CITATION: Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 ONSC 7491
COURT FILE NO.: CV-15-520661
DATE: 20171218

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION Applicant	)	*Jonathan C Lisus*, *Michael H Rosenberg*, *Larissa C Moscu*, *Paul J Davis*, *Charlotte-Anne Malischewski* and *Fahad Siddiqui*, for the Applicant
– and –	)	
HER MAJESTY THE QUEEN as represented by THE ATTORNEY GENERAL OF CANADA Respondent	)	*Peter Southey*, *Kathryn Hucal* and *Negar Hashemi,* for the Respondent
	)	**HEARD:** September 11,13,14 & 15, 2017

MARROCCO A.C.J.S.C.

Introduction

[1] When introduced 200 years ago, isolating inmates was a progressive development in Western prison management. It aimed to supplant practices such as the death penalty and limb amputations. The practice began in the 1820s in the United States where it was believed that the isolation of prisoners would aid in their rehabilitation. The idea was that the prisoners would spend their entire day alone, mostly within the confines of their cells and reflect on their transgressions.

[2] I take judicial notice of the fact that Canada's history of isolating prisoners originates with the *Penitentiary Act* of 1834.

[3] The applicant seeks a declaration that sections 31-37 of the *Corrections and Conditional Release Act,* which permit the Correctional Service of Canada to remove an inmate from the general population of inmates in a penitentiary for a non-disciplinary

reason (i.e. administratively segregate an inmate), are invalid because they infringe sections 7, 11 (h) and 12 of the *Charter of Rights and Freedoms*.

[4] The respondent presents isolating inmates in administrative segregation as an appropriate last resort for managing a difficult and dangerous prison population. The respondent maintains that instances where administrative segregation may have been applied in a manner that violated an individual's rights are cases of maladministration and do not demonstrate that the current legislative regime cannot be administered constitutionally.

[5] This application concerns only administrative segregation. Administrative segregation is distinct from segregation for a disciplinary infraction (i.e. disciplinary segregation). Disciplinary segregation is a sanction imposed at the end of a disciplinary proceeding for a serious offence. It results from a decision made by an Independent Chairperson. It is time limited and may not exceed 30 days for a single offence or 45 days for multiple offences. It is not the subject of this application.

Housekeeping

[6] This proceeding was started by the Corporation of the Canadian Association of Civil Liberties and the Canadian Association of Elizabeth Fry Societies on January 27th, 2015.

[7] The Canadian Association of Elizabeth Fry Societies filed a Notice of Discontinuance of its role as an applicant in this proceeding on February 29th, 2016. As a result, the style of cause has been amended on consent to reflect that it is no longer a party.

[8] The remaining applicant is the Corporation of the Canadian Civil Liberties Association, a national organization established in 1964 to protect and promote respect for and observance of fundamental human rights and civil liberties.

[9] After the close of arguments, the applicant requested leave to submit four quotations from a joint report of the Correctional Investigator of Canada and the Ontario Child Advocate, released October 3rd, 2017. The respondent objected to the admission of the report both because the record was closed and because it was hearsay evidence.

[10] I agree with the respondent that the original submissions by the applicant highlight evidence consistent with evidence already in the record. Given the timing of this evidence, I do not have information on, and the applicant has not sought leave to submit, evidence on the source of the opinions in the report. There has been no cross examination.

[11] The use I make of this report is limited: It confirms that the appropriate management of inmates using administrative segregation continues to be a contentious issue in Canada.

[12] The applicant filed service of a Notice of Constitutional Question on the Attorney General of Ontario and entered it as an exhibit.

Applicant's standing

[13] The applicant claims public interest standing. In accordance with the test laid out in *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General),* 2012 SCC 45, 2 S.C.R. 524, it asserts that the challenge to the legislative authorization for solitary confinement is a serious justiciable issue; that as an advocate for civil liberties, it has a genuine interest in the outcome; and that this application is a reasonable and effective means of bringing the case given the difficulty inmates subjected to administrative segregation would have in bringing a court application that draws heavily on expert evidence.

[14] The respondent maintains that the applicant has standing only to ask for a declaration of invalidity pursuant to section 52(1) of the *Charter* and that such a declaration is only available, if the applicant establishes that the statutory scheme of the administrative segregation provisions of the *Corrections and Conditional Release Act* cannot be constitutionally administered.

The applicant cannot resort to section 24 (1) of the *Charter of Rights and Freedoms*

[15] The respondent cautions that public interest standing does not grant standing to seek a section 24(1) remedy.

[16] The respondent maintains that the applicant cannot bring a section 24 (1) *Charter* application, impugning the Correctional Service of Canada's past or present practice of administrative segregation, claiming that only a party alleging an infringement of its own *Charter* Rights can resort to section 24 (1).

[17] I accept the respondent's submissions in this regard.

[18] Apart from the plain meaning of the words used in section 24 (1) of the *Charter of Rights and Freedoms*; namely "Anyone whose rights or freedoms, as guaranteed by this *Charter* have been infringed or denied may apply…", the issue appears to have been addressed by the Supreme Court in *R v Ferguson,* 2008 SCC 6.1 SLR 96 In that case the accused, an RCMP officer, shot and killed a person held in a cell at an RCMP detachment and was convicted of manslaughter. Notwithstanding the mandatory minimum sentence required for manslaughter with a firearm the trial judge imposed a conditional sentence purporting to grant the accused a constitutional exemption from the mandatory minimum four-year sentence. A majority of the Court of Appeal overturned that sentence and the Supreme Court of Canada dismissed the accused's appeal of that decision.

[19] In dismissing the appeal, the Supreme Court of Canada had occasion to consider the remedial purposes of section 52 (1) and section 24 (1) of the *Charter*. The court held that the sections serve different remedial purposes: section 52(1) provides a remedy for laws that in purpose or effect violate *Charter* Rights; section 24(1) provides a personal remedy against unconstitutional government action and, unlike section 52(1), can only be

invoked by a party alleging a violation of that party's own constitutional rights. See para. 61.

[20] I am not persuaded by the applicant's submission that *Ferguson* is distinguishable on the basis that a *Charter* violation had not been established prior to requesting a section 24(1) remedy. Establishing a *Charter* violation is a crucial step in obtaining a remedy, but it is an entirely separate question from what remedy the applicant is entitled to seek.

[21] The Correctional Service of Canada's decision to place an inmate in segregation pursuant to the provisions of the *Corrections and Conditional Release Act* does not violate this applicant's constitutional rights.

[22] Accordingly, I am satisfied that the applicant does not have standing to ask for a section 24 (1) *Charter* remedy.

Canada's administration of the scheme cannot result in a declaration of invalidity

[23] The respondent opposes the applicant's claim that sections 31-37 of the *Corrections and Conditional Release Act* are invalid because of the Correctional Service of Canada's administration of those provisions.

[24] I agree with this submission.

[25] The Correctional Service of Canada's administration of the statutory scheme is not before the Court because even if the Correctional Service of Canada's administration of that scheme is flawless, Canada could not advance that flawless administration as a reason to refuse a declaration of invalidity pursuant to section 52(1) of the *Charter*.

[26] Individual cases of maladministration where Correctional Service of Canada personnel contravene Correctional Service of Canada policies and in so doing violate an inmate's *Charter* rights do not prove that the *Corrections and Conditional Release Act* is incapable of constitutional administration.

[27] The Supreme Court of Canada rejected the argument that a legislative scheme that is open to maladministration should be struck down in its entirety and found that Parliament is entitled to assume that its enactments "will be applied constitutionally" by the public service. See *Little Sisters Book and Art Emporium vs Canada (Minister of Justice),* 2000 SCC 69, 2 S.C.R. 1120, para. 71.

Previous scrutiny of administrative segregation

[28] Administrative segregation has been subjected to judicial scrutiny in Canada (e.g. *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440, 41 Alta. LR (6^{th}) 29; *Bacon v Surrey Pre-Trial Services Centre*, 2010 BCSC 805; 11 Admin LR (5th), *R v. Olson*, [1987] 62 O.R. (2d) 321, aff'd [1989] 1 S.C.R. 296).

[29] It has also been subject to various reviews. The Office of the Correctional Investigator has touched on administrative segregation. Two considerations of

administrative segregation occurred as part of the *Coroner's Inquest Touching the Death of Ashley Smith (Ashley Smith Inquest)* completed in 2013 and the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* by the Honourable Louise Arbour completed in 1996 (Arbour Commission).

[30] The Arbour Commission was established in response to an incident in the Prison for Women in Kingston. The initial incident was a violent assault on four correctional officers by a group of six inmates. The incident destabilized the institution; correctional officers refused orders from their superiors to unlock the range and protested, demanding the transfer of the assailants to another institution. The inmates were left in administrative segregation for an extended period.

[31] The Arbour Commission made wide-ranging recommendations on prison administration. Part of the recommendations were targeted specifically at the practice of segregation. These recommendations included, at p. 135:

- Ending the practice of long-term confinement in administrative segregation;
- Imposing a time limit on administrative segregation along the following lines;
    - if the existing statutory pre-conditions for administrative segregation are met, an inmate be segregated for a maximum of three days in response to an immediate incident;
    - after three days, a documented review take place, if further detention in segregation is contemplated the administrative review specifies what further period of segregation, if any, is authorised, up to a maximum of 30 days;
    - an inmate not spend more than 60 non-consecutive days in segregation in a year;
    - after 30 days or if the days served in segregation during that year approaches 60, the institution consider and apply other options not involving interaction with the general population and if these options prove unavailable, or the Correctional Service believes a longer period in segregation is required, the Service apply to a court for a determination of the necessity of further segregation;

[32] The *Ashley Smith Inquest* was a coroner's inquest into the death of an inmate by suicide while in segregation and in which guards were ordered not to intervene. In addition to making its required statutory findings, the jury delivered 104 recommendations aimed at preventing similar incidents. Those recommendations included:

- Abolishing indefinite solitary confinement;
- Prohibiting the practice of placing female inmates in conditions of long- term segregation which was defined as more than 15 days;

- Prohibiting placing an inmate in segregation for more than 60 days in a calendar year.

[33] Both reports recommended firm limits in administrative segregation subject to meaningful reviews.

International context

[34] The applicant seeks to assert an international norm against indefinite solitary confinement, against prolonged solitary confinement defined as more than 15 days and against any use of solitary confinement on inmates with mental illnesses and juveniles.

[35] These prohibitions are most clearly laid out in the Nelson Mandela Rules, a 2015 revision and renaming of the Standard Minimum rules for the Treatment of Prisoners. These Rules were approved by a United Nations General Assembly Resolution, GA Resolution 70/175.

[36] The applicant points to other statements such as the Istanbul Statement adopted by a panel of experts at the International Psychological Trauma Symposium in Istanbul in 2007.

[37] In 2013, the Inter-American Commission on Human Rights indicated that member states "must adopt strong, concrete measures to eliminate the use of prolonged or indefinite isolation under all circumstances", and stresses that this practice may never constitute a legitimate instrument in the hands of the State.

Canada practices solitary confinement as defined in the Mandela Rules

[38] Canada submitted that it did not practice what the Mandela Rules referred to as solitary confinement. Canada in its factum relied on the fact that prisoners were allowed out of their cell for more than two hours per day because the new Correctional Service of Canada policy permits a daily shower in addition to the two hours per day that segregating inmates are permitted out of their cells and because the policies permit daily meaningful contact.

[39] It is trite to observe that the Court is concerned with violations of the *Charter* and not with whether administrative segregation qualifies as solitary confinement under the international framework.

[40] More to the point, I do not accept the respondent's submission.

[41] The time spent taking a shower is a de minimis increase in the two hours per day that segregated inmates are allowed out of their cells. More importantly, the time spent locked down in a cell only partly describes the nature of segregation.

[42] Professor Mendez, who provided evidence submitted by the applicant and who, among his many accomplishments, was the United Nations Special Rapporteur on Torture until October 31, 2016, indicates in his 2011 Report to the United Nations General

Assembly that solitary confinement reduces meaningful social contact to an absolute minimum and that the resulting level of social stimulus is insufficient to allow the individual to remain in a reasonable state of mental health. He points out that research indicates that when individuals are deprived of a sufficient social stimulation they become incapable of maintaining an adequate state of alertness and attention to their environment. He states that, if this occurs for even a few days, brain activity shifts toward an abnormal pattern.

[43] This aspect of segregation is also addressed in Rule 44 of the Mandela Rules. Specifically, this Rule defines solitary confinement as confinement of a prisoner "for 22 hours or more a day without meaningful human contact."

[44] I recognize that an inmate in segregation will have perfunctory contact with Correctional Service of Canada staff. I am not persuaded by the evidence that this type of contact is "meaningful."

[45] Canada can take itself outside of the literature dealing with solitary confinement by changing the nature of the confinement in administrative segregation both in terms of the time that an inmate spends in his or her cell and the nature of the human contact that they have while segregated.

[46] However, until this happens, Canada is using administrative segregation to isolate prisoners in a way captured by the term solitary confinement as that term is defined in the Mandela Rules.

Application of The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)

[47] Professor Mendez, testified that the Mandela Rules are an authoritative interpretation of binding international rules including the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987).*

[48] When he was cross examined on his affidavit, Professor Mendez agreed with respondent's counsel that the Mandela Rules, themselves, however, are not binding international law because states have not agreed that the Mandela Rules will bind them.

[49] I am satisfied that the Mandela Rules do not bind Canada although I would point out that the respondent acknowledged in paragraph 96 of its factum that Canada participated in drafting these Rules.

The relevant Mandela Rules

[50] Rule 43 of the Mandela Rules provides in part as follows: "the following practices, in particular, shall be prohibited: (a) indefinite solitary confinement; (b) prolonged solitary confinement…"

[51] Rule 44 of the Mandela Rules provides: "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 period in excess of 15 days."

[52] Rule 45 of the Mandela Rules provides: "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…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…"

[53] The applicant submitted that a violation of the Mandela Rules was a violation of Canada's obligations under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987)* and a violation of Canada's international obligations pursuant to the *International Covenant on Civil and Political Rights*.

[54] I do not accept this submission.

[55] Canada has specifically agreed without qualification to be bound at international law by the provisions of both the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987)* and the *International Covenant on Civil and Political Rights*.

[56] Preliminary Observation 2 of the Mandela Rules provides that "not all of the rules are capable of application in all places and at all times." While it is possible that a failure to comply with the Mandela Rules could be a contravention of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987),* such a conclusion is not inevitable, due to this qualification.

[57] Canada suggested that the Professor Mendez has been inconsistent on the question of whether segregation for more than 15 days must constitute torture or other cruel or inhuman or degrading treatment. Specifically, Canada suggested that in 2011 Professor Mendez stated in an address to the United Nations that determining whether indefinite isolation of prisoners amounts to torture should take into consideration all relevant circumstances on a case-by-case basis, while in this application Professor Mendez was treating more than 15 days in segregation as a hard and fast rule for cruel, inhuman and degrading treatment contrary to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (June 1987).*

[58] I do not accept this submission.

[59] Professor Mendez position concerning more than 15 days in segregation evolved from a contextual analysis to a hard and fast rule because the international community came to a consensus view about this in December 2015 when the United Nations approved the Mandela Rules revision. Professor Mendez view of the 15-day limit has been informed by the international consensus achieved in 2015. His current view in this regard is largely like limitations suggested domestically by the Arbour Commission and the *Ashley Smith Inquest*.

[60] I am satisfied that the fact that Professor Mendez made different statements about indefinite segregation does not affect the weight attaching to his opinion concerning the inappropriateness of a person spending more than 15 days in segregation and his evidence generally.

[61] I am satisfied based on the evidence that the Mandela Rules represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined.

Treatment of the expert evidence

[62] Both sides submitted affidavits from experts. I do not reject the totality of the evidence of any of these experts. However, some aspects of the evidence of the experts are entitled to more weight than others.

The statutory scheme for administrative segregation

[63] The legislative framework of administrative segregation is established in sections 31-37 of the *Corrections and Conditional Release Act*. There are other statutory provisions that relate to administrative segregation. There are also regulations and Commissioner's Directives that give further structure to the administrative segregation regime.

[64] The purpose of administrative segregation is the maintenance of security of the penitentiary or the safety of any person, within the penitentiary. See section 31 (1) of the *Corrections and Conditional Release Act*.

[65] Section 31 (2) of that Act provides for release from administrative segregation at the earliest appropriate time.

[66] Section 31 (3) sets the considerations which justify a decision to segregate. Those considerations are:

- the Institutional Head is satisfied that there is no reasonable alternative to administrative segregation and:
- the Institutional Head believes on reasonable grounds that:
    - 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; or
    - allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a serious

disciplinary charge under section 41 (2) of the *Corrections and Conditional Release Act*; or

- allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

[67] Section 32 requires that all decisions by the Institutional Head to admit into, continue or release an inmate from administrative segregation shall be based on the considerations in section 31(3) of the *Corrections and Conditional Release Act.*

[68] Section 33 of that Act provides for reviews of the decision to segregate. The Institutional Head chooses the reviewer, the reviewer can only make recommendations the Institutional Head (i.e. the original decision maker).

[69] Sections 33(2), 34 and 35 are procedural provisions.

[70] Sections 36 provides for visits to a segregated inmate by a health care professional and the Institutional Head.

[71] Section 37 states that the inmate has the same rights and conditions of confinement as other inmates except for those that can only be enjoyed in association with other inmates.

[72] Other relevant sections of the *Corrections and Conditional Release Act* address the obligation to provide health care to inmates, consider the health of inmates in the decision-making processes, prohibit cruel, inhuman or degrading treatment or punishment, and authorize regulations. See sections 86, 87, 69, and 96(g) of the Act.

[73] The *Corrections and Conditional Release Regulations*, SOR/92-620 provide additional requirements for administrative segregation in sections 19-23. The regulations require providing the inmate with notice in writing within one working day of the reason for involuntary placement in administrative segregation (section 19), review of the decision by the institutional head within one working day where a delegate places an individual in administrative segregation (section 20), establish procedures for the review by the Segregation Review Board, including a hearing within five days of placement in administrative segregation and at least once every additional 30 days (section 21), a review every 60 days by the head of the region or a staff member in regional headquarters (section 22) and where an inmate is voluntarily placed in administrative segregation by a staff member, a review by the Institutional Head within one working day (section 23).

[74] Sections 97 and 98 of the *Corrections and Conditional Release Act* authorize the Commissioner to create rules, some of which are Commissioner's Directives. Commissioner's Directive 709 governs the administrative segregation process. Commissioner's Directive 709 has an accompanying Guideline 709-1. There is also a specific guideline for health assessments: Health Assessments for Administrative Segregation Guidelines. There is also an Administrative Segregation Handbook that provides further detail on how to apply administrative segregation.

[75] It is the constitutionality of this scheme which is raised in this application.

The current nature of administrative segregation in Canadian federal penitentiaries

[76] The current approach to administrative segregation is set in the *Corrections and Conditional Release Act*, Regulations, Commissioner's Directives and related policies. The Regulations, directives, and policies are subject to change over time; a new Commissioner's Directive was introduced effective August 1st, 2017, only shortly before the hearing in this matter.

[77] Under the framework currently in place, administrative segregation means the inmate

- is out of his or her cell for a minimum of two hours daily, including the opportunity to exercise outdoors for at least one hour, and
- may take a daily shower in addition to the two-hour period previously described.

[78] Pursuant to Commissioner's Directive 709, an inmate in administrative segregation currently receives:

- personal effects within 24 hours of the segregation placement, including books, radio, TV, and anything else that does not pose a security risk;
- bedding, clothing and toiletries to ensure adequate hygiene;
- a daily visit by a health care professional (usually a nurse);
- a daily visit by the Institutional Head;
- a visit by a correctional manager once per shift to inspect the conditions of confinement;
- visits by legal counsel;
- a visit by the inmate's Parole Officer within 2 working days of admission to begin preparation of the inmate's Reintegration Action Plan;
- an inmate handbook detailing the procedures and rights of segregated inmates;
- an immediate visit by an advocate;
- access to elected inmate representatives;
- visits by family and friends on scheduled days;
- telephone calls to friends and family on the inmate's approved calling list;
- ongoing participation in educational programs modified by the security requirements of segregation (e.g. teachers can visit, provide homework and books for self-study);

- appointments with health professionals where the Case Management Team has determined that ongoing medical treatment should be provided in the administrative segregation cell;

- when available, visits by Elders or religious advisors, as requested; and

- access to cultural practices that do not represent a security threat.

[79] All decisions concerning placement or maintenance of administrative segregation can be grieved pursuant to section 90 of the *Corrections and Conditional Release Act* and sections 74-82 of the *Corrections and Conditional Release Regulations*. Neither party makes substantial submissions regarding the application of this grievance procedure. I do not believe that the grievance process is a credible avenue to challenge administrative segregation because the grievance process is intended to yield to other remedial processes (section 81(1)) and there is an alternative process established that applies specifically to administrative segregation decisions.

Section 7 of the *Charter of Rights and Freedoms*

[80] Section 7 of the *Charter* provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[81] Interpretation of this section has established a two-part analysis. First, there must be an infringement of life, liberty or security of the person. Second, that infringement must be inconsistent with the principles of fundamental justice (*Blencoe v BC,* 2000 SCC 44, 2 S.C.R. 307, para. 47).

[82] The applicant asserts that the administrative segregation legislative scheme constitutes a deprivation of liberty and of security of the person. The applicant asserts three reasons why the legislative scheme is not in accordance with the principles of fundamental justice. The first is that it is grossly disproportionate. The second is that it is arbitrary. The third is that it is procedurally unfair.

[83] The first ground has been dealt with under *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, 3 S.C.R. 571 and will be considered when section 12 of the *Charter* is considered.

[84] However, the courts have also held that it is appropriate to consider the administrative decision maker's independence under section 7 of the *Charter* in a prison context. *R.v. Shubley,* [1990] 1 S.C.R. 3, p. 23-24; *Morin v. Saskatoon Correctional Centre* (1990), 86 Sask. R. 269 (Q.B.) (para. 8).

Liberty

[85] Although the parties agree that administrative segregation constitutes a depravation of liberty, they dispute the severity of this deprivation. The applicant maintains that it constitutes "the most serious deprivation of liberty." The respondent argues that it is only a deprivation of a residual liberty interest.

[86] Deprivation of even a residual liberty interest will engage *habeas corpus*. See ***R v Miller*** [1985] 2 S.C.R. 613 at 637 and *Gogan v Attorney General of Canada* 2017 ABQB 609 at para.43-51.

[87] Admitting or maintaining an inmate in administrative segregation amounts to a significant deprivation of liberty. It amounts to placing the inmate in a prison located within the prison. The Ontario Court of Appeal in ***R v Boone,*** 2014 ONCA 515, 312 C.C.C. (3d) 27 at para. 3 noted that a transfer to administrative segregation is a serious deprivation of liberty. Specifically, the court stated: "There has been a growing recognition over the last half-century that solitary confinement is a very severe form of incarceration and one that has a lasting psychological impact on prisoners."

[88] Section 7 of the *Charter* does not permit infringement of liberty except in accordance with the principles of fundamental justice.

Security of the person

[89] I am also satisfied that the evidence presented by the applicant establishes that placing an inmate in administrative segregation imposes a psychological stress, quite capable of producing serious permanent observable negative mental health effects.

[90] The *Corrections and Conditional Release Act* also recognizes the psychological stress created by administrative segregation and recognizes that prolonged administrative segregation will harm an inmate. Specifically, section 31 (2) provides that an inmate is to be released from administrative segregation at the earliest appropriate time. Section 31 (3) provides that the Institutional Head can only order an inmate into administrative segregation if there is no reasonable alternative. Section 36 (1) directs that an inmate in administrative segregation shall be visited at least once every day by a registered healthcare professional. Section 36 (2) mandates that the Institutional Head visit the administrative segregation area at least once every day and meet with inmates housed there upon request. Finally, after an inmate is placed in administrative segregation a Suicide Risk must be completed.

[91] The evidence adduced by the respondent also recognizes this fact. Specifically, the respondent tendered the affidavit evidence of Dr. Robert Morgan. Dr. Morgan is a psychologist. He was retained to provide expert evidence concerning "the impact of administrative segregation on inmates as practised in Canadian federal penitentiaries, generally and particularly those suffering from mental illness." On cross-examination, the applicant challenged Dr. Morgan's evidence of the extent of harm from administrative segregation, both in terms of the extent of the harm compared to other inmate populations and how common it was for inmates not to suffer harm.

[92] Dr. Morgan accepted that the literature demonstrated that some inmates placed in administrative segregation experienced the negative effects on their mental health described by the applicant's experts, which included sensory deprivation, isolation, sleeplessness, anger, elevated levels of hopelessness, the development of previously undetected psychiatric symptoms, including depression and suicidal ideation.

[93] While I do not accept all of Dr. Morgan's evidence, I find this part of his evidence confirmatory of the adverse effects of administrative segregation.

[94] I do not accept Dr. Morgan's evidence that some will be harmed, and a significant number will not.

[95] I accept this aspect of Dr. Morgan's evidence only to the extent that I agree that it is possible that an individual inmate will not present these serious permanent negative mental health effects. I do not rely on Dr. Morgan's evidence further in this regard and I specifically do not accept his evidence for concluding that some inmates will experience no serious permanent negative mental health effects from prolonged administrative segregation. Specifically, his report that administrative segregation was no more harmful than incarceration in the general prison population was based on an erroneous conclusion that there was a negative association between incarceration in the general population and health outcomes when the opposite was correct.

[96] The harm is recognized not only in the *Corrections and Conditional Release Act* but in International Standards and by reputable Canadian medical organizations like the CMA and the Registered Nurses Association of Ontario. No nurse or doctor currently working with segregated prisoners in Canadian Penitentiaries testified that practice was benign in some or most cases.

[97] I am satisfied that there is no serious question the practice is harmful.

[98] Serious state imposed psychological stress constitutes a breach of security of the person. See *Blencoe v B.C. (Human Rights Commission)* [2000] 2 S.C.R. 307 at para. 56.

[99] Obviously, the imposition of administrative segregation is state imposed and the psychological harm that can result from administrative segregation is serious which leads to the conclusion that the induced stress is serious.

[100] The stress capable of producing the documented negative effects described in the evidence, therefore, exceeds the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". See Lamer C.J, in *New Brunswick (Minister of Health and Community Services) v G. (J)* [1999] 3 S.C.R. 46 at para.59.

[101] Accordingly, suffering this level of psychological stress infringes the security of the person of the inmate and the issue again becomes whether this infringement is in accordance with the principles of fundamental justice.

The principles of fundamental justice require an independent review of the decision to segregate

[102] The principles of fundamental justice are the basic principles of our judicial system and legal process. They are found in the basic tenets of our legal system. See *Reference Re Section 94 (2) of the Motor Vehicle Act,* [1985] 2 S.C.R. 486. paras. 28-40.

[103] The principles of fundamental justice are not defined in the abstract. They must be interpreted in the context of the alleged infringement. See *Chiarelli v Canada (M. E. I.),* [1992] 1 S.C.R. 711 at 732.

[104] The principles of fundamental justice are about the basic values underpinning our constitutional order. See *Canada (Attorney General) v Bedford,* 2013 SCC 72, 3 S.C.R. 1101 at para. 96.

Insulating the administrative segregation decision maker from meaningful review is arbitrary

[105] One basic value is against arbitrariness in legislative schemes requiring administrative decision making. Arbitrariness describes a situation where there is no connection between the effect of the law and the purpose of the law. See *Canada (Attorney General) v Bedford,* 2013 SCC 72, 3 S.C.R. 1101 at para. 96.

[106] The effect of the sections of the *Corrections and Conditional Release Act*, with which this application is concerned, is the insulation of the decision maker from meaningful review. Specifically, section 33 (1) of the *Corrections and Conditional Release Act* provides that, where the Institutional Head has involuntarily confined an inmate in administrative segregation, a person designated by the Institutional Head shall conduct a review and may recommend to the Institutional Head whether or not to release the inmate. Procedurally, the Institutional Head is the final institutional decision maker concerning decisions to admit to or release an inmate from administrative segregation during the relevant time and is not bound to accept the recommendation.

[107] The purpose of administrative segregation is the preservation of the safety of people working in the penitentiary, inmates housed there and the integrity of ongoing serious investigations. See section 31(1) of the *Corrections and Conditional Release Act.*

[108] Insulating the administrative segregation decision-maker from meaningful review does not advance this legislative purpose. Therefore, insulating the decision maker from meaningful review is arbitrary which is consistent with it being procedurally unfair.

Insulating the administrative segregation decision maker from meaningful review is procedurally unfair

[109] Procedural fairness is a basic value underpinning our constitutional order and has been accepted as such in early *Charter* cases. See *Singh v Canada (Minister of Employment and Immigration)* [1985] 1 S.C.R. 177 at 212-213. Subsequent cases held that the principles of fundamental justice are informed by the procedural fairness requirements found in administrative law (*Ruby v Canada*, [2002] 4 S.C.R. 3 at para. 39; *Suresh v Canada*

(Minister of Citizenship and Immigration), 2002 SCC 1, paras. 113, 115). Just as in administrative law, the extent of procedural fairness required varies with the context (*Suresh*, para. 113; *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, 1 S.C.R. 350 at para. 20)

[110] While fundamental justice is not synonymous with natural justice, the principles of fundamental justice are very often procedural in nature. At a minimum, the requirements of fundamental justice embrace the requirements of procedural fairness. See *Ruby v Canada* at para. 39.

[111] It is therefore helpful to consider whether a common law duty of procedural fairness is owed to an inmate in administrative segregation proceedings and, if it is owed, the nature of that duty.

The Baker factors

[112] *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 listed five factors affecting the procedural fairness required in making or reviewing a decision:

- the nature of the decision being made, and process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual;
- the legitimate expectations of the person challenging the decision;
- the choices of procedure made by the agency itself.

[113] The *Baker* list is not exhaustive. See *Baker v Canada* para. 28.

[114] Before discussing the procedural requirements, it is important to note that the decision in question is not the initial decision to place the inmate in administrative segregation. The courts have previously held that the institutional head needs wide discretion to respond quickly by placing an inmate in administrative segregation (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 655). Rather, the question is the procedural fairness to which an inmate is entitled on review of that decision by the Segregation Review Board.

<u>The decision being made and the process followed in making it</u>

[115] The decision being made is a decision to continue to isolate an inmate from the general inmate population by placing the inmate in a prison inside a prison.

[116] The nature of the decision making review process followed in making this decision suggests a robust requirement for procedural fairness. The focus is the extent to which the

decision making review resembles a trial and the judicial process (*Baker* para. 23; *Knight v Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 683).

[117] The review decision requires a hearing (*Corrections and Conditional Release Act*, section 33(1)(a)). The inmate must be given three working days' notice of the hearing and that notice must include the information the Segregation Review Board will be considering (*Corrections and Conditional Release Regulations*, section 21(3)(a)). The inmate is generally permitted to attend the hearing (*Corrections and Conditional Release Act*, section 33(2)) with counsel. Where the institutional head does not accept a recommendation from the Segregation Review Board to release the inmate, the institutional head must provide an explanation to the inmate and provide an opportunity to listen to the inmate's response to the decision (*Corrections and Conditional Release Act*, section 34; *Cardinal* at 659-660). To the extent that the daily visit by the institutional head provides an opportunity to raise a ground for ending administrative segregation, it provides significant opportunities for reconsideration (*Corrections and Conditional Release Act*, 36(2)). Finally, the question of whether maintaining administrative segregation is justified is governed by strict legal criteria: that there is no reasonable alternative to administrative segregation and one of the criteria in *Corrections and Conditional Release Act* section 31(3)(a)-(c) (*Corrections and Conditional Release Act*, sections 31 and 32).

[118] Although initial placement in segregation is not at issue, written reasons are required within one day of that decision (*Corrections and Conditional Release Regulations,* section 19). The authority to make the decision cannot be delegated below the level of correctional manager. If the decision is made by an individual other than the Institutional Head, it must be reviewed by the institutional Head within one working day (*Corrections and Conditional Release Regulations*, section 20).

[119] Given the potential harm after 30 days of administrative segregation, it is appropriate to consider this as a final, rather than interim, decision.

[120] I am aware that there is a requirement for the Head of a Region or a staff member in Regional Headquarters to review an inmate's case at least once every 60 days to determine if administrative segregation is justified (*Corrections and Conditional Release Regulations,* section 22). This is not a prompt review. This requirement does little, if anything, to provide a substantive right of appeal from decisions of the Institutional Head. There is no indication that this review includes a formal power to overturn the Institutional Head's decision.

<u>The decision is important</u>

[121] The review decision is important which suggests a robust requirement for procedural fairness.

[122] The decision affects the safety of the institution, and can continue serious stress on the mental health of the person segregated. "The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated." (*Baker,* para. 25).

[123] Specifically, Dr. Ruth Martin a family physician and a prison physician, offered evidence filed by the applicant that the harmful effects of sensory deprivation caused by solitary confinement could occur as early as 48 hours after segregation. I accept this evidence of Dr. Martin.

[124] Dr. Chaimowitz, the Head of Forensic Psychiatry at St. Joseph's Healthcare in Hamilton and a Professor in the Department of Psychiatry and Behavioural Sciences at McMaster University offered evidence filed by the applicant that solitary confinement for more than 15 days posed a serious risk of psychological harm.

[125] The Canadian Medical Association Journal in an editorial published in December 2014 stated that a growing body of literature showed that solitary confinement can change brain activity and result in symptoms within 7 days.

[126] The College of Family Physicians of Canada also concluded that solitary confinement can alter brain activity and result in symptoms within days.

[127] I accept all this evidence.

[128] The respondent's evidence also indicates the importance of the decision to admit and by implication, to continue segregation. The Administrative Segregation Handbook for Staff provides at page 16 (page 813 of the Respondent's Application Record): "The seriousness of the decision to admit the inmate in administrative segregation cannot be overstated."

[129] There is no doubt that the decision to place an inmate in administrative segregation is an important one.

[130] This third Baker factor weighs heavily in favour of robust procedural fairness protections.

The legitimate expectations of the person challenging the decision

[131] The fourth Baker factor is the legitimate expectations of the person challenging the decision. This involves the extent to which an official makes representations about the process that will be followed (*Canada (Attorney General) v. Mavi*, 2011 SCC 30, 2 S.C.R. 504, paras. 68-72).

[132] There is no individual plaintiff in this case. The application is proceeding on the basis that the legislation, and related policies, are not capable of *Charter* compliant application. This factor does not weigh heavily.

Respect for the procedural choices made by the decision maker

[133] The fifth Baker factor is respect for the procedural choices made by the decision maker. This factor is concerned with the decision maker's expertise in determining procedures that appropriately balance competing interests (*Baker*, para. 27). It has been framed as "the nature of the deference due to the decision maker" *Congrégation des*

témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), 2004 SCC 48, 2 S.C.R. 650, para. 11.

[134] It is the statutory provisions that are being challenged. I recognize that Parliament is entitled to deference with respect to the diverse ways to approach the problem of security in a penitentiary and administrative segregation.

[135] However, Parliament has provided for a review. Stipulating that the reviewer must be independent of the decision maker and must have the power to do more than make recommendations provides more robust protection for the section 7 interests infringed by the decision to segregate while respecting Parliament's legislative scheme. Finally, as indicated, stipulating that the decision maker is immune from a meaningful review is not reasonably connected to the Parliament's legislative reason for permitting administrative segregation.

The Baker factors are not exhaustive

[136] It is helpful to focus on the prison context when considering decision making in prisons because the duty of procedural fairness is flexible and variable; the content of the duty of procedural fairness depends on an appreciation of the context of the statute and the rights affected. See *Baker* at para. 22

[137] The context with which the statute is concerned is complicated.

[138] Jay Pyke, the Warden of Collins Bay Institution provided some contextual evidence. Warden Pyke provided evidence which established that inmates often maintain affiliations with gangs and criminal organizations, participate in an underground economy of contraband and illegal commodities, participate in an unwritten inmate code requiring violent responses to specified conduct, and make and use home-made weapons.

[139] Warden Pike's evidence on this point is confirmed by evidence filed by the applicant. Specifically, the applicant filed three inmate affidavits in reply to the evidence of Mr. Bruce Summers of the Correctional Service of Canada. One inmate had 39 criminal convictions and was currently serving a sentence for first-degree murder; one inmate had an extensive criminal history and had been declared a dangerous offender; and one inmate had spent most of his adult life in prison and was currently serving a sentence for manslaughter.

[140] I accept this evidence. Warden Pike's evidence established that part of the context for this application is an environment where there is an ever-present possibility of violence.

[141] The context presented by this application is also complicated because the circumstances of the inmate are not always straightforward. For example, one of the inmates, whose affidavit was presented to the Court, was placed in administrative segregation for his own safety because other inmates objected to his presence, resulting in a concern that his life was in danger. Arrangements were made to transfer the inmate to another institution so that he could be housed outside the segregation unit in the general prison population. The inmate objected and obtained an interlocutory order from the

Federal Court preventing his transfer. By the time the Federal Court proceedings were over, it was no longer possible to transfer the inmate.

[142] The courts have previously considered the prison context and found that the obligations of procedural fairness should not overly burden or obstruct effective prison administration (*Cardinal*, 654-655, 660).

[143] Procedural fairness requirements should be "fully 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 procedural requirements" *Cardinal* (660). Relatedly in *Charkaoui*, "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 section 7" (para. 27).

[144] Nonetheless, the decision which is being reviewed for procedural fairness is not the initial decision to place the inmate in administrative segregation. The obligations of permitting expedient resolution are lessened because the inmate is already segregated. Concerns for the security of the penitentiary, other inmates, interference with disciplinary investigations, or risk of harm from other inmates identified in *Corrections and Conditional Release Act* section 31(3) have been stabilized.

[145] Overall, this factor limits the extent of a duty of procedural fairness.

The nature and content of the duty of procedural fairness owed in segregation proceedings

[146] After considering the *Baker* factors, I have concluded that a robust duty of procedural fairness applies to the decision to maintain an inmate in administrative segregation. This conclusion is consistent with the finding in *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 that a high degree of procedural fairness is required in involuntary segregation (para. 67). However, it is always necessary to consider the burden this will place on the operation of correctional facilities.

[147] The legislative context in part is that Parliament intended that there should be an immediate review of the decision to admit or maintain an inmate in administrative segregation because the *Corrections and Conditional Release Act* and regulations provide for a review; although not a robust one, within 5 working days of the decision to segregate. The review is not robust because the Institutional Head, whose decision is being reviewed decides the membership of the reviewing board (Institutional Segregation Review Board) and the reviewing board can only make a recommendation to the Institutional Head.

[148] The regulations permit the Institutional Head to designate a staff member who can decide to segregate an inmate. However, if this occurs, the Institutional Head must review the staff member's decision within one working day. Interestingly, the Administrative Segregation Handbook for Staff cautions that it would be a conflict of interest if the delegate was acting as the Institutional Head and purported in that capacity to review his or her decision to segregate. See page 811 of the Respondent's Application Record.

[149] The legislative scheme requires independent reviews in other contexts. Hearings of serious disciplinary offences require that panel is chaired by an independent chairperson (*Corrections and Conditional Release Regulations* section 24(1)(a)). Where an inmate files a grievance, there is a requirement that the grievance can be elevated up the chain of command to a superior.

[150] Yet despite the Handbook's obvious sensitivity to reviewing your own decision, only the Institutional Head can confirm or change his or her decision to segregate. Procedurally, the Institutional Head is the final institutional decision maker concerning decisions to admit to or release an inmate from administrative segregation during the relevant time. This is an anomaly even within the context of penitentiary decision making.

[151] It is a basic principle of our judicial system and legal process that a decision maker should not sit as a member of a tribunal hearing an appeal from his or her own decision. See, for example, section 132 of the *Courts of Justice Act,* RSO 1990, cC.43; first enacted in 1913. In this regard, I appreciate that the fifth working day review is not an appeal but having regard to the context set out here I see that as a distinction without a difference.

[152] A procedure which mandates that the Institutional Head is both the decision maker and the only person who can vary the decision ignores the intellectual commitment which a person makes when publicly deciding and the difficulty anyone has altering an opinion that has been publicly declared and formally expressed in writing.

[153] Because the Institutional Head is fulfilling roles of both investigator and adjudicator, if, prior to a review, the Institutional Head believed administrative segregation was no longer justified according to the requirements of *Corrections and Conditional Release Act* section 31(3), the Institutional Head would be required to release the inmate from administrative segregation. The very fact that the inmate remains in administrative segregation and is coming before the Segregation Review Board means that the Institutional Head intends to maintain administrative segregation.

[154] Finally, Rule 45 of the Mandela Rules contemplates an independent review of the decision segregate. I recognize that the Mandela Rules are not binding in Canada. However, I am also satisfied that the principles of fundamental justice and the limits on rights that may be justified under section 1 of the *Charter* cannot be considered in isolation from international norms. The concern is the determination of what is meant by the principles of fundamental justice; the court is not concerned with determining Canada's international obligations. Further, in seeking the meaning of the Canadian Constitution, international law may inform the Court. See *Suresh v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, 1 S.C.R. 3 at paras. 59-60.

[155] I am satisfied that the statutory review of the decision to segregate is procedurally unfair under the *Baker* test and contrary to the principles of fundamental justice because the procedure chosen provides that the Institutional Head is the final decision maker for admission, maintenance and release from administrative segregation and is the final institutional decision-maker of required reviews and hearings which occur immediately after an inmate is segregated.

[156] I am also satisfied because of this context, because *Charter* rights are affected and because negative psychological effects can occur within days that it is a principle of fundamental justice that the review of the decision to place an inmate in segregation required by Parliament must occur promptly.

The infringement is not saved by section 1 of the *Charter*

[157] Infringement of these two section 7 *Charter* rights is not saved by section 1. It is difficult, but not impossible, to justify a section 7 violation (*Bedford*, para. 95). It may be justified where the competing public interest protected by the law also involves *Charter* rights.

[158] To justify a law under section 1, the government must demonstrate that the law meets a pressing and substantial objective, that it is rationally connected to its objectives, and that it is minimally impairing.

[159] The purposes of administrative segregation are the preservation of the security of the penitentiary, the safety of the people working in the penitentiary, the safety of the inmates housed there and the integrity of serious investigations.

[160] These are pressing and substantial objectives.

[161] I am satisfied that it is reasonable to believe that preventing inmates, who are a danger to others, endangered themselves or potentially an obstruction to a serious investigation, from associating with the general inmate population is rationally connected to these objectives.

[162] I am not satisfied that administrative expediency justifies a one decision maker model. Section 1 may for reasons of expediency justify a section 7 infringement but only in exceptional conditions such as natural disasters, the outbreak of war etc. See *Reference re section 94(2) of Motor Vehicle Act (British Columbia)* at para. 93. This is not such a case.

[163] The lack of an independent review means that there is virtually no accountability for the decision to segregate. Further, this lack of accountability occurs within a legislative scheme in which there is no cap on the length of time an inmate can spend in segregation, despite calls for a cap for a long time. For example, the Arbour Report and the Corners Jury in the *Ashley Smith Inquest* recommended the abolition of indefinite isolation.

[164] Providing for an independent review of the decision to segregate does not increase the risk of harm to persons working in the penitentiary or the inmates housed there because the inmate is segregated at the time of the review and a wrong decision by the Institutional Head to continue segregation protects no one.

[165] Accordingly, I am not satisfied that insulating the Institutional Head from meaningful review falls within a range of reasonable alternatives for reviewing the decision to continue segregation. In addition, for the same reason the deleterious effects of not

providing an independent review are not proportional to the objectives of the administrative segregation regime.

[166] Finally, as indicated, the lack of an independent review is not rationally connected to the legislated purposes for permitting administrative segregation.

[167] For these reasons I am satisfied that the lack of an independent review of the decision to segregate more than minimally impairs the inmate's liberty and security of the person interests and that as a result the infringement, caused by this aspect of sections 31-37 of the *Corrections and Conditional Release Act,* is not saved by section 1 of the *Charter of Rights and Freedoms*.

What is an independent review?

[168] Because the harmful effects of segregation can manifest in as little as 48 hours it is not practical to view *habeas corpus* as a sufficient remedy.

[169] By independence I mean freedom from control by or subordination to the decision maker. See for example the reference to Fawcett*" "The Application of the European Convention on Human Rights (1969)* contained in *R v. Valente (No. 2),* [1985] 2 S.C.R. 673 at 686.

[170] The respondent relies on *Morin v Saskatoon Correctional Centre et al*. (1990) 86 Sask.R. 269 for the assertion that the principles of fundamental justice do not require the full protections of section 11(d) of the *Charter*, however, that does not mean that some indices of independence and impartiality are not required.

[171] The applicant at page 68 of its factum seems to suggest that the Correctional Service of Canada cannot conduct the review, if it is to be an independent review.

[172] I do not accept this submission.

[173] The prison environment can call for swift solutions; the negative psychological effects from administrative segregation can present quickly. A review which is not timely and, therefore, ineffective is no review at all. There is a trade-off between expeditious dispute resolution and the full protection of procedural rights. The reviewing tribunal can have adequate independence without having all the attributes of a judge. The 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.

[174] The reviewing tribunal can be independent without having all the attributes of a judge.

[175] The administrative review of the decision can be independent and impartial if the reviewer is:

- not chosen by the person whose decision is being reviewed,

- not reporting to the person whose decision is being reviewed,
- completely outside the circle of influence of the person whose decision is being reviewed and
- given the need for a prompt decision, able to substitute its decision for that of the person whose decision is being reviewed.

[176] I am satisfied that this type of independence would satisfy a fully informed reasonable observer. See *Muhammad v MCI* 2014 FC 448 at para 127 et seq.

The other issues raised in this application

[177] While this determination is sufficient to conclude this application, I propose to address the other issues raised by this application.

Administrative segregation is not contrary to section 11 (h) of the *Charter of Rights and Freedoms*

[178] Section 11(h) of the *Charter of Rights and Freedoms* provides as follows:

> Any person charged with an offence has the right….
>
> (h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[179] The applicant submits that section 31 (3) of the *Corrections and Conditional Release Act* violates section 11(h) of the *Charter of Rights and Freedoms* because it can be used to segregate and thereby punish inmates who have done nothing to threaten the safety of the institution or any other person. The applicant submits that placing an inmate in administrative segregation in this circumstance changes the nature of the inmate's incarceration and imposes a harsher sanction than that contemplated at sentencing.

[180] This submission presents two types of situations: an inmate requesting administrative segregation for his or her own protection from the prison population and voluntarily entering administrative segregation and an inmate involuntarily placed in administrative segregation for his or her own protection.

[181] These two situations were reflected in the evidence.

[182] Specifically, as indicated, the applicant filed the affidavit of Professor Juan Méndez, formerly, the United Nations Special Rapporteur on Torture, in which he states at paragraph 55 that LGBTI inmates "may be placed in solitary confinement at their own request or at the discretion of prison officials." In addition, one of the inmate affiants (JH) was in administrative segregation on a prior occasion at his own request. See Respondent's Second Supplementary Application Record p.95. Warden Pyke indicated in his cross examination that the presence of incompatible inmates at an institution will result in the

involuntary segregation of one of the inmates until an alternative placement or other solution is found.

[183] The applicant relies on *Whaling v. Canada (Attorney General),* 2014 SCC 20, 1 S.C.R. 392. In that case Mr. Whaling was serving a penitentiary sentence. As a first-time non-violent offender, he was eligible for accelerated parole review under the system in place at the time of his sentencing. With the coming into force of the *Abolition of Early Parole Act*, accelerated parole review was abolished. Section 10 (1) of the *Abolition of Early Parole Act* made the abolition of accelerated parole review apply to offenders already serving their sentences which delayed Mr. Whaling's eligibility for day-parole: eligibility for day-parole after the offender had served one sixth of the sentence or six months was replaced by eligibility six months before the full parole eligibility date.

[184] The Supreme Court held that this delay in day-parole eligibility infringed the right guaranteed by section 11 (h) of the *Charter* not to be "punished . . . again" for an offence and that the infringement was not saved under section 1.

[185] Sections 31-37 have been in effect since 1992. This application does not concern the retrospective application of legislation. This application does not present a fact situation in which something happened after sentencing which had the effect of prolonging it. This application does not present a situation where the duration of an inmate's sentence is affected or where there has been some retrospective frustration of a reasonable expectation of liberty.

[186] In terms of an inmate's reasonable expectations, a person who is being sentenced and who is in danger inside a penitentiary because, for example, he or she is an informant, a crown witness or otherwise incompatible with the other inmates in the general prison population must reasonably be expected to know that there is a likelihood of placement in administrative segregation.

[187] Administrative segregation is not a sanction available under the *Criminal Code* and it is not imposed for the purpose and principles of sentencing. It is imposed for the reasons set out in section 31(1) of the *Corrections and Conditional Release Act.*

[188] At the time of sentencing an offender knows that you can go to general population or you can be put in segregation. While Judges typically concern themselves with the length of the sentence, it would be open to a person being sentenced to suggest that a lower sentence is appropriate due to the likelihood that he or she will spend a significant portion of their time in custody in segregation for their own protection.

[189] Finally, prison disciplinary proceedings have been characterized as noncriminal. See *Vukelich v Mission Institution* 2005 BCCA 75, 38 BCLR (4th) 132 at para. 37. This strongly suggests that non-disciplinary prison proceedings should also be characterized as noncriminal.

[190] Accordingly, I am satisfied that section 11 (h) has no application.

The legislative scheme is not contrary to section 12 of the Charter

[191] Section 12 of the *Charter of Rights and Freedoms* provides:

> Everyone has the right not to be subjected to any
> cruel and unusual treatment or punishment

[192] The applicant submits that segregation of young adults and the mentally ill constitutes a cruel and unusual treatment or punishment contrary to section 12 of the *Charter of Rights and Freedoms*. The applicant also submits that any use of administrative segregation beyond 15 days is a similar violation.

[193] A punishment violates section 12 of the *Charter of Rights and Freedoms* where it is excessive to such an extent that it outrages society's standards of decency. The punishment must not be grossly disproportionate to what would have been appropriate. To be cruel and unusual, the punishment must be too severe for any person committing the same offence. See *R v Smith, (Edward Dewey),* [1987] 1 S.C.R. 1045 at para. 86.

[194] The words "cruel and unusual" are used together to describe a punishment or treatment that is grossly disproportionate in the circumstances in which it is applied. See *R v Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at para. 86

[195] If one considers administrative segregation a treatment rather than a punishment, one must remember that the treatment can be excessive and still not be grossly disproportionate. A sentence or treatment may be sufficiently excessive to attract appellate review and still not be grossly disproportionate. See *R v K. (R),* [2005], 198 C.C.C (3d) 232 at para. 66.

[196] The Supreme Court of Canada has consistently used extreme language when describing the kind of treatment that infringes section 12. Chief Justice McLachlin indicated *R v Ferguson* that the treatment would have to be so excessive that it outraged Canadian standards of decency and so disproportionate that Canadians would find it abhorrent or intolerable.

[197] The respondent referred to section 69 of the *Corrections and Conditional Release Act* which provides as follows:

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

[198] While I agree with the statement in section 69, I do not find the section helpful in this inquiry because I assume that the officials of the Correctional Service of Canada intend to carry out their responsibilities compliance with the *Charter of Rights and Freedoms* and the provisions of the *Corrections and Conditional Release Act.*

Persons between the ages of 18 & 21 years

[199] The applicant asks for a finding that young adults aged 18-21 are particularly vulnerable and therefore any placement of these individuals in administrative segregation constitutes a violation of section 12.

[200] When considering articles written concerning research into the effects of isolation from the general inmate population on young persons, it is necessary to keep in mind section 76 (2) of the *Youth Criminal Justice Act*, SC 2002, c 1 which stipulates that no young person under the age of 18 years is to serve any portion of his or her sentence in a penitentiary.

[201] Professor Mendez did not know until his cross-examination in this application that persons under the age of 18 could not be housed in a penitentiary in Canada.

[202] The age 18 cut-off is not always observed in articles or papers using terms like "adolescents" or "juveniles". For example, the applicant filed a copy of an amicus brief submitted by the American Psychological Association to the Supreme Court of the United States in the case of *Roper v Simmons*. The court was dealing with the constitutionality of executing juveniles. It appears that the thrust of the brief is that adolescents 16 and 17 should not be executed because they are still psychologically maturing.

[203] It is not clear to me that this observation: namely that at 16 and 17 years adolescents are less likely to restrain their impulses because their brains have not yet fully matured, apply to persons 18 to 21 years. The brief observes for example that "Delinquent even criminal behavior is characteristic of many adolescents, often peeking around age 18."

[204] The respondent's expert Dr. Nussbaum conceded that brain maturation continues after 18 but disputed that the literature established that the brains of persons between 18 and 21 are therefore fragile.

[205] Similarly, the applicant filed a paper published in the Official Journal of the American Academy of Pediatrics calling for an end to solitary confinement of children in juvenile detention facilities. It is not clear to me that the considerations applying to the appropriateness of placing children in solitary confinement apply when considering the appropriateness of placing persons between 18 and 21 years in administrative segregation.

[206] The applicant criticized Dr. Nussbaum for failing to write a report concerning the difficulty, if any, inmates between 18 and 24 years would have with administrative segregation. This criticism was based on the fact that the respondent had requested such an opinion in Dr. Nussbaum's retainer letter. The applicant complains that Dr. Nussbaum did not report on this question but rather confined himself to the physical maturation of the structures of the brain.

[207] I do not accept this criticism.

[208] Dr. Chaimowitz and Dr. Martin, both of whom provided affidavit evidence tendered by the applicant based their opinion that administrative segregation would be

difficult for persons between 18 and 21 on the fact that their brains are still maturing. Dr. Nussbaum agreed that brain maturation continues until people are in their 40s; he offered the opinion that the claim that the brains of persons between 18 and 21 were fragile due to their continued maturation beyond the age of 21 was overstated.

[209] In short, I am satisfied that Dr. Nussbaum drew a valid distinction between his views and those of Dr. Chaimowitz and Dr. Martin on this question.

[210] I accept the distinction drawn by Dr. Nussbaum and found his evidence on this question persuasive.

[211] I am not satisfied that the evidence proves that, because the brain of a person aged 18 to 21 continues to develop, that person is vulnerable to severe termination of development if exposed to administrative segregation.

[212] Accordingly, I would not, based on the evidence, conclude that the legislative scheme permits cruel and unusual punishment or treatment because it does not forbid administrative segregation of persons between the ages of 18 and 21.

Inmates with mental illness

[213] The respondent to some extent agrees that inmates with mental illness should not be in administrative segregation. The dispute with the applicant arises in the definition of the class of inmates with mental health issues who should be excluded from administrative segregation.

[214] The August 1st, 2017 revisions to Commissioner's Directive 709 at paragraph 19 provide that inmates:

- with a serious mental illness with significant impairments including inmates who are certified in accordance with provincial mental health legislation; and
- who are actively engaging in self-injury which is deemed likely to result in serious bodily harm or;
- at an elevated or imminent risk of suicide;
- cannot be placed in administrative segregation.

[215] This represents no change from the status quo because, according to Warden Pyke, inmates with these mental health issues were not supposed to be in administrative segregation under the policy in effect prior to August 1st, 2017.

[216] The practice described by Commissioner's Directive 709 is inconsistent with section 87 (a) of the *Corrections and Conditional Release Act* which provides: "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 …administrative

segregation…." Health care in section 87 includes mental health care; offender in section 87 includes an inmate.

[217] This inconsistency has its genesis in the *Corrections and Conditional Release Act.* Specifically, sections 31 (3) and 32 do not reference the mental health of the inmate as a consideration for admission to or release from administrative segregation. They stipulate that safety and the integrity of investigations are the only considerations for admission in or release from administrative segregation. As indicated, section 87 (a) stipulates that an inmate's mental health must be taken into consideration in decisions relating to administrative segregation.

[218] Sections 31(3), 32 and 87 were enacted at the same time. I assume that Parliament did not intend sections 31(3) and 32 to conflict with section 87 (a).

[219] Commissioner's Directive 709 does not rationalize the apparent conflict. Rather, it creates a real risk that the Institutional Head will exercise his or her discretion in a way that contravenes section 87 (a). The Directive creates a subclass of mentally ill inmates who cannot be placed in administrative segregation; namely inmates with "serious mental illness", inmates "actively engaging in self-injury" which is deemed likely to result in "serious bodily harm" or inmates at an "elevated or imminent risk of suicide".

[220] The necessary implication for the Institutional Head from the wording of this Directive is that mentally ill inmates not falling within the class described in Directive 709 can be placed in administrative segregation. Section 87 (a), however, is not restricted in this way or at all.

[221] The ambiguity in the legislation, caused because the legislative scheme requires consideration of mental health, while mental health is omitted from section 31, and because of the inconsistency between Commissioner's Directive 709 and section 87 (a) is even more unsatisfactory because the respondent agrees segregating some mentally ill inmates should be prohibited.

[222] The ambiguity in the legislation and the inconsistency between Commissioner's Directive 709 and section 87 (a) is not assisted by Commissioner's Directive 843 which provides for different "watch levels" for inmates who are suicide risks. Directive 843 also calls for the use of restraints, monitoring and foods that can easily be consumed without cutlery. The thrust of the Directive is the treatment of suicide risks without removing the inmate from segregation. Presumably this is because the safety concern which caused admission in segregation remains. This approach does not reflect an attempt to balance security and mental health risks. Rather it suggests that the mental health risk is considered in decisions relating to the inmate except the decision to release from administrative segregation.

[223] Commissioner's Directives 709 and 843 entrench the failure to balance the safety of persons working or housed in the penitentiary and the mental health of the inmate administratively segregated. They direct staff to monitor and record the harm suffered

because of prolonged administrative segregation without mandating a balancing of security and mental health risks when deciding whether to continue administrative segregation.

[224] There is no case in which section 87 (a) of the *Corrections and Conditional Release Act* has been applied to compel the release of an inmate from administrative segregation.

[225] I am satisfied however that this part of the problem can be constitutionally addressed by deciding that the Institutional Head has a discretion to admit an inmate to segregation which seems clear from the use of the word "may" in section 31 (3) and must when exercising that discretion take into account section 87 (a) of the *Corrections and Conditional Release Act.* Similarly, the independent reviewer, necessitated under section 7 of the *Charter*, is also making a discretionary decision concerning whether to continue administrative segregation and must also consider section 87 (a). Neither is to inhibit the exercise of their individual discretion by assuming that inmates not captured in paragraph 19 of Commissioner's Directive 709 are eligible for placement in segregation regardless of the state of their mental health. Neither can ignore an inmate's mental health and decide to segregate solely based on the criteria in section 31 (3) of the *Corrections and Conditional Release Act.*

[226] The need to consider the inmate's mental health when making the administrative segregation decision does not flow from the Administrative Segregation Handbook for Staff or Commissioner's Directive 709 or the Segregation Assessment Tool. It flows from the fact that as a matter of law the Institutional Head and the independent reviewer must apply section 87 (a) of the *Corrections and Conditional Release Act.*

[227] The Handbook, the Commissioner's Directive and the Assessment Tool can change but the law requires a genuine attempt to balance the security needs of employees and inmates in the general population with the psychological harm to the administratively segregated inmate.

[228] Because the legislation requires both the Institutional Head and the independent reviewer to balance the security needs of employees and inmates in the general population with the psychological harm to the administratively segregated inmate, I am satisfied that the legislative scheme properly applied to inmates with mental illness does not offend section 12 of the *Charter of Rights and Freedoms*.

[229] I am satisfied that the legislative scheme is capable of administration in relation to mentally ill inmates in a way which does not offend section 12 of the *Charter of Rights and Freedoms.*

Prolonged segregation

[230] The applicant asks me to declare that a legislative scheme which permits the Correctional Service of Canada to administratively segregate an inmate for more than 15 days is a legislative scheme which imposes a cruel and unusual treatment or punishment contrary to section 12 of the *Charter of Rights and Freedoms*.

[231] The applicant has asked me to declare that an inmate may never be segregated for more than 15 days.

[232] I decline to make such declarations.

[233] The visit by a health professional is sufficient to negate the potential cruelty of indefinite segregation if the impact on the prisoner is a consideration for release, which it will be if the Correctional Service of Canada provides a proper Directive concerning the application of section 87 (a) to the consideration of whether to release an inmate from segregation.

[234] If it takes more time to resolve the issue which triggered the decision to consider administrative segregation, it is possible to change the length of time that prisoners in administrative segregation are locked in their cells and to change the social contact to which they are exposed. These changes, if they occur, will affect the maximum time that a person should spend in segregated confinement and would reflect a genuine attempt to apply section 87 (a) in a way that leads to a balancing of the security needs of employees and inmates in a penitentiary with the psychological harm to the administratively segregated inmates.

[235] The respondent relied on a study by Dr. Ivan Zinger in 2001 which concluded that there was no evidence that over a period of 60 days the mental health and psychological functioning of segregated offenders significantly deteriorated. I am not prepared to accept this conclusion because many of the inmates studied had been segregated on more than one occasion prior to being examined and it is impossible to say that the damage had not already been done. If those inmates are removed, the sample size is small. Also, Dr. Zinger states at page 64 in the conclusion: "… the findings of this study should not be used to legitimize the practice of administrative segregation".

[236] The respondent also relied on the O'Keefe study completed in Colorado in 2010. I do not accept that this study is valid in Canada because the system of administrative segregation is different in Canada. Specifically, at page 11 of the study the authors describe the incentive-based Colorado program. This program has three quality-of-life levels. Each level brings with it more privileges which must be earned through appropriate behaviour. At quality-of-life level 3, inmates in administrative segregation are allowed four three-hour visits per month, four 20-minute phone sessions, $25 worth of canteen per week and the opportunity to work as a porter or barber in the institution.

[237] This is not comparable to the Canadian system.

[238] Dr. Kelly Hannah-Moffatt described the following effects of prolonged segregation in the literature:

- Prisoners experience the isolated conditions of solitary confinement, sensory deprivation, and constant 'lock down' status very negatively and stressfully (Toch, 1992);

- Prisoners leave supermax 'deeply traumatized' and 'socially disabled' (Lowen and lsaccs, 2012);

- Segregated prisoners who are already experiencing mental health problems, have a history of suicide attempts, and have high levels of hopelessness, are more likely to report suicidal ideation (Bonner, 2006; Kuper, 2006);

- Long-term segregation may lead to the development of previously undetected psychiatric symptoms (Kupers, 2006);

- Segregation appears to be a significant risk factor for the development of psychiatric symptoms including depression and suicidal ideation (Bonner, 2006), as well as psychiatric symptoms generally (Brodsky and Scogin, 1988; Grassian, 1983; Grassian and Friedman, 1986; Korn, 1988; Kupers, 1999; Miller, 1994);

- Antipsychotic medication loses some effectiveness on people in segregation (Kupers, 2006);

- Prisoners who experience isolation report experiencing anger, hatred, bitterness, boredom, stress, loss of the sense of reality, suicidal thoughts, trouble sleeping, impaired concentration, confusion, depression, and hallucinations (Jackson, 1983; Korn, 1988b; Andersen, Lillebrek, and Sestoft, 1997; Kupers, 1999; Martel, 1999; Rhodes, 2004);

- Prolonged isolation may negatively affect women's ability to cope with incarceration (Kruttschnitt and Vuolo, 2007);

- Segregation can erode federally sentenced women's self-worth, re-traumatizes them, and contributes to a range of mental health issues (Martel, 1999);

- Segregation has repeatedly been linked to appetite and sleep problems, anxiety, panic, rage, loss of control, depersonalization, paranoia, hallucinations, self-mutilation, increased rates of suicide and self-harm, an increased level of violence against others, and higher rates of frustration (Miller and Young, 1997; Haney, 2003; 2006; Kupers, 2006.,);

- Isolation can produce emotional damage, declines in mental functioning, depersonalization, hallucination, and delusion (Scott and Gendreau, 1969; Grassian, 1983; Brodsky and Scogin, 1988; Korn, 1988; Kupers, 1999; Miller, 1994; Haney, 2006);

- Segregation may lead to cognitive-behavioural problems among prisoners: difficulty solving interpersonal problems, unawareness of the consequences of their actions, inability to make positive choices, and a tendency to display disregard for others as a result of being socially unaware and impulsive (Motiuk and Blanchette, 2001);

- Segregation can produce a vicious cycle where a prisoner's extreme behaviour and 'acting out' leads to an increase in physical altercations with prison staff, which

ultimately increases the level of frustration and violence engaged in by both parties (Kupers, 2006);

- Prisoners who are denied normal social contact with others on a long-term basis experience heightened levels of anxiety, increased risk of panic attacks, and a sense of impending emotional breakdown (Haney, 2009);

- Prisoners housed in segregation may lose the ability to limit and control their own behaviour, relying instead on the prison structure to manage their conduct. Others in extreme forms of restricted isolation may become severely apathetic and lethargic resulting in an inability to initiate behaviour (Arrigo and Bullock, 2008); and

- Mentally ill prisoners are more likely than other prisoners to be sent to solitary confinement. Several studies have estimated that about one-third of prisoners in solitary confinement are mentally ill (Arrigo and Bullock, 2008; Haney, 2009; Metzner and Fellner, 2010).

[239] The respondent suggested that Dr. Hannah-Moffat's evidence did not reflect consideration of policy changes since 2015. While this is true, I am satisfied that it does not affect Dr. Hannah-Moffat's evidence. Dr. Hannah-Moffat is a professor of Sociology and the former director of the Centre of Criminology and Socio-legal Studies at the University of Toronto. Dr. Hannah-Moffat was a policy advisor to the Commission of Inquiry into Certain Events at the Prison for Women in Kingston April 1994 and an expert witness for the Office of the Ontario Coroner in the Ashely Smith Inquest. I am satisfied that Dr. Hannah-Moffat, who was not cross-examined, was undoubtedly aware of those changes and would have referred to them if they altered or qualified her conclusions.

[240] I accept Dr. Hannah-Moffat's evidence that these effects, which include the development and exacerbation of mental illness, have been documented in the literature which she reviewed and as a result I conclude that these negative effects are foreseeable and expected.

[241] I accept that in an individual case, as Dr. Morgan indicated, negative psychological effects may not be observable, but I do not accept that these have not occurred. As indicated, Dr. Morgan's suggestion, that they occur in some cases but not others, is unpersuasive.

[242] Dr. Chaimowitz stated that administrative segregation for more than 15 consecutive days poses a serious risk of serious permanent observable negative mental health effects and that this risk grows as the segregation continues, particularly if the individual has no certainty of a date on which it will end. Serious permanent observable mental health effects can otherwise be called mental illness.

[243] Dr. Chaimowitz was not cross-examined although the respondent forcefully pointed out that Dr. Chaimowitz did not describe any experience treating inmates in a federal institution.

[244] I do not accept this criticism of Dr. Chaimowitz.

[245] Dr. Chaimowitz has professional experience treating persons who had previously been in administrative segregation. I recognize that these individuals may have had problems before they were admitted to administrative segregation. However, Dr. Chaimowitz is a psychiatrist duly licensed in Canada and certified by the American Boards of Psychiatry and Neurology.

[246] The respondent tenders Dr. Blanchette on the nature of the mental health services provided to inmates. In her evidence Dr. Blanchette makes claims related to the effectiveness of treatment: "Even though substance abuse is a mental health disorder, the cognitive-behavioural intervention techniques which are taught and learned in correctional programs, including self-management (also known as relapse prevention) have been shown to be highly effective in reducing substance abuse and associated criminal offending." This evidence is tendered despite Dr. Blanchette's lack of frontline treatment of offenders. If evidence of the effects of administrative segregation can only be effectively adduced by an individual with current experience treating inmates in administrative segregation, it behoves the respondent to lead evidence on the effectiveness of the treatment of inmates through an individual with current experience treating such inmates. The respondent leads no such evidence.

[247] Dr. Chaimowitz' opinion about the nature, causes and exacerbation of the mental health problems of his patients who had been administratively segregated while in prison is an opinion well within his expertise.

[248] I also accept Dr. Chaimowitz evidence that prolonged administrative segregation poses a serious risk of negative psychological effects.

[249] Rule 43 of the Mandela Rules prohibits prolonged solitary confinement and Rule 44 provides solitary confinement for a period of more than 15 days is considered prolonged. I accept the respondent's view that the Mandela Rules are not binding but they do represent an international consensus which Canada supported. As indicated, the respondent acknowledges that Canada helped draft these Rules.

[250] The Organization of American States of which Canada is a member, took the position in 2013 that member states must adopt concrete measures to eliminate prolonged or indefinite isolation.

[251] The *Corrections and Conditional Release Act* and Correctional Service of Canada practice recognize the danger of prolonged segregation. Specifically, section 31 (2) provides that an inmate should be released from administrative segregation at the earliest appropriate time. Section 31 (3) provides that the Institutional Head must be satisfied that there is no reasonable alternative to administrative segregation before ordering an inmate into it. Pursuant to the Commissioner's Directive 709 paragraph 70 a mental health professional must provide a written opinion noting any deterioration of mental health within the first 25 days of admission and a healthcare professional must visit each inmate in administrative segregation daily including weekends. The *Corrections and Conditional*

Release Act provides for a maximum amount of time that a person can spend in disciplinary segregation; namely 45 days.

[252] I am satisfied by the evidence that keeping a person in administrative segregation for an indefinite prolonged period exposes that person to abnormal psychological stress and will if the stay continues indefinitely result in permanent psychological harm and that Canada seeks to avoid that harm by providing inmate entitlements, a review mechanism, ongoing health services and perfunctory contact with Correctional Service of Canada personnel.

[253] The absence of a maximum limit on detention has been held not to violate the *Charter of Rights and Freedoms* in an immigration context. See *Brown v Canada,* 2017 F.C. 710. However, the issue here is different because the person detained is segregated and it is the prolonged isolation from the general inmate population not detention in the penitentiary which causes the harm.

[254] I am satisfied that there is no serious question the practice of keeping an inmate in administrative segregation for a prolonged period is harmful and offside responsible medical opinion.

[255] Despite section 87 (a) of the legislative scheme, the current regime waits for the negative psychological effects to manifest in the form of some recognizable observable form of mental decompensation or suicidal ideation before supporting or perhaps removing the inmate. In other words, the person is not removed or supported until it is obvious that they have been harmed.

[256] Detaining a person until they have manifested psychological harm is a treatment if not a punishment. It is also likely contrary to section 87 (a) *Corrections and Conditional Release Act*. The question for me however is whether it is "cruel and unusual" as these words are constitutionally understood.

[257] The applicant's section 12 claim is not based on the length of the sentence. It is based on the psychological effect of isolating an inmate. This will require its own analysis.

[258] The thrust of the applicant's argument is that the high threshold under section 12 is reached because of the unacceptable medical harm experienced by inmates in prolonged segregation. In particular, this is the clinically recognized harm to the inmate's mental health.

[259] As harms from administrative segregation develop, the inmate is being monitored by the Correctional Service of Canada staff in accordance with current procedures. The applicant did not convince me that this monitoring is ineffective. While the applicant challenged Dr. Morgan's assertion that initial screening, prior to placement in administrative segregation, would be effective at ensuring inmates that could be harmed were not admitted to administrative segregation, the applicant did not challenge his suggestion that ongoing monitoring could be effective. In fact, the applicant specifically put to Dr. Morgan that ongoing monitoring is important precisely because the initial screening is imprecise. Nor did the applicant suggest that the ongoing monitoring of

inmates provided in the Correctional Service of Canada's policies would be unable to detect deteriorating health.

[260] I accept that the Correctional Service of Canada can adequately monitor inmates who are in administrative segregation to identify when an inmate's physical and mental health is deteriorating.

[261] The Correctional Service of Canada is therefore required to balance the harms to the inmate caused by continuing administrative segregation against the benefits to safety by maintaining administrative segregation.

[262] If the benefits to safety are greater than the continued harm suffered, the institution must consider whether its staff can comply with *Corrections and Conditional Release Act* section 69, if they keep the inmate in administrative segregation.

[263] There is a comparative analysis necessary when determining whether the serious permanent observable negative mental health effects consequent upon prolonged administrative segregation are grossly disproportionate. This comparative analysis requires a comparator. The applicant here is not an inmate but brings this application because it has public interest standing. Accordingly, the comparator can only be hypothetical.

[264] I pose the following hypothetical:

- an inmate has been administratively segregated for his or her protection because there is an incompatible in the prison population and not due to anything the inmate has done;
- the decision to segregate has been made to preserve the safety of persons working in the penitentiary and inmates housed there;
- the decision to administratively segregate prevented an outbreak of violence; and
- the inmate will spend more than 15 days in administrative segregation and will not be released until an unknown time in the future which will increase the inmate's mental health problems.

[265] Is this treatment so excessive that it outrages Canadian standards of decency and so disproportionate to the purpose for which it was made that Canadians find it abhorrent or intolerable?

[266] While it would be convenient to switch the inquiry, and review a legislative scheme providing for prolonged or indefinite administrative segregation by reference to the principles of fundamental justice, this approach has been rejected. See *R v Malmo-Levine,* 2003 SCC 74 at para. 160.

[267] Section 7 cannot find a treatment or punishment disproportionate where it passes the test under section 12.

[268] There is evidence which suggests that a cap on the maximum amount of time an inmate can be administratively segregated is possible. First, the average length of time spent in administrative segregation in 2016 was 24 days. Of course, averages can be deceiving. Second, there is a cap of 45 days on the time that an inmate spends in segregation because of a disciplinary proceeding. Third, the Mandela Rules call for an end to prolonged segregation which they define as segregation for more than 15 days. While it would be tempting to think that the Rules are aimed at less "civilized" countries, it is important to bear in mind that in 2012, the Committee Against Torture published a sixth periodic report on Canada. The Committee against Torture, is a body of 10 independent experts monitoring implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* by State parties to the Convention. That Report noted as a principal concern Canada's "use of solitary confinement, in the forms of disciplinary and administrative segregation, often extensively prolonged, even for persons with mental illness".

[269] I am not satisfied by the evidence that the applicant has demonstrated that the answer to this question will always be the same and will always be in the affirmative. If effective monitoring is possible and I believe it is and if section 87 (a) is applied as the *Corrections and Conditional Release Act* requires, then I do not believe the current legislative scheme which permits prolonged administrative segregation must inevitably result in the treatment of an inmate which is grossly disproportionate to the safety risk the inmate presents.

[270] Accordingly, I am not prepared to find that the legislative scheme providing for administrative segregation in the *Corrections and Conditional Release Act* is contrary to section 12 of the *Charter of Rights and Freedoms* because it does not contain a hard cap on the length of time that an inmate can be administratively segregated.

[271] I do not wish to be taken as having concluded that the application of this legislative scheme could never be grossly disproportionate treatment of a particular inmate. See for example *Ogiamien v Ontario (Ministry of Community safety and Correctional Services* 2016 ONSC 3080, not overturned on this point in 2017 ONCA 667.

Conclusion and remedy

[272] The fifth working day review fails to provide the procedural safeguards required by the principles of fundamental justice. The use of administrative segregation beyond the fifth working day is *ultra vires* a *Charter* compliant interpretation of the current legislative provisions. Any continued use of administrative segregation that relies on the fifth working day review is unconstitutional.

[273] The appropriate remedy is a declaration that the current provisions of the *Corrections and Conditional Release Act* sections 31-37 do not authorize administrative segregation after the fifth working day as it does not have sufficient procedural protections to ensure that continued administrative segregation does not deprive inmates of liberty or security of the person in a manner inconsistent with the principles of fundamental justice. As declaratory relief, this remedy is consistent with the court's response to previous section

52 (1) cases. It is consistent with the sort of harm that *Operation Dismantle*, [1985] 1 S.C.R. 441 suggests is properly subject to declaratory relief (p. 457).

[274] The respondent requested that any order to this effect be stayed for a period of 12 months to allow Parliament a reasonable period to, if it wished to do so, enact an appropriate legislative response. The applicant suggests that in view of the seriousness of the ongoing and potential *Charter* breaches to individuals the declaration of invalidity should not be suspended for more than six months.

[275] I accept that a suspended declaration of invalidity is required. Prisons are dangerous places and the inability to resort to administrative segregation, without an appropriate timeline to implement changes, creates unacceptable risks for Correctional Service of Canada personnel and inmates (*Schachter v. Canada*, [1992] 2 S.C.R. 679, p. 719).

[276] I am also satisfied that the constitutional challenge posed by this application essentially involves the court and Parliament in a conversation about the constitutional appropriateness of sections 31-37 of the *Corrections and Conditional Release Act*. In my view it is unrealistic to expect Parliament to respond within six months.

[277] Accordingly, this declaration of invalidity is suspended for 12 months during which time sections 31-37 of the *Corrections and Conditional Release Act* will remain in force.

Costs

[278] Generally, the applicant seeks no costs and requests that no costs be awarded against it. However, in its reply factum the applicant asks for its costs if the court concludes that the changes implemented by the Correctional Service of Canada since the commencement of this application address the constitutional issues raised in this application. I did not come to this conclusion so there will be no order for costs.

Marrocco A.C.J.S.C.

Released: 20171218

CITATION: Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 ONSC 7491
COURT FILE NO.: CV-15-520661
DATE: 20171218

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

– and –

HER MAJESTY THE QUEEN as represented by THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

Marrocco A.C.J.S.C.

Released: 20171218