Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

- and -

HER MAJESTY THE QUEEN as represented by
THE ATTORNEY GENERAL OF THE ATTORNEY GENERAL

Respondent

REPLY FACTUM OF THE APPLICANT,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(RETURNABLE SEPTEMBER 11-15, 2017)

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

Paul J. Davis LSUC#65471L
Email: pdavis@mccarthy.ca

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

Lax O'Sullivan Lisus Gottlieb 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 Applicant, 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

Peter Southey
Kathryn Hucal
Tel: 416-973-2240
Email: peter.southey@justice.gc.ca

Lawyers for the Respondent/Moving Party

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PART I - INTRODUCTION

1. Canada's argument glosses over the core constitutional problem: the impugned provisions of the legislation utterly fail to recognise and balance the serious harm caused by administrative segregation with the security interests of the institution. As a result, the legislation authorises the indefinite confinement of adolescents and young people and inmates who have done nothing wrong. It places solitary confinement entirely outside of meaningful independent review and oversight. The legislation's failure to recognise and balance the harm solitary confinement can cause places the regime well outside international and domestic constitutional norms and in violation of the overwhelming consensus of medical and psychological opinion.

2. This record does not reflect a diversity of expert opinion on the harm caused by solitary confinement. The medical evidence is overwhelming and essentially unchallenged. The CSC's proposed changes, in response to this record, fail to address the core constitutional deficits and the harm they cause. This Court has jurisdiction to bar these abhorrent practices and justice demands no less.

3. At base, CSC's approach to administrative segregation represents a failure to balance the security of the prison against the wellbeing of the inmate. The problem arises, because the impugned provisions of the *CCRA* direct the consideration of only the former and CSC refuses to acknowledge the harm to the latter. The use of administrative segregation must stop when it infringes inmates' *Charter* rights: when adolescents (18-19) and young people are confined, when those with a mental disorder are confined, when segregation is prolonged, and when CSC fails to obtain independent authorization for continued segregation.

4. Ultimately, this Application is about more than time limits or prohibitions on segregating certain inmates. It is about the fact that the *CCRA* authorizes potentially and frequently devastating treatment without directing that the need for the security of the institution be balanced against the security of the person. And where the former may require that inmates be separated from the general prison population, the latter demands that resources be allocated to ensure that institutional interests do not come at unacceptable human cost.

PART II - ARGUMENTS

A. The harm caused by prolonged administrative segregation is not a matter for debate

5. The evidence of harm, opinion and fact, is clear and compelling. Canada has chosen to keep the best evidence of the psycho-social and emotional impact of the practice from scrutiny. Its quibbles with the evidence ought to be given no weight when it chose to keep from the Court the testimony and records from those medical professionals it deploys - hundreds of clinicians - who witness the impact of administrative segregation on inmates first-hand.

i. Dr. Blanchette's evidence does not assist the Court on the evidence of harm

6. Canada made a strategic decision not to put forward any front line evidence of the real effects of administrative segregation from those who are charged with measuring and treating its impact on inmates. It instead offered the unsupported evidence of an administrator, Dr. Kelly Blanchette, and asks this Court to accept that evidence in lieu of its experienced practitioners and prefer it to the Applicant's evidence. Dr. Blanchette was the Director General of CSC's Mental Health Branch from 2014 to 2017.[1]

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[1] Respondent's Factum, at para. 49.

7. As Director General, as in many of her previous roles with CSC, Dr. Blanchette was a manager, supervising some 30 staff at CSC's National Headquarters in Ottawa.[2] Her *curriculum vitae* discloses that she has also served as a researcher for CSC. However, she has never treated, cared for or dealt with an inmate in administrative segregation. She is not an expert and does not profess to be an expert in the effects of solitary confinement. She is not a member of the College of Psychologists of Ontario, and is not licensed to practice as a psychologist. Other than an internship in 1996 while completing her Masters, it appears that Dr. Blanchette has never treated any patients whatsoever.

8. Dr. Blanchette's affidavit confirms her complete lack of any contact with inmates. Her evidence is limited to describing CSC's policies and procedures concerning mental health. Dr. Blanchette's affidavit provides a dry recitation of the policy and does not address the implementation of these policies, nor their impact on inmates. It is telling that Canada relies on Dr. Blanchette's affidavit to refute the adverse inference that the evidence of its clinicians would undermine Canada's position on this Application.

ii. Dr. Morgan's evidence does not raise any real controversy

9. On these issues Canada grounds its response in the evidence of Drs. Morgan and Nussbaum. Canada asserts that Dr. Morgan is "the only expert in this proceeding who has actual experience as a mental health professional conducting rounds in the segregation unit of a maximum-security prison, albeit in the United States".[3] This claim is not accurate. It ignores Dr. Martin's decade of experience providing care to inmates at the Burnaby Correctional Centre for

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[2] CV of K. Blanchette, Responding Motion Record, Tab 4A, p. 950; Affidavit of K. Blanchette, Responding Motion Record, Tab 4, at para. 3, p. 915 [**"Blanchette Affidavit"**].
[3] Respondent's Factum, at para. 72.

Women, a medium/maximum security federal/provincial prison.[4] Similarly, this claim ignores the unchallenged evidence of Dr. Chaimowitz regarding his experience treating inmates subject to solitary confinement.

10. Canada also neglects to mention that Dr. Morgan's only experience conducting rounds in a maximum-security prison was from 1993 to 1995, before he was trained as a psychologist.[5] As a psychologist, his primary clinical focus has been offenders on probation, as well as his work at the Mental Retardation Centre with inmates deemed unfit to stand trial.[6]

11. Regardless, Dr. Morgan's evidence does not establish a real controversy regarding the effects of administrative segregation. Canada makes much of Dr. Morgan's meta-study, which aggregated the results of empirical work conducted by others. However, this exercise was conducted by a group of like-minded authors, all of whom are skeptical of the harm caused by administrative segregation.[7] The authors selected variables to ensure that the favourable Colorado study was significantly overrepresented. By contrast, the key findings of studies like Dr. Kaba's, which had a robust sample size of 244,699, and which found a strong correlation between segregation and self-harm, were largely excluded from the results.[8] This selective approach has the effect of making the heavily criticized Colorado Study seem representative.[9] The Court should give no weight to Dr. Morgan's meta-study.

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[4] Expert Report of Dr. R. Martin, Second Supplementary Application Record of the Applicant, Tab 1, at p. 1.
[5] Affidavit of R. Morgan, Supplemental Application Record of the Respondent, Tab 2, at para. 6 ["**Morgan Affidavit**"]; Cross-Examination of R. Morgan, q. 84, p. 24, Transcript Brief, Tab 3.
[6] Morgan Affidavit, at paras. 3 and 7.
[7] Cross-Examination of R. Morgan, q. 391-399, p. 98-99, Transcript Brief, Tab 3.
[8] Solitary Confinement and Risk of Self-Harm Among Jail Inmates (Kaba 2014), CCLA Exhibit Brief, Volume 3, Tab 47; Quantitative Syntheses of the Effects of Administrative Segregation on Inmates' Well-Being (Morgan 2016) at p. 20, CCLA Exhibit Brief, Volume 2, Tab 30.
[9] Applicant's Factum, at paras. 127-134.

12. In an effort to rehabilitate Dr. Morgan, Canada attempts to minimize the fact that Dr. Morgan's proposal to conduct empirical work of his own was rejected.[10] However, in rejecting Dr. Morgan's application, the National Institute of Justice (the "**NIJ**") found that Dr. Morgan had failed to select appropriate variables: "[t]he proposal would be greatly strengthened if the applicant reviewed the literature and selected variables that were known to be associated with administrative segregation placement".[11] The NIJ found that Dr. Morgan's methodology would be "ineffective", and "the findings would be limited in their use".[12] These comments should give the Court pause in relying on Dr. Morgan's evidence.

iii. Canada has deprived the Court of the best evidence

13. That Canada had to go to Lubbock, Texas to find an expert who supports its position speaks to the lack of any real controversy regarding the effects of administrative segregation.[13] Were it otherwise, Canada could have led the evidence from one of the *twelve hundred* CSC clinicians who interact daily with inmates in federal prisons. The conspicuous absence of evidence from a single one of Canada's clinicians strongly supports an adverse inference. The Court should draw the inference that none of CSC's clinicians was prepared to support Canada's position in this case. The Court should assume that CSC's clinicians would have given the same evidence as Drs. Martin and Chaimowitz.

14. The Court should also take note of Canada's efforts to avoid leading a witness to adduce what it says is statistical evidence of progress in reducing its reliance on administrative segregation. Retired Assistant Deputy Commissioner Somers testified to having access to relevant

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[10] Respondent's Factum, at para. 73.
[11] Rejection letter to Dr. Morgan, National Institute of Justice ["**Rejection Letter**"], Third Supplemental Application Record of the Respondent, Tab 1, p. 5.
[12] Rejection Letter, Third Supplemental Application Record of the Respondent, Tab 1, p. 6.
[13] Respondent's Factum, at para. 131.

databases and produced some occupancy statistics by way of undertaking. However, instead of leading its statistical case through Assistant Deputy Commissioner Somers, or any other witness, Canada has instead delivered a *brief of authorities* that includes CSC's Senate testimony regarding segregation statistics.[14] This is the source of Canada's so-called evidence.

15. Canada's approach denied the CCLA any opportunity to cross-examine on this evidence, and to ask, for example, what happened to inmates that had previously been segregated and why they were able to be released. The Court should not accept hearsay evidence in a brief of authorities, another example of Canada's refusal to put forward the best evidence in its control on this Application. Ultimately, this failure to engage with the Application cannot create a factual controversy that would bar relief on the merits.

B. Canada's approach to administrative segregation ignores the harm that it causes

16. Much of the difficulty arises from CSC's unwillingness to tailor its approach to the serious danger posed by administrative segregation.

i. CSC continues to deny the psychological and physical harm

17. Canada complains that the CCLA used an incomplete quote from Warden Pyke when discussing his view of the harm caused by administrative segregation.[15] It then excerpts an incomplete quote from Warden Pyke's evidence to explain that he does appreciate the potential for harm. However, Canada's factum literally cuts Warden Pyke off mid-answer. Warden Pyke acknowledges the possibility of harm from long-term segregation, but then clarifies that this is only "in the sense of the delay to, again, the correctional intervention strategy in terms of the

[14] Respondent's Factum, at para. 41, fn 49-52. These footnotes reference Senate testimony given in February 2017, prior to the delivery of Canada's Responding Application Record. See also Respondent's Factum, at para. 123.
[15] Respondent's Factum, at para. 63.

ability for the inmate to address criminogenic needs, dynamic factors, take responsibility for their actions outside of segregation".[16] Warden Pyke was referencing his earlier answer:

> Q. And the reason that it's important to alleviate the admin segregation status as soon as possible is because admin segregation can be harmful to inmates?
>
> A. It's more along the lines for myself of being able to provide them access to correctional interventions, vocational programs, programs that they aren't able to access in admin segregation. In many ways, it pauses, you know, their ability to participate in correctional interventions.[17]

18. Warden Pyke confirmed that the harm of administrative segregation is that it takes inmates "off the track of their reintegration plan".[18] However, he maintained that he was not aware of any psychological or physical harm that could result from administrative segregation, and that the possibility of *that* harm did not drive his decision to release an inmate from administrative segregation.[19]

19. CSC's candid refusal to acknowledge the harm caused by administrative segregation is telling; it informs its approach to the standard of necessity set out in the *CCRA*. Because CSC refuses to acknowledge that administrative segregation may cause harm, it does not adequately investigate or invest in alternatives. The absence of such alternatives, in turn, allows CSC to maintain that administrative segregation is the only alternative available to manage inmates who cannot be securely or safely housed in general population.

20. This circular logic cannot be sustained in the face of the clear evidence of harm, including the overwhelming scientific and medical consensus linking prolonged administrative segregation to physical and psychological damage, and the disproportionate effect of administrative

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[16] Transcript, Cross-Examination of J. Pyke, Transcript Brief, Vol. I, Tab 2 [**"Pyke Cross-Examination"**], at pp. 39-40, Q. 103.
[17] Pyke Cross-Examination, at p. 36, Q. 99.
[18] Pyke Cross-Examination, at p. 40, Q. 104.
[19] Pyke Cross-Examination, at pp. 41-42, Q. 106-111.

segregation on younger and mentally ill inmates. It is an approach would not be possible if the *CCRA* directed the institutional head to consider the wellbeing of the inmate when deciding to order or maintain administrative segregation.

ii. CSC's need for flexibility does not justify the harm that it causes

21. Canada avoids addressing the issue by arguing that CSC needs flexibility to accommodate outliers, such as the instance in which T.N. obtained an interim injunction barring his transfer to another prison pending the determination of his *habeas corpus* application.[20] What Canada never answers, however, is why solitary confinement is the only solution to such situations.

22. Assuming it is sometimes necessary to separate inmates from the general population, or even from other inmates, the question remains why must that inmate be locked alone in small, sometimes windowless cells for 23 hours a day? Why was T.N. , for example, confined for *hundreds* of days in administrative segregation, on multiple occasions, and at times for his own protection?[21]

23. Dr. Martin described a "light bulb moment" when she saw how prison authorities at the Styal Prison in Northern England had, adopted a different, more humane protocol:

> While I was there, the deputy governor asked if I would also like to see a special unit called the "Keller Unit." This is a single storey unit, about 30 years old, which had been purposefully built as a segregation unit, with cells placed in a circular pattern around a central hub. However, because of the high numbers of women who had committed suicide while in a segregation cell, they had re conceived the Keller Unit to be a place for women who would benefit from more care, not less care. The staff of the Keller Unit explained to me that if a woman was deemed to be a danger to themselves or to others, they were transferred to the Keller Unit to receive extra care: instead of being placed in isolation, the women in Keller Unit

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[20] Respondent's Factum at para 30.
[21] Dates in Segregation for Inmate Affiants, Brief of Respondent's Productions on Refusals, Tab 3.

> were now never left alone. For every minute of the day, there was care available therapy, group, counselling or volunteer care – for every woman in the unit.
>
> When I visited the Keller Unit, I was struck by how many non-correctional professionals were present in the unit, and by the positive and collaborative nature of the interactions between staff (correctional and non-correctional) and between staff and clients. As I observed and listened, I realized with a "light-bulb" moment of clarity that my previous assumption that "individuals must be placed in segregation for the sake of the correctional security" was incorrect. I realized that what is happening within Canadian correctional facilities is not the "best standard" of care for incarcerated individuals. I understood that Styal Prison had developed collaborations with community mental, health and volunteer organizations, in order to enable this level of care. Their goal was to create an integrated unit that connected community health care organizations and prison staff to deal with incarcerated women who were high risk. The unit at Styal was oriented around a mental health approach and on individual risk and management. Segregation was replaced with case managers, health care, and other support staff and the result has been far fewer deaths in custody.[22]

24. Canada has led no evidence that it has explored any alternatives to administrative segregation. Canada has not seriously engaged with the alternatives proposed by the CCLA. Canada simply asks the Court to accept the bald proposition that the practices challenged by this Application are necessary.

iii. CSC's recent policy changes do not change the fact that it employs prolonged solitary confinement, contrary to its international obligations

25. Canada cannot rely on an August 1, 2017 amendment to CD-709 to avoid the conclusion that it practices prolonged solitary confinement, contrary to the ICCPR and the CAT. The new CD-709 provides that inmates must be offered two hours a day outside their cells, plus a shower. On its motion for an adjournment, Canada told the court that CSC would implement an earlier draft of the new CD-709, which provided for only two hours a day out of cell.[23] While this change

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[22] Report of Dr. R. Martin, Second Supplementary Application Record, Tab 1, pp. 10-11 [emphasis added].
[23] Commissioner's Directives 709 for Consultations dated May 17, 2017, s. 29d, Affidavit of S. Lagana, Exhibit B Motion Record of the Respondent on the Motion to Adjourn, Tab 2F; Commissioner's Message "Promulgation of Commissioner's Directives 709 and 843" Affidavit of S. Lagana, Exhibit F, Motion Record of the Respondent on the Motion to Adjourn, Tab 2F.

was welcome, the CCLA noted that the new standard still met the definition of solitary confinement under the Mandela Rules. In an effort to avoid the consequences of international law, CSC further amended CD-709 to exclude shower time from the two hours out of cell, effectively introducing a standard of "solitary confinement less a shower".[24]

26. These recent changes miss the mark. Canada is still offside international norms that bar the use of prolonged solitary confinement.[25] In resisting the charge of solitary confinement, Canada relies on a daily routine of interactions with prison staff and the availability of programming, much of which takes place through the cell door.[26] However, there is very little meaningful human contact in administrative segregation, and pursuant to the Mandela Rules, such a routine is solitary confinement, even though inmates are now supposed to be held in their cells for less than 22 hours per day.

27. The Essex Group of international experts, which supported the UN's Inter-governmental Expert Group Meeting to negotiate the Mandela Rules, recently published guidance for the interpretation and implementation of the Mandela Rules.[27] The Essex Group guidance specifically addressed the standard of meaningful human contact for the purpose of Rule 44:

> Such interaction requires the human contact to be face to face and direct (without physical barriers) and more than fleeting or incidental, enabling empathetic interpersonal communication. Contact must not be limited to those interactions determined by prison routines, the course of (criminal) investigations or medical necessity.[28]

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[24] Commissioner's Directives 709, effective August 1, 2017, Respondent's Book of Authorities, Tab 67.
[25] Respondent's Factum, at para. 112.
[26] Cross Examination of J. Pyke, qs. 157, 158, 160, 163, at p. 52-54, Transcript Brief, Tab 2.
[27] *Essex Paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules*, Penal Reform International, 2016 (https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf) ["**Essex Paper 3**"], at 5.
[28] Essex Paper 3, *ibid.*, at 88-89.

28. Applying this standard, the Essex Group rejected much of what Canada considers to be meaningful human contact in administrative segregation:

> ...it does not constitute 'meaningful human contact' if prison staff deliver a food tray, mail or medication to the cell door or if prisoners are able to shout at each other through cell walls or vents. In order for the rationale of the Rule to be met, the contact needs to provide the stimuli necessary for human well-being, which implies an empathetic exchange and sustained, social interaction. Meaningful human contact is direct rather than mediated, continuous rather than abrupt, and must involve genuine dialogue. It could be provided by prison or external staff, individual prisoners, family, friends or others – or by a combination of these.[29]

29. Canada also sought to avoid Professor Mendez's conclusion that prolonged administrative segregation constitutes torture or cruel, inhuman, or degrading treatment or punishment by presenting an incomplete picture of his evidence. Canada referred to Professor Mendez's earlier work and suggested that he had been inconsistent in his opinion on the permissible limits of solitary confinement.[30]

30. Canada cross-examined Professor Mendez on this point. In cross-examination, Professor Mendez differentiated his "opinion before the debate and discussions leading to the Nelson Mandela Rules" from his current position that "the international standard has become more firm to anything exceeding 15 days, even with mitigating circumstances, violating an international standard" as a result of the United Nations' adoption of the Mandela Rules, with Canada's support.[31] Furthermore, Professor Mendez did not identify the Mandela Rules as merely an emerging consensus, as Canada claims, but rather, as "quite a solid consensus".[32] Professor Mendez' testimony goes well beyond reflecting "at best" a "debate".

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[29] Essex Paper 3, *ibid.*, at 89.
[30] Respondent's Factum, at para. 106-109.
[31] Cross Examination of J. Mendez, q. 55, at p. 25, Transcript Brief, Tab 1.
[32] Cross Examination of J. Mendez, q. 49, at p. 22, Transcript Brief, Tab 1.

iv. Administrative segregation is a significant incremental deprivation of liberty

31. Canada relies on *R. v. Shubley*[33] to avoid the conclusion that administrative segregation for the protection of the inmate constitutes a subsequent punishment without a subsequent offence by relying on the test in *R v. Wigglesworth*.[34] However, the more recent decision in *R. v. Whaling* governs the case at bar, because Canada claims that administrative segregation is not intended as a disciplinary sanction.[35] From the inmate's perspective, administrative segregation is a restriction of his liberty interest that is imposed after sentencing. It therefore constitutes a further punishment for the purpose of s. 11(h) of the *Charter*.

32. This conclusion was recently foreshadowed by the Court of Appeal for Ontario in its recent decision in *Ogiamien v. Ontario (Community Safety and Correctional Services)*.[36] In *Ogiamien*, Laskin J.A. referred to *Whaling* rather than *Shubley* for "the standard for showing that an inmate's conditions of confinement can amount to a further or residual deprivation of liberty". Laskin J.A. found that the lockdowns at issue did not rise to that level, but he expressly contemplated that administrative segregation might:

> In my view, the frequency, duration and impact of the lockdowns affecting Ogiamien and Nguyen caused a change in their conditions of incarceration at Maplehurst, but not a substantial change. During a lockdown neither was singled out or dealt with more harshly than any other inmate in the remand units. Neither was placed in administrative segregation. Neither was transferred to a different and higher risk or higher security correctional institution. These latter instances might have amounted to a substantial change sufficient to trigger a deprivation of Ogiamien's and Nguyen's residual liberty under s. 7. The lockdowns did not.[37]

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[33] [1990] 1 S.C.R. 3, Respondent's BOA, Tab 35.
[34] Respondent's Factum at para 184; *R v. Wigglesworth,* [1987] 2 S.C.R. 541;Brief of Authorities of the Applicant, Volume 4, Tab 47.
[35] *R v. Whaling,* [2014] 1 S.C.R. 392, Brief of Authorities of the Applicant, Volume 4, Tab 36.
[36] *Ogiamien v. Ontario (Community Safety and Correctional Services),* 2017 ONCA 667 [*Ogiamien*] at paras. 49, 80-81, Applicant's Reply Book of Authorities ["**Applicant's Reply BOA**"], Tab 2.
[37] *Ogiamien, ibid,* at para. 81 [emphasis added] , Applicant's Reply BOA, Tab 2.

33. On the evidence before the Court, prolonged administrative segregation and the segregation of vulnerable groups clearly does rise to the level of a substantial residual deprivation of liberty.

C. The Court can, and should strike down the impugned legislation

34. Canada contends that the court lacks jurisdiction to grant the relief that the CCLA seeks under s. 52(1) of the *Charter* and further, that the CCLA lacks standing to seek a remedy under s. 24(1) of the *Charter*. In effect, Canada argues that no matter how damning the evidence, there is nothing that the Court can do. This is simply not true.

v. The Court has jurisdiction to strike down the impugned provisions under section 52(1) of the *Charter*

35. Canada relies on the decision of a majority of the Supreme Court of Canada in *Little Sisters Book and Art Emporium v. Canada* for the proposition that relief will not be available under s. 52(1) of the *Charter* where the impugned legislation is capable of being applied in a constitutionally compliant manner.[38] Canada argues that, because CSC *could* choose to limit the use of administrative segregation to fifteen days, it *could* choose to exclude youth, individuals with mental illness, and prisoners requiring protection, and it *could* implement independent review, there is no basis to strike down the legislative provisions that authorize administrative segregation.

36. This argument misapprehends the holding in *Little Sisters*. In that case, Customs officials were applying a legally valid prohibition on the importation of obscene materials. The problem of maladministration arose because customs officials were applying this prohibition to catch material that was not actually obscene. The constitutional problem arose because the maladministration

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[38] *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [*Little Sisters*] at para. 71, per Binnie J, Applicant's Reply BOA, Tab 1.

demonstrated a pattern of discrimination on the basis of a constitutionally protected ground, namely, sexual orientation.[39]

37. As the majority held in *Little Sisters*, "there is nothing on the face of the Customs legislation, or in its necessary effects, which contemplates or encourages differential treatment based on sexual orientation".[40] Because the constitutional problem arose as a result of customs officials acting outside the scope of their lawful authority, the remedy devolved from s. 24(1) of the *Charter*, and there was no need to strike down the legislation under s. 52(1).

38. Key to this holding was the finding that the standard for obscenity, which referenced the prohibition in the *Criminal Code*, was itself lawful.[41] If material was obscene, its importation could lawfully be prohibited. The majority disagreed with the minority's view that "not only the standard but also the procedures attending its exercise must be spelled out in the legislation".[42] The majority held that Parliament was entitled to leave open this latter question because "Departmental priorities change and resources rise and fall in response to a moving government agenda" and "[t]he Minister requires flexibility to determine how the departmental mandate is to be met".[43]

39. The case at bar differs from *Little Sisters* because the "standard" to order and maintain administrative segregation is *itself* unlawful. On Canada's interpretation, ss. 31 and 32 of the *CCRA* authorize the indefinite detention of an inmate in administrative segregation for as long as CSC considers necessary. In other words, the impugned provision itself results in unconstitutional conduct. Furthermore, the deficiency in this regard not a matter of bureaucratic tinkering that

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[39] *Little Sisters*, *ibid.*, at para. 6, Applicant's Reply BOA, Tab 1.
[40] *Little Sisters*, *ibid.*, at para. 125, Applicant's Reply BOA, Tab 1.
[41] *Little Sisters*, *ibid.*, at para. 130, Applicant's Reply BOA, Tab 1.
[42] *Little Sisters*, *ibid.*, at para. 130, Applicant's Reply BOA, Tab 1.
[43] *Little Sisters*, *ibid.*, at para. 132, Applicant's Reply BOA, Tab 1.

might require flexibility; it is a fundamental violation of human rights. By analogy, it is as though the statutory provision at issue in *Little Sisters* was "you may bar the importation of obscene materials in a manner that unlawfully discriminates on the basis of an analogous ground".

40. Canada responds that there is no remedy under s. 52(1) because the impugned sections of the *CCRA could* be applied constitutionally. According to Canada, legislation that authorizes unconstitutional conduct is distinct from legislation that mandates unconstitutional conduct, and only the latter is susceptible to a s. 52(1) remedy. Legislation that say says you *may* violate rights is different than legislation that says you *must* violate rights.

41. In Canada's view, even if the Court accepts that it is constitutionally impermissible to subject inmates to administrative segregation for periods longer than fifteen days, a s. 52(1) remedy would lie only if the *CCRA required* that administrative segregation be imposed for more than fifteen days. The same applies to any confinement of vulnerable inmates and the availability of independent review.

42. Canada urges a result that does not accord with Supreme Court of Canada precedent. The case of *R. v. Bain*[44] is a complete answer to Canada's argument. In that case, which the majority in *Little Sisters* accepted as correct, the accused challenged the lack of even-handedness in the selection process for a criminal jury. Parliament gave the Crown the ability to stand aside 48 prospective jurors and to challenge 4 jurors peremptorily. The accused in such case had but 12 peremptory challenges, a legislated advantage to the Crown of over 4 to 1. The Crown assured the court that its power would be exercised responsibly, but the Court considered that the discriminatory law could not be thus salvaged. As Cory J. explained:

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[44] [1992] 1 SCR 91 [*Bain*], Applicant's Reply BOA, Tab 3.

> 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.[45]

43. In the case at bar, the impugned provisions of the *CCRA* are unconstitutional because they authorize indefinite detention in administrative segregation without independent review and do not require a balancing of inmate harm. Canada says that the impugned provisions of the *CCRA* could be implemented constitutionally. This argument was raised and rejected conclusively in *R v. Bain*. As Stevenson J. held in his concurring opinion, "I do not think we can rely on professed good intentions to uphold such a disparity".[46]

44. This case is also similar to *Hunter v. Southam*, which the majority in *Little Sisters* also adopted as correct and described as follows:

> 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.[47]

45. Similarly here, because ss. 31 and 32 of the *CCRA* authorize the detention of inmates in administrative segregation beyond 15 days, and authorize the detention of vulnerable inmates in administrative segregation for any period of time, there is no way to apply these powers constitutionally. To take the most basic example, the *CCRA* says that CSC can detain a young

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[45] *Bain, ibid*, at para. 8, Cory J. writing for a three-judge plurality, Stevenson J. concurring in the result, Applicant's Reply BOA, Tab 3.
[46] *Bain, ibid.*, at para. 63, Applicant's Reply BOA, Tab 3.
[47] *Little Sisters, ibid,* at para. 129, citing *Hunter v. Southam,* 2 S.C.R 145, Applicant's Reply BOA, Tab 1.

inmate in administrative segregation indefinitely. The CCLA says that CSC cannot lawfully detain that inmate in administrative segregation for even a single day. A s. 52(1) remedy is therefore both available and necessary in these circumstances.

46. The parallel to *Hunter* is particularly stark in respect of the requirement of independent review to maintain administrative segregation beyond five days. In *Hunter*, the *Combines Investigation Act* permitted the Restrictive Trade Practices Commission to authorize a search and seizure despite the fact that it was not an independent arbiter. Likewise, the *CCRA* permits CSC to hold inmates in administrative segregation indefinitely without ever subjecting their detention to independent review or even considering the wellbeing of the inmate, as the *Charter* requires.

47. A more recent precedent is *R. v. Tse*, where a unanimous Supreme Court of Canada accepted 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.[48] 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*.[49] As the Court explained, even when Parliament limits a grant of authority, the provision may nevertheless be unconstitutional when those limits are deficient:

> Section 184.4 [the authority for warrantless wiretaps] is an emergency provision. It allows for extreme measures in extreme circumstances…Parliament has included stringent conditions to ensure that the provision is only used in exigent circumstances. In our view, these conditions effect an appropriate balance between an individual's reasonable expectation of privacy and society's interest in preventing serious harm. To that extent, s. 184.4 passes constitutional muster…In

[48] *R. v. Tse*, 2012 SCC 16 [*Tse*], Applicant's Reply BOA, Tab 4.
[49] *Tse*, *ibid.*, at para. 102, Applicant's Reply BOA, Tab 4.

> its present form however, s. 184.4 contains no accountability measures. That, in our view, is fatal and constitutes a breach of s. 8 of the Charter.[50]

48. In view of these precedents, relief under s. 52(1) is clearly available on the facts of the present case. In the alternative, this case is too important to turn on technicalities. If the Court accepts that the impugned practices contravene inmates' *Charter* rights, it should not permit Canada to perpetuate this misconduct. Unlike in *Little Sisters*, where Canada had "addressed the institutional and administrative problems encountered by the appellants",[51] Canada's submissions make clear that it intends to continue to subject inmates to indefinite administrative segregation for as long as it considers necessary, and to continue subjecting young and mentally ill inmates to the practice. There is a real immediate and continuing need to act to prevent an ongoing injustice.

vi. Alternatively, the Court has jurisdiction to bar the impugned practices under section 24(1) of the *Charter*

49. If the Court determines that relief under s. 52(1) of the *Charter* is not available in this case, it should nevertheless issue a declaration pursuant to s. 24(1) of the *Charter* that the impugned conduct contravenes inmates' *Charter* rights.[52] It should also enjoin Canada from engaging in this conduct in the future pursuant to s. 24(1). In *Little Sisters*, the majority only hesitated to craft a s. 24(1) remedy that addressed the *Charter* breach because six years had passed and the Court did not have sufficient evidence to assess Canada's corrective efforts.[53] That is simply not the case here, and there must be a remedy to end CSC's abhorrent practices.

50. Canada concedes that the CCLA has standing to litigate this matter, but makes the absurd suggestion that it nevertheless has no standing to compel a remedy. This Court should be sensitive

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[50] *Tse*, *ibid.*, at paras. 94-95, Applicant's Reply BOA, Tab 4.
[51] *Little Sisters*, *supra*, at para. 157, Applicant's Reply BOA, Tab 1.
[52] Amended Notice of Application, at para. 1(a).
[53] *Little Sisters*, *supra*, at paras. 157-58, Applicant's Reply BOA, Tab 1.

to the fact that, but for the efforts of the CCLA and like organizations, these issues would never be brought before the court in any meaningful way. Therefore, meaningful remedies have to be available. The Court cannot accede to Canada's submission that the CCLA lacks standing to seek a remedy under s. 24(1) of the *Charter*.[54] Canada properly concedes the CCLA's public interest standing. The CCLA does not say that it has been subjected to administrative segregation contrary to the *Charter*, or that it could be subject to such treatment. Rather, it challenges the constitutionality of the impugned sections of the *CCRA* "on their face, and as applied in penitentiary institutions across Canada" because the present proceeding is a reasonable and effective means to bring the matter before the Court.[55] This is entirely distinguishable from *R. v. Ferguson*, upon which Canada relies, where the accused sought a s. 24(1) remedy without first establishing a *Charter* breach.[56] Indeed, the converse is true here, and if the breach is established and ongoing, there must be a meaningful remedy under s. 24(1).

51. Finally, as on Canada's unsuccessful motion to adjourn this proceeding, the Court must give no weight to Canada's submission that inmates should pursue relief in some other proceeding. Canada has not identified a single proceeding that seeks to bar the continued use of the practices impugned by this application. Insofar as Canada relies on the existence of class actions that challenge administrative segregation,[57] any finding on the merits may be years away. In any event, these actions do not seek injunctive relief to bar the continuation of CSC's misconduct, and they do not include many of the inmates impacted by the practices at issue on this application, such

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[54] Respondent's Factum, at para. 114.
[55] Amended Notice of Application, at para. 1(a), Factum of the Applicant, at paras. 155-160.
[56] Respondent's Factum, at para. 114 citing *R. v. Ferguson*, 2008 SCC 6, Brief of Authorities of the Applicant, Vol. 2, Tab 24.
[57] Respondent's Factum, at fn 145.

as young people subjected to administrative segregation for periods shorter than fifteen days (or fewer than three days in Quebec after February 24, 2013).

52. Canada's submissions on jurisdiction and standing amount to an invitation to allow the *Charter* breaches identified by the CCLA to persist indefinitely. If the Court agrees that these *Charter* breaches exist, it must act, and it can do so pursuant to either s. 52(1) or s. 24(1).

PART III - CONCLUSION

53. This Court has jurisdiction and a compelling evidentiary, legal, moral, and constitutional foundation to strike the impugned provisions in the *CCRA*.

54. The costs of litigating this Application over the past three years have been significant, and they have been borne by the CCLA and its *pro bono* counsel and experts. If, contrary to the CCLA's submission, the Court concludes that the changes implemented by Canada since the commencement of this Application address the issues raised by the CCLA, then the CCLA should have its costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of September, 2017.

Michael Rosenberg for Jonathan Lisus

Jonathan C. Lisus
Larissa Moscu
Fahad Siddiqui

Lax O'Sullivan Lisus Gottlieb LLP

H. Michael Rosenberg
Paul J. Davis
Charlotte-Anne Malischewski

McCarthy Tétrault LLP

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

Jonathan C. Lisus LSUC#: 32952H
jlisus@counsel-toronto.com
Tel: 416 598 7873
Larissa Moscu LSUC#: 62928W
lmoscu@counsel-toronto.com
Tel: 416 360 3018
Fahad Siddiqui LSUC#: 67001A
fsiddiqui@counsel-toronto.com
Tel: 416 645 3786
Fax: 416 598 3730

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

H. Michael Rosenberg LSUC#: 58140U
Tel: (416) 601-7831
mrosenberg@mccarthy.ca
Paul J. Davis LSUC#: 65471L
Tel: (416) 601-8125
pdavis@mccarthy.ca
Charlotte-Anne Malischewski LSUC#69687F
cmalischewski@mccarthy.ca

Lawyers for the Canadian Civil Liberties Association

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69
2. *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667
3. *R. v. Bain*, [1992] 1 S.C.R. 91
4. *R v. Shubley*, [1990] 1 S.C.R. 3
5. *R. v. Tse*, 2012 SCC 16
6. *R v. Wigglesworth,* [1987] 2 S.C.R. 541
7. *R v. Whaling,* [2014] 1 SCR 392

SCHEDULE "B"

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.

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

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

-and-

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

Respondent

Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

REPLY FACTUM OF THE APPLICANT, THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(RETURNABLE SEPTEMBER 11-15, 2017)

LAX O'SULLIVAN LISUS GOTTLIEB LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8
Jonathan C. Lisus LSUC#: 32952H
Tel: (416) 598-7873
jlisus@counsel-toronto.com
Larissa C. Moscu LSUC#: 62928W
Tel: (416) 360-3018
lmoscu@counsel-toronto.com
Fahad Siddiqui LSUC#: 67001A
fsiddiqui@counsel-toronto.com
Tel: 416 645 3786

MCCARTHY TETRAULT LLP
Suite 5300, 66 Wellington Street West
Toronto, ON M5K 1E6
H. Michael Rosenberg LSUC#: 58140U
Tel: (416) 601-7831
mrosenberg@mccarthy.ca
Paul J. Davis LSUC#: 65471L
Tel: (416) 601-8125
pdavis@mccarthy.ca
Charlotte-Anne Malischewski LSUC#: 69687F
Tel: (416) 601-850
cmalischewski@mccarthy.ca

Lawyers for the Canadian Civil Liberties Association