CITATION: Reddock v. Canada (Attorney General), 2019 ONSC 5053
COURT FILE NO.: CV-17-570771-00CP
DATE: 2019/08/29

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:		
Jullian Jordea Reddock	Plaintiff	*H. Michael Rosenberg, James Sayce* and *Charlotte-Anne Malischewski* for the Plaintiff
– and –		
Attorney General of Canada	Defendant	*Eric Lafreniere, Susan Gans, Negar Hashemi,* and *Lucan Gregory* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*		**HEARD**: July 22-26, 2019

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] This is a summary judgment motion.

[2] Pursuant to the *Class Proceedings Act, 1992*,[1] Jullian Jordea Reddock sues the Attorney General of Canada, which is to say that he sues the Federal Government of Canada. The Reddock Case arises out of the use of administrative segregation in the Federal Government's penitentiaries, which are administered by the Correctional Service of Canada, sometimes referred to as "CSC".

[3] Because of the use of administrative segregation, Mr. Reddock alleges that the Federal Government breached the inmates' rights under the *Canadian Charter of Rights and Freedoms*,[2] including their rights under s. 7 (life, liberty, and security of the person), s. 9 (arbitrary detention), s. 11 (h) (double jeopardy) and s. 12 (cruel and unusual treatment). Mr. Reddock also advances a systemic negligence claim against the Federal Government. Mr. Reddock moves for a

[1] S.O. 1992, c.6.
[2] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

summary judgment of the common issues in his action.

[4] The Reddock Case is closely connected with *Brazeau v. Attorney General (Canada)*,[3] a case that I recently decided, which has been appealed to the Ontario Court of Appeal. The appeal has been expedited and is scheduled to be heard on November 6, 2019.

[5] In turn, the Reddock Case and the *Brazeau* Case are also closely connected to *British Columbia Civil Liberties Association v. Canada (Attorney General)*,[4] a recent decision of the British Columbia Court of Appeal, and to *Canadian Civil Liberties Association v. Canada*,[5] a recent decision of the Ontario Court of Appeal, for which the Federal Government and the Canadian Civil Liberties Association are seeking leave to appeal to the Supreme Court of Canada.

[6] Thus, the Reddock Case is closely connected to three recent lower court decisions and two very recent appellate court decisions about administrative segregation. Taken together, but not uniformly, these decisions hold that administrative segregation's enabling legislation, the *Corrections and Conditional Release Act* ("*CCRA*") [6] and also the manner of its operation are contrary to the *Charter*.

[7] In the summary judgment motion in the Reddock Case, whether the alleged breaches of the *Charter* were: (a) the exclusive product of the enabling statute, the *CCRA*; or (b) arose from maladministration of the statute was a significant controversy between the parties with significant legal repercussions that will preoccupy much of the discussion below.

[8] As the discussion below will reveal, the *Cdn Civil Liberties Assn, BC Civil Liberties Assn, Brazeau*, and Reddock Cases raise profoundly complex and difficult problems for the appellate courts to eventually resolve about *Charter* violations, *Charter* remedies, and common law remedies for *Charter* violations. And, the interconnection amongst the cases is a very problematic feature for the summary judgment motion in the Reddock Case.

[9] Indeed, I was asked to adjourn the motion to await the outcome of the *Brazeau* Case's appeal and the *Cdn Civil Liberties Assn* Case's leave to appeal motion and if leave be granted the appeal to the Supreme Court of Canada. However, I declined to wait,[7] and I proceeded to hear the summary judgment motion in the Reddock Case over five days in July 2019. Since my decision in the immediate case will be appealed by one or the other or both of the parties, I felt it preferable to decide the Reddock Case promptly so the appeals of these interconnected cases, with their very similar and factual footprints, could, if possible, be heard together.

[10] On the summary judgment motion, in light of the interconnection amongst the *Cdn Civil Liberties Assn, BC Civil Liberties Assn, Brazeau*, and Reddock Cases, Class Counsel made the following main arguments:

i. Class Counsel argued that I should grant summary judgment in the Reddock Case based on *res judicata* or issue estoppels, or based on *stare decisis*, arising from

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[3] 2019 ONSC 1888.
[4] 2019 BCCA 228, varying 2018 BCSC 62.
[5] 2019 ONCA 243 (Justice Benotto, and Chief Justice Strathy and Justice Roberts, concurring), varying 2017 ONSC 7491.
[6] S.C. 1992, c. 20.
[7] *Reddock v. Canada (Attorney General)*, 2019 ONSC 3196.

the interconnected cases.

ii. Further, Class Counsel argued that regardless of the principles of *res judicata*, issue estoppel, or *stare decisis* and based just on the evidentiary record in the immediate case (which record substantially replicated the evidence in the interconnected cases), I should grant Mr. Reddock and the Class Members summary judgment for each of the various *Charter* breaches.

iii. Further still, notwithstanding that the claim had been unsuccessful in the *Cdn Civil Liberties Assn* Case, Class Counsel argued that the Class Members' rights under s. 11(h) of the *Charter* had been breached and that the Federal Government should also be found liable on this account as well.

iv. Further still, given that a systemic negligence claim was not a factor in the interconnected cases, Class Counsel argued that based just on the evidentiary record in the immediate case, I should grant Mr. Reddock and the Class Members summary judgment for systemic negligence.

v. Further still, Class Counsel argued that the systemic negligence claim provided an alternative basis to award compensatory aggregate damages. As the discussion below will reveal, the systemic negligence claim also provides a way for Class Counsel to circumvent the Federal Government's argument based on the principle from *Mackin v. New Brunswick (Minister of Finance),*[8] which principle would immunize the Federal Government from liability under s. 24 (1) of the *Charter* to pay damages for a *Charter* breach.

vi. As for remedies, without suggesting that I had erred in the *Brazeau* Case, Class Counsel submitted that unlike the result in the *Brazeau* Case, where I made an aggregate *Charter* damages award only for vindication and deterrence that was not payable directly to the Class Members, I should in the Reddock Case make an award directly to the Class Members that included a base level award for deterrence, vindication and also compensatory damages for each Class Member. Class Counsel submitted that if a Class Member wished more than the base award of damages, then he or she would be entitled to make a claim at an individual issues trial.

vii. In the alternative, as for remedies, Class Counsel submitted that if I did not make a base level award for *Charter* damages as aforesaid, then I should employ the approach that I used in the *Brazeau* Case and award the Class Members aggregate *Charter* damages for just vindication and deterrence, which award would be distributed, less Class Counsel's approved legal fees and disbursements, in the form of a legal aid program for inmates seeking to have reviewed their placement in Structured Intervention Units ("SIUs"), which is the recently introduced replacement for administrative segregation units. Once again, the Class Members' claims for additional compensatory damages would proceed by individual issues trials.

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[8] 2002 SCC 13.

[11] For its part, on the summary judgment motion, in addition to arguing that there were genuine issues requiring a trial and that the Reddock Case and most particularly its systemic negligence claim was therefore inappropriate on jurisdictional grounds to be decided summarily, the Federal Government made the following main arguments:

i. The Federal Government argued that if the summary judgment motion was to proceed to a decision on the merits, it should not be decided on the basis of *res judicata*, issue estoppel or *stare decisis* arising from the interconnected cases.

ii. The Federal Government argued for a variety of discrete reasons associated with the Classes' discrete claims or causes of action for breaches of the *Charter* or for the discrete claim of systemic negligence, that the Federal Government was not liable to the Class Members.

iii. For examples of the discrete defences, the Federal Government argued that policy factors foreclosed a duty of care and negated the Classes' systemic negligence claim, and it argued that there was a defence to each of the discrete alleged *Charter* breaches, most particularly defences under s. 1 of the *Charter* that the infringement was a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

iv. Further, as for remedies, the Federal Government argued that based on the principles from *Vancouver (City) v. Ward* [9] and *Mackin v. New Brunswick (Minister of Finance),*[10] *Charter* damages were not available in the Reddock Case. I had rejected this argument in the *Brazeau* Case, but based in part on the appellate decisions in the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases, the Federal Government submitted that I had erred in the *Brazeau* Case. Thus, the Federal Government denied liability, but assuming there was a *Charter* breach, it submitted that the Class was bereft of any compensatory remedy and that the Federal Government was immune from having to pay *Charter* damages under s. 24(1) of the *Charter*.

v. Also, as for remedies, the Federal Government argued that I erred in awarding aggregate damages in the *Brazeau* Case, even for vindication and deterrence damages and would err again if I made such an award on a summary judgment motion. It submitted that under s. 24 (1) of the *Class Proceedings Act, 1992*, aggregate damages for vindication, deterrence, and compensation were not available in the circumstances of the Reddock Case for any of the claims.

vi. Further still, as for remedies, the Federal Government, in what I regard as an ironical argument, submitted that one of its grounds of appeal in the *Brazeau* Case was that I did not have the jurisdiction to make the distribution plan order for the aggregate damages, and it argued that I ought not make a similar error in the Reddock Case. (I shall explain the irony of this submission later in this decision.)

[12] Thus, in the Reddock Case, there is a large amount of factual and legal territory to cross

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[9] 2010 SCC 27.
[10] 2002 SCC 13.

including unexplored terrain with respect to the systemic negligence claim. Moreover, during the argument of the summary judgment motion, both parties added to the factual background the history of recent government initiatives to replace administrative segregation with the SIUs. Both parties thought it necessary to update Parliament's legislative initiatives impelled by the decisions in the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases.

[13] By way of a map to traverse this enormous factual and legal territory, my Reasons for Decision will be organized under the following headings:

[14] To complete this introduction and by way of an overview, I foreshadow my decision. For the reasons that follow, I grant the Class Members' summary judgment motion. I make the following answers to the common issues that are the precise subject matter of this summary judgment motion:

i. Subject to individual Class Members rebutting the statute-bar, there is a six-year limitation period that applies to all claims, and, thus, the start date for the Class Period is March 3, 2011. This means that without prejudice to the claims of Class Members that have an individual rebuttal to the tolling of the limitation period, their claims arising from a placement in administrative segregation before March 3, 2011 are statute-barred.

ii. By its operation and management of the Federal Institutions from November 1, 1992 to the present, the Federal Government did not breach the Class Members' rights under 11 (h) of the *Charter*

iii. By its operation and management of the Federal Institutions from March 3, 2011 to the present, the Federal Government breached the Class Members' rights under s. 7 of the *Charter* by the absence of an adequate review process for placements in administrative segregation.

iv. By its operation and management of the Federal Institutions from March 3, 2011 to the present, the Federal Government breached the Class Member's rights under s. 7 of the *Charter* by placing inmates in administrative segregation for more than fifteen days.

v. By its operation and management of the Federal Institutions from March 3, 2011 to the present, the Federal Government breached the Class Member's rights under s. 12 of the *Charter* by placing inmates in administrative segregation for more than fifteen days.

vi. The Federal Government's contraventions of sections 7 and 12 of the *Charter* are not saved by s. 1 of the *Charter*.

vii. The Class Members are entitled to damages under s. 24 (1) of the *Charter*. Notwithstanding the principles from *Mackin v. New Brunswick (Minister of Finance),*[11] damages are available under s. 24 (1) of the *Charter* for the breaches of sections 7 and 12 of the *Charter*.

viii. The court can make a partial aggregate assessment for *Charter* damages for the breaches of sections 7 and 12 of the *Charter*. The value of the partial *Charter* damages award, which incorporates a partial award for systemic negligence damages, is $20 million.

ix. Pursuant to sections 24 (2) and 24 (8) of the *Class Proceedings Act, 1992,* I order the aggregate damages award to be applied so that all Class members share in the award equally.

x. The damages award is without prejudice to the Class Member's claiming at individual issue's trials: (a) punitive damages, and (b) additional *Charter* damages for the contraventions of the *Charter* or for systemic negligence.

xi. For the systemic negligence claim, it has been proven on a class-wide basis that: (a) the Federal Government has a duty of care in its operation and management of the Federal Institutions from March 3, 2011 to the present; (b) that it breached the duty of care; (c) that the Federal Government's breach caused damages; and (d) each Class Member suffered a base level of compensable damages.

xii. The Federal Government is not liable for punitive damages on a class-wide basis but may be liable for punitive damages after the *Charter* damages or the damages for systemic negligence are determined at the individual issue's trials.

[11] 2002 SCC 13.

B. Issue Estoppel Background

[15] As noted above, Class Counsel submits that I should grant summary judgment in the Reddock Case based on *res judicata* or issue estoppels or based on binding precedents, *stare decisis*, arising from the interconnected cases. I shall discuss this argument much later in these Reasons for Decision. In this part of my Reasons for Decision, I shall simply set out the chronology of the interconnected cases. As it happens, the chronology is a part of the factual background to the Reddock Case.

[16] On January 27, 2015, in Ontario, the *Cdn Civil Liberties Assn* Case was commenced.

[17] On July 17, 2015, in Ontario, the *Brazeau* Case was commenced.

[18] In 2017, in British Columbia, the *BC Civil Liberties Assn* Case was commenced.

[19] On March 3, 2017, the Reddock Case was commenced.

[20] On December 18, 2017, Associate Chief Justice Marrocco released his decision in the *Cdn Civil Liberties Assn* Case.

[21] On January 17, 2018, Justice Leask released his decision in the *BC Civil Liberties Assn* Case.

[22] On March 23, 2019, I released the decision in the *Brazeau* Case.

[23] On March 25, 2019, the Ontario Court of Appeal released its decision in the *Cdn Civil Liberties Assn* Case.

[24] On June 24, 2019, the British Columbia Court of Appeal released its decision in the *BC Civil Liberties Assn* Case.

[25] On July 22-26, 2019, the summary judgment motion in the Reddock Case was argued.

C. Procedural Background to the Class Action and Class Member Demographics

[26] As noted above, Mr. Reddock commenced this action on March 3, 2017.

[27] Co-Class Counsel are Koskie Minsky LLP and McCarthy Tétrault LLP.

[28] There is a parallel action in Québec that has been authorized as a class action: *Gallone c. Canada (Procureur général)*.[12]

[29] In 2018, on consent the Reddock Case was certified as a class proceeding.[13] On June 24, 2019, there was a supplemental consent certification order. That order certified the systemic negligence common issues.

[30] The class definition is as follows:

> All persons, except Excluded Persons, as defined below, who were involuntarily subjected to a period of Prolonged Administrative Segregation, as defined below, at a Federal Institution, as defined below, between November 1, 1992 and the present, and were alive as of March 3, 2015

[12] *Gallone c. Procureur Général du Canada* (Court File No. 500-06-00781-167), 2017 QCCS 2138.
[13] *Reddock v. Canada (Attorney General)*, 2018 ONSC 3914.

(**"the Class"**);

Excluded person are:

> i. All offenders incarcerated at a Federal Institution who were diagnosed by a medical doctor with an Axis I Disorder (excluding substance abuse disorders), or Borderline Personality Disorder, who suffered from their disorder in a manner described in Appendix "A", and reported such during their incarceration, where the diagnosis by a medical doctor occurred either before or during incarceration in a federal institution and the offenders were incarcerated between November 1, 1992 and the present and were alive as of July 20, 2013; and
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> ii. All persons who were involuntarily subjected to Prolonged Administrative Segregation, as defined below, only at a Federal Institution situated in the Province of Quebec after February 24, 2013. Persons who were involuntarily subjected to Prolonged Administrative Segregation at Federal Institutions situated in Quebec and another Canadian province, or at a Federal Institution situated in Quebec prior to February 24, 2013, are not Excluded Persons.
>
> "Administrative Segregation" is defined as sections 31 to 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20.
>
> "Prolonged Administrative Segregation" is defined as the practice of subjecting an inmate to Administrative Segregation for a period of at least fifteen (15) consecutive days.
>
> "Federal Institutions" are defined as the system of Federal correctional facilities across Canada that is administered by the Correctional Service of Canada, a Federal Government body.

[31] The Class is made up of prisoners who have spent more than fifteen consecutive days in administrative segregation. The Class definition was reached on consent to exclude *Brazeau* Case Class Members and the Class Members in the parallel *Gallone v. Canada* action, which concerns claims for damages suffered in Québec from February 24, 2013 onward. The Reddock Case includes claims for damages that were suffered by inmates in Québec before that date.

[32] Between November 1, 1992 and April 7, 2019, excluding segregation placements in Québec that continued past February 24, 2013, The Federal Government placed 27,817 inmates in administrative segregation for more than fifteen days for a total of 79,605 placements. The individual inmates were, on average, placed in segregation three times. The placements lasted an average of 71 days.

[33] Before the application of limitation periods barring claims and removing the *Brazeau* Case Class Members, the Reddock Class comprises 24,229 Class Members.[14]

[34] Applying a presumptive six-year limitation period, excluding placements in Québec that continued past February 24, 2013, the Federal Government placed 10,247 inmates in administrative segregation for more than fifteen days between March 3, 2011 and April 7, 2019 for a total of 21,641 placements. The inmates were, on average, placed in segregation twice. The

[14] The Federal Government admits that 18.3% of male inmates have both (i) a current Axis I Disorder (excluding substance use disorders) or a Borderline Personality Disorder, and (ii) a Global Assessment of Function score of 50 or less (pursuant to the World Health Organization's Modified GAF Scale) and that 50% to 70% of these inmates have a clinical diagnosis. Conservatively, therefore, 12.8% of inmates placed in administrative segregation for fifteen days or longer are Class Members of the *Brazeau* Case.

placements lasted an average of 59 days.

[35] Applying a presumptive six-year limitation period, the Reddock Class comprises 8,934 Class Members.

[36] It is necessary and helpful to keep in mind that the class definition does not include all inmates who have been placed in administrative segregation. Inmates who were placed in administrative segregation for less than fifteen days are not Class Members.

[37] One consequence of the class definition in the Reddock Case is that notwithstanding the finding that has been made in the interconnected cases and again in the immediate that there has been a breach of s. 7 of the *Charter* by reason of the absence of an adequate review process, inmates that were placed in administrative segregation for less than fifteen days are not Class Members and they do not participate in this class action even though a proven breach of s. 7 of the *Charter* affects them and the breach has nothing to do with the duration of their placement in administrative segregation.

[38] I point out this consequence because it dampens an argument made by the Federal Government that the Class Members cannot demonstrate that they have been caused harm by the absence of an adequate review process because they will have been harmed in any event for other reasons. While there are reasons to reject the Federal Government's argument on its merits, which I shall discuss later, the argument is thus dampened by the fact that regardless of whether the Class Members can show causation of harm for this particular s. 7 breach, they will have been caused harm by the other contraventions of sections 7 and 12 of the *Charter*.

[39] Another consequence of the class definition is that notwithstanding my conclusions explained below that there has been systemic negligence causing damages, inmates that were placed in administrative segregation for less than fifteen days are not Class Members and, once again, they do not participate in the systemic negligence claim.

[40] The following certified common issues are the subject matter of this summary judgment motion:

i. By its operation and management of the Federal Institutions from November 1, 1992 to the present, did Canada [the Federal Government] breach the Class members' rights under ss. 7, 9, 11(h), or 12 of the *Charter*?

ii. If so, were its actions saved by s. 1 of the *Charter*?

iii. If the answer to (i), is yes, and the answer to (ii), is no, are damages available to the Class under s. 24 (1) of the *Charter*?

iv. Does Canada [the Federal Government] owe a duty of care to the Class Members by virtue of its operation and management of Federal Institutions from November 1, 1992 to the present?

v. If the answer to (iv) is yes, what is the nature of that duty of care?

vi. If the answer to (iii) and/or (iv), is "yes", can the Court make an aggregate assessment of all or part of the damages suffered by Class members?

vii. If the answer to any common issue is "yes", does Canada's [the Federal Government's] conduct justify an award of punitive damages, and if so, in what amount?

D. Evidentiary Record

[41] The evidentiary record for the summary judgment motion was extensive comprising approximately 22,500 pages. Mr. Reddock's six volume Motion Record was 3,399 pages. The Federal Government's eighteen volume Motion Record was 8,873 pages. The eight volumes of Transcript and Evidence Brief was 6,020 pages. The eight volumes of Undertaking Briefs was 3,970 pages. The Admissions Brief was 418 pages.

[42] Mr. Reddock supported his summary judgment motion with the evidence of the following twelve affiants, and he summoned Emily Greenfield, Acting Director Facility Planning & Standards of the Correctional Service, for cross-examination for the summary motion pursuant to Rule 39.03 of the *Rules of Civil Procedure*.

[43] Mr. Reddock's witnesses for the summary judgment motion were:

- **Carson Graham Campbell** - Mr. Campbell was first imprisoned in 2010. He has been incarcerated at Dorchester Penitentiary, the Springhill Institution, and the Westmorland Institution. He deposed that on one occasion, he spent 55 days in administrative segregation and that on another occasion, his placement in administrative segregation lasted for more than a year. He described the harm he suffered as a result of his placements in administrative segregation. The Federal Government, however, disputes that Mr. Campbell was ever detained in administrative segregation.
- **Jeffery Cansanay** - Mr. Cansanay began a federal sentence in late 2009 or early 2010. He has been incarcerated at Collins Bay Institution, Edmonton Institution, Saskatchewan Penitentiary, and Stony Mountain Institution. He has been subject to administrative segregation placements longer than fifteen days on more than a dozen occasions, including a placement for two months and a placement for almost two years. He described the harm he suffered as a result of his placements in administrative segregation.
- **Gary Chaimowitz** – Dr. Chaimowitz is a psychiatrist, a professor in the Department of Psychiatry and Behavioral Neurosciences at McMaster University, and the Head of Forensic Psychiatry at St. Joseph's Health Care Centre in Hamilton. He was a member of the expert panel in the Ashley Smith Inquiry, which concerned Ms. Smith's death while in administrative segregation. He has worked extensively with inmates who have been detained in administrative segregation, including more than ten years under contract for the Correctional Service. In his current role at the health centre in Hamilton, the majority of his patients have spent time in correctional facilities.
- **Robert Clark** – Mr. Clark is a retired Deputy Warden with more than thirty years of experience at Corrections Canada at seven different penitentiaries. From 1991 to 1996, he served as the manager in charge of administrative segregation at both the Joyceville Institution and the Millhaven Institution. From 2004 until 2007, he was the Deputy Warden at Bath Institution, and he had final authority on all placements in administrative segregation. From 2007 to 2009, he was the Deputy Warden at the Regional Treatment Center, which provides treatment for inmates with acute mental health problems, including crisis referrals arising out of prolonged administrative

segregation. In 2017, he authored a book entitled *Down Inside: Thirty Years in Canada's Prison Service*, which describes his experiences with the Correctional Service.

- **Andrew Coyle** - Dr. Coyle is a former Governor (Warden) of prisons in the United Kingdom. He holds a Ph.D.in Law, is Emeritus Professor of Prison Studies at the University of London, and is the author of a manual on prison operations. He was founding Director of the International Centre for Prison Studies at the University of London from 1997 to 2005. He has served as a consultant on prison matters for international organizations and governments including Australia, Brazil, Chile, China, Colombia, Ireland, New Zealand, Russia, South Africa, Spain, and Sweden. Dr. Coyle testified as an expert at the Ashley Smith Inquiry, and he has been qualified as an expert witness about the operation of prisons by the courts of the U.K., Ontario, and British Columbia.

- **Stuart Grassian -** Dr. Grassian is a board-certified psychiatrist, licensed to practice medicine in Massachusetts, U.S. with over 40 years of experience, including a 25-year tenure at Harvard Medical School. He is a scholar about the psychiatric effects of solitary confinement on inmates, having assessed over 400 inmates and having written a seminal article in the *American Journal of Psychiatry* on the effects of solitary confinement on inmates, which he identified as a clinical syndrome. Dr. Grassian has been involved in the observation and assessment of over 400 inmates while in solitary confinement or after release. In 2006, Dr. Grassian published an article reviewing the academic literature on solitary confinement. Dr. Grassian has been qualified to give expert evidence on the harms of solitary confinement by the courts of Ontario and British Columbia. He was a witness in the *BC Civil Liberties Assn* Case and the *Brazeau* Case and his scholarly work was referred to in the *Cdn Civil Liberties* Case.

- **Ruth Martin** - Dr. Martin is a Clinical Professor at the University of British Columbia School of Population and Public Health. She is a family physician with a master's degree in Public Health. She has worked extensively in prisons and with prisoners. From 1994 to 2011, Dr. Martin served as a physician at the Burnaby Correctional Centre for Women, the Alouette Correctional Centre for Women in Maple Ridge, and the Surrey Pre-Trial Services Centre. Dr. Martin is currently conducting research at Mission Correctional Facility in Fraser Valley, a men's penitentiary. Since 2011, Dr. Martin has been Chair of the Prison Health Program Committee of the College of Family Physicians of Canada. The Committee released a position paper on solitary confinement that is discussed below.

- **David McMath** - Mr. McMath was first incarcerated around 1982 or 1983. He has been incarcerated at Bowden Institution, Cowansville Institution, Drumheller Institution, Edmonton Institution, Kent Institution, Matsqui Institution, Mountain Institution, Pacific Institution in Abbotsford, Port-Cartier Institution, Saskatchewan Penitentiary, and Warkworth Institution. He had numerous placements in administrative segregation, including two placements that lasted approximately eight months and one that lasted approximately a year. Mr. McMath has spent almost five years in administrative segregation. He described the harm he suffered as a result of

his placements in administrative segregation.

- **Juan E. Méndez –** Professor Méndez is a Professor of Human Rights Law at American University's Washington College of Law, where he is also the Faculty Director of the Anti-Torture Initiative at the Center for Human Rights and Humanitarian Law. Professor Méndez has dedicated his legal career to the defense of human rights after being subject to torture during his time as a political prisoner of the Argentinean military dictatorship. From 1996 to 1999, Professor Méndez served as the Executive Director of the Inter-American Institute of Human Rights. From 2000 to 2003, he was a member of the Inter-American Commission on Human Rights of the Organization of American States. He was the United Nations Special Rapporteur on Torture from 2010 to 2016. As Rapporteur, he reports on solitary confinement as it is practiced across the world and he makes recommendations to prison authorities about compliance with international standards. In 2011, Professor Méndez delivered a report to the United Nations General Assembly that recommended a complete prohibition of solitary confinement for inmates with psychological disabilities, and he recommended a complete prohibition on any solitary confinement in excess of fifteen days.
- **Kelly Hannah-Moffat** - Dr. Hannah-Moffat, who has a Ph.D. in criminology, is a Vice-President of the University of Toronto, a professor of sociology and criminology, and the former director of the Centre of Criminology and Sociolegal Studies at the university. She was a policy advisor to Madame Justice Arbour on the Commission of Inquiry into Certain Events at the Prison for Women in Kingston and an expert witness for the Office of the Ontario Coroner in the Ashely Smith Inquest. Dr. Hannah-Moffat has published several books that focus on prison policy and punishment.
- **Jullian Jordea Reddock -** Mr. Reddock is the Representative Plaintiff. He was imprisoned in federal penitentiaries beginning in 2012. He was released in 2018. He has been incarcerated at the Bowden Institution, the Donnacona Institution, Kent Institution, Kingston Penitentiary, Millhaven Institution, Mountain Institution, Saskatchewan Penitentiary, and Stony Mountain Institution. He spend more than seventeen months in administrative segregation. He described the harm he suffered as a result of his placements in administrative segregation.
- **Jasmine Rhandawa** – Ms. Rhandawa is a law clerk with Class Counsel. She delivered a brief of documents about the operation of the penitentiaries and about solitary confinement.
- **Cory Edward Spence** – Mr. Spence began a federal sentence in 2005. He has been incarcerated at Drumheller Institution, Grand Cache Institution, Saskatchewan Penitentiary, and Stony Mountain Institution. He has been subject to administrative segregation placements longer than fifteen days on several occasions, including a placement that lasted six months and one which lasted almost two years. In total, Mr. Spence has spent more than four years in administrative segregation. He described the harm he suffered as a result of his placements in administrative segregation.

[44] The Federal Government cross-examined Drs. Grassian, Chaimowitz, Hannah-Moffat and Martin, and Professor Méndez. The Federal Government did not cross-examine Campbell,

Cansanay, Clarke, Coyle, McMath, Reddock, and Spence.

[45] The Federal Government responded to the summary judgment motion with the evidence of the following eleven affiants, all of whom were cross-examined with the exception of Professor Glancy. By the time of the summary judgment hearing, The Federal Government had withdrawn the affidavit of Professor Glancy.

[46] The Federal Government's witnesses for the summary judgment motion were:

- **Julie Bédard** - Ms. Bédard has worked for the Correctional Service for more than twenty years. She holds a Masters of Psychology. She was appointed as the Executive Director of the Regional Treatment in the Atlantic Region in 2016. She also sits on CSC's National Medical Advisory Committee, where she provides advice and recommendations to the Assistant Commissioner, Health Services, on matters such as the quality of the health services provided to inmates.

- **Kelley Blanchette** - Dr. Blanchette has worked for the Correctional Service for more than twenty years. She holds a PhD in psychology. Since 2017, Dr. Blanchette has served as Deputy Commissioner for Women. In that capacity, she has responsibility for research and policy and for program development and implementation. Previously, Dr. Blanchette was a CSC researcher, and she served as Director, Women Offender Research, and Senior Director, Correctional Research. Dr. Blanchette also served as Director General, Women Offender Sector and Director General, Mental Health.

- **Graham David Glancy –** Professor Glancy is an associate professor in the Department of Psychology at the University of Toronto and an assistant clinical professor at McMaster University. He is the co-head of the Division of Forensic Psychiatry at the University of Toronto. He also teaches Trial Advocacy at the Faculty of Law of the University of Toronto. He is the co-author of *Mental Health and Social Work in Canada*, (Oxford University Press, 2010, 2015). (As noted above, the Federal Government withdrew Mr. Glancy as a witness.)

- **Emily Greenfield** - Ms. Greenfield has worked for the Correctional Service for nearly 20 years. She currently serves as the Acting Director Facility Planning & Standards. As Acting Director, Ms. Greenfield oversees consultants contracted to design the physical space inside the penitentiaries, including segregation units. Ms. Greenfield was previously a designer for the Correctional Service and her responsibilities included planning, development, and supporting the implementation of long-term planning studies, as well as projects related to maintenance or construction at institutions. Class Counsel summonsed Ms. Greenfield for cross-examination on this summary motion under Rule 39.03.

- **Mike Hayden** - Mr. Hayden has worked for the Correctional Service since 1988. For more than thirty years, he has worked in data operations, where he manages the collection and the analysis of data about the inmates. Since 2006, Mr. Hayden has served as Manager, Statistical Data Analysis and he has responsibility for the Offender Management System.

- **Ian Irving** – Mr. Irving, who is a registered nurse, has served as the Correctional Services Regional Manager for Clinical Services for the Ontario Region since 2007. Mr. Irving has held various management roles, including Chief of Health Services and Acting

Regional Director Health Services. As Regional Manager, he is responsible for clinical health care in all of the penitentiaries in Ontario. In this role, he also analyzes internal reports, external reports, audits, and the reports of investigations. He previously worked as a front-line nurse. In 2006, he was a Deputy Warden responsible for admitting inmates to administrative segregation.

- **Curtis Jackson** – Mr. Jackson has worked for the Correctional Service for twenty-five years. Since May 2016, he has served as the Assistant Deputy Commissioner of Correctional Operations, Ontario Region. Beginning in April 2018, he became Acting Regional Deputy Commissioner for Ontario. In this capacity, he is responsible for the preparations for the implementation of Bill C-83: *An Act to amend the Corrections and Conditional Release Act and another Act*. Mr. Jackson has held a variety of increasingly senior roles with the Correctional Service. He served as Warden of Collins Bay Institution from 2012 to 2016 and was Warden of Millhaven Institution from 2009 to 2012. He also served as a Deputy Warden and a Unit Manager. Mr. Jackson spent twelve years as a parole officer, parole supervisor, and acting area director. As a Deputy Warden and Warden, Mr. Jackson admitted inmates to administrative segregation, and as Acting Regional Deputy Commissioner for Ontario he now conducts the regional reviews of placements in administrative segregation.

- **David Nussbaum** - Dr. Nussbaum is a retired Lecturer in the Department of Psychology at the University of Toronto. He holds a PhD in Psychology. His work focuses on linking psychology to neurobiological processes. Dr. Nussbaum is a psychologist who had experience assessing inmates in provincial pretrial custody while practicing at CAMH (the Centre for Addiction and Mental Health) in Toronto. Dr. Nussbaum has been qualified as an expert in young adult brain development by the courts of Ontario.

- **Jay Pyke** - Mr. Pyke has worked for the Correctional Service since 1995, when he was hired as correctional officer. He was a Warden at the Collins Bay Institution when he was examined in the *Cdn Civil Liberties Assn* Case and he is presently the Regional Deputy Commissioner for the Atlantic Region. Mr. Pyke served as Warden of the Kingston Penitentiary before its closing in 2013. As Warden, Mr. Pyke was responsible for admitting inmates to administrative segregation. Mr. Pyke was a witness in the *Cdn Civil Liberties Assn* Case, the *BC Civil Liberties* Case, and the *Brazeau* Case. The parties agreed that Mr. Reddock could file the transcript of his cross-examination in the *Cdn Civil Liberties Assn* Case.

- **Lee Redpath** – Ms. Redpath worked for the Correctional Service for thirty years in a variety of increasingly senior roles. She served as Director of Security Operations at National Headquarters until April 2018. At the headquarters, she is responsible for the development, monitoring, and maintenance of the policy concerning security operations with respect to administrative segregation. Ms. Redpath is charged with implementing the Structured Intervention Units ("SIUs"), which will replace administrative segregation. She previously served as: Director General of Security Branch; Director of Departmental Security; Director of Institutional Reintegration Operation; Director Federal of Women Offender Sector; Director of Operations for the Women Offender Sector; Director of Intergovernmental Relations, and Director of Reintegration Programs. Earlier in her career, she also served as a Warden, Deputy Warden, Parole Officer, and Correctional

Officer. She has placed inmates into administrative segregation and has conducted reviews of administration segregation placements.

- **Kevin Snedden** - Mr. Snedden has worked for the Correctional Service for more than twenty years. He currently is Director General for Security, National Headquarters and is responsible for the policy infrastructure around the security operations for the Correctional Service, including administrative segregation policies. Mr. Snedden has held a variety of senior roles with the Correctional Service. He served as Acting Regional Deputy Commissioner for the Atlantic Region, as a Warden, and as a Deputy Warden. As Warden and Deputy Warden, he placed inmates into administrative segregation, and as Acting Regional Deputy Commissioner, he conducted reviews of administrative segregation placements.
- **Ralph Serin** – Dr. Serin has been a Professor in the Department of Psychology at Carleton University since 2003. He holds a PhD in Psychology. At Carleton University, he is the Director of the Criminal Justice Decision Making Laboratory and is a member of the Forensic Psychology Research Centre. Dr. Serin previously worked at the Correctional Service for twenty-seven years in various research and clinical capacities, and he served as Director Operations & Programs Research.

[47] Class Counsel cross-examined all of the Federal Government's witnesses.

[48] The following chart sets out the evidentiary overlap of the *BC Civil Liberties Assn*, *Cdn Civil Liberties Assn*, *Brazeau*, and Reddock Cases.

Cdn Civil Liberties Assn	*BC Civil Liberties Assn*	*Brazeau*	Reddock
Dr. Chaimowitz		Dr. Chaimowitz	Dr. Chaimowitz
Dr. Glancy		Dr. Glancy	Dr. Glancy
	Dr. Grassian	Dr. Grassian	Dr. Grassian
		Mr. Hayden	Mr. Hayden
		Mr. Curtis Jackson	Mr. Curtis Jackson
	Prof. M. Jackson	Prof. M. Jackson	
Dr. Martin	Dr. Martin		Dr. Martin
Prof. Méndez		Prof. Méndez	Prof. Méndez
Dr. Nussbaum			Dr. Nussbaum
Mr. Pyke	Mr. Pyke	Mr. Pyke	Mr. Pyke
	Dr. Rivera	Dr. Rivera	
		Mr. Sneddon	Mr. Sneddon

[49] The chart actually understates the interconnections amongst the cases, because different witnesses in the respective proceedings provided identical or similar evidence. A simple example of the overlap is that the background documents in the Reddock Case were proffered by Ms. Rhandawa, a law clerk with Class Counsel, and this role was played in the *Brazeau* Case by Catherine MacDonald, another law clerk with the same Class Counsel, who provided virtually the same brief of documents.

[50] Similarly, although the inmate Class Member witnesses in the Reddock Case were not the same as the inmate Class Members of the *Brazeau* Case, their evidence about the experience of being in administrative segregation was similar, and while the witnesses from the Correctional Service were not the precisely the same in the *Brazeau* and Reddock Cases, their accounts of the administration and management of Canadian penitentiaries was consistent and similar.

E. Factual Background

1. The Correctional Service of Canada, Prison Demographics and Culture, and the Placement of Inmates

[51] Canada is a confederation of the federal and provincial governments, and under the *Constitutional Act, 1867*[15] (formerly the *British North America Act)*, legislative authority is distributed between the governments. Pursuant to s. 92, paragraph 6, provincial governments have the legislative authority with respect to "The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province". Pursuant to s. 91 paragraph 28, the Federal Government has legislative authority for "The Establishment, Maintenance, and Management of Penitentiaries".

[52] Federal Government penitentiaries are currently regulated by the *Corrections and Conditional Release Act* ("*CCRA*")[16] and SOR/92-620 (*Corrections and Conditional Release Regulations*).[17]

[53] Under the *CCRA*, a Commissioner of Corrections is appointed by the Governor in Council (*CCRA* s.6). Under the direction of the Minister of Public Safety and Emergency Preparedness, the Commissioner has the control and management of the Correctional Service of Canada ("CSC"), which operates federal penitentiaries and associated facilities across the country. Where a person convicted of a crime receives a sentence of two or more years in duration, the sentence is served in a federal penitentiary.

[54] The Commissioner by order declares any prison defined in the *Prisons and Reformatories Act*[18] or any hospital to be a penitentiary. The Governor in Council may declare any place to be a penitentiary (*CCRA* s. 7). The person who is normally in charge of a penitentiary is its "institutional head," and he or she is typically known and described as the warden of the penitentiary.

[55] The Commissioner may make rules for the management and administration of the Correctional Service (*CCRA* s. 97). The Commissioner may designate any or all rules as Commissioner's Directives (*CCRA* s. 98). The Commissioner's Directives and Standing Operating Practices establish the operational policies of the Correctional Service. The most important of these is *Commissioner's Directive 709 Administrative Segregation* ("CD 709"), which was the policy guideline governing the use of administrative segregation.

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[15] 1867 (U.K,), 30 & 31 Vict. c. 3.
[16] S.C. 1992, c. 20.
[17] Penitentiaries in Canada were formerly governed by the *Penitentiary Act*, R.S.C. 1970, c. P-6 (repealed) and the *Penitentiary Service Regulations*, P.C. 1962-302, S.O.R./62-90 (repealed).
[18] R.S.C. 1985, c. P-20.

[56] The Commissioner may designate any staff member of the Correctional Service to be a peace officer (*CCRA* s. 10). The Commissioner may appoint a person or persons to investigate and report on any matter relating to the operations of the Correctional Service (*CCRA* s. 20).

[57] The purpose of the Correctional Service is to contribute to the maintenance of a just, peaceful and safe society by: (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community (*CCRA* s. 3). The Correctional Service is responsible, among other things, for the care and custody of inmates and for providing them with programs that contribute to their rehabilitation and their successful reintegration into the community (*CCRA* s. 5).

[58] The paramount consideration for the Correctional Service is the protection of society (*CCRA* s. 3.1).

[59] The principles that guide the Correctional Service are set out in s. 4 of the *Corrections and Conditional Release Act*. Those principles include using measures that are consistent with the protection of society, staff members, and offenders and that are limited to only what is necessary and proportionate to attain the purposes of the *CCRA*. The principles include recognizing that inmates retain the rights of all members of society except those that are, as a consequence of their sentence, lawfully and necessarily removed or restricted.

[60] Section 69 of the *CCRA* provides that no person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender. Section 73 prescribes that inmates are entitled to reasonable opportunities to assemble peacefully and associate with other inmates within the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons. Section 75 prescribes that an inmate is entitled to reasonable opportunities to freely and openly participate in, and express, religion or spirituality, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.

[61] Over five regions, CSC operates ninety-one parole and sub-parole offices, forty-three penal institutions, including fifteen community correctional centres, and five Regional Treatment Centres (“RTC”). The RTCs are a hybrid of a penitentiary and a psychiatric treatment centre under provincial legislation. The RTCs purpose is to deal with the most significant impairments and mental health disorders. They provide interdisciplinary treatment to offenders with mental and physical health care needs.

[62] There are different types of penitentiaries. There are maximum-security, medium-security, and minimum-security penitentiaries. There are multi-level security penitentiaries, which are some combination of maximum, medium, and minimum-security institutions. There are penitentiary clusters, a form of multi-level institution where separate penitentiaries are located on the same site.

[63] Of the forty-three penal institutions, there are six maximum-security, nine medium-security, five minimum-security, twelve multi-level security and eleven clustered institutions. Included within the forty-three penal institutions are six institutions for women and thirty-seven institutions for men. Included within the forty-three penal institutions are three Aboriginal healing lodges that accommodate Aboriginal men with minimum-security classifications and one

healing lodge for Aboriginal women with minimum and medium-security classifications.

[64] There are approximately 14,000 inmates (also referred to as offenders or prisoners) in federal penitentiaries, the overwhelming majority of which are men. Over 70% of the inmates were sentenced for violent crimes (20% murder; 50% manslaughter, robbery, assault, sexual assault). Many inmates have mental problems.

[65] Intolerance, bigotry, prejudice, hatred, and hostility are common in penitentiaries and inmates organize themselves into groups, whose members are compatible and protective of one another but antagonistic to other inmates. Some of these groups are "Security Threat Groups" (STGs), including: Aboriginal gangs, hate groups, outlaw motorcycle gangs, organized crime groups, prison gangs, street gangs, subversive groups, terrorist organizations, and white supremacy groups. Certain inmates in the prison population, such as pedophiles, perpetrators of heinous crimes, informants, Crown witness, and former police officers are ostracized and are targets for retaliation, revenge, and mob justice by other inmates.

[66] Violence and criminal activities persist inside penitentiaries. Security Threat Groups use psychological intimidation and violence to ensure control and influence. The violence is often associated with an underground economy developed by inmates for the sale of contraband materials such as tobacco, drugs, and alcohol that are smuggled into the penitentiary or that are available and horded inside the penitentiary, for example, inmates may stash their medicines and sell them to other inmates. Participation in the prison subculture and underground economy is detrimental to an inmate's progress in their correctional plan, their rehabilitation and their potential for reintegration into society. Despite the Correctional Service's efforts to change the prison sub-culture, criminal activities and the underground economy continue and violence remains prevalent.

[67] Management of the safety and security of the inmate population is further complicated by the fact that inmates have a legislatively prescribed right to be provided with copies of their prison files. The files contain information about the inmate's criminal record, criminal affiliations, and how the inmate has served his or her sentence, including whether the inmate has sought any form of protective custody. This information becomes widely known amongst the inmate population and may result in an inmate being a target for violence by other inmates.

[68] The Correctional Service decides where; *i.e.*, in what type of penitentiary, the inmate should be placed. The criteria for placement and transfers are set out in sections 28 to 30 of the Act. Each inmate is assigned a security classification of maximum, medium, or minimum (*CCRA* s. 30). Section 28 of the *CCRA* sets out the criteria for selection of a particular type of penitentiary for an inmate.

[69] Each inmate is classified in accordance to his or her dangerousness and risk of escape as well as the level of supervision he or she requires within the penitentiary. To assess these factors, the Correctional Service considers the nature of the offence committed, whether there are outstanding charges, an inmate's behaviour while detained, the inmate's social and criminal history, his or her potential for violent behaviour, and the inmate's continued involvement in criminal activity.

[70] Approximately 20% of inmates are classified as minimum security. Approximately 60% of inmates are medium security. Approximately 15% of inmates are maximum security. The classification of the security risk is used to place the inmate in minimum-security, medium-

security, or maximum-security penitentiaries.

[71] Once assigned to a particular type of penitentiary, an inmate will be placed in a cell amongst the general population of inmates at the penal institution. Inmates reside in cells and may be double and even triple bunked. The Correctional Service decides where to place each inmate.

[72] Typically, the cells of the general population of inmates in a penitentiary are in ranges of cells. Section 70 of the *Corrections and Conditional Release Act* directs that the Correctional Service take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

[73] In which institution and where in an institution to house an inmate is a serious and difficult problem for the Correctional Service. One of the major problems for the Correctional Service is how to safely accommodate the incompatible groups of inmates who pose dangers one to another and to the staff of the penitentiary.

2. The Correctional Investigator of Canada

[74] Pursuant to sections 158 to 196 of the *Corrections and Conditional Release Act*, the Governor in Council may appoint a person to be known as the Correctional Investigator of Canada (*CCRA* s. 158). The function of the Correctional Investigator is to conduct investigations into the problems of offenders related to decisions, recommendations, acts or omissions of the Commissioner or any person under the control and management of, or performing services for or on behalf of, the Commissioner that affect offenders either individually or as a group (*CCRA* s. 167).

[75] In the course of an investigation, the Correctional Investigator may hold a hearing and make inquiries as he or she considers appropriate, but no person is entitled as of right to be heard by the Correctional Investigator (*CCRA* s. 171). In the course of an investigation, the Correctional Investigator may require any person to furnish information and documents (*CCRA* s. 172) and may summon and examine persons under oath (*CCRA* s. 173). The Correctional Investigator may, on satisfying any applicable security requirements, at any time enter any premises occupied by or under the control and management of the Commissioner and inspect the premises and carry out therein any investigation or inspection. The Correctional Investigator's authority to make findings, reports and recommendations is set out in sections 175-181 of the *Act*.

[76] The Correctional Investigator may on his or her own initiative investigate the implementation of administrative segregation and disciplinary segregation, and as the discussion below will reveal, the Correctional Investigator has done so on several occasions and made recommendations to the Commissioner.

[77] Annually, the Correctional Investigator is obliged to submit a report to the Minister about the Correctional Investigator's activities. The report is submitted to Parliament (*CCRA* s. 192).

[78] The office of the Canadian Federal Correctional Investigator was established in 1973, and the Correctional Investigator at the time of the enactment of the *Corrections and Conditional Release Act* was Ronald R. Stewart, who had been appointed to office in 1977 under the old legislation. Mr. Stewart served until October 2004. He was succeeded by Howard Sapers, a

lawyer, politician, and civil servant, who was appointed the Correctional Investigator in April 2004. Mr. Sapers served until November 2016, when he resigned to take office as the Independent Advisor on Corrections Reform to the Ontario provincial government. Dr. Ivan Zinger, a lawyer, adjunct law professor, civil servant with a Ph.D. in psychology of criminal conduct is the current Correctional Investigator, having been appointed in 2016. Dr. Zingler's thesis and published paper was one of the reports considered by the expert witnesses in the immediate case

3. Administrative and Disciplinary Segregation

[79] An inmate may be placed in a cell isolated from the general population. Sections 31 to 41 of the *Corrections and Conditional Release Act* along with sections 19 to 23 of SOR/92-620 (Corrections and Conditional Release Regulations) provides for administrative segregation and for a disciplinary system at the penitentiaries. Under the disciplinary regime, one of the punishments is disciplinary segregation. When an inmate is placed in administrative or disciplinary segregation, he or she is separated and isolated from the general population of inmates.

[80] Section 31 of the *Corrections and Conditional Release Act* authorizes administrative segregation; it states:

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

[81] Under s. 31 (3) of the *CCRA*, if the institutional head reasonably believes an inmate's safety is at risk then, the Institutional Head can administratively segregate that inmate for his or her own safety or until it can be determined how safety can be ensured. Under s. 31 (2) of the *Corrections and Conditional Release Act*, an inmate in administrative segregation must be released at the earliest appropriate time. The Warden has a responsibility to encourage the inmate to consider other options that would allow release from segregation.

[82] Administrative segregation is used to maintain the security of the penitentiary and the safety of Correctional Service staff and of inmates by not permitting particular inmates to associate with other inmates for periods of time. Sometimes an inmate is placed in administrative segregation to secure his or her safety or the institution's safety pending a relocation of the inmate at a different institution sometimes with a different security rating where the inmate can be safely housed.

[83] Placements pursuant to s. 31(3)(a) (jeopardizes the security of the penitentiary) are the most common (68% in 2016-2017). Placements under s. 31(3)(b) (interference with an investigation) are the least common at 5%. Segregation for the purpose of ensuring the inmate's own safety under s. 31(3)(c) account for 28% of placements

[84] The decision to place an inmate in administrative segregation is dependent on multitude of factors and circumstances including: the particular circumstances of the immediate situation that posed a security threat; the inmate's health: the inmate's behaviour and history inside and outside the penitentiary; the inmate's attitude and wishes; the inmate's security rating; the relationship of the inmate to other inmates; the nature of the penitentiary's facilities; the availability of staff and resources; and the size and demographics of the inmate population.

[85] Under s. 32 of the *CCRA*, the same criteria are relevant in deciding whether to release an inmate from administrative segregation; section 32 states:

> 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.

[86] It is to be noted that the institutional head - the person who made the initial placement order - generally decides whether and when an inmate should be released from administrative segregation.

[87] The Correction Service uses the same cells for administrative and disciplinary segregation, despite the fact that the latter constitutes the harshest punishment known to prison discipline, while the former is a security measure.

[88] The Correctional Services design requirements stipulate that segregation cells must be seven square meters in size. The photographic evidence, which was reviewed by the Court of Appeal in the *Cdn Civil Liberties Assn* appeal, reveals the austerity and bleakness of the accommodation. The Court of Appeal, at paragraph 20 of its decision, described the segregation cells as follows:[19]

> 20. … the distinguishing feature of administrative segregation is the elimination of meaningful social interaction or stimulus. The photographic evidence adduced by the CCLA in this case depicts a small cell where the inmate is held. It contains a narrow platform with a thin mattress overtop, a toilet, a sink, maybe or maybe not a small table, maybe or maybe not a small window. The heavy steel door has a small food slot a few feet off the ground. It is often through this food slot that interactions with staff and health personnel take place.

[89] Many of the administrative or disciplinary cells are very-very poorly maintained. They are filthy and unsanitary. In some circumstances, the conditions of the segregation units have

[19] 2019 ONCA 243 at para. 20.

been appalling. At the Edmonton Institution, the exercise yard for segregated inmates resembled a dog kennel. The kennel was dismantled when the Correctional Investigator released photos to the media. In the case at bar, Ms. Greenfield admitted that the kennels did not conform to design standards, and she did not know how and why they had been installed.

[90] Under administrative segregation, under the *Corrections and Conditional Release Act*, the inmate is out of his or her cell for a minimum of two hours daily, including the opportunity to exercise outdoors for at least one hour, and he or she may take a daily shower in addition to the two-hour period.

[91] The inmate may have books, a radio, and a TV. The inmate has or may have visits from: fan advocate (immediately upon placement); a health care professional (daily, usually a nurse); the Institutional Head (daily); a correctional manager (once per shift) to inspect the conditions of confinement; legal counsel (periodically); the inmate's Parole Officer to prepare the inmate's Reintegration Action Plan (periodically); visits by family and friends (periodically, on scheduled days); elders or religious advisors (as requested); teachers to provide homework and books for self-study (periodically). The inmate may make telephone calls to friends and family on the inmate's approved calling list and may attend appointments with health professionals.

[92] Mr. Reddock deposed that while in administrative segregation, he spent about twenty-three hours of every day in his cell, sometimes more. He said that some days, he never left the cell. He testified that there were long periods in which he did not see the outdoors; on some days, yard time would not be offered, and on other days, especially in winter, the weather made the yard inaccessible.

[93] Mr. Hall deposed that he was alone during yard time. On very rare occasions, he could speak to another inmate in an adjacent yard, but always through a chain-link fence.

[94] Mr. Reddock and Mr. McMath deposed that at some penitentiaries, they were not offered any educational programs while in administrative segregation.

[95] In the case at bar, Dr. Blanchette and Mr. Snedden confirmed that being in segregation hinders access to programming. Dr. Hannah-Moffat testified that segregated prisoners are often not permitted to leave their cells for classes, or to use the library or a computer and their motivation to continue schooling under these conditions diminishes and some inmates stop participating.

[96] Segregated inmates' interactions with penitentiary staff is minimal and usually as brief as possible. Many of the interactions with nurses, psychologists, parole officers, and others occurs through the food slot. It was not until the introduction of Bill C-83, discussed below, in October 2018 that the Federal Government sought to mandate a daily health assessment that would not be conducted through the cell door.

[97] Under CD-709, wardens are charged with responsibility for conducting daily visits to inmates in administrative segregation. Mr. Clark deposed, however, the visits are typically delegated to lower ranking staff, sometimes as low as the Correctional Manager. According to Mr. Clark, the interactions are usually as short as possible, occur through the food slot, and that conversations can be heard by other inmates.

[98] The isolation from the general population, the physical configuration of the inmate's cell, and the daily experience of administrative segregation and disciplinary segregation are essentially the same. However, the policies and procedures of administrative segregation are

different from the policies and procedures of disciplinary segregation, which, as already noted, is an outcome of the disciplinary system of isolating an inmate who offends the rules. Disciplinary segregation is a form of punishment; administrative segregation is a means to provide security amongst the inhabitants of the penitentiary.

[99] Disciplinary segregation is a sanction imposed at the end of a disciplinary proceeding for a serious offence committed at the penitentiary. It results from a decision made by an Independent Chairperson. Disciplinary segregation is time limited and may not exceed thirty days for a single offence or forty-five days for multiple offences.[20] Section 44 (1)(f) of the *CCRA* states:

> 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:
>
> …
>
> (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.

[100] In contrast, administrative segregation is administered and reviewed differently and may be for prolonged periods and indeed may be for an indefinite duration. Although s. 31 (2) of the *Corrections and Conditional Release Act* requires that an inmate be released at the earliest appropriate time, there are no caps on the length of time an inmate may be confined in administrative segregation. Although measures have been taken in recent years to reduce the length of time inmates spend in administrative segregation, many inmates spend months and some years confined in administrative segregation.

[101] In the *Brazeau* Case, I held that the potential indeterminacy of administrative segregation makes it a greater hardship and is actually more punishing than disciplinary segregation. In the *BC Civil Liberties Assn* Case, Justice Leask came to a similar conclusion.[21] At paragraph 248 of his decision, he stated: "The indeterminacy of administrative segregation is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation."

[102] In the immediate case, Mr. Reddock deposed:

> I became extremely anxious in solitary confinement, and particularly administrative segregation, because I never knew when I would get out. Sometimes, I thought that I might stay in there forever. […] I would get my hands on something we called "Buspar." It was Buspirone, a drug used to treat anxiety. I would crush it and would inhale the powder to knock myself unconscious. I just wanted to pass out. I was so depressed. When I would wake up, I just inhaled more Busiprone and lost consciousness again. 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.

[103] Mr. Spence deposed that being placed in administrative segregation was especially hard to deal with because:

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[20] SOR/92-620 (*Corrections and Conditional Release Regulations*, s. 40 (2).
[21] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at para. 248.

> I only receive vague reasons from the guards for why I keep being put in solitary confinement. … At this point I wake up every day feeling that it is hopeless — I have no way of knowing if I'm closer to freedom or not. It doesn't matter how well-behaved I am, … My family and I feel that we are waiting indefinitely.

[104] In the *Brazeau* Case, I concluded that administrative segregation is often used as an informal disciplinary measure to avoid the formal procedural requirements and time caps of disciplinary segregation. The 2014-2015 Annual Report of the Office of the Correctional Investigator described this practice:

> [O]ne of the most disturbing elements in the evolving administrative segregation framework, is that it is used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system.

[105] The affiants in the Reddock Case confirm the observations of the Correctional Investigator. Mr. Spence was detained in administrative segregation for 102 days to investigate an allegation that he had been involved in a variety of disciplinary offences, including threatening other inmates. However, he was never subject to any disciplinary proceedings. If he had been convicted of a serious disciplinary offence, he could have been sentenced to disciplinary segregation for a maximum of thirty days.

[106] After an inmate is placed in administrative segregation, the placement is reviewed by the Institutional Segregation Review Board ("ISRB") at a hearing within five days after admission and then again within thirty days and at least once every thirty days thereafter. A review hearing may also be held at any time when the ISRB receives information that challenges the reasons for the inmate's admission in segregation. The ISRB makes a recommendation to the Institutional Head.

[107] The Regional Segregation Review Board ("RSRB") reviews cases after thirty-eight days of administrative segregation and then every thirty days thereafter. It also reviews cases specifically referred to it to determine whether the administrative segregation should not be continued. The RSRB makes a recommendation to the Regional Deputy Commissioner.

[108] For an inmate who has spent sixty days or more in administrative segregation, the case is reviewed by the National Long-Term Segregation Review Committee ("NLTSRC"). The NLTRC reviews cases where the inmate has been in segregation for sixty days and will review the case every thirty days thereafter. It also reviews the cases of inmates who have reached four placements in a calendar year or ninety cumulative days in a calendar year, and it will review such cases at least once every thirty days thereafter.

[109] Commissioner's Directive 709 was amended in August 2017, and under the amended CD 709: (a) the Senior Deputy Commission must review the case when an inmate reaches sixty days of administrative segregation or who has reached four placements in a calendar year or ninety cumulative days in a calendar year; (b) the RSRB must review all cases where the inmate has been in segregation for thirty-eight days; and (c) the Regional Deputy Commissioner is required to review all recommendations of the RSRB at the forty-day mark and determine whether the placement in administrative segregation should continue.

[110] Under the amended CD 709, responsibility to chair the NLTSRC has been elevated from the Director General, Security to the Senior Deputy Commissioner, who now has the responsibility to determine whether an inmate is to be maintained in or released from administrative segregation.

4. A Survey History and Historiography of Solitary Confinement and Administrative Segregation

[111] In paragraphs 85-131 of my decision in the *Brazeau* Case, I set out a survey history and historiography of solitary confinement and administrative segregation based on historical documents. This survey applies equally to the Reddock Case where the documentary evidence was virtually the same. I, therefore, shall incorporate my discussion from the *Brazeau* Case into these Reasons for Decision with some additional new paragraphs as follows:

> 85. The history of solitary confinement and the study of its use in Canada and around the world are important parts of the factual background to this summary judgment motion and to Messrs. Brazeau and Kifts' class action and particularly relevant to their claims for *Charter* damages. This history is surveyed in this part of the Reasons for Decision.
>
> 86. As it happens, the history and historiography of solitary confinement and the history of the juridical, sociological, penological, and medical studies of solitary confinement are part of a body of scientific knowledge that is also a part of the factual narrative for the immediate case. And, as it happens, several witnesses, such as Dr. Grassian, Professor Jackson, Professor Méndez, Dr. Rivera, and Dr. Morgan, apart from their involvement in the immediate case as experts, had roles to play in the history and historiography of solitary confinement.
>
> 87. The early history of solitary confinement and its effect on prisoners is described by Justice Miller in the 1890 decision of the U.S. Supreme Court in *Re Medley*[22], Justice Miller stated:
>
> > Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the *American Cyclopsedia*, Volume XIII, under the word "Prison" this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community It became evident that some changes must be made in the system, and the separate system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.
>
> 88. In 1829, the Philadelphia Prison in Pennsylvania, U.S. was one of the early adopters of the notion that prisoners could be rehabilitated by confinement in conditions of extreme isolation and separation from other prisoners in the penitentiary. It was theorized that the solitary confinement would inspire reflection and penitence and lead to the rehabilitation of the convicts. As practiced in the Philadelphia Prison solitary separation was very severe. Inmates were hooded when brought into the institution so as not to see or be seen by other inmates as they were led to their cells where

[22] 134 U.S. 160 at pp. 167-168.

they were to reside in isolation.

89. After his tour of North America, Charles Dickens in 1850, in his *American Notes for General Circulation* wrote about the penitentiaries in Philadelphia:[23]

> In the outskirts, stands a great prison, called the Eastern Penitentiary: conducted on a plan peculiar to the state of Pennsylvania. The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.
>
> In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether, if I had the power of saying 'Yes' or 'No,' I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.

90. A less extreme version of isolated confinement was adopted in New York State and at Canada's Kingston Penitentiary, which opened in 1835. However, because of experience from countries around the world that solitary confinement was causing psychiatric and physical illness and disease, by the 1900s the practice of solitary confinement as an institution-wide practice fell out of use in North America and elsewhere.

91. Although the scientific explanation for the harm caused by solitary confinement is a product of the later part of the twentieth century, that solitary confinements could have dire psychiatric consequences has been appreciated for well over a century.

92. Although solitary confinement declined as a general practice for all inmates in a penitentiary, it continued to be used as a special practice within penitentiaries in the United States, Canada, and across the world.

93. Prompted, in part, by events during the Second World War and the Korean War associated with the treatment of prisoners of war, the use of solitary confinement was heavily scrutinized and investigated by social scientists, and a consensus began to build that it was a harsh practice that in some places and in some conditions was tantamount to torture.

94. The scientific study of solitary confinement can be placed within the larger study of the psychological significance of social contact and on medical and psychiatric study of the effects of isolation and small group confinement. The study of the psychiatric effects of restricted environmental stimulation have been studied, among others, by the military (submarine service,

[23] *American Notes for General Circulation* by Charles Dickens, transcribed from the 1913 Chapman & Hall, Ltd. edition by David Price, The Project Gutenberg eBook https://www.gutenberg.org/files/675/675-h/675-h.htm

polar exploration, brainwashing, and interrogation), by the aeronautical industry (long-term flight and space travel), and medical practitioners (patients in long-term traction, in iron lungs, and in blinding eye-patches following surgery). In Canada, funded by the United States' Central Intelligence Agency, researchers at McGill University (and at Harvard University) studied the medical effects of sensory deprivation. There is an enormous academic literature about solitary confinement and associated topics.

95. The prison conditions of captured combatants and of civilians was studied by world organizations. In 1957, the UN Economic and Social Counsel adopted the *Standard Minimum Rules for the Treatment of Prisoners* for the humane operation of prisons in accordance with human rights and the rule of law.

96. In Canada, under the now repealed *Penitentiary Act*, the practice of segregating and isolating an inmate was known as "dissociation," and it was governed by the now repealed *Penitentiary Service Regulations.* It took some time, but eventually, administrative segregation became the subject of judicial scrutiny and of law reform.

97. In the 1970s, in *McCann v. The Queen,*[24] Jack McCann, an inmate of the British Columbia Penitentiary, who had been in administrative segregation (dissociation) for 754 days in what was sardonically known as the "Penthouse" of the British Columbia Penitentiary and seven other inmates who had been placed in administrative segregation for extended periods of time successfully challenged the practice as cruel and unusual punishment contrary to s. 2(b) of the *Canadian Bill of Rights*. Professor Jackson was the academic advisor to the plaintiffs' counsel and interviewed a group of prisoners who had been placed in the Penthouse, which was located at the top floor of the penitentiary. Professor Jackson's account of the interviews reads like a non-fiction version of Kafka's *the Penal Colony*.

98. Around the same time as the McCann litigation, the matter of the use of segregation in particular and the management of penitentiaries generally became the subject of study and law reform by the Federal Government. In the 1970s, the Solicitor General appointed James Vantour to deliver a report on the use of segregation, and after riots at the Kingston Penitentiary, an all-party House of Commons subcommittee chaired by Mark MacGuigan delivered a report about the federal penitentiary system. The subcommittee endorsed a recommendation of the Vantour Report that placements in segregation be reviewed by review boards.

99. In 1980, in *Martineau v. Matsqui Disciplinary Bd.*,[25] the Supreme Court held that the decisions of penitentiary authorities were subject to judicial review oversight and an administrative law duty to act fairly.

100. After the enactment of the *Charter* in 1982, the Federal Government ordered a review of the federal laws regarding penitentiaries. The Correctional Law Review reported that the regulation of administrative segregation, then known as dissociation, was deficient.

101. In 1983, Dr. Grassian (a witness for Messrs. Brazeau and Kift in the immediate case) published his very influential article in the *American Journal of Psychiatry* entitled *Psychopathological Effects of Solitary Confinement.*[26] The article reported on the effects of solitary confinement on inmates and identified a syndrome caused by solitary confinement.

102. On December 10, 1984, the United Nations General Assembly adopted the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (1465 UNTS 85), which Canada ratified on July 24, 1987. The Convention prohibits torture and cruel, inhuman, or degrading treatment or punishment and imposes on each state party affirmative obligations to prevent such acts in any territory under its jurisdiction.

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[24] [1976] 1 F.C. 570 (T.D.).
[25] [1980] 1 S.C.R. 602.
[26] (1983), 140 *Am. J. Psychiatry*1450.

103. In 1985, in *Cardinal v. Director of Kent Institution*,[27] the Supreme Court held that the duty to act fairly applied to decisions about administrative segregation.

104. In 1990, the Federal Government released a comprehensive consultation package about amendments to the corrections law, which was followed by the enactment in 1992 of the *Corrections and Conditional Release Act* and its regulations.

105. In 1996, the Honourable Louise Arbour released the report of *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. The Arbour Commission investigated an incident in the Prison for Women in Kingston. In the incident, four Correctional Service officers were attacked by a group of inmates, five staff members were taken hostage, two inmates were killed, the institution was locked down, and the inmates were effectively left in administration segregation for an extended time because the officers refused to unlock the range of cells.

106. In her report, Justice Arbour set out the report of the penitentiary's psychologists of the effect of prolonged segregation on the mental health of the women inmates. The psychologists report stated:

> Many of the symptoms currently observed are typical effects of long-term isolation and sensory deprivation. […] The following symptoms have been observed: perceptual distortions, auditory and visual hallucinations, flashbacks, increased sensitivity and startle response, concentration difficulties and subsequent effect on school work, emotional distress due to the extreme boredom and monotony, anxiety, particularly associated with leaving the cell or seg area, generalized emotional lability at times, fear that they are "going crazy" or "losing their minds" because of limited interaction with others which results in lack of external frames of reference, low mood and generalized sense of hopelessness.

107. The Arbour Commission, found that the rule of law was not a feature of the administration of the penitentiary, and, among other things, the Commission recommended: (a) for administrative segregation, the initial segregation be for a maximum of three days followed by a review for further segregation up to a maximum of thirty days; (b) an inmate not spend more than sixty non-consecutive days in segregation in a year; (c) after thirty days or if the days served in segregation during a year approached sixty, the Correctional Service should employ other options or the Correctional Service should apply to a court for a determination of the necessity of further segregation.

[new] The Arbour Commission recommended that there should be a limit on the duration of administrative segregation for all inmates of no more than thirty consecutive days or sixty non-consecutive days. Justice Arbour wrote:

> In my opinion the most objectionable feature of administrative segregation, at least on the basis of what I have learned during this inquiry, is its indeterminate, prolonged duration, which often does not conform to the legal standards. The management of administrative segregation that I have observed is inconsistent with the Charter culture which permeates other branches of the administration of criminal justice. In keeping with the notion that a sentence served in unduly harsh conditions may deserve to be reconsidered by the courts, I would recommend that there be a time limit imposed on an inmate being kept in administrative segregation …. The segregation review process that I have examined in this case was not operating in accordance with the principles of fundamental justice. The literature suggests that this is not unusual.

108. Following the Arbour Commission, the Correctional Service established the Task Force on Administrative Segregation. From 1998-2006, Professor Jackson was an independent member of the Task Force, an advisory group for the Commissioner. The Task Force's mandate was to

[27] [1985] 2 S.C.R. 643.

address the recommendations of the Arbour Commission. The Task Force visited every segregation unit within the Correctional Service and provided advice to the Commissioner. The task force made findings about the operational realities of administrative segregation and made recommendations for practice reforms. In his expert's report for the case at bar, Professor Jackson stated that the systemic problems that the Task Force identified in relation to the treatment of mentally ill inmates were by and large not implemented and the problems continued.

[new] The Task Force recognized that administrative segregation is harmful to inmates' mental health and social functioning and found that the Correctional Service demonstrated a casual attitude toward segregation placements, segregating inmates when less restrictive housing was available. The Task Force stated that convenience and security considerations had all but eclipsed the delivery of programming for inmates.

109. There were other investigations of penitentiary practices in the years following Justice Arbour's report that made recommendations similar to those made by Justice Arbour's Commission including the Correctional Services Working Group on Human Rights chaired by Max Yalden (1997); the House of Commons Standing Committee on Justice and Human Rights which produced a report in 2000, and the Canadian Human Rights Commission, which in 2003 released a report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*.

110. In 2006, Dr. Grassian published an article entitled *Psychiatric Effects of Solitary Confinement*.[28] The article was an extensive review of the academic literature about the medical effects of solitary confinement and it updated the work that he had completed for his journal article in 1983.

111. On December 13, 2006, the United Nations General Assembly adopted the *Convention on the Rights of Persons with Disabilities* (GA. Res. 61/106), which Canada ratified on March 11, 2010. Article 14 of the Convention provides that State parties should ensure that "the existence of a disability shall in no case justify a deprivation of liberty" and that persons with disabilities who are deprived of their liberty "shall be treated in compliance with the objectives and principles in the present Convention, including by provision of reasonable accommodation."

[new] In 2007, to address the increasing use of solitary confinement and its harmful effects, a working group of 24 international experts in psychiatry, medicine, forensic medicine, torture, criminology, and imprisonment at the International Psychological Trauma Symposium (December 9, 2007), released the *Istanbul Expert Statement on the Use and Effects of Solitary Confinement*. The Statement called on states to limit the use of solitary confinement to very exceptional cases, for as short a time as possible, and only as a last resort. The expert working group concluded that the negative health effects can occur after only a few days in solitary confinement.

112. On October 19, 2007, Ashley Smith, who was nineteen year's old and an inmate at the Grand Valley Institution for Women committed suicide in her segregation cell. There was a coroner's inquest. Ms. Smith committed suicide after extended periods in administrative segregation.

[The balance of s. 112 has been moved below]

113. [moved below]

114. In 2008, the Corrections Investigator (then Howard Sapers) did an investigation of the Ashley Smith tragedy, and he released a report dated June 28, 2008, entitled *A Preventable Death*. The Corrections Investigator concluded that Ms. Smith's death was preventable. He stated that had there been an independent adjudicator and a detailed review of the case alternatives would have been implemented to placing Ms. Smith in administrative segregation. He recommended that the immediate implementation of independent adjudication of segregation placements of inmates with mental health concerns, to be completed within 30 days of the placement, with the adjudicator's

[28] (2006), 22 *Washington University Journal of Law and Policy* 325.

decision to be forwarded to the regional deputy commissioner.

115. In his 2009-2010 Annual Report, the Corrections Investigator noted the continuing problems associated with mentally ill inmates being placed in administrative segregation. The report stated:

> In the past year, I have been very clear on the point that mentally disordered offenders should not be held in segregation or in conditions approaching solitary confinement. Segregation is not therapeutic. In too many cases, segregation worsens underlying mental health issues. Solitary confinement places inmates alone in a cell for 23 hours a day with little sensory or mental stimulation, sometimes for months at a time. Deprived of meaningful social contact and interaction with others, the prisoner in solitary confinement may withdraw, "act out" or regress. Research suggests that between one-third and as many as 90% of prisoners experience some adverse symptoms in solitary confinement, including insomnia, confusion, feelings of hopelessness and despair, hallucinations, distorted perceptions and psychosis.
>
> […] There is growing international recognition and expert consensus that the use of solitary confinement should be prohibited for mentally ill prisoners and that it should never be used as a substitute for appropriate mental health care.

116. Corrections Canada declined to implement the recommendations of the Correctional Investigator. Instead, it undertook to arrange an external review of its practices associated with administrative segregation. It retained, Dr. Rivera (another witness in the immediate proceeding for Messrs. Brazeau and Kift) to prepare a report.

117. In May 2010, Dr. Rivera published her findings and recommendations in a report entitled *Operational Examination of Long-Term Segregation and Segregation Placements of Inmates with Mental Health Concerns in the Correctional Service of Canada*. She recommended, among other things, a reduction in the use of administrative segregation, particularly for prisoners with mental health issues, the development of alternatives to administrative segregation, and improvements to the physical and operational conditions of segregation.

118. While Dr. Rivera was undertaking her review, on August 13, 2010, Edward Snowshoe, a 22-year-old Aboriginal man who suffered from serious mental illness, committed suicide in a segregation cell at Edmonton Institution after spending 162 days in administrative segregation. The Honourable Justice James K. Wheatley, an Alberta Provincial Court Judge, conducted an inquiry and reported to the Minister of Justice and Attorney General of Canada. He concluded that the review procedure for administrative segregation had not functioned properly and that Mr. Snowshoe's plight while in administrative had gone unnoticed.

119. In August 2011, Professor Méndez, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted an interim report to the United Nations General Assembly with respect to solitary confinement. (Cruel Inhuman and or Degrading Treatment is referred to as "CIDT".) Solitary confinement was defined as the physical and social isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. The Special Rapporteur concluded that in certain circumstances solitary confinement constituted torture as defined in Article 1 of the of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, or constituted CIDT as Defined in Articles 1 and 16 of the *Convention* and Article 7 of the *International Covenant on Civil and Political Rights*.[29]

120. Here it may be noted that as a matter of international law, the Federal Government has agreed to be bound by the provisions of both the *Convention against Torture* and the *International Covenant on Civil and Political Rights*.

121. In his 2011 Report to the General Assembly, the Special Rapporteur stated that solitary confinement reduces meaningful social contact to an absolute minimum and that the resulting

[29] 999 U.N.T.S. 171.

level of social stimulus is insufficient to allow the individual to remain in a reasonable state of mental health. He states that, if the insufficient social stimulus is occurs for even a few days, brain activity shifts toward an abnormal pattern. The Special Rapporteur wrote:

> Negative health effects can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in such conditions. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement: social isolation, minimal environmental stimulation and "minimal opportunity for social interaction". Research can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, and psychosis and self-harm.

122. The Special Rapporteur specified that the circumstances where solitary confinement amounted to torture or CIDT were: (a) where the physical conditions were so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals subject to the confinement; (b) the confinement was of indefinite duration; and (c) the confinement was prolonged. The Special Rapporteur reported that the placement in solitary confinement of any duration of persons with mental disabilities was CITD.

123. The Special Rapporteur concluded that given the negative psychological and physiological effects of solitary confinement, which can manifest after only a few days, the practice should only be used in exceptional circumstances, as a last resort, for as short a time as possible, and subject to minimum procedural safeguards. He recommended an absolute prohibition on indefinite solitary confinement and on placements exceeding fifteen consecutive days and the abolition of its use for persons with mental disabilities.

124. In the 2010-2011 Annual Report of the Correctional Investigator, the Correctional Investigator stated that: the practice of placing mentally ill offenders or those at risk of suicide or serious self-injury in prolonged segregation must stop; the Correctional Service's approach to preventing deaths in custody must change; that inmates with mental health issues in long-term administrative segregation (beyond 60 days) were not being independently and expertly monitored; and there was not enough practical alternatives such as intermediate mental health care units to end the practice of placing inmates with mental health problems in long-term segregation.

125. In the 2011-2012 Annual Report, the Correctional Investigator recommended an absolute prohibition of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation. He said that this was in keeping with Canada's domestic and international human rights commitments.

[112. - moved from above.] In 2013, the coroner's jury delivered over a hundred recommendations including: (a) improving the conditions of administrative segregation; (b) requiring that both the institutional head of the penitentiary and also a mental health professional visit the inmate daily; (c) abolishing indefinite solitary confinement; (d) prohibiting placing a female inmate in segregation for periods in excess of fifteen days and for more than sixty days in a calendar year; (e) that female inmates with serious mental health issues be placed in a treatment facility not a security-focused penitentiary.

[new] The coroner recommendations included recommending that in accordance with the Recommendations of the United Nations Special Rapporteur's 2011 Interim Report on Solitary Confinement, indefinite solitary confinement should be abolished. should be defined as any period in excess of 15 days.

[113. – moved from above] The Correctional Service rejected the jury's recommendations in the Ashley Smith inquiry. The CSC stated that the adoption of the recommendations would cause undue risk to the safe management of the correctional system. In its *Response to the Coroner's Inquest Touching the Death of Ashley Smith*, the Federal Government did, however, accept that long periods in administrative segregation was not conducive to the inmate's health or to meeting the goals of the correctional planning process.

[new] In 2013, the Inter-American Commission on Human Rights reported that after fifteen days

the harmful psychological effects of isolation can become irreversible. It concluded that prolonged or indefinite isolation through solitary confinement may never be a legitimate instrument in the hands of the state.

126. In the 2014-2015 Annual Report, the Correctional Investigator recommended prohibiting segregation in excess of fifteen days for inmates suffering from serious mental illness. The Correctional Investigator objected to the fact that administrative segregation was being used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system.[30] He recommended that the *Corrections and Conditional Release Act* be amended to significantly limit the use of administrative segregation for young offenders and for the mentally ill and to impose a maximum of no more than 30 continuous days of administrative segregation with judicial oversight or independent adjudication for a subsequent stay beyond the initial thirty day placement.

127. In 2015, the United Nations General Assembly acted on the reports of the Special Rapporteur. His opinions informed the United Nations' decision to update the *Standard Minimum Rules for the Treatment of Prisoners*. The revised rules were unanimously adopted by the UN General Assembly in 2015. These rules are known as the Nelson Mandela Rules" in honor of Mandela who spent twenty-seven years in prison, the first eighteen of which were on Robben Island, South Africa, where Mandala was placed in solitary confinement.

128. Rule 43 of the revised Mandela Rules state:

> Rule 43
>
> (1) In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> (a) indefinite solitary confinement;
>
> (b) prolonged solitary confinement;
>
> (c) placement of a prisoner in a dark or constantly lit cell ...

[new] Rules 44 and 45 of the Mandela Rules state:

> Rule 44
>
> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
>
> Rule 45
>
> Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

129. Although it did not involve a federal penitentiary, the most recent, and a distressing and disgraceful, incident in the history of administrative segregation in Canada is the matter of Adam Capay, a young member of Lac Seul First Nation whose murder charges in *R. v. Capay*,[31] were dismissed because of his experience in administrative segregation at a provincial prison pending his trial. His plight in solitary confinement was discovered and revealed by the Ontario Ombudsman who published a report on segregation practices in provincially run institutions.

130. For decades, the Federal Government's regime for administrative segregation has been

[30] 2014-2015 *Annual Report* at p. 30.
[31] 2019 ONSC 535.

criticized for the absence of a robust and timely adjudicative review process for placements in administrative segregation infused with the rule of law.

[new] The Correctional Service was aware of the need for an independent review process as early as 1983. This recommendation can be found in: (a) Professor Jackson's 1983 book *Prisoners of Isolation: Solitary Confinement in Canada*"; (b) a 1988 Report of the Canadian Bar Association; (c) the 1996 Arbour Report; (d) a 1997 Correctional Service Task Force Report, (e) a 2004 Department of Public Safety and Emergency Preparedness Canada evaluation; and (f) a 2005 report of the Office of the Correctional Investigator. The Arbour Commission of Inquiry and the Task Force on Administrative Segregation recommended that a placement in administrative segregation be reviewed within three days to determine whether it should be continued.

131. For decades, the Federal Government's regime for administrative segregation has been criticized for the failure to adequately monitor the segregated inmate's current mental health status, with a special emphasis on the evaluation of the risk for self-harm.

[new] On December 18, 2017, in the *Cdn Civil Liberties Assn* Case, Associate Chief Justice Marrocco ruled that ss. 31-37 of the *CCRA* breached s. 7 of the *Charter* insofar as there was no adequate review of administrative segregation. He did not find that s. 12 of the *Charter* had been breached.

[new] On January 17, 2018, in the *BC Civil Liberties Assn* Case, Justice Leask declared, among other things, that, to the extent that ss. 31-33 and s. 37 of the *CCRA* authorize and effect prolonged, indefinite administrative segregation for any inmate; authorize internal review; and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews, the provisions breached s. 7 of the *Charter*.

[new] On March 25, 2019, in the *Brazeau* Case, I ruled that segregation of inmates with serious mental illness involuntarily placed in administrative segregation for longer than thirty days breached sections 7 and 12 of the *Charter* as did voluntary segregation of inmates with serious mental illness for longer than sixty days.

[new] On March 28, 2019, the Ontario Court of Appeal varied Associate Chief Justice Marrocco's decision in the *Cdn Civil Liberties Assn* Case. The Court ruled that segregation of any inmate for longer than 15 days breaches s. 12 of the *Charter*.

[new] On June 24, 2019, the British Columbia Court of Appeal varied Justice Leask's decision in the *BC Civil Liberties Assn* Case. The Court upheld the decision that the administrative segregation sections of the *CCRA* violate s. 7 but rather than striking down the statutory provisions, it declared that they violated the *Charter*. The issue of whether administrative segregation contravenes s. 12 of the *Charter* was not before the Court.

5. The Abolition and Replacement of Disciplinary Segregation and Administrative Segregation

[112] In the fall of 2015, Prime Minister Justin Trudeau directed then-Minister of Justice Jodi Wilson-Raybould to implement the recommendations from the Ashley Smith coroner's inquest.

[113] On June 19, 2017, the Federal Government introduced in Parliament Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*. The Bill specified a presumptive time limit for confinement in administrative segregation and a system of independent, external review. CD-709 was also to be amended. In light of this legislation, the Federal Government sought an adjournment of the hearings in the *Cdn Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases. The adjournment requests, however, were refused.

[114] Bill C-56 did not proceed beyond first reading.

[115] Subsequently, as noted above, in December 2017 and January 2018 respectively, Associate Chief Justice Marrocco and Justice Leask declared the legislation authorizing administrative segregation contrary to s. 12 of the *Charter* and each suspended their rulings to allow the Federal Government to draft *Charter*-compliant law. Associate Chief Justice Marrocco suspended his declaration for twelve months to December 18, 2018. Justice Leask suspended the effect of his declaration until January 18, 2019.

[116] On October 16, 2018, the Federal Government tabled Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, for first reading in Parliament. Bill C-83 will eliminate the use of both administrative segregation and disciplinary segregation but authorize Correctional Services to use a structured intervention unit ("SIU"). Inmates who cannot for security purposes be accommodated in general population may be placed in a SIU, where they will be allowed to spend at least four hours per day outside their cells to interact with other inmates and there will be a minimum of two hours per day for programs.

[117] In the fall of 2018, the Correctional Service began preparing for the enactment of Bill-C-83 ant the discontinuance of the use of administrative segregation. In Ontario, the population management committee began looking at strategies for integrating Collins Bay, closing segregation units at the various institutions and making the arrangements for Millhaven Institution to have the first SIU in the province. These plans did not require infrastructure changes but required changes to staffing, training, programming, and space allotment for SIUs.

[118] Meanwhile with the introduction of Bill C-83, the Federal Government moved to extend the suspension of the declarations of constitutional invalidity in Ontario and British Columbia. In November 2018, the Federal Government applied to the Ontario Court of Appeal for an extension of the suspension to November 30, 2019.

[119] In asking for an extension, in the interim, the Federal Government promised to implement an independent review process for administrative segregation at the fifteenth day of segregation.

[120] On December 17, 2018, the Court of Appeal for Ontario extended the suspension until June 17, 2019, but the Court expressed disappointment that the proposed legislation did not appear to adequately deal with the s. 7 *Charter* breach identified by Associate Chief Justice Marrocco.[32]

[121] Meanwhile also in November, the appeal in the *BC Civil Liberties* Case was argued and the Court reserved judgment. Following the hearing of this appeal, in December 2018, the Federal Government applied for an extension of the suspension to July 31, 2019.

[122] On January 5, 2019, the British Columbia Court of Appeal granted an extension until June 17, 2019, or until further order of the Court. [33] The Court made its order subject to some conditions that ameliorated the conditions of the inmates still being subjected to administrative segregation. One of the condition was that the Correctional Service implement a fifteenth day independent review of administrative segregation.

[123] In compliance with the condition, the Correctional Service delegated the authority to

[32] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2018 ONCA 1038.
[33] *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*,2019 BCCA 5.

release inmates to the Assistant Deputy Commissioner, Correctional Operations or Assistant Deputy Commissioner, Integrated Services. This delegation was implemented only for the Pacific Region, which includes British Columbia. The delegation was implemented by way of a memorandum from the Regional Deputy Commissioner; *i.e.*. it was carried out without any amendment to the *Corrections and Conditional Release Act,* the regulations, or CD-709.

[124] On March 18, 2019, Bill C-83 passed third reading in the House of Commons.

[125] In March 2019, the applicants in the *BC Civil Liberties Assn* Case applied for the imposition of additional terms ameliorating the conditions of administrative segregation during the suspension. The Court of Appeal reserved judgment on this request.

[126] On May 21, 2019, the British Columbia Court of Appeal added more conditions to the suspension order.[34] Meanwhile, the Federal Government applied again to the Court for an extension of the suspension, this time to November 30, 2019.

[127] On June 6, 2019, the British Columbia Court of Appeal dismissed the extension request without prejudice to the Federal Government's right to re-apply once it was known whether and in what form Bill C-83 would be enacted.[35]

[128] On June 12, 2019, in Parliament, the Senate passed an amended version of Bill C-83.

[129] Meanwhile, the Federal Government still was unable to meet the June 17, 2019 deadline, and on June 12, 2019, with the declaration of invalidity to take effect imminently, the Federal Government made an emergency motion to the Supreme Court of Canada to obtain a temporary stay of Associate Chief Justice Marrocco's declarations of constitutional invalidity. The Federal Government also delivered a notice of appeal of the Ontario Court of Appeal's refusal to grant an extension to November 30, 2019.

[130] Justice Côté granted an interim extension of the suspension in Ontario until November 30, 2019 to permit the Associations to respond to the Federal Government's motion for an extension of the suspension.

[131] On June 21, 2019, Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act,* was enacted by Parliament. The Federal Government did not accept the amendments proposed by the Senate with respect to the review process for placements in administrative segregation. Bill C-83, has not yet been proclaimed in force.

[132] On June 24, 2019, the British Columbia Court of Appeal released its decision in the *BC Civil Liberties* Case and substituted its own declarations of constitutional invalidity for those of Justice Leask, and the Court suspended the operation of its own declarations to June 28, 2019.[36] The Federal Government then obtained a further extension of the declaration of constitutional invalidity from the British Columbia Court of Appeal until November 30, 2019.[37]

[133] As noted above, Bill C-83 will eliminate the use of both administrative segregation and disciplinary segregation but authorize SIUs. Because Bill C-83 still contemplates circumstances

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[34] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),*2019 BCCA 177.
[35] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2019 BCCA 202.
[36] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),* 2019 BCCA 228.
[37] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2019 BCCA 233.

where the inmate receives no time out of cell, and it does not actually end Canada's ability to order solitary confinement. Bill C-83 provides for review by an independent external decision-maker with authority to release an inmate from segregation but the independent review is triggered only where an inmate is being denied his or her entitlements for five consecutive days, or for 15 days in total. If the independent reviewer is not satisfied that the Correctional Service has taken all reasonable steps to provide the entitlements, the reviewer can order the inmates' release after a further seven days.

[134] The current situation is that pending the coming into force of Bill C-83, administrative segregation continues to operate under the unamended *Corrections and Conditional Release Act* because the orders made in the *Cdn Civil Liberties Assn* and the *BC Civil Liberties Case* are under suspension at least until November 30, 2019. The Correctional Service has made changes to the review process in British Columbia but did not make any change to the review process in Ontario.

6. *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*

[135] On January 27, 2015, in Ontario, In *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[38] the Canadian Civil Liberties Association, a national organization established in 1964 to protect and promote respect for and observance of fundamental human rights and civil liberties, sued the Federal Government.

[136] In its action, the Association submitted that the legislation that authorizes administrative segregation is contrary to the *Charter*. The Association sought a declaration that sections 31-37 of the *Corrections and Conditional Release Act*, which permit the Correctional Service to remove an inmate from the general population of inmates in a penitentiary for a non-disciplinary reason are invalid because they infringe sections 7, 11 (h) and 12 of the *Charter*.

[137] In December 2017, Associate Chief Justice Marrocco held that the administrative segregation sections of the *CCRA* contravened s. 7 of the *Charter*, and the contravention could not be saved under s. 1 of the *Charter*.[39] He concluded, however, that the legislation authorizing administrative segregation was not contrary to sections 11 (h) and 12 of the *Charter*. Based on the s. 7 violation, he directed the Federal Government to redraft the legislation to make it compliant with the *Charter.*

[138] For reasons that will become particularly important to the discussion later about *Charter* damages, it is important to note the analytical framework for Associate Chief Justice Marrocco's conclusion that the administrative segregation provisions of the *CCRA* should be redrafted. He began by finding that the Association as a litigant with public interest standing could not seek a remedy under s. 24 (1) of the *Charter* because its own constitutional rights were not engaged. He held that the Association could seek only declaratory relief under s. 52 (1) of the *Constitutional Act, 1992* that would be available if the Association could demonstrate that the *CCRA* itself and not the implementation of the *CCRA* was contrary to the *Charter*. Next, Citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),*[40] he held that, as a matter of law, Parliament

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[38] 2017 ONSC 7491.
[39] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491.
[40] 2000 SCC 69 at para. 71.

was entitled to assume that its enactments will be applied constitutionally by the public service and he concluded that the administration of the statutory scheme was not the source of the problem and that it was possible for the Correctional Service to administer the statutory scheme in a constitutionally proper way. The issue then was whether the *CCRA* itself was *Charter* compliant.

[139] Associate Chief Justice Marrocco made the following factual and legal findings: (a) the Mandela Rules promulgated by the United Nations represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined; (b) as practiced by Corrections Canada, administrative segregation was what the Mandela Rules referred to as solitary confinement; (c) the placing of an inmate in in administrative segregation imposes a psychological stress, quite capable of producing serious permanent observable negative mental health effects; (d) reputable Canadian medical organizations such as the Canadian Medical Association, the College of Family Physicians of Canada, the Registered Nurses Association of Ontario regard administrative segregation as a harmful practice; (e) the harmful effects of sensory deprivation caused by solitary confinement can occur as early as forty-eight hours after segregation; (f) administrative segregation can change brain activity and becomes symptomatic within seven days or less; (g) administrative segregation of fifteen days duration posed a serious risk of psychological harm; (h) administrative segregation exacerbates existing mental illness; (i) prolonged administrative segregation poses a serious risk of negative psychological effects; (j) keeping a person in administrative segregation for an indefinite prolonged period exposes that person to abnormal psychological stress and will if the stay continues indefinitely result in permanent psychological harm; (k) the practice of keeping an inmate in administrative segregation for a prolonged period is harmful and offside responsible medical opinion; (l) lack of independent review of the warden's decisions amounted to virtually no accountability for the decision to segregate; (m) there was an inherent conflict between the administrative segregation sections of the *CCRA* and the mental health section of the Act (s. 87(a)) that entailed that the mental health of inmates could not be considered within the administrative segregation decision-making process; and, (n) CD 709 created a risk that the Institutional Head would exercise his or her discretion in a way that would contravene 87(a) of the Act and not consider mental health risk in the decision to release from administrative segregation.

[140] In reaching his conclusions, Associate Chief Justice Marrocco accepted the evidence of Drs. Martin and Chaimowitz , and Hannah-Moffat, (all witnesses in the Reddock Case) that a prolonged placement in administrative segregation causes harm to the inmate. Relying on their evidence, Associate Chief Justice Marrocco found that: administrative segregation was (a) a significant deprivation of liberty; (b) was harmful and imposed a psychological stress capable of producing serious permanent observable negative mental health effects; (c) caused sensory deprivation with harmful effects as early as 48 hours after the placement; (d) can alter brain activity with symptoms within seven days; (e) poses a serious risk of negative psychological effects when prolonged; and (f) as a practice is contrary to responsible medical opinion.

[141] The Association appealed the dismissal of the claims that were based on sections 11 (h) and 12 of the *Charter*, and on the appeal, it submitted that the *Corrections and Conditional Release Act* contravened s. 7 of the *Charter* for the additional reasons that it was grossly disproportionate and overbroad. The Federal Government did not cross-appeal.

[142] On the appeal, the Ontario Court of Appeal agreed with Associate Chief Justice Marrocco

that there was no violation of s. 11 (h) of the *Charter* but reversing him, the Court held that the provisions in the *Corrections and Conditional Release Act* that authorized prolonged administrative segregation infringed s. 12 of the *Charter* and the infringement was not justified under s. 1 of the *Charter*. The Court held that a remedy pursuant to the superior court's inherent jurisdiction and pursuant s. 52 (1) of the *Constitution Act, 1982* was appropriate.

[143] The Court of Appeal did not find an additional violation of s. 7 of the *Charter* in part because the issue was subsumed by the s. 12 analysis[41] and in part because, generally speaking, an appellate court will not entertain arguments not advanced in the court below.[42]

[144] On the appeal, the Court of Appeal addressed the arguments about whether administrative segregation was contrary to s. 12 of the *Charter*. In making their original argument before Associate Chief Justice Marrocco that administrative segregation was a cruel and unusual treatment contrary to s. 12 of the *Charter*, the Association had argued that the evidence established that inmates aged 18-21, inmates with mental illness, and inmates placed in segregation for their own protection were harmed by any placement in administration regardless of its duration. On the Association's appeal, the Court of Appeal, however, accepted Associate Chief Justice Marrocco conclusions that it could not be categorically shown that inmates aged 18-21, those with mental illness, and those placed in segregation for their own protection were harmed by any placement in administrative segregation. But, disagreeing with Associate Chief Justice Marrocco the Court of Appeal concluded categorically that prolonged administrative segregation of any inmate for more than fifteen consecutive days was unconstitutional as a cruel and unusual treatment contrary to s. 12 of the *Charter*.

[145] The Court of Appeal accepted that prolonged administrative segregation poses a serious risk of negative psychological effects and that these negative effects although not always observable are a foreseeable and expected result from the abnormal psychological stress of administrative segregation that will cause permanent psychological harm if the placement continues indefinitely. The Court found that prolonged administrative segregation has the potential to cause serious harm that could be permanent.

[146] Once again for reasons that will become particular important to the discussion later about *Charter* damages, it is important to note that the Court of Appeal disagreed with Associate Chief Justice Marrocco's analytical framework that posited that it was possible for the Correctional Service to administer the statutory scheme in a constitutionally proper way. On this point, Justice Benotto stated at paragraphs 116-119 of her decision for the Court:

> 116. As I have mentioned, the application judge considered *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* and concluded that any problems with the scheme of administrative segregation were the results of maladministration, not unconstitutionality of the legislation. At para. 26, the application judge concluded:
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> > Individual cases of maladministration where Correctional Service of Canada personnel contravene Correctional Service of Canada policies and in so doing violate an inmate's Charter rights do not prove that the Corrections and Conditional Release Act is incapable of constitutional administration.
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> 117. I disagree that this is a case of maladministration. In my view, this is not a *Little Sisters*

[41] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2019 ONCA 243 at paras. 144-149.
[42] *R. v. Roach*, 2009 ONCA 156.

> situation.
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> 118. The court in *Little Sister*s found that discrimination suffered by the appellants was not the result of an unconstitutional statute and that the statutory provisions, on their face, did not infringe s. 15. The problem in *Little Sisters* was the manner in which the provisions were enforced. There, the Supreme Court of Canada concluded that the appellant's s. 15 rights had been breached because of how the statute was administered but found that the statute was itself valid.
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> 119. Such is not the case here. Prolonged administrative segregation subjects inmates to grossly disproportionate treatment. As I have explained, ss. 31-37 of the Act authorize and do not safeguard against such treatment. Thus, the Act infringes s. 12.

[147] As noted above, both parties are at present seeking leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

7. British Columbia Civil Liberties Association v. Canada (Attorney General)

[148] In 2017, in British Columbia, in *British Columbia Civil Liberties Association v. Canada (Attorney General),* the British Columbia Civil Liberties Association and the John Howard Society of Canada sued the Federal Government challenging the administrative segregation legislation as contrary to the *Charter*.

[149] On January 17, 2018, Justice Leask held that the administrative segregation sections of the *Corrections and Conditional Release Act* contravened s. 7 and s. 15 of the *Charter*, and the contraventions could not be saved under s. 1 of the *Charter*.[43] He declared ss. 31-33 and 37 of the *CCRA* to be of no force and effect. He did not find a breach of sections 9 and 12 of the *Charter*. Justice Leask suspended his declaratory order for twelve months and ordered the Federal Government to redraft the legislation within twelve months. It is worth noting that Justice Leask went further then Associate Chief Justice Marrocco in concluding that review process for placements in administrative segregation was inadequate because he required the initial review to be conducted by an external adjudicator; *i.e*., someone independent of the *Correctional Service*.

[150] For present purposes, it is not necessary to discuss Justice Leask's findings with respect to s. 15 of the Charter other than to note that the they were connected to his findings with respect to sections 7 and 12 of the *Charter*.

[151] With respect to s. 7 (and also s. 15) of the *Charter*Justice Leask made the following factual and legal findings: (a) administrative segregation conforms to the definition of solitary confinement found in the Mandela Rules; (b) administrative segregation is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide; (c) some of the specific harms of administrative segregation include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour; (d) the risks of these harms are intensified in the case of mentally ill inmates; however, all inmates subject to segregation are subject to the risk of harm to some degree; (e) the indeterminacy of administrative segregation is a particularly

[43] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62.

problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation; (f) while many of the acute symptoms of mental illness caused by administrative segregation are likely to subside upon termination of segregation, many inmates are likely to suffer permanent harm as a result of their confinement; (g) the harm of administrative segregation is most commonly manifested by a continued intolerance of social interaction, which has adverse repercussions for an inmates' ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison; (h) negative health effects from administrative segregation can occur after only a few days in segregation, and those harms increase as the duration of the time spent in segregation increases; (i) although the fifteen-day maximum prescribed by the Mandela Rules is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm; nevertheless, it is a defensible standard; (j) the history of solitary confinement in the United States and more particularly in Germany, demonstrates that these harmful effects have been recognized since the late 19th and early 20th centuries; (k) inmates with mental disabilities are over-represented in administrative segregation; (l) CD 709 is deficient because its definition of serious mental illness was both unclear and too narrow and intermingled symptoms and diagnoses; (m) the Federal Government's processes for dealing with mentally ill inmates were deficient and failed to appreciate the size and seriousness of the health issue; (n) isolating inmates was not necessary to achieve the safety and security objectives of administrative segregation; and (o) prolonged periods of administrative segregation was unnecessary to eliminate the safety and security issues and this could be achieved by alternative measures.

[152] At the *BC Civil Liberties Assn* trial, the Federal Government conceded that sections 31-33 and 37 of the *CCRA* engaged the inmates' liberty interest, but Justice Leask concluded that their interests in life and security of the person were also engaged. Justice Leask concluded that the impugned sections of the *CCRA* authorized the indefinite and prolonged use of administrative segregation and the inmate's rights under s. 7 of the *Charter* were violated. He concluded that the impugned provisions contravened s. 7 because their interference with life, liberty, and the security of the person were overbroad because: (a) the harm caused by prolonged confinement in administrative segregation undermines the maintenance of institutional security as well as the ultimate goal of achieving public protection by fostering the rehabilitation of offenders and their successful reintegration into the community; (b) prolonged confinement in administrative segregation is not necessary to achieve the safety or security objectives that trigger its use and less harmful measures would achieve the objectives underlying the legislation; and (c) there was no rational connection between the legitimate security needs and the authority to keep inmates in what amounts to solitary confinement for prolonged months or even years.

[153] In the *BC Civil Liberties Assn* Case, Justice Leask found that administrative segregation causes serious harm. He stated at paragraphs 247-250 and 252 of his decision:[44]

> 247. I find as a fact that administrative segregation as enacted by s. 31 of the *CCRA* is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-

[44] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at paras. 247-250, 252.

> harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree.
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> 248. The indeterminacy of administrative segregation is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation.
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> 249. While many of the acute symptoms are likely to subside upon termination of segregation, many inmates are likely to suffer permanent harm as a result of their confinement. This harm is most commonly manifested by a continued intolerance of social interaction, which has repercussions for inmates' ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison.
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> 250. Negative health effects can occur after only a few days in segregation, and those harms increase as the duration of the time spent in segregation increases. The 15-day maximum prescribed by the Mandela Rules is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm. It is, nevertheless, a defensible standard.
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> […]
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> 252. I accept that the early history of solitary confinement in the United States and more particularly in Germany, demonstrates that these harmful effects have been recognized since the late 19th and early 20th centuries.

[154] Pausing here, for the discussion later in these Reasons for Decision about remedies, it is worth pointing out that Justice Leask did not address the application of s. 24 (1) of the *Charter* to the circumstances of the *BC Civil Liberties* Case. The remedy sought by the Association was a declaration of invalidity pursuant to s. 52 (1) of the *Constitution Act, 1982*.

[155] The Federal Government appealed Justice Leask's decision, but it did not appeal his ruling that the review provisions of the *CCRA* did not pass *Charter* scrutiny. There was no cross-appeal of Justice Leask's decision that the impugned provisions of the *CCRA* did not violate s. 12 of the *Charter*. So that issue was not before the British Columbia Court of Appeal.

[156] More precisely, the Federal Government appealed Justice Leask's conclusions that the impugned provisions of the *CCRA* contravened s. 7 of the *Charter.* It submitted that he had erred by failing to conclude that any *Charter* violations were justified under s. 1 of the *Charter*.

[157] Unlike the situation in the Reddock Case, on the appeal, the Federal Government did not dispute that the inmate's rights to life and security of the person were engaged in addition to the inmate's liberty interest.

[158] On the appeal, the Federal Government submitted that the *CCRA* itself was sound. It submitted that the *CCRA* did not authorize indefinite and prolonged confinement in administrative segregation and if there were *Charter* breaches, they were found in the Correctional Service's misapplication of a constitutionally compliant regime for administrative segregation.

[159] Thus, the Federal Government submitted that Association was not entitled to a

declaration of constitutional invalidity under s. 52 (1) of the *Constitution Act, 1982*. The Federal Government, relying on *R. v. Ferguson*,[45] also argued that the Association was not entitled to a remedy for the Correctional Service's misapplication of the *CCRA.* The Federal Government argued that even if there were individual *Charter* breaches, s. 24 (1) of the *Charter,* the remedies provision, provides a remedy only to a party suffering an infringement of his or her own *Charter* rights. The Association's *Charter* rights were not engaged, and, therefore no s. 24 (1) remedy was available to the Association.

[160] The British Columbia Court of Appeal in a judgment written by Justice Groberman,[46] (Justices Willcock and Fitch concurring) varied Justice Leask's decision on matters not pertinent to the immediate case.

[161] On the pertinent issues, the British Columbia Court of Appeal concluded that the *CCRA* authorized indefinite and prolonged confinement in administrative segregation. The Court rejected the Federal Government's argument that the indefinite and prolonged confinements of administrative segregation were caused by the Correctional Service misapplying the statute. The Court concluded that the *Charter* violations were a product of the *CCRA* itself. At paragraph 160 of his judgment, Justice Groberman said:

> 160. While decisions by CSC staff in particular cases to maintain the confinement of inmates in segregation for lengthy periods may have been imprudent or short-sighted, or simply hamstrung by the operational realities within which CSC must work, those decisions cannot be characterized as running afoul of the requirements of the Act.

[162] Although he preferred to analyze the violation of the principles of fundamental justice through the lens of gross disproportionality, Justice Groberman found no error in Justice Leask's findings that: (a) the provisions of the *CCRA* that authorized indefinite and prolonged solitary confinement were overbroad and violated s. 7 of the *Charter*; and (b) the impugned provisions could not be justified under s. 1 of the *Charter*. At paragraph 167 of his judgment, Justice Justice Groberman stated:

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

[163] Turning to the matter of remedies, the British Columbia Court of Appeal held that the plaintiffs and the intervenors, who were public interest litigants whose own *Charter* rights had not been violated, were not entitled to a remedy under s. 24 (1) of the *Charter*.

[164] The Court held that the superior court has an inherent jurisdiction to grant a declaration that will strike down legislation or to declare that a statute was being applied in a way that violates the *Charter*. Justice Groberman noted that 52 (1) of the *Constitution Act, 1982*

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[45] 2008 SCC 6.
[46] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),* 2019 BCCA 228.

recognized the superior court's jurisdiction to make declaratory judgments.[47] He said that the availability of common law declaratory relief provided an important remedy where relief under s. 24 (1) of the *Charter* was unavailable.[48]

[165] In the end result, the British Columbia Court of Appeal substituted its declarations for the declarations of Justice Leask, which it had suspended to June 28, 2019 and the Court suspended the substitute declarations also to June 28, 2019. As described above, the declarations have been further suspended at least until November 30, 2019.

8. ***Brazeau v. Attorney General (Canada)***

[166] On July 17, 2015, in Ontario, the *Brazeau* Case was commenced as a class action under the *Class Proceedings Act, 1992*. On behalf of a class of inmates who are seriously mentally ill, Christopher Brazeau and David Kift alleged that by placing mentally ill inmates in administrative segregation, the Federal Government breached the inmate's rights under sections 7, 9, and 12 of the *Charter*. The Class Members sought an aggregate award of *Charter* damages without prejudice to their right to claim more at individual issues trials. In 2016, on consent, the action was certified as a class proceeding.[49]

[167] After a summary judgment motion that was argued over five days in February 2019, on March 25, 2019, I concluded that:

i. subject to individual Class Members rebutting the statute-bar, there is a six-year limitation period that applies to all claims, and, thus, the start date for the Class Period is July 20, 2009 for all but the Estate claimants, for which the start date is July 20, 2013;

ii. there was no breach of s. 9 of the *Charter*;

iii. there was a class-wide breach of s. 7 of the *Charter* because the review process for administrative segregation contravened the *Charter*;

iv. there was a breach of s. 7 and of s. 12 of the *Charter* for those Class Members who were involuntarily placed in administrative segregation for more than thirty days;

v. there was a breach of s. 7 and s. 12 of the *Charter* for those Class Members who were voluntarily placed in administrative segregation for more than sixty days;

vi. Notwithstanding the principles from *Mackin v. New Brunswick (Minister of Finance),*[50] vindication and deterrence damages are available to the whole class under s. 24 (1) of the *Charter* for the breach of s. 7 of the *Charter* regarding the inadequate review procedure for placements in administrative segregation

vii. Vindication and deterrence damages were also available to the subclasses that suffered a breach of sections 7 and 12 of the *Charter*.

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[47] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),* 2019 BCCA 228 at paras. 225-272
[48] *British Columbia Civil Liberties Assn. v. Canada (Attorney General),* 2019 BCCA 228 at para. 265.
[49] *Brazeau v. Attorney General (Canada),* 2016 ONSC 7836.
[50] 2002 SCC 13.

viii. As a result of the *Charter* breaches, there were aggregate *Charter* damages for vindication and deterrence of $20 million, which was to be distributed, less Class Counsel's approved legal fees and disbursements, in the form of additional mental health or program resources for structural changes to penal institutions as the court on further motion may direct.

ix. The *Charter* damages awards were without prejudice to any individual Class Member's claim at an individual issues trial to assert that his or her treatment was contrary to sections 7 and 12 of the *Charter* in his or her particular circumstances.

x. The Federal Government was not liable for punitive damages on a class-wide basis but may be liable for punitive damages after the *Charter* damages are determined at the individual issues trials.

[168] Based on the evidence on the summary judgment motion in the *Brazeau* Case, I made the following findings of fact:

i. Administrative segregation as practiced by the Correctional Service is different from protective custody, where with same rights as inmates in the general population, inmates are housed for their own protection.

ii. In practice and in experience, there is no meaningful difference between administrative segregation and solitary confinement as it is known around the world.

iii. The policies, practices, and procedures for administrative segregation that arguably might make administrative segregation different from solitary confinement are more honoured in the breach than in the observance, but even if the policies were honoured, administrative segregation would still be a version of solitary confinement.

iv. In practice and in experience there is also no meaningful difference between administrative segregation under s. 31 of the *Corrections and Conditional Release Act* and disciplinary segregation under the *Act*. If the Correctional Service's purpose was to make administrative segregation something different from solitary confinement or disciplinary segregation, then the evidence establishes that it failed in achieving that purpose. If anything, administrative segregation, because of its potential indeterminate duration, is more punishing than disciplinary segregation.

v. Given their different purposes, there is no justification for the terms and conditions of administrative segregation being as draconian as those of disciplinary segregation.

vi. From time to time and more often at some penitentiaries than others, administrative segregation is used as a form of punishment for the inmate's behaviour in the penitentiary.

vii. From time to time and more often at some penitentiaries than others, administrative segregation is used to avoid the administrative regime for disciplinary segregation.

viii. A placement in administrative segregation can cause and does cause physical and

mental harm to inmates, particularly to inmates that have serious pre-existing psychiatric illness.

ix. A placement in administrative segregation imposes severe psychological stress, and for inmates who have or who develop serious mental illnesses a prolonged placement may cause permanent harm.

x. Negative health effects from administrative segregation can occur within a few days in segregation and those harms increase as the duration of the time in administrative segregation increases.

xi. Some of the specific harms of administrative segregation include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour.

xii. Depending on its duration, a placement of a seriously mentally ill inmate in administrative segregation is deleterious to the purpose of rehabilitating the inmate and returning him or her to the society outside the penitentiary. Prolonged administrative segregation may impair the mentally ill inmate's capacity to return to society as a law-abiding citizen.

xiii. A placement in administrative segregation of a seriously ill inmate is contrary to one the purposes of the Correctional Service under s. 5 of the *Corrections and Conditional Release Act*; namely; that of assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

xiv. Administrative segregation has the potentiality and the actuality of causing serious physical and serious psychological harm to any inmate and the potentiality and actuality of serious physical and serious psychological harm is particularly acute for those already suffering from serious mental illnesses and disabilities.

xv. Without regard to whether the inmate suffers from a mental illness but especially for inmates that do suffer from a serious mental illness, if not a consensus about the precise duration of acceptable solitary confinement, there is a strongly prevalent view that prolonged and especially indeterminately prolonged solitary confinement should not be allowed and that there should be a maximum time-limit for an inmate being kept in administrative segregation.

xvi. Although under the CCRA, an inmate in administrative segregation must be released at the earliest appropriate time, in practice, the policy of a prompt release was a policy that the Correctional Services always talks but does not always walk.

xvii. The Federal Government had no explanation justifying responding to a security problem with solitary confinement for potentially indefinite periods of time and without a constitutionally adequate system of adjudicative review.

xviii. The Federal Government had no explanation that would justify handling a security problem virtually in the same manner as a disciplinary manner.

[169] In the *Brazeau* Case, I accepted Dr. Grassian's opinion and gave it considerable weight. I noted that Dr. Grassian's opinion was based on personal extensive research, and his opinion was consistent with the academic literature and with the overwhelming consensus positions of the professional organizations that have taken positions about the effects of solitary confinement.

[170] In the *Brazeau* Case, I found that although the scientific explanation for the harm caused by solitary confinement is a product of the later part of the twentieth century, that solitary confinements could have dire psychiatric consequences has been appreciated for well over a century.[51] I found that the use of solitary confinement was heavily scrutinized and investigated by social scientists, and a consensus began to build that it was a harsh practice that in some places and in some conditions was tantamount to torture,[52] and I noted that in 1983, Dr. Grassian published his very influential article in the American Journal of Psychiatry entitled *Psychopathological Effects of Solitary Confinement*, which reported on the effects of solitary confinement on inmates and identified a syndrome caused by solitary confinement".[53]

9. The Harm Caused by Prolonged Administrative Segregation

(a) The Evidence about the Harm of a Placement in Administrative Segregation

[171] As was the case in the *Cdn Civil Liberties Assn* Case, the *BC Civil Liberties Assn* Case, and the *Brazeau* Case, the affiants in the Reddock Case provided evidence of the horrific effects of their placement in administrative segregation.

[172] As in the *Cdn Civil Liberties Assn* Case, the *BC Civil Liberties Assn* Case, and the *Brazeau* Case, the history and historiography of isolation or segregation in penitentiaries is part of the evidentiary record of the Reddock Case. The historical evidentiary record reveals that for almost two hundred years, it has been generally known that prolonged isolation in a cell in a penitentiary causes physical and psychological harm to the person segregated.

[173] Although the Federal Government lead some evidence from the prison files and from prison officials to contradict the affiants' personal stories, Messrs. Campbell, Cansanay, McMath, Reddock, and Spence were not cross-examined. I accept their evidence that they suffered horribly from their experience in administrative segregation.

[174] The evidence of the Correctional Service witnesses confirms that many inmates suffered from a placement in administrative segregation, but the Federal Government disputed that the evidence established that every inmate whose placement was longer than fifteen days suffered harm. The idiosyncratic evidence of Messrs. Campbell, Cansanay, McMath, Reddock, and Spence, of course, cannot categorically prove that every Class Member suffered harm from a placement of more than fifteen days, but their evidence does prove that prolonged administrative segregation has the potential to cause harm to every Class Member and frequently did cause harm. Their evidence showed that the likelihood of harm was very high for all Class Members who by definition suffered a prolonged segregation.

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[51] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 at para. 91.
[52] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 at para. 93.
[53] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 at para. 101.

[175] Class Counsel led evidence from three medical experts qualified to opine on the harms of administrative segregation; *i.e.* Drs. Grassian, Chaimowitz, and Martin, and they deposed that every Class Member suffered from their placement in administrative segregation. Their evidence established that given what is now known of the psychological effect of isolation on humans, the risk of harm form administrative segregation is common to all inmates.

[176] In the Reddock Case, Dr. Nussbaum criticized Dr. Grassian's opinion but under cross-examination, Dr. Nussbaum conceded that his criticism of Dr. Grassian's position was not accurate. In my opinion, Dr. Nussbaum's critiques are unwarranted, and his criticisms do not detract from the weight that I give (and that I gave in the *Brazeau* Case) to Dr. Grassian's evidence.

[177] In the Reddock Case and in the *Brazeau* Case, Dr. Grassian opined that after even a relatively brief period of time in solitary confinement, an individual will begin to descend into a mental torpor in which alertness, attention and concentration all become impaired. Massive confusion and disorientation and an obsessive fixation on unpleasant thoughts can follow. He said that over time, the absence of meaningful human contact causes the individual to become increasingly incapable of processing external stimuli and he or she may suffer terrifying hallucinations.

[178] Dr. Grassian deposed that the individual often becomes seriously depressed, even to the point of suicide. An individual in prolonged solitary confinement often develops serious anxiety disorders, including acute panic attacks characterized by tachycardia, diaphoresis, shortness of breath, panic, tremulousness and dread of impending death.

[179] On cross-examination, Dr. Grassian described how the harms would be common, but differentially experienced among Class Members; in other words, the suffering would be in kind with differences in degree. Dr. Grassian deposed:

> Well, my work states that there's a commonality of harm that's associated with being in solitary confinement. That has to do with the restricted environmental stimulation, the social stimulation, perceptual stimulation and occupational stimulation that impairs the ability to maintain an active state of awareness. And there are consequences that flow from that. That - those effects will occur in both male and female inmates.

[180] Dr. Chaimowitz testified that every inmate detained in prolonged administrative segregation endures a painful experience. In the *Brazeau* Case, I accepted and relied on Dr. Chaimowitz's opinion. It was relied upon by Associate Chief Justice Marrocco in the *Cdn Civil Liberties Assn* Case. Dr. Chaimowitz deposed that the negative effects of administrative segregation arise quickly, and while there is some variation in degree, the experience is uniformly harmful. He said that inmates will more likely than not experience a base level of harm after fifteen days. He stated that:

> The risk of "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 […] grows as solitary confinement is continued, particularly if the individual does not have the certainty of a date on which it will end.

[181] On cross-examination, Dr. Chaimowitz, confirmed Dr. Grassian's evidence and said that the patients he had treated after release from solitary confinement, manifested depression and some said that pre-existing psychotic symptoms had worsened. Some of Dr. Chaimowitz's patients described increased anxiety, a sense of disconnection from society, and persistent

discomfort in associating with others. It was Dr. Chaimowitz's clinical opinion that the experience of administrative segregation will universally cause negative effects for some period of time.

[182] Dr. Martin, a family physician with extensive experience treating inmates, whose evidence was accepted in the *Cdn Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases testified that administrative segregation causes significant harm. She said that the mental and physical harm and the exacerbation of pre-existing mental illness can manifest themselves with 48 hours. She said the symptoms include hallucinations, anxiety, rage, a feeling of going mad, inexplicable fatigue, and diminished memory.

[183] Dr. Martin has been Chair of the Prison Health Program Committee of the College of Family Physicians of Canada. Her Committee released a position paper on solitary confinement and concluded that solitary confinement can alter brain activity and result in symptomatology within days.

[184] The evidence on this summary judgment motion revealed that the harm caused by prolonged solitary confinement cannot be prevented by screening to determine whether the inmate is prone to serious adverse health outcomes in segregation because no neuropsychological assessments are done. Rather, the Correctional Service relies on monitoring which is ineffective, and which comes too late. The Correctional Service waits for the manifestation of decompensation or suicidal ideation before ending the segregation. The evidence is that prolonged administrative segregation causes foreseeable harm and that monitoring only detects harm after the fact.

[185] Dr. Nussbaum, who gave evidence for the Federal Government, reviewed the scientific literature in order to determine whether there was a recognized duration of time in administrative segregation that would likely give rise to significant negative psychological effects on inmates who were in administrative segregation for more than fifteen days. In his report, he stated that he was not aware of any studies that compared groups of inmates subject to administrative segregation for 14 days or less with those subjected to 16 days or longer. This response is not responsive to the question he was asked, and it was not helpful evidence for this summary judgment motion. Moreover, Dr. Nussbaum's response was incorrect. There are reports that have studied the harm caused by both short and prolonged segregation.

[186] In any event, the research request made of him by the Federal Government was itself a misdirected and perverse question since it has been known for almost 200 years that solitary confinement is, to borrow from Charles Dicken, a slow and daily tampering with the mysteries of the brain that is immeasurably worse than any torture of the body because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh. Given this state of knowledge, it is difficult to conceive what would have been an appropriate research question, if there is one, about a recognized duration for negative effects from administrative segregation for the purposes of penitentiary safety and security.

[187] Dr. Serin, who gave evidence for the Federal Government, accepted that administrative segregation was a form of solitary confinement and that it causes harm that can be severe. He accepted that administrative segregation can cause physical and/or psychological harm including depression, anxiety, insomnia. He said that in rare cases it could cause psychosis, bipolar manifestations, and schizoaffective disorder even in the absence of pre-existing conditions. He agreed that indefinite solitary confinement should be prohibited, and he said that administrative

segregation should only be used as a last resort in exceptional cases for as short a period as possible, ordered by a competent authority, and subject to independent review.

[188] Dr. Serin admitted that inmates who have been subjected to administrative segregation are more likely to lengthen their sentences by committing disciplinary infractions, and that administrative segregation has become punishment for the purpose of deterrence but is ineffective for that purpose. He agreed with the Prison Health Program Committee of the College of Family Physicians of Canada position paper.

[189] I find as a fact that a placement in administrative segregation for more than fifteen days causes serious physical and mental harm. The risk of that harm happens immediately upon the placement into administrative segregation and the risk is actualized into harm in some Class Members immediately and in the rest of the Class Members by no later than fifteen days.

(b) The Academic Literature on the Harm Caused by Solitary Confinement

[190] As noted above in the historiography portion of these Reasons for Decision, in his 1983 study, Dr. Grassian identified a syndrome caused by solitary confinement. Since his study, there has been a body of medical literature that finds an association between solitary confinement and various serious harms.

[191] Solitary confinement has been associated with serious mental illness and with the exacerbation of the symptoms of those with pre-existing mental health problems. The evidence of Drs. Grassian, Chaimowitz, and Martin revealed that there is a very substantial body of medical literature that catalogues the serious harms caused by prolonged solitary confinement. Their evidence also revealed that the medical or scientific literature reveals social ills that are the product of prolonged administrative segregation.

[192] In particular, in 2004 the Correctional Service's own research branch released "The Wichmann/Taylor CSC Study" that revealed that women inmates who had been segregated were: (a) significantly less likely to be released on discretion before expiry of their warrant of committal; and (b) significantly more likely to have their parole revoked without a subsequent offence.

[193] In 2013, Dr. Fatos Kaba released a study titled "Solitary Confinement and Risk of Self-Harm Among Jail Inmates," Dr. Kaba and his co-authors found that segregation was significantly associated with self-harm and the strongest association was with inmates who did not have a pre-existing serious mental illness.

[194] In 2017, Dr. Brian Hagan released a study titled "History of Solitary Confinement is Associated with post-Traumatic Stress Disorder Symptoms among Individuals Recently Released from Prison," Dr. Hagan and his co-authors found that solitary confinement was significantly associated with Post Traumatic Stress Disorder ("PTSD"). The study revealed that segregated inmates were approximately four times more likely to experience PTSD than inmates who had not been segregated. These negative effects did not depend on whether the segregated inmates spent more or less than one week in segregation, nor the involuntariness of the segregation affect inmate outcomes.

[195] Dr. Nussbaum, however, relied on three studies that he said revealed that the harms and risks alleged to be associated with solitary confinement were overstated; namely: (1) The Suedfeld Study: a 1982 study led by Dr. Peter Suedfeld titled "Reactions and Attributes of

Prisoners in Solitary Confinement"; (2) the "Zingler Study", a 2001 study led by Dr. Ivan Zingler titled "The Psychological Effect of 60 days in Administrative Segregation" that found that overall, segregated prisoners had poorer mental health and psychological functioning", but their mental health and psychological functioning did not significantly deteriorate over a sixty-day period; and (3) the "Colorado Study": a 2010 study by Maureen O'Keefe, titled "One Year Longitudinal Effects of Administrative Segregation," that studied segregation in Colorado penitentiaries.

[196] However, under cross-examination Dr. Nussbuam conceded that: (a) there were biases in the Suedfield study, it was not a definitive work, and it actually did not assist in determining the risk posed by administrative segregation; (2) the Zingler Study should not be used to legitimize the practice of solitary confinement which was not a healthy practice; and (3) the findings of the Colorado Study were not useful because the conditions of administrative segregation in Canada differed significantly from those in Colorado.

[197] In my opinion, although the parties had at each other about the credibility of the opposing expert witnesses and about what findings of fact could be drawn from the medical literature, for the purposes of the summary judgment motion, not much turns on the scientific evidence. Far more important was the evidence of: (a) the almost 200 year historical record about solitary confinement; (b) the witnesses from the Correctional Service who placed inmates into administrative segregation; (c) the witnesses who experienced prolonged stays in administrative segregation; (d) the witnesses, like Dr. Grassian, who interviewed and studied inmates who had been segregated from the general prison population; and (e) those witness who treated inmates before, during, and after placements in administrative segregation.

[198] All of those witnesses agreed that prolonged administrative segregation can cause and does cause serious physical and psychiatric harm. The historical record showed how harmful and dysfunctional has been the practice of isolating inmates from meaningful human and humane contact. The more recent academic literature was consistent and confirmatory of the fact that prolonged administrative segregation causes physical and psychiatric harm.

F. Discussion and Analysis: Jurisdiction to Grant Summary Judgment

[199] The Federal Government submits that the Reddock Case requires a trial. It submits that the case is complex with contentious highly technical and scientific evidence. It submits that *Charter* rights are by their nature individual rights and alleged contraventions cannot be assessed collectively but require the contextualization of individual circumstances. It submits that the Class Members in the Reddock are more diverse than those in the *Brazeau* Case all of whom were diagnosed with serious mental illness and as such at greater risk than the general inmate population to the adverse effects of administrative segregation. To quote from paragraphs 179 of the Federal Government's factum:

> 179. The Plaintiff's case, seeking blanket declarations that *Charter* rights were infringed, fails to appreciate the nature and context of the discretionary decision to segregate any particular Class Members on a particular day at a particular institution following a particular series of events. One institution is not the same as the next. Institutions have different security ratings, different capacity, different populations, etc. Each inmate is also unique. They have different offence and social histories, different mental or physical health needs, different treatment plans, different security ratings, different incompatibles, and different reasons for their segregation. All of these factors influence a decision to segregate an inmate and are important to any finding of a Charter

infringement.

180. Regarding the Plaintiff's negligence claim, a detailed analysis of the decades of policy changes and recommendations of multiple stakeholders is necessary to determine the appropriate standard of care and whether CSC met that standard throughout the Class Period. This analysis should not be done in a summary fashion.

[200] In the *Brazeau* Case at paragraphs 270 to 282, I discuss the court's jurisdiction to grant summary judgment. That analysis applies equally to the Reddock Case, and with some additional paragraphs to follow the quote, I incorporate my *Brazeau* decision into these Reasons for Decision *mutatis mutandis* as follows:

270. Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

271. *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[54] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[55]

272. Under rule 20.02(1), the affidavits for a summary judgment motion may be made on information and belief, but on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. The principles governing the admissibility of evidence are the same as apply at trial save for the limited exception of permitting an affidavit made on information and belief.[56] Where an affidavit relied upon in support of a motion for summary judgment does not state the source of the information and the fact of the deponent's belief, the court may nevertheless rely upon the substance of the exhibits to the affidavit in evaluating the merits of the case.[57] However, evidence of an expert witness may not be provided by the information and belief evidence of an affiant because the responding party should have the opportunity to cross-examine the expert.[58]

273. In *Hryniak v. Mauldin*[59] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[60] the Supreme

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[54] *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11; *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc.* (1994), 18 O.R. (3d) 481 (C.A.).
[55] *Toronto-Dominion Bank v. 466888 Ontario Ltd.*, 2010 ONSC 3798.
[56] *Sanzone v. Schecter*, 2016 ONCA 566 at para. 15; *Caithesan v. Amjad*, 2016 ONSC 5720 at para. 24.
[57] *Carevest Capital Inc. v. North Tech Electronics Ltd.*, 2010 ONSC 1290 at para. 16 (Div. Ct.).
[58] *Dutton v. Hospitality Equity Corp.*, [1994] O.J. No. 1071(Gen. Div.).
[59] 2014 SCC 7.

Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

274. If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings and to fairly and justly adjudicate the issues in the case.[61]

275. If a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial; this will be the case when the summary judgment process: (1) allows the judge to make the necessary findings of fact; (2) allows the judge to apply the law to the facts; and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.[62] The motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to make a fair and just determination.[63]

276. Turning to the case at bar, the Federal Government submits that there are numerous genuine issues that require a trial. It submits that these genuine issues cannot be and ought not to be dealt with summarily. For the reasons set out above and below that address the genuine issues, I disagree.

277. Although there are numerous issues, there is no paucity of evidence to resolve them, and, while there is a great deal of factual and legal work that has been done by the parties and that needs to be completed by the court, there is no need for that the work be completed by a trial process.

278. There is a ginormous evidentiary record, but apart from perhaps a more leisurely pace of presentation, the issues are capable of being fairly and proportionately resolved by a motion procedure.

279. There is no need to assume that the parties' put their best evidentiary foot forward; they did. Both parties lead their best trump hand that they could. While there are issues of credibility and reliability about the evidence of the inmates, those differences, which may make a difference at a Class Member's individual issues trial do not detract from my findings about how the Correctional Service manages and operates administrative segregation, which findings can be based on the Federal Government's own witnesses.

280. There was a fulsome cross-examination of the rival experts and the reports and the transcripts of the cross-examinations are all that is necessary to make findings of facts on a summary

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[60] 2014 SCC 8.
[61] *Campana v. The City of Mississauga*, 2016 ONSC 3421; *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.
[62] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49 and 50.
[63] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 51-55; *Wise v. Abbott Laboratories, Ltd.*, 2016 ONSC 7275 at paras. 320-336; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc*., 2016 ONSC 5784 at paras. 122-131.

> judgment motion.
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> 281. Justice Marrocco in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* decided substantial issues about administrative segregation by an application procedure, and, in my opinion, it is in the interests of justice to decide the common issues in the immediate case by a motion procedure.
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> 282. I am confident that the procedure will lead to a fair and just result that will also facilitate the individual issues trials that will follow.

[201] Although the Reddock Case adds a systemic negligence claim to the adjudicative workload, I see no reason to depart from the decision that I made in the *Brazeau* Case that although there are many genuine issues, they do not for fairness or for any other reason require a trial and the genuine issues may be determined by means of a summary judgment motion.

[202] Putting the systemic negligence claim aside, the *Charter* claims are reprised in the immediate case, and, as shall explain below, this time, I am prepared to rely on the doctrines of *res judicata*, issue estoppel, abuse of process, and *stare decisis*, which makes the Reddock Case even more appropriate for a summary judgment, than the *Brazeau* Case.

[203] Further, it does not follow from the indisputable truth that the Class Members, as individuals, have different offence and social histories, different mental or physical health needs, different treatment plans, different security ratings, different incompatibles, and different reasons for their segregation, that a trial as opposed to a summary judgment motion is required to determine whether the Federal Government contravened the *Charter* by placing inmates in administrative segregation without a meaningful review procedure. Associate Chief Justice Marrocco and the Court of Appeal were able to decide these issues without a trial in the *Cdn Civil Liberties Assn* Case, and I was able to decide similar issues in the *Brazeau* Case on a summary judgment motion.

[204] Although I did not make such a determination in the *Brazeau* Case of compensatory damages, as I shall explain below, based on the evidence in the Reddock Case and a new argument made in the Reddock Case about the significance of the Supreme Court's decisions in *Saadati v. Moorhead* [64] and *Mustapha v. Culligan of Canada Ltd.*,[65] about damages for mental harm, I am fairly able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for systemic negligence.

[205] Nor is a trial required to determine the issue of the application of limitation periods, the general causation issue, the issue of the availability of aggregate damages, or the issue of whether there is a base level of damages suffered when a Class Member is placed is placed in administrative segregation.

[206] Nor does it follow that a trial is required to determine the fundamentally legal issues about the principles from *Vancouver (City) v. Ward* [66] and *Mackin v. New Brunswick (Minister of Finance),*[67] about the availability of *Charter* damages.

[207] Nor is a trial required to determine whether the Federal Government has a duty of care to

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[64] 2017 SCC 28.
[65] 2008 SCC 27.
[66] 2010 SCC 27.
[67] 2002 SCC 13.

the Class Members. Indeed, this issue, which is heavily nuanced with legal principles, might have been decided on a Rule 21 motion, which depending on what branch of the rule is relied on, can be decided based on the pleadings and without evidence. In the immediate case, of course, I have had copious evidence about the Correctional Services responsibilities and the surrounding circumstances.

[208] Further, while I agree with the Federal Government's submission that a detailed analysis of the decades of policy changes and recommendations of multiple stakeholders is necessary to determine the appropriate standard of care, I do not agree with the hidden suggestion that a summary judgment motion entails that this analysis will be "done in a summary fashion". A summary judgment motion does not preclude a detailed analysis, and a trial is not required in the Reddock Case for a detailed analysis of the standard of care over the class period, which I note has been substantially shorted by the application of limitation periods.

[209] I conclude that the Reddock Case is an appropriate case for a summary judgment.

G. Discussion and Analysis: *Res Judicata*, Issue Estoppel, Abuse of Process, and *Stare Decisis*

[210] Class Counsel submits that as a matter of *res judicata*, issue estoppel, abuse of process, or *stare decisis*, the following legal and factual issues were conclusively decided in the *Cdn Civil Liberties Assn, BC Civil Liberties Assn*, and *Brazeau* Cases and these decisions bind and apply to the Federal Government in the Reddock Case; namely:

i. The Mandela Rules promulgated by the United Nations represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined;

ii. The Mandela Rules constitute an authoritative interpretation of the Federal Government's obligations under the CAT and the ICCPR;

iii. Administrative segregation constitutes solitary confinement within the meaning of the Mandela Rules;

iv. Detaining an inmate in administrative segregation for more than fifteen consecutive days imposes psychological stress capable of producing serious, and event permanent negative effects on mental health;

v. The harmful effects of administrative segregation can occur within forty-eight hours;

vi. Detaining an inmate in administrative segregation for more than fifteen consecutive days poses a significant risk of serious psychological harm;

vii. The practice of detaining an inmate in administrative segregation for more than fifteen consecutive days is offside responsible medical opinion;

viii. There is no independent review of the decision to admit an inmate to administrative segregation, or the decision to maintain an inmate's detention once admitted; and

ix. The effect of detaining an inmate in administrative segregation for more than fifteen consecutive days is grossly disproportionate and it cannot be justified in a

free and democratic society.

[211] *Res judicata*, issue estoppel, and abuse of process, which are related and partially overlapping legal doctrines, are bars to litigation that preclude a party from re-litigating a claim, a defence, or an issue that has already been determined. Cause of action estoppel, which is a branch of *res judicata*, precludes a litigant from asserting a claim or a defence that: (a) it asserted; or (b) it had an opportunity of asserting and should have asserted in past proceedings, which is the rule from *Henderson v. Henderson*.[68] Issue estoppel, another branch of *res judicata*, precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point already decided in a proceeding in which the litigant participated.

[212] The requirements for an issue estoppel are: (1) the parties or their privies must be the same; (2) the same question must be involved in the initial and subsequent hearing; (3) the question must have been actually litigated and determined in the first hearing and its determination must have been necessary to the result; and (4) the decision on the issue must have been final.[69]

[213] Abuse of process is a doctrine that a court may use to preclude re-litigation of a cause of action or an issue. The court has an inherent jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute, and the court can and has used this jurisdiction to preclude re-litigation when the strict requirements of *res judicata* or issue estoppel are not satisfied.[70]

[214] In *Danyluk v. Ainsworth Technologies Inc*.[71] and in *Penner v. Niagara (Regional Police Services Board)*,[72] the Supreme Court added a discretionary element to *res judicata* and to the flexible doctrine of abuse of process. The Supreme Court held that where a party establishes the pre-conditions for an issue estoppel or an abuse of process, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The court should stand back and, taking into account the entirety of the circumstances and consider whether an estoppel in the particular case would work an injustice.

[215] In *Danyluk v. Ainsworth Technologies Inc*. and in *Penner v. Niagara (Regional Police Services Board)* the Court recognized that there may be situations where re-litigation would enhance the integrity of the judicial system; for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. In these instances, the subsequent proceeding would not be an abuse of process.

[216] In the *Brazeau* Case, Class Counsel submitted that there were issue estoppels binding on the Federal Government arising from the *Cdn Civil Liberties Assn* and the *BC Civil Liberties*

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[68] (1843), 67 E.R. 313, 3 Hare 100.
[69] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44.
[70] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77; *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at paras. 55-56, *per* Justice Goudge dissenting (C.A.), approved [2002] 3 S.C.R. 307.
[71] 2001 SCC 44.
[72] 2013 SCC 19.

Assn Cases, but in the *Brazeau* Case, I declined to preclude the Federal Government from asserting a position that was contrary to an issue already decided in the interconnecting cases, and so I decided to make my findings on the substantive merits based on the evidence presented in the *Brazeau* Case. In the *Brazeau* Case, I felt that it was too late to prevent re-litigation, and no purpose would be served by imposing an issue estoppel, and it would not be fair nor in the interests of justice to impose an issue estoppel.

[217] I shall, however, exercise my discretion about issue estoppels differently in the Reddock Case. In the analysis and discussion below, I shall rely on both my findings of fact based on the evidentiary record in the Reddock Case and also on the findings of fact in the *Cdn Civil Liberties Assn* Case and the *BC Civil Liberties Assn* Case, both of which were affirmed by appellate courts after I released my decision in the *Brazeau* Case. Further, I shall rely on my findings of fact in the *Brazeau* Case as raising issue estoppels

[218] Practically speaking, that I am imposing binding issue estoppels from the interconnected case is actually of little import, because I can say that based on the evidence presented just in the Reddock Case, my factual and legal analysis would be the same.

[219] Practically speaking, applying issue estoppels has not prevented re-litigation because the Federal Government has reargued the evidence much of which overlaps with the evidence in the interconnected cases, and, practically speaking, applying issue estoppels coincidentally has led to consistent results.

[220] Since I would come to the same result without relying on issue estoppels, relying on issue estoppels just confirms my own findings of fact. Further, I see no unfairness in imposing binding issue estoppels against the Federal Government, because as I shall reveal below, the Federal Government heavily relies on an issue estoppel arising from the appellate decisions in the *Cdn Civil Liberties* Case and the *BC Civil Liberties Assn* Cases. What's good for the goose is good for the gander.

[221] The matter of *stare decisis* is, of course, different. I have no discretion and I am bound to apply the law spoken by the Ontario Court of Appeal and by the Supreme Court of Canada, and I am bound to respect the decision of the British Columbia courts.

[222] *Stare decisis* is the name for the doctrine of precedent that governs the application of the law in civil and criminal proceedings. It means "to stand by decided matters" and comes from the Latin phrase "*stare decisis et non quieta movere*" which means "to stand by decisions and not to disturb settled matters". That courts follow and apply precedents is a foundational principle upon which the common law relies.[73] In *Sriskandarajah v. United States of America*,[74] Chief Justice McLachlin speaking for the Supreme Court of Canada stated at paragraph 18:

> 18. The Court does not lightly depart from the law set out in the precedents. Adherence to precedent has long animated the common law: "... it is an established rule to abide by former precedents, where the same points come again in litigation" (W. Blackstone, *Commentaries on the Laws of England* (4th ed. 1770), Book I, at p. 69). The rule of precedent, or *stare decisis*, promotes predictability, reduces arbitrariness, and enhances fairness, by treating like cases alike.

[73] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 38.
[74] 2012 SCC 70.

[223] In operation, the doctrine of precedent has two aspects known as vertical *stare decisis* and horizontal *stare decisis.*[75] Vertical *stare decisis* is the idea that lower ranking courts are bound to follow the authorities or precedents established by courts ranking higher in the administration of justice.[76] Horizontal *stare decisis* is the idea that with a few exceptions, a court at any level of the court hierarchy should not depart from its own precedents.[77]

[224] The doctrine of *stare decisis* is subordinate to the constitution and when it is arguable that a law contravenes the *Charter*, a lower court may revisit a binding precedent if new *Charter* issues are raised or if new issues are raised because of significant developments in the law or in the evidence fundamentally shifts the parameters of the debate.[78]

[225] As a matter of law, appellate courts, in cases with substantially identical facts to those in the Reddock Case have ruled that the *Corrections and Conditional Release Act* contravenes sections 7 and 12 of the *Charter*. The Ontario Court of Appeal has ruled that administrative segregation for more than fifteen days is cruel and unusual treatment contrary to s. 12 of the *Charter*. Those decisions are precedents to be applied in the Reddock Case.

[226] I am bound by these decisions. That said, practically speaking, once again, if the case at bar was a case of first instance, I would have decided it the same way.

H. Discussion and Analysis: Limitation Period for the Class Members' Claims

[227] Limitations periods apply to the Class Members' systemic negligence claim and to the claim for damages under s. 24 of the *Charter.*[79]

[228] Section 32 of the *Crown Liability and Proceedings Act*[80] states:

> *Provincial laws applicable*
>
> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

[229] In the *Brazeau* Case, I held that the claims of Class Members are subject to a presumptive six-year limitation period under s. 32 of the *Crown Liability and Proceedings Act*, given that they are proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province". Class Counsel submit that the same presumptive limitation period should apply to the Reddock Case.

[230] My reasoning in the *Brazeau* Case was that collectively and individually, the facts giving

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[75] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 39.
[76] *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235; *Woods Manufacturing Co. v. Canada (Attorney General)*, [1951] S.C.R. 504; *RSG Mechanical Inc. v. 1398796 Ontario Inc*., 2015 ONSC 2070 (Div. Ct.).
[77] *Sriskandarajah v. United States of America*, 2012 SCC 70; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24; *Segnitz v. Royal & SunAlliance Insurance Co. of Canada*, (2005), 76 O.R. (3d) 161 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 388.
[78] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 38-45.
[79] *Ravndahl v. Saskatchewan*, 2009 SCC 7.
[80] R.S.C. 1985, c. C-50, s. 32

rise to the *Charter* violations arise in more than one province. With a head office in Ottawa, Ontario, the Correctional Service operates and administers the federal penitentiaries by dividing the provinces and territories of Canada into five regions. The administration of the prisons is pursuant to federal legislation. Regardless of where the crime has been committed, prisoners may be placed in penitentiaries across the country. Prisoners are moved from penitentiaries in one region to penitentiaries in another. Staff are moved from one province to another. For an inmate who has spent sixty days or more in administrative segregation, the case is reviewed by a national committee Administrative Segregation and the *Charter*.

[231] In *Markevich v. Canada*,[81] a case about the payment of income taxes, the majority of the Supreme Court held that in providing for a limitation period of six years to apply to proceedings in respect of a cause of action arising otherwise than in a province, Parliament intended for limitation provisions to apply uniformly throughout the country.

[232] In the immediate case, in my opinion, insofar as causes of action are advanced against the Correctional Service, Parliament intended the limitation provisions to apply uniformly throughout the country.

[233] An example makes the point; visualize: three inmates are imprisoned in Ontario and one inmate is placed in prolonged administrative segregation for security reasons to be moved to a penitentiary in British Columbia; the second inmate is placed in prolonged administrative segregation for security reasons to be moved to a different penitentiary in Ontario; and the third inmate is moved from Ontario to British Columbia to complete his sentence and is placed in prolonged administrative segregation in British Columbia for security reasons. All the inmates have causes of action that their respective placements in administrative segregation were contrary to the *Charter*. How then could it be fair and just to interpret and apply s. 32 of the *Crown Liability and Proceedings Act* so that there is a different limitation periods for the three inmates to advance their *Charter* claims? The answer to that rhetorical question is that it would not be fair and justice, and Parliament would have intended the limitation period to apply uniformly throughout the country.

[234] Notwithstanding the Federal Government's arguments in the immediate case, I am not persuaded that I should change the decision I made in the *Brazeau* Case.

[235] In the Reddock Case, as is the situation in the *Brazeau* Case, the Class Members' claims are subject to a presumptive six-year limitation period. The claims before March 3, 2011 are statute-barred. This determination is without prejudice to the Class Members at individual issues trials rebutting the limitation period on the basis of discoverability or disability for all or part of the time that the limitation period would otherwise have run.

I. Discussion and Analysis: The Class Members' *Charter* Claims

1. Section 9 of the *Charter*

[236] Although Mr. Reddock's claim with respect to a breach of s. 9 of the *Charter* was certified, it was not pursued on the summary judgment motion and it should be treated as

[81] 2003 SCC 9.

discontinued or abandoned.

2. Section 11 (h) of the *Charter*

[237] Class Counsel in the Reddock Case, one of whom was counsel in the *Cdn Civil Liberties Association* Case, repeats the argument in that case that administrative segregation violates s. 11 (h) of the *Charter*, a no double jeopardy provision, which provides:

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

[238] Counsel in the *Cdn Civil Liberties Assn* Case submitted that administrative segregation violates s. 11 (h) of the *Charter* because administrative segregation constitutes further punishment. This argument was rejected by Associate Chief Justice Marrocco, and the argument was rejected by the Court of Appeal on the Association's appeal. Justice Benotto stated at paragraphs 134 – 143:

> 134. It was argued below that s. 31(3) [of the *CCRA*] violates s. 11(h) because it can be used to segregate and thereby punish inmates who have done nothing to threaten the safety of the institution or any other person -- such as in the case of inmates who identify as LGBTQ and are voluntarily or involuntarily being placed in administrative segregation for their own protection. In those circumstances, the nature of the inmate's incarceration is changed and a harsher sanction is imposed than what was contemplated at the time of sentencing.
>
> 135. The application judge rejected these arguments and concluded that s. 11(h) did not apply because administrative segregation for the purposes of protecting an inmate: (1) did not prolong the duration of an inmate's sentence; (2) did not retrospectively frustrate an inmate's reasonable expectation of liberty; (3) was not a sanction under the Criminal Code and did not arise from a criminal proceeding; (4) was reasonably foreseeable at the time of sentencing for those such as informants, Crown witnesses, and others who are incompatible with other inmates; and (5) was not imposed for the purpose or principles of sentencing.
>
> 136. The CCLA submits that for prisoners who have done nothing wrong and are segregated for their own protection, administrative segregation, which is harsh and punitive, constitutes an additional punishment for purposes of s. 11(h). Indefinite segregation fundamentally changes the nature of incarceration beyond that imposed at sentencing. Inmates cannot be taken to have expected to be segregated in a manner that is "offside responsible medical opinion" and carries a real risk of harm. A non-disciplinary prison proceeding can be punitive for the purposes of s. 11(h).
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> 137. The CCLA relies primarily on *Whaling v. Canada (Attorney General)*, 2014 SCC 20, [2014] 1 S.C.R. 392, in arguing that s. 31(3) violates the prohibition against imposing "punishment... again". In *Whaling*, the court revisited the Supreme Court's prior evolving jurisprudence on s. 11(h), including: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Shubley*, [1990] 1 S.C.R. 3.
>
> 138. In *Whaling*, what was at issue was the retrospective application of the repeal of the accelerated parole review, or APR. The court stated that "the dominant consideration in each case will ... be the extent to which an offender's settled expectation of liberty has been thwarted by retrospective legislative action": at para. 60. The court concluded that there was a violation of s. 11(h). The effect of repealing APR retrospectively was to delay the applicants' eligibility for early day parole even though APR was in effect when they were convicted.
>
> 139. According to *Whaling*, s. 11(h) may be engaged even where there is no second proceeding but where a person is "punished again". As *Whaling* indicates, the scope of "punishment" in the context of s. 11(h) has expanded over the years.

> 140. Under *Rodgers*, "the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is imposed in furtherance of the purpose and principles of sentencing": at para. 63. Here, the additional "punishment" is said to be a change in the conditions of imprisonment for the purpose of protecting the inmate's safety and not for the purpose or principles of sentencing.
>
> 141. In *Whaling*, Wagner J. noted that the problem with the *Rodgers* test is that it does not assist in identifying situations in which, from a functional rather than a formalistic perspective, the harshness of the punishment has been increased: at para. 42. He also noted that "[g]enerally speaking, offenders have constitutionally protected expectations as to the duration, but not the condition, of their sentences": at para. 57.
>
> 142. *Whaling* expressly deals with retrospective legislative changes to the parole system. Here, there is no change to the system of administrative segregation under the Act that results in changes to the length of an inmate's incarceration. Assuming that the "offender's settled expectation of liberty" is relevant even where there is no retrospective legislative action, the application judge found that there was no frustration of an inmate's reasonable expectation of liberty.
>
> 143. As I see no error in the application judge's analysis with respect to s. 11(h), I would dismiss the CCLA's claim on this issue.

[239] I am bound by the Court of Appeal's decision in the *Cdn Civil Liberties Assn* Case and on the issue of whether administrative segregation violates s. 11 (h) of the *Charter*, the Reddock Case is both factually and legally indistinguishable. I, therefore, dismiss Mr. Reddock's claim based on s. 11 (h) of the *Charter*.

3. Section 7 of the *Charter*

[240] Sections 1 and 7 of the *Charter* state:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 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.

[241] While there are severally highly contentious issues about whether the Correctional Service breached the *Charter*, there is no question that the Federal Government has violated on a class-wide basis s. 7 of the *Charter* at least insofar as the legislation authorizing administrative segregation does not provide for an independent review of the decision to place an inmate in administrative segregation, which the Federal Government concedes is a violation of a residual right to liberty.[82]

[242] In the *Cdn Civil Liberties Assn* Case, Associate Chief Justice Marrocco found that there was a breach of s. 7 of the *Charter* because of an inadequate system to review placements into administrative segregation, and the Federal Government did not challenge that finding on the appeal. In the *BC Civil Liberties Assn* Case, Justice Leask made a similar finding, and the Federal Government did not appeal that finding. In *Brazeau*, I found that the Federal Government's failure to provide an independent review mechanism for the decision to segregate

[82] Every prisoner retains a "residual liberty right" under s. 7 of the *Charte*r: *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at p. 625.

constitutes a class-wide, a stand-alone, breach of s. 7 of the *Charter*. Once again, in the immediate case, the Federal Government concedes that - its legislation - constitutes a violation of s. 7 of the *Charter* and that the violation cannot be saved by s. 1 of the *Charter*.

[243] However, in the immediate case, the Federal Government denies any other breaches of s. 7 of the *Charter.* In the case at bar and in the *Brazeau* Case, the Federal Government conceded that a residual liberty interest of an inmate may be interfered with when an inmate is placed in administrative segregation; however, in the immediate case, it denies that the rights to life and security of the person are engaged, and the Federal Government submits that a placement in administrative segregation accords with the principles of fundamental justice. It submits that – the Correctional Service's actions - in performance of the *Corrections and Conditional Release* Act, do not violate s. 7 of the *Charter*. [83]

[244] This argument, as I shall note again later in the discussion below of the *Mackin* principle is fundamentally inconsistent with the position that the Federal Government took in the *Canadian Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases. In those cases, the Federal Government submitted that the *CCRA* itself was constitutional and that any *Charter* breaches were associated with the Correctional Service's conduct misapplying the *CCRA.* In other words, in *Canadian Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases, the Federal Government placed the blame on how the *CCRA* was administered and in the Reddock Case, it places the blame exclusively on the *CCRA* itself. Because of these inconsistent arguments, ultimately, I need to characterize whether the alleged *Charter* breaches are a matter of government legislation or a matter of government action. I will do that characterization later in the discussion of the *Macklin* principle.

[245] For present purposes of discussing s. 7 of the *Charter,* I will assume that the impugned conduct of the Correctional Service can be characterized as government action in whole or in part, and I shall assess whether Class Counsel has demonstrated that there has been a breach of s. 7 of the *Charter* by the Correctional Service's placement of the Class Members in administrative segregation for more than fifteen days.

[246] For present purposes, it is necessary, once again, to examine whether a s. 7 *Charter* right is engaged. In the Reddock Case, Class Counsel submitted that the Federal Government breached the Class Members' right to life by subjecting them to a practice that creates a significant risk of suicide. And, Class Counsel submitted that the Federal Government breached the Class Members' right to security of the person because a placement in administrative segregation for more than fifteen days puts the inmate at risk of harm and does actually harm the inmate. Class Counsel submits that the breaches of s. 7 of the *Charter* were not done in accordance with the principles of fundamental justice because the placement in administrative segregation was both an overbroad and disproportionate government action.

[247] Class Counsel submits that the instrumentality of administrative segregation unnecessarily imposes a cruel and unusual treatment as its means of securing the safety of the

[83] This submission about the nature of the s. 7 violation, also fuels the Federal Government's argument, discussed later in these Reasons for Decision, that the principle from *Mackin v. New Brunswick (Minister of Finance* immunizes the government from having to pay *Charter* damages under s. 24 (1) of the *Charter* and rather limits the Class Members' to a remedy only under s. 52 (1) of the *Constitution Act, 1982*.

prison and the prison population. Class Counsel also submits that administrative segregation contravenes the principles of fundamental justice because it operates operate in a way that is overbroad and disproportionate.

[248] In the case at bar, the Federal Government disputes Class Counsel's submission that its actions with respect to administrative segregation constitute a violation of both an inmate's right to life and also his or her right to security of the person. Further, the Federal Government disputes that Class Counsel can even make these submissions because these alleged violations of s. 7 of the *Charter* have not been properly or adequately pleaded. In this regard, the Federal Government's Amended Notice of Motion makes no mention of life or security of the person, and the Fresh as Further Amended Statement of Claim mentions security of the person only once, in the list of damages.

[249] Further still and in any event, the Federal Government submits that if there has been a violation of an inmate's right to life or security of the person when an inmate is placed in administrative segregation for more than fifteen days, the placement in administrative segregation accords with the principles of fundamental justice. And, it argues that it is impossible to conclude that segregation for more than fifteen days will deprive every Class Member of his or her life or security of the person. In other words, the Federal Government disputes that a violation of the s. 7 of the *Charter* can be shown on a class-wide basis.

[250] Before beginning the analysis of s. 7, to address first the pleadings point, the evidence for the summary judgment motion would be no different had Mr. Reddock been more effusive in mentioning life and security of the person in his pleadings. Further, I think the issue of the manner in which s. 7 is alleged to have been breached is within the scope of the common issues that are before the court. Further still, if necessary, I would grant leave to amend the pleading at the summary judgment motion as it might have been amended at a trial. The Federal Government's pleading point fails and is no obstacle to deciding whether the Federal Government has breached s. 7 of the *Charter*.

[251] The analysis of whether the Class Members' rights under s. 7 of the *Charter* begins with the observation that as acknowledged by the *Corrections and Conditional Relief Act*, inmates of federal penitentiaries do not lose all their legal rights. The Class Members' are protected by the *Charter*. The judiciary is the guardian of the Constitution and the *Charter* should be used for the "unremitting protection of individual rights and liberties": *Hunter v. Southam Inc.*,[84] *per* Justice Dickson, as he then was. Inmates are protected by the *Charter*, and as Chief Justice McLachlin noted, prisoners are not outcasts from the Canadian system of rights.[85]

[252] To demonstrate that government action has infringed s. 7 of the *Charter*, a plaintiff must demonstrate that: (a) the action interferes with or deprives individuals of life, liberty, or security of the person; and (b) the deprivation is not in accordance with a principles of fundamental justice.[86] To demonstrate that government action has infringed s. 7 of the *Charter*, a plaintiff must identify and define the relevant principles of fundamental justice that apply, and then show

[84] [1984] 2 S.C.R. 145 at p. 155.
[85] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 40.
[86] *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.

that the infringement or deprivation of rights does not accord with the identified principles.[87]

[253] Principles of fundamental justice are basic tenets of the Canadian legal system.[88] To establish that a rule or principle is a principle of fundamental justice, the plaintiff must show that it is a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[89] The principles of fundamental justice are concerned not only with the interests of the person who claims that his or her liberty has been limited but with the protection of society; fundamental justice requires a fair balance, both procedurally and substantively, between these interests.[90] A principle of fundamental justice can be established through international law, if the international law is shown to be a principle that is part of international customary law or is incorporated into Canadian domestic law in some way.[91]

[254] A principle of fundamental justice is that laws infringing on life, liberty or security of the person must not be overbroad, which is to say that there is no rational connection between the purpose of the impugned provisions and some of its impacts.[92]

[255] Imprisonment and the imminent threat of imprisonment engage the liberty interest under s. 7 of the *Charter*.[93] Every prisoner retains a residual liberty right under s. 7 of the *Charter* relating to the nature of his incarceration.[94] In *R. v. Boone*,[95] the Ontario Court of Appeal noted that a decision to transfer an inmate to the more restrictive institutional setting of administrative segregation is a significant deprivation of the inmate's residual liberty interests and therefore engages s. 7 of the *Charter*.[96] The Court also stated that there has been a growing recognition that solitary confinement is a very severe form of incarceration that can have a lasting psychological impact on prisoners.[97]

[256] The right to life is engaged where a law or government action directly or indirectly imposes death or an increased risk of death on a person.[98]

[257] Government action deprives or infringes the security of the person when it seriously impairs one's physical or mental health or causes severe psychological harm.[99] State imposed serious psychological stress constitutes a breach of security of the person.[100] To constitute an infringement to a person's security of the person, the impact of the government action on

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[87] *R. v. Malmo-Levine*, 2003 SCC 74 *R v. White*, [1999] 2 S.C.R. 417.
[88] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
[89] *R. v. Malmo-Levine*, 2003 SCC 74; *R v. White*, [1999] 2 S.C.R. 417.
[90] *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at pp. 151-2 *per* McLachlin, J.; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 502-3 *per* Lamer, J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at p. 212 *per* Wilson, J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 828 *per* Iacobucci, J.
[91] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.
[92] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 72, 85-88*; Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 93-119*; British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228.
[93] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
[94] *R. v. Gamble*, [1988] 2 S.C.R. 595 at p. 645; *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at p. 625.
[95] 2014 ONCA 515.
[96] *May v. Ferndale Institution*, 2005 SCC 82; *R. v. Boone*, 2014 ONCA 515; *R v. Miller*, [1985] 2 S.C.R. 613.
[97] *R. v. Boone*, 2014 ONCA 515 at para. 3.
[98] *Carter v. Canada (Attorney General)*, 2015 SCC 5.
[99] *Carter v. Canada (Attorney General)*, 2015 SCC 5.
[100] *Blencoe v. B.C. (Human Rights Commission).*, 2000 SCC 44.

psychological integrity need not rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety.[101]

[258] In *R. v. Morgentaler*,[102] *Chaoulli v. Canada*,[103] *Canada (AG) v. PHS Community Services Society*,[104] and *Carter v. Canada*,[105] which all involved state interference to access to medical treatment, the Supreme Court held that a risk of harm is sufficient to engage the right to security of the person and that state interference with a woman's access to medical treatment constituted a deprivation of security of the person. In *Bedford v. Canada*,[106] the Supreme Court ruled that legislation that increases sex workers' risk of harm constitutes unlawful interference with security of the person.

[259] In the *BC Civil Liberties Assn* Case, Justice Leask found that administrative segregation engages an inmate's right to life under s. 7 of the *Charter*. In the *Brazeau* Case, I concluded that that the placement of a mentally ill inmate in administrative segregation engages the inmate's right not to be deprived of life because of the increased risk of suicide. Although the class in the Reddock Case excludes the mentally ill inmates that constituted the class in *Brazeau*, the evidence in the immediate case establishes that administrative segregation creates an increased risk of suicide for all Class Members, thereby infringing the right to life under s. 7 of the *Charter*.

[260] In the case at bar, I find as a fact that suicide is a common response to administrative segregation. Mr. Reddock, Mr. McConville, and Mr. McMath all contemplated suicide, while Mr. Snowshoe and Ashley Smith actually were successful in killing themselves in response to the stresses of segregation. Dr. Grassian, Dr. Hannah-Moffat, and Dr. Martin all opined that administrative segregation puts inmates at an increased risk of self-harm and suicide.

[261] In the *Cdn Civil Liberties Assn* Case, the Ontario Court of Appeal accepted that although there was a need for prison staff to respond to the security concerns of the penitentiary environment nevertheless, administrative segregation becomes cruel and unusual after fifteen days, and it cannot be justified for any prisoner. The Federal Government is now in the process of eliminating administrative segregation entirely by introducing SIUs. Although it remains to be determined whether SIUs will survive constitutional challenge, the modifications to the nature of segregation could and should have been made decades ago based on the recommendations of Justice Arbour and many others.

[262] In the Reddock Case, I find as a fact, and I find as a matter of issue estoppel and as a matter of *stare decisis* that all the Class Members, who all at one or more times were placed in administrative segregation for more than fifteen days, actually suffered an infringement of their right to life and their right to security of the person.

[263] Thus, in the Reddock Case, on a class-wide basis, I conclude that there has been a violation of the inmates' right to life, liberty, and security of the person.

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[101] *New Brunswick (Minister of Health and Community Services)* v. G. (J.), [1999] 3 S.C.R. 46 at para. 60.
[102] [1988] 1 S.C.R. 30.
[103] 2005 SCC 35.
[104] 2011 SCC 44.
[105] 2015 SCC 5.
[106] 2013 SCC 72.

[264] In the *BC Civil Liberties Assn* Case, Justice Leask ruled that administrative segregation, which he equated to solitary confinements, is overbroad in two respects; he stated at paragraphs 326 and 327 of his decision:[107]

> 326. However, I find that the impugned provisions are overbroad in two respects First, while temporary segregation is rationally connected to the objective of security and safety, prolonged segregation, which the provisions also permit, inflicts harm on inmates and ultimately undermines institutional security. Second, the provisions define segregation overly restrictively and authorize solitary confinement in circumstances where some lesser form of restriction would achieve the objective of the provision.
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> 327. Prolonged segregation is both unnecessary for and, indeed, even inconsistent with, the objective of maintaining institutional security and personal safety. While the separation of inmates can be justified for the limited time it legitimately takes to make alternative arrangements to ensure inmate safety or enable an investigation, indefinite and prolonged segregation with its attendant harms is simply not necessary to enable such steps to be taken. To my mind, there is no rational connection between, for example, the legitimate need for CSC to have the authority to separate inmates who have a conflict with one another and the authority to keep one or both in segregation indefinitely for periods of months or even years.

[265] I agree with Justice Leask and also conclude that the Correctional Service has breached on a class wide basis the Class Members' s. 7 rights and that the contravention does not accord with the principles of fundamental justice.

[266] As I shall explain later in these Reasons for Decision under the heading "Section 1 of the *Charter*," the contravention of s. 7 is not saved by s. 1 of the *Charter*.

[267] I shall discuss below whether the Federal Government's violation of s. 7 because the enabling legislation for administrative segregation does not provide for an independent review of the decision to place an inmate in administrative segregation, causes damages on a class-wide basis. Putting aside that issue of causation with respect to the absence of an independent review, the other violations of the inmates' s. 7 rights did cause damages on a class-wide basis.

[268] The contraventions of the rights to life, liberty, and security of the person caused severe psychological distress, including anxiety, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. There are new psychological symptoms and exacerbated psychiatric conditions in those with diagnosed or undiagnosed mental illnesses. The negative health effects from administrative segregation can occur within a few days of segregation and those harms increase as the duration of the time in administrative segregation increases and the expert evidence in the immediate case establishes that there is physical and mental harm from prolonged administrative segregation, which is to say that every inmate placed in administrative segregation for more than fifteen days suffers a base level of psychiatric and physical harm.

[269] The personal stories, Messrs. Campbell, Cansanay, McMath, Reddock, and Spence about their experiences in administrative segregation, the academic literature, and the expert evidence of Drs. Chaimowitz, Grassian, and Martin and of Professor Méndez prove that while an inmate

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[107] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at paras. 326-327.

will suffer differentially from his or her placement in administrative segregation, they will also suffer to some degree and there is a base level of suffering that all will suffer from a placement in administrative segregation for more than fifteen days.

[270] In a factual finding that was upheld by the Ontario Court of Appeal in the *Cdn Civil Liberties Assn* Case, Associate Chief Justice Marrocco concluded that keeping a person in administrative segregation exposes that person to abnormal psychological stress. The evidence in the immediate case (and also the evidence in the *Brazeau* Case) revealed that once the placement had become prolonged the stress and anxiety was serious and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd*.[108] and *Saadati v. Moorhead*,[109] the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary. In *Mustapha* and in *Saadati*, the Supreme Court spoke about the comparator of stress and anxiety in a civil society but the point to emphasize is that to be a compensable harm, the stress and anxiety must be serious and extraordinary. The evidence in the Reddock Case proves that the stress and anxiety from prolonged administrative segregation rises to the level that the inmate suffers a mental shock that is a compensable harm.

[271] That there is a base level of harm for every inmate is now a matter of issue estoppel and *stare decisis*. In this regard, it is worth noting that in the *Cdn Civil Liberties Assn* Case, although the Ontario Court of Appeal was not prepared to find that administrative segregation was inherently cruel and unusual punishment for young persons or persons with a mental illness, it included these inmates as those suffering a cruel and unusual punishment if the segregation was more than fifteen days. It was the prolonged duration of the administrative segregation, not the idiosyncratic character of the inmate, that was determinative. Justice Benotto stated at paragraphs 66-67 of her judgment:

> 66. While I agree with the application judge's resolution of the apparent conflict between CD-709 and the Act, I do not share his confidence about the efficacy of s. 87(a) in preventing serious harm to inmates with a mental illness. In principle, I agree with the CCLA that those with mental illness should not be placed in administrative segregation. However, the evidence does not provide the court with a meaningful way to identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation for any length of time cruel and unusual. I take some comfort in my view that a cap of 15 days would reduce the risk of harm to inmates who suffer from mental illness -- at least until the court has the benefit of medical and institutional expert evidence to address meaningful guidelines. This issue therefore remains to be determined another day.
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> 67. Based on the record as it presently exists, I would not therefore make the determination sought by the CCLA on this issue.

[272] Thus, the Court of Appeal's decision was categorical about administrative segregation being unconstitutional when the placement was for more than fifteen days. And the unconstitutionality was universal for anyone placed in administrative segregation and not based on personality traits of the inmate. Moreover, the universality did not distinguish between voluntary or involuntary admissions to administrative segregation.

[273] In the *Brazeau* Case, based on the evidence I read, including the scientific literature, I

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[108] 2008 SCC 27.
[109] 2017 SCC 28.

was satisfied that it made a difference to the constitutionality of administrative segregation whether the inmate was placed in segregation involuntarily or voluntarily. However, as a matter of law, the distinction between voluntary and involuntary has been overturned by the Ontario Court of Appeal. For the present purposes of the Reddock Case, all Class Members are to be treated as having involuntary placements, which the evidence shows was likely the case for the majority of the Class Members anyway. (It may be that the judgment in the *Brazeau* decision needs to be varied accordingly, and later in this decision, I discuss reconciling the Reddock, Gallone, *Brazeau*, *BC Civil Liberties Assn, Cdn Civil Liberties Assn* Cases).

[274] Before concluding the discussion of s. 7 of the *Charter,* I return to the topic of whether the absence of an independent review process of the placements in administrative segregation caused damage on a class-wide basis.

[275] It cannot be categorically concluded that every Class Member suffered physical or psychiatric harm as a result of the absence of an independent review process because some inmates would not have sought a review and it is a matter of speculation that inmates who did seek a review would have been successful had a meaningful review been conducted impartially. However, it does not follow that the contravention of s. 7 of the *Charter* because of the absence of an adequate review system did not cause compensable *Charter* damages.

[276] As discussed further later in the discussion of *Charter* damages, the contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages even if every member of the class could not be said to have suffered physical or psychiatric harm. Moreover, and more to the point, every inmate would have suffered general damages for the assault on their *Charter* rights.

[277] By way of analogy as a tort, assault does not require proof of personal harm in order to support an award of general damages. The assault in and of itself justifies an award of general damages and the situation ought to be the same for the assault on *Charter* rights. Other causes of action justify damages awards notwithstanding that the victim did not suffer any pecuniary or non-pecuniary losses; visualize, nominal damages are awarded for a breach of contract when no actual damages are proven.

[278] Further, the case law reveals that compensation for personal loss or personal injury is not necessary for an award of *Charter* damages. For example, in *Du-Lude v. Canada,*[110] in breach of his s. 12 rights, a soldier was imprisoned for a weekend and he received *Charter* damages of $10,000, even though he suffered no substantial harm. In *Vancouver (City) v. Ward,*[111] discussed at length later in these Reasons for Decision, the plaintiff received *Charter* damages for a strip search that caused him no harm.

[279] Professor Kent Roach, in his article "A Promising Late Spring for Charter Damages: *Ward v. Vancouver*"[112] at pp. 144-145 explains that *Charter* damages extend beyond pecuniary losses; he stated:

> The Supreme Court has defined the compensatory purposes of *Charter* damages very broadly to include "physical, psychological and pecuniary" loss as well as harm to "intangible interests"

[110] [2001] 1 F.C. 545 (Fed. C.A.).
[111] 2010 SCC 27.
[112] (2011) 29 Nat'l J. Const. L 135 at pp. 144-45.

> including “distress, humiliation, embarrassment, and anxiety” as well as “pain and suffering”. The court has explicitly ruled that it is an error to restrict damages to pecuniary losses, and this holding effectively reverses many early *Charter* cases that implicitly or explicitly limited *Charter* damages in such a manner. The court’s approach is appropriate because the *Charter* is designed to protect many important non-pecuniary values including fairness, privacy, security of the person, liberty and equality. Although "non-pecuniary damages are harder to measure” than pecuniary losses and require a "fairly modest conventional rate, subject to variation for the degree of suffering in the particular case”, the court clearly requires that they be measured and compensated.

[280] The evidence on this summary judgment motion reveals that there was a minimal level of harm suffered by all Class Members for administrative segregations of more than fifteen members that some Class Members would have been suffered before fifteen days and the suffering would continue and grow as the duration of segregation lengthened.

[281] In my opinion, therefore, it can be concluded that on a class-wide basis, all of the several breaches of s. 7 of the *Charter*, including the absence of an independent review process, caused all the Class Members harm.

4. Section 12 of the *Charter*

[282] Section 12 of the *Charter* states:

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

[283] Where it is alleged that s. 12 of the *Charter* has been breached, the plaintiff has the burden of establishing that a given treatment or punishment constitutes cruel and unusual punishment on a balance of probabilities.[113] To demonstrate a violation of s. 12, a plaintiff must show that the treatment or punishment is grossly disproportionate in the circumstances, such that it would outrage society’s sense of decency”.[114] Demonstrating that a treatment or punishment was merely excessive is not sufficient to ground a finding that s. 12 has been violated.[115]

[284] In determining whether there has been a breach of s. 12 of the *Charter*, the court must consider whether the treatment goes beyond what is necessary to achieve a legislative aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or a social purpose. Other considerations include whether the treatment is unacceptable to a large segment of the population, whether it accords with public standards of decency or propriety, whether it shocks the general conscience and whether it is unusually severe and hence degrading to human dignity and worth.[116]

[285] In the *Brazeau* Case, I concluded that without regard to whether the inmate suffers from a mental illness but especially for inmates that do suffer from a serious mental illness, if not a consensus about the precise duration of acceptable solitary confinement, there was a strongly prevalent view that prolonged and especially indeterminately prolonged solitary confinement should not be allowed and that there should be a maximum time-limit for an inmate being kept in administrative segregation. In the *Brazeau* Case, I concluded that the maximum time limit was thirty days for inmates who were involuntarily placed in administrative segregation and sixty

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[113] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 95.
[114] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at p. 1055; *R. v. Lloyd*, 2016 SCC 13 at para. 24.
[115] *R. v. Nur*, 2015 SCC 15 at para 39.
[116] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at p. 1068.

days for inmates whose placement was voluntarily. As noted above, my decision in the *Brazeau* Case has been overrun or replaced by the Ontario Court of Appeal's decision in the *Cdn Civil Liberties Assn* Case that the maximum time after which the segregation constitutes cruel and unusual treatment on a class-wide basis is fifteen days.

[286] In the *Brazeau* Case, based on virtually the same evidentiary record as in the immediate case, I concluded that the Federal Government had breached s. 12 of the *Charter.* As I stated in the *Brazeau* Case, it may be the case that there was a time that Canadians thought that prolonged administrative segregation was not cruel or unusual treatment but that is no longer the case. Academic research, commissions, inquiries, inquests, court cases, domestic and international organizations, and the Correctional Investigator have produced a vast body of knowledge that consistently proves the harm caused by administrative segregation to inmates generally and to their chances of rehabilitation and that a prolonged placement in administrative segregation constitutes a cruel and unusual treatment.

[287] In the case at bar, which excludes the particular focus on seriously mentally ill inmates, as a matter of issue estoppel, as a matter of *stare decisis,* and based on the evidentiary record, I conclude that contrary to s. 12 of the *Charter,* an inmate who is placed in administrative segregation is cruelly and unusually treated once the placement is more than fifteen days.

[288] For the reasons expressed next below, the *Charter* breach is not saved by s. 1 of the *Charter*.

5. Section 1 of the Charter

[289] I have concluded that the Federal Government has breached on a class-wide basis, the Class Members' *Charter* rights under sections 7 and 12 of the *Charter*. This brings the discussion to s. 1 of the *Charter,* which states that the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[290] In *R. v. Oakes,*[117] the Supreme Court of Canada held that to establish that a limit is reasonable and demonstrably justified in a free and democratic society: (1) the objective of the limit must be of sufficient importance to override a constitutionally protected right or freedom and at a minimum the objective must relate to a concern that are pressing and substantial in a free and democratic society; and (2) the means of implementing that objective are reasonable and demonstrably justified, which involves a proportionality test balancing the interest of society with those of individuals and groups. The components of the proportionality test are that: (a) the means must be carefully designed for the objective and not be arbitrary, unfair, or based on irrational considerations; they must be rationally connected to the objective; (b) the means must impair as little as possible the right or freedom in question; (c) the effect of the means must be proportionate to its objective.

[291] The Federal Government concedes that the lack of independent review of administrative segregation placements constitutes a breach of s. 7 that cannot be justified pursuant to s. 1. However, the Federal Government submits that it has demonstrated that the implementation of

[117] [1986] 1 S.C.R. 103.

administrative segregation is a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society.

[292] Class Counsel concede that the safety of the penitentiary and its population, which is the objective of administrative segregation, is of sufficient importance to override a constitutionally protected right, but they dispute that the means of implementing that objective are reasonably and demonstrably justified. They submit that the Federal Government's *Charter* breaches of sections 7 and 12 of the *Charter* are not saved by s. 1 of the *Charter*.

[293] I agree with Class Counsel's argument that the specifications, which is to say the means adopted of administrative segregation are not rationally connected to the safety of the penitentiaries the aim of the segregation in the first place. I also agree with Class Counsel's argument that there is no explanation why it would be necessary to subject any inmate to administrative segregation for more than 15 days.

[294] Class Counsel's argument was focused on how long it might be necessary for the Correctional Service to address a security concern, but I would add that there is no explanation why it would ever be necessary to subject an inmate to administrative segregation – as it has been practiced as a type of solitary confinement - for even one day. There is no explanation why the management specifications of the administrative segregation; *i.e.*, the duration of isolation from meaningful human conflict could not have reduced years ago as recommended years ago, and there is no explanation why the specifications of administrative segregation were identical to those of disciplinary segregation and indeed worse than disciplinary segregation because the indefinite duration of administrative segregation is more punishing and damaging than the capped duration of disciplinary segregation. This too was known decades ago. The alacrity in which the Federal Government now introduces SIUs belies the inability to make changes years' ago.

[295] Even if some form of segregation were necessary to ensure the safety or security of the penitentiary and its population, there never has been an explanation and hence no justification for depriving an inmate of meaningful human contact. This form of segregation is not rationally connected to the safety of the penitentiaries.

[296] Moreover, in relying on prolonged administrative segregation, the Federal Government adopted and maintained a type of segregation that did not minimally impair rights. Alternatives like the recently introduced SIUs were available or could have been developed with no significant infrastructure changes or substantial budget increases. Drs. Martin and Hannah-Moffat and Professors Coyle identified alternatives to prolonged segregation.

[297] In the immediate case, the Federal Government confirmed that it required no statutory authority to implement SIUs, which have already been budgeted, and which were being deployed before the enactment of Bill C-83.[118] This development shows that it was never necessary to subject inmates to solitary confinement for prolonged periods or at all.

[298] There is other evidence that administrative segregation, even as it has been authorized

[118] For present purposes, nothing turns on it, but it is interesting to note that the Parliamentary Budget Officer estimated that it costs $92,740 per year to house a maximum-security inmate and $555,785 to house that inmate in administrative segregation per year. The evidentiary record did not reveal whether SUI units would be more or less expensive than administrative segregation.

under the *CCRA*, was not required to maintain the security of the penitentiaries. The evidence in the Reddock Case showed that after the commencement of the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases, the Correctional Service found ways to reduce the use of administrative segregation and yet maintain its obligations to secure the safety of its penitentiaries. Visualize, before the *Charter* challenges of these cases, at the peak, there were approximately 8,300 placements in administrative segregation. After the *Charter* challenges, in 2017-2018, without any change to the *CCRA*, the placement fell to approximately 5,300, a 36% decline, due to better population management techniques and resources.

[299] In the immediate case, Ms. Redpath agreed that the Federal Government does not require an amended statute to create prison subpopulations, to implement new Commissioner's Directives, or to otherwise grant segregated prisoners significantly more time out of their cells, meaningful human contact, or expanded programming.

[300] I also agree with Class Counsel's argument that administrative segregation is not proportional in achieving an appropriate balance between its deleterious and its salutary effects. The inmates are unnecessarily exposed to serious harm. The inmates in prolonged administrative segregation are exposed to cruel and unusual punishment. In the *Cdn Civil Liberties Assn* Case, the Ontario Court of Appeal pondered whether cruel and unusual treatment could ever be justified in a free and democratic society. Justice Benotto stated at paragraphs 123-126 of her decision for the Court:

> 123. The AGC submits that administrative segregation is a rational way to prevent potential death, injury, or jeopardy to security. The statutory safeguards relating to the admission to and release from administrative segregation ensure that any *Charter* infringement is minimal. The AGC submits that alternatives such as "Close Supervision Centres", suggested by the CCLA's expert Professor Coyle, and the Scottish Model, are not more appropriate or less harmful means of achieving the legislative goals. In terms of proportionality, it is submitted that saving lives and ensuring safety and security outweigh the potential and uncertain deleterious effects on the rights of inmates placed in administrative segregation.
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> 124. I leave for another day the threshold issue of whether -- in the context of current moral norms -- s.1 is *ever* available to justify a s. 12 breach. As Peter Hogg observes in *Constitutional Law of Canada*, 5th ed., Vol. 2 (Toronto: Carswell, 2007), at pp. 158-159:
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> > It may simply be the failure of my imagination, but I find it difficult to accept that the right not to be subjected to any "cruel and unusual treatment or punishment" could ever be justifiably limited. This may be an absolute right. Perhaps it is the only one.
>
> 125. I am aware that recently the Supreme Court has said that, while rare, s. 1 may justify a breach under s. 7: see *R. v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 144. No cases are put forward where s. 1 justifies a s.12 breach.
>
> 126. In any event, here the AGC has not met its onus to justify prolonged administrative segregation. The submissions of the AGC speak generally to the need for prison staff to respond quickly to a dynamic and dangerous situation. However, the provisions in the Act which authorize prolonged segregation beyond 15 consecutive days do not minimally impair the s. 12 rights of inmates. On the contrary. They expose the inmates to the risk of severe and potentially permanent psychological harm. Consequently, the infringement is not justified under s. 1.

[301] Once again, the Federal Government has not put forward an instance where a breach of s. 12 of the *Charter* has been found to be a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. I think the day, however, has come to agree with Professor Hogg that in the context of current moral norms once it has been established that the treatment is cruel and unusual, it cannot ever justify a s. 12 breach. In any event, I also

conclude that the Federal Government has not met its onus of justifying an administrative segregation that is more than fifteen days.

[302] Nevertheless, relying on the juridical framework of *Loyola High School v. Quebec (Attorney General)*[119] *Doré v. Barreau du Québec*,[120] and *Law Society of British Columbia v. Trinity Western University*[121], rather than the framework of the *Oakes* test, the Federal Government submits that when the *Charter* viability of a discretionary decision is at issue, like the decision to place an inmate into potentially prolonged administrative segregation, the *Oakes* framework is replaced with a proportionality analysis consistent with administrative law principles. The Federal Government submits therefore that the court must consider when making a s. 1 analysis whether the administrative decisions of the Correctional Service reflected a proportionate balance of the relevant *Charter* protections with the statutory objectives of the *Corrections and Conditional Release Act*. The Federal Government submits that the question for the reviewing court is whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charte*r protections at play.

[303] Class Counsel denies that the principles of *Loyola High School v. Quebec (Attorney General), Doré v. Barreau du Québec, and Law Society of British Columbia v. Trinity Western University* are applicable in the case at bar, and Class Counsel submit that the Federal Government's approach to administrative segregation cannot be justified under s. 1 of the *Charter*.

[304] For present purposes, I need not decide whether *Loyola High School v. Quebec (Attorney General), Doré v. Barreau du Québec,* and *Law Society of British Columbia v. Trinity Western University* have displaced the framework of the *Oakes* test in the circumstances of the Reddock Case, because the administrative or discretionary decisions of the Correctional Service do not reflect a proportionate balance of the relevant *Charter* protections.

[305] Whatever the analytical legal framework, the Federal Government has not shown that a placement in administrative segregation for more than fifteen days for security purposes is a reasonable limit on life, liberty, or the security of the person that can be demonstrably justified in a free and democratic society.

[306] As noted above, the Federal Government concedes that the lack of independent review of administrative segregation placements constitutes a breach of s. 7 that cannot be justified pursuant to s. 1. I conclude that the other breaches of s. 7 and the breach of s. 12 also are not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

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[119] 2015 SCC 12.
[120] 2012 SCC 12.
[121] 2018 SCC 32.

6. *Charter* Remedies

(a) Introduction

[307] I have concluded that by its operation and management of federal penitentiaries from March 3, 2011 to the present: (a) the Federal Government breached the Class Members' rights under s. 7 of the *Charter* by the absence of an adequate review process for placements in administrative segregation; (b) the Federal Government breached the Class Members' rights under s. 7 of the *Charter* by placing inmates in administrative segregation for more than fifteen days; and (c) the Federal Government breached the Class Members' rights under s. 12 of the *Charter* by placing inmates in administrative segregation for more than fifteen days. I have also concluded that the Federal Government's contraventions of sections 7 and 12 of the *Charter* are not saved by s. 1 of the *Charter*. These conclusions bring the analysis to what was the most hotly contested and controversial issue in the oral argument of the summary judgment motion - the issue of remedies.

[308] The Class Members are not seeking any declaratory remedy or remedy under s. 52 (1) of the *Constitution Act, 1982*. Rather, they seek *Charter* damages under s. 24 (1) of the *Charter*.

[309] The Federal Government makes a three-stage argument that the Class Members are not entitled to any remedy under s. 24 (1) of the *Charter*.

i. The first stage of the Federal Government's argument is that the Ontario Court of Appeal in the *Cdn Civil Liberties Assn* Case and Justice Leask in the British Columbia Court of Appeal in the *BC Civil Liberties Assn* have found that the Federal Government's legislation violates sections 7 and 12 of the *Charter* and these courts also found that the *Charter* breaches arose from the legislation itself and not from maladministration by the Correctional Service, and thus the courts made declaratory order under s. 52 (1) of the *Constitution Act, 1982* or the court's inherent jurisdiction and they did not award damages award under s. 24 (1) of the *Charter*.

ii. The second stage of the argument is that it therefore follows that up until the declaratory orders, the Correctional Service was administering a statutory regime that was presumed to be constitutionally valid and the Correctional Service was obliged to adhere to the administrative segregation provisions in the *Corrections and Conditional Release Act*, which it did without maladministration.

iii. The third stage of the argument is that pursuant to the principle from *Mackin v. New Brunswick (Minister of Finance)*,[122] absent conduct that is clearly wrong, in bad faith, or an abuse of power, the Federal Government is immunized from having to pay damages under s. 24 (1) of the *Charter* for its proven breaches of sections 7 and 12 of the *Charter*. Since in the Reddock Case there is no evidence of the conduct of the Correctional Service being clearly wrong, in bad faith, or an abuse of power, the *Mackin* principle applies and forecloses the Class Members' claim for *Charter* damages under s. 24 (1) of the *Charter*.

[122] 2002 SCC 13.

[310] In this part of my Reasons for Decision I shall analyze the merits of the Federal Government's argument and explain why I conclude that there is no merit to it. I shall explain below that there are missteps at each stage of the Federal Government's argument. I shall conclude that the Reddock Case Class Members are entitled to a base level of *Charter* damages on a class-wide basis without prejudice to individual claims for more compensation at individual issues trials. I shall in this part of my Reasons quantify the base level of class-wide *Charter* damages.

[311] Before making that analysis, I note the cynical ironies of the Federal Government's argument; namely:

i. The Federal Government's argument that where a statute has been struck down under s. 52 (1) of the *Constitution Act, 1982* because it contravenes the *Charter*, then the injured citizens are precluded from a remedy under s. 24 (1) of the *Charter* is ironical because it overstates the position it took in the *BC Civil Liberties Assn* Case which was that a public interest litigant is not entitled to damages under s. 24 (1) of the *Charter*.

ii. The Federal Government's argument in the immediate case relies on an issue estoppel from the *Cdn Civil Liberties Assn* Case and the *BC Civil Liberties Assn* to bind the Reddock Class Members, who were not parties or privies in the Ontario and BC cases on the issue of remedies or damages.[123] The irony is that in the immediate case, the Federal Government opposes being bound by liability issue estoppels from those same cases, notwithstanding that it was a party to those proceedings and had its day in court on the liability issues.

iii. The Federal Government's argument relies on the submission that the *Charter* breaches emanate from the legislation itself and not from maladministration by the Correctional Service. The irony is that the Federal Government adamantly took the opposite position before the courts in British Columbia and Ontario to submit that the legislation ought not to be struck down because it was possible to apply it without maladministration and without it being a violation of the *Charter*. Relying on *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),*[124] the Federal Government submitted that where a law can be applied constitutionally, then it does not become unconstitutional through improper application.

iv. Thus, the Federal Government's core argument uses an issue estoppel from the *Cdn Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases and then purportedly applies the legal principles from *Mackin v. New Brunswick (Minister of Finance),* which provides an immunity to the *Charter* damages prescribed by *Vancouver (City) v. Ward.*[125] The irony is that in deciding the *Cdn Civil Liberties Assn* and the *BC Civil Liberties Assn* Cases, neither the Ontario Court of Appeal

[123] It is arguable that the inmates were privies to the Associations in the *Cdn Civil Liberties Assn* and in the *BC Civil Liberties Assn* Case on the issues of *Charter* violations but not on the issue of remedies.
[124] 2000 SCC 69 at paras. 77, 128-136.
[125] 2010 SCC 27.

nor the British Columbia Court of Appeal in the *BC Civil Liberties Assn* Case ever mention the *Mackin* Case or *Vancouver (City) v. Ward.*

(b) Charter Remedies

[312] Charter Remedies in civil cases are associated with s. 52 of the *Constitution Act, 1982* and s. 24 (1) of the *Charter*.

[313] Section 52 (1) of the *Constitution Act, 1982* states:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any other law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

[314] Section 52 (1) of the *Constitution Act, 1982*, does not provide personal remedies. It envisions a declaratory remedy when a law in its purpose or effect violates the Constitution of Canada including the *Charter*. Pursuant to s. 52 (1) of the *Constitution Act, 1982*, when a law contravenes the Constitution or the *Charter*, a court exercising its inherent powers may: (a) declare the law invalid; (b) strike down the law in whole or in part severing the tainted provisions; (c) read down the law, which is to say interpret it in a way that makes it compliant with the *Charter*; (d) read into the law to make it complaint with the *Charter*; (e) grant exemptions to the operation of the law;[126] and, or (f) suspend the operation of the declaratory orders of invalidity until the government has the opportunity to enact a constitutionally valid law.[127]

[315] Section 24 (1) of the *Charter* is a remedies provision for violations of the *Charter*, which does provide personal remedies; it states:

> *ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS/ Exclusion of evidence bringing administration of justice into disrepute*
>
> 24 (1) Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[316] Section 24 (1) provides remedies for government conduct that violate the *Charter*.[128] Section 24 (1) of the *Charter* authorizes a court of competent jurisdiction to grant a personal remedy to anyone whose *Charter* rights have been infringed or denied.[129] Section 24 (1) of the *Charter* can be invoked only by a party alleging a violation of that party's personal constitutional rights.[130]

[317] Section 24 (1) of the *Charter* is to be given a generous and purposive interpretation and application. The nature of the s. 24 (1) remedy is a matter for a court of competent jurisdiction to

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[126] *Schacter v. Canada*, [1992] 2 S.C.R. 679.
[127] *Schacter v. Canada*, [1992] 2 S.C.R. 679; *Canada (Attorney General) v. Hislop*, 2007 SCC 10.
[128] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[129] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[130] *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228 at paras. 225-272; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* 2017 ONSC 7491 at para. 19, varied on other grounds, 2019 ONCA 243.

fashion. It is for the court functionally or purposely to design substantive legal remedies for *Charter* violations independent of, but informed by, the substantive common and civil law. The remedies of s. 24 (1) are new substantive legal territory and are to be developed incrementally without a pre-determined formula. Section 24 (1) gives the court a wide discretion to fashion meaningful remedies.[131]

[318] Section 24 (1) provides the court with an extremely broad discretion - but not an unfettered or unguided discretion - to determine what remedy is appropriate and just in the circumstances of a particular case.[132] A *Charter* remedy will: (a) meaningfully vindicate *Charter* rights; (b) employ means that respect the different roles of governments and courts in the Canadian constitutional democracy; (c) be a judicial remedy that vindicates the *Charter* right within the function and powers of a court; and (d) be fair to the government actor against whom the order is made.[133]

[319] In *Doucet-Boudreau v. Nova Scotia (Minister of Education),*[134] Justices Iacobucci and Arbour stated at paragraph 87:

> 87. Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

[320] Justices Iacobucci and Arbour described at paragraphs 55 – 59 what is "an appropriate and just remedy" under section 24 (1) of the *Charter*, as follows:

> 55. First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, on one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore no appropriate and just (see *Dunedin, supra,* at para. 20, McLachlin C.J. citing *Mills, supra,* at p. 882, *per* Lamer J. (as he then was)).
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> 56. Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24 (1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
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> 57. Third, an appropriate and just remedy is a judicial one which vindicates the right while

[131] *Doucet-Boudrea v. Nova Scotia,* [2003] 3 S.C.R. 3.
[132] *Vancouver (City) v. Ward,* 2010 SCC 27 at paras. 17 -19; *Mills v. The Queen,* [1986] 1 S.C.R. 863 at p. 965
[133] *Vancouver (City) v. Ward,* 2010 SCC 27 at para. 20; *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62.
[134] 2003 SCC 62 at para. 87.

> invoking the powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of the courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
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> 58. Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
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> 59. Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[321] In *Vancouver (City) v. Ward*,[135] the Supreme Court of Canada held that *Charter* damages may be available in appropriate cases where they would serve a functional purpose in remedying a *Charter* violation. Damages under s. 24 (1) of the *Charter*, however, are not common law damages, but the distinct remedy of damages shaped by constitutional principles.

[322] The facts in *Vancouver (City) v. Ward* were that the Vancouver Police Department wished to avoid the repeat of an incident where Prime Minister Chrétien while visiting the city for a political event was struck by a pie-thrower. Mr. Ward, a Vancouver lawyer attending the event, was mistaken to be the pie-thrower. He was arrested, and his car was impounded. While in detention, he was strip-searched down to his underwear. He was held for several hours in jail, and then he was released. Mr. Ward sued the Police Department and others. Justice Tysoe, the trial judge, awarded Mr. Ward $5,000 tort damages for the wrongful imprisonment plus *Charter* damages of: (a) $5,000 for the imprisonment; and, (b) $100 for the seizure of the car.[136] The *Charter* breaches were of s. 8 (the right to be free from an unreasonable search and seizure) and s. 9 (the right to be free from an arbitrary detention or imprisonment). The tort award was not appealed, but the Police Department appealed the *Charter* damage awards. The trial decision about *Charter* damages was affirmed by the British Columbia Court of Appeal (Finch, C.J.B.C., Low, J. in the majority, Saunder, J., dissenting).[137] The Police Department appealed to the Supreme Court of Canada and submitted that *Charter* damages ought not to have been awarded.

[323] In a unanimous judgment written by Chief Justice McLachlin, the Supreme Court upheld the $5,000 *Charter* damages but not the $100 award. The Chief Justice held that a monetary award; *i.e.*, *Charter* damages was a possible remedy under s. 24 (1) of the *Charter*; she stated at paragraph 21:

> 21. Damages for breach of a claimant's *Charter* rights may meet these conditions. They may meaningfully vindicate the claimant's rights and freedoms. They employ a means well-recognized within our legal framework. They are appropriate to the function and powers of a court. And, depending on the circumstances and the amount awarded, they can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them. I therefore conclude

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[135] 2010 SCC 27.
[136] *Ward v. Vancouver (City)*, 2007 BCSC 3.
[137] *Ward v. Vancouver (City)*, 2009 BCCA 23.

> that s. 24 (1) is broad enough to include the remedy of damages for *Charter* breach. That said, granting damages under the *Charter* is a new endeavour, and an approach to when damages are appropriate and just should develop incrementally. *Charter* damages are only one remedy amongst others available under s. 24 (1), and often other s. 24 (1) remedies will be more responsive to the breach.

[324] In *Vancouver (City) v. Ward*, Chief Justice McLachlin set out a four-step enquiry to determine whether *Charter* damages may be awarded under s. 24 (1) of the *Charter*. The enquiry involved:

i. First, the claimant must establish that his or her *Charter* right has been breached.

ii. Second, the claimant must establish that damages are an "appropriate and just" remedy, having regard to whether they would serve one or more of the functions of compensation, vindication, or deterrence. Compensation focuses on remedying the claimant's personal losses, physical, psychological, pecuniary, and non-pecuniary. As far as possible, the claimant should be placed in the same position as if his or her *Charter* rights had not been breached. Vindication remedies the harm caused to society, such as impaired public confidence and diminished faith in the efficacy of constitutional protections. Deterrence serves to influence government behaviour to ensure future compliance with the *Charter*.

iii. Third, the government may establish that countervailing factors, such as alternative remedies and concerns for good governance negate exposure to civil liability or render a damages award inappropriate or unjust in the circumstances. If other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24 (1) would serve no function and it would not be appropriate and just. A concurrent action in tort, or other private law claim, will bar *Charter* damages if it would result in double compensation.

iv. The fourth step is the determination of quantum. The quantum will be determined based on evidence of pecuniary or non-pecuniary loss, as well as in light of the other functional purposes of s. 24 (1), such as vindication and deterrence.

[325] The individual making a claim for *Charter* damages bears the initial burden of satisfying the first two steps of the *Ward* test, and then the onus shifts to the state to show that countervailing factors, such as alternative remedies and concerns for good governance negate exposure to civil liability or render a damages award inappropriate or unjust in the circumstances.[138]

[326] The case law, animated by general principles of public law, had developed a limitation or qualification to the availability of *Charter* damages under s. 24 (1) of the *Charter* in circumstances where a court has made a declaratory order striking down a law on the grounds that it violates the *Charter*. This limitation or qualification is associated with the case of *Mackin v. New Brunswick (Minister of Finance)*.[139]

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[138] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCCA 305; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para. 37.
[139] *Mackin v. New Brunswick (Minister of Finance*), 2002 SCC 13.

[327] The facts of *Macklin v. New Brunswick (Minister of Finance)* were that the province of New Brunswick abolished the position of supernumerary judge for its provincial court judges. Judge Macklin, who was already a supernumerary judge, was given the choice of resuming as a full-time judge or of retiring. He successfully sued the province arguing that the legislation contravened the constitutional guarantees of judicial independent in s. 11 (d) of the *Charter.* The Court declared the legislation unconstitutional; however, it dismissed Judge Macklin's claim for *Charter* damages. The Court held that a claim for damages under s. 24 (1) of the *Charter* cannot normally be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.

[328] In the *Mackin* Case, the Supreme Court of Canada held that according to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional

[329] The rationale for this limitation is that government actors acting in good faith pursuant to what is the express law of country should not be exposed to monetary liability when the law is later found to be unconstitutional. The *Mackin* principle applies where a challenge is made that a law is contrary to the *Charter* and also where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24 (1) of the *Charter*.[140]

[330] In the *Mackin* Case, Justice Gonthier (Justices L'Heureux-Dubé, Iacobucci, Major, and Arbour concurring) stated at paragraphs 78-82:

> 78. According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
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> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]
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> 79. However, as I stated in *Guimond v. Quebec (Attorney General), supra*, since the adoption of the *Charte*r, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charte*r. The limited immunity given to

[140] (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 441.

> government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).
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> 80. Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter, supra*, at p. 720:
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> > An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.
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> 81. In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.
>
> 82. Applying these principles to the situation before us, it is clear that the respondents are not entitled to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers. […] Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

[331] The *Macklin* principle immunizes the government from a claim for *Charter* damages under s. 24 (1) of the *Charter* but admits of exceptions. In *Abbey v. Ontario (Community and Social Services),*[141] the Ontario Divisional Court held that the list of exemptions to the *Mackin* principle; *i.e.*, defined as conduct that is clearly wrong, in bad faith or an abuse of power, are a closed list and no additional exceptions are to be added to the list.

[332] However, in *Wynberg v. Ontario,*[142] the Ontario Court of Appeal interpreted *Mackin* more liberally and more in line with the letter and spirit of the Supreme Court of Canada's decisions about the development of s. 24 (1) of the *Charter.* In *Wynberg,* the Court (Justices Goudge, Simmons and Gillese) at paragraph 202 did not mention conduct that is clearly wrong and included negligence amongst the exemptions to the *Macklin* principle; the Court stated:

> 202. Absent bad faith, abuse of power, negligence or willful blindness in respect of its constitutional obligations, damages are not available as a remedy in conjunction with a declaration of unconstitutionality. As the trial judge made no such findings on the part of Ontario, it was an error in principle to award damages in conjunction with declaratory relief. […] [emphasis added]

[333] In *Macklin,* itself it may be noted that while, Justice Gonthier referred initially in

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[141] 2018 ONSC 1899 (Div. Ct.).
[142] (2006), 82 O.R. (3d) 561 at para. 202 (C.A.), leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 441.

paragraph 79 to conduct that is clearly wrong, in bad faith or an abuse of power; however, when he actually applied the *Macklin* principle in paragraph 82, he said that the exceptions did not apply because the conduct of the province did not display negligence, bad faith, or wilful blindness with respect to its constitutional obligations.

7. The Availability of *Charter* Damages in the Reddock Case

[334] In this part of my Reasons for Decision, I discuss whether *Charter* damages are available in the Reddock Case pursuant to s. 24 (1) of the *Charter*.

[335] Class Counsel argues that the Class Members on a class-wide basis satisfy the test for *Charter* damages. The Federal Government, however, in the three-stage argument that is set out in the Introduction to this part of my Reasons for Decision submits that the principle from *Mackin v. New Brunswick (Minister of Finance),*[143] precludes the Class Members in the Reddock Case from a *Charter* damages award under s. 24 (1) of the *Charter*.

[336] In the discussion that follows in this part, I conclude, however, that: (a) applying the four steps of the *Vancouver (City) v. Ward* analysis to the circumstances of the Reddock Case, the Class Members are entitled to *Charter* damages; and (b) the Class Members are either exempt from the *Mackin* principle or the *Mackin* principle does not apply to the circumstances of the immediate case.

[337] Applying the four steps of the *Vancouver (City) v. Ward* analysis to the circumstances of the Reddock Case, first, all the Class Members have established that their *Charter* rights have been breached.

[338] Moving to the second step, damages are an appropriate and just having regard to the functions of vindication, deterrence, and compensation. For decades, academic research, commissions, inquiries, inquests, court cases, domestic and international organizations, and the Correctional Investigator have recommended that the Correctional Service change its policies and practices with respect to the treatment of inmates placed in segregation and *Charter* damages would fulfill the objectives of vindication, deterrence, and compensation, which as I have explained above, includes compensation both for personal injuries but also general damages for the assault on the Class Members' *Charter* rights.

[339] Moving to the third step, save for the *Mackin* principle and the policies that animate it, the Federal Government has not established that there are countervailing factors that would justify not making a damages award. Since, as I shall explain below, the Class Members are either exempt from the *Mackin* principle or the *Mackin* principle does not apply to the circumstances of the immediate case, thus, the Class Members' claim for *Charter* damages has been perfected.

[340] Moving to the fourth step, all that remains in the *Vancouver (City) v. Ward* analysis is to quantify the *Charter* damages, which I shall do as the next part of my analysis. As foreshadowed in the Introduction to these Reasons for Decision and foreshadowed again here, I conclude that there is a base level of *Charter* damages that I value at $20 million. This base level award is for

[143] 2002 SCC 13.

vindication, deterrence, and for compensation for the *Charter* breaches and should be distributed to the Class Members equally after the deduction of fees, disbursements, *etc*.

[341] Turning now to the Federal Government's three-stage argument that the principle from *Mackin v. New Brunswick (Minister of Finance),*[144] precludes the Class Members in the Reddock Case from a *Charter* damages award under s. 24 (1) of the *Charter,* the first two stages of the argument assert that the principle from *Mackin* is triggered in the circumstances of the *Reddock* Case.

[342] The Federal Government asserts that *Mackin* applies because: (a) the courts in the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases have made declaratory orders that, in effect, strike down the administrative segregation provisions of the *Corrections and Conditional Release Act*; and (b) these declarations of constitutional invalidity (made pursuant to the superior courts inherent jurisdiction and s. 52 (1) of the *Constitution Act, 1982*) immunize the Federal Government from *Charter* damages in the Reddock Case. It is a corollary of the Federal Government's argument that I erred in awarding *Charter* damages in the *Brazeau* Case.

[343] As I indicated in the Introduction to this part of my Reasons for Decision there are missteps at each stage of the Federal Government's argument. I shall begin my explanation with the missteps in the third stage because they are the easiest missteps to identify.

[344] The third stage of the Federal Government's argument is to apply the *Mackin* Case to the circumstances of the *Reddock* Case and to argue that in the Reddock Case (and also the *Brazeau* Case), there is no evidence of the conduct of the Correctional Service being clearly wrong, in bad faith, or an abuse of power, and therefore the *Mackin* principle applies and forecloses the Class Members' claim for *Charter* damages under s. 24 (1) of the *Charter*.

[345] Although on the evidence in the Reddock Case (and on the evidence in the *Brazeau* Case), there are individual instances of bad faith and abuse of power by the Correctional Service, I agree with the Federal Government that it cannot be said on a class-wide basis that it acted in bad faith or abused its power. (This explains, in part, why, as discussed below, class-wide punitive damages are inappropriate in the immediate case).

[346] However, it can be said on a class-wide basis that the evidence in the Reddock Case (and in the *Brazeau* Case) establishes conduct of the Correctional Service that was clearly wrong. It was clearly wrong for the Correctional Service to make administrative segregation a type of solitary confinement. It was clearly wrong and not required for security purposes to make administrative segregation the equivalent of disciplinary segregation. It was clearly wrong, as I shall explain later in these Reasons for Decision, for the Federal Government to be systemically negligent in its administration of administrative segregation. It was clearly wrong and unnecessary for security purposes for the Correctional Service to operate administrative segregation as it was operated for the Federal Government.

[347] Be it one day or fifteen days of administrative segregation, the Correctional Service knew that it was harmful and unnecessary for security purposes to make the conditions of administrative segregation a type of solitary confinement that was worse than disciplinary segregation. And while segregation may have been justified or justifiable for security purposes,

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[144] 2002 SCC 13.

to the day of the summary judgment motion, there is no explanation from the Correctional Service as to why the housing conditions and the availability of health services and the programs meant to rehabilitate the inmate for a return to society were substantially worse than the housing conditions of the general prison population.

[348] The Correctional Service's mode of operation of administrative segregation was not necessary for security purposes and indeed to some extent diminished the security of the penitentiary by diminishing the rehabilitation of the inmates. The Federal Government knew for decades that administrative segregation was clearly wrong all of legally, morally, and functionally because there was no need to inflict this harm for security or safety purposes.

[349] I reach the same conclusion and for the same reasons that I did in the *Brazeau* Case that the conduct of the Correctional Service was clearly wrong, and the Federal Government cannot take cover under the *Mackin* principle. The Federal Government, however, submits that in the *Brazeau* Case, I disregarded the *Mackin* immunity principle and applied an "inadequacy" standard, as opposed to applying the test that requires government conduct that is clearly wrong, in bad faith or an abuse of power.

[350] I disagree, in the *Brazeau* Case, I applied the appropriate test and came to the same conclusions that I make in the immediate case. I repeat what I wrote in the *Brazeau* Case at paragraphs 429-433:

> 429. I agree with Messrs. Brazeau and Kift that the restrictive principle from *Macklin v. New Brunswick* do not apply with respect to the *Charter* damages claims of the two subclasses for the breaches of sections 7 and 12 of the Charter.
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> 430. I also agree that the in the circumstances of the immediate case the Macklin principle does not bar the class-wide claim with respect to the deficiencies of the review process for administrative segregation placements. In my opinion, the declaratory relief already provided by the courts in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* and *British Columbia Civil Liberties Association v. Canada (Attorney General)* is inadequate to respond to the vindication and deterrence functions of a *Charter* remedy.
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> 431. The Federal Government has not established that an award of *Charter* damages would interfere with good governance as was the situation in Macklin but is not the situation in the case at bar.
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> 432. Further, I am satisfied that there has been a threshold of misconduct with respect to the review process for placements in administrative segregation that goes beyond its legislated imperfections. In other words, although perhaps not on a class-wide basis, even if the review of administrative segregation provisions of the *Corrections and Conditional Release Act* had not been struck down under s. 52 (1) of the *Constitution Act, 1982*, in individual cases there were breaches of section of 7 of the Charter. In the immediate case, the accounts of the mentally-ill inmates reveal that apart from the want of an independent and impartial reviewer, the reviews were often superficial or based on incomplete or inaccurate information about the mental health of the inmate and about the circumstances that led to his or her administrative segregation.
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> 433. In short, the application of the *Macklin* principle is inappropriate. In the immediate case, an immunity does not create a balance between the protection of constitutional rights and the need for effective government. In the circumstances of the case at bar, an immunity from *Charter* damages does just the opposite, it balances the violation of constitutional rights with bad and ineffective governance.

[351] The finding of facts in the immediate case are such that I can conclude that the Federal Government's conduct was not only clearly wrong in individual cases, the conduct was, systemically and on a class-wide basis, clearly harmful and clearly wrong. Thus, the exemption

built into the *Mackin* principle applies and the Reddock Class Members are not foreclosed from a remedy under s. 24 (1) of the *Charter*.

[352] And to segue to the missteps of the first two stages of the Federal Government's argument, in my opinion, the *Mackin* principle does not apply and it was not meant to apply to circumstances like those at the case at bar.

[353] My explanation for this opinion begins by noting that the *Mackin* principle expressly states that courts will not award damages for the harm suffered as a result of **the mere enactment or application of a law** and by observing that the factual circumstances of the *Brazeau* and Reddock Cases, and also the *Cdn Civil Liberties* and *BC Civil Liberties Assn* Cases, do not involve circumstances in which it the government's alleged misconduct is purely or exclusively in the legislative or policy field or where the harm suffered by the mere enactment or application of the *CCRA*. In the *Brazeau* and Reddock Cases the alleged *Charter* breaches are matter of government action.

[354] The factual circumstances of the interconnected cases do not make it easy, as it was in the *Mackin* case to put the blame for a violation of the *Charter* on the mere enactment or application of the law. For strategic reasons, the Federal Government itself has been ironically inconsistent in pointing the finger at the source of the *Charter* violations. In the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases, it put the blame on the Correctional Service's conduct to avert the CCRA being struck down while in the *Brazeau* and Reddock Cases the Federal Government puts the blame onto its own *Corrections and Conditional Release Act* to avert having to pay *Charter* damages.

[355] Where then is the blame to be placed and has the *Mackin* principle been triggered because the harm has been caused by the mere enactment or application of the *CCRA*? Relying on the appellate decisions in the *Cdn Civil Liberties Assn* and *BC Civil Liberties Assn* Cases, which were released after I decided the *Brazeau* Case and before the summary judgment motion in the Reddock Case was argued, the Federal Government submits that it has now been juridically found that the blame lies with the statute and, therefore, the *Mackin* principle has been triggered.

[356] I disagree with the Federal Government's submission for three reasons, which reasons also identify the missteps in the Federal Government's argument that attempts to apply the *Mackin* principle.

[357] The first reason that in my opinion the *Mackin* principle does not apply in the circumstances case is that by its reliance on the *Cdn Civil Liberties Assn* and the *British Columbia Civil Liberties Assn* Cases, the Federal Government has prevented or pre-empted a proper application of the test from *Vancouver (City) v. Ward*.

[358] This consequence of the Federal Government's reliance on issue estoppels from these cases can be demonstrated by the thought experiment of what would have happened had the Civil Liberties Association not brought public interest litigation in Ontario and British Columbia. Had there been no parallel proceedings, then when the Reddock Case came to be decided, there would have been no pre-emptive conclusion that a declaration of invalidity was the only remedy for the Reddock Class Members, which remedy, of course, they were never seeking. The *Vancouver (City) v. Ward* analysis would have reached the third stage without it already having been decided that *Charter* damages were unavailable. Rather, there would have been a fair

argument between the Federal Government and the Reddock Class Members who had real skin in the game for a personal remedy to argue that a declaratory order did not adequately meet their need for compensation, vindication, and deterrence.

[359] What the Federal Government's three stage argument does is that it loads the litigation dice in its favour. Under the *Ward* analysis, the onus is on the state to show that an award of *Charter* damages is not appropriate and just. The British Columbia Court of Appeal discussed the heaviness of this burden in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education),*[145] where the Court stated at paragraphs 282-283:

> 282. […] But, as "it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach" (*Ward* at para. 35), one commentator has suggested "[i]n general, declarations will only be an adequate alternative remedy in situations where there is no compensable tangible or intangible loss and no need to deter future *Charter* violations" (K. Roach, *Constitutional Remedies in Canada* (Toronto: Thomson Reuters) (loose-leaf updated 2017, release 30), c. 11 at 33).
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> 283. Concerns for good governance may also render *Charter* damages inappropriate or unjust. While the state bears the burden of establishing that functional concerns should preclude an award of damages, "the availability of *Charter* damages [is] circumscribed through the establishment of a high threshold" in certain circumstances: *Henry* at para. 41. In such instances, the onus is on the state to demonstrate that the nature of the *Charter*-breaching conduct in the case at hand falls within the scope of any proposed limited immunity. Once the state has established that the context engages a limited immunity, or what *Henry* calls a "*per se* liability threshold", a claimant may then demonstrate that his or her case meets the applicable test to overcome the liability threshold to recover damages.

[360] The three-step argument of the Federal Government pre-empts the Class Members from, arguing the appropriateness of a declaratory order. The Class Members would have had the argument that making only a declaratory order and denying *Charter* damages makes as much sense as denying a person seriously injured in a car accident compensation in a civil tort action because a court in a criminal proceeding has revoked the defendant's licence to drive or confiscated her vehicle. A fine result for other citizens who might have been injured by the careless driver but little comfort to the victim of the car accident. Had the court accepted the Class Members analysis, there would have been no declaratory order and the application of *Macklin* principle would have been stillborn.

[361] The second reason that in my opinion the *Mackin* principle does not apply in the circumstances of the Reddock Case is that while the Ontario Court of Appeal in the *Cdn Civil Liberties* Case placed the blame for the alleged violations of sections 7 and 12 of the *Charter* on the *CCRA*, Justice Benotto's statement at paragraph 117 of her judgment that the *Cdn Liberties Case* was not a case of maladministration or a *Little Sisters* situation meant no more than the blame for the constitutional violation did not lie exclusively outside the statutory provision, which was the case in the *Little Sisters* Case. The critical matter for Justice Benotto's decision was that the Federal Government could not deflect the constitutional violation totally away from the statute and thus a remedy was available pursuant to s. 52 (1) of the *Constitution Act*.

[362] Further, and in any event, the matter of whether *Charter* damages were precluded by the *Mackin* principle was not before the Ontario Court of Appeal in the *Cdn Civil Liberties Assn*

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[145] 2018 BCCA 305.

Case. In my opinion, the Federal Government exaggerates what Justice Benotto was saying. All she was saying was that the *Cdn Civil Liberties Assn* Case was not a case of maladministration of the type in the *Little Sisters* Case that would source the constitutional violation exclusively outside of a constitutionally valid statute. She certainly was not saying that the Federal Government could not be liable for a violation of the *Charter* by virtue of the misconduct of the Correctional Service in individual cases or systemically.

[363] In this last regard, it should be noted that in the *Cdn Civil Liberties Assn* Case, as was the situation in the *Brazeau* Case, and as is the situation in the Reddock Case, there is evidence of conduct, *i.e.*, government action, that both contravenes *Charter* rights and that causes harm that does not arise from the mere application of the *CCRA*. Indeed, the Correctional Service was not applying the *CCRA*, it was misapplying the statute. Contrary to the provisions of the *CCRA*:

> (a) the Correctional Service was not always releasing inmates from administrative segregation at the earliest appropriate time (s. 31 (2));
>
> (b) the Correctional Service was not using administrative segregation for disciplinary purposes and not always using it just to maintain the security of the penitentiary (s. 31);
>
> (c) the Correctional Service was not always carrying out sentences through the humane custody and supervision of the inmates (ss. 3, 5);
>
> (d) the Correctional Service was not always using measures limited to only what is necessary and proportionate to attain the purposes of the Act; (s. 4);
>
> (e) the Correctional Service was not always recognizing that inmates retain their *Charter* rights except those that are as a consequence of their sentence (s. 4);
>
> (f) the Correctional Service was not always implementing administrative segregation in a way that would assist the rehabilitation of the inmates and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries (ss. 3, 5);
>
> (g) the Correctional Service was not taking all reasonable steps to ensure that the living conditions of inmates are free of practices that undermine a person's sense of personal dignity (s. 70); and,
>
> (h) the Correctional Service was through the manner of its administration of administrative segregation administering a cruel, inhumane and degrading treatment, which is prohibited by the *CCRA* (s. 69).

[364] In furtherance of its argument that the *Mackin* principle applies, the Federal Government also relies on Justice Groberman's conclusion in the *BC Civil Liberties Assn* Case that the *Charter* violations were a product of the *CCRA* itself for which declarations of invalidity were appropriate and his statement, quoted above, and repeated here that:

> 160. While decisions by CSC staff in particular cases to maintain the confinement of inmates in segregation for lengthy periods may have been imprudent or short-sighted, or simply hamstrung by the operational realities within which CSC must work, those decisions cannot be characterized as running afoul of the requirements of the Act.

[365] The Federal Government's reliance on the British Columbia's decision in the *BC Civil Liberties Assn* Case, however, is another misstep for reasons similar to why the Ontario Court of Appeal's judgment in the Cdn Civil Liberties does not make the case for the application of the

Mackin principle. Moreover, Justice Groberman's comments were only about the facts associated with the s. 7 breaches and the issue of whether or not there was a breach of s. 12 of the *Charter* and the issue of a claim for *Charter* damages was not before the Court.

[366] I appreciate that in in *Abbey v. Ontario (Community and Social Services)*,[146] the Divisional Court rejected the arguments that the *Mackin* principle applies only when the government is exercising its law-making function or making core operational decisions, and I am not to be taken in the immediate case to be drawing such a distinction. I am rather simply saying that the conduct of the Correctional Service and the serious harm that it caused in individual cases and systemically to the Class Members of the Reddock Case did not arise from the mere enactment or application of the *CCRA*.

[367] In its factum, the Federal Government submits that the rule of law would be undermined, and good governance would be deterred, if public officials are deterred from applying the *CCRA*, the law currently in force, because of the fear of having to pay damages following a declaration of invalidity. This submission might carry some weight if the conduct of the Correctional Service was compliant with the rule of law, which it was not (as noted by Justice Arbour and others), and if the harm caused arose merely from the Correctional Service applying the current law, which it did not.

[368] The third reason that in my opinion the *Mackin* principle does not apply in the circumstances of the Reddock Case is that the rationales that animate, which is to say that trigger the *Mackin* principle, are not applicable in the circumstances of the Reddock Case, as they were not applicable in the circumstances of the *Brazeau* Case.

[369] In *Vancouver (City) v. Ward,*[147] Chief Justice McLachlin explained the rationales behind the *Mackin* principle at paragraphs 40-41 as follows:

> 40. The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:
>
> > The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context.
>
> 41. The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid – applicable in the present situation. Thus, the *Macklin* immunity does not apply to this case.

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[146] 2018 ONSC 1899 at para. 52 (Div. Ct.).
[147] 2010 SCC 27.

[370] As Chief Justice McLachin explains in the context of state action, *Mackin* stands for the principle that state action taken under a statute that is subsequently declared invalid will not give rise to *Charter* damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down.

[371] In the Reddock Case, and in the *Brazeau* Case, it is true that the statute, the *CCRA*, under which the Correctional Service carried out administrative segregation was later struck down, but the rationale animating the *Mackin* principle that dully enacted laws should be enforced until declared invalid was not applicable in the circumstances of the *Brazeau* and Reddock cases.

[372] The animating principle was not applicable because the Correctional Service was maladministering its duties under the *CCRA*, and while good governance required that the Correctional Service carry out its duties without fear of liability should the *CCRA* be struck down, good governance does not require that the Correctional Service carry out its duties associated with administrative segregation immunized of any liability that was separate and apart from the constitutionally of the statute that authorized administrative segregation. The fact that the *CCRA* was struck down or for that matter upheld is irrelevant to whether or not the Correctional Service should be responsible for its own contraventions of the *Charter* and its own failures in complying with the *CCRA*.

[373] To allow *Charter* damages for the failures of the Correctional Service does not create a conflict between its responsibilities to abide by the *Charter* and to enforce the *CCRA*. Rather, imposing *Charter* damages would encourage the Correctional Service to enforce the *CCRA* as the Federal Government expressly meant it to enforced., which is the argument that the Federal Government made in the *BC Civil Liberties Assn* Case to avoid a declaration of invalidity only to reverse course in the immediate case in an attempt to avoid *Charter* damages.

[374] There may be circumstances where good governance or other public law considerations justify the application of the *Mackin* principle, but it is a rule to be narrowly and cautiously applied and it does not overrule the other guiding principles about making s. 24 (1) of the *Charter* a meaningful, powerful, and creative remedial provision. The case at bar is not a case that would justify the application of the *Mackin* principle.

[375] One final point about the *Mackin* principle before moving on to the matter of quantifying the class-wide *Charter* damages, and the point is that if the *Mackin* principle does apply, it is circumventable in the immediate case.

[376] As I shall determine below, the Federal Government is liable for systemic negligence and there is a base level award of aggregate damages suffered by the Class Members. The *Macklin* principle, which is a public law principle, does not apply to a common law cause of action for negligence. Thus, if it were the case that *Charter* damages were unavailable under s. 24 (1) of the *Charter* because of the *Mackin* principle, then the Class Members would, nevertheless, be entitled to the common law remedy of damages for systemic negligence. As the Divisional Court noted in *Abbey v. Ontario (Community and Social Services)*,[148] the *Mackin* principle addresses when *Charter* damages are available and not immunity from any liability altogether.

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[148] 2018 ONSC 1899 at para. 52 (Div. Ct.).

[377] Since the Correctional Institute had for decades been advised not to use administration in the way it was being used, this last point, however, may just be another way of saying that the *Mackin* principle does not apply because the conduct of the Federal Government was clearly wrong.

8. Quantification of *Charter* Damages

[378] I turn now to the quantification of the Class Members' *Charter* Damages.

[379] While there is no doubt that each Class Member has an idiosyncratic and unique response to the experience of having been placed in administrative segregation, Class Counsel submits that there is a base level of harm suffered by all the Class Members, who as should be kept in mind, have all experienced one or more incidents of a placement in administrative segregation of more than fifteen days.

[380] Class Counsel's submission is the lynchpin to Class Counsel's argument that if the court finds that there has been systemic negligence and or if there has been contraventions of the *Charter*, the court can and should make an award of damages in the aggregate that includes a head of damages a base level compensatory award for the harm suffered. The award of a base level of compensatory damages would be without prejudice to the Class Member's idiosyncratic claim at individual issues trials for: (a) additional compensatory damages for the contraventions of the *Charter* or for systemic negligence; and (b) punitive damages.

[381] As I shall explain below, I conclude that there is a base level of *Charter* damages that I would value at $20 million. This base level award is for: (a) vindication and deterrence for the breach of s. 7 of the *Charter* that the Federal Government does not dispute; and (b) vindication, deterrence and compensation for the other breaches of sections 7 and 12 of the *Charter*. I would assess the compensatory portion of this award as having a value of $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately $9 million.

[382] It is true that each Class Member has a unique or idiosyncratic claim for a remedy for having his or her *Charter* rights violated. It is also true that the totality of all the discrete claims of the Class Members can only be determined after individual issues trial, which is to say that an aggregate assessment of the totality of the Class Member's claims is not possible. However, while the totality of the Class Members' *Charter* damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of *Charter* damages that can be awarded to the class on this summary judgment motion.

[383] The contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages even if every member of the class could not be said to have suffered physical or psychiatric harm from the violation of his or her *Charter* rights.

[384] Also, as noted above, that there is a base level of harm for every Class Member, who by definition has been in administrative segregation for more than fifteen days, is now a matter of issue estoppel and *stare decisis*. This follows because the Ontario Court of Appeal in *the Cdn Civil Liberties* Case held that administrative segregation for more than fifteen days is a cruel and unusual treatment that contravenes s. 12 of the *Charter*. It follows that there is a base level of harm caused by the breaches of sections 7 and 12 of the *Charter*.

[385] Further, in any event, based on the evidence in the immediate case, I am satisfied that

there is a base level of mental suffering that has been suffered by all Class Members. Further still, in any event, the evidence on this summary judgment motion is that every inmate would have suffered general damages for the assault on their *Charter* rights and this assault is worthy of compensation regardless of whether or not the Class Member suffered physical or mental harm. There is thus an evidentiary foundation for a base level *Charter* damages award, and in this part of my Reasons for Decision, I shall quantify that award.

[386] I appreciate that I shall be going farther in the Reddock Case than I did in the *Brazeau* Case where I made a class-wide *Charter* damages award for vindication and deterrence but did not include compensatory damages, which were to be left to be assessed at individual issues trials.

[387] I also appreciate that courts have rejected claims for aggregate damages in cases of personal injury where liability cannot be determined on a class-wide basis[149] and that claims of psychological injury are generally not amenable to an aggregate assessment because of the individual nature of damages as well as causation. Indeed, I refused to make an award for psychological injury in *Healy v Lakeridge Health Corporation*,[150] in a judgment that was affirmed by the Ontario Court of Appeal. In the Court of Appeal, Justice Sharpe stated at paragraph 71:

> 71. Given the nature of the claims advanced here, it seems to me apparent that the assessment of damages requires proof of the harm suffered by the individual class members. The appellants concede that not all members of the class suffered compensable harm, even on the relaxed test they advance for psychological injury. Some class members will have suffered no compensable harm and some will have suffered more stress and anxiety than others. The claims are inherently individual in nature and hence fall squarely within the principle identified by Winkler J. in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.) at paras. 18-19.

[388] However, as a result of the Supreme Court of Canada's decision in *Saadati v. Moorhead*,[151] about damages for mental harm, I am fairly able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for systemic negligence. The Supreme Court in *Saadati* overturned the authority of *Healy v Lakeridge Health Corporation* and other cases as to what counts as a compensable psychiatric injury.

[389] Prior to the *Saadati v. Moorhead* decision, the conventional view was that recovery for mental injury required a claimant to prove with expert medical opinion evidence a recognized psychiatric illness, which came to mean an illness within the classification of mental disorders contained in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), published by the American Psychiatric Association, and the *International Statistical Classification of Diseases and Related Health Problems* ("ICD"), published by the World Health Organization.

[390] But after *Saadati v. Moorhead*, while an expert's opinion is relevant it is not a necessity

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[149] *Bywater v Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 19 (Gen. Div.); *Caputo v Imperial Tobacco Ltd*, [2004] O.J. No. 299 at paras. 52-55 (S.C.J.); *Monaco v Coquitlam (City)*, 2015 BCSC 2421 at paras. 166, 194; *Murray v East Coast Forensic Hospital*, 2015 NSSC 61 at paras. 95, 96, aff'd on appeal in *Murray v East Coast Forensic Hospital*, 2017 NSCA 28 at para. 86.
[150] *Healey v Lakeridge Health Corporation*, 2010 ONSC 725, aff'd 2011 ONCA 55.
[151] 2017 SCC 28.

and in order to establish a compensable mental injury, the claimant need not prove that he or she was suffering a recognized psychiatric illness. Rather, the claimant needs to prove that as a result of the defendant's negligence he or she suffered a mental disturbance that is serious and prolonged and that rises above the ordinary annoyances, anxieties and fears that come with living in civil society

[391] In the case at bar, I am satisfied from the evidence in the Reddock Case that for every Class Member the stress and anxiety was serious and prolonged and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd*. and *Saadati v. Moorhead*, the stress and anxiety was above the ordinary annoyances, anxieties and fears that come with living in a penitentiary.

[392] In the Reddock Case, Class Counsel submitted that the quantum of damages should be guided by other *Charter* damages cases and provided the following examples: (a) In *Vancouver (City) v. Ward*, discussed above, the plaintiff recovered $5,000 for two days of wrongful incarceration and a strip search; (b) in *Carr v. Ottawa Police Services Board*,[152] the plaintiff recovered $7,500 for an unlawful arrest, detention, and strip-search; (c) in *Curry v. Canada*,[153] a prisoner detained in a dry cell for an illegal cavity search and x-ray searches recovered $10,000; (d) In *Elmardy v. Toronto Police Services Board*,[154] the plaintiff who was wrongfully detained based on racial profiling recovered $50,000 for breaches of sections 8, 9, 10, and 15 of the *Charter*; and (e) in *Ogiamien v. Ontario*,[155] the plaintiff recovered $60,000 for a violation of s. 12 of the *Charter*.

[393] While opposing the notion that could be any quantification on a class wide basis, the Federal Government provided a few more examples of *Charter* damages awards; namely: (a) *Hill v. British Columbia*,[156] where the plaintiff recovered $500 because there was a failure to conduct a 5-day review of his placement in administrative segregation and the plaintiff was segregated for an additional 11 days; and (b) *Brandon v. Canada (Correctional Service)*,[157] where the plaintiff recovered $680 for 68 days of unlawful detention in disciplinary segregation and administrative detention; and, (c) *Hermiz v. R.*,[158] where the plaintiff recovered $6,000 for a wrongful two-month detention in jail.

[394] There is, however, no established formula or juridical science to assessing *Charter* damages. I agree with what Justice Sharpe and Professor Roach say in their book, R.J. Sharpe and K. Roach¸ *The Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2009) at pp. 384-5

> It can be extremely difficult to measure in money terms the amount appropriate to compensate the plaintiff for physical injuries or for damages to reputation, dignity, or privacy or simply for the violation of a *Charter* right. Translating into money the extent of the injury amounts to little more than sophisticated guesswork. In many cases, the damage suffered as a result of a *Charter* violation will fall into this intangible territory. The rights and freedoms guaranteed by the *Charter* are abstract and intangible and thus assessment of the extent of the injury in monetary terms will

[152] 2017 ONSC 4331 at para. 248.
[153] 2006 FC 63 at para. 33.
[154] 2017 ONSC 2074 at para. 5.
[155] 2016 rev'd on liability 2017 ONCA 667.
[156] [1997] B.C.L.R. (3rd) 211 (C.A.)
[157] [1996] F.C.J. No. 1 (T.D.)
[158] 2013 FC 764.

> often be difficult. Low awards for the violation of a *Charter* right might trivialize the right while high awards may create an unjustified windfall for the applicant.

[395] The assessment of *Charter* damages is made somewhat easier in the immediate case, because only a base level award is being requested. In the *Brazeau* Case, I awarded *Charter* damages for vindication and deterrence of $20 million and I see no reason to award any less in the immediate case.

[396] I would include in this amount a base level award for compensatory damages which include damages for the mental suffering of the Class Members and general damages for the assault on their *Charter* rights. I assess that base level compensatory award as worth $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I would value the compensatory portion of the award as having a value of approximately $9 million.

[397] I, therefore, conclude that there is a base level of *Charter* damages that I would value at $20 million. This base level award is for vindication, deterrence, and compensation.

J. Discussion and Analysis: Administrative Segregation and Systemic Negligence

1. Introduction

[398] In paragraph 60 of the Fresh as Further Amended Statement of Claim, Mr. Reddock pleads that there is recognized class-wide duty of care owed by Corrections Canada with respect to the "design, organization, administration and staffing of the federal institutions, as well as the policies and procedures applied therein".

[399] The Federal Government submits that this is a novel claim of negligence that fails to satisfy the test used by Canadian courts to determine whether there is a duty of care[159] because: (a) there is no class-wide duty of care as pleaded by Mr. Reddock; and (b) if there was a duty of care, there are policy reasons that negate the existence of the duty.

[400] The Federal Government submits that Mr. Reddock has mistakenly used the case law that establishes – on an individual basis – a duty of care owed by prison officials to individual inmates to attempt to fashion a novel claim by a collective of inmates. The Federal Government submits that the foreseeable duty of care owed individual inmates cannot be extrapolated to a class wide duty of care that would impose liability for systemic negligence.

[401] Further, the Federal Government argues that many aspects of Mr. Reddock's systemic negligence claim are not justiciable, including his particulars of negligence that the Federal Government was negligent in failing to legislate, to formulate appropriate policies, or to properly

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[159] *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63; *Saadati v. Moorhead*, 2017 SCC 28; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42; *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Design Services Ltd. v. Canada*, 2008 SCC 22; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38; *Childs v. Desormeaux*, 2006 SCC 18; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Cooper v. Hobart*, 2001 SCC 79; *Ingles v. Tutkaluk*, 2000 SCC 12; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.); *Haig v. Bamford*, [1976] 1 S.C.R. 466. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

allocate resources including the staffing of the penitentiaries.

[402] Further still, the Federal Government argues that if there was a duty of care, then it was not breached. It submits that negligence claims cannot be judged in hindsight and setting a standard of care must account for evolving standards. It submits that until very recently, Canadian Courts have accepted that administrative segregation was authorized by law, and it argues that the evidence in this case does not establish a systemic mismanagement of the segregation system.

[403] Finally, the Federal Government submits that Mr. Reddock's systemic negligence claim fails because he cannot prove class-wide causation, a constituent element of a systemic negligence claim.

[404] Class Counsel denies that Mr. Reddock's systemic negligence claim is novel. They submit that it has long been recognized that prison officials owe a private law duty of care to individual prisoners,[160] and there is a long-recognized cause of action for systemic negligence relating to institutional abuse,[161] which the Supreme Court summarized in *Rumley v British Columbia*[162] as "failing to have in place management and operations procedures that would reasonably have prevented the abuse". They submit that the Federal Government operated a penitentiary system that has abused administrative segregation for decades and repeatedly ignored calls for reform and is liable for its systemic negligence.

[405] As I shall explain below, there are aspects of the Federal Government's argument that are correct, because there are aspects of Mr. Reddock's pleaded claim that are novel and these pleadings of a duty of care might not survive the test for new negligence claims against a government or public authority. And there are other aspects of Mr. Reddock's pleaded claim that have already been foreclosed by existing case law, most particularly the law that carelessness in legislating is not actionable and is a matter for the electorate not the judiciary.[163]

[406] However, as I shall explain below when Mr. Reddock's systemic negligence claim is pruned to its core and the doubtful or already-doubted aspects of it are removed, there is: (a) an established duty of care that is owed on a class-wide basis to the inmates of a penitentiary; (b) taking into account evolving standards of care, the duty owed the inmates has been breached; (c) the breach has caused damages to all Class Members; and (d) there is a base level of damages suffered by all Class Members for the Federal Government's systemic negligence.

2. Duty of Care

[407] The Federal Government argues that the essence of Mr. Reddock's systemic negligence claim is an attack on the laws and policies enacted about administrative segregation and about the failure of the Federal Government to enact the laws and policies that ought to have been

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[160] *Hennebury v. Ontario*, 2018 ONSC 6584; *Miller v. Canada*, 2015 ONSC 669; *MacLean v. The Queen*, [1973] S.C.R. 2. The Federal Government concedes that there is a duty of care on an individual basis: *Fontenelle v Canada (Attorney General)*, 2018 ONCA 475; *Walters v. Ontario*, 2017 ONCA 53; *Bastarache v. Her Majesty the Queen*, 2003 FC 1463; *Swayze v Kingston Penitentiary (Keeper Penitentiary)*, 2002 (S.C.J.).

[161] See, for example: *Seed v. Ontario*, 2012 ONSC 2681; *Slark v. Ontario*, 2010 ONSC 1726; *Cloud v. Canada* [2004] O.J. No. 4924 (C.A.), leave to appeal to the S.C.C. ref'd [2005] S.C.C.A. No. 50; *Rumley v British Columbia* 2001 SCC 69.

[162] 2001 SCC 69 at para 30.

[163] *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957.

enacted and to build the infrastructure and to provide the resources necessary to properly manage and administer administrative segregation. The Federal Government then submits that the jurisprudence establishes that a government or public authority is not liable for the failure to legislate or about its policy decisions that are dictated by economic, financial, political, and social factors or about infrastructure decisions or about the allocation of public resources.[164]

[408] Class Counsel does not dispute that the case law establishes that a government or public authority is not liable for legislating or for making policy decisions, but Class Counsel asserts that this immunity is confined to core policy decisions; *i.e.*, decisions that require the balancing of public policy factors and that the immunity does not extent to a government or a public authority's operational behaviour in implementing or administering policy decisions of whatever type. Class Counsel submits that governments and public authorities may be liable for their negligent operational decisions and careless conduct implementing the *CCRA*.[165]

[409] Putting aside for separate analysis below the matter of the absence of an independent review process, in my opinion, there is some merit in the Federal Government's argument about the scope of a government's duty of care in the immediate case. There are some aspects of the systemic negligence pleaded in the Reddock Case that are indeed not justiciable or are within the area of core law-making and policy-making that is immune from a negligence claim.

[410] However, in my opinion, the Federal Government's argument that all the allegations of negligence in the Reddock Case arise from policy or legislative decisions is not correct. I rather agree with Class Counsel's argument set out in paragraphs 345 and 346 of its factum, which states:

> 345. Canada's policy allows for the use of administrative segregation; however, indefinite and prolonged administrative segregation is negligent operational conduct. This policy is directly contrary to the direction in the *CCRA* to "take all reasonable steps to ensure" that inmates' living conditions are "safe, healthful and free of practices that undermine a person's sense of personal dignity". The Supreme Court of Canada in *Imperial Tobacco* described the distinction as follows: "[t]here is general agreement that governments may attract liability in tort where government agents are negligent in carrying out prescribed duties."
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> 346. In this matter, once Canada took custody of Class members, it was obliged to care for them in a manner that would not unduly inflict harm on them. Canada therefore owed class members a duty of care.

[411] Put somewhat differently, it is my opinion, that both on an individual basis and on a collective basis, through Corrections Canada, the Federal Government had a duty of care not to operate a system of administration segregation that caused harm to the inmates and a duty of care not to violate the inmates' *Charter* rights. The Correctional Service operated administrative segregation in a way that unnecessarily caused harm to the inmates and the Class Members suffered harm because of a systemic failure by the Correctional Service and its staff to exercise due care in administering their statutory and regulatory authority. The Federal Government's duty of care is, in part, commensurate with its *Charter* obligations.

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[164] *Cirillo v. Ontario*, 2019 ONSC 3066; *CUPE v. Ontario*, 2017 ONSC 4874, aff'd 2018 ONCA 309; *Conley v. Chippewas of the Thames First Nation Chief*, 2015 ONSC 404; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; *Ontario v. Phaneuf*, 2010 ONCA 901; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35; *Kwong v. R.*, [1978] A.J. No. 594 (C.A.); aff'd [1979], 2 S.C.R. 1010.

[165] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.

[412] Further, the Federal Government's duty of care is, in part, constituted by the recognized duty of care to take reasonable care to avoid causing foreseeable mental injury. Of this duty of care, in *Saadati v. Moorhead*,[166] Justice Brown stated at paragraph 23 of his decision for the Supreme Court:

> 23. I add this. As to that first necessary element for recovery (establishing that the defendant owed the claimant a duty of care), it is implicit in the Court's decision in *Mustapha* that Canadian negligence law recognizes that a duty exists at common law to take reasonable care to avoid causing foreseeable mental injury, and that this cause of action protects a right to be free from negligent interference with one's mental health. That right is grounded in the simple truth that a person's mental health -- like a person's physical integrity or property, injury to which is also compensable in negligence law -- is an essential means by which that person chooses to live life and pursue goals (A. Ripstein, Private Wrongs (2016), at pp. 87 and 252-53). And, where mental injury is negligently inflicted, a person's autonomy to make those choices is undeniably impaired, sometimes to an even greater degree than the impairment which follows a serious physical injury (*Bourhill v. Young*, [1943] A.C. 92 (H.L.), at p. 103; *Toronto Railway*, at p. 276). To put the point more starkly, "[t]he loss of our mental health is a more fundamental violation of our sense of self than the loss of a finger" (*Stevens*, at p. 55).

[413] The essence of Mr. Reddock's action is that the core decisions - that are already found in the *Corrections and Conditional Release Act* have systemically been carelessly implemented by Correctional Service. In *Brown v. British Columbia (Minister of Transportation and Highways)*,[167] the Supreme Court noted that the operational area where a government or public authority may be exposed to liability for negligence is concerned with the practical implementation of the formulated policies and it mainly covers the performance or carrying out of a policy decisions made on the basis of administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness. The essence of Mr. Reddock's systemic negligence claim is that it was careless in implementing the formulated policies of the *CCRA.*

[414] I agree that the carelessness of Corrections Canada is at an operational level and this is demonstrated by the factual record, which reveals that:

i. Corrections Canada, through its operation of administrative segregation, has not recognized that inmates retain the rights of all members of society except those that are, as a consequence of their sentence, lawfully and necessarily removed or restricted as required by s. 4 of the *CCRA*.

ii. In using measures consistent with the protection of the penitentiary population, Corrections Canada, through its operation of administrative segregation, has not limited those measures to only what is necessary and proportionate to attain the purposes of the Act as required by s. 4 of the *CCRA.*

iii. Corrections Canada, through its operation of administrative segregation, has not assisted the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries as required by sections 3 and 5 of the *CCRA.*

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[166] 2017 SCC 28.
[167] [1994] 1 S.C.R. 420 at p. 441.

iv. Corrections Canada, through its operation of administrative segregation, has not allowed inmates a reasonable opportunities to associate with other inmates within the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons as required by s. 73 of the *CCRA.*

v. Corrections Canada, through its operation of administrative segregation, has not released inmates at the earliest appropriate time as required by s. 31 (2) of the *CCRA.*

vi. Corrections Canada, through its operation of administrative segregation, has not taken all reasonable steps to ensure that the living conditions of inmates are free of practices that undermine a person's sense of personal dignity as required by s. 70 of the *CCRA.*

vii. Corrections Canada, through its operation of administrative segregation, has administered a cruel, inhumane or degrading treatment as prohibited by s. 69 of the *CCRA.*

viii. Corrections Canada, through its operation of administrative segregation, has not carried out the sentences imposed by the courts through the safe the safe and humane custody and supervision of offenders as required by sections 3 and 5 of the *CCRA.*

[415] I wish to be crystal clear that I am not basing the duty of care in the immediate case on the theory that the Correctional Service breached the *Corrections and Conditional Release Act*. It is well established that mere breach of a statutory duty does not constitute negligence and the remedy for breach of a statutory duty is judicial review for invalidity.[168] While some of the allegations of negligence must be pruned from Mr. Reddock's Statement of Claim, I recognize a duty of care in the immediate case on the reality that the Correctional Service negligently implemented and administered the *CCRA.*

[416] The overpleading in the Reddock Case is similar to the overpleading in *Holland v. Saskatchewan,*[169] where a group of cattle farmers brought a class action against the Province of Saskatchewan. The province required the farmers to enter into a government program with a provision that was ruled to be unlawful and the province downgraded the farmers' status when they refused to enroll in the program.

[417] In *Holland v. Saskatchewan,* the Supreme Court struck the negligence claim based on the allegations that sounded in misconduct in legislating or in adjudicating, but the Court held that the central claim that the province had failed to implement a judicial decree to remedy the wrongful reduction in the group's herd status was an "operational" act that public authorities were expected to carry out. Chief Justice McLachlin, who wrote the judgment of the Court stated at paragraph 14:

> 14. With respect, it is not clear to me that the reasons given by the Court of Appeal provide a

[168] *Holland v. Saskatchewan*,2008 SCC 42 at para. 9; *The Queen in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205.
[169] 2008 SCC 42.

> sound basis for striking para. 61.1(f) at the outset of the proceedings. The real issue, not addressed by the Court of Appeal, is whether a claim for negligent failure to implement a judicial decree clearly cannot succeed in law and hence must be struck at the outset. Such a claim is not a claim for negligent breach of statute. It stands on a different footing. In *Welbridge Holdings Ltd. v. Greater* Winnipeg, [1971] S.C.R. 957, at p. 970, this Court noted the difference in terms that appear to recognize the possibility of an action for failure to implement a judicial decree:
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> > ... the risk of loss from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care. The situation is different where a claim for damages for negligence is based on acts done in pursuance or in implementation of legislation or of adjudicative decrees. [Emphasis added.]
>
> More recent authorities describe the distinction in terms of "policy" versus "operational" decisions. Policy decisions about what acts to perform under a statute do not give rise to liability in negligence. On the other hand, once a decision to act has been made, the government may be liable in negligence for the manner in which it implements that decision: *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705; *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145. Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an "operational" act. It is therefore not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree.

[418] In the immediate case, the central allegation of Mr. Reddock's negligence claim is that systemically the Correctional Service was careless in implementing the legislative decisions made by the Federal Government and that the Federal Government should be liable in negligence for the operational acts of the Correctional Service in how it implemented administrative segregation. The Correctional Services misconduct was in the operational area.

[419] In *R. v. Imperial Tobacco Canada Ltd.*,[170] the Supreme Court wrestled with how to differentiate policy decisions for which a government or public authority would be immune from a negligence claim and operational decisions for which it could be liable in negligence. Chief Justice McLachlin, who wrote the judgment for the Court, stated at paragraph 90 of her decision:

> 90. I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[420] In the immediate case although some of the allegations made against the Federal Government concern rational, good faith core policy government decisions as to a course or principle of action that is based on public policy considerations such as economic, social, and political factors, in my opinion, the essential characterization of the duty of care in the Reddock

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[170] 2011 SCC 42

Case is that the duties do not involve a balancing of economic, social and political considerations but rather involve carelessness in implementing government policy decisions.

[421] The core of Mr. Reddock's systemic negligence claim against the Federal Government is not a novel claim. It does not require a duty of care analysis. The Correctional Service, which controlled every aspect of the inmate's lives had a proximate relationship with the inmates with respect to the operation of administrative segregation, and the Federal Government had a duty of care with respect to the operation of administrative segregation, which had the potential to cause great harm, particularly psychiatric harm, when the segregation became prolonged. The systemic negligence claim advanced by Mr. Reddock is not a novel case that extends the duties of government or public authority; it falls within the ambit of established public authority negligence.

[422] The Reddock Case may be novel in the sense that it is a class action systemic negligence claim against a government that is being determined on its merits at a trial or summary judgment motion, but the legal viability of systemic negligence claims has been recognized in class action settlements that have received court approval[171] and in in certification motions,[172] some of which have involved fulsome duty of care analyses.

[423] The Federal Government relies on cases such as: *Edwards v. Law Society of Upper Canada*;[173] *Cooper v. Hobart*;[174] *Williams v. Canada (Attorney General)*;[175] and *Eliopoulos (Litigation Trustee) v. Ontario (Minister of Health and Long-Term Care*),[176] where the courts concluded that the government or public authorities' statutory duty was owed to the public at large and this public duty required the government or public authority to balance a myriad of factors the nature of which were inconsistent with the imposition of a private law duty of care to individuals.

[424] I agree that these cases foreclose Mr. Reddock's systemic negligence claim based on allegations that the Federal Government owed a duty of care with respect to the staffing of the penitentiaries or with respect to the law making or policy making function including the responsibility to have in place safeguards and policies to prevent the harms associated with administrative segregation.

[425] But these authorities do not foreclose the prospect that there is a foreseeable duty of care to an identifiable group for whom there is a relationship of proximity that gives rise to a duty of care. At its essence, the Reddock Case is not a case of a failure to protect a plaintiff or group of plaintiffs from the risk of harm from an external source like a SARs epidemic or a negligent manufacturer of a good or service; it is a case about a public authority causing physical and mental harm by carelessly carrying out its responsibilities to both the public and to the inmates, the persons in its charge, custody, and control.

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[171] *Seed v. Ontario*, 2012 ONSC 2681; *Slark v. Ontario*, 2010 ONSC 1726.
[172] *Good v. Toronto*, 2016 ONCA 250 at para. 75, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 255; *Davidson v. Canada (Attorney General)*, 2015 ONSC 8008; *Cloud v. Canada* [2004] O.J. No. 4924 (C.A.), leave to appeal to the S.C.C. ref'd [2005] S.C.C.A. No. 50; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184.
[173] 2001 SCC 80.
[174] 2001 SCC 79.
[175] 2009 ONCA 278.
[176] (2006) 82 O.R. (3d) 321, leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 514.

[426] In *Rumley v. British Columbia*,[177] the Supreme Court had a negative definition of systemic negligence, which is to say a definition based on acts of omission. The systemic negligence of the province was its failure to have in place procedures that would have prevented the tortious conduct. But a positive definition of a systemic negligence, which is to say a definition based on actions of commission, would have been carelessly having in place harmful procedures and practices contrary to the intent of the enabling legislation.

[427] A negative definition of systemic negligence was appropriate for the factual circumstances of *Rumley v. British Columbia*, where the provincial government operated schools for the deaf where sexual assaults on students by staff and by other students was rampant. Obviously, the government had not prescribed sexual assaults and abuse as part of the operation or curriculum for the schools, and the systemic negligence was defined as the failure to have in place policies to prevent the toxic environment at the schools. The point is that the negative definition of the cause of action for systemic negligence used in the *Rumley* Case*,* which was appropriate for that case, is not exhaustive or comprehensive definition of what counts for a legally viable plea of systemic negligence.

[428] In this last regard, it is also worth noting that the cause of action criterion for certification was not in issue in the *Rumley* Case. By the time the case had reached the Supreme Court of Canada, the issues were whether there were common issues and whether a class proceeding was the preferable procedure for the resolution of the common issues. In *Rumley,* the Representative Plaintiff relied on systemic negligence being the common issue, and the Supreme Court of Canada agreed that systemic negligence, which had already passed the cause of action criterion, satisfied the commonality and preferable procedure requirements of British Columbia's class proceedings statute. Thus, Chief Justice McLachlin stated at paragraph 30 of her judgment for the court:

> 30. I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence -- "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS [the school for the deaf] had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

[429] While not a systemic negligence case, *Little Sisters Book and Art Emporium v. Canada (Minister of Justice),*[178] mentioned several times above, demonstrates how a systemic breach of a citizen's *Charter* rights is not limited to acts of omission; *i.e.,* failing to introduce safeguards, but includes mismanaging a system, acts of commission.

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[177] [2001] 3 S.C.R. 184 at para. 30.
[178] 2000 SCC 69 at para. 71.

[430] In the *Little Sisters* Case, the Federal Government was found liable for breaching s. 15 of the *Charter* (equality rights) because of the systemic mismanagement of the *Customs Act*,[179] by its Customs Officials. The trial judge and the majority of the Supreme Court of Canada held that the legislation itself, which authorized Customs Officials to seize matter considered to be obscene, was constitutionally sound, but they concluded that how the Customs Officials administered the Act contravened the *Charter*. The trial judge had concluded, and the majority of the Supreme Court agreed, that there were systemic causes for the Custom's Officials errors in classifying material as obscene and there were systemic reasons for the Custom's Official's discriminatory treatment of the plaintiff bookstore, which served the gay and lesbian community. The bookstore imported publications that were being seized by Customs Officers at the border. The seizures were found to breach the bookstore's *Charter* rights. The systemic misconduct of the Customs Officials was acts of commission not the omission to introduce safeguards.

[431] Much the same reasoning applies in the immediate case. Corrections Canada both through what it did and did not do systemically mismanaged administrative segregation. Corrections Canada had a duty of care to all the Class Members. As was the case in *Rumley*, in the immediate case, Mr. Reddock advanced a claim that was amenable to a class proceeding, and I conclude that once the foreclosed allegations of a private law duty of care are removed from the Statement of Claim, the Reddock Case comes within an already recognized negligence claim and it is not necessary to undertake a duty of care analysis. That all said, it is necessary for me to note that I disagree with the public policy arguments advanced by the Federal Government that it is submits negate proximity or negate a *prima facie* duty of care.

[432] I do not accept the argument that a private law of duty to the inmates about the use of administrative segregation would require the Correctional Service to disregard: (a) the safety of the penitentiary population regardless of the threat posed and regardless of whether or not there were effective, existing alternatives to address the risk; and (b) its paramount statutory mandate to protect society.

[433] This argument is just not true. As noted above, there is no explanation from the Federal Government why administrative segregation for the purposes of maintaining the security of the penitentiary had to be a form of solitary confinement that was worse in the harm it caused than disciplinary segregation.

[434] In the Reddock Case, the nature of the private law duties of care are not inconsistent with the Federal Government's duties to the public; which include not contravening the inmates *Charter* rights; rather, the Federal Government's duties to the inmates are consistent and indeed baked into the *Corrections and Conditional Release Act* and the Federal Government's duties to the public.

[435] The safety of the inmate as well as that of the staff, the institution, and the community never had to be disregarded in order to operate a humane form of segregation for security purposes. Moreover, it has never been necessary to hold inmates in prolonged solitary confinement, given the danger that it poses to their physical and mental health and to their rights under s. 7 of the *Charter*. The Federal Government has now accepted that reality by legislating for SIUs to isolate inmates in much less restrictive conditions.

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[179] R.S.C., 1985, c. 1 (2nd Supp.).

[436] While there may perhaps be some new infrastructure associated with the introduction of the SIUs, there is no explanation why the operational features of these units, including enhanced human interaction and enhanced availability of programs and enhanced attention to the health needs of the inmates could not have been introduced decades ago, which would have enhanced the security of the penitentiaries and alleviated a great deal of suffering and harm of inmates.

[437] The recent behaviour of the Federal Government in responding to the directives of the Courts of Appeal in British Columbia and Ontario belie that the Federal Government ever was confronted with a duty that would compromise its paramount duty to protect society. Change for the better was always feasible and the need for change has been brought to the attention of the Federal Government for decades.

[438] If there are conflicting responsibilities of having to protect inmates and also to protect the population of the penitentiary and the public, those conflicting responsibilities are sourced in the *CCSA* itself and in the inherent nature of a penitentiary and there is no chilling effect in requiring the Correctional Service to do what it has been charged to do over the decades that have passed since the enactment of the *CCSA*.

[439] I now turn to the matter of the absence of an independent review process and its relationship to the systemic negligence claim. In this regard, I shall be brief. Although the matter of the review process admits of a legal analysis based on public law and constitutional law principles, I do not see how it can give rise to private law obligations.

[440] Because the review process is a public law and legislative phenomenon, it does not admit of a standard of care analysis. Moreover, that the Federal Government did not implement an independent review process is a legislative, adjudicative, or policy choice and not an operational matter.

[441] Although it was a public policy decision that did not satisfy the requirements of public law and the *Charter*, it was not carelessness but simply a bad or ill-informed policy choice to not have an adequate review process. And who is to say what the standard of care would be for developing a review process to satisfy the Federal Government's *Charter* obligations. These are public law not tort law issues.

[442] Mr. Reddock's allegations about systemic negligence in not having introduced an independent review process for administrative segregation is an example of an aspect of his negligence claim that would be novel, but it is not essential or necessary for his systemic negligence claim and can be pruned from the systemic negligence claim. I conclude that the Federal Government has a duty of care to the Class Members that underpins a systemic negligence claim. I will discuss the standard of care, whether the standard of care has been breached, causation, and damages below.

3. Standard of Care

[443] Mr. Reddock has a very elaborate and complicated argument about the standard of care including the submissions that:

i. The Federal Government failed to respond, or was willfully blind, to a chorus of calls for administrative segregation reform dating back decades. Those recommendations came from: the Office of the Correctional Investigator; the Inter-American Commission the United Nations; the Prime Minister's office;

numerous Courts; domestic medical organizations; media; and common sense.

ii. The Federal Government failed to offer segregated inmates appropriate programming and other opportunities for meaningful human contact.

iii. The Federal Government regularly used prolonged and indefinite administrative segregation on vulnerable groups, including the mentally ill, young persons, the elderly, those who were suicidal, aboriginal persons and women, contrary to the common law and statutory standard of care.

iv. The Federal Government regularly used administrative segregation to punish, rather than for prescribed purposes contrary to its legislative purpose.

[444] These submissions, while they may illustrate breaches of a standard of care, are not helpful in setting the standard of care, which is more typically done by having an expert describe the standard of practice in a particular industry or calling.

[445] While witnesses with expertise in the management of penitentiaries gave evidence in the immediate case about the problems of solitary confinement, about how penitentiaries are managed in other jurisdictions, and about how the problems might be and have been solved by alternative measures, some of which have been employed in other parts of the world, that evidence did not establish, as such, a standard of care.

[446] The problems of determining the standard of care appropriate for the operation of administrative segregation are complex. I agree with the Federal Government's submissions that to determine the standard of care, a Court must consider the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury, including the fact that public resources are not unlimited.[180] In *Ryan v. Victoria (City)*,[181] Justice Major stated for the Supreme Court of Canada at paragraph 28:

> 28. Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[447] I also agree with the Federal Government's submission that if there is a statutory duty to the public, the standard of care due the inmates must reflect this reality, [182] but that evidence of a statutory breach is not necessarily evidence of a breach of the standard of care.[183] In *Ryan v. Victoria (City)*,[184] Justice Major discussed the relevance of legislative standards to determining the standard of care at paragraph 29 as follows:

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[180] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201
[181] [1999] 1 S.C.R. 201 at para. 28.
[182] *Livent Inc. v Deloitte & Touche*, 2016 ONCA 11, appeal allowed in part in *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63.
[183] *Williams v. Toronto (City)*, 2016 ONCA 666; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201
[184] [1999] 1 S.C.R. 201 at para. 28.

> 29. Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. See *R. in right of Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205. Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. See, e.g., *Stewart v. Pettie*, [1995] 1 S.C.R. 131, at para. 36, and *Saskatchewan Wheat Pool*, at p. 225. By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. See Linden, supra, at p. 219. Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties.

[448] Further, I agree that the standard of care cannot be determined with the benefit of hindsight and that to determine the standard of care, the court must evaluate the defendant's conduct in relation to the facts that existed at the time of the alleged negligence because the standard of care evolves over time as experience and understanding accumulate.[185]

[449] In the immediate case, determining the standard of care over time would be particularly challenging because administrative segregation and solitary confinement for that matter have an ancient history of which the pleaded Class Period begins with the introduction of the *Corrections and Conditional Release Act* in in 1992 and continues to the present.

[450] The problems of determining the standard of care, however, while difficult are not insurmountable on this summary judgment motion. I begin by noting that because of the presumptive limitation period, the issue becomes what was the standard of care with respect to administrative segregation for the period between March 3, 2011 to the date of the summary judgment motion.

[451] Then, based on the evidence advanced in the case at bar, the answer to the standard of care issue is that between March 3, 2011 to date, the standard of care by the Federal Government with respect to administrative segregation for security purposes was that: (a) it should be the last resort in order to satisfy safety and security concerns; (b) its duration should not be indeterminate; (c) it should be as short as possible; (d) it should not be prolonged and any segregation that was the equivalent of solitary confinement should be capped and not extend beyond fifteen days; (e) it should never be used as a punishment or a substitute for disciplinary segregation; (f) it should comply with the Mandela Rules; and (g) it should not be used when the inmate was an adolescent, pregnant, or seriously mentally ill.

[452] By 2011 and with respect to some standards long before 2011, there was an international consensus in those parts of the world that respect for the rule of law and human and civil rights that these were the standards for the operation of administrative segregation or solitary confinement.

[453] I find that the Federal Government was careless in its operation of the administrative segregation regime. There were numerous individual instances of maladministration, but the

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[185] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Blackwater v. Plint*, [2005] 3 S.C.R. 3; *Rumley v. British Columbia*, 2001 SCC 6.

failure was also systemic. Throughout the period from March 3, 2011 to the date of the summary judgment motion, the Federal Government operation of administrative segregation was below the standard or care described above.

[454] I disagree with the Federal Government's submission that international and industry standards were constantly shifting. If there was a shift it was to shift to accelerate what Charles Dickens had called for in 1850, which was the abolition of solitary confinement, which possibly has been achieved with the enactment of Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, assuming it passes any constitutional challenge.

[455] While the precise period that would constitute cruel and unusual treatment was evolving, it was evolving in one direction and the other standards set out above did not shift.

[456] The Federal Government's submission that administrative segregation had to be indeterminate because it is impossible to put a deadline on eliminating risk does not withstand analysis. The elimination of risk was the reason the inmate was placed in administrative segregation supposedly as a last resort. Once the inmate was in administrative segregation, the directive of the *Corrections and Conditional Release Act* – as far back as 1992 - was to make the segregation as short as possible, which is the contrary of an indeterminate segregation, and in any event, there never was a justification for making the housing conditions of administrative segregation the equivalent of the most severe penalty for disciplinary offences.

[457] The notion of impossibility in finding solutions to mitigate the risk that led to the placement in administrative segregation is belied by the statistical evidence that without any change other than putting its mind to the problem of finding solutions, the average duration of administrative segregation was 62 days in 1994 and was below 30 days since 2015.

[458] I disagree with the Federal Government submission that from a tort liability perspective, it cannot be said that the Correctional Service knew or ought to have known of a certain risk of harm on a class-wide basis resulting from administrative segregation beyond a certain point in time.

[459] This submission is incorrect, it misstates the international and industry standards that had been established, and it misses the point that that Correctional Service knew or ought to have known that there was a duration for which there was an absolute certainty of harm and not just a risk of harm and the Correctional Service was indifferent to the duration of administrative segregation. Operating administrative segregation with an indeterminate duration of segregation that was a type of solitary confinement while knowing that prolonged solitary confinement was harmful is a breach of the standard of care, and it is no answer or excuse for the Federal Government to say that it never understood precisely on what day the indeterminate segregation ought to have become determinate.

[460] And the Federal Government's submission ignores the fact that whatever the diminishing duration of acceptable administrative segregation, the Federal Government was exceeding it both by placing persons who ought not have been placed in administrative segregation because of their health and by exceeding the acceptable duration for the majority of inmates.

[461] Moreover, the Federal Government breached the international and industry standards for the inmates of the its penitentiaries, when it decided that the housing conditions and the solitary confinement of administrative segregation with its indefinite duration should be same as the housing conditions and the solitary confinement of disciplinary segregation with its maximum

duration of thirty or forty-five days.

[462] As it is relevant to Mr. Reddock's claim of punitive damages, I need to add that I although I find as a fact that based on the evidence of this case, the Federal Government's conduct fell below the standard of care, I do not find that the Federal Government or the Correctional Service was ignoring or intentionally evading responsibilities. I find the Correctional Service's operation of administrative segregation was careless, rigid, obstinately unnecessary, and negligent, but it was not an intentional or willful evasion of responsibilities.

4. Causation and a Base Level of Damages

[463] The discussion above establishes that the Federal Government has a class wide duty of care that has been breached and the standard of care is, in part, commensurate with the Federal Government's obligations under the *Charter* and is, in part, formed by the duty to take reasonable care to avoid causing foreseeable mental injury. The Correctional Service's conduct has been found to have breached sections 7 and 12 of the *Charter* and the same conduct is systemic negligence. Instances of carelessness and non-compliance with the *CCRA* have been identified. The next issue is whether the Class Members have suffered across the class damages caused by the systemic negligence.

[464] As explained above in the discussion of the quantification of the Class Members' *Charter* damages, the misconduct of the Federal Government be it negligence or a be it a contravention of the *Charter* has indeed caused a base level of harm for every Class Member.

[465] In some instances, the harm is suffered across the class differentially which is to say that the systemic negligence causes every Class Member to suffer harm but not the same kind of harm. In other instances, the harm is of the same kind but suffered to different degrees by each Class Member. Particularly in the latter sense but also in the former sense, the evidence establishes that the systemic negligence of the Federal Government has caused every Class Member a base level of compensatory harm for the contraventions of the *Charter* or for systemic negligence.

[466] I have quantified that harm above. I need say nothing more other than that the Class Members do not receive a double recovery.

K. Discussion and Analysis: Punitive Damages

[467] As noted in the Introduction to these Reasons for Decision, it is my conclusion that the Federal Government is not liable for punitive damages on a class-wide basis but may be liable for punitive damages after the *Charter* damages and damages for systemic negligence are determined at the individual issues trials. My explanation for this conclusion follows.

[468] Justice Binnie examined the liability for and the quantification of punitive damages in the leading case of *Whiten v. Pilot Insurance Co.*[186] In that case, the Supreme Court of Canada restored a punitive damages award of $1 million made by a jury in an action against an insurer who had breached its duty of good faith and fair dealing to its insured. In paragraph 94 of his

[186] 2002 SCC 18.

judgment, in the context of how a court should charge a jury about punitive damages, Justice Binnie explained the nature of punitive damages. He stated:

> 94. [I]t would be helpful if the trial judge's charge to the jury included words to convey an understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[469] It follows from Justice Binnie's remarks that an assessment of punitive damages requires: first, a determination that there has been high-handed, malicious, arbitrary or highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour; and second that the punitive damages be given in an amount that is no greater than necessary to rationally accomplish their non-compensatory purposes of retribution, deterrence, and denunciation. These assessments require an requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. An analysis of these ensures that punitive damages are rational and in an amount that is not greater than is necessary to accomplish their purposes of retribution, deterrence, and denunciation.

[470] In the case at bar, as I did in the *Brazeau* Case, I shall in the first instance assume without deciding that the conduct of the Correctional Service on a class-wide basis departs to a marked degree from the ordinary standards of decent behaviour that would justify an award of punitive damages. With that assumption, the question becomes what amount of punitive damages is rationally necessary to serve the purposes of retribution, deterrence, and denunciation.

[471] In the immediate case, given that I have already awarded $20 million on a class-wide basis for *Charter* damages, which serve the similar purposes of retribution, deterrence, and denunciation, the answer to the question is that with the availability of this *Charter* remedy, the purposes of an award of punitive damages have already been served.

[472] The conclusion of this analysis is that the Federal Government is not liable for punitive damages on a class-wide basis but may be liable for punitive damages if additional *Charter* damages are determined at the individual issues trials.

[473] In the case at bar, I also dismiss the claim for class-wide punitive damages for a second

reason. Although I did not do in the *Brazeau* Case, in the Reddock Case, I shall make a decision about the conduct of the Correctional Service on a class-wide basis.

[474] As noted above in the discussion of the standard of care, I do not find that that the conduct of the Correctional Service on a class-wide basis departs to a marked degree from the ordinary standards of decent behaviour that would justify an award of punitive damages. I do not find as a fact that on a class-wide basis, there has been high-handed, malicious, arbitrary, or highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour.

[475] Although the conduct of the Correctional Service was clearly wrong on a class-wide basis for the purpose of applying the *Macklin* principle, this does not warrant an additional punitive damages award especially in circumstances when *Charter* damages for vindication and deterrence are being awarded. Thus, I shall not make a class-wide award of punitive damages.

L. Discussion and Analysis: Aggregate Damages

[476] Mr. Reddock seeks a base level award of aggregate *Charter* damages for vindication, deterrence, and compensation to be paid directly to the Class Members. The compensatory part of the aggregate award for *Charter* damages would also include base level compensation for the Federal Government's systemic negligence. In other words, there is no double recovery for the base level compensatory portion of the aggregate damages award.

[477] The base level award for *Charter* damages and for systemic negligence is without prejudice to the Class Members seeking more *Charter* damages or more compensation for the systemic negligence (a top up) at individual issues trials.

[478] The Federal Government submits, however, that given the individual nature of the harm suffered by each inmate, there can be no aggregate assessment. For the reasons set out in the analysis of *Charter* damages, I disagree. There is a minimum level of harm suffered by each and every Class Member.

[479] Section 24 of the *Class Proceedings Act, 2002* states:

> *Aggregate assessment of monetary relief*
>
> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> *Average or proportional application*
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> *Idem*
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or

to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

(a) the use of standardized proof of claim forms;

(b) the receipt of affidavit or other documentary evidence; and

(c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

(a) there are apparent grounds for relief;

(b) the delay was not caused by any fault of the person seeking the relief; and

(c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

[480] For an aggregate assessment of damages to be available under s. 24 of the *Class Proceedings Act, 1992*, no questions of fact or law other than those relating to the assessment of monetary relief must remain to be determined in order to establish the amount of the defendant's monetary liability.[187] In *Ramdath v. George Brown College of Applied Arts and Technology*,[188] Justice Belobaba stated at paragraph 1:

> 1. Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception.

[187] *Bennett v. Hydro One Inc*., 2017 ONSC 7065 at para. 104.
[188] 2014 ONSC 3066 at para. 1, aff'd 2015 ONCA 921. With respect to the trial aggregate assessment, see also supplementary reasons, *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 4215.

> Otherwise, the potential of the class action for enhancing access to justice will not be realized.

[481] On appeal, in *Ramdath*, the Court of Appeal endorsed Justice Belobaba's approach to the quantification of agreement damages. Justice Belobaba held that provided that the liability of the defendant was not overstated, the standard of proof of aggregate damages did not have to achieve the same degree of accuracy as in an ordinary action and instead the standard was whether the damages could be reasonably determined without proof by individual class members.

[482] In *Ramdath*, the Court of Appeal noted in that it is desirable to award aggregate damages where the criteria under s. 24 (1) are met in order to make the class action an effective instrument to provide access to justice and the the standard to meet in determining whether an aggregate assessment will be ordered is reasonableness.[189] The Court of Appeal also noted that provided that Defendant's total liability is not over-stated, an aggregate damages methodology will be reasonable if some members of the class are over-compensated and some are under-compensated.[190]

[483] In *Good v. Toronto*,[191] a class action where political protestors alleged that their *Charter* rights had been violated, the Court of Appeal stated:

> s. 24 (1) [of the *Class Proceedings Act, 1992*] asks whether the aggregated or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para 73 that "it does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under section 9 of the *Charter*, a minimum award of damages in a certain amount is justified.

[484] Thus, the court may award aggregate damages under s. 24(1)(c) of the *Class Proceedings Act, 2002* if the evidence put forward by class counsel is sufficiently reliable to permit a just determination of all or part of the defendant's monetary liability without proof by individual class members.

[485] In deciding whether aggregate damages should be awarded in whole or in part, the court should consider: (a) the reliability of the non-individualized evidence that is being presented; whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and whether the denial of an aggregate approach will result in a wrong eluding an effective remedy and thus a denial of access to justice.[192]

[486] In the Reddock Case, the evidence put forward by Class Counsel is sufficiently reliable to permit an aggregate assessment of $20 million for *Charter* damages for the purposes of vindication, deterrence, and compensation. A portion of the $20 million, approximately $9 million, is for compensation and this compensation is for both the *Charter* damages and the systemic negligence claim. This damages award is a base level award for all class members and is an aggregation of just a part of the Federal Government's total liability. It does not overstate

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[189] 2015 ONCA 921 at para. 76.
[190] 2015 ONCA 921 at para. 51.
[191] 2016 ONCA 250 at para. 75, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 255.
[192] *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras. 47-52.

the Federal Government's liability. The $20 million award comes within s. 24 (1) of *Class Proceedings Act, 1992* because: (a) the $20 million is claimed on behalf of all Class Members; (b) there are no questions of fact or law that remain to be determined to establish this $20 million amount of the Federal Government's liability; and (c) the $20 million liability to the class can reasonable be determined without proof by individual class members.

M. Housekeeping, Class Definitions, Reconciling the Reddock, Gallone, *Brazeau*, *BC Civil Liberties Assn*, *Cdn Civil Liberties Assn* Cases, and the Distribution Plan

[487] Mr. Reddock's claim for unjust gains and waiver of tort were not certified and should be treated as discontinued or abandoned with the approval of the court pursuant to s. 29 of the *Class Proceedings Act, 1992*.

[488] Although Mr. Reddock's claim with respect to a breach of s. 9 of the *Charter* was certified, it was not pursued on the summary judgment motion and, as noted above, it also should be treated as discontinued or abandoned.

[489] As noted above under the heading "Procedural Background and Class Member Demographics," the *Brazeau* Class Members, who by the class definition in the *Brazeau* Case had been diagnosed with very serious mental illness are not Class Members in the Reddock Case. In the *Brazeau* Case, I recommended that the class definition be amended to include Class Members with undiagnosed serious mental illnesses. In light of the outcome of the Reddock Case and the *Cdn Civil Liberties Assn* Case, there is no purpose in following through on this recommendation The Class Members with undiagnosed mental conditions are members of the Reddock Class if they were placed in administrative segregation for more than fifteen days.

[490] Depending on the outcome of the appeal in the *Brazeau* Case and the outcome of any appeal in the immediate case, it may be possible to amalgamate the distribution plan and the protocol for individual issues trials.

[491] Turning now to the distribution plan for the Class Members of the Reddock Case, they have been awarded $20 million in aggregate damages. Unlike the outcome of the *Brazeau* Case, the award in the Reddock Case is to be distributed directly to Class Members.

[492] Pursuant to s. 24 (2) of the *Class Proceedings Act, 1994,* the court may order that all or a part of an aggregate assessment be applied so that some or all individual class members share in the award on an average or proportional basis. Pursuant to s. 26 (8), the court may order that an award of aggregate damages be paid in a lump or in installments on such terms as the court considers appropriate. I interpret these provisions to mean that the $20 million can be distributed equally to every member of the Class. I, therefore, order that the award of aggregate damages be distributed equally to the Class Members after deducting Class Counsel's legal fees, the claim of the Class Action Proceedings Fund, if any, disbursements, and the expense of the distribution

[493] There are approximately 9,000 Class Members. Before deducting Class Counsel's legal fees, the claim of the Class Action Proceedings Fund, if any, disbursements, and the expense of the distribution, the gross award is approximately $2,200 per Class Member.

[494] In the *Brazeau* Case, I ordered the aggregate assessment award, which was only for vindication and deterrence purposes, to be paid to a fund to be used for mental health programs in the penitentiaries. If I were to adopt the same approach in the immediate case - which I do not

propose to do – then, the gross award for compensation would be approximately $1,000 and approximately $1,200 would be distributed to a fund. In this regard, as noted above, Class Counsel as an alternative to a direct payment to the Class Members suggested a fund for legal aid purposes.

[495] I shall not adopt the approach I used in the *Brazeau* Case to establish a fund. As noted above, the Federal Government submitted that it was an error for me to do so in the *Brazeau* Case. As I indicated in the Introduction to these Reasons for Decision, I found this submission to be ironical and I promised to explain why.

[496] In the *Brazeau* Case, the Federal Government submitted that there were countervailing policy considerations that stood against a base award of *Charter* damages and suggested a declaratory order would be sufficient. In paragraph 128 of its factum, the Federal Government stated:

> 128. Further to the submissions above in paragraphs 115 to 122, alternate remedies, such as declaratory relief, ought to be considered as a more appropriate form of relief. Such relief would allow the government to craft a legislative and/or policy response, including possibly with regards to Bill C-83. Whether this is in the form of additional mental health or program resources, or structural changes to institutions, either way, such remedies are more appropriate than an award of damages. Such alternatives responses serve a functional purpose in addressing alleged *Charter* violations. The principles of deterrence, vindication and compensation would all be met through such declaratory relief.

[497] Thus, the irony is that my inspiration in the *Brazeau* Case for distributing the *Charter* damages to a fund was the submissions of the Federal Government. In effect, my order was largely declaratory, but it now appears that the *Brazeau* Order is the irony of "be careful what you wish for because it might come true".

[498] The order I made in the *Brazeau* Case was thus animated by the Federal Government's submissions and quite favourable to the Federal Government, but they submit that I did not have the jurisdiction to make it. If they are correct, then if the Court of Appeal in the *Brazeau* Case upholds the aggregate damages award but agrees that I erred in how it should be distributed, then I suppose the Court of Appeal will make the order that I ought to have made, which would be to distribute the vindication and deterrence *Charter* damages to the Class Members directly, which is what I propose to do in the immediate case.

[499] I disagree that I did not have the jurisdiction to make the Order I did in the *Brazeau* Case, but if I was wrong, then I shall not make the same mistake in the Reddock Case. But error avoidance is not the reason I shall make this order for a direct payment to the Class Members. The reason that I am making an order that the aggregate award be distributed directly to the Class Members is that on the evidence in the Reddock Case, I am satisfied that there is a base level of compensatory damages that is owed to the Class and it should be paid to them directly.

N. The Protocol for Individual Issues Trials

[500] The whole Class has suffered breaches of sections 7 and 12 of the *Charter*. The whole Class is entitled to seek to top up the award of aggregate damages at individual issues trials. The quantification of additional damages is a matter of individual issues trials.

[501] The court's jurisdiction to design the individual issues trials is found in s. 25 of the *Class Proceedings Act, 1992* which states:

Individual issues

25. (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court.

[502] Where a Class Member has a substantial claim for damages, then his or her individual issues trial may require the full procedure provided for under the *Rules of Civil Procedure.* For less substantial claims, a more proportional procedure may be appropriate.

[503] Section 25 provides the court with the jurisdiction to design the individual issues trials. Depending on the quantum of each individual inmate's claim, the principles of proportionality in procedure may require dispute resolution procedures ranging from a simple claims-qualification procedure to conventional trials pursuant to the *Rules of Civil Procedure.*

[504] I direct a motion to settle the procedures for the individual issues trials. For present purposes, I note that issue estoppels from the summary judgment motion shall carry forward into the individual issues trials.

[505] By way of observation, I note that the protocol for the individual issues trials in the Reddock Case might usefully be consolidated with those in the *Brazeau* Case, which are in the process of being settled

O. Conclusion

[506] I grant the summary judgment motion. A judgment shall be taken out in accordance with these Reasons for Decision.

[507] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Reddock's submissions within twenty days of the release of these Reasons for Decision followed by the Federal Government's submissions within a further days.

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Perell, J.

Released: August 29, 2019

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Jullian Jordea Reddock

Plaintiff

– and –

Attorney General of Canada

Defendant

REASONS FOR DECISION

PERELL J.

Released: August 29, 2019