

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia Civil Liberties Association
v. Canada (Attorney General),*
2018 BCSC 62

Date: 20180117
Docket: S150415
Registry: Vancouver

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**

Intervenors

Before: The Honourable Mr. Justice Leask

Reasons for Judgment

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I. INTRODUCTION

[1] Segregation has been described as “the most onerous and depriving experience that the state can legally administer in Canada”: *Annual Report of the Office of the Correctional Investigator 2014-2015* at p. 31 [2014-2015 *Annual Report*]. The British Columbia Civil Liberties Association and the John Howard Society of Canada ask the Court to end administrative segregation as it is presently practised in federal penitentiaries in Canada.

[2] The plaintiffs contend that ss. 31-33 and 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the “CCRA”), authorizing administrative segregation are contrary to ss. 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms*. They say that the impugned provisions permit indeterminate and prolonged solitary confinement, as that term is understood in international law and accepted worldwide by virtually every organization or professional group conversant with the issue. Segregation, especially when endured for extended periods, has significant adverse effects on the physical, psychological, and social health of inmates; there is no independent oversight of placements in what has been described by the Supreme Court of Canada as a “prison within a prison”: *Martineau v. Matsqui Disciplinary Bd.*, [1980] 1 S.C.R. 602 at 622. The plaintiffs further allege that the impugned provisions have a disproportionate impact on Aboriginal inmates and those with mental illness.

[3] The Attorney General of Canada (the “Government”) responds that administrative segregation as it is practised in federal correctional facilities is not solitary confinement since inmates have daily opportunity for meaningful human contact. Moreover, the psychological effects of segregation on inmates remain the subject of ongoing and vigorous scientific debate. The Government submits that maintaining institutional security and inmate and staff safety is a complicated task, and that administrative segregation is a necessary tool when no other reasonable alternatives exist. The length of placements is not indeterminate as alleged but, rather, determined by the time required to eliminate the safety or security issue that triggered its use. Accordingly, the Government contends that the plaintiffs have

failed to establish that the impugned provisions are unconstitutional on their face or in their application, and that their claims must therefore be dismissed.

A. The Parties

[4] The British Columbia Civil Liberties Association is a non-profit advocacy group whose objects include the promotion and defence of civil liberties in British Columbia and Canada. The Association has had long-standing interest in inmates' rights and policy.

[5] The John Howard Society of Canada is a non-profit organization with a strong history of commitment to and involvement in matters of criminal justice, especially as they pertain to penal policy and corrections.

[6] The Government does not dispute that the plaintiffs are entitled to public interest standing in this case. However, it contends that the lack of an individual plaintiff has implications for the available remedies.

[7] Two intervenors also participated in these proceedings. West Coast LEAF's submissions focussed on what it says is the disproportionate impact of administrative segregation on individuals with intersecting characteristics of disadvantage, namely, Aboriginal women with mental illness. The Criminal Defence Advocacy Society ("CDAS") primarily challenged the lack of access to counsel during the segregation review process.

B. Nature Of The Evidence

[8] Although the parties were required to operate under very tight timelines, they nevertheless assembled a substantial evidentiary record.

[9] Twenty-eight witnesses were cross-examined on their affidavits before the Court. The plaintiffs' witnesses comprised 10 experts on a range of subject matters relating to the practice and effects of administrative segregation, and eight lay witnesses. These latter individuals were primarily former Correctional Service of Canada ("CSC") employees and inmates who had experienced placements in administrative segregation.

[10] The Government tendered the evidence of two experts with respect to the psychological effects of administrative segregation, and 10 lay witnesses who were all current or former CSC employees.

[11] Because of the volume of evidence, I will not refer to every affidavit or witness in these Reasons. However, I have reviewed the entire record, and my conclusions are based on all of the evidence before me.

C. The Office of the Correctional Investigator's Reports

[12] The Office of the Correctional Investigator ("OCI") serves as ombudsman for federally sentenced inmates. Among its statutory responsibilities are the investigation of individual or systemic concerns relating to corrections, and the preparation of annual and special reports. To enable performance of these duties, the OCI has full access to all of CSC's facilities, records and staff.

[13] The plaintiffs seek the admissibility of numerous OCI reports pursuant to either the public records exception to the rule against hearsay or the principled approach. The Government objects to their admissibility on both grounds.

[14] I refer to OCI reports throughout these Reasons. For the most part, the particular facts or statistics I cite were put to the Government's witnesses in cross-examination and accepted by them as accurate. Where this was not the case, I am satisfied the reports are nonetheless admissible pursuant to the principled approach to hearsay. They are necessary because the Correctional Investigator is not a competent or compellable witness pursuant to s. 189 of the *CCRA*. They are also reliable because they are compiled by the OCI in the discharge of a public duty on the basis of data maintained by CSC.

II. HISTORY OF SOLITARY CONFINEMENT

A. History

[15] The following history derives primarily from the expert reports of Dr. Stuart Grassian, whose qualifications are discussed later, and Michael Jackson, Q.C. Professor Jackson is Emeritus Professor of Law at the University of British

Columbia. For over 40 years, he has conducted research in the area of correctional law, policy and practice in Canadian prisons. He has been an advisor to several royal commissions and commissions of inquiry, including the Commission of Inquiry into Certain Events at the Prison for Women in Kingston headed by Justice Louise Arbour, and has also been a member of government task forces and committees addressing correctional matters. Professor Jackson is one of the leading Canadian experts in his field. Counsel for the Government agreed that Professor Jackson's opinion is "very important" and "should be given considerable respect and weight".

[16] Solitary confinement was originally conceived as an enlightened and humane alternative to the harsh punishments of the time.

[17] Early penitentiaries in 19th century America were founded as places of penitence in the belief that social deviance was largely the result of the stresses of "modern society" and that rehabilitation would occur naturally if inmates spent time in quiet contemplation. The Philadelphia Prison, completed in 1829, was one of the first to adopt this revolutionary approach and was particularly rigid in ensuring the absolute isolation of inmates from the negative influences of not only society at large but also of other inmates. Inmates were hooded when brought into the institution so as not to see or be seen by other inmates as they were led to their cells. The expectation was that conditions of isolation without the distractions of human contact, activities or even books would inspire penitence and foster rehabilitation.

[18] A less rigid system prevailed in New York State at the Auburn and Sing-Sing Penitentiaries. While also based on solitary confinement, inmates were permitted to leave their cells to work in workshops and exercise in a common courtyard, though in strict silence at all times. Canada's Kingston Penitentiary in Ontario, which opened in 1835, operated on this model.

[19] America's novel penitentiary system attracted international attention, and many Europeans came to tour American penitentiaries and bring back their principles for emulation in Europe.

[20] However, it was not long before concerns about the psychological effects of rigid solitary confinement were raised. As early as the 1830s, statistical comparisons between the Philadelphia and Auburn systems began to generate evidence. As well, the former appeared to have a higher incidence of not only mental illness but also of physical disease and death than its New York counterpart.

[21] Similarly, clinicians in Germany, a country which had been quick to emulate the American system, began amassing large amounts of statistical data that revealed an increase in the incidence of psychotic disturbances among inmates. The German medical literature on the subject collectively described hundreds of cases of psychoses deemed to be the result of the stringent conditions of confinement.

[22] As statistical evidence accumulated over the 19th century that solitary confinement produced a disturbing incidence of psychiatric illness, physical disease and death, what had started as an optimistic experiment in social reform fell into disrepute by the early 1900s. Nevertheless, though entire penitentiaries no longer operated on a strict segregation model, solitary confinement continued as a practice within institutions.

[23] For much of the 20th century, the legislative framework governing penitentiaries in Canada was the *Penitentiary Act*, R.S.C. 1970, c. P-6 [repealed] and the *Penitentiary Service Regulations*, P.C. 1962-302, S.O.R./62-90 [repealed] though it was largely in Commissioner's Directives ("CDs") that the official rules of prison justice were fleshed out. Layered on this was the reluctance of the courts to review the decisions of prison officials on the basis that such matters involved administrative, as opposed to legal, decision-making. The result was a prison system largely immunized from public scrutiny in which prison officials were in a position of virtual invulnerability and absolute power over the persons committed to their institutions.

[24] "Dissociation", the earlier name for segregation, was governed by s. 2.30 of the *Penitentiary Service Regulations* and authorized where the warden was satisfied it was necessary for "the maintenance of good order and discipline in the institution"

or was in “the best interests of an inmate”. Given these vague criteria, placement decisions were often made on the basis of rumours, hunches and intangible feelings about the inmate’s past reputation or present attitude.

[25] Section 2.30 came before the Federal Court in *McCann et al. v. The Queen et al.*, [1976] 1 F.C. 570 (T.D.). Jack McCann, an inmate at the British Columbia Penitentiary, had been held in segregation for 754 continuous days under the authority of the provision and challenged his confinement as cruel and unusual punishment under s. 2(b) of the *Canadian Bill of Rights*. Seven other plaintiffs had been segregated at the same institution for continuous periods ranging from 95 to 682 days. Each inmate was confined to a small cell with the light burning 24-hours a day and had to sleep with his head next to the toilet. They were also subject to open strip searches. The Court found that the conditions to which the plaintiffs had been subjected constituted cruel and unusual punishment. However, it was not prepared to go so far as to require due process in decisions concerning segregation, concluding that such matters were purely procedural.

[26] Several months after the *McCann* trial began in 1975, the Solicitor General established a Study Group on Dissociation chaired by James Vantour to study the use of segregation in Canadian penitentiaries. The Study Group presented its report one week before the decision in *McCann* was released, concluding that the Canadian Penitentiary Service had failed to comply with existing laws, regulations and policy dealing with segregation (the “Vantour Report”). In its proposals for reform, the Study Group recommended the establishment of a segregation review board chaired by the warden of the institution. The board would review an inmate’s case within five days of the warden’s decision to segregate, and at least once every two weeks thereafter.

[27] The *McCann* decision and the Vantour Report were at the vanguard of a shift in the 1970s towards recognition of inmates’ rights, as government committees and inquiries emerged as important oversight bodies, and litigation in the courts led to recognition of the duty to act fairly in correctional decision-making.

[28] Continuing deficiencies in the federal penitentiary system sparked a series of riots in the 1970s, most prominently at the Kingston Penitentiary during which five staff were taken hostage and two inmates were killed. In 1976, an all-party House of Commons subcommittee chaired by Mark MacGuigan undertook a major inquiry into the federal penitentiary system. The subcommittee's report (the "MacGuigan Report") was a damning indictment of the absence of the rule of law in the penitentiary system. The Report stated as follows at p. 85:

There is a great deal of irony in the fact that imprisonment – the ultimate product of our system of criminal justice – itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community – according to decent standards and rules known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree - a situation which is hardly consistent with any understandable or coherent concept of justice.

[29] The MacGuigan Report identified as core principles both that the rule of law must prevail inside Canadian penitentiaries and that justice must be an essential condition of corrections.

[30] To bring the rule of law into penitentiaries, the report made a series of recommendations, including that CDs be consolidated into a consistent code of regulations having the force of law for both inmates and staff; independent chairs be appointed in all institutions to preside over disciplinary hearings; and an inmate grievance procedure be established in which inmates would have a substantial role. The report also endorsed the recommendation of the Vantour Report that segregation review boards chaired by the warden be established in each institution to review administrative segregation placements at fixed intervals.

[31] Although the Vantour Report had made these recommendations earlier, it was not until the MacGuigan Report was filed that the CSC implemented them.

[32] Two years after the MacGuigan Report, the Supreme Court of Canada laid the foundation for the contemporary practice of judicial review of correctional decisions in *Martineau*, holding that prison authorities were subject to a general administrative law duty to act fairly under the supervision of the courts. Then in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Court specifically extended this duty to act fairly to decisions regarding administrative segregation.

[33] The enactment of the *Canadian Charter of Rights and Freedoms* in 1982 led the federal government, as part of its general review of criminal law, to review federal legislation regarding corrections. The Correctional Law Review, appointed to this task, found the regulatory provisions regarding dissociation to be deficient. The criterion for placement in and release from dissociation – “for the good order of the institution” – was vague and broadly worded. Moreover, absent from the provisions were the right to a hearing, any requirement that reasons be given, limits on the length of the dissociation period, and a right to be seen by a health professional.

[34] In July 1990, the federal government released a comprehensive consultation package proposing a much more detailed legislative scheme that aimed to aggregate and synthesize the proposals and reforms of the preceding 20 years into a single, modern corrections and conditional release statute. That act, the *CCRA*, came into force in 1992 along with the *Corrections and Conditional Release Regulations*, SOR/92-620 (the “*Regulations*”). Many of the features of the administrative segregation process formerly contained in CDs were elevated to legally binding provisions in the *CCRA* and the *Regulations*. The provisions for both administrative and disciplinary segregation included specific details on placement and release tests, due process and conditions of confinement.

[35] Throughout the 1990s, a pattern of non-compliance persisted under the *CCRA*. It is Professor Jackson’s view that the fault lines of the abuse of administrative segregation, both then and today, lie in the legislation itself, its administration by correctional officials, and a lack of effective enforcement of the legislative framework.

[36] Important events unfolded at the Prison for Women in Kingston in April 1994, which exposed to public scrutiny aspects of the operational reality of federal corrections in Canada. Violent confrontation between a number of inmates and correctional staff ultimately resulted in a male emergency response team being called in to conduct a cell extraction and strip search of the women held in segregation.

[37] The manner in which the strip search was carried out and the subsequent segregation of the inmates became the subject of a Commission of Inquiry, the *Commission of Inquiry into certain events at the Prison for Women in Kingston*, headed by Justice Arbour. Justice Arbour was severely critical of CSC's response to the incident, concluding that nearly every action it took was contrary to the *CCRA*. Significantly, she found these were not individual examples of a failure to respect the law but, rather, were symptomatic of a culture that did not respect the rule of law, noting at p. 39:

...significantly in my view, when the departures from legal requirements in this case became known through this inquiry's process, their importance was downplayed and the overriding public security concern was always relied upon when lack of compliance had to be admitted. This was true to the higher ranks of the Correctional Service management, which leads me to believe that the lack of observance of individual rights is not an isolated factor applicable only to the Prison for Women, but is probably very much part of CSC's corporate culture.

[38] Justice Arbour detailed the harsh conditions under which the segregated inmates were being held, and noted the dissonance between the legislative requirements and operational reality in this regard. She was also critical of the segregation review process; among the shortcomings were the failure of the reviews to address the statutory standards, and the deferential nature of the regional reviews.

[39] Justice Arbour made numerous recommendations with respect to segregation, including that the practice of long-term segregation be brought to an end. She recommended that no inmate spend more than 30 consecutive days in administrative segregation no more than twice in a calendar year; that management

of administrative segregation be subject preferably to judicial supervision but, in the alternative, to independent adjudication; and that, in the case of independent adjudication, the adjudicator be a lawyer and be required to give reasons for a decision to maintain segregation, and that segregation reviews be conducted every 30 days before a different adjudicator each time.

[40] In the years following Justice Arbour's report, several other internal and external reports observed similar non-compliance and fairness issues, and made similar recommendations regarding independent adjudication of administrative segregation decisions. These included the Task Force on Administrative Segregation (1997); the CSC Working Group on Human Rights chaired by Max Yalden (1997); the House of Commons Standing Committee on Justice and Human Rights – *A Work in Progress* (2000); and the Canadian Human Rights Commission – *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003).

[41] In the fall of 2007, Ashley Smith died in her segregation cell after spending more than a year of continuous segregation in federal institutions. In June 2008, the OCI documented the abuse of administrative segregation as a factor contributing to Ms. Smith's death in a report entitled *A Preventable Death*. Despite her documented troubled history in provincial juvenile corrections, Ms. Smith was never provided with a comprehensive mental health assessment or treatment plan. Immediately upon her entry into the federal system, she was placed in administrative segregation and maintained on that status for her entire time under federal jurisdiction. Moreover, Ms. Smith did not receive the benefit of the legislative safeguards requiring timely reviews of her segregation status, in part because each institution erroneously "lifted" her segregation status whenever she was physically moved out of a CSC facility (for example, to attend court, to be temporarily admitted to a psychiatric facility or to be transferred to another correctional facility). The conditions of her confinement were oppressive and inhumane, and her grievances regarding these conditions were inadequately addressed.

[42] Included in the OCI's recommendations was the immediate implementation of independent adjudication of segregation placements of inmates with mental health concerns, to be completed within 30 days of the placement, with the adjudicator's decision to be forwarded to the regional deputy commissioner.

[43] CSC responded that it did not support the recommendation but that it would explore other options that might lead to a revised review process of such segregation placements. An additional aspect of its response was a commitment to an external review of long-term segregation and segregation placements of inmates with mental health concerns. CSC retained Dr. Margo Rivera to undertake this review, and in May 2010 she published her findings and recommendations to reduce the use of administrative segregation, improve the conditions in segregation, and increase the available programming for inmates in segregation. She observed that "radically re-thinking the rationale for segregating inmates may well be a necessary prelude in the direction of decreasing segregation numbers". Dr. Rivera was a witness for the plaintiffs in this case.

[44] Two years after the release of the OCI's report into the death of Ms. Smith, and while Dr. Rivera was undertaking her review, Edward Snowshoe, a 22-year-old Aboriginal man from the Northwest Territories, hanged himself in a segregation cell at Edmonton Institution after spending 162 days in segregation. The public fatality inquiry into his death concluded that he had "fallen through the cracks" of the system. It found that CSC officials were unaware that he had attempted suicide numerous times at his previous facility, and that he had been in segregation for as long as he had. His five-day segregation review, which Mr. Snowshoe did not attend, had been conducted by an institutional parole officer who had never met him. During the review, his history of mental illness was not raised even though the information had been flagged in his institutional records. The inquiry also found that Mr. Snowshoe's 60-day review had not occurred.

[45] In addition to the investigation by the OCI, the *Coroner's Inquest Touching the Death of Ashley Smith* was completed in 2013. The jury at the inquest heard extensive expert evidence regarding the practices around segregation and the

treatment of inmates with mental illness, and it released its recommendations in December 2013. Eleven recommendations specifically addressed segregation, principally that indefinite solitary confinement be abolished and long-term segregation not exceed 15 days. The jury also sought restrictions on the number of periods that inmates could spend in segregation, including a requirement that inmates spend no more than a cumulative total of 60 days in a calendar year in segregation. Other recommendations included that the restrictive conditions of segregation be reduced to the lowest possible level, and that both the institutional head and a mental health professional be required to visit all segregated inmates at least once a day, and not, under any circumstances, through the food slot in the cell door.

[46] In December 2014, CSC released a *Response to the Coroner's Inquest Touching the Death of Ashley Smith*, its response to the jury's recommendations. CSC rejected the term "solitary confinement", stating that "Canadian law and correctional policy allows for the use of administrative segregation for the shortest period of time necessary, in limited circumstances, and only when there are no reasonable, safe alternatives". Administrative segregation, it said, was not a form of punishment but "an interim population management measure resulting from a carefully considered decision made by the Institutional Head to facilitate an investigation or to protect the safety and security of individuals and/or the institution". Moreover, "[t]he legislation and policy surrounding segregation is very rigorous. Decision-makers are held to the highest standards of accountability." Accordingly, "there are various aspects of the Jury recommendations in the section entitled Segregation and Seclusion ... that the Government is unable to fully support without causing undue risk to the safe management of the federal correctional system."

[47] The OCI was critical of CSC's response to the Ashley Smith inquest recommendations in its *2014-2015 Annual Report*, describing it at p. 15 as "frustrating and disappointing". With respect to administrative segregation specifically, the OCI noted the ongoing overuse of the practice as "the most commonly used population management tool to address tensions and conflicts in

federal correctional facilities”, as well as “to manage mentally ill offenders, self-injurious offenders and those at risk of suicide”: *2014-2015 Annual Report* at pp. 26-27. During the reporting period of the OCI’s report, 27% of the inmate population experienced at least one placement in administrative segregation. So overused was the practice that “nearly half (48%) of the current inmate population [had] experienced administrative segregation at least once during their present sentence”: *2014-2015 Annual Report* at p. 26.

[48] The OCI found one of the most disturbing elements of the administrative segregation framework was the fact that it was “used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system”: *2014-2015 Annual Report* at p. 30. The administrative segregation portion of its report concluded with the following observation and recommendation at p. 31:

Segregation is the most onerous and depriving experience that the state can legally administer in Canada; it is only fitting that safeguards should match the degree of deprivation. The system desperately requires reform not “renewal”. As Canada’s prison Ombudsman, I will continue to advocate for significant, meaningful and lasting reforms to the administrative segregation operational and legal framework.

9. *I recommend that the Government of Canada amend the Corrections and Conditional Release Act to significantly limit the use of administrative segregation, prohibit its use for inmates who are mentally ill and for younger offenders (up to 21 years of age), impose a ceiling of no more than 30 continuous days, and introduce judicial oversight or independent adjudication for any subsequent stay in segregation beyond the initial 30 day placement.*

[Emphasis in original.]

[49] In November 2015, Prime Minister Trudeau made public his mandate letter to the Minister of Justice and Attorney General of Canada. The letter directed, in part:

In particular, I will expect you to work with your colleagues and through established legislative, regulator, and Cabinet processes to deliver on your top priorities:

...

- [including] 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.

[Emphasis added.]

B. International Law

[50] There is an emerging consensus in international law that under certain circumstances solitary confinement can cross the threshold from a legitimate practice into cruel, inhuman or degrading treatment (“CIDT”), even torture.

[51] The use of torture and CIDT is absolutely prohibited under international law: Article 1 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT”), 1465 U.N.T.S. 85; Article 7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (“ICCPR”).

[52] A number of United Nations bodies – including the United Nations Human Rights Committee and the United Nations Committee Against Torture – have declared that prolonged solitary confinement amounts to conduct prohibited by the CAT and ICCPR. So, too, has the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[53] At a regional level, the European Court of Human Rights has made clear that the use of solitary confinement can amount to torture or CIDT. The Revised European Prison Rules of 2006 state that solitary confinement should be an exceptional measure and that, when used, must be for a specified period of time that must also be as short as possible. The Inter-American Court of Human Rights has also stated that prolonged solitary confinement constitutes a form of CIDT prohibited under Article 5 of the *American Convention on Human Rights*.

[54] In August 2011, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted an interim report to the United Nations General Assembly with respect to solitary confinement, which he defined as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day. Of particular concern to him was prolonged solitary confinement, meaning any period of solitary confinement in excess of 15 days, because at that point, according to the medical literature that he surveyed, some of the harmful psychological effects of isolation can become irreversible.

[55] The Special Rapporteur found the imposition of solitary confinement in the following circumstances to constitute torture or CIDT as defined in Articles 1 and 16 of the *CAT* and Article 7 of the *ICCPR*:

- a) where the physical conditions are so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals subject to the confinement;
- b) the indefinite imposition of solitary confinement;
- c) prolonged solitary confinement; and
- d) its imposition, for any duration, on persons with mental disabilities.

[56] The Special Rapporteur concluded that given the negative psychological and physiological effects of solitary confinement, which can manifest after only a few days, the practice should only be used in exceptional circumstances, as a last resort, for as short a time as possible, and subject to minimum procedural safeguards. He called on the international community to impose an absolute prohibition on indefinite solitary confinement and on placements exceeding 15 consecutive days. He further endorsed the abolition of its use for persons with mental disabilities.

[57] The Special Rapporteur's opinions informed the most recent version of the United Nations' *Standard Minimum Rules for the Treatment of Prisoners* ("SMRs"). In December 2015, the UN General Assembly unanimously adopted a revised version of the SMRs, known as "the Nelson Mandela Rules". Whereas the previous rules provided only that "[c]orporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences" (Rule 31), the Mandela Rules state as follows:

Rule 43

(1) In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

- (a) indefinite solitary confinement;
- (b) prolonged solitary confinement;
- (c) placement of a prisoner in a dark or constantly lit cell ...

...

Rule 44

For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.

Rule 45

(1) Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

(2) The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United Nations standards and norms in crime prevention and criminal justice, continues to apply.

[58] In its preliminary observations to the Mandela Rules, the General Assembly observed that the Rules sought, "on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of inmates and prison management."

III. ADMINISTRATIVE SEGREGATION

A. Correctional Service of Canada: Organization and Statistics

[59] CSC is the federal government agency responsible for administering sentences of a term of two years or more. CSC manages 43 institutions across the country: six maximum-security, nine medium-security, five minimum-security, 12 multi-level security and 11 clustered.

[60] Within these 43 institutions are four Aboriginal healing lodges and five regional treatment centres. Healing lodges are penitentiaries where Aboriginal values and traditions are used to design services and programs for inmates. They accommodate Aboriginal women with minimum- and medium-security classifications, and Aboriginal men with a minimum-security classification.

[61] Regional treatment centres are hybrid facilities that are both a federal penitentiary subject to the *CCRA* and a hospital subject to the provisions of the

relevant provincial health legislation. They accommodate inmates of all security classifications and provide mental health care to those suffering from serious mental health conditions that require in-patient treatment.

[62] CSC operates six women's institutions, including a healing lodge. All women's institutions, with the exception of the healing lodge, are multi-level and accommodate all security classifications. Women who are classified as minimum- or medium-security live in housing units with communal living areas where they are responsible for their daily needs such as cooking, cleaning and laundry. The institutions have separate secure facilities for maximum-security inmates and those who require more high level intervention and supervision.

[63] In the 2016-2017 fiscal year, there were just over 14,000 inmates in federal institutions. Of these, 679 were women.

[64] In May 2015, the OCI published *Administrative Segregation in Federal Corrections: 10 Year Trends*. The report identified trends in CSC data from March 2005 to March 2015, including the following:

- a) between 2005 and 2015, the annual number of admissions to segregation has fluctuated but with a generally upward trend;
- b) the number of federally sentenced women admitted to segregation has also fluctuated over this period with the highest number in 2014-2015;
- c) the number of Aboriginal inmate admissions to segregation has increased most years;
- d) the number of Black inmate admissions to segregation has increased significantly over the last 10 years;
- e) the number of Caucasian inmate admissions to segregation has decreased over the same period;
- f) women have the highest average number of admissions to segregation per individual inmate. However, they also remain in segregation for significantly shorter periods than the average for all inmates;
- g) the average length of stay in segregation has decreased for all inmates, from 40 days in 2005-2006 to 27 in 2014-2015. For women, the average has decreased from 16 days to eight days over the same period;

- h) Aboriginal inmates consistently have an average length of stay in segregation that is greater than for Black or Caucasian inmates;
- i) women who were admitted to segregation in 2013-2014 were much more likely than men to have a history of self-injury (31.2% to 12.8%);
- j) similarly, Aboriginal inmates who were admitted to segregation in 2013-2014 were more likely than non-Aboriginal inmates to have a history of self-injury (17.3% to 11.9%);
- k) of the total incarcerated population, 6.7% have a history of self-injury. This 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;
- l) approximately one quarter of men incarcerated during a fiscal year spend some time in segregation. Over 40% of women spend some time in segregation;
- m) approximately one quarter of non-Aboriginal inmates who are incarcerated during a fiscal year spend some time in segregation. In the case of Aboriginal inmates, that percentage is one third;
- n) of the 14,517 incarcerated inmates, 48.1% had spent some time in segregation. A higher proportion of men than women have a history of segregation (48.5% to 39.1%); and
- o) Aboriginal inmates are somewhat more likely to have been in segregation than non-Aboriginal inmates (55.9% to 45.6%).

[65] More current Government of Canada statistics indicate that the total number of inmates in administrative segregation at fiscal year-end has declined in the past number of years from 638 in 2014-2015, to 454 in 2015-2016, and to 430 in 2016-2017. As of July 31, 2017, fewer than 300 inmates were in administrative segregation across the country.

[66] By comparison, the number of inmates in disciplinary segregation has always been exceedingly low. In the case of men, there were five in disciplinary segregation in 2010-2011, 9 in 2012-2013, and 3 in 2014-2015. The women's disciplinary segregation population numbered one person in 2012-2013, and zero in all other years.

[67] The total number of Aboriginal inmates in administrative segregation at fiscal year-end has changed in the past three years from 202 in 2014-2015, to 126 in 2015-2016, and to 166 in 2016-2017.

[68] The number of women in administrative segregation has always been low. The total number of women in administrative segregation at the end of each of the last six fiscal years, starting in 2011-2012 and ending in 2016-2017, was 12, 10, 14, 6, 4, and 10. The total number of women inmates at the end of each of the last six fiscal years was 615, 604, 614, 672, 688, and 679.

[69] For the past two years, the average stay in administrative segregation has declined from an average of 30 days in September 2015 to 22 days in March 2017.

[70] Bruce Somers was a witness for the Government who recently retired as Assistant Deputy Commissioner of Correctional Operations for the Ontario Region. He had been employed with CSC since June 1983 in diverse and progressively more senior positions. Mr. Somers attributed the recent decline in the number of segregated inmates to several causes, including a more aggressive use of transfers to move segregated inmates to other institutions where they are able to reside in the general population; improvements in practice brought about by the 2015 revisions to CD 709 – these include the involvement of more senior leadership in the review process and the development of the Segregation Assessment Tool (“SAT”) to assist in assessing whether segregation placements are appropriate; and an increased institutional will on the part of CSC to see administrative segregation better managed, in part in response to the highly publicized deaths of Ms. Smith and Mr. Snowshoe.

[71] Mr. Somers described inmates volunteering to be in segregation in accordance with s. 31(3)(c) of the *CRCA* as comprising the largest proportion of segregated inmates and the most difficult to get out of segregation.

B. The Statute, Regulations, and Commissioner's Directives

[72] The *CCRA* and the *Regulations* form the legislative basis for the operations of the CSC.

[73] To carry out its legislative mandate, CSC establishes national policies in the form of CDs that must be implemented by all regions and in all institutions. It is in these detailed CDs that much of CSC's operational policy and practice is contained.

[74] The *CCRA* provides for two types of segregation: disciplinary and administrative.

1. Disciplinary Segregation

[75] Disciplinary segregation can be imposed as a sanction where an inmate has been found guilty of a serious disciplinary offence: *CCRA*, s. 44(1)(f). It is the most severe of a range of available punishments, and is limited to a maximum of 30 days. Where an inmate serves consecutive periods of disciplinary segregation, the total period of segregation cannot exceed 45 days: the *Regulations*, s. 40(2).

[76] While hearings for minor disciplinary offences are conducted by the warden, those for serious disciplinary offences (which means that segregation is a possible sanction) are conducted by an independent chair. Chairs are appointed to serve this function by the Governor General in Council.

2. Administrative Segregation

[77] Sections 31 to 37 of the *CCRA* and ss. 19 to 23 of the *Regulations* provide the basic framework for administrative segregation.

[78] Section 31 of the *CCRA* sets out the purpose and grounds for ordering administrative segregation:

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.

[79] Section 32 of the *CCRA* provides that all decisions by the institutional head (warden) to "release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31".

[80] Administrative segregation was formerly described as either "voluntary" or "involuntary" depending on the nature of the placement. A voluntary placement is one in which the inmate requests to be segregated, generally because he or she fears for his or her safety in the general population. Perhaps because "voluntary" is hardly a fair descriptor of the placement given that most such inmates would return to general population if they did not feel at risk, CSC no longer uses these terms. Nevertheless, the descriptor "involuntary" remains in the *CCRA* and *Regulations*.

[81] The *CCRA* and the *Regulations* provide for a periodic review of an inmate's placement in administrative segregation after five days, 30 days and every 30 days thereafter by an institutional segregation review board ("ISRB"). The ISRB is chaired by the deputy warden at the five-day review, and by the warden at the 30-day and all subsequent reviews.

[82] The *Regulations* direct regional reviews of segregation placements by the Regional Segregation Review Board ("RSRB") that continue past 60 days, though CD 709 has shortened that period to 38 days, and every 30 days thereafter. The CD also requires a national review of cases in which the inmate reaches 60 days in

segregation or has had four segregation placements or spent 90 cumulative days in segregation in a calendar year.

[83] CD 709 governs administrative segregation. In some areas it restates the law and provides specific guidance as to how it is to be implemented; in others, it sets policy and practice about matters not specifically referred to in the legislation.

[84] CD 709 was significantly revised in October 2015. A further revised CD 709 came into effect on August 1, 2017 in the midst of the evidentiary portion of this case. The new CD made further substantial changes, most notably:

- a) a prohibition on the use of administrative segregation for inmates with a “serious mental illness with significant impairment”, and inmates who are either actively engaging in self-injury that is likely to result in serious bodily harm or are at elevated or imminent risk for suicide;
- b) except in exceptional circumstances, a prohibition on the use of administrative segregation for inmates who are pregnant, have significant mobility impairments or are in palliative care;
- c) improvements to the conditions of confinement, including:
 - i. immediate access to personal items related to hygiene, religion and spirituality, medical care and non-electronic personal items;
 - ii. access to remaining personal property items within 24-hours of admission to administrative segregation;
 - iii. a minimum of two hours out of cell daily, including the opportunity to exercise for at least one hour everyday outdoors, weather permitting; and
 - iv. daily showers, with the time spent not to be included in the inmate’s two hours out of cell; and
- d) new compliance and reporting obligations on CSC administrators.

[85] For the purpose of these Reasons, I will assume that administrative segregation is currently practised in accordance with the August 1, 2017 CD 709.

C. Placement in Administrative Segregation

[86] CSC uses the SAT to evaluate the proposed admission of an inmate to administrative segregation. The tool guides staff through a structured process that consists of a series of questions directed to the relevant factors that must be considered prior to an inmate being admitted or maintained in administrative segregation. The responses to the various assessment questions lead to a recommendation of either “segregation recommended” or “segregation not recommended”. If the decision-maker does not agree with the recommendation provided by the tool, he or she must provide a rationale to justify the decision.

[87] For example, one section is headed “alternatives considered and eliminated as viable options”, and lists a number of options:

- a) change in unit;
- b) transfer (intra- or inter-regional);
- c) voluntary cell confinement;
- d) mediation;
- e) culturally appropriate/restorative alternatives: and
- f) intermediate mental health care placement.

[88] If any one of the options is not eliminated, the result of the tool automatically becomes “segregation not recommended”.

[89] Before an inmate is admitted to administrative segregation, a consultation will occur with the members of the inmate’s case management team, using the SAT, to ensure that the admission is justified and that all alternative options have been considered. At a minimum, this consultation will include the inmate’s parole officer and health care professionals. It may also include an elder, chaplain or other relevant staff as necessary.

[90] During the health care consultation, the health professional (defined in CD 709 as a psychologist, psychiatrist, physician, nurse or clinical social worker) will meet with the inmate to determine physical health care needs and any mental health

concerns, including suicide or self-injury, and refer the inmate to mental health services if appropriate. The inmate is taken through the *Immediate Needs Checklist – Suicide Risk* (the “Suicide Risk Checklist”). The person administering the checklist is instructed to observe the inmate’s behaviour and engage him or her using the background questions as a warm up, indicating “yes”, “no” or “no response” to each question. Depending on the responses, the checklist sets out the required action; for example, a referral to a mental health professional.

[91] The Suicide Risk Checklist is not without shortcomings. Dr. Peggy Koopman, a witness for the plaintiffs, is a registered psychologist who has worked as a forensic psychologist in every federal correctional institution in Canada. She was qualified as an expert in diagnosing mental disorders, impairment, suicidality and self-injury in inmates, including those considered for administrative segregation. She testified that the checklist does not necessarily draw out the information it seeks to get, as results will depend greatly on the inmate’s relationship with the person asking the questions. If they feel comfortable, they may be fairly forthcoming; if they do not or believe that certain answers will land them in trouble or in segregation, they will not be inclined to answer truthfully. There is the additional complication that the inmate may be psychologically in a state of denial and not able to admit to any of these things, even to themselves.

[92] The evidence of James Lee Busch, one of the plaintiffs’ inmate witnesses, accords with this. He deposed that he had suicidal feelings while in segregation but did not share them with the staff psychologist because he did not wish to be placed in an observation cell, which he described as the only thing worse than segregation.

[93] It is of some note that each of the 14 segregated inmates who died by suicide between April 2011 and March 2014 had completed the Suicide Risk Checklist and had been seen by a health care professional at some point: OCI, *A Three Year Review of Federal Inmate Suicides (2011-2014)*. Christopher Roy, whose father Robert was a witness for the plaintiffs in these proceedings, also completed the Suicide Risk Checklist, answering “no” to each of the questions posed. He hanged himself in his cell two months later while still in administrative segregation.

[94] Some inmates are placed in administrative segregation because they are deemed to pose a threat to the security of the institution or to other inmates. Others are segregated for their own protection. They may be at risk because of the nature of their offence, gang affiliations, debts to other inmates, because they are “rats”, or any of a number of other reasons.

[95] The CSC witnesses were adamant that administrative segregation is not punishment, nor is it a tool for dealing with problematic patterns of behaviour, absent a risk to the safety of individuals or the institution. The OCI, however, had a different assessment, expressing the view in its *2014-2015 Annual Report* that one of the most disturbing aspects of the administrative segregation framework was its use as a punitive measure to circumvent the more onerous due process requirements of disciplinary segregation. For the reporting period, there were only 209 placements in disciplinary segregation (2.5% of the total segregation placements) compared to 8,309 placements in administrative segregation. The OCI reasoned that the disparity in procedural safeguards between the two types of segregation helped explain the discrepancy.

[96] Dr. Rivera, in her May 2010 report for CSC entitled *Segregation is Our Prison Within The Prison: Operational Examination of Long-Term Segregation and Segregation Placements of Inmates with Mental Health Concerns in the Correctional Service of Canada*, qualitatively examined the experiences of 78 men and six women inmates who resided in long-term administrative segregation units in 10 correctional facilities, as well as the experiences of the correctional staff.

[97] Dr. Rivera found that 54% of placements were involuntary and 46% were voluntary. The formal reason for most of the involuntary placements was that the inmate was jeopardizing the safety of others, themselves or the institution; a smaller number of placements were to facilitate the investigation of an incident. Additional factors relevant to the segregation of inmates included mental illness and the need to await a transfer to another institution.

[98] According to Dr. Rivera, the long-term administrative segregation population in Ontario included inmates who had threatened or harmed other inmates or staff; inmates involved in the drug trade; inmates in debt to other inmates; informants in need of protection; and inmates whose offences put them in danger from other inmates. In the Prairie Region, gang activity was an additional reason for the increasing number of segregated inmates.

[99] Many corrections staff spoke to Dr. Rivera about the changing population of inmates and its impact on segregation as a population management tool. Of particular note were the increase in gang activity, inmates with mental health problems, and younger inmates who were less respectful of both staff and other inmates.

[100] The impact of gang activity and affiliations on the use of administrative segregation was discussed by Robert Bonnefoy, warden of Stony Mountain Institution in Manitoba. CSC defines Security Threat Groups (“STGs”) as “any formal or informal ongoing inmate/offender group, gang, organization or association consisting of three or more members”. Mr. Bonnefoy explained that inmates associated with STGs tend to involve themselves in STG-related activities, including the institutional drug trade, violence and intimidation to exert influence within an institution. STGs also use violence within their own membership to maintain discipline and allegiance. Involvement in violent institutional incidents has a direct correlation to placement in segregation, as there is frequently a need to segregate those involved to allow for an investigation into the incident and also to determine whether it is possible to safely return those involved to the general population.

[101] Moreover, the presence of STGs also leads inmates, whether affiliated with STGs or not, to request segregation for their own safety. This can result from either the deliberate actions of a STG or from the impression that an individual conflict with a member of a STG makes the inmate a target for the entire STG. If inmates refuse to return to the general population, the only option for the institution is to facilitate a transfer to another institution.

D. Alternatives to Administrative Segregation

[102] The primary alternatives to administrative segregation are listed in the SAT, as referred to above. They include:

- a) mediations with other inmates or the inmate committee;
- b) contacting elders or Aboriginal liaison officers to help resolve a situation;
- c) assisting inmates to have contact with family members; and
- d) transferring inmates to other ranges, institutions or regions where they can live safely.

[103] Transfers can be either intra-regional or inter-regional. According to Mr. Somers, inter-regional transfers require flight operations that involve significant logistical planning and considerable expense. They are therefore an option of last resort to alleviate a segregation placement, especially given the importance of maintaining an inmate's family and community contacts. Where it is the only available option, every effort is made to effect the transfer as soon as practicable.

[104] In practice, "as soon as practicable" can be a long time due to various system complexities, leaving inmates in segregation longer than is satisfactory. This reality is reflected in Dr. Rivera's evidence that 35% of the men in long-term segregation during her review had been reclassified from medium- to maximum-security and were awaiting a transfer to maximum-security facilities.

[105] The transfer process involves assessment of the inmate's situation, and consultation amongst the inmate's parole officer, the warden, and other members of the inmate's case management team. Relevant factors in the assessment include the inmate's willingness to transfer, the presence of incompatibles (generally, potentially dangerous enemies) at the proposed destination institutions, an inmate's upcoming court dates, his or her ability to obtain the programming required by his or her correctional plan at the potential destination institutions, and the inmate's desire to remain close to his or her family and home.

[106] Once an institution is found where the inmate's program needs can be met and there are no incompatibles, it can take up to 30 days to receive comments back from the receiving destination. Mr. Somers was quick to acknowledge that the 30-day response period must change. Other variables impacting the timeframe for transfer include the availability of bed space and transfer flights. In the 2016-2017 fiscal year, there were eight pre-scheduled flight transfer operations with a total cost of \$3.1 million that transferred 1,112 inmates.

[107] The circumstances of Christopher Roy illustrate some of the difficulties that can arise when attempting to transfer an inmate. Christopher was placed in administrative segregation immediately upon his admission to Matsqui Institution in British Columbia. According to CSC records, this initial placement was to enable a review of Christopher's security classification and penitentiary placement since his arrival at the institution had been unexpected due to suspension of his statutory release. CSC subsequently had difficulty finding an appropriate placement for him at a medium-security facility where he did not have incompatibles. Due to possible threats to Christopher's safety, Matsqui, Mountain and Pacific Institutions were found to be unsuitable placement destinations, leaving Mission Institution in British Columbia as the only viable facility in the Pacific Region. However, efforts to transfer Christopher to Mission Institution failed because the institution did not support the transfer since Christopher had been involved in a number of incidents while previously incarcerated there. Following a security incident while at Matsqui Institution, Christopher's security classification was increased, and a decision was made to transfer him to Kent Institution in British Columbia. He died by suicide before the transfer could occur.

[108] Mr. Somers testified that prior to the 2015 revisions to CD 709, CSC did not use involuntary transfers to relieve segregation. As noted earlier, he attributes the recent decline in the number of inmates in administrative segregation to CSC's more frequent use of involuntary transfers.

[109] Jay Pyke is currently warden of Collins Bay Institution in Ontario. He was previously warden of both Joyceville Institution and Kingston Penitentiary, also in

Ontario. Mr. Pyke confirmed that the use of involuntary transfers has been effective in reducing the number of segregated inmates. He testified that where CSC determines that an inmate's placement in administrative segregation is not justified but the inmate nevertheless refuses to integrate, CSC will pursue an involuntary transfer to another institution. It was his personal experience that the transferred inmates were, for the most part, prepared to participate in their correctional plans once they were in an environment where they felt safe.

E. Conditions of Confinement

[110] Segregated inmates are entitled to have “the same rights and conditions of confinement as other inmates, except for those that (a) can only be enjoyed in association with other inmates; or (b) cannot be enjoyed due to limitations specific to the administrative segregation area or security requirements”: *CCRA*, s. 37 [emphasis added]. As observed by Professor Jackson, the omnibus nature of the qualification “limitations specific to the administrative segregation area”, together with the limitations of the existing infrastructure, has allowed an operational reality in which the conditions in segregation and the general population are vastly different.

1. Physical Conditions

[111] Men's institutions at the medium- and maximum-security levels generally have specific segregation units where all segregated inmates are confined. As the five women's institutions are multi-level security facilities, women inmates at all security levels can be segregated in the specific segregation unit within the facilities.

[112] As explained by Dr. Kelly Hannah-Moffat, a professor at the Centre of Criminology and Sociolegal Studies at the University of Toronto, CSC's architectural specifications require that segregation cells have a minimum of 7.0m² of living space. The cells are made of poured concrete and/or metal/steel-clad walls. The concrete walls are painted. Cells contain an affixed bed, desk and chair (both affixed and detached from the walls and floors), and a shelf. Most contain a window to the outdoors, have a stainless steel toilet and sink combination, a mirror, and power and cable outlets for TV and radio. Inmates are issued a single mattress, pillow and

pillow cases, sheets, and blankets. Temperatures in cells are centrally controlled, generally between 21 to 25 degrees Celsius. Air conditioning is uncommon, with institutions reporting that segregation cells become hot in the summer due to natural light and/or lack of air circulation. Most institutions, save two, have natural light in the segregation cells.

[113] Segregation cells at women's facilities are similar. Brigitte Bouchard, the warden at the Edmonton Institution for Women ("EIW"), described the segregation cells at her institution as having beds bolted to the floor, an outside window, a toilet and sink, a metal desk bolted to the wall, and some shelving.

[114] A number of inmate witnesses described the reality of segregation cells. Leslie Brownjohn deposed in reference to his cell at Kent Institution:

11. My cell in Kent segregation was approximately the width of my arms when outstretched. It contained a mattress with a blanket and a window that could be opened. When sleeping on my bed, my head was approximately two feet from my toilet.

12. The walls of my cell were filthy. They were splattered with feces and smeared with food, nasal mucus, and other bodily fluid. The air quality was terrible. The vents were covered in a thick layer of dust.

...

14. I could not control the lights in my segregation cell. All of the lighting was controlled by prison staff. During my first segregation placement at Kent, my cell light was rarely turned off.

15. The segregation unit was very loud. Other inmates in segregation would frequently scream and kick their cell doors. Between the noise and the constant light in my cell, I had significant difficulty sleeping.

16. My cell was extremely hot in the summer. In July and August 2012, my segregation cell had a window that was exposed to the sun for much of the day. I was not allowed to cover the window.

[115] I note Mr. Somers' testimony that Kent Institution was the only institution in which inmates were not able to control their own lights, and that the Institution is currently in the process of changing that.

[116] Mr. Busch said of his segregation cell at the Saskatchewan Penitentiary:

19. The cell was extremely dirty. It was about nine feet by six feet and contained a bed, a conjoined sink and toilet, a desk and a shelving unit. It did not have a window. It was an open bar cell, so I could see out the door and across the hall, but all I could see was the opposite wall and the door to the recreation area.

[117] Andre Blair described his segregation cell at Millhaven Institution in Ontario as follows:

20. While segregated at Millhaven, I was usually alone in my cell for 23 hours every day. the cell had a solid door with a meal slot. It was very small and dirty. If I sat on my bed, my knees almost touched the desk that was bolted to the opposite wall. ...

[118] Mr. Somers testified that inmates are given access to cleaning supplies to clean their cells, usually on the days that they shower.

[119] Exercise yards for segregated inmates range from approximately 50m² to 100m² depending on the number of segregation cells in the unit. Depending on the institution, these yards can be indoors or outdoors. Rarely do the yards have any exercise equipment, though some may have limited cardio equipment or chin-up bars. As well, some yards include a fixed table and attached chairs. Outdoor yards typically have concrete flooring and are fenced; sometimes they also have a wire-meshed ceiling with razor wire. CSC's technical criteria do not require that these yards include temperature control or shelter from the weather.

[120] Eleven of 16 men's institutions that reported do not have an indoor exercise area.

2. Cell Effects

[121] Section 83(2) of the *Regulations* requires the following of CSC:

83. (2) The Service shall take all reasonable steps to ensure the safety of every inmate and that every inmate is
- (a) adequately clothed and fed;
 - (b) provided with adequate bedding;
 - (c) provided with toilet articles and all other articles necessary for personal health and cleanliness; and

- (d) given the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors.

[122] Section 39 of the new CD 709 elaborates upon these bare requirements, as described above at para. 84(c) of these Reasons.

3. Human Contact

[123] The Mandela Rules define solitary confinement as the confinement of an inmate for 22 hours or more a day without meaningful human contact. CSC resists this label, maintaining that administrative segregation as practised in Canada does not constitute solitary confinement. Mr. Somers, for example, expressed his view that segregated inmates have some meaningful human contact daily.

[124] However, just how limited and superficial that human contact is in reality became apparent when Mr. Somers was cross-examined about the typical daily routine of a segregated inmate:

7:10 a.m. – food service officers deliver breakfast through the food slot. Communication is limited to inquiries whether the inmate wants anything further, such as milk or coffee. The inmate eats in his cell.

8:00 a.m. – morning yard, showers, and medical parade begin. Inmates who have yard in the morning will have showers in the afternoon and vice versa. More often than not compatible inmates will be in the yard at the same time but there are occasions when that is not possible and an inmate will be in the yard alone. A health care professional will do rounds, checking in with inmates and dispensing medications where required. The extent of the interaction will depend on the inmate but can be as limited as “How are you doing today?”, “Fine”.

9:00 a.m. – phone calls begin in cells; the receiver is passed through the food slot. Phone calls must generally be pre-booked one day prior to the requested call and are limited to 30 minutes. Inmates are also limited in the number of calls they may place, generally five per week.

9:00 - 12:00 – the inmate is in his cell. The typical inmate does not have access to programs other than self-studies. These are delivered and picked-up through the food slot.

12:00 – lunch is delivered through the food slot. The inmate eats in his cell.

1:00 - 4:00 – if the inmate had yard in the morning, he will have his shower during this time and vice versa. He is otherwise in his cell.

4:00 – dinner is delivered through the food slot. The inmate eats in his cell.

5:00 – 10:00 p.m. – showers and telephone calls for those inmates who did not have them earlier. The inmate is otherwise in his cell.

[125] Additionally, the warden is statutorily required to visit the segregation unit daily and meet with individual inmates on request: *CCRA*, s. 36(2). As well, segregated inmates must be visited at least once every day by a registered health care professional: *CCRA*, s. 36(1).

[126] The warden walks the range, inspects the conditions of confinement, and converses through the food slot with any inmate who wishes to speak with him or her. Such conversations are not likely to be lengthy and could be as brief as a minute or two. In this regard, the experience of segregated women may be different, given their substantially lower numbers compared to men. Ms. Bouchard, for example, testified that she spends at least half an hour to an hour with the segregated inmates in her institution. Because there are only four segregation cells, she has the ability to spend as much time with them as she (or they) wish.

[127] Inmates may also have visits from their parole officer, psychologist, elder or chaplain, though these are not daily occurrences. Visits from a psychologist, for instance, would not occur more than once a week. Finally, inmates are permitted visits from family and friends. Most institutions have fixed times when these visits take place. At Millhaven Institution where Mr. Somers was warden, family visits took place only on Monday mornings.

[128] The evidence of the witnesses who spent time in administrative segregation bear out this description of the typical routine.

[129] Mr. Blair, for example, had a 363 day placement in administrative segregation at Millhaven Institution. He described being alone in his cell for 23 hours every day with almost no interaction with other inmates, and interactions with CSC staff through the meal slot in his door. Prior to his segregation placement, Mr. Blair attended school daily in a classroom. During his placement, he continued his studies but could no longer attend classes. The teacher would come to the segregation unit once a week and hand him his school work through the meal slot in his door.

Mr. Blair was also unable to go to the library or use a computer. He was allowed to make phone calls for 20 minutes every other day.

[130] Mr. Blair said that the opportunity for open visits with his family was very limited. The only time they were permitted was on Monday mornings, which conflicted with his children's schooling and partner's work schedule. Visits at other times of the week were through glass, and Mr. Blair did not want his partner to drive his two young children for two hours for a brief visit through a glass wall.

[131] Mr. Busch gave very similar evidence regarding a 66 day placement at the Saskatchewan Penitentiary: 23 hours a day in his cell; very limited contact with other people; 15 minutes to shower every other day; one hour of yard time each day, occasionally with one or two other inmates present; occasional use of the phone in the evenings in his cell when the handset would be passed through the meal slot; school lessons handed through the meal slot with no instruction or tutoring beyond a brief interaction through the cell door; and a weekly walk-through of the unit by a psychologist who would call out "psychology!" to alert inmates but "if you were sleeping or did not do something to attract their attention, it was unlikely that they would speak to you" – there was no privacy and other inmates could hear everything that was being said.

[132] Mr. Brownjohn, who had four segregation placements while at Kent Institution, described having no direct interaction with other inmates and very little interaction with prison staff. As a result, he became "desperately lonely". Every second week, a psychologist would come through the segregation unit. During Mr. Brownjohn's first placement, he spoke to the psychologist only once. The psychologist asked, speaking through the meal slot, how Mr. Brownjohn was feeling. He responded, "fine", and the psychologist left.

[133] As I discuss later in these Reasons, it is the opinion of the plaintiffs' expert, Dr. Craig Haney, that the core harmful feature of segregation is the reduction of meaningful social contact. In his view, the routine interactions between CSC staff and segregated inmates do not constitute meaningful human contact:

I mean in the context of solitary confinement contact that is not mediated by bars and fences and tray slots and security glass where people interact the way you and I have interacted, the way we're all of us used to interacting with each other in a meaningful and authentic way.

Oftentimes it includes being able to collaborate on purposeful activity in a classroom or in vocational training, in a job, where the activity is social in nature, where it is as normal as possible within a prison setting, but it is meaningful and it is not bound by the very thick psychological barrier that exists between prisoners and staff, which despite the good intentions of many staff members, is virtually insurmountable.

...

And so that – these kinds of pro forma routine rote interactions that take place that are essentially life maintenance functions. A nurse has to come by. There's pill call. Food has to be delivered. People have to check on whether or not somebody is harming themselves. These things are part and parcel of what happens in order to maintain life in these units. This is not meaningful social interaction.

Of course it needs to take place in order for people to survive these places, but psychological survival is another matter entirely and those kinds of rote routinized interactions are not meaningful social interaction to sustain someone psychologically.

[134] The bleakness of the segregated inmate's existence is especially pronounced when it is compared to that of an inmate in general population. Robert Clark, a witness for the plaintiffs, is a former CSC employee who worked at seven different penitentiaries over a 30-year career, including as deputy warden of Bath Institution in Ontario and assistant warden at Kingston Institution. Mr. Clark described the typical weekday routine in the general population. Cells are unlocked at 7:00 a.m. Inmates pick up their breakfast from the kitchen and then eat in their cells. By 8:00 a.m., cells are open and inmates are showering, getting dressed, intermingling with each other and otherwise getting ready for work, schooling or programs. Work may be carpentry or other like endeavour. Schooling is classroom style with a teacher and anywhere between five and 20 students. Rehabilitative programming, such as for substance abuse or anger management, also takes place in a classroom setting with about 10 inmates.

[135] At around 11:00 to 11:30 a.m., inmates return to their ranges. The lunch routine is similar to that at breakfast, following which inmates return to their work sites. The work day ends at around 3:30 p.m., and dinner is served at 4:00 p.m.

Inmates then have use of the range, showers and any common areas until 5:30 p.m., at which time “yard up” is called and the recreational period begins and continues until 9:00 or 10:00 p.m. By 10:00 p.m., inmates are back at their ranges but not necessarily in their cells. Final count and lock up for the night is at 11:00 p.m.

[136] On weekends, the routine is similar except that inmates have no work, schooling or programming, and are able to spend that time in the yard or gym.

[137] On the basis of the evidence detailed in this section of my Reasons, I am satisfied that administrative segregation as currently practiced in Canada conforms to the definition of solitary confinement found in the Mandela Rules. In particular, I find as a fact that inmates in administrative segregation are confined without meaningful human contact. I base this finding in part on the evidence of Mr. Somers, Mr. Clark, Dr. Haney, and the inmate witnesses.

[138] I am also satisfied that there is no legislative justification for the practice of communicating with segregated inmates “through the food slot”. The most extreme example of this practice was the experience of Glenn Patterson, an institutional elder at Matsqui Institution from 2009 to 2014. Mr. Patterson testified that for most of his interactions with inmates in administrative segregation he knelt or squatted on the corridor floor outside the inmates’ cells in order for the inmates to be able to look at his face while they spoke to him through the food slot in the door.

[139] As I understood the evidence of other witnesses describing the behaviour of wardens, correctional staff, psychologists and nurses, most individuals that interact with inmates in administrative segregation simply stand erect outside the inmates’ cells, speak to the inmates without making eye contact and rely on their voices being heard through the food slot. I consider this behaviour to be demeaning and inhumane. In my view, the conditions of confinement should be improved so that the practice of speaking to inmates through food slots can be terminated forever. This is primarily a problem in the men’s institutions. There are several possible solutions. One would be providing more meeting rooms near the segregation cells – and using them. Another, in appropriate situations, would be to copy Professor Andrew Coyl’s

Clark's approach at Peterhead Prison in Scotland and speak to the inmates in their cells. Professor Coyle was a former warden in the prison services of the United Kingdom.

4. Programming

(a) General

[140] CSC provides various types of programming to assist inmates in their rehabilitation and successful reintegration into the community:

- a) correctional programming that addresses the risk factors for criminal offending, including substance abuse and violence, whether general, spousal or sexual;
- b) educational programs for high school completion;
- c) social programs, such as parenting skills, and recreational and socialization programs; and
- d) employment and employability programs.

[141] However, programs are difficult to deliver in segregation units since most are geared towards group settings. Mr. Clark described programs in administrative segregation as "pretty much non-existent", as segregation status does not lend itself to the participatory nature of rehabilitation programming. Mr. Somers similarly testified that correctional programming is designed for a minimum of 10 inmates because of the importance of open dialogue and interaction to the rehabilitation process. Ms. Bouchard confirmed that it "defeats the purpose, having only one offender in a program". She agreed that administrative segregation interferes with CSC's ability to provide inmates access to correctional interventions, vocational programs and other programming. This can have direct consequences since an inmate's correctional plan might identify a program need that should be met before they get parole.

[142] In my view, it would be wise for CSC to modify this policy. They should be able to develop programs for segregated inmates that can be presented to a single inmate or a small group. Requirements that programs have a minimum number of

participants ensures that some of the inmates most in need of programs, particularly those in administrative segregation, will never get them.

[143] Most institutions provide educational/cell studies whereby segregated inmates study on their own in their cells with some limited interaction with a teacher through the food slot. Unless an inmate is particularly motivated, the limitations of such self-study are apparent. Bobby Lee Worm, an inmate placed in segregation eight times over her five year sentence, described this as “a very hard way to try to learn”.

Mr. Busch said this of his experience:

25. I had been taking GED course prior to being placed in segregation, and had progressed from having a Grade 5 education to being close to graduating. The daily classes were taught in a classroom. Teachers and tutors helped me and other inmates with our school work. I enjoyed school.

26. In segregation, I could technically continue my studies but I could no longer attend the daily classes. Instead, once a week, the teacher would walk down the segregation range yelling “school”. Lessons would be passed to me through the meal slot. Without the human interaction of a classroom setting, school felt pointless and I lost my motivation to pursue education.

[144] Segregated inmates at women’s institutions have greater access to programs and services than do the men. Nancy Kinsman, formerly a warden at Grand Valley Institution for Women in Ontario, testified that once a woman is admitted to segregation, the general rule is that a behavioural counsellor will visit the inmate as soon as it is safe for them to do so. The counsellor will work with the inmate on the various programs she may have been involved in prior to being segregated. Additionally, a program delivery officer is also available on a daily basis.

(b) *Aboriginal Programming*

[145] Sections 79 to 84 of the CCRA require CSC to provide programs designed specifically to address the unique needs of Aboriginal inmates and CD 702 provides details of those initiatives.

[146] Aboriginal inmates in general population have access to regular programming. They additionally have access to numerous culturally specific programs and interventions that CSC operates with the objective of integrating Aboriginal culture and spirituality into its operations. These programs include

traditional teachings and ceremonies, and cultural activities. Among CSC's culturally specific correctional interventions are:

- a) access to elders, whereby CSC contracts with elders to provide spiritual counselling and guidance to Aboriginal inmates within its institutions, as well as culturally specific correctional programs;
- b) healing lodges, which are correctional institutions that provide traditional healing environments as a method of intervention;
- c) pathways initiatives, which operate within selected institutions to provide inmates with intensive counselling and support, consistent with Aboriginal values and traditions; and
- d) partnerships with Aboriginal community groups and organizations in the release planning process continuing after the inmate is released.

[147] It is Dr. Rivera's evidence that in men's institutions, segregated inmates have more limited access to Aboriginal services compared to those in general population. They are unable to participate in any group programming, and contact with an elder is infrequent.

[148] The experience of Glenn Patterson, an institutional elder at Matsqui Institution from 2009 to 2014, is consistent with Dr. Rivera's evidence. As an elder, he provided one-on-one counselling to Aboriginal inmates and facilitated cultural ceremonies within the institution, the most common being smudging. He also worked closely with the institution's staff regarding individual inmates.

[149] Mr. Patterson testified that he visited the segregation unit once a week. On the rare occasion when the one private meeting room within the unit was available, he would meet with segregated inmates there. Most of the time, he either met them in the outdoor yard area or interacted with them at their cell doors where he would kneel or crouch on the floor and speak to them through the food slot. Due to an institutional ban on second hand smoke, the only area where Mr. Patterson was able to perform smudging was outside in a caged area of the yard. He was not able to provide the smudging ceremony to all the segregated inmates who wanted it because there was simply insufficient time to take each inmate individually into the

yard. (I note here that in June 2014 Matsqui Institution passed a Standing Order permitting smudging in an offender's cell, including in segregation.)

[150] According to Mr. Patterson, there were several areas within the Matsqui Institution that were used for Aboriginal ceremonies, including sacred grounds and a sweat lodge. However, segregated inmates were not permitted to access these areas.

[151] Mr. Patterson testified that for a considerable portion of his tenure, he was the only elder at the institution. There were two at the time he left, and currently there are three.

[152] Inmates in women's institutions have greater access to Aboriginal programs and interventions. Ms. Bouchard, warden at EIW, testified that she has funding for six elders but given recruitment difficulties currently has only four on staff. The ratio of elders to women inmates across the system is one elder for every 25 women. In contrast, it is 1 to 100 in institutions for men.

[153] Ms. Bouchard gave evidence that women generally do not stay in segregation for more than seven days at EIW. There are four segregation cells. Women at EIW, including those in segregation, have access to elders. They are able to meet in various rooms other than the cell.

5. Duration of Placements

[154] A central feature of administrative segregation is its indefiniteness. Unlike disciplinary segregation, which is limited to 30 days, there is currently no cap on the duration of a placement in administrative segregation, beyond the requirement in s. 31(2) of the *CCRA* that the inmate be released from administrative segregation at "the earliest appropriate time". The evidence indicates that in some cases that has been measured in the thousands of days.

[155] Amongst inmates released from segregation units across Canada between January 1, 2013 and December 31, 2014 were several who had spent extremely long periods of time in segregation. An inmate at Kingston Penitentiary who was

released between those dates had been in segregation for 6,273 days. One inmate released from the Special Handling Unit in Quebec had been in segregation for 1,785 days, and an inmate from Millhaven Institution had been in segregation for 1,175 days.

[156] Although the average duration of placements has declined in recent years, some inmates continue to remain in segregation for very lengthy periods. As of April 9, 2017, 430 federal inmates were in administrative segregation. The duration of their placements as of that date was as follows:

1-2 days – 11 inmates

3-8 days – 91 inmates

9-16 days – 72 inmates

17-31 days – 101 inmates

32-61 days – 78 inmates

62-91 days – 39 inmates

92-121 days – 10 inmates

122 or more days – 28 inmates

[157] Some of the reasons for lengthy segregation placements include lack of bed space at other institutions, limiting the possibility of transfers; incompatibility issues with other inmates, which complicates both reintegration within the general population and transfers to other institutions, especially as inmate affiliations with STGs increase; length of time to coordinate inter-regional transfers; difficulty integrating inmates with mental health issues; and voluntarily segregated inmates refusing to leave the segregation units.

[158] For many inmates, the indefiniteness of administrative segregation is its most challenging feature. Justice Arbour recognized this in her report regarding the Kingston Prison for Women, stating at p. 81:

The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made

it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation....

[159] Not surprisingly, several of the inmate witnesses gave evidence that one of the worst aspects of their experiences in administrative segregation was not knowing when they would be released. Mr. Brownjohn was one such witness. He added that his final segregation placement at Kent Institution was not as bad as his previous stints because his statutory release date was coming up, and knowing that he would not remain in segregation indefinitely made the experience easier. Mr. Busch gave similar evidence that “the not knowing whether, when or under what circumstances I would be released was the worst part”. Based on his experience assessing segregated inmates, Dr. Haney said that the indeterminacy of segregation placements exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in these environments. He wrote that “[p]risoner after prisoner subjected to this pernicious form of segregation has told me that the fact that they have no way of knowing when their suffering will end, and no way of hastening its end, leads to anger and to a deep sense of helplessness.”

F. Effects of Segregation on Mental Health

[160] The plaintiffs allege that inmates who are segregated for extended periods of time suffer from adverse effects to their psychological, social, and spiritual health, including: delirium, psychosis, major depression, hallucinations, paranoia, aggression, rage, loss of appetite, self-harm, suicidal behaviour, and disruption of sleep patterns.

[161] The Government denies that administrative segregation adversely affects inmates as alleged by the plaintiffs, and asserts that the research on the impact of administrative segregation is inconclusive.

[162] Although both the plaintiffs and the Government tendered evidence from various witnesses on the effects of solitary confinement, the main protagonists of

this debate were four expert witnesses: Dr. Stuart Grassian and Dr. Craig Haney for the plaintiffs, and Dr. Jeremy Mills and Dr. Paul Gendreau for the Government.

1. Plaintiffs' Experts

(a) *Dr. Stuart Grassian*

(i) *Qualifications*

[163] Dr. Grassian is a board certified psychiatrist who was on the faculty of the Harvard Medical School for over 25 years. He published a seminal article in the American Journal of Psychiatry in 1983 in which he identified a syndrome that he had recognized in a number of inmates he interviewed in solitary confinement in Walpole Prison in Massachusetts. Subsequently he has had extensive experience in evaluating the psychiatric effects of stringent conditions of confinement, given expert evidence in a number of court cases on this issue, and published a further article in 2006 entitled “Psychiatric Effects of Solitary Confinement” which describes the extensive body of literature including clinical and experimental literature, regarding the effects of a restriction of environmental and social stimulation, and, more specifically, observations concerning the effects of segregated confinement on inmates. Over the course of his involvement as an expert, Dr. Grassian has interviewed and assessed approximately 400 inmates who were or had been in solitary confinement.

(ii) *Opinion*

[164] Dr. Grassian’s opinion, in brief, is that solitary confinement — the confinement of an inmate alone in a cell for all, or nearly all, of the day with minimal environmental stimulation and minimal opportunity for social interaction — can cause severe psychiatric harm. The restriction of environmental stimulation and social isolation associated with solitary confinement are “strikingly toxic” to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, segregated inmates have developed florid delirium, a confusional psychosis with intense agitation, fearfulness and disorganization. Even inmates who are more

psychologically resilient inevitably suffer severe psychological pain as a result of solitary confinement, especially when the confinement is prolonged and/or the individual experiences this confinement as being the product of an arbitrary exercise of power and intimidation. Moreover, the harm caused by solitary confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously affect the inmate's capacity to reintegrate into the broader community upon release from prison.

[165] When he initially evaluated the 14 Walpole inmates housed in the Special Housing Unit, it was in the context of a class action lawsuit in Massachusetts challenging the conditions in solitary confinement at the maximum-security state penitentiary. Dr. Grassian discovered that the psychiatric symptoms reported to him by the inmates were strikingly consistent:

- a) hypersensitivity to external stimuli – more than half the inmates reported a progressive inability to tolerate ordinary stimuli;
- b) perceptual distortions and hallucinations – almost a third of the inmates described hearing voices, often saying frightening things to them;
- c) panic attacks – well over half the inmates described severe panic attacks;
- d) difficulties with thinking, concentration and memory – these ranged in severity from loss of memory or difficulty concentrating to acute psychotic, confusional states;
- e) intensive obsessional thoughts – almost half the inmates reported the emergence of primitive aggressive fantasies of revenge, torture and mutilation of the prison guards. In each case the fantasies were described as entirely unwelcome, frightening and uncontrollable;
- f) overt paranoia – almost half the inmates reported paranoid and persecutory fears; and
- g) problems with impulse control – slightly less than half the inmates reported episodes of loss of impulse control with random violence, such as throwing things around, “snap[ping] off the handle over absolutely nothing”, and even impulsive self-mutilation.

[166] Dr. Grassian explains that most of these dramatic symptoms are exceedingly rare in psychiatric practice and, where they do exist, are more commonly associated

with neurological illnesses such as seizure disorders and brain tumors. Thus, the fact that all of these quite unusual symptoms ran together was strongly suggestive of a clinically distinguishable syndrome of stupor and delirium. Delirium is a syndrome characterized by a decreased level of alertness and electroencephalogram (“EEG”) abnormalities, as well as the same perceptual and cognitive disturbances Dr. Grassian observed in the Walpole inmates. Moreover, delirium is a syndrome which is known to result from the type of conditions, including restricted environmental stimulation, that are characteristic of solitary confinement.

[167] Dr. Grassian described how his subsequent research and literature review indicated that it had long been known that severe restriction of environmental and social stimulation had a profoundly deleterious effect on mental functioning. A major body of clinical literature had developed regarding psychiatric disturbances among inmates in 19th century American and German penitentiaries. Concerns about the profound psychiatric effects of solitary confinement continued into the 20th century, both in the medical literature and in the news, especially in the context of prisoners of war.

[168] Moreover, the fact that restricted environmental stimulation can cause stupor and delirium was well-known in various medical situations, such as patients in intensive care units, spinal patients immobilized by the need for prolonged traction, and patients with impairment of their sensory apparatus (such as eye-patched or hearing-impaired patients).

[169] The literature, as well as Dr. Grassian’s own observations, demonstrated that, deprived of a sufficient level of environmental and social stimulation, individuals soon become incapable of maintaining an adequate state of alertness and attention to the environment. Even a few days of solitary confinement will predictably shift the EEG pattern toward an abnormal pattern characteristic of stupor and delirium. Dr. Grassian states that in his own professional experience, he has seen individuals who, after only hours in solitary, have descended into a psychotic delirium and attempted suicide.

[170] After even a relatively brief period in a situation of inadequate environmental stimulation, an individual is likely to descend into a mental torpor or “fog,” in which alertness, attention, and concentration all become impaired. In such a state, after a time, the individual becomes increasingly incapable of processing external stimuli, and often becomes “hyperresponsive” to such stimulation. Over time, the absence of stimulation causes whatever stimulation is available to become noxious and irritating. Individuals in such a stupor tend to avoid any stimulation, and withdraw progressively into themselves and their own mental fog.

[171] There are substantial differences in the effects of solitary confinement upon different individuals. Those most severely affected are often individuals with evidence of subtle neurological or attention deficit disorder, or with some other vulnerability. These individuals suffer from states of florid psychotic delirium, marked by severe hallucinatory confusion, disorientation, and even incoherence, and by intense agitation and paranoia. These psychotic disturbances often have a dissociative character, and individuals so affected often do not recall events which occurred during the course of the confusional psychosis. Generally, individuals with more stable personalities and greater ability to modulate their emotional expression and behaviour and individuals with stronger cognitive functioning are less severely affected. However, all of these individuals will still experience a degree of stupor, difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli (especially noxious stimuli).

[172] Moreover, although many of the acute symptoms suffered by these inmates are likely to subside upon termination of solitary confinement, many – including some who did not become overtly psychiatrically ill during their confinement in solitary – will likely suffer permanent harm as a result of such confinement. This harm is most commonly manifested by a continued intolerance of social interaction, a handicap which often prevents the inmate from successfully readjusting to the broader social environment of general population in prison and, perhaps more significantly, often severely impairs the inmate’s capacity to reintegrate into the broader community upon release from imprisonment.

[173] Many inmates housed in such stringent conditions are extremely fearful of acknowledging the psychological harm or stress they are experiencing as a result of such confinement. This reluctance of inmates in solitary confinement is a response to the perception that such confinement is an overt attempt by authorities to “break them down” psychologically, and in Dr. Grassian’s experience, tends to be more severe when the inmate experiences the stringencies of his or her confinement as being the product of an arbitrary exercise of power, rather than the fair result of an inherently reasonable process.

[174] Dr. Grassian explains that these findings received further corroboration in his observations of inmates at Pelican Bay State Prison, a new “supermax” facility in California. In 1991-1992, as part of his participation in *Madrid v. Gomez* (1995) 889 F. Supp. 1146 (N.D. Cal.), a class-action lawsuit challenging conditions at the prison, he evaluated 49 inmates housed in the Security Housing Unit (“SHU”) and prepared a lengthy report to the Federal District Court of his findings. Many of the inmates Dr. Grassian evaluated suffered severe psychiatric disturbances while housed in the SHU, either springing up *de novo* while so incarcerated or representing a recurrence or severe exacerbation of pre-existing illness.

[175] Dr. Grassian says that the clinical data at Pelican Bay added corroboration to the conclusion that the severe and prolonged restriction of environmental stimulation in solitary confinement is toxic to brain functioning. The data also demonstrated that the most severe psychiatric illnesses resulting from solitary confinement tended to be suffered by those individuals with pre-existing brain dysfunction.

[176] Dr. Grassian expresses the view that while not all individuals will become floridly ill after 15 days of solitary confinement, all or certainly some will suffer greatly as a consequence of experiencing it. In this regard, he describes the 15-day maximum in the Mandela Rules as “generous” given the overwhelming evidence that even within the space of 15 days solitary confinement can cause severe psychiatric harm.

(b) Dr. Craig Haney

(i) Qualifications

[177] Dr. Haney is a Distinguished Professor of psychology at the University of California, Santa Cruz. He has both a PhD in psychology and a J.D. degree from Stanford University. His academic specialization is psychology and law. He has published numerous scholarly articles and book chapters on topics in law and psychology including the psychological effects of imprisonment and the nature and consequences of solitary or “supermax”-type confinement. He has lectured and given invited addresses on these topics.

[178] Dr. Haney has studied the psychological effects of living and working in real (as opposed to simulated) institutional environments, including juvenile facilities, mainline adult prison and jail settings, and specialized correctional housing units (such as solitary and “supermax”-type confinement). Because his focus is primarily on the psychological and mental health effects of correctional environments, he has studied the ways that mentally ill inmates, especially, are affected by their conditions of confinement and how prison systems address the needs of this vulnerable population. In the course of that work, Dr. Haney has toured and inspected numerous maximum-security state prisons and related facilities across the United States and around the world, including in Canada. Dr. Haney’s research, writing, and testimony have been cited by numerous U.S. Courts including state courts, Federal District Courts, Circuit Courts of Appeal, and the United States Supreme Court.

[179] Since the 1970s to the present, Dr. Haney has interviewed and assessed over 1,000 segregated inmates.

(ii) Opinion

[180] In brief compass, it is Dr. Haney’s opinion, based on the existing scientific literature as well as his own long-standing study of the subject, that administrative segregation places all inmates at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. These risks are intensified when the inmates have pre-existing

vulnerabilities, particularly juveniles and the mentally ill, but also inmates with other forms of vulnerability such as cognitive deficits.

[181] Dr. Haney says that his conclusions are empirically supported by a robust literature that spans many decades and has been generated by scholars and researchers in different countries coming from a variety of academic perspectives and specialities ranging from psychiatrists to sociologists to architects. With remarkably few exceptions, virtually every one of the studies has documented the pain and suffering that isolated inmates endure and the significant risk of serious psychological harm to which they are exposed. These broad patterns have also been consistently identified in the personal accounts of persons confined in isolation, and in descriptive studies authored by mental health professionals who worked in many such places. Moreover, the conclusions are also theoretically sound in that they are based on broad scientific knowledge about the psychological effects of social deprivation and isolation in a variety of other contexts outside of prison.

[182] According to Dr. Haney, the central harmful feature of solitary confinement is the reduction of meaningful social contact. Psychologists know that social contact is fundamental to establishing and maintaining emotional health and well-being. Conversely, social isolation in general is potentially very harmful and can undermine health and psychological well-being. Prolonged social deprivation is painful and destabilizing in part because it deprives people of the opportunity to ground their thoughts and emotions in a meaningful social context – to know what they feel and whether those feelings are appropriate. Numerous scientific studies have established the psychological significance of social contact and connectedness. They have concluded, among other things, that the human brain is literally “wired to connect” to others. Thwarting this “need to connect” not only undermines psychological well-being but also increases physical morbidity and mortality.

[183] According to Dr. Haney, the social deprivation imposed by solitary confinement leaves inmates with no choice but to adapt in socially pathological ways. Over time, they gradually change their patterns of thinking, acting and feeling to cope with the profoundly asocial world in which they are forced to live, adapting to

the absence of social support and the routine feedback that comes from normal, meaningful social contact. Not surprisingly, this has problematic consequences. As they become increasingly unfamiliar and uncomfortable with social interaction, some inmates become further alienated from others and made anxious in their presence. Although their adaptations may have been functional in isolation, they are typically acutely dysfunctional in the social world most inmates are expected to re-enter. In extreme cases, these ways of being are not only dysfunctional but have been internalized so deeply that they become disabling, interfering with the capacity to live a remotely normal or fulfilling social life. In this way, long-term isolation can make inmates' adjustment to general population especially painful and challenging.

[184] Dr. Haney says that although social deprivation is the source of the greatest psychological pain that inmates experience in solitary confinement and places them at the greatest risk of harm, administrative segregation units frequently deprive inmates of other things as well. These units operate by imposing high levels of repressive control, enforce almost complete idleness or inactivity on inmates, reduce positive environmental stimulation to a bare minimum, and impose physical and material deprivations that collectively produce psychological distress and can exacerbate the negative consequences of social deprivation. Most beneficial features – such as participation in institutional programming, contact visits with persons from outside the prison, opportunities for meaningful physical exercise or recreation – are either functionally denied or greatly restricted. Thus, in addition to the social pathology that is created by the experience of solitary confinement, these other stressors also can produce additional negative psychological effects.

[185] Studies have identified some of the symptoms that appear to be produced by these conditions as including appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilation. Moreover, direct studies of prison isolation have documented an extremely broad range of harmful psychological reactions. These effects include increases in the following potentially damaging symptoms and problematic behaviours: anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability,

aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour.

[186] In addition, self-mutilation and suicide are more prevalent in isolated, punitive housing units such as administrative segregation. For example, clinical researchers have attributed higher suicide rates in solitary confinement-type units to the heightened levels of “environmental stress” that are generated by the isolation, punitive sanctions, and severely restricted living conditions that exist there.

[187] The prevalence of the psychological symptoms suffered in solitary confinement is often very high. For example, in an early study, Dr. Haney conducted systematic assessments of a randomly selected sample of 100 inmates housed at the SHU at Pelican Bay State Prison in California. He found that every symptom of psychological distress that he measured but one (fainting spells) was suffered by more than half of the inmates who were interviewed. Many of the symptoms were reported by two-thirds or more of the inmates assessed, and some were suffered by nearly everyone. Well over half of the inmates reported a constellation of symptoms – headaches, trembling, sweaty palms, and heart palpitations – that are known to be stress-related.

[188] Dr. Haney also found that almost all of the inmates whom he evaluated reported ruminations or intrusive thoughts, an oversensitivity to external stimuli, irrational anger and irritability, difficulties with attention and often with memory, and a tendency to socially withdraw. Almost as many inmates reported a constellation of symptoms indicative of mood or emotional disorders – concerns over emotional flatness or losing the ability to feel, swings in emotional responding, and feelings of depression or sadness that did not go away. Finally, sizable minorities of the inmates reported symptoms that are typically only associated with more extreme forms of psychopathology – hallucinations, perceptual distortions, and thoughts of suicide.

[189] In addition to these specific symptoms and reactions of psychological stress, other significant aspects of the psychological pain and dysfunction that prolonged

solitary confinement can produce in inmates include damage to or distortion of their social identities, destabilization of their sense of self and, for some, destruction of their ability to function normally in free society.

[190] Dr. Haney expresses the opinion that indeterminacy is a particularly problematic feature of segregation. Based on his work conducting systematic assessments of isolated inmates in the United States, it is his experience that the indeterminacy of segregation placements exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in these environments.

[191] Dr. Haney says that these conclusions about the harmfulness of segregation are not only widely accepted in the scientific community but also reflect a large and growing consensus in correctional circles as well as among a wide range of mental health, legal and human rights organizations worldwide that have opined on the matter. As he notes in his expert report:

The list of professional groups and organizations that have explicitly recognized the harmful psychological consequences of exposure to solitary confinement and, as a result, have taken official positions in favor of significantly limiting when, for how long, and on whom it can be imposed has grown dramatically over the last ten years. It is now truly daunting. The list includes *human rights organizations ...*, *professional oversight bodies ...*, *religious groups ...*, *medical and mental health associations ...*, and *correctional organizations ...*

In addition, a committee of the most prestigious scientific organization in the United States, the National Academy of Science, concluded that solitary confinement could precipitate such “serious psychological change” in prisoners that the practice itself “is best minimized.” As the American Psychological Association, the world’s largest professional association of psychologists, recently stated: “Solitary confinement is associated with severe harm to physical and mental health among both youth and adults, including: increased risk of self-mutilation, and suicidal ideation; greater anxiety, depression, sleep disturbance, paranoia, and aggression; exacerbation of the onset of pre-existing mental illness and trauma symptoms; [and] increased risk of cardiovascular problems.” ...

[Emphasis in original.]

[192] The widespread recognition of the harmful effects of solitary confinement has led to a consensus about three important limits that must be applied to its use: (1)

because the risks of psychological and physical harm increase as a function of the increased length of exposure, the use of the practice must be limited to the briefest amount of time possible; (2) solitary confinement must be used only when it is absolutely necessary and as a last resort; and (3) the added risk to vulnerable groups requires that they be exempted entirely from prolonged solitary confinement.

[193] While some organizations call for an outright ban on the use of solitary confinement, many recommend strict time limits on its use, limits that are typically measured in days and weeks. Dr. Haney testified that the international standard is a 15-day maximum, which he accepts as defensible. He testified, “what I am sure of is that the longer somebody is there the greater the risks”.

[194] As for the exacerbating effects of segregation on mental illness, Dr. Haney states that there are sound theoretical reasons that explain why inmates with serious mental illness have a much more difficult time tolerating the painful experience of segregation. In part, it is because of the greater vulnerability of the mentally ill in general to stressful, traumatic conditions. Social contact and interaction play a critical role in maintaining psychological equilibrium, and thus its absence is very psychologically destabilizing. In addition, some of the conditions of isolation exacerbate the particular symptoms from which mentally ill inmates suffer.

2. Government Experts

(a) *Dr. Jeremy Mills*

(i) *Qualifications*

[195] Dr. Mills is a licensed psychologist in the Province of Ontario with 25 years’ experience in the federal correctional system. He was an institutional psychologist in several medium- and maximum-security institutions before becoming the Regional Psychologist for Ontario with functional authority for the provision of psychological services in 2009. In 2013, Dr. Mill’s role changed to that of Regional Manager Institutional Mental Health, where he had direct supervisory responsibility for the delivery of institutional mental health services in the Ontario Region. Since 2014, he

has been the acting Regional Director Health Services in the Ontario Region and was recently appointed to the position on a permanent basis.

[196] During the 25 years that Dr. Mills worked as a psychologist within the institutions, he routinely conducted psychological evaluations (including segregation and suicide assessments), provided individual and group therapy, and completed risk assessments. During this time period, he estimates that he completed well over 1,000 segregation reviews, not including routine visits to segregation for crisis intervention or counselling/therapy.

[197] Dr. Mills is also an adjunct research professor within the Psychology Department at Carleton University, a position he has held since 2001.

(ii) Opinion

[198] It is Dr. Mills' opinion, based on the literature and consistent with his clinical experience, that, as a group, segregated inmates without mental illness do not experience debilitating psychological or psychiatric symptoms due to their placement in segregation, and that following a period of adjustment, the majority function within their normal baseline of psychological functioning. It is his further opinion, that, as a group, inmates with mental illness do not deteriorate over the time period they spend in segregation.

[199] In his expert report, Dr. Mills reviews the different types of research into the psychological effects of segregation, beginning with anecdotal or observational reports.

[200] One research method is cross-sectional or comparative, which in the present context would compare segregated inmates with non-segregated inmates. Dr. Mills cites three examples of such studies. The first (Suedfeld et al., 1982) compared segregated and non-segregated inmates from three different institutions in Canada and the United States. Dr. Mills says that researchers found little difference on the psychological tests used in the overall sample, though a relationship was found between length of stay and measures of depression and hostility. The study's

authors concluded that their data did not support the claim that solitary confinement as practiced in North America was overwhelmingly aversive, stressful or damaging to inmates.

[201] Another comparative study (Miller, 1994) did find higher rates of psychological distress as measured by a self-report test. When inmates were asked if they wanted to spend the remainder of their sentence in segregation, 77% said no. The third comparative study (Coid et al., 2003) found that inmates placed in restrictive confinement conditions had higher incidence of various mental illnesses. Dr. Mills says that taken together, comparative studies have found differences in diagnoses and symptoms to varying degrees and have also found that inmates do not universally seek to leave segregation.

[202] Dr. Mills explains that observational studies and comparative research, while important in indicating the presence of a phenomenon in one person or a small group, do not confirm a causal link; only that symptoms related to mental health are more frequent among segregated inmates when compared to the non-segregated. However, he says, this is not unexpected given the over-representation of inmates with mental health issues in segregation.

[203] According to Dr. Mills, more helpful and scientifically rigorous are longitudinal research studies that measure symptoms of mental health over time. One such study upon which Dr. Mills puts considerable weight was conducted by Zinger, Wichmann, and Andrews (2001) in three Canadian federal institutions, and is usually referred to as the “Zinger Study”. The study measured change in mental health symptoms of segregated inmates over time. Eighty-three inmates in segregation were compared with 53 inmates in the general population using a battery of psychological tests at the time of admission, 30 days after admission, and 60 days after admission to segregation. Randomly selected volunteers in general population were tested along the same timeframes. The study did not make a distinction between inmates with or without mental illness. Segregated inmates were found to be younger and at higher risk for criminal behaviour.

[204] Initially, segregated inmates in the Zinger Study reported more depressive symptoms on one of two measures of depression, a measure of anxiety and a measure of psychosocial adjustment. However, segregated inmates did not differ from non-segregated inmates on a measure of hopelessness. More importantly, both segregated and non-segregated inmates improved over the 60 days on measures of depression, psychosocial adjustment, hopelessness, and anxiety. Notwithstanding that the findings ran contrary to much current opinion, it was not inconsistent with Dr. Mills' experience in working with segregated inmates. Dr. Mills' experience has been that most inmates adjust to segregation and there are even some who improve due to the circumstances they are escaping from in the general population.

[205] Another important research method is meta-analysis – a study of studies. Dr. Mills puts great emphasis on a meta-analysis in which he participated, frequently referred to as the “Morgan et al. Study” (Morgan, Gendreau et al., 2016). As he explains, the researchers undertook a study of the effects (differences between segregated and non-segregated inmates) across available sources of published and unpublished papers. In addition to being a meta-analysis, the study is unique in that two groups of researchers (one led by Dr. Paul Gendreau and the other by Dr. Robert Morgan) were conducting a meta-analysis of the same nature, separately, without knowledge of the other's results until after the data had been gathered and analyzed. It was decided by the teams to publish the two studies in one paper as the studies constituted a replication of findings, which is a hallmark of the scientific process. Each study used slightly different research criteria and statistical approaches which resulted in 14 studies being included in the Gendreau research team's analyses and 19 studies included in the Morgan research team's analyses. The studies were combined using a common metric.

[206] Overall, the findings of the two studies were quite consistent and found that the differences between segregated and non-segregated inmates ranged from small to moderate on a wide range of psychological indicators including anger, anxiety, hostility, mood, psychosis, and cognitive functioning. Further, both studies found that the size of these differences were significantly reduced when only the studies rated

as more scientifically rigorous were considered. According to Dr. Mills, the findings do not support the notion that, as a group, inmates in segregation suffer from debilitating psychological and emotional distress when compared with inmates outside of segregation.

[207] Although he considers this study to be quite likely the most comprehensive empirical review of the segregation literature, Dr. Mills acknowledged some of its limitations: (a) the studies included within the meta-analysis were primarily comparative, which means that the results do not infer a causal link; (b) the differences measured were not placed within a clinical context; and (c) the findings of group-based analyses do not address the experiences of every individual.

[208] With respect to the psychological effects of segregation on mentally ill inmates, Dr. Mills referred to two longitudinal studies that examined the symptoms of mentally ill inmates over time in segregation. One took place at a remand facility in Denmark and found that there were greater incidences of mental health diagnoses among the segregated inmates than the non-segregated inmates, though the authors attributed much of the difference to adjustment disorders (Andersen et al, 2003; Andersen et al, 2000).

[209] According to Dr. Mills, quite likely the most sophisticated longitudinal study to date examining the effects of segregation on mentally ill and non-mentally ill inmates was completed by Maureen O'Keefe and colleagues (O'Keefe et al., 2013) on inmates in the state of Colorado (the "Colorado Study"). The authors studied 270 inmates placed in one of five groups for a one-year period. Inmates were classified as having a mental illness or not and were then placed in administrative segregation or general population, which comprised four groups. A fifth group of inmates was placed in a special needs prison for inmates with acute psychiatric symptoms who could not be managed in the general prison population. The inmates were initially tested on admission across a broad array of psychological symptoms and were then test every three months thereafter for a period of one year.

[210] The Colorado Study found that overall there was improvement over time. When the segregated inmates with mental illness and segregated inmates without mental illness were compared, the results showed that those with mental illness had more symptoms than those without but that both groups' symptoms declined over time in a similar logarithmic fashion: more positive change earlier with the rate of improvement declining over time. Another important finding was that, upon initial placement, the inmates with mental illness placed in segregation did not differ from those mentally ill inmates placed in general population or those placed in the special needs prison. The original report on this study (O'Keefe et al., 2011) indicated that of those placed in segregation, 7% showed worsening symptoms, 20% showed improved symptoms, and the majority remained the same.

[211] The authors concluded that their results did not support the hypothesis that inmates, with or without mental illness, experience significant psychological decline in administrative segregation. The authors offered as an explanation that placement in prison, administrative segregation or the special needs prison was a crisis (significant change) and that, with time, the crisis dissipated and the inmates adapted to their environment. Dr. Mills says that these findings are consistent with those reported previously, and that further, as a class, inmates who are segregated improve over time with no deterioration for up to one year. This held true for inmates with and without mental illness.

[212] It has been Dr. Mills' clinical experience that many inmates – both mentally ill and non-mentally ill – admitted to administrative segregation do go through a period of adjustment that usually lasts a few days. Some inmates who have been segregated more frequently show little to no signs of an adjustment period because they are familiar with the environment. Other inmates actually report improved functioning if they were in a stressful situation in general population prior to their segregation placement.

[213] With respect to the impact of a firm time cap of 15 days on the mental health of inmates without mental illness, it is Dr. Mills' view that such a cap could work against inmates by forcing those voluntarily in administrative segregation to leave a

place they consider safe before they are ready, thus increasing their anxiety and fear. In his opinion, the imposition of a firm time cap overlooks the need to treat each case individually with consideration of the particular facts at hand.

[214] With respect to inmates with mental illness, Dr. Mills states that there is no evidence that they are best served by being removed from segregation at or before 15 days. Rather, Dr. Mills is of the opinion that an individualized approach that takes the clinical case specifics of each inmate into consideration and which provides the appropriate clinical intervention with a view to reintegrating inmates into the general population as soon as possible is to be preferred.

(b) Dr. Paul Gendreau

(i) Qualifications

[215] Dr. Gendreau, Professor Emeritus at the University of New Brunswick, has worked as a full-time research professor in the area of corrections and forensics for 16 years. He has an M.A. degree in clinical psychology from the University of Ottawa and a PhD in experimental psychology from Queen's University, Ontario focussed on the effects of solitary confinement.

[216] For the past 40 years, Dr. Gendreau has been a certified psychologist in the province of Ontario where he has worked as a clinical psychologist in both the federal and provincial correctional services systems. For two years he was a psychologist at Kingston Penitentiary where he conducted psychological assessments and reviewed cases in administrative segregation. He was subsequently the Regional Chief Psychologist for the Eastern Region of the Ontario Ministry of Correctional Services in which capacity he supervised prison psychology staff, carried offender caseloads for counseling, supervised and ran treatment programs, reviewed administrative segregation cases, and conducted evaluations of treatment services.

[217] For the past 28 years, Dr. Gendreau has also been licensed in the province of New Brunswick to practice psychology. He was chief researcher for mentally ill and

forensic patients at a major psychiatric hospital, as well as an adjunct professor with the Department of Psychiatry at Dalhousie University in Halifax.

[218] Dr. Gendreau has been a consultant to a number of foreign governments on various prison issues, and has served on a number of Canadian federal government committees. He has published over 200 peer-reviewed publications in scientific journals as well as a number of book chapters. About 80% of his scientific publications have been on the effects of prison life in general; seventeen of his publications dealt with solitary confinement issues.

(ii) Opinion

[219] According to Dr. Gendreau, the available evidence indicates that solitary confinement has an effect on inmates but that it is much milder than that predicted by the plaintiffs' experts. In his view, it is highly likely that these mild effects are no greater than inmates' experiences with the usual stresses of prison life. Based on the existing literature, it is his opinion that the effects of solitary confinement are not well understood. He says more research is needed in regards to segregation for longer periods of time – that is, 90 days or more. In his cross-examination, Dr. Gendreau did not deny that for some inmates, segregation can cause psychological or psychiatric harm. He also agreed that, whatever the cause, some inmates in segregation cope badly with the conditions, though the percentage is unclear.

[220] Dr. Gendreau and his colleagues have predicted that for long periods of segregation, even if cell conditions are acceptable, programming is available and supportive interactions between inmates and staff occur, negative outcomes from mild to greater than reported in the Morgan et al. Study will likely be found for some, but not all, inmates. In this regard, he and his colleagues have conducted about 3,000 clinical assessments of inmates in segregation who have resisted all attempts to get them to leave even after longer periods, e.g., one year. In his clinical experience, together with information received from CSC officials, 20 to 25% of inmates in segregation claim they prefer to remain in segregation.

[221] In Dr. Gendreau's view, when adverse effects do occur in segregation, it is due in large part to the destructive relationships that are formed between correctional staff and inmates, and, secondarily, the lack of availability of treatment services.

[222] Nevertheless, Dr. Gendreau is in agreement with placing limits on the time inmates spend in administrative segregation. He considers the 15-day limit suggested by some, including the Mandela Rules, to be well-intentioned but naïve in regards to the complexity of segregation decision-making. The requisite consultations with stakeholders and logistical realities of the process make it one that takes time to sort out and implement. To Dr. Gendreau's knowledge, no jurisdiction has been able to implement the 15-day limit imposed by the Mandela Rules.

[223] Based on the extensive sensory deprivation literature, as well as the Morgan et al. Study, it is Dr. Gendreau's recommendation that a 60-day limit be imposed on the use of administrative segregation. However, it is necessary that there be an exception for the population of dangerous inmates, in the range of 5 to 10% of the general prison population, that pose a considerable hazard to the good running and good order of institutions. Dr. Gendreau notes that the 60-day limit has been met comfortably by CSC for 87% of men's cases and 99% of women's cases.

[224] In cross-examination, Dr. Gendreau was presented with a study he had published in 2016 in which he had stated that segregation periods of longer than 30 days could produce negative mental health consequences that violate reasonable standards of humane care. He accepted that that was his essential view today but that he had extended the limit up to 60 days.

[225] With respect to the exacerbating effects of segregation on mentally ill inmates, Dr. Gendreau cites literature to the effect that such inmates have difficulty processing information in conditions where they are inundated with sensory input, which can be the case in general population cells with their constant noise. They therefore function better in quiet environments such as segregation, though he

acknowledges that is not a reason to leave them there. Dr. Gendreau's view is that mentally ill inmates should be identified as such before even finding themselves in a situation where they might be sent to segregation, and should be diverted to a psychiatric setting where their needs can be addressed. In cross-examination, he more clearly expressed his agreement that administrative segregation should not be used for the mentally ill.

[226] In cross-examination, Dr. Gendreau acknowledged two policies that can be used to limit segregation. One is to design prison environments in a way to discourage the assaults that lead to administrative segregation. Another is to limit the number of segregation cells in an institution. In this regard, he recounted how he had been a clinical administrator in a 200-person institution that had only five segregation cells which inmates had to leave within a week. The result was that staff and inmates learned to cope with that reality. When the number of segregation cells was later increased by a subsequent administration, those cells were filled to capacity despite there being no changes in the inmate composition or the prison climate.

3. Discussion

[227] The experts for the plaintiffs and the Government do not simply disagree about whether or not solitary confinement is harmful to inmates; they disagree about the proper scientific method for determining the answer to that question. The position of the Government's experts is stated most clearly by Dr. Gendreau. He rejects the opinions of the plaintiffs' experts by describing them this way:

33. For the greater part of the 20th century sources of knowledge in psychological research took two forms.... First, there was evidence based on qualitative sources which was rooted in testimonials, anecdotes, intuition and case histories. The integration of evidence was 'simple', typified by 'what everybody knows' declarations, exceptions prove the rule, and 'what experience has taught me' and "a single case tells me all I need to know about a phenomenon". Kimble (1994) refers to this form of reasoning as common sense....

[Citations omitted.]

[228] In contrast to what Dr. Gendreau terms the “common sense” approach of the plaintiffs’ experts, he suggests that a better scientific method now can be employed, namely meta-analysis:

Meta-analysis was a true paradigm shift in how psychology and related disciplines (i.e., medicine) took stock of scientific findings.... It achieved the goal of the replication of findings which is a hallmark of the ‘hard’ sciences such as chemistry and physics.

Meta-analysis achieves replication by statistically summarizing and averaging the results from a group of single quantitative studies. It provides a precise numerical estimate of the effectiveness of a treatment effect and identifies moderators statistically that can either enhance or diminish those effects. Understandably, it took time to implement these changes as new training and mindset was required in moving forward; meta-analysis is now the gold standard for reviewing literature in criminology, psychology and medicine.

[Citation omitted.]

[229] Dr. Mills also puts great emphasis on the Morgan et al. Study, a meta-analysis in which he participated. He additionally puts considerable weight on the Zinger Study.

[230] To be fair to Dr. Mills, who was a fellow graduate student with Mr. Zinger at the time the study was conducted, he predicted its outcome based on his own experience working in Canadian federal prisons:

My response to Zinger was that he would not find the deterioration in mental health symptoms he believed existed because it was my experience that a small number of offenders deteriorated over time, a larger number improved as they were escaping a stressful situation within the general population, and a majority of offenders showed little measureable change in mental health symptoms during their stay in segregation.

[231] At the time he prepared his expert report for this case, Dr. Mills’ views had not changed:

25. Despite the fact that these findings ran contrary to much current opinion, including that of the primary author, it was not inconsistent with my experience in working with segregated offenders. It has been my experience that most offenders adjust to segregation and there are some who improve due to the circumstances they are leaving in the general population.

[232] Dr. Grassian responded to Dr. Mills’ report not by disagreeing with the concept of meta-analysis but by pointing out problems in the particular meta-analysis

relied upon by Dr. Mills and Dr. Gendreau, the Morgan et al. Study. Dr. Grassian first made the point that question and answer tests given to subjects must be validated. In his view, this is done by having a fairly large number of individuals take the test and then comparing the results with those obtained by direct evaluation by a seasoned clinician. If the assessments basically match, the test is valid for that group. Dr. Grassian then questioned whether the tests being administered to inmates had been validated. He stated that incarcerated individuals have tremendous incentive *not* to answer truthfully, an obvious fact ignored in many of the studies that Dr. Mills endorses.

[233] The Court heard evidence confirming Dr. Grassian's view from Mr. Patterson, the Aboriginal elder who had worked at Matsqui Institution. Mr. Patterson testified that many inmates are concerned about being labelled as having mental health issues for fear they will be sent to a treatment centre. Dr. Koopman similarly testified that not only may inmates not be inclined to answer questions about mental health truthfully but they may be psychologically in a state of denial.

[234] Dr. Grassian then critiqued the selection process of the articles considered for the Morgan et al. Study. The article is based on two review studies. In the first, 200 publications regarding solitary confinement were identified; the authors then decided that only 14 of the 200 were adequately "scientific", thus rejecting 93% of the identified publications "and all of the articles written by the leading voices for reform", including Dr. Grassian's articles. In the second study, over 40,000 potential articles were culled down to 60, then further reduced to 19, of which nine were also included in the first study. Combining the two, a total of 24 articles were considered. Two of those were not published and Dr. Grassian could not locate them. Dr. Haney critiqued the Zinger Study and Dr. Grassian critiqued the other 21.

[235] According to Dr. Grassian, none of the 21 articles provide evidence that solitary confinement is not psychiatrically harmful, some provide direct evidence that it is in fact psychiatrically harmful, and a number of them simply have no relevance to the issue.

[236] The most important article reviewed in the Morgan et al. Study was the Colorado Study, originally available in 2010 then published in 2013 in the Journal of the American Academy of Psychiatry and the Law. Briefly, the research participants were inmates who faced disciplinary hearings at Colorado State Prison. Some were sentenced to administrative segregation, while others received a sanction but remained in the general population. The two groups were then further subdivided according to whether they had a mental illness. Subjects were asked to fill out self-report scales, both initially and on a quarterly basis over the following 12 months. The data that was collected was statistically analyzed and said to demonstrate two things: (1) there was no difference in the psychological adjustment of the inmates in administrative segregation and those in the general population; and (2) the psychological status of the inmates in administrative segregation did not deteriorate over the course of the year.

[237] Dr. Grassian made the following criticisms of the Colorado Study:

- a) its critical methodological failing is in the validity of the self-report rating scale used – it will not be valid if the test-taker is not disposed towards answering accurately. In this study, there was no incentive for inmates to answer the questions accurately; to the contrary, inmates have intrinsic disincentives against revealing psychological problems or vulnerabilities, including fear that such disclosures will be exploited or used against them;
- b) a number of the inmate subjects transferred during the course of the year from one custody status (administrative segregation or general population) to the other; the authors chose to ignore the transfer and treat the inmate as if he remained where first assigned; and
- c) objective data in the form of records of psychiatric crises (either self-harm/suicidality or psychotic disturbance) kept by the corrections staff squarely contradicted the self-report rating scales and demonstrated that they were not a valid means of assessing psychological status in this population. Specifically, among the 33 psychiatrically vulnerable inmates in the general population, there were only three psychiatric crises over the

course of the year (less than 1 episode for every 10 inmates), whereas for the 59 vulnerable people in administrative segregation, there were actually 37 such episodes (almost 2 episodes for every three inmates.) Moreover, while according to the self-report rating scales there was no evidence of psychiatric deterioration over the course of the 12 months, the psychiatric crisis data demonstrated otherwise: of the 37 episodes among the administrative segregation group during the year, only 12 happened in the first six months; more than double that (25 episodes) occurred in the second six months. Upon discovering the massive discrepancy between the self-reporting data scales and the psychiatric crisis data, Dr. Grassian sought the underlying data from the study's authors but was refused.

[238] In reviewing the remaining 20 articles, Dr. Grassian divides them into several categories. The first category includes articles that raise both ethical and major methodological concerns. In addition to the Colorado Study, he includes a further three studies: the Suedfeld study and two studies co-authored by Dr. Gendreau.

[239] The second of the two studies co-authored by Dr. Gendreau concerned the effects of one week of solitary confinement on inmates' EEG (brain wave) patterns. It found both a significant slowing of the EEG (that is, a decline in the level of alertness, corresponding to stupor over time) and an increase in the electrical spike evoked by visual stimulation. Thus, that study documents only that during solitary confinement the EEG patterns indicate a general increase of stupor and delirium, and hyperresponsivity to external stimuli.

[240] In the second category, Dr. Grassian critiqued nine articles whose subject matter he said was irrelevant in that they did not address the psychiatric effects of solitary confinement. The balance of the articles in the third category were studies that Dr. Grassian says demonstrated psychiatric harm resulting from solitary confinement.

[241] Dr. Grassian concludes that the Morgan et al. Study, which is the foundation for Dr. Mills' conclusions regarding the research concerning the psychiatric effects of

solitary confinement, entirely fails to provide any such foundation (leaving aside the Zinger Study); indeed, none of the articles supports his conclusion, and many actually demonstrate that solitary confinement causes serious psychiatric illness.

[242] The other plaintiff expert, Dr. Haney, did an analysis of the Zinger Study relied on by Dr. Mills both in his own opinion and in the Morgan et al. Study. His primary criticisms were the following:

- a) the Study was based on co-mingled data from both voluntarily and involuntarily segregated inmates. However, since the psychological state of mind of the two groups are very different, they cannot be treated as if they are the same;
- b) the Study suffered from a high rate of attrition such that by the end of the 60 days there were only 23 administrative segregation inmates in total (from a starting number of 83), among which only 10 were involuntarily segregated inmates. Thus the study was essentially of segregation lasting, for a great majority of the participants, a much shorter duration than the 60 days intended at the outset;
- c) Dr. Zinger had stated that the great majority of prisoners in Canadian administrative segregation units at the time the study was done (the late 1990s) could expect to be released before 60 days. Presumably, then, many if not most of the inmates in the study expected to be released from segregation at least by then;
- d) the Study also suffered from the possible flattening or masking of real changes over time due to “practice effects” that can occur in all longitudinal studies that use repeated measures - ones where the exact same tests are administered several times over a period of weeks or months. This occurs as a result of participants getting practised at (and sometimes bored with) taking the tests and thus giving essentially the same answers, thereby producing a false pattern of apparent stability or lack of change; and

- e) a careful examination of the data suggests that the segregated prisoners actually were doing a little worse, not better, on most measures. This is especially true between testing sessions 2 (30 days) and 3 (60 days), a key time period in which the segregated prisoners appear pretty consistently to be deteriorating on most measures. Dr. Zinger had no way of knowing whether the clear decline in functioning on most measures between 30 and 60 days for this group was the start of a longer process of deterioration, such that longer periods of segregation, beyond 60 days, would have produced dramatically worse outcomes for the isolated prisoners (despite the limitations of attrition and practice effects that compromised the data overall).

[243] Despite these serious limitations, the Zinger Study is not only a study that Dr. Mills relied heavily on, it is also featured in the Morgan et al. Study as one of the very few studies (along with the fatally flawed Colorado Study) that the authors judged to have a “stronger” quality design. According to Dr. Haney, if the results of those fatally flawed studies were discarded, very little data would remain from the already too-narrow Morgan et al. Study on which to premise a meaningful conclusion. If the data from the Colorado Study and the Zinger Study were eliminated from the Morgan et al. Study, the calculations would lead the authors inextricably to precisely the opposite conclusions from the ones they drew.

[244] Dr. Haney also critiques the Morgan et al. Study relied upon by Dr. Mills, his concerns echoing some of those levelled by Dr. Grassian; primarily, its over dependency on the “nearly universally criticized and discredited” Colorado Study, which Dr. Haney describes as a “methodological disaster”. As Dr. Haney notes, over half of the psychological outcomes of administrative segregation noted in the two meta-analyses that make up the Morgan et al. Study were taken directly from the Colorado Study, leading him to state, “[t]hus, what Morgan et al. described as a comprehensive ‘meta-analysis’ of the overall literature on effects of administrative segregation is nothing more than a repackaging of the results of a single study –

indeed, a study that had already been roundly criticized by nearly every prominent expert in the field.”

[245] In Dr. Gendreau’s response to Dr. Haney’s report, he emphasizes the importance of sensory deprivation studies. In his view, the solitary confinement situation in prison “is a very reasonable facsimile” for the sensory deprivation literature even though the participants differ from inmates. He also disagreed with Dr. Haney’s comment that “we clearly do know what happens to people in prison and elsewhere in society when they are deprived of normal social contact for extended periods of time”. In Dr. Gendreau’s view, the research is far from clear on the matter.

[246] In Dr. Haney’s response to Dr. Gendreau, he said Dr. Gendreau is “stuck” in a very old paradigm that the harmfulness of solitary confinement derives from its sensory deprivation aspects. In the more than 40 years since Dr. Gendreau conducted any studies on the issue – and those studies involved a very limited number of typically volunteer participants who were exposed for brief periods to circumstances that bear no relation to a contemporary solitary confinement unit – that paradigm no longer dominates and has not for some time. Instead, the contemporary scientific understanding about how and why solitary confinement causes pain, suffering and psychological suffering focuses primarily on the social deprivation dimensions of the experience.

4. Conclusion

[247] I find as a fact that administrative segregation as enacted by s. 31 of the CCRA is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill

inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree.

[248] The indeterminacy of administrative segregation is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation.

[249] While many of the acute symptoms are likely to subside upon termination of segregation, many inmates are likely to suffer permanent harm as a result of their confinement. This harm is most commonly manifested by a continued intolerance of social interaction, which has repercussions for inmates' ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison.

[250] Negative health effects can occur after only a few days in segregation, and those harms increase as the duration of the time spent in segregation increases. The 15-day maximum prescribed by the Mandela Rules is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm. It is, nevertheless, a defensible standard.

[251] I base these findings on the expert opinions of Dr. Grassian and Dr. Haney and, in so doing, I reject some of the expert opinions expressed by Dr. Mills and Dr. Gendreau. In particular, I find that the main body of scientific opinion on the subject of solitary confinement is that it is psychologically harmful to inmates. In that sense, I am in agreement with Dr. Haney that Dr. Mills and Dr. Gendreau are "outliers" in the opinions they hold on the subject. I accept Dr. Grassian's evidence that there is a syndrome – delirium – caused in inmates by being subjected to solitary confinement. I accept Dr. Haney's evidence that the contemporary scientific understandings of how and why solitary confinement creates pain, suffering, and psychological damage focuses primarily on the social rather than the sensory deprivation dimension of the experience, while recognizing that sensory deprivation is a factor in causing the harm.

[252] I accept that the early history of solitary confinement in the United States and more particularly in Germany, demonstrates that these harmful effects have been recognized since the late 19th and early 20th centuries.

[253] Dr. Mills and Dr. Gendreau base their opinions to a significant extent on the Morgan et al. Study which, in turn, relies for its results on the Colorado Study and the Zinger Study of Canadian inmates. I agree with Dr. Grassian and Dr. Haney's criticisms of the Colorado Study and Dr. Haney's criticisms of the Zinger Study. In particular, the distinction that Dr. Haney draws between voluntary and involuntary confinement in administrative segregation will be discussed later in these Reasons.

[254] None of my above findings should be read as a criticism of meta-analysis as a method of scientific research. I agree with Dr. Gendreau that it can be a valuable tool for understanding complex problems. The Morgan et al. Study is unhelpful in understanding solitary confinement because of flaws in the Colorado and Zinger studies.

[255] I now turn to the legal significance of the facts that I have found.

IV. SECTION 7

[256] Section 7 of the *Charter* guarantees everyone "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

[257] To establish a breach of s. 7, the plaintiffs must show that (a) the impugned laws interfere with, or deprive them of, their life, liberty or security of the person; and (b) that the deprivation in question is not in accordance with the principles of fundamental justice.

[258] The inquiry under s. 7 is not a quantitative one – for instance, how many people are negatively impacted – but qualitative. Accordingly, an arbitrary, overbroad or grossly disproportionate impact on one person suffices to establish a breach of s. 7: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 127.

A. Interests

[259] The requisite level of causation at this first stage of the s. 7 analysis is a “sufficient causal connection” between the state-caused effect and the prejudice suffered by the claimant: *Bedford* at para. 75. The standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference drawn on a balance of probabilities. Nevertheless, there must be a real, as opposed to a speculative, link.

[260] The plaintiffs claim that the impugned provisions engage all three s. 7 interests: life, because inmates subject to them are at increased risk of death by suicide; liberty, because placement in segregation is the most severe deprivation of liberty available at law; and security of the person, because indeterminate and prolonged confinement causes serious psychological and physiological harm.

[261] The Government acknowledges that a decision to place an inmate in administrative segregation, a more restrictive institutional setting, is a deprivation of the inmate’s residual liberty interest and therefore engages s. 7. It denies, however, that either the impugned provisions or the administration of administrative segregation deprives an inmate of the right to life or security of the person.

[262] Although the Government concedes liberty, it is still necessary that I consider whether the impugned provisions engage the other two interests protected by s. 7 because of their relevance to the analysis under s. 1. A law that has deleterious effects on multiple protected interests will weigh differently in the balance than a law that impacts only one.

1. Life

[263] The right to life is engaged where a law or state action imposes death or an increased risk of death on a person, either directly or indirectly: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 62.

[264] I acknowledge that incarceration itself puts inmates at a heightened risk of suicide. By its nature, it entails a loss of autonomy and personal control, and separation from loved ones. Additionally, inmates are more likely to have mental health issues and to be younger than people outside prison, themselves factors associated with suicide. Nevertheless, I find that the evidence establishes that suicide is proportionately more prevalent amongst inmates in segregation.

[265] Dr. Haney's evidence, which I have accepted, is that administrative segregation puts inmates at increased risk of self-harm and suicide.

[266] As well, in September 2014, the OCI released *A Three Year Review of Federal Inmate Suicides (2011-2014)*. Dr. Kelley Blanchette, a witness for the Government, is currently CSC's Deputy Commissioner for Women. Immediately prior to her current position she was the Director General of the Mental Health Branch. Excerpts from the OCI's report were put to her in cross-examination. While she did not necessarily agree with all of the OCI's conclusions, she accepted the validity of the data contained in the report.

[267] According to the OCI's Report, between April 2011 and March 2014, 30 inmate suicides occurred in federal penitentiaries. Fourteen of these suicides occurred while the inmate was in segregation. Only one segregated inmate was being actively managed on suicide watch at the time of his death, though at least three others were being monitored. Nearly all of the segregated inmates had known significant mental health issues; most were or had been referred and/or seen by mental health staff while on segregation status, some on a regular basis. At least half had spent a previous period on mental health monitoring status. All had completed the Suicide Risk Checklist. Several had been transferred in and out of regional treatment centres over the course of their incarceration.

[268] In terms of the time spent in segregation before death, three inmates took their lives within five days of the placement. Three others died by suicide between 15 and 30 days in segregation, and another two had spent between 30 and 60 days in segregation. Three inmates died by suicide after being in segregation for more

than 120 days on a continuous basis. Another inmate was kept on perpetual segregation status that lasted years right up to his death.

[269] Dr. Blanchette acknowledged that suicide rates are proportionally higher in administrative segregation but took the position that the relationship was only correlational. However, as Dr. Haney testified, where correlations are surrounded by theoretical explanations they come very close to a causal explanation. Given the disproportionate number of suicides in segregation and the fact that so many studies have shown that isolating conditions, whether inside prison or elsewhere, have harmful effects, I consider it a matter of common sense that there is a causal connection between segregation and an increased risk of self-harm and suicide.

[270] There are numerous tragic examples in the evidence before the Court. The well-known cases of Ms. Smith and Mr. Snowshoe were referred to earlier. The OCI said the following about Ms. Smith's death at para. 93 of *A Preventable Death*:

93. 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.

[271] To the extent causation remains an open question, at least in Ms. Smith's case, the OCI accepted that there was sufficient causal connection between her placement in segregation and her death.

[272] Christopher Roy died on June 3, 2015 after he was found hanging in his segregation cell at Matsqui Institution. According to his father, Robert Roy, who gave evidence in this case, his son had spent about two months in segregation at the time of his death.

[273] Although the new CD 709 prohibits the placement of self-injurious inmates in administrative segregation, that does not resolve the issue. As will be discussed later, there are significant limitations to the scope of the Directive as it pertains to

self-injurious inmates. As well, inmates may not initially present as self-injurious but become that way over the duration of their placement.

[274] Accordingly, I am satisfied that the impugned provisions engage an inmate's right to life under s. 7.

2. Security of the Person

[275] The right to security of the person protects both the physical and psychological integrity of the person. It is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering: *Carter* at para. 64. The impact on psychological integrity need not rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety: *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 60.

(a) *Segregation Causes Serious Psychological Suffering*

[276] I have already concluded, based on the evidence of Dr. Grassian and Dr. Haney, that administrative segregation places inmates at significant risk of serious psychological harm. While the risks of such harms are particularly acute in the case of mentally ill inmates, all inmates subject to segregation are at risk of harm to some degree. Further, the health risks increase as the duration of time spent in segregation increases. Many inmates suffer permanent harm as a result of spending time in administrative segregation.

[277] While I have not referred to them specifically, other expert witnesses also gave consistent evidence about the psychological harms of segregation. They include Dr. Ruth Martin, a witness for the plaintiffs, whose evidence is that some of the negative consequences of segregation include onset of mental illness, exacerbation of pre-existing mental illness, and the development or worsening of physical symptoms. In her opinion, the practice should be abolished for inmates with mental illness, observing that an inmate's symptoms of mental health problems in segregation may be mistaken for behavioural problems, thus creating a dissonance

between the best medical practices for the mentally ill and correctional segregation practices. Dr. Martin is a physician and clinical professor at the School of Population and Public Health at the University of British Columbia. She has over 15 years experience as a prison physician at custodial institutions in British Columbia.

[278] Dr. Koopman also expresses the view, based on her experience, that segregation exacerbates symptoms and provokes recurrence of mental disorder. She further states in her expert report that it is accepted in her profession that:

... solitary confinement can be as clinically disturbing as physical torture. The absence of social interaction, lack of privacy, abnormal environmental stimuli and access to natural light, among other factors, can cause normal persons anxiety, depression, anger, cognitive disturbance, perceptual distortion, obsessive thoughts, paranoia and psychosis. These are exacerbated for persons with mental disorders and in ways that cannot often be predicted in advance of segregation.

[279] Moreover, a number of the inmate witnesses recounted experiences with administrative segregation that were consistent with the expert evidence about its harmful psychological effects.

[280] Mr. Blair described feeling “depressed, anxious and sometimes hopeless” during his placements in segregation. He said that he understood the desperation that drove people to take drastic steps such as suicide or caused them to lash out in violence. Mr. Busch’s evidence was to the same effect; that he felt depressed, hopeless and suicidal while in segregation, and that the experience “made [him] feel defeated as a person and like [he] did not want to live anymore.” He felt like his mind was deteriorating.

[281] Ms. Worm described severe feelings of depression, hopelessness and lack of control. She, too, struggled with suicidal thoughts, anxiety and paranoia. Ms. Worm said that while in segregation, she suffered from loss of memory, as well as deficits in attention and focus. She had trouble tracking time and often found her mind drifting. She also suffered from insomnia, which made her exhausted and irritable. Ms. Worm further deposed:

87. I sometimes experienced hallucinations while I was in segregation. I would see moving shadows and think that I could hear my name being called.

I did not usually tell anyone about these incidents because I was afraid that I would be put into the Regional Psychiatric Centre and forced to take medication. The few times I did talk to correctional staff about these sorts of experiences, I felt they were dismissive or that it was something they viewed as “routine” in solitary. They suggested I was exaggerating and that it was no big deal.

88. I also became hypersensitive about being in large spaces, making reintegrating into the general population very challenging. Large spaces overwhelmed me. I was also especially sensitive to loud noises. These symptoms were probably the most severe after I had been on the MP [Management Protocol] for a few months.

[282] The inmate witnesses’ evidence also touched on the lasting effects of their placements in segregation. Mr. Busch deposed as follows:

38. When I was finally released from segregation after 66 days, I believe I was suffering from post-traumatic stress, although this was never officially diagnosed. I went from having almost no human interaction to being right back in the general population. It was completely overwhelming.

39. I was anxious all the time. I found it hard to think clearly. I reacted negatively to everything – other inmates, guards, and day-to-day things that had not bothered me much in the past. I felt like my anger was just barely under the surface all of the time. I struggled to interact with other people. My thoughts would start racing and my heart would pound. Everything felt like it was just too much.

[283] Mr. Brownjohn also referred to his distrust, anger, and anxiety around other people after his release from his first segregation placement. He had had so few personal interactions in segregation that he found release into the intense social environment of general population overwhelming and, as a result, was quick to react negatively when interacting with others. When Mr. Brownjohn was released directly from segregation into the community at the end of a subsequent placement, he found that “going from segregation to the outside world was difficult. I found myself getting anxious in public places, particularly in large crowds of people”.

[284] Ms. Worm says that she continues to feel the impact of segregation to this day. For example, she experiences anxiety when she is alone, has to interact with new people or has to leave the house. The long periods of isolation have created considerable social anxiety that she continues to deal with.

(b) Mental Health Monitoring

[285] In addition to arguing that the evidence does not establish that administrative segregation causes serious psychological suffering – a position that I have rejected – the Government also contends that there are safeguards in place to prevent such harm, primarily in the form of mental health monitoring, meaningful human contact on a daily basis, and efforts to minimize the duration of administrative segregation placements. I have already expressed my disagreement with the Government's position in regards the latter two aspects. I turn now to the evidence with respect to mental health monitoring and why I do not consider that it addresses the harms of administrative segregation.

[286] Much of CSC's policy regarding mental health monitoring is contained in CD 709.

[287] Prior to admission to administrative segregation, a health professional (or other mental health staff under the supervision of a health professional) will review the inmate's case to provide an opinion as to whether there are mental health issues that could preclude the inmate's placement in administrative segregation. This opinion is normally based on a review of the inmate's file. In cases where the inmate is not already known to Mental Health Services and it is determined based on the file review that a more thorough assessment is warranted, follow-up will be undertaken.

[288] Additionally, a health professional, usually a nurse, must visit the inmate at the time of admission or without delay to determine whether there are any health concerns. During this initial visit, the nurse must:

- a) visit the inmate in person;
- b) verbally interact with the inmate to determine physical health care needs and any mental health concerns, including suicide or self-injury;
- c) on the health care record, document all significant interactions that occur between the health professional and the inmate during the visit and share any information that might have an impact on the safety and security of staff, inmates and/or the institution with the appropriate staff; and
- d) refer the inmate to mental health services, if appropriate.

[289] At least once within the first 25 days of admission to segregation and once every 60 days thereafter, a mental health professional must assess and report on the segregated inmate's current mental health status, noting any deterioration of mental health or risk of self-injury or suicide. These assessments include a file review and interview, segregation log review, discussion with correctional officers on duty and perhaps discussion with the inmate's parole officer or other appropriate individuals, including elders.

[290] The mental health professional completing the assessment will ask the inmate in person if he or she wishes to participate in the assessment. This allows for an opportunity to observe the inmate. If the inmate refuses, best efforts are made to identify any behaviour that might be indicative of a problem.

[291] Once admitted to segregation, an inmate must be visited daily by a health professional. In practice, nursing rounds tend to be brief and conducted through the meal slot. For example, Amanda Lepine, an inmate witness, testified that a nurse typically visited her each day to distribute medication through the meal slot but did not converse with her.

[292] Additionally, staff psychologists make periodic rounds of the segregation unit; the evidence suggests about once every week or two weeks. Mr. Busch testified that when he was in the segregation unit at the Saskatchewan Penitentiary, a psychologist would come through about once a week but unless an inmate did something to attract the psychologist's attention, it was unlikely the inmate would speak with them. Occasionally, the psychologist would approach his door and ask Mr. Busch how he was doing. However, there was no privacy, and the other inmates in the unit could hear everything being said. As a result, Mr. Busch's engagement with the psychologists was brief to non-existent.

[293] Mr. Brownjohn's experience at Kent Institution echoes that of Mr. Busch. The psychologist came through his unit every second week but Mr. Brownjohn was wary of speaking with him or her since there was no confidentiality as they were communicating through the meal slot in the cell door. Furthermore, a guard was also

always standing nearby since he or she had to unlock the meal slot for the psychologist.

[294] According to Dr. Rivera, the shortage of psychologists in men's institutions leaves those that are there with heavy caseloads and little ability to deliver more than assessment services and crisis management. For example, in Warkworth Institution in Ontario at the time of her report, there was one psychologist for 581 inmates. The mental health nurse at the Saskatchewan Penitentiary carried a caseload of 250 inmates in addition to providing the mental health awareness training for correctional officers. Dr. Rivera added that women's institutions provide a higher level of mental health services on account of the fewer number of women in segregation.

[295] Another concern expressed by many of the inmate witnesses with respect to their interactions with mental health staff, whether at their cell doors or in more structured psychological assessments, was that they did not trust the staff psychologist and were therefore not forthcoming with their true feelings. Mr. Blair deposed that he found it difficult to open up to a psychologist employed by CSC, and would put on a brave face and deny any depression or emotional issues. Ms. Worm said she felt CSC counsellors and psychologists were there to sign off on her continued segregation rather than to help her, and that anything she told them would be used against her. As a result, she did not trust them and did not open up to them.

[296] Prior to all ISRB hearings, the inmate's parole officer consults with health care professionals to obtain information on any health issues that may impact the inmate's segregation status and how their health needs can be accommodated. The outcome of the consultation will be considered and documented in the ISRB recommendation.

[297] The ISRB has a mental health professional as a permanent member to provide advice and expertise regarding mental health interventions, as required. Their opinion is limited to the impact on the inmate of their placement, or continued placement, in administrative segregation.

[298] In the case of an inmate who has been identified as having functional challenges related to mental health, and where the ISRB has been unable to identify alternatives to administrative segregation, the case will be referred to the Regional Complex Mental Health Committee (“RCMHC”) for support until the inmate is released from segregation. The RCMHC may recommend an external review of the case to assist in determining intervention strategies.

[299] There are five RCMHCs across the country, one per region. These Committees meet monthly to review complex cases, and consult with institutions to offer support and advice in the management and treatment of inmates with complex mental health needs.

[300] At the regional level, the RSRB is directed to consider the inmate’s state of mental health and mental health treatment options in providing its recommendation on the justification of the continued placement to the Regional Deputy Commissioner. The Regional Deputy Commissioner is also required to consider these factors in determining whether segregation continues to be justified. Finally, the National Long-Term Segregation Review Committee must also consider these mental health issues. The Director General, Mental Health sits as a member of this committee.

[301] If, at any time, an inmate is engaging in self-injurious behaviour or requires immediate mental health care, a mental health professional will conduct an immediate assessment or, in cases where it is believed that the inmate is at risk for suicide, the inmate will be placed on high suicide watch by the warden. CD 843 – *Interventions to Preserve Life and Prevent Serious Bodily Harm* – provides the overall policy framework for managing inmates on suicide precautions, such as screening for suicide risk, and suicide observation levels.

[302] CSC staff undergo mandatory training on suicide prevention and self-injurious behaviour in prisons.

[303] While CSC policy mandates considerable mental health monitoring, I am not persuaded that, in practice, the mental health care actually provided is sufficient to

address the risk of psychological harm that arises from segregation. As Dr. Koopman observed, the mere fact that assessments are required and performed does not necessarily mean that they are done adequately. Based on her experience as a forensic psychologist with extensive experience in the federal correctional system, she said:

Too many assessments, as I say in my report, are done in a cursory manner where an individual, a psychologist even, ... , will go to segregation and will speak to the individual, you know, through the cell door. I wouldn't consider that as adequate assessment.

[304] I agree with Dr. Koopman. The evidence referred to above is consistent with Dr. Koopman's experience with psychologists with heavy caseloads engaging in limited interactions with inmates through their cell doors. Dr. Grassian gave similar evidence when the proposition was put to him that daily contact with a medical professional is helpful for an inmate in segregation:

Contact – what does that mean by contact. If contact is rounds through the door it's pretty much always useless, because no one is going to reveal anything through the door to the stranger they are not really sitting down with. So it doesn't amount to much. Or anything really. And sometimes it's actually aversive.

[305] Dr. Martin expressed her professional opinion as to the necessary level of care in her expert report:

23. If an individual is placed in solitary confinement, the individual should be reviewed frequently (at least daily, or more often if needed) by qualified health care professionals, including nursing staff and primary care physician(s), who should review the number of days in segregation, review the individual's action health plan, with goals and objectives, and examine for, and document, the physical and mental psychological impacts of isolation. If the health care practitioner's opinion is that the individual's mental or physical health is in jeopardy by spending time in isolation, then the individual's health should take top priority and the individual should be removed from the isolation cell. In my opinion this ideal is not being actualized, and security tends to trump health within Canadian correctional facilities.

[306] She qualified her evidence to the extent that the notion of CSC health care providers monitoring the length of time an inmate is in segregation is in conflict with the official position of the College of Family Physicians of Canada that solitary confinement should be abolished. However, the core of her evidence is what, in my

view, ought to be an uncontroversial proposition that there should be *meaningful* assessment of the mental health of segregated inmates by medical staff on a regular basis. I am not satisfied that occurs. Based on the evidence I have reviewed, I reject the Government's argument that there are adequate safeguards in place to prevent psychological harm to segregated inmates.

(c) Segregation Causes Physical Harm

[307] Although I will not dwell on it any length, the evidence establishes that administrative segregation also causes physical harm to some inmates.

[308] In brief, it is the evidence of Dr. Brie Williams, an American physician and professor with experience in geriatrics and prison healthcare, that older inmates (which she defines as in their 50s), with chronic medical conditions, and/or with physical disabilities are at high risk of immediate and future harm from administrative segregation as it is practised in federal penitentiaries. In particular, she opines, the denial of access to exercise spaces that allow sustained walking, and/or the housing of inmates in conditions that contribute to social isolation or sensory deprivation, poses a substantial risk of serious harm to older inmates and those with chronic medical conditions and/or physical disabilities.

[309] According to data tendered by the Government, of all federal inmates in custody on April 9, 2017, 3,492 (out of a total of 14,149) were aged 50 and above. The risk of physical harm arising from placement in administrative segregation therefore potentially affects a substantial number of older inmates.

[310] For all the foregoing reasons, I conclude that the impugned provisions engage an inmate's right to security of the person under s. 7.

B. Principles of Fundamental Justice

[311] The principles of fundamental justice set out the minimum constitutional requirements that a law that trenches on a person's life, liberty or security of the person must meet: *Bedford* at para. 94. While the Supreme Court has recognized a number of principles of fundamental justice over the years, the three that have

emerged as central are that laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad or have consequences that are grossly disproportionate to their purpose.

[312] Principles of fundamental justice also include a procedural component, guaranteeing procedural fairness having regard to the circumstances and consequences of the law's intrusion on life, liberty or security of the person: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 19.

[313] The plaintiffs rely on each of the foregoing principles, submitting that the impugned provisions are arbitrary, overbroad and grossly disproportionate to their objective, and that they also deny inmates subject to their application procedural fairness.

[314] The plaintiffs claim, as well, that the Mandela Rules are *jus cogens*, a peremptory norm of customary international law, and, as such, are themselves a principle of fundamental justice, citing *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1. They say that since the impugned provisions permit solitary confinement as defined by the Mandela Rules, they are necessarily contrary to s. 7 of the *Charter*. While an interesting argument, I prefer to decide this case under the more established principles of fundamental justice, and decline to address this aspect of the plaintiffs' submissions further.

[315] The Government submits that the impugned provisions are in accordance with the principles of fundamental justice. They are not arbitrary, overbroad or grossly disproportionate, nor are they procedurally unfair.

1. Legislative Objective

[316] Arbitrariness, overbreadth and gross disproportionality each involves a comparison between the rights infringement caused by the impugned law and the objective of the law: *Bedford* at para. 123. An appropriate statement of the law's objective is therefore critical to a proper analysis of these principles.

[317] The objective of a law is identified by an analysis of the law in its full context. In general, the articulation of the objective should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality, and capture the main thrust of the law in precise and succinct terms: *R. v. Moriarty*, 2015 SCC 55 at para. 26. The appropriate level of generality resides between the statement of an “animating social value” – which is too general – and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from context – which risks being too specific.

[318] The parties in this case are generally agreed that the objective of administrative segregation is as set out in s. 31(1) of the *CCRA*: “[t]he 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.” The plaintiffs, however, go further and submit that this objective must be informed by the context of the *CCRA* as a whole and the broader purposes of the correctional system, which, according to s. 3 of the *CCRA*, are contributing to

3. ...the maintenance of a just, peaceful and safe society by
 - (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and
 - (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

[319] In my view, s. 31(1) of the *CCRA* is explicit about the legislative objective in question: it is to maintain the security of the penitentiary and the safety of the people within it. While I consider the latter part – “by not allowing an inmate to associate with other inmates” – to be the means by which that objective is to be achieved, I find that the objective of the impugned provisions is as otherwise stated in the section.

2. Arbitrariness and Overbreadth

[320] The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford* at para. 111. For

example, in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, legislative provisions prohibiting private health insurance were held to be unrelated to the objective of protecting the public health system, and therefore arbitrary.

[321] The standard for arbitrariness is not easily met. There must be no connection, in whole or in part, between the effects of the law and its purpose: *Bedford* at para. 119. As for the nature of the lack of connection, the Court said the following:

[119] As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore “inconsistent” with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore unnecessary”. Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[Emphasis in original.]

[322] On the other hand, overbreadth is concerned with the situation where there is no rational connection between the object of the law and some, but not all, of its impacts. In this sense, the law is arbitrary in part. Overbreadth allows courts to recognize that the law is rational in some cases but that it overreaches in its effects in others. The question is not whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature: *Carter* at para. 85.

[323] The plaintiffs submit that the impugned provisions are both arbitrary and overbroad. They say that the provisions undermine the safety of segregated inmates by negatively impacting their psychological and physiological well-being. They also impede program delivery, and generate emotions of bitterness and resentment that erode respect for correctional authority and lawful society. As a consequence, it is more difficult for segregated inmates to adjust to life in general population, which, in turn, undermines the security of the institution and the safety of staff and other inmates. The plaintiffs therefore maintain that the impugned provisions are arbitrary.

[324] The plaintiffs further submit that should the Court find that in some instances a brief period of administrative segregation maintains safety and security, in other instances it does not and, therefore, the provisions are overbroad. They are also overbroad insofar as they authorize the complete isolation of a segregated inmate in circumstances where there are other compatible inmates with whom the inmate can associate without risking the security or safety of the institution and those within it.

[325] I do not agree that the impugned provisions are arbitrary. There is clearly a rational connection between the object of maintaining institutional security and personal safety, and the segregation of inmates in the circumstances identified in s. 31(3) of the *CCRA*. To reiterate, those circumstances are threefold: (a) the inmate's actions or intended actions jeopardize the security of the institution or the safety of people within it; (b) to prevent interference with an investigation that could lead to a criminal charge or a serious disciplinary offence; and (c) the inmate's own safety is at risk. There are certainly legitimate reasons to segregate inmates, and in those appropriate cases, segregation is a valid means of promoting safety and security.

[326] However, I find that the impugned provisions are overbroad in two respects. First, while temporary segregation is rationally connected to the objective of security and safety, prolonged segregation, which the provisions also permit, inflicts harm on inmates and ultimately undermines institutional security. Second, the provisions define segregation overly restrictively and authorize solitary confinement in circumstances where some lesser form of restriction would achieve the objective of the provisions. I will address each of my concerns in further detail.

[327] Prolonged segregation is both unnecessary for and, indeed, even inconsistent with, the objective of maintaining institutional security and personal safety. While the separation of inmates can be justified for the limited time it legitimately takes to make alternative arrangements to ensure inmate safety or enable an investigation, indefinite and prolonged segregation with its attendant harms is simply not necessary to enable such steps to be taken. To my mind, there is no rational connection between, for example, the legitimate need for CSC to have the authority

to separate inmates who have a conflict with one another and the authority to keep one or both in segregation indefinitely for periods of months or even years.

[328] Not only that, prolonged segregation undermines the very security and safety the provisions are meant to promote. Based on the evidence, I find that segregation breaks down inmates' ability to interact with other human beings; deprives them of rehabilitative and educational group programming; risks mentally healthy inmates descending into mental illness; and exacerbates symptoms for those with pre-existing mental illness. I accept, as well, the evidence of Professor Jackson, based on his experience over the past 40 years, that the broad correctional discretion that can lead to extended placements in 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 inmates will return".

[329] Even CSC itself now accepts that "long periods in administrative segregation is generally not conducive to healthy living or meeting the goals of the correctional planning process": *Response to the Coroner's Inquest touching the Death of Ashley Smith* at 3.2.

[330] I have no hesitation in concluding that rather than prepare inmates for their return to the general population, prolonged placements in segregation have the opposite effect of making them more dangerous both within the institutions' walls and in the community outside.

[331] My second concern with overbreadth relates to the restrictive form of segregation imposed by the impugned provisions. As Professor Coyle explains, "segregation" is a generic term that encompasses a range of circumstances. In its widest sense, it implies that some form of restriction is placed on the degree of association that an inmate may have with other inmates. For example, an inmate may be kept in a normal cell but be limited as to which other inmates he or she can interact with or the activities in which he or she can participate. Segregation can also

be very restrictive and amount to isolation wherein the inmate is confined to a special cell with no association with any other inmates.

[332] Section 31(1) of the *CCRA* defines administrative segregation as “not allowing an inmate to associate with other inmates”, thus placing it at the restrictive end of the spectrum. The provision, on its face, mandates isolation.

[333] It is interesting to compare s. 31(1) with its previous iteration, prior to the 2012 amendment of the section. Section 31 formerly read:

- 31. (1) The purpose of administrative segregation is to keep an inmate from associating with the general inmate population.
- (2) Where an inmate is in administrative segregation in a penitentiary, the Service shall endeavour to return the inmate to the general inmate population, either of that penitentiary or of another penitentiary, at the earliest appropriate time.
- (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head believes on reasonable grounds
 - (a) that
 - (i) 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
 - (ii) the continued presence of the inmate in the general population would jeopardize the security of the penitentiary or the safety of any person,
 - (b) that the continued presence of the inmate in the general inmate population 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) that the continued presence of the inmate in the general inmate population would jeopardize the inmate’s own safety,and the institutional head is satisfied that there is no reasonable alternative to administrative segregation.

[334] Administrative segregation was thus formerly segregation from the general population as compared to the present segregation of the individual. As formerly defined, administrative segregation could accommodate subpopulations or the

segregated inmate otherwise associating with compatible inmates not in the general inmate population.

[335] Section 31 in its present form, logically interpreted, precludes the possibility of inmates being safely managed in these less isolating situations. Take s. 31(3)(c) for example: allowing the inmate to associate with other inmates would jeopardize the inmate's safety. If an inmate's safety is in jeopardy at the hands of particular inmates, it would be logical – and less impairing – to segregate the inmate from those particular inmates, not from all inmates.

[336] Accordingly, I find that to the extent that the impugned provisions authorize the isolation of inmates in circumstances where that is not necessary to achieve institutional and personal safety and security it is overbroad.

3. Gross Disproportionality

[337] The principle against gross disproportionality is infringed where the impact of a law's effects on an individual's life, liberty or security of the person is so grossly disproportionate to the law's purpose that it cannot be rationally supported: *Bedford* at para. 120. The principle applies only in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. The Court in *Bedford* offered the following example:

[120] ...This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[338] Gross disproportionality does not consider the beneficial effects of the law for society; rather, it balances the negative effect on the individual against the purpose of the law, not against the societal benefit that might flow from the law: *Bedford* at para. 121.

[339] I do not regard it as necessary for me to consider gross disproportionality given my conclusion on overbreadth.

C. Procedural Fairness

1. The Law

[340] The principles of fundamental justice guaranteed by s. 7 of the *Charter* include a guarantee of procedural fairness, having regard for the circumstances and consequences of the particular intrusion on life, liberty or security of the person: *Charkaoui* at para. 19. The values underlying the duty relate to the principle that the individual affected should have the opportunity to present his or her case fully and fairly, and have decisions affecting their rights, interests or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decision: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28.

[341] The duty of procedural fairness applies to reviews of administrative segregation placements: *Cardinal* at para. 14.

[342] Madam Justice Veit went further in *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para. 68, stating that given the severity of a decision to place an inmate in administrative segregation, “the appropriate level of procedural fairness required is, therefore, one which mirrors the safeguards contained in the criminal trial process as attenuated by the lower level of overall jeopardy”.

[343] The particular feature of procedural fairness at issue here is the right to an impartial decision-maker. It is well-established that the degree of independence and impartiality required of a tribunal will vary according to its function: *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at para. 21. The closer a tribunal is to the judicial or adjudicative end of the spectrum, the more stringent will be the requirements of procedural fairness.

[344] These principles from *Bell* were cited in *Currie v. Alberta (Edmonton Remand Centre)*, 2006 ABQB 858, where Mr. Justice Marceau characterized an appearance before a disciplinary tribunal in a provincial remand facility as more closely resembling a criminal trial than the implementation of government policy by, for

instance, a liquor commission or taxing authority. He ultimately concluded that independent adjudication was constitutionally required in the context of disciplinary segregation hearings in provincial facilities.

2. Positions of the Parties

[345] The plaintiffs' position is captured by the Latin maxim *nemo iudex in causa sua debet esse* – no one should be a judge in his own cause. They submit that the existing segregation review regime places the warden in the untenable position of being both prosecutor and judge, thus offending a core principle of procedural fairness guaranteed by s. 7 of the *Charter*. The plaintiffs not only challenge the constitutionality of the impugned provisions but urge the Court to declare that a procedurally fair process requires independent review of placement decisions beginning from the five-day review.

[346] The Government responds that the plaintiffs have not established that SRB reviews are procedurally unfair as a result of bias or otherwise. It further says that not only is external oversight not required to ensure procedural fairness but that it could jeopardize the security of correctional institutions. Segregation placement and review decisions are complex and can only be safely reviewed by individuals with detailed knowledge and expertise with respect to the safety and security concerns at issue, including the culture of the particular institution and the personalities and behaviours of the inmates involved.

3. Discussion

[347] Section 33 of the *CCRA* reads:

33. (1) Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall
 - (a) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate's case;
 - (b) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate's case; and

- (c) recommend to the institutional head, after the hearing mentioned in paragraph (a) and after each hearing mentioned in paragraph (b), whether or not the inmate should be released from administrative segregation.

[348] The *Regulations* and CD 709 refine the review process. Of relevance here is the fact that the deputy warden chairs the five-day review and the warden chairs the 30-day and all subsequent reviews.

[349] Thus, the warden has decision-making authority with respect to placements to and release from administrative segregation. He or she additionally ensures that an ISRB is in place within the institution, designates its members, and chairs the 30-day and subsequent reviews.

[350] Section 33 of the *CCRA* states simply that there will be “a hearing to review the inmate’s case”. It does not specify the purpose of the hearing; that is, whether it is to review the initial placement into administrative segregation or the continuing placement. However, since s. 33(1)(c) indicates that the ISRB’s recommendation to the warden is with respect to “whether or not the inmate should be released from administrative segregation”, it is apparent that the Board’s focus is on the inmate’s circumstances at the time of review. This was confirmed by Mr. Somers, who testified that the purpose of the review was to determine whether the inmate’s continuing placement in administrative segregation was justified. Were it otherwise, he observed, “you’re asking a board that’s subordinate to the warden to make a recommendation or to make a finding that his or her decision was unjustified.”

[351] The notion of a review in this context suggests an objective consideration of the facts measured against the statutory criteria for segregation, and a determination as to whether segregation remains justifiable in light of reasonable alternatives. Leaving aside whether this is what functionally occurs at the five-day review, the impartiality of any such assessment is undercut by the fact that the ISRB only makes a recommendation to the warden as to whether the inmate should be released. The warden is not bound to accept the recommendation, and thus the ultimate outcome

of the review is left in the hands of the individual who made the initial placement decision.

[352] At the 30-day and subsequent ISRB reviews, the warden chairs the ISRB. The new CD 709 explains at para. 53 that “[t]he role of the Chairperson will be to facilitate the recommendation and ensure that procedural safeguards, policy and the law are respected”. However, in apparent recognition of the conflict in the warden facilitating the Board’s recommendation to him- or herself as warden, para. 55 of the CD provides:

55. During the 30-day review and all subsequent reviews, the Institutional Head is the Chairperson and decision maker and does not participate in the recommendation of the ISRB. In these cases, once the ISRB is prepared to proceed, the designated person will present the Board’s recommendation to the Institutional Head, including any dissenting views.

[353] Nevertheless, the same concern that the warden, who made the initial placement decision, retains authority to disregard the Board’s recommendation, remains. The warden effectively sits in judgment of his or her own decision.

[354] The situation is not unlike what the Supreme Court found wanting in *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145. Sections 10(1) and 10(3) of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 [repealed], authorized the Director of the Combines Investigation Branch to enter any premises to search for evidence of a breach of the *Act* with the approval of a member of the Restrictive Trade Practices Commission. The Court concluded that the numerous investigatory functions invested in the Commission ill-accommodated with the neutrality and detachment necessary to assess whether the proposed search appropriately balanced the interests of the individual and the state. Citing the maxim *nemo iudex in causa*, the Court held that a member of the Commission simply could not be the impartial arbiter necessary to grant an authorization.

[355] Returning to the present case, the existing statutory regime permits the warden to quite literally be the judge in his or her own cause with respect to placement decisions. At a minimum, it creates a reasonable apprehension of bias, if not actual bias, in favour of continued segregation. Because of the serious risk of

harm that arises from placements in administrative segregation, I conclude that this lack of impartiality in the review process is contrary to the principle of procedural fairness guaranteed by s. 7 of the *Charter*. Whether procedural fairness necessitates that an independent arbiter adjudicate any such review is the question I turn to next.

D. External Oversight

1. Background

[356] As noted earlier in the review of the history of administrative segregation, there have been many calls over the years for external review of placement decisions.

[357] An early proponent of independent adjudication was Professor Jackson, who began advocating for the appointment of independent adjudicators in the early 1970s based on his study of the disciplinary process at Matsqui Institution. In the mid-1970s, the MacGuigan Report recommended that independent chairs preside over disciplinary hearings but it stopped short of endorsing the same for the segregation review boards it was recommending be established, suggesting that the efficacy of the new boards first be tested before being found wanting. Professor Jackson's subsequent research concluded that despite the enhanced procedural protections, abuse of discretionary power continued in segregation decisions partly due to the absence of a rigorous and independent process of review.

[358] Even after the *CCRA* came into force in 1992, Professor Jackson's next study of prison decision-making revealed that the new legislation had achieved little in limiting the abuses of segregation. Among the shortcomings in the segregation review process he observed were the lack of reference to the legislative criteria for segregation, and of any critical line of inquiry directed to whether the information available to the SRB established legal justification for segregation or whether there were reasonable alternatives. In addition, there was no compliance with some of the procedural requirements, such as that the inmate receive any documentation to be relied upon at the five-day hearing three days in advance.

[359] Professor Jackson was, and remains, of the view that locating the decision-making power in an independent adjudicator would enable more rigorous analysis than the present system, stating in his expert report that:

Segregation Review Board discussions were often unfocussed and shapeless, particularly in cases of long-term segregation, where the very existence of a lengthy segregation almost fatalistically provided evidence of its future inevitability. In many cases the decision to maintain segregation emerged not as a decision but as a *fait accompli*. In other cases, prisoners were left with vague promises that the institution would “try to do something” – to overcome the resistance of other institutions to accepting a prisoner; to ensure that a progress summary required for a transfer application was completed before the next review; to see that the institutional security preventive security officer visited the prisoner to try to resolve problems of incompatibility. In these and myriad other situations, the prisoner was, in fact, “sloughed off”.

[360] Justice Arbour went a step further in her 1996 report, recommending *judicial* supervision of administrative segregation decisions. She found that the management of administrative segregation was inconsistent with the *Charter* culture that permeated other branches of the criminal justice system. She further concluded that the segregation review process did not operate in accordance with principles of fundamental justice, and that there should be judicial input into the decision to confine someone to “a prison within a prison”: *Martineau* at 622. Justice Arbour went on to say the following at p. 105 of her report:

... I see no alternative to the current overuse of prolonged segregation but to recommend it be placed under the control and supervision of the courts. Failing a willingness to put segregation under judicial supervision, I would recommend that segregation decisions made at an institutional level be subject to confirmation within five days by an independent adjudicator. Such a person should be a lawyer, and he or she should be required to give reasons for a decision to maintain segregation. Segregation reviews should be conducted every 30 days, before a different adjudicator, who should also be a lawyer. It should be open to an inmate to challenge the legality or fairness of his segregation by applying to a court for a variation of sentence in accordance with the principle set out earlier.

[361] Among the problems Justice Arbour specifically identified with respect to the segregation review process at the Kingston Prison for Women were that irrelevant considerations (such as outstanding criminal charges) were improperly relied upon as the basis for ongoing segregation, and that the regional reviews were heavily

influenced by the judgment of the institution, as reflected in the record of the segregation review.

[362] In response to these (and other) findings and recommendations, CSC appointed the Task Force on Administrative Segregation in June 1996 to undertake a comprehensive review of the use of segregation across all Canadian penitentiaries. One component of its mandate was to review Justice Arbour's recommendations for independent oversight of segregation decisions, and to make recommendations for improving the effectiveness of the segregation review process.

[363] Members of the Task Force were drawn from both within and outside CSC, and a clear division soon emerged between the two groups regarding the need for independent adjudication. CSC members argued vigorously that the necessary reforms could be achieved through "enhancing" the existing internal model of administrative decision-making. Their arguments were rooted in concerns for institutional security and safety, as well the corrosive effect on institutional morale if authority for segregation decisions was transferred to external adjudicators.

[364] The competing arguments from non-CSC members focussed on the failures of CSC's previous attempts at internal reform (most recently documented in Justice Arbour's report), and principles of fairness. Legislative criteria for a decision that affects the institutional liberty of an inmate and consigns him to "a prison within a prison" should be applied free of institutional bias with an objective weighing of the competing interests of inmates and prison administrators. Principles of fairness were the foundation for the introduction of independent adjudication of serious disciplinary offences, and were no less compelling in the case of administrative segregation.

[365] The consensus ultimately reached was that the Task Force would recommend reform of the segregation process along parallel paths: enhancement of the internal review process and an experiment with external adjudication within the existing framework of the law under which the warden had ultimate legal authority to make segregation decisions.

[366] The Task Force report was filed with the Commissioner of Corrections in March 1997. Later that year, the Commissioner received the report of the Working Group on Human Rights, which had also been established in response to Justice Arbour's report. The Working Group specifically identified and supported the recommendation of the Task Force that there be an experiment in independent adjudication.

[367] Despite the accumulated weight of support in the reports of Justice Arbour, the Task Force on Segregation and the Working Group on Human Rights, the Commissioner concluded there would be no experiment with independent adjudication. Instead, CSC would proceed with an enhanced internal review initiative that comprised the provision of further training to managers and staff on the proper use of segregation, development of more alternatives to the use of segregation, and the appointment of a senior staff member in each region to monitor the segregation review process and report progress to the regional deputy commissioner.

[368] At the time the *CCRA* had been enacted in 1992, a provision was included requiring a mandatory five-year review of the new legislation by Parliament. The Sub-Committee of the House of Commons Committee on Justice and Human Rights was tasked with this duty and conducted a thorough review, visiting 17 penitentiaries and holding public hearings across the country. It tabled its report, *A Work in Progress*, in May 2000.

[369] The report devoted a chapter to the issue of "Fair and Equitable Decision Making" in which it specifically addressed and accepted the case for independent adjudication of administrative segregation. While commending CSC for taking steps to enhance and monitor the segregation review process, the Sub-Committee expressed the view that these initiatives were "a complement to, and not a replacement for, the independent adjudication of the actions affecting the residual rights and freedoms of inmates". It further expressed the view that:

5.37 Administrative segregation removes inmates from normal daily contact with other offenders. It has the effect of making their access to programs, employment, services and recreation more difficult than it is for inmates in the general prison population. It has a dramatic impact on their

residual rights. It makes the conditions of incarceration more stringent than they are for other inmates.

5.38 For these reasons, the Sub-committee believes there is a need for the insertion of an independent decision-maker who will take into account all factors related to administrative segregation cases. It is not necessary for all segregation decisions to be made by this independent adjudicator. The Sub-committee believes that the Correctional Service should continue its efforts to develop alternatives to administrative segregation and find ways to safely reintegrate long-term administratively segregated inmates.

5.39 The Sub-committee believes that the process in place for the review by the warden of segregation cases after one working day and by the segregation review board after five working days should remain in place. The Sub-committee believes, however, there should be independent adjudication of administrative segregation cases 30 calendar days after the initial segregation decision. It may be necessary to distinguish between voluntary and involuntary cases and allow for independent adjudication in the former type of case 60 calendar days after the initial placement. Regular independent adjudication would occur subsequently every 30 or 60 days, depending on the nature of the case.

[370] CSC's response was to propose a pilot not for the model of independent adjudication recommended by the Sub-Committee but for an enhanced segregation review process that included external membership. Instead of being chaired by a unit manager, these pilot review boards were co-chaired by the deputy warden and a community member who shared responsibility for making recommendations to the warden on placement, maintenance and release. An external evaluation of the pilot found that while the participation of an external member resulted in a more disciplined and open hearing process, the recommendations and decisions from the pilot review boards were generally consistent with those taken in the existing review process.

[371] In his expert report, Professor Jackson identified several shortcomings in the pilot model that limit its usefulness in drawing definitive conclusions on the value of independent adjudication. These include the scale and duration of the project (89 case reviews over five months at five institutions), and the fact that a different set of cases were selected for each monthly review, preventing the opportunity of seeing whether re-integration plans agreed to at a review were actually implemented.

[372] In December 2003, the Canadian Human Rights Commission issued a report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* that presented an extensive review of the treatment of women inmates in the federal correctional system and made a number of recommendations. With respect to administrative segregation, the report stated the following:

In her report, Justice Arbour made a series of recommendations relating to judicial supervision of segregation or review of segregation decisions by an independent adjudicator. These were echoed by the Correctional Service's own Task Force on Administrative Segregation and, more recently by the Office of the Correctional Investigator. Unfortunately, the Correctional Service has not adopted these recommendations, nor does it appear that reasonable efforts have been made to develop approaches to segregation or alternatives to it that reflect the needs and characteristics of women offenders.

Recommendation No. 6

It is recommended that:

(a) the Correctional Service of Canada implement independent adjudication for decisions related to involuntary segregation at all of its regional facilities for women. The impact of independent adjudication on the fairness and effectiveness of decision making should be assessed by an independent external evaluator after two years. ...

[373] In response to this renewed call for independent adjudication, CSC took the position that its hands were tied by the existing legal framework, and that a decision as to whether to re-examine the issue of independent adjudication would need to be considered by the Department of Public Safety and Emergency Preparedness Canada ("PSEPC"). In 2004, PSEPC undertook its own evaluation and again found that CSC's repeated attempts to achieve compliance with the rule of law and fair decision making through operational enhancement did not yield sufficient, sustained or desired results. PSEPC recommended that CSC implement and test models of independent adjudication.

[374] Following another round of consultations, CSC filed its action plan in response to the Human Rights Commission in February 2005. With respect to the recommendation regarding independent adjudication, it responded, in part, with the following:

CSC shares the concern of long stays and possible overuse but situates this within operational realities which must be addressed first:

- Outdated infrastructure
- Lack of alternatives
- Difficulties with transfers
- Management of long-term cases, including those who refuse to leave segregation

Members discussed the issues and concluded that the proposed PSEPC model for independent adjudication does not respond to the CSC's concerns and, based on experience with the enhanced review pilot, would not resolve the concerns identified by external bodies. Members decided to generate alternate models while continuing to focus attention on the operation context concerns.

At present, CSC will continue with internal measures to address segregation concerns. In the past, as a means to address some of the issues raised in these reviews, while maintaining its accountability for segregation placements, CSC has tested a number of initiatives, such as an "enhanced" internal review model, enhanced segregation review pilots and a revised regional review process. Out of these initiatives have come lessons learned and best practices which are being used as a basis to improve performance.

[375] For at least the past 10 years, the OCI has been critical of CSC for failing to adopt some form of independent adjudication. For example, in the *Annual Report of the Office of the Correctional Investigator 2004-2005* [2004-2005 Annual Report], the OCI reviewed the history of calls for independent adjudication, beginning with Justice Arbour's report in 1996 and ending with the PSEPC's 2004 recommendation that CSC implement a model of independent adjudication. It recommended that the CSC "immediately adopt the independent adjudication model for administrative segregation proposed by the Department of Public Safety and Emergency Preparedness Canada": *2004-2005 Annual Report* at 24.

[376] In its report into Ms. Smith's death, *A Preventable Death*, the OCI identified numerous ways in which her continuous placement in administrative segregation was in violation of relevant law and policy. It also identified how the involvement of an independent adjudicator could have led to a different outcome for Ms. Smith (at para. 93):

93. 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. An independent adjudicator – as recommended by Justice Arbour – would have been able to undertake a detailed review of Ms. Smith's case and could have caused the Correctional Service to rigorously examine alternatives to simply placing Ms. Smith in increasingly restrictive conditions of confinement. At that point, if it had been determined that no immediate and/or appropriate alternatives were available for Ms. Smith, the independent adjudicator could have caused the Correctional Service to expeditiously develop or seek out more suitable, safe and humane options for this young woman.

[377] Included in its recommendations was the immediate implementation of independent adjudication of segregation placements of inmates with mental health concerns, to be completed within 30 days of the placement and the adjudicator's decision to be forwarded to the regional deputy commissioner.

[378] More recently in its *2014-2015 Annual Report*, the OCI recognized that CSC had, over the years, accepted some of its recommendations regarding administrative policy changes to the segregation framework but had "consistently and repeatedly rejected any call to strengthen oversight and accountability deficiencies".

[379] Rule 45 of the Mandela Rules states that solitary confinement shall be subject to independent review.

[380] CSC has to this day rejected independent adjudication.

[381] There is clearly much overlap in the reasons for independent adjudication advanced by these knowledgeable parties over the years but some themes emerge. Independent adjudication would:

- a) ensure an objective consideration of the facts measured against the legislative criteria for segregation free of institutional pressures and bias;
- b) cause CSC to more rigorously examine alternatives to segregation;
- c) increase the level of accountability of the institution and provide inmates with an opportunity to present their case to an individual not affiliated with the institution, thus increasing the perception of fairness;
- d) ensure compliance with time limits and other legislative and policy requirements of administrative segregation;

- e) avoid the situation whereby all placement reviews are conducted by individuals who are part of the culture and hierarchy of the CSC, and therefore deferential to other decision-makers; and
- f) address the failure of repeated attempts at internal reform to ensure procedural fairness

[382] It is Professor Jackson's opinion, based on his decades of research and experience, that independent adjudication is necessary to ensure both compliance with the procedural and substantive legal provisions of the *CCRA*, the *Regulations* and *CDs*, and the fair balancing of the rights and interests of inmates with the exigencies of institutional administration. In his expert report, he states:

The principal lesson to be drawn from my review of the history of segregation over the last 40 years is that neither fairness nor the necessary balance of interests and rights can be achieved without the importation of a system of independent adjudication. That review has also shown that providing correctional managers with assessment tools and procedural guides for how to conduct a segregation review in non-legally binding policy documents (particularly when it includes boilerplate language) has not translated into changes in operational practice.

2. Discussion

[383] As discussed earlier, a law that deprives an applicant of the required level of procedural protection will be unconstitutional. Particularly where, as here, the decision in question engages fundamental rights to life, liberty and security of the person, a high level of procedural fairness is demanded.

[384] CSC has long accepted independent adjudication of disciplinary hearings. In *Currie*, Marceau J. held that procedural fairness required the same in provincial institutions.

[385] The question then becomes whether the features that warrant independent adjudication in regards to disciplinary decisions also arise with respect to administrative segregation. A SRB hearing does not necessarily involve a dispute in the same way as disciplinary hearings. Nevertheless, in many cases there is a conflict between the institution's view of the facts and that of the inmate. Certainly many involuntary placements are adversarial in nature, particularly when the

allegation is that the inmate engaged in conduct that threatened another inmate or the security of the institution. Take, for example, the evidence of Mr. Brownjohn.

[386] Mr. Brownjohn was involuntarily transferred from Mission Institution to Kent Institution for allegedly assaulting a guard. He was immediately placed in administrative segregation pursuant to s. 31(3)(a) on the grounds that his behaviour posed a significant risk to the security of the institution. Mr. Brownjohn testified that the guard had instigated the altercation. Multiple other guards had then proceeded to assault Mr. Brownjohn after first turning off the emergency camera. Mr. Brownjohn remained in administrative segregation for 25 days. He subsequently had a criminal trial in relation to the incident and was acquitted.

[387] Mr. Brownjohn's evidence is consistent with Professor Jackson's experience observing many hundreds of SRB reviews that limited weight is given to the inmate's account, and the institution's information is taken to be presumptively reliable. While this dynamic is hardly surprising and is not unique to CSC, several features of CSC's organizational culture exacerbate the problem.

[388] One is deference on the part of senior administrators to their frontline staff. Mr. Clark testified that it was his experience with senior administrators that they would generally defer to what those to whom they delegated tasks thought best:

So if I said look, this guy has been in there three months but I'm still trying to get him to Warkworth – that's a prison – and I'm waiting on an answer. There is a waiting list so he's not going today or tomorrow, but it's the best thing we've got for him. Other than that, it's going to be out of province. It means he has to go in a regional transfer which will take longer. They say sure, Rob, sign it.

[389] Similar deference exists at the regional and national levels in relation to wardens and correctional managers who must deal with the operational realities of their institutions.

[390] In my view, the concerns regarding institutional bias that have driven the requirement for independent adjudication in disciplinary hearings also exist in

administrative segregation review hearings where credibility of information must be weighed and competing interests balanced.

[391] There is, as well, a feature specific to administrative segregation that further demands independent adjudication: the open-ended nature of placements. In circumstances where an inmate remains in segregation until the warden determines he or she should be released, it is especially important that the statutory criteria for segregation be rigorously applied. An independent adjudicator is best placed to ensure that robust inquiry occurs at segregation reviews and that institutional staff and administrators make the case for segregation by demonstrating that there are no reasonable alternatives.

[392] Mr. Clark offered the following candid view of the dynamics of the current review process:

When a prisoner is placed in solitary confinement, within 24 hours the institutional head or his delegate must sign affirming the placement that it is lawful, necessary and that there are no other options available. Within five days the solitary confinement review board must meet with the prisoner face to face and then make a recommendation to the institutional head or his or her delegate to sign confirming the placement is justified and ongoing. After that, the prisoner is seen every 30 days.

These on the surface sound like safeguards that would prevent the system over utilizing solitary confinement. It sounds on the surface as though there are enough safeguards to prevent someone from languishing in that particular environment. But the truth is, is that all of these things are basically amounting to a rubber stamp. And I'll explain that.

Because when a person is placed in solitary confinement, if the person has safety concerns within that prison it's very quickly established that it's not possible for them to return to the main population. They become what is called a protective custody prisoner or a PC.

The other prisoners in general population have a tremendous disdain for PC prisoners, and many will actively seek them out to assault them or victimize them if they know someone at some point has been at some point in protective custody.

So what happens is even though there are all these meetings and forms being signed, the underlying truth is that until we find a new prison for this person to be admitted to, and until everybody has signed off on it and we have a warrant and a date of movement, they will remain in solitary confinement until that happens. And generally it can take months.

[393] The experience of Mr. Busch is consistent with Mr. Clark's assessment.

[394] Mr. Busch had a 66-day placement in administrative segregation at the Saskatchewan Penitentiary between October 23 and December 22, 2009 under s. 31(3)(a). Mr. Busch deposed that he had misinterpreted a guard's behaviour towards him as flirtation and passed her an inappropriate note. Around the same time, he had a verbal altercation with a psychologist who wished to prescribe him psychotropic medication he did not wish to take.

[395] During this time, Mr. Busch had four ISRB and one RSRB hearings. He described his experience with the institutional reviews as follows:

33. During my 66 days in segregation, I had four institutional segregation reviews. The reviews usually lasted no more than 20 minutes. At no time in any of these reviews was there any credible explanation of why I remained a "threat" to the institution, or why it was deemed necessary to maintain me in segregation.

34. While I attended each of my segregation reviews, it felt pretty pointless. I felt like the deck was stacked against me, and that the reviews were a farce. In my experience, once the institution has made up its mind, there is nothing you can say that will change it. Fighting seemed like a waste of time. I did raise access to my music collection a number of times during my segregation reviews, but it took me making a formal grievance before my albums were returned to me.

[396] It is of some note that Mr. Somers testified that he did not have a problem with independent adjudication as a concept, though he had difficulty envisioning who an appropriate adjudicator would be since this person would have to understand the dynamics of the facility and the specifics of the particular case.

[397] It is no answer to the deficiencies in the current scheme to point to grievance procedures and *habeas corpus* applications as avenues of recourse by which inmates can challenge their placements. As Ms. Lepine's experience grieving her placement in administrative segregation demonstrates, the grievance process is not timely. She filed her grievance in late January or early February 2017. Despite the file being marked high priority, it was not until May 26, 2017 that her grievance was upheld. As for *habeas corpus* applications, Professor Jackson testified that they are difficult for inmates to pursue given the challenges of finding counsel prepared to bring the application and the funding it requires. Moreover, in his experience, CSC will often release the inmate from segregation just before the hearing, rendering the

application moot and preventing any systemic resolution of the issue. In my view, in the absence of a procedurally fair review process, it is simply unreasonable to place the onus on segregated inmates to challenge their segregation placements through these mechanisms.

[398] A case study illustrating both the problem of fairness in decision-making by wardens and the serious limitations on the review process as practiced by CSC involved Mr. Blair, one of the inmate witnesses.

[399] Mr. Blair was placed in administrative segregation while at Joyceville Institution for 79 days from January 22 to April 11, 2014. Following a family visit with his girlfriend, a drug detection dog gave an indication that Mr. Blair had drugs on his person, though a subsequent strip search did not reveal any. Mr. Pyke, the warden of Joyceville at the time, testified that there were reasonable grounds to believe that Mr. Blair had ingested drugs or was carrying drugs in a body cavity. As a result, he was placed in a dry cell, a cell with no toilet or running water intended to prevent inmates from disposing of contraband. Inmates placed in a dry cell use a toilet in a separate locked room that is monitored by video. Mr. Blair described the dry cell conditions as even more restrictive than those in segregation: 24-hour-a-day lock-up with no visitors, phone access, furniture, television or books.

[400] Mr. Blair repeatedly denied having drugs in his body and asked that he be x-rayed to prove that his placement in the dry cell was not justified. On the third day, he reported having painful stomach cramps and asked the guards to call the nurse. The guards demanded that Mr. Blair tell them what he swallowed before they would do so. Mr. Blair lied and told the guards he had swallowed two pellets of cocaine. At that point, he was taken to a hospital and x-rayed. The x-ray was negative and Mr. Blair admitted that he had lied about swallowing the drugs. The doctor found that Mr. Blair was very constipated and prescribed medication to get his system moving. A guard was present during the x-ray and the conversation with the doctor.

[401] Mr. Blair deposed that when he returned to the institution later that day, he was returned to the dry cell “for that little stunt” and told he would have to produce

three bowel movement before he would be released. This, despite the fact that the x-ray confirmed there were no drugs. Mr. Blair was also told that he would not receive the medication prescribed by the doctor until he was released from the dry cell.

[402] When cross-examined on why Mr. Blair was returned to the dry cell when the x-ray ruled out the possibility that he had swallowed any drugs, Mr. Pyke said that he had not seen the x-ray. He continued:

As I have indicated, I don't – I didn't see the x-ray. I didn't get information in relation to the x-ray. I don't know if the x-ray was simply of the stomach. I don't know if it was of his entire digestive tract. I don't know if it was of his rectal area. So it's very feasible, sir, that he may have had an x-ray of his stomach but still had something concealed in his rectal cavity.

So there was potential in that case for him to be able to remove things, which is not uncommon in the drug loo.

[403] Mr. Blair described feeling extremely frustrated that he was being punished by being put back into the dry cell. His requests for the medication he had been prescribed were being refused and he felt he was spiralling out of control. Mr. Blair testified that he felt temporarily insane and behaved uncharacteristically by defecating on the floor of the dry cell.

[404] Mr. Blair was released from the dry cell after six days and was immediately placed into administrative segregation.

[405] Mr. Pyke deposed that he authorized Mr. Blair's placement in administrative segregation pursuant to s. 31(3)(a) on the basis of a number of factors: (a) an assault on another inmate two weeks earlier for which Mr. Blair was charged with a disciplinary offence; (b) being aggressive and disrespectful towards officers; (c) his fabrication of a medical emergency to manipulate his way out of the dry cell and to a hospital for an x-ray; and (d) his threatening and hostile behaviour while in the dry cell.

[406] In cross-examination, Mr. Pyke admitted that (a), (b), and (d) did not individually warrant placement in segregation but was adamant in respect of (c) that the fact that Mr. Blair had manipulated his way out of the dry cell was a threat to the

security of the institution. Mr. Pyke was firm in his view that the cumulative effect of these factors justified Mr. Blair's placement in administrative segregation. He denied that he had punished Mr. Blair for his behaviour.

[407] At the five-day review, ongoing segregation was recommended pending a consultation by the chair with the security intelligence department. At the 30-day review, on February 21, 2014, ongoing segregation was recommended pending the completion of arrangements for an involuntary transfer. On April 10, 2014, Mr. Blair was interviewed by the warden, Mr. Pyke. Based on Mr. Pyke's further review of the case, he recommended that Mr. Blair be released back into the general population. He had been in segregation for 79 days.

[408] Mr. Blair grieved his placements in the dry cell and in administrative segregation. His complaint about the former was upheld. In particular, his return to the dry cell following the x-ray was found to be unjustified. However, his complaints about his placement in administrative segregation were denied.

[409] I find myself in respectful disagreement with Mr. Justice Marrocco in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 171-76, as I believe that the evidence led before me and summarized above demonstrates that CSC has shown an inability to fairly review administrative segregation decisions.

[410] I therefore conclude that procedural fairness in the context of administrative segregation requires that the party reviewing a segregation decision be independent of CSC. Such an independent reviewer must have the authority to release an inmate from segregation, not simply make recommendations that the warden may override or disregard. Given that the harms of segregation can manifest in a short time, meaningful oversight must occur at the earliest possible opportunity, certainly no later than the five-day review.

E. Right to Counsel

[411] The plaintiffs argue that a further requirement of procedural fairness in the context of segregation reviews is representation by counsel. They say that given the formality of the disclosure requirements, the vulnerability of inmates and the severity of the consequences, ISRB hearings cannot be conducted fairly unless inmates are represented by counsel. (To be clear, I do not understand the plaintiffs to be arguing for a right to state-funded counsel.)

[412] Counsel for the Government takes the position that it necessarily follows from an inmate's statutory right to retain and consult counsel that counsel may also appear at SRB hearings. However, he says that the plaintiffs have not established either that many inmates seek and are denied the ability to be represented by counsel at review hearings or that the results of review hearings would be different on a system-wide basis if inmates were permitted to be represented by counsel.

[413] An inmate's right to counsel is set out in s. 97(2) of the *Regulations*:

The Service shall ensure that every inmate is given a reasonable opportunity to retain and instruct legal counsel without delay and that every inmate is informed of the inmate's right to legal counsel where the inmate

(a) is placed in administrative segregation;

...

[414] The section is silent with respect to the right of counsel to appear with inmates at SRB hearings. I accept the evidence of Mr. Somers and Mr. Clark, both of whom have participated in many review board hearings, that as a matter of practice, counsel are not permitted to attend. Mr. Somers, for example, explained that the reviews are not considered a "judicial-type hearing" and are meant to be informal. Although he questioned the extent to which counsel could practically assist the Board in determining whether the continued placement was appropriate, he indicated that he would be prepared to include anyone who might be helpful to the board in making its determination.

[415] Mr. Clark similarly testified that counsel representation had never been made part of the process.

[416] CD 709 makes some concession in regards inmates with significant mental health needs, requiring that they be informed of the right to engage an advocate to assist with the institutional segregation review process. Mr. Somers testified that it is possible for an advocate to be a lawyer but that it is usually someone from the John Howard Society. An advocate can even be another inmate who CSC believes can assist the inmate appearing before the ISRB.

[417] It is the opinion of Professor Jackson that the right to engage an advocate should not be restricted to inmates with acute mental health needs. Based on his observations at a great many segregation review hearings, it is his view that the assistance of counsel is necessary to ensure the fairness and integrity of the proceedings in all cases. Counsel's contributions to a fair process would include ensuring that all relevant information on which the institution seeks to rely is provided to the inmate so that he or she is able to make full answer and defence; in cases where the institution seeks to withhold confidential information, ensuring that the grounds for withholding are made out and that the gist of the information provided is sufficient for the inmate to answer the case against him or her; providing a focussed argument applying the facts to the legal criteria for segregation; pressing the institution to complete any ongoing investigations; assisting the inmate to develop viable alternatives to segregation; and challenging the conditions of segregation where there is demonstrable non-compliance with the law and policy.

[418] I agree that there is an important role for counsel at hearings should an inmate wish to be represented. The right to assistance should not, in my view, be limited to those with acute mental health needs. Given the consequences of a decision to continue segregation for *any* inmate, counsel should be permitted to provide that important assistance where an inmate so wishes. Additionally, and significantly, counsel will often be much better able to present a focussed argument applying the facts to the legal criteria, or, at a minimum, put the institution in the position of having to do so, and press the institution to justify ongoing placements or facilitate viable alternatives.

[419] The importance of counsel to the hearing process is recognized in the disciplinary segregation context. Section 31 of the *Regulations* provides an interesting counterpoint. That provision says the following about the role of counsel:

- (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to
 - (a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and
 - (b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.
- (2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

[420] In final submissions, counsel for the Government said:

In terms of the legal requirement and in terms of what the common law would say if a matter were brought to court, a lawyer could attend such [a] hearing.

The contrasting silence of s. 97(2) of the *Regulations* regarding counsel's participation at ISRB hearings and the evidence of Messrs. Somers and Clark suggests that counsel for the Government's submissions concerning inmates' right to have counsel attend review hearings does not reflect the current reality.

[421] I conclude that procedural fairness requires that any inmate who wishes to be represented by counsel at an ISRB hearing is entitled to such representation.

V. SECTION 10

[422] The plaintiffs, and particularly the intervenor CDAS, argue that the administrative segregation regime also engages the right to counsel under s. 10(b) of the Charter. CDAS says that the practical difficulties inmates experience in accessing counsel, and CSC's practice of not permitting counsel to attend ISRB hearings, effectively extinguish an inmate's s. 10(b) rights. It submits that the evidence that segregated inmates are frequently unable to reach counsel because

they are only allowed to make phone calls when lawyers are typically in court indicates that they do not have meaningful access to counsel.

[423] The Government acknowledges that placement in administrative segregation constitutes a new detention that engages s. 10(b). It submits that upon placement, inmates are informed of their right to counsel and given an opportunity to contact counsel, thus satisfying both the informational and implementational components of the s. 10(b) right.

[424] Section 10(b) of the Charter guarantees the right upon arrest or detention “to retain and instruct counsel without delay and to be informed of that right”. Placement of an inmate in administrative segregation amounts to a new and separate detention that entitles the inmate to new s. 10(b) rights: *Williams v. Canada (Regional Transfer Board)*, [1993] 1 F.C. 710 (C.A.).

[425] The Supreme Court of Canada described the purpose of s. 10(b) in *R. v. Sinclair*, 2010 SCC 35 at paras. 24 and 26:

[24] The purpose of s. 10(b) is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation.

...

[26] The purpose of the right to counsel is “to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights” [citation omitted].

[426] The right to counsel under s. 10(b) comprises two components. The informational component requires that detainees be informed of their right to retain and instruct counsel and the implementational component requires that detainees be provided with a reasonable opportunity to do so.

[427] I have discussed the right of counsel to attend ISRB hearings under s. 7 of the Charter since, in my view, that is where the analysis more appropriately belongs. This is because the content of the right to counsel under s. 10(b) has been given a limited interpretation by Canadian courts. In *R. v. McCrimmon*, 2010 SCC 36 at para. 18, for instance, the Supreme Court held:

[18] ... The right to counsel upon arrest or detention is intended to provide detainees with immediate legal advice on his or her rights and obligations under the law, mainly regarding the right to remain silent.

[428] Similarly, in *Sinclair* at para. 2, the Court stated that in most cases, “an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies s. 10(b)”. It follows that in the context of administrative segregation, the s. 10(b) right is satisfied where an inmate has timely access to counsel so as to be informed of their rights in regards their placement.

[429] The evidence suggests that the time before inmates are able to make meaningful contact with counsel is frequently measured in days, and thus is not timely.

[430] Mr. Somers testified that inmates in administrative segregation access counsel in the same way as those in general population do: they make an appointment with their counsel for a visit. Counsel then puts the arrangements in place through the institution’s visit and correspondence section. According to Mr. Somers, there is no difference in access as between segregated and non-segregated inmates; the only difference is in the location where the visit would occur.

[431] However, this evidence ignores the fact that a recently segregated inmate has a much more urgent need to speak with counsel than most inmates in general population.

[432] Mr. Somers testified that a segregated inmate’s legal calls are given priority over other calls, and that inmates are also given access to duty counsel or Brydges line services. However, he acknowledged that other than at the time of admittance, phone calls must be made during regular business hours. As with their other phone calls, segregated inmates place their calls to counsel on a telephone that is wheeled to their cells and the receiver is passed through the food slot.

[433] Mr. Clark testified to his experience that most lawyers are in court during the day, and that when segregated inmates call lawyers' offices they usually only reach the receptionist. He continued:

So these guys would try a number of times unsuccessfully to consult with a lawyer about their placement, only to be told he will be back in the office at 5:00 from court. But 5:00 may not be a suitable time to make that call because shift change occurs at 3:00 and fewer officers take over for the evening shift because there's less activities within that unit. It's all about conserving money and about deploying your officers. So you wouldn't normally after 5:00 have the kind of staff complement you would like to have to facilitate things like that.

[434] He contrasted the situation to the general population where inmates have access to telephones on their ranges that they can use anytime.

[435] Another component of the right to counsel under s. 10(b) is the privacy of the communication between counsel and the individual exercising the right: *R. v. Laird*, 2003 BCSC 90 at para. 47. The right to consult counsel in private is inherent in s. 10(b), the rationale for which is described in *R. v. Ali*, 2015 BCSC 155 at para. 116, citing from *R. v. Playford* (1987), 63 O.R. (2d) 289 (C.A.) at 301 as follows:

In my opinion, the right to retain and instruct counsel without delay carries with it the right to do so in privacy. It would defy common sense to expect an accused person to instruct counsel properly when his instructions can be overheard by other persons and in particular by police officers. Such lack of privacy might even seriously prejudice his ability to retain counsel. Retention of counsel usually requires some explanation by the accused of the circumstances which have led to his arrest.

[436] Communication with counsel on a telephone passed through the meal slot is not a private communication given the ability of others to hear.

[437] It is axiomatic that for legal advice to be of assistance, it must be prompt. In the case of segregated inmates, it is my view that, at the very minimum, it ought to be facilitated before the five-day review takes place. The communications between segregated inmates and their counsel must also be private. While I consider that current CSC practice does not accord segregated inmates their proper s. 10(b) rights, I make no declaration to that effect. I recognize that this issue would normally

arise in cases where an individual plaintiff seeks a s. 24(1) remedy. CSC should be aware that such a plaintiff could well be successful. However, considering the s. 52 remedies the plaintiffs are seeking and the conclusions I have reached concerning s. 52, I believe this is not the proper case for me to make a ruling on this important issue.

VI. SECTION 15

A. Positions of the Parties

[438] The plaintiffs submit that on their face, the impugned laws treat everyone equally but in purpose or effect they impose a burden on two already disadvantaged groups, those being inmates with mental disabilities and Aboriginal inmates, that is greater than the burden imposed on other inmates. Both groups are over-represented in the administrative segregation population, and segregation is also particularly burdensome on them.

[439] The intervenor West Coast LEAF endorses the submissions of the plaintiffs in connection with their s. 15 claim, and makes further submissions to highlight the discriminatory adverse effects of segregation experienced by women particular to their unique experience as Aboriginal women and/or as women experiencing mental illness.

[440] West Coast LEAF submits that the impugned laws fall into the category of indirect discrimination, as they place a differential and disproportionate burden on individuals who are identifiable on the enumerated grounds of sex, race/ethnicity (Aboriginality) and mental disability. While sex discrimination has not been pleaded in this case as a separate ground of discrimination, the evidence shows that Aboriginal women are increasingly disproportionately represented in the federal prison population, and that mentally ill inmates in federal custody are disproportionately women.

[441] Notwithstanding important efforts to make women's corrections more gender-responsive, West Coast LEAF says that the evidence indicates that the experience of women in prison corresponds to more general correctional trends towards an

increased focus on risk and security classification, which has led to harsher conditions for some women, particularly Aboriginal women and women experiencing mental illness. Correctional data collection, assessment processes and decision-making do not adequately account for or assess intersecting axes of identity – for the experiences and needs of a woman who is Aboriginal and also mentally ill.

[442] West Coast LEAF submits that the impugned laws and their application are discriminatory because they do not have regard for the historical and continuing societal disadvantage suffered by Aboriginal women and women experiencing mental illness. The impugned laws and their application perpetuate and exacerbate societal disadvantage – they widen the gap – for Aboriginal women and for women experiencing mental illness.

[443] Citing *Symes v. Canada*, [1993] 4 S.C.R. 695 at 765, and *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 64, the Government stresses that to be in breach of s. 15, the challenged distinction must be caused by the law and not the product of diffuse social factors or circumstances that exist independently of the law.

[444] Thus, the Government submits that Aboriginal inmates are not over-represented in administrative segregation because of the impugned legislation or how it is administered; rather, their higher representation is attributable to Aboriginal social history factors such as entrenched violence and gang affiliation. As well, Aboriginal inmates tend to be younger, less educated, and more likely to present a history of substance abuse, addictions, and mental health concerns.

[445] Moreover, the Government contends, the statutory provisions authorizing administrative segregation, and the application of those provisions, mandate regular and repeated individualized assessments of inmates, as well as particular measures to accommodate the unique needs and circumstances of Aboriginal inmates. Far from constituting an arbitrary perpetuation of disadvantage, the impugned scheme seeks to respond to the particular disadvantage of Aboriginal persons with the overall aim of reducing their placement in administrative segregation.

[446] As for inmates with mental illness, the Government responds that the plaintiffs have not proven that they are over-represented in administrative segregation. Any over-representation that may exist is a function of the reality that persons with mental illnesses are more likely to engage in misconduct or otherwise be involved in situations that trigger the application of s. 31 of the *CCRA*.

[447] With respect to women, the Government submits that the evidence indicates that very few are placed in administrative segregation, that even that small number has decreased in the past few years, and that they spend only short periods of time in that placement. These trends apply to Aboriginal women as well. Further, CSC has made important efforts to provide gender-responsive interventions and programs for women, including interventions targeted at those inmates who identify as Aboriginal and those with complex mental health needs. CSC staff working in women's institutions are selected with a view to ensuring a women-centered approach, and are specifically trained to work in women's institutions by focusing on women-specific interventions and perspectives.

B. Law

[448] Section 15 of the *Charter* guarantees that:

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[449] Section 15 protects substantive, as opposed to formal, equality. Substantive equality appreciates that the achievement of equality may require groups and individuals who are unlike in relevant ways to be treated differently. In *Withler* at para. 39, the Court described substantive equality in this way:

[39] ... Substantive equality, unlike formal equality, rejects the mere presence or absence of difference as an answer to differential treatment. It insists on going behind the facade of similarities and differences. It asks not only what characteristics the different treatment is predicated upon, but also whether those characteristics are relevant considerations under the circumstances. The focus of the inquiry is on the actual impact of the impugned law, taking full account of social, political, economic and historical factors concerning the group. The result may be to reveal differential

treatment as discriminatory because of prejudicial impact or negative stereotyping. Or it may reveal that differential treatment is required in order to ameliorate the actual situation of the claimant group.

[450] Importantly, substantive equality captures both indirect as well as direct discrimination. Consequently, a distinction on the basis of an enumerated or analogous ground need not arise on the face of the law but may arise from a disproportionately negative impact on particular claimants: *Withler* at para. 64.

[451] A renewed analytical approach to s. 15 was unanimously affirmed in *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30. The Court clarified that s. 15 requires a “flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant because of his or her membership in an enumerated or analogous group”: *Taypotat* at para. 16. The focus of s. 15 is on laws that draw discriminatory distinctions; that is, distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual’s membership in an enumerated or analogous group. The analysis is, accordingly, concerned with the social and economic context in which a claim of inequality arises, and with the effects of the challenged law or action on the claimant group.

[452] There are two stages to the s. 15 analysis. The question at the first stage is whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground. Thus, the claimant must demonstrate that the law at issue has a disproportionate effect on the claimant based on his or her membership in an enumerated or analogous group.

[453] At the second stage, the analysis turns to whether the impugned law fails to respond to the actual capacities and needs of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. The specific evidence required will vary according to the context of the claim but evidence that goes to establishing a claimant’s historical position of disadvantage will be relevant.

C. Analysis

[454] In analyzing the relevance of s. 15 to the issues in this case, I will deal with the effects of administrative segregation in the federal prison system on women, Aboriginal inmates, and the mentally ill. Following those analyses, I will deal specifically with the submissions of the intervenor, West Coast LEAF, on the issue of intersecting grounds of discrimination.

[455] Because the impugned provisions do not on their face create any of the foregoing alleged distinctions, the analysis necessarily turns on whether the provisions have that effect or impact.

1. Women

[456] On the evidence led in this trial, I am satisfied that women are not disproportionately affected by the impugned provisions.

[457] I acknowledge that the evidence establishes that segregation has a significant impact on women. Women tend to be linked to each other through relationships, and thus the isolation of segregation, especially over longer periods, can take a heavy toll. Additionally, because there are fewer federal institutions for women, they are on average further away from their home communities than are men.

[458] Nevertheless, the substantially smaller number of incarcerated women makes it easier for CSC to provide them with individualized treatment. At EIW, for example, the vast majority of segregated inmates are released from segregation well before 15 days. As Ms. Bouchard testified, EIW is making efforts to minimize the amount of time segregated women spend in their cells. To the extent it is operationally feasible, segregated women have access to programs in the program room and are able to attend school on the range. They also have as much yard time as can be facilitated, way above the two hours that Ms. Bouchard instructs her staff to provide. Similarly, showers are daily if inmates wish. The policy sets the minimum standard and, so long as it is operationally feasible, staff can go above and beyond.

[459] In addition, I heard evidence of better mental health treatment for women in segregation.

[460] Only a few women spend long periods in segregation. These women are provided with a higher level of mental health services than their male counterparts. As Dr. Rivera explains in her report, dialectical behavioural therapy (“DBT”) is an evidence-based treatment for cognitive behavioural dysregulation, including suicidality, self-injurious behaviour and a range of other dysfunctional behaviours. It is a core mental health treatment provided to all women who are motivated and capable of participating. It is the policy of the women’s institutions that all staff providing direct service to the women in the enhanced units are trained in basic DBT skills and in communicating with inmates within a DBT framework.

[461] At Fraser Valley Institution in British Columbia, a psychologist offers women in long-term segregation two individual therapy sessions a week, followed by input from a behavioural counsellor to assist the inmate to learn DBT skills. Dr. Rivera states that this level of mental health treatment for women in long-term segregation who suffer from psychological problems is not unusual in women’s institutions; most are seen by a psychologist at least weekly, sometimes more frequently when needed, and a behavioural counsellor is readily available to assist them with behavioural skills. A psychiatrist provides psychiatric treatment to segregated women exhibiting mental health symptoms, frequently including the prescription of psychotropic medication.

[462] Aboriginal women are also treated more favourably than their male counterparts in some respects. Notably, there is a ratio of one elder for every twenty-five Aboriginal women, while the ratio for men is one to one hundred.

[463] Indeed, there have been past injustices in the treatment of women inmates as detailed in Justice Arbour’s report and, more recently, the existence of the Management Protocol, which caused one of the witnesses, Ms. Worm, to spend approximately one half of her five-year robbery sentence in administrative segregation. After years of protests by the OCI, CSC terminated the Management

Protocol in 2011. In the present, however, I am satisfied that the impugned provisions do not have a disproportionate effect on women.

2. Aboriginal Inmates

[464] Of course, Aboriginal people are heavily over-represented in Canada's federal prisons.

[465] As of January 2016, 25% of the inmate population in federal penitentiaries was Aboriginal, a number that rises to 35% in the case of women. To put those numbers in perspective, the federal inmate population grew by 10% between 2005 and 2015. Over the same period, the Aboriginal inmate population increased by more than 50% and the number of Aboriginal women inmates almost doubled. Given that 4.3% of Canada's population is Aboriginal, as a group they are incarcerated at a significantly higher rate than the balance of the Canadian population. This is not a problem that can be solved in a case dealing with solitary confinement.

[466] Nevertheless, even within the general over-representation of Aboriginal inmates, they are further over-represented in administrative segregation.

[467] The OCI's 2015 report, *Administrative Segregation in Federal Corrections: 10 Year Trends*, documented an upward trend in Aboriginal inmate placements, while those of Caucasian inmates decreased over the same period. The percentage of segregated Aboriginal inmates increased by 31% between 2005 and 2015 compared to a growth of 1.9% for non-Aboriginal inmates. Ms. Bouchard agreed that Aboriginal inmates were over-represented in segregation.

[468] The same OCI report also found that although the average length of stay in segregation had decreased for all inmates, including Aboriginal inmates, the latter consistently had an average length of stay that was greater than for Black or Caucasian inmates. When these trends were put to her, Ms. Bouchard acknowledged that the data showed this to be the case but testified that that was not her experience at EIW.

[469] Mr. Bonnefoy is the warden of Stony Mountain Institution. It is his evidence that in the Prairie Region, 49% of inmates are Aboriginal, and at Stony Mountain, 62% are Aboriginal. There is an over-representation of Aboriginal inmates in administrative segregation both in the Prairie Region and at Stony Mountain. The rate was 5% for institutions in the Prairie Region generally and 7% at Stony Mountain at the end of the 2016-2017 fiscal year (as compared with 4% and 6% for the overall inmate population).

[470] As with Aboriginal inmates generally, Aboriginal women are significantly over-represented in segregation, comprising 50% of such placements. The evidence further indicates that administrative segregation is particularly burdensome for Aboriginal women. For example, Ms. Bouchard agreed that women are affected differently by administrative segregation, in part because it can exacerbate distress for individuals with a history of physical or sexual abuse. Aboriginal women, she agreed, suffer high rates of physical and sexual abuse, and are therefore particularly vulnerable to the negative impacts of segregation. Moreover, there are fewer institutions for women than there are for men, and they are on average further away from their home communities. Ms. Bouchard agreed that this is particularly problematic for Aboriginal inmates since their identity is often inextricably linked with the land.

[471] On that basis, I am satisfied that administrative segregation has a small, but significant, disproportionate effect on Aboriginal men. The disproportionate effect on Aboriginal women is more severe. Consequently, Aboriginal inmates satisfy the first stage of the s. 15 test.

[472] As for whether the impugned provisions fail to respond to the actual needs and capacities of Aboriginal inmates and instead perpetuate or exacerbate their disadvantage, again, I am satisfied that they do.

[473] The historical disadvantage of Aboriginal inmates is well known and recognized by CSC as “Aboriginal social history”. CD 702 defines it in the following terms:

... the various circumstances that have affected the lives of most Aboriginal people. Considering these circumstances may result in alternative options or solutions and applies only to Aboriginal offenders (not to non-Aboriginal offenders who choose to follow the Aboriginal way of life). These circumstances include the following (note that this is not an exhaustive list):

- effects of the residential school system
- sixties scoop into the adoption system
- effects of the dislocation and dispossession of Inuit people
- family or community history of suicide
- family or community history of substance abuse
- family or community history of victimization
- family or community fragmentation
- level or lack of formal education
- level of connectivity with family/community
- experience in the child welfare system
- experience with poverty
- loss of or struggle with cultural/spiritual identity

[474] Ms. Bouchard attributed the higher representation of Aboriginal inmates in segregation to entrenched violence and gang affiliation arising from such social history factors. She agreed with the findings of the OCI in the *Annual Report of the Office of the Correctional Investigator 2015-2016* [2015-2016 Annual Report] that Aboriginal inmates under federal sentence tend to be younger, less educated and more likely to present with a history of substance abuse, addictions and mental health concerns. A file review of the social histories of Aboriginal women inmates undertaken by the OCI indicated that over half reported having attended or a family member having attended residential schools; 2/3 of their parents had substance abuse issues; 48% had been removed from their family home; and almost all had previous traumatic experiences, including sexual and physical abuse, and substance misuse problems. Ms. Bouchard agreed these findings were consistent with her experience managing the custody of Aboriginal women at EIW.

[475] The OCI acknowledged in an October 2012 report, *Spirit Matters: Aboriginal People and the Corrections and Conditional Release Act* at p. 5, that Aboriginal inmates are disproportionately involved in institutional security incidents, use of force

interventions, segregation placements and self-injurious behaviour. Ms. Bouchard accepted that that had been CSC's overall experience. It is also consistent with the evidence of Mr. Bonnefoy that the fact that a greater number of Aboriginal inmates are members of STGs is a factor in their over-representation in segregation, as involvement in violent institutional incidents has a direct correlation to placement in segregation.

[476] In *Spirit Matters*, the OCI identified a number of barriers that inadvertently perpetuate conditions that further disadvantage and/or discriminate against Aboriginal inmates in federal corrections, leading to differential outcomes, including:

- a) restricted access to healing lodges – Ms. Bouchard acknowledged that healing lodges are restricted to minimum-security inmates, thus excluding almost 90% of Aboriginal inmates from even being eligible for a transfer;
- b) limited understanding and awareness within CSC of Aboriginal peoples, cultures, spirituality and approaches to healing – Ms. Bouchard acknowledged that while the situation was improving, the statement was accurate; and
- c) limited understanding and inadequate consideration and application of *Gladue* factors in correctional decision-making affecting the interests of Aboriginal inmates.

[477] The reference to *Gladue* factors relates to the Supreme Court's direction in *R. v. Gladue*, [1999] 1 S.C.R. 688, that courts take into account the systemic disadvantages of Aboriginal peoples in reaching sentencing decisions. CSC has extended the application of *Gladue* factors (what CSC refers to as "Aboriginal social history") to correctional decision-making, including with respect to administrative segregation.

[478] Nevertheless, despite CSC's commitment in this regard, the OCI has, over the years, cast doubt as to whether the requirement to consider Aboriginal social history has had the desired impact. Most recently in its *2015-2016 Annual Report*, the OCI found insufficient and uneven application of social history considerations in correctional decision-making. The OCI noted, for example, that some inmates' files contained only a brief notation that Aboriginal social history was taken into account with little, if any, explanation how precisely it was considered and applied.

[479] The first working day review of Ms. Lepine's placement in segregation for her alleged role in a violent assault of an inmate demonstrates the validity of the OCI's concern. The review document indicates:

Aboriginal Social History has been taken into account for this decision; Ms. Lepine is an Aboriginal offender. She experienced physical and sexual abuse, left school at an early age after having difficulties with other students. Substance Abuse was normalized in the home and she started experimenting with alcohol and marijuana at an early age. She was associated with several Security Threat Groups notably [redacted], [redacted] and the [redacted]. Her Elder review was 2015 October 16. An Elder update on 2016-06-07 identified no new ASH factors.

[480] As Ms. Bouchard agreed when this passage was put to her, it is not possible to discern just how the Aboriginal social history factors were considered or applied in the decision to either place or maintain Ms. Lepine in segregation.

[481] Ms. Bouchard agreed with the OCI that CSC staff are poor at documenting how they take Aboriginal social history factors into account but maintained that that does not necessarily mean they fail to do so. She did acknowledge that CSC is still learning how to consider Aboriginal social history in its decision-making, and agreed with the OCI's recommendation that more *Gladue* training, support and resources be provided to ensure that a meaningful *Gladue* analysis informs CSC decisions affecting the security and liberty of Aboriginal inmates, including decisions to segregate. She also agreed with its recommendation that CSC develop new culturally appropriate assessment tools founded on *Gladue* principles to be used with Aboriginal inmates, both men and women.

[482] The SAT that CSC currently uses poses the question, "[h]as the offender's Aboriginal Social History been considered?" Mr. Somers testified that he is not aware of a case in which an inmate's Aboriginal social history prevented segregation. He said that it is difficult to make the assessment whether an inmate should be placed in segregation on the basis of Aboriginal social history; the consideration of those factors usually occurs later.

[483] I wish to acknowledge that Canadian courts have had some difficulties applying the *Gladue* factors and, unfortunately, the 18 years that have passed since

Gladue was decided have not seen a marked reduction in the imprisonment of Aboriginal Canadians. Having said that, on the evidence before me, CSC has not done a good job of using Aboriginal social history to reduce the impact of administrative segregation on Aboriginal inmates. There is a box to be ticked on a form and it is ticked. Meaningful results have not followed.

[484] Beyond the risk of psychological harm inherent in the segregation experience itself, the fact that Aboriginal inmates are placed in segregation more often, with limited access to programming, impacts their ability to transfer to lower security institutions and to obtain conditional release, as they may not have been able to carry out their correctional plan and may not be perceived as significantly rehabilitated as a result.

[485] The Auditor General's statistics in a 2016 report entitled *Preparing Indigenous Offenders for Release – Correctional Service of Canada* reveal the following: 740 of the 1,066 Aboriginal inmates released in the 2015-2016 fiscal year (69%) were released at their statutory release dates; there were similar rates in each of the previous three years, at persistently higher levels (an average of 18% higher) than for non-Aboriginal inmates; three-quarters of those released were released directly into the community from maximum security (14%) and medium security (65%) institutions, limiting their ability to benefit from a gradual release supporting successful reintegration; and fewer Aboriginal inmates were released on parole relative to non-Aboriginal inmates (31% to 48% in the 2015-2016 fiscal year). CSC accepts the data and findings of this report.

[486] While a number of CSC's witnesses candidly allowed that Aboriginal inmates may be subject to racism and racial profiling, in spite of CSC's efforts to eliminate such prejudicial practices, that does not account for why Aboriginal inmates fare worse at almost every correctional decision point than non-Aboriginal inmates.

[487] According to the OCI, the nature of the underlying offence is one factor in later parole rates for Aboriginal inmates, given their proportionately higher representation in the commission of violent crime: *Good Intentions, Disappointing*

Results: A Progress Report on Federal Aboriginal Corrections, November 2009.

Certainly, Mr. Bonnefoy's evidence that, as of April 2017, 64% of Aboriginal inmates were serving a Schedule 1 offence under the *CCRA* (violent offences other than murder), compared to 49% of non-Aboriginal inmates is consistent with this.

However, as the OCI notes, it is unlikely this alone accounts for the disproportionate rates. In its view, systemic discrimination, culturally laden notions of accountability, over-classification, over-segregation, and a lack of availability of specific programming for Aboriginal inmates may all play a role in the granting of parole to Aboriginal inmates. Ms. Bouchard accepted that over-segregation was one of the factors that may impact the later parole dates for Aboriginal inmates.

[488] The OCI concluded in its *2015-2016 Annual Report* that CSC had made little discernible or meaningful progress in narrowing the gap in key areas regarding Aboriginal corrections in the previous decade. Ms. Bouchard agreed but noted that it was important to recognize that the Aboriginal population is younger and growing much faster compared with the rest of the Canadian population – as a consequence, there are proportionally more Aboriginal people in the 18 to 30-year age cohort, the demographic most likely to engage in criminal behaviour. Ms. Bouchard acknowledged that CSC is struggling to reduce the gap in various correctional measures between Aboriginal and non-Aboriginal inmates but has not yet succeeded.

[489] On the basis of the evidence presented to the Court, I am satisfied that the impugned laws fail to respond to the needs of Aboriginal inmates and instead impose burdens or deny benefits in a manner that has the effect of perpetuating their disadvantage and thus violating s. 15.

[490] I believe that CSC should make a concerted effort to improve the assessment tools and programs for Aboriginal inmates. At a minimum, CSC should:

- a) increase the ratio of Aboriginal elders for men to the same proportions as those at women's institutions, i.e. one elder per 25 inmates;

- b) accept the recommendations of the Truth and Reconciliation Commission to establish more Healing Lodges and configure them so they can accept inmates classified as medium-security; and
- c) develop an Aboriginal program designed to assist Aboriginal inmates to cease membership in STGs.

3. Inmates with Mental Illness

[491] Mental disability is an enumerated ground under s. 15 of the *Charter*. The first question to address, therefore, is whether the impugned provisions have a disproportionate effect on inmates with mentally illness.

[492] CSC does not keep track of the number of inmates with mental disabilities in either the general inmate population or in segregation. Most of the statistics before the Court regarding the connection between segregation and mental health derive from reports of the OCI.

[493] The OCI in its report *Administrative Segregation in Federal Corrections: 10 Year Trends* made a number of findings that bear on this issue:

- a) offenders who have been identified in their correctional plans as having mental health issues are more likely to have a history of being segregated than those identified as having no mental health issues (63.2% to 48%);
- b) offenders who have been identified in their correctional plans as having cognitive or mental ability issues are much more likely to have a history of being segregated than those who have been identified as having no cognitive or mental ability issues (61.6% to 47.8%); and
- c) of the 6,982 currently incarcerated population who have a history of being segregated, 20.7% also have a history of being in a regional treatment centre. For women inmates the ratio is 16.9% and for Aboriginal inmates, 26.1%. Of the 2,111 currently incarcerated offenders who have been in a treatment centre, 68.3% have also been in segregation. For women inmates the ratio is 78.9% and for Aboriginal inmates, 72.9%.

Dr. Blanchette did not dispute these statistics.

[494] The OCI stated in its *2014-2015 Annual Report* that administrative segregation is commonly used to manage mentally ill inmates, self-injurious inmates and those at risk of suicide. Inmates in administrative segregation are twice as likely

to have a history of self-injury and to have attempted suicide, and 31% more likely to have a mental health issue. Of all federal inmates with a history of self-injury, more than 85% also have a history of segregation placement. Sixty-eight percent of inmates at Regional Treatment Centres have a history of administrative segregation. For women inmates, the ratio is 78.9% and for Aboriginal inmates, 72.9%.

[495] The Government led no evidence to suggest that these trends have changed.

[496] Thus, inmates with mental disabilities are over-represented in administrative segregation. As the evidence amply establishes, placement in administrative segregation also has a disproportionate effect on the mentally ill.

[497] Both Dr. Grassian and Dr. Haney gave evidence that the risks of harm from segregation are greater for inmates with mental illness. Dr. Haney explained in some detail why this is so. In part, it is because of the greater vulnerability of the mentally ill in general to stressful, traumatic conditions. As well, some of the conditions of isolation exacerbate the particular symptoms from which inmates with mental illness suffer. For example, inmates prone to psychotic breaks are denied the stabilizing influence of social feedback, while those who suffer from disorders of impulse control are likely to find their pre-existing condition made worse by the frustration and anger that segregation generates.

[498] Dr. Koopman expressed her view that administrative segregation exacerbates symptoms and provokes recurrence of mental disorder. Dr. Martin and Dr. Hannah-Moffat also gave evidence about exacerbation of pre-existing mental illness being one of the harms of the practice.

[499] I acknowledge that CSC has endeavoured to address how inmates with mental illness are treated with respect to administrative segregation with the August 1, 2017 changes to CD 709. Although a welcome recognition of the existence of the problem of mental illness and solitary confinement, it is an inadequate solution.

[500] The new CD 709 identifies two classes of inmates who will not be admitted to administrative segregation:

- a) inmates with a serious mental illness with significant impairment, including inmates who are certified in accordance with the relevant provincial/territorial legislation; and
- b) inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk for suicide.

[501] CD 709 provides that inmates deemed inadmissible for either of these reasons will be identified by a health care professional or, in their absence, by one of two processes: (a) a determination whether the inmate has been flagged in the OMS (Offender Management System) for a serious mental illness; or (b) the Suicide Risk Checklist. Inmates excluded from administrative segregation by CD 709 are managed under CD 843 – *Interventions to Preserve Life and Prevent Serious Bodily Harm*.

[502] CD 709 further defines “serious mental illness with significant impairment” as follows:

...[P]resentation of symptoms associated with psychotic, major depressive and bipolar disorders resulting in significant impairment in functioning. Assessment of mental disorder and level of impairment is a clinical judgment and determined by a registered health care professional. Significant impairment may be characterized by severe impairment in mood, reality testing, communication or judgment, behaviour that is influenced by delusions or hallucinations, inability to maintain personal hygiene and serious impairment in social and interpersonal interactions. This group includes inmates who are certified in accordance with the relevant provincial/territorial legislation.

[503] I accept the evidence of Dr. Koopman as to the inadequacy of the new CD. It is her opinion that the definition of serious mental illness is both unclear and too narrow. The definition intermingles symptoms and diagnoses, and is not sufficiently clear as to how inmates will be assessed as having a mental disorder and who will make the determination. Further, there are a great number of mental disorders listed and discussed in the DSM-5 beyond psychotic, major depressive and bipolar disorders, and the CD does not address whether inmates with any of these diagnoses will also be excluded from segregation. If a diagnosis is not required for exclusion from segregation, the CD does not explain the nature of the

symptomatology that will need to be present and identified for the inmate to be excluded on the basis of behaviour.

[504] As Dr. Blanchette agreed, individuals may have significant impairment as a result of mental disorders other than those included in the definition. She agreed, as well, that inmates with a serious mental illness with *moderate* instead of significant impairment may fare worse in segregation than inmates who do not have the impairment at all.

[505] Dr. Koopman was asked whether focussing on an inmate's symptoms would capture inmates with serious mental health issues even if they were not specifically diagnosed. She responded that it would depend on the adequacy of the symptom list and on the ability of the individual assessing the inmate to pick up on the symptoms. In this regard, Dr. Koopman expressed concern regarding the qualifications of the individuals who would make these decisions. CD 709 defines a health care professional as: "an individual registered or licensed for autonomous practice in the province of practice. Individuals must operate within their scope of practice and competence. Examples include Psychologists, Psychiatrists, Physicians, Nurses, and Clinical Social Workers." However, not all of these health professionals are trained in the diagnostic skills necessary to determine whether a mental disorder exists and, if it does, whether segregation will be unduly problematic for the inmate.

[506] Dr. Blanchette testified that of the current inmate population, 182 inmates had been flagged for serious mental illness and significant impairment within the meaning of CD 709; 44 of them were certified in accordance with the mental health legislation of their respective provinces. Ms. Kinsman, warden of Beaver Creek Institution in Ontario, said that all the inmates in the Ontario Region exempted on the basis of the mental health clause were acute cases in regional treatment centres, not mainstream institutions.

[507] The vagueness of the CD's definition of serious mental illness with significant impairment becomes evident in the differing interpretation given to it by a number of the witnesses. Dr. Blanchette testified that the exclusion did not require a diagnosis

of a psychotic, major depressive or bipolar disorder. Ms. Kinsman, on the other hand, was of the view that the acuteness of the inmate's case had to be confirmed and diagnosed. She testified to her understanding that the determination whether an inmate met the definition was made through the chief of mental health.

[508] With respect to the second component of the exclusion – inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk of suicide – I again find the definition in CD 709 to be too narrow.

[509] Dr. Blanchette agreed in cross-examination that inmates with certain risk factors identified by the OCI as elevating the risk of suicide would not necessarily be excluded from segregation on the basis of CD 709, including: (a) inmates with recent self-injurious histories who were not actively engaging in self-injury; (b) inmates who emphatically deny suicidal ideation but whose psychiatric history and behaviour suggests otherwise; (c) inmates afflicted with psychiatric disorders and whose psychotropic medications have been initiated or recently changed or withdrawn; (d) inmates withdrawing from alcohol or drugs; and (e) inmates with psychiatric and concurrent substance abuse disorders.

[510] Dr. Blanchette testified that the exclusion requires that the inmate be actively engaging in the behaviour and that it be likely to result in serious bodily harm and an imminent risk of suicide. Ms. Kinsman did not know how recent the self-harming behaviour would have to be in order to exempt the inmate from segregation. She said that she would be relying on her chief of mental health services and clinicians to inform her.

[511] Thus, I am not satisfied that CD 709 sufficiently addresses the over-representation of mentally ill inmates in administrative segregation.

[512] I conclude that the impugned provisions have a more burdensome effect on mentally ill inmates, and that the first stage of the s. 15 test has been met.

[513] The second question is whether the impugned provisions fail to respond to the actual needs of mentally ill inmates and instead imposes burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.

[514] CSC does not keep track of the number of inmates with mental disabilities in either the general inmate population or in segregation. As Dr. Blanchette agreed, without hard data of this sort, it is difficult, if not impossible, for CSC to conduct principled strategic planning with respect to that population.

[515] To cast some light on the situation, CSC recently commissioned a study, the results of which were released in February 2015 and entitled *National Prevalence of Mental Disorders among Incoming Federally-Sentenced Men*. As its title suggests, the study determined the prevalence rates of major mental disorders among men newly admitted to CSC reception centres using structured clinical interviews. Data was collected from 1,108 inmates over a six-month period. Current (within the past month) and lifetime rates were obtained for the following categories of disorders: (a) mood; (b) psychotic; (c) substance abuse; (d) anxiety; (e) eating; (f) pathological gambling; (g) antisocial personality disorder; and (h) borderline personality disorder. (Disorders (a) to (f) are categorized as Axis I disorders in the DSM-4.)

[516] Among the study's findings were the following:

- a) 81% of offenders met the diagnostic criteria for at least one mental disorder in their lifetime; 73% met the criteria for a current disorder;
- b) alcohol and substance abuse were the most common disorders (49.6%), closely followed by antisocial personality disorder (44.1%) and anxiety disorders (29.5%);
- c) 482 of 1,108 (43.5%) had a current Axis I disorder. Of these inmates, 203 (18.3%) had Global Assessment of Functioning ("GAF") scores of 50 or less, the threshold used by the World Health Organization as suggesting overall serious impairment related to a mental health diagnosis; and
- d) 137 of 1,108 (12.4%) had a major mental disorder, defined as at least one of major depressive disorder, bipolar disorder or a psychotic disorder. Of these inmates, 78 (7%) had GAF scores of 50 or less.

[517] A similar study is currently underway for women.

[518] While the plaintiffs challenge the validity of the study, taken at face value, it does indicate that mental illness is prevalent in the population studied.

[519] When new federal inmates are initially admitted into the penitentiary system, they are sent to a regional intake assessment unit where CSC staff conduct a comprehensive assessment including security requirements, and physical and mental health. Mental health is assessed by means of the Computerized Mental Health Intake Screening System (“CoMHISS”), a computer administered aggregate of four assessment tools to flag for follow-up those inmates with potential mental health concerns. The test is self-administered by the inmate who identifies where he or she falls on a scale of 0 to 5 or 6 in relation to basic symptoms patterns. CoMHISS is a screening device, as opposed to a diagnostic tool. On the basis of analysis of the collection of test scores, a recommendation is made regarding the need for further assessment.

[520] Dr. Koopman identified several problems with CoMHISS, including: (a) the inmates are newly imprisoned and may be unsure whether they wish to take the test or may be shy of doing so; (b) the language used in the test can be very confusing – parts of it require a grade 5 or 6 reading level but the average reading level of the inmate population is a little above grade 3; and (c) the scales themselves that measure conditions such as anxiety, depression and hostility are not particularly effective. In Dr. Koopman’s view, too much rests on the score at the end of the test, which determines whether the inmate will be seen by someone competent to make a mental health diagnosis.

[521] At the time an inmate is placed in administrative segregation, they are taken through the Suicide Risk Checklist. I have already discussed the shortcomings of the checklist. Dr. Koopman’s evidence, which I accept, is that its use is a high risk practice that places too much faith on a very general instrument and interpretation by someone without the knowledge to make the judgments required. I have also detailed how the mental health monitoring and supports that are in place for segregated inmates are simply not up to the task.

[522] On the evidence before this Court, the most serious deficiency in dealing with administrative segregation placements is the inadequacy of the Government's processes for dealing with the mentally ill. I am satisfied that the law (including the newly revised CD 709) fails to respond to the actual capacities and needs of mentally ill inmates and instead imposes burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. Accordingly, I find that the plaintiffs have established a breach of s. 15.

[523] Of primary importance is for the Government and CSC to recognize the size and importance of the mentally ill, cognitively impaired, and potentially self-harming and suicidal contingent in Canada's penitentiaries. There needs to be a recognition that this is a serious health issue. CSC should evaluate its incoming inmates to assess these aspects of their health. In my view, this will involve a need for more medically trained staff, more facilities for treatment and, of course, substantially increased funding.

4. Intersecting Characteristics

[524] In my respectful view it is not necessary to give special consideration to mentally ill women inmates in light of my finding that mentally ill inmates (including both men and women) are entitled to s. 15 relief. I believe that the same is true with respect to Aboriginal women; having found an entitlement to s. 15 relief for Aboriginal inmates (including both men and women), no further consideration of West Coast LEAF's submissions is necessary.

VII. SECTION 12

[525] Although the plaintiffs focused their submissions on s. 7 of the *Charter*, they also challenge the impugned provisions under s. 12, which guarantees everyone the right not to be subjected to cruel and unusual treatment or punishment.

[526] The plaintiffs submit that administrative segregation constitutes treatment or punishment for the purpose of s. 12 and that prolonged, indefinite administrative segregation is an excessive measure that violates basic standards of decency given its significant psychological harms. They refer to international norms that prohibit

prolonged indefinite solitary confinement and maintain that these ought to inform the assessment of whether the impugned provisions violate standards of decency.

[527] The Government concedes that administrative segregation constitutes “treatment” within the meaning of s. 12, but submits that the plaintiffs have not met the high threshold of establishing that it is cruel and unusual. It highlights that courts have repeatedly declined to conclude that the authorization of administrative segregation under the *CCRA* scheme itself is cruel and unusual treatment under s. 12 and have instead found that the determination of whether s. 12 is violated in a particular case is necessarily driven by the facts at hand. Relevant factors include “the conditions, duration and reasons for segregation”, as well as the particular circumstances of an inmate: *R. v. Marriott*, 2014 NSCA 28 at para. 38. The Government maintains that the absence of a personal plaintiff in this case precludes a sufficient factual record to enable the Court to determine whether individual placements in administrative segregation violate s. 12.

[528] The Government further takes the position that the impugned legislation does not violate s. 12 simply because it allows for lengthy detention. As in *Charkoui* at para. 98, although the duration of segregation is theoretically uncertain under the *CCRA*, the existence of review procedures negates the claim that the legislation violates s. 12.

[529] Section 12 is breached when the punishment or treatment prescribed is so excessive as to outrage standards of decency: *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at 1072. Gross disproportionality is the standard for both ss. 12 and 7 of the *Charter*: see *R. v. Marmo-Levine*; *R. v. Caine*, 2003 SCC 74 at paras. 159-61.

[530] “Cruel and unusual” is a high bar to meet: *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667 at para. 9. Merely excessive or disproportionate treatment or punishment is not enough to establish a s. 12 violation.

[531] Segregation is not an automatic breach of s. 12 of the *Charter*. In *R. v. Olson* (1987), 38 C.C.C. (3d) 534 (O.N.C.A.), aff’d [1989] 1 S.C.R. 296, Mr. Justice Brooke stated at para. 41 that:

[41] ... [s]egregation to a prison within a prison is not, *per se*, cruel and unusual treatment ... [but] it may become so if it is so excessive as to outrage standards of decency.

[532] To date, courts have determined whether segregation amounts to a violation of s. 12 based on the circumstances of segregation in each case. The conditions, duration and reasons for segregation are considered, and the outcome as to whether a breach of s. 12 is found varies accordingly: see for example *Wu v. Attorney General of Canada*, 2006 BCSC 44 and *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805.

[533] In the present case, the application of s. 31 of the *CCRA* does not result in identical treatment for every inmate to whom it is applied. I have accepted much of the plaintiffs' evidence with respect to the conditions experienced by inmates held in administrative segregation. While individual circumstances of administrative segregation may amount to cruel and unusual punishment, not every application of the impugned legislation will, nor do I have the evidence to make the findings that it will.

[534] The plaintiffs do not argue that administrative segregation as a practice is unconstitutional; they argue that certain conditions experienced by inmates placed in administrative segregation are. Namely, the plaintiffs argue that any period of administrative segregation that exceeds 15 days is unconstitutional and that mentally ill inmates should never be placed in administrative segregation. In the case before me, there is no basis for finding a breach of s. 12.

VIII. SECTION 9

[535] Section 9 of the *Charter* protects against arbitrary detention or imprisonment. The state cannot detain individuals arbitrarily; it must only do so in accordance with the law: *R. v. Grant*, 2009 SCC 32, at para. 54; *Charkaoui* at para. 88.

[536] CDAS takes the lead in advancing the claim under s. 9, arguing that administrative segregation violates the section for two reasons. First, there is no ability for independent review, absent *habeas corpus*, which CDAS maintains is a

remedy rather than a review process; and second, the rights of due process available to an inmate placed in administrative segregation are essentially a “rubber stamp.”

[537] The Government responds that placements in administrative segregation are not arbitrary and that neither the law itself, nor specific applications of the law, run afoul of the s. 9 standard. It says that s. 31 of the *CCRA* provides standards and criteria for lawful detention that limit detention in administrative segregation to a narrow group of people. Further, the Government argues, the standards that govern detention in administrative segregation are rationally related to the purpose of the power of detention, namely the safety and security of the prison and its inmates.

[538] Section 9 is concerned with the adequacy of the standards prescribed by law for a detention or imprisonment. Concerns with the severity of the detention or imprisonment, including the nature and duration of the detention, are more appropriately reviewed under s. 12 of the *Charter*; procedural concerns about the detention, including a lack of procedural safeguards, would more properly be regarded as breaches of s. 7 of the *Charter*. see Peter Hogg, *Constitutional Law of Canada* 5th ed. Vol. 2 at 49-9.

[539] There is no dispute that placement in administrative segregation is a new detention that is “distinct and separate from that imposed on the general inmate population”: *R. v. Miller*, [1985] 2 S.C.R. 613 at para. 35; *May v. Ferndale Institution*, 2005 SCC 82. Thus, the only issue here is whether such placement is arbitrary.

[540] The Supreme Court of Canada discussed the meaning of arbitrariness in this context in *Grant* as follows at para. 54:

[54] ... [a] lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

[541] To determine whether a detention is arbitrary, a court must consider (a) whether the detention is authorized by law; (b) whether the standards set out in the law limit detention to a narrow or restricted category of people; and (c) whether the

limitation set out in law is based on criteria that are rationally connected to the legislative objective: see *R. c. Perry*, 2013 QCCA 212 at para. 118.

[542] Applying those factors to the present case, administrative segregation is authorized by law, namely, s. 31 of the *CCRA*. Second, the law is limited to a restricted category of inmates. An inmate is only placed in administrative segregation where there is no reasonable alternative and there are reasonable grounds to believe that the inmate acted, or attempted to act, in a way that jeopardizes the security or safety of the penitentiary; allowing the inmate to associate with other inmates would interfere in an ongoing criminal investigation; or allowing the inmate to associate with other inmates would jeopardize the inmate's own safety. Third, there is a rational connection between placing an inmate in segregation and the legislative purpose of maintaining the safety and security of the institution.

[543] Accordingly, placing an inmate in administrative segregation is authorized by law. The law is not arbitrary because it limits administrative segregation to a narrow group of inmates and sets out standards to govern the exercise of the provision's exercise, thus structuring the warden's discretion under the *CCRA*. Any procedural concerns with administrative segregation, including review processes under the *CCRA*, are more appropriately dealt with under s. 7. Accordingly, I find no s. 9 violation on these facts.

[544] Having found that the impugned provisions violate ss. 7 and 15 of the *Charter*, I turn now to consider whether they can nevertheless constitute a reasonable limit that is justified under s. 1.

IX. SECTION 1

[545] I have found that the impugned provisions are contrary to s. 7 of the *Charter* to the extent that they authorize (a) prolonged and indefinite administrative segregation; (b) internal review of segregation placement decisions; and (c) the deprivation of counsel at segregation review hearings. I have also found that they

are contrary to s. 15 to the extent that they impose a discriminatory burden on mentally ill inmates and Aboriginal inmates.

[546] I therefore turn now to consider whether the provisions can nevertheless constitute a reasonable limit that is justified under s. 1.

[547] I will state at the outset that my analysis principally addresses the s. 7 infringements. Given my ultimate conclusion that those infringements cannot be justified in this case, there is little purpose in undertaking a detailed analysis with respect to the infringements of s. 15, although I do refer to the treatment of inmates with mental illness as an alternative to administrative segregation. Moreover, the parties, including the Government who bears the onus on this issue, did not meaningfully address the s. 15 infringements in the context of s. 1.

A. Governing Legal Principles

[548] *Charter* rights are not absolute. Reconciliation of the competing interests of society or of other individuals may at times require that a claimant's *Charter* rights be limited. To that end, s. 1 of the *Charter* provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[549] The Government bears the onus of proving, on a balance of probabilities, that any limit of a right or freedom is justified. To do so, it must demonstrate that the law has a pressing and substantial objective, and that the means chosen are proportional to that objective. A law is proportionate if (a) the means adopted are rationally connected to that objective; (b) it is minimally impairing of the rights in question; and (c) there is proportionality between the deleterious and salutary effects of the law: *R. v. Oakes*, [1986] 1 S.C.R. 103.

[550] It is difficult to justify a violation of s. 7: *Re B.C. Motor Vehicle Act* at 518. As the Court further explained in *Carter* at para. 95:

- [95] ... The rights protected by s. 7 are fundamental, and "not easily overridden by competing social interests" (*Charkaoui*, at para. 66). And it is hard to justify a law that runs afoul of the principles of fundamental justice

and is thus inherently flawed (*Bedford*, at para. 96). However, in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*. More particularly, in cases such as this where the competing societal interests are themselves protected under the *Charter*, a restriction on s. 7 rights may in the end be found to be proportionate to its objective.

[551] Here, the impugned provisions are prescribed by law, and the plaintiffs concede that they have a pressing and substantial objective. The question, therefore, is whether the Government has demonstrated that they are proportionate. I will consider this issue with respect to the three s. 7 infringements, focussing on the fact that the provisions authorize prolonged and indefinite segregation.

B. Proportionality – Prolonged, Indeterminate Segregation

1. Rational Connection

[552] To establish a rational connection, the Government must show “a causal connection between the infringement and the benefit sought on the basis of reason or logic”: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 153. The rational connection requirement is aimed at preventing limits being imposed on rights arbitrarily. The Government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so: *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 48. This stage of analysis has been described as “not particularly onerous”: *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at para. 148.

[553] For the reasons discussed in the context of the s. 7 arbitrariness/overbreadth analysis, I find there is no rational connection between prolonged segregation, which the impugned provisions permit, and their legislative objective.

[554] While technically this is sufficient to end the s. 1 analysis, I will nevertheless go on to consider the remaining factors as if I had found a rational connection.

2. Minimal Impairment

[555] The inquiry at this stage of the proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. In other words, are there alternative, less drastic means of achieving the legislative objective in a real and substantial manner. In making this assessment, the Court must accord Parliament a measure of deference, particularly on complex social issues where Parliament may be better positioned than the courts to choose among a range of alternatives: *Hutterian Brethren* at para. 53.

[556] The Government in this case submits that the statutory safeguards regarding admission to and release from administrative segregation ensure that any breach of *Charter* rights is minimal. It says the legislation achieves this by limiting the use of segregation to exceptional circumstances when no other option exists to ensure the safety of inmates and/or the institution, and is only applied for the shortest time possible to achieve these ends.

[557] It will come as no surprise at this point, given my findings throughout these Reasons, that I do not agree with the Government's position on minimal impairment. While I accept that security requires that CSC be able to remove inmates from the general prison population, whether to ensure their safety or that of others, I do not accept that it is necessary that they be placed in administrative segregation where some lesser form of restriction would serve the purpose. Or that there is any justification for keeping them segregated for any prolonged period. I conclude that the impugned provisions are not minimally impairing of the rights of segregated inmates, and that there are less impairing alternatives as set out below.

(a) *Time Limits*

[558] Given that much of the harm of administrative segregation arises when it is prolonged, a less drastic means of achieving institutional security is to require strict time limits on the use of what is otherwise a legitimate means of promoting that end.

[559] I begin by noting that even the Government's expert witness, Dr. Gendreau, recommends that a time limit be imposed on the general use of administrative segregation; in his view, 60 days.

[560] It is an important fact that the Mandela Rules prohibit solitary confinement for a period in excess of 15 consecutive days. As the Supreme Court recognized in *Suresh* at para. 59, "the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect". Both Dr. Grassian and Dr. Haney accept 15 days as a generous but defensible standard.

[561] Mr. Somers was asked about his views regarding a 15-day hard cap on placements. He testified that it was achievable in many cases, reflected in the fact that most inmates are released from segregation before their five-day review. It was also viable where an intra-regional transfer could alleviate segregation. However, he responded that it would be operationally very difficult where there was an ongoing police investigation or an inter-regional transfer was necessary. The consequences of a forced release from segregation before risk to the inmate was appropriately managed could be dire, he said; it could result in grievous bodily harm and even death.

[562] Mr. Pyke also testified that a 15-day hard cap would be incredibly difficult for an institution to meet. He used as an example an inmate who had killed another inmate inside the institution. Between the police investigation and the need to manage the safety of the inmate from retaliation and other risks, 15 days would be an exceedingly tight timeframe. Mr. Pyke also expressed concern that a hard cap would lead to voluntarily segregated inmates being moved to a "seg lite" situation so that the institution could say that it had complied with the deadline.

[563] However, Mr. Pyke said that a 15-day soft cap that allowed for deviation in exceptional circumstances was something they could manage.

[564] Ms. Bouchard was asked whether, within the context of her particular institution, she could live with a five-day cap on segregation. She responded that she

could in most cases but that it could pose problems where transfers were required since they depended on external flight schedules and other factors beyond her control.

[565] To the extent that the witnesses' resistance to the notion of a ceiling on the use of segregation is based on administrative or operational concerns, that is simply no justification for a *Charter* infringement: *Bacon* at para. 269. I would further note Professor Jackson's evidence that under current arrangements without a ceiling, "time is simply extended and things take too long because of the absence of any constraints on resolving them quicker."

[566] In this regard, I am firmly of the view that a time limit on the use of administrative segregation would create the pressure to ensure that decisions about alleviating an inmate's segregation were made and implemented promptly, while still allowing CSC to use the practice for short periods to address security concerns.

[567] As for whether a time limit would impose unacceptable constraints on the management of security, I accept Professor Coyle's evidence that none of the recommendations of the jury at the *Coroner's Inquest Touching the Death of Ashley Smith* – which included that administrative segregation be restricted to no more than 15 consecutive days – gives rise to undue risk to the safe management of a prison. Professor Coyle is a former warden in the prison services of the United Kingdom where he commanded three major prisons, including Peterhead Prison in Scotland which held the most dangerous and difficult inmates in the system. His opinion thus carries substantial weight on this point.

[568] Also relevant is Dr. Gendreau's evidence about having been a clinical administrator in a 200-person institution that had only five segregation cells which inmates had to leave within a week. The result was that staff and inmates learned to cope with that reality.

[569] I finally turn again to the evidence of Professor Jackson:

... putting myself in the position of a warden, a correctional manager, I sort of asked myself if I was told you can only put people in segregation under 22

hours or 23 hours a day for 15 days and then you've got to figure out something else, how would I deal with what happened in Kent I 1999. And it would be a challenge. But I believe it's a challenge that they can meet.

...

So in looking at correctional managers I have come to have a lot of respect for their ability to respond in the moment and also to respond to situations which most of us in the legal profession never have to deal with. And I am satisfied that if you had a cap, even as short as 15 days on segregation as presently practiced with 23 hours lock-up, you could come up with measures in which you can take people out of the population for the purposes of investigation but not put them into 23-hour lock-up. Take them to a different part of the prison, contain the situation, carry on your investigation. They wouldn't be in general population in the sense – in the same situation they were before the event, but they would not be in isolation 23 hours a day.

The need for sort of intermediate steps is something I believe – if the Correctional Service of Canada was told you cannot do this anymore, you cannot lock people up for a longer period of time under 23 hours lock-up, there are enough bright imaginative people with extremely great depth of experience who will say okay, but we're got to do something. We just had a riot. We just had a murder. We can't say oh well, big deal. Let's kind of just go on like nothing happened. Something happened. And they have to protect other prisoners, they have to protect the staff. And there are a number of intermediate ways you can do it.

Now, some of it requires some new construction. It requires much more in terms of new construction of a mindset as much as it does bricks and mortars and steel and barbwire.

[570] Those comments conveniently segue my discussion into other minimally impairing alternatives to administrative segregation as prescribed by the impugned provisions.

(b) Voluntary Dissociation

[571] Section 31(3) of the *CCRA* identifies three categories of inmates who may be placed in administrative segregation. The first two categories are clearly involuntary. Category (c) is “allowing the inmate to associate with other inmates would jeopardize the inmate’s safety.” Historically, inmates segregated for this reason were referred to as “voluntary”. This terminology has recently ceased to be used because there was a perception that these inmates needed to be segregated because of CSC’s inability to keep them safe in the general prison population. In that sense it was considered to be a misnomer to refer to them as “voluntary”. As mentioned in the previous

discussion of time limits, government witnesses expressed serious concerns about the viability of a “hard cap” for administrative segregation under s. 31(3)(c).

[572] It was my impression that Messrs. Somers and Pyke, when considering the problems of a “hard cap” were primarily concerned with “voluntary” inmates in administrative segregation who resisted returning to the general population even when CSC could not identify any real threat to their safety. Messrs. Clark and Pyke referred to the placement of such inmates in segregation as “non-justified”.

[573] I also find some of Dr. Haney’s critique of the Zinger Study of inmates in administrative segregation relevant here:

The first key limitation is that the Zinger Study is based on co-mingled data from 132 “voluntary” and “involuntary” administrative segregation prisoners. The “voluntary” administrative segregation prisoners were all protective custody inmates (what, in some jurisdictions, are referred to as safekeeping, or sensitive needs-type prisoners). Note that there were quite a few of these “voluntary” administrative segregation prisoners in the study; they started out as 39% of Zinger’s administrative segregation sample and they represented the *majority* of those who were left at the end of 60 days. Of course, people who chose to be in administrative segregation (and who were presumably relieved to be in “safekeeping”) would not be expected to report suffering to prison authorities. There are usually comparatively few “voluntary” prisoners in standard solitary confinement or administrative segregation units and, because of their especially complicated situation (i.e., they not only want to be there but a fearful of being returned to the mainline prison housing units from which they came), are typically not the focus of most of the studies that have been done of isolated prisoners.

They certainly cannot and should not be lumped together in studies of the adverse psychological effects of isolation....

[574] In my opinion, one of the important distinctions between voluntarily segregated inmates and inmates segregated against their will is the issue of uncertainty of length of detention. One of the psychological stressors of administrative segregation is the uncertainty of the length of detention.

[575] I believe that a satisfactory solution to the problems described above, is to create a new subpopulation labelled “voluntary dissociation” and reserve administrative segregation for the inmates now described in *CCRA* s. 31(3)(a) and (b). The inmates choosing “voluntary dissociation” would, generally speaking, be

free to return to general population when they felt it was safe to do so. The procedural protections for involuntarily segregated inmates would not be necessary for such a subpopulation.

(c) *Other Subpopulations*

[576] There is a place for subpopulations of vulnerable inmates to avoid segregation. While CSC takes a predominantly binary approach to prison management that sees either general population or segregation as the available options for housing inmates, it has recognized the need for interim options in its creation of subpopulations in some of its institutions.

[577] For example, Mr. Thompson, who was warden at Kent Institution from 2012-2014, testified that there were four subpopulations during his time:

- a) a general population;
- b) a protective custody population which had to be kept separate from the general population inmates and could not be in the same area as them at any time;
- c) a smaller subpopulation within the protective custody unit for inmates who were so vulnerable they were at risk even from those who were themselves in protective custody, including high profile inmates, certain sex inmates, those with cognitive disabilities and geriatric inmates. The unit had a separate exercise area, programming facility and visiting area; and
- d) a separate range with one or two high profile inmates who were particularly difficult to house safely with other inmates. Its purpose was to avoid prolonged segregation placements for these inmates, and staff use variable approaches to allow for as much interaction between them as possible.

[578] Although the Kingston Penitentiary has since shut down, it had seven subpopulations when Mr. Pyke was warden from 2010 to 2013:

- a) a general population;
- b) administrative segregation;
- c) an intermediate mental health unit;

- d) a transition unit to assist inmates who had been in segregation for a lengthy period of time to transition back to the general population;
- e) an intensive supervision unit, not unlike the transition unit, comprised of inmates whose voluntary admission to segregation the institution considered unjustified. The objective was to work with the inmates on a one-on-one or small group basis to address some of their concerns about leaving segregation, teach them coping strategies, and try to get them to integrate with the general population. On average there were 25-30 inmates in the unit;
- f) a special needs unit for lower functioning inmates who were being victimized and intimidated by other inmates; and
- g) a temporary detainee unit for inmates out on conditional release in the community who breached their conditions and were returned to the institution for reassessment.

[579] Several CSC witnesses testified about CSC's experimentation with transition ranges. Inmates were permitted to spend more time out of their cells, and the intention was that they would have more access to programming. However, that did not occur since correctional programming is group-based and therefore dependent on having sufficient inmates in the range who required the same program. Although the inmates were relieved of their segregation status on paper, in reality their circumstances were not meaningfully different, thus earning the transition ranges the label "segregation lite". As Professor Jackson observed, the problem that emerged with some of these special units is that they set out to be well-meaning alternatives but ultimately became much like segregation. Since they were not legally defined as administrative segregation, however, the review mechanisms and other procedural protections did not apply.

[580] According to the CSC witnesses, CSC has since abandoned the transition ranges since they did not prove effective in integrating the inmates into the general population. CSC discovered that it was incredibly difficult to get the inmates to take the next step from the subpopulation to the general population because, in essence, it became too comfortable for them to remain in the transition ranges where they had

better conditions than in segregation but without the worries for their personal safety in the general population.

[581] Dr. Rivera offered a somewhat different view, however. She indicated in her report that some transition units operated successfully for a while in providing support and extra services to inmates who had been in segregation for a significant time period and who did not have the motivation or skills to return to general population. However, gradually the resources allocated to transition units decreased, and, at the time of Dr. Rivera's review, most transition units in the men's institutions were holding pens for men who had no intention of leaving them and no resources to enable them to do so.

[582] Subpopulations undoubtedly have shortcomings, and they were not embraced by the CSC witnesses who testified about them. Subpopulations can also further splinter, as was the case with the protective custody population at Kent Institution; there will always be relatively stronger inmates who will prey on relatively weaker ones in each subpopulation that is created. Importantly, the creation of subpopulations necessarily involves the partition of the physical infrastructure to accommodate each individual group and also limits the ability of the institution to provide programming and other services. An institution can either provide these programs and services within each unit or, alternatively, provide them in one area and cycle each subpopulation through on a strict schedule to ensure separation. Both options require significant increases in staff and limit inmate access to programs and services.

[583] Although Mr. Pyke agreed that resources in and of themselves should not be a reason for denying inmates access to programs and services, he said that the operational reality is that there are a fixed number of hours in the day within which to coordinate the movements of the different subpopulations.

[584] At Kent Institution, each of the three primary subpopulations is essentially a mirror image of the others in terms of staffing, services and programming. However,

staffing has been a challenge, and the institution has had difficulties recruiting enough nurses and psychologists to meet its healthcare needs.

[585] Dr. Rivera gave evidence about a number of alternatives to segregation in place at a number of Canadian institutions. For example, Stony Mountain Institution has a sheltered unit for inmates who have difficulty living in general population, whether because they are low-functioning intellectually, have habits other inmates find offensive or annoying, or are simply loners who prefer being in their cells. The activities in the unit are designed to engage inmates socially and teach them social skills. This population of inmates would otherwise have been at high risk of being placed in segregation.

[586] Another example is a living unit at EIW for low-functioning women who need special supervision to live with others. A behavioural counsellor supervises the unit part-time and provides supportive counselling and relevant social skills teaching. Some of the women who were in the unit were in segregation previously because their dysfunctional behaviours tended to lead to conflict and sometimes violence.

[587] Dr. Rivera notes that where various alternative units have been created over the years, they have eventually failed when the resources committed to them were reduced and their effectiveness was therefore undermined; this despite staff support for the utility of these units in providing the extra attention and interventions that were able to keep vulnerable inmates from acting out in such a way that they ended up in segregation. Special-needs units often work well when they are created and supervised by someone who is committed to their effective functioning. Nevertheless, resources tend to be reallocated after a while and these units get watered down and ultimately closed down. A greater recognition of the continuing value of special needs units for appropriate subpopulations would be a useful check on the overuse of administrative segregation.

[588] Dr. Rivera identified a number of other ways to address the high number of inmates living in long-term administrative segregation including:

- a) increasing the level of intervention by program and mental health professionals in general population before inmates act out and get placed in segregation;
- b) ensuring that dynamic security is used in general population to prevent misconduct from occurring and handling them creatively when they do; and
- c) creating day programs where inmates with particular problems can associate and build new skills throughout the day and then return to their general population ranges at the end of the day.

[589] Instead, the correctional setting offers too few options, creating a situation in which the only alternative to general population is segregation.

[590] In my view, properly resourced subpopulations are a less impairing alternative than administrative segregation.

[591] I would briefly note that a further alternative is involuntary transfers, which I discussed earlier in these Reasons as one of the reasons for the recent decline in the number of segregated inmates.

[592] This concludes my analysis of s. 7 alternatives to administrative segregation.

(d) Treatment Approach

[593] As for s. 15, in the case of inmates with mental illness, the most obvious – and far less impairing – alternative to administrative segregation is treatment.

[594] Dr. Hannah-Moffat gave evidence about alternative approaches to segregation for inmates with serious mental health issues. In the United States, for example, the New York Department of Corrections and the Department of Health and Mental Hygiene plan to eliminate solitary confinement and adopt a treatment approach for inmates with serious mental health issues who break institutional rules. These inmates will be placed in clinical settings where clinical staff will have authority to make decisions about how to respond to problematic behaviour. The plan includes individual and group therapy. It also includes provisions for inmates with mild to moderate mental health and behavioural problems (including those with

personality disorders) to be managed in a setting designed to provide tangible incentives, such as increased time out of cell, for engaging in programming and following institutional rules.

[595] There is no reason why CSC cannot treat mentally ill inmates as a health problem, not a security problem.

3. Proportionality of Effects

[596] This final stage of the proportionality analysis weighs the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good. The analysis entails a broad assessment of whether the benefits of the impugned law are worth the costs of the rights limitation: *Hutterian Brethren* at paras. 76-77.

[597] Given my conclusion that the impugned provisions are not minimally impairing, it is not necessary that I address this final step. I will nevertheless state that had my conclusion on minimal impairment been different, I would have found that the impugned provisions are not proportionate in their effects.

[598] The Government argues that administrative segregation is a measure that is used to separate either at-risk inmates from unsafe conditions or aggressors who pose a threat to personal or institutional safety. Administrative segregation therefore limits the segregated inmate's residual liberty interest in order to protect the s. 7 right to life of that inmate or others. There is no greater salutary effect, the Government contends, than keeping inmates alive. The societal interest in protecting the safety of inmates under the care of CSC ought to be accorded considerable weight in the analysis.

[599] While I agree that the salutary effects of short-term administrative segregation in terms of enabling CSC to remove inmates from the general population in order to maintain safety and security within the institution balances favourably against some limitation of inmates' s. 7 rights, that balance shifts dramatically in the case of prolonged and indeterminate segregation. Given the severity of the harms – and

corresponding rights infringement – as has been discussed, the deleterious effects of the impugned provisions in those circumstances substantially outweigh their salutary effects.

C. Proportionality: Lack of Independent Review and Right to Counsel

[600] Little need be said as to whether these infringements of s. 7 can be justified under s. 1 of the *Charter*. In each instance, there is an absence of any rational connection between the infringement and the objective of preserving safety and security within the institution. Providing these procedural protections to segregated inmates does not increase any security risk to the institution, and they therefore do not fall within a range of reasonable alternatives for reviewing segregation placements. Additionally, the deleterious effects of denying the protections are not proportional to the objectives of the administrative segregation regime.

[601] For these reasons, I conclude that the Government has failed to discharge its burden of justifying the infringement of ss. 7 and 15 of the *Charter* under s. 1.

X. REMEDIES

[602] The plaintiffs seek the following relief:

A declaration that the impugned laws are invalid pursuant to ss. 7, 9, 10, 12 and 15 of the *Charter* to the extent that:

- a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
- b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
- c) the impugned laws authorize internal review;
- d) the impugned laws authorize and effect administrative segregation in conditions that lack meaningful human contact;
- e) the impugned laws authorize and effect administrative segregation in the present environment of confinement;
- f) the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and

- g) the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.

[603] The plaintiffs submit that, because legislation is required to regulate the use of administrative segregation, this is not a case where reading in or reading down is appropriate. Their position is that the only proper remedy is to strike down the law and send the matter to Parliament to address.

[604] The Government does not concede the existence of any inconsistency between the challenged sections of the *CCRA* and the *Charter*.

[605] It says that if the Court concludes otherwise, the impugned provisions are capable of being administered in a *Charter* compliant manner, and therefore any deficiencies arise from maladministration of the administrative segregation regime. Section 52 is not available as a remedy for maladministration.

[606] In addition, the Government asks that if s. 52 relief is granted, the declaration of invalidity be suspended for 12 months. In support of that request, the Government argues:

A declaration of invalidity under s. 52 renders a law of no force or effect to the extent of its inconsistency with the Constitution. Where an immediate declaration of invalidity would create a problematic legal vacuum, however, the effect of the declaration may be suspended to permit the legislature sufficient time to craft an appropriate legislative response.

The use of suspended declarations of invalidity is addressed to the problems that arise when important, albeit constitutionally problematic, legislation is suddenly struck down. Although suspended declarations allow “a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation”, their use reflects the practical reality that even unconstitutional laws may serve important functions, and that it may take some time for Parliament to fashion adequate replacements.

In *Schachter*, the SCC identified three circumstances in which the balance of these considerations would clearly favour granting a suspended declaration of invalidity. These are: 1) where striking down the legislation without enacting something in its place would be dangerous; 2) where it would threaten the rule of law; and 3) where it would result in the deprivation of benefits from deserving persons.

[607] The plaintiffs’ primary position is that no suspension of a declaration of invalidity should be given. Their reasoning is:

A suspension provides for the continuance of a regime that has been found to violate the Constitution, a state of affairs which is repugnant to our legal order. The supremacy of the Constitution and our tradition of strong judicial review dictate an approach that renders immediate invalidity the default remedy and demands a compelling reason for departure from this starting position.

To suspend the declaration of invalidity would simply continue an undesirable uncertainty for a further period of time.

[608] Their alternate position is:

If there is to be a suspension of the declaration of invalidity, it should be for no more than six months.

If this Court sees fit to extend the suspension of the declaration of invalidity, it should outline a mechanism whereby CSC bears the onus of seeking judicial approval of decisions to maintain inmates in segregation longer than 15 days pending expiration of the suspension period. Such a mechanism was outlined in the Arbour Report.

As noted above, a suspension of a declaration of invalidity is a constitutional compromise and one that is repugnant to our legal order because it allows for the continuation in force of a law which has been found to violate the highest law of the land. It is essentially a grace period to permit the legislatures to act. In circumstances where their very lives are at stake, Canadian inmates require some means for an exercise of their rights in exchange for the state's request to continue to enforce what is known to be unconstitutional laws.

[609] On the basis of the findings made in these Reasons, I am prepared to make the following s. 52 declaration:

1. The impugned laws are invalid pursuant to s. 7 of the *Charter* to the extent that:
 - a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
 - b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
 - c) the impugned laws authorize internal review; and
 - d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.

2. The impugned laws are invalid pursuant to s. 15 of the *Charter*.
 - a) to the extent that the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and
 - b) also to the extent that the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.

[610] I am prepared to grant a 12 month suspension of my declaration of invalidity on the basis of the first two reasons enumerated in *Schachter v. Canada*, [1992] 2 S.C.R. 679, that is that an immediate declaration would pose a potential danger to the public or threaten the rule of law.

XI. COSTS

[611] I am satisfied that this is a proper case to award the plaintiffs' special costs and am pleased that counsel have worked out a mechanism to accomplish this.

XII. END NOTE

[612] I want to express my appreciation for the hard work and legal abilities of all counsel who have been involved in this matter. The issues were complex, the time pressures formidable, yet the professionalism of counsel substantially lightened the burden on the Court.

"Leask J."