No. S-150415
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
THE JOHN HOWARD SOCIETY OF CANADA

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND and
CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENOR

OPENING STATEMENT OF THE PLAINTIFF

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Overview

1. Solitary confinement has been described by Professor Michael Jackson as "the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country."

2. It is a practice that engages various *Charter* rights and freedoms: life, liberty, security of the person, cruel and unusual treatment, arbitrary detention and imprisonment and equality.

3. It is for those reason that our clients, the British Columbia Civil Liberties Association and the John Howard Society of Canada, have brought this lawsuit.

4. We seek an Order from this Court declaring the provisions of the *Corrections and Conditional Release Act,* S.C. 1992, c. 20 (the "Act" or "*CCRA*") to be unconstitutional to the extent that:

   a. they authorize prolonged, indefinite administrative segregation for anyone;

   b. they authorize any period of administrative segregation for the mentally ill; and

   c. they fail to protect Aboriginal inmates from targeting either in purpose or effect.

2. Further, we seek a declaration for past mal-administration of the Act.

3. In the course of our opening today, we will provide an overview of the evidence that we expect you will hear in the coming weeks.

4. Before I do it is important to note at the outset why we brought this case and some of the developments in this case after it was filed in January 2015 – about all of which you will hear or read evidence.

5. It is fair to say that the tragic death of Ashley Smith was a major impetus for this case. She, of course, was the 19 year old woman who died alone in her segregation

cell after more than a year of continuous segregation in the care and custody of the Correctional Service of Canada ("Corrections" or "CSC") in October 2007. She had been an inmate at Grand Valley Institution for Women where she had been kept in a segregation cell, at times with no clothing other than a smock, no shoes, no mattress, and no blanket. During the last weeks of her life she often slept on the floor of her segregation cell, from which the tiles had been removed. In the hours just prior to her death she spoke to a Primary Worker of her strong desire to end her life. She then wrapped a ligature tightly around her neck cutting off her air flow. Correctional staff failed to respond immediately to this medical emergency, and this failure cost Ms. Smith her life. The Correctional Investigator ("CI") issued a report where he said:

> I believe strongly that a thorough external review of Ms. Smith's segregation status could very likely have generated viable alternatives to her continued and deleterious placement on such a highly restrictive form of confinement. There is reason to believe that Ms. Smith would be alive today if she had not remained on segregation status and if she had received appropriate care.[1]

5. The CI recommended that CSC implement independent adjudication of segregation placements of inmates with mental health concerns within 30 days of placement.

6. CSC rejected that recommendation.

7. There was also a coroner's inquest into Ashley Smith's death. On December 19, 2013, the coroner's jury returned a verdict of homicide and provided dozens of recommendations to the presiding judge. Key recommendations included:

a. Indefinite solitary confinement for prisoners be abolished.

b. That there should be an absolute prohibition on the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation or observation. Long-term should be defined as any period in excess of 15 days.

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[1] "A Preventable Death" by Howard Sapers dated June 20, 2008, Plaintiffs' Doc 1.109, para. 93

c. That until segregation and seclusion is abolished in all CSC-operated penitentiaries and treatment facilities:

i. CSC restricts the use of segregation and seclusion to fifteen (15) consecutive days, that is, no more than 360 hours, in an uninterrupted period;

ii. that a mandatory period outside of segregation or seclusion of five (5) consecutive days, that is, no less than 120 consecutive hours, be in effect after any period of segregation or seclusion;

iii. that an inmate may not be placed into segregation or seclusion for more than 60 days in a calendar year; and

iv. that in the event an inmate is transferred to an alternative institution or treatment facility, the calculation of consecutive days continues and does not constitute a "break" from segregation or seclusion.

d. Meetings between prisoners and support staff should not happen through food slots (something that happened frequently with Ms. Smith).

8. In response, CSC said the term "solitary confinement" was not accurate or applicable within the Canadian federal correctional system. It rejected these and other key recommendations saying they would cause undue risk to the safe management of the federal correctional system.

9. The CI, in his 2014-2015 Annual Report, observed that this response was both frustrating and disappointing.

10. In the meantime – on August 2010 - there was another tragic death: that of Edward Snowshoe. Mr. Snowshoe was an Aboriginal man serving a five year sentence with a statutory release date of December 2010. He never made it. This is what Judge Wheatley said about Mr. Snowshoe in his report to the Minister of Justice after an inquiry into his death:

> While in custody at Stony Mountain Institution he attempted suicide on three occasions in November 2007, September 2008 and February 2009. Following a major depressive episode in August 2009 there was a self harm incident in 2010 which resulted in him being placed in observation on a suicide watch. On March 1, 2010 he is involved in an incident where he brandished what appeared to be a jail-made weapon which later was found to be a stabbing weapon made out of a juice box turned inside out and, as a result of this incident, he was placed in segregation on March 2, 2010. A decision is made to transfer him to Edmonton Institution, a maximum security institution as a result of this incident. On July 15th he is transferred from Stony Mountain to Edmonton Institution arriving on July 16th. He is once again placed into segregation and remained in segregation until his death.[2] (emphasis added)

11. There have been other multiple, albeit less high profile, in custody suicides since then.

12. The CI's 2014-2015 Annual Report said this:

> The most disturbing finding of this review was that 14 of the 30 suicides took place in segregation cells. Segregation placement was found to be an independent factor that elevated suicidal risk. Nearly all of the segregated inmates had known mental health issues; most were or had been referred and/or seen by mental health staff while on segregation status. Significantly, ten of the 14 inmates who committed suicide in segregation were beyond the 15 day mark; five in fact had been held in segregation for more than 120 days prior to taking their life. The fact that segregated inmates had both the means and opportunity to end their lives in an area of the prison that is supposed to be safe and subject to continuous monitoring represents a serious organizational vulnerability.[3] (emphasis added)

13. The CI also said that:

> For more than 20 years, the Office has extensively documented the fact that administrative segregation is overused. With an average daily inmate population of just over 14,500 the CSC made 8,300 placements in administrative segregation in 2014-15. On April 1, 2014, there were 749 offenders in administrative segregation. There is no escaping the fact that administrative segregation has become the most commonly used population management tool to address tensions and conflicts in federal

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[2] Report to the Minister of Justice and Attorney General – Public Fatality Inquiry into the death of Edward Christopher Snowshoe dated June 4, 2014, Plaintiffs' Doc 1.29, p. 2

[3] Annual Report of the Office of the Correctional Investigator 2014-2015 ("2014-2015 Report"), CAN1-0039368, p. 19

> correctional facilities. During the reporting period, 27% of the inmate population experienced at least one placement in administrative segregation. It is so overused that nearly half (48%) of the current inmate population has experienced segregation at least once during their present sentence.[4] (emphasis added)

14. In his 2015 Report on 10 year trends,[5] the CI reported: [see graphs]

    a. Between 2005 and 2015, the number of admissions and offenders placed in segregation have fluctuated, but with a generally upward trend (p. 4).

    b. The number of Aboriginal admissions to segregation and offenders has increased most years in that same time period (p. 5).

    c. Likewise, both the number of Black offender admissions to segregation and the number of offenders have increased significantly in the last 10 years (p. 5).

    d. Meanwhile, the number of Caucasian offender admissions to segregation and the number of offenders have both decreased in the last 10 years (p. 6).

    e. Aboriginal offenders consistently have an average length of stay in segregation that is greater than for Black or Caucasian offenders (p. 8).

    f. Of the total incarcerated population, 6.7% have a history of self-injury. The rate increases to 12.0% for those who also have a history of segregation and decreases to 1.7% for those with no segregation history. Of the 967 with a history of self-injury, 86.6% also have a history of segregation (p. 13).

    g. Approximately one quarter of male offenders who are incarcerated during a fiscal year spend some time in segregation. Over 40% of female

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[4] 2014-2015 Report, p. 26

[5] Administrative Segregation in Federal Corrections – 10 Year Trends, dated May 28, 2015, CAN1-0014575

offenders who are incarcerated during a fiscal year spend some time in segregation (p. 14).

h. Approximately one quarter of non-Aboriginal offenders who are incarcerated during a fiscal year spend some time in segregation. Approximately one third of Aboriginal offenders who are incarcerated during a fiscal year spend some time in segregation (p. 14).

i. Offenders who have been identified in their Correctional Plans as having cognitive issues are much more likely to have a history of being segregated than those who have been identified as having no cognitive issues (p. 20).

j. Offenders who have been identified in their Correctional Plans as having mental health issues are much more likely to have a history of being segregated than those who have been identified as having no mental health issues (p. 21).

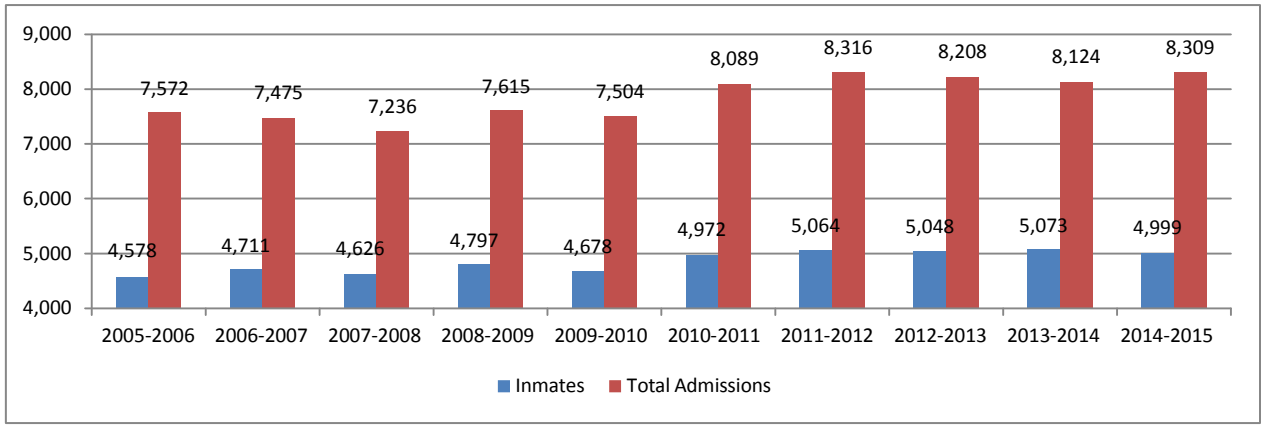
k. Offenders who have been identified in their Correctional Plans as having mental ability issues are much more likely to have a history of being segregated than those who have been identified as having no mental ability issues (p. 21).

Section 1 – Admissions to Segregation

The following graphs and tables show information related to the total number of segregation admissions within a fiscal year and the number of individual inmates involved in those admissions. While all admissions to segregation are shown, an individual offender will be counted once per fiscal year irrespective of their total number of admissions. Voluntary and involuntary segregation have been aggregated whereas disciplinary segregation is not included in this report. For comparative purposes please refer to Table 2 which shows a snapshot of the CSC incarcerated population on March 31st from 2005 to 2015 by male, female, Aboriginal, non-Aboriginal, Black and Caucasian.

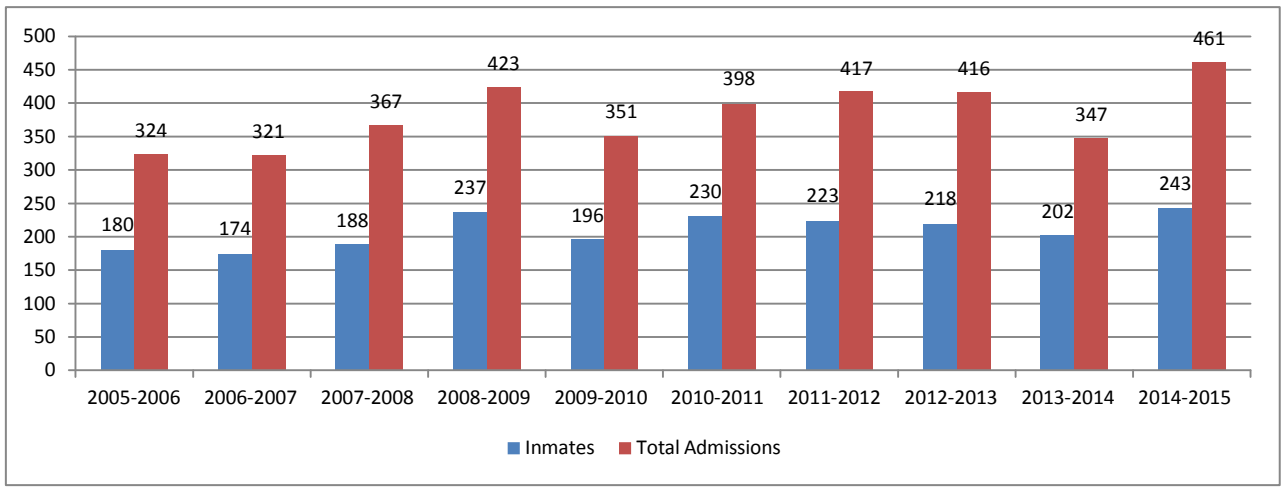
Graph 1: Total Admissions to Segregation – 10 Years

This graph combines voluntary segregation admissions and involuntary segregation admissions. Shown in the graph are the total admissions in red and the number of individual inmates in blue.



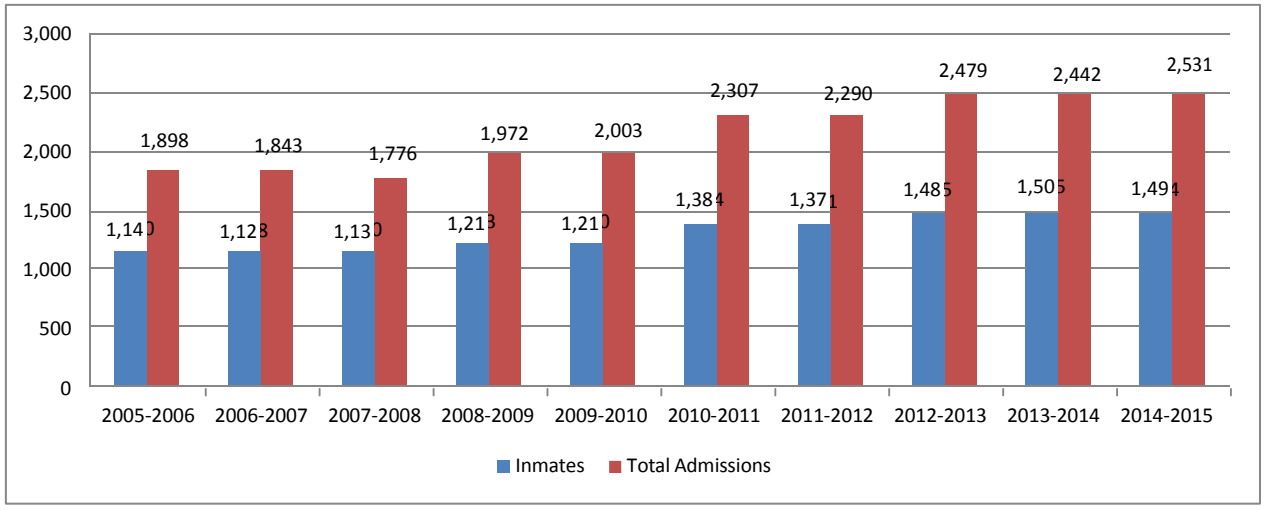
- The number of admissions and offenders have fluctuated but with a generally upward trend.

Graph 2: Total FSW Admissions to Segregation – 10 Years



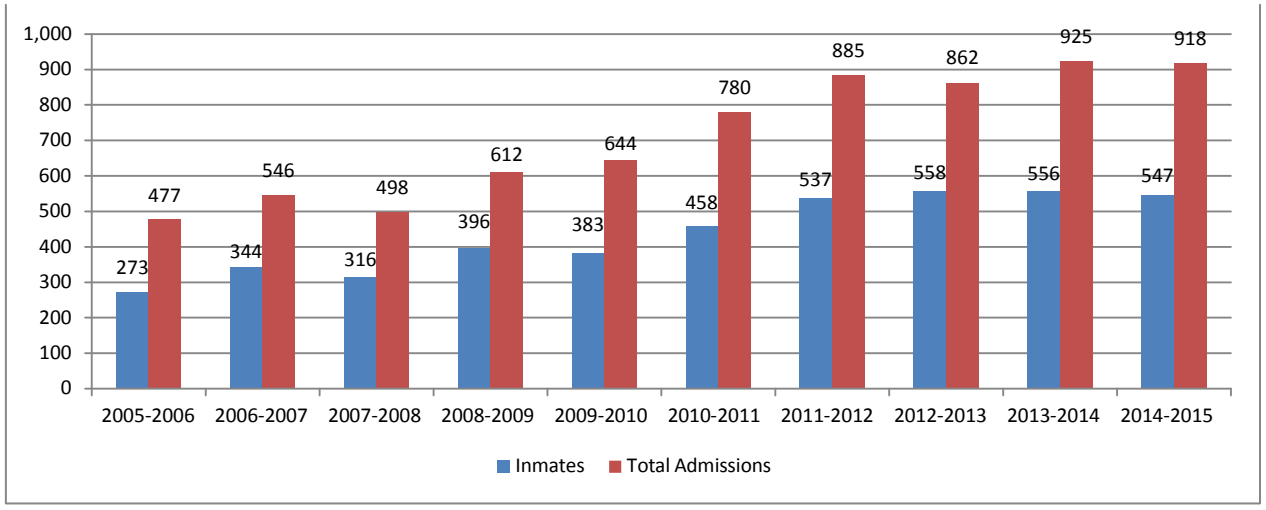
- The number of FSW admissions to segregation and offenders has fluctuated.
- 2014-2015 saw the highest number of FSW admissions and offenders for the last 10 years.

Graph 3: Total Aboriginal Admissions to Segregation – 10 Years



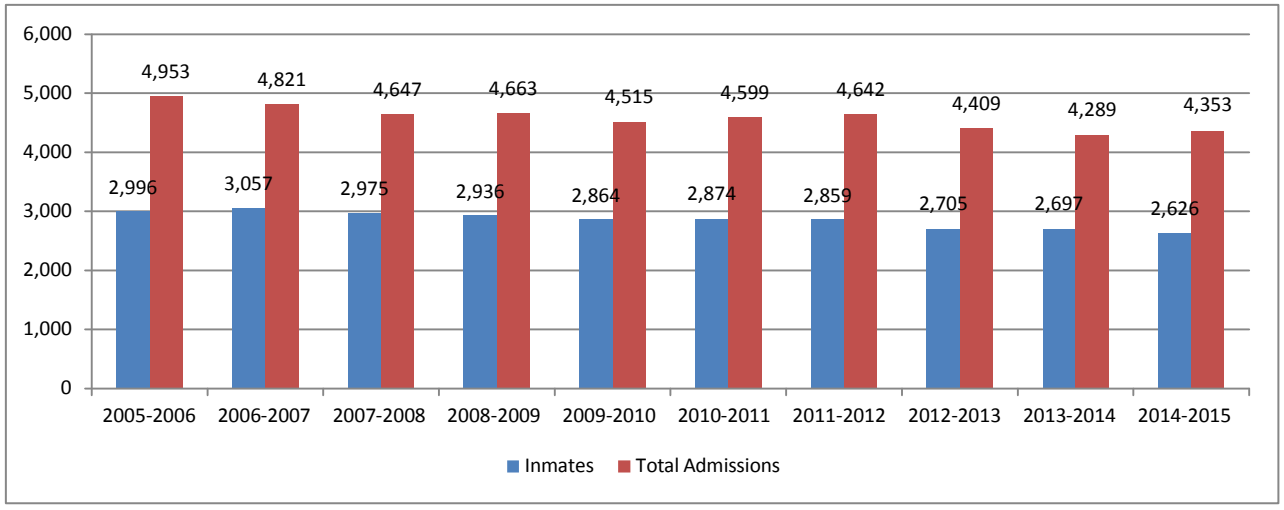
- The number of Aboriginal admissions to segregation and offenders has increased most years.

Graph 4: Total Black Admissions to Segregation – 10 Years



- Both the number of Black offender admissions to segregation and the number of offenders have increased significantly in the last 10 years.

Graph 5: Total Caucasian Admissions to Segregation – 10 Years



- The number of Caucasian offender admissions to segregation and the number of offenders have both decreased in the last 10 years.

Table 1: Average Number of Admissions per Individual Offender

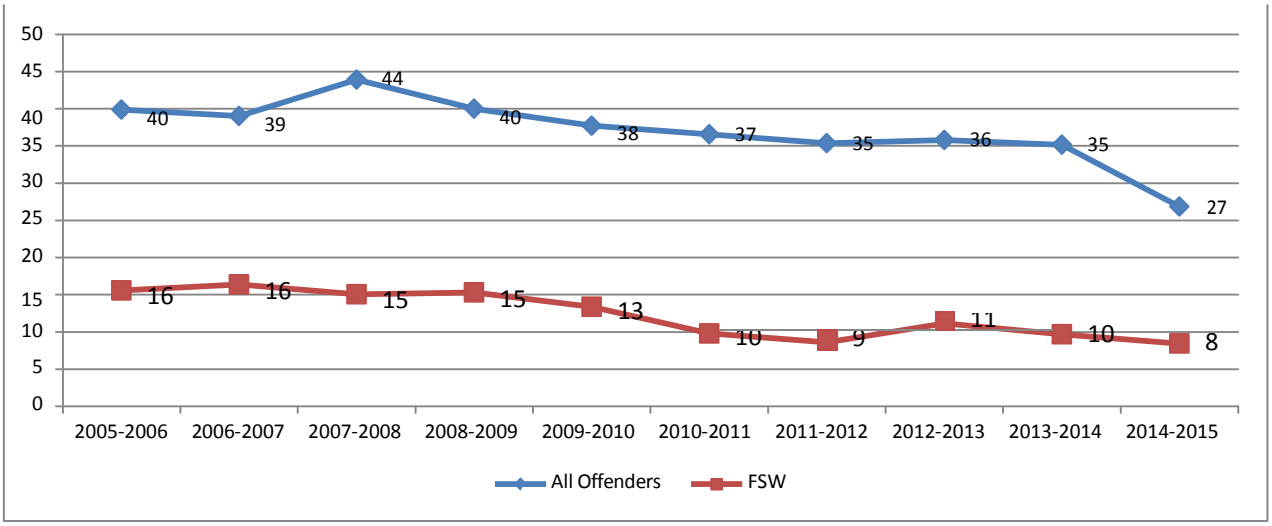
	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Total	1.7	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.6	1.7
FSW	1.8	1.9	2.0	1.8	1.8	1.7	1.9	1.9	1.7	1.9
Aboriginal	1.7	1.6	1.6	1.6	1.7	1.7	1.7	1.7	1.6	1.7
Black	1.8	1.6	1.6	1.5	1.7	1.8	1.7	1.6	1.7	1.7
Caucasian	1.7	1.6	1.6	1.6	1.6	1.6	1.7	1.7	1.6	1.7

- FSW have the highest average number of admissions to segregation per individual offender.

Section 2 – Average Length of Stay in Segregation

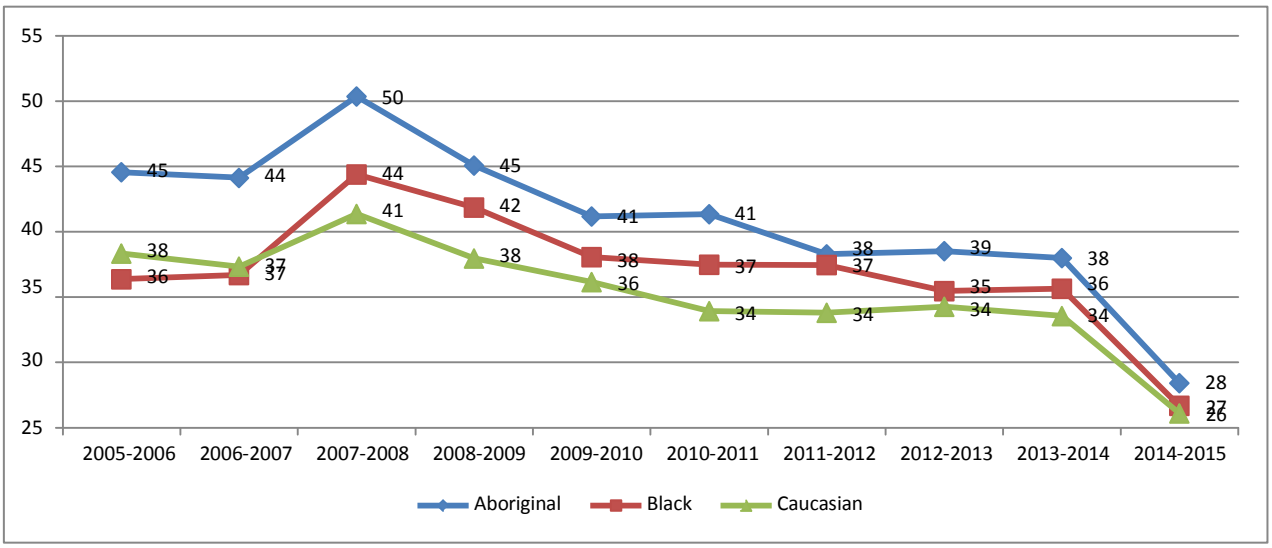
This section shows the average length of stay in segregation. The length of stay is calculated based on the number of days from the date of admission to segregation and the date of release. Offenders who have not yet been released from segregation are not included in these calculations.

Graph 6: Average Length of Stay in Segregation – All Offenders and FSW



- FSW offenders remain in segregation for significantly shorter periods than the average for all offenders.
- The average length of stay in segregation has decreased for all offenders and for FSW.

Graph 7: Average Length of Stay in Segregation – Aboriginal, Black and Caucasian Offenders



- The average length of stay in segregation has decreased for these three racial groups
- Aboriginal offenders consistently have an average length of stay in segregation that is greater than for Black or Caucasian offenders.

Table 12: Total Current Incarcerated Population with and without a History of Self-Injury and with and without a History of Segregation

This table and the two that follow show the current incarcerated population of 14,517 offenders and separates them into those who have a history of self-injury or not and those who have a history of segregation or not.

	Self-Injury History	No Incidents	Total	% History of Self-Injury
No Segregation History	130	7,405	7,535	1.7%
History of Segregation	837	6,145	6,982	12.0%
Total	967	13,550	14,517	6.7%
% History of Segregation	86.6%	45.4%	48.1%	

- Of the total incarcerated population 6.7% have a history of self-injury. The rate increases to 12.0% for those who also have a history of segregation and decreases to 1.7% for those with no segregation history.
- Of the 967 with a history of self-injury 86.6% also have a history of segregation.

Table 13: Total Current Incarcerated FSW Population with and without a History of Self-Injury and with and without a History of Segregation

	Self-Injury History	No Incidents	Total	% History of Self-Injury
No Segregation History	12	403	415	2.9%
History of Segregation	68	199	267	25.5%
Total	80	602	682	11.7%
% History of Segregation	85.0%	33.1%	39.1%	

- Of the total incarcerated FSW population 11.7% have a history of self-injury. The rate increases to 25.5% for those who also have a history of segregation and decrease to 2.9% for those with no segregation history.
- Of the 80 with a history of self-injury 85.0% also have a history of segregation.

Table 14: Total Current Incarcerated Aboriginal Population with and without a History of Self-Injury and with and without a History of Segregation

	Self-Injury History	No Incidents	Total	% History of Self-Injury
No Segregation History	37	1,519	1,556	2.4%
History of Segregation	286	1,690	1,976	14.5%
Total	323	3,209	3,532	9.1%
% History of Segregation	88.5%	52.7%	55.9%	

- Of the total incarcerated Aboriginal population 9.1% have a history of self-injury. The rate increases to 14.5% for those who also have a history of segregation and decrease to 2.4% for those with no segregation history.
- Of the 323 with a history of self-injury 88.5% also have a history of segregation.

Section 4 -Flow-Through Population of Offenders and Segregation

The following tables show the flow-through population for CSC compared to the flow-through population of those who were placed in segregation. The flow-through counts each offender once who spent at least one day in a federal penitentiary during the fiscal year no matter how many times that the offender may have been admitted and released or the number of days that the offender might have been in custody during the year.

Table 15: Flow-Through Population by Gender and Proportion that Spent time in Segregation

Total Flow-Through	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Male	19,080	19,324	19,513	19,829	20,166	19,556
Female	903	909	981	936	943	995
Total	19,983	20,233	20,494	20,765	21,109	20,551

Segregation Flow-Through	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Male	4,810	5,136	5,214	5,205	5,293	5,145
Female	351	398	417	416	347	461
Total	5,161	5,534	5,631	5,621	5,640	5,606

% of Population	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Male	25.2%	26.6%	26.7%	26.2%	26.2%	26.3%
Female	38.9%	43.8%	42.5%	44.4%	36.8%	46.3%
Total	25.8%	27.4%	27.5%	27.1%	26.7%	27.3%

- Approximately one quarter of male offenders who are incarcerated during a fiscal year spend some time in segregation.
- Over 40% of female offenders who are incarcerated during a fiscal year spend some time in segregation.

Table 16: Flow-Through Population by Race and Proportion that Spent time in Segregation

Total Flow-Through	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Aboriginal	4,125	4,220	4,460	4,784	4,843	4,967
Non-Aboriginal	15858	16013	16034	15981	16266	15584
All Races	19,983	20,233	20,494	20,765	21,109	20,551

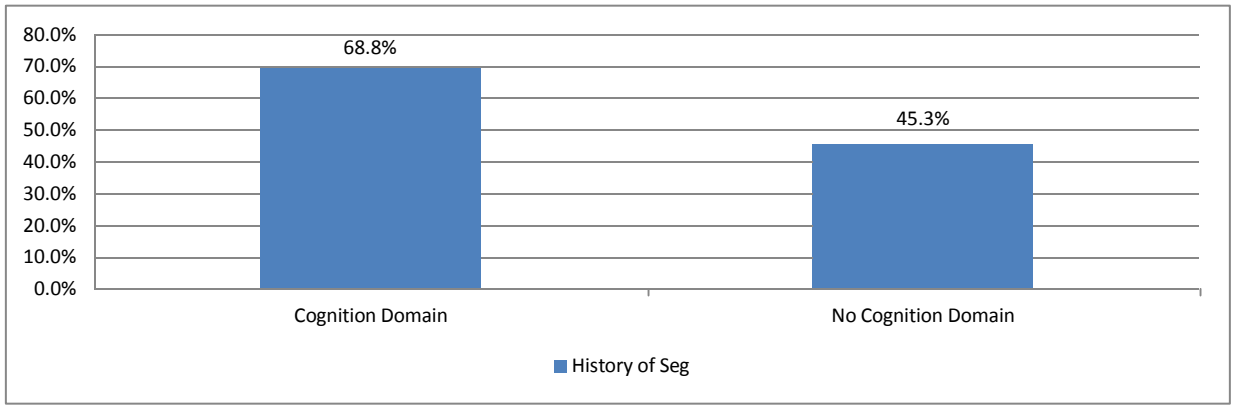
Segregation Flow-Through	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Aboriginal	1,349	1,573	1,533	1,686	1,686	1,689
Non-Aboriginal	3,812	3,961	4,098	3,935	3,954	3,917
All Races	5,161	5,534	5,631	5,621	5,640	5,606

% of Population	2009-2010	2010-2011	2011-2012	2012-2013	2013-2014	2014-2015
Aboriginal	32.7%	37.3%	34.4%	35.2%	34.8%	34.0%
Non-Aboriginal	24.0%	24.7%	25.6%	24.6%	24.3%	25.1%
All Races	25.8%	27.4%	27.5%	27.1%	26.7%	27.3%

- Approximately one quarter of non-Aboriginal offenders who are incarcerated during a fiscal year spend some time in segregation.
- Approximately one third of Aboriginal offenders who are incarcerated during a fiscal year spend some time in segregation.

Graph 14: Offenders with a Principal Domain of Cognition by those with and without a History of Segregation

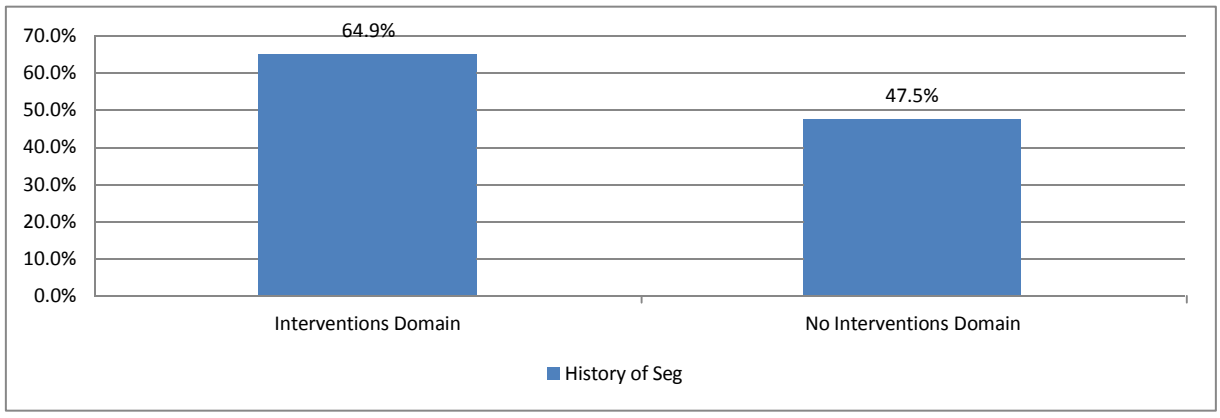
This graph shows the proportion of offenders who have been identified in their Correctional plans as having "cognitive" issues and those with no "cognitive" issues comparing those who have a history of segregation with those with no history of segregation.



- Offenders who have been identified in their Correctional Plans as having cognitive issues are much more likely to have a history of being segregated than those who have been identified as having no cognitive issues (68.8% compared to 45.3%).

Graph 15: Offenders with a Principal Domain of Interventions by those with and without a History of Segregation

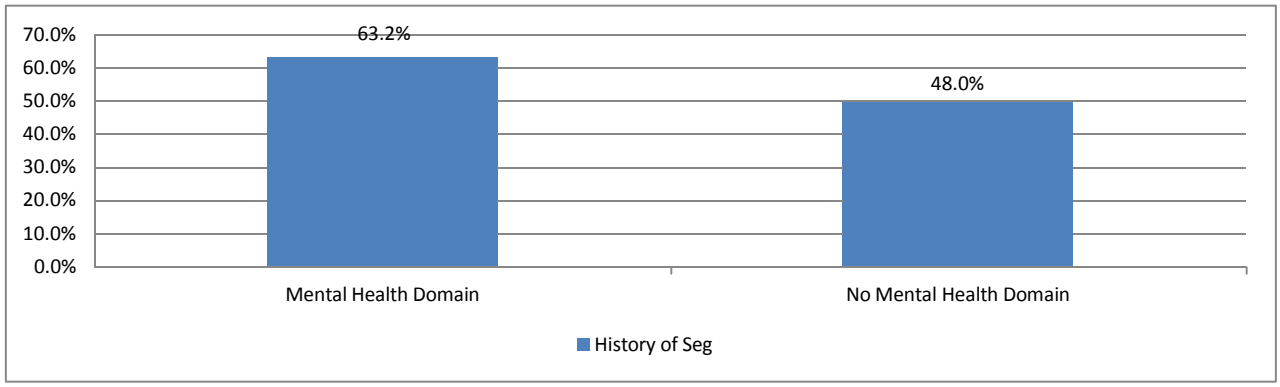
This graph shows the proportion of offenders who have been identified in their Correctional plans as requiring "interventions" and those not requiring "interventions" comparing those who have a history of segregation with those with no history of segregation.



- Offenders who have been identified in their Correctional Plans as having interventions issues are much more likely to have a history of being segregated than those who have been identified as having no interventions issues (64.9% compared to 47.5%).

Graph 16: Offenders with a Principal Domain of Mental Health by those with and without a History of Segregation

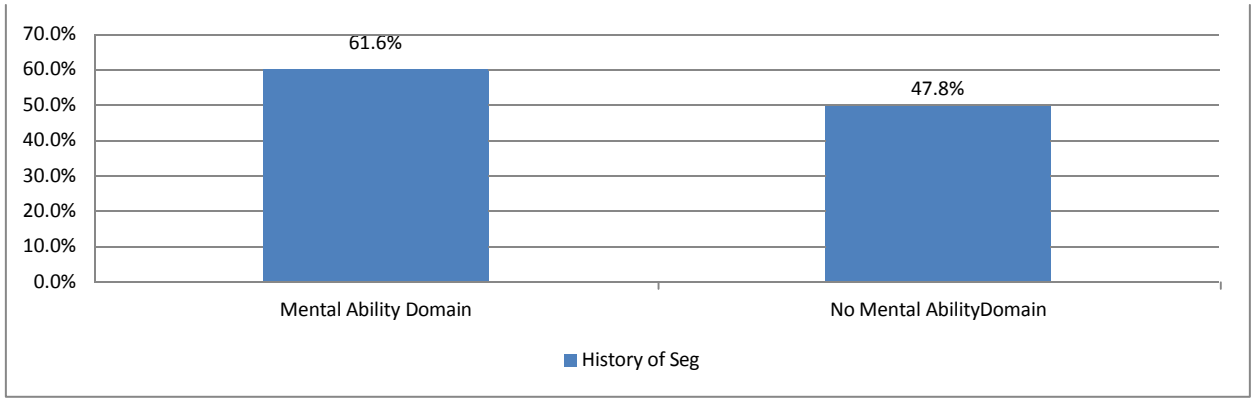
This graph shows the proportion of offenders who have been identified in their Correctional plans as having "mental health" issues and those with no "mental health" issues comparing those who have a history of segregation with those with no history of segregation.



- Offenders who have been identified in their Correctional Plans as having mental health issues are much more likely to have a history of being segregated than those who have been identified as having no mental health issues (63.2% compared to 48.0%).

Graph 17: Offenders with a Principal Domain of Mental Ability by those with and without a History of Segregation

This graph shows the proportion of offenders who have been identified in their Correctional plans as having "mental ability" issues and those with no "mental ability" issues comparing those who have a history of segregation with those with no history of segregation.



- Offenders who have been identified in their Correctional Plans as having mental ability issues are much more likely to have a history of being segregated than those who have been identified as having no mental ability issues (61.6% compared to 47.8%).

15. After we commenced this lawsuit there was a federal election. One of the first tasks of the new Prime Minister was to issue a mandate letter to the new Minister of Justice and Attorney General ("Attorney General"). It provided:

> You should conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system. Outcomes of this process should include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians, and implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness.[6] (emphasis added)

16. We actually thought that this mandate might make our lawsuit moot at least in part. What the Prime Minster was telling the Attorney General to do was in effect, part of what we were asking the court to do. But there was no amendment to the Response to Civil Claim that had been filed in this case which continued to deny that the present law or its administration was unconstitutional. And, when asked through a Notice to Admit, the Attorney General refused to admit that she intended to implement the Smith Recommendations.

17. But then lo and behold there were some developments.

18. The CI noted sharp reductions in the use of segregation in his 2015-2016 Annual Report.

19. Yet there is nothing to explain this reduction other than the public outcry over the use of administrative segregation generated in large part by media reports and this very litigation. The Act was not amended; the demographics of the prison population did not change nor did the conduct of the prisoners themselves. There were no less prisoners who were mentally ill. This significant reduction is in our view proof that Corrections had

[6] Mandate letter from Prime Minister Justin Trudeau to Minister of Justice and Attorney General Jody Wilson-Raybould, Cross-examination of Bruce Somers conducted on March 24, 2016, Exhibit 2

been misusing and indeed abusing their powers. You will hear how in discovery, the Attorney General's own representative in this proceeding, Bruce Somers, fairly acknowledged that administrative segregation has been overused. This in itself should justify this Court granting the plaintiffs the declaration that they seek that CSC has administered the Act and Regulations in a manner that infringed the *Charter* rights of the prisoners.

20. But the evidence will show that this excessive and abusive use of administrative segregation is largely due to the fact that:

a. the Act failed to place hard time limits on the time that a prisoner can spend in administrative segregation and failed to provide for external independent adjudicators with powers to intercede and prevent or remedy the practice;

b. it failed to prohibit the use of administrative segregation for the mentally ill; and

c. it failed to protect Aboriginal inmates from targeting.

21. Had those legislative provisions been in place when the Act was first introduced in 1992, it is our submission that literally thousands of prisoners would have been saved from what the UN Special Rapporteur characterized as not only cruel and unusual punishment, but torture. For some, like Ashley Smith, Edward Snowshoe, and Christopher Roy whose father will testify in these proceedings, that treatment has resulted in death.

22. Of course, CSC has made some changes to the policy governing administrative segregation. In October 2015, CSC introduced a new Commissioner's Directive. You will hear how many of these new policies are recycled reform attempts that previously have been inadequate to effect substantive change.

23. Despite all of this, according to CSC's own witnesses, while the average length of stay in segregation in the 2015-2016 fiscal year was down 28 days, 43% of inmates

still stay in longer than 16 days, 26.9% stay in longer than 31 days, 12.4% stay in longer than 61 days, 9.1% stay in longer than 91 days, and 5.7% longer than 121 days.

24. That is too many and too long.

25. And it does not appear that much has changed in the year since. In response to an information request from CBC, CSC provided the following data in respect of administrative segregation: in the month of May 2017 there were still over 400 inmates in administrative segregation, 20% over 30 days, 8% over 60 days, and 5.5% over 100 days.

Terminology

26. We wish to address the issue of terminology. *Solitary confinement* refers to the confinement of prisoners for 22 hours or more a day without meaningful human contact. According to the Mandela Rules, *prolonged* solitary confinement refers to solitary confinement for a time period in excess of 15 consecutive days. Our position is that *prolonged* solitary confinement includes confinement for more than 60 days in a calendar year.

27. CSC, and by extension the Attorney General in this case, does not use the term *solitary confinement*.

28. Nevertheless, countless entities that have studied or discussed the law and practice of *segregation* in Canada refer to it interchangeably as *solitary confinement*. Those individuals and entities include the CI, the Smith Inquiry, the government's own expert Prof. Gendreau and even the Prime Minister. We will likewise use these terms interchangeably. Insistence on the term *segregation* is insistence on a euphemism that risks obscuring the true conditions of confinement of prisoners in the hole.

29. But what is solitary confinement or segregation?

30. It used to be termed *voluntary* or *involuntary* depending on whether or not an inmate requested that he or she be placed in segregation. CSC no longer uses these terms. The reason for this change, you will hear is that there is nothing voluntary about

voluntary segregation. Many inmates who seek refuge in administrative segregation do so because they fear for their personal safety. Most inmates who voluntarily request administrative segregation would return to the general inmate population if the risk to their physical integrity was removed and their safety assured by CSC. Others have "accommodated" to the asocial world of solitary confinement. This in itself is problematic, you will hear, because of its implication for their ability to live in the general population and later in the community. As our expert Dr. Haney will testify, these prisoners have been compelled to trade their psychological well-being for preservation of their physical safety.

31. There is also a distinction between administrative segregation and disciplinary segregation. Disciplinary segregation has significant substantive and procedural safeguards not available for administrative segregation. For example, there is a hard cap of 30 days for anyone sentenced to disciplinary segregation and that can only be imposed by an independent external adjudicator.

32. But this is what the CI said about the use of administrative and disciplinary segregation in his 2014-2015 Report:

> One of the most disturbing elements in the evolving administrative segregation framework is that it is used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system. For the reporting period, there were only 209 placements in disciplinary segregation (or 2.5% of the total segregation placements) compared to 8,309 placements in administrative segregation.[7] (emphasis added)

33. According to CSC, segregation is both a status and a place. Sometimes inmates are segregated outside of designated segregation cells.

34. The evidence will show that segregation cell walls generally range from 50 square feet to 100.5 square feet, are generally made of poured concrete and/or metal/steel-clad walls. As is said, a picture is worth a thousand words. So let me show you the administrative segregation cells that exist today in 28 federal penitentiaries.[see photos]

[7] 2014-2015 Report, p. 30

Appendix C

Architecture – Inmate Cells

Atlantic Institution Segregation Cell

Beaver Creek Institution Segregation Cell

Bowden Institution Segregation Cell

Collins Bay Institution Segregation Cell

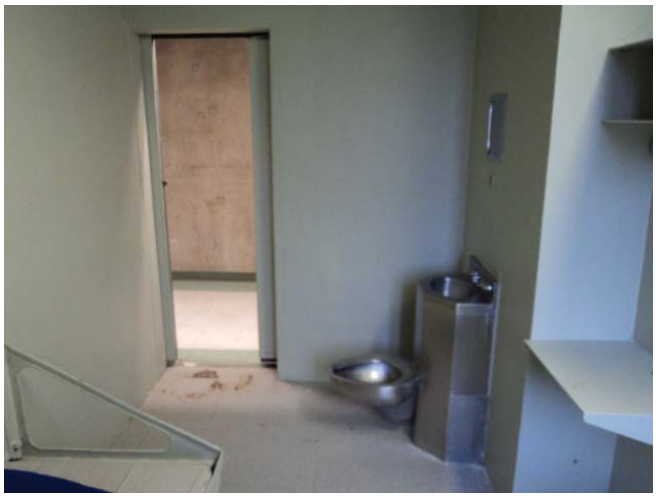
Cowansville Institution Segregation Cell

Donnacona Institution Segregation Cell

Dorchester Penitentiary Segregation Cell

Drumheller Institution Segregation Cell

Drummond Institution Segregation Cell



Edmonton Institution Segregation Cell

Edmonton Institution for Women Segregation Cell (cell in 2nd pic currently under renovation)

Federal Training Centre Segregation Cell


V4


V4

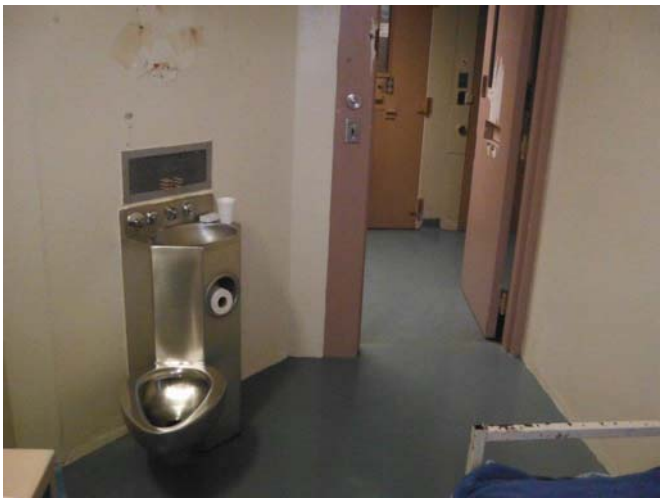
Fraser Valley Institution Segregation Cell

Grande Cache Institution Segregation Cell

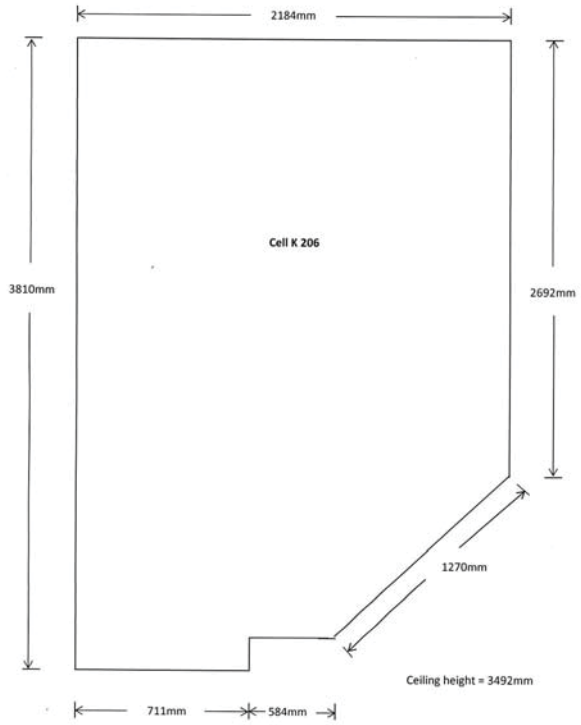
Grand Valley Institution for Women Segregation Cell

Joliette Institution for Women Segregation Cell

Joyceville Institution

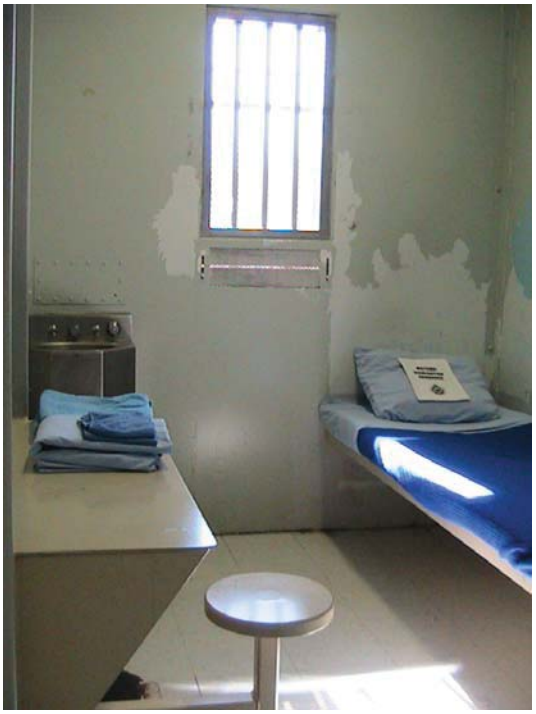


Kent Institution Segregation Cell

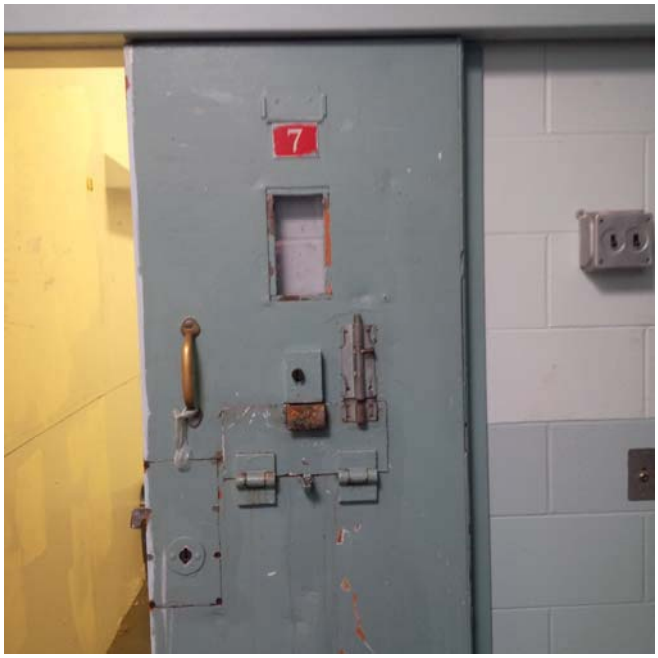


La Macaza Institution Segregation Cell

Matsqui Institution Segregation Cell



Millhaven Institution Segregation Cell



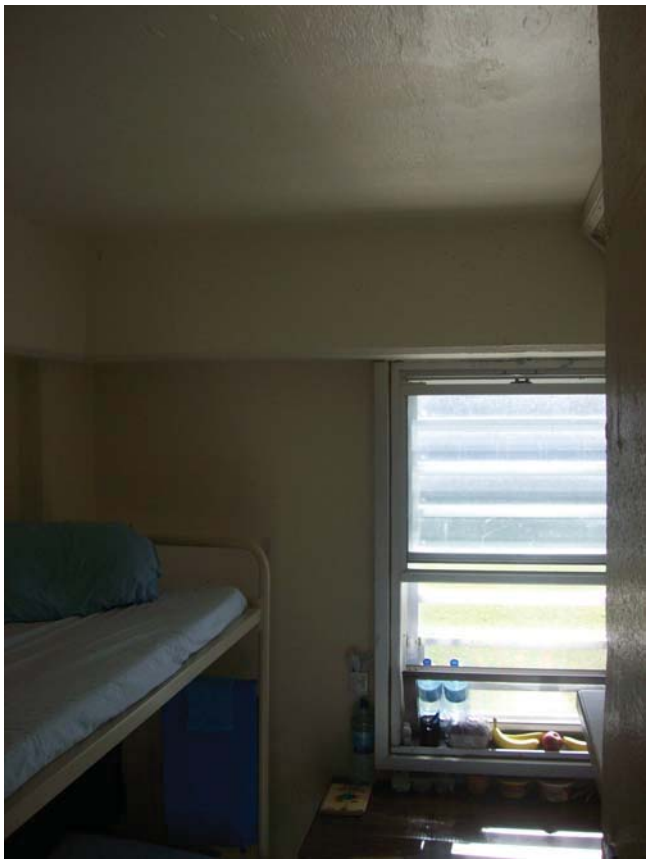
Mission Institution Segregation Cell

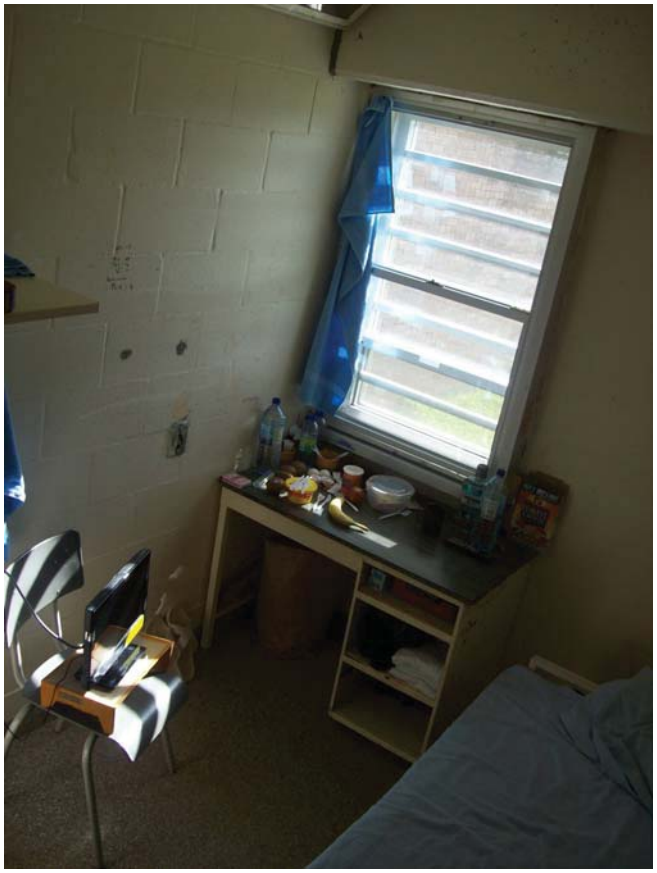
Mountain Institution Segregation Cell

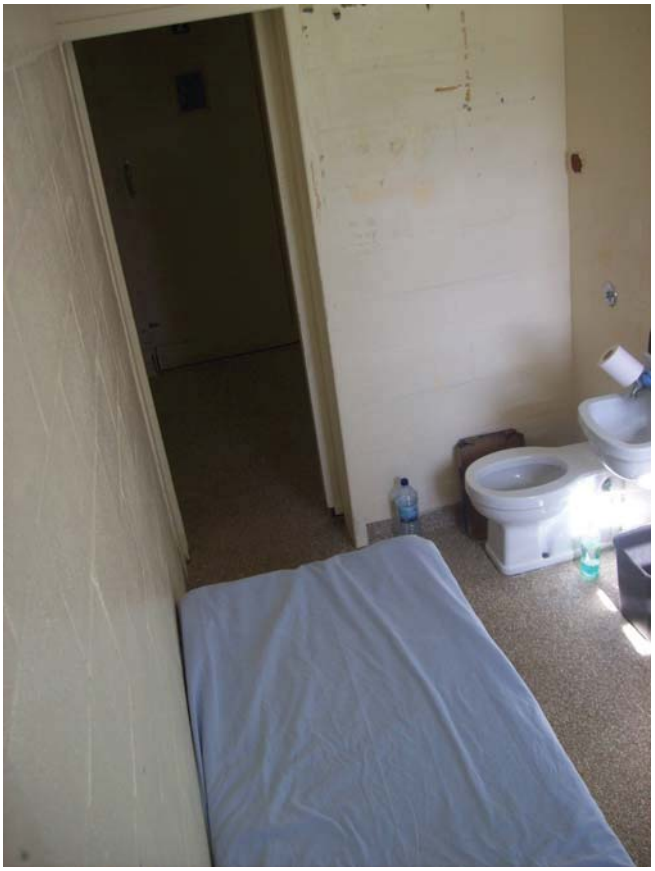
Nova Institution for Women Segregation Cell

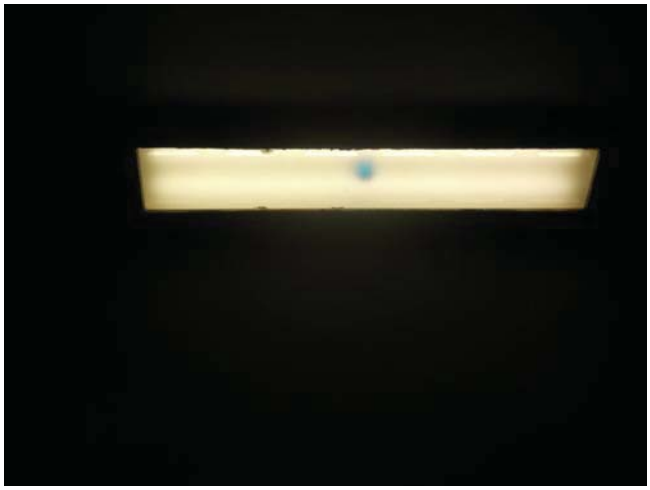
Port-Cartier Institution Segregation Cell

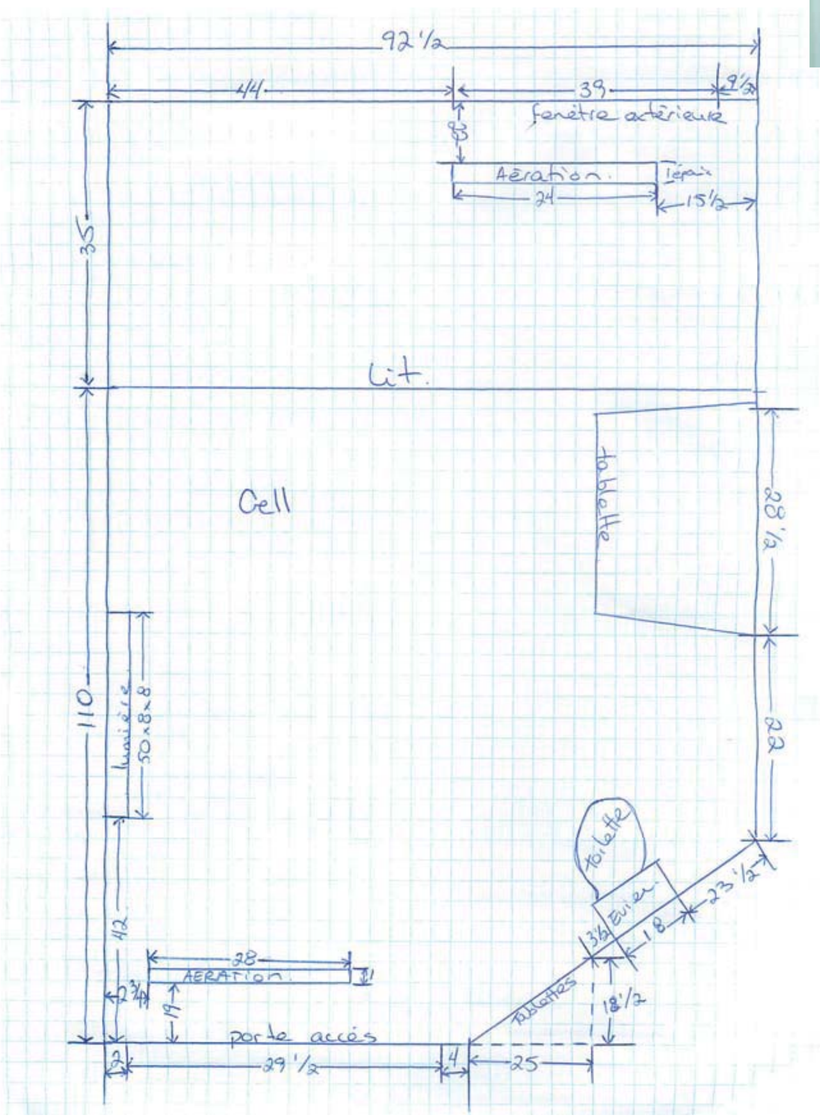
Regional Reception Centre Segrgation Cell





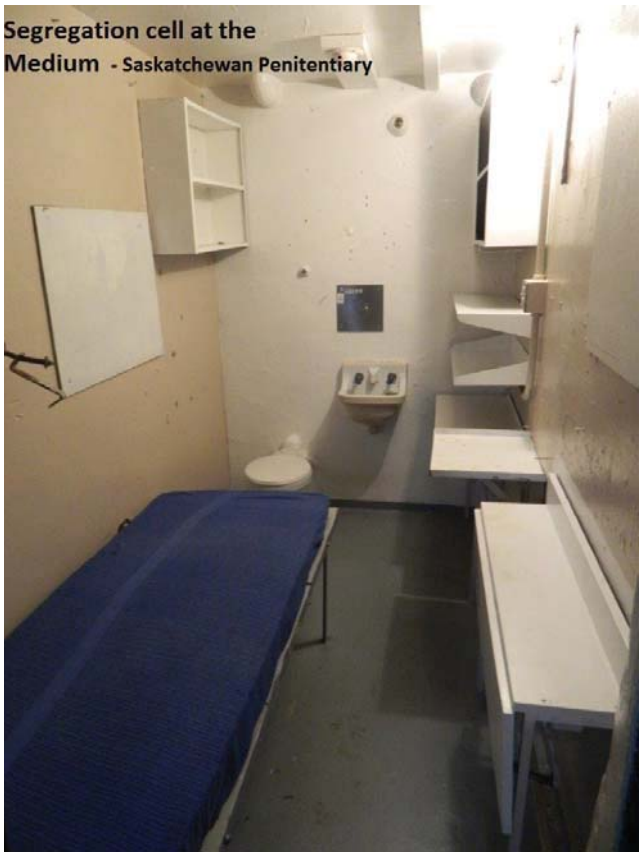






92 ½
44
39
9 ½
fenêtre extérieure
8
Aération
1 épais
24
15 ½
35
Lit
Cell
tablette
28 ½
22
110
lumière
50 x 8 x 8
toilette
Évier
3½
18
23 ½
42
28
AÉRATION
1
2¾
19
tablettes
18 ½
porte accès
2
29 ½
4
25

Saskatvhewan Penitentiary Segregation Cell



(maximum security)

Springhill Institution Segregation Cell

Stoney Mountain Institution Segregation Cell

Warkworth Institution Segregation Cell

Overview of the Anticipated Evidence

35. We wish to set out an overview of the enormous amount of evidence that has been prepared and that will be filed with the Court in this case in the form of affidavits and expert reports. Of course we cannot exhaustively detail all of that evidence now. What follows is an overview of the evidence by grouping or category; the actual order of witnesses is driven by logistical concerns.

36. You will hear from Bobby Lee Worm, and other former and current federal inmates like her or their family members, who have been subjected to administrative segregation. Many of these witnesses come from disadvantaged or vulnerable backgrounds. Some had upbringings marked by poverty, unstable homes and abuse. Some are Aboriginal. Some have long histories of mental illness and substance abuse.

37. You will hear about the conditions of confinement that these individuals have endured. Some of these people describe the segregation cells as small, sparsely furnished and filthy. Inmates in solitary often sleep with their heads in close proximity to their toilet in cells with walls smeared with food and bodily fluids. Some have described denial of access to basic cleaning supplies.

38. Some have described cells with no windows or with windows that let in little natural light. Many have no ability to control the lights in their cell and some describe those lights being rarely turned off. Amplified, unrelenting noise has been described as another issue in these cells.

39. The exercise yards available have been described as a small cage with no equipment and nothing to do.

40. Inmates describe the very limited interaction they had with other inmates and prison staff. Phone access and visitation was also curtailed.

41. Many inmates will testify that their ability to access programming was very restricted while in segregation. Others will say that they were deprived of medical treatment. Still others will testify about the lack of access to legal counsel.

42. Some inmates describe deprivation of their personal effects while in segregation, particularly at the start of the segregation placement. Others describe destruction of their effects.

43. The environmental conditions have a significant detrimental impact on inmates. The inmates describe these impacts as including loss of a sense of time, difficulty sleeping, extreme loneliness, depression, suicidality, anxiety, paranoia, hypersensitivity, and feeling “broken” and a loss of personhood.

44. Some effects last after inmates are released from segregation. Inmates will describe feeling overwhelmed in general population and lasting feelings of depression, anger, anxiety and hypersensitivity.

45. The impacts of solitary confinement described poignantly by the witnesses who have endured it are corroborated by the expert evidence that will be adduced in this case.

46. There is evidence from mental health professionals like Dr. Grassian, Dr. Haney and Dr. Rivera.

47. Dr. Stuart Grassian is a Board-certified psychiatrist, licensed to practice medicine in the Commonwealth of Massachusetts and formerly on the teaching staff of the Harvard Medical School. Dr. Grassian has extensive experience in evaluating the psychiatric effects of stringent conditions of confinement, and has served as an expert in a number of both individual and class-action lawsuits addressing this issue.

48. Dr. Grassian has identified a particular syndrome caused by the restriction of environmental stimulation experienced by prisoners in solitary confinement termed stupor or delirium.

49. Dr. Grassian describes how some individuals in solitary experience major perceptual disturbances – illusions and hallucinations in multiple spheres. They become intensely fearful, confused, suspicious – paranoid ideas often emerge. For many, the experience is one of a continual struggle to maintain their sanity, to control

their own mind and to not succumb to confusion, paranoia and psychotic symptomatology.

50. He opines that solitary confinement can cause hyper-responsivity to external stimuli which can continue to be a major affliction for these individuals well after release from solitary and perhaps indefinitely. Relatedly, these inmates have a difficult time adjusting to living in the general population. They cannot process the abundant stimuli surrounding them; they react too strongly to each, and cannot process the whole. As a result, they tend to retreat back into their cells, and to dread being among a large group of inmates. Some are unable to accommodate to life after release from prison. Some spend almost all of their time alone in their room. Unable to even join their family for a meal. Families suffer as a result.

51. Dr. Grassian will also refute the opinion of the government's experts Dr. Mills and Dr. Gendreau, neither of whom is a physician, unlike Dr. Grassian, and both of whom he says rely on faulty studies and reasoning. Dr. Grassian concludes that the evidence is overwhelming that even within the space of 15 days solitary confinement can cause severe psychiatric harm; that it is enormously toxic psychologically.

52. Dr. Craig Haney is also a leading expert in this area. He is a Distinguished Professor of Psychology and has served for the last seven years as the Director of the Legal Studies Program at the University of California. His area of academic specialization is in "psychology and law," which is the application of psychological data and principles to legal issues. He has been the recipient of a number of scholarship, fellowship and other academic awards and has published numerous scholarly articles and book chapters on topics in law and psychology including encyclopedia and handbook chapters on the nature and consequences of solitary or "supermax"-type confinement.

53. Dr. Haney has served as a consultant to numerous governmental, law enforcement and legal agencies and organizations. His academic interest in the psychological effects of various prison conditions dates back to 1971 and since that time he has studied the psychological effects of living and working in real institutional

environments including specialized correctional housing units (such as solitary and "supermax"-type confinement). He has studied the ways that mentally ill prisoners, especially, are affected by their conditions of confinement and how prison systems address the needs of this vulnerable population.

54. Like Dr. Grassian, Dr. Haney has been qualified and has testified as an expert in various previous legal proceedings.

55. Dr. Haney opines that the existing scientific literature as well as his own long-standing study of solitary or isolated confinement establish its harmful psychological effects and the significant risk of harm to which it subjects all prisoners, especially those who have pre-existing vulnerabilities (such as juveniles and the mentally ill), and these conclusions are not only empirically confirmed but also theoretically sound.

56. Dr. Haney describes how with remarkably few exceptions, virtually every study has documented the pain and suffering that isolated prisoners endure and the significant risk of serious psychological harm to which they are exposed. The conditions of segregation predictably impair the psychological functioning of many of the prisoners who are subjected to them. And for some prisoners, these impairments can be permanent and life-threatening.

57. The problematic symptoms include appetite and sleep disturbances, anxiety, irritability, aggression, rage, panic, loss of control and breakdowns, hopelessness, paranoia, hallucinations, psychological regression, difficulties with attention and often with memory, withdrawal, hypersensitivity, ruminations, cognitive dysfunction, self-mutilation and suicidal ideation and behaviour.

58. Dr. Haney opines that depriving people of normal social contact, including human touch and meaningful social interaction over prolonged periods of time, can damage or distort their social identities, destabilize their sense of self and, for some, destroy their ability to function normally in free society. And that the subjective experience of social exclusion results in what has been called "cognitive deconstructive states" in which

there is emotional numbing, reduced empathy, cognitive inflexibility, lethargy and an absence of meaningful thought. These may persist long after the prisoner's time in isolation has ended making adjustment to the general population especially painful and challenging.

59. Dr. Haney opines that virtually all of these effects are far more problematic and dangerous for mentally ill prisoners both because of the greater vulnerability of this population in general to stressful, traumatic conditions. Dr. Haney's opinion is that the "indeterminacy" of their confinement exacerbates its painfulness, increases frustration and intensifies the depression and hopelessness that is often generated in these environments.

60. Dr. Haney is of the opinion that prolonged isolation is generally used in the literature to refer to durations of solitary confinement that are measured in days or weeks and it is his opinion that if these consensus positions are violated, prisoners are subjected to psychological pain and place at significant risk of serious psychological harm whose adverse consequences may be long lasting, permanent and even fatal.

61. Dr. Haney will also refute the opinions of the government's experts who he says have rejected a whole body of scientific studies simply because they are qualitative rather than quantitative and have relied almost exclusively on only three studies, each of which Dr. Haney will criticize as fundamentally unsound.

62. Finally, we wish to highlight the qualifications and evidence of Dr. Margo Rivera. Dr. Rivera is an Associate Professor and the Director of Psychotherapy in the Department of Psychiatry, Queen's University, and Clinical Leader of the Personality Disorders Service at Providence Care - Mental Health Services, Kingston, Ontario.

63. She acts as a Consultant in the Forensic Unit at Providence Care – Mental Health Services and at Correctional Services Canada. She is a registered psychologist and has worked for 45 years as a psychotherapist with adults and children who are trauma survivors.

64. Dr. Rivera's evidence is notable because it is based, in large part, on her experience in 2010, when she was retained by CSC as a member of an External Review Board mandated to provide a description of male and female inmates who had been in administrative segregation for long time periods with particular attention to inmates for whom there may be mental health concerns. Her mandate included outlining strategies on how to reduce the number of inmates spending time in long-term administrative segregation, as well as the expected outcome associated with each proposed strategy.

65. Dr. Rivera describes the segregation units she visited. Her research revealed that access to televisions was inconsistent, yard time was offered really early in the morning in the cold and there was no access to indoor yard time. Access to Aboriginal services and educational programs was limited.

66. She describes the reasons for segregation ranging from waiting for a transfer, lack of space at the necessary security classification, disruptive behaviour from mentally ill inmates, and use as a population management tool in light of the changing population of the institutions. Both offenders and staff at all levels of CSC noted that some offenders are currently placed in segregation for offences that do not necessarily merit segregation

67. Dr. Rivera describes inmates who suffered ill health effects in administrative segregation ranging from weight loss and weakness, to loss of vocal power, boredom and loneliness. Dr. Rivera opines that inmates in long-term segregation tend to have many and varied mental health needs. They suffer from a range of non-psychotic psychiatric conditions, the most common being depression, anxiety, insomnia, learning disabilities, attention deficit hyperactivity disorder and posttraumatic stress disorder. Many also show features of antisocial and borderline personality disorders and exhibit some of the interpersonal and behavioural problems that are associated with these conditions. Some suffered from a major mental illness, which left them clearly and significantly incapacitated. Correctional staff and a CSC psychologist expressed concern to Dr. Rivera about the lack of mental health services and/or training.

68. Dr. Rivera describes some existing alternatives to segregation that have already been designed and implemented in Canadian institutions. She outlines 52 recommendations to decrease the numbers of federally sentenced offenders residing in segregation and to enhance the quality of life, mental health and productivity of those who do reside in the administrative segregation units of Canadian federal correctional institutions.

69. She further opines that time limits and independent external oversight would improve the prospects of implementation of these recommendations.

70. Another specie of expert evidence in this case addresses the *physiological* impact of administrative segregation. This evidence comes from Dr. Williams.

71. Dr. Brie Williams is a licensed and practicing physician in the state of California and a board-certified in Internal Medicine, Hospice and Palliative Medicine, and Geriatrics. She is an associate professor at the University of California, San Francisco. Dr. Williams has visited and assessed medical care in several prisons and jails across the U.S. and internationally. She has lectured nationally and internationally about prison healthcare and co-founded the San Quentin Prison Geriatrics Consultation and Teaching Service, which attends to patients age 50 or older. She has published extensively and served as an expert or consultant in various legal cases related to prisoner health.

72. Dr. Williams will describe the medical research which documents that prolonged solitary confinement can inflict grave physiological harms including: deconditioning in older adults; the development or worsening of serious medical conditions; the development or worsening of memory impairment in older adults; the worsening of symptoms associated with osteoarthritis; the development and worsening of hypertension and, in turn, a future risk of end-organ damage, morbidity, and mortality; the development and worsening of hearing impairment and, in turn, a future risk of functional and cognitive impairments including dementia and falls; the development and worsening of insomnia and poor-quality sleep and, in turn, a future risk of cognitive and functional decline, falls and early mortality; the worsening and poor management of

type 2 diabetes and, in turn, a future risk of complications from type 2 diabetes, including further disability and cardiovascular disease.

73. There is evidence from those who have experienced solitary or segregation from the other side of the wall – that is former CSC or government employees like Darren Frick and Robert Clark, Glen Patterson, Mary Campbell and Dr. Ruth Martin.

74. Mr. Frick and Mr. Clark are former CSC officials.

75. Mr. Frick joined the CSC as Assistant Warden Management Services for Edmonton Institution in 2007. In 2012, Mr. Frick left Edmonton Institution for a position as Manager Finance and Administration at Edmonton Remand Centre.

76. Mr. Frick testifies about the workplace culture at CSC. According to Mr. Frick, CSC staff members are instilled with values and priorities that strongly emphasize staff safety and solidarity with the bargaining agent. Those priorities omit the well-being and possible rehabilitation of inmates.

77. He describes the very punitive conditions of confinement that inmates at Edmonton Institution face in segregation. He describes small cells, lack of common space for inmate interaction, and small, dim outdoor exercise yards enclosed within solid masonry walls of roughly 15 feet height, a concrete floor, and a ceiling of expanded metal grating which allows fresh air to enter but no clear view of the sky. The exercise yard is partitioned into “dog runs”, smaller metal pens that allow incompatible inmates to receive fresh air simultaneously.

78. Mr. Frick confirms that the ability of segregated inmates to access outdoor exercise is impacted by institutional routine and by inmate population dynamics. He deposed that it was not at all unusual for segregated inmates to receive exercise only every second day, especially when institutional routine was disrupted, which occurred regularly. Although staff were aware that inmates were entitled to one hour per day as per policy, that policy was not always what dictated everyday management.

79. According to Mr. Frick, other than for the mandated exercise and minimal time for daily showers, inmates are rarely allowed out of their cells.

80. He deposed that no one would enter a segregated inmate's cell in the company of an inmate. If a private discussion was required, each range had a glass walled room beside the unit sub-control. Family and friend visits were not allowed to segregated inmates as that was one of the privileges suspended during segregation. Although there were times when segregated inmates were allowed visits, this occurred on a very limited and controlled basis. Religious and medical visitors would typically talk to inmates at their cell door, meaning that a visitor would have to kneel down and speak to the inmate through the meal slot in their door. These meetings are necessarily brief as it is a difficult way to communicate and with compromised privacy. Phone calls and meals were taken in cell.

81. Mr. Frick's observation was that Aboriginal people were not only over-represented within Canada's inmate population, but that this over-representation was evident among the segregated inmate population. He deposed that for reasons of culture and geography, Aboriginal inmates would on average be particularly isolated while in custody. He also observed that segregation was particularly difficult for Aboriginal inmates because of a systemic lack of access to meaningful Aboriginal programming in segregation.

82. Mr. Frick observed that inmates with mental health challenges were also over-represented in the segregation population. Their mental health issues appeared to be a contributing factor in their behaviour. For inmates with mental health conditions or disabilities, Mr. Frick observed that segregation was particularly challenging and punitive. He estimated that more than half of all suicides occur amongst segregated inmates even though they represent only roughly 15% of the inmate population.

83. Because segregated inmates have limited access to supports, programming or even an environment that might help them resolve underlying issues, Mr. Frick deposed that segregation thwarts efforts to protect the public and assist offenders to become law abiding citizens who can successfully reintegrate into society upon release. Because

there are no time limits, Mr. Frick deposed, many inmates in segregation fall through the cracks.

84. Mr. Frick observed that the use of segregation jeopardizes the eventual safety of inmates, correctional staff and ultimately the public.

85. Like Mr. Frick, Mr. Clark will testify that he worked for CSC for years. Mr. Clark held a number of positions between 1980 and 2009 ultimately reaching the level of Deputy Warden at a Regional Treatment Centre.

86. Mr. Clark will discuss the culture of CSC and, in particular, the “blue wall” which is an overdeveloped sense of solidarity, a level of cohesiveness that transcends one’s personal values. This culture prevents the penal system from exercising complete control over its prisons and permits mistreatment of prisoners.

87. Mr. Clark will testify that he experienced CSC’s culture of collective indifference towards both the prisoners and CSC’s stated higher goals. This culture is largely responsible for most of the problems that occur within CSC’s institutions.

88. In Mr. Clark’s experience, too few prison employees care about the prisoners under their care, other than to make sure they are alive and behaving. Some prison employees regard prisoners as less than human and mistreat them in myriad ways.

89. He will testify that CSC is firmly centred in a culture of secure confinement, with rehabilitation a second and distant goal.

90. Mr. Clark chaired over 200 solitary-confinement review boards and attended hundreds more. He will testify that these processes amount to little more than a rubber stamp.

91. He will testify that procedural safeguards do little to protect against overuse of solitary confinement.

92. Mr. Clark will testify that in his experience, solitary confinement was used as a way to manage mentally ill prisoners and prisoners' mental condition appeared to deteriorate in solitary.

93. Many solitary confinement prisoners resort to acting out and self-harming as a means to draw attention to their plight. Some take their own lives.

94. Mr. Clark saw repeated breach of the rules and policies in place for prisoners in solitary confinement, including allowing prisoners to languish in this difficult environment for longer than necessary, not allowing them access to exercise, to programs and so on.

95. Mr. Clark will testify that most of the patients arriving at the Regional Treatment Centre came from a solitary confinement cell.

96. At the Regional Treatment Centre, they provided only temporary relief. When patients began to show signs of improvement, they were returned to their parent institution. In Mr. Clark's experience, patients were often returned to solitary confinement, where they might languish for months or years. In many cases, they would return to the very same cell they had occupied previously.

97. In light of his experiences and the institutional culture, Mr. Clark's view is that absent external oversight, the system will continue to suffer from inertia. Mr. Clark favours judicial oversight after 15 days in order to maintain the administrative segregation status. Absent external oversight, there is no great urgency within the system to prevent misuse and abuse of solitary confinement.

98. Next, you will hear from Glenn Patterson whose work between 2009 and 2014, as the Institution Elder to men at Matsqui, including inmates in segregation, grounds his evidence.

99. Mr. Patterson will describe how over the five years he was employed at Matsqui, he provided culturally sourced ceremonies and one-on-one counselling to approximately 70 Indigenous men at the institution, and also supported non-Indigenous inmates.

100. Mr. Patterson will explain that one of the cultural ceremonies that he conducted with inmates was Smudging. Smudging is a central ceremony within Indigenous spirituality, and is often conducted prior to conducting any other spiritual practices or counselling. However, Matsqui staff did not allow Smudging to occur within the segregation unit. Mr. Patterson therefore preferred to meet segregated inmates during their daily yard hour, because the outdoor space was the only area on the Matsqui premises where Mr. Patterson was allowed to conduct Smudging ceremonies. Mr. Patterson will testify that he was not typically able to visit with inmates during their daily yard hour.

101. The segregation conditions at Matsqui limited Mr. Patterson's ability to establish meaningful connections and contact with segregated inmates. In Mr. Patterson's experience, meaningful contact with segregated inmates ameliorates the emotional and spiritual harms of segregation and provides valuable insight into how an inmate is doing in segregation.

102. Mr. Patterson has witnessed the harms of segregation. For example, in December of 2009, Mr. Patterson became concerned that one of the inmates he regularly visited in Matsqui had become suicidal. He advised CSC staff that the inmate was, in his view, depressed and was not doing well. The inmate hung himself to death in his segregation cell the following day.

103. Another witness you will hear from is Mary Campbell, a retired lawyer who worked at the Corrections and Conditional Release Directorate (the "Directorate") for 28 years. The Directorate was responsible for all policy and legislative issues relating to CSC and Ms. Campbell worked closely with CSC official at all levels.

104. She attests to the culture of CSC and her role in drafting and then monitoring compliance with the Act and related regulations. She describes the changes in the institutional context of Canadian prisons and the social and psychological profiles of prisoners in the intervening years between the enactment of the Act and the present, and whether or not CSC policies are an effective response to these changes. Her

evidence provides important support to the need for a legal, as opposed to policy, change.

105. And finally Dr. Ruth Martin is a licensed physician in British Columbia and a member and Fellow of the College of Family Physicians of Canada. She has considerable experience treating federally incarcerated inmates which began in 1994 when she worked part-time in the medical clinic of Burnaby Correctional Centre for Women, which was a medium/maximum security federal/provincial prison for women. In 2004 when that institution closed, Dr. Martin continued to work with provincially incarcerated inmates including working for BC Corrections Branch as a prison physician until 2011, working at Alouette Correctional Centre for Women, Maple Ridge, until March 2011, and at Surrey Pre-trial medical clinic, which houses men on remand.

106. Like Mr. Clark, Dr. Martin describes her understanding based on her experience that security processes determined whether or not an inmate was placed in segregation. Correctional health care providers were not consulted about that decision.

107. She would only be asked to become involved with patients held in segregation cells in three circumstances and those were: first, inmates held in segregation to stabilize acute or urgent medical situations such as substance withdrawal; second, patients held in segregation who suffered from acute mental illness such as patients who were depressed and suicidal and therefore a danger to themselves or others; and third, inmates held in segregation who request to see a health care provider because of a medical need.

108. Dr. Martin observed that incarcerated populations have a higher percentage of individuals with mental illness compared with the general population and by some definitions that percentage is estimated between 80-90% of the population. Dr. Martin also opines that incarceration itself can be bad for an individual's mental health and individuals who may have had a negative mental health screening upon admission, may subsequently develop mental health disorders during the course of their incarceration. She observed that the conditions of segregation for individuals with mental illness were the same as those held for other reasons and were not conducive to improving mental

health. In her experience and observation, the negative consequences of segregation on mental and physical health may be seen as early as 48 hours after segregation. She observed that during periods of segregation, an individual's symptoms of mental health problems may be mistaken for behavioural problems, thus creating the dissonance between the best medical practices for individuals with mental health problems and correctional segregation practices.

109. As well, based on data prepared in the UK and her own experiences in Canadian prisons, she estimated that 20-30% of incarcerated people have learning difficulties and disabilities, including Fetal Alcohol Spectrum Disorder, that interfere with their ability to cope within the criminal justice system.

110. Dr. Martin also describes her experiences at Styal Prison in the UK as an alternative to the use of administrative segregation.

111. A third category of expert evidence comes from renowned prison scholars Kelly Hannah-Moffat, Andrew Coyle and Michael Jackson.

112. Prof. Kelly Hannah-Moffat is a tenured full professor at the Centre of Criminology and Sociolegal studies, and Vice President Human Resources and Equity at the University of Toronto.

113. Based on available information, including answers provided by the defendant in response to interrogatories in this proceeding, Prof. Hannah-Moffat describes some of the demographic make up of the federal prison population.

114. She explains data that is missing and the lack of transparency of CSC in general that not only complicates assessment of the use of segregation, but also raises concerns about CSC's ability to meet the needs of inmates.

115. She describes the conditions of confinement and how, based on CSC's own information, some institutions fail to meet present policy requirements for minimum cell size.

116. Exercise yards are policy compliant insofar as *there is no requirement* that these yards include temperature control, shelter form weather, seating or access to water. Although the Regulations require that indoor exercise be offered where weather does not permit exercising outdoors, many institutions explicitly state that they have no indoor exercise area.

117. Prof. Hannah-Moffat worked as a policy advisor for Madame Justice Arbour on the Commission of Inquiry into Certain Events at the Prison for Women in Kingston ("Arbour Commission") and was an expert witness for the Office of the Ontario Coroner in the Ashley Smith Inquest. She describes her work in those capacities.

118. Again she explains why lack of transparency and access to prisoners for interviewing make it exceptionally difficult to ascertain with precision how prisoners' experiences of administrative segregation, access to due process, management of health needs (mental and physical), or suicide and self-injury have changed in the last 20 years.

119. In reliance on the CI reports, recent coroners' inquest findings, and research conducted by independent researchers, she concludes that some of the same issues identified in the Arbour Report[8] persist to this day. Those issues include lack of transparency and accountability in operations, and a lack of willingness to be scrutinized by others. As well, CSC crisis intervention capacities, training and development of alternatives to segregation remain areas of concern.

120. Prof. Hannah-Moffat explains that there is little evidence of substantive change in these areas and instead a consistent history of critique and calls for change.

121. She explains how the Smith Inquest shows that the problems identified in the Arbour Report persist and CSC's response to this inquest fails to address the underlying problems with administrative segregation and oversight.

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[8] *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) ("Arbour Report"), www.caefs.ca/wp-content/uploads/2013/05/Arbour_Report.pdf

122. She provides, as well, an assessment of the use of solitary confinement in respect of self-injuring inmates and its use in respect of various gender, race and mental health populations.

123. In particular, her opinion is that segregation is not a best practice for the management of self-injury and that it tends to exacerbate prior mental health problems and can lead to the development of previously undetected mental health problems.

124. For women in particular, isolated conditions of confinement is an important contributing factor to their higher rates of self-harm and suicidal thoughts. She explains that males in solitary confinement in particular may hide distress from prison guards and that these signs may be misinterpreted by guards when they are shown.

125. She criticizes CSC's data for its failure to allow consideration of intersecting axes of identity such as a woman who is also Indigenous, those who identify as other racialized minorities, or those with physical or mental disabilities.

126. Finally, she considers factors that may enhance or, conversely, complicate the relationship between prisoners and officers and essential components of effective administrative segregation policy and practice.

127. As well, you will hear from Professor Andrew Coyle who is an Emeritus Professor at the School of Law in King's College of the University of London. He was the founding Director of the International Centre for Prison Studies, and prior to becoming an academic, spent 24 years as a governor in the prison services of the United Kingdom. Prof. Coyle was also an expert witness in the Coroner's Inquiry into the death of Ashley Smith.

128. Prof. Coyle will opine on the international and regional standards relating to the use of solitary confinement and best practices in the operational application of these standards, as well as to explain his role and testimony in the Ashley Smith Inquiry.

129. Prof. Coyle challenges the assumption latent in the Attorney General's position in this litigation that there are only two options for housing inmates being segregation, or

general population. He describes a more positive model, implemented in England and Wales, which houses prisoners in small units of up to ten, operated by professionally trained staff. Prisoners move freely within the unit and have a normal prison routine.

130. Prof. Coyle will be critical of CSC's response to the Smith Recommendations. He does not accept CSC's assertion that solitary confinement does not exist within the Canadian system. He opines that none of the Smith Recommendations, including the recommendation for a time limit of 15 days, gave rise to an undue risk to the safe management of a prison.

131. You will hear that it is Prof. Coyle's opinion that offenders with mental health disorders who have been designated as acute or high need intermediate care cases ought not to be held in administrative segregation.

132. Michael Jackson, Q.C., is an Emeritus Professor at the University of British Columbia's Faculty of Law. For over 40 years he has conducted research in the area of correctional law, policy and practice in Canadian prisons, and has published numerous books and papers in the area.

133. He provides a historical view of segregation practice and legislative reform in Canada. He describes the Canadian prison context prior to the enactment of the Act and the implementation of, compliance with the Act, and reform of the Act.

134. What emerges from this evidence is:

a. repeated recognition of the harmful effects of administrative segregation on inmates;

b. repeated recommendations for independent external review of administrative segregation and for time limits;

c. delay or failure to adequately evaluate and/or respond and implement recommendations to improve the practice of administrative segregation;

d. repeated findings that CSC has a culture of defensiveness and lack of respect for the Rule of Law;

e. CSC rejection of outside recommendations as being reflective of just isolated events. Although, the number and similarity of "isolated events" argues against such a view; and

f. in the wake of high profile incidents involving segregation, CSC has periodically responded by introducing policy reforms that are poorly implemented and that over time any commitment to change wanes in the face of other administrative priorities, and the systemic issues of abuse of administrative segregation are re-established.

135. Prof. Jackson will provide you with a broad sweep of the practice of administrative segregation from the mid-1970s through to the 1980s and the various studies and reports on the practice.

136. You will hear how during the 1980s, the power to place a prisoner in administrative segregation continued to rest in the broadly worded authority of the *Penitentiary Service Regulations,* although Commissioner's Directives ("CDs") now provided a much more detailed decision-making structure. Despite these greater procedural protections in the CDs, the abuse of discretionary power remained a systemic problem.

137. You will hear how in 1983, Prof. Jackson drafted a Model Segregation Code to encourage the creation of a principled and fair process through which segregation decisions were made and a system of checks and balances to protect against the abuse of the involuntary segregation power. The linchpin of the Model Segregation Code was the requirement for an independent adjudicator. Another key feature is time limits on how long an inmate can be segregated.

138. Prof. Jackson will testify that throughout the 1990's pre-*CCRA* customary law and a pattern of noncompliance persisted under the Act.

139. You will hear about the highly authoritative 1996 report from the *Commission of inquiry into certain events at the Prison for Women in Kingston*, conducted by Louise Arbour, former UN High Commissioner of Human Rights and former justice of the Supreme Court of Canada ("Arbour Report").

140. The Arbour Report noted the dissonance between law and operational reality in respect of the Act's requirement that administrative segregation offenders receive the same rights, privileges and conditions of confinement as the general inmate population, with the exception of those that can only be afforded in the company of other inmates.

141. The Arbour Report called for the development of alternatives to segregation, as well as best practices for diffusing difficult situations and managing prisoners in crisis. The Arbour Report recommendations not only built off the recommendations in the Model Segregation Code, but were in fact more rigorous. It made very specific recommendations about the use and oversight of administrative segregation including, *inter alia*, that the practice of long-term confinement in administrative segregation be brought to an end and a time limit be imposed of a maximum of 30 days, no more than twice in a calendar year after which, if other options are unavailable, CSC apply to court for a determination of the necessity of further segregation. Failing judicial supervision, the Arbour Report recommended an independent adjudicator within five days and every 30 days thereafter.

142. You will hear that the Arbour Report found that CSC had a defensive corporate culture lacking a culture of rights and respect for the rule of law, and downplaying its importance while using public security as a justification for the lack of compliance. In Justice Arbour's judgment, there was "nothing to suggest that the Service is either willing or able to reform without judicial guidance and control."[9]

143. Prof. Jackson will testify that then around 1996, the Commissioner of Corrections established a Task Force on Administrative Segregation ("Task Force") in response to the Arbour Report. The Task Force endorsed Justice Arbour's finding that CSC has a culture that does not respect the Rule of Law.

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[9] Arbour Report, p. 108

144. Prof. Jackson will testify that in May 2000, the Sub-Committee of the House of Commons Standing Committee on Justice and Human Rights tabled a report entitled "*A Work in Progress*"[10] which accepted Justice Arbour's description of the impact of administrative segregation on inmates and noted that the "physical and program constraints on" administrative segregation inmates were "severe" and this was "obvious". The Sub-Committee called for immediate implementation of independent adjudication in the segregation review process. The CSC rejected that recommendation as well.

145. You will hear that in 2003 there was a renewed call for implementing independent adjudication by the Canadian Human Rights Commission in a report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*,[11] which led to further consultations.

146. The CSC rejected the recommendation on the basis that independent adjudication does not respond to the CSC's operational problems with population management.

147. Prof. Jackson will describe appropriate standards and best practices for the treatment of prisoners and the administration of correctional institutions, and particularly with respect to the use of administrative segregation.

148. He has witnessed first-hand the practical effects upon prisoners of a legal regime which relies upon broad and unfettered grants of discretion upon correctional officials rather than upon provisions which precisely define the nature of correctional authority in clear rules of positive law. He provides opinions on the sound principles, practices and standards to be applied in the development and operation of administrative segregation decisions and reviews.

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[10] Sub-Committee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, *A Work in Progress: The Corrections and Conditional Release Act* (Ottawa: Public Works and Government Services, 2000) (*"A Work in Progress"*), Plaintiffs' Doc 1.92

[11] Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women - December 2003*, https://www.chrc-ccdp.ca/sites/default/files/fswen.pdf

149. Prof. Jackson will also speak to the effects upon inmates that he has personally seen to result from breaches of sound correctional principles, practices and standards in the context of administrative segregation decisions and reviews and conditions of confinement.

150. Prof. Jackson maintains the view that external independent adjudication is a necessary part of any equation of reform of segregation regimes. The fundamental problem with the current law and practice is the absence of independent assessment and judgment in the balancing of the competing interests and the weighing of issues of credibility and reliability of information. He opines that external independent review is an integral element of a fair and effective system of corrections.

151. Prof. Jackson is also of the opinion that correctional regimes that fail to subject correctional discretion to clearly defined and legally prescribed limits for administrative segregation generate in prisoners a powerful and toxic mix of bitterness, resentment and anger that undermines respect not only for correctional authority but also for lawful society to which most prisoners will return. Without independent external review and prescriptive time limits, reform initiatives will have only limited impact in addressing the documented problems with administrative segregation.

Summary

152. What will be made clear from the totality of the evidence discussed already is that Prime Minister Trudeau's mandate to the Attorney General was evidence-based in terms of the humane treatment of human beings. It was at least partially compliant with repeated calls for reform from within Canada by those who were tasked *by government* to consider such things. It was consistent with international norms and standards that guide corrections practice.

153. Yet despite this now dated public call for reform from the highest office in Canada, those recommendations have not been implemented.

154. Instead, through the course of this litigation there has been policy tinkering and, at the eleventh hour, the introduction of a bill that may one day, but has not yet, amend

the laws that govern solitary confinement in Canada. While we recognize that the constitutionality of that Bill is not before the Court – and if it were ever enacted we would argue that it falls short of the *Charter* - the fact of its existence is before this Court. We say this Bill is evidence that the government recognizes that requiring at least so-called soft caps and non-binding external independent review is a less impairing means of achieving government's objectives. In other words, once we establish that the impugned laws engage inmates' rights to life, liberty or security of the person, introduction of the Bill amounts to a concession that the existing Act is overbroad and non-minimally impairing of the inmates' rights and hence cannot be justified under s. 1 of the *Charter*.

155. I have not even mentioned the proposed CD that is to come into effect in August as it has not apparently been finalized. But if that CD does come into effect, then that CD also constitutes a significant admission that the existing Act, policy and practice is overbroad and not minimally impairing and thus unconstitutional insofar as it allows placing into administrative segregation the mentally ill.

156. We are hopeful once your Lordship examines all of the evidence and hears all of the argument, you will conclude that the provisions of the *Corrections and Conditional Release Act must* be declared unconstitutional in the specific terms we have suggested at the outset of this Opening. In light of the history of the failure of CSC's repeated initiatives to reform the system from within, it will be our position that judicial orders are required if the constitutional rights of inmates - a group almost by definition who are vulnerable, marginal and without political power - are to be respected. It is for such persons that the *Charter* was enacted and on whose behalf judicial vigilance is most needed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of July, 2017.

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