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)

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CHRONOLOGY OF THE RELEVANT DATES IN THE LITIGATION

1992	*Corrections and Conditional Release Act* ("*CCRA*") S.C. 1992, c. 20 and *Corrections and Conditional Release Regulations,* SOR/92-620 ("*CCRR*") come into force.
1996	Commission of Inquiry into certain events at the Prison for Women in Kingston ("Arbour Report") concludes Correctional Service Canada ("CSC")'s response to incident at Prison for Women in Kingston is not individual example of failure to respect the law, but symptomatic of CSC's culture. Recommends no inmate spend more than 30 consecutive days in administrative segregation ("AS") no more than twice in a calendar year and that AS be subject to independent adjudication.
Fall 2007	Ashley Smith dies alone in her segregation cell after more than a year of continuous solitary confinement.
June 2008	Office of the Correctional Investigator ("OCI") documents abuse of AS as a factor contributing to Ms. Smith's death. Recommends that CSC implement independent adjudication of AS placements of inmates with mental health concerns within 30 days of placement. CSC rejects that recommendation.
August 2011	Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submits interim report to the UN General Assembly documenting concern with prolonged solitary confinement, meaning solitary confinement in excess of 15 days. Calls for prohibition on indefinite solitary confinement and on placements exceeding 15 consecutive days and abolition of its use for persons with mental disabilities.
2013	Coroner's Verdict from Ashley Smith Inquest. Recommendations include abolishment of indefinite solitary confinement and a prohibition on placing female inmates in solitary confinement in excess of 15 days (the "Smith Recommendations"). CSC rejects those recommendations.
2014	Edward Snowshoe dies alone in his segregation cell after 162 days in solitary confinement.
January 19, 2015	Notice of Civil Claim filed.
June 3, 2015	Christopher Roy dies alone in his segregation cell after approximately 2 months in solitary confinement.

October 13, 2015	Amendments to Commissioner's Directive ("CD") 709 come into effect.
November 2015	Prime Minister Trudeau issues a mandate letter to the Minister of Justice and Attorney General. The Prime Minister tasks the new Attorney General to conduct a review of changes in the criminal justice system and stated that outcomes of this process should include, among other things, implementation of the Smith Recommendations regarding "the restriction of the use of solitary confinement and the treatment of those with mental illness".
December 2015	UN General Assembly unanimously adopts the Mandela Rules prohibiting indefinite and prolonged solitary confinement and solitary confinement of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.
May 16, 2016	Respondents deliver a notice to admit to the appellant ("AGC") asking that she admit that she intended to implement the Smith Recommendations regarding "the restriction of the use of solitary confinement and the treatment of those with mental illness". AGC refuses to make the admission.
December 2016	AGC represents that amendments to the law and practice of AS are imminent and likely by the end of April 2017. BCSC adjourns the trial set for January 2017 with consent of all parties.
April 2017	No legislation or policy change is made. The trial is again set down this time to begin July 2017.
June 19, 2017	Tabling of Bill C-56 and first reading in Parliament. The Bill proposes a presumptive time limit of 21 days that can be over-ridden by the warden. If that occurs, a reviewer would review the AS and recommend whether the inmate should be released. The reviewer would also be required to conduct a review at other and subsequent times. There is a further provision that 18 months after the amended legislation is in force the presumptive release from AS would change to 15 days. CSC announces that on August 1, 2017 new CDs on AS will be implemented that, among other things, will prohibit the use of AS for certain inmates with serious mental disorders who suffer significant impairment, inmates who are certified under provincial mental health legislation and inmates who are at imminent risk of suicide or self-injury. The new CD 709 will also

	provide increased time out of cell, daily showers and immediate allowance of personal effects.
June 20, 2017	AGC applies to adjourn the trial.
June 23, 2017	Hearing of adjournment application. Parties ordered to reconvene on June 27, 2017.
June 27, 2017	Further hearing of AGC's application to adjourn the trial. Leask J. dismisses application to adjourn and requires trial to proceed as scheduled July 4, 2017.
June 28, 2017	AGC seeks leave to appeal, asks that the leave application be heard on short notice and concurrently with the appeal, and that the trial be stayed pending the disposition of the appeal. Frankel J. declines to direct that the application for leave to appeal be heard on an expedited basis.
July 4, 2017	Trial commences.
September 1, 2017	Trial concludes.
January 17,2018	Reasons for Judgment issued.
February 16, 2018	AGC files Notice of Appeal.

OPENING STATEMENT

1. This appeal concerns the constitutionality of provisions of the *CCRA* that authorize solitary confinement of inmates for prolonged, indefinite periods of time spanning weeks and sometimes years. Inmates held in solitary confinement are deprived of meaningful human contact and caged in small cells for 22-23 hours a day. It has been described by Prof. Jackson as "the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country."

2. Upon being elected in October 2015 the Prime Minister tasked the Attorney General to conduct a review of changes in the criminal justice system and stated that outcomes of this process should include, among others, implementation of the Ashley Smith Recommendations regarding "the restriction of the use of solitary confinement and the treatment of those with mental illness". That has not occurred.

3. After a 36 day trial, Leask J. found ss. 31-33 and 37 of the *CCRA* (the "impugned laws") to unjustifiably deprive inmates of their lives, liberty and security of the person in a manner not in accordance with the principles of fundamental justice and to unjustifiably discriminate against mentally ill and/or disabled inmates and Aboriginal inmates.

4. AGC concedes the record supports findings that inmates were deprived of their s. 7 rights in a manner that was overbroad, and in some cases, procedurally unfair. AGC concedes the record supports a finding of discrimination against Aboriginal inmates. But AGC asks this Court to deny these wrongs a remedy arguing *inter alia* that "neither prolonged segregation nor absolute isolation are permitted by the legislation". Instead she claims these unconstitutional acts arise from discretionary (mis)application of the *CCRA*.

5. Respondents are entitled to s. 52 relief because each breach is authorized by the *CCRA*. The record demonstrates that under the impugned laws thousands of inmates for at least the last decade have been held in AS for 22-23 hours a day, with no meaningful human contact, for indefinite and prolonged periods of time, in some cases for hundreds and even thousands of days. The Court should affirm that *Charter* rights must have effective remedies. The decision below should be confirmed and the appeal dismissed.

PART I. STATEMENT OF FACTS

1. HISTORY OF ADMINISTRATIVE SEGREGATION

1. A review of the history of critiques of administrative segregation ("AS") over the past 40 years, detailed to some extent below, reveals the following themes:

a. repeated recognition of the harmful effects of AS;

b. repeated recommendations for independent external review and time limits for AS;

c. delay or failure to adequately evaluate and/or respond and implement recommendations to improve the practice of AS;[1]

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

e. CSC rejection of outside recommendations as being reflective of just isolated events, a position undermined by the number and similarity of "isolated events";[2]

f. in the wake of high profile incidents involving AS, CSC has periodically responded by introducing policy reforms that are poorly implemented and over time commitment to change wanes and the systemic abuse of AS is re-established.[3]

2. For much of the 20th century, the legislative framework governing Canadian penitentiaries was the *Penitentiary Act*, R.S.C. 1970, c. P-6 [repealed] and the *Penitentiary Service Regulations*, P.C. 1962-302, S.O.R./62-90 [repealed] though it was largely in Commissioner's Directives ("CDs") that the rules were fleshed out.[4]

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[1] Expert Report of Professor Michael Jackson, Q.C. ["Jackson Report"], ¶72, Appeal Book ["AB"] v. 1, p. 337.
[2] Affidavit #1 of Mary Campbell ["Campbell #1"], ¶20, AB v. 3, pp. 1167-8.
[3] Jackson Report, ¶151, AB v. 1, p. 360.
[4] Reasons for Judgment ("RFJ" or "Reasons"), ¶23, Appeal Record ["AR"] p. 36.

3. Dissociation, the earlier name for AS, was governed by s. 2.30 of the *Penitentiary Service Regulations*. In *McCann*,[5] Mr. McCann and other inmates challenged their conditions of confinement as cruel and unusual punishment. The Court agreed but did not require due process in decisions concerning AS.[6]

4. Months after the *McCann* trial began in 1975, the Solicitor General established a Study Group on Dissociation chaired by James Vantour to study the use of AS in Canadian penitentiaries. The Study Group concluded that the Canadian Penitentiary Service had failed to comply with existing laws, regulations and policy dealing with AS.[7]

5. In 1976, an all-party House of Commons subcommittee chaired by Mark MacGuigan undertook a major inquiry into the federal penitentiary system. The subcommittee's report (the "MacGuigan Report") was a damning indictment of the absence of the rule of law in the penitentiary system.[8]

6. Although the MacGuigan Report made many of the same recommendations as the Vantour Report, CSC did not implement them until the MacGuigan Report was filed.[9]

7. Two years after the MacGuigan Report, the SCC laid the foundation for the contemporary practice of judicial review of correctional decisions in *Martineau,* holding that prison authorities were subject to a general administrative law duty to act fairly under the supervision of the courts. In *Cardinal*, the Court specifically extended this duty to act fairly to decisions regarding AS.[10]

8. In July 1990, the federal government released a comprehensive consultation package proposing a more detailed legislative scheme that aimed to aggregate and synthesize the proposals and reforms of the preceding 20 years into a single, modern

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[5] *McCann et al. v. The Queen et al.*, [1976] 1 F.C. 570 (T.D.) [*McCann*].
[6] RFJ, ¶¶24-5, AR pp. 36-7.
[7] RFJ, ¶26, AR p. 37.
[8] RFJ, ¶28, AR p. 38.
[9] RFJ, ¶31, AR p. 38.
[10] RFJ, ¶32, AR p. 39 citing *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 [*Cardinal*] and *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602 [*Martineau*].

corrections and conditional release statute. The *CCRA* came into force in 1992 along with the *CCRR*.[11]

9. In April 1994, events unfolded at the Prison for Women in Kingston which exposed to public scrutiny aspects of the operational reality of federal corrections in Canada. The events became the subject of the *Commission of Inquiry into certain events at the Prison for Women in Kingston,* headed by Arbour J., was severely critical of CSC's response to the incident. Significantly, she found these were not individual examples of a failure to respect the law but, rather, were symptomatic of CSC's culture.[12]

10. Arbour J. detailed the harsh conditions under which inmates in AS were held. She was critical of the AS review process. Arbour J. made recommendations with respect to AS, including that the practice of long-term AS be brought to an end; that no inmate spend more than 30 consecutive days in AS no more than twice in a calendar year; that management of AS be subject preferably to judicial supervision but, in the alternative, to independent adjudication; that, in the case of independent adjudication, the adjudicator be a lawyer and be required to give reasons for a decision to maintain AS; and that AS reviews be conducted every 30 days before a different adjudicator each time.[13]

11. In the years following Arbour J.'s report, several other internal and external reports observed similar issues, and made similar recommendations regarding independent adjudication of AS decisions. These included the Task Force on Administrative Segregation (1997); the CSC Working Group on Human Rights chaired by Max Yalden (1997); the House of Commons Standing Committee on Justice and Human Rights – *A Work in Progress* (2000); the Canadian Human Rights Commission – *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (2003); *A Preventable Death* (2008); and the *Coroner's Inquest Touching the Death of Ashley Smith* (2013).[14]

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[11] RFJ, ¶34, AR p. 39.
[12] RFJ, ¶37, AR p. 40.
[13] RFJ, ¶¶38-9, AR pp. 40-1.
[14] RFJ, ¶¶40-8, AR pp. 41-4.

12. CSC failed to implement time limits or independent adjudication of AS decisions despite numerous recommendations for same.

13. In November 2015, the Prime Minister made public his mandate letter to AGC. The letter directed, in part, implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness. Key recommendations from that process included abolishment of indefinite solitary confinement and a prohibition on placing female inmates in solitary confinement in excess of 15 days.[15] That has yet to occur.

14. In October 2015, amendments were made to CD 709. While the revisions offered accelerated internal reviews of AS, none of the revisions proscribed a limit on the duration of AS nor did they change the indefinite nature of the AS regime.

15. In December 2016, AGC represented that amendments to the law and practice of AS were imminent and likely by the end of April 2017. The BCSC adjourned the trial by consent of all parties. Unfortunately, by April 2017, there was no legislation or policy change. The trial was again set down this time to begin in July 2017.

16. On June 19, 2017, Canada introduced in Bill C-56 in the House of Commons. The Bill proposes a presumptive cap of 21 days requiring that an inmate be released from AS before the end of 21 days of confinement, unless before then the institutional head orders in writing that the inmate is to remain in AS. At that point, a reviewer would review the AS and recommend whether the inmate should be released. The reviewer would also be required to conduct a review at other and subsequent times. Further, 18 months after the amended legislation is in force the presumptive release would change to 15 days.[16]

17. In addition to the Bill, CSC announced that on August 1, 2017 new CDs on AS would be implemented that, among other things, would prohibit the use of AS for certain inmates with serious mental disorders who suffer significant impairment, inmates who are

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[15] RFJ, ¶49, AR p. 44.
[16] Bill C-56, *An Act to Amend the Correctional and Conditional Release Act and the Abolition of Early Parole Act*, 1st Sess, 42nd Parl, 2017 (first reading June19, 2017).

certified under provincial mental health legislation and inmates who are at imminent risk of suicide or self-injury. The new CD 709 would also provide for one extra hour of increased time out of cell, daily showers and immediate allowance of personal effects.

18. A week before the scheduled trial, the AG sought another adjournment in light of these proposed developments. Based on the content of the proposed amendments, the timing and the history of insufficient and abortive amendment attempts, that application was opposed by the plaintiffs/respondents herein. Leask J. dismissed the application. Frankel JA. declined to authorize an expedited leave to appeal process.

2. INTERNATIONAL NORMS

19. Leask J. rightly found that there is an emerging consensus in international law that under certain circumstances solitary confinement can cross the threshold from a legitimate practice into cruel, inhuman or degrading treatment ("CIDT"), even torture.[17]

20. The Mandela Rules, discussed below, define solitary confinement as confinement of prisoners for 22 hours or more a day without meaningful human contact.[18] Leask J. found that AS as currently practiced in Canada conforms to this definition.[19]

21. The use of torture and CIDT is absolutely prohibited under international law.[20]

22. A number of United Nations bodies have declared that prolonged solitary confinement amounts to conduct prohibited by the *CAT* and *ICCPR*. So too has the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. "Prolonged" means any period of solitary confinement in excess of 15 days, because at that point, according to the medical literature that he surveyed, some of the

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[17] RFJ, ¶50, AR p. 45.
[18] RFJ, ¶57, AR p. 46, citing United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (2015) ["Mandela Rules"], Rule 44.
[19] RFJ, ¶137, AR p. 67.
[20] RFJ, ¶51, AR p. 45, citing *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85 [*CAT*]; Article 7 of the *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 [*ICCPR*].

harmful psychological effects of isolation can become irreversible.[21] The Special Rapporteur called on the international community to impose an absolute prohibition on indefinite solitary confinement and on placements exceeding 15 consecutive days. He further endorsed the abolition of its use for persons with mental disabilities.[22]

23. The Special Rapporteur's opinions informed the most recent version of the UN's *Standard Minimum Rules for the Treatment of Prisoners* ("SMRs"). In December 2015, the UN General Assembly unanimously adopted a revised version of the SMRs, known as the "Mandela Rules". Among other things, the Mandela Rules prohibit "[i]ndefinite" and "[p]rolonged" solitary confinement as "amount[ing] to torture or other cruel, inhuman, or degrading treatment or punishment;" they require independent review; and prohibit solitary confinement for prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures.[23]

24. In its preliminary observations to the Mandela Rules, the General Assembly observed that the Rules sought, "on the basis of the general consensus of contemporary thought and the essential elements of the most adequate systems of today, to set out what is generally accepted as being good principles and practice in the treatment of inmates and prison management.[24]

3. HEALTH EFFECTS OF SEGREGATION

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

[21] RFJ, ¶¶52, 54-55, AR pp. 45-6
[22] RFJ, ¶56, AR p. 46
[23] RFJ, ¶57, AR pp. 46-7, citing Mandela Rules 43, 45.
[24] RFJ, ¶58, AR p. 47.

inmates. However, all inmates subject to AS are subject to the risk of harm to some degree.[25] Negative consequences of AS include onset of mental illness, exacerbation of pre-existing mental illness, and the development and worsening of physical symptoms. [26]

26. The indeterminacy of AS is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize AS.[27]

27. Many inmates are likely to suffer permanent harm as a result of AS.[28]

28. Negative health effects can occur after only a few days in AS, and those harms increase as the duration of the time spent in AS increases. The 15-day maximum prescribed by the Mandela Rules is a generous but defensible standard given the overwhelming evidence that within that time individuals can suffer severe psychological harm.[29] These health effects have been recognized since the late 19th century.[30]

29. AS also causes physical harm to some inmates.[31]

4. ABORIGINAL INMATES

30. Aboriginal inmates are heavily over-represented in Canada's federal prisons.[32] Even within the general over-representation of Aboriginal inmates, they are further over-represented in AS.[33] Aboriginal inmates consistently have an average length of stay that is greater than for Black or Caucasian inmates.[34]

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[25] RFJ, ¶¶247, 264-72, 277-84, AR pp. 100-1, 104-8.
[26] RFJ, ¶¶277-8, 328, AR pp. 106-7, 119.
[27] RFJ, ¶248, AR p. 101.
[28] RFJ, ¶¶249, 276, 282, 284, AR pp. 101, 106, 108.
[29] RFJ, ¶250, AR p. 101.
[30] RFJ, ¶252, AR p. 102.
[31] RFJ, ¶¶307-10, AR p. 114.
[32] RFJ, ¶464, AR p. 153.
[33] RFJ, ¶¶466-7, 469, AR p. 153-4; see also RFJ ¶64, AR pp. 48-9.
[34] RFJ, ¶¶468, AR p. 153; see also RFJ, ¶64, AR pp. 48-9.

31. Aboriginal women are significantly over-represented in AS and AS is particularly burdensome for them.[35]

32. CSC has not done a good job of using Aboriginal social history (or the *Gladue* factors) to reduce the impact of AS on Aboriginal inmates.[36]

33. Aboriginal inmates in general population have access to regular programming.[37] Inmates in AS have more limited access to Aboriginal services.[38]

34. The fact that Aboriginal inmates are placed in AS more often, with limited access to programming, impacts their ability to transfer to lower security institutions and to obtain conditional release, as they may not have been able to carry out their correctional plan and may not be perceived as significantly rehabilitated as a result.[39] Aboriginal inmates are released at their statutory release date at persistently higher levels than non-Aboriginal inmates. Three-quarters of those released were released directly into the community from maximum and medium security institutions, limiting their ability to benefit from a gradual release supporting successful reintegration, and fewer Aboriginal inmates were released on parole relative to non-Aboriginal inmates.[40]

35. Aboriginal inmates are subject to racism and racial profiling in spite of CSC's efforts to eliminate such prejudicial practices.[41]

5. MENTALLY DISABLED INMATES

36. CSC does not keep track of the number of inmates with mental disabilities in either the general inmate population or in AS. Without such data, it is difficult, if not impossible, for CSC to conduct principled strategic planning with respect to that population.[42]

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[35] RFJ, ¶470, AR p. 154.
[36] RFJ, ¶483, AR pp. 157-8 citing *R. v. Gladue*, [1999] 1 S.C.R. 688.
[37] RFJ, ¶146, AR pp. 69-70.
[38] RFJ, ¶¶147-51, AR pp. 70-1.
[39] RFJ, ¶484, AR p. 158.
[40] RFJ, ¶¶485, 487, AR pp. 158-9.
[41] RFJ, ¶486, AR p. 158.
[42] RFJ, ¶¶492, 514, AR pp. 160, 165.

37. Inmates with mental disabilities are over-represented in AS.[43] The OCI collects data, accepted by AGC's witnesses, that shows that offenders who have been identified in their correctional plans as having mental health issues are more likely to have a history of AS than those identified as having no mental health issues. Offenders who have been identified in their correctional plans as having cognitive or mental ability issues are much more likely to have a history of AS than those who have been identified as having no cognitive or mental ability issues. Of the 6,982 currently incarcerated population who have a history of AS, 20.7% also have a history of being in a regional treatment centre. For women inmates the ratio is 16.9% and for Aboriginal inmates, 26.1%. Of the 2,111 currently incarcerated offenders who have been in a treatment centre, 68.3% have also been in AS. For women inmates the ratio is 78.9% and for Aboriginal inmates, 72.9%.[44]

38. The OCI stated in its *2014-2015 Annual Report* that AS is commonly used to manage mentally ill inmates, self-injurious inmates and those at risk of suicide.[45]

39. Inmates in AS are twice as likely to have a history of self-injury and to have attempted suicide, and 31% more likely to have a mental health issue. Of all federal inmates with a history of self-injury, more than 85% also have a history of AS placement. Sixty-eight percent of inmates at Regional Treatment Centres have a history of AS. For women inmates, the ratio is 78.9% and for Aboriginal inmates, 72.9%.[46]

40. The risks of harm from AS are greater for inmates with mental illness.[47]

41. The mental health policies in place to address medical needs are inadequate. The definition of serious mental illness is both unclear and too narrow. The definition intermingles symptoms and diagnoses, and is insufficiently clear as to how inmates will be assessed as having a mental disorder and who will make the determination. Further,

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[43] RFJ, ¶496, AR p. 161.
[44] RFJ, ¶493, AR p. 160.
[45] RFJ, ¶494, AR pp. 160-1.
[46] RFJ, ¶¶494-5, AR pp. 160-1.
[47] RFJ, ¶497, AR p. 161.

there are many mental disorders listed and discussed in the DSM-5 beyond psychotic, major depressive and bipolar disorders, and the CD does not address whether inmates with any of these diagnoses will also be excluded from AS. If a diagnosis is not required for exclusion from AS, the CD does not explain the nature of the symptomatology that must be present and identified for the inmate to be excluded on the basis of behavior.[48]

42. The definition of inmates actively engaging in self-injury likely to result in serious bodily harm or at elevated or imminent risk of suicide is also too narrow.[49]

43. The mental health assessment tools used and mental health monitoring and supports in place for segregated inmates are not up to the task.[50]

6. CONCLUSIONS ON FACTS

44. Respondents rely on the facts as set out by Leask J. The findings of fact below are extensive. Respondents will more specifically list the critical findings they rely upon in the context of the issues they most directly pertain to and so address their import and reliability in context. Although AGC states that she is challenging only conclusions of law, not fact,[51] AGC's factum casts as "facts" their own - very selective - account of the evidence. These assertions do *not* represent findings below, are misleading and are rejected. Respondents will address these in detail in the course of their argument below.

PART II. ISSUES ON APPEAL

45. Leask J. was correct that:

a. the impugned laws infringe s. 7 of the *Charter* because they authorize and effect prolonged, indefinite AS 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 inmates' right to counsel at AS hearings and reviews;

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[48] RFJ, ¶503, AR pp. 162-3; see also RFJ, ¶¶504-7, AR pp. 163-4.
[49] RFJ, ¶508, AR p. 164; see also RFJ, ¶¶509-10, AR p. 165.
[50] RFJ, ¶¶90-3, 519-522, AR pp. 54-5, 166-7.
[51] See e.g. Factum of the Appellant ["AGC Factum"], Opening Statement and ¶24.

b. the AS provisions infringe s. 15 of the *Charter* for inmates with mental illness or disability, and that compliance with s. 15 precludes any period of AS 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 AS provisions are constitutionally invalid for the above reasons, and because they infringe s. 15 of the *Charter* for Aboriginal inmates.

PART III. ARGUMENT

1. SECTION 7

A. Liberty and Life and Security of the Person

46. Leask J. found, and AGC does not dispute, that placement of inmates in solitary confinement deprives them of their residual liberty. It is a prison within a prison.[52]

47. AGC does not dispute (but ignores) Leask J.'s findings in respect of the s. 7 security of the person and life interests. Leask J. was correct to consider these interests in light of their relevance to the analysis not only under s. 1[53] but also to the demands of procedural fairness. These interests should not be ignored on this appeal.

48. Leask J.'s unchallenged finding was that the life interest was engaged because suicide is proportionally more prevalent amongst inmates in AS and AS puts inmates at increased risk of self-harm and suicide.[54]

49. As well, Leask J.'s unchallenged finding was that security of the person interest is engaged because AS places all inmates at risk of serious psychological harm including mental pain and suffering, and increased incidence of self-harm and suicide.[55] That risk,

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[52] RFJ, ¶261, AR p. 103; AGC Factum, ¶46; see also *Cunningham v. Canada,* [1993] 2 S.C.R. 143*,* ¶10; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, ¶58; *May v. Ferndale Institution*, 2005 SCC 82, ¶76.
[53] RFJ, ¶262, AR p. 103.
[54] RFJ, ¶¶263-74, AR pp. 103-6.
[55] RFJ, ¶247, AR p. 100-1.

he found, can manifest after only a few days and increases as the duration of time spent in AS increases.[56] Many inmates suffer permanent harm as a result of time spent in AS.[57]

50. The security of the person interest was further engaged, Leask J. found, because AS causes physical harm to some inmates.[58]

B. Principles of Fundamental Justice

a) Overbreadth

51. AGC does not dispute that Leask J. identified the correct test for overbreadth,[59] nor that he measured the laws' effects against the correct purpose.[60]

52. Respondents say if anything, Leask J.'s identification of the law's objective was too narrow. Also informative is the context of the whole *CCRA*, and the broader purposes of the correctional system. Two key tenets of the justice system are "carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders" and "assisting the rehabilitation of offenders and their reintegration into the community…" Regard should also be had to s. 4 of the *CCRA*.[61] Viewed in its entire context, a more nuanced framing of the law's object is as follows: to promote security and safety, humane custody, rehabilitation and reintegration into the community. Leask J.'s findings measured against this objective make his conclusions of law all the more compelling.

53. AGC argues that Leask J. erred in concluding that the impugned laws authorize:

a. *prolonged* AS which harms inmates and undermines institutional security; and

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[56] RFJ, ¶¶250, 410, AR pp. 101, 140.
[57] RFJ, ¶¶249, 276-84, AR pp. 101, 106-8.
[58] RFJ, ¶¶307-10, AR p. 114.
[59] RFJ, ¶322, AR p. 117.
[60] RFJ, ¶¶318-9, AR p. 116. Avoiding interference with criminal or serious disciplinary investigations was not found to be a *purpose* of the law, although it was acknowledged to be a ground for the use of AS: *contra* AGC Factum, ¶49.
[61] *CCRA*, s. 3-4; *R. v. Moriarity*, 2015 SCC 55, ¶¶26-8; *Carter v. Canada (Attorney General)*, 2015 SCC 5 [*Carter #1*], ¶77.

b. AS where some lesser form of restriction would achieve the objective.[62]

The error alleged is these proven effects stem from a misapplication of the law, and not the law itself.

i) Law Itself Authorizes Complete Isolation in AS

54. Leask J. found that the law itself authorizes isolation and is overbroad to the extent that it authorizes the isolation of inmates in circumstances where that is not necessary to achieve institutional and personal safety and security.[63]

55. It is as a result of the impugned laws that inmates in AS are not allowed to associate with other inmates and that programming is all but absent in AS.[64] It is also because of the impugned laws that the conditions of confinement, in terms of the cells and yards and meal slots etc., are isolating.[65] We elaborate upon these points below.

56. The words of the *CCRA* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *CCRA*, the object of the *CCRA*, and the intention of Parliament.[66] It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids including other principles of interpretation, such as "*Charter* values" interpretations. [67]

57. Section 31(1) of the *CCRA* provides that the purpose of AS is to maintain the security of the penitentiary or the safety of any person by "not allowing an inmate to associate with other inmates."[68]

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[62] RFJ, ¶¶326-7, 545, AR pp. 118-9, 171-2.
[63] RFJ, ¶¶332, 335-6, AR pp. 120-1.
[64] *CCRA*, s. 31(1) and 37(b)(i).
[65] *CCRA*, s. 37(b)(i).
[66] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 [*Bell ExpressVu*], ¶26.
[67] *Bell ExpressVu,* ¶¶28-9.
[68] RFJ, ¶332 (emphasis added), AR p. 120.

58. Apparently in an attempt to have the *CCRA* comply with the Constitution, AGC urges this Court to interpret s. 31(1) as though it says 'by not allowing an inmate to associate with <u>*some*</u> other inmates.'[69] The *CCRA* does not support that interpretation. The words "not allowing" are clear and unambiguous. They are absolute. Section 31(1) does not say "some", it does not say "by limiting association" or "by curtailing association" nor does it use any similar less absolute language.

59. Nor does the statutory scheme support such an interpretation. Section 37(a)(i) provides that an inmate in AS 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". Thus the exception in s. 37 is equally categorical - it contemplates conditions of confinement that exclude association with other inmates. It is also significant that, in practice, programs are not offered in AS[70] – apparently because programs typically require association with other inmates. Thus administrative decision-makers expert in applying the *CCRA* do not read any qualifying words into s. 37.

60. As noted by Leask J., s. 31 was amended in 2012. The old wording of the *CCRA* provided that the purpose of AS is to "keep an inmate from associating with the general inmate population." Leask J. rightly observed that AS was formerly segregation from the general population and could accommodate sub-population as compared to present segregation of the individual.[71]

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[69] AGC Factum, ¶54.

[70] RFJ, ¶¶124, 134, 141-3, AR pp. 63-4, 66, 68-9; AB v. 20, p. 7895-905; Expert Report of Kelly Hannah-Moffat ["Hannah-Moffat Report"], ¶25, AB v. 10, p. 3938; Affidavit #1 of Daren Frick, ¶¶3, 14, AB v. 26, pp. 10409, 10412; Examination in Chief of Bruce Somers ["Somers Direct"], Trial Transcripts ["TT"], v. 4, pp. 1216:32- 1218:2 and 1227:18-22; Cross-Examination of Bruce Somers on August 1, 2017 ["Somers Cross 2"], TT v. 4, pp. 1297:39-1298:11; Cross-Examination of Brigitte Bouchard ["Bouchard Cross"], TT v. 4, pp. 1556:24-28, 1558:40-1564:13; Cross-Examination of Nancy Kinsman, TT v. 6, pp. 2090:40-2091:8; Cross-Examination of Kelley Blanchette ["Blanchette Cross"], TT v. 5, pp. 1854:31-1855:5; Expert Report of Margo Rivera ["Rivera Report"], ¶¶16-19, 21-25, 31, AB v. 11, pp. 4287-90; Examination in Chief of Robert Clark, TT v. 2, p. 438:15-28; Affidavit #1 of Andre Blair, ¶¶21, 51, AB v. 6, pp. 2113, 2118.

[71] RFJ, ¶334, AR pp. 120-1.

61. There is no basis to suggest that the addition of the safety and security objectives attenuated the dissociation objective.

62. The isolating physical conditions of confinement also persist by virtue of the *CCRA* itself. Section 37(b)(i) provides that an inmate in AS has the same rights and conditions of confinement as other inmates, except for those that "(b) cannot be enjoyed due to (i) limitations specific to the administrative segregation area" Parliament enacted this law fully cognizant that AS areas involve ranges of cells with food slots, solid steel doors, and minimal yard and perhaps an "interview" room. To fail to take this reality into account, fails to give a contextual interpretation to the impugned laws. Thus it is the *CCRA* that specifically authorizes the limitations in the infrastructure to serve as a barrier to human contact.

ii) Law Itself Authorizes Both Indefinite and Prolonged AS

63. Leask J. was correct that the *CCRA* authorizes both prolonged and indefinite AS. Leask J. characterized its indefiniteness as "a central feature" of AS and noted that in some cases AS is measured "in the thousands of days."[72]

64. AGC ignores Leask J.'s finding that the impugned laws authorise *indefinite* AS as an aspect of his overbreadth analysis. That finding was significant and unassailable. Leask J. observed, "[f]or many inmates, the indefiniteness of administrative segregation is its most challenging feature."[73] The indeterminacy of AS exacerbates its painfulness, increases frustration, and intensifies depression and hopelessness often generated in this environment.[74] Leask J.'s overbreadth analysis specifically noted that indefinite AS "with its attendant harms is simply not necessary to enable such steps to be taken."[75] That unchallenged finding requires the overbroad effect of the laws to be justified under s. 1.

65. But Leask J.'s analysis of overbreadth went further. He found that the laws themselves authorize *prolonged* AS. Leask J. noted the evidence that "prolonged solitary

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[72] RFJ, ¶154, AR p. 71.
[73] RFJ, ¶158, AR pp. 72-3.
[74] RFJ, ¶¶159, 190, 248, 327, AR pp. 73, 83, 101, 118-9.
[75] RFJ, ¶327, AR pp. 118-9; see also RFJ, ¶545, AR pp. 171-2.

confinement" was any period of solitary confinement in excess of 15 days and Leask J. accepted that this was a "generous" standard.[76] AGC does not take the position, on this appeal, that the *CCRA* does not authorize AS after 15 days (or after 30 days, or after 100 or 1000 days). AGC is simply silent on what it considers a "prolonged" period of AS to be but argues whatever that standard is, the *CCRA* requires that there be no reasonable alternative to AS, that the inmate be released at the earliest appropriate time, and that the inmate's case be subject of regular reviews.[77]

66. The *CCRA* requirements to consider alternatives and release an inmate from AS at "the earliest appropriate time" do not mean inmates are not subjected to prolonged and indefinite AS. A prisoner sentenced as a dangerous offender to an *indeterminate* sentence is periodically reviewed by the Parole Board of Canada and must be released when the board is satisfied that his risk to public safety can be managed on unconditional release. The possibility of release conditioned by the interests of public safety does not change the *indeterminate* nature of the sentence, nor make it other than *prolonged*.

67. That the *CCRA* authorizes prolonged solitary confinement is further supported by the fact that, the vast majority of institutions who are expert in applying the *CCRA*, those working in the institutions, have interpreted this standard as authorizing AS for hundreds if not thousands of days.[78] While the average length of stay in AS in the 2015-2016 fiscal year was down 28 days, 43% of inmates still stay in longer than 16 days, 26.9% stay in longer than 31 days, 12.4% stay in longer than 61 days, 9.1% stay in longer than 91 days, and 5.7% longer than 121 days.[79]

68. As Leask J. noted, it is important that the Mandela Rules prohibit solitary confinement for a period in excess of 15 consecutive days. As the SCC recognized in *Suresh*, "the principles of fundamental justice expressed in s. 7 of the *Charter* and the

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[76] RFJ, ¶¶54, 250, AR p. 45, 101; see also RFJ, ¶¶176, 193, 560, AR pp. 78, 84, 175.
[77] AGC Factum, ¶50.
[78] RFJ, ¶154, AR p. 71.
[79] RFJ, ¶¶155-156, AR pp. 71-2; see also Plaintiffs' Interrogatory Read-ins, AB v. 21, pp. 8051-8059; see also Affidavit #2 of Mike Hayden, Exhibits Y and Z, AB v. 32, pp. 12764-12789.

limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect".[80]

b) Procedural Fairness

i) External Review Required for Procedural Fairness

69. AGC concedes that the current regime offends procedural fairness.[81] But AGC says independent and impartial review by an individual who is not chosen by, does not report to, and is completely outside the circle of influence of the decision-maker and who is able to substitute their decision for that of the decision-maker is all that is required. AGC argues this person need not be *external* to CSC in reliance on the *CCLA* case.[82]

70. Leask J. considered and rejected that aspect of the judgment in *CCLA*. He was right to do so based on the different and better record advanced in this case and not before the Court in *CCLA*. That record supports Leask J.'s conclusion that CSC has shown an inability to fairly review AS.[83]

71. In particular, the record here includes the expert report of Prof. Michael Jackson who was extensively cross-examined before the Court and whose opinion AGC agreed is "very important" and "should be given considerable respect and weight".[84]

72. Prof. Jackson provided a detailed review of the repeated calls for external oversight of AS dating back to the 1970s and extending to present day, all of which were rejected by CSC in favour of enhanced internal review that failed to address the identified problems.[85] Leask J. concluded:

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

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[80] RFJ ¶560, AR p. 175, citing *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 [*Suresh*], ¶59.
[81] AGC Factum, ¶¶55-56; citing *Corporation of the Canadian Civil Liberties Association v. Canada*, 2017 ONSC 7491 [*CCLA*], ¶175.
[82] AGC Factum, ¶¶55-56; citing *CCLA*, ¶175.
[83] RFJ, ¶409, AR p. 140.
[84] RFJ, ¶15, AR pp. 34-5.
[85] RFJ, ¶¶356-382, AR pp. 126-34.

> a) ensure an objective consideration of the facts measured against the legislative criteria for segregation free of institutional pressures and bias;
>
> b) cause CSC to more rigorously examine alternatives to segregation;
>
> c) increase the level of accountability of the institution and provide inmates with an opportunity to present their case to an individual not affiliated with the institution, thus increasing the perception of fairness;
>
> d) ensure compliance with time limits and other legislative and policy requirements of administrative segregation;
>
> e) avoid the situation whereby all placement reviews are conducted by individuals who are part of the culture and hierarchy of the CSC, and therefore deferential to other decision-makers; and
>
> f) address the failure of repeated attempts at internal reform to ensure procedural fairness.[86]

73. In light of that specific context, Leask J. considered whether the *CCRA* met the requirements of procedural fairness. His appreciation of the legal principles informing such analysis was without fault. Contrary to AGC's assertion, Leask J. was express in his consideration of *Baker*. He was also express in his consideration of the Court's analysis in *CCLA* which was structured around *Baker* and with which he disagreed, in part.[87]

74. Leask J.'s consideration of the *Baker* factors is apparent throughout his decision. Leask J. was aware of the nature of the decision. He did not misapprehend the purpose of the AS review scheme.[88] Leask J. understood that the Segregation Review Board ["SRB"]'s focus was on the inmate's circumstances at the time of review, rather than the time of placement, and the question was whether continued placement in AS was justified.[89]

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[86] RFJ, ¶381, AR pp. 133-4.
[87] AGC Factum, ¶63 citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]; RFJ, ¶¶340, 409, AR pp. 122, 140; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, ¶19.
[88] AGC Factum, ¶57.
[89] RFJ, ¶350, AR p. 124.

75. Leask J. was aware of the process followed in making this decision, a process extensively described in the RFJ.[90] Unlike the court in *CCLA*, Leask J. was not operating under the misapprehension that inmates were permitted to attend the SRB hearings with counsel.[91] Leask J.'s finding in this respect was supported by evidence from AGC's own witness. He was also correct that that the grievance procedure and possibility of *habeas corpus* applications were no answer to the deficiencies of procedural fairness in the review process that he had identified.[92]

76. Leask J. was rightly alive to significant importance of the decision. A high degree of procedural fairness is required by a law that engages the rights to life, liberty and security of the person.[93] The *CCLA* case did not consider the right to life was engaged.

77. The legitimate expectations of the parties was not a weighty factor in this case.

78. In terms of the procedural choices made by the decision maker, Leask J. was alive to CSC's repeated rejection of external adjudication. But, Leask J. noted that AGC's own witness, Bruce Somers, acknowledged he did not have a problem with independent adjudication[94] and CSC accepts independent adjudication of disciplinary hearings.[95]

79. The *Baker* factors are not exhaustive. CSC's particular culture and context was significant to Leask J. The enhanced record in this case put Leask J. in an advantaged position as compared to the Court in *CCLA*. After considering not only Prof. Jackson's expert evidence, but also the evidence of inmates and CSC employees, Leask J. concluded that the very features that warrant independent adjudication in regards to disciplinary decisions also arise with respect to AS, and in particular:

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[90] RFJ, ¶¶77-90, 296-301, AR pp. 51-5, 111-2.
[91] *CCLA*, ¶117; RFJ, ¶¶413-414, AR p. 141.
[92] RFJ, ¶397, AR pp. 137-8.
[93] RFJ, ¶383, AR p. 134.
[94] RFJ, ¶396, AR p. 137.
[95] RFJ, ¶384, AR p. 134.

a. In many cases there is a conflict between the institution and the inmate's view of the facts. Absent independent adjudication limited weight is given to the inmate's account and the institution's information is taken as presumptively reliable;[96]

b. CSC's organizational culture exacerbates this problem. That culture includes deference on the part of senior administrators to frontline staff, and similar deference at the regional and national levels in relation to wardens and correctional managers who deal with operational realities in institutions;[97]

c. Institutional bias prevents a fair weighing of credibility of information and balancing of competing interests;[98]

d. The open-ended nature of AS placements makes rigorous application of the statutory criteria important. An independent adjudicator is best placed to ensure that robust inquiry occurs at reviews and that institutional staff and administrators make the case for AS by demonstrating there are no reasonable alternatives.[99]

80. These features make this case unlike *Oliver v. Attorney General (Canada)*, where what was at stake was the security classification of the offender, not open-ended maintenance in AS with the attendant risks to life and security of the person.[100]

81. In light of these particular features, Leask J.'s was correct that given the severity of a decision to place an inmate in AS, "the appropriate level of procedural fairness required is, therefore, one which mirrors the safeguards contained in the criminal trial process as attenuated by the lower level of overall jeopardy".[101]

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[96] RFJ, ¶¶385-6, AR pp. 134-5
[97] RFJ, ¶¶387-8, AR p. 135.
[98] RFJ, ¶¶390, 398-408, AR pp. 135-6, 138-40.
[99] RFJ, ¶¶391-5, AR p. 136-7
[100] AGC Factum, ¶¶61-2, citing *Oliver v. Attorney General (Canada)*, 2010 ONSC 3976, ¶¶66, 67.
[101] RFJ, ¶¶342-4, AR pp. 122-3, citing *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440, ¶68; *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36, ¶21; *Currie v. Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 [*Currie*].

82. Leask J. rightly relied upon *Currie* where the ABQB found independent adjudication to be required in light of s. 7 of the *Charter* in the context of disciplinary segregation.[102] In *Currie*, the Court concluded that in assessing whether the tribunals as constituted are sufficiently independent and impartial, it may hear evidence of what actually occurs in the hearings, and not merely rely on the wording of laws and policy.[103] The Court concluded that discipline boards have none of the trappings usually associated with independence.[104] The Court further accepted that challenges based on lack of independence and impartiality may be brought based on reasonable apprehension of bias on an institutional or structural level.[105] The Court found that an essential conflict exists "between the role of prison staff statutorily responsible for maintaining the discipline of inmates in an institution and the role of adjudicator on a discipline panel."[106] The Court concluded "access to judicial review, ministerial review, or to the ombudsman are not practical solutions to the problems."[107] The Court held there was a conflict between the duty of staff members of a disciplinary board in Alberta's correctional centres to maintain discipline and staff morale and the right of the prisoner to have his charges dealt with before a tribunal with a sufficient degree of independence and impartiality giving rise to actual or perceived bias.[108]

83. Respondents submit that a like finding is warranted for SRB hearings. Appearance before an SRB does not necessarily involve the adjudication of a dispute. However, in many AS cases there is a conflict between the institution's view of the facts (including appropriate alternatives) and the prisoner's, a reality reflected in the evidence led in this case. As in disciplinary cases, there is therefore a reasonable apprehension of bias on the part of the SRB and the institutional head as the ultimate decision-maker. Here, as in *Currie*, independent adjudication is required to ensure fairness.

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[102] *Currie*, ¶¶33-51, 196-201.
[103] *Currie,* ¶¶52-9.
[104] *Currie,* ¶¶159-67.
[105] *Currie,* ¶169.
[106] *Currie,* ¶174.
[107] *Currie,* ¶185.
[108] *Currie,* ¶196 see also ¶¶197-200.

84. *Hunter* also stands for the proposition that "the statute had to require prior authorization of the search by a 'neutral and impartial arbiter'"[109] and likewise for all the reasons above the impugned laws must require independent external review.

85. As Leask J. rightly noted, a case study involving Andre Blair illustrated the problem of fairness in decision-making by wardens and the serious limitations on the review process as practiced by CSC.[110] That case study is detailed at length in the Reasons but briefly, Mr. Blair was wrongly accused of ingesting drugs and placed in a dry cell. He lied and said he had ingested drugs in order to get medical attention for constipation. He was taken to a hospital and x-rayed. The x-ray was negative and Mr. Blair admitted he had lied about swallowing the drugs. Mr. Blair was returned to the dry cell at the institution and his medication refused. The warden testified he did not see the x-ray. After six days in the dry cell, Mr. Blair was returned to AS. The warden testified that the fact that Mr. Blair had manipulated his way out of the dry cell was a threat to the security of the institution and his placement in AS was justified. He refused to admit that he had used AS to punish Mr. Blair for his behaviour. Mr. Blair grieved his placements in the dry cell and in AS. His complaint about the former was upheld. In particular, his return to the dry cell following the x-ray was found to be unjustified. However and most significantly, his complaints about his placement in AS were denied by the offender grievance response.[111]

86. In this case, like in *Hunter* and unlike in *Little Sisters*, the defects identified by the respondents in respect of procedural fairness are the necessary effect of the law as spelled out in the impugned laws. It is as a result of the impugned laws, and in particular s. 33(1)(c), that the warden is the judge in his own cause.[112] It is because of the *CCRA* that the warden designates the person who must recommend to the institutional head whether or not the inmate should be released from AS. The *CCRA* itself purports to confer powers to individuals and entities who are not impartial as explained in *Currie.*

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[109] *Little Sisters Book & Art Emporium v. Canada*, 2000 SCC 69 [*Little Sisters*], ¶207, citing *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 [*Hunter*], pp. 160-2.
[110] RFJ, ¶398, AR p. 138.
[111] RFJ, ¶¶399-408, AR pp. 138-40.
[112] One cannot be the judge in ones own cause: *Scotland v. Canada (Attorney General)*, 2017 ONSC 4850, ¶¶60-3.

ii) Right to Counsel Required for Procedural Fairness

87. AGC says that because the *CCRA* does not *prohibit* counsel at SRB hearings, any failings in this respect are the result of discretionary decisions by CSC officials, not the *CCRA* itself. AGC therefore opposes s. 52 relief in favour of s. 24 relief, which AGC says is, in any event, not available to the respondents on this appeal.[113]

88. Leask J. was correct to situate the procedural unfairness in the *CCRA*, which must make clear that there is no discretion to prohibit participation of counsel at SRB hearings.

89. In other such circumstances where the right to counsel is engaged, the *CCRR* are express. The *CCRR* require that an inmate who is charged with a serious disciplinary offence must be given a reasonable opportunity to retain and instruct legal counsel for the hearing, pursuant to s. 31(2).[114] In contrast, the *CCRR* is silent with respect to the right of counsel to appear with inmates at SRB hearings.[115] Leask J. found as a fact that as a matter of practice, counsel are not permitted to appear.[116]

90. While CD 709 requires inmates with significant mental health needs be informed of the right to engage *an advocate* to assist with the AS review process, that person need not be legal counsel.[117]

91. Leask J. found, given the consequences of a decision to continue AS for *any* inmate, that there is an important role for counsel at SRB hearings should any inmate wish to be represented, and that the right to such assistance should not be limited to those with acute mental health needs. He found that counsel will often be much better able to present a focussed argument applying the facts to the legal criteria, or, at a

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[113] AGC Factum, ¶¶66-68
[114] See also Examination for Discovery of Bruce Somers, March 24, 2016 ["Somers XFD 1"], AB v. 22, pp. 8572-5; Campbell #1, AB v. 3, pp. 1166-7.
[115] RFJ, ¶¶413-4, AR p. 141; *CCRR*, s. 97(2).
[116] RFJ, ¶¶414, 419-20, AR pp. 141, 143; see also Examination for Discovery of Bruce Somers, November 8, 2016 ["Somers XFD 2"], AB v. 23, pp. 8855-6; Somers XFD 1, AB v. 22, p. 8669-75; Somers Cross 2, TT v. 4, pp. 1366:15-43.
[117] RFJ, ¶416, AR p. 142.

minimum, put the institution in the position of having to do so, and press the institution to justify ongoing placements or facilitate viable alternatives.[118]

92. The right to counsel must not be left to the discretion of those administering the laws. AGC conceded as much, as a matter of law, in final submissions before Leask J.[119]

93. In the circumstances of this case, Leask J. was correct that procedural fairness requires that any inmate who wishes to be represented by counsel at an SRB hearing is entitled to such representation.[120] The formality of the disclosure requirements, the vulnerability of inmates, and the severity of the consequence at stake - which includes not only a deprivation of residual liberty, but a possible postponement of parole, and significant risks to health, and life - all demand that a person in such jeopardy have not only the right to speak for themselves, but the right to speak through counsel.[121]

c) Gross Disproportionality

94. Gross Disproportionality asks whether the impact of restrictions that law places on an individual's life, liberty, or security of the person is totally out of sync with the law's objective.[122] The gross disproportionality analysis focuses on impacts on individual claimants rather than broader society - it does not consider the beneficial effects of the law for society - it evaluates only the negative impacts on the individual.[123]

95. Gross disproportionality is assessed on a high standard, requiring that "the connection between the draconian impact of the law and its object… be entirely outside the norms accepted in our free and democratic society."[124]

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[118] RFJ, ¶418, AR p. 142; see also Jackson Report, ¶¶313-23, AB v. 2, pp. 442-51.
[119] RFJ, ¶420, AR p. 143.
[120] RFJ, ¶421, AR p. 143.
[121] *Joplin v. Vancouver Police Department* (1982), 144 D.L.R. (3d) 285 (BCSC).
[122] *Carter #1*, ¶89; *Canada (Attorney General) v. Bedford*, 2013 SCC 72 [*Bedford*], ¶120.
[123] *Bedford*, ¶121.
[124] *Bedford*, ¶120.

96. Gross disproportionality is not a utilitarian analysis: It "is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm."[125]

97. Leask J. concluded it was unnecessary to consider the principle that laws not be grossly disproportionate in light of his conclusion on overbreadth.[126] However, given his finding at the final stage of s. 1 where the impact of the law on protected rights is weighed against the objective of the law *and* its beneficial effects, he likely would have concluded that the law was grossly disproportionate in its effects.[127]

98. Leask J. found that the impugned laws cause suffering as detailed above. In addition, as set out above, he found that in some instances they undermine and do not further the legislative objectives and undermine rehabilitation and reintegration into the community. He also found, as we detail below, that they undermine equality. In some instances, as noted above, those practices amount to torture under international norms.

99. For all these reasons, respondents ask this Court, in the exercise of its powers pursuant to s. 9 of the *Court of Appeal Act*, to declare the impugned laws grossly disproportionate in their effects.[128]

2. SECTION 15

A. Aboriginal Inmates

100. Leask J.'s finding of discrimination against Aboriginal inmates is unchallenged.[129]

101. Leask J. accepted that AS has a disproportionate effect on Aboriginal inmates.[130] Leask J. found that Aboriginal inmates are not only over-represented in the general prison population, but also further increasingly over-represented in AS.[131] AS is particularly

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[125] *Bedford*, ¶122.
[126] RFJ, ¶339, AR p. 121.
[127] RFJ, ¶¶596-600, AR pp. 184-5.
[128] *Court of Appeal Act*, R.S.B.C. 1996, c 77, s. 9.
[129] AGC Factum, ¶22.
[130] RFJ, ¶471, AR p. 154.
[131] RFJ, ¶466-7, 470, AR pp. 153-4.

burdensome for Aboriginal women.[132] Aboriginal inmates also consistently have a longer average length of stay in AS than Black or Caucasian inmates.[133]

102. Leask J. found the impugned laws fail to respond to the actual needs and capacities of Aboriginal inmates and perpetuate and exacerbate their disadvantage.[134] Aboriginal inmates face historical disadvantage[135] and are subject to racism and racial profiling within CSC.[136] Placement in AS impacts the ability to transfer to lower security institutions and to obtain conditional release, and adversely affects Aboriginal inmates' ability to carry out their correctional plan and to be perceived as significantly rehabilitated.[137] The discriminatory effects of the over-segregation include that a higher proportion of Aboriginal inmates are released at their statutory release dates and from maximum or medium security institutions, limiting their ability to benefit from gradual release supporting successful reintegration; and fewer Aboriginal inmates were released on parole relative to non-Aboriginal inmates.[138] Systemic discrimination, culturally laden notions of accountability, over-classification, over-segregation, and a lack of availability of specific programming for Aboriginal inmates may all play a role in the granting of parole to Aboriginal inmates.[139]

B. Mental Health

103. AGC does not argue that Leask J. erred in his articulation or application of the analysis of s. 15. Instead, AGC alleges decisions concerning AS are premised on individualized assessment of inmates' health and do not involve stereotyping[140] and even if there is discrimination, the relief granted is too broad.[141]

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[132] RFJ, ¶470, AR p. 154.
[133] RFJ, ¶468, AR p. 153.
[134] RFJ, ¶¶472, 489, AR pp. 154, 159.
[135] RFJ, ¶473, AR p. 154-5.
[136] RFJ, ¶¶476, 486, AR pp. 156, 158.
[137] RFJ, ¶484, AR p. 158.
[138] RFJ, ¶485, AR p. 158.
[139] RFJ, ¶487, AR pp. 158-9.
[140] RFJ, ¶¶78-9, AR pp. 51-2.
[141] AGC Factum, ¶¶75, 77.

a) No Need to Show Stereotyping

104. The claimant's burden at the second stage of analysis under s. 15(1) is to show that the identified distinction's impact on the individual or group perpetuates disadvantage.[142] Proof of prejudice or stereotyping is not required to establish discrimination. A majority of the SCC recently emphasized, "[t]he focus is not on "whether a discriminatory attitude exists", or on whether a distinction "perpetuates negative attitudes" about a disadvantaged group, but rather on the discriminatory *impact* of the distinction."[143] If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory.[144]

105. Thus even if AGC could show effective individualized assessment of mental disability, this would not undermine a finding that the law has a discriminatory impact on mentally disabled inmates. However, Leask J. was correct (and his findings are unchallenged) that CSC's endeavours to address how inmates with mental disability are treated with respect to AS have been inadequate.[145]

106. In this case, the evidence was overwhelming that the impugned laws have a discriminatory impact on mentally disabled inmates. Leask J. found that the risks of harm from AS are greater for inmates with mental illness not only because of their actual circumstances, including their greater vulnerability in general to stressful, traumatic conditions, but because the conditions of isolation exacerbate particular symptoms.[146] Again, those conditions of isolation are the result of the law itself.[147]

107. AS is an utterly unsuitable environment for addressing their actual needs and capacities. The OCI has made the obvious finding that the infrastructure gets in the way

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[142] *Quebec (Attorney General) v. A*, 2013 SCC 5 [*Quebec v. A*], ¶323.
[143] *Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17, ¶28 citing *Quebec v. A*, ¶¶327, 330; see also *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, ¶20.
[144] *Quebec v. A*, ¶332.
[145] RFJ, ¶¶90-3, 499-523, AR pp. 54-6, 161-7.
[146] RFJ, ¶497, AR p. 161.
[147] *CCRA*, s. 37.

of effective mental health interventions.[148] AS cells are small and bleak and lack privacy.[149]

108. Further, AS interferes with the physician patient relationship.[150]

109. In some cases it interferes with mental health treatment such as treatment of substance use disorder and borderline personality disorder offered as programs and in a group format or therapy.[151]

110. These failures of the law widen the gap between this historically disadvantaged group and the rest of society rather than narrowing it.

b) Declaration is Not Too Broad

111. AGC says the declaration is too broad because:

a. Inmates with mental illness can be placed in AS for a period of time without serious harm;[152]

b. There are circumstances where an inmate with mental illness or disability must be isolated to safeguard personal safety;[153]

c. Leask J. erroneously relied on evidence of adverse impacts on mental health arising from AS on inmates in the US who were prone to psychotic breaks and

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[148] 2010-2011 Annual Report of the Office of the Correctional Investigator, AB v. 14, pp. 5538, 5540, 5555.
[149] RFJ, ¶¶131-3, 278, 292, AR pp. 65-6, 107, 110.
[150] 2015-2016 Annual Report of the Office of the Correctional Investigator, AB v. 19, p. 7364; Cross-Examination of Ruth Martin, TT v. 3, p. 898:45-899:19; see also Solitary Confinement and Federal Corrections: Recent Changes In Ethical Guidelines For Health Care Professionals And In International Human Rights Obligations, AB v. 29, p. 11547-9.
[151] RFJ, ¶141, AR p. 68; Blanchette Cross, TT v. 5, p. 1854:31-1855:15; Expert Report of Dr. Peggy Koopman, ¶30, AB v. 36, p. 14287.
[152] AGC Factum, ¶82.
[153] AGC Factum, ¶83.

those who suffered from disorders of impulse control and the conclusions as to those inmates do not apply universally to all inmates with mental illness;[154]

d. Leask J.'s declaration could jeopardize safety.[155]

112. We address each of these issues below.

113. First, Leask J. made no finding and the evidence does not support that inmates with mental illness can be placed in AS for a period of time without serious harm. AGC cites ¶¶210-2 of the Reasons in support of this assertion. At these paragraphs Leask J. summarized the evidence of AGC's experts which pertained to the Colorado Study. Leask J. specifically agreed with the criticisms of that study advanced by Drs. Grassian and Haney – essentially that it was "nearly universally criticized and discredited" and a "methodological disaster".[156] As well, AGC cites ¶219 of the Reasons where Leask J. simply summarizes evidence of Dr. Gendreau to the effect that solitary confinement has a much milder effect on inmates than predicted, and its effects are not well understood. Leask J. specifically rejected these portions of the expert opinions expressed by Drs. Mills and Gendreau and found solitary confinement is psychologically harmful to inmates. Leask J. accepted Dr. Haney's evidence as to how and why solitary confinement causes such harm. He found that Drs. Mills and Gendreau were outliers in the opinions they hold on the subject.[157] AGC has not established any palpable and overriding error to justify this Court to interfere with Leask J.'s assessment of the evidence.

114. Second, Leask J. did not find that there were circumstances where mentally disabled inmates must be "isolated to safeguard personal safety".[158] Nor did Dr. Grassian or Dr. Haney give such evidence. In the transcript cited of Dr. Grassian's cross-examination, Dr. Grassian described the practice of clinical seclusion utilized in psychiatric hospitals. This practice does not involve isolation. It involves placing a patient

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[154] AGC Factum, ¶84.
[155] AGC Factum, ¶85.
[156] RFJ, ¶253, AR p. 102; see also RFJ, ¶¶236-7, 243-4, AR pp. 96-7, 99-100.
[157] RFJ, ¶251, AR p. 101.
[158] AGC Factum, ¶83.

in a quiet room for minutes or a couple of hours with a clinician right outside the door talking to the person and trying to quiet them down.[159] That practice bears no resemblance to AS as practiced in Canadian penitentiaries. Nor did Dr. Haney endorse the isolation of mentally disabled inmates. In the transcript cited from Dr. Haney's cross-examination, he simply agreed to the rather obvious fact that regulation must balance the legitimate interests of prison administrators to maintain institutional security and physical safety of staff and prisoners, against the interests of prisoners to be free from unnecessary cruel and psychological punishments. He further testified that in striking the balance, oftentimes the first part of the equation unduly outweighs the second.[160]

115. Third, Leask J. held:

> [497] Both Dr. Grassian and Dr. Haney gave evidence that the risks of harm from segregation are greater for inmates with mental illness. Dr. Haney explained in some detail why this is so. In part, it is because of the greater vulnerability of the mentally ill in general to stressful, traumatic conditions. As well, some of the conditions of isolation exacerbate the particular symptoms from which inmates with mental illness suffer. For example, inmates prone to psychotic breaks are denied the stabilizing influence of social feedback, while those who suffer from disorders of impulse control are likely to find their pre-existing condition made worse by the frustration and anger that segregation generates.
>
> [498] Dr. Koopman expressed her view that administrative segregation exacerbates symptoms and provokes recurrence of mental disorder. Dr. Martin and Dr. Hannah-Moffat also gave evidence about exacerbation of pre-existing mental illness being one of the harms of the practice.[161]

116. Thus it is clear that the evidence about inmates prone to psychotic breaks and those who suffered from disorders of impulse control simply served as non-exhaustive, illustrative examples of types of symptoms that may be exacerbated by isolation. No palpable and overriding error of fact has been established.

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[159] Cross-Examination of Dr. Stuart Grassian, TT v. 1, p. 281:6-282:13.
[160]Cross-Examination of Dr. Craig Haney, TT v. 5, pp. 1710:31-1711:13.
[161] RFJ, ¶¶497-8, AR pp. 161.

117. Finally, any concern about the effect Leask J.'s declaration may have on institutional safety falls to be considered at s. 1. As Leask J. noted, AGC bears the onus on this issue and did not meaningfully address s. 1 in the context of the s. 15 breaches.[162]

3. SECTION 1

A. Section 15 Breaches Unjustified

118. A separate s. 1 justification must be carried out with respect to each independent *Charter* violation. AGC raised no s. 1 defence in respect of the s. 15 infringements which are therefore unjustifiable.

B. Section 7: Prolonged, Indefinite, and Absolute Isolation Unjustified

119. In terms of the s. 7 breaches, AGC says Leask J. erred in finding that prolonged and absolute isolation are permitted by the *CCRA*. Respondents say, for the reasons explained above and below, both prolonged and absolute isolation are authorized by the *CCRA*.[163] In addition, Leask J. found that *indefinite* segregation was authorized by the *CCRA*.[164] AGC does not dispute this finding and for that reason as well as explained above, the s. 7 breaches must be justified under s. 1.

120. AGC says Leask J. failed to accord sufficient deference to the legislature.[165] Like in the field of administrative law, deference in *Charter* adjudication demands a posture of respectful attention to the evidence and rationales offered by the government under s. 1 rather than blind reverence by the courts.[166] "Deference" imports respect for the decision-making process of the legislature. It does not mean courts are subservient to the determinations made by a legislature, or that courts must show blind reverence to the legislative decisions made or that they may pay lip service to the concept of proportionality review while imposing their own view.[167]

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[162] RFJ, ¶547, AR p. 172.
[163] AGC Factum, ¶92.
[164] AGC Factum, ¶92; RFJ, ¶¶553, 599, AR pp. 173, 184-5; see also ¶¶154, 158-9, 190, 248, 327, AR pp. 71-3, 83, 101, 118-9.
[165] AGC Factum, ¶¶93-7.
[166] *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*], ¶¶48-50.
[167] *Dunsmuir*, ¶¶48-50.

121. A posture of respectful attention is consistent with the approach articulated by the SCC in other prison cases such as *Sauvé*, in which McLachlin C.J. held that limits on the right to vote "require not deference, but careful examination."[168]

122. In a case such as this, respectful attention to the evidence and rationales offered by government reveals AGC's new Bill itself proposes a soft time limit for AS which demonstrates that the present law, having no time limit at all, is not minimally impairing.

123. Leask J. also noted that even AGC's witnesses recommended time limits be imposed on the use of AS[169] and that a soft time limit was achievable.[170]

124. Some witnesses expressed concern that CSC's own procedures present challenges for a hard time limit. Leask J. was correct that administrative or operational concerns such as these were no justification for a *Charter* breach.[171]

125. As noted above, Leask J. found the 15-day maximum prescribed by the Mandela Rules is a generous and defensible standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm.[172] Leask J. found that a time limit on the use of AS would create the pressure to ensure decisions about alleviating an inmate's AS were made and implemented promptly while still allowing CSC to use the practice for short periods to address security concerns.[173] That finding was supported by evidence, including that of AGC's own witnesses[174] and has not been

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[168] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 [*Sauvé*], ¶9.
[169] RFJ, ¶559, AR p. 175.
[170] RFJ, ¶561, 563-4, AR p. 175-6.
[171] RFJ, ¶565, AR p. 176; citing *Bacon v. Surrey Pretrial Services Centre (Warden)*, 2010 BCSC 805, ¶269.
[172] RFJ, ¶250, AR p. 101; see also Jackson Cross 2, TT v. 1, pp. 163:18-43; Expert Report of Emeritus Professor Andrew Coyle, ¶47, AB v. 12 p. 4533; Cross-Examination of Andrew Coyle, TT v. 3, p. 1079:42-1080:46; Re-examination of Andrew Coyle TT v. 3, pp. 1149:43-1150:19; Rivera Report, ¶57, AB v. 11, pp. 4294-9.
[173] RFJ, ¶¶566-569, AR pp. 176-7.
[174] Cross-Examination of Paul Gendreau, TT v. 2, pp. 597:17-30; Cross-Examination of Bruce Somers on August 2, 2017 ["Somers Cross 3"], TT v. 4, p. 1398:19-44; Bouchard Cross, TT v. 4, pp. 1565:25-46.

challenged on this appeal. The respondents' witnesses, including those with experience working in prisons, all supported a hard time limit and Prof. Coyle accepted that such a time limit would not give rise to undue risk to the safe management of a prison.[175] Leask J. was entitled to accept this evidence. No palpable or overriding error has displaced his findings which were also consistent with international norms recognizing that a time limit is appropriate.[176]

126. On the question of sub-populations, Mr. Thompson provided evidence that sub-populations exist in federal penitentiaries. For example, Kent Institution had four sub-populations including general population, a protective custody population, and a smaller population within protective custody. Kent also had an additional range with 1-2 high profile inmates.[177] Mr. Pyke confirmed CSC has created sub-populations in different institutions to avoid AS status, where inmates are legally entitled to all the same rights and privileges as inmates in the general population, except to the extent that they cannot associate with those in the general population.[178] Mr. Pyke testified about the special needs subpopulation at Kingston, where inmates were low functioning and were easily intimidated (e.g. let others take their personal effects).[179] Inmates in this unit had the same programming as general population.[180] Mr. Pyke stated this unit was successful.[181]

127. Despite this evidence, Leask J. was rightly aware that some CSC witnesses did not embrace the concept.[182] Nevertheless, Leask J. was entitled to consider CSC's own current and historic use of sub-populations as one possible less impairing means of

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[175] RFJ, ¶¶560, 567, AR pp. 175-6.
[176] RFJ, ¶560, AR p. 175.
[177] Affidavit #1 of Bill Thompson, AB v. 36, pp. 14270-2.
[178] Cross-Examination of Jay Pyke ["Pyke Cross"], TT v. 6, p. 1960:7-39.
[179] Pyke Cross, TT v. 6, pp. 1984:29-1985:20.
[180] Pyke Cross, TT v. 6, p. 1986:5-9.
[181] Pyke Cross, TT v. 6, p. 1985:38-42.
[182] AGC Factum, ¶96; RFJ, ¶582, AR p. 181.

achieving Parliament's objectives in a real and substantial manner.[183] To do so does not evidence a lack of deference.

128. The very salutary effects identified by AGC were recognized and considered by Leask J.[184] AGC's complaint at the final stage of the *Oakes* analysis, then, is simply a request for this Court to reweigh the deleterious and salutary effects of the law as found by Leask J. That is not consistent with the standard of review on appeal.

129. Respectful attention to the record in this case demonstrated that government did not discharge its heavy onus of proving that there were no alternative, less drastic means of achieving Parliament's objective in a real and substantial manner. The call for deference in this circumstance amounts to a request for blind reverence.

C. Section 7: Procedural Unfairness Unjustified

130. Leask J. was entitled to reject AGC's argument, unsupported by the record, that an external body would be insufficiently familiar with the workings and dynamics of a particular institutional setting and less equipped to assess the safety implications of releasing an inmate.[185] He committed no palpable and overriding error in failing to so find.

131. The record in this case, discussed at length above, demonstrates that for years: CSC has used external review for disciplinary segregation placements; numerous knowledgeable parties have recommended the use of external review for AS placements; and international norms require independent review of AS. CSC's own witness testified that he did not have a problem with independent adjudication.

132. AGC has led no s. 1 defence in respect of the right to counsel.

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[183] RFJ, ¶576-90, AR p. 179-83.
[184] AGC Factum, ¶98; RFJ, ¶¶598-9, AR p. 184.
[185] AGC Factum, ¶100.

4. REMEDIES

A. Section 52 Relief was Appropriately Granted

133. The impugned laws themselves produce the unconstitutional effects detailed in the Reasons. Respondents have explained above that each *Charter* breach is the result of the *CCRA* in at least some cases during confinement in AS.

134. When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1). A law may be inconsistent with the *Charter* either because of its purpose or its effect.[186] Section 24(1), by contrast, is generally used as a remedy, not for unconstitutional laws, but for unconstitutional government acts committed under the authority of legal regimes which are accepted as fully constitutional. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agents applying a discretion conferred by the law in an unconstitutional manner.[187] In some cases, this distinction is clear but less so in others.

135. The question in determining the appropriate remedial route is whether there is a single instance in which a constitutional infringement will be the "the necessary result or 'effect' of the law".[188] Where as in this case there has been endemic, persistent and systematic constitutional infringement, the only appropriate remedy is to render the law of no force and effect.

136. On this point, the *Little Sisters* case is entirely distinguishable. In *Little Sisters* the Act only allowed Customs to detain and prohibit material that was "obscene" as defined in the *Criminal Code*. The SCC had earlier upheld the obscenity provision of the *Criminal Code* as constitutionally valid in *R. v. Butler,* [1992] 1 S.C.R. 452, and it provided an intelligible standard so there was nothing constitutionally wrong with Customs applying that standard.

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[186] *R. v. Ferguson*, 2008 SCC 6 [*Ferguson*], ¶59.
[187] *Ferguson*, ¶60.
[188] *Ferguson*, ¶60.

137. The plaintiffs in *Little Sisters* were able to show that Customs had systemically misapplied the Act such that Customs was detaining and prohibiting non-obscene material. Customs conceded that point.[189] When the material was not obscene, the violations of the *Customs Act* resulted in a violation of s. 2(b) that was not "prescribed by law" and therefore not justifiable under s. 1.[190] The Court refused to strike down the Act saying the problem was very poor training of Customs and with more resources and better training there was no reason to think that Customs would continue to violate the Act.

138. In contrast, the very violations of the inmates' constitutional rights that AGC says only allows a s. 24 remedy are authorized by the *CCRA* itself and such violations have been taking place for years and in significant numbers such that they can be safely described as the necessary result of the law.

139. Similarly in *Morgentaler*,[191] the unconstitutionally cumbersome procedures governing therapeutic abortion committees were set out in s. 251 of the *Criminal Code*. The legislative scheme itself was held to be unworkable even if some women were able to obtain abortions in a timely way and that was one reason it was struck down. But the Court identified the "further flaw" that Parliament had failed to provide in s. 251 "an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted"[192]. In contrast, in *Little Sisters*, no such flaw existed because the standard for obscenity was incorporated by reference of s. 163(8) of the *Criminal Code*.

140. Likewise a further flaw in the *CCRA* is that it fails to provide an intelligible standard for a) when an inmates must be released from AS, b) when inmates ought not to be subjected to AS because of the mental health status, or c) Aboriginal social history. Section 52 has been applied when laws fail to provide an adequate standard for its application. AGC points to s. 31(2) and argues that the requirement to release inmates "at the earliest appropriate time" constitutes such a standard.

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[189] *Little Sisters,* ¶¶183, 185, 190.
[190] *Little Sisters*, ¶¶18, 28, 37-8, 43-4, 70-2, 127-9, 131, 133, 135, 154.
[191] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].
[192] *Morgentaler*, p. 68.

141. Respondents disagree. The recent decline in both number and duration of placements in AS, without apparent change in the *CCRA* or the issues facing CSC, demonstrate both it is the *CCRA* and the excessive laxity of the standard, not isolated misapplication of the law that cause prolonged and indefinite periods of AS.[193]

142. The driving force in CSC discovering an increased institutional will to find alternatives segregation placements is the heightened public scrutiny arising from deaths in AS and the unremitting pressure brought to bear on CSC through this litigation. Yet many inmates continue to remain in AS for very lengthy periods.[194] AGC does not concede these or any previous placements are examples of a misapplication of the *CCRA* nor has CSC in any of its many reports or in the evidence in this case.

143. Thus, the regrettable but correct conclusion is that the *CCRA* has been properly administered for the most part over the past 25 years and certainly that was the position of CSC. However, it is in that so called proper administration that the violation of the inmates constitutional rights systemically occur for all the reasons noted above.

144. While AGC seems to now accept there were many instances of prolonged isolation in the record that may have been unconstitutional, AGC fails to indicate which ones or explain why such instances were unauthorized by the impugned laws. At best AGC seems to say that unless and until there is a judicial review by an individual inmate and a *Doré*[195] analysis is conducted, no such determinations can be made and in the meantime the *CCRA* remains valid.

145. The fact that an individual inmate could bring a judicial review of a specific decision to place or maintain him in AS and a court find in his favour by doing a *Doré* analysis does not mean a court cannot provide a s. 52 remedy when the challenge is a systemic one, and the findings of Leask J. were that the unconstitutional conduct was permitted or authorized by the *CCRA* even if it was not "required" by it. This is especially so in a case

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[193] Somers Direct 1, TT v. 4, pp. 1189:6-17; Somers Cross 2, TT v. 4, pp. 1321:18-25, 1340:12-22; Somers XFD 2, AB v. 23, pp. 8816-9.
[194] RFJ, ¶156, AR p. 72.
[195] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*].

like the present one where AGC was often resistant to providing documents pertaining to individual inmates precisely because the claim was described by AGC as systemic.

146. Nor is there any intelligible standard provided in the *CCRA* for when inmates ought not to be subjected to AS because of their mental health status or Aboriginal social history. While AGC points to ss. 4(g), 86-88 of the *CCRA*, which require CSC to take into consideration the offender's Aboriginality and state of health and health care needs in all decisions including AS, the *CCRA* fails to provide an adequate standard for when or how an offender's Aboriginal social history must, as a matter of law, mitigate the decision to place an inmate in AS and for what health care needs will preclude the use of AS. For the reasons already explained above, the CDs fail to provide such a standard.

147. It is no answer to simply rely on CSC officials to cure the problems in the *CCRA* by exercise of their own discretion. In *Bain*,[196] the accused challenged the lack of even-handedness in the selection process for a criminal jury. Parliament gave the Crown the ability to stand aside 48 prospective jurors and to challenge 4 jurors peremptorily. The accused in such case had but 12 peremptory challenges, a legislated advantage to the Crown of over 4 to 1. The Crown assured the court that its power would be exercised responsibly but the court considered that the discriminatory law could not be thus salvaged. There it was unsuccessfully argued that a discriminatory law was capable of implementation in a neutral fashion. In that case Justice Cory said:

> Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control. Rather the offending statutory provision should be removed.[197]

148. Those observations apply here.

149. A more recent precedent is *R. v. Tse*, where a unanimous SCC accepted that the warrantless wiretap provision of the *Criminal Code* contravened s. 8 to the extent that it

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[196] *R. v. Bain*, [1992] 1 S.C.R. 91 [*Bain*].
[197] *Bai*n, pp. 103-104.

did not require *ex post facto* notice to targets where practicable.[198] While the police *could* have made use of the warrantless wiretapping power in a constitutional manner by simply giving notice, the SCC struck down the provision in its entirety pursuant to s. 52(1) of the *Charter*.[199] As the Court explained, even when Parliament limits a grant of authority, the provision may nevertheless be unconstitutional when those limits are deficient.[200]

150. AGC relies on *Brown*[201] to suggest that a s. 52 remedy is inappropriate. *Brown* relies on *Little Sisters* and is distinguishable on the same basis.

151. Unlike *Little Sisters* the problems here cannot be improved by better training. Customs officers had no training[202]; the record in this case demonstrates that CSC is proud of its training[203] and has had decades to address the very problems raised in this case knowing about those problems. The problem is that the CSC officials are trained to prioritize security because that is the singular focus of the *CCRA*.

B. Section 52 Relief Properly Granted, Alternatively section 24 Relief Available

152. Section 52 relief was properly granted for all the reasons above. Thus, Leask J. did not address s. 24(1) relief and this Court need not and should not consider AGC's arguments at paragraphs 137-42 of her factum.

153. In the alternative, if this Court accepts AGC's arguments that the wrongs identified arise from systemic misapplication of a constitutionally valid law, Respondents are entitled to s. 24(1) relief.

154. There is no principled reason to deny a corporate party with public interest standing the ability to challenge state action rather than legislation. The case law of this Province

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[198] *R. v. Tse*, 2012 SCC 16 [*Tse*] ¶¶1-12.
[199] *Tse*, ¶¶101-3.
[200] *Tse*, ¶¶94-5.
[201] *Brown v. Canada (Citizenship and Immigration)*, 2017 FC 710 [*Brown*].
[202] *Little Sisters*, ¶¶6-7, 37, 81.
[203] See e.g. See Affidavit #1 of Jay Pyke, ¶¶94-7, AB v. 29, pp. 11575; Affidavit #1 of Kelley Blanchette, ¶¶22-30, 108-11, 115, 118, 125, AB v. 28, pp. 10968-9, 10989, 10991, 10993.

Carter extension decision is yet another example.[205] The *Carter #2* orders could only have been made pursuant to s. 24, it is submitted, there being no other jurisdiction to make such orders. These orders were made despite the fact that there was no individual plaintiff alive at that time who could benefit from such an order. The order was in effect granted at the request of the British Columbia Civil Liberties Association in light of their public interest standing, one of the same corporate plaintiffs as in this case.

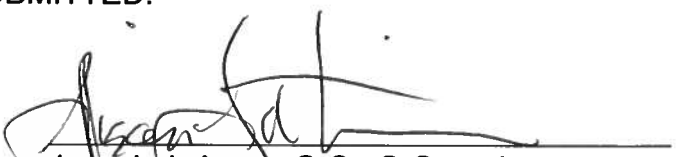
154. On AGC's approach to s. 24, the efficiency of the process would not just suffer, but the entire process would likely fall apart. There are no other plaintiffs in this proceeding. AGC's formalistic approach to the remedial powers under the *Charter* would result in many rights without an effective remedy and should be rejected.

PART IV. NATURE OF ORDER SOUGHT

155. The appeal be dismissed, the order of Leask J. be upheld. In the alternative, this Court substitute the same declarations under s. 24 in the exercise of its powers pursuant to s. 9 of the *Court of Appeal Act*.[206] The respondents seek special costs of this appeal on a full indemnity basis in any event of the outcome.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 18, 2018



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Columbia (Attorney General), 2012 BCCA 422, ¶¶34-6; *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817, ¶¶95-106; *Abbotsford (City) v. Shantz*, 2015 BCSC 1909, ¶265; *PHS Community Services Society v. Canada (Attorney General)*, 2010 BCCA 15; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309.

[205] *Carter v. Canada (Attorney General)*, 2016 SCC 4 ["*Carter #2*"].

[206] *Court of Appeal Act*, R.S.B.C. 1996, c 77, s. 9.

APPENDIX A

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, 24, 52 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

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.

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.

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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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 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.

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).

Amendments to Constitution of Canada

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

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Corrections and Conditional Release Act, S.C. 1992, c. 20, ss. 3-4, 31-33 and 37, 86-88

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.

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 components of the criminal justice system;

(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;

(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;

(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;

(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;

(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(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;

(h) offenders are expected to obey penitentiary rules and conditions 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.

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 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.

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.

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

(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.

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

(i) imitations specific to the administrative segregation area, or

(ii) security requirements.

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.

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 segregation and disciplinary matters; and

(b) in the preparation of the offender for release and the supervision of the offender.

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.

Corrections and Conditional Release Regulations, SOR/92-620, s. 31(2), 97(2).

Hearings of Disciplinary Offences

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…

(2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

Access to Legal Counsel and Legal and Non-Legal Materials

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(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.

Court of Appeal Act, R.S.B.C. 1996, c 77, s. 9

Powers of Court of Appeal

9 (1) On an appeal, the court may

(a) make or give any order that could have been made or given by the court or tribunal appealed from,

(b) impose reasonable terms and conditions in an order, and

(c) make or give any additional order that it considers just.

(2) The court or a justice may draw inferences of fact.

(3) The court may exercise any original jurisdiction that may be necessary or incidental to the hearing and determination of an appeal.

(4) The court may exercise its powers

(a) even though only part of an order has been appealed from, and

(b) in favour of any person whether or not the person is a party to the appeal.

(5) If a power is given to a justice by this Act or the rules, the court may exercise the power.

(6) The court may discharge or vary any order made by a justice other than an order granting leave to appeal under section 7.

(7) The court and a justice have the same powers as the Supreme Court in relation to matters of contempt of court.

(8) For all purposes of and incidental to the hearing and determination of any matter and the amendment, execution and enforcement of any order and for the purpose of every other authority expressly or impliedly given to the Court of Appeal,

(a) the Court of Appeal has the power, authority and jurisdiction vested in the Supreme Court, and

(b) if the appeal is not from the Supreme Court, the Court of Appeal has the power, authority and jurisdiction vested in the court or tribunal from which the appeal was brought.

UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*: resolution / adopted by the General Assembly, 8 January 2016, A/RES/70/175, Rules 43-5

Rule 43

1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment.

The following practices, in particular, shall be prohibited:

(a) Indefinite solitary confinement;

(b) Prolonged solitary confinement;

(c) Placement of a prisoner in a dark or constantly lit cell;

(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;

(e) Collective punishment.

2. Instruments of restraint shall never be applied as a sanction for disciplinary offences.

3. Disciplinary sanctions or restrictive measures shall not include the prohibition of family contact. The means of family contact may only be restricted for a limited time period and as strictly required for the maintenance of security and order.

Rule 44

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

Rule 45

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

2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures. The prohibition of the use of solitary confinement and similar measures in cases involving women and children, as referred to in other United

Nations standards and norms in crime prevention and criminal justice,2 continues to apply.

LIST OF AUTHORITIES

Legislation