Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

- and -

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

Respondent

FACTUM OF THE APPLICANT,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(RETURNABLE SEPTEMBER 11-15, 2017)

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CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

and

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

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FACTUM OF THE APPLICANT,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(RETURNABLE SEPTEMBER 11-15, 2017)

PART I - OVERVIEW

1. This Application calls on the Court to end the administrative segregation regime in federal penitentiaries. This regime, and the provisions of the *Corrections and Conditional Release Act* (the "***CCRA***") which authorize it, violates sections 7, 11, and 12 of the *Charter*. Administrative segregation may only be used as an absolute last resort, for the shortest possible duration and with the least restrictive conditions, never for more than 15 consecutive days, and only where there has been an independent authorization within five days of the decision. Additionally, the use of administrative segregation is never constitutionally permissible where the inmate is young (18-21), has a mental illness, or requires protective custody. These limits reflect international norms as well as Canadian and international medical and psychological opinion regarding the great harm caused by administrative segregation.

2. Regrettably, the Respondent's approach to the use of administrative segregation, as authorized by the *CCRA*, falls woefully short of the *Charter* mark. Canada routinely confines inmates, many of whom have done absolutely nothing wrong, in administrative segregation, sometimes for weeks, months, and years, with 23 hours a day in cell and no meaningful human contact. It does the same to young adults and those with mental illness. There is no external oversight of these practices. And their toll is unconscionably and irreversibly high.

3. Remarkably, and despite the overwhelming medical opinion and consensus statements of the Canadian medical community, the Canadian Medical Association, the Registered Nurses Association of Ontario, the Canadian Mental Health Association, the American Psychological Association, the American Psychiatric Association, Mental Health America, coroners inquests and recommendations, the Correctional Investigator's damning investigations, and expert reports filed

on this Application, Canada's affiant, the warden of Collins Bay Institution, still testified that he does not believe that administrative segregation causes any psychological or physical harm.

4. Canada employs more than 250 psychologists and many other health care professionals who work on a daily basis with inmates in administrative segregation. Tellingly, however, Canada did not bring forward any evidence in defence of its practices from these clinicians. Instead, Canada proffered two witnesses: a psychologist from Texas with little relevant experience and a Canadian psychologist with absolutely no relevant experience. The evidence of these "experts" should, for reasons set out below, be given no weight.

5. It is cruel and unusual treatment to subject any prisoner to administrative segregation for more than 15 days, and to subject young adults and individuals with mental illness to administrative segregation for any period of time. Because of the serious harm that may result from even short periods of administrative segregation, principles of fundamental justice require that a decision to confine must be reviewed and authorized within the shortest possible period, and no later than 5 days after the decision, by an independent decision maker directed to balance the safety of the institution against the risk of harm to the inmate. Finally, Canada imposes double punishment contrary to s. 11(h) of the *Charter* when it confines inmates to administrative segregation for their own protection.

6. None of these breaches are saved by section 1. The evidence is uncontradicted that the objective of prison safety can be served without confining prisoners to their tiny cells for 23 hours a day, and that the system should have ample capacity to implement such changes. There is no evidence of any connection between the practices impugned by this Application and prison safety. Nor is there evidence that the relief requested and the alternatives provided will in any way impair

prison safety. Distressingly, the Respondent's witnesses chose not to review, let alone consider, the Applicant's expert evidence on these issues. Nor did Canada challenge or contradict it. The impugned practices may have become a matter of bureaucratic habit, but they fall far short of necessity.

PART II - FACTUAL EVIDENCE

1. OVERVIEW OF SOLITARY CONFINEMENT IN CANADA

7. Administrative segregation is a prison within a prison.[1] As described by J.R: "[n]o matter what the institution was, segregation meant spending all, or almost all of my day locked in a tiny cell, completely alone, with little to do, and never knowing when, or if, I would get out".[2]

8. A central feature of administrative segregation is indefinite isolation. Whereas segregation for disciplinary purposes is limited to 30 days, there is no limit on the time an inmate can spend in administrative segregation.[3] Some spend years in administrative segregation. T.N. was segregated for the better part of two decades.[4] As he explained: "[t]he uncertainty of how long I would be in Administrative Segregation makes it much worse than disciplinary segregation. At least then I knew when I would be getting out".[5] Canada has refused to confirm precisely how long T.N., or any of the inmate affiants, spent in administrative segregation.[6]

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1 See e.g. *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 67, CCLA Brief of Authorities, Tab 15.

2 Affidavit of J.R., sworn April 20, 2017 at para 17, CCLA Reply Record, Tab 2.

3 *Corrections and Conditional Release Act*, SC 1992, c 20, s 44(1)(f), CCLA Brief of Authorities, Volume 5, Tab 53.

4 Affidavit of T.N., sworn April 21, 2017, at paras 9-12, CCLA Reply Record, Tab 3.

5 Affidavit of T.N., sworn April 21, 2017, at para 29, CCLA Reply Record, Tab 3.

6 At the Cross-examination of B. Somers at p. 26, Q. 115, CCLA Transcript Brief, Volume 2, Tab 4, Canada took under advisement a request for logs recording T.N.'s admissions to administrative segregation after Assistant Deputy Commissioner Somers confirmed that these logs could readily be generated from CSC's computer database. Canada subsequently refused to produce logs recording the admission of any of the inmate affiants to administrative segregation.

9. The Correctional Service of Canada (**"CSC"**) uses administrative segregation for inmates who, for whatever reason, it believes cannot be housed in the general prison population or in any sub-population.[7] These inmates are indefinitely locked in a cell for 23 hours a day without meaningful contact even though CSC maintains that they are not being punished.

10. Some inmates are confined to administrative segregation because they need protection. They may be in danger because a hostile inmate is admitted to general population, or because they are gang targets.[8] Their confinement persists until a bed is found elsewhere.[9]

11. Other inmates are confined in administrative segregation, because they are deemed to pose a threat to the orderly operation of the prison or to their fellow prisoners.[10] Although these inmates have not been tried or sanctioned for any disciplinary infraction, CSC claims that their confinement is necessary to manage behavioural problems.[11]

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7 Affidavit #2 of J. Pyke, sworn March 30, 2017 at para 57, Respondent's Application Record, Volume 2, Tab 2.

8 Affidavit #2 of J. Pyke, sworn March 30, 2017, at para 57, Respondent's Application Record, Volume 2, Tab 2.

9 Affidavit #2 of J. Pyke, sworn March 30, 2017, at para 10, Respondent's Application Record, Volume 2, Tab 2.

10 Affidavit #2 of J. Pyke, sworn March 30, 2017, at para 67, Respondent's Application Record, Volume 2, Tab 2.

11 Affidavit #2 of J. Pyke, sworn March 30, 2017, at paras 67-68, Respondent's Application Record, Volume 2, Tab 2. Disturbingly, it appears that administrative segregation is actually being imposed *in lieu* of laying institutional charges: see e.g. *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 70, CCLA Brief of Authorities, Volume 1, Tab 14.

2. THE LEGISLATIVE, REGULATORY, AND POLICY FRAMEWORK

12. Canada's prisons are governed by the *CCRA*.[12] Section 31 of the *CCRA* sets out the grounds for ordering administrative segregation:

> **31** (1) The purpose of administrative segregation is to maintain the security of the penitentiary or the safety of any person *by not allowing an inmate to associate with other inmates*. [Emphasis added]
>
> **Duration**
>
> (2) The inmate is to be released from administrative segregation at the earliest appropriate time.
>
> **Grounds for confining inmate in administrative segregation**
>
> (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that
>
> > (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;
> >
> > (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or
> >
> > (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

13. Section 32 of the *CCRA* provides that "all decisions by the institutional head to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31". The criteria in section 31 are the gate through which all inmates must pass, both

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[12] *Corrections and Conditional Release Act*, SC 1992, c 20, s 20, CCLA Brief of Authorities, Volume 5, Tab 53.

when condemned to administrative segregation and in order to be released. But, these considerations do not include the impact of confinement on the health of the inmate.

14. The *Corrections and Conditional Release Act Regulations* (the "***Regulations***") provide that the authority of the institutional head may be exercised by designated staff members.[13] Warden Jay Pyke of Collins Bay Institution, for example, testified that, with the rank of Correctional Supervisor, he had authority to admit inmates to administrative segregation in the absence of the warden.[14] He was 32 years old, with six years' experience when he assumed that role. Under the current regime, the institutional head need only subsequently review and confirm a decision by a delegate to admit an inmate to segregation.[15]

15. The *Regulations* provide for the periodic review of an inmate's confinement in administrative segregation by a Segregation Review Board after five and 30 days, respectively.[16] They also expressly provide that the members of the Segregation Review Board will be "designated by the institutional head".[17] In light of the statutory directive that "the inmate is to be released from administrative segregation at the earliest appropriate time", if an inmate remains in segregation, it is because the institutional head has determined that continued detention is necessary.[18] The Board is thus appointed by the institutional head to review the institutional

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13 *Corrections and Conditional Release Regulations*, SOR/92-620, s 6(c), CCLA Brief of Authorities, Volume 5, Tab 54.

14 Cross-examination of J. Pyke at p. 11, Q 29-32, CCLA Transcript Brief, Volume 1, Tab 2.

15 *Corrections and Conditional Release Regulations*, SOR/92-620, s 20, CCLA Brief of Authorities, Volume 5, Tab 54.

16 *Corrections and Conditional Release Regulations*, SOR/92-620, s 21, CCLA Brief of Authorities, Volume 5, Tab 54.

17 *Corrections and Conditional Release Regulations*, SOR/92-620, s 21(1), CCLA Brief of Authorities, Volume 5, Tab 54.

18 *Corrections and Conditional Release Regulations*, SOR/92-620, s 31(2), CCLA Brief of Authorities, Volume 5, Tab 54.

head's own decision. The institutional head actually chairs the 30-day Segregation Review Board.[19]

16. The review process is perfunctory.[20] J.H., an inmate confined immediately to segregation at the beginning of his sentence, was given meaningless reasons for his initial admission to segregation. Those reasons were reproduced word for word in his subsequent reviews.[21]

17. Where an inmate's detention in administrative segregation is maintained beyond 60 days, the *Regulations* direct a review every 60 days by the regional head or a staff member designated by the regional head.[22] But, as Warden Pyke confirmed on cross-examination, there is no independent review, at any level, of the decision to maintain an inmate's detention in administrative segregation.[23] The decision to confine and continue confinement is, from beginning to end, made and reviewed by CSC personnel.[24]

18. Although Parliament is now beginning to contemplate an independent review of administrative segregation after 21 days, and later 15 days, the independent reviewer would only make non-binding recommendations and has no power to modify or override the decision of the institutional head.

3. THE CONDITIONS OF ADMINISTRATIVE SEGREGATION

19. J.R., who was confined in segregation cells at many federal institutions, deposed:

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19 *Commissioner's Directive 709*, s 47, CCLA Brief of Authorities, Volume 5, Tab 51.

20 See e.g. Affidavit of T.N., sworn April 21, 2017, at para 35, CCLA Reply Record, Tab 3.

21 "Kingston Penitentiary Involuntary Segregation Placement document pertaining to J.H.", CCLA Exhibit Brief, Volume 1, Tab 18 ; cross-examination of J. Pyke at p. 137, Q. 478; 172, Q. 621-622, CCLA Transcript Brief, Volume 1, Tab 2.

22 *Corrections and Conditional Release Regulations*, SOR/92-620, s 22, CCLA Brief of Authorities, Volume 5, Tab 54.

23 Cross-examination of J. Pyke at p. 60-61, Q. 187-194, CCLA Transcript Brief, Volume 1, Tab 2.

24 Cross-examination of J. Pyke at p. 133-134, Q. 461-462, CCLA Transcript Brief, Volume 1, Tab 2 [emphasis added].

> The Administrative Segregation cells were about 7 feet by 10 feet [70 square feet or 6.51 square metres] and they were really dirty. The cells all had a bed, a toilet, and a shelf. That was it. The doors were usually made of steel. There was always a hatch at knee height and everything came through that slot. The guards would push our food through the hatch or pass us the receiver through it when we got to make a phone call.[25]

20. The segregation cell described by J.R. was larger than some. Eleven of the segregation cells at the Dorchester Institution (built in 1880) measure only 48 square feet (4.48 square metres).[26] The remaining segregation cells are 54 square feet (5.05 square metres). Cells measuring some 65 to 75 square feet (6 to 7 square meters) are common.[27]

21. Segregation cells are sparse. T.N.'s bed "was made of cinderblock filled with cement and wrapped in steel plate. The walls are steel plate, too".[28] And "[t]he cells do not have any air control so the walls sweat. There are often bugs and [T.N.] remember them biting [his] legs".[29] J.H. deposed that "[t]he walls are made of steel. They are filthy. There is dirt and rust everywhere. In some places, the rust is so bad that it has eaten through the first sheet of metal in the wall".[30]

22. Some segregation cells are windowless.[31] T.N. described being confined to a windowless cell at the Millhaven Institution, with only a 3 inch by 5 inch piece of Plexiglas in the door.[32] Similarly, J.H. remembered that in some segregation cells "there are no windows. The only view outside the cell is through the door".[33] Some segregation cells do not permit the inmate to control

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25 Affidavit of J.R., sworn April 20, 2017, at para 18, CCLA Reply Record, Tab 2.

26 Cross-examination of B. Somers, Answer to U/T #4, CCLA Transcript Brief, Volume 2, Tab 4.

27 Cross-examination of B. Somers, Answer to U/T #4, CCLA Transcript Brief, Volume 2, Tab 4.

28 Affidavit of T.N., sworn April 21, 2017, at para 22, CCLA Reply Record, Tab 3.

29 Affidavit of T.N., sworn April 21, 2017, at para 22, CCLA Reply Record, Tab 3.

30 Affidavit of J.H., sworn April 20, 2017, at para 19, CCLA Reply Record, Tab 1.

31 Cross-examination of B. Somers at p. 36-37, Q 164, CCLA Transcript Brief, Volume 2, Tab 4; Affidavit of J.R., sworn April 20, 2017, at para 20, CCLA Reply Record, Tab 2; Affidavit of T.N., sworn April 21, 2017, at para 22, CCLA Reply Record, Tab 3.

32 Affidavit of T.N., sworn April 21, 2017, at para 22, CCLA Reply Record, Tab 3.

33 Affidavit of J.H., sworn April 20, 2017, at para 20, CCLA Reply Record, Tab 1.

the lights.[34] T.N. went "days without the light being turned on". He remembered: "if the window on the door was shut, I could not see anything. Everything was dark. All I had were the thoughts inside my mind. The feeling of hopelessness was all-consuming".[35]

23. Canada has photographs of the inside of its segregation cells, but it refused to produce them.[36] On cross-examination, however, Assistant Deputy Commissioner Bruce Somers identified photographs of segregation cells at the Collins Bay Institution - some 65 square feet (6.04 metres) - in which inmates spend 23 out of 24 hours.[37]

24. J.R. deposed that while in administrative segregation, "I spent about twenty-three hours of every day in my cell, sometimes more. Some days, I never left my cell at all"[38] and that "there were long periods in which I did not see the outdoors".[39] "I often went an entire month or more without getting outdoors. The guards paid lip service to our entitlement to exercise time, but the reality was such that it was generally not an option".[40] On some days, yard time would not be offered, and on other days, especially in winter, the weather rendered the yard inaccessible.

25. Warden Pyke confirmed that the reason inmates are not confined for 24 hours a day is the requirement in the *Regulations* that they be given one hour a day of exercise.[41] He explained that, when allowed outside, they are limited to "[s]egregation yards [that] are very small and very

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34 Affidavit of J.R., sworn April 20, 2017, at para 20, CCLA Reply Record, Tab 2; Affidavit of T.N., sworn April 21, 2017, at paras 16, 23-24, CCLA Reply Record, Tab 3.

35 Affidavit of T.N., sworn April 21, 2017, at para 27, CCLA Reply Record, Tab 3.

36 Cross-examination of B. Somers at p. 34, Q. 148; Refusal to U/T#3, CCLA Undertakings Brief.

37 Cross-examination of B. Somers, Answer to U/T #5, CCLA Undertakings Brief, Tab C;Photographs of cell, CCLA Exhibit Brief, Volume 1, Tabs 12-13; Cross-examination of B. Somers, Answer to U/T #4.

38 Affidavit of J.R., sworn April 20, 2017, at para 21, CCLA Reply Record, Tab 2.

39 Affidavit of J.R., sworn April 20, 2017, at para 45, CCLA Reply Record, Tab 2.

40 Affidavit of T.N., sworn April 21, 2017, at para 46, CCLA Reply Record, Tab 3.

41 Cross-examination of J. Pyke at p. 46, Q. 131; p. 46-47, Q. 134-136, referring to s. 83(2)(d) of the *Regulations*; p. 50, Q. 145, CCLA Transcript Brief, Volume 1, Tab 2.

confined and subject to closed-circuit TV monitoring".[42] At some institutions, the walls around the yard are 20 feet high and inmates can see nothing but sky.[43] T.N. remembered that "[t]here was no toilet in the yard and so guys would urinate out there and the smell would fester".[44] Often, inmates are not permitted to be in the yard with others. J.H. remembered that "'yard' time was always spent by myself", and T.N. recalled that he was almost always alone in the yard.[45] Assistant Deputy Commissioner Somers confirmed that "operational requirements may not permit two inmates to be in the yard at the same time".[46]

26. Segregated inmates are cut off from the world. J.R. deposed that "because my family was often three or four provinces away, I did not often receive visitors. That is the reality of being shuffled between federal institutions".[47] He added "[w]hen I did get a visit, it was always a closed visit behind a window.[48] Assistant Deputy Commissioner Somers' sur-reply Affidavit attached a series of desperate handwritten transfer requests from J.R.:

> I'm losing my marbles...I have gone through periods of high depression and complentation [sic] of suicide...though I unfortunately took another person's life I did not come to die in prison.[49]
>
> ...
>
> I need help I am going through a mental breakdown. I have less than one year till warrent [sic] expire [sic] but I feel like the walls are closing in. I have a strong case of depression I'm one step towards suicide and one step towards assaulting somebody. I'm impulsive I have serious anxiety issues

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42 Cross-examination of J. Pyke at p. 48, Q. 140, CCLA Transcript Brief, Volume 1, Tab 2.
43 Affidavit of T.N., sworn April 21, 2017, at para 50, CCLA Reply Record, Tab 3.
44 Affidavit of T.N., sworn April 21, 2017, at para 48, CCLA Reply Record, Tab 3.
45 Cross-examination of J. Pyke at p. 51, Q. 149, CCLA Transcript Brief, Volume 1, Tab 2; Affidavit of J.H., sworn April 20, 2017, at para 23, CCLA Reply Record, Tab 1; Affidavit of T.N., sworn April 21, 2017, at para 50, CCLA Reply Record, Tab 3.
46 Reply affidavit of B. Somers, sworn June 9, 2017, at para 21, Second Supplementary Application Record of the Respondent, Volume 1, Tab 1.
47 Affidavit of J.R., sworn April 20, 2017, at para 59, CCLA Reply Record, Tab 2.
48 Affidavit of J.R., sworn April 20, 2017, at para 59, CCLA Reply Record, Tab 2.
49 Applications for Transfer, at 646, Respondent's Second Supplemental Application Record, Volume 1, Tab Z.

> ...I would like to go as soon as possible I need help professional help.[50]

27. Many of the educational programs for inmates in administrative segregation are conducted through the cell door, and much of it is self-study.[51] T.N. deposed to the limited educational offerings in administrative segregation, describing how "[i]t took acts of desperation to get the attention of the prison staff who eventually gave me access".[52] J.R. deposed that he was not even offered educational programs while in administrative segregation at many institutions.[53]

28. Nursing "rounds" in the segregation unit are for the most part "through the door":

> Q. Visits from the nurse, I understand, are usually through the cell door?
>
> A. Yes. The nurse walks the entire range, goes cell to cell in terms of, you know, looking at the -- to see if the inmates has made a request. Or the inmates can make a request to see the RN in the unit, and then when the RN goes to do their rounds, they'll stop by the inmate's cell if they've made a request to speak to them particularly. Otherwise, they just go down, look in the units, administer medications to those that require it and then return.[54]

29. As J.R. deposed, "[t]he services performed by the nurses were perfunctory and referrals to doctors, therapists, psychiatrists, or dentists would take weeks".[55]

30. Dr. Robert Morgan, a Texas psychologist retained by Canada, testified that conditions in administrative segregation in Canadian penitentiaries are the same as those in American Supermax prisons:

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50 Applications for Transfer, at 650 [emphasis in original], Respondent's Second Supplemental Application Record, Volume 1, Tab Z (requesting transfer from Stony Mountain Institution to Saskatchewan Penitentiary).

51 Cross-examination of J. Pyke at p. 52-53, Q. 156-159, CCLA Transcript Brief, Volume 1, Tab 2.

52 Affidavit of T.N., sworn April 21, 2017, at para 55, CCLA Reply Record, Tab 3.

53 Affidavit of J.R., sworn April 20, 2017, at para 48, CCLA Reply Record, Tab 2.

54 Cross-examination of J. Pyke at p. 53, Q. 160, CCLA Transcript Brief, Volume 1, Tab 2 [emphasis added]. See also the evidence of Dr. Robert Morgan, Canada's expert, below at paragraph 113.

55 Affidavit of J.R., sworn April 20, 2017, at para 51, CCLA Reply Record, Tab 2; Affidavit of T.N., sworn April 21, 2017, at para 62, CCLA Reply Record, Tab 3.

> A.· ·Yes, a supermax facility typically means a specific correctional institution that's designated as a secured facility, and secured would be a similar definition to administrative segregation, meaning inmates are locked down or locked in their cell 23 hours a day with different times out of the cell depending on the jurisdiction but typically meaning about an hour of exercise either five days a week or every day of the week, a shower on average between every other day to three times a week. They get out of their cell for visitations, legal visits, things of that nature, but the overarching issue with regard to the supermax facility is that it's a facility with 23-hour lockdown.
>
> Q.· ·And for what period of time are inmates incarcerated in supermax facilities?
>
> A.· ·It's typically like administrative segregation is used in non-supermax facilities in that it's indeterminate.· It depends on issues regarding the inmate's behaviour, security and risk to the institution, which could include incompatibles.· It varies, and supermax is usually indeterminate, just like administrative segregation in most jurisdictions.[56]

4. THE EFFECTS OF SEGREGATION ON INMATES

31. Each of the inmate affiants deposed that prolonged administrative segregation caused them serious harm. None of them were cross examined. No admissible evidence from any prison clinician was proffered to contradict or challenge this evidence, notwithstanding voluminous files on each inmate and the involvement of psychologists and nurses in their confinement.

32. J.H. deposed that he suffered from "depression, [...]anxiety and an inability to concentrate" and that he experienced "severe mental and physical exhaustion".[57]

33. J.R. was first confined in administrative segregation at Kingston Penitentiary in 2007, when he was 20 years old. He was confined for more than two months and suffered greatly:

> I used to self-medicate to deal with the stress .... I was so young. I did not know how to handle the isolation of confinement, because I had a lot of

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56 Re-examination of R. Morgan, 23 June 2017, at p. 165-166, Q. 629-630, CCLA Transcript Brief, Volume 1, Tab 3 [emphasis added].

57 Affidavit of J.H., sworn April 20, 2017, at paras 27-28, CCLA Reply Record, Tab 1.

> energy. I was immature and impulsive. I wanted to get out and move, but I could not. I did not know what to do with my stress [...]All I wanted was to pass out cold for as long as possible, again and again. It was all I could think to do to cope with the hopelessness of not knowing when they would let me out.[58]

34. J.R. was segregated on several other occasions, and he described being "extremely anxious" and "so depressed".[59] J. R. also recalled suicidal thoughts:

> In the moments when all I had was my stress and my depression, I would go deep into my thoughts. I would remember everybody who showed hate to me [...] And I would think: if I could do things over, I would just end my life. The longer I spent isolated, the more I started to feel like I wasn't really human. [...] I started to feel like I was an animal. The days started to run together. I had no way of knowing for how long I would in segregation. I just wanted to give up on life and I came very close to doing so. On several occasions, I made a noose and planned to take my life, before deciding against it.[60]

35. According to T.N.:

> Just about everyone I know in Administrative Segregation eventually starts to cut himself. It usually starts within the first sixty days. I have peeled a piece of steel off of my cell. I think that is what most people do to cut themselves.[61]

36. T.N. described the fate of his friend, R.Y., also in administrative segregation:

> I could hear him through the walls. He was crying and begging to be released. I felt bad for him so when the guards came around, I warned them that I thought he might do something to himself. Then, he started to give stuff away to the people in the cells around him. That's when I knew it was really bad. One night, he strung himself up to the cover of the smoke detector using bed sheets. It took him a long time to die. I could hear him gagging and choking. It felt like forever. The guards didn't come around to cut him down until the next morning. [...] This made me angry and deeply sad.[62]

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58 Affidavit of J. R., sworn April 20, 2017, at para 26, CCLA Reply Record, Tab 2.
59 Affidavit of J. R., sworn April 20, 2017, at paras 25, 27, CCLA Reply Record, Tab 2.
60 Affidavit of J. R., sworn April 20, 2017, at paras 34-36, CCLA Reply Record, Tab 2.
61 Affidavit of T.N., sworn April 21, 2017, at para 32, CCLA Reply Record, Tab 3.
62 Affidavit of T.N., sworn April 21, 2017, at para 34, CCLA Reply Record, Tab 3.

37. T.N. went on hunger strikes.[63] He wondered "how much more torture [he] could withstand before giving up the fight" and killing himself.[64]

5. CANADA HAS CREATED THE NEED FOR ADMINISTRATIVE SEGREGATION

38. Canada's approach to the purported necessity of administrative segregation lacks rigour, because it does not accept the serious risk of harm. For example, Warden Pyke decides who goes, and stays, in administrative segregation, and he confirmed that his practices are similar to those of other CSC institutional heads.[65] Yet he candidly admitted that he approached these decisions from the perspective that administrative segregation does not cause physical or psychological harm:

> Q. But you're not aware of any psychological injury that can occur as a result of long-term administrative segregation?
>
> A. Personally, I am not.
>
> Q. And the same for physical injury?
>
> A. Can you be more direct, please, in terms of what you're referring to as physical injury in segregation?
>
> Q. Let's take it at the broadest possible level. You're not aware of any danger of physical injury to the inmate from prolonged administrative segregation?
>
> A. From the placement in admin segregation in and of itself?
>
> Q. Correct.
>
> A. No.[66]

39. Because CSC refuses to acknowledge the serious consequences of administrative segregation, it does not try to avoid or even minimize its use. Rather, administrative segregation has become an entrenched, routine feature of CSC's population management practices. J.H's

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63 Affidavit of T.N., sworn April 21, 2017, at paras 36-37, CCLA Reply Record, Tab 3.

64 Affidavit of T.N., sworn April 21, 2017, at paras 36-37, CCLA Reply Record, Tab 3.

65 Affidavit #2 of J. Pyke, sworn March 30, 2017, at paras 61-68; Cross-examination of J. Pyke at p. 14-15, Q. 46.

66 Cross-examination of J. Pyke at p. 40-41, Q. 106-11, CCLA Transcript Brief, Volume 1, Tab 2.

experience is representative of the ease with which institutional heads order and maintain administrative segregation.

40. J.H. began serving his sentence at the Kingston Penitentiary, under the direction of Warden Pyke. Before his arrival, CSC was aware that J.H.'s co-accused, who had testified against him, was in the general population at Kingston Penitentiary, and, as such, was an "incompatible".[67] CSC's response was to order J.H. directly into administrative segregation and hold him there until he could be placed in a penitentiary, expecting that this would occur some three months later.[68] As Warden Pyke explained, when an inmate arrives at a prison where an incompatible inmate his housed, it is CSC's policy to keep one of those inmates in administrative segregation for as long as it takes to resolve the incompatibility.[69] As Warden Pyke agreed, "[i]t's pretty automatic segregation".[70]

41. CSC acknowledged that J.H. would have been capable of sharing a cell with another inmate, and further, that the issue of incompatibility might have been avoided altogether at another institution.[71] Despite the existence of alternatives to Kingston Penitentiary,[72] Warden Pyke did not consider transferring J.H. to another intuition where he might have been released to the general population.[73]

42. When Kingston Penitentiary closed, J.H. was transferred to the Millhaven Institution, where he remained in administrative segregation, despite the fact that there was no incompatible in

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67 Cross-examination of J. Pyke at p. 97-100, CCLA Transcript Brief, Volume 1, Tab 2.
68 Cross-examination of J. Pyke at p. 126, Q. 425-428; p. 114, Q. 381; p. 179, Q. 647, CCLA Transcript Brief, Volume 1, Tab 2.
69 Affidavit #2 of J. Pyke, sworn March 30, 2017, at para 10, Respondent's Application Record, Volume 2, Tab 2.
70 Cross-examination of J. Pyke at p. 101, Q. 333-335, CCLA Transcript Brief, Volume 1, Tab 2.
71 Cross-examination of J. Pyke at p. 106, Q. 356, CCLA Transcript Brief, Volume 1, Tab 2.
72 Cross-examination of J. Pyke at p. 101, Q. 334-335, CCLA Transcript Brief, Volume 1, Tab 2.
73 Cross-examination of J. Pyke at p. 167, Q. 600-601, CCLA Transcript Brief, Volume 1, Tab 2.

the general population.[74] Although J.H. had not caused any incident in federal custody, the warden at Millhaven Institution wanted to "see a long period of stability and positive behaviour before any consideration for placement in the open population".[75] In each review of J.H.'s administrative segregation, the rationale for his continued detention was simply cut and pasted from the last review.[76]

43. In the end, J.H. spent 138 days in continuous segregation between Kingston and Millhaven before he was released into general custody in Millhaven.[77] Disturbingly, Warden Pyke testified that there was nothing about J.H.'s case that raises eyebrows.[78] He saw nothing wrong with the way that J.H. was treated.[79] On the contrary, he testified that J.H.'s treatment was what CSC means by its core values of "respect" and "fairness".[80]

44. J.H.'s case is but one example of the situations in which CSC uses segregation to manage institutional dynamics. T.N., for example, required protection from other inmates who had threatened him. CSC's response was to place him in administrative segregation for extended periods, even though he had done nothing wrong. Warden Pyke described this kind of segregation:

> Q. ... So they're minding their own business, an incompatibility issue arises, and you determine that they need to be involuntarily placed in administrative segregation [for their own protection]?
>
> A. Yes, until a solution's found to alleviate the incompatibility concerns.
>
> Q. Right. And that solution can take as long as it takes, right?

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74 Cross-examination of J. Pyke at pp. 179-180, Q. 647, CCLA Transcript Brief, Volume 1, Tab 2.
75 Cross-examination of J. Pyke at p. 158, Q. 569, CCLA Transcript Brief, Volume 1, Tab 2.
76 Cross-examination of J. Pyke at p. 137, Q. 478; p. 172, Q. 621-622, CCLA Transcript Brief, Volume 1, Tab 2.
77 Cross-examination of J. Pyke at p. 101, Q. 334; p. 175, Q. 637-639, CCLA Transcript Brief, Volume 1, Tab 2.
78 Cross-examination of J. Pyke at p. 181, Q. 650, CCLA Transcript Brief, Volume 1, Tab 2.
79 Cross-examination of J. Pyke at p. 177-78, Q. 646, CCLA Transcript Brief, Volume 1, Tab 2.
80 Cross-examination of J. Pyke at p. 181-184, Q. 652, 655, CCLA Transcript Brief, Volume 1, Tab 2.

A. It's a priority in terms of alleviating the segregation status to try to find that, but there's no set time limit.

Q. Right. And I think as we'll see in J.H.'s case, it takes 138 days.

A. Yeah.[81]

45. There is no evidence that it was necessary to confine J.H. or T.N. to his cell for months on end, or that CSC explored any less draconian measures. Rather, CSC has made the extraordinary practice of administrative segregation a routine feature of prison bureaucracy.

6. CANADA'S PROPOSED CHANGES DO NOT CORRECT THE CONSTITUTIONAL PROBLEM

46. Canada has proposed changes to the *CCRA* in the form of Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, and amendments to Commissioner's Directive 709 (**"CD-709"**). None of Canada's proposed changes should bar a ruling on the record before the Court.

47. This Court considered these proposed changes in rejecting Canada's request to adjourn. Bill C-56 does not impose a limit on the time that an inmate may remain in administrative segregation. Bill C-56 would provide that an inmate must be released from administrative segregation within 20 days, or earlier, unless the criteria set out in s 31(3) of the *Act* persist.[82] As the Court noted, Bill C-56 does not propose to change the criteria in s. 31 of the *Act*.[83] Therefore, if an inmate cannot be released immediately under the *Act* as it stands today, the inmate cannot be released under Bill C-56.[84]

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81 Cross-examination of J. Pyke at p. 111-112, CCLA Transcript Brief, Volume 1, Tab 2.

82 Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, 1st Sess, 42nd Parl, 2017, s 32, CCLA Brief of Authorities, Volume 5, Tab 48.

83 *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 4191 at para 12, CCLA Book of Authorities, Volume 1, Tab 10.

84 Cross-examination of J. Pyke at pp. 42-43, Q. 116-117, 119-120, CCLA Transcript Brief, Volume 1, Tab 2.

48. Furthermore, Bill C-56 does not contemplate any meaningful independent review with the power to order an inmate's release from administrative segregation. It does not even contemplate an independent recommendation on continued detention until an inmate has endured either 21 consecutive days in administrative segregation, or four separate placements in administrative segregation during a calendar year.[85] Bill C-56 also says nothing about excluding vulnerable groups from administrative segregation.

49. The proposed CD-709 is likewise silent with respect to young adults and those confined for their own protection. Insofar as the proposed CD-709 addresses certain categories of inmates with serious mental illness, Warden Pyke confirmed that these inmates were not supposed to be subject to administrative segregation, even under the current policies.[86]

50. On the adjournment motion, the Court concluded that "I am satisfied that the application challenges the constitutionality of aspects of the *Corrections and Conditional Release Act* that are not affected by the proposed amendments and that it is not, therefore, disrespectful of Parliament's legislative process to continue with this application".[87] The same can be said of the proposed changes to CD-709. Even if all of Canada's proposed changes are implemented, they will not affect the basis for this Application. Young adults, inmates needing protection, and all but the most seriously mentally ill will continue to be subjected to administrative segregation without meaningful oversight and there will be no limits on the length of their confinement.

7. ADMINISTRATIVE SEGREGATION IS SOLITARY CONFINEMENT

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85 Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, 1st Sess, 42nd Parl, 2017, ss 35.2(1)(a), 35.2(1)(b), CCLA Brief of Authorities, Volume 5, Tab 48.

86 Cross-examination of J. Pyke at pp. 43-44, Q. 121-123, CCLA Transcript Brief, Volume 1, Tab 2.

87 *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 4191 at para 15, CCLA Book of Authorities, Volume 1, Tab 10.

51. Although Canada denies that administrative segregation constitutes solitary confinement, this denial is of no consequence. Administrative segregation practiced in Canadian prisons falls squarely within the internationally accepted definition of solitary confinement: physical and social isolation in a cell for 22 to 24 hours per day.[88] As Justice Veit of the Alberta Court of Queen's Bench recently noted in *Hamm v. Canada*, "[i]t is agreed by all parties that what the institution describes as 'segregation' is often referred to in the public media, in academia, and in United Nations documents as 'solitary confinement'".[89]

52. Similarly, Professor Andrew Coyle, an expert on prison management whose evidence is discussed further below, referenced his testimony before the Coroner's Inquest Touching the Death of Ashley Smith (the "Ashley Smith Inquest") in responding to Canada's claim that it does not use solitary confinement:

> In the course of giving my evidence I was questioned at length about the definition of solitary confinement by several of the Counsel involved and by the Jury. I do not recollect anyone disputing the fact that the treatment of Ashley Smith amounted to solitary confinement. My understanding is that a number of prisoners in CSC custody are currently held in conditions of extended administrative segregation similar to those in which Ashley Smith was held. I find it difficult to accept the Government's assertion that solitary confinement does not exist within the Canadian correctional system.[90]

8. CANADA'S USE OF SOLITARY CONFINEMENT CONTRAVENES ITS INTERNATIONAL OBLIGATIONS

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88 As defined by the *Istanbul Statement on the Use and Effects of Solitary Confinement,* adopted by a panel of experts at the International Psychological Trauma Symposium in Istanbul on December 9, 2007. Annex to the Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (A/63/175) at p. 81, CCLA First Supplementary Application Record, Tab D.

89 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 15, CCLA Book of Authorities, Volume 1, Tab 14.

90 Expert report of A. Coyle at p. 21, CCLA Application Record, Tab C [emphasis added].

53. Professor Juan Méndez was the United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment, when he gave his opinion. He is now a Professor of human rights and international law at the Washington College of Law at American University in Washington D.C. He was a professor at Notre Dame Law School, and has taught at the School of Advanced International Studies at Johns Hopkins University, Georgetown Law School, and Oxford University. Professor Méndez served as President of the International Center for Transitional Justice and as Special Advisor to the Secretary General of the United Nations on the Prevention of Genocide. Additionally, he was President of the Inter-American Commission on Human Rights of the Organization of American States.

54. Professor Méndez deposed that solitary confinement in excess of 15 days contravenes Canada's obligations under international law:[91]

> ... prolonged solitary confinement cannot be justified for any reason when used for the purpose of criminal or disciplinary punishment, precisely because it causes severe mental pain and suffering beyond any reasonable retribution for criminal behaviour and thus constitutes an act defined in article 1 or article 16 of the Convention against Torture, and a breach of article 7 of the International Covenant on Civil and Political Rights.[92]

55. Under article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "CAT"), which Canada ratified in 1987, torture is defined as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or

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91 Affidavit of J. Méndez, Sworn June 15, 2016, at para 65, CCLA First Supplementary Application Record, Tab 1.

92 Affidavit of J. Méndez, Sworn June 15, 2016, at para 29, CCLA First Supplementary Application Record, Tab 1 [emphasis added].

> other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[93] [Emphasis added.]

56. Acts falling short of the definition of torture under Article 1 of the CAT may nevertheless constitute cruel, inhuman or degrading treatment or punishment under Article 16 of the CAT.

57. The United Nations' Nelson Mandela Rules provide "the specific and most-respected means of interpretation" of the content of the prohibitions in the CAT.[94] The Mandela Rules represent "an objective standard by which states and courts can determine whether in a given case that [sic] the person has been subjected to cruel, inhuman and degrading treatment, or in certain circumstances, torture".[95] A violation of the Mandela Rules is a violation of Canada's obligations under the CAT.

58. Rule 44 of the Mandela Rules defines solitary confinement as "confinement of prisoners for 22 hours or more a day without meaningful human contact". Prolonged solitary confinement is defined as "solitary confinement for a time period in excess of 15 consecutive days". Rule 43 (1) of the Mandela Rules prohibits solitary confinement in excess of fifteen days:

> in no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> a. Indefinite solitary confinement;
>
> b. Prolonged solitary confinement.

59. On cross-examination, Professor Méndez maintained that solitary confinement in excess of 15 days therefore constitutes either torture or cruel, inhuman, or degrading treatment or

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93 United Nations *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 1987), at p.1, CCLA Brief of Authorities, Volume 7, Tab 64.

94 Re-examination of J. Méndez, at pp. 32, 36, Q. 65, 73, CCLA Transcript Brief, Volume 1, Tab 1; Cross-examination of J. Méndez at p. 8, Q. 15, CCLA Transcript Brief, Volume 1, Tab 1.

95 Re-examination of J. Méndez at p. 36, Q. 73, CCLA Transcript Brief, Volume 1, Tab 1.

punishment, and contravenes Canada's obligations under the *Convention Against Torture*, regardless of any mitigating factors.[96] Furthermore, Professor Méndez testified that solitary confinement for periods shorter than 15 days could also contravene the CAT, if the prisoner was subject to a particular vulnerability.[97]

60. Article 7 of the International Covenant on Civil and Political Rights (the "ICCPR"), to which Canada acceded on May 19, 1976,[98] requires that no person be subjected to torture or to cruel, inhuman or degrading treatment or punishment. According to the United Nations Human Rights Committee, prolonged solitary confinement may be prohibited by article 7 of the ICCPR.[99] Prolonged solitary confinement contravenes article 10, paragraph 3 of the ICCPR, which states that "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation," because the severe mental health impacts of the practice do not promote those aims.[100]

61. Finally, Canada is also a member of the Organization of American States, of which the Inter-American Commission on Human Rights (the "IACHR") is a principle organ. At its 147th session, the IACHR held that all of the Commission's member states must adopt concrete measures to eliminate prolonged or indefinite isolation. The Commission affirmed that solitary

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96 Cross-examination of J. Méndez at pp. 18-19, Q. 46, CCLA Transcript Brief, Volume 1, Tab 1.

97 Cross-examination of J. Mendez at pp. 25-26, Q. 56, CCLA Transcript Brief, Volume 1, Tab 1.

98 *International Covenant on Civil and Political Rights*, *United Nations Treaty Series*, vol. 999 no. 1-14668, CCLA Brief of Authorities, Volume 7, Tab 60.

99 Human Rights Committee, *International Covenant on Civil and Political Rights, General Comment No. 20*, 44th session (1992), Annex VI.A, CCLA Brief of Authorities, Volume 7, Tab 59.

100 Affidavit of J. Méndez, sworn June 15, 2016, at para 18, CCLA First Supplementary Application Record, Tab 1.

confinement must never be applied to juveniles or persons with mental disabilities, and it upheld the prohibition of solitary confinement in excess of 15 consecutive days.[101]

9. THERE ARE PROVEN ALTERNATIVES TO ADMINISTRATIVE SEGREGATION

62. There are reasonable alternatives to administrative segregation, many of which are already used in comparable jurisdictions, including in England and Wales, the US, and Australia.

63. The unchallenged opinion of Professor Andrew Coyle, a world-renowned expert on the operation of prisons, is that it is possible to structure prisons "in a manner that minimizes the use of solitary confinement, not only without compromising other objectives of that system, but while strengthening them".[102] In Professor Coyle's view, proper prison management can "substantially reduce if not eliminate the use of administrative segregation".[103]

64. Professor Coyle is a former Governor (Warden) of prisons housing some of the UK's most dangerous inmates, Emeritus Professor of Prison Studies at the University of London, and author of an authoritative prison manual that has been translated into 16 languages. Professor Coyle was founding Director of the International Centre for Prison Studies at the University of London from 1997 to 2005, and in that capacity, he advised on prison management and reform in all regions of the world. He served as a consultant on prison matters for international organizations and governments including Brazil, Chile, Russia, Sweden, Spain, South Africa, Australia, New Zealand, China and Colombia, and at the time he prepared his report was engaged in an intendent review of the Irish Prison Service. He has provided expert opinions in U.K., Canadian and international proceedings on prison matters.

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101 Affidavit of J. Méndez, sworn June 15, 2016, at para 43, CCLA First Supplementary Application Record, Tab 1; See "Annex to the Press Release Issued at the Close of the 147th Session", Organization of American States, April 5 2013.

102 Expert Report of Dr. A. Coyle at para 1, CCLA Application Record, Tab C.

103 Expert Report of Dr. A. Coyle at para 48, CCLA Application Record, Tab C.

65. Professor Coyle describes how prison authorities in England and Wales manage those inmates who are "too dangerous or disruptive to be in general population" in Close Supervision Centres (**"CS Centres"**).[104] However, Professor Coyle was clear that these measures are not used on inmates less than 21 years of age, or those who require separation for the inmate's own protection. The aim of CS Centres, according to the National Offender Management System, the agency that administers prisons, is to:

> ...remove the most significantly disruptive, challenging, and dangerous prisoners from ordinary location and manage them within small and highly supervised units; to enable an assessment of individual risks to be carried out, follow by individual and/or group work to try to reduce the risk of harm to others, thus enabling a return to normal or more appropriate location as risk reduces.[105]

66. Importantly, there are only 56 places in CS Centres in the entire prison system, which has over 85,000 prisoners. This solution is therefore required for the management of only approximately 0.066 percent of inmates in England and Wales.[106] Stated in the converse, more than 99.93 percent of inmates can be managed without resort to these extraordinary measures.

67. Unlike Canada's prisons, CS Centres do not employ solitary confinement. As Professor Coyle describes, "small groups of prisoners are able to move about within their living units although their contact is closely and directly supervised". The regime in the CS Centre "generally includes daily access to showers, telephone, library, outside exercise, gym, education, visits and association with other prisoners in the Centre".[107]

68. While those rare inmates who present an "acute level of severe or fatal risk of harm to other prisoners" are not permitted to associate freely with other prisoners, they are still allowed to access

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104 Expert Report of Dr. A. Coyle at para 24, CCLA Application Record, Tab C.
105 Expert Report of Dr. A. Coyle at para 11, CCLA Application Record, Tab C.
106 Expert Report of Dr. A. Coyle at paras 23-24, CCLA Application Record, Tab C.
107 Expert Report of Dr. A. Coyle at para 28, CCLA Application Record, Tab C.

"the gymnasium and exercise yards adjacent to another prisoner, thus permitting verbal and visual contact".[108] All prisoners in the CS Centre have daily direct contact with prison and health staff. Accordingly, CS Centres do not deprive inmates of human contact.

69. This evidence undermines the premise of the binary approach taken in Canadian prisons, whereby many inmates are isolated in their cells for all, or substantially all of their day simply because they cannot be housed in the general population.

70. The CCLA has also provided an expert report from Dr. Kelly Hannah-Moffat. Dr. Hannah-Moffat is a professor of Sociology and the former director of the Centre of Criminology and Sociolegal Studies at the University of Toronto. Dr. Hannah-Moffat was a policy advisor to Madame Justice Arbour on 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. She is an expert in Canadian and international penal policy.

71. Like Dr. Coyle, Dr. Hannah-Moffat's unchallenged expert opinion is that there are effective alternatives to administrative segregation, including for inmates who suffer from serious mental health issues. She points to alternatives approaches used in the United Kingdom, Australia, and the United States. For example, she explains that in 2015, the NYC Department of Correction and Department of Health and Mental Hygiene announced a plan to eliminate solitary confinement for prisoners with serious mental health issues, and will place those prisoners in "clinical settings where they will receive a high level of individual and group therapy aimed at promoting treatment

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108 Expert Report of Dr. A. Coyle at para 28, CCLA Application Record, Tab C.

adherence and pro-social behaviours. Exchanging a punishment model for a treatment model will allow clinical staff members to decide how best to respond to problematic behaviour..."[109]

72. The response of Canada to the evidence of Professor Coyle and Dr. Hannah Moffat is instructive. Neither were cross-examined. No evidence challenging their opinion was filed. Canada has not put forward any evidence that the alternate approaches suggested by these experts are unworkable, have been considered and rejected, or cannot be implemented. This important evidence is simply ignored. There is no evidence that CSC has made any effort to explore alternatives to administrative segregation. Unfortunately, Assistant Deputy Commissioner Somers testified that he had not even read Professor Coyle's expert report, or any of the expert reports tendered by the CCLA.[110]

73. This stubborn refusal to consider alternate approaches is especially troubling given that there is no evidence of budgetary, staffing, or any other kinds of restraints to their implementation. The opportunity created by empty segregation cells has been ignored. There are a total of 783 segregation cells in Canada, which presently house some 430 inmates.[111] On average, 45% of these segregation cells sit empty, though in the Pacific region, that figure rises to 65%.

74. Rather than retrofit empty segregation wings to permit inmates to have greater human contact, Canada has instead spent millions maintaining the conditions of administrative segregation. Indeed, Assistant Deputy Commissioner Somers described how Millhaven Institution is actually constructing a new segregation unit instead of implementing less restrictive housing arrangements.[112] The approved budget for this "Range Hardening" initiative is $12.5

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109 Expert Report of Dr. K. Hannah-Moffat at paras 11–12, CCLA Application Record, Tab 2B.
110 Cross-examination of B. Somers at pp. 51-52, Q. 237–243, CCLA Transcript Brief, Volume 2, Tab 4.
111 Cross-examination of B. Somers at p. 13, Q. 49,54, CCLA Answers to Undertakings Brief, Tab A.
112 Cross-examination of B. Somers at pp. 37-38, Q. 165, 169-171, CCLA Transcript Brief, Volume 2, Tab 4.

million.[113] These funds could have been used to explore and implement upstream solutions and programs, or at a minimum, to build alternatives to segregation. Sadly, the evidence suggests Canada is instead retrenching its commitment to administrative segregation.

PART III - EXPERT EVIDENCE ON HARM

1. THE APPLICANT'S EXPERT EVIDENCE ON HARM

75. The Applicant has tendered opinions from two expert physicians on the harm caused by administrative segregation: Dr. Ruth Elwood Martin, a family physician and prison doctor, and Dr. Gary A. Chaimowitz, a forensic psychiatrist.

76. Dr. Martin is a Clinical Professor at the University of British Columbia School of Population and Public Health. Dr. Martin received her MD degree from the University of British Columbia in 1979 and her Masters of Public Health from the University of Manchester in 2008. She has worked extensively in prisons and with prisoners. Starting in 1994, Dr. Martin served as a prison physician at the medical clinic of Burnaby Correctional Centre for Women, a medium/maximum security federal/provincial prison for women. From 2004 until March 2011, Dr. Martin worked at Alouette Correctional Centre for Women, Maple Ridge. She also worked for several years at Surrey pre-trial medical clinic, an institution holding inmates awaiting sentencing for provincial and federal sentences.[114]

77. Dr. Martin's evidence on the mental health effects of solitary confinement is:

- The conditions of segregation are not conducive to improving mental health.[115]
- The harmful effects of sensory deprivation caused by solitary confinement can be seen as early as 48 hours after segregation.[116]

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113 Cross-examination of B. Somers at p. 43, Q. 199, CCLA Answer to Undertaking Brief, Index Tab.
114 Curriculum Vitae of Dr. R. Martin, CCLA Second Supplementary Application Record, Tab A.
115 Expert Report of Dr. R. Martin at para 46, CCLA Second Supplementary Application Record, Tab 1.

- These include onset of mental illness, exacerbation of pre-existing mental illness, and development or worsening of physical symptoms.[117]
- The effects of isolation and segregation on mental and physical health are well documented in medical and psychiatric literature. They include restlessness, memory failure, difficulties with memory, inexplicable fatigue, distinct emotional lability (including fits of rage), hallucinations, and a belief that one is going mad.[118]
- Self-harm is associated significantly with being in solitary confinement at least once and having serious mental illness.[119]

78. Dr. Martin concludes that "the use of solitary confinement in Canadian correctional facilities should be abolished" and, until this is implemented, "time in solitary confinement should be limited to 15 days or less".[120] With respect to inmates with mental illness, Dr. Martin concludes that "solitary confinement practices for individuals with mental illness should be abolished".[121] Dr. Martin was not cross-examined.

79. Dr. Chaimowitz is the Head of Forensic Psychiatry at St. Joseph's Healthcare in Hamilton, Ontario and a Professor in the Department of Psychiatry and Behavioral Neurosciences at McMaster University. Dr. Chaimowitz has been licensed by the College of Physicians and Surgeons of Ontario since 1979, certified in Psychiatry by the Royal College of Physicians of Canada since 1988, and is designated as a Founder in Forensic Psychiatry by the Royal College of Physicians of Canada. Dr. Chaimowitz is also certified in Psychiatry by the American Boards of Psychiatry and Neurology.[122]

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116 Expert Report of Dr. R. Martin at para 22, CCLA Second Supplementary Application Record, Tab 1.
117 Expert Report of Dr. R. Martin at para 22, CCLA Second Supplementary Application Record, Tab 1.
118 Expert Report of Dr. R. Martin at para 23, CCLA Second Supplementary Application Record, Tab 1.
119 Expert Report of Dr. R. Martin at para 24, CCLA Second Supplementary Application Record, Tab 1.
120 Expert Report of Dr. R. Martin at para 21, CCLA Second Supplementary Application Record, Tab 1.
121 Expert Report of Dr. R. Martin at para 24, CCLA Second Supplementary Application Record, Tab 1.
122 Affidavit of Dr. G. Chaimowitz, Sworn January 23, 2017, at p. 1, CCLA Third Supplementary Application Record, Tab 1.

80. Dr. Chaimowitz has significant experience treating mental illness in Canada's correctional population. In particular, Dr. Chaimowitz has treated individuals in administrative segregation. He has also treated federal parolees who were subjected to administrative segregation. Dr. Chaimowitz is presently Vice Chair of the Consent and Capacity Board of Ontario, a position he has held since 2005, and he has served as a Member of that body since 2001. Dr. Chaimowitz served as the Office of the Ontario Coroner's Expert in the Ashley Smith Inquest.[123]

81. Dr. Chaimowitz's evidence on the mental health effects of solitary confinement is:

- Solitary confinement can cause lasting psychological harm in addition to acute side effects such as hallucinations, psychosis, posttraumatic stress symptoms, and the potential for suicidal or self-harming behaviors.[124]
- Inmates with mental illness occupy a significant and disproportionate percentage of inmates in segregation.[125]
- Where individuals already suffer mental illness, there is a "real danger" that solitary confinement—and prolonged solitary confinement especially—may cause serious trauma and may lead to a marked deterioration of mental health.[126]
- The disproportionate number of inmates with mental illness in administrative segregation is the consequences of the absence of timely care in the federal prison system.[127]
- Individuals with behaviourally disturbances, including individuals with acute psychosis, are frequently placed in solitary confinement because of the inadequate medical care available to mentally ill in Canada's prisons.[128]
- The assessment and treatment of people with mental illness in Canadian corrections does not meet community standards.[129]
- Federal inmates with psychiatric disorders are often not seen and treated in a timely manner.
- The ability to spend time with an inmate for the assessment and treatment of their conditions is limited and insufficient.[130]

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123 Affidavit of Dr. G. Chaimowitz, Sworn January 23, 2017, at 1, CCLA Third Supplementary Application Record, Tab 1.

124 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.

125 Expert Report of Dr. G. Chaimowitz at p. 2, CCLA Third Supplementary Brief, Tab B [references omitted].

126 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.

127 Expert Report of Dr. G. Chaimowitz at p. 3, CCLA Third Supplementary Brief, Tab B [references omitted].

128 Expert Report of Dr. G. Chaimowitz at p. 3, CCLA Third Supplementary Brief, Tab B.

129 Expert Report of Dr. G. Chaimowitz at p. 3, CCLA Third Supplementary Brief, Tab B.

- Inmates with mental illness are more frequently transferred between facilities, with associated disruption in treatment and loss of support systems.[131]
- The difficulties in treating "psychotic people" in correctional settings results in many languishing untreated in solitary confinement for extended periods of time.[132]

82. Dr. Chaimowitz concluded that solitary confinement "can produce longstanding, lasting psychological effects in addition to acute side effects such as hallucinations, psychosis, posttraumatic stress symptoms, and the potential for suicidal or self-harming behaviors".[133] It his is his opinion that "[s]olitary confinement in excess of 15 consecutive days poses a serious risk of psychological effects".[134]

83. Like Dr. Martin, Dr. Chaimowitz was not cross-examined.

2. THE APPLICANT'S EXPERT EVIDENCE OF HARM TO YOUNG INMATES

84. The Applicant has led expert medical evidence demonstrating that young people are more vulnerable to the effects of solitary confinement because they are still in crucial stages of development. The uncontroverted expert evidence is that the adverse effects of isolation and segregation are sufficiently harmful that solitary confinement of youth aged 18 to 21 should be eliminated. This evidence is also well-grounded in prevailing international standards and the consensus position of leading international and Canadian medical organizations.

85. As Dr. Chaimowitz attests, the medical literature demonstrates that young people continue to experience structural brain growth through their early twenties.[135] The last area of the brain to undergo substantial change is the prefrontal cortex which is linked to judgment, impulsivity and

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130 Expert Report of Dr. G. Chaimowitz at pp. 2-3, CCLA Third Supplementary Brief, Tab B [references omitted].
131 Expert Report of Dr. G. Chaimowitz at p. 3, CCLA Third Supplementary Brief, Tab B.
132 Expert Report of Dr. G. Chaimowitz at p. 3, CCLA Third Supplementary Brief, Tab B.
133 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.
134 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.
135 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.

emotion. This may contribute to the difficulty young people experience with the deprivation and isolation associated with solitary confinement, which, in turn, could make them more susceptible to physical and mental health problems.[136] Dr. Chaimowitz also attests that the solitary confinement of young people may detrimentally affect their rehabilitation and future growth. These risks are more acute with young people with disabilities and histories of trauma and abuse.[137]

86. Dr. Chaimowitz concludes that "[y]oung people may be more vulnerable to effects of solitary confinement as they are still in crucial stages of social and psychological development".[138]

87. Dr. Martin also attests that the negative effects of solitary confinement will have a greater impact on youth due to their more fragile brains.[139] Dr. Martin concludes that the adverse effects of isolation and segregation are sufficiently harmful that "solitary confinement of youth (aged 16-21 years) should be eliminated".[140]

88. The evidence of Drs. Martin and Chaimowitz on the continuing development of the brain and adolescent/junior adult psycho-social development reflects the consistently-held positions of the American Psychological Association, the American Psychiatric Association ("**APcA**") and the National Association of Social Workers ("**NASW**"). The APA, APcA and NASW have filed *amici curiae* briefs with the U.S. Supreme Court in cases involving juvenile sentencing and youth interaction with the criminal justice system:

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136 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.
137 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.
138 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B.
139 Expert Report of Dr. R. Martin at para 21, CCLA Second Supplementary Application Record, Tab 1.
140 Expert Report of Dr. R. Martin at para 21, CCLA Second Supplementary Application Record, Tab 1.

- In *Roper v. Simmons*,[141] the APA and the Missouri Psychological Association state: "Late maturation of the frontal lobes is also consistent with electroencephalogram (EEG) research showing that the frontal executive region matures from ages 17 to 21 – after maturation appears to cease in other brain regions".[142]
- In *Graham v. Florida*,[143] the APA, APcA, NASW and Mental Health America state: "Research in developmental psychology and neuroscience... confirms and strengthens the conclusion that juveniles, as a group, differ from adults in the salient ways the Court identified. Juveniles—including older adolescents—are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions. Consistently with these recognized developmental characteristics of adolescents, recent neuroscience research shows that adolescent brains are not yet fully developed in regions related to higher-order executive functions such as impulse control, planning ahead, and risk evaluation. That anatomical maturity is consonant with juveniles' demonstrated psychosocial (that is, social and emotional) immaturity".[144][...I]t is clear that, in late adolescence, important aspects of brain maturation remain incomplete, particularly those involving the brain's executive functions and the coordinated activity of regions involved in emotion and cognition. In short, the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence, consistent with the demonstrated behavioral and psychosocial immaturity of juveniles".[145]
- In *Miller v. Alabama*,[146] the APA, APcA and NASW state: "It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance".[147] According to all three organizations, "[i]t is now well-established that the brain continues to develop throughout adolescence and young adulthood in precisely the areas and systems that are regarded as most involved in impulse control, planning, and self-regulation".[148]

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141 Roper v. Simmons, 543 U.S. 551.

142 Amicus Brief filed on behalf of the American Psychological Association and The Missouri Psychological Association re Simmons at p. 12, CCLA Exhibit Brief, Volume 4, Tab 59.

143 *Graham v Florida*, 560 US 48.

144 Amicus Brief filed by the American Psychological Association, American Psychiatric Association and National Association of Social Workers and Mental Health America in *Sullivan, Graham v State of Florida* and *Sullivan v State of Florida* at p. 3-4, CCLA Exhibit Brief, Volume 4, Tab 58.

145 Amicus Brief filed by the American Psychological Association, American Psychiatric Association and National Association of Social Workers and Mental Health America in *Sullivan, Graham v State of Florida* and *Sullivan v State of Florida* at p. 27, CCLA Exhibit Brief, Volume 4, Tab 58.

146 *Miller v Alabama*, 567 US 460, consolidated with *Jackson v Hobbs*, No. 10-9647.

147 Amicus Brief of the American Psychological Association, American Psychiatric Association and National Association of Social Workers in *Miller v. State of Alabama* and *Jackson v Hobbs* at p. 4, CCLA Exhibit Brief, Volume 4, Tab 57.

148 Amicus Brief of the American Psychological Association, American Psychiatric Association and National Association of Social Workers in *Miller v State of Alabama* and *Jackson v Hobbs* at p. 9-10, CCLA Exhibit Brief, Volume 4, Tab 57.

89. It should not be forgotten that Ashley Smith was a 19 year old adolescent when she killed herself in administrative segregation. Despite the Prime Minister's promise to do so, the Respondent has yet to implement the recommendations of the coroner's jury that examined her death.[149]

3. THE EXPERT EVIDENCE ON HARM TO INMATES WITH MENTAL ILLNESS

90. The parties largely agree that inmates with mental illness should not be subjected to administrative segregation for any length of time because of the heightened risk of harm.

91. Dr. Chaimowitz deposed that individuals suffering from mental illness may experience a marked deterioration in their mental health from administrative segregation:

> Solitary confinement can produce longstanding, lasting psychological effects, as well as producing acute side effects such as hallucinations, psychosis, posttraumatic stress symptoms, and the potential for suicidal or self-harming behaviours. These consequences may manifest themselves in individuals who have previously suffered mental illness. Where individuals already suffer mental illness there is a real danger that solitary confinement especially prolonged solitary confinement may cause serious trauma and may lead to a marked deterioration in their mental health.[150]

92. Similarly, Dr. Martin deposed that "[d]ue to the adverse effects of isolation and segregation, and considering the high prevalence of mental disorder and learning difficulties among incarcerated individuals, it is my opinion that confinement of individuals with mental illness should be abolished".[151]

93. Canada does not appear to seriously dispute that inmates with mental illness should be excluded from administrative segregation. The dispute arises in defining the class of inmates with

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149 Minister of Justice and Attorney General of Canada Mandate Letter by Prime Minister Justin Trudeau (November 2015), CCLA Exhibit Brief, Volume 1, Tab 3.

150 Expert Report of Dr. G. Chaimowitz at p. 4, CCLA Third Supplementary Brief, Tab B [emphasis added].

151 Expert Report of Dr. R. Martin at para 24, CCLA Second Supplementary Application Record, Tab 1.

mental illness to be excluded. The proposed changes to CD-709 would exclude only those inmates with the most serious mental illness, who are certified under provincial mental health legislation, who have a "serious mental disorder with significant impairments", or who are "actively engaging in self-injury or at elevated or imminent risk for suicide".[152]

94. Canada's proposed exclusion is far too narrow. It is not even consistent with the opinion of its own expert psychologist, Dr. Robert Morgan, whose evidence is discussed further below. Dr. Morgan deposed that administrative segregation should be "limit[ed]" for inmates suffering from "serious" mental illness.[153] On cross-examination, he confirmed that inmates suffering from "serious" mental illness should not be subjected to administrate segregation, except in "extreme circumstances".[154]

95. Dr. Morgan's definition of "serious" mental illness includes "schizophrenia and other thought disorders, significant mood disorders that include manic and depressed episodes, and significant anxiety disorders".[155] His definition does not include "things like sexual disorders, eating disorders," anti-social disorders, or substance use disorders that are not "made worse or compounded" by segregation.[156]

96. The opinion of Canada's own expert provides a minimum for the scope of inmates with mental illness who must be excluded from administrative segregation under any circumstances.

4. DR. MARTIN AND DR. CHAIMOWITZ'S OPINIONS REPRESENT THE MEDICAL CONSENSUS

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152 Draft CD-709, s 11, Respondent's Second Supplemental Application Record, Volume 1, Tab A.

153 Expert Report of Dr. R. Morgan at pp.120-21, Respondent's Supplemental Application Record, Tab 2C.

154 Cross-examination of Dr. R. Morgan at pp. 80-81, Q. 341-342, CCLA Transcript Brief, Volume 1, Tab 3; Quantitative Syntheses of the Effects of Administrative Segregation on Inmates' Well-Being (Morgan 2016) at p. 20, CCLA Exhibit Brief, Volume 2, Tab 30.

155 Expert Report of Dr. R. Morgan at p. 120, Respondent's Supplemental Application Record, Tab 2C.

156 Cross-examination of Dr. R. Morgan at p. 87, Q. 359, CCLA Transcript Brief, Volume 1, Tab 3; Expert Report of Dr. R. Morgan at p. 120, Respondent's Supplemental Application Record, Tab 2C.

97. The evidence of Drs. Martin and Chaimowitz is solidly grounded in peer-reviewed medical literature and represents the consensus of Canadian and U.S. medical organizations.

98. The Canadian Medical Association ("**CMA**") is Canada's national voluntary association of physicians comprised of 85,000 clinicians across all disciplines. The CMA publishes the Canadian Medical Association Journal ("**CMAJ**"), a peer-reviewed medical journal with original clinical research, clinical practice updates and editorials.[157] A CMAJ editorial published in December 2014 concluded:

- "Solitary confinement, defined as physical isolation for 22 to 24 hours per day and termed 'administrative segregation' in federal prisons, has substantial health effects. These effects may develop within a few days and increase the longer segregation lasts".[158]
- "Those in solitary confinement are at increased risk of self-harm and suicide. Over the past three years, nearly half of suicides (14/30) in federal prisons occurred in segregation cells; most of these inmates had known serious mental health conditions".[159]
- "A growing body of literature shows that solitary confinement can change brain activity and result in symptomatology within seven days".[160]

99. The Canadian Mental Health Association ("**CMHA**") is Canada's oldest and most extensive community mental health organization. It is the only association in Canada that addresses all aspects of mental health and mental illness. It is the CMHA's view that solitary confinement "can aggravate pre-existing mental health and addictions conditions and impede recovery and successful transition back into the community".[161] As a result, the CMHA's position

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157 Canadian Medical Association Journal Editorial Advisory Board, CCLA Exhibit Brief, Volume 5, Tab 63. See also Cross-examination of Dr. D. Nussbaum at p. 77, Q. 297-298, CCLA Transcript Brief, Volume 2, Tab 5.

158 Canadian Medical Association Journal Editorial, Cruel and unusual punishment: Solitary confinement in Canadian prisons, CCLA Exhibit Brief, Volume 5, Tab 63 [references omitted].

159 Canadian Medical Association Journal Editorial, Cruel and unusual punishment: Solitary confinement in Canadian prisons, CCLA Exhibit Brief, Volume 5, Tab 63 [references omitted].

160 Canadian Medical Association Journal Editorial, Cruel and unusual punishment: Solitary confinement in Canadian prisons, CCLA Exhibit Brief, Volume 5, Tab 63 [references omitted].

161 Canadian Medical Association Journal, "Segregation and mental health: CMHA Ontario Supports Sapers' Report", CCLA Exhibit Brief, Volume 5, Tab 66.

is that "the irresponsible use of solitary confinement for individuals with serious mental health issues can be life-threatening".[162]

100. The Ontario Division of the CMHA has expressly endorsed the findings of an independent report on the use of solitary confinement in Ontario penned by Howard Sapers,[163] the Correctional Investigator of Canada from 2004 to 2016.[164] Although authored in the context of the provincial correctional system, Mr. Sapers' conclusion on the differential impacts of solitary confinement on vulnerable populations is instructive:

- "Particular individuals and groups – the young and the elderly, those with mental illness, women, racialized and indigenous persons – are differentially impacted by incarceration".[165]
- "Indigenous individuals make up 2% of Ontario's population, but in 2016 accounted for at least 14% of the admissions to custody and segregation. Just over half of the Indigenous women and men admitted to segregation in 2016 had a suicide risk alert".[166]
- "Those with mental health needs end up in segregation more often and for longer periods of time. Approximately one in five individuals admitted to custody in Ontario in 2016 had a suicide alert on file. For those admitted to segregation, it was one in three".[167]

101. The College of Family Physicians of Canada ("**CFPC**") is the professional organization responsible for establishing standards for the training, certification and continuing education of family physicians, and represents more than 35,000 members across the country. Through its Prison Health Program Committee, the CFPC represents the interests of members providing care

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162 Canadian Medical Association Journal, "Segregation and mental health: CMHA Ontario Supports Sapers' Report", CCLA Exhibit Brief, Volume 5, Tab 66.

163 Canadian Medical Association Journal, "Segregation and mental health: CMHA Ontario Supports Sapers' Report", CCLA Exhibit Brief, Volume 5, Tab 66 [references omitted].

164 Segregation in Ontario, Independent Review of Ontario Corrections (March 2017), CCLA Exhibit Brief, Volume 3, Tab 62.

165 Segregation in Ontario, Independent Review of Ontario Corrections (March 2017) at p. 3, CCLA Exhibit Brief, Volume 4, Tab 62.

166 Segregation in Ontario, Independent Review of Ontario Corrections (March 2017) at p. 43, CCLA Exhibit Brief, Volume 4, Tab 62.

167 Segregation in Ontario, Independent Review of Ontario Corrections (March 2017) at p. 3, CCLA Exhibit Brief, Volume 4, Tab 62.

to persons incarcerated in federal prisons. In August 2016, the CFPC released a Position Statement on solitary confinement.[168] The CFPC concludes that the peer-reviewed literature demonstrates that solitary confinement can alter brain activity and result in symptomatology within days.[169] As a result, the CFPC has issued the following recommendations:

- "Abolish solitary confinement. Non-segregation options must be created within correctional facilities, with adequate resources and correctional staff".[170]
- "Solitary confinement for mental illness (including those with post-traumatic stress disorder) is inappropriate. These persons require care in a specialized setting that will address the mental health needs rather than exacerbate them in solitary confinement".[171]
- "Abolish solitary confinement for youth. Due to their more fragile brains, the negative effects of solitary confinement will have a greater impact on youth".[172]

102. The Registered Nurses' Association of Ontario ("**RNAO**") is the professional association representing registered nurses, nurse practitioners and nursing students in Ontario. In January 2015, the RNAO delivered a letter to the then-Minister of Community Safety and Correctional Services outlining its position on solitary confinement:

- "[Canada must] limit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review";[173]
- "[Canada must] abolish the use of solitary confinement for persons with serious or acute mental illness";[174] and

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168 Dr. Ruth Martin is head of this Committee and was involved in the preparation of the Policy Statement: see Expert Report of Dr. R. Martin at para 8, CCLA Second Supplementary Application Record, Tab 1.

169 "Position Paper on Solitary Confinement"(7 August 2016) at 1, CCLA Second Supplementary Application Record, Tab 1B. See also Cross-examination of Dr. D. Nussbaum at p. 86, Q. 335-336, CCLA Transcript Brief, Volume 2, Tab 5.

170 "Position Paper on Solitary Confinement" (7 August 2016) at p. 2, CCLA Second Supplementary Application Record, Tab 1B.

171 "Position Paper on Solitary Confinement" (7 August 2016) at p. 2, CCLA Second Supplementary Application Record, Tab 1B.

172 "Position Paper on Solitary Confinement" (7 August 2016) at p. 2, CCLA Second Supplementary Application Record, Tab 1B, [references omitted].

173 Letter of the Registered Nurses' Association of Ontario dated January 25, 2015, at p. 2, CCLA Exhibit Brief, Volume 5, Tab 65.

174 Letter of the Registered Nurses' Association of Ontario dated January 25, 2015, at p. 2, CCLA Exhibit Brief, Volume 5, Tab 65.

- "Using segregation as a work-around to the problem of not having fully staffed infirmaries or mental health units contravenes the letter and spirit of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*".[175]

103. The American Psychological Association ("**APA**") is the preeminent scientific and professional organization for psychologists in the United States. In October 2015, the APA made submissions to the U.S. Senate on the use of solitary confinement for juveniles in federal custody. The APA's position is that "[c]ritical research demonstrates that adolescents are still developing in neurological, cognitive, and emotional domains and cannot be treated as adults"[176] and that "solitary confinement among youth is associated with increased risk of self-mutilation and suicidal ideation, post-traumatic stress disorder, anxiety, depression, paranoia and aggression".[177] In its submissions, the APA repeated and emphasised its position in *Roper, Graham* and *Miller*.

104. The Canadian Paediatric Society ("**CPS**") is the national association of paediatricians.[178] It represents more than 3,000 paediatricians.[179] The CPS defines adolescence as the, "development [into adulthood that] corresponds roughly to the period between the ages of 10 and 19".[180]

105. Similarly, the World Health Organization ("**WHO**"), a specialized agency of the United Nations, defines "adolescents" as those between 10 and 19 years of age, and adolescence as "a

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175 Letter of the Registered Nurses' Association of Ontario dated January 25, 2015, CCLA Exhibit Brief, Volume 5, Tab 65 [references omitted].

176 Cross-Examination of Dr. Nussbaum, at pp. 40-47, Q. 157-184, CCLA Transcript Brief, Volume 2, Tab 5.

177 Cross-Examination of Dr. Nussbaum, at pp. 40-47, Q. 157-184, CCLA Transcript Brief, Volume 2, Tab 5.

178 Document from the Canadian Paediatric Society entitled About the Canadian Paediatric Society, CCLA Exhibit Brief, Volume 4, Tab 53.

179 Document from the Canadian Paediatric Society entitled About the Canadian Paediatric Society, CCLA Exhibit Brief, Volume 4, Tab 53.

180 Document from the Canadian Paediatric Society entitled About the Canadian Paediatric Society, CCLA Exhibit Brief, Volume 4, Tab 53.

period of life with specific health and development needs and rights".[181] The United Nations also defines "youth" as the period between 15 and 24 years of age.[182]

106. According to both Canadian and international medical standards, the Respondent imposes solitary confinement on adolescents and youth.

5. CANADA'S RESPONSE TO THE OVERWHELMING EXPERT EVIDENCE OF HARM

A. Canada Fails to Present Contrary Evidence

107. Canada's response to the Applicant's evidence, the peer-reviewed literature, and the consensus views of the medical community should be of concern to this Court.

108. As the administrator of the practice of solitary confinement and custodian of the deepest body of evidence and information regarding the practice, Canada is uniquely positioned to provide the best evidence on the issues of vulnerability of persons with mental illness, adolescents and young adults. Solitary confinement is administered in Canadian prisons by numerous health care professionals, mental health professionals, and other mental health staff.[183] CSC maintains psychology departments in every one of its institutions and employs approximately 1,200 health professionals and staff, including approximately 250 psychologists and 856 nurses.[184] Canada also employs psychiatrists on staff and retains several others on contract.[185]

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181 Document from the World Health Organization titled Recognizing Adolescence, CCLA Exhibit Brief, Volume 4, Tab 55.

182 Document from the World Health Organization titled Recognizing Adolescence, CCLA Exhibit Brief, Volume 4, Tab 55. Faced with these definitions, Canada's only Canadian medical expert, Dr. D. Nussbaum, conceded that "[t]here are 18- and 19-year-olds who are placed in segregation, and if they call them adolescents, then in terms of their definition, they are adolescents, yes". Cross-examination of Dr. D. Nussbaum at pp. 17-19, Q. 55-61, CCLA Transcript Brief, Volume 2, Tab 5.

183 Affidavit of B.Somers (March 30, 2017), at para. 53, Respondent Application Record, Tab 3.

184 Cross-examination of B. Somers at pp. 53-55, Q. 251-266, CCLA Transcript Brief, Volume 2, Tab 4; Affidavit of K. Blanchette, sworn March 30, 2017, at para. 15, Respondent's Application Record, Volume 4, Tab 4

185 Cross-examination of B. Somers at p. 54, Q. 259, CCLA Transcript Brief, Volume 2, Tab 4.

109. These health professionals regularly diagnose, assess and treat inmates in administrative segregation.[186] In fact, a health professional is required to visit each inmate in administrative segregation every day.[187] Regrettably, Canada chose to lead no evidence whatsoever from the medical professionals involved in the day to day practice of administrative segregation in Canadian prisons.

110. Canada elected instead to lead the evidence of Dr. Robert Morgan, who was not qualified to give an opinion on the practice of administrative segregation in Canada, and Dr. David Nussbaum, who was similarly unqualified, and in fact offered no opinion on the practice of solitary confinement in Canada. Neither of these two opinions is helpful to the Court.

B. Opinion of Dr. Morgan Must be Given No Weight

111. Dr. Morgan, a professor of psychology at Texas Tech University, was Canada's only expert on the harm caused by administrative segregation.

112. Dr. Morgan opined that "[w]hen you place inmates in administrative segregation (AS), some will experience negative effects, some will not experience negative effects, and some will improve in functioning," and "on average, [administrative segregation will] produce mild to moderate health and mental health effects comparable to the effects of incarceration generally".[188]

113. Nevertheless, Dr. Morgan acknowledged that inmates subjected to segregation may experience "severe adverse health consequences",[189] that on average, they do worse than inmates

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186 Cross-examination of B. Somers, at pp. 54-55, Q. 261-266, CCLA Transcript Brief, Volume 2, Tab 4.

187 Affidavit of K. Blanchette, sworn March 30, 2017, at para. 88, Respondent's Application Record, Volume 4, Tab 4.

188 Expert Report of Dr. R. Morgan, at pp. 1-2, Respondent's Supplemental Application Record, Tab 2C.

189 Cross-examination of Dr. R. Morgan, at p. 40, Q. 153, CCLA Transcript Brief, Volume 1, Tab 3.

in general population,[190] and that it is difficult to know in advance which inmates will experience poor outcomes.[191] Furthermore, Dr. Morgan acknowledged that alternatives exist to segregation and he believed that those alternatives should be used.[192]

114. Dr. Morgan's opinion should be given no weight on any matter in controversy because (i) he is not an appropriately qualified expert; (ii) his opinion misrepresents the literature on which he relies; and (iii) his analysis suffers from fatal defects.

(i) Dr. Morgan is not an appropriately qualified expert

115. Dr. Morgan's only exposure to a Canadian correctional institution was a single tour of the Kingston Penitentiary after its closure.[193] He has never personally examined the conditions of administrative segregation as practiced in Canadian correctional institutions.[194] Nor has he ever assessed an inmate at a Canadian correctional institution.[195]

116. Dr. Morgan's published work on administrative segregation is limited to a single co-authored meta-analysis of empirical studies conducted by others. He has not published any other papers on the subject.[196] Although Dr. Morgan works for a private prison contractor in the United States,[197] and has had his research funded by the Texas Department of Corrections,[198] since becoming a psychologist, Dr. Morgan's principal clinical activities have not involved segregated inmates.[199]

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190 Cross-examination of Dr. R. Morgan, at pp. 54-55, Q. 212, CCLA Transcript Brief, Volume 1, Tab 3.
191 Cross-examination of Dr. R. Morgan, at pp. 40-41, Q. 154-155, CCLA Transcript Brief, Volume 1, Tab 3.
192 Cross-examination of Dr. R. Morgan, at pp. 79-80, Q. 338, CCLA Transcript Brief, Volume 1, Tab 3.
193 Cross-examination of Dr. R. Morgan, at pp. 25-26, Q. 93-96, CCLA Transcript Brief, Volume 1, Tab 3.
194 Cross-examination of Dr. R. Morgan, at pp. 25-26, Q. 93-96, CCLA Transcript Brief, Volume 1, Tab 3.
195 Cross-examination of Dr. R. Morgan, at p. 26, Q. 98, CCLA Transcript Brief, Volume 1, Tab 3.
196 Cross-examination of Dr. R. Morgan, at pp. 13-14, Q. 24-28, CCLA Transcript Brief, Volume 1, Tab 3.
197 Cross-examination of Dr. R. Morgan, at pp. 18-19, Q. 55-56, CCLA Transcript Brief, Volume 1, Tab 3.
198 Cross-examination of Dr. R. Morgan, at pp. 21-22, Q. 72-74, CCLA Transcript Brief, Volume 1, Tab 3.
199 Cross-examination of Dr. R. Morgan, at pp. 49-54, Q. 189-211, CCLA Transcript Brief, Volume 1, Tab 3.

117. Rather, Dr. Morgan worked for many years at an institution called the "Lubbock Regional Mental Health Mental Retardation Center".[200] Today, his principal clinical supervision concerns former inmates on probation.[201] He has also published a book titled "Life After Graduate School in Psychology: Insider's Advice from New Psychologists" and contributed to four editions of another book titled "Careers in Psychology; Opportunities in a Changing World".[202]

118. When Dr. Morgan recently applied for a grant to lead his own empirical study of the effects of administrative segregation, the National Institute of Justice, the research arm of the U.S. Department of Justice, rejected his proposal because a "peer review team found methodological concerns and elected not to fund it".[203]

119. Dr. Morgan is not an expert on administrative segregation in any jurisdiction, and he should not be qualified as an expert on the harm caused by administrative segregation in Canadian prisons.

(ii) Dr. Morgan misrepresents the literature on which his opinion relies

120. Dr. Morgan's opinion relies on a comparison between the relative impacts of administrative segregation and incarceration in the general prison population. He admitted, however, that he used different studies to make this comparison, so it was not "apples to apples".[204] In any event, Dr. Morgan's conclusion relies on a misrepresentation of the findings of the studies that followed inmates in the general prison population.

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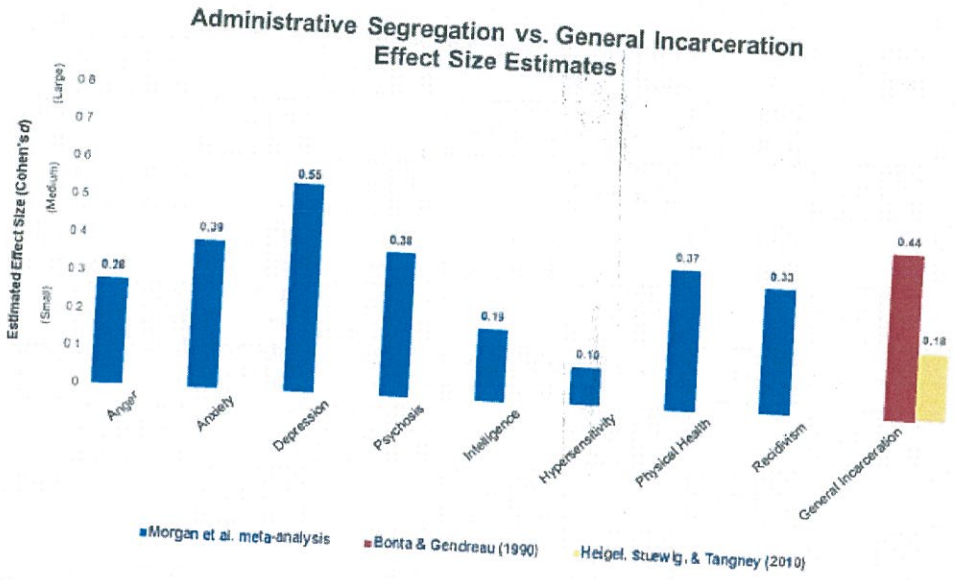
200 Cross-examination of Dr. R. Morgan, at pp. 24-25, Q. 86-89, CCLA Transcript Brief, Volume 1, Tab 3.
201 Cross-examination of Dr. R. Morgan, at pp. 23, Q. 77-79, CCLA Transcript Brief, Volume 1, Tab 3.
202 Cross-examination of Dr. R. Morgan, at pp. 14-15, Q. 30-34, CCLA Transcript Brief, Volume 1, Tab 3.
203 Transcript pp. 19-21, qq. 61-69, , CCLA Transcript Brief, Volume 1, Tab 3; Curriculum Vitae of Dr. R. Martin, CCLA Second Supplementary Application Record, Tab A.
204 Cross-examination of Dr. R. Morgan, at pp. 56-57, Q. 218-23, CCLA Transcript Brief, Volume 1, Tab 3.

121. In his report, Dr. Morgan used the following bar graph to illustrate his conclusion that the adverse effects of administrative segregation were similar to those experienced in the general prison population.[205]



122. The blue bars on the left side of the table show the negative effects of segregation from Dr. Morgan's meta-study. The red and gold bars on the right side of the table purport to show the negative effects of incarceration in the general prison population. Because the effects are similar, Dr. Morgan concluded that administrative segregation is no more harmful than incarceration in the general prison population.[206]

123. The problem is that Dr. Morgan misrepresented the findings of the two studies on which he relied for the harm of incarceration in the general prison population.

124. On cross-examination, Dr. Morgan admitted that the gold bar was an error. His chart shows a negative association between incarceration in the general population and health outcomes.

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205 Expert Report of Dr. R. Morgan, at p. 7, Respondent's Supplemental Application Record, Tab 2C.

206 Cross-examination of Dr. R. Morgan, at pp. 55-56, Q. 216, CCLA Transcript Brief, Volume 1, Tab 3.

However, Dr. Morgan admitted that the gold bar should point in the other direction because the study apparently found that inmates' heath improved while incarcerated in the general prison population.[207]

125. Similarly, the red bar was also an error. On cross-examination, Dr. Morgan admitted that the data had nothing to do with the health effects of incarceration in the general prison population. Rather, the authors were investigating whether inmates complained about prison crowding as prisons got more crowded.[208] And, in that study, the authors did reach a conclusion on the health effects of incarceration in the general prison population: "there was little or no effect".[209]

126. When Dr. Morgan's misrepresentations are corrected, the literature on which he relies suggests that administrative segregation is actually much more harmful than incarceration in the general prison population.

(iii) Dr. Morgan's analysis is fatally flawed

127. Like his views on incarceration in the general population, Dr. Morgan's opinion on the harm of administrative segregation rests on faulty analysis.

128. Dr. Morgan relied in part on a personal interview with an inmate named "Jonathan" to explain why administrative segregation is only mild to moderately harmful. He took this approach despite his criticism of studies that relied on single interviews.[210] Moreover, on re-examination by Canada, Dr. Morgan admitted that "Jonathan" was an outlier whose "experience was qualitatively

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207 Cross-examination of Dr. R. Morgan, at pp. 63-64, Q. 254-259, CCLA Transcript Brief, Volume 1, Tab 3.

208 Reexamining the Cruel and Unusual Punishment of Prison Life (Bonta & Gendreau 1990), at p. 351, CCLA Exhibit Brief, Volume 2, Tab 28; Cross-examination of Dr. R. Morgan, at pp. 60-63, Q. 236-251, CCLA Transcript Brief, Volume 1, Tab 3

209 Reexamining the Cruel and Unusual Punishment of Prison Life (Bonta & Gendreau 1990), at p. 356, CCLA Exhibit Brief, Volume 2, Tab 28; Cross-examination of Dr. R. Morgan, at p. 63, Q. 253, CCLA Transcript Brief, Volume 1, Tab 3.

210 Expert Report of Dr. R. Morgan, at p. 4, Respondent's Supplemental Application Record, Tab 2C; Cross-examination of Dr. R. Morgan, at p. 48, Q. 184, CCLA Transcript Brief, Volume 1, Tab 3.

different than the majority of other inmates I interviewed" in that he "expressed no concerns and no significant distress, whereas the majority of other inmates I interviewed expressed distress and concern resulting from their segregation placement".[211]

129. Dr. Morgan's view of the harm caused by administrative segregation also relied in part on the meta-study that he co-authored with a group of other skeptics.[212] The meta-study involved no original assessment of inmates,[213] but was rather a combination of two meta-analyses of existing literature.[214] The meta-study concluded that segregation has only a mild to moderate negative effect on inmates.

130. However, the meta-study failed to control for the reasons inmates were sent to segregation, the physical conditions of segregation, the staff-inmate relations at the institution, or the healthcare and treatment services available for those individuals with mental illness. [215] On cross-examination, Dr. Morgan acknowledged that all of these factors are "important" in generalizing the conclusions of any particular study.[216]

131. Furthermore, the outcome of Dr. Morgan's meta-analysis accords with the conclusions of only a small minority of the studies that he canvassed. The meta-study reviews 24 studies.[217] Only 13 of these actually addressed the effects of segregation on inmates' psychological or psychosocial

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211 Cross-examination of Dr. R. Morgan, at pp. 163-164, Q. 626, CCLA Transcript Brief, Volume 1, Tab 3. [emphasis added].

212 Cross-examination of Dr. R. Morgan, at p. 99, Q. 399-401, CCLA Transcript Brief, Volume 1, Tab 3; Quantitative Syntheses of the Effects of Administrative Segregation on Inmates' Well-Being (Morgan 2016), CCLA Exhibit Brief, Volume 2, Tab 30.

213 Cross-examination of Dr. R. Morgan, at pp. 71-72, Q. 294-298, CCLA Transcript Brief, Volume 1, Tab 3.

214 Cross-examination of Dr. R. Morgan, at p. 73, Q. 307, CCLA Transcript Brief, Volume 1, Tab 3.

215 Cross-examination of Dr. R. Morgan, at pp. 73-74, Q. 310-313, CCLA Transcript Brief, Volume 1, Tab 3.

216 Cross-examination of Dr. R. Morgan, at p. 74, Q. 314, CCLA Transcript Brief, Volume 1, Tab 3.

217 The studies are contained in Volume 2 and Volume 3 of the Exhibit Brief at Tabs 27-52.

functioning.[218] Of these 13 studies, 4 of them tested periods of segregation of ten days or fewer.[219] Of the remaining 9, 6 found significant negative consequences to segregation.[220] This left 3 studies that supported Dr. Morgan's view. However, one of those 3 did not include a control group, and the authors freely professed their "bias" that segregation was harmless.[221] The remaining two studies were strongly represented in the meta-analysis, and they are largely responsible for its conclusions.

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218 'A longitudinal study of prisoners on remand, repeated measures of psychopathology in the initial phase of solitary versus nonsolitary confinement.' (Andersen 2003), Brief of Authorities of the Applicant, Volume 8, Tab 70; longitudinal study of prisoners on remand: psychiatric prevalence, incidence and psychopathy in solitary vs. non-solitary confinement (Anderson 2000), CCLA Exhibit Brief, Volume 2, Tab 34; Assessment of Psychological Impairment in a Supermaximum Security Unit Sample (Cloyes 2006), CCLA Exhibit Brief, Volume 2, Tab 32; Solitary confinement of prisoners: an assessment of its effects on inmates' personal constructs and adrenocortical activity (Ecclestone 1974), CCLA Exhibit Brief, Volume 3, Tab 44; Stimulation Seeking After Seven Days of Perceptual Deprivation (Gendreau 1968), CCLA Exhibit Brief, Volume 3, Tab 49; Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement (Gendreau 1972), CCLA Exhibit Brief, Volume 3, Tab 50; Solitary Confinement and Risk of Self-Harm Among Jail Inmates (Kaba 2014), CCLA Exhibit Brief, Volume 3, Tab 47; Reexamining Psychological Distress in the Current Conditions of Segregation (Miller 1994), CCLA Exhibit Brief, Volume 3, Tab 48; Prison Segregation: administrative detention remedy or mental health problem? (Miller 1997), CCLA Exhibit Brief, Volume 2, Tab 37; One Year Longitudinal Study of the Psychological Effects of Administrative Segregation (Colorado Study) (O'Keefe 2010), CCLA Exhibit Brief, Volume 2, Tab 27; Reactions and Attributes of Prisoners in Solitary Confinement (Suedfeld 1982), CCLA Exhibit Brief, Volume 3, Tab 46; Effect of Solitary Confinement on Prisoners (Walters 1963), CCLA Exhibit Brief, Volume 3, Tab 41; The psychological effects of 60 days in administrative segregation (Zinger 2001), CCLA Exhibit Brief, Volume 2, Tab 31; The other 11 address recidivism or describe the characteristics of inmates subjected to segregation: CLA Exhibit Brief, Volume 2 & Volume 3, Tabs 33, 35, 36,38, 39, 50, 42, 43, 45, 51, 52.

219 Solitary confinement of prisoners: an assessment of its effects on inmates' personal constructs and adrenocortical activity (Ecclestone 1974), CCLA Exhibit Brief, Volume 3, Tab 44; Stimulation Seeking After Seven Days of Perceptual Deprivation (Gendreau 1968), CCLA Exhibit Brief, Volume 3, Tab 49; Changes in EEG Alpha Frequency and Evoked Response Latency During Solitary Confinement (Gendreau 1972), CCLA Exhibit Brief, Volume 3, Tab 50; Effect of Solitary Confinement on Prisoners (Walters 1963), CCLA Exhibit Brief, Volume 3, Tab 41.

220 'A longitudinal study of prisoners on remand, repeated measures of psychopathology in the initial phase of solitary versus nonsolitary confinement.' (Andersen 2003), Brief of Authorities of the Applicant, Volume 8, Tab 70; A longitudinal study of prisoners on remand: psychiatric prevalence, incidence and psychopathy in solitary vs. non-solitary confinement (Anderson 2000), CCLA Exhibit Brief, Volume 2, Tab 34; Assessment of Psychological Impairment in a Supermaximum Security Unit Sample (Cloyes 2006), CCLA Exhibit Brief, Volume 2, Tab 32; Solitary Confinement and Risk of Self-Harm Among Jail Inmates (Kaba 2014), CCLA Exhibit Brief, Volume 3, Tab 47; Reexamining Psychological Distress in the Current Conditions of Segregation (Miller 1994), CCLA Exhibit Brief, Volume 3, Tab 48; Prison Segregation: administrative detention remedy or mental health problem? (Miller 1997), CCLA Exhibit Brief, Volume 2, Tab 37.

221 Reactions and Attributes of Prisoners in Solitary Confinement (Suedfeld 1982), at p. 312, CCLA Exhibit Brief, Volume 3, Tab 46; In that study, the authors indicated their "bias" that solitary confinement is "innocuous for the vast majority of participants and extremely beneficial for many".

132. Both of the studies that drive the outcome of Dr. Morgan's meta-analysis are themselves problematic. The first study has drawn stinging criticism in the academic literature for excluding high risk inmates, failing to examine the medical records when assessing outcomes, and failing to account for the high degree of self-harm that was observed in administrative segregation.[222] The authors of the second study acknowledged that the outcome may be due to artificially high levels of mental health support and the underreporting of harm.[223]

133. Importantly, the authors of the second study expressly stated that their work should not be used to justify the practice of segregation:

> Regardless of whether prisoners adapt and cope well with the segregation experience, it is not healthy for anyone to idle aimlessly in a cell for 23 out of 24 hours a day; it simply is not a constructive way of serving a sentence: and, it is likely to impede attempts to rehabilitate and safely reintegrate prisoners into society.[224]

134. Even if the Court were willing to overlook Dr. Morgan's patent lack of relevant experience, the many, many serious defects in his work should cause the Court to give his opinion no weight.

C. Opinion of Dr. Nussbaum Must be Given no Weight

135. Canada also chose to tender the evidence of Dr. David Nussbaum, a psychologist who admitted that he has no experience with administrative segregation in Canadian penitentiaries and

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222 Grassian & Kupers (2011)'The Colorado Study vs. the Reality of Supermax Confinement.' *Correctional Mental Health Report*, Brief of Authorities of the Applicant, Volume 8, Tab 78; O'Keefe (2010) 'One Year Longitudinal Study of the Psychological Effects of Administrative Segregation', CCLA Exhibit Brief, Volume 2, Tab 27.

223 Zinger (2001) 'The psychological effects of 60 days in administrative segregation,' at p. 53; CCLA Exhibit Brief, Volume 2, Tab 31; See Cross-examination of Dr. R. Morgan, at p. 108, Q. 441; Cross-examination of Dr. R. Morgan, at pp. 52-53, qq. 206-07, p. 121, q. 480. See also Cloyes (2006) 'Assessment of Psychological Impairment in a Supermaximum Security Unit Sample,' at p. 762, CCLA Exhibit Brief, Volume 2, Tab 32.

224 Zinger (2001) 'The psychological effects of 60 days in administrative segregation,' at p. 78; CCLA Exhibit Brief, Volume 2, Tab 31 [emphasis added].

the totality of his contact with the practice was a single visit to Millhaven Institution, years ago[225] Dr. Nussbaum's opinion should be given no weight on any matters in controversy.

136. Dr. Nussbaum was instructed to write a report on whether administrative segregation is particularly difficult on young inmates between the ages of 18 and 25. His report does no such thing. It is instead a tactically narrow review of the physical maturation of the anatomical structures of the brain, to the exclusion of any real analysis of the psychosocial development of the individual.[226]

137. Furthermore, contrary to his duty as an independent expert, on the question of the impact of the practice of solitary confinement on adolescents and young adults, Dr. Nussbaum was highly selective in his selection of the peer reviewed literature and positions of authoritative learned organisations such as the American Psychological Association, of which he is a Fellow and at which he has presented papers.

138. Dr. Nussbaum conceded on cross-examination that not one of the scientific papers he brought to the attention of this Court addresses the effects of administrative segregation on young people between the ages of 18 and 25.[227] Moreover, despite being aware of the official position of

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225 Cross-examination of Dr. D. Nussbaum at p. 75, Q. 286-287, CCLA Transcript Brief, Volume 2, Tab 5.

226 Expert Report of Dr. D. Nussbaum, Respondent's Supplemental Application Record, Tab 1C.

227 Cross-examination of Dr. D. Nussbaum at pp. 24-30, Q. 82-109, CCLA Transcript Brief, Volume 2, Tab 5; Dr. D. Nussbaum concedes that none of the following papers in his expert report addresses the effects of administrative segregation in prison on people between the ages of 18 and 25: Tamnes, C.K. et. al., "The brain dynamics of intellectual development: Waxing and waning white and gray matter" (2011) 49 Neuropsychologica 3606 cited at Expert Report of Dr. D. Nussbaum, at p. 6 Respondent's Supplemental Application Record, Tab 1C; Amlien, I.K. et. al., "Organizing Principles of Human Cortical Development—Thickness and Area from 4 to 30 Years: Insights from Comparative Primate Neuroanatomy" (2016) 26 Cerebral Cortex 257 cited at Expert Report of Dr. D. Nussbaum, p. 7, Respondent's Supplemental Application Record, Tab 1C; Uda, S. et. al., "Normal development of human brain white matter from infancy to early adulthood: a diffusion tensor imaging study" (2015) 37 Developmental Neuroscience 182 cited at Expert Report of Dr. D. Nussbaum, p. 8, Respondent's Supplemental Application Record, Tab 1C; Giedd, J.N. et. al., "Brain development during childhood and adolescence: a longitudinal study" (1999) 2 Nature Neuroscience 861 cited at Expert Report of Dr. D. Nussbaum, p. 12, Respondent's Supplemental Application Record, Tab 1C; Que, M. et. al., "Voxel-based analysis of white matter during adolescence and young

the American Psychological Association as summarised at paragraph 103 above, Dr. Nussbaum did not bring this evidence to the attention of the Court despite conceding on cross-examination that he considers the APA the pre-eminent psychological association and it papers and positions authoritative. In fact, Dr. Nussbaum made efforts to dismiss or minimise the position of the APA on the issues by selectively focusing on positions it had taken before the United States courts and inaccurately describing them as "outdated".

139. Notably, at paragraph 25 of his report, Dr. Nussbaum refers to a 2002 affidavit of Dr. Ruben C. Gur, a neuropsychologist, filed in support of a *habeas corpus* petition in the Court of Criminal Appeals of Texas.[228] Dr. Gur is a Fellow of the APA, the American Psychological Society and the American College of Neuropsycopharmacology. In his affidavit, Dr. Gur opined as follows:

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adulthood" (2010) 32 Brain and Development 531 cited at Expert Report of Dr. D. Nussbaum, p. 13, Respondent's Supplemental Application Record, Tab 1C; Tamnes, C.K. et. al., "Intellectual abilities and white matter microstructure in development: a diffusion tensor imaging study" (2010) 31 Human Brain Mapping 1609 cited at Expert Report of Dr. D. Nussbaum, p. 14, Respondent's Supplemental Application Record, Tab 1C; Tamnes, C.K. et. al., "Longitudinal working memory development is related to structural maturation of frontal and parietal cortices" (2013) 25 Journal of Cognitive Neuroscience 1611 cited at Expert Report of Dr. D. Nussbaum, p. 16, Respondent's Supplemental Application Record, Tab 1C; Walhovd, B. et. al., "Neurodevelopmental origins of lifespan changes in brain and cognition" (2016) 113 PNAS 9357 cited at Expert Report of Dr. D. Nussbaum, p. 17, Respondent's Supplemental Application Record, Tab 1C; Bjork, J.M. et. al., "Incentive-Elicited Brain Activation in Adolescents: Similarities and Differences from Young Adults" (2004) 24 Neuroscience 1793 cited at Expert Report of Dr. D. Nussbaum, p. 20, Respondent's Supplemental Application Record, Tab 1C; Casey, B.J. et. al., "Structural and functional brain development and its relation to cognitive development" (2000) 54 Biological Psychology 241 cited at Expert Report of Dr. D. Nussbaum, p. 20, Respondent's Supplemental Application Record, Tab 1C; Fritsch, E.J. et. al., "Youth Behind Bars: Doing Justice or Doing Harm?" in Benekos, Peter J. and Merlo, Alida V., Controversies in Juvenile Justice and Delinquency (Routledge, Abingdon: 2015) cited at Expert Report of Dr. D. Nussbaum, p. 21, Respondent's Supplemental Application Record, Tab 1C; Gardner M. et. al., "Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study" (2005) 41 Developmental Psychology 625 cited at Expert Report of Dr. D. Nussbaum, p. 21, Respondent's Supplemental Application Record, Tab 1C; Spear, L., "Neurobehavioral Changes in Adolescence" (2000) 9 Current Directions in Psychological Science 111 cited at Expert Report of Dr. D. Nussbaum, p. 22, Respondent's Supplemental Application Record, Tab 1C; and White, A., "Substance Use & Adolescent Brain Development" (2003) 22 Youth Studies Australia 39 cited at Expert Report of Dr. D. Nussbaum, p. 22, Respondent's Supplemental Application Record, Tab 1C.

228 Declaration of Ruben C. Gur, Ph.D., CCLA Exhibit Brief, Volume 4, Tab 54

- "The review of neuroanatomic studies across methods and approaches, and the few neurophysiologic studies in humans, indicates considerable convergence of findings with respect to brain maturation during childhood, adolescence and early adulthood. The overwhelming weight of evidence supports the early post mortem studies indicating that the main index of maturation, which is the process called 'myelination,' is not complete until some time in the beginning of the third decade of life (probably around age 20-22)".[229]
- "These results have rather profound implications for understanding behavioral development. The cortical regions that are last to mature, particularly those in prefrontal areas, are involved in behavioral facets germane to many aspect [sic] of criminal culpability. Perhaps most relevant is the involvement of these brain regions in the control of aggression and other impulses, the process of planning for long-range goals, organization of sequential behavior, consideration of alternatives and consequences, the process of abstraction and mental flexibility, and aspects of memory including 'working memory'".[230]
- "The evidence is now strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an undeveloped brain".[231]
- "Additionally, since brain development in the relevant areas goes in phases that vary in rate and is usually not complete before the early to mid-20s, there is no way to state with any scientific reliability that an individual 17-year-old has a fully matured brain (and should be eligible for the most severe punishment)…".[232]

140. Dr. Nussbaum states that Dr. Gur's affidavit does not reflect prevailing scientific consensus and is out of date. Like Dr. Gur, Dr. Nussbaum is a Fellow of the APA. Dr. Nussbaum acknowledges that the APA is a preeminent professional organization of psychologists.[233] Although he acknowledged on cross-examination that he was aware of the APA's ongoing involvement in the issue of solitary confinement of young people, he did not bring the Court's attention to amicus briefs and formal positions taken by the APA in 2004, 2009, 2012 and 2015, well after the opinion of Dr. Gur and after the dates of the publications Dr. Nussbaum cites.

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229 Declaration of Ruben C. Gur, Ph.D., at p. 14, CCLA Exhibit Brief, Volume 4, Tab 54.
230 Declaration of Ruben C. Gur, Ph.D., at p. 14, CCLA Exhibit Brief, Volume 4, Tab 54.
231 Declaration of Ruben C. Gur, Ph.D., at p. 15, CCLA Exhibit Brief, Volume 4, Tab 54.
232 Declaration of Ruben C. Gur, Ph.D., at p. 15, CCLA Exhibit Brief, Volume 4, Tab 54.
233 Declaration of Ruben C. Gur, Ph.D., at p. 15, CCLA Exhibit Brief, Volume 4, Tab 54.

141. In summary, although a Fellow of the APA and aware of its position, Dr. Nussbaum presented an inaccurate and incomplete picture of the consensus of this pre-eminent body and an inaccurate portrayal of the opinion of one of his Fellows, Dr. Gur, whose opinion on brain development accurately reflects the APA's position and its 'flagship' publications to this day.

142. APA's stated position is that "[c]ritical research demonstrates that adolescents are still developing in neurological, cognitive, and emotional domains and cannot be treated as adults".[234] The APA has repeatedly stated its position that older adolescents' brains are not yet fully developed in regions related to higher-order functions which is consonant with young persons' demonstrated psychosocial immaturity.[235] Dr. Nussbaum receives the newsletters and publications circulated by the APA.[236] Indeed, he recalls receiving notice of the APA's submission on solitary confinement to the U.S. Senate.[237]

143. Dr. Nussbaum's report does not once mention the APA's position, or that Dr. Gur's 2002 affidavit reflects the current view of the APA on these issues.[238]

144. Dr. Nussbaum also failed to bring to the Court's attention articles published in leading authoritative peer-reviewed medical journals on the effects of solitary confinement on young persons. Dr. Nussbaum acknowledged on cross-examination that he did not search any of the paediatric peer-reviewed literature for position statements on the impact of solitary confinement on adolescents and children.[239] This includes a 2016 paper published in Pediatrics, the official

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234 Cross-Examination of Dr. Nussbaum at pp. 40-47, Q. 157-184, CCLA Transcript Brief, Volume 2, Tab 5.

235 Amicus Brief filed by the American Psychological Association, American Psychiatric Association and National Association of Social Workers and Mental Health America in *Sullivan, Graham v. State of Florida* and *Sullivan v. State of Florida* at pp. 3-4, CCLA Exhibit Brief, Volume 4, Tab 58.

236 Cross-examination of Dr. D. Nussbaum, at p. 39, Q. 153, CCLA Transcript Brief, Volume 2, Tab 5.

237 Cross-examination of Dr. D. Nussbaum at p. 40, Q. 156, CCLA Transcript Brief, Volume 2, Tab 5.

238 Cross-examination of Dr. D. Nussbaum at p. 46, Q. 180, CCLA Transcript Brief, Volume 2, Tab 5.

239 Cross-examination of Dr. D. Nussbaum at p. 90, Q. 353, CCLA Transcript Brief, Volume 2, Tab 5.

journal of the American Academy of Pediatrics ("**AAP**"), recommending that the AAP and national organizations committed to child advocacy "call for a ban on the use of solitary confinement and similar forms of isolation of children and adolescents in the United States and internationally".[240]

145. Dr. Nussbaum also failed to draw the Court's attention to other pertinent papers in the peer-reviewed literature addressing the psychological development of adolescents and young adults. For example:

- A 2013 article from *Development and Psychology*, a Cambridge University-published journal, discussing the results of a psychosocial study of 1,088 serious juvenile offenders followed from adolescence to early adulthood (ages 14 – 25).[241] Significantly, the paper concludes that "across each of the six indicators of psychosocial maturity and the global measure of psychological maturity [ ] individuals in the sample were still developing at age 25". Further, "at age 25, individuals in our sample were still continuing to increase in impulse control, suppression of aggression, consideration of others, future orientation, personal responsibility, resistance to peer influence, and global psychosocial maturity, suggesting that psychosocial maturity continues to develop into the midtwenties".[242]
- A 2016 article from *Psychological Science*, a journal published by the Association for Psychological Science which Dr. Nussbaum acknowledges is an authoritative organization before which he has made presentations,[243] discussing the results of a study subjecting 110 individuals aged 13 – 25 to negative and positive arousal.[244] The results of the study showed diminished cognitive performance in 18 – 21 year olds relative to adults over the age of 21.[245] "Taken together, these findings suggest that young adulthood is a time when cognitive control is still vulnerable to negative emotional influences, in part as a result of

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240 Cover of Pediatric journal and paper, "Children and Solitary Confinement: A Call to Action, Pediatrics, Official Journal of the American Academy of Pediatrics, CCLA Exhibit Brief, Volume 5, Tab 67; See Cross-examination of Dr. D. Nussbaum at pp. 90-95, CCLA Transcript Brief, Volume 2, Tab 5.

241 Psychosocial (Im)maturity from Adolescence to Early Adulthood (Monahan 2013), CCLA Exhibit Brief, Volume 5, Tab 68; See Cross-examination of Dr. D. Nussbaum at pp. 90-95, CCLA Transcript Brief, Volume 2, Tab 5.

242 Psychosocial (Im)maturity from Adolescence to Early Adulthood (Monahan 2013), at p 1099, CCLA Exhibit Brief, Volume 5, Tab 68.

243 Cross-examination of Dr. D. Nussbaum, at p. 95, CCLA Transcript Brief, Volume 2, Tab 5.

244 Association for Psychological Science, "When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts," and corrigendum (Cohen 2017), CCLA Exhibit Brief, Volume 5, Tab 69; See Cross-examination of Dr. D. Nussbaum at pp. 95- 104, CCLA Transcript Brief, Volume 2, Tab 5.

245 Association for Psychological Science, "When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts," and corrigendum (Cohen 2017), at p. 549, CCLA Exhibit Brief, Volume 5, Tab 69.

continued development of lateral and medial prefrontal circuitry".[246] The authors conclude that these findings "have potential implications for informing age-related legal and social policies" including "the boundaries of juvenile-court jurisdiction, criminal court sentencing, and punishment may be informed by developmental considerations".[247]

- A 2009 article from *American Psychologist*, the flagship journal of the APA, discussing the implications of developmental psychology for the appropriate treatment of young people under the law.[248] The paper concludes that "[b]y age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but *adolescents' psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s*".[249] Under cross-examination, Dr. Nussbaum acknowledged that he probably read this article.[250] It does not appear in his report.

146. In short, Dr. Nussbaum chose not to bring the Court's attention to recent and relevant scholarship from leading and authoritative peer-reviewed journals, the publicly-adopted positions of the preeminent professional organization of psychologists (the APA) of which he is a Fellow and from which he admits receiving newsletters and publications, or the positions of the CMA, CMHA, CFPC, RNAO, CPS, WHO, United Nations, APcA, NASW, and AAP on the effects of solitary confinement.

147. In addition to giving no weight to Dr. Nussbaum's opinion on any issues in controversy, the Court should sanction his failure to fairly represent this body of opinion and supporting literature, particularly when he took steps to discredit the opinions of Drs. Martin and Chaimowitz.

6. CONCLUSION ON EVIDENCE OF HARM

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246 Association for Psychological Science, "When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts," and corrigendum (Cohen 2017), at p. 559, CCLA Exhibit Brief, Volume 5, Tab 69.

247 Association for Psychological Science, "When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts," and corrigendum (Cohen 2017), at p. 560a, CCLA Exhibit Brief, Volume 5, Tab 69.

248 American Psychologists , "Are Adolescents Less Mature than Adults?" (Steinberg 2009), CCLA Exhibit Brief, Volume 5, Tab 70; See Cross-examination of Dr. D. Nussbaum, at pp. 104-106, CCLA Transcript Brief, Volume 2, Tab 5.

249 American Psychologists , "Are Adolescents Less Mature than Adults?" (Steinberg 2009), at p. 592, CCLA Exhibit Brief, Volume 5, Tab 70.

250 Cross-examination of Dr. D. Nussbaum at p. 105, Q. 401-403, CCLA Transcript Brief, Volume 2, Tab 5.

148. On the core issue of solitary confinement's cruelty, Canada has been regrettably unhelpful to the Court. It has a wealth of psychological, psychiatric, medical and psychosocial information and experience on the practice of solitary confinement and its impact. It has chosen to keep this information from this Court. It has deliberately shut its mind to the approaches of comparable correctional systems. It brought forward a Texas "expert" whose expertise was revealed to be woefully lacking. It proffered the opinion of a Canadian psychologist with absolutely no experience with or knowledge of the core issue who presented an astonishingly incomplete account of professional opinion.

149. In addition to depriving the Court of the best evidence of its professionals, Canada put forward records that are not admissible for opinion purposes by simply attaching to an affidavit prison records describing qualitative observations.[251] It is well-settled that a professional medical opinion, including a diagnosis, is not an "act, transaction, occurrence or event" within the meaning of s. 35(2) of the *Evidence Act*, R.S.O. 1990, c. E.23or s. 30 of the *Canada Evidence Act*, R.S.C., 1985, c. c-5.[252] The business records exception under the *Evidence Act* does not contemplate the admissibility of records containing the opinions of their makers.[253] Courts have therefore cautioned against resort to medical opinions by experts who do not testify.[254] In the absence of a testifying declarant, such opinions, inferences, subjective observations and conclusions in Canada's Application Record are not properly receivable for their truth.

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251 See Exhibits L, M, O, P, Q, R, S, T, V, W, X, Y, JJ, KK, and portions of Exhibits D, E, F, G, H, I, J, K, BB, CC, DD, HH, II to the Reply Affidavit of Bruce Somers (June 9, 2017), Second Supplementary Application Record of the Respondent, Volume 1, Tab 1.

252 *Blake v Dominion of Canada General Insurance*, 2015 ONCA 165, citing *Adderly v Bremner*, [1968] 1 OR 621 (HC), Brief of Authorities of the Applicant, Volume 1, Tab 6.

253 *Slough Estates Canada Ltd v Federal Pioneer Ltd*, 20 OR (3d) 429 at para 65, [1994] OJ No 2147 (Gen Div), Brief of Authorities of the Applicant, Volume 4, Tab 44.

254 *Adderly v Bremner*, [1968] 1 OR. 621 (HC), Brief of Authorities of the Applicant, Volume 1, Tab 3; See eg *R v S (G)*, [1995] OJ No 3914 (CA), 29 WCB (2d) 270, Brief of Authorities of the Applicant, Volume 3, Tab 32.

150. An adverse inference may also be drawn when, in the absence of any explanation, a party fails to provide pertinent affidavit evidence on an application or fails to call a material witness over whom the party has exclusive control.[255] Such a failure amounts to an implied admission that the evidence of the absent witness would be "contrary to the party's case, or at least would not support it".[256] The Supreme Court of Canada has held that this inference must be drawn against a party that fails to adduce relevant medical evidence that is within its sole control.[257]

151. Canada's failure to bring forward the best evidence available on the effects of solitary confinement—which is the experience of the numerous doctors, psychologists, psychiatrists, registered nurses and other mental health professionals and staff that administer the practice in Canadian prisons on a daily basis—should be of concern to this Court. An adverse inference should be drawn. In particular, the Court should infer that the views of Canada's doctors, psychologists, psychiatrists, nurses, social workers and other health practitioners on solitary confinement and the harm it causes are consistent with the opinions of Drs. Martin and Chaimowitz and the positions of the CMA, CMHA, CFPC, RNAO, APA, APcA, NASW and AAP.

PART IV - ISSUES

152. This Application raises five issues. The first issue is whether the Canadian Civil Liberties Association (**"CCLA"**) has standing to bring this Application, and the answer to this question is

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255 *1664550 Ontario Inc v 1240393 Ontario Ltd*, 2011 CarswellOnt 14713 at para 50, [2011] OJ No 6441 (Sup Ct), citing Sopkina, Lederman and Bryant, *The Law of Evidence in Canada*, Second Edition (Butterworths: Toronto, 1999), at p. 297, Brief of Authorities of the Applicant, Volume 1, Tab 2.

256 Sopkina, Lederman and Bryant, *The Law of Evidence in Canada*, *supra*, at p. 297, cited with approval in *1664550 Ontario Inc v 1240393 Ontario Ltd*, 2011 CarswellOnt 14713 at para 50, [2011] OJ No 6441, Brief of Authorities of the Applicant, Volume 1, Tab 2.

257 *Levesque v. Comeau*, [1970] SCR 1010 at para 6, [1970] SCJ No 55, Brief of Authorities of the Applicant, Volume 2, Tab 18.

"Yes". The next three issues consider whether ss. 31 to 37 of the *CCRA*, on their face, and as applied in prisons across Canada, contravene:

(a) the right not to be subjected to any cruel or unusual treatment or punishment under s. 12 of the *Charter*;

(b) the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice under s. 7 of the *Charter*; and

(c) the right, once found guilty and punished for the offence, not to be tried or punished for it again under s. 11(h) of the *Charter*.

153. The answer to all three questions is "Yes".

154. The fifth issue is whether the impugned sections of the *CCRA* nevertheless constitute a reasonable limit that can be demonstrably justified in a free and democratic society. The answer to this question is "No".

PART V - LAW AND ARGUMENT

1. *CCLA* HAS PUBLIC INTEREST STANDING TO BRING THIS APPLICATION

155. As a preliminary issue, the CCLA submits that it has public interest standing to bring this Application. It meets each of the three requirements that the Supreme Court has identified:

(a) the case itself raises a serious justiciable issue;

(b) the CCLA has a real stake or a genuine interest in its outcome; and

(c) the proposed action is a reasonable and effective means to bring the case to court.[258]

156. First, a "serious justiciable issue" is one that raises a substantial or important constitutional issue that is "far from frivolous".[259] There is no doubt that a challenge to the constitutionality of the legislative provisions that authorize solitary confinement is substantial and important.

157. The second factor is "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise".[260] In *Canadian Council of Churches*[261], the Supreme Court concluded that a court can determine an applicant's engagement with the issues by examining the applicant's reputation, continuing interest, and link with the claim. The CCLA meets these criteria, as it has a sterling reputation for championing the liberties of vulnerable groups; has demonstrated a real and continuing interest in the issues in this case; and has a link with the claim through its ongoing advocacy work.

158. The third factor is whether the proposed action is reasonable and effective, which must be addressed "from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs propose[...] to bring".[262] The CCLA meets this third factor, as it is nearly impossible for individuals who are currently incarcerated and in solitary confinement to lead the expert evidence required to systematically challenge the practice of solitary confinement,

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258 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45; *Borowski v Canada (Minister of Justice)* [1981] 2 SCR 575, Brief of Authorities of the Applicant, Volume 1, Tab 12.

259 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 42, Brief of Authorities of the Applicant, Volume 1, Tab 12.

260 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 43, Brief of Authorities of the Applicant, Volume 1, Tab 12.

261 *Canadian Council of Churches v R* [1992] 1 SCR. 23, Brief of Authorities of the Applicant, Volume 1, Tab 8.

262 *Downtown Eastside Sex Workers United Against Violence Society v Canada (Attorney General)*, 2012 SCC 45 at para 47, Brief of Authorities of the Applicant, Volume 1, Tab 12.

and to do so with particular reference to the harm caused by prolonged solitary confinement. These individuals are vulnerable and lack resources.

159. The case at bar is very different than a *habeas corpus* proceeding, for example, in which self-represented inmates, should they have the wherewithal to access the courts, challenge the sufficiency of the reasons for their admission to administrative segregation. The case at bar is also distinct from the one being advanced by the British Columbia Civil Liberties Association and the John Howard Society before the courts of British Columbia, and Canada has conceded as much by confirming that it would not seek to stay the present proceedings on the basis of duplication.

160. Thus, the issues raised by the CCLA's application impact an economically disadvantaged and vulnerable group and are clearly matters of significant public interest which transcend the interests of those directly affected by solitary confinement. The harms created by Canada's segregation regime, and the horrific circumstances and conditions of individuals within it are shocking to the conscience. This is clearly a matter of public interest that must be challenged. The CCLA has public interest standing to bring this application

2. SOLITARY CONFINEMENT CONTRAVENES THE CHARTER

A. This Court Has Benefit of A Significant Evidentiary Record

161. The importance of the record before this Court cannot be overstated. While some earlier cases have deemed the impugned provisions of the *CCRA* to be *Charter* compliant, none of these decisions had the benefit of the evidentiary record now before the Court.

162. For example, in *R. v. Olson*, decided some thirty years ago, Mr. Olson did not adduce any evidence on the effects of segregation nor any evidence of alternatives to long-term segregation. There was no evidence to counter that of prison administrators, who claimed that solitary

confinement was required to protect Mr. Olson. And even there, the Court recognized that segregation could become so excessive that it would outrage standards of decency.[263]

163. Similarly, in *R. v. Farell,* the court did not have access to expert evidence of the significant harms of solitary confinement and gave great deference to the expertise of prison administrators.[264] The Court accepted these administrators' claims that the "problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions"[265] and asserted that *habeas corpus* and the standards for punishment under s. 12 of the Charter are not available for complaints relating to "fresh air, medical treatment, meals, the right to call and receive calls from a lawyer, and available counseling".[266] The Court referred to these items—fresh air and medical treatment—as "trivial issues" that could never violate s. 12 of the Charter. [267]

164. In this case, unlike in *Olson* and *Farell,* the Court has the benefit of an extensive evidentiary record, including expert evidence of the significant physical and physiological harms of prolonged administrative segregation and alternatives to segregation—a record that the CSC has failed to answer. In other cases where courts have had a record of the harm caused by solitary confinement, they have concluded that confinement violates inmates' rights.

165. For example, in the pre-*Charter* era, the Federal Court in *R. v. McCann* found that solitary confinement in the British Columbia Penitentiary infringed the plaintiffs' right to freedom from cruel and unusual treatment or punishment guaranteed under s. 2(b) of the Canadian *Bill of Rights.*[268] In that case, the inmates were subject to poor ventilation, improper medical care,

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263 *R v Olson*, [1987] OJ No 855 at para 40, Brief of Authorities of the Applicant, Volume 2, Tab 29.
264 *R v Farrell*, 2011 ONSC 2160, Brief of Authorities of the Applicant, Volume 2, Tab 23.
265 *R v Farrell*, 2011 ONSC 2160 at para 47, Brief of Authorities of the Applicant, Volume 2, Tab 23.
266 *R v Farrell*, 2011 ONSC 2160 at para 68, Brief of Authorities of the Applicant, Volume 2, Tab 23.
267 *R v Farrell*, 2011 ONSC 2160 at para 68, Brief of Authorities of the Applicant, Volume 2, Tab 23.
268 *R v McCann*, [1976] 1 FC 570 at para 95, Brief of Authorities of the Applicant, Volume 2, Tab 28.

minimal exercise and 24-hour lights, among other conditions.[269] The inmates testified as to the harms those conditions caused: they described feelings of hate, frustration and resentment; paranoia and hallucinations; difficulty concentrating and controlling their emotions; and suicide attempts and self-harming behaviour. The inmates also testified as to the difficulties reintegrating into the general population. One said that the most difficult thing about solitary confinement was "the fact that you did not know why you were there or for how long".[270]

166. The evidence in *McCann* is similar to the more recent case of *Bacon v. Surrey Pre-trial Services Centre*.[271] In *Bacon*, the British Columbia Supreme Court found the following conditions of solitary confinement violated the inmate's rights under ss. 7 and 12 of the Charter: the inmate was confined to a cell for 23-hours per day; was permitted to be outside of the cell for one hour to shower or visit the exercise facility; had no pillow and there was no change of bedding in the first five weeks he was segregated; was given cold food; denied access to programs and activities; and denied asthma medication for the first three weeks of his confinement, among other things.[272] The inmate had also described episodes of increasing anxiety, including panic attacks occurring as often as three times per day.[273]

167. In *Bacon*, the Court recognized the availability of reasonable alternatives to solitary confinement and ordered the following relief:

> The petitioner is entitled to an order in the nature of *habeas corpus* directing that if he is not found, on proper grounds, to be a candidate for

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269 *R v McCann*, [1976] 1 FC 570 at para 79, Brief of Authorities of the Applicant, Volume 2, Tab 28.

270 *R v McCann*, [1976] 1 FC 570 at para 46, Brief of Authorities of the Applicant, Volume 2, Tab 28.

271 *Bacon v Surrey Pre-trial Services Centre*, 2010 BCSC 805, Brief of Authorities of the Applicant, Volume 1, Tab 4.

272 *Bacon v Surrey Pre-trial Services Centre*, 2010 BCSC 805 at paras 49-73, Brief of Authorities of the Applicant, Volume 1, Tab 4.

273 *Bacon v Surrey Pre-trial Services Centre*, 2010 BCSC 805 at paras 92-94, Brief of Authorities of the Applicant, Volume 1, Tab 4.

> release within the general prison population, but must continue to be separated from at least a segment of that population, the respondent must either:
>
> (a) find the means to place the petitioner in a setting that will include other inmates who are not at risk from, or a risk to, him; or
>
> (b) otherwise mitigate the petitioner's conditions of confinement to achieve a level of treatment comparable to that of an inmate in the general population, including times out, recreational opportunities and comparable privileges. He must not be treated as if he is being perpetually punished or disciplined. If it is a question of resource limitations, resources must be found.[274]

168. In addition to the evidence of harm, this Court has expert evidence of the consensus on solitary confinement at international law: solitary confinement must never be indefinite, must never last more than 15 days, and must never be applied to juveniles or persons with mental disabilities. This Court also has the benefit of expert evidence explaining these standards, which were adopted as the Mandela Rules and reinforced by the Inter-American Human Rights Commission. These are Canada's international obligations under the CAT and the ICCPR.

169. What the international community says is relevant. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court stated that "the principles of fundamental justice expressed in s. 7 of the Charter and the limits on rights that may be justified under s. 1 of the Charter cannot be considered in isolation from the international norms which they reflect".[275]

170. Canadian courts have canvassed international norms in other solitary confinement cases:

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274 *Bacon v Surrey Pre-trial Services Centre*, 2010 BCSC 805 at para 351 [emphasis added], Brief of Authorities of the Applicant, Volume 1, Tab 4.

275 *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 59 [emphasis added], Brief of Authorities of the Applicant, Volume 4, Tab 45.

(a) In *Bacon,* the court identified the norms for the treatment of prisoners and emphasised the inherent dignity of the human person;[276]

(b) In *Trang v. Alberta (Edmonton Remand Centre*),[277] the Alberta Court of Queen's Bench reviewed international authorities and found a minimum standard of one hour outdoor exercise per day;[278]

(c) In *Hamm*, without expert opinion on the Mandela Rules, the Alberta Court of Queen's Bench relied on*114957 Canada Ltee (Spraytech, Societe d'arrosage)*[279] to apply "international standards such as the Mandela Rules".[280]

171. This evidentiary record compels the conclusion that solitary confinement violates ss. 12, 7, and 11(h), and is not a reasonable limit.

B. The Impugned Practices Constitute Cruel And Unusual, Contrary to Section 12 of the Charter

172. Section 12 of the *Charter* prohibits cruel and unusual treatment or punishment. A punishment violates s. 12 where it is so excessive that it outrages the standards of decency".[281] Prolonged administrative segregation is a clear violation of s. 12, as is the segregation of young adults and the mentally ill.

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276 *Bacon v Surrey Pre-trial Services Centre*, 2010 BCSC 805 at paras 271-290 [emphasis added], Brief of Authorities of the Applicant, Volume 1, Tab 4.

277 See: *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6 at para 182, Brief of Authorities of the Applicant, Volume 4, Tab 46; and *Ogiamien v Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3080, Brief of Authorities of the Applicant, Volume 2, Tab 22.

278 *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6 at para 182, Brief of Authorities of the Applicant, Volume 4, Tab 46.

279 *114957 Canada Ltee (Spraytech, Societe d'arrosage)*, 2001 SCC 40, Brief of Authorities of the Applicant, Volume 1, Tab 1.

280 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 92, Brief of Authorities of the Applicant, Volume 1, Tab 14.

281 *R v Smith, (Edward Dewey)* [1KRJ987] 1 SCR 1045 at para 86, 40 DLR.(4th) 435, Brief of Authorities of the Applicant, Volume 3, Tab 34; *R v Goltz,*, [1991] 3 SCR 485 at 24 [1991] SCJ No 90, Brief of Authorities of the Applicant, Volume 2, Tab 25; and *R v Ferguson,* 2008 SCC 6 at para 14, Brief of Authorities of the Applicant, Volume 2, Tab 24.

173. In addition to the cases discussed above, courts have frequently concluded that certain practices or situations constitute cruel and unusual punishment based on the facts and evidence presented:

(a) In *R. v. MacPherson*[282], the New Brunswick Court of Queen's Bench held that Mr. MacPherson's treatment in two provincial prisons was "cruel and unusual". The Court accepted that, on one occasion lasting more than two hours, he was fastened face down on a stretcher with plastic ties on his upper back, waist, keens, ankles, and wrists, and a helmet on his head in a bare cell with the only window being the one in the steel door.[283] This constituted "unreasonable and excessive force and illegal actions,"[284] and rose to the level of cruel and unusual treatment.

(b) In *R. v. Palmantier,* the Territorial Court of the Northwest Territories held that Mr. Palmantier's treatment at the North Slave Correctional Centre was "cruel and unusual".[285] Over 132 days, he was held in a 6' by 10' isolation cell for 23 hours a day without clothing, toiletries, running water, a bed, bedding, towels, or cutlery. The was cruel and unusual, because "[a]s a society we would not tolerate subjecting people to that kind of treatment, even if they are in custody, it would be inhumane, and 'so excessive as to outrage standards of decency,'"[286]

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282 *R v MacPherson*, [1996] NBJ No. 182, Brief of Authorities of the Applicant, Volume 2, Tab 27.
283 *R v MacPherson*, 2011 ONSC 7717 at paras 8-75, Brief of Authorities of the Applicant, Volume 2, Tab 27.
284 *R v MacPherson*, 2011 ONSC 7717 at paras 81, Brief of Authorities of the Applicant, Volume 2, Tab 27.
285 *R v Palmantier*, 2014 NWTTC 10 at para 46-48, Brief of Authorities of the Applicant, Volume 3, Tab 30.
286 *R v Palmantier*, 2014 NWTTC 10 at para 47, Brief of Authorities of the Applicant, Volume 3, Tab 30.

(c) In *R. v. Ogiamien,* this Court found Mr. Ogiamien's treatment while incarcerated at Maplehurst Correctional Complex in Ontario was "cruel and unusual".[287] The facility was locked down for long periods during which Mr. Ogiamien had limited access to healthcare, programs (educational, vocational, remedial, moral, spiritual, social) and exercise; unsanitary conditions including reduced shower access, clean clothes, clean bedding, limited access to food; and increased security risk because of limited guards and increased tension among inmates There was "little difficulty in concluding that the treatment of the applicants, in their totality, was so excessive as to outrage standards of decency; was disproportionate; and was degrading," contrary to s. 12.

174. In all these cases, the breach of section 12 was a factual matter. Little time was consumed explaining why the treatment rose to the level of "cruel and unusual". This record compels a like result.

175. The record is overwhelming in demonstrating that prolonged administrative segregation and the segregation of young adults and individuals with mental illness causes serious and lasting physical, psychological, and emotional harm. The time has come to denounce the forms of administrative segregation challenged by this Application as an outrage to our standards of decency.

C. The Impugned Practices Violate Section 7 of the Charter

176. Section 7 of the *Charter* protects the right to life, liberty and security of the person. Prolonged administrative segregation and the segregation of young adults and inmates with mental

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287 *Ogiamien v Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3080 at para 141, Brief of Authorities of the Applicant, Volume 2, Tab 22.

illness violate s. 7 because it deprives the inmate of liberty and force an inmate to endure circumstances that manifestly threaten the inmate's security of person in a manner that does not, and cannot, accord with the principles of fundamental justice.

177. As the Supreme Court stated in *Sauvé v. Canada (Chief Electoral Officer)*, the right to punish and denounce "cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing".[288] As with the analysis under s. 12, this aspect of the s. 7 analysis turns on the factual record before the court. Cruel and unusual punishment will necessarily constitute a violation of s. 7.[289]

(i) Deprivation of liberty and violation of security of the person

178. The confinement of inmates in administrative segregation as an incident of non-reviewable bureaucratic discretion constitutes the most serious deprivation of liberty. Inmates are confined to the most restrictive conditions imaginable, beyond the reach of any judicial sentencing guidelines in conditions that violate international norms and all civilised medical standards, for an indeterminate period of time, and without any meaningful oversight, often for reasons entirely unconnected to their conduct.

179. In the case of young people, this deprivation occurs without regard to their fragile psycho-social status and without any accommodation for the disproportionately crushing impact that segregation has on them. The same is true for inmates who suffer from mental illness. And, in all cases, this deprivation of liberty is compounded by the absence of proper medical care.

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288 *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 52, Brief of Authorities of the Applicant, Volume 4, Tab 42.

289 *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at paras 34-36, [1985] SCJ No 73, Brief of Authorities of the Applicant, Volume 4, Tab 37.

180. The legislation makes absolutely no provision for the weighing of the impact of the deprivation of liberty on inmates and does not contain any measures to ensure that the deprivation of liberty is minimized, properly reviewed, or rationally connected to inmate behaviour. This perhaps accounts for Warden Pyke's view that segregation can never cause psychological harm and Canada's troubling refusal to put the evidence of its health care professionals before the Court, its refusal to have its witnesses review and comment on the Applicant's evidence of alternative approaches, and its troublingly selective approach to the evidence of Drs. Nussbaum and Morgan.

(ii) Violation of Security of the person, Contrary to Principles of Fundamental Justice

181. There can be no doubt that solitary confinement constitutes a serious violation of security of the person. These deprivations are not in accordance with the principles of fundamental justice.

182. The medical and fact evidence establish that segregation causes serious and often lasting harm. At a minimum, therefore, any admission to segregation cannot be constitutional absent due process provisions including an independent review. Currently, the institutional head acts as investigator, prosecutor and adjudicator. And based on evidence adduced, Canada's prevailing view is that segregation causes no harm. The principles of fundamental justice require that at a minimum, an inmate's placement into and their continued detention in segregation must be reviewed by an independent arbiter. It is well established that the right to be heard by an independent and impartial tribunal is a principle of fundamental justice.[290]

183. The requirements of independence and impartiality are related – they are both components of the rule against bias and seek to uphold public confidence in the fairness of administrative

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290 *Ruffo c Québec (Conseil de la magistrature)*, [1995] 4 SCR 267 at para 38 [1995] SCJ No 100, Brief of Authorities of the Applicant, Volume 4, Tab 41.

agencies and their decision-making procedures.[291] Both tests require us to ask: what would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude?[292]

184. Independence and impartiality are not identical. As Justice Le Dain wrote in *R v. Valente (No. 2),* while impartiality is about the state of mind or attitude of the tribunal, "[t]he word 'independent' in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude... but a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees".[293]

185. The deprivation of liberty and security of the person are s. 7 infringements that, at a minimum, demand due process, including a separation between the party that imposes administrative segregation and the reviewer of that decision. As Justice Veit concluded in *Hamm*, "a decision to place an inmate in solitary confinement is the equivalent, as other courts have put it, of sentencing an inmate to a 'prison within a prison'. Therefore, the process to be followed in making such decisions should mirror the process in the justice system whereby a court sentences a convict to a prison sentence".[294]

186. As Justice Veit concluded, "necessarily, the usual administrative law safeguard against apprehension of bias must be modified in the custodial context where the inmate is fighting against the prison authorities from whom he must obtain practical support. The general need for

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291 *Bell Canada v CTEA*, 2003 SCC 36 at para 17, Brief of Authorities of the Applicant, Volume 1, Tab 5.

292 *Committee for Justice & Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at para 40, per de Grandpré J, dissenting, Brief of Authorities of the Applicant, Volume 1, Tab 10.

293 *R v Valente (No 2)*, [1985] 2 SCR 673, at para 15 [emphasis added], Brief of Authorities of the Applicant, Volume 3, Tab 35.

294 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para. 67, Brief of Authorities of the Applicant, Volume 1, Tab 14.

procedural fairness is heightened in such situations".[295] As discussed above, the *Regulations* already require that an independent chairperson preside over the hearing into an infraction for which segregation is a possible penalty.

187. Under the present practice, CSC officials, whether at the prison level or in regional headquarters, sit in judgment of their own decision to maintain confinement. This is particularly significant at the 30-day review, where the warden actually chairs the review of their (own) decision. This is a bias in favour of continued confinement.

188. In *Norshield Asset Management (Canada) Ltd.*, the institutional impartiality of the Ontario Securities Commission was challenged.[296] In dismissing the application and determining that the Hearing Panel was independent from the Chair, the Commission placed significant weight on s. 3.5(4) of the *Securities Act*, which prohibits Commissioners from acting in *both* investigatory and adjudicative capacities in connection with the same proceeding.[297] The Commission also found it important that "the Commission has created very effective walls between its investigation and enforcement branches and the Commissioners acting in their adjudicative capacities".[298]

189. Such legislative and operational safeguards are completely absent from the *CCRA*, the Regulations, and the Commissioner's Directives, which entrench self-review of the most serious decisions.. As the Alberta Court of the Queen's Bench said in reviewing the composition of disciplinary boards under the *Corrections Act*, while s. 7 does not necessarily require the board to

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295 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para. 67, Brief of Authorities of the Applicant, Volume 1, Tab 14.

296 *Norshield Asset Management (Canada) Ltd., Re,* 2010 CarswellOnt 5803, 33 OSCB. 7171, aff'd 2010 CarswellOnt 5803, Brief of Authorities of the Applicant, Volume 1, Tab 21.

297 *Norshield Asset Management (Canada) Ltd., Re,* 2010 CarswellOnt 5803 at para 110, 33 OSCB 7171, Brief of Authorities of the Applicant, Volume 1, Tab 21.

298 *Norshield Asset Management (Canada) Ltd., Re,* 2010 CarswellOnt 5803 at para 112, 33 OSCB 7171, Brief of Authorities of the Applicant, Volume 1, Tab 21.

have all the attributes of a judge, this is a "far cry from interpreting s. 7 as approving as sufficiently independent a tribunal who is staffed by persons who are responsible for maintaining discipline in the institution".[299]

190. Grievance procedures and applications for *habeas corpus* are insufficient to correct for the deficiencies in CSC's review process. Because the harm caused by segregation can manifest itself in as little as 48 hours, it is not practicable to expect inmates to bring a timely application for *habeas corpus* before a court. This is particularly true when they are routinely deprived of their personal effects for days after their arrival in segregation.

191. More importantly, it is, with respect, manifestly unreasonable to the point of disingenuousness for Canada to suggest that the answer to this systemic violation of international standards and *Charter* rights is to put the onus on segregated inmates to bring *habeas corpus* applications to the Court. This Application is the best way to ensure that the systemic harm caused by such practices is never corrected.

192. It is therefore necessary that the initial reviewer of the inmate's confinement be truly independent, which must include the authority to release the inmate from segregation. On such a review, the reviewer must balance the need to maintain the security of the institution and other inmates, as well as the best interests of the inmate at issue. In particular, the reviewer must consider the availability of less restrictive measures to advance these objectives. Without such a review, the continued detention of the inmate contravenes s. 7 of the *Charter* in a manner that is not in accordance with the principles of fundamental justice.

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299 *Currie v. Alberta (Director, Edmonton Remand Centre)*, 2006 ABQB 858, at para 38, Brief of Authorities of the Applicant, Volume 1, Tab 11.

193. As a practical matter, a review by an independent decision-maker at the earliest possible opportunity, and no later than five days from the decision to place the inmate in administrative segregation, is a standard below which Canada cannot fall in order to create a procedural safeguard.

D. Administrative Segregation Contravenes Section 11(h)

194. Section 31(3) of the *CCRA* authorizes administrative segregation where "allowing the inmate to associate with other inmates would jeopardize the inmate's safety". As a result, inmates who have done nothing to threaten the safety of the institution or any other person are subjected to solitary confinement. In this respect, administrative segregation constitutes an independent and incremental punishment that is separate from the inmate's sentence or conduct. It therefore violates the right protected under s. 11(h) of the *Charter* not to be punished again for the same offence.

(i) Section 11(h) is Engaged under the *Whaling* test

195. The Supreme Court has developed three legal tests to determine whether s. 11(h) is engaged. Most recently, in *Whaling v. Canada*,[300] the Court addressed the impact of changes in the nature of an inmate's incarceration. The issue in *Whaling* was whether retrospective changes to parole eligibility engaged s. 11(h), but the Court's "functional" analysis is applicable here. The core issue was to "identify situations in which, from a functional rather than a formalistic perspective, the harshness of punishment has been increased".[301] The court looks to whether "retrospective changes to the original sanction ... have the effect of adding to the offender's

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300 *Whaling v Canada (Attorney General)*, 2014 SCC 20, Brief of Authorities of the Applicant, Volume 4, Tab 47.

301 *Whaling v Canada (Attorney General)*, 2014 SCC 20 at para. 52, Brief of Authorities of the Applicant, Volume 4, Tab 47.

punishment" and thereby offend the rule against double punishment in s.11(h).[302] The functional perspective on the effect on the inmate's "settled expectation of liberty" is the animating principle of s. 11(h).[303]

196. In the other tests to engage section 11(h), the court focuses on (1) whether non-criminal proceedings engage the section (the *Wigglesworth* test);[304] or (2) whether particular "sanctions" under the *Criminal Code* engage the section (the *Rodgers* test).[305] Neither of these tests is applicable in the circumstances of this case, which is governed by *Whaling*.

(ii) Solitary confinement constitutes double punishment

197. Administrative segregation is a harsh sanction that increases the inmate's punishment beyond the level contemplated at sentencing. As in *Whaling*, the inmate has an expectation of a certain quantum of liberty at the time of his sentencing, such that he will not be punished further unless guilty of s further misconduct.[306] When administrative segregation is imposed for his own protection he is subjected to the harshest of treatment available in the prison system.[307]

198. Here administrative segregation disregards the measured punishment ordered by the sentencing judge, and instead imposes a harsher sentence. This practice runs roughshod over carefully considered sentencing decisions, thus undermining judicial authority and the integrity of the administration of justice.

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302 *Whaling v Canada (Attorney General)*, 2014 SCC 20 at para. 54, Brief of Authorities of the Applicant, Volume 4, Tab 47.

303 *R v KRJ*, 2016 SCC 31 at para 39, Brief of Authorities of the Applicant, Volume 2, Tab 26.

304 *R v Wigglesworth*, [1987] 2 SCR 54, 1 [1987] SCJ No 71, Brief of Authorities of the Applicant, Volume 4, Tab 36.

305 *R v Rodgers*, 2006 SCC 15, Brief of Authorities of the Applicant, Volume 3, Tab 31.

306 *Whaling v Canada (Attorney General)*, 2014 SCC 20 at para 58, Brief of Authorities of the Applicant, Volume 4, Tab 47.

307 By way of analogy, transfer decisions to a greater level of security classification are subject to *habeas corpus* applications: See: *Mission Institution v Khela*, 2014 SCC 24. In this way, the Supreme Court has recognized that additional restrictions alters the state of an inmate's detention, Brief of Authorities of the Applicant, Volume 2, Tab 20.

199. The example of J.H. illustrates this issue. As Warden Pyke explained, in a situation where an inmate arrives at an institution where an incompatible inmate is housed, CSC's policy is to maintain one of the inmates in segregation for as long as necessary to resolve the incompatibility.[308] Either J.H. or the incompatible inmate was going to be placed in solitary confinement, even though neither had engaged in any misconduct while in custody.[309] By bureaucratic design, one inmate will face a second punishment, without a second infraction.

200. Accordingly, the use of administrative segregation for inmates' protection infringes their rights under section 11(h) to be free from double punishment.

3. *CCRA* CANNOT BE SAVED BY SECTION 1

E. General Principles

201. Section 1 of the *Charter* guarantees that rights and freedoms are subject only to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The impugned defects of the *Act* are not reasonable limits that can be demonstrably justified in a free and democratic society.

202. The Supreme Court of Canada described the analysis under s. 1 is as follows:

> (1) Is the purpose for which the limit is imposed pressing and substantial?
>
> (2) Are the means by which the legislative purpose is furthered proportionate?
>
> (a) Is the limit rationally connected to the purpose?
>
> (b) Does the limit minimally impair the Charter right?

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308 Affidavit #2 of J. Pyke, sworn March 30, 2017, at para. 10; Cross-examination of J. Pyke, 21 June 2017, at pp. 111-12, Respondent Application Record, Volume 1, Tab 1.

309 Cross-examination of J. Pyke, 21 June 2017, at p. 167, Q. 600-601, Transcript Brief, Volume 1, Tab 2; Cross-examination of J. Pyke, 21 June 2017, at pp. 111-12, Transcript Brief, Volume 1, Tab 2.

(c) Is the law proportionate in its effect?[310]

203. While security and current prison practices may require that certain inmates be removed from the general prison population, there is no evidence that it is necessary to keep these inmates in isolation, and certainly not beyond 15 days. Rather, the evidence is that there are well-established procedures used in comparable jurisdictions such as England and Wales. Likewise, there is no evidence that young adults, individuals with mental illness, and prisoners requiring protection must be isolated for any period of time. Finally, there is no evidence that the decision to maintain inmates in segregation could not be subject to independent authorization after 5 days, just as the decision to order disciplinary segregation is itself imposed by an independent chairperson.

204. To the extent that any necessity arises in the case at bar, it is a situational necessity of Canada's own making, and it arises directly from Canada's decision to structure its affairs in a manner that exacerbates conditions and ignores the harms caused by the practices impugned on this Application. Accordingly, the *Charter* violations at issue cannot be saved by s. 1.

F. Cannot be Saved if Legislation Violates Section 7

205. Infringements of s. 7 rights are only justified under s. 1 in exceptional circumstances. As noted by Chief Justice Lamer in *G. (J.)*:

> Section 7 violations are not easily saved by s. 1. In *Re B.C. Motor Vehicle Act*, *supra*, at p. 518, I said:
>
> > Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.
> >
> > This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant

310 *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37 at para 27, Brief of Authorities of the Applicant, Volume 1, Tab 15.

> and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.[311]

206. Confining inmates to segregation is not an exceptional circumstance. If this Court finds that individuals' s. 7 rights have been violated, these violations cannot be saved by s. 1.

G. The Oakes Test

(i) "Pressing and Substantial Objective"

207. While ensuring safety in prisons is an important objective, the evidence does not establish that this is the true basis for many administrative segregation decisions or that making the changes demanded will compromise safety. In *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, the plaintiffs (former inmates of the Alouette Correctional Centre for Women and their children) challenged a decision to cancel a program that permitted mothers to have their babies with them while they served sentences of provincial incarceration.[312] The central issues in the litigation were whether the decision to cancel the program engaged constitutionally protected rights of the mother and babies affected by the decision and if so, whether those rights were infringed.

208. British Columbia submitted that the objective of cancelling the program was to prevent harm to infants in provincial correctional centres. Its argument that this was a pressing and substantial objective was rejected:

> The decision to cancel the Program was not based upon a reasonable apprehension of potential harm to infants. It was not based upon

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311 *Reference re s 94(2) of Motor Vehicle Act (British Columbia)*, [1985] 2 SCR 486 at paras 90-94, [1985] SCJ No 73, Brief of Authorities of the Applicant, Volume 4, Tab 37.

312 *Inglis v British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309, Brief of Authorities of the Applicant, Volume 2, Tab 16.

> considerations of cost. Rather it was based upon [a] conclusion that infants were not within the mandate of Corrections, that [Corrections] did not have to accommodate them and that [Corrections] was not prepared to extend the mandate to do so.[313]

209. The Court concluded that the objective was not infant safety but a concern with the mandate of Corrections. The Court concluded that in light of the fact that the constitutional rights of both mothers and infants are engaged, this was not a pressing and substantial objective.[314]

210. Here, there is reason to doubt that the government's objective is, in fact, protecting the inmate and prison staff from immediate danger, as opposed to, for example, punishment for bad behaviour or administrative inertia. J.H.'s case and Warden Pyke's testimony speak to this concern, as do the findings in *Hamm*.[315]

(ii) "Proportionate Means"

211. In any event, the impugned practices are not a proportionate means of promoting prison safety because they are neither rationally connected to Canada's stated objective, nor are they minimally impairing of the rights at issue.

(a) Rational Connection

212. In *Hutterian Brethren*, Chief Justice McLachlin stated that in order to establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic". The " rational connection requirement is aimed at

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313 *Inglis v British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309 at para 4, Brief of Authorities of the Applicant, Volume 2, Tab 16.

314 *Inglis v British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309 at para 364, Brief of Authorities of the Applicant, Volume 2, Tab 16.

315 *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para. 70, Brief of Authorities of the Applicant, Volume 1, Tab 14.

preventing limits being imposed on rights arbitrarily. The government must show that it is reasonable to suppose that the limit may further the goal, not that it will do so."

213. Canada must demonstrate that there is a reasonable apprehension of harm if inmates are not subjected to solitary confinement.[316] The provisions permitting solitary confinement, while facially directed at addressing a reasonable apprehension of harm, only exist because of Canada's *Charter*-infringing decision to structure its affairs to require solitary confinement for inmates who cannot in current circumstances be housed in the general prison population.

214. This is not a rational connection between maintenance of institutional security and the practice of solitary confinement. This Court should not permit Canada to manufacture a connection between its stated objective and a *Charter*-infringing practice. Such a connection, if any, cannot be defined as "rational."

(b) Minimal Impairment

215. As explained in detail above, there are well-established alternatives to maintain institutional safety that do not require prison authorities to subject inmates to solitary confinement. In *Hutterian Brethren*, Chief Justice McLachlin described the question to be addressed:

> The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. Another way of putting this question is to ask whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may

316 *R v Sharpe*, 2001 SCC 2 at para 85, Brief of Authorities of the Applicant, Volume 3, Tab 33; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 775, Brief of Authorities of the Applicant, Volume 3, Tab 38.

> be better positioned than the courts to choose among a range of alternatives.[317]

216. The Chief Justice added:

> I hasten to add that in considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure in the passage from *RJR-MacDonald*, quoted above, should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal: [*Charkaoui*.][318] ...

217. The impugned limits on rights are not reasonably tailored to the objective for two reasons.

218. First, there are non-infringing means available to Canada to achieve the objective of institutional safety. The uncontested evidence of Professor Coyle is that prison regimes that do not employ solitary confinement at all for difficult inmates are used effectively in England and Wales. Indeed, his evidence is that special CS Centres are only required for a miniscule percentage of inmates. Canada has put forward no evidence that English and Welsh style CS Centres would not be "equally effective" in Canada.

219. Second, Canada has adduced no evidence to suggest it has even explored the availability of reasonable alternatives, despite large numbers of segregation cells sitting empty. Instead, it continues to commit millions of dollars to "Range Hardening" exercises like the one at the Millhaven Institution, which simply reinforce its reliance on administrative segregation. In making these expenditures, Canada is doubling down on solitary confinement. There is no

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317 *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37at para 53, Brief of Authorities of the Applicant, Volume 1, Tab 15.

318 *Hutterian Brethren of Wilson Colony v Alberta*, 2009 SCC 37at para 55 [*emphasis added*] , Brief of Authorities of the Applicant, Volume 1, Tab 15.

evidence to explain why such funds could not have been spent on measures that do not intrude on the constitutional rights of individuals, nor why Canada has apparently failed to even consider employing such alternatives.

220. Administrative convenience or expediency is no defence to a *Charter* infringement. In *Ogiamien*, the lockdown case, Justice Gray explained that the Crown cannot rely on administrative difficulty or cost when alternatives exist:

> *Charter* violations cannot be explained or condoned by considerations of expediency or lack of resources. I noted earlier the statement by Justice McEwan in *Bacon v. Surrey Pre-trial Services Centre*, at para. 269, to that effect.
>
> Expediency is not a defence to a *Charter* violation, whether through reliance on s.1 of the *Charter* or otherwise. In *Reference Re Motor Vehicle Act*, *supra*, Lamer J. stated at para. 85:
>
> > Administrative expediency, absolute liability's mains supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.
>
> [262] In *Singh v. Canada (Minister of Employment and Immigration)*, *supra*, Wilson J. said "Certainly the guarantees of the *Charter* would be illusory if they could be ignored because it was administratively convenient to do so".
>
> These observations apply, with equal force, here. The Government of Ontario has had it within its power to fix the problem since at least 2002, at least when the problem was identified by Nordheimer J. in *Jordan*, and has not chosen to invest sufficient resources so that the problem of lockdowns caused by staff shortages can be alleviated. I am not persuaded that the terms of the applicable collective agreement prevent the government from dealing with the issue.[319]

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319 *Ogiamien v. Ontario*, 2016 ONSC 3080 at paras 260-63, Brief of Authorities of the Applicant, Volume 2, Tab 22.

221. In short, the Applicants are not proposing that Canada implement hypothetical alternatives to solitary confinement with no proven track record. Rather, the evidence is clear that alternatives exist, are used in comparable jurisdictions, and that Canada has the resources available to impose such alternatives. It has simply chosen not to.

222. Accordingly, Canada cannot meet its onus to show that the impugned practices are minimally impairing of inmates' constitutional rights.

(c) Proportionality

223. In any event, the impugned measures are not proportionate. The inquiry at this stage is to ask whether the benefits of the impugned provision are worth the costs of the infringement to inmates' rights. The answer is "No".

224. Taking Canada's argument at face value, the impugned practices have the salutary effect of enhancing the safety of the institution by removing certain inmates from the general population. However, this comes at the cost of enormous deleterious effects to the affected inmates, who are subjected to treatment that rises to the level of cruel, inhuman, and degrading treatment or even torture. This is a bargain that cannot even be contemplated in a free and democratic society.

PART VI - ORDER REQUESTED

225. For the reasons set out above, the impugned provisions of the *CCRA* clearly violate the *Charter*. In crafting an appropriate remedy under s. 52 of the *Constitution Act, 1982*, the Court

must have regard to both the nature of the *Charter* breaches and the manner in which they fall short of justification pursuant to s. 1.[320]

226. The *Charter* breaches set out above are extensive and severe. In the circumstances, the CCLA submits that it would be appropriate for the Court to provide guidance to Parliament as to the Constitutional failures established, and to the Constitutional minimums demonstrably required for administrative segregation. The CCLA respectfully submits that the Court should defer to Parliament in drafting a regime that incorporates these minimums. Consequently, this is a case in which the impugned provisions of the *CCRA* should be struck down in their entirety, rather than read down to be constitutionally compliant.[321]

227. The CCLA therefore requests an order declaring that ss. 31 to 37 of the *CCRA* are of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. In view of the seriousness of the ongoing and potential *Charter* breaches to individuals, the CCLA submits that this declaration of invalidity should not be suspended for more than 6 months.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of July, 2017.

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320 See *Schachter v. Canada*, [1992] 2 SCR 679 at paras 24-25, [1992] SCJ No 68, Brief of Authorities of the Applicant, Volume 4, Tab 43.

321 *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 at para 52, [1990] SCJ No, Brief of Authorities of the Applicant, Volume 3, Tab 39.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Ville)*, 2001 SCC 40.
2. *1664550 Ontario Inc. v. 1240393 Ontario Ltd.*, [2011] O.J. No. 6441 (Sup. Ct.).
3. *Adderly v. Bremner*, [1968] 1 O.R. 621 (H.C.).
4. *Bacon v. Surrey Pre-trial Services Centre*, 2010 BCSC 805.
5. *Bell Canada v. C.T.E.A.*, 2003 SCC 36.
6. *Blake v. Dominion of Canada General Insurance*, 2015 ONCA 165.
7. *Borowski v. Canada (Minister of Justice)* [1981] 2 S.C.R. 575.
8. *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 23.
9. *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369.
10. *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 4191.
11. *Currie v. Alberta (Director, Edmonton Remand Centre)*, 2006 ABQB 858.
12. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45.
13. *Graham v. Florida*, 560 U.S. 48.
14. *Hamm v. Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440.
15. *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37.
16. *Inglis v. British Columbia (Minister of Public Safety and Solicitor General)*, 2013 BCSC 2309.
17. *Jackson v. Hobbs*, 565 U.S. 1244.
18. *Levesque v. Comeau*, [1970] S.C.R. 1010, [1970] S.C.J. No. 55.
19. *Miller v. Alabama*, 567 U.S. 460.
20. *Mission Institution v. Khela*, 2014 SCC 24.
21. *Norshield Asset Management (Canada) Ltd., Re*, 2009 CarswellOnt 528, 32 O.S.C.B. 1249, aff'd 2010 CarswellOnt 5803.

22. *Ogiamien v. Ontario (Ministry of Community Safety and Correctional Services)*, 2016 ONSC 3080.

23. *R. v. Farrell*, 2011 ONSC 2160.

24. *R. v. Ferguson,* 2008 SCC 6.

25. *R. v. Goltz,* [1991] 3 S.C.R. 485, [1991] S.C.J. No. 90.

26. *R.. v. K.R.J,* 2016 SCC 31.

27. *R. v. MacPherson*, [1996] N.B.J. No. 182, 106 C.C.C. (3d) 271.

28. *R. v. McCann*, [1976] 1 F.C. 570, 68 D.L.R. (3d) 66.

29. *R. v. Olson*, 62 O.R. (2d) 321, [1987] O.J. No. 855, aff'd [1989] 1 S.C.R. 296, 47 C.C.C. (3d)

30. *R. v. Palmantier*, 2014 NWTTC 10.

31. *R. v. Rodgers*, 2006 SCC 15.

32. *R. v. S.(G.)*, [1995] O.J. No. 3914 (C.A.), 29 W.C.B. (2d) 270.

33. *R.. v. Sharpe*, 2001 SCC 2.

34. *R. v. Smith, (Edward Dewey)*, [1987] 1 S.C.R. 104, 40 D.L.R.(4th).

35. *R. v. Valente (No 2)*, [1985] 2 S.C.R. 673, [1985] S.C.J. No. 77.

36. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, [1987] S.C.J. No. 71.

37. *Reference re s. 94(2) of Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73.*

38. *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588.

39. *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, [1990] S.C.J. No.

40. *Roper v. Simmons*, 543 U.S. 551.

41. *Ruffo c. Québec (Conseil de la magistrature)*, [1995] 4 S.C.R. 267, [1995] S.C.J. No. 100.

42. *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68.

43. *Schachter v. Canada*, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68.

44. *Slough Estates Canada Ltd. v. Federal Pioneer Ltd.*, 20 O.R. (3d) 429, [1994] O.J. No. 2147.

45. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1.

46. *Trang v. Alberta (Edmonton Remand Centre)*, 2010 ABQB 6.

47. *Whaling v. Canada (Attorney General)*, 2014 SCC 20.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

31 (1) The purpose of administrative segregation is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.

(2) The inmate is to be released from administrative segregation at the earliest appropriate time.

(3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

> (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;
>
> (b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or
>
> (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

32 All recommendations to the institutional head referred to in paragraph 33(1)(c) and all decisions by the institutional head to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31.

33 (1) Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall

> (a) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate's case;
>
> (b) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate's case; and
>
> (c) recommend to the institutional head, after the hearing mentioned in paragraph (a) and after each hearing mentioned in paragraph (b), whether or not the inmate should be released from administrative segregation.

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

(a) the inmate is voluntarily absent;

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

(c) the inmate seriously disrupts the hearing.

34 Where the institutional head does not intend to accept a recommendation made under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to accept the recommendation; and

(b) to give the inmate an opportunity to make oral or written representations.

35 Where an inmate requests to be placed in, or continue in, administrative segregation and the institutional head does not intend to grant the request, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to grant the request; and

(b) to give the inmate an opportunity to make oral or written representations.

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

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

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

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

(ii) security requirements.

44 (1) An inmate who is found guilty of a disciplinary offence is liable, in accordance with the regulations made under paragraphs 96(i) and (j), to one or more of the following:

(a) a warning or reprimand;

(b) a loss of privileges;

(c) an order to make restitution, including in respect of any property that is damaged or destroyed as a result of the offence;...

(d) a fine;

(e) performance of extra duties; and

(f) in the case of a serious disciplinary offence, segregation from other inmates — with or without restrictions on visits with family, friends and other persons from outside the penitentiary — for a maximum of 30 days.

Corrections and Conditional Release Regulations, SOR 92-620

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

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

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

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

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

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

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

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

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

(d)

24 (1) The Minister shall appoint

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

27 (1) Subject to subsections 30(2) and (3), a hearing of a minor disciplinary offence shall be conducted by the institutional head or a staff member designated by the institutional head.

(2) A hearing of a serious disciplinary offence shall be conducted by an independent chairperson, except in extraordinary circumstances where the independent chairperson or another independent chairperson is not available within a reasonable period of time, in which case the institutional head may conduct the hearing.

***Canadian Charter of Rights and Freedoms,* Constitution Act, 1982**

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

11 Any person charged with an offence has the right,

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(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; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

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

***United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* entry into force June 26, 1987**

Article 1 For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or

a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Article 16 Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment.

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicant

-and-

HER MAJESTY THE QUEEN AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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