COURT OF APPEAL FILE NO. CA45092

COURT OF APPEAL

ON APPEAL FROM the Order of the Honourable Mr. Justice Leask of the Supreme Court of British Columbia pronounced on January 17, 2018

BETWEEN:

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

RESPONDENTS
(PLAINTIFFS)

AND

ATTORNEY GENERAL OF CANADA

APPELLANT
(DEFENDANT)

FACTUM OF THE APPELLANT
THE ATTORNEY GENERAL OF CANADA

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CHRONOLOGY

Date	Event
January 19, 2015	The BC Civil Liberties Association and The John Howard Society of Canada [BCCLA/JHSC] file a Notice of Civil Claim challenging the constitutional validity and administration of ss. 31-33 of the *Corrections and Conditional Release Act*
January 19, 2015	BCCLA/JHSC file a Notice of Constitutional Question
October 13, 2015	Commissioner's Directive 709: Administrative Segregation comes into effect
December 15, 2016	West Coast Women's Legal Education and Action Fund is granted intervenor status on terms
April 5, 2017	Criminal Defence Advocacy Society is granted intervenor status on terms
June 21, 2017	BCCLA/JHSC file an amended Notice of Civil Claim claiming, among other things, that the administrative segregation provisions of the *Corrections and Conditional Release Act* are overbroad.
June 21, 2017	BCCLA/JHSC file an amended Notice of Constitutional Question
August 1, 2017	Commissioner's Directive 709: Administrative Segregation is amended to ensure a fair, reasonable and transparent decision-making process based on a review of all relevant information and that vulnerable offenders are not placed in administrative segregation, except in exceptional circumstances
August 29, 2017	BCCLA/JHSC file a further amended Notice of Civil Claim to include s. 37 of the *Corrections and Conditional Release Act*
August 29, 2017	BCCLA/JHSC file a further amended Notice of Constitutional Question
July 4, 2017	Trial commences
September 1, 2017	Trial concludes
January 17, 2018	Reasons for Judgment issued
February 16, 2018	Attorney General of Canada files Notice of Appeal

OPENING STATEMENT

The administrative segregation of inmates in federal institutions is a legislative tool available to institutional heads for the limited purposes of maintaining institutional security, the safety of persons, and avoiding interference with investigations. It is a tool of limited duration: inmates must be released at the earliest appropriate time. It is also a tool of last resort: inmates can only be segregated if there is no reasonable alternative. While in segregation, inmates retain the same rights as other inmates, including the ability to challenge decisions respecting segregation placements.

The trial judge's conclusion that the statutory provisions permitting administrative segregation infringed ss. 7 and 15 of the *Charter* was based on evidence that certain inmates had experienced prolonged segregation, lacked meaningful human contact, or were denied counsel at review hearings. His conclusion was also based on evidence that segregation had a disproportional impact on Aboriginal inmates and those with mental illness. It was open to the trial judge to conclude on this evidence that some inmates had been improperly segregated: what is at issue in this appeal is whether those facts justified the striking down of the statutory provisions.

The statutory provisions, properly interpreted, do not violate either ss. 7 or 15 of the *Charter*. The ability to remove inmates from the general population is integral to the difficult task of effectively managing large inmate populations. The provisions can be administered in a restrained way, one that achieves their important legislative goals while respecting inmates' rights. Evidence that the provisions were not administered with restraint does not lead to the provisions being constitutionally invalid. Rather, this may show they were administered in an unfair manner in individual cases.

A s. 52(1) declaration was not appropriate in this case as a law that can be applied constitutionally does not become unconstitutional through improper application. Any relief for unconstitutional application of the administrative segregation provisions would only lie at the suit of one or more aggrieved individuals under s. 24(1) of the *Charter*. No such individual is a claimant in this case.

PART 1 – STATEMENT OF FACTS

1. The respondents are non-profit organizations.[1] In their pleadings and at trial, the respondents sought declaratory relief under s. 52(1) of the *Constitution Act, 1982* [*Constitution*] and s. 24(1) of the *Canadian Charter of Rights and Freedoms* [*Charter*], claiming that ss. 31-33 and 37 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [*CCRA*], and their administration, unjustifiably infringe ss. 7, 9, 10, 12, and 15 of the *Charter*.[2]

A. Trial Decision

2. After a 36-day trial, the trial judge made a s. 52(1) declaration that the administrative segregation provisions (ss. 31-33 and 37) are invalid pursuant to s. 7 of the *Charter* to the extent that they authorize and effect prolonged, indefinite, administrative segregation for anyone; authorize and effect the institutional head to be the judge and prosecutor of his own cause; authorize internal review; and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.

3. The trial judge further declared that the administrative segregation provisions infringe s. 15 of the *Charter* to the extent that they authorize and effect any period of administrative segregation for the mentally ill or disabled, and authorize and effect a procedure that results in discrimination against Aboriginal inmates.[3]

4. The trial judge granted a 12 month suspension of this declaration from January 17, 2018, as an immediate declaration would pose a potential danger to the public or threaten the rule of law.[4] He did not address the request for s. 24(1) relief.

5. The federal government has signalled its intention to make changes to the administrative segregation provisions. A bill currently before Parliament would place

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[1] Reasons for Judgment, 17 January 2018, [RFJ] paras. 4-5, Appeal Record [AR] Tab 4, p. 33.
[2] Further Amended Notice of Civil Claim, 21 September 2017, Part 2, paras. 1(a)-1(b), AR Tab 1, pp. 7-8.
[3] RFJ para. 609, AR Tab 4, pp. 187-188.
[4] RFJ para. 610, AR Tab 4, p. 188.

presumptive limits on confinements in administrative segregation, and provide for independent, external review of an inmate's confinement in administrative segregation.[5]

B. Administrative Segregation

6. The Correctional Service of Canada [CSC] manages 43 institutions, which includes four Aboriginal healing lodges and five regional treatment centres.[6] Five of the institutions and one of the healing lodges are for women.[7] In fiscal year 2016-2017, there were approximately 14,316 inmates in federal institutions.[8] Of these, 679 were women inmates, while 3,798 identified as Aboriginal.[9]

7. Since October 2015, there has been a continuing decrease in the number of inmates placed in administrative segregation.[10] The total number of inmates in administrative segregation at fiscal year-end declined from 815 in 2011-2012 (5% of the total inmate population) to 430 in 2016-2017 (3% of the total inmate population).[11] The total number of Aboriginal inmates in administrative segregation at fiscal year-end declined from 266 in 2011-2012 (8% of the total Aboriginal inmate population) to 166 in 2016-2017 (4% of the total Aboriginal inmate population).[12]

8. Aboriginal inmates now have a lower mean stay in administrative segregation than non-Aboriginal inmates, declining from 38 days in 2011-2012 to 23 days in 2016-

[5] Bill C-56, An Act to Amend the Corrections and Conditional Release Act, 1st Reading June 19, 2017.
[6] Ex. 122: Affidavit #1 of J. Pyke at paras. 22, 25, AB Vol. 29, pp. 11559-11560.
[7] N. Kinsman, 16 August 2017, Trans Vol. 6, p. 2039:15-29.
[8] RFJ para. 63, AR Tab 4, p. 48; Ex. 114: Affidavit #1 of Dr. K. Blanchette at para. 14, AB Vol. 28, p. 10966.
[9] RFJ para 63, AR Tab 4, p. 48; Ex. 136: Index of Exhibits at Tabs A, B, AB Vol. 36, pp. 14107-14110; Ex. 135: Affidavit #2 of M. Hayden at Ex. SS, AB Vol. 33, p. 13143.
[10] B. Somers, 31 July 2017, Trans Vol. 4, pp. 1188:43-1189:24, 1 August 2017, Trans Vol 4, pp. 1285:8-31, 1313:12 to 1314:01.
[11] Ex. 135: Affidavit #2 of M. Hayden at Ex. R, AB Vol. 32, pp. 12706-12715.
[12] Ex. 135: Affidavit #2 of M. Hayden at Ex. III, AB Vol. 33, pp. 13197-13206.

2017.[13] For non-Aboriginal inmates, the mean stay declined from 34 days in 2011-2012 to 24 days in 2016-2017.[14] For women inmates, the mean in 2016-2017 was 10 days.[15]

9. The length of time inmates spent in administrative segregation has also declined. From 2014-2015 to 2016-2017, the number of stays of 32-61 days declined from 1,272 to 848, while stays of 62-92 days dropped from 499 to 292. Stays of 92-121 days dropped from 296 to 132, and stays of over 122 days dropped from 493 to 111.[16] For women inmates, the vast majority stay less than 31 days. Of the 297 placements of women in 2016-2017, 280 were under 31 days, 15 were between 32-61 days, and 2 were between 62-91 days. In 2014-2015, there were 461 placements of women inmates.[17]

C. Aboriginal inmates

10. CSC's Strategic Plan for Aboriginal Corrections focuses on providing a full continuum of care to Aboriginal inmates through interventions and services from intake to warrant expiry, with the aim of healthy and successful reintegration.[18] CSC considers Aboriginal social history at every point in its decision making process, including the decision to place an inmate in administrative segregation, to determine if culturally appropriate alternatives to an administrative segregation placement exist.[19]

11. Aboriginal social history references the hundreds of years of interaction between Aboriginal and non-Aboriginal peoples, including through legislation, that created trauma and led to poverty, lack of education, substance use, violence, and gang

[13] Ex. 135: Affidavit #2 of M. Hayden at Ex. JJJ, AB Vol. 33, pp.13207-13208.
[14] Ex. 135: Affidavit #2 of M. Hayden at Ex. AAAAA, AB Vol. 35, pp. 13690-13691.
[15] Ex. 136: Index of Exhibits and Tabs at Tab S, AB Vol. 36, pp. 14166-14169.
[16] Ex. 135: Affidavit #2 of M Hayden at Ex. Y, AB Vol. 32, pp. 12764-12786.
[17] Ex. 136: Index of Exhibits and Tabs at Tab Y, AB Vol. 36, pp. 14214-14224.
[18] B. Bouchard, 3 August 2017, Trans Vol. 4, pp. 1472:42 to 1473:22; Ex 89: Corporate Institution and Community, AB Vol. 26, p. 10163.
[19] RFJ para. 477, AR Tab 4, p. 156; B. Bouchard, 3 August 2017, Trans Vol. 4, pp. 1495:9-10, 1495:14-25, 1518:1-10; Ex 77: Guidelines 709-1 at s. 36, AB Vol. 22, p. 8485.

affiliation. An Aboriginal social history report is prepared for each inmate who identifies as Aboriginal.[20]

12. Within an institution, Elders act as spiritual leaders and are at the center of Aboriginal initiatives. Elders provide guidance and teachings, and help Aboriginal inmates stay connected or reconnect with their culture through activities such as smudging and the provision of traditional foods.[21] The ratio of Elders to women inmates is one Elder for every 25 Aboriginal women; in male institutions, the Elder ratio is one to 100 Aboriginal inmates.[22]

13. Commissioner's Directive [CD] 702: Aboriginal Offenders requires that institutions have indoor and outdoor spaces designated to conduct traditional ceremonies and spiritual activities and areas for Elders to meet one-on-one with Aboriginal inmates.[23] CD 702 also requires specific interventions and correctional programs that are culturally responsive to Aboriginal people.[24] Upon admission to administrative segregation, Aboriginal inmates are informed of their right to have access to an Elder while in segregation, and to engage in spiritual practices.[25]

D. Effects of Segregation on Mental Health

14. Drs. Grassian and Haney testified for the respondents and Drs. Gendreau and Mills testified for the appellant.[26] These expert witnesses agreed that an inmate's response to confinement in administrative segregation varies depending on the

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[20] RFJ para. 473, AR Tab 4, p. 154; B. Bouchard, 3 August 2017, Trans Vol. 4, pp. 1471:1 to 1472:8.
[21] B. Bouchard, 3 August 2017, Trans Vol. 4, pp. 1478:39 to 1479:28, 1481:10-13; Ex. 86-26; CD 702 at s. 6, AB Vol. 25, p. 9770.
[22] RFJ para. 462, AR Tab 4, p. 152; N. Kinsman, 16 August 2017, Trans Vol. 6, pp. 2055:23 to 2056:12.
[23] Ex. 86-26; CD 702 at s. 6, AB Vol. 25, p. 9770; RFJ para. 150, AR Tab 4, p. 71; B. Bouchard, 3 August 2017, Trans Vol. 4, pp. 1498:18-30, 1499:7-12.
[24] RFJ para. 146, AR Tab 4, pp. 69-70.
[25] RFJ paras. 153, 127, AR Tab 4, pp. 71, 64; Ex 75: Affidavit #3 of B. Somers at para. 24(g), AB Vol. 21. p. 8140; B. Bouchard, 3 August 2017, Trans Vol. 4 pp. 1481:31-42, 1482:11-13, 20-30.
[26] RFJ para. 162, AR Tab 4, pp. 73-74.

individual, but the experts differed on the length of time an inmate could be segregated before experiencing negative mental health effects.[27]

15. Dr. Grassian testified that there are substantial differences in the effects of administrative segregation upon different individuals.[28] He noted that "[t]hose most severely affected are often individuals with evidence of neurological or attention deficit disorder, or with some other vulnerability," and "[g]enerally, 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."[29] Dr. Haney stated that "inmates with serious mental illness have a much more difficult time tolerating the painful experience of segregation."[30]

16. Similarly, Drs. Gendreau and Mills testified that while there can be adverse mental health impacts on a segregated inmate, responses to segregation depend on the individual inmate, and each case should be approached separately.[31]

17. Where the experts differed was with respect to the length of time an inmate could be segregated before experiencing negative mental health effects. Drs. Grassian and Haney accepted a 15-day maximum time limit as generous but defensible.[32] Dr. Haney testified that there should be "important limits" to the use of segregation, specifically that it be for the briefest possible duration, only be a measure of "last resort," and that "vulnerable groups [be] exempted entirely from prolonged solitary confinement."[33]

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[27] RFJ para. 171, AR Tab 4, p. 77; Dr. S. Grassian, 10 July 2017, Trans Vol. 1, pp. 281:6-39, 282:3-13; RFJ paras. 191-192, AR Tab 4, pp. 83-84; Dr. Craig Haney, 9 August, 2017, Trans Vol. 5, p. 1716:8-27; Dr. J. Mills, 17 August 2017, Trans Vol. 6, pp. 2118:44 to 2119:11, 2122:1-9, 2147:3-40, 2148:44 to 2149:24.
[28] RFJ para. 171, AR Tab 4, p. 77; Dr. S. Grassian, 10 July 2017, Trans Vol. 1, pp. 281:6-42, 282:3-9.
[29] RFJ para. 171, AR Tab 4, p. 77.
[30] RFJ para. 194, AR Tab 4, p. 84.
[31] RFJ paras. 212, 214, 220, AR Tab 4, pp. 89-91; Dr. J. Mills, 17 August 2017, Trans Vol. 6, p. 2118:44 to 2119:8; Dr. P. Gendreau, Trans Vol. 2, pp. 613:34-46, 726:18-42, 767:32-47.
[32] RFJ paras. 176, 193, 560, AR Tab 4, pp. 78, 84, 175; Dr. C. Haney, 9 August 2017, Trans Vol. 5, p. 1704:22-25
[33] RFJ paras. 191-192, AR Tab 4, pp. 83-84; Dr. C. Haney, 9 August, 2017, Trans Vol. 5, p. 1716:8-27.

18. Dr. Mills expressed concern that a time limit could work against inmates who are in segregation voluntarily by forcing them to leave before they are ready, and opined that each case should be treated individually. Dr. Gendreau opined that a 60-day time limit should be used, with an exception for the 5-10% of the inmate population who pose a considerable dangerous hazard.[34]

19. Extensive mental health policies recognize that administrative segregation can have negative health consequences on segregated inmates, and provide measures to address any medical needs that may arise. CD 709: Administrative Segregation and CSC's Integrated Mental Health Guidelines outline procedures to identify, monitor, and address the mental health needs of inmates placed in administrative segregation.[35]

E. Subpopulations as an Alternative to Segregation

20. CSC has used subpopulations in the past as an alternative to segregation, but found that being placed in these subpopulations can increase an inmates' tendency to offend, discourage reintegration into the general population, and limit CSC's ability to provide programming and services to all inmates, thus impairing rehabilitation and reintegration goals.[36] Further, subpopulations require the physical partitioning of institutions. It is a concern that, there are a fixed number of hours in the day within which to coordinate the movements of the different subpopulations. It is an operational reality that increasing subpopulations would make movement within the institution for the purpose of providing access to programs and services more difficult.[37]

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[34] RFJ, para. 223, AR Tab 4, p. 92.
[35] Ex. 76: CD 709 at s. 70, AB Vol. 22, pp. 8473-8474; Ex. 114: Affidavit #1 of Dr. K. Blanchette at paras. 85-96, Ex. H: Integrated Mental Health Guidelines at s. 11.2.1, Appendix E Health Assessments for Administrative Segregation. AB Vol. 28 pp. 10984-10987, 11113, 11148-11154
[36] Ex 138: Affidavit of B. Thompson at paras. 25-30, 35, AB Vol. 36, pp. 14272-14275; B. Somers, 31 July 2017, Trans Vol. 4, pp. 1255:43 to 1256:32; J. Pyke, 14 August 2017, Trans Vol. 6, pp. 1962:19 to 1963:2, 1964:33 to 1965:11, 1987:28 to 1988:10; Ex 138: Affidavit of B. Thompson at paras. 25-30, 35, AB Vol. 36, pp. 14272-14275;; Ex 133: Affidavit of R. Bonnefoy at para. 13, AB Vol. 32, p. 12569.
[37] B. Somers, 31 July 2017, Trans Vol. 4, pp. 1255:43 to 1256:32; J. Pyke, 14 August 2017, Trans Vol. 6, pp. 1964:33 to 1965:11.

PART 2 – ERRORS IN JUDGMENT

21. The appellant submits that the trial judge erred in law by holding that:

a) the administrative segregation provisions infringe s. 7 of the *Charter* to the extent they authorize and effect the prolonged, indefinite segregation of inmates, authorize and effect the institutional head to be the judge and prosecutor of his own cause, authorize internal review, and authorize and effect the deprivation of inmate's right to counsel at segregation hearings and reviews;

b) the administrative segregation provisions infringe s. 15 of the *Charter* for inmates with mental illness or disability, and that compliance with s. 15 precludes any period of administrative segregation for inmates with mental illness or disability;

c) any *Charter* infringements are not justified under s. 1 of the *Charter*; and

d) granting a s. 52(1) declaration that the administrative segregation provisions are constitutionally invalid, save as regards internal review of segregation decisions.

22. The appellant is not challenging the trial judge's finding of discrimination against Aboriginal inmates. The appellant only challenges the trial judge's finding that infirmities in CSC's implementation of the administrative segregation provisions in the case of Aboriginal inmates entitle the respondents to s. 52(1) relief.

PART 3 – ARGUMENT

A. Standard of Review

23. The applicable standard of review on appeal in *Charter* cases was articulated by the Supreme Court of Canada in *Housen v. Nikolaisen*. On questions of fact – whether adjudicative, social, or legislative – or of mixed fact and law, the standard of review is palpable and overriding error. Pure questions of law, and legal issues that can be

extricated from questions of mixed fact and law, are subject to review on the correctness standard.[38]

24. The trial judge's errors concern the constitutional validity of the administrative segregation provisions of the *CCRA* and, as such, are errors of law. The standard of review is correctness.

B. Legislative Framework

25. An understanding of the complex regime governing administrative segregation is essential to consideration of the *Charter* issues. The *CCRA* contains both general and specific provisions to ensure that inmates are subject to administrative segregation as a last resort, that their particular circumstances are considered in decision-making respecting administrative segregation, and that they are accorded procedural fairness throughout the process.

i. General Provisions

26. The *CCRA* sets out, in ss. 3 and 4, the purposes and principles that are intended to guide the actions of CSC.[39]

27. The purposes of the federal correctional system are to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by the courts through the safe and humane custody and supervision of offenders, and to assist 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. Protection of society is the paramount consideration.[40]

28. The *CCRA* also sets out general guiding principles, some of which have particular relevance to administrative segregation. For example, CSC must use measures that are necessary and proportionate to the purposes of the *CCRA*.[41]

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[38] *Housen* v. *Nikolaisen*, 2002 SCC 33, at paras. 8, 10, 36, and 49.
[39] *CCRA* ss. 3, 4
[40] *CCRA* s. 3.1.
[41] *CCRA* s. 4 (c)

Policies, programs and practices must respect gender, ethnic, cultural, and linguistic differences, and be responsive to the special needs of women, Aboriginal peoples, persons requiring mental health care, and other groups.[42] Inmates retain the rights of all members of society except those that are lawfully and necessarily removed or restricted.[43]

ii. *Administrative Segregation Generally*

29. Administrative segregation is governed by statute, regulation and directives. Sections 31-33 and 37 of the *CCRA* authorize the use of administrative segregation to maintain institutional security, the safety of persons, or to avoid interference with a criminal or serious disciplinary investigation, by not allowing an inmate to associate with other inmates.[44] It is to be used as a tool of last resort, and a segregated inmate is to be released at the earliest appropriate time.[45]

30. Subsection 31(3) permits the institutional head (Warden) to order that an inmate be confined in administrative segregation if the Warden is satisfied that there is no reasonable alternative to segregation, and believes on reasonable grounds that a) the inmate has acted, attempted to act, or intends to act in a way that jeopardizes the security of the institution or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the institution or the safety of any person; b) allowing the inmate to associate with other inmates would interfere with a criminal or serious disciplinary investigation; or c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety. The inmate is to be segregated only for so long as necessary to address these concerns.[46]

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[42] *CCRA* s. 4 (g).
[43] *CCRA* s. 4 (d).
[44] *CCRA* s. 31(1) (3).
[45] *CCRA* s. 31(2) (3).
[46] CCRA s. 31(3)

iii. Provisions Governing Mental and Physical Health

31. An inmate's state of health and health care needs must be considered in all decisions affecting the inmate, including placement in administrative segregation.[47] CSC must provide every inmate with essential health care and reasonable access to non-essential mental health care that will contribute to rehabilitation and reintegration, and that conforms to professionally accepted standards.[48] A segregated inmate must be visited by a registered health care professional daily, and the Warden must visit the administrative segregation area at least once every day and meet with individual inmates on request.[49]

32. Paragraph 87(a) of the *CCRA* mandates that an inmate's state of health and health care needs are to be considered in all decisions affecting the inmate, including administrative segregation placements.[50] This requirement is to be read in conjunction with s. 86, which requires that CSC provide every inmate with essential health care and reasonable access to non-essential mental health care that will contribute to rehabilitation and reintegration.

33. Section 69 of the *CCRA* prohibits the use of cruel, inhumane, or degrading treatment, while s. 70 requires that CSC take all reasonable steps to ensure that the living and working conditions of inmates and staff are safe, healthful, and free of practices that undermine a person's sense of dignity. Paragraph 4(g) of the *CCRA* requires that "correctional policies, programs and practices … [be] responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups."

34. CDs 709 and 843 provide further guidance respecting inmates' health care and treatment, and bolster the legislative provisions described above.[51]

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[47] *CCRA* paragraph 87(a).
[48] *CCRA* ss. 86, 88.
[49] *CCRA* s. 36.
[50] *CCRA*, paragraph. 87(a).
[51] Ex. 76: CD 709, AB Vol. 22, pp. 8460-8477; Ex. 78: CD 843, AB Vol. 22, pp. 8510-8527.

35. CD 709: Administrative Segregation sets out CSC's obligations with respect to the provision of health assessments and services for inmates confined in administrative segregation.[52] A health care professional must visit an inmate at the time of admission to administrative segregation or without delay to determine if there are any health concerns, and then daily thereafter.[53] If there are health concerns, the inmate is to be provided with medical care, and where necessary, is to be diverted to a treatment facility. A healthcare professional must also provide comments to the Segregation Review Board in regards to the mental and physical health of every inmate presented to the Board.

36. CD 709 prohibits the segregation of inmates with serious mental illness with significant impairment and those who are actively engaging in self-injury that is deemed likely to result in serious bodily harm or those at elevated or imminent risk for suicide.[54] Further, administrative segregation may only be used in "exceptional circumstances" for inmates who have significant mobility impairments, are pregnant, or are in palliative care.[55] An exceptional circumstance is defined as an immediate situation that endangers the life, safety or health of inmates, staff, visitors, or the security of the institution.[56]

37. CD 843: Interventions to Preserve Life and Prevent Serious Bodily Injury is intended to ensure the safety of inmates who are self-injurious, suicidal, or have a serious mental illness with significant impairment. It does so by using observation or, as a last resort, restraint, for the purpose of preserving life and preventing serious bodily harm while maintaining an inmate's dignity in a safe and secure environment.[57]

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[52] RFJ para. 286, AR Tab 4, p. 109; Ex 76: CD 709 at s. 70, AB Vol. 22, pp. 8473-8474.
[53] This requirement is also prescribed by s. 36 of the *CCRA*. Ex 76: CD 709 at s. 70, AB Vol. 22, pp. 8473-8474.
[54] Ex. 76: CD 709 at ss. 19-20, AB Vol. 22, p. 8465.
[55] Ex. 76: CD 70 at s. 22-24, AB Vol. 22, p. 8465; RFJ para. 84, AR Tab 4, p. 53.
[56] Ex. 76: CD 709 at ss. 22-24, AB Vol. 22, p. 8465.
[57] Ex: 86-49: CD 843, AB Vol. 26, pp. 10121-10137; Ex. 78: CD 843, AB Vol. 22, pp. 8510-8527. RFJ paras. 285-292, AR Tab 4, pp. 109-110; Dr. K. Blanchette, 11 August 2017, Trans Vol. 5, pp. 1822:19 to 1824:42.

iv. *Aboriginal Inmates*

38. Sections 4 and 79 to 84 of the *CCRA* outline CSC's statutory obligations as regards Aboriginal inmates, including the requirement that CSC provide programs designed particularly to address the needs of Aboriginal inmates, and establish a National Aboriginal Advisory Committee to provide advice to CSC on the provision of correctional services to Aboriginal inmates. [58]

39. Further guidance is provided by CD 702, which sets out CSC's policies respecting Aboriginal inmates, including cultural initiatives, interventions, and programs, and access to the services of Elders. CD 702 also prescribes the use of a continuum of case model for Aboriginal inmates, and permits the establishment of Aboriginal wellness committees.[59]

v. *Procedural Protections*

40. The *CCRA* contains provisions to ensure procedural protections for segregated inmates. The continued confinement or release of inmates in administrative segregation is reviewed by the Segregation Review Board, whose members are designated by the Warden.[60] Following each review, the Board must make a recommendation to the Warden as to whether the confined inmate should be released.[61] Section 32 requires that these recommendations, and the decisions of the Warden be based on s. 31(3) considerations respecting institutional security, the safety of persons, and avoiding interference with criminal or serious disciplinary investigations.[62]

41. Subsection 33(2) provides that an inmate shall be present at their Segregation Review Board hearings unless they are voluntarily absent, the Board believes on

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[58] *CCRA* ss. 4, 79-84.
[59] Ex. 86-26: CD 702, AB Vol. 25, pp. 9768-9787.
[60] *CCRA* s. 33(1); *Corrections and Conditional Release Regulations* SOR 92/620, s. 21(1) [*CCRR*].
[61] *CCRA* s. 33(1)(c)
[62] RFJ para. 79, AR Tab 4, p. 52.

reasonable grounds that the inmate's presence would jeopardize the safety of any person at the hearing, or the inmate seriously disrupts the hearing.

42. An inmate's right to legal counsel, including when an inmate is confined in administrative segregation, is set out in s. 97(2) of the *Corrections and Conditional Release Regulations* [*CCRR*].[63] That subsection provides that every inmate shall have a reasonable opportunity to retain and instruct counsel without delay, and to be informed of that right where the inmate is placed in administrative segregation or is the subject of a proposed involuntary transfer.

43. Section 37 confirms that inmates in administrative segregation have the same rights and are to be housed under the same conditions of confinement as other inmates, except for those rights that can only be enjoyed in association with other inmates, or those conditions that cannot be enjoyed because of limitations specific to the administrative segregation area or security requirements.[64]

C. The trial judge erred in law in finding that the administrative segregation provisions infringe inmates' rights under s. 7 of the *Charter*

44. The administrative segregation provisions are designed to be restrained in their application, and sensitive to the particular circumstances of inmates. The trial judge erroneously relied on individual instances of their application, rather than an analysis of the provisions themselves, to find an infringement of s. 7 of the *Charter*.

45. With the exception of internal review, the effects identified by the trial judge do not flow from the *CCRA*, but rather from individual administrative segregation decisions. To be reasonable and lawful, these decisions must observe the statutory requirements. They must also proportionately balance any implicated *Charter* values.[65] The legislation does not permit unconstitutional action. Exercise of discretion may, in some instances,

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[63] *CCRR* s. 97(2)
[64] RFJ para. 110, AR Tab 4, p. 60; *CCRA* s. 37
[65] *Doré* v. *Barreau du Québec*, 2012 SCC 12 at para. 57 [*Doré*].

infringe *Charter* rights – in which case there are remedies available – but the laws themselves are constitutionally valid as they are capable of constitutional administration.

i. *Legal Principles*

46. A decision to place an inmate in the more restrictive setting of administrative segregation engages s. 7 and is a deprivation of the inmate's residual liberty interests.[66] Accordingly, the s. 7 analysis is this appeal focuses on whether the deprivation is in accordance with the principles of fundamental justice. This involves consideration of whether the law is arbitrary, overbroad, or results in consequences that are grossly disproportionate to its purpose.[67]

47. The trial judge found that the law is not arbitrary: there is a rational connection between the object of maintaining institutional security and personal safety, and the segregation of inmates in prescribed circumstances. However, he found the administrative segregation provisions to be overbroad. He found it unnecessary to consider gross disproportionality in view of his conclusion on overbreadth.[68].

ii. *The Administrative Segregation Provisions Are Not Overbroad*

48. The trial judge correctly found that the administrative segregation provisions are not arbitrary. He went on to find them overbroad because they allow prolonged segregation and require the total isolation of an inmate from other inmates, when a lesser form of restriction would achieve the legislative objective.[69] The trial judge erred in finding the provisions overbroad.

49. The trial judge accepted that the purposes of the administrative segregation provisions are to maintain institutional security, the safety of persons, or to avoid interference with criminal or serious disciplinary investigations. Confinement in

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[66] *R.* v. *Miller*, [1985] 2 SCR 613 at 637; *May* v. *Ferndale Institution*, 2005 SCC 82 at paras 76, 77.
[67] *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72 at paras. 111-113 [*Bedford*]
[68] RFJ para. 325-326, 339, AR Tab 4, pp. 118-119.
[69] RFJ paras. 325-327, AR Tab 4, p. 118-119.

administrative segregation that is unrelated to these purposes would be unlawful.[70] Administrative segregation can only be used when security, safety, or investigative concerns require it.[71]

50. The administrative segregation provisions seek to ensure that these purposes are observed by placing limits on the exercise of a Warden's discretion. Resort to segregation is constrained: confinement in administrative segregation is allowed only when the Warden is satisfied that there is no reasonable alternative to segregation, and a segregated inmate must be released at the earliest appropriate time.[72] The exercise of discretion is also subject to regular, fresh, and point-in-time review of an inmate's case.

51. The statute ensures that the appropriate safeguards are in place by mandating that an inmate's state of health and health care needs are to be considered in all decisions affecting the inmate, including administrative segregation placements.[73] CSC must provide each inmate with essential health care and reasonable access to non-essential health care that will contribute to rehabilitation and reintegration.[74]

52. Contrary to the trial judge's conclusion, properly interpreted the administrative segregation provisions prohibit segregation that is disconnected with the law's purpose. While the trial judge found that there had been instances where the administrative segregation provisions had been misapplied such that there was prolonged segregation, such misapplication does not support a finding that the provisions are constitutionally invalid.[75]

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[70] RFJ para. 319, AR Tab 4, p. 116; *CCRA* ss. 32, 33(1).
[71] *CCRA* ss. 32, 31(3).
[72] *CCRA* ss. 31(2), (3).
[73] CCRA s. 87(a).
[74] CCRA s. 86; Ex. 47: CD 800, AB Vol. 26, pp 10105-10114; Ex, 114: Affidavit #1 of Dr. K. Blanchette at Ex. H: Integrated Mental Health Guidelines, AB Vol. 28, pp. 11094-11154.
[75] *Little Sisters Book and Art Emporium* v. *Canada (Minister of Justice)*, 2000 SCC 69 at paras. 77 and 82 [*Little Sisters*].

iii. *Administrative Segregation Provisions Do Not Mandate the Isolation of Inmates*

53. The trial judge judge's conclusions on s. 7 were also influenced by his finding that the provisions caused inmates to be isolated. In this respect, he erred by misunderstanding the nature and effect of the administrative segregation scheme. Subsection 31(1) of the *CCRA* defines administrative segregation as "not allowing an inmate to associate with other inmates." It does not, however, mandate that a segregated inmate be kept in complete isolation from other inmates.[76]

54. Moreover, "other inmates" does not mean *all* other inmates. It is usually only in exceptional cases that it will be necessary to isolate an inmate. In most cases, complete isolation is not required to ensure institutional security, the safety of persons, or to avoid interference with a criminal or disciplinary investigation.[77] A finding that a segregation placement is more restrictive than necessary would not support a finding that the law is overbroad, but rather, could support an argument that the placement was inconsistent with the legislative scheme, or did not proportionately balance *Charter* values.[78]

iv. Administrative Segregation Provisions Provide for Review of an Inmate's Case

55. The trial judge declared the provisions invalid to the extent they allow for the Warden to review their own segregation decisions. The Ontario Superior Court of Justice arrived at the same conclusion in *Corporation of the Canadian Civil Liberties Association v. Canada*. There, the Court held that independent and impartial review could be achieved internally within CSC if the reviewer is not chosen by, does not report to, and is completely outside the circle of influence of the decision-maker, and if the reviewer is able to substitute her decision for that of the decision-maker.[79] The appellant accepts that these are appropriate limitations on internal review of segregation cases.

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[76] RFJ paras. 332, 335 AR Tab 4, pp. 120-121.
[77] RFJ para. 131, AR Tab 4, p. 65; A. Coyle, 28 July 2017, Trans Vol. 3, pp. 1075:39-1076:24.
[78] Doré at para 57.
[79] *Corporation of the Canadian Civil Liberties Association* v. *Canada*, 2017 ONSC 7491 at para 175 [*CCLA*].

56. The trial judge went further than *CCLA*, however, and also found that procedural fairness under s. 7 of the *Charter* requires that review of a segregated inmate's case be performed by a person independent from CSC.[80]

57. The trial judge misapprehended the purpose of the review scheme for segregation decisions in concluding that independent, external review is required. The objective of the statutory review scheme is not to determine the propriety of the initial decision to confine an inmate in segregation. Rather, reviews are of "the inmate's case" for the purposes of determining whether the inmate should be released from administrative segregation, or whether administrative segregation continues to be justified.[81] Contrary to the judge's finding, the administrative segregation provisions do not authorize and effect the Warden to be the judge and prosecutor of his own cause.[82]

58. The trial judge relied upon *Hunter* v. *Southam* in concluding that the administrative segregation provisions permit the Warden be the judge in their own cause, which creates a reasonable apprehension of bias, if not actual bias, in favour of continued segregation.[83]

59. In that case, the Supreme Court of Canada found that a member of the Restrictive Trade Practices Commission, responsible for investigating and adjudicating alleged breaches of the *Combines Investigations Act*, did not have the impartiality required to authorize searches under the *Act* by the Combines Investigations Branch.[84] The Court determined that impartiality was required because of the conflict between state interests (investigating and prosecuting breaches of the *Act*) and individual interests (privacy).

60. There is no such conflict with administrative segregation since CSC must always consider the collective interests of safety and security. Although the Warden is the decision-maker throughout an inmate's confinement in administrative segregation, the

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[80] RFJ para. 410, AR Tab 4, p. 140.
[81] *CCRA* s. 33(1); *CCRR* s. 22.
[82] RFJ para. 609, AR Tab 4, p. 187.
[83] RFJ para. 355, AR Tab 4, p. 125.
[84] *Hunter* v. *Southam,* [1984] 2 S.C.R. 145 at pp. 161-165.

statutory scheme requires them to regularly issue fresh, point-in-time decisions on an inmate's case. The trial judge acknowledged that, "the Board's focus is on the inmate's circumstances at the time of review."[85] However, the remainder of his analysis reveals that the trial judge misapprehended the scheme's purpose.[86]

61. Further, the trial judge did not take proper account of the purposes of administrative segregation in reaching his conclusion on independent, external review. As the trial judge accepted, the purposes are to maintain institutional security, the safety of persons, and to avoid interference with criminal or disciplinary investigations. Administrative segregation decisions are neither disciplinary nor quasi-criminal in nature.[87]

62. In *Oliver v Attorney General (Canada)*, the Ontario Superior Court of Justice agreed that CSC does not operate in a judicial or quasi-judicial manner, but rather, as an administrative body that has fundamentally different processes to achieve its different purposes. The level of procedural requirements in a judicial or quasi-judicial process, including disciplinary segregation, do not apply when CSC operates in an administrative capacity.[88] While this was said in the context of a case involving the determination of an inmate's security level, it has application to the present case.

63. Because administrative segregation's purposes are fundamentally different from the purposes of disciplinary and quasi-criminal matters, the same procedural requirements do not apply. Unlike the Court in *CCLA*, the trial judge did not undertake the analysis prescribed in *Baker v. Canada (Minister of Citizenship and Immigration)* to determine the level of procedural fairness required in the circumstances.[89] He simply accepted that administrative segregation decisions require the same or a similar level of procedural fairness as disciplinary decisions.[90]

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[85] RFJ para. 350, AR Tab 4, p. 124.
[86] RFJ paras. 351, 353, 410, AR Tab 4, pp. 124-125, 140.
[87] RFJ para. 319, AR Tab 4, p. 116.
[88] *Oliver* v. *Attorney General (Canada),* 2010 ONSC 3976 at paras 66, 67.
[89] *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras. 21-28.
[90] RFJ paras. 364, 384-388, 390, AR Tab 4, pp. 128, 134-136.

64. Administrative segregation reviews are not *ex post facto* determinations of whether an inmate's segregation was warranted. Rather, they are real-time decisions on whether segregation should continue, with potentially fatal consequences.[91] The Warden has authority over the institution and responsibility for all inmates, staff and visitors. In making determinations on administrative segregation, the Warden is not judging the lawfulness of their actions, but rather is fulfilling their statutory mandate. Given the life, liberty, and security interests at stake, it is not reasonable to impose on administrative segregation review proceedings the stringent standards for quasi-judicial or quasi-criminal proceedings.

65. The trial judge found that internal review is inconsistent with procedural fairness under s. 7 of the *Charter* on the basis that the current review scheme was overly deferential to front line staff and failed to rigorously apply statutory criteria. However, the trial judge took no analysis of how these problems could persist under an independent review scheme and did not assess the potential effectiveness of less drastic restructuring to achieve procedural fairness.[92] The trial judge reviewed how CSC had administered administrative segregation previously, found fairness problems, and then jumped to the conclusion that CSC could not be trusted with review of administrative segregation decisions. In doing so, he erred.

v. *Administrative Segregation Provisions Do Not Authorize or Effect the Deprivation of Inmates' Right to Counsel at Segregation Reviews*

66. The trial judge's approach to the provision of counsel at segregation hearings is similarly flawed.[93] The *CCRA* does not prohibit legal counsel at Segregation Review Board hearings. If, in fact, legal counsel have been prohibited from attending, this is a consequence of erroneous, discretionary decisions by CSC officials, and not a practice

[91] Ex. 75: Affidavit #3 of B. Somers at para. 64, AB Vol. 21, p. 8150; Ex. 123: Affidavit #2 of J. Pyke at paras. 13-47, 90, 92-95, AB Vol. 30, pp. 11958-11966, 11978-11980; Ex. 133: Affidavit of R. Bonnefoy at paras. 6-10, 15-16, AB Vol. 32, pp. 12567-12568, 12570; Ex. 142: Affidavit #1 of C. Jackson at paras. 5-10 and 13-18, AB Vol. 36, pp. 14338-14340; B. Somers 31 July 2017, Trans Vol. 4, pp. 1249:21-32, 1257:37-46.
[92] RFJ paras. 356-378, 381, 391 AR Tab 4, pp. 126-133, 134, 136.
[93] RFJ para. 421, AR Tab 4, p. 143.

mandated by the *CCRA*. The legislation does not have to be struck to obtain a legal remedy for denial of counsel.

67. The trial judge acknowledged this distinction when he stated that CSC's current practice with respect to the exercise of segregated inmates' right to counsel is inconsistent with subsection 10(b) of the *Charter*, but then refused to make a s. 52(1) declaration because this "would normally arise in cases where an individual plaintiff seeks a s. 24(1) remedy."[94]

68. Prolonged, indefinite segregation that is contrary to the *Charter* is not authorized by the *CCRA*. Nor is the deprivation of the right to counsel at Segregation Review Board hearings. Any prolonged, indefinite confinement in administrative segregation that violates an inmate's *Charter* rights, or denial of access to legal counsel at review hearings, would derive from discretionary decisions by CSC officials made in the course of implementing the administrative segregation provisions. The legislation does not infringe s. 7.

D. The trial judge erred in finding that the administrative segregation provisions infringe inmates' rights under s. 15 of the *Charter*

69. The administrative segregation provisions are consistent with s. 15 of the *Charter*. Numerous statutory safeguards seek to prevent confinement in administrative segregation where that confinement could be harmful to an inmate's mental health. As with his s. 7 analysis, the trial judge erred in considering isolated instances in which the provisions may have been improperly administered, rather than examining the legislation itself.[95]

70. The evidence establishes that the effects of administrative segregation vary among inmates depending on the individual, the reason for confinement, the conditions in administrative segregation, and the duration of the confinement.[96] Determination of

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[94] RFJ para. 437, AR Tab 4, pp. 146-147.
[95] *Little Sisters* at para. 82.
[96] A. Coyle, 28 July 2017, Trans Vol. 3, p. 1092:42 to 1093:29; Dr. C. Haney, 9 August 2017, Trans Vol. 5, pp. 1681:46 to 1683:19, 1701:20-45, 1704:12-21; RFJ paras 171, 212, 214, 220, AR Tab 4, pp. 77, 89-91; Dr. P. Gendreau, 17 July 2017, Trans Vol. 2, p. 597:17-36; Dr. J. Mills,

the effects of segregation in a particular case necessarily requires an individualized assessment. The administrative segregation provisions and related CDs acknowledge that there will be cases where a given inmate, particularly one who has a mental illness, should not be confined in administrative segregation or their stay should be terminated because of the inmate's mental health or risk to personal safety. The administrative segregation provisions and related CDs seek to avoid those situations.

i. Legal Principles

71. Section 15 of the *Charter* guarantees substantive equality, meaning it prohibits both direct and indirect discrimination.[97] The focus of the protection is to prevent distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group. There are two stages to the s. 15 analysis.[98]

72. The first stage asks whether the law creates a distinction on the basis of an enumerated or analogous ground. A claimant must show that the impugned law on its face or in its effect has a disproportionately negative impact on the claimant or group based on membership in an enumerated or analogous group. The second stage asks whether the distinction is one that is discriminatory, in that the impugned law fails to address the capacities and needs of the group and instead imposes burdens or denies benefits in a way that perpetuates an arbitrary disadvantage based on membership in an enumerated or analogous group.

ii. Trial Judge's Errors

73. The trial judge found that the administrative segregation provisions, on their face, do not create any of the distinctions prohibited by s. 15.[99] Accordingly, his s. 15 analysis

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17 August 2017, Trans Vol. 6, pp. 2118:44 to 2119:11, 2122:1-9, 2147:3-40, 2148:44 to 2150:24.

[97] *Kahkewistahaw First Nation* v. *Taypotatt*, 2015 SCC 30 at paras. 16-18 [*Taypotat*]; *Quebec (Attorney General)* v. *A*, 2013 SCC 5 at para. 325; *Withler* v. *Canada (Attorney General*) 2011 SCC 12 at paras. 2, 39.

[98] *Taypotat* at paras. 19-20.

[99] RFJ paras. 454-456, AR Tab 4, p. 151.

focused on whether administrative segregation, as authorized by the *CCRA*, has a discriminatory effect or impact on inmates with mental illness.

74. The expert witnesses who testified at trial agreed that an inmate's response to confinement in administrative segregation will vary depending on the individual inmate, but differed on the length of time an inmate could be confined to administrative segregation before experiencing negative mental or physical health effects.[100]

75. Despite this important qualification, the trial judge found that all inmates confined in administrative segregation are at risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide.[101]

76. The trial judge concluded that the administrative segregation provisions have a more burdensome effect on inmates with mental illness, and fail to respond to the actual capacities and needs of mentally ill inmates, instead imposing burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.[102] In the result, the trial judge found that to the extent that the administrative segregation provisions authorize and effect any period of administrative segregation for the mentally ill and /or disabled, they are invalid.[103]

iii. The Declaration that Inmates who are Mentally Ill or Disabled Should Not be Placed in Administrative Segregation is Too Broad

77. Neither the blanket finding that there is serious risk of harm to all mentally ill inmates due to segregation, nor the trial judge's s. 15 analysis, support the scope of declaratory relief afforded to the respondents in this case.

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[100] RFJ paras. 171, 191-192, 201, 212-214, 219-220, 223-224, AR Tab 4, pp. 77, 83-84, 86, 89-92; Dr. S. Grassian, 10 July 2017, Trans Vol. 1, pp. 281:6-42, 282:3-13; Dr. C. Haney, 9 August, 2017, Trans Vol. 5, p. 1716:8-27; Dr. P. Gendreau, 17 July 2017, Trans Vol. 2, p. 597:17-36; Dr. J. Mills, 17 August 2017, Trans Vol. 6, pp. 2118:44 to 2119:11, 2122:1-8, 2147:3-40, 2148:44 to 2150:24, 2151:1 to 2152:24.
[101] RFJ para. 247, AR Tab 4, p.100.
[102] RFJ paras. 512, 522, AR Tab 4, pp. 164, 167.
[103] RFJ para. 609, AR Tab 4, pp. 187-188.

78. Although persons with mental illness or disability suffer from a pre-existing disadvantage, all decisions concerning segregation are premised on an individualized assessment of the inmate's health and the circumstances pertaining to the safety of the inmate or others or the security of the penitentiary. Decision-making that respects individual differences does not involve stereotyping.[104]

79. In considering segregation placements, the *CCRA* requires CSC to consider a less restrictive solution and the inmate's mental health needs. Where alternative forms of confinement are more appropriate, then those routes are to be pursued.[105] The mental health needs of inmates are considered before and throughout confinement in administrative segregation, and must inform all decision-making with an eye to the need for treatment, referral to a mental health alternative, or release from segregation.[106]

80. Even if there is discrimination, the trial judge erred in the breadth of his declaration. A more carefully crafted declaration that limited, but did not foreclose, administrative segregation for inmates with mental illness is all that would have been required.

81. Section 52(1) of the *Constitution* mandates the striking down of any law that is inconsistent with the *Constitution*, but only to the extent of the inconsistency.[107] The first step in choosing a remedy under s. 52(1) is determining the extent of the inconsistency.[108] As with s. 7, the trial judge failed to undertake this analysis as regards s. 15 or, alternatively, failed to do so properly.

82. The appellant's expert witnesses, Drs. Gendreau and Mills, acknowledged that there can be adverse mental health impacts on a segregated inmate, but testified that

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[104] *Winko v British Columbia (Forensic Psychiatric Institute*), [1999] 2 SCR at para 88.
[105] Ex. 75: Affidavit #3 of B. Somers at paras. 15(b), 63, AB Vol. 21, pp. 8136, 8149; *CCRA* ss. 31(3), 87; Ex. 76: CD 709 at s. 28, AB Vol. 22, p. 8466; Ex. 78: CD 843 at ss. 8, 10, AB Vol. 22, pp. 8514, 8515.
[106] Ex. 75: Affidavit #3 of B. Somers at para 39, AB Vol. 21, p. 8144; Ex. 114: Affidavit #1 of Dr. K. Blanchette at paras 89-90, AB Vol. 28, p. 10985.
[107] *Schachter* v. *Canada*, [1992] 2 SCR 679 at p. 694 [*Schachter*].
[108] *Schachter* at p. 702.

as a general proposition, inmates with mental illness can be placed in administrative segregation for a period of time without serious harm.[109]

83. While Drs. Grassian and Haney, the respondents' expert witnesses, opined that administrative segregation will adversely affect inmates who suffer from mental illness, their evidence does not support a conclusion that any placement of any inmates with mental illness in administrative segregation is unjustifiably discriminatory and hence unconstitutional. Drs. Grassian and Haney agreed that there are circumstances where an inmate, even one with mental illness or disability, must be isolated to safeguard personal safety.[110] In such circumstances, it is crucial to provide appropriate treatment and monitoring of the inmate, but some degree of isolation will be required nonetheless.

84. Further, the trial judge's examples of adverse impacts on mental health arising from administrative segregation pertained to inmates in the United States who were prone to psychotic breaks and those who suffered from disorders of impulse control.[111] Those inmates are a subset of inmates with mental illness, and the conclusions as to those inmates do not universally apply to all other inmates with any form of mental illness. Further, as many inmates have some mental health issues, the trial judge's sweeping declaration would capture the vast majority of inmates, without any evidence to support such breadth.

85. The trial judge's analysis and findings do not support the preclusion of any period of administrative segregation for all persons with any mental illness or disability. His declaration is itself overbroad and could jeopardize safety. There will be instances where an inmate must be isolated for reasons of institutional security, the safety of persons, or to avoid interference with a criminal or disciplinary investigation. That can be done with appropriate monitoring and treatment without causing serious harm. The statute ensures that the appropriate safeguards are in place by mandating that an inmate's state of health

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[109] RFJ paras. 210-212, 219, AR Tab 4, pp. 89, 91; Dr. J. Mills, 17 August 2017, Trans Vol. 6, pp. 2113:10-39, 2118:44 to 2119:11, 2146:25-27
[110] Dr. S. Grassian, 10 July 2017, Trans Vol. 1, pp. 281:6 to 282:13; Dr. C. Haney, 9 August 2017, Trans Vol. pp. 1710:31 to 1711:13.
[111] RFJ para. 497, AR Tab 4, p. 161.

and health care needs are to be considered in all decisions affecting the inmate, including administrative segregation placements.[112] CSC must provide each inmate with essential health care and reasonable access to non-essential health care that will contribute to rehabilitation and reintegration.[113]

E. The trial judge erred in law by finding that the *Charter* infringements are not justified under s. 1 of the *Charter*

i. Legal Principles

86. The trial judge found that the limits on inmate's rights imposed by the *CCRA* are prescribed by law and have a pressing and substantial objective, but held that these limits fail each of the three branches of the *Oakes* proportionality test.[114]

87. The question on appeal is whether the infringements found by the trial judge can be justified under the *Oakes* test, which asks: whether the means adopted are rationally connected to the legislative objective; whether the limit minimally impairs the right in question; and whether there is proportionality between the deleterious and salutary effects of the law.

88. To establish a rational connection, the government must show a causal connection between the limitation and the benefit sought on the basis of reason or logic.[115] This connection is established where the government shows that it is reasonable to suppose that the limit may further the goal, not that it will do so.[116]

89. The minimal impairment stage asks whether there is a less drastic means of achieving the objective in a real and substantial manner.[117] Parliament is entitled to a

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[112] *CCRA* paragraph 87(a).
[113] *CCRA* s. 86; Ex. 86-47: CD 800, AB Vol. 26, pp. 10105-10114.
[114] RFJ paras. 551, 553, 557, 597, AR Tab 4, pp. 173-174, 184; *R.* v. *Oakes,* [1989] 1 SCR 103 [*Oakes*]*,* cited in *Carter* v. *Canada* 2015 SCC 5 at para. 94 [*Carter*].
[115] *RJR-MacDonald Inc.* v. *Canada (Attorney General)*, [1995] 3 SCR 199 at para. 153 [*RJR-MacDonald*].
[116] *Alberta* v. *Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 48 [*Hutterian Brethren*].
[117] *Hutterian Brethren* at para. 55.

margin of deference in selecting the means to achieve its objective, particularly where the matter involves complex policy decisions.[118] The question is whether the measure falls within a range of reasonable alternatives that could be used to pursue the pressing and substantial objective.[119]

90. The final balancing stage involves an assessment of whether the impugned law's benefits outweigh the burdens imposed by the rights limitation.[120] To satisfy this part of the test, the government must show that there is proportionality between the limitation's deleterious and salutary effects, or between the limitation's impact on the individual or group in question and its likely benefits for society.[121] The deleterious effects of a given limitation can vary depending on the nature of the right violated, the extent of the violation, and the degree to which the measures that impose the limit encroach upon the integral principles of a free and democratic society.[122]

ii. *The Trial Judge's Findings in Respect of Section 1*

91. The trial judge's s. 1 analysis focused on s. 7 of the *Charter*. He stated that in light of his ultimate conclusion that infringements of s. 7 could not be justified, there was little purpose in undertaking a detailed analysis with respect to infringements of s. 15 of the *Charter*.[123]

iii. *The Trial Judge Erred in Assuming Prolonged, Indefinite Segregation and Absolute Isolation*

92. The trial judge found prolonged, indefinite segregation does not meet the proportionality test.[124] His error was essentially the same as the one he committed in

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[118] *Hutterian Brethren* at para. 54; *Charkaoui* v. *Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 85.
[119] *RJR-Macdonald* at para. 160.
[120] *Hutterian Brethren* at para. 77.
[121] *Dagenais* v. *Canadian Broadcasting Corp,* [1994] 3 SCR 835 at 889; *R* v. *Michaud*, 2015 ONCA 585 at para 137 [*Michaud*].
[122] *Oakes* at 139-140.
[123] RFJ para. 547, AR Tab 4, p. 172.
[124] RFJ para. 553, AR Tab 4, p. 173.

considering overbreadth: neither prolonged segregation nor absolute isolation are permitted by the legislation.

93. In addition to this fundamental error in applying *Oakes,* and in the alternative, assuming that the legislation itself authorizes prolonged or indefinite placements, the trial judge also erred in finding that the administrative segregation provisions do not minimally impair inmates' s. 7 *Charter* rights. His consideration of alternatives to administrative segregation failed to accord sufficient deference to Parliament's legislative choices.

94. Under the minimal impairment branch of the proportionality test, deference is appropriate where the legislature has greater institutional competence.[125] For example, deference is warranted where the limit arises from complex policy decisions involving the assessment of conflicting social science evidence, competing interests, demands on resources, and the protection of vulnerable groups[126] – where there is room to debate what will work and what will not[127] – or where the limit is a complex regulatory response to a difficult social problem.[128]

95. Given the complexity of the concerns addressed by the administrative segregation provisions and the need to strike a balance so as to protect the safety, security, and health of all those who are implicated, deference should be afforded to the CSC's institutional competence in these matters. An overly-rigid approach would fail to achieve the legislative purposes of maintaining institutional security, the safety of persons, and the avoidance of interference with criminal or disciplinary investigations.

96. On the question of subpopulations, the evidence demonstrated that CSC's past use of subpopulations could increase inmates' criminogenic tendencies and limit institutions' abilities to provide programming and services to all inmates, thus impairing

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[125] *M*. v. *H*., [1999] 2 SCR 3 at para. 78.
[126] *Irwin Toy Ltd.* v. *Quebec (Attorney General)*, [1989] 1 SCR 927 at p. 993; *Canada (Attorney General)* v. *JTI-MacDonald Corp. 2007 SCC 30* at paras. 41, 43 [*JTI-MacDonald*]; *Carter* at para. 98.
[127] *Saskatchewan (Human Rights Comm.)* v. *Whatcott*, 2013 SCC 11 at para. 78.
[128] *Hutterian Brethren* at paras. 35, 37, 53; *Carter* at para. 97.

rehabilitation and reintegration.[129] The trial judge did not acknowledge that these are the principle reasons why CSC has made a concerted effort to eliminate subpopulations and move toward "integrated" institutions. Subpopulations require the physical partitioning of institutions, and the coordination of many inmates' movements for the purposes of providing access to programs and services.[130]

97. With respect to the trial judge's proposed "voluntary dissociation" subpopulation, that proposal was made without consideration of evidence of the ramifications of creating an inmate-directed population that inmates could choose to enter and leave at will, and with respect to which the procedural protections for segregated inmates – such as regular reviews of their cases – would not apply.[131]

98. The trial judge correctly determined that allowing CSC to remove inmates from the general population in order to maintain safety and security is a salutary effect of administrative segregation that is proportional to its objective under s.1. He then concluded that the severity of the harm outweighs the salutary effects of administrative segregation. In doing so, he failed to recognize and give due consideration of the salutary effects that the use of segregation has in containing the institution and helping it respond to having rival gang members, inmates with poor anger management and impulse control, and violence among inmates and against staff. For the majority of inmates who do not cause trouble inside the institution and are working on their rehabilitation, prohibiting segregation would put them and staff at risk of physical harm.

99. Any limits to s.7 rights arising from the administrative segregation provisions are outweighed by their benefits to the safety and security of inmates, correctional staff, and the public.[132] Given the complexity and consequence of administrative segregation decisions, and the risks of imposing an inflexible deadline on placements and that have

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[129] Ex. 138: Affidavit of B. Thompson, AB Vol. 36, pp. 14266-14280.
[130] RFJ paras. 582-583, AR Tab 4, p. 181; J. Pyke, 14 August 2017, Trans Vol. 6, pp. 1961:45 to 1964:17.
[131] RFJ para. 575, AR Tab 4, p. 178.
[132] *Michaud* at para 143.

been seen with creating more subpopulations, deference to Parliament's choice is appropriate.

iv. Review of an Inmate's Case

100. In his s. 1 analysis, the trial judge erred in finding that there was no rational connection between internal review of administrative segregation and the legislative objective of preserving safety and security within institutions. In so finding, he failed to acknowledge that an external body would not be sufficiently familiar with the workings and dynamics of a particular institutional setting and thus would be less equipped to assess the safety implications of releasing an inmate.[133]

101. The trial judge's further finding that external review does not increase any security risk to institutions, and is therefore minimally impairing, ignores this evidence and directly contradicts Supreme Court of Canada jurisprudence stating that a government need not adopt legislative options that are less effective than the one chosen.[134]

102. The means chosen by Parliament are a proportionate and minimally impairing approach to the review of decisions respecting an inmate's continued confinement in or release from administrative segregation.[135]

F. The trial judge erred in granting to the respondents a s. 52(1) declaration

103. The trial judge found infringements of s. 7 of the *Charter* because some inmates experience prolonged segregation, lacked meaningful human contact, and were denied access to counsel at Segregation Review Board hearings; he found that s. 15 was infringed because of the treatment of inmates with mental illness or disability and Aboriginal inmates.

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[133] *R.* v. *Marriott*, 2014 NSCA 28, dismissed [2014] S.C.C.A. No. 482 at para. 44.
[134] RFJ para. 600, AR Tab 4, p. 185; *JTI-Macdonald* at para 137.
[135] *Michaud* at para 143.

104. These findings pertain to discretionary decisions that do not affect the constitutionality of the administrative segregation provisions. Section 52(1) declaratory relief is only available where the legislation itself violates the *Charter*.

i. Legal Principles

105. Subsection 52(1) provides that "any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect."

106. In *Little Sisters*, the Supreme Court of Canada held that a declaration of statutory invalidity is not available if the impugned statute is capable of being administered in a constitutional manner.[136] If the sole complaint about the legislation is how the statutory scheme is operated by government officials, then legislation should not be declared unconstitutional.[137]

107. The appellant in *Little Sisters* argued that given the absence of legislative safeguards, the statute must be declared invalid under s. 52(1) of the *Constitution*. The Supreme Court rejected this argument. It found that where a legislative scheme can be interpreted and applied in a manner consistent with the *Charter*, but has been implemented in an unconstitutional manner, s. 52(1) relief is inappropriate.

108. This principle was reinforced in *Canada (Attorney General) v. PHS Community Services Society* and *Suresh v. Canada (Minister of Citizenship and Immigration)*.[138] In both cases, the Court determined that the impugned laws did not become constitutionally invalid because a decision maker misapplied them.

109. In *PHS*, the Court found that the *Controlled Drugs and Substances Act* [*CDSA*] was *Charter*-compliant because it was capable of being applied in a way that was not overbroad. The Court stated that "the availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary,

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[136] *Little Sisters* at paras. 133-135.
[137] *Little Sisters* at para. 77.
[138] *Canada (Attorney General)* v. *PHS Community Services Society*, 2011 SCC 44 [*PHS*]*; Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*].

overbroad or grossly disproportionate in its effects … If there is a *Charter* problem, it lies not in the statute but in the Minister's exercise of the power the statute gives him to grant appropriate exemptions."[139]

110. Similarly, in *Suresh*, the Court found that the principles of fundamental justice were breached because procedural requirements set out in the *Immigration Act* were not met, but concluded that this breach did not invalidate the legislation. Instead, only the Minister's decision-making process under that legislation was invalid.[140]

111. The reasoning in *Little Sisters* was recently applied by the Federal Court in *Brown v Canada* to deny a s. 52(1) remedy.[141] In that case, the applicant – on the basis of the alleged maladministration of statutory provisions authorizing immigration detention, and the absence of certain legislated protections – sought a declaration of constitutional invalidity. The Court, citing *Little Sisters,* denied the applicability of s. 52(1), noting that none of the complained-of shortcomings were the inevitable consequence of the legislative regime. The Court stated that properly interpreted and applied, the legislative regime complied with the *Charter*.[142]

112. The reasoning in *Little Sisters* was also applied in *CCLA*, which also concerned a challenge to ss. 31-37 of the *CCRA.* In its decision dated December 18, 2017, the Court refused to issue a declaration that ss. 31-37 of the *CCRA* are constitutionally invalid because of how CSC had administered those provisions.[143]

113. In CCLA the Court stated that such a declaration is only available if the applicant establishes that the administrative segregation provisions of the *CCRA* cannot be constitutionally administered.[144] Further, individual instances where CSC officials have

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[139] *PHS* at paras. 113-114.
[140] *Suresh* at paras. 108, 121, 128.
[141] *Brown* v. *Canada*, 2017 FC 710 [*Brown*].
[142] *Brown* at para. 5.
[143] *CCLA* paras. 23-26.
[144] *CCLA* para. 14.

contravened CSC policies and in doing so violated an inmate's *Charter* rights do not prove that the *CCRA* is incapable of constitutional administration.[145]

ii. S. 52 Relief is not Available to the Respondents in these Circumstances

114. Applying the foregoing jurisprudence to this case, any shortcomings in CSC's application of the administrative segregation provisions are not an inevitable consequence of the *CCRA*. Rather, if the *CCRA* is interpreted and applied in accordance with the principles and requirements set out above, it is *Charter*-compliant.

115. If the trial judge had interpreted the provisions in a manner that complied with the *Charter*, he could have provided guidance to CSC officials on constitutional administration of the scheme, as was done in *Brown* in respect of the constitutional interpretation of the *Immigration and Refugee Protection Act* detention provisions.[146]

116. The trial judge erred in finding that the respondents were entitled to a declaration that the administrative segregation provisions are invalid pursuant to s. 52(1) of the *Constitution* on the basis of his findings that CSC's implementation of those laws has, in certain circumstances, resulted in prolonged, indefinite administrative segregation, the deprivation of the right to counsel at Segregation Review Board hearings, and discrimination against inmates with mental illness or disability and Aboriginal inmates.

117. The trial judge's s. 52(1) declaration would be unassailable if the administrative segregation provisions were incapable of being applied in a constitutional manner. However, that is not the case, and, importantly, is not the conclusion that the trial judge reached.

118. The one caveat to the appellant's submission on this error is the trial judge's declaration that the administrative segregation provisions are invalid because they authorize and effect the Warden to be the judge and prosecutor in his own cause, and authorize internal review of continued placement in or release from administrative

[145] *CCLA* para. 26.
[146] *Brown* at para. 159.

segregation. The appellant accepts these findings may be the subject of a s. 52(1) declaration because they are provided for in the *CCRA* itself. However, for the reasons submitted above, the trial judge erred in finding that internal review violated s. 7 and cannot be saved under s. 1.

119. With respect to the findings that are not properly the subject of a s. 52(1) declaration (respecting prolonged confinement, lack of access to counsel at Segregation Review Board hearings, and the treatment of Aboriginal inmates and inmates with mental illness or disability), these findings are in error as they arose from individual instances of the implementation of the administrative segregation provisions.

iii. Instances of Prolonged Confinement Do Not Entitle Respondents to S. 52(1) Relief

120. The trial judge found that inmates in administrative segregation lack meaningful human contact, that some placements were too long, and that inmates were not being provided access to legal counsel at Segregation Review Board hearings. The trial judge also found that administrative segregation places a discriminatory burden on inmates with mental illness or disability (due to their over-representation in administrative segregation and the disproportionate effect of administrative segregation on such inmates) and Aboriginal inmates (due to their over-representation in administrative segregation and a lack of responsiveness to their actual needs and capacities).[147]

121. These are concerns with how administrative segregation has been administered by CSC, not with the legislation authorizing administrative segregation.

122. Notwithstanding specific statutory language requiring that administrative segregation be used only as a last resort and that release be at the earliest appropriate time, the trial judge concluded that the legislation itself authorized confinement in

[147] RFJ paras. 472, 489, 496, 522, 545, AR Tab 4, pp. 154, 159, 161, 167, 171-172.

circumstances where some lesser form of restriction would achieve the objectives of the legislation.[148]

123. However, the trial judge acknowledged that prolonged confinements in administrative segregation are caused by a range of factors, including "broad correctional discretion that can lead to extended placements in segregation," difficulties in arranging institutional transfers, inmate incompatibility issues, and the refusal of segregated inmates to leave segregation units.[149] All of these factors are fact-specific and are related to the exercise of discretion. Prolonged confinements do not arise from the challenged legislative provisions. The trial judge's acknowledgement of the role these factors have in prolonged confinements weighs against his conclusion that a lesser form of restriction could achieve the objectives of the legislation.

124. As regards the lack of meaningful human contact during confinement in administrative segregation, the trial judge found this to be a result of the physical structure of segregation units, limitations on the duration and location of interactions between inmates and staff, inmates and family, and amongst segregated inmates, and limitations with existing infrastructure and the inability of segregated inmates to access rehabilitation and reintegration programming.[150]

125. All of these findings underline that the identified limitations and conditions were a consequence of CSC's administration of, and not mandated by, the administrative segregation provisions. It was open to the trial judge to offer guidance respecting how the administrative segregation provisions could be administered in a constitutional manner. Instead, he erroneously granted s. 52(1) relief.

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[148] RFJ para. 326, AR Tab 4, p. 118.
[149] RFJ paras. 102-106, 157-159, 561, AR Tab 4, pp. 58-59, 72-73, 175.
[150] RFJ paras. 110-153, AR Tab 4, pp. 60-71.

iv. *Instances of Deprivation of the Right to Counsel Do Not Entitle Respondents to S. 52(1) Relief*

126. As regards the right to legal counsel at Segregation Review Board hearings, there is nothing in the legislation that prohibits legal counsel from attending the hearings.[151] An inmate's right to counsel – including when an inmate is confined in administrative segregation – is set out in s. 97(2) of the *CCRR*. While the subsection is silent with respect to a specific right to counsel at Segregation Review Board hearings, this does not been that legal counsel at Board hearings is prohibited.[152]

127. The trial judge accepted lay witness evidence that as a matter of CSC practice, legal counsel are not allowed to attend such hearings.[153] He noted that CD 709 permits inmates who have been identified as having functional challenges related to mental health to engage an advocate at review hearings, and that advocates may be lawyers.[154] If segregated inmates have been unable to obtain legal representation for these review hearings, then it is because CSC has erroneously administered the review hearing process.

v. *Instances of Differential Treatment Do Not Entitle Respondents to S. 52(1) Relief*

128. The trial judge attributed negative impacts arising from administrative segregation to the administrative segregation provisions.[155] However, nothing on the face of the provisions, or in their necessary effect, contemplates or authorizes adverse effects on the basis of mental illness or disability. To the contrary, the *CCRA* and CDs mandate that an inmate's health care needs be considered and addressed in all CSC decision-making.

129. The trial judge found that the administrative segregation provisions have a more burdensome effect on inmates with mental illness.[156] He determined that the provisions

[151] RFJ paras. 413-414, AR Tab 4, p. 141.
[152] RFJ paras. 413-414, AR Tab 4, p. 141.
[153] RFJ para. 414, AR Tab 4, p. 141.
[154] RFJ paras. 416-418, AR Tab 4, p. 142.
[155] RFJ para. 247, AR Tab 4, pp. 100-101.
[156] RFJ para. 512, AR Tab 4, p. 164.

fail to respond to the actual capacities and needs of mentally ill inmates, and instead impose burdens in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage.[157]

130. The trial judge held that that the most serious deficiency leading to this finding was CSC's processes for dealing with the mentally ill.[158] He accepted the opinion of the respondents' expert, Dr. Koopman, that the definition of "serious mental illness with significant impairment" in the revised CD 709, which determines which inmates may be confined in administrative segregation, is both unclear and too narrow.[159] He also found the definition of "inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk of suicide" was too narrow.[160] In the result, the trial judge stated that he was not satisfied that CD 709 sufficiently addresses the over-representation of inmates with mental illness in administrative segregation.[161]

131. To cure these deficiencies, the trial judge recommended that CSC improve its processes for evaluating inmates with mental illness, cognitive impairments, and who are potentially self-harming or suicidal in Canada's penitentiaries, hire more medically trained staff, provide more facilities for treatment, and substantially increase funding.[162] None of these recommendations would require legislative amendment to effect.

132. In respect of Aboriginal inmates, the trial judge found that the administrative segregation provisions fail to respond to the actual needs and capacities of Aboriginal inmates, and instead perpetuate or exacerbate their disadvantage.[163] He found that segregation has a significant, disproportionate effect on Aboriginal inmates, and imposes burdens or denies benefits in a manner that perpetuates their disadvantage.[164]

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[157] RFJ para. 522, AR Tab 4, p. 167.
[158] RFJ para. 522, AR Tab 4, p. 167.
[159] RFJ paras. 500-503, AR Tab 4, pp. 161-163.
[160] RFJ para. 508, AR Tab 4, p. 164.
[161] RFJ para. 511, AR Tab 4, p. 164.
[162] RFJ para. 523, AR Tab 4, p. 167.
[163] RFJ paras. 472, 489, AR Tab 4, pp. 154, 159.
[164] RFJ paras. 471, 489, AR Tab 4, p. 154, 159.

133. In so finding, the trial judge relied on evidence of CSC's administrative segregation practices as regards Aboriginal inmates. The trial judge accepted that due to social history factors, Aboriginal inmates tend to be more involved in violence and gangs, are disproportionately involved in security incidents, and thus more likely to be placed in administrative segregation.[165]

134. The trial judge also accepted the Office of the Correctional Investigator's findings respecting restricted access to healing lodges for Aboriginal inmates, limited understanding and awareness within CSC of Aboriginal peoples' culture, spirituality, and healing approaches, and limited understanding and inadequate consideration and application of *Gladue* factors in correctional decision-making.[166] He noted that CSC's application of social history factors in decision-making was uneven and insufficient.[167]

135. The trial judge's characterization of discrimination against Aboriginal inmates as a function of the administrative segregation provisions is belied by his own non-legislative prescription for curing this infirmity. Specifically, he proposed that CSC make a concerted effort to improve the assessment tools and programs for Aboriginal inmates, and at a minimum, increase the ratio of Aboriginal elders for men, establish more healing lodges, and introduce programming to assist Aboriginal inmates in ceasing membership in gangs.[168] As with the trial judge' recommendations respecting inmates with mental illness, none of these prescriptions would require legislative amendment to effect.

vi. *Conclusion*

136. To reiterate the principle articulated in *Little Sisters*, a declaration of statutory invalidity is not available if the impugned statute is capable of being administered in a constitutional manner.[169] If the sole complaint about the legislation is how the statutory scheme is operated by government officials, then legislation cannot be declared

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[165] RFJ paras. 474-475, AR Tab 4, pp. 155-156.
[166] RFJ para. 476, AR Tab 4, p. 156.
[167] RFJ paras. 478-479, AR Tab 4, pp. 156-157.
[168] RFJ para. 490, AR Tab 4, pp. 159-160.
[169] *Little Sisters* at paras. 133-135.

unconstitutional.[170] Parliament is entitled to proceed on the basis that its enactments will be applied constitutionally by government officials.[171] If they are not, then claimants can pursue relief under s. 24(1) of the *Charter*.

vii. *S. 24(1) Relief Is Not Available To These Respondents*

137. In this case, there is no individual plaintiff whose *Charter* rights are implicated by the administrative segregation provisions. The respondents are corporate plaintiffs seeking to vindicate the rights of third parties. As such, a s. 24(1) remedy is not available.[172]

138. Section 24(1) gives a court of competent jurisdiction the ability to grant a just and appropriate remedy to anyone whose *Charter* rights have been infringed or denied. As such, s. 24(1) provides a personal remedy against unconstitutional government action that can be invoked only by a party alleging a violation of that party's own constitutional rights.[173]

139. The trial judge did not address the appropriateness or availability of s. 24(1) *Charter* relief in his Reasons for Judgment. He simply acknowledged the appellant's argument that a s. 24(1) remedy is not available in this case because there is no individual plaintiff before the Court whose *Charter* rights are implicated.[174]

140. In *CCLA*, the Court accepted that the corporate applicants could not bring an application for s. 24(1) relief, impugning CSC's past or present practice of administrative segregation, and that only a party alleging an infringement of its own *Charter* rights can resort to s. 24(1).[175]

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[170] *Little Sisters* at para. 77.
[171] *Little Sisters* at para. 71.
[172] *R.* v. *Ferguson*, 2008 SCC 6 at para. 61 [*Ferguson*].
[173] *Ferguson* at para. 61.
[174] RFJ paras. 6, 605, AR Tab 4, pp. 33, 186.
[175] *CCLA* paras. 16-17.

141. If this Court determines that the evidence establishes infirmities in CSC's administration of the legislation, then following the direction of the Supreme Court of Canada in *R.* v. *Ferguson*, these respondents are not entitled to a s. 24(1) remedy.

142. To obtain such a remedy, individuals whose *Charter* rights have been violated by CSC's actions must bring their own action and adduce the necessary evidence to establish a *Charter* breach in their particular circumstances. In such a proceeding, the Court would then have to apply the reasoning in *Doré* v. *Barreau du Québec* to determine whether particular decisions respecting administrative segregation reflect a proportionate balancing of *Charter* values.[176]

PART 4 – NATURE OF ORDER SOUGHT

143. The appellant seeks an Order that the appeal be allowed, and the respondents' claim for a declaration that ss. 31-33 and 37 of the *CCRA*, and/or or their administration, unjustifiably infringe ss. 7, 9, 10, 12, and 15 of the *Charter*, be dismissed with costs.

144. Alternatively, in the event the appeal is dismissed either in whole or in part, the appellant seeks an Order suspending any declaration of invalidity for a period of 12 months from the date of judgment in order to avoid potential danger to the public or any threat to the rule of law while Parliament pursues legislative reform.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated the 17th day of May, 2018.

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[176] *Doré* at paras. 5-7, 39, 55-58.

LIST OF AUTHORITIES

Authorities	**Page # in factum**	**Para # in factum**
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APPENDIX: ENACTMENTS

CONSTITUTION ACT, 1982 PART I CANADIAN CHARTER OF RIGHTS AND FREEDOMS	**LOI CONSTITUTIONNELLE DE 1867** PARTIE I LOI CONSTITUTIONNELLE DE 1982
GUARANTEE OF RIGHTS AND FREEDOMS Rights and freedoms in Canada **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.	GARANTIE DES DROITS ET LIBERTÉS Droits et libertés au Canada 1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
LEGAL RIGHTS Life, liberty and security of person **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	GARANTIES JURIDIQUES Vie, liberté et sécurité **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
Detention or imprisonment **9.** Everyone has the right not to be arbitrarily detained or imprisoned.	Détention ou emprisonnement **9.** Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.
Arrest or detention **10.** Everyone has the right on arrest or detention *(*a) to be informed promptly of the reasons therefor;	Arrestation ou détention **10.** Chacun a le droit, en cas d'arrestation ou de détention : *a*) d'être informé dans les plus brefs délais des motifs de son arrestation ou de sa détention;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and (*c*) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.	*b*) d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit; *c*) de faire contrôler, par *habeas corpus*, la légalité de sa détention et d'obtenir, le cas échéant, sa libération.
Treatment or punishment **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	Cruauté **12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.
EQUALITY RIGHTS Equality before and under law and equal protection and benefit of law **15.** (1) 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.	DROITS A L'EGALITE Égalité devant la loi, égalité de bénéfice et protection égale de la loi **15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.
ENFORCEMENT Enforcement of guaranteed rights and freedoms **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Exclusion of evidence bringing administration of justice into disrepute (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that	RECOURS Recours en cas d'atteinte aux droits et libertés **24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances. Note marginale :Irrecevabilité d'éléments de preuve qui risqueraient

infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	de déconsidérer l'administration de la justice (2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.
PART VII GENERAL Primacy of Constitution of Canada **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. Constitution of Canada (2) The Constitution of Canada includes *(*a) the *Canada Act 1982*, including this Act; (*b*) the Acts and orders referred to in the schedule; and (*c*) any amendment to any Act or order referred to in paragraph (*a*) or (*b*).	PARTIE VII DISPOSITIONS GÉNÉRALES Primauté de la Constitution du Canada **52**. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. Constitution du Canada (2) La Constitution du Canada comprend : a) la *Loi de 1982 sur le Canada*, y compris la présente loi; b) les textes législatifs et les décrets figurant à l'annexe; c) les modifications des textes législatifs et des décrets mentionnés aux alinéas *a*) ou *b*). Modification (3) La Constitution du Canada ne peut être modifiée que conformément aux pouvoirs conférés par elle.

Corrections and Conditional Release Act S.C. 1992, c. 20	Loi sur le systeme correctionnel et la mise en liberte sous condition L.C. 1992, ch. 20
Purpose of correctional system **3** The purpose of the federal correctional system is to contribute to 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. **Paramount consideration** **3.1** The protection of society is the paramount consideration for the Service in the corrections process.	**But du système correctionnel** **3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois. **Critère prépondérant** **3.1** La protection de la société est le critère prépondérant appliqué par le Service dans le cadre du processus correctionnel.
Principles that guide Service **4** The principles that guide the Service in achieving the purpose referred to in section 3 are as follows: (a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other	**Principes de fonctionnement** **4** Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants : a) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment les motifs et recommandations donnés par le juge qui l'a prononcée, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine ou fournis par les victimes, les délinquants ou d'autres éléments du système de justice pénale,

components of the criminal justice system;	ainsi que les directives ou observations de la Commission des libérations
(b) the Service enhances its effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about its correctional policies and programs to victims, offenders and the public;	b) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux victimes et aux délinquants qu'au public;
(c) the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act;	c) il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la présente loi;
(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;	d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;
(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;	e) il facilite la participation du public aux questions relatives à ses activités;
(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;	f) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;
(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;	g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones, aux personnes nécessitant des soins de santé mentale et à d'autres groupes;
(h) offenders are expected to obey penitentiary rules and conditions	h) il est attendu que les délinquants observent les règlements pénitentiaires

governing temporary absences, work release, parole, statutory release and long-term supervision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and (i) staff members are properly selected and trained and are given (i) appropriate career development opportunities, (ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and (iii) opportunities to participate in the development of correctional policies and programs.	et les conditions d'octroi des permissions de sortir, des placements à l'extérieur, des libérations conditionnelles ou d'office et des ordonnances de surveillance de longue durée et participent activement à la réalisation des objectifs énoncés dans leur plan correctionnel, notamment les programmes favorisant leur réadaptation et leur réinsertion sociale; i) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.
Administrative Segregation **Purpose** **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. **Duration** **(2)** The inmate is to be released from administrative segregation at the earliest appropriate time. **Grounds for confining inmate in administrative Segregation** **(3)** The institutional head may order that an inmate be confined in administrative segregation if the institutional head is	**Isolement préventif** **Objet** **31 (1)** L'isolement préventif a pour but d'assurer la sécurité d'une personne ou du pénitencier en empêchant un détenu d'entretenir des rapports avec d'autres détenus. **Fin de l'isolement préventif** **(2)** Il est mis fin à l'isolement préventif le plus tôt possible. **Motifs d'isolement préventif** **(3)** Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des

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.	motifs raisonnables de croire, selon le cas : a) que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité; b) que son maintien parmi les autres détenus nuirait au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2); c) que son maintien parmi les autres détenus mettrait en danger sa sécurité.
Considerations governing release **32** All recommendations to the institutional head referred to in paragraph 33(1)(c) and all decisions by the institutional head to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31.	**Considérations** **32** Les recommandations faites aux termes du paragraphe 33(1) et les décisions que prend le directeur en matière d'isolement préventif sont fondées sur les principes ou critères énoncés à l'article 31.
Considerations governing release **Case to be reviewed** **33 (1)** Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall	**Considérations** **Réexamen** **33 (1)** Lorsque l'isolement préventif est imposé au détenu, le directeur charge une ou plusieurs personnes de réexaminer périodiquement chaque cas, par une audition, selon les modalités réglementaires de temps et autres, et de lui faire après chaque réexamen des

(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. **Presence of inmate** **(2)** A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless (a) the inmate is voluntarily absent; (b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or (c) the inmate seriously disrupts the hearing.	recommandations quant au maintien ou non du détenu en isolement préventif. **Présence du détenu** **(2)** L'audition a lieu en présence du détenu, sauf dans les cas suivants : a) celui-ci décide de ne pas y assister; b) les personnes chargées de l'audition croient, pour des motifs raisonnables, que sa présence mettrait en danger la sécurité de quiconque y assiste; c) celui-ci en perturbe gravement le déroulement.
Where institutional head must meet with inmate **34** Where the institutional head does not intend to accept a recommendation made under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate (a) to explain the reasons for not intending to accept the recommendation; and	**Obligation du directeur** **34** Quand le directeur, contrairement à une recommendation faite aux termes du paragraphe 33(1), a l'intention de maintenir le détenu en isolement préventif, il doit, dès que possible, rencontrer celui-ci, lui exposer les motifs de son désaccord et lui donner l'occasion de lui présenter des observations, oralement ou par écrit.

(b) to give the inmate an opportunity to make oral or written representations.	
Idem **35** Where an inmate requests to be placed in, or continue in, administrative segregation and the institutional head does not intend to grant the request, the institutional head shall, as soon as is practicable, meet with the inmate (a) to explain the reasons for not intending to grant the request; and (b) to give the inmate an opportunity to make oral or written representations.	**Idem** **35** Il procède de même quand il n'a pas l'intention d'accéder à la demande du détenu d'être placé ou maintenu en isolement préventif.
Visits to inmate **36 (1)** An inmate in administrative segregation shall be visited at least once every day by a registered health care professional. **Idem** **(2)** The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.	**Visites par un professionnel de la santé** **36 (1)** Le détenu en isolement préventif reçoit au moins une fois par jour la visite d'un professionnel de la santé agréé. **Visites par le directeur** **(2)** Le directeur visite l'aire d'isolement au moins une fois par jour et, sur demande, rencontre tout détenu qui s'y trouve.
Inmate rights **37** An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that (a) can only be enjoyed in association with other inmates; or (b) cannot be enjoyed due to	**Droits du détenu** **37** Le détenu en isolement préventif jouit, compte tenu des contraintes inhérentes à l'isolement et des impératifs de sécurité, des mêmes droits et conditions que ceux dont bénéficient les autres détenus du pénitencier.

(i) limitations specific to the administrative segregation area, or (ii) security requirements.	
Cruel treatment, etc. **69** No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.	**Cruauté** **69** Il est interdit de faire subir un traitement inhumain, cruel ou dégradant à un délinquant, d'y consentir ou d'encourager un tel traitement.
Living conditions, etc. **70** The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.	**Conditions de vie** **70** Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.
Aboriginal Offenders **Definitions** **79** In sections 80 to 84, *aboriginal* means Indian, Inuit or Métis; (autochtone) *aboriginal community* means a first nation, tribal council, band, community, organization or other group with a predominantly aboriginal leadership; (*collectivité autochtone*) *correctional services* means services or programs for offenders, including their care and custody. (*services correctionnels*)	Autochtones **Définitions** **79** Les définitions qui suivent s'appliquent aux articles 80 à 84. *autochtone* Indien, Inuit ou Métis. (aboriginal) *collectivité autochtone* Une nation autochtone, un conseil de bande, un conseil tribal ou une bande ainsi qu'une collectivité, une organisation ou un autre groupe dont la majorité des dirigeants sont autochtones. (*aboriginal community*) services correctionnels *Services ou programmes* — y compris la prise en charge et la garde — destinés aux délinquants. (*correctional services*)
Programs	**Programmes**

80 Without limiting the generality of section 76, the Service shall provide programs designed particularly to address the needs of aboriginal offenders.	**80** Dans le cadre de l'obligation qui lui est imposée par l'article 76, le Service doit offrir des programmes adaptés aux besoins des délinquants autochtones.
Agreements **81 (1)** The Minister, or a person authorized by the Minister, may enter into an agreement with an aboriginal community for the provision of correctional services to aboriginal offenders and for payment by the Minister, or by a person authorized by the Minister, in respect of the provision of those services. **Scope of agreement** **(2)** Notwithstanding subsection (1), an agreement entered into under that subsection may provide for the provision of correctional services to a non-aboriginal offender. **Placement of offender** **(3)** In accordance with any agreement entered into under subsection (1), the Commissioner may transfer an offender to the care and custody of an aboriginal community, with the consent of the offender and of the aboriginal community.	**Accords** **81 (1)** Le ministre ou son délégué peut conclure avec une collectivité autochtone un accord prévoyant la prestation de services correctionnels aux délinquants autochtones et le paiement par lui de leurs coûts. **Portée de l'accord** **(2)** L'accord peut aussi prévoir la prestation de services correctionnels à un délinquant autre qu'un autochtone. **Transfert à la collectivité** **(3)** En vertu de l'accord, le commissaire peut, avec le consentement des deux parties, confier le soin et la garde d'un délinquant à une collectivité autochtone.
Advisory committees **82 (1)** The Service shall establish a National Aboriginal Advisory Committee, and may establish regional and local aboriginal advisory committees, which shall provide advice to the Service on the provision of correctional services to aboriginal offenders. **Committees to consult**	**Comités consultatifs** **82 (1)** Le Service constitue un Comité consultatif autochtone national et peut constituer des comités consultatifs autochtones régionaux ou locaux chargés de le conseiller sur la prestation de services correctionnels aux délinquants autochtones. **Consultation par les comités**

(2) For the purpose of carrying out their function under subsection (1), all committees shall consult regularly with aboriginal communities and other appropriate persons with knowledge of aboriginal matters.	**(2)** À cette fin, les comités consultent régulièrement les collectivités autochtones et toute personne compétente sur les questions autochtones.
Spiritual leaders and elders **83 (1)** For greater certainty, aboriginal spirituality and aboriginal spiritual leaders and elders have the same status as other religions and other religious leaders. **Idem** **(2)** The Service shall take all reasonable steps to make available to aboriginal inmates the services of an aboriginal spiritual leader or elder after consultation with (a) the National Aboriginal Advisory Committee mentioned in section 82; and (b) the appropriate regional and local aboriginal advisory committees, if such committees have been established pursuant to that section.	**Chefs spirituels et aînés** **83 (1)** Il est entendu que la spiritualité autochtone et les chefs spirituels ou aînés autochtones sont respectivement traités à égalité de statut avec toute autre religion et chef religieux. **Obligation du Service en la matière** **(2)** Le Service prend toutes mesures utiles pour offrir aux détenus les services d'un chef spirituel ou d'un aîné après consultation du Comité consultatif autochtone national et des comités régionaux et locaux concernés.
Release to aboriginal community **84** If an inmate expresses an interest in being released into an aboriginal community, the Service shall, with the inmate's consent, give the aboriginal community (a) adequate notice of the inmate's parole review or their statutory release date, as the case may be; and (b) an opportunity to propose a plan for the inmate's release and integration into that community.	**Libération dans une collectivité autochtone** **84** Avec le consentement du détenu qui exprime le souhait d'être libéré au sein d'une collectivité autochtone, le Service donne à celle-ci un préavis suffisant de l'examen en vue de la libération conditionnelle du détenu ou de la date de sa libération d'office, ainsi que la possibilité de soumettre un plan pour la libération du détenu et son intégration au sein de cette collectivité. **Plan de surveillance de longue durée**

Plans with respect to long-term supervision **84.1** Where an offender who is required to be supervised by a long-term supervision order has expressed an interest in being supervised in an aboriginal community, the Service shall, if the offender consents, give the aboriginal community (a) adequate notice of the order; and (b) an opportunity to propose a plan for the offender's release on supervision, and integration, into the aboriginal community.	**84.1** Avec le consentement du délinquant qui est soumis à une ordonnance de surveillance de longue durée et qui sollicite une surveillance au sein d'une collectivité autochtone, le Service donne à celle-ci un préavis suffisant de la demande, ainsi que la possibilité de soumettre un plan pour la surveillance du délinquant et son intégration au sein de cette collectivité.
Obligations of Service **86 (1)** The Service shall provide every inmate with (a) essential health care; and (b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community. **Standards** **(2)** The provision of health care under subsection (1) shall conform to professionally accepted standards.	**Obligation du Service** **86 (1)** Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la mesure du possible, aux soins qui peuvent faciliter sa réadaptation et sa réinsertion sociale. **Qualité des soins** **(2)** La prestation des soins de santé doit satisfaire aux normes professionnelles reconnues.
Service to consider health factors **87** The Service shall take into consideration an offender's state of health and health care needs (a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative	**État de santé du délinquant** **87** Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir

segregation and disciplinary matters; and (b) in the preparation of the offender for release and the supervision of the offender.	compte de son état de santé et des soins qu'il requiert.
When treatment permitted **88 (1)** Except as provided by subsection (5), (a) treatment shall not be given to an inmate, or continued once started, unless the inmate voluntarily gives an informed consent thereto; and (b) an inmate has the right to refuse treatment or withdraw from treatment at any time.	**Consentement et droit de refus** **88 (1)** Sous réserve du paragraphe (5), l'administration de tout traitement est subordonnée au consentement libre et éclairé du détenu, lequel peut refuser de le suivre ou de le poursuivre.

Corrections and Conditional Release Regulations SOR/92-620	**Règlement sur le système correctionnel et la mise en liberté sous condition DORS/92-620**
21 (1) Where an inmate is involuntarily confined in administrative segregation, the institutional head shall ensure that the person or persons referred to in section 33 of the Act who have been designated by the institutional head, which person or persons shall be known as a Segregation Review Board, are informed of the involuntary confinement.	**21 (1)** Lorsque l'isolement préventif est imposé au détenu, le directeur du pénitencier doit veiller à ce que la ou les personnes visées à l'article 33 de la Loi, qu'il a chargées de réexaminer les cas d'isolement préventif en tant que comité de réexamen des cas d'isolement, soient informées de l'isolement préventif du détenu.
22 Where an inmate is confined in administrative segregation, the head of the region or a staff member in the regional headquarters who is designated by the head of the region shall review the inmate's case at least once every 60 days that the inmate remains in administrative segregation to determine whether, based on the considerations set out in section 31 of the Act, the administrative segregation of the inmate continues to be justified.	**22** Lorsque le détenu est mis en isolement préventif, le responsable de la région ou l'agent de l'administration régionale désigné par lui doit examiner son cas au moins une fois tous les 60 jours pendant qu'il est en isolement préventif pour décider, selon les motifs énoncés à l'article 31 de la Loi, si le maintien de cette mesure est justifié.
Access to Legal Counsel and Legal and Non-Legal Materials **97 (1)** The Service shall ensure that each inmate is given, on arrest, an opportunity to retain and instruct legal counsel without delay and that every inmate is informed of their right thereto. (2) 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	Accès aux avocats et aux publications juridiques et non juridiques **97 (1)** Le Service doit veiller à ce que, dès son arrestation, le détenu ait la possibilité d'avoir recours sans délai à l'assistance d'un avocat et de lui donner des instructions et que le détenu soit informé de ce droit. (2) Le Service doit veiller à ce que le détenu ait la possibilité, dans des limites raisonnables, d'avoir recours sans délai à l'assistance d'un avocat et de lui donner des instructions et que le détenu soit informé de ce droit :

(a) is placed in administrative segregation; or (b) is the subject of a proposed involuntary transfer pursuant to section 12 or has been the subject of an emergency transfer pursuant to section 13.	a) soit lorsqu'il est mis en isolement préventif; b) soit lorsqu'il fait l'objet d'un projet de transfèrement imposé en application de l'article 12 ou d'un transfèrement d'urgence, en application de l'article 13.