishment because it was punitive in its effect".[77] 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."[78]

54. From the inmate's perspective, administrative segregation is interchangeable with disciplinary segregation. They use the same cells, follow the same schedule, and subject the inmate to the same deprivation of any meaningful human contact. Indeed, administrative segregation is arguably more harmful than disciplinary segregation because the former is indefinite. Following *Whaling*, it is no answer to say that the intention of administrative segregation is to manage the prison population rather than punish. The effect of administrative segregation is to materially increase the prisoner's punishment.

55. The question asked by the Application Judge was whether subjecting an inmate to administrative segregation for their own protection has the effect of diminishing a settled expectation of liberty. The Application Judge held that administrative segregation would not be contrary to the inmate's settled expectation of liberty because "[a]t the time of sentencing an offender knows that you can go to general population or you can be put in segregation".[79] The materialization of the possibility of segregation is said to be an expected result. The ONCA agreed with this view, noting that "there is no change to the system of administrative segregation under the Act that results in changes to the length of an inmate's incarceration".[80]

56. The Application Judge's approach echoes this Court's decision in *Shubley* nearly three decades earlier. That case concerned the application of s. 11(h) to a sentence of disciplinary segregation. By a majority of 3-2 this Court accepted that solitary confinement was "mainly the loss or withdrawal of

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[76] *Whaling v. Canada (Attorney General),* 2014 SCC 20 at paras 41-42, 44 ("***Whaling***").
[77] *R. v. K.R.J.*, 2016 SCC 31, at para. 39; Hamish Stewart, "Punitive in Effect: Reflections on Canada v. Whaling", *Supreme Court Law Review*, vol. 71 (2015), 263, Exhibit G to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.
[78] *Whaling*, at para 38.
[79] *CCLA SCJ*, at para. 188.
[80] *CCLA ONCA*, at para 142.

privileges or benefits normally available".[81] In the majority's view, the sanction was confined to "the manner in which the inmate serves his time" and was "not of a magnitude or consequence" that would be expected for a true penal sanction.[82]

57. The majority's view of solitary confinement in *Shubley* is incompatible with the present evidentiary record. Rather, the dissenting view expressed by Cory J. is more consistent with Application Judge's findings of harm:

> Close or solitary confinement is a severe form of punishment…To be deprived of human companionship for a period of up to thirty days can and must have very serious consequences. Literature of yesteryear and today is replete with the deterrent effects of such punishment.[83]

58. As Cory J. explained, solitary confinement is "an additional violation of whatever residual liberties an inmate may retain", and prisoners cannot be taken to expect whatever mistreatment is necessary to maintain prison discipline:

> To say otherwise would mean that once convicted an inmate has forfeited all rights and could no longer question the validity of any supplementary form of punishment. If the inmate can never question the validity of supplementary punishment, then any form of punishment could be justified on the basis that good treatment is only a privilege.[84]

59. Consequently, Cory J. found that "[s]olitary confinement must be treated as a distinct form of punishment", and as a penal consequence, it would be subject to s. 11(h) of the *Charter*.[85] A similar conclusion could be drawn from the Application Judge's finding 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".[86] A sanction that justifies a shorter sentence is a penal consequence in the same vein as the retroactive parole changes that had the effect of lengthening the sentence in *Whaling*.

60. However, the Application Judge erred in assuming that segregation for the inmate's own protection has been built into the sentence. While a lengthy detention in pre-sentencing segregation may indeed

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[81] *R. v. Shubley*, [1990] 1 SCR 3, at para. 26, per McLachlin J.

[82] *R. v. Shubley*, [1990] 1 SCR 3, at para. 40, 42.

[83] *R. v. Shubley,* [1990] 1 SCR 3, at para. 7, per Cory J., dissenting.

[84] *R. v. Shubley,* [1990] 1 SCR 3, at para. 8, per Cory J., dissenting.

[85] *R. v. Shubley,* [1990] 1 SCR 3, at para. 8, per Cory J., dissenting.

[86] *CCLA SCJ*, at paras. 186 and 188 [emphasis added].

reduce the sentence, the CCLA is not aware of any case in which an inmate's sentence has been reduced because it is expected that they will serve a portion of that sentence in administrative segregation.[87] And considering the harms of solitary confinement, nor would the CCLA support such a practice.

61. Indeed, the solitary confinement of many inmates is not foreseeable at the time of sentencing. J.H., for example, was segregated because CSC placed him in a prison where his co-accused was housed in the general population.[88] It was open to CSC to place J.H. in another prison, as it eventually did. However, J.H. and those like him, who were segregated because they needed protection, would have had no reason to request a shorter sentence on account of the likelihood they would serve it in solitary confinement.

62. An appeal on s. 11(h) of the *Charter* offers this Court an opportunity to reconcile the jurisprudence that runs from *Shubley* to *Whaling*, and explain how these precedents should adapt to the harms of solitary confinement, in general, and the dangers of prolonged solitary confinement, in particular. The widespread use of indefinite solitary confinement to house inmates requiring protection is an outrage that gives rise to a matter of public importance. Relief under s. 11(h) requires, at most, only a modest and incremental extension of the existing scope of the *Charter* right. However, because of the established jurisprudence, only this Court has authority to reconsider Cory J.'s dissent in *Shubley* in light of the evidence of the enormous harm caused by prolonged segregation. For inmates who require protection, this Court is their last hope, and the CCLA asks that leave to appeal be granted on s. 11(h) of the *Charter*.

### D. There is reason to doubt the correctness of the ONCA's holding on s. 12 of the *Charter* with respect to inmates with mental illness

63. The ONCA found that the *CCRA* imposes insufficient safeguards to prevent serious harm to inmates with mental illness. The expert evidence unanimously identified inmates with mental illness as among the most vulnerable to the harms of solitary confinement. Accordingly, the ONCA held that "[i]n principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation".[89] The *CCRA* contains no prohibition on admitting mentally ill inmates to segregation. On this basis, the ONCA should have struck down the impugned provisions as contrary to s. 12 of the *Charter*.

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[87] *R v. Prystay*, 2019 ABQB 8 at paras 131; *R v H (KD),* 2012 ABQB 471, at para 14; *R v Chan*, 2005 ABQB 615, at para 73-77.
[88] Affidavit of J.H., sworn April 20, 2017, at para. 6, Exhibit B to the Affidavit of C. Vincent, dated June 25, 2019, Respondent's Record.
[89] *CCLA ONCA*, at para. 66.

64. Instead, the Court of Appeal dismissed the application for a declaration that the it is cruel and unusual to subject inmates with mental illness to indefinite solitary confinement on the basis that "the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual".[90] The CCLA disagrees with this assessment of the evidence – Canada's own expert articulated a baseline standard for exclusion – but in any event, the declaration should have issued with a view to allowing Parliament to propose an appropriate legislative solution.

65. This same issue arose in *British Columbia Civil Liberties Association*, where the trial judge would have excluded "mentally ill and/or disabled" inmates from segregation under s. 7 of the *Charter*, but the Court of Appeal balked at the lack of specificity. In the CCLA's view, if the courts are unable to draw the necessary line, which in the ONCA's view "remains to be determined another day", they should at least declare that the constitutionality of the statute depends on addressing the exclusion of mentally ill inmates from solitary confinement.[91] There is clearly an issue of public importance that requires this Court's assistance to resolve the unsettled state of the law.[92] Accordingly, the CCLA should be granted leave to appeal on this point, under s. 12 of the *Charter*, or in the alternative, under s. 7 of the *Charter*.

**E. This Court should order costs against Canada in any event of the cause**

66. The CCLA is a public interest litigant represented by *pro bono* counsel. It has litigated this matter for nearly five years. In the result, it has struck down the impugned legislation on two occasions, and it has provoked significant statutory reform. The CCLA has only ever sought its costs to the extent that Canada's efforts rendered its application moot, and to date, the CCLA has received no costs despite its success.

67. This is the fifth proceeding before this Court to which the CCLA has responded in the last two months. These proceedings, together with related proceedings in the Court of Appeal for Ontario, arise from Canada's efforts to excuse its refusal to comply with the orders of the courts below. The CCLA has presented fulsome arguments in the public interest, often on very little notice. This work has placed tremendous strain on the CCLA and the resources of its *pro bono* counsel.

68. Unfortunately, Canada has decided to ask for costs against the CCLA on this application for leave to

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[90] *CCLA ONCA*, at para. 66.

[91] *CCLA ONCA*, at para. 66.

[92] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, at para. 169, at para. 152.

appeal and on the appeal itself. Canada's request is improper, and it is a transparent effort to discourage the CCLA from continuing to advance the public interest on vital questions of public importance. Canada's approach is disappointing, and the CCLA asks this Court to intervene in the interest of promoting access to justice.

69. In the parallel *British Columbia Civil Liberties Association* matter – which did not seek a 15-day hard cap on segregation under s. 12 of the *Charter* – the public interest standing applicants have received full indemnity for their costs at trial and on appeal. The Court of Appeal for British Columbia found that the applicants satisfied the criteria for special costs in public interest litigation that this Court articulated in *Carter*:

> This case involved important and unresolved questions of broad public interest that are truly exceptional. The respondents have no personal or pecuniary interest in the litigation and it would not have been possible to pursue the litigation with private funding. It is contrary to the interests of justice to ask the respondents (or their counsel) to bear the financial burden associated with pursuing the litigation. In the result, I would depart from the usual rule and award the respondents special costs of the appeal on a full indemnity basis.[93]

70. The CCLA likewise satisfies these criteria. Given the zeal with which Canada continues to defend prolonged solitary confinement, the CCLA requires assistance to ensure that it can continue to represent the public interest. On the basis of the results that it has already achieved, the CCLA asks for its costs on a full indemnity basis, in any event of the cause.

71. The CCLA also asks that its costs in this Court be paid on an interim basis. In this regard, the CCLA satisfies the test articulated by this Court in *British Columbia (Minister of Forests) v. Okanagan Indian Band*.[94] This is particularly true given the inevitability of further proceedings to defend the results in the courts below, such as Canada's pending application for leave to appeal from the ONCA's dismissal of its motion to extend the suspension of the Application Judge's declaration of constitutional invalidity. The CCLA respectfully requests assistance to ensure that the Court has the benefit of fulsome argument on issues of great public interest.

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[93] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 5, at paras. 16-20, citing *Carter v. Canada (Attorney General)*, 2015 SCC 5, at paras. 140-41.

[94] *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71, at para. 40.

## PART I. ORDER REQUESTED

72. The CCLA respectfully requests that Canada's application for leave to appeal be dismissed and the CCLA's application for leave to cross-appeal be allowed. The CCLA asks the Court to state the following questions on the appeal:

(a) Did the courts below err in dismissing the CCLA's application for a declaration that administrative segregation or solitary confinement for the protection of the inmate contravenes s. 11(h) of the *Charter*?

(b) Did the courts below err in dismissing the CCLA's application for a declaration that administrative segregation or solitary confinement of inmates with mental illness contravenes ss. 12 or 7 of the *Charter*?

73. Additionally, the CCLA requests an award of full indemnity costs in any event of the cause, and on an interim basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of June, 2019.

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| 1. | *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 | 469 |
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| 3. | *British Columbia Civil Liberties Association v Canada (AG)*, 2019 BCCA 5 | 16-20 |
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| 8. | *Carter v. Canada (Attorney General)*, 2015 SCC 5 | 140-141 |
| 9. | *R v Chan*, 2005 ABQB 615 | 73-77 |
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| 1. | *Corrections and Conditional Release Act,* S.C. 1992, c. 20 | 31-37 |
| 2. | *Corrections and Conditional Release Regulations,* SOR/92-620. | 6, 27 |
| 3. | Bill C-83: *An Act to amend the Corrections and Conditional Release Act and another Act* (received Royal Assent, not yet in force) | 36(1), 37(1)(c) |