COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2019 BCCA 228

Date: 20190624
Docket: CA45092

Between:

British Columbia Civil Liberties Association and The John Howard Society of Canada

Respondents (Plaintiffs)

And

Attorney General of Canada

Appellant (Defendant)

And

Canadian Human Rights Commission, Canadian Prison Law Association, Canadian Association of Elizabeth Fry Societies, Criminal Defence Advocacy Society, Native Women's Association of Canada, and West Coast Women's Legal Education and Action Fund

Intervenors

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock
The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated January 17, 2018 (*British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, Vancouver Docket S150415).

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Place and Date of Hearing:	Vancouver, British Columbia November 13–14, 2018
Place and Date of Judgment:	Vancouver, British Columbia June 24, 2019

Written Reasons by:
The Honourable Mr. Justice Fitch

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock

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Summary:

The Attorney General of Canada appeals from an order declaring ss. 31–33 and 37 of the Corrections and Conditional Release Act, S.C. 1992, c. 20, which pertain to the administrative segregation of inmates in federal penitentiaries, to be of no force and effect to the extent that they violate ss. 7 and 15 of the Charter of Rights and Freedoms. The order declared that the impugned provisions: (1) unjustifiably infringe s. 7 of the Charter and are of no force and effect to the extent that they authorize and effect (a) prolonged, indefinite solitary confinement, (b) the institutional head to be the judge and prosecutor of his own cause, (c) internal review of placements in administrative segregation, and (d) the deprivation of inmates' right to counsel at segregation review hearings; and (2) unjustifiably infringe s. 15 of the Charter to the extent that they authorize and effect (a) any period of administrative segregation for mentally ill and/or disabled inmates, and (b) a procedure that results in discrimination against Aboriginal inmates. The judge also found that CSC had denied inmates their right under s. 97(2) of the Corrections and Conditional Release Regulations, SOR/92-620, to retain and instruct counsel without delay upon being placed in administrative segregation. He declined, however, to make a declaration in relation to this finding, concluding that such a claim was more properly brought by an individual inmate seeking relief under s. 24(1). On appeal, the Attorney General challenges all aspects of the order except paragraph 1(b). The Attorney General argues that the impugned provisions are constitutionally valid but have been applied by CSC in an unconstitutional manner.

Held: Appeal allowed in part. The judge did not err in finding that the impugned provisions unjustifiably infringe s. 7 and are of no force and effect because they authorize indefinite and prolonged administrative segregation in conditions that constitute solitary confinement, and authorize internal rather than external review of decisions to segregate inmates in solitary confinement. He did err, however, in concluding that it was necessary to strike down the legislation because it does not expressly confer upon inmates the right to counsel at segregation review hearings. The judge also erred in finding that the impugned provisions violate s. 15 in respect of either Indigenous or mentally ill and/or disabled inmates, as the discrimination he found is sourced in maladministration of the Act, not the Act itself. Paragraph 2 of the order is, accordingly, set aside. Instead, it is appropriate to grant declarations that CSC has, in its implementation of the administrative segregation

provisions: breached its obligation under the Act to give meaningful consideration to the health care needs of mentally ill and/or disabled inmates before placing or confirming the placement of such inmates in segregation; and breached its obligation under the Act to ensure that inmates placed in administrative segregation are given a reasonable opportunity to retain and instruct counsel without delay and to do so in private. A declaration is also granted that inmates have a constitutional right to be represented by counsel on segregation review hearings.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

[1] The issues that lie at the heart of this appeal concern the constitutional validity of sections of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*" or the "Act") that authorize an institutional head to order that an inmate incarcerated in a federal penitentiary be confined indefinitely in "administrative segregation" for safety or security reasons.

[2] This appeal is not about the practice of administrative segregation *per se*. The significant challenges associated with preserving life and maintaining institutional order in federal penitentiaries, while at the same time preserving an environment conducive to the rehabilitation of offenders committed to self-improvement, are such that the humane segregation of some inmates will be both necessary and justified in defined circumstances and for limited periods.

[3] This appeal is about: (1) the constitutionality of provisions authorizing indefinite confinement in administrative segregation which, in practice, has resulted in some inmates being subjected to prolonged and unnecessarily harmful periods of isolation; (2) the procedural fairness of the provisions and whether they accord with the principles of fundamental justice; (3) whether the provisions infringe s. 15 of the *Charter of Rights and Freedoms* in relation to Indigenous inmates and inmates with a mental illness and/or disability; and (4) the remedies that are available to the respondents, both of them not-for-profit organizations who were granted public interest standing, in the event the trial judge's findings with respect to the infringements are sustained on appeal.

[4] The appellant, the Attorney General of Canada ("Attorney General"), submits that the trial judge erred by concluding that aspects of the legislative scheme violate the *Charter* and by granting a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* in circumstances where the impugned provisions are capable of being administered in a constitutional manner. The Attorney General says that demonstrated instances of the unconstitutional application of the provisions are attributable to maladministration of a constitutionally compliant legislative scheme by the Correctional Service of Canada ("CSC") — the federal agency responsible for administering prison sentences that are two years or longer in duration. The Attorney General submits that relief for the unconstitutional application of the administrative segregation provisions in individual cases would ordinarily lie at the suit of one or more aggrieved individuals under s. 24(1) of the *Charter*, and there is no individual claimant entitled to such relief in this case.

[5] For the reasons that follow, I would allow the appeal in part. I would not disturb the order of the trial judge declaring ss. 31–33 and 37 of the *CCRA* (the "impugned provisions") to be of no force and effect because those provisions authorize: (a) the prolonged, indefinite administrative segregation of inmates: (b) institutional heads to sit in review of their own segregation decisions; and (c) the internal review of segregation decisions. I would, however, set aside the term of the order striking down the impugned provisions because they do not expressly confer upon inmates the right to counsel at segregation review hearings. In my view, it was unnecessary for the judge to make that order. In its place, I would make a declaration that inmates have a constitutional right to be represented by counsel at segregation review hearings.

[6] I would also set aside the order of the trial judge that the impugned provisions violate the s. 15 rights of Indigenous and mentally ill and/or disabled inmates. For reasons I will develop, I would instead declare that CSC has breached its obligation under the Act: (1) to give meaningful consideration to the health care needs of mentally ill and/or disabled inmates before placing or confirming the placements of such inmates in segregation; and (2) to ensure that inmates placed in administrative segregation are given a reasonable opportunity to retain and instruct counsel without delay and to do so in private.

II. Overview

[7] Confinement in administrative segregation is intended to be a tool of last resort in circumstances where the institutional head has reasonable grounds to believe that: an inmate has acted 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; allowing the inmate to associate with other inmates would interfere with an investigation; or allowing the inmate to associate with other inmates would jeopardize the inmate's safety (*CCRA*, s. 31(3)). An order confining an inmate to administrative segregation is not to be used for disciplinary purposes.

[8] Under the current legislative regime, placements in administrative segregation are subject to periodic internal review. The institutional head — the person who ordered the initial confinement — generally decides whether and when an inmate should be released from administrative segregation.

[9] Segregation may also be used for disciplinary purposes after an inmate has been found guilty of a serious disciplinary offence. When segregation is resorted to for disciplinary purposes, different provisions of the Act and the *Corrections and Conditional Release Regulations*, SOR/92-620 ("*CCRR*" or the "Regulations") are engaged. Those provisions, which are not before us on this appeal, provide for segregation as a disciplinary sanction for a maximum of 30 days, or 45 days when an inmate is sentenced to consecutive periods of disciplinary segregation (*CCRA*, s. 44(1)(f) and *CCRR*, s. 40(2)). Unlike administrative segregation reviews, hearings in relation to serious disciplinary offences are conducted by independent chairpersons appointed by the Minister (*CCRR*, ss. 24 and 27(2)). An

inmate charged with a serious disciplinary offence has the right to retain and instruct counsel for the hearing and that inmate's legal counsel is permitted to participate in the hearing (*CCRR*, s. 31(2)). By contrast, the *CCRA* and the *CCRR* are conspicuously silent on whether an inmate has the right to be represented by counsel at an administrative segregation review hearing.

[10] Inmates in administrative segregation are housed in cells that have a standard minimum dimension of seven square meters or approximately 75 square feet. Segregation cells used in some older federal institutions appear to be somewhat smaller. Segregation cells are typically equipped with a stainless steel toilet and sink combination, an affixed steel bed pan covered by a thin mattress and a steel desk. The cell door typically has an observation window and a food slot through which meals and medications are delivered. Communications between a segregated inmate and correctional staff typically occur through the food slot. Most segregation cells contain a window to the outdoors; some do not.

[11] Inmates in administrative segregation are permitted to be out of their cells for a minimum of two hours a day, and given the opportunity to exercise for at least one hour every day. The exercise "yards" to which segregated inmates have access are typically concrete or fenced enclosures of varying dimensions.

[12] Inmates confined in administrative segregation are to be released at the earliest appropriate time (*CCRA*, s. 31(2)). An order confining an inmate to administrative segregation is, however, of an indefinite duration. There are no hard or soft caps on the length of time an inmate may be confined in administrative segregation. Although some measures have been taken over the past five years to reduce the length of time inmates spend in administrative segregation, on the undisputed record before the trial judge, many inmates still spend months confined in administrative segregation. As the trial judge put it, "[t]he evidence indicates that in some cases ['the earliest appropriate time' for release] has been measured in the thousands of days" (at para. 154).

[13] The trial judge found that the impugned provisions of the *CCRA* authorize the indefinite and prolonged use of administrative segregation and that inmates confined in segregation are isolated and deprived of meaningful human contact. He found that administrative segregation, as currently practiced in Canada, permits resort to a form of "solitary confinement" (confinement for 22 hours or more a day without meaningful human contact) and "prolonged solitary confinement" (confinement in excess of 15 consecutive days) contrary to the United Nations' Standard Minimum Rules ("SMRs") for the Treatment of Prisoners (UNGAOR, 70th Sess, UN Doc A/Res/70/175 (2015)). The SMRs were adopted in 2015 and are known as "the Nelson Mandela Rules" or "the Mandela Rules".

[14] The judge concluded on the extensive record before him that administrative segregation puts inmates at increased risk of self-harm and suicide. He also found that administrative segregation puts all inmates at significant risk of serious psychological harm — a risk that is elevated for mentally ill inmates. Indeed, he found that many inmates suffer permanent psychological harm as a result of spending time in administrative segregation. He concluded that the impugned provisions engaged

inmates' interests in life and security of the person (at paras. 274, 310). The Attorney General conceded that the impugned provisions deprived inmates of liberty (at para. 261).

[15] The judge found the impugned provisions of the *CCRA* to be overbroad and, as such, a violation of s. 7 of the *Charter* on two bases. First, he found that the harm caused by prolonged confinement in administrative segregation undermines the maintenance of institutional security as well as the ultimate goal of achieving public protection by fostering the rehabilitation of offenders and their successful reintegration into the community. Second, he found that prolonged confinement in administrative segregation is not necessary to achieve the safety or security objectives that trigger its use. He concluded that less restrictive, less harmful measures would achieve the objectives underlying the legislation. In addition, he found no rational connection between the legitimate need to temporarily segregate inmates who are at risk, or pose a risk to others or to the maintenance of institutional security, and the authority to keep inmates in what amounts to solitary confinement for months or even years.

[16] While the evidence accepted by the judge established that inmates can suffer severe psychological harm within the 15-day maximum period prescribed by the Mandela Rules, he nevertheless considered a 15-day maximum to be a defensible standard.

[17] The judge also found that the impugned provisions violate s. 15 of the *Charter* to the extent that they authorize and effect: (1) any period of administrative segregation for the mentally ill and/or disabled; and (2) "a procedure" that results in discrimination against Indigenous inmates.

[18] Against this background, the judge made the following orders:

> 1. Sections 31–33 and 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [the "impugned provisions"] unjustifiably infringe s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [the "*Charter*"] and are of no force and effect to the extent that:
>
> (a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone;
>
> (b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause;
>
> (c) the impugned laws authorize internal review [of segregation decisions]; and
>
> (d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.
>
> 2. The impugned laws unjustifiably infringe s. 15 of the *Charter* and are of no force and effect to the extent that:
>
> (a) the impugned laws authorize and effect any period of administrative segregation for the mentally ill and/or disabled; and
>
> (b) the impugned laws authorize and effect a procedure that results in discrimination against Aboriginal inmates.
>
> 3. The effect of the declarations in paragraphs 1 and 2 is suspended for one year.
>
> 4. The plaintiffs are awarded special costs.

[19] The Attorney General appeals from the order with two exceptions.

[20] First, the Attorney General does not challenge the trial judge's conclusion (reflected in paragraph 1(b) of the order) that the impugned provisions violate s. 7 of the *Charter* because they require an institutional head to review his or her own decision to confine an inmate in administrative segregation. The Attorney General accepts that procedural fairness requires a greater level of independence in the review process than is contemplated by the Act. This concession reflects the conclusion reached in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 [*Canadian Civil Liberties Assn.* (ONSC)], appeal allowed in part on another issue, *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243 [*Canadian Civil Liberties Assn.* (ONCA)], leave to appeal to S.C.C. requested. In that case, Associate Chief Justice Marrocco concluded that insulating the decision to confine an inmate to administrative segregation from meaningful review is procedurally unfair. He held, however, that internal review of an order confining an inmate to administrative segregation could be sufficiently independent and impartial if the reviewer: is not chosen by the person whose decision is being reviewed; does not report to the person whose decision is being reviewed; is completely outside the circle of influence of the person whose decision is being reviewed; and is able to substitute his or her decision for that of the person whose decision is being reviewed (at para. 175).

[21] The Attorney General says these are appropriate limitations on internal review of administrative segregation placements, but argues that the judge in this case erred by going further and holding that procedural fairness under s. 7 of the *Charter* requires that administrative segregation placements be externally reviewed by individuals who are independent of CSC.

[22] Second, the Attorney General does not challenge the judge's finding that Indigenous inmates have, in practice, been discriminated against by CSC in its application of the impugned provisions. Indigenous inmates are over-represented in federal penitentiaries and, within federal penitentiaries, in the inmate population confined to administrative segregation. They are also likely to be confined in administrative segregation for longer periods than Caucasian and Black inmates. The judge found this over-representation was having a deleterious impact on the ability of Indigenous inmates to transfer to lower security institutions, follow through with their correctional plans, and obtain earlier conditional release. The Attorney General submits that this unfortunate state of affairs does not flow from the Act itself, but from CSC's failure to properly administer constitutional provisions. Relying on *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at paras. 77, 128–136 and like authorities, the Attorney General submits that a law that can be applied constitutionally does not become unconstitutional through improper application.

[23] With respect to the trial judge's declaration that the impugned provisions of the *CCRA* offend s. 15 of the *Charter* to the extent that they "effect a procedure that results in discrimination" against Indigenous inmates, the Attorney General also submits that the way in which the declaration has been framed makes it impossible to know what, if any, part of the legislative scheme has been struck down. In these circumstances, the order does not permit Parliament to engage in meaningful constitutional

dialogue with the courts. As a consequence, the Attorney General submits that the declaration of invalidity should be set aside.

[24] Similarly, the Attorney General submits that in addressing the claim that the impugned provisions infringe the s. 15 rights of mentally ill and/or disabled inmates, the judge erred by focusing on “isolated instances” in which the provisions may have been improperly administered by CSC staff, rather than considering the constitutionality of the legislation itself. The Attorney General says the legislation provides robust protection for mentally ill and/or disabled inmates. The judge found that inmates with mental illnesses are particularly susceptible to harm resulting from confinement in administrative segregation and that some have improperly been placed in segregation (or held in segregation for too long), resulting in the acute aggravation of pre-existing mental conditions and, in some tragic cases, suicide.

[25] The Attorney General also submits that as many inmates have some mental health issues, the judge’s declaration that administrative segregation cannot be used in any circumstance for any mentally ill inmate is overbroad as it would capture the majority of federally incarcerated inmates. The Attorney General argues that neither the evidence nor the judge’s findings support a sweeping declaration that precludes resort to confinement in administrative segregation for all persons with any form of mental illness or disability.

[26] Along the same lines, the Attorney General submits that the confinement of some inmates in administrative segregation for lengthy periods is not authorized by the legislation itself, but is attributable to maladministration of the Act by CSC staff. Once again, the Attorney General argues that evidence the impugned provisions were not always administered with the restraint the Act requires should not have led to a declaration of constitutional invalidity.

[27] Likewise, the Attorney General submits that the exclusion of counsel from segregation review hearings does not flow from any provision of the *CCRA*, but reflects an erroneous interpretation and application of the Act by CSC staff. The Attorney General argues that the judge erred in interpreting the *CCRA* as prohibiting the attendance of counsel at segregation review hearings. Indeed, he submits that, by operation of the Act, inmates in administrative segregation are entitled to be represented by counsel at segregation review hearings.

[28] In short, and with the exception of the statutorily mandated segregation provisions that require an institutional head to sit in review of his or her own judgment, the Attorney General submits that the constitutional violations found by the trial judge are not sourced on the face of the impugned legislation or in its necessary effect, but in the widespread misapplication by CSC of a constitutionally compliant legislative regime. In these circumstances, the Attorney General submits that the judge erred in granting the respondents declaratory relief under s. 52(1).

[29] In his factum, the Attorney General argued that relief for the unconstitutional application of the impugned provisions in individual cases would, in accordance with the language of s. 24(1) of the

Charter, be limited to "[a]nyone whose rights or freedoms … have been infringed or denied". Although the judge declined to address the application of s. 24(1) to the circumstances of this case, the Attorney General notes that the respondents are corporate plaintiffs who were granted public interest standing to vindicate the rights of third parties. Relying on *R. v. Ferguson*, 2008 SCC 6, the Attorney General submits that s. 24(1) provides a personal remedy against unconstitutional government action that can only be invoked by a party alleging an infringement of his or her own *Charter* rights. In the absence of an individual plaintiff whose *Charter* rights are implicated by the impugned provisions, the Attorney General says that no s. 24(1) remedy is available.

[30] In oral argument, counsel for the Attorney General conceded that in public interest litigation a superior court can issue a declaration that constitutional rights have been infringed by government action but maintained his position that, in the circumstances of this case, such a remedy is unavailable under s. 24(1). Counsel for the Attorney General did not squarely address the jurisdictional foundation upon which this concession was made.

III. A Brief History of Solitary Confinement

1. The Canadian Experience

[31] In reasons for judgment indexed as 2018 BCSC 62, the judge undertook (at paras. 15–49) a review of the troubled history of solitary confinement in Canadian penitentiaries. I do not intend to repeat that review here but will highlight some significant historical events relating to the use of solitary confinement in Canada. I will also summarize recommendations for reform that have consistently been made over the past five decades to reduce reliance on solitary confinement and re-conceptualize how institutional security and individual safety can be achieved within the framework of a more humane regime. In undertaking this brief review, I acknowledge my indebtedness to the trial judge for his thorough reasons for judgment on this point and to the work of Professor Michael Jackson, Q.C., who prepared an expert report for trial and was called to give evidence. Professor Jackson is the author of an early, seminal work in this area entitled *Prisoners of Isolation: Solitary Confinement in Canada* (Toronto: University of Toronto Press, 1983).

[32] Central to the blueprint for prison reform in the late 18th and early 19th centuries was the disciplinary regime of solitary confinement and the utilitarian goal that prisoners subject to it would, through silent contemplation, achieve rehabilitation. John Howard, one of the early prison reformers, expressed concern about resort to a rigid form of solitary confinement fearing that unbroken solitude would break the spirit of inmates and lead them to "insensibility or despair": *An Account of the Principal Lazarettos of Europe* (London: W. Eyres, 1789) at 222, quoted in Jackson, *Prisoners of Isolation* at 15.

[33] Howard's concern soon proved to be founded. As early as the 1830s, statistical data showed that rigid adherence to solitary confinement was associated with a higher incidence of mental illness and psychotic disturbances amongst inmates.

[34] Critics of early forms of solitary confinement included Alexis de Tocqueville and Charles Dickens. Tocqueville commented that rigid adherence to solitary confinement "devours the victim incessantly and unmercifully; it does not reform, it kills": quoted in Torsten Ericksson, *The Reformers: An Historical Survey of Pioneer Experiments in the Treatment of Criminals* (New York: Elsevier, 1976) at 49. Dickens visited Cherry Hill Penitentiary in Pennsylvania which sought to bring about penance through silence and prolonged isolation. In *American Notes for General Circulation* (London: Chapman and Hall, 1842) at 119–20, quoted in Jackson, *Prisoners of Isolation* at 20, he offered this sobering view of the impact prolonged exposure to solitary confinement was having on prisoners:

> In its intention I am well convinced that it is kind, humane and meant for reformation; but I am persuaded that those who devised the system and those benevolent gentlemen who carry it into execution, do not know what it is they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces… I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow creatures.
>
> I hold this slow and daily tampering with the mysteries of the brain to be immeasurably worse than any torture of the body; and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh, because its wounds are not on the surface and it extorts few cries that human ears can hear, therefore I denounce it as a secret punishment which slumbering humanity is not roused to stay.

[35] Against this background, solitary confinement as the animating principle of penal institutions, and the means through which rehabilitation could be achieved, gradually fell into disrepute. Despite the fact that penitentiaries no longer operated on a strict segregation model, solitary confinement continued as a practice in Canadian penitentiaries.

[36] In *McCann v. The Queen* (1975), 68 D.L.R. (3d) 661 (F.C.T.D), it was held that the conditions in which a number of inmates were held in "dissociation" — an earlier name for administrative segregation — at the notorious British Columbia Penitentiary constituted cruel and unusual punishment within the meaning of s. 2(b) of the *Canadian Bill of Rights*, S.C. 1960, c. 44. Justice Heald accepted expert evidence before him that prolonged exposure to solitary confinement is a crushing experience, the effects of which can be life-long. He found that the indefinite and indeterminate nature of the confinement was a contributing factor to the declining mental health of inmates subject to dissociation. The mental health challenges associated with prolonged exposure to solitary confinement manifested themselves in a variety of ways including active hallucinations, episodes of claustrophobia and, in some cases, suicide or self-harm. As in this case, it does not appear to have been suggested in *McCann* that dissociation is unnecessary in all circumstances. But Heald J. made the important point in *McCann* that "solitary confinement" and "dissociation" are not synonymous. He accepted expert evidence that adequate alternatives exist which would remove the cruel and unusual aspects of solitary confinement, while at the same time achieving the necessary safety and security goals of dissociation (at 693–94).

[37] In 1975, the Solicitor General established a Study Group on Dissociation, chaired by James Vantour, to review the use of both disciplinary and administrative dissociation. The Study Group reported that prolonged segregation "enhances the inmate's antisocial attitude and, in general, constitutes a self-fulfilling prophecy": *Report of the Study Group on Dissociation, 1975* (Ottawa: Solicitor General of Canada) at 24. The Study Group recommended the establishment of a Segregation Review Board, chaired by the institutional warden and responsible for reviewing a prisoner's case within five working days of the warden's decision to segregate, and at least once every two weeks thereafter. The Study Group did not address the issue of independent adjudicators for segregation review hearings but recommended that disciplinary hearings be run by independent chairpersons.

[38] In 1977, these recommendations were echoed in a *Report to Parliament* of the House of Commons Subcommittee on the Penitentiary System in Canada, Standing Committee on Justice and Legal Affairs (Ottawa: Minister of Supply and Services, 1977) (the "MacGuigan Report"). The Subcommittee debated whether chairs of segregation review boards should, like disciplinary hearing chairs, be independent of what was then called the Canadian Penitentiary Service (the predecessor to CSC). In the end, the Subcommittee determined that having institutional wardens chair segregation review boards should not be found wanting until it had been tried. The Subcommittee recommended that the adequacy of this procedural model be reconsidered after two years of experience.

[39] In *Prisoners of Isolation*, Professor Jackson proposed a Model Segregation Code whereby the confinement of an inmate in administrative segregation for more than 72 hours would trigger referral of the case to an independent hearing officer. He proposed specific rules designed to promote procedural fairness, the maintenance of institutional order, the protection of witnesses and the safeguarding of confidential information. The inmate would have the right to be represented by counsel at the hearing. If continued segregation was authorized, further reviews would be required every week, subject to the same procedural requirements. An onus would be placed on the institution to develop a plan to reintegrate the prisoner into the population and the independent adjudicator would monitor that plan at subsequent reviews. Except under very limited circumstances, segregation would be terminated after a 90-day period.

[40] Two years after the MacGuigan Report, the Supreme Court of Canada, in its landmark judgment in *Martineau v. Matsqui Institution Disciplinary Board (No. 2)*, [1980] 1 S.C.R. 602, laid the legal foundation for the contemporary practice of judicial review of correctional decisions, based on the duty to act fairly. Justice Dickson (as he then was) concluded that "[t]he rule of law must run within penitentiary walls" (at 622). In that case, the Court held that the duty of procedural fairness applies to disciplinary proceedings within the penitentiary.

[41] In *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, the Court extended the duty to act fairly to decisions regarding administrative segregation. *Cardinal* holds that the serious impact of a decision by an institutional head to continue to confine an inmate in administrative segregation against the recommendation of a review board requires the institutional head, as a matter of observing the

minimum requirements of procedural fairness, to inform the inmate of his or her intended decision and give the inmate an opportunity to respond. This requirement is now reflected in s. 34 of the *CCRA*.

[42] The *CCRA*, which came into force in 1992 along with the *CCRR*, represented an effort to synthesize the proposals and reforms of the preceding 20 years into a modern, *Charter*-compliant corrections and conditional release statute. Under the *CCRA*, segregation decisions continued to be made and reviewed by correctional administrators with no element of independent oversight. The *CCRA* did not limit the length of time a prisoner may be confined in administrative segregation. Instead, s. 31(2) of the Act provides that an inmate is to be released from administrative segregation at the earliest appropriate time.

[43] Less than two years after the enactment of the *CCRA*, a series of high-profile events unfolded at the Prison for Women in Kingston, Ontario that led to female prisoners being strip-searched by male members of an emergency response team and confined to segregation for between eight and nine months. These unfortunate incidents led to the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services Canada, 1996) headed by the Honourable Louise Arbour (the “Arbour Report”).

[44] The Arbour Report traces the appalling conditions in which the inmates were held in segregation, the deprivations to which they were subjected that appeared to be unrelated to any security justification, the segregation review process through which their solitary confinement was maintained, and the impact long-term segregation had on them.

[45] Commissioner Arbour concluded that serious concerns arose about whether decisions made following review hearings were governed by the statutory criteria that justify ongoing confinement in segregation. She questioned whether the segregation review conducted at the Regional Headquarters level after 60 days was independent in any real sense. She concluded that the Regional Headquarters review was heavily influenced by the previous judgment of the institutional head. She noted that institutional officials had been advised by staff psychologists of the deleterious psychological effects the inmates were experiencing due to long-term isolation and sensory deprivation, including perceptual distortions, auditory and visual hallucinations, mood disorders and emotional distress associated with a fear that they were “going crazy” or “losing their minds”. She concluded that the prolonged segregation of these inmates was not in accordance with law and policy and was a profound failure of the custodial mandate of CSC. She characterized the segregation as being “administrative” in name only; it was, in fact, punitive.

[46] Commissioner Arbour’s investigation took her to a variety of institutions for women administered by CSC. She observed that all of the segregation units she visited shared this common feature — they were totally bare and bleak. They contained very little to relieve the depression that would be associated with forced isolation. To the contrary, she found that the physical space inmates in segregation occupy would exacerbate a pre-existing mood disorder. The Commissioner did not see any segregation unit she considered to be suitable for long-term confinement.

[47] More generally, the Commissioner concluded that the most objectionable feature of administrative segregation under the Act is its indeterminate, prolonged duration.

[48] Disturbingly, the Commissioner concluded that although CSC rules were everywhere, the rule of law was absent behind prison walls and there was no evidence that it would emerge spontaneously through internal organizational introspection. She concluded with this observation (at 100):

> The Service would be well advised to resist the impulse to further regulate itself by the issuance of even more administrative directions. Rather, the effort must be made to bring home to all the participants in the correctional enterprise the need to yield to the external power of Parliament and of the courts, and to join in the legal order that binds the other branches of the criminal justice system.

[49] The Commissioner made a number of recommendations including that the practice of long-term confinement in administrative segregation be brought to an end. She recommended that maintenance of an administrative segregation placement be subject to judicial oversight or, failing a willingness to put segregation decisions under judicial supervision, to independent adjudication. Her preferred model would permit the institutional head to segregate a prisoner for up to three days to diffuse an immediate incident. She recommended that no inmate spend more than 30 consecutive days in administrative segregation, no more than twice in the calendar year.

[50] Following release of the Arbour Report, the Acting Commissioner of Corrections established in 1996 a Task Force on Administrative Segregation with members drawn from both within and outside CSC. Among other things, the Task Force was charged with reviewing the recommendations of Commissioner Arbour regarding the judicial supervision or independent adjudication of segregation placements. Professor Jackson was appointed to the Task Force as a consultant. In his report prepared for use in this litigation he offered these observations:

> 152. … In its initial meetings, a clear division of opinion on the issue of independent adjudication emerged between members from within the ranks of the Service and those drawn from outside. The CSC members argued vigorously that the necessary reforms could be achieved through “enhancing” the existing internal model of administrative decision-making, in which the Segregation Review Board, chaired by institutional managers, made recommendations and the warden had the ultimate authority.
>
> 153. The CSC members’ argument had several strands. Under existing law, the warden was the person held accountable for the security of the institution and the safety of staff and prisoners. The decision to segregate a prisoner involved critical issues of safety and security. The staff’s understanding of the dynamics of an institution and the personalities of the prisoners was integral to making the right decision in a situation where the wrong decision could be fatal; no outsider, however well-educated in the law, could provide an adequate substitute for correctional experience and understanding. Furthermore, transferring decision-making for segregation from institutional managers to outside adjudicators would have a corrosive effect on institutional morale and add to existing staff dissatisfaction with the independent adjudication of disciplinary hearings. The final strand to the argument was that the Service, having been made aware of the extent of its non-compliance with the law and the deficiency of its existing procedures, should be given the opportunity to put its own house in order.
>
> 154. Task Force members from outside the Service set out the competing arguments. There was first the compelling historical record, which demonstrated that the Service’s efforts to reform itself had consistently failed. The Arbour Report documented the latest chapter in that history. Second, principles of fairness require that the legislative criteria for a decision that affects the institutional liberty of a prisoner and consigns him to “a prison within a prison” be applied free

> from the pressure of institutional bias, with an objective weighing of the competing interests of prisoners and prison administrators. Principles of fairness had underpinned the introduction of independent adjudication for serious disciplinary offences and were no less compelling in the case of administrative segregation.

[51] In the absence of consensus on this issue, the Task Force resolved to recommend experimentation with independent adjudication in four institutions, two of which would have independent adjudicators and two of which, for comparative purposes, would not. It was further recommended that evaluation criteria be developed to enable CSC to determine the legal, policy and operational implications for the best blend of internal and external review.

[52] Later that year, the Commissioner of Corrections received a report from the Working Group on Human Rights chaired by Max Yalden and entitled *Human Rights and Corrections: A Strategic Model* (Ottawa: Correctional Service of Canada, 1997). The working group supported the recommendation of the Task Force that there be an experiment in independent adjudication.

[53] In 1998, the Commissioner of Corrections announced there would be no experiment with independent adjudication. Instead, CSC would proceed with an enhanced internal review initiative that involved additional training, the development of alternatives to administrative segregation and the appointment of a senior staff member in each region to monitor the segregation review process.

[54] In the years following the Arbour Report, similar calls for the independent adjudication of administrative segregation decisions were made: see Subcommittee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, *A Work in Progress: The Corrections and Conditional Release Act* (Ottawa: Public Works and Government Services, 2000) recommending independent adjudication at the 30-day review for involuntary cases, and Canadian Human Rights Commission, *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (December 2003), recommending independent adjudication for decisions relating to the involuntary segregation of female inmates.

[55] In 2004, the Department of Public Safety and Emergency Preparedness Canada undertook its own evaluation and also recommended that CSC test models of independent adjudication.

[56] In 2005, CSC responded to the Canadian Human Rights Commission Report. While CSC said that it shared concerns about prolonged confinement in administrative segregation, it situated those concerns within existing operational realities, including an outdated infrastructure and the absence of alternatives to administrative segregation. Proposed models for independent adjudication were found not to respond to CSC's concerns.

[57] In 2007, Ashley Smith, a 19-year-old female inmate, died alone in her cell after more than a year of continuous segregation in federal prisons. The Office of the Correctional Investigator ("OCI") — which serves as ombudsperson for federally incarcerated inmates — concluded that the abuse of administrative segregation was a contributing factor in Ms. Smith's death: Correctional Investigator of Canada, *A Preventable Death* (2008). The OCI concluded that despite her

well-documented and troubled history, Ms. Smith was never provided with a comprehensive mental health assessment or treatment plan. In addition, she did not receive the benefit of legislative safeguards requiring timely reviews of her segregation status. The conditions of her confinement were found to be oppressive and inhumane. The OCI called for the independent adjudication of segregation placements for inmates with mental health concerns within 30 days of the placement. Once again, CSC responded that it did not support this recommendation.

[58] In 2010, Edward Snowshoe, a 24-year-old Indigenous man from the Northwest Territories, hanged himself in his segregation cell in Edmonton Institution after spending 162 consecutive days in administrative segregation. An inquiry into his death concluded that he had “fallen through the cracks”, that correctional officers were unaware of his previous suicide attempts or that he had been in administrative segregation for as long as he had. His five-day segregation review was conducted by an institutional parole officer who had never met him. His 60-day review never occurred. Despite the existence of “flags” on the Offender Management System (“OMS”) maintained by CSC that indicated Mr. Snowshoe was at risk of self-harm, efforts to set up any kind of therapeutic intervention for him were found to be cursory and practically non-existent.

[59] The tragic circumstances that led to the deaths of Ms. Smith and Mr. Snowshoe attracted considerable public attention. It is not lost on the Court that other inmates ended their own lives while being confined in administrative segregation during the same time.

[60] In 2013, the jury in the Ontario Coroner’s Inquest into the Death of Ashley Smith made 11 recommendations addressing administrative segregation, including that: indefinite solitary confinement be abolished; until segregation is abolished, its use be restricted to 15 consecutive days; a mandatory period outside of segregation of five consecutive days be in effect after any period of segregation; no inmate be placed in segregation for more than 60 days in a calendar year; and the institutional head and a mental health professional be required to visit all inmates in segregation at least once every day with such meeting not to take place through the food slot of the inmate’s cell door. The jury made no recommendations regarding the independent review of segregation decisions.

[61] In 2014, CSC responded to the jury’s recommendations. First, CSC asserted that “solitary confinement” is not practised in Canadian federal correctional institutions. CSC pointed out that the *CCRA* allows for the use of administrative segregation for the shortest period of time necessary and only when there are no reasonable, safe alternatives. CSC maintained that segregated inmates have frequent interaction with others, that the legislation and policy surrounding the use of administrative segregation is rigorous, and that decision-makers are held to the highest standards of accountability. CSC advised that it was unable to fully support the jury’s recommendations concerning the use of administrative segregation “without causing undue risk to the safe management of the federal correctional system.”

[62] The OCI weighed in, noting that resort to administrative segregation was so common that as of March 2015, 48% of the current inmate population had experienced administrative segregation at

least once while serving their sentence: *Annual Report of the Office of the Correctional Investigator 2014–2015* at 26, 30–31.

[63] In 2015, the Prime Minister made public his mandate letter to the Minister of Justice and Attorney General of Canada. It reads, in material part, as follows:

> … I will expect you to work with your colleagues … to deliver on your top priorities [including]:
>
> …
>
> - … implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness.

[64] On June 19, 2017, Canada introduced in the House of Commons Bill C-56, *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act.* The Bill proposed a presumptive cap of 21 days requiring an inmate to be released from administrative segregation at that time unless the institutional head ordered in writing that the inmate remain in administrative segregation. It was proposed that the presumptive cap would be reduced to 15 days eighteen months after the amending legislation came into force.

[65] On August 1, 2017, in the midst of the trial, CSC introduced significant revisions to Commissioner's Directive ("CD") 709 on administrative segregation to address more fully the circumstances in which mentally ill inmates can be confined in segregation.

[66] On October 16, 2018, Canada introduced in the House of Commons Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*. The Bill passed third reading in the House of Commons on March 18, 2019. The Senate passed an amended version of the Bill on June 12, 2019. The House of Commons commenced consideration of the Senate version of the Bill on June 14, 2019, with the Minister of Public Safety and Emergency Preparedness proposing further amendments to it. As this judgment is being prepared for release, the ultimate fate of Bill C-83 remains unknown.

[67] Bill C-83 is, of course, not before us and I will comment only briefly on some of its complex provisions. If enacted, the Bill (as passed by the House of Commons) would amend the *CCRA* by abolishing administrative segregation. The Commissioner would be authorized to designate a penitentiary or an area in a penitentiary as a structured intervention unit ("SIU") for the confinement of inmates who cannot be maintained in the general inmate population for security or other reasons. Inmates in an SIU would be provided with an opportunity for meaningful human contact, an opportunity to participate in programs and the ability to access services that respond to the inmate's specific needs and risks. Every reasonable effort is to be made to ensure that the opportunity for meaningful human contact is not mediated by physical barriers such as bars, security glass, door hatches or screens. It is proposed that inmates be entitled to spend a minimum of four hours a day outside their cell.

[68] Pursuant to the provisions of the Bill, if a staff member believes that the confinement of an inmate in an SIU is having a detrimental impact on the inmate's health, the staff member shall refer the inmate's case to CSC's health care administrators (s. 37.11). In addition, a registered health care professional may recommend to the institutional head that the conditions of confinement of an inmate in an SIU be altered or that the inmate not remain in the unit (s. 37.2). If an institutional head determines that an inmate should remain in an SIU contrary to the recommendation of a registered health care professional, that decision must be reviewed as soon as practicable by a committee consisting of CSC staff members who hold a position higher in rank than that of the institutional head (s. 37.31–37.32).

[69] With respect to the review process, the Bill would require an institutional head to determine within five days of the initial placement (s. 29.01(2)) and within 30 days thereafter (s. 37.3(1)(b)) whether an inmate should remain in an SIU. The institutional head would also make the initial decision (subject to internal committee review) about whether an inmate should remain confined in an SIU where a registered health care professional recommends that the inmate be removed from the unit (s. 37.3(1)(a)). The Commissioner must determine whether an inmate should remain in an SIU 30 days after an institutional head determines not to release the inmate from an SIU and every 60 days thereafter (s. 37.4).

[70] The Bill proposes that an "independent external decision-maker" appointed by the Minister review an inmate's confinement in an SIU and determine whether such confinement should be maintained in three circumstances:

1. Thirty days after each of the Commissioner's determinations that an inmate should remain in an SIU. In the result, the first independent review would take place approximately 90 days after the inmate is placed in an SIU (s. 37.8);
2. Where a registered health care professional has recommended that an inmate be released from an SIU or, alternatively, that the inmate's conditions of confinement be altered but the institutional head and the committee have both determined not to release the inmate or alter the inmate's conditions of confinement as the case may be (s. 37.81); and
3. Where an inmate confined in an SIU does not interact for a minimum of two hours a day with others, or spend a minimum of four hours a day outside his or her cell for five consecutive days or for a total of 15 days during a 30-day period, the independent external decision-maker shall, as soon as practicable, determine whether CSC has taken all reasonable steps to provide the inmate with opportunities for time out of cell and to participate in programs. If the independent external decision-maker concludes that CSC has not taken all reasonable steps, he or she may make recommendations to remedy the situation. If, within seven days, CSC fails to satisfy the independent external decision-maker that it has taken all reasonable steps, the independent external decision-maker shall direct CSC to remove the person from the SIU.

2. The Development of International Norms

[71] In 1955, the First UN Congress on the Prevention of Crime and the Treatment of Offenders adopted Draft SMRs for the Treatment of Prisoners. Two years later, they were adopted by the UN Economic and Social Council. While the Rules are not legally binding, they have influenced legislation and prison rules in many countries and played an important role in giving interpretive content to key human rights provisions. The Rules remained largely unchanged for 60 years. During this period, it is fair to say that the consciousness of the international community was raised regarding the harmful impact of long-term segregation, largely as a consequence of the experience of Nelson Mandela, who spent 27 years in prison, the first 18 of which were in solitary confinement.

[72] In July 2008, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment issued an interim report warning that solitary confinement causes psychological harm to prisoners who were not previously mentally ill, and tends to worsen the mental health of those with pre-existing psychological disturbances. While it was acknowledged that individuals may react to solitary confinement in different ways, the Special Rapporteur noted that a significant number of individuals will experience serious health problems regardless of pre-existing personal factors. He referred to research suggesting that between one third and as many as 90% of prisoners experience adverse symptoms in solitary confinement including insomnia, hallucinations and psychosis. He noted that negative health effects can occur after only a few days in solitary confinement, and that the health risks rise with each additional day spent in isolation.

[73] The Special Rapporteur concluded that the central harmful feature of solitary confinement is that it reduces meaningful social contact to a level that many will experience as insufficient to sustain health and well-being. He recommended, as a general principle, that solitary confinement should only be used in exceptional cases for the shortest time possible and only as a last resort: *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 63rd Sess, UN Doc A/63/175 (2008).

[74] In August 2011, the Special Rapporteur submitted an additional interim report to the United Nations General Assembly with respect to solitary confinement, which he defined as the physical and social isolation of individuals who are confined to their cells for 22 to 24 hours a day: *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011). The Special Rapporteur found that solitary confinement constitutes torture or cruel, inhuman or degrading treatment as defined in Articles 1 and 16 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85 and Article 7 of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, where it is imposed on an indefinite or prolonged basis or, for any duration, on persons with mental disabilities. He also concluded that, due to the harmful effects of solitary confinement, it should be used in exceptional circumstances, as a last resort, for as short a time as possible, and subject to minimum procedural safeguards. He called on

the international community to impose an absolute prohibition on indefinite solitary confinement, and on placements exceeding 15 days.

[75] On December 17, 2015, revised SMRs — the Nelson Mandela Rules — were adopted by the UN General Assembly: GA Res 70/175, UNGAOR, 70th Sess, UN Doc A/Res/70/175 (2016). The Nelson Mandela Rules reflect generally accepted best practices in the treatment of prisoners and prison management. Whereas the 1955 Rules proscribed "corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments," the Nelson Mandela Rules provide as follows:

> *Rule 43*
>
> 1. In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> *(a)* indefinite solitary confinement;
>
> *(b)* prolonged solitary confinement;
>
> *(c)* placement of a prisoner in a dark or constantly lit cell ...
>
> ...
>
> *Rule 44*
>
> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
>
> *Rule 45*
>
> 1. Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.
>
> 2. The imposition of solitary confinement should be prohibited in the case of prisoners with mental or physical disabilities when their conditions would be exacerbated by such measures …
>
> [Emphasis added.]

IV. The Statutory Scheme Governing Administrative Segregation

[76] The legislative framework governing administrative segregation is set out in ss. 31–37 of the *CCRA*.

[77] Sections 19–23 of the *CCRR* and several CDs give further structure to the administrative segregation regime. CDs are authorized under s. 98 of the *CCRA*. Many of CSC's operational policies and practices are contained in CDs. CD 709 pertains exclusively to administrative segregation.

[78] For present purposes, the most important provisions of the Act, Regulations and CDs may be found in Appendices to this judgment. They are discussed herein to put in context the trial judge's reasons and the issues on appeal.

[79] The respondents challenged the constitutional validity of ss. 31–33 and 37 of the *CCRA.* They argued that these provisions infringe ss. 7, 9, 10, 12 and 15 of the *Charter*.

[80] The impugned provisions are, for convenience, reproduced below:

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.

Presence of inmate

(2) A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless

(a) the inmate is voluntarily absent;

(b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

(c) the inmate seriously disrupts the hearing.

…

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) limitations specific to the administrative segregation area, or

(ii) security requirements.

V. The Reasons for Judgment (2018 BCSC 62)

1. Recent Trends in the Use of Administrative Segregation

[81] Relying on statistics included in the OCI's 2015 report entitled *Administrative Segregation in Federal Corrections: 10 Year Trends*, the trial judge noted that between 2005 and 2015 the annual number of admissions to administrative segregation fluctuated but generally reflected an upward trend. Indigenous inmates were more likely to have been in segregation than non-Indigenous inmates (55.9% compared to 45.6%). The percentage of segregated Indigenous inmates increased by 31% between 2005 and 2015 compared to a growth of 1.9% for non-Indigenous inmates.

[82] The average length of stay in segregation decreased for all inmates over the same period, from 40 days in 2005–2006, to 27 days in 2014–2105. The average stay in administrative segregation further declined to 22 days in March 2017. The average length of stay in segregation has consistently been longer for Indigenous inmates than Caucasian or Black inmates.

[83] Approximately 48% of federally incarcerated inmates have spent some time in segregation. The total number of inmates in administrative segregation at fiscal year-end declined from 638 in 2014–2015, to 454 in 2015–2016, and to 430 in 2016–2017. As of July 31, 2017, fewer than 300 inmates were in administrative segregation across the country.

[84] Inmates in administrative segregation are twice as likely to have a history of self-injury and to have attempted suicide, and are 31% more likely to have a mental health challenge.

[85] Inmates who "volunteer" to go into administrative segregation because of concerns for their own safety comprise the largest proportion of segregated inmates and the most difficult to get out of segregation.

[86] A recent decline in admissions to administrative segregation is likely a product of more aggressive use of transfers to move segregated inmates to other institutions where they are able to reside in the general population, the development by CSC of a Segregation Assessment Tool ("SAT") to assist in determining whether segregation placements are appropriate and being used as a tool of last resort, and an increased will on the part of CSC to better manage administrative segregation in the wake of the highly publicized deaths of Mr. Snowshoe, Ms. Smith and others.

[87] Effecting inmate transfers as a means of reducing reliance on administrative segregation is a complex intervention that must take account of an inmate's willingness to transfer, the presence of incompatibles at the proposed destination institution, an inmate's upcoming court dates, an inmate's ability to access programming required by his or her correctional plan at the proposed destination institution, the location of the inmate's family and support system and, no doubt, cost-related factors.

[88] It is to CSC's credit that admissions to administrative segregation have declined of late, particularly given the rise of gang-related activity within federal institutions and evidence that CSC must increasingly manage mentally ill inmates. Gang-affiliated inmates or Security Threat Groups ("STGs") tend to involve themselves in the institutional drug trade, and use violence and intimidation to exert influence within the penitentiary. The presence of STGs causes institutional disorder and individual safety concerns motivating some inmates to request admission to administrative segregation for their own protection.

[89] Even with these recent improvements, some inmates remain in segregation for very long periods. As of April 9, 2017, more than half of all inmates confined in administrative segregation had been there for more than 17 days. Approximately 18% had been in administrative segregation for more than two months.

2. Findings of the Trial Judge

[90] The judge made a number of detailed findings of fact, or mixed fact and law, none of which are challenged on appeal. I have grouped them below topically with reference to the Reasons for Judgment:

(a) The Central Features of Administrative Segregation in Canada

- administrative segregation, as it is currently practised in Canada, conforms to the definition of "solitary confinement" found in the Mandela Rules (at para. 137). [I note that the same conclusion was reached by Marrocco A.C.J. in *Canadian Civil Liberties Assn.* (ONSC) at paras. 38–46, aff'd on this point 2019 ONCA 243 at para. 25];
- federally incarcerated inmates who are placed in administrative segregation lack meaningful human contact (at para. 137);
- the social deprivation that characterizes administrative segregation — the elimination of meaningful human contact — is the most pernicious consequence of placement in segregation and the source of the greatest psychological harm, although sensory deprivation also plays a role (at para. 251);
- there is no justification for the practice of communicating with segregated inmates through a food slot in the cell door (at para. 139);
- programming for inmates in administrative segregation is "pretty much non-existent" (at para. 141);
- there is no cap on the duration of a placement in administrative segregation beyond the requirement in s. 31(2) of the *CCRA* that the inmate be released from administrative segregation at the earliest appropriate time. The evidence indicates that in some cases that has been measured in the thousands of days (at para. 154);
- for many inmates, the most challenging feature of administrative segregation is its indefiniteness — not knowing when or under what circumstances they will be

released (at para. 158);

- resort to prolonged periods of administrative segregation is unnecessary to eliminate the safety and security issues that triggered its use — a lesser form of restriction would achieve the objectives of the provisions (at para. 327);
- isolating inmates is not necessary to achieve the objectives of the provisions (at paras. 334–36);
- prolonged exposure to segregation undermines the goals of enhancing institutional safety and security and promoting the successful reintegration of offenders into the community (at paras. 328, 330); and
- limiting an inmate's confinement in administrative segregation to no more than 15 consecutive days would not unduly compromise the safe management of penitentiaries (at para. 567).

(b) The Effects of Segregation on Mental Health

- administrative segregation places all federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and is associated with an increased incidence of self-harm and suicide (at para. 247);
- while acute symptoms often subside upon termination of segregation, many inmates are likely to suffer permanent harm as a result of their confinement in segregation. That harm is most commonly manifested in an intolerance to social interaction which negatively affects the ability of some inmates to successfully readjust to the general prison population and to the broader community upon release from custody (at para. 249);
- the risk of harm is intensified in the case of mentally ill inmates (at para. 247);
- the indeterminacy of administrative segregation is a particularly problematic feature that exacerbates its harmful effects and intensifies the depression and hopelessness that is often generated in the restricted environment that characterizes segregation (at para. 248);
- negative health effects can occur after only a few days in segregation and those harms increase as the amount of time spent in segregation increases (at para. 250);
- suicide is proportionately more prevalent amongst inmates in segregation (at para. 264);
- there is a real and sufficient causal connection between segregation and an increased risk of self-harm and suicide (at paras. 259, 269); and
- while both the Act and CSC policy as reflected in CD 709 mandate considerable mental health monitoring, in practice, the mental health care actually provided is not sufficient to address the risk of psychological harm that arises from segregation. The

judge accepted the evidence of a forensic psychologist with considerable experience working in federal penitentiaries that "the mere fact that assessments are required and performed does not necessarily mean that they are done adequately" (at para. 303). With respect to the requirement in s. 36(1) of the Act that an inmate in administrative segregation be visited daily by a registered health care professional, the judge found that, in practice, the rounds tend to be perfunctory, non-private and conducted through the food slot of the cell door (at para. 291). Based on the evidence he heard, the judge concluded that "meaningful assessment of the mental health of segregated inmates" is not occurring in Canadian penitentiaries (at para. 306, emphasis removed).

(c) The Effects of Segregation on Physical Health

- administrative segregation also causes physical harm to some inmates and a substantial risk of harm to older inmates and those with chronic medical conditions and/or physical disabilities (at para. 308).

(d) Fundamental Justice, Procedural Fairness and the Review Process

- CSC has, on the evidence adduced at trial, shown an inability to fairly undertake the review of administrative segregation decisions (at paras. 387–390, 409).

(e) Fundamental Justice and the Right to Counsel

- in practice, counsel are not permitted by CSC to attend segregation review hearings (at para. 414).

(f) Indigenous Inmates

- Indigenous inmates are over-represented in federal penitentiaries and further over-represented in administrative segregation (at para. 466);
- administrative segregation is particularly burdensome for Indigenous women, in part because it can exacerbate distress for individuals with a history of physical or sexual abuse and, in part, because there are fewer federal institutions for women than men and they are generally further away from their home communities and traditional lands (at para. 470);
- administrative segregation has a small, but significant, disproportionate effect on Indigenous men and an even more significant effect on Indigenous women (at para. 471);
- the impugned provisions fail to respond to the actual needs and capacities of Indigenous inmates and instead perpetuate or exacerbate their disadvantage (at paras. 472, 489); and
- CSC "has not done a good job of using Aboriginal social history to reduce the impact of administrative segregation on Aboriginal inmates" (at para. 483).

(g) Mentally Ill Inmates

- inmates with mental disabilities are over-represented in administrative segregation (at para. 496); and
- placement in administrative segregation has a disproportionate effect on inmates with mental illness. It exacerbates symptoms and provokes recurrence of mental disorders (at paras. 497–98).

3. Constitutional Violations Found by the Trial Judge

(a) Section 7: Prolonged and Indefinite Solitary Confinement

[91] Based on his factual findings, the trial judge found that the administrative segregation provisions of the *CCRA* infringe inmates' rights to life and security of the person. As noted earlier, the Crown conceded that the provisions infringed inmates' right to liberty. The judge turned then to consider whether the infringement was in accordance with the principles of fundamental justice.

[92] The parties agreed that the objective of administrative segregation is set out in s. 31(1) of the *CCRA* — "to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates."

[93] The trial judge rejected a submission that the provisions were arbitrary but found them to be overbroad in two respects. First, he concluded that prolonged segregation, which he found the provisions to authorize, inflicts harm on inmates and undermines both institutional security and the goal of rehabilitation. Rather than preparing inmates for their return to the general population, he found that prolonged placements in segregation have the opposite effect, making them more dangerous both within the institution's walls and in the community on their release. Second, he found that s. 31(1) of the *CCRA*, which provides that the objective of administrative segregation is to be achieved by "not allowing an inmate to associate with other inmates", mandates solitary confinement or isolation in circumstances where a lesser form of restriction would achieve the purpose of the provisions. He declined to go further and consider whether the effects of the provisions are grossly disproportionate to their objective.

[94] He concluded that the 15-day maximum period of detention in solitary confinement prescribed by the Mandela Rules is a generous but defensible standard (at para. 250). He made a declaration pursuant to s. 52(1) of the *Constitution Act, 1982* that the impugned laws are invalid to the extent that they authorize "prolonged, indefinite administrative segregation for anyone".

[95] The respondents also sought a declaration below that the impugned provisions constitute cruel and unusual treatment and, thus, infringe s. 12 of the *Charter*. Relying on *R. v. Olson* (1987), 38 C.C.C. (3d) 534 (Ont. C.A.), aff'd [1989] 1 S.C.R. 296, the judge concluded that segregation is not, *per se*, cruel and unusual treatment and noted that the respondents did not argue otherwise. Rather, they argued that resort to administrative segregation may amount to cruel and unusual treatment in

two circumstances — when it exceeds 15 consecutive days and when it is used in relation to mentally ill offenders. The judge concluded that there was no basis for finding that the impugned provisions violate s. 12. The Ontario Court of Appeal in *Canadian Civil Liberties Assn.* (ONCA) has since concluded that administrative segregation for longer than 15 consecutive days is authorized by ss. 31–37 of the *CCRA* and subjects inmates to grossly disproportionate treatment that violates s. 12 of the *Charter*. That issue is not, however, before us on this appeal.

[96] In addition, the respondents sought a declaration below that the impugned provisions authorize the arbitrary detention of inmates in administrative segregation contrary to s. 9 of the *Charter*. Placement in administrative segregation is a new detention that is "distinct and separate from that imposed on the general inmate population": *R. v. Miller*, [1985] 2 S.C.R. 613 at 641; *May v. Ferndale Institution*, 2005 SCC 82 at para. 28. The issue was whether this additional detention was arbitrary. The judge found it was not, noting there was a rational connection between the objective of maintaining institutional security and personal safety, and the segregation of inmates in the limited circumstances provided for in the Act. In appropriate cases, segregation was a valid means of promoting the legislative objectives.

(b) Section 7: Procedural Fairness and Administrative Review of Segregation Placements

[97] To put in context the trial judge's ruling on this issue, and to frame the debate on appeal, some background is required on the procedures governing the internal review of segregation placements.

[98] Section 33 of the *CCRA, ss.* 20–22 of the *CCRR* and CD 709, taken together, establish those procedures. When an inmate is involuntarily confined in administrative segregation by a staff member, the institutional head must review the order within one working day after the confinement (*CCRR*, s. 20). The Institutional Segregation Review Board ("ISRB") must conduct a review hearing within five working days after an inmate's confinement in administrative segregation. ISRBs are established under s. 21(1) of the *CCRR* and consist of CSC staff members who are designated by the institutional head. The five-day review hearing is chaired by the Deputy Warden (CD 709, s. 9) and results in a recommendation being made to the institutional head about whether the inmate should be released from or remain in administrative segregation (CD 709, s. 54). If the inmate remains in administrative segregation, the ISRB must conduct a further hearing within 30 calendar days of the inmate's placement in segregation. Subsequent review hearings must be held at least once every 30 calendar days from the date of the last 30-day review (*CCRR*, s. 21(2)(b) and CD 709 s. 43). The 30-day reviews are chaired by institutional heads. Institutional heads are required to receive a recommendation from the ISRB and decide whether the inmate should be released from or remain in segregation. All recommendations made to the institutional head by the ISRB, and all decisions by the institutional head to release or not release an inmate from administrative segregation, must be based on the considerations set out in s. 31 of the Act.

[99] Section 31(2) of the *CCRA* provides that an inmate is to be released from administrative segregation at the earliest appropriate time. Consistent with this subsection, and in addition to the

review hearings mandated by the Act and Regulations, s. 61 of CD 709 provides that cases will be reviewed at any time when the ISRB receives new reliable information that challenges the reasons for the inmate's placement in segregation.

[100] Sections 63–69 of CD 709 also establish Regional Segregation Review Boards and a National Long-Term Segregation Review Committee.

[101] The judge found, and the Attorney General does not dispute on appeal, that a statutory procedure requiring an institutional head to sit in review of his or her own decision to confine or maintain the confinement of an inmate in administrative segregation is procedurally unfair and contrary to the principles of fundamental justice.

[102] The judge then turned to the contentious issue of whether the requirements of procedural fairness in this context mandate external review of an institutional head's decision to confine an inmate in administrative segregation by a decision-maker who is independent of CSC. The judge referenced *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 28 and *Hamm v. Attorney General of Canada (Edmonton Institution),* 2016 ABQB 440 at paras. 67–68, in which Justice Veit conducted a *Baker* analysis and concluded that the serious consequences of confinement in administrative segregation dictate a high level of procedural fairness. The judge concluded, given the nature of the rights affected, that a high level of procedural fairness is required (at para. 383).

[103] The judge also noted that CSC long ago adopted a system of independent adjudication of disciplinary hearings. He recognized that a segregation review hearing does not necessarily involve a dispute in the same way as a disciplinary hearing. He found, however, that in many cases involving administrative segregation the proceedings are adversarial in nature and will engage factual disputes between institutional staff and inmates on issues going to whether particular conduct occurred and, if it did, whether the conduct was such that there is no reasonable alternative to placement in administrative segregation. He concluded that the same concerns respecting institutional bias that led to the requirement for independent adjudication in disciplinary hearings exist in the context of administrative segregation review hearings where the credibility of information must be weighed and competing interests balanced.

[104] He considered that the indefinite and prolonged confinement of inmates in administrative segregation authorized by the Act was a factor to be taken into account in determining whether procedural fairness requires that resort to administrative segregation be subject to external oversight. He concluded that procedural fairness in the context of administrative segregation requires that review hearings be conducted externally by adjudicators independent of CSC who are authorized to release an inmate from segregation. He said this:

> [409] I find myself in respectful disagreement with Mr. Justice Marrocco in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 171-76, as I believe that the evidence led before me and summarized above

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

[105] The judge declared the impugned laws to be invalid to the extent that they: (1) authorize and effect the institutional head to be the judge and prosecutor of his own cause; and (2) authorize the internal review of decisions to confine or maintain the confinement of inmates in administrative segregation.

(c) Section 7: The Right to Counsel at a Segregation Review Hearing

[106] The respondents argued below that procedural fairness in this context also requires that inmates have a constitutional right to be represented by counsel at segregation review hearings.

[107] Section 33(2) of the *CCRA* provides that a segregation review hearing must be conducted with the inmate present, except in narrowly defined circumstances. The Act does not specifically address whether an inmate has a right to be represented by counsel at such a hearing.

[108] Section 97(2)(a) of the *CCRR* provides that an inmate placed in administrative segregation must be informed of the right to counsel and given a reasonable opportunity to retain and instruct counsel without delay (see also CD 709, s. 33(a)). This section is silent on whether an inmate has the right to be represented by counsel at an ISRB hearing.

[109] Section 33(f) of CD 709 provides that an inmate identified as having “functional challenges related to mental health” (defined in Annex A to CD 709 as “cognitive impairment or severe personality disorder with disturbance in emotional regulation, interpersonal relationships and behavioural controls, resulting in difficulties in functioning within the structure of a mainstream institution”) must be informed of the right to engage an “advocate” (defined in Annex A as “a person who, in the opinion of the Institutional Head, is acting or will act in the best interest of the inmate”) to assist them with the segregation review process. Section 51 of CD 709 provides that “[t]he inmate and their advocate, where applicable, will be provided with a reasonable opportunity to present their case to the ISRB.” CD 709 does not otherwise contemplate the attendance of an advocate or counsel on an inmate’s behalf at a review hearing.

[110] In addition, CSC’s Administrative Segregation Guidelines (“Guidelines 709-1”), developed pursuant to CD 709, prescribe additional and more detailed administrative segregation procedures that must be followed by CSC staff in relation to placement and review decisions, including utilization of the SAT. The SAT is a checklist designed to ensure that the Act is properly administered, that the grounds for placement in administrative segregation set out in s. 31(3) are present, and that there are no reasonable alternative measures. The SAT also includes a checklist to ensure that procedural

safeguards built into the review process are respected. The SAT checklist requires verification that the inmate was notified of their right to attend the ISRB hearing and that an inmate with functional challenges related to mental health was given an opportunity to engage an advocate to assist them with the hearing. The SAT inquires as to whether the advocate was present at the hearing and whether anyone acting on the inmate's behalf submitted "written comments for consideration." There is nothing in the SAT checklist that contemplates either notification of counsel of the date of the ISRB hearing or the attendance of counsel at the hearing. Guidelines 709-1 require the ISRB to entertain submissions "by the inmate … as well as submissions by any other person who has a right to participate in the hearing." Again, no reference is made to the participation of counsel at an ISRB hearing.

[111] By contrast, in a disciplinary hearing context, s. 31(2) of the *CCRR* provides that CSC shall ensure that an inmate charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct counsel for the hearing and that legal counsel so retained is permitted to participate in the proceedings.

[112] The Attorney General maintains that it follows from s. 97(2) of the *CCRR* that an inmate has the right to be represented by counsel at an ISRB hearing. He submits that cases in which inmates have been denied this right reflect CSC's misunderstanding of the requirements of the Act and its legal obligations.

[113] As noted earlier, the trial judge found that, as a matter of practice, counsel are not permitted to attend ISRB hearings. This also appears to be the case in Alberta (*R. v. Prystay*, 2019 ABQB 8 at para. 91). On the different record before him in *Canadian Civil Liberties Assn.* (ONSC), Marrocco A.C.J. found that inmates in CSC's Ontario Region are generally permitted to be represented by counsel at a segregation review hearing (at para. 117).

[114] Noting the important role counsel could play at a review hearing, the trial judge concluded that the right to counsel should not be limited to those with acute mental health needs (at para. 418). I take from this a finding by the trial judge that, with the exception of inmates who have functional challenges related to mental health, the legislative regime does not expressly provide inmates confined in administrative segregation with the right to be represented by counsel on a review hearing. The judge held that procedural fairness requires that inmates have this right. He issued a declaration that the impugned laws are invalid pursuant to s. 52(1) of the *Constitution Act, 1982* to the extent that they authorize and effect the deprivation of an inmate's right to counsel at a segregation review hearing.

[115] On the evidence before him, the judge also found that CSC was not fulfilling its duty under the Regulations to facilitate the right of inmates to retain and instruct counsel without delay upon placement in administrative segregation and, as a necessary incident of that right, to do so in private. He declined, however, to make a declaration to this effect noting that "this issue would normally arise in cases where an individual plaintiff seeks a s. 24(1) remedy" (at para. 437).

(d) Section 15: Indigenous Inmates

[116] The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders and by assisting in their rehabilitation and reintegration into the community (*CCRA*, s. 3). The principles that guide CSC in achieving its purpose include the implementation of correctional policies, programs and practices that are "responsive to the special needs of … aboriginal peoples ..." (*CCRA*, s. 4(g)).

[117] CD 709 requires the institutional head to ensure that all decisions regarding administrative segregation consider and be responsive to the "special needs of … Aboriginal peoples" (s. 8(i)(iv)). In the case of an institutional head's first-working-day review, and in the context of any subsequent recommendation made by an ISRB or decision made by an institutional head, this requirement extends to considering "an inmate's Aboriginal social history" in deciding whether to maintain the placement or release the inmate from segregation (ss. 40(a), 42). The same obligation is placed on Regional Segregation Review Boards and on the National Long-Term Segregation Review Committee (ss. 64(b) and 68(c)). "Aboriginal social history" is defined in CD 702, "Aboriginal Offenders", as:

> … the various circumstances that have affected the lives of most Aboriginal people. Considering these circumstances may result in alternate options or solutions and applies only to Aboriginal offenders (not to non-Aboriginal offenders who choose to follow the Aboriginal way of life). These circumstances include the following (note that this is not an exhaustive list):
>
> - effects of the residential school system
> - sixties scoop into the adoption system
> - effects of the dislocation and dispossession of Inuit people
> - family or community history of suicide
> - family or community history of substance abuse
> - family or community history of victimization
> - family or community fragmentation
> - level or lack of formal education
> - level of connectivity with family/community
> - experience in the child welfare system
> - experience with poverty
> - loss of or struggle with cultural/spiritual identity.

[118] Guidelines 709-1 prescribe additional and more detailed administrative segregation procedures that must be followed by CSC staff. Indigenous elders may be appointed on an *ad hoc* basis to serve on an ISRB. Section 4 of Annex B to Guidelines 709-1, which must also be followed, requires an ISRB to do the following:

- In accordance with CD 702 – Aboriginal Offenders, ensure that all factors relevant to the inmate's Aboriginal social history were considered prior to rendering a decision. This includes discussion about the incident, possible link with the inmate's Aboriginal social history, access to Elder support, Aboriginal programs, and traditional healing paths.
- Demonstrate that the unique circumstances of the Aboriginal offender were defined and considered, including whether culturally appropriate alternatives and restorative options

were considered and eliminated as viable options. If culturally appropriate alternatives and restorative options are not viable, provide a justification.

- When consulting with the Case Management Team, demonstrate that relevant individual static and dynamic factors of the inmate were considered with respect to the inmate's Aboriginal social history.

[119] The judge found that administrative segregation has a small, but significant, disproportionate effect on Indigenous men and an even more significant effect on Indigenous women. He concluded that the impugned provisions fail to respond to the actual needs and capacities of Indigenous inmates and instead perpetuate or exacerbate their disadvantage. He declared that the impugned laws violate s. 15 and are invalid "to the extent that they authorize and effect a procedure that results in discrimination against Aboriginal inmates." The judge did not identify the law or the procedure that gives rise to the infringement he found. He did not suggest how the offending law or procedure might be adapted to bring it within constitutional bounds. Rather, he recommended that CSC make a concerted effort to improve assessment tools and programs for Indigenous inmates; increase the ratio of Indigenous elders for men to one elder for every 25 inmates; establish more Healing Lodges, including for inmates classified as medium security; and develop unspecified programs designed to assist Indigenous inmates (at para. 490). CSC's obligation to provide programs designed to address the needs of Indigenous offenders is set out in ss. 79–83 of the Act.

[120] The Attorney General does not challenge the trial judge's finding that CSC has, in practice, discriminated against Indigenous inmates, but argues that demonstrated infirmities in the way in which CSC has applied the impugned provisions to Indigenous inmates are not sourced in the legislative scheme and do not entitle the respondents to s. 52(1) relief.

(e) Section 15: Mentally Ill Inmates

[121] The principles that guide CSC in achieving its statutorily defined purpose also require that correctional policies, programs and practices be "responsive to the special needs of … persons requiring mental health care …" (*CCRA*, s. 4(g)).

[122] As noted earlier, CD 709 was amended during the trial to introduce more restrictive requirements respecting the placement of inmates with mental health challenges in administrative segregation.

[123] Pursuant to s. 19 of CD 709, the following inmates cannot be admitted to administrative segregation:

a. inmates with a serious mental illness with significant impairment, including inmates who are certified in accordance with the relevant provincial/territorial legislation[; and]

b. inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk for suicide.

[124] CD 709 defines the phrase "serious mental illness with significant impairment" as follows:

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

[125] Inmates not admissible to administrative segregation under s. 19 of CD 709 are to be identified by a registered or licensed health care professional. In the absence of a health care professional, inadmissible inmates may be identified (a) by reference to CSC's OMS documenting that the inmate has a serious mental illness with significant impairment, (b) as a consequence of immediate concerns identified after completion of a suicide risk checklist, or (c) by virtue of the fact that the inmate is actively engaged in self-injury that is deemed likely to place them at risk for serious bodily harm (CD 709, s. 26).

[126] Before an inmate is admitted to administrative segregation, consultation is required, including with healthcare professionals (CD 709, s. 28). Prior to admission, the case must be reviewed by a registered health care professional, who will provide an opinion about whether there are mental health issues that could preclude the inmate's placement in segregation, or if a referral to Mental Health Services is appropriate. A referral to Mental Health Services may involve assessment and treatment or other mental health interventions, including psychiatric hospital care (CD 709, s. 29 and Annex A to CD 709). A suicide risk checklist must also be completed upon admission to administrative segregation (CD 843, "Interventions to Preserve Life and Prevent Serious Bodily Harm," s. 6(b)).

[127] A registered or licensed health care professional must visit an inmate at the time of admission to segregation (or without delay) to establish if there are any health concerns (CD 709, s. 70(a)). An inmate in administrative segregation must also be visited at least once every day by a "health care professional", defined in CD 709 to include a registered or licensed psychologist, psychiatrist, physician, nurse, or clinical social worker (*CCRA*, s. 36(1); CD 709, s. 70(c) and Annex A to CD 709).

[128] Within 25 days of admission to administrative segregation, a mental health professional must provide a written opinion on the inmate's current mental health status, any noted deterioration in the inmate's mental health, and the appropriateness of a referral to Mental Health Services (CD 709, s. 70(b)). Thereafter, an assessment of the inmate's mental health status must be completed once every 60 days.

[129] Inmates placed in administrative segregation who are subsequently identified as falling within s. 19 of CD 709 must be released from administrative segregation and managed in accordance with CD 843 (CD 709, s. 20).

[130] In conducting a first-working-day review, an institutional head must consider an inmate's mental health and health care needs and give specific consideration to available mental health treatment options in determining whether to maintain the inmate's placement in segregation (CD 709, s. 40(a)).

An institutional head must visit the segregation unit on a daily basis and ensure that all subsequent decisions regarding administrative segregation consider the inmate's mental and physical health care needs (*CCRA*, s. 36(2) and CD 709, ss. 8(i)(iv), 40(a) and 58). These considerations must be documented in all decisions and a plan must be developed to address those needs (CD 709, s. 58).

[131] The ISRB must also consider an inmate's mental health and physical well-being in making recommendations to the institutional head. A "mental health professional" (defined in Annex A to include a registered or licensed psychologist, psychiatrist, physician, mental health nurse or clinical social worker) or a mental health clinician under the supervision of a mental health professional must be present for the review hearing and sit as a permanent member of the ISRB. The role of the mental health professional is to provide advice and expertise regarding mental health interventions and an opinion as to the impact on the inmate of their placement or continued confinement in administrative segregation (CD 709, ss. 45, 70(d)).

[132] Where an inmate has been identified as having "functional challenges related to mental health" and where the ISRB has been unable to identify alternatives to administrative segregation, the case must be referred to the Regional Complex Mental Health Committee ("RCMHC") for support until the inmate is released from segregation. The RCMHC may recommend an external review of the case to assist in identifying intervention strategies (CD 709, s. 59).

[133] Guidelines 709-1 include a checklist to ensure that inmates who are inadmissible to administrative segregation are identified prior to placement, physical and mental health needs have been taken into consideration in the decision to place the inmate in administrative segregation, inmates placed in segregation are monitored for mental health concerns, and any subsequent decision-making process is informed by physical and mental health needs that may impact on the inmate's segregation status.

[134] Against this background, and based on the factual findings he made, the trial judge found that confinement in administrative segregation has a disproportionate effect on mentally ill inmates and that the scheme (including revised CD 709) fails to respond to the actual capacities and needs of mentally ill inmates and imposes burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. The judge declared the impugned laws to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982* to the extent that they authorize and effect any period of administrative segregation for mentally ill and/or disabled inmates. Once again, he made a number of recommendations, including that Canada and CSC recognize the number of mentally ill, cognitively impaired and potentially self-harming inmates housed in Canada's penitentiaries, and evaluate inmates on admission to assess their mental health needs and risks. In his view, this would require more medically trained staff, more facilities for treatment and substantially increased funding (at para. 523).

(f) Section 1 of the Charter

[135] In considering whether the provisions had been shown to be justified under s. 1, the judge focused his analysis on the s. 7 violations. Applying *R. v. Oakes*, [1986] 1 S.C.R. 103, he found there was no rational connection between prolonged segregation and the objectives of the legislation, and that the impugned provisions were not minimally impairing of the rights of segregated inmates. On the latter point, the judge concluded that time limits on administrative segregation placements and the creation of two properly resourced subpopulations — one for inmates wishing to "voluntarily" withdraw from the general population, and the other for inmates considered to be at risk if left in the general population — were reasonable alternatives to prolonged, indefinite administrative segregation. He found that both alternatives would achieve the objectives of the legislation through less impairing means. Although he recognized that further analysis was not required, the judge turned to consider the third prong of the *Oakes* test which asks whether the benefits of the impugned law are worth the cost of the rights limitation. While the judge agreed that utilization of administrative segregation in the short term was beneficial because it enabled CSC to achieve the objectives of institutional security and the safety of inmates and CSC staff, the balance shifted dramatically insofar as prolonged confinement in segregation was concerned. In this context, the judge concluded that, given the severity of the harms and the extent of the corresponding rights infringements, the deleterious effects of the provisions substantially outweighed their salutary effects.

[136] Having come to this conclusion, the judge determined there was no purpose in undertaking a detailed analysis of whether the s. 15 infringements he found had been shown to be justified under s. 1. He also noted that the Attorney General bore the onus on this issue and did not meaningfully address the s. 15 violations in the context of s. 1. In the case of mentally ill inmates, the judge concluded that the most obvious — and far less impairing — option was treatment. He suggested that there was no reason why CSC cannot treat mentally ill inmates as a health problem, not a security problem (at paras. 593, 595).

[137] In the end, the judge concluded that the impugned provisions were not a reasonable limit on the rights of segregated inmates that could be justified under s. 1 of the *Charter*.

[138] The judge concluded that an order immediately striking down the impugned provisions — the effect of which would be to preclude CSC from resorting to administrative segregation in any circumstance — would give rise to safety concerns inside federal penitentiaries. Accordingly, he suspended the declaration of invalidity for 12 months, to January 17, 2019.

[139] Following the hearing of this appeal, the Attorney General applied for an extension of the suspension to July 31, 2019. In reasons for judgment indexed as 2019 BCCA 5, we ordered that the suspension of the declaration of invalidity be extended until June 17, 2019, or until further order of the Court, subject to the conditions set out in paras. 34–37 therein.

[140] By notice of motion filed March 22, 2019, the respondents sought the imposition of additional conditions during the suspension of the declaration of invalidity. In reasons for judgment indexed as 2019 BCCA 177, we added conditions designed to facilitate the right the Attorney General says

segregated inmates have under the current regime to obtain timely legal advice and be represented by counsel at segregation review hearings.

[141] By notice of motion filed May 17, 2019, the Attorney General applied for an interim extension of the suspension of the declaration of invalidity to November 30, 2019, to allow Parliament time to enact replacement legislation. In reasons for judgment delivered June 6, 2019, and indexed as 2019 BCCA 202, the application was dismissed without prejudice to the Attorney General's right to re-apply once it is known whether Bill C-83 will pass and the Attorney General is able to provide details respecting the implementation of legislated reforms or, in the alternative, until the Attorney General is able to provide the details of any interim contingency plan he proposes adopting until such time as replacement legislation is enacted.

[142] The Attorney General subsequently gave notice of his intention to re-apply for an extension of the suspension of the declaration of invalidity. To properly prepare this further application, the Attorney General sought an interim extension of the suspension to June 28, 2019. In reasons for judgment delivered June 3, 2019, and indexed as 2019 BCCA 219, the application was granted. The suspension of the declaration of invalidity was extended, on an interim basis, to June 28, 2019.

VI. The Grounds of Appeal

[143] The Attorney General appeals on grounds that the trial judge erred in law:

1. By holding that the administrative segregation provisions of the *CCRA* (ss. 31–33 and 37) infringe s. 7 of the *Charter* to the extent that they: authorize and effect the prolonged, indefinite segregation of inmates; authorize the internal review of segregation decisions; and authorize and effect the deprivation of an inmate's right to counsel at segregation hearings and reviews;
2. By holding that the administrative segregation provisions of the *CCRA* (ss. 31–33 and 37) infringe s. 15 of the *Charter* when applied to mentally ill and/or disabled inmates, and that compliance with s. 15 precludes any period of administrative segregation for inmates who are mentally ill and/or disabled;
3. By failing to conclude that any *Charter* infringements are justified under s. 1 of the *Charter*; and
4. By granting a declaration under s. 52(1) of the *Constitution Act, 1982* in circumstances where the constitutional violations found by the trial judge are not sourced in the impugned legislation itself, but in the maladministration of the Act by CSC.

VII. Analysis

1. Interpreting the Order

[144] The manner in which the order from which this appeal is taken is framed gives rise to some interpretive difficulties that complicate the analysis.

[145] For convenience, paragraph 1 of the order confirms the s. 7 breaches found by the judge and declares ss. 31–33 and 37 of the Act to be of no force and effect "to the extent that: (a) the impugned laws authorize and effect prolonged, indefinite administrative segregation for anyone; (b) the impugned laws authorize and effect the institutional head to be the judge and prosecutor of his own cause; (c) the impugned laws authorize internal review; and (d) the impugned laws authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews" (emphasis added). While I appreciate that the emphasized language used in the order is not without precedent, depending on the context in which it is used it is capable of giving rise to confusion about the remedial effect of the order. In this context, however, I am satisfied and counsel agree that the effect of paragraph 1 of the order is to strike down the impugned provisions because they authorize measures or procedures that violate s. 7 or, in the case of paragraph 1(d), fail to extend to segregated inmates what the judge found to be a constitutional entitlement — the right to be represented by counsel at a segregation review hearing.

[146] More problematic is the judge's use in paragraph 1(d) of the order of the constitutional proscription against "prolonged, indefinite administrative segregation." The word "prolonged" is not defined in the order. As noted earlier, the judge concluded that the 15-day maximum prescribed by the Mandela Rules is a "defensible standard" (at para. 250). In addressing whether the impugned provisions minimally impair the rights of inmates confined in administrative segregation, the judge concluded that "some lesser form of restriction" than prolonged and indefinite exposure to solitary confinement would achieve the objectives of the provisions (at para. 557). In light of the harm caused by prolonged confinement in administrative segregation, he concluded that a less drastic means of attaining the purpose of the provisions "is to require strict time limits on the use of what is otherwise a legitimate means of promoting that end" (at para. 558). He accepted expert evidence adduced at trial that none of the recommendations arising from the Coroner's Inquest into the Death of Ashley Smith — including that administrative segregation be restricted to no more than 15 days — would give rise to undue risk to the safe management of a penitentiary (at para. 567). He expressed the view that a time limit on resort to administrative segregation would allow CSC to use the practice for short periods to address safety or security concerns, but incentivize the implementation of prompt strategies that would avoid the need for prolonged placements (at para. 566). He did not, however, expressly conclude that a 15-day hard cap on administrative segregation placements was constitutionally required.

[147] Against this background the respondents seem to suggest that the proscription against resort to prolonged administrative segregation amounts to a conclusion that confinement in administrative segregation for longer than 15 consecutive days will, in all circumstances, violate s. 7 of the *Charter*. Although the parties did not develop their positions on this issue in their written or oral arguments, I do not understand the Attorney General to concede that the order mandates inflexible adherence to a 15-day time limit. As I understand the Attorney General's position, the order does no more than proscribe prolonged and indefinite reliance on administrative segregation.

[148] I agree with the Attorney General's position that the order goes no further than declaring the practice of prolonged, indefinite confinement in administrative segregation to be unconstitutional. I do not read the order, standing alone or in the context of the reasons as a whole, as mandating, in all circumstances, adherence to a hard cap of 15 days in order to bring the provisions within constitutional bounds. I appreciate that the Ontario Court of Appeal in *Canadian Civil Liberties Assn.* (ONCA) concluded in the context of s. 12 that prolonged confinement of an inmate in administrative segregation constituted cruel and unusual treatment. In that case, "prolonged" confinement was expressly defined in the reasons as segregation for more than 15 consecutive days.

[149] I would emphasize, however, that the Attorney General's position on appeal rests on an implicit acknowledgement that if the legislative regime under consideration authorizes the prolonged and indefinite confinement of an inmate in administrative segregation as it is currently practised in Canada, it would be susceptible to constitutional attack under s. 7. The Attorney General did not advance any position on what might constitute a "prolonged" period of confinement in segregation, nor did the Attorney General suggest what a minimally impairing, constitutionally defensible standard might be.

[150] I do not, however, understand the Attorney General to contest the proposition that one element of a constitutionally sound regime would be time restrictions on the use of administrative segregation. The debate amongst the expert witnesses called at trial was not whether there should be time limits imposed on the use of administrative segregation, but on what those limits should be. One of the expert witnesses called by the Attorney General, Dr. Gendreau, recommended a 60-day time limit on the use of administrative segregation. The respondents' experts, Dr. Grassian and Dr. Haney, adopted the 15-day maximum permitted under the Mandela Rules.

[151] I take no issue with the judge's conclusion that a 15-day limit on resort to administrative segregation in conditions that constitute solitary confinement is a defensible standard. In my view, we need not decide on this appeal whether strict adherence to a 15-day limit is the only constitutionally defensible standard. For example, whether a soft cap of 15 days with legislative authority to modestly extend the confinement in narrowly defined circumstances might pass constitutional muster is not before us. That issue should only be determined in the context of a reformulated legislative regime in which the issue squarely arises.

[152] Paragraph 2 of the order is more problematic still. For convenience, paragraph 2(a) strikes the provisions "to the extent that" they "authorize and effect any period of administrative segregation for the mentally ill and/or disabled". Neither "mentally ill" nor "mentally disabled" is defined in the order or in the judgment. The reasons provide no guidance as to the criteria that should be applied in determining when an inmate is mentally ill and/or mentally disabled and, thus, not admissible to administrative segregation. Further, the distinction required by the order between inmates who are mentally ill and/or disabled, and those who are not, defies precise articulation. The term "mental illness" encompasses a very wide range of mental health conditions of varying degrees of severity with very different symptomatology. As I will explain later in these reasons, my concern is that the order imposes on the legislature the impossible task of attempting to define more precisely than it

already has when a mental illness and/or mental disability operates to preclude resort to administrative segregation. Moreover, the judge does not suggest any prescription to cure the constitutional infirmity he identified in the legislation. Rather, he made the recommendations detailed earlier in these reasons. As the appellant points out, none of these recommendations would require legislative amendment.

[153] Finally, paragraph 2(b) of the order declares the impugned laws to be of no force and effect "to the extent that" they "authorize and effect a procedure that results in discrimination against Aboriginal inmates" (emphasis added). The procedure referred to in the order is not defined therein or in the reasons for judgment. What can be said is this: paragraph 2(b) of the order is not self-defining and reading it in the context of the reasons for judgment as a whole does not assist in identifying what provisions have been found to infringe the s. 15 rights of Indigenous inmates, or the basis upon which that finding has been made. As noted earlier, the judge offered a number of prescriptions for curing this constitutional infirmity. Once again, none of the recommendations would require legislative amendment. The difficulty with the way in which this term of the order is worded is that the necessary process of dialogue between the legislature and the courts cannot occur if the legislature does not know how or why its enactments violate the *Charter*. I will further address these concerns in analyzing the grounds of appeal and the remedies that flow from my analysis.

2. Section 7: Prolonged and Indefinite Solitary Confinement

[154] The Attorney General does not argue that the judge erred in concluding that the impugned provisions deprive inmates of their right to life, liberty and security of the person. Having come to this conclusion, the judge was obliged to turn to the issue of whether the respondents established that these deprivations were not in accordance with the principles of fundamental justice. One of the principles of fundamental justice is that laws impinging on life, liberty or security of the person must not be overbroad. A law will be overbroad where there is no rational connection between the purpose of the impugned provisions and some of its impacts. In concluding that the impugned provisions were overbroad and that the deprivations they effected were, therefore, not in accordance with the principles of fundamental justice, the judge was applying a well-settled framework of principles: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 93–119; *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 72, 85–88.

[155] The Attorney General does not argue that the judge erred in his articulation of the overbreadth test, nor does he dispute that the judge was correct in measuring the effects of the provisions against their purpose as set out in s. 31 of the Act.

[156] Further, I do not understand the Attorney General to suggest that a legislative provision authorizing the prolonged and indefinite confinement of an inmate in solitary confinement would comply with the *Charter*. Rather, the Attorney General submits that the impugned provisions do not authorize prolonged and indefinite solitary confinement and that the judge erred in interpreting the

legislation as authorizing either the “prolonged” confinement of an inmate in administrative segregation or the “absolute isolation” of an inmate so confined.

[157] In my view, there is no merit in either of these contentions.

[158] The Act plainly authorizes indefinite and prolonged confinement in administrative segregation. The Attorney General is unable to point to any specific provision that requires the confinement to be brought to an end after a particular period of time. There are no hard or soft caps in the Act, Regulations or CDs on the length of time an inmate can remain in administrative segregation. The length of confinement is not measured in days, months or even years, but determined by the existence of the grounds enumerated in s. 31(3) and the absence of reasonable alternatives to confinement in administrative segregation.

[159] The requirements of the Act that alternatives to administrative segregation be considered and that an inmate be released from segregation “at the earliest appropriate time” do not change the fact that inmates are subject, by the terms of the Act, to segregation that is indefinite and prolonged. Indeed, an inmate confined in administrative segregation for a very long time could not, on that account alone, hope to secure release solely on grounds that such confinement is contrary to the Act. Counsel for the Attorney General conceded as much in oral argument.

[160] Accordingly, I reject the Attorney General’s submission that the numerous examples of the prolonged confinement of inmates in administrative segregation reflect nothing more than widespread misapplication of the impugned provisions by CSC staff. While decisions by CSC staff in particular cases to maintain the confinement of inmates in segregation for lengthy periods may have been imprudent or short-sighted, or simply hamstrung by the operational realities within which CSC must work, those decisions cannot be characterized as running afoul of the requirements of the Act. As noted by Justice Benotto in *Canadian Civil Liberties Assn.* (ONCA) in the context of a s. 12 (cruel and unusual punishment) claim, “[e]ven when conscientiously applied by the institutional head, ss. 31(2) [and] 31(3) … do not preclude the possibility of prolonged administrative segregation” (at para. 115). The Ontario Court of Appeal found *Little Sisters* inapplicable because the impugned provisions authorize and do not safeguard against unconstitutional treatment. Although the context here is s. 7, not s. 12, the same reasoning applies.

[161] The Attorney General’s contention that the Act does not mandate that a segregated inmate be kept in “complete” or “absolute” isolation and that the judge erred in concluding otherwise is, in my respectful view, a straw man argument and I would not give effect to it. The judge did not conclude that inmates confined in administrative segregation are in complete or absolute isolation. The judge fully appreciated that the legislative regime contemplates some supervised out-of-cell time and communication with CSC staff, even if that communication generally occurs through the food slot of a steel door. Rather, the judge concluded that the Act permits resort to, and CSC practises, a form of “solitary confinement” (confinement for 22 hours or more a day without meaningful human contact)

and “prolonged solitary confinement” (confinement in excess of 15 consecutive days) prohibited by the Mandela Rules.

[162] I see no error in the judge’s interpretation of the relevant provisions. By the wording of s. 31(1) of the Act, the goal of administrative segregation is to be achieved “by not allowing an inmate to associate with other inmates.” Section 37 of the Act reinforces the point by providing that 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”. In my view, the language of the provision is clear and unambiguous. Placement in administrative segregation does not contemplate merely “limiting” or “curtailing” an inmate’s association with other inmates. Had Parliament intended this, it could easily have said so. Rather, resort to administrative segregation is designed to achieve the goal of individual safety and institutional security by isolating an inmate who meets the grounds set out in s. 31(3). The judge concluded that the provision, on its face, mandates isolation. I agree. That inmates placed in administrative segregation are held in what amounts to solitary confinement is the inevitable consequence of the legislative regime.

[163] It follows that I reject the Attorney General’s submission that the words “other inmates”, does not mean all other inmates. There is nothing in the language of the Act that supports such an interpretation. It also follows that when CSC routinely enforces the “solitary confinement” of inmates placed in administrative segregation as that phrase is defined in the Mandela Rules, it is not infringing the Act, but giving effect to it: see also *Canadian Civil Liberties Assn.* (ONSC) at paras. 38–46, aff’d on this point 2019 ONCA 243 at para. 25 and *R. v. Prystay* at para. 46, both of which confirm that administrative segregation, as it is currently practised in federal institutions, constitutes a form of solitary confinement prohibited by the Mandela Rules.

[164] I would also note, as did the trial judge, that before being amended in 2012, s. 31(1) of the Act provided that “[t]he purpose of administrative segregation is to keep an inmate from associating with the general inmate population” (emphasis added). Whereas the previous version of s. 31(1) mandated the isolation of segregated inmates from the general population (and could therefore accommodate subpopulations of inmates), the current version mandates the isolation of a segregated inmate from all other inmates. As the respondents point out, Parliament enacted this law fully cognizant that inmates confined in administrative segregation would be isolated from all other inmates in the conditions I have described.

[165] On his interpretation of the impugned provisions and the facts he found, I see no error in the judge’s conclusions that the sections in issue are overbroad and violate s. 7 of the *Charter* because prolonged and indefinite segregation inflicts harm on inmates subject to it and ultimately undermines the goal of institutional security.

[166] I also agree with the judge that the Act authorizes prolonged and indefinite solitary confinement in circumstances where some lesser form of restriction would achieve the objective of the provisions. I

would, however, prefer to analyse the s. 7 issue that arises in this context through the lens of gross disproportionality rather than overbreadth. As the court explained in *Bedford*:

> [108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.
>
> [109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.
>
> …
>
> [120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[167] In my respectful view, a legislative provision that authorizes the prolonged and indefinite use of administrative segregation in circumstances that constitute the solitary confinement of an inmate within the meaning of the Mandela Rules deprives an inmate of life, liberty and security of the person in a way that is grossly disproportionate to the objectives of the law. In addition, the draconian impact of the law on segregated inmates, as reflected in Canada's historical experience with administrative segregation and in the judge's detailed factual findings, is so grossly disproportionate to the objectives of the provision that it offends the fundamental norms of a free and democratic society.

[168] This conclusion is supported by reference to the international context. As explained in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 59, "the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect." While those international norms do not dictate a particular result, they inform constitutional interpretation and, in particular, our understanding of the principles of fundamental justice. Relevant, in this context, are the Mandela Rules that prohibit the use of prolonged solitary confinement.

[169] The conclusion that prolonged administrative segregation authorized by ss. 31–33 and 37 of the *CCRA* is grossly disproportionate to its objective is also supported by the decision in *Canadian Civil Liberties Assn.* (ONCA) that such segregation subjects inmates to grossly disproportionate treatment in violation of s. 12 of the *Charter* (at paras. 4, 119).

[170] Likewise, I see no error in the judge's conclusion that the impugned provisions cannot be justified under s. 1 because: (1) there is no rational connection between the prolonged segregation of inmates in solitary confinement and achievement of the objectives of the provisions; (2) even affording

deference to Parliament, there are less impairing alternatives, including the imposition of time limits and the creation of inmate subpopulations; and (3) the deleterious effects of reliance on prolonged and indefinite segregation of inmates in solitary confinement substantially outweigh the salutary effects of the legislation. That conclusion is supported by factual findings made in the trial court, none of which are contested on appeal.

[171] The Attorney General's contention that the provisions can be saved by resort to s. 1 hinges on acceptance of the proposition that the legislation does not authorize either prolonged segregation or isolation. As I have rejected both positions, I would not give effect to the Attorney General's position that the judge erred in his s. 1 analysis.

[172] In the result, I would uphold the judge's s. 52(1) declaration of invalidity on grounds that the impugned provisions violate s. 7 of the *Charter* because they authorize the prolonged, indefinite administrative segregation of federally incarcerated inmates.

3. Section 7: Procedural Fairness and Administrative Review of Segregation Placements

[173] The principles of fundamental justice embrace the requirements of procedural fairness. The Attorney General acknowledges that the legislation is procedurally unfair because it requires institutional heads to review their own segregation decisions. In *Canadian Civil Liberties Assn.* (ONSC), Marrocco A.C.J. concluded that a legislative regime which insulates the administrative segregation decision-maker from meaningful review is both arbitrary and procedurally unfair. I do not understand the Attorney General to take issue with the analysis set out in paras. 102–176 of that decision, including the finding that "a robust duty of procedural fairness applies to the decision to maintain an inmate in administrative segregation" (at para. 146).

[174] The Attorney General's concession on this point was eminently reasonable. An institutional head has an ongoing statutory obligation to ensure that an inmate placed in administrative segregation is released at the earliest appropriate time. It follows that the institutional head will, at the time of the segregation review, already have concluded that the inmate's confinement in segregation is the only reasonable alternative to address the safety and security issues that led to the initial placement. In the circumstances, such a "review" cannot reasonably be regarded as being impartial, independent or meaningful. I would not interfere with the judge's declaration that the impugned laws are of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982* because they require an institutional head to sit in review of his or her own decision.

[175] The Attorney General submits, however, that the judge erred by finding that procedural fairness under s. 7 of the *Charter* requires that the review of a segregated inmate's case be undertaken by a person who is independent of CSC. Relying on *Oliver v. Attorney General (Canada)*, 2010 ONSC 3976 at paras. 66–67 (a case involving the determination of an inmate's security classification), the Attorney General submits that the procedural requirements of a judicial or quasi-judicial process, including disciplinary segregation, do not apply when CSC operates in an administrative capacity.

[176] The respondents distinguish *Oliver* on grounds that what was at stake in that case was the security classification (and related transfer) of an inmate, not the maintenance of an inmate in administrative segregation with the attendant risks to life and security of the person. The respondents emphasize the various recommendations that have been made over the years, both nationally and on the international stage, that a form of independent adjudication be adopted; the opinion of Professor Jackson that "neither fairness nor the necessary balance of interests and rights can be achieved without the importation of a system of independent adjudication"; and the trial judge's conclusion that CSC has historically shown an inability to fairly review administrative segregation decisions (at para. 409). On this latter point, the respondents argue that the requirements of procedural fairness — which include independence and impartiality — can include consideration of operational realities, which is to say how a legislative scheme actually works in practice. In support of their position, the respondents rely on *Currie v. Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 at paras. 33–59, and the authorities cited therein, which held that s. 7 required the independent adjudication of disciplinary hearings in a provincial correctional institution.

[177] I do not understand the Attorney General to argue that the judge erred by considering the historical practices of CSC in determining whether the internal review of segregation decisions is sufficiently independent. Indeed, it seems clear that past practice is one of the many factors to consider in determining whether the necessary degree of independence is present to avoid creating a reasonable apprehension of bias: see, for example, *Katz v. Vancouver Stock Exchange* (1995), 128 D.L.R. (4th) 424 (B.C.C.A.), aff'd [1996] 3 S.C.R. 405.

[178] As noted earlier, the duty of fairness applies in the context of administrative segregation decisions. The existence of a duty of fairness does not, however, determine what requirements will apply in particular circumstances. As noted in *Baker*, the duty of fairness is flexible and variable and depends on the context of the particular statute and the rights affected.

[179] In *Baker*, the Court identified a number of criteria to be used in determining what procedural rights the duty of fairness requires in a given set of circumstances, including:

1. the nature of the decision being made and the process followed in making it;
2. the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
3. the importance of the decision to the individual or individuals affected — the more important the decision is to the lives of those affected by it and the greater its impact, the more stringent the required procedural protections will be;
4. the legitimate expectations of the person challenging the decision; and
5. the choices of procedure made by the agency itself.

[180] The Attorney General argues that the judge did not undertake a *Baker* analysis to determine the level of procedural fairness required in these circumstances, but simply accepted that

administrative segregation decisions require the same or a similar level of procedural fairness as disciplinary decisions. I do not accept this submission. The judge was alive to the differences between segregation review and disciplinary hearings and the contextual analysis *Baker* requires (at para. 340). While he did not organize his reasons to demonstrate that he considered each and every one of the *Baker* criteria, he was not obliged to do so. Not all of the *Baker* criteria are easily applied in the context of this litigation and the judge's reasons reflect extended consideration of what I consider to be the most important of them.

[181] The judge reviewed the legislative scheme, previous calls in this country for adoption of some form of external oversight, and the emergence of international standards requiring the "independent review" of decisions made by correctional officials to place an inmate in solitary confinement.

[182] The judge summarized (at para. 381) what he considered to be the benefits associated with independent review (by which he meant external review) of segregation placement decisions, noting that independent adjudication would:

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

[183] Of particular relevance to the analysis are the following six factual findings made by the judge: (1) "many cases" involving involuntary placement in administrative segregation necessitate the adjudication of a factual dispute between the institution and an inmate and are adversarial in nature (at para. 385); (2) "the concerns regarding institutional bias that have driven the requirement for independent adjudication in disciplinary hearings also exist in administrative segregation review hearings" (at para. 390); (3) senior administrators, including those who work at the regional and national levels, have displayed a pattern of deference to institutional heads who must deal with the operational realities of their institutions (at paras. 388–389); (4) inmates exposed to solitary confinement in administrative segregation are at risk of significant harm (at para. 247); (5) many inmates are likely to suffer permanent harm as a result of being isolated in administrative segregation (at para. 249); and (6) the negative health effects associated with reliance on solitary confinement can occur after only a few days in segregation (at para. 250). Again, none of these factual findings are challenged on appeal.

[184] I agree with the judge's conclusion that the adjudicative nature of the decision being made, the elaborate review process to be followed in making this decision, and the consequences of a decision

to confirm an inmate's placement in administrative segregation all suggest a robust requirement for procedural fairness. As I have said, I do not understand the Attorney General to suggest otherwise.

[185] The decision to keep an inmate in administrative segregation is an important one that carries with it the risk that the person so confined will suffer significant emotional harm which, in some cases, will be permanent. The risk of self-harm and suicide also increases with exposure to solitary confinement. The interests at stake are high. The procedural protections required must reflect the extent to which the decision affects an inmate's life, liberty and emotional security (*Baker* at para. 25). This factor also weighs heavily in favour of robust procedural fairness protections.

[186] Further, an inmate placed in administrative segregation would hold a legitimate expectation that the review would amount to more than a "rubber stamp" authorizing ongoing confinement. On this point, the trial judge seems to have accepted the evidence of Robert Clark, a former CSC employee who worked at seven penitentiaries over a 30-year career, including as a deputy and assistant warden (at para. 392). Mr. Clark's evidence was that once an inmate has been placed in administrative segregation, the procedural safeguards in place do not, in practice, work to prevent the individual from "languishing" in solitary confinement.

[187] I recognize that the criteria in *Baker* were not intended to be an exhaustive catalogue of the factors to be considered in determining the level of procedural fairness required in a particular context. The context in which the statute operates, as well as the nature of the rights affected and the extent to which those rights are affected, must also inform the analysis.

[188] The context in which the impugned provisions operate is highly complex. Decision-making in this area must be informed by a constellation of competing individual and collective interests and goals. Indeed, I think it fair to describe as singular the complexities associated with managing risks to personal safety and institutional order in a penitentiary context.

[189] Informed decision-making in relation to the use of administrative segregation requires a profound appreciation of institutional dynamics, individual behavioural patterns, inmate alliances, security intelligence information and the existence and efficacy of alternatives to administrative segregation, including inmate transfers. I do not underestimate the value of institutional knowledge and experience, or the challenges associated with placing decision-making in this context in the hands of an external adjudicator. I also accept that the challenges will, in general terms, be greater than those associated with the adjudication of disciplinary hearings by external decision-makers. Disciplinary proceedings will ordinarily be focused on a particular event. Decisions to confine inmates in administrative segregation will, more frequently, involve the assessment of dynamic risk factors that do not necessarily relate to a single event. I am also mindful of the evidence of Bruce Somers, a retired Assistant Deputy Commissioner of Correctional Operations for the Ontario Region, that while he had no problem in theory with the external review of segregation decisions, he had difficulty envisioning who outside CSC would be sufficiently knowledgeable to take on the task (at para. 396).

[190] In addition, I am mindful of the cautionary note sounded in *Cardinal* that the requirements of procedural fairness in this context must be compatible with the concern that the process of prison administration, because of its special nature and exigencies, should not be unduly burdened or obstructed by the imposition of unreasonable or inappropriate dictates (at 660). At the same time, to satisfy the requirements of s. 7 there must be a fair process attuned to the context. As the Court put it in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9:

> [27] The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. …

[191] While the trial judge properly emphasized the history of reform-minded calls for the external adjudication of segregation review hearings, it is also of some significance that those calls were made in the context of a legislative regime that permitted prolonged and indefinite reliance on administrative segregation. I have found that the provisions of the *CCRA* that permit prolonged and indefinite reliance on administrative segregation do not withstand constitutional scrutiny. Given that Parliament will have to adopt constitutionally defensible temporal restrictions on administrative segregation involving the solitary confinement of inmates, it is tempting to conclude that the review process should be internal but structured along the lines contemplated by Marrocco A.C.J in *Canadian Civil Liberties Assn.* (ONSC) at para. 175 to ensure that the reviewer is both independent (free from control by or subordination to the decision-maker) and impartial (possessed of a neutral state of mind not predisposed in appearance or in fact to a particular outcome): see *Bell Canada v. Canadian Telephone Employees Association*, 2003 SCC 36 at paras. 17–18.

[192] Balancing all of these considerations and giving effect to the judge's undisputed factual findings, I have come to the conclusion that he correctly concluded that procedural fairness in this context (the placement of inmates in solitary confinement) requires the external review of administrative segregation decisions by reviewers who are independent of CSC, commencing with the five-day review.

[193] As the Court explained in *Bell Canada*, the requirements of independence and impartiality both seek to uphold public confidence in the fairness of administrative bodies and their decision-making procedures. The legal tests for independence and impartiality appeal to the perceptions of the reasonable, well-informed member of the public. The question concerns what an informed person viewing the matter realistically and practically would conclude. Would that person think that it is more likely than not that the decision-maker, whether consciously or unconsciously, would not decide fairly? (See *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at 394, *per* de Grandpré J., dissenting; cited in *Bell Canada* at para. 17).

[194] On the basis of the judge's findings of fact, the Canadian experience with internal review, and detailed studies of the issue which have resulted in repeated calls for the adoption of external review, a well-informed member of the public could not reasonably conclude that internal review of

segregation decisions will be done fairly. That is so even if those decisions are made by CSC officials who are neither subordinate to nor within the circle of influence of the institutional head whose decision is being reviewed. As noted, the judge found that at least unconscious institutional bias has plagued the segregation review process, even in circumstances where the decision-making process has been elevated to the regional or national levels.

[195] Adoption of an external review model still permits CSC to respond to exigencies that will arise in a correctional context by placing an inmate in segregation to address risks concerning individual safety, institutional security or interference with an ongoing investigation. In addition, it permits the institutional head to review the order within one working day and confirm the inmate's confinement in administrative segregation or order that the inmate be returned to the general population as contemplated by s. 20 of the *CCRR.* External review is only required within five working days after an inmate's confinement in administrative segregation as contemplated by s. 21(2) of the *CCRA*.

[196] In rejecting the contention that procedural fairness in this context requires that segregation decisions be externally reviewed, Marrocco A.C.J. concluded that there is a necessary "trade-off" between an expeditious review process and the full protection of procedural rights. He determined that "[t]he only realistic way to conduct a timely review of the decision to segregate is if the review is an administrative review provided by the Correctional Service of Canada" (at para. 173). On the record before me, I see the issue differently.

[197] First, there is no evidence in this case that unacceptable delay will be the inevitable consequence of an external review process. It is not obvious to me why external review undertaken by someone who is knowledgeable about the inmate's background and present circumstances, and the dynamics of the institution, including relevant security intelligence information, would necessarily take longer than if the task was, for example, assigned to someone in Regional Headquarters. Nor is it obvious to me that informed decision-making would be compromised by the external review of segregation decisions. If adopted, Bill C-83 would require the external review of segregation decisions in defined circumstances.

[198] For the foregoing reasons, I would uphold paragraphs 1(b) and (c) of the order made below. I emphasize that the constitutional requirement for external review is responsive to a particular context — specifically, a legislative regime that requires inmates who are placed in administrative segregation to be kept in solitary confinement.

4. Section 7: Procedural Fairness and the Right to Counsel

[199] The Attorney General argued in his factum that there is nothing in the legislative scheme prohibiting inmates from being represented by counsel at segregation review hearings. In oral argument, the Attorney General went further, conceding that inmates have the right to be represented by counsel at segregation review hearings. This right was said to flow from s. 97(2) of the Regulations which requires CSC, upon placing an inmate in administrative segregation, to inform the inmate of the

right to counsel and provide the inmate with a reasonable opportunity to retain and instruct counsel without delay.

[200] The Attorney General does not dispute that there have been instances in which CSC has not permitted inmates to be represented by counsel at review hearings. He says these decisions are not sourced in the Act but in the failure of CSC staff to consistently observe its requirements. As the constitutional problem is not with the Act itself, but attributable to CSC's maladministration of constitutional legislation, the Attorney General once again says there is no basis upon which a declaration of invalidity could have been made.

[201] Further, the Attorney General submits that while an inmate who has been denied the right to have counsel represent him or her at a review hearing could seek relief under s. 24(1), such relief is not available to the respondents. In support of this argument, the Attorney General relies on *R. v. Ferguson*, which addresses the different remedial purposes of s. 52(1) of the *Constitution Act, 1982* and s. 24(1) of the *Charter*:

> [35] Two remedial provisions govern remedies for *Charter* violations: s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*. Section 24(1) confers on judges a wide discretion to grant appropriate remedies in response to *Charter* violations:
>
> > 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.
>
> Section 24(1) has generally been seen — at least until now — as providing a case-by-case remedy for unconstitutional acts of government agents operating under lawful schemes whose constitutionality is not challenged. The other remedy section, s. 52(1) of the *Constitution Act, 1982,* confers no discretion on judges. It simply provides that laws that are inconsistent with the *Charter* are of no force and effect to the extent of the inconsistency:
>
> > 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.
>
> When a litigant claims that a law violates the *Charter*, and a court rules or "declares" that it does, the effect of s. 52(1) is to render the law null and void. It is common to describe this as the court "striking down" the law. In fact, when a court "strikes down" a law, the law has failed by operation of s. 52 of the *Constitution Act, 1982.*
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> …
>
> [59] When a law produces an unconstitutional effect, the usual remedy lies under s. 52(1), which provides that the law is of no force or effect to the extent that it is inconsistent with the *Charter.* A law may be inconsistent with the *Charter* either because of its purpose or its effect: *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Section 52 does not create a personal remedy. A claimant who otherwise has standing can generally seek a declaration of invalidity under s. 52 on the grounds that a law has unconstitutional effects either in his own case or on third parties ...
>
> [60] 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: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6. The acts of government agents acting under such regimes are not the necessary result or "effect" of the law, but of the government agent's applying a discretion conferred by the law in an unconstitutional manner. Section 52(1) is thus not applicable. The appropriate remedy lies under s. 24(1).

> [61] It thus becomes apparent that ss. 52(1) and 24(1) serve different remedial purposes. Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982,* while the validity of government action falls to be determined under s. 24 of the *Charter: Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. …
>
> [Emphasis in original.]

[202] I do not accept the Attorney General's position that the Act confers upon inmates the right to legal representation at segregation review hearings. Section 97(2) goes no further than to provide inmates an opportunity to consult with counsel upon placement in administrative segregation. It does not provide for the right to legal representation at a review hearing. There is nothing in the Act, Regulations or related CDs contemplating the attendance of counsel at a segregation review hearing. The Act is silent on the issue. The Regulations contemplate the attendance of the inmate at the review hearing, but not the attendance of counsel (s. 21(3)(b)). CD 709 extends only to inmates identified as having functional challenges related to mental health the opportunity to engage an "advocate" to assist them with the review board process.

[203] Further, I note that in circumstances where the statutory scheme contemplates a right to counsel, the Regulations confer it expressly. For example, s. 31(2) of the Regulations provides that CSC must ensure that an inmate charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing. CSC must also ensure that counsel so retained is permitted to participate in the proceedings to the same extent as an inmate. There are no similar provisions applicable to administrative segregation review hearings.

[204] I conclude that the Act and Regulations exhaustively define the circumstances in which it is contemplated that an inmate is entitled to legal representation at a hearing. Neither the Act nor the Regulations confer upon inmates a general right to legal representation at segregation review hearings. It follows that, under the current regime, CSC has no statutory obligation to permit the attendance of counsel at such a hearing. In the result, I do not accept that CSC has failed in its interpretation or implementation of the legislative scheme by refusing to permit counsel to attend review hearings. The constitutional deficiency does not lie in the interpretation of the legislative scheme by CSC staff, but in the process the legislation contemplates.

[205] I turn next to the question of whether procedural fairness in this context — administrative segregation involving solitary confinement — requires that inmates have the right to be represented by counsel at segregation review hearings. On appeal, the Attorney General did not clearly articulate a position on whether procedural fairness requires that inmates have the right to legal representation at such hearings if such a right is not provided in the Act. The Attorney General appears to have taken the position in the court below that the requirements of procedural fairness in this context would confer

upon inmates the right to legal representation at review hearings (at para. 420). In my view, however, the safest course is to proceed on the footing that the point has not been conceded.

[206] The judge concluded that, under the current regime, procedural fairness requires that any inmate who wishes to be represented by counsel at an ISRB hearing is entitled to such representation. Having considered the *Baker* factors in light of the factual findings made by the judge, I agree. Many of the *Baker* factors play out the same way in this context as in the context of external review. The nature of the decision being made, the process followed in making it, the importance of the decision to the inmate, the significant role counsel could play at a review hearing, the significant risk of harm associated with the use of solitary confinement, and the evidence of past practices, including historical over-reliance on administrative segregation, persuade me that procedural fairness requires that inmates placed in administrative segregation have a constitutional right to be represented by counsel at review hearings.

[207] In paragraph 1(d) of his order, the trial judge declared ss. 31–37 of the Act to be of no force and effect because they do not provide inmates the right to counsel at segregation review hearings. As explained in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 698–699, s. 52(1) declares the law and not the words expressing that law to be of no force or effect to the extent of any inconsistency with the Constitution. The inconsistency can equally be defined by what is left out of the legislation as by what is wrongly included in it.

[208] It is true that the statutory regime under consideration does not contemplate inmates in administrative segregation having a right to counsel at review hearings. Nonetheless, nothing in the statute prohibits the recognition of such a right, nor is it the sort of right that demands statutory authority in order to be implemented. Accordingly, it is not necessary to strike down the legislation on this account, nor are other constitutional remedies directed at the statutory regime, itself, needed. Counsel for the respondents conceded as much in oral argument, acknowledging that a declaration to the effect that segregated inmates are entitled to be represented by counsel at a segregation review hearing was likely more appropriate than a remedy under s. 52(1) striking the impugned provisions. I will address the remedy that, in my view, should have been granted in relation to this issue later in these reasons.

5. Section 15

[209] The judge set out in some detail the analytical approach to s. 15 of the *Charter* before turning to discuss whether the impugned provisions infringe s. 15 in their application to mentally ill inmates and Indigenous inmates:

> [448] Section 15 of the *Charter* guarantees that:
>
> > 15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> [449] Section 15 protects substantive, as opposed to formal, equality. Substantive equality appreciates that the achievement of equality may require groups and individuals who are unalike

in relevant ways to be treated differently. In [*Withler v. Canada (Attorney General)*, 2011 SCC 12] at para. 39, the Court described substantive equality in this way:

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

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

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

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

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

[Emphasis added.]

[210] No issue is taken on appeal with this summary of the s. 15 jurisprudence or with the judge's finding that the way in which CSC has applied the impugned provisions has had the effect of placing discriminatory burdens on Indigenous inmates. Similarly, the Attorney General does not challenge the judge's finding that administrative segregation, as it has been used by CSC in particular instances, has had a discriminatory impact on some inmates with a mental illness and/or disability. Once again, the Attorney General submits that these failings relate to the manner in which administrative segregation has been utilized by CSC. The Attorney General argues that none of these operational failings are attributable to the legislation that authorizes administrative segregation. Relying on *Little Sisters* at paras. 132–136, the Attorney General argues that a declaration of invalidity is not available if, as here, the impugned statute is capable of being administered in a constitutional manner.

(a) Indigenous Inmates

[211] As noted earlier, s. 4 of the Act sets out the principles that guide CSC in the management of penitentiaries, including that its correctional policies and practices be responsive to the special needs

of Aboriginal peoples. In pursuit of this goal, CD 709 requires an institutional head to ensure that all decisions regarding administrative segregation be responsive to the special needs of Aboriginal peoples and that an inmate's Aboriginal social history be considered in deciding whether to release an Indigenous inmate from segregation or to maintain their confinement. Guidelines 709-1 require that factors relevant to an inmate's Aboriginal social history be taken into account, the inmate's unique circumstances are identified, and that viable and culturally appropriate alternatives and restorative options are considered in the decision-making process. Where culturally appropriate alternatives and restorative options have been rejected, the Guidelines require that a justification be provided for that determination.

[212] The judge accepted that over-representation of Indigenous inmates in segregation is, in part, attributable to the fact that a greater number of Indigenous inmates have gang affiliations arising from Aboriginal social history factors. He concluded, however, that "CSC has not done a good job" of using Aboriginal social history to reduce the impact of administrative segregation on Indigenous inmates (at para. 483). The judge also found that CSC staff is doing a poor job of documenting how Aboriginal social history factors have been taken into account in administrative segregation decisions. The Attorney General takes no issue with these factual findings.

[213] There are two closely related difficulties associated with the declaration of invalidity made in paragraph 2(b) of the order. The first is that paragraph 2(b) does not identify which provisions infringe the s. 15 rights of Indigenous inmates, or the basis upon which that finding has been made. The offending "procedure" said to give rise to the infringement is not defined in the order or in the reasons for judgment. Further, the judge's prescriptions for curing the problems he identified, while they may be eminently sensible, do not illuminate or speak directly to any constitutional infirmity in the legislation itself. Implementation of the judge's policy recommendations would not require legislative amendment. In short, it is unclear which of the impugned provisions have been struck or why. As I have said, the necessary process of constitutional dialogue between the legislature and the courts must be an informed one. Paragraph 2(b) of the order does not alert Parliament to a constitutional defect in its legislation or permit an informed response.

[214] The second difficulty is that the judge does not identify how the impugned provisions on their face or in their necessary effect violate the s. 15 rights of Indigenous inmates. While the judge identifies organizational failings on the part of CSC in following its guiding principles and policies in resorting to administrative segregation for Indigenous offenders, these failings are not sourced in the legislation itself. Indeed, the judge does not say that they are.

[215] The judge's conclusion that the impugned laws fail to respond to the needs of Indigenous inmates and instead impose burdens in a manner that has the effect of perpetuating their disadvantage is a conclusory statement. The judge did not identify the offending laws (or "procedure") that do so or how, on their face or in their necessary effect, they violate the s. 15 rights of Indigenous inmates.

[216] In the result, I agree with the position of the Attorney General that the judge erred by granting a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982* where, on his own findings, the problems are not sourced in a legislative regime that is incapable of constitutional administration, but in the maladministration of the legislative regime by CSC staff.

[217] For these reasons, I would set aside the declaration of invalidity in paragraph 2(b) of the order. I will return to the question of remedy in relation to this issue at the end of these reasons.

(b) Mentally Ill and/or Disabled Inmates

[218] I wish to address at the outset an issue that arose on appeal respecting interpretation of s. 31(3) of the Act — the provision that sets out the grounds justifying the confinement of an inmate in administrative segregation.

[219] Read in isolation, s. 31(3) does not require that consideration be given to the mental health of an inmate before a decision is made to confine that inmate to administrative segregation. Importantly, s. 31(3) is permissive, not mandatory. It provides that an institutional head "may" order that an inmate be confined in administrative segregation if the institutional head has reasonable grounds to believe that the criteria justifying segregation are met and there are no reasonable alternative ways of addressing the safety or security risks that have been identified.

[220] Subsection 31(3) must, however, be read in the context of the Act as a whole. Subsection 4(g) identifies as one of CSC's guiding principles that correctional policies and practices be responsive to the special needs of persons requiring mental health care. More significantly, s. 87(a) requires CSC to take into consideration an offender's state of health and health care needs in all decisions affecting the offender including decisions relating to administrative segregation. (In s. 87(a), "health care" includes mental health care and "offender" includes "inmate".) In short, the relevant provisions of the Act give the institutional head discretion to admit an inmate to segregation but require him or her, when exercising that discretion, to take into account the possible impact of segregation on the inmate's mental health. So interpreted, the Act requires an individualized assessment of whether an inmate's mental health needs are such that the inmate should not be placed in administrative segregation.

[221] As noted earlier, s. 19 of CD 709 sets out two categories of inmates with mental health challenges who must not be admitted to administrative segregation — inmates with a serious mental illness with significant impairment, and inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or an elevated or imminent risk for suicide. In my view, CD 709 does not operate to inhibit the exercise of discretion of the institutional head (or independent reviewer) under s. 31(3) of the Act to decline to place an offender who has been diagnosed with a mental illness or who is displaying symptoms consistent with an existing mental illness in administrative segregation, even if that mental illness is not captured by s. 19. CD 709 cannot have that effect because it is superseded by s. 87(a) of the Act, which requires CSC to consider the mental health of inmates in decisions relating to administrative segregation. In coming to this conclusion, I am fortified by the

similar interpretive approach taken by Marrocco A.C.J. in *Canadian Civil Liberties Assn.* (ONSC) at paras. 216–229, aff'd on this point 2019 ONCA 243 at paras. 62–66.

[222] Against this background, I turn to consider the findings of the trial judge.

[223] The trial judge found that administrative segregation has a discriminatory impact on mentally ill inmates, largely due to the vulnerability of those with mental illness to isolation. His concerns did not centre on the Act, but on the adequacy of CD 709 in protecting mentally ill inmates from exposure to solitary confinement, and the failure of CSC, in its practices, to adhere to safeguards designed to prevent the placement of vulnerable, mentally ill inmates in segregation and remove from segregation inmates whose mental health shows signs of deterioration. He found the definition of "serious mental illness with significant impairment" unclear and too narrow (at paras. 503, 508) without explaining what definition would be adequate. He expressed concern that "healthcare professionals", as defined in CD 709, may not always possess the qualifications necessary to determine whether a mental disorder exists and, if it does, whether segregation will be "unduly problematic" for the inmate (at para. 505). While he accepted that CSC policy "mandates considerable mental health monitoring" of inmates confined in segregation, he was "not persuaded that, in practice, the mental health care actually provided is sufficient to address the risk of psychological harm that arises from segregation" (at para. 303; emphasis added). He was not satisfied that CSC was following its own policy by conducting meaningful assessments of the mental health of segregated inmates (at para. 306). He accepted the evidence of Dr. Koopman that "the mere fact that assessments are required and performed does not necessarily mean that they are done adequately" (at para. 303).

[224] The judge concluded, based on these findings, that the confinement of mentally ill and/or disabled inmates in administrative segregation for any period of time has discriminatory impacts and is constitutionally impermissible. In reaching this conclusion, he went further than the Mandela Rules, which prohibit the solitary confinement of prisoners with mental or physical disabilities when their conditions would be exacerbated by the use of such a measure.

[225] I note, in passing, an issue that arose at the hearing of the appeal regarding the legal status of CDs. The parties did not address in argument whether CDs are mere administrative directives or whether they have the force of law. In response to a question from the Court in oral argument, the respondents, relying on *Martineau et al v. The Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118 at 129, conceded that CDs do not have the force of law. Whether *Martineau* remains good law on this issue in light of *Mercier v. Canada (Correctional Service)*, 2010 FCA 167, leave to appeal ref'd [2010] S.C.C.A. No. 331, was not addressed by either party, and their respective positions on this issue were not further developed. In the absence of focused argument on this issue, I am not inclined to decide the point in this case.

[226] The Attorney General correctly submits that the effect of paragraph 2(a) of the order is to require Parliament to amend the Act to prohibit absolutely the placement of any mentally ill and/or mentally disabled inmate in administrative segregation, regardless of the exigencies of the situation

and for any period of time, however short. The Attorney General points to evidence before the judge, apparently accepted by him, that 81% of offenders met the diagnostic criteria for at least one mental disorder in their lifetime, while 73% met the criteria for a current disorder (at para. 516(a)). Therefore, in rough terms, the judge's order prohibits reliance on administrative segregation in any circumstance for approximately three-quarters of the inmate population. The Attorney General argues that the "sweeping" nature of the declaration imperils institutional safety and security. As I see it, these factors could be relevant to whether the impugned provisions could be saved under s. 1, but the Attorney General has not sought to defend the s. 15 violations the judge found on s. 1 grounds. As a consequence, I do not view these arguments as being particularly helpful in this case.

[227] As noted earlier, the phrase "mentally ill and/or disabled" is not defined in the order and does not lend itself to precise definition. In oral argument, the respondents suggested that the phrase is exhaustively defined in the *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed. (Arlington, VA: American Psychiatric Association, 2013) ("DSM–5"). The DSM–5 exists to promote the diagnosis and treatment of mental health conditions. I take judicial notice of the fact that it lists close to 300 mental disorders, many of which have no obvious relevance to whether a placement in administrative segregation is contraindicated. I conclude that the DSM–5 is of limited utility in bringing clarity to the order.

[228] In my view, the order provides no guidance to the legislature on where the line should be drawn between inmates who are mentally ill and/or disabled and those who are not. Neither do the reasons. They do not, in this respect, facilitate the process of constitutional dialogue.

[229] The practical difficulties associated with the exercise of line-drawing in this context were highlighted in the parallel Ontario litigation. Associate Chief Justice Marrocco rejected a challenge to ss. 31–37 of the *CCRA*, concluding that the legislative scheme is capable of being administered in a way that does not result in the cruel or unusual treatment of mentally ill inmates. On appeal, the Court declined to interfere with this aspect of the order, while determining that administrative segregation beyond 15 consecutive days for any inmate did infringe s. 12. Writing for the court, Benotto J.A. said this:

> [38] With respect to inmates with mental illness, the application judge found that the existing legislative scheme and relevant Commissioner's Directives provide adequate protection because there are limits on placing inmates with mental illness in administrative segregation. Specifically, s. 87(a) of the Act requires the institutional head and the independent reviewer to consider the inmate's health, including the inmate's mental health, when making the decision to place or maintain the inmate in administrative segregation.
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> …
>
> [66] … In principle, I agree with the CCLA [Canadian Civil Liberties Association] that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness — at least until the court has the benefit of medical and institutional expert evidence to address meaningful guidelines. This issue therefore remains to be determined another day.

> [67] Based on the record as it presently exists, I would not therefore make the determination sought by the CCLA on this issue.
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> [Emphasis added.]

[230] While I appreciate that the nature of the challenge and the evidentiary record are different in this case, I am similarly of the view that neither the evidence nor the judge's analysis afford a meaningful way of identifying inmates who have a mental illness and/or disability of a kind that would render their confinement in administrative segregation for any period of time unconstitutional.

[231] The Attorney General says the judge erred by striking the legislation in circumstances where the impugned provisions, as applied to mentally ill inmates, are capable of being administered in a constitutional fashion, and that concerns arising in this context stem solely from the manner in which CSC has administered the Act. I agree with the Attorney General's position on this point. The judge's conclusion that the impugned laws fail to respond to the needs of mentally ill and/or disabled inmates and instead impose burdens in a manner that has the effect of perpetuating their disadvantage is a conclusory statement unsupported by any identification by the judge of how the impugned laws do so either on their face or in their necessary effect.

[232] I cannot, in any event, endorse the judge's analysis under s. 15 of the *Charter* in relation to the effect of the impugned laws on mentally ill inmates.

[233] While the judge accepted that the impugned provisions are facially neutral, he determined for the purposes of the first stage of the analysis that the impact of the law is to create a distinction based on an enumerated ground — mental disability.

[234] The second part of the analysis focuses on the discriminatory impact of the distinction (*Quebec (Attorney General) v. Alliance du personnel professionnel et technique de la santé et des services sociaux*, 2018 SCC 17 at para. 28). The question is whether the impugned laws impose burdens on members of the group in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage (*Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 20; *Alliance* at para. 25). The judge concluded that the second part of the test was met and that the respondents had established a breach of s. 15 (at para. 522).

[235] In my view, the judge erred by concluding, at the second stage of the s. 15 analysis, that the impugned provisions fail to respond to the actual capacities and needs of mentally ill inmates and instead impose burdens that have the effect of reinforcing, perpetuating or exacerbating their disadvantage.

[236] Read in context, the impugned provisions require individualized assessment of whether an inmate's mental health needs are such as to preclude resort to administrative segregation, even when the placement criteria set out in s. 31(3) of the Act are met. The individualized decision-making process required by the Act, while not determinative, does not readily permit a finding that the impugned provisions draw discriminatory distinctions (*Winko v. British Columbia*

(Forensic Psychiatric Institute), [1999] 2 S.C.R. 625 at 681–682). In my view, the impugned provisions do not have the effect of disadvantaging mentally ill inmates by creating discriminatory distinctions. Rather, the Act recognizes the unique vulnerabilities of mentally ill inmates. It promotes substantive equality by requiring an individualized decision-making process designed to shield particularly vulnerable inmates from exposure to the enhanced risks placement in administrative segregation entails. In my view, the impugned provisions do not draw discriminatory distinctions and do not violate s. 15 as applied to mentally ill inmates.

[237] As the judge found, there are too many examples of cases in which vulnerable inmates with severe mental illness have been inappropriately assessed and confined in administrative segregation. In some of those cases, tragic consequences have resulted. I agree with the Attorney General, however, that it has not been established that the impugned provisions violate the s. 15 rights of mentally ill and/or disabled inmates. Accordingly, I would set aside paragraph 2(a) of the order.

(c) Women

[238] The respondents did not seek a declaration in the court below that the impugned provisions of the *CCRA* discriminate against women inmates. The intervenor West Coast LEAF, endorsing the respondents' s. 15 arguments, made further submissions regarding the unique experiences of mentally ill and Indigenous women inmates in administrative segregation. Despite the fact that no such claim had been made, the trial judge determined that the evidence before him did not establish that the impugned provisions had discriminatory effects on women inmates.

[239] The question of whether the impugned provisions have discriminatory effects on women inmates is not before us on appeal. I do not wish, however, to be taken as endorsing the trial judge's conclusion on an issue that was neither pleaded nor argued before him. I shall say no more about it except to note that the issue, should it arise in future, remains to be determined on the basis of a full evidentiary record in circumstances where it has been pleaded and argued by the parties.

VIII. Remedy

1. The Positions of the Parties

[240] The Attorney General does not contest the judge's factual findings that CSC, in its administration of the impugned provisions, has engaged in practices which have violated the constitutional and legislated rights of individual inmates. The judge found that, in practice, CSC has failed to facilitate the right of inmates placed in administrative segregation to retain and instruct counsel without delay, and to do so in private. The judge also found that CSC, in its administration of the impugned provisions, has discriminated against Indigenous inmates. Further, he found that CSC has, in practice, failed to meaningfully apply safeguards designed to ensure that inmates with a mental illness and/or disability who are particularly vulnerable to the deprivations of solitary confinement are either not confined in administrative segregation or, if so confined, adequately monitored for

deteriorations in mental health and removed from administrative segregation in a timely way to prevent harm.

[241] The Attorney General submits, however, that as the respondents are corporate entities, there is no individual plaintiff whose *Charter* rights have been shown to have been infringed. The Attorney General points out that s. 24(1) of the *Charter* gives a court of competent jurisdiction the ability to grant a just and appropriate remedy to anyone whose rights have been infringed or denied. As s. 24(1) provides a personal remedy against unconstitutional government action that can be invoked only by a party alleging a violation of his or her own constitutional rights, the Attorney General submits that no s. 24(1) remedy is available in this case. The Attorney General's position on this point was accepted by Marrocco A.C.J. in *Canadian Civil Liberties Assn.* (ONSC) at paras. 15–22.

[242] In his factum, the Attorney General argued that to obtain a remedy under s. 24(1) a segregated inmate must bring his or her own individual action and adduce evidence to establish that CSC has breached his or her *Charter* rights. The court would then have to apply *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 55–58, to determine whether a decision relating to administrative segregation reflects a proportionate balancing of the *Charter* rights and values at play. In oral argument, and in response to questions from the Court, the Attorney General conceded that where, as here, a superior court judge has concluded that an administrative body has engaged in conduct reflecting a systemic violation of constitutional rights, the judge could grant a declaration that the administrative body breached its obligations under the Act or the *Charter*. The Attorney General submits, however, that such relief could not be granted to the respondents, as public interest standing litigants, under s. 24(1) of the *Charter*.

[243] The respondents submit that the s. 52(1) declaration of invalidity should not be disturbed. In the alternative, should the Court find that the wrongs identified by the court below arose as a consequence of the systemic misapplication of constitutionally valid laws, the respondents submit they are either entitled to relief under s. 24(1) or to a declaration that CSC has applied the legislation in a way that violates the *Charter* without relying on s. 24(1). They argue there is no principled reason to deny a corporate party with public interest standing the ability to obtain appropriate relief when challenging state action, rather than legislation, and that a "formalistic" approach to the issue would, for practical purposes, leave segregated inmates without an effective remedy.

[244] The respondents further argue that the case law does not establish that s. 24(1) remedies can only be claimed by parties with private interest standing or that s. 24(1) remedies are limited to personal remedies. To the contrary, the respondents submit the jurisprudence establishes that a remedy under s. 24(1) can be granted in favour of individuals who are not themselves parties to the action. In support of their position, the respondents rely on a number of authorities including *B.C./Yukon Association of Drug War Survivors v. Abbotsford (City)*, 2014 BCSC 1817, aff'd 2015 BCCA 142 (*"DWS"*); *Abbotsford (City) v. Shantz*, 2015 BCSC 1909; and *Fédération des parents francophones de Colombie-Britannique v. British Columbia (Attorney General)*, 2012 BCCA 422.

[245] I do not agree that these authorities decide that s. 24(1) remedies can be granted to a corporate entity with public interest standing.

[246] *DWS* dealt with an application to strike the plaintiff Association's amended notice of civil claim seeking relief under s. 24(1) on the basis that s. 24(1) can only be invoked by a party alleging a violation of that party's own constitutional rights. The Association had been granted public interest standing. The judgments in *DWS* only go so far as to decide that "it is not plain and obvious" that the Association could not seek a remedy under s. 24(1) in favour of individuals who were not parties to the action.

[247] Reasons for judgment in both the *DWS* action and a related action by the City of Abbotsford were delivered in *Shantz*. Chief Justice Hinkson said this:

> [265] Section 24(1) is a provision that exists to provide remedies. There is no principled basis upon which a litigant with public interest standing must necessarily be foreclosed from relief for state action under s. 24(1). This is certainly true in circumstances where, as here, DWS [British Columbia/Yukon Association of Drug War Survivors] is made up of individuals who assert that their *Charter* rights have been infringed. …

Chief Justice Hinkson did not order any relief pursuant to s. 24(1), concluding that the appropriate remedy could be found under s. 52(1). *Shantz* does not purport to decide the issue. Further, the above-noted observations are *obiter*. They are not, in any event, binding on this Court.

[248] *Fédération* involved the application of the test for public interest standing in a particular context. The case does not purport to address the remedies that are or may be available to an organization granted public interest standing (*Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at 635).

[249] The intervenor Canadian Prison Law Association ("CPLA") submits that public interest standing litigants should be entitled to the same remedies that are available to parties who directly challenge *Charter*-infringing state conduct, including relief under s. 24(1). Unlike the respondents, CPLA concedes that, under the current state of the law, s. 24(1) provides for a personal remedy against unconstitutional government action and so, unlike s. 52(1), can only be invoked by a party alleging that their own constitutional rights have been violated (*R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295 at 313; *Ferguson* at para. 61).

[250] CPLA submits that this remedial gap — the unavailability of relief under s. 24(1) where public interest standing litigants challenge state conduct — is at odds with the development of the doctrine of public interest standing in Canada and, in particular, the principle of legality that lies at the centre of that doctrine. The principle of legality embraces two animating ideas — that state action should conform to the Constitution, and that there must be a practical and effective way to challenge the legality of state action (*Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at paras. 31–34).

[251] CPLA submits that the liberal and generous approach that characterizes public interest standing issues as reflected in *Canadian Council of Churches v. Canada (Minister of Employment and*

Immigration), [1992] 1 S.C.R. 236, should also be the lens through which the scope of the remedial provisions under s. 24(1) is construed. CPLA submits that adopting a generous and liberal approach to the interpretation of s. 24(1) would promote consistency between these two areas of the law. In support of its position, CPLA relies on *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, where it was held that the generous and expansive approach to the interpretation of *Charter* rights is equally applicable to *Charter* remedies:

> 25 Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach" ([*R. v. 974649 Ontario Inc.*, 2001 SCC 81 ("*Dunedin*")] at paras. 19-20). A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.
>
> [Emphasis in original.]

[252] CPLA submits that revisiting the circumstances in which s. 24(1) relief can be provided is justified because significant developments in the law of public interest standing either raise new legal issues that require reconsideration, or give rise to a change in circumstances that fundamentally shifts the parameters of the debate (*Bedford* at paras. 43–45).

[253] I cannot agree that the respondents are entitled to relief under s. 24(1). The nature and extent of remedies available under s. 24(1) remain limited by the words of the section itself (*Doucet-Boudreau* at para. 50). Accepting the position of the respondents and CPLA would require the Court to ignore the text of s. 24(1). We cannot do this.

[254] Does this mean that no relief can be granted because the respondents are public interest standing litigants? I say the answer to this question is "No". A superior court judge has inherent jurisdiction to grant a declaration that legislation is being applied in a way that violates the *Charter* without relying on s. 24(1). It is to that issue I now turn.

2. Discussion

[255] It is often convenient to think of *Charter* remedies as falling under either s. 24(1) (commonly referred to as "individual remedies") or s. 52(1) (commonly referred to as "declarations of invalidity"). The reality, however, is rather more complex. While both s. 24(1) and s. 52(1) play important roles in the law of *Charter* remedies, they do not constitute a comprehensive code.

[256] To begin with, it is important to recognize that neither s. 24(1) nor s. 52(1) serves as a source of jurisdiction to grant remedies. The point, with respect to s. 24(1), was made by Wilson J. in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 222:

> Section 24(1) of the *Charter* provides remedial powers to "a court of competent jurisdiction". As I understand this phrase, it premises the existence of jurisdiction from a source external to the *Charter* itself.
>
> [Emphasis added.]

[257] Section 52(1) requires courts to refuse to apply laws that are unconstitutional. The same requirement applies to administrative tribunals that have the power to decide issues of law (see *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54; *R. v. Conway*, 2010 SCC 22). Section 52(1) does not, however, confer on a court or tribunal the power to make a formal declaration that a statute is unconstitutional, thus striking it down (see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 at 17). Such a power derives not from s. 52, but instead from the inherent jurisdiction of superior courts, or from the statutory authority given to such bodies as the federal courts and the provincial appellate courts (*R. v. Lloyd*, 2016 SCC 13 at para. 15).

[258] The question to be asked in respect of the declarations sought by the respondents, therefore, is not whether jurisdiction to grant them derives from s. 24(1) or s. 52(1), but rather, more simply, whether the Supreme Court had jurisdiction to grant the remedy.

[259] Superior courts have inherent jurisdiction to grant declaratory relief (*Shuswap Lake Utilities Ltd. v. Mattison*, 2008 BCCA 176 at para. 45). Declaratory relief is a discretionary remedy that is available without a cause of action and whether or not any consequential relief (such as damages) is sought (*Ewert v. Canada*, 2018 SCC 30 at para. 81; *Supreme Court Civil Rules*, R. 20-4). The test for granting declaratory relief was recently summarized in *Ewert* at para. 81:

(a) The court has jurisdiction to hear the issue;

(b) The dispute is real and not theoretical;

(c) The party raising the issue has a genuine interest in its resolution; and

(d) The responding party has an interest in opposing the declaration being sought.

[260] An important consideration in determining the exercise of the discretion is whether an adequate alternative remedy exists (*Shuswap Lake* at para. 51, citing *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at 87, *per* La Forest J.).

[261] Declaratory relief was first recognized as a remedy against government action in the landmark English decision of *Dyson v. Attorney-General,* [1911] 1 K.B. 410 (C.A.). The plaintiff brought an action against the Attorney General alleging that a tax notice issued by the Commissioners of Inland Revenue was unauthorized and illegal and seeking a declaration that he was not obliged to comply. The Court of Appeal allowed the plaintiff's appeal from an order striking out the action, observing that the action for declaratory relief could provide "speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials" (*per* Farwell L.J. at 423). In *Kourtessis*, La Forest J. noted that *Dyson* "signalled the awareness in the courts of the utility of the declaration as a remedy for contesting Crown actions" (at 85–86).

[262] The issue of whether a superior court can rely on its inherent jurisdiction to declare the conduct of state actors unconstitutional appears to be one that has attracted scant post-*Charter* judicial

attention. I do note, however, that in *McCann* a declaration was granted that the circumstances in which inmates were confined in administrative dissociation amounted to cruel and unusual treatment or punishment contrary to s. 2(b) of the *Canadian Bill of Rights*.

[263] It is true that declaratory relief in *Charter* matters has generally been granted either by a superior court, in reliance on s. 52(1) of the *Constitution Act, 1982*, or by a court granting individual remedies under s. 24(1) of the *Charter.* The parties did not refer us, however, to any case that suggests that a superior court's general jurisdiction to grant a declaration is in some way diminished by the existence of s. 24(1).

[264] The parties also did not refer us to any case in which a declaration that government action violated the *Charter* was granted other than pursuant to s. 24(1). However, while it is not determinative of the issue, *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, may be read as providing some support for the notion that declaratory relief against unconstitutional government action may be available at common law, independent of s. 24(1). In that case a group of organizations and unions appealed from an order striking out their statement of claim as disclosing no reasonable cause of action. They alleged that a federal cabinet decision to permit the United States to test cruise missiles in Canadian territory infringed the s. 7 rights of themselves, their members, and all Canadians, and sought, *inter alia*, a declaration that the decision was unconstitutional. Justice Wilson, concurring in the result, found that the facts alleged did not disclose a reasonable cause of action under s. 24(1), a cause of action for declaratory relief at common law on the principle of *Dyson v. Attorney-General*, or a cause of action under s. 52(1) for a declaration of invalidity. The majority dismissed the appeal on the basis that the link between the cabinet decision and the alleged s. 7 violation was merely speculative (at 447–48). Chief Justice Dickson stated at 450:

> I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief — whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law — they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter*.
>
> [Emphasis added.]

Thus, the Court in *Operation Dismantle* proceeded on the footing that there is a common law basis for a declaration that government action violates the *Charter*.

[265] In my view, the availability of declaratory relief where government action is found to violate the *Charter* provides an important residual remedy where, as here, relief under s. 24(1) is unavailable. It would give effect to the goal of providing remedies for *Charter* violations. In addition, it is important to recognize the emergence of public interest standing litigation in the *Charter* context, and the principle of legality that has driven this development in the law, by giving public interest standing litigants access to a broad array of remedial options. This should include the ability of public interest standing litigants to obtain, on behalf of individuals adversely impacted by government action — individuals who are often ill-positioned to bring their own lawsuits — declaratory relief that particular state conduct violates the *Charter*.

[266] Consistent with the positions advanced by the parties on appeal, I conclude that a superior court judge has inherent jurisdiction at common law to grant a public interest standing litigant declaratory relief that state conduct against a non-party violates the *Charter*.

[267] There is also practical utility in granting some declaratory relief in this case. The remedy will provide practical guidance and should bring about salutary changes to the way in which CSC has discharged its legislated and constitutional responsibilities in applying the administrative segregation provisions of the Act.

[268] Courts of appeal are, of course, creatures of statute and do not have inherent jurisdiction (*Kourtessis* at 69–70). This Court does, however, have the power to make or give any order that could have been made or given by the court appealed from pursuant to s. 9(1)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

[269] In the result, I would make a declaration that CSC has, in its administration of the impugned provisions, breached its obligation under ss. 31–33 and 87(a) of the Act to give meaningful consideration to the health care needs of mentally ill and/or disabled inmates before placing or confirming the placement of such inmates in administrative segregation.

[270] I would also make a declaration that CSC has breached its obligation under s. 97(2) of the *CCRR* to ensure that inmates placed in administrative segregation are given a reasonable opportunity to retain and instruct counsel without delay and to do so in private.

[271] If this case involved an inmate in administrative segregation who was being denied the right to counsel at a review hearing, that inmate would clearly be entitled to a remedy under s. 24(1) of the *Charter*. For the reasons given, the respondents are entitled to a declaration that inmates confined in administrative segregation have a constitutional right to be represented by counsel at segregation review hearings and that CSC has infringed the rights of segregated inmates who have been denied such representation.

[272] As noted earlier, the Attorney General conceded that, in its administration of the impugned provisions, including by its adoption of certain undefined procedures, CSC has discriminated against Indigenous inmates. I accept that concession without hesitation, as I do the trial judge's finding that CSC can "do better" to reduce reliance on administrative segregation for Indigenous inmates. I would not, however, make a specific declaration in relation to this issue. The declarations that have been granted are designed to provide practical guidance to the end of bringing about salutary changes in the way CSC administers the *CCRA* and *CCRR*. To accomplish this goal, declarations should, as a general rule, identify the offending practice with sufficient particularity to permit the implementation of remedial measures. Neither the trial judge nor the Attorney General in his concession identified how CSC, in applying the impugned provisions, has discriminated against Indigenous inmates or otherwise breached its statutory obligations in relation to Indigenous inmates. I am unable to discern the precise basis upon which either the trial judge's findings or the Attorney General's concession rests. In these

circumstances, any declaration this Court could grant would necessarily be vague. It would not assist CSC in devising remedial measures and, apart from giving a form of judicial expression to the Attorney General's concession, would serve no useful purpose.

IX. Costs

[273] The trial judge awarded the respondents special costs. I would not interfere with that award. Even though the Attorney General's appeal has been allowed in part, the respondents have, in my view, been substantially successful on appeal. The respondents seek special costs in relation to the appeal on a full indemnity basis. The circumstances in which special costs may be awarded to a successful party in public interest litigation were addressed in *Carter* at paras. 140–41:

> [140] … First, the case must involve matters of public interest that are truly exceptional. It is not enough that the issues raised have not previously been resolved or that they transcend the individual interests of the successful litigant: they must also have a significant and widespread societal impact. Second, in addition to showing that they have no personal, proprietary or pecuniary interest in the litigation that would justify the proceedings on economic grounds, the plaintiffs must show that it would not have been possible to effectively pursue the litigation in question with private funding. In those rare cases, it will be contrary to the interests of justice to ask the individual litigants (or, more likely, pro bono counsel) to bear the majority of the financial burden associated with pursuing the claim.
>
> [141] Where these criteria are met, a court will have the discretion to depart from the usual rule on costs and award special costs.

[274] In my view, the criteria set out in *Carter* are present here. This case involved important and unresolved questions of broad public interest that are truly exceptional. The respondents have no personal or pecuniary interest in the litigation and it would not have been possible to pursue the litigation with private funding. It is contrary to the interests of justice to ask the respondents (or their counsel) to bear the financial burden associated with pursuing the litigation. In the result, I would depart from the usual rule and award the respondents special costs of the appeal on a full indemnity basis.

X. Suspension of the Declaration of Invalidity

[275] As noted earlier, the Court has already granted a conditional suspension of the declarations of constitutional invalidity issued by the trial judge. The suspension expires on June 28, 2019. The declarations made in this judgment will be suspended on the same terms, including the expiry date.

XI. Conclusion

[276] For the foregoing reasons, I would allow the appeal in part. I would not disturb paragraphs 1(a), (b) or (c) of the order made by the trial judge and would affirm his declaration that ss. 31–33 and 37 of the *CCRA* are of no force and effect because those provisions authorize: (a) the prolonged, indefinite administrative segregation of inmates; (b) institutional heads to sit in review of their own segregation decisions; and (c) the internal review of segregation decisions. I would set aside paragraph 1(d) of the order striking down the impugned provisions because they do not expressly confer upon inmates the right to counsel at segregation review hearings. It was unnecessary for the

judge to strike the legislation on this account in circumstances where a declaration of constitutional rights and corresponding institutional obligations provides an adequate remedy. I would also set aside paragraph 2 of the order declaring the impugned provisions to be invalid on s. 15 grounds: (a) to the extent that they authorize any period of administrative segregation for mentally ill and/or disabled inmates; and (b) to the extent that they authorize a procedure that results in discrimination against Indigenous inmates.

[277] For the reasons given, I would make the declarations set out in paragraphs 269–71.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Willcock"

APPENDIX 1

Corrections and Conditional Release Act, S.C. 1992, c. 20

…

Part I

Institutional and Community Corrections

…

Purpose and Principles

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.

…

Principles that guide Service

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

…

(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;

…

(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;

…

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.

Presence of inmate

(2) A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless

(a) the inmate is voluntarily absent;

(b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

(c) the inmate seriously disrupts the hearing.

…

Visits to inmate

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

Idem

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

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) limitations specific to the administrative segregation area, or

(ii) security requirements.

…

General — Living Conditions

…

Cruel treatment, etc.

69 No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.

Living conditions, etc.

70 The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

…

Assembly and association

73 Inmates are entitled to reasonable opportunities to assemble peacefully and associate with other inmates within the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

…

Health Care

Definitions

85 In sections 86 and 87,

health care means medical care, dental care and mental health care, provided by registered health care professionals; (*soins de santé*)

mental health care means the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to recognize reality or the ability to meet the ordinary demands of life; (*soins de santé mentale*)

treatment means health care treatment. (*Version anglaise seulement*)

…

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.

…

Rules

97 Subject to this Part and the regulations, the Commissioner may make rules

(a) for the management of the Service;

(b) for the matters described in section 4; and

(c) generally for carrying out the purposes and provisions of this Part and the regulations.

Commissioner's Directives

98 (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.

Accessibility

(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.

APPENDIX 2

Corrections and Conditional Release Regulations, SOR/92-620

…

Part I

Corrections

…

Administrative Segregation

19 Where an inmate is involuntarily confined in administrative segregation, the institutional head or a staff member designated in accordance with paragraph 6(1)(c) shall give the inmate notice in writing of the reasons for the segregation within one working day after the inmate's confinement.

20 Where an inmate is involuntarily confined in administrative segregation by a staff member designated in accordance with paragraph 6(1)(c), the institutional head shall review the order within one working day after the confinement and shall confirm the confinement or order that the inmate be returned to the general inmate population.

21 (1) Where an inmate is involuntarily confined in administrative segregation, the institutional head shall ensure that the person or persons referred to in section 33 of the Act who have been designated by the institutional head, which person or persons shall be known as a Segregation Review Board, are informed of the involuntary confinement.

(2) A Segregation Review Board referred to in subsection (1) shall conduct a hearing

(a) within five working days after the inmate's confinement in administrative segregation; and

(b) at least once every 30 days thereafter that the inmate remains in administrative segregation.

(3) The institutional head shall ensure that an inmate who is the subject of a Segregation Review Board hearing pursuant to subsection (2)

(a) is given, at least three working days before the hearing, notice in writing of the hearing and the information that the Board will be considering at the hearing;

(b) is given an opportunity to be present and to make representations at the hearing; and

(c) is advised in writing of the Board's recommendation to the institutional head and the reasons for the recommendation.

22 Where an inmate is confined in administrative segregation, the head of the region or a staff member in the regional headquarters who is designated by the head of the region shall review the inmate's case at least once every 60 days that the inmate remains in administrative segregation to determine whether, based on the considerations set out in section 31 of the Act, the administrative segregation of the inmate continues to be justified.

23 Where an inmate is voluntarily confined in administrative segregation by a staff member designated in accordance with paragraph 6(1)(c), the institutional head shall review the order within one working day after the confinement and shall confirm the confinement or order that the inmate be returned to the general inmate population.

Inmate Discipline

Independent Chairpersons

24 (1) The Minister shall appoint

(a) a person, other than a staff member or an offender, who has knowledge of the administrative decision-making process to be an independent chairperson for the purpose of conducting hearings of serious disciplinary offences; …

…

Living Conditions

…

Access to Legal Counsel and Legal and Non-Legal Materials

97 (1) …

(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

(a) is placed in administrative segregation; or

(b) is the subject of a proposed involuntary transfer pursuant to section 12 or has been the subject of an emergency transfer pursuant to section 13.

(3) The Service shall ensure that every inmate has reasonable access to

(a) legal counsel and legal reading materials;

APPENDIX 3

Commissioner's Directive 709, "Administrative Segregation" (2017)

PURPOSE

- To ensure administrative segregation is only used for the shortest period of time necessary, when there are no reasonable and safe alternatives
- To ensure that the administrative segregation of an inmate occurs only when specific legal requirements are met and that restrictions are based on the least restrictive requirements to meet the objectives of the Corrections and Conditional Release Act
- To ensure a fair, reasonable and transparent decision-making process based on a review of all relevant information
- To contribute to the safety of staff and inmates and to the security of the institution by providing a safe and humane administrative segregation process
- To ensure that vulnerable offenders are not placed in administrative segregation, except in exceptional circumstances

…

RESPONSIBILITIES

…

8. The Institutional Head will:
    a. be the decision maker for the admission to, maintenance in, and release from administrative segregation in accordance with sections 31-37 of the CCRA
    b. ensure an Institutional Segregation Review Board (ISRB) is in place

c. chair the 30-day ISRB and subsequent institutional reviews

d. when absent, designate, through a Standing Order, a staff member not below the level of Correctional Manager who will have the authority to admit an inmate to administrative segregation pursuant to subsection 31(3) of the CCRA

e. ensure that the least restrictive measures are applied to any circumstance of an inmate placed in segregation

f. ensure that inmates are released from segregation at the earliest appropriate time

g. visit the segregation unit on a daily basis. Outside regular business hours, if the Institutional Head is not present in the institution, this responsibility must be performed by a staff member who is designated by the Institutional Head, through a Standing Order, as being in charge of the penitentiary. This visit consists of viewing all areas of the segregation unit, including program and/or recreation areas, and inspecting the conditions of confinement for each inmate. The visit and any notable observations and actions taken will be logged in the Segregation Log (CSC/SCC 0218)

h. when not present in the institution during business hours, ensure the highest authority on that day completes the segregation unit visit, documents any complaints or non-compliance in writing to the Institutional Head and documents the visit and any notable observations and actions taken in the Segregation Log (CSC/SCC 0218)

i. ensure that all decisions regarding administrative segregation are documented and:

i. clearly detail the information being relied upon and include an explanation of why that information is credible and persuasive

ii. clearly detail why an admission or a continued placement in administrative segregation is necessary and the least restrictive measure

iii. fully consider and address the inmate's verbal or written submissions

iv. consider the inmate's mental health needs, gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women and Aboriginal peoples

j. meet with any inmate in administrative segregation at the inmate's request and document the meeting in the Segregation Log (CSC/SCC 0218).

9. The Deputy Warden will chair the fifth-working-day Institutional Segregation Review Board.

…

INMATES NOT ADMISSIBLE TO ADMINISTRATIVE SEGREGATION

19. The following inmates will not be admitted to administrative segregation:

a. inmates with a serious mental illness with significant impairment, including inmates who are certified in accordance with the relevant provincial/territorial legislation

b. inmates actively engaging in self-injury which is deemed likely to result in serious bodily harm or at elevated or imminent risk for suicide.

20. Inmates admitted to administrative segregation who are subsequently identified as falling within paragraph 19a and/or b will be released from administrative segregation and managed in accordance with CD 843 – Interventions to Preserve Life and Prevent Serious Bodily Harm.

21. An inmate may be admitted or readmitted to administrative segregation pursuant to section 31 of the CCRA only after discontinuation of the observation level in accordance with CD 843 – Interventions to Preserve Life and Prevent Serious Bodily Harm. All health considerations will be documented in the segregation admission screen of the Offender Management System (OMS).

22. Unless exceptional circumstances exist, the following inmates will not be admitted to administrative segregation:

    a. pregnant inmates

    b. inmates with significant mobility impairment

    c. inmates in palliative care.

…

25. If the inmate has been identified as having a serious mental illness with significant impairment, the OMS Serious Mental Illness with Significant Impairment Alert will be activated by a health care professional. The alert will be managed in accordance with OMS guidelines.

26. Inmates not admissible to administrative segregation per paragraph 19a and b will be identified by a health care professional, or in their absence, by the following processes:

    a. determination of whether the inmate has an OMS Serious Mental Illness with Significant Impairment Alert activated

    b. immediate concerns identified after completion of the Immediate Needs Checklist – Suicide Risk (CSC/SCC 1433e)

    c. the inmate is actively engaging in self-injury that is deemed likely to place them at risk for serious bodily harm.

ADMISSION

27. Pursuant to Annex B of GL 709-1 – Administrative Segregation Guidelines, the Administrative Segregation Assessment Framework, including the Segregation Assessment Tool (SAT), must be completed prior to an admission to administrative segregation.

28. Before an inmate is admitted to administrative segregation, consultation will normally occur with the members of the Case Management Team to ensure that the admission is justified and that all alternative options have been considered. Consultation will minimally include the Parole Officer and health care professionals and may also include the Elder, Chaplain, or other relevant staff as necessary.

29. Prior to the admission to administrative segregation, the case will be reviewed by a health professional to provide an opinion as to whether there are mental health issues that could preclude the inmate's placement in segregation or if a referral to Mental Health Services is appropriate. This review will be conducted pursuant to the Health Consultation and Assessment for Administrative Segregation Guidelines.

30. When an inmate is admitted to administrative segregation outside regular Health Services hours, the case will be reviewed by a health professional without delay.

31. Pursuant to CD 843 – Interventions to Preserve Life and Prevent Serious Bodily Harm, the Immediate Needs Checklist – Suicide Risk (CSC/SCC 1433e) will be completed in OMS prior to admission to administrative segregation.

…

33. Without delay, upon admission to administrative segregation, an inmate will be:

    a. informed of their right to legal counsel pursuant to subsection 97(2) of the CCRR and given an opportunity to contact counsel

    b. informed that they may submit complaints and grievances about administrative segregation, conditions of confinement and treatment pursuant to section 90 of the CCRA and sections 74-82 of the CCRR

c. provided with a copy of the Administrative Segregation Handbook for Inmates

d. informed that arrangements for an interpreter will be made if they do not speak or understand either official language or have a disability that requires the use of an interpreter

e. informed of the right to have access to a Chaplain/Elder/Spiritual Advisor while in segregation, as well as to spiritual practices

f. informed of the right to engage an advocate to assist with the institutional segregation review process in the case of inmates who have been identified as having functional challenges related to mental health

g. informed of the right to have access to organizations, including but not limited to the Office of the Correctional Investigator of Canada, Citizen Advisory Committee, Canadian Association of Elizabeth Fry Societies and John Howard Society

h. informed of their right to access programs, services and visits, unless restrictions are required, while in administrative segregation.

34. The Administrative Segregation Admission screen will be completed in OMS at the time of an inmate's admission to administrative segregation. The inmate will be notified in writing of the reasons for the admission to administrative segregation within one working day of admission pursuant to section 19 of the CCRR (as outlined in Annex B of GL 709-1 – Administrative Segregation Guidelines).

…

38. Following an inmate's admission to administrative segregation, a Parole Officer will meet with the inmate within two working days to discuss reintegration options.

CONDITIONS OF CONFINEMENT

39. In addition to subsection 83(2) of the CCRR, all inmates admitted to and maintained in administrative segregation will be provided with:

a. immediately upon admission, their personal property items related to hygiene, religion and spirituality, medical care and non-electronic personal items (e.g. photographs, phone cards, phone book), subject to safety and security concerns in accordance with section 37 of the CCRA

b. their remaining personal property items within 24 hours of admission to administrative segregation, subject to safety and security concerns in accordance with section 37 of the CCRA

c. the opportunity to be out of their cell for a minimum of two hours daily, including the opportunity to exercise for at least one hour every day outdoors, weather permitting, or indoors where the weather does not permit exercising outdoors (this includes weekends and holidays)

d. the opportunity to shower each day, including weekends and holidays. This time is not included in the minimum two hours out of the inmate's cell in accordance with paragraph 39c.

FIRST-WORKING-DAY REVIEW

40. When an inmate is admitted to administrative segregation outside regular business hours:

a. the Institutional Head will review the admission decisions made by a delegate within one working day to either confirm the admission or order the release from administrative segregation. Consideration of the inmate's Aboriginal social history, mental health and health care needs, including specific consideration of available mental health treatment options, must be addressed in the decision to either maintain or release. The inmate will be provided with a copy of the Institutional Head's decision within two working days

b. consultation with the Case Management Team, including the Elder, Chaplain or other relevant staff where feasible, will occur prior to finalizing the

first-working-day review.

INSTITUTIONAL SEGREGATION REVIEW BOARD

41. In accordance with paragraph 21(2)(a) of the CCRR, the Institutional Segregation Review Board (ISRB) will conduct a hearing within five working days after the inmate's admission or following any readmission to administrative segregation.

42. If the inmate remains in administrative segregation after the fifth-working-day review, the Parole Officer, in consultation with other Case Management Team members, will develop a Reintegration Action Plan (RAP) within 10 working days that will be consistent with the inmate's Correctional Plan and outlines actions to be taken to safely release the inmate from administrative segregation at the earliest appropriate time, and to monitor and support the inmate following their release from administrative segregation. The RAP will consider the inmate's individual static and dynamic factors, including mental health, Aboriginal social history, and physical well-being (as outlined in GL 709-1 – Administrative Segregation Guidelines).

43. In accordance with paragraph 21(2)(b) of the CCRR, the ISRB will conduct a hearing within 30 calendar days of the inmate's admission. Subsequent hearings will be held at least once every 30 calendar days from the date of the last 30-day review.

44. Prior to all ISRBs, the Parole Officer will consult with health care professionals to obtain information on any health issues that may impact the inmate's segregation status and how their health needs can be accommodated. The outcome of the consultation will be considered and documented in the ISRB recommendation.

45. A mental health professional, or Mental Health Clinician under the supervision of a mental health professional, must be present as a permanent member of the ISRB to provide advice and expertise regarding mental health interventions, as required. The mental health professional will only provide their opinion as to the impact on the inmate of their placement or continued placement in administrative segregation.

46. The ISRB will be chaired by:

    a. the Deputy Warden, for the fifth-working-day review

    b. the Institutional Head, for the 30-day review and all subsequent institutional reviews. The 30-day review can be delegated to the Deputy Warden with the approval of the Regional Deputy Commissioner. This delegation will be provided in writing to the Institutional Head. Delegation will only be on an as needed basis.

…

49. The inmate will receive notification in writing at least three working days – or any shorter period to which the inmate has consented – prior to the date and time of each Institutional Segregation Review Board hearing that will include:

    a. a copy of any information to be addressed in the review, including that which has not previously been shared

    b. a gist of any information that is withheld pursuant to subsection 27(3) of the CCRA and CD 701 – Information Sharing, and has not been previously shared

    c. Commissioner's Directives and Institutional Standing Orders that are related to the hearing, at the inmate's request

    d. notification of the opportunity to make verbal or written representation to the ISRB.

…

51. The inmate and their advocate, where applicable, will be provided with a reasonable opportunity to present their case to the ISRB. The Chairperson will also solicit the opinion of all ISRB members in attendance.

…

53. Once the hearing has concluded, if required, the ISRB members will be afforded the opportunity to further discuss the case to facilitate their recommendation. The role of the Chairperson will be to facilitate the recommendation and ensure that procedural safeguards, policy and the law are respected. Unless the ISRB is satisfied that the inmate must be maintained in segregation pursuant to section 31 of the CCRA, the Board's recommendation must be to release the inmate from administrative segregation.

54. The ISRB will provide a written recommendation to the Institutional Head as to whether or not the inmate should be released from or maintained in administrative segregation.

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

56. The inmate will then be presented with the recommendation of the Institutional Segregation Review Board (ISRB) by the Institutional Head and informed that a final decision regarding their segregation status will be provided, in writing, within two business days. Nothing precludes the Institutional Head, as the final decision maker from sharing, with the inmate and other members of the ISRB, their final decision at the time the inmate is presented with the ISRB recommendation.

57. If the Institutional Head does not intend to accept the ISRB recommendation to release the inmate or when the inmate has requested that the administrative segregation placement be continued and the Institutional Head does not intend to grant the request, the Institutional Head must personally meet with the inmate as soon as practicable to explain the reasons for the decision. The inmate will be given an opportunity to respond in person or in writing.

58. The Institutional Head must consider the inmate's state of mental and physical health and health care needs when making segregation decisions. These considerations are to be documented in all decisions and a plan must be developed to address health care needs.

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

…

61. Cases will be reviewed at any time when the ISRB receives new reliable information that challenges the reasons for the inmate's placement in segregation.

…

REGIONAL SEGREGATION REVIEW BOARD

63. All regional reviews will be based on the total accumulated days in segregation – continuous status pursuant to Annex D of GL 709-1 – Administrative Segregation Guidelines.

64. The Regional Segregation Review Board (RSRB) will:

    a. review the case of every inmate who reaches 38 days in administrative segregation and review such cases at least once every 30 days thereafter. The RSRB will also review any case specifically referred to them to determine whether the administrative segregation of the inmate continues to be justified

    b. consider the inmate's Aboriginal social history, gender considerations, state of mental and physical health and health care needs, including available mental health treatment options

c. provide its recommendation on the justification of the continued placement of the inmate in administrative segregation to the Regional Deputy Commissioner.

65. The Regional Deputy Commissioner will:

a. review the case of every inmate who reaches 40 days and that has been reviewed by the RSRB to determine whether the administrative segregation of the inmate continues to be justified

b. consider the inmate's Aboriginal social history, gender considerations, state of mental and physical health and health care needs, including available mental health treatment options

c. provide the inmate with a written copy of the Board's review, including information about the grievance process, within five working days of the review and may direct the Institutional Head to take action in order to resolve the inmate's segregation status, including reviewing the inmate's case for transfer, if necessary.

NATIONAL LONG-TERM SEGREGATION REVIEW COMMITTEE

66. The Senior Deputy Commissioner will chair the National Long-Term Segregation Review Committee (NLTSRC) which will be comprised of the following members:

a. Director General, Security Branch, or delegate

b. Director General, Mental Health, or delegate

c. Director General, Offender Programs and Reintegration, or delegate

d. Director General, Women Offender Sector, or delegate

e. Director General, Aboriginal Initiatives Directorate, or delegate

f. Assistant Deputy Commissioner, Correctional Operations, and/or Assistant Deputy Commissioner, Integrated Services, of all regions

g. other ad hoc members as required.

67. Prior to each meeting, National Headquarters will provide NLTSRC members with the list of inmates for review.

68. The National Long-Term Segregation Review Committee will:

a. review the case of every inmate who reaches 60 days in administrative segregation, and will review such cases at least once every 30 days thereafter

b. review the case of every inmate who has reached 4 placements in a calendar year or 90 cumulative days in a calendar year, and will review such cases at least once every 30 days thereafter

c. consider the inmate's Aboriginal social history, gender considerations, state of mental and physical health and health care needs, including available mental health treatment options

d. provide the inmate with a written copy of the Committee's review, including information about the grievance process, within five working days of the review.

69. The Senior Deputy Commissioner may direct the Institutional Head to take action in order to resolve the inmate's segregation status.

HEALTH ASSESSMENTS AND SERVICES

70. The provision of regular health assessments, including mental health assessments, for inmates confined in administrative segregation includes the following obligations:

a. a health care professional must visit an inmate at the time of admission or without delay to establish if there are any health concerns

b. a mental health professional, or other mental health staff under the supervision of a mental health professional, must provide a written opinion on

the inmate's current mental health status, any noted deterioration of mental health and the appropriateness of a referral to Mental Health Services (if applicable) within the first 25 days of admission to administrative segregation and an assessment of current mental health status once every subsequent 60 days. This assessment is completed pursuant to the Health Consultation and Assessment for Administrative Segregation Guidelines

c. a health care professional must visit each inmate in administrative segregation daily, including on weekends and holidays

d. a health care professional will provide comments to the Institutional Segregation Review Board in regards to the physical/mental health of every inmate being presented to the Segregation Review Board.