COURT OF APPEAL FOR ONTARIO

CITATION: Brazeau v. Canada (Attorney General), 2020 ONCA 184
DATE: 20200309
DOCKET: C66844 & C67459

Sharpe, Juriansz and Trotter JJ.

DOCKET: C66844

BETWEEN

Christopher Brazeau and David Kift

Plaintiffs/Moving Parties (Respondents)

and

Attorney General of Canada

Defendant/Responding Party (Appellant)

DOCKET: C67459

AND BETWEEN

Jullian Jordea Reddock

Plaintiff/Moving Party (Respondent)

and

Attorney General of Canada

Defendant/Responding Party (Appellant)

Gregory Tzemenakis, Eric Lafreniere, Lucan Gregory, Negar Hashemi, Sean Stynes, and Diya Bouchedid for the appellant

James Sayce, H. Michael Rosenberg, Charlotte-Anne Malischewski, Charles Hatt, Jacob Klugsberg, and Nathalie Gondek for the respondents

Andrea Bolieiro, Hera Evans, Alexandra Clark, and Matthew Chung, for the intervener, the Attorney General of Ontario

Heard: January 7 and 8, 2020

On appeal from the judgments of Justice Paul M. Perell of the Superior Court of Justice, dated March 25, 2019, with reasons reported at 2019 ONSC 1888, 431 C.R.R. (2d) 136, and August 29, 2019, with reasons reported at 2019 ONSC 5053.

Sharpe and Juriansz JJ.A.:

[1] These appeals involve two class actions claiming damages for breach of *Charter* rights brought by inmates in federal penitentiaries who were held in administrative segregation. One claimed damages for systemic negligence as well.

[2] In *Brazeau*, the class consists of offenders in federal custody between November 1, 1992 and the present who were placed in administrative segregation; were diagnosed with or suffered from serious mental illness, defined as "an Axis I Disorder (excluding substance use disorders) or Borderline Personality Disorder"; and were still alive on July 20, 2013.

[3] In *Reddock*, the class is defined to consist of all offenders in federal custody who were involuntarily subjected to prolonged (defined as at least 15 consecutive days) administrative segregation between November 1, 1992 and the present, and were still alive on March 3, 2015. The members of the *Brazeau* class are excluded from the *Reddock* class.

[4] In *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243, 144 O.R. (3d) 641, this court struck down ss. 31-37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*"), which authorized administrative segregation in federal penitentiaries, on the grounds that administrative segregation amounts to solitary confinement and that subjecting an inmate to solitary confinement for longer than 15 days constitutes cruel and unusual punishment contrary to s. 12 of the *Charter*. The court stated, at para. 5, that "prolonged administrative segregation [more than 15 days] causes foreseeable and expected harm which may be permanent, and which cannot be detected through monitoring until it has already occurred." The *CCRA* lacked the safeguards necessary to prevent inmates from remaining in segregation for more than 15 days and, thus, to prevent grossly disproportionate treatment: at paras. 113-15. In *CCLA*, Canada did not appeal the finding of the application judge that the legislation violated s. 7 of the *Charter* because it does not provide for an independent review of the decision to place an inmate in administrative segregation: 2019 ONSC 7491, 140 O.R. (3d) 342.

[5] The Court of Appeal for British Columbia in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, 377 C.C.C. (3d) 420, struck down ss. 31-37 of the *CCRA* on the grounds that they violated s. 7 of the *Charter* by authorizing prolonged administrative segregation (more than 15 days) that deprives persons of life, liberty or security in a manner that is grossly

disproportionate to the law's objectives, and because they did not provide for independent review of administrative segregation decisions.

[6] Both decisions were released after *Brazeau* was decided and before *Reddock* was argued.

[7] In June 2019, Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess., 42nd Parl., 2019, received royal assent, and entered into force in November 2019. That legislation replaces ss. 31-37 of the *CCRA* with a scheme of "Structured Intervention Units" ("SIUs") that are to provide inmates with four hours a day out of their cells and at least two hours of meaningful human contact in place of administrative segregation, as well as a mechanism for independent review.

[8] The appellant, the Attorney General of Canada, received leave to appeal *CCLA* and *BCCLA* to the Supreme Court of Canada: [2019] S.C.C.A. No. 96; [2019] S.C.C.A. No. 308. The civil liberties associations each also received leave to cross-appeal. Canada accepts, however, that unless and until *CCLA* is reversed by the Supreme Court, it is binding and that, for the purposes of these appeals, *CCLA* establishes the *Charter* breaches relied upon by the respondents.

[9] The motion judge granted summary judgment in both cases, finding Canada liable in damages for breach of the class members' *Charter* rights. In *Reddock*, the motion judge found that Canada was also liable for systemic

negligence, although he awarded one set of damages to account for both the breach of *Charter* rights and negligence: at para. 486.

[10] In both cases, the motion judge awarded a base level of aggregate damages and directed that a process to deal with additional individual claims by class members be established. In both cases, he assessed the aggregate damages at $20 million. In *Reddock*, he ordered that the aggregate damages, less approved legal fees and disbursements, be distributed to the class members. In *Brazeau*, he ordered that the aggregate damages, less approved legal fees and disbursements, be appropriated for "additional mental health or program resources for structural changes to penal institutions": at para. 458. He retained supervisory jurisdiction over distribution of the funds to implement these "structural changes": at para. 459.

[11] The central issue on these appeals is the availability of damages for the breaches of ss. 7 and 12 of the *Charter*. In *Reddock*, there is also the issue of systemic negligence, and in *Brazeau* the propriety of the damage award to implement structural changes. Canada also raises several procedural objections and argues that the motion judge erred in his determination of the applicable limitation periods.

A. FACTS

[12] As *CCLA* has found that administrative segregation as practiced in Canadian penitentiaries violates s. 12 of the *Charter*, and as Canada did not appeal the Superior Court's finding of the s. 7 violation, our review of the facts will be brief.

[13] When placed in administrative segregation, an inmate is removed from his or her cell and the general prison population and placed in a segregated area of the prison in a solitary cell with very limited access to others. This court held in *CCLA* that, as practiced in federal penitentiaries, administrative segregation amounts to solitary confinement, that is, isolation from meaningful human contact for more than 22 hours per day.

[14] In both appeals, the motion judge reviewed the history of solitary confinement in Canada and other jurisdictions dating back to the mid-19th century. While the practice has long been criticized as cruel and inhumane, it is defended by Canada's correctional authorities as necessary to maintain institutional security, the safety of inmates, and to facilitate criminal or disciplinary investigations.

[15] The conditions of administrative segregation are harsh. The inmate is placed in an austere small cell containing a toilet, a sink, a solid bed fixed to the wall covered by a thin mattress, sometimes a desk and sometimes a small

window. The cell door has a food slot through which meals are delivered and which is used for communication with the inmate.

[16] The motion judge made clear findings, amply supported by the record, by the decision of this court in *CCLA*, and by that of the Court of Appeal for British Columbia in *BCCLA*, that prolonged administrative segregation causes harm to the health and wellbeing of inmates. The motion judge's factual findings in *Brazeau* may be summarized as follows, as abbreviated from para. 262 of his reasons:

- There is no meaningful difference between administrative segregation and solitary confinement;
- There is also no meaningful difference between administrative segregation and disciplinary segregation under the *CCRA*;
- If anything, administrative segregation, because of its potential indeterminate duration, is more punishing than disciplinary segregation;
- There is no justification for the terms and conditions of administrative segregation being as draconian as those of disciplinary segregation;
- A placement in administrative segregation can cause and does cause physical and mental harm to inmates, particularly to inmates who have serious pre-existing psychiatric illness;

- A placement in administrative segregation imposes severe psychological stress. For inmates who have or who develop serious mental illnesses, a prolonged placement may cause permanent harm;
- 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;
- 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;
- A placement of an inmate with a serious mental illness 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 inmate's capacity to return to society as a law-abiding citizen;
- Factors affecting the extent to which a placement in administrative segregation causes psychiatric harm include whether the inmate volunteered for the placement or whether the placement was involuntary;

- Where the placement in solitary confinement is involuntary, it has substantial and adverse effects on the mental health of the inmate that may develop within a matter of days and likely will have substantial and adverse effects on mental health if the confinement is prolonged beyond 30 days;
- Where the placement in solitary confinement is voluntary, the placement can and likely will have substantial and adverse effects on mental health if the confinement is prolonged beyond 60 days. In some inmates with mental illness, the harm may occur sooner;
- Administrative segregation is not a therapeutic setting. Inmates with very serious mental illness belong in a setting where they can receive the treatment that they need. They cannot receive adequate treatment in administrative segregation as it is currently constituted;
- Because of human resource issues of availability of health professionals and inadequate training of Correctional Service of Canada ("CSC") staff, the mental health assessments of inmates with serious mental illness who are placed in administrative segregation is often ineffective and inadequate;
- In some but not all cases, the CSC has failed to adequately monitor the current mental health status of an inmate in administrative segregation;

- There is no justification for placing an inmate suffering from a serious mental illness in administrative segregation for more than 30 days if the placement is involuntary or for more than 60 days if the placement is voluntary.

[17] Those findings were repeated in *Reddock*. At para. 189 of that decision, the motion judge stated:

> 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.

[18] In our view, those findings were amply supported by the record. They coincide with the findings made in *CCLA* and *BCCLA* and, in any event, attract deference on appeal.

B. THE LEGISLATION

[19] In *CCLA*, at paras. 7-18, this court provided the following helpful outline of ss. 31-37 of the *CCRA*, which deal with administrative segregation, and other relevant provisions.

> [7] The *Corrections and Conditional Release Act* permits the Correctional Service of Canada ("CSC") to place an inmate in administrative segregation. The provisions at issue are ss. 31-37. An inmate who is held in administrative segregation is permitted out of his or

her cell for a minimum of two hours per day plus time for a daily shower.

[8] The structure of the Act is as follows.

Purpose and principles

[9] The Act includes a general "purpose and principles" section. Section 3 states that the purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community. Section 3.1 states that "[t]he protection of society is the paramount consideration for the Service in the corrections process."

[10] Section 4 sets out nine principles that guide the CSC in achieving the purpose set out in s. 3. These include that "the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act" and that "offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted": ss. 4(c)-4(d). [Section 4 of the *CCRA* was amended in mid-2019 to add two additional principles which remain in force today and concern alternatives to custody in a penitentiary and the effective delivery of programs to offenders with a view to promoting rehabilitation: see ss. 4(c.1)-(c.2).]

Administrative segregation

[11] The purpose of administrative segregation is explained in s. 31(1):

> 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.

[12] Section 31(2) speaks to the duration of administrative segregation:

> 31 (2) The inmate is to be released from administrative segregation at the earliest appropriate time.

[13] Section 31(3) gives the institutional head the discretion to order administrative segregation if certain conditions are met:

> 31 (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.

[14] Under s. 32, the same criteria are relevant in deciding whether to release an inmate from administrative segregation:

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

[15] There are also provisions in ss. 33-35 mandating a review process:

> 33 (1) Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall
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> (a) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate's case;
>
> (b) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate's case; and
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> (c) recommend to the institutional head, after the hearing mentioned in paragraph (a) and after each hearing mentioned in paragraph (b), whether or not the inmate should be released from administrative segregation.
>
> 33 (2) A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless
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> (a) the inmate is voluntarily absent;
>
> (b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or
>
> (c) the inmate seriously disrupts the hearing.
>
> 34 Where the institutional head does not intend to accept a recommendation made

> under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate
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> (a) to explain the reasons for not intending to accept the recommendation; and
>
> (b) to give the inmate an opportunity to make oral or written representations.
>
> 35 Where an inmate requests to be placed in, or continue in, administrative segregation and the institutional head does not intend to grant the request, the institutional head shall, as soon as is practicable, meet with the inmate
>
> (a) to explain the reasons for not intending to grant the request; and
>
> (b) to give the inmate an opportunity to make oral or written representations.

[16] Sections 36 and 37 deal with the rights of inmates who are placed in administrative segregation:

> 36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.
>
> (2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.
>
> 37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that
>
> (a) can only be enjoyed in association with other inmates; or
>
> (b) cannot be enjoyed due to

> (i) limitations specific to the administrative segregation area, or
>
> (ii) security requirements.

Other Relevant Provisions

[17] As I will discuss, ss. 69 and 87(a) of the Act are also relevant to this appeal:

> 69 No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.
>
> […]
>
> 87 The Service shall take into consideration an offender's state of health and health care needs
>
> (a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters[.]

[18] Lastly, ss. 97 and 98 of the Act authorize the creation of rules and Commissioner's Directives, which are referred to by the designation "CD". Some Commissioner's Directives are relevant to the practice of administrative segregation, as discussed below.

[20] Prior to the introduction of the new "SIU" regime in late 2019, the most significant Commissioner's Directive in the administrative segregation context was CD-709, which set out guidelines for administrative segregation. Various sections of the *Corrections and Conditional Release Regulations* also dealt with the segregation regime: see SOR/92-620, ss. 19-23, as they appeared before November 30, 2019.

C. ISSUES

[21] Canada raises the following issues on these appeals:

1. Did the motion judge err by deciding these appeals by way of summary judgment (both appeals)?
2. Did the motion judge err by altering the class definition (*Reddock*)?
3. Did the motion judge err with respect to the appropriate limitation period (both appeals)?
4. Did the motion judge err by awarding *Charter* damages (both appeals)?
5. Did the motion judge err by directing that damages be used to implement “structural changes” (*Brazeau*)?
6. Did the motion judge err by finding Canada liable for damages for systemic negligence (*Reddock*)?
7. Did the motion judge err by ruling on causation in the systemic negligence claim (*Reddock*)?

D. ANALYSIS

(1) Summary Judgment

[22] In *Brazeau*, at paras. 270-82, and in *Reddock*, at paras. 200-9, the motion judge rejected Canada’s argument that the cases should be decided after a trial rather than by way of summary judgment. Applying the language of r. 20 of the

Rules of Civil Procedure, he was "satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." To the extent there were facts in dispute, he relied on the fact-finding powers conferred by r. 20.04(2.1), as interpreted in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

[23] Canada submits that the trial judge erred in both cases by proceeding to decision by way of summary judgment rather than ordering a trial.

[24] We do not accept that submission.

[25] The motion judge found that Canada's own witnesses provided ample support for his findings about how CSC manages and operates administrative segregation: *Brazeau*, at para. 279. He also noted that any remaining issues of credibility in relation to individual claims could be determined at subsequent individual issues trials: *Brazeau*, at para. 279.

[26] In *Reddock*, the motion judge concluded that summary judgment was "even more appropriate" than in *Brazeau* because of this court's decision in *CCLA*: at para. 202. Moreover, *CCLA* had been decided on a paper record and there was no reason or need for a trial when the same issues arose in the class proceeding: at para. 203.

[27] We see no error on the part of the motion judge. His ruling that the case was appropriate for summary judgment is well supported on this record and is entitled to deference on appeal. There was no serious dispute as to the essential

facts of how administrative segregation was used in Canada's penitentiaries. Canada did not cross-examine the class witnesses on their experience with administrative segregation. The motion judge gave compelling reasons for rejecting the evidence of one of Canada's main experts in *Brazeau*, at paras. 177-84, and Canada withdrew that evidence in *Reddock*, at para. 45. The motion judge's ruling is in line with the post-*Hyrniak* approach to summary judgment.

[28] Accordingly, we would not give effect to this ground of appeal.

(2) Class Definition in *Reddock*

[29] We do not accept Canada's contention that the motion judge amended the definition of the certified class in *Reddock* without notice to Canada. The motion judge, after observing that this court's decision in *CCLA* applied with equal force to both voluntary and involuntary placements in administrative segregation, decided that all placements should be treated as involuntary. In doing so, he did not amend the class definition but found that no confinement in administrative segregation was actually voluntary: *Reddock*, at para. 273. That finding was open to him on the record.

(3) Limitation Period

[30] In both cases, the motion judge found that the federal six-year limitation set by s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, applies to the class members' claim for damages under s. 24 of the *Charter*, and

to the systemic negligence claim in *Reddock* as well: *Brazeau*, at paras. 381-87; *Reddock*, at paras. 227-35.

[31] Section 32 provides:

> 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.

[32] We agree with the motion judge that the six-year federal limitation period applies to these claims. The claims for *Charter* damages in both cases are with respect to the adoption and maintenance of a federal regulatory policy regime regarding administrative segregation that applied in all provinces. In this sense, the claims for *Charter* damages arise "otherwise than in a province": see *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94. As found by the motion judge, the start date for claims in *Brazeau* is July 20, 2009, and in *Reddock*, it is March 3, 2011.

[33] We do not, however, agree with how the motion judge dealt with the potential tolling of the limitation period for particular individuals. At para. 386 of *Brazeau*, the motion judge said it was open to individual claimants to rebut the running of "the six-year limitation period in accordance with the laws relating to

prescription and the limitation of actions in force in a province". If the federal limitation period applies, we do not understand how the tolling of that limitation period could be determined by provincial law. The *Charter* claims in both cases are governed by the federal limitation period and the jurisprudence relating to the tolling of that limitation period: see e.g., *Doig v. Canada (Minister of National Revenue)*, 2011 FC 371, 387 F.T.R. 156.

[34] Given our conclusion, below, that the systemic negligence claim in *Reddock* fails, it is unnecessary to address the arguments about the limitation period that would have applied to that claim. The limitation period applicable to individual claims of negligence remains to be determined on the basis of the particular facts of the inmates' incarceration and the specific acts of negligence alleged.

(4) *Charter* Damages

[35] The leading case on *Charter* damages is *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. The plaintiff was strip searched following a public demonstration after he was wrongly identified as an individual the police suspected of planning to commit an assault. The Supreme Court upheld an award of $5,000 damages for breach of his s. 8 right to be free from unreasonable search and seizure.

[36] Writing for a unanimous court, McLachlin C.J.C. held that damages may be an appropriate and just remedy under s. 24(1). At para. 20, she adopted and applied the general principles identified in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at paras. 55-58, and held that an appropriate and just remedy is one that will:

> (1) meaningfully vindicate the rights and freedoms of the claimants; (2) employ means that are legitimate within the framework of our constitutional democracy; (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and (4) be fair to the party against whom the order is made.

[37] She stated that damages "may meaningfully vindicate the claimant's rights and freedoms" and are "a means well-recognized within our legal framework … [and] appropriate to the function and powers of a court": at para. 21. Finally, depending upon the circumstances, the damages "can be fair not only to the claimant whose rights were breached, but to the state which is required to pay them": at para. 21.

[38] The Chief Justice went on to establish a four-part test to determine whether damages are an appropriate and just remedy:

1. Has a *Charter* right been breached?

2. Would damages fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches?

3. Has the state demonstrated countervailing factors that defeat the functional considerations that support a damage award and render damages inappropriate or unjust?

4. What is the appropriate quantum of damages?

[39] Before us, little issue was taken with the motion judge's findings that *Charter* rights have been breached in each case. Those findings are supported by the evidence and by this court's and the application judge's decisions in *CCLA*. Nor is issue taken that damages would fulfill one or more of the related functions of compensation, vindication of the right, and deterrence of future breaches. The disagreement focuses on the third stage.

[40] At the third stage, the evidentiary burden shifts to the state to attempt to demonstrate that a damage award would be inappropriate or unjust. While the Chief Justice, at para. 33, says there is no "complete catalogue of countervailing considerations", she discusses two: the availability of alternative remedies and "concerns for good governance". We address each of these in turn.

(a) Alternative Remedies

[41] In *Reddock,* in addition to granting *Charter* damages, the motion judge granted base level damages for systemic negligence and provided that class members' claims for additional damages for breach of *Charter* rights or negligence would proceed by individual issues trials: at para. 477.

[42] Canada argues that the motion judge erred by granting *Charter* damages despite the alternative tort remedy in negligence. We explain later in these reasons that the motion judge erred in finding systemic negligence. However, each class member's individual claim in negligence must also be considered as a potential alternative remedy.

[43] We are not persuaded that the mere existence or possibility of a tort claim precluded the motion judge from awarding *Charter* damages. *Ward* does not establish a firm rule that a court should not award *Charter* damages simply because there is a possible private law claim for the same damages. The concern expressed with respect to alternative remedies is the need to avoid duplication and double recovery. *Ward* contemplates concurrent claims for private law and *Charter* damages, provided an award of *Charter* damages is not "duplicative": at para. 35. If there is another avenue to damages, "a <u>further</u> award of damages under s. 24(1) would serve no function and would not be 'appropriate and just'" (emphasis added): at para. 34. Nor does *Ward* create a hierarchy of remedies with *Charter* remedies coming last. A claimant is not required to "show that she has exhausted all other recourses": at para. 35. The evidentiary burden is the reverse. It is for the state "to show that other remedies are available in the particular case that will sufficiently address the breach": at para. 35.

[44] The state can only complain if the award of *Charter* damages duplicates the available private law damages. Double recovery will not occur in this case.

The motion judge made it clear, at para. 486 of *Reddock* that the damages he awarded were for both the *Charter* breach and for systemic negligence, and he ordered that "Class Members must credit the amount of their participation in the Aggregate Award against any subsequent award of damages".

[45] The other possible alternative remedy is the declaration granted in both cases that the class members' *Charter* rights were violated. In our view, the availability of a declaration should not displace damages in these cases. A declaration would fail to satisfy the need for compensation or provide meaningful deterrence of future breaches of the *Charter* right.

(b) Concerns for Good Governance

[46] The second countervailing consideration that makes a damage award inappropriate and unjust, which the Chief Justice discussed in *Ward*, was "concerns for good governance". Canada, supported by the Attorney General of Ontario, argues that *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, provides an example of the principle that applies.

[47] In *Mackin*, the plaintiffs, two provincial court judges, complained that a statute removing their status as supernumerary judges violated the constitutional principle of judicial independence enshrined in s. 11(d) of the *Charter*. The Supreme Court agreed that the statute had to be struck down but refused to

award the plaintiffs the damages they claimed for the loss they suffered by virtue of the statute. There is, said the court, a limited immunity that protects government "against actions in civil liability based on the fact that a legislative instrument is invalid": *Mackin*, at para. 78.

[48] *Ward*, at paras. 39-40, explains the rationale for this limited immunity:

> The rule of law would be undermined if governments were deterred from enforcing the law by the possibility of future damage awards in the event the law was, at some future date, to be declared invalid. Thus, absent threshold misconduct, an action for damages under s. 24(1) of the *Charter* cannot be combined with an action for invalidity based on s. 52 of the Constitution Act, 1982: *Mackin*, at para. 81.
>
> 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 [in *Mackin*, at para. 79]:
>
> > 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.

[49] The Chief Justice added, at para. 42 of *Ward*, that *Mackin* was not exhaustive and that other situations might arise where "the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance".

[50] The Chief Justice held that the *Mackin* principle did not apply in *Ward* as the case did not concern action taken pursuant to a valid statute that had subsequently been struck down as invalid: *Ward*, at para. 41.

[51] Canada submits that by striking down the administrative segregation provisions of the *CCRA* in *CCLA*, this court determined that government has immunity from the class claims advanced here under the *Mackin* principle. We do not agree. The applicant in *CCLA* was a public interest litigant with no standing to claim damages under s. 24(1) and the issue of damages was not before the court.

[52] Even if *CCLA* is not determinative, Canada argues the *Mackin* principle applies because the source of the breaches of both ss. 7 and 12 of the *Charter* is the Act.

[53] The respondents seek to distinguish the s. 12 breaches in the cases before us from *Mackin* by pointing out that in *Mackin*, it was the statute and nothing else that deprived the plaintiff of the income and status he would otherwise have enjoyed. Here, the respondents submit, the *CCRA* did not require the correctional authorities to act in a certain way but rather left it to them to determine when to resort to administrative segregation. The respondents identify provisions of the *CCRA* that appear to safeguard against the routine use of prolonged administrative segregation.

[54] The court in *CCLA* noted these safeguards, at paras. 111-114, but went on to observe they did not preclude the possibility of prolonged administrative segregation even when "conscientiously applied". The constitutional infirmity found in *CCLA* was that "ss. 31-37 of the Act authorize and do not safeguard against" (emphasis added) treatment that offends s. 12 of the *Charter*: at para. 119. The s. 12 *Charter* breach was in part a product of the legislation but, at least in part, it was a product of the practices and policies adopted by the correctional authorities.

[55] While that is so, it does not exclude consideration of the good governance concern as a possible limitation on the liability of the state for *Charter* damages. *Mackin,* at para. 78 refers not only to harm suffered as a result of the mere enactment of a law that is subsequently declared to be unconstitutional, but also to its application. Moreover, we agree with the submissions of Ontario and the respondents that *Mackin* considerations have been subsumed in the third step of the *Ward* test for *Charter* damages.

[56] We accept that at the third stage of the *Ward* test, the more general good governance concern does come into play in both *Brazeau* and *Reddock*. These are class-wide claims that do not rest upon proof of individual or specific acts of maladministration. They challenge the regulatory scheme and the systemic practices and policies adopted by the correctional authorities in the application of the *CCRA*. This court held in *CCLA*, at paras. 116-18, that the constitutional

infirmity in ss. 31-37 of the *CCRA* was not the maladministration of the legislative scheme but rather the systematic way administrative segregation was used by the correctional authorities and the failure of the *CCRA* to safeguard against such treatment.

[57] The correctional authorities adopted practices and policies under the umbrella of ss. 31-37 of the *CCRA* regarding the propriety and use of administrative segregation in the administration of federal penitentiaries. That regime was plainly premised on the routine use of long-term administrative segregation as a way of maintaining peace and safety in federal penitentiaries.

[58] This can be inferred from the extraordinary number of placements of inmates in administrative segregation for lengthy periods: almost 22,000 placements from 2011 to 2019, averaging 59 days: *Reddock*, at para. 34. It can also be inferred from the regulatory requirements for reviews of long-term placements in administrative segregation lasting longer than 60 days. The *Corrections and Conditional Release Regulations*, SOR/92-620, as they read under the administrative segregation regime, required the Segregation Review Board to conduct a review within five working days of an inmate's placement into segregation and "at least once every 30 days thereafter that the inmate remains in administrative segregation": s. 21(2). Commissioner's Directive 709 establishes the National Long-Term Segregation Review Committee to review the case of every inmate who reaches 60 days in administrative segregation and

at least every 30 days thereafter: s. 68. These reviews presume the regular use of lengthy, indeterminate periods in administrative segregation.

[59] When a regulatory regime is challenged, the state is entitled to assert that "concerns for good governance" immunity must be considered. The regulatory regime is the sort of policy choice for which, in the words of *Ward*, "the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance": at para. 42.

[60] Considering the damages that flow from the breach of s. 7 of the *Charter* leads to this conclusion more directly. That is because the s. 7 breach for the lack of independent review of administrative segregation decisions, as found by the application judge in *CCLA* and not appealed to this court, is premised directly on the provisions of the statute. It is not possible to disentangle the damages that flow from the s. 7 breach from those that flow from the s. 12 breach. An independent review, had one existed, might have lessened the resort to and duration of administrative segregation, thus reducing the damages attributed to the s. 12 breach.

[61] We are satisfied that the good governance concern arises for the *Charter* breaches in these cases.

(c) Appropriate Fault Threshold

[62] This brings us to what appears to be the real issue at the third stage of the inquiry. It is the issue that lies at the heart of this case. *Ward* states, at para. 39, that where an award of *Charter* damages would interfere with good governance, "damages should not be awarded unless the state conduct meets a minimum threshold of gravity." The issue is whether the imposition of administrative segregation meets the minimum threshold of gravity.

[63] Care must be taken at stage three of *Ward* not to simply repeat the analysis that led to the finding of a *Charter* breach. The imposition of administrative segregation that exceeded the stipulated time caps in both cases has to be found not only to breach ss. 7 and 12 of the *Charter*, but also to be sufficiently "wrong" to warrant *Charter* damages. The question at stage three of *Ward* is whether the state is sufficiently at fault to warrant lifting its *prima facie* good governance immunity.

[64] The plaintiff in *Mackin* was not entitled to damages "merely because the enactment of [the impugned law] was unconstitutional": at para. 82. The court in *Mackin* used various terms to describe the fault threshold required to trigger liability. At one point, the court referred to the general public law principle that in such cases, there is no liability unless the enactment of the law was "clearly wrong, in bad faith or an abuse of power": at para. 78. The court also said the

government and its representatives will not be liable “if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional”: at para. 79. At three other points in the judgment, the court refers to “negligence”: at para. 82 (“negligently, in bad faith or by abusing its powers” and “negligence, bad faith or wilful blindness”) and at para. 83 (“a negligent or unreasonable attitude on the part of government”).

[65] The earlier decision in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 17, cites similar language: “no cause of action exists for the conduct of [government actors] when acting within the authority of the legislation in the absence of any allegation of wrongful conduct, bad faith, negligence or collateral purpose.” Subsequent cases have similarly included negligence as an appropriate fault threshold. One such case is *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 441, in which this court held, at para. 202, that “[a]bsent bad faith, abuse of power, negligence or wilful blindness in respect of its constitutional obligations, damages are not available as a remedy in conjunction with a declaration of unconstitutionality” (emphasis added). Another is *Sagharian v. Ontario (Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, leave to appeal refused, [2008] S.C.C.A. No. 350, which summarized *Mackin* as holding that “the respondents were not entitled to damages merely because the enactment of the legislation at issue was

unconstitutional, finding no evidence that the government acted negligently, abusively, or in bad faith" (emphasis in original): at para. 34.

[66] In *Ward*, the Chief Justice said that where good governance concerns arise, "a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate": at para. 43. However, "[d]ifferent situations may call for different thresholds" in a manner analogous to private law, ranging from malice for malicious prosecution to negligence for claims based on inadequate police investigation: at para. 43.

[67] As we are dealing with a regulatory regime premised on administrative segregation of indeterminate duration rather than legislation requiring that result, we consider it appropriate to apply the minimum threshold of fault described in *Ward,* namely, "a clear disregard for the claimant's *Charter* rights": at para. 43.

[68] Canada submits that fault cannot be found with the maintenance of the administrative segregation regulatory regime because the legal characterization of administrative segregation as a form of solitary confinement and cruel and unusual punishment has only recently evolved. While the use of solitary confinement as a means of maintaining security in prisons has been debated for some time, Canada argues that it could not have known that administrative segregation violates s. 12 of the *Charter* until this court's decision in *CCLA*.

[69] In submitting that the motion judge erred, Canada poses a rhetorical question with considerable force: if available research made it evident that administrative segregation for more than 15 days was clearly wrong, why was it not evident to the motion judge himself, who, on the basis of virtually identical evidence, fixed caps in *Brazeau* at 30 and 60 days for inmates with mental illness who were segregated involuntarily and voluntarily, respectively?

[70] We agree with the submission that the 15-day cap found by the motion judge in *Reddock* is difficult to reconcile with the 30- and 60-day caps found in *Brazeau*. However, the important point is that the motion judge found in *Brazeau* that a line had to be drawn and a cap had to be imposed. The cap the motion judge settled on in *Brazeau* gave considerable leeway to Canada — leeway that, it turned out, is inconsistent with this court's judgment in *CCLA*. In *Reddock*, the motion judge explained that he was bound by *CCLA* on both the 15-day cap and the elimination of the distinction he made in *Brazeau* between voluntary and involuntary segregation: *Reddock*, at para. 273.

[71] As we will explain, a ban on the use of solitary confinement for inmates with mental illness, some form of cap for all inmates, and the need for independent review of segregation decisions have been urged since the 1990s. The move to the 15-day cap as an international standard was well underway by 2011 and ultimately codified in the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess.,

UN Doc. A/Res/70/175 (2015) (the "Mandela Rules"). Canada cannot avoid the finding of fault in *Reddock* on account of the undeniably anomalous cap fixed in *Brazeau*.

[72] Another reason for rejecting Canada's plea that it should be allowed to take a gradual approach is the gravity of the *Charter* breach and harm caused to the class members. As this court recognized in *CCLA*, at para. 58, citing *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, 416 D.L.R. (4th) 124, at para. 9, there is a high threshold for establishing that punishment or treatment is cruel and unusual. It must be "so excessive as to outrage standards of decency"; "grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable": *CCLA*, at para. 58. In the appeals presently before this court, the *Charter* breach has caused severe harm to very vulnerable people and the state's conduct has been condemned as being cruel, excessive, abhorrent and intolerable. The state should be expected to be particularly vigilant to avoid inflicting such harm.

[73] It is also relevant to note here that the lead architect of the Special Intervention Units introduced in 2019 agreed that these SIUs could have been deployed without statutory or regulatory change, the changes were already budgeted, and in any event, might actually save money. The motion judge found in *Reddock*, at para. 296, that "[a]lternatives like the recently introduced SIUs

were available or could have been developed with no significant infrastructure changes or substantial budget increases."

[74] A survey of international and domestic sources shows that the motion judge was right to establish a cap on the duration of administrative segregation. The record in this case establishes that since the 19th century, there has been a consistent stream of medical opinion that incarceration in solitary confinement causes and exacerbates mental illness. In the 1950s, evidence was gathered of harm caused to prisoners of war and political prisoners subjected to sensory deprivation and social isolation. Stuart Grassian, a psychiatrist qualified as an expert in both appeals, stated in his affidavit in *Reddock*, summarizing a journal article filed in both appeals: "the fact that solitary confinement has a particular, severe psychiatric toxicity was clearly known by well before the end of the nineteenth century, and became a source of international alarm in the 1950's". In *CCLA*, this court accepted the application judge's finding in that case that "there is no serious question the practice of keeping an inmate in administrative segregation for a prolonged period is harmful and offside responsible medical opinion": at para. 98.

[75] In international law, for at least 30 years, there has been a growing recognition of the need to eliminate use of solitary confinement for prisoners with mental illness and strictly limit its use for all prisoners. Principle 7 of the *Basic Principles for the Treatment of Prisoners*, adopted in a 1990 resolution of the

United Nations General Assembly, states that efforts to abolish solitary confinement as a punishment, or to restrict its use, should be undertaken and encouraged: G.A. Res. 45/111, UNGAOR, 45th Sess., UN Doc. A/RES/45/111 (1990) 199.

[76] Various other international organizations have also recognized the harms of solitary confinement. In 1994, the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of the Council of Europe stated that "[s]olitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible": *2nd General Report on the CPT's Activities*, (1992) CPT/Inf (92) 3, at p. 25. While the record in *Brazeau*, unlike the record in *Reddock*, did not contain this report, it contained other Council of Europe reports from the early 2000s stating that solitary confinement could amount to inhuman and degrading treatment and that, in any event, all forms of solitary confinement should be as short as possible. The 2007 Istanbul Statement on Use and Effects of Solitary, adopted by the International Psychological Trauma Symposium, noted the harm solitary confinement causes to all prisoners and recommended a ban on segregation of mentally ill inmates and that "[a]s a general principle solitary confinement should only be used in very exceptional cases, for as short a time as possible and only as a last resort": at p. 4. Through expert reports, these materials were all before the motion judge in *Brazeau* and *Reddock*.

[77] In 2008, the United Nations Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment informed the General Assembly that "the prolonged isolation of detainees may amount to cruel, inhuman or degrading treatment or punishment and, in certain instances, may amount to torture. […] In the opinion of the Special Rapporteur, the use of solitary confinement should be kept to a minimum, used in very exceptional cases, for as short a time as possible, and only as a last resort": UNGAOR, 63rd Sess., UN Doc. A/63/175, (2008), at paras. 77 and 83.

[78] In 2011, the UN Special Rapporteur reported that "[n]egative 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": *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 66th Sess., UN Doc. A/66/268, (2011), at para. 62. The Special Rapporteur concluded that at 15 days, solitary confinement becomes "prolonged solitary confinement" because the medical literature establishes that "some of the harmful psychological effects of isolation can become irreversible": at para. 26. He concluded that any imposition of solitary confinement beyond 15 days constitutes torture or cruel, inhuman or degrading treatment or punishment, in contravention of various norms codified in the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976, accession by Canada 19 May

1976) and in the *Convention against Torture*, 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987, accession by Canada 24 June 1987): at paras. 79-81.

[79] These international developments were certainly brought home to Canada's correctional authorities. The Office of the Correctional Investigator is created by Part III of the *CCRA*. The Correctional Investigator's mandate is to serve as an independent ombudsman for federally sentenced offenders: *CCRA*, s. 167(1). The Correctional Investigator's 2011-12 Annual Report, at p. 13, stated:

> In August 2011, the UN Special Rapporteur of the Human Rights Council on Torture and other Cruel, Inhumane or Degrading Treatment or Punishment reported on the effects of or indefinite solitary confinement. Among other findings and recommendations, Juan E. Méndez noted:
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> …
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> Prolonged solitary confinement in excess of 15 days should be subject to an absolute prohibition, and indefinite solitary confinement should be abolished.
>
> …
>
> I once more recommend, in keeping with Canada's domestic and international human rights commitments, laws and norms, an absolute prohibition on the practice of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation.

[80] In 2012, the UN Committee against Torture expressed concern about Canada's "use of solitary confinement, in the forms of disciplinary and

administrative segregation, often extensively prolonged, even for persons with mental illness": *Report of the Committee against Torture*, UNGAOR, 67th Sess., Supp. No. 44, UN Doc. A/67/44 (2012), at p. 120. The report recommended that Canada "[l]imit the use of solitary confinement as a measure of last resort for as short a time as possible under strict supervision and with a possibility of judicial review" and "[a]bolish the use of solitary confinement for persons with serious or acute mental illness": at pp. 120-21.

[81] In 2013, the Inter-American Commission on Human Rights stated that, as the prohibition on torture and cruel, inhuman and degrading treatment is universal, all member states, including Canada, must adopt concrete measures to eliminate prolonged or indefinite isolation in all circumstances. The Commission also affirmed that solitary confinement must never be applied to persons with mental disabilities.

[82] Finally, in 2015, the United Nations General Assembly unanimously adopted the Mandela Rules, imposing a 15-day limit on incarceration in solitary confinement for all prisoners and a complete prohibition on solitary confinement for mentally ill prisoners. Canada not only voted for the Mandela Rules but played a role in their development: *CCLA*, at para. 29. Canada attended all four meetings of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, which met between 2012 and 2015 to revise the Standard Minimum Rules and create the document now referred to as the Mandela Rules. While

there is no record that Canada took a position supporting the 15-day limit and prohibition of solitary confinement for mentally ill prisoners, participating states were invited to make submissions on best practices and to raise concerns with respect to any given proposal in the Mandela Rules. No publicly available minutes of the Expert Group's meetings suggest that Canada took any exception to the suggested limits on solitary confinement.

[83] The attack on solitary confinement was not restricted to the international level. In 1996, Louise Arbour's *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* recommended a 30-day consecutive and a 60-day non-consecutive annual limit on solitary confinement: at p. 105. The Arbour Commission also recommended, at p. 105, that "segregation decisions made at an institutional level be subject to confirmation within five days by an independent adjudicator."

[84] In 2013, the Coroner's Inquest Touching the Death of Ashley Smith recommended an absolute prohibition on the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation, or observation. The recommendation defined long-term as any period in excess of 15 days.

[85] For many years, the Correctional Investigator independently reported on the harm suffered by inmates in solitary confinement and recommended that the

use of segregation be restricted or eliminated. In his 2006-7 report, at p. 11, the Correctional Investigator decried the fact that: “[a]fter years of calls for fundamental reforms, the Correctional Service continues to place offenders in administrative segregation and other restrictive environments as its main tool for resolving disputes and tensions in penitentiaries.” He added, at p. 18: “Too many vulnerable offenders suffering from mental illnesses are subject to abuse from other offenders, while many more become the subject of avoidable use of force interventions and extensive placements in segregation.”

[86] In our view, the record establishes that from the late 2000s it was widely recognized and accepted that placing inmates suffering from mental illness into solitary confinement caused them serious harm and therefore should be avoided. It was also widely recognized from 2011 that the prolonged solitary confinement of any inmate caused serious harm and should be avoided.

[87] As we have stated, in this case the minimum fault threshold required to overcome the claim of good governance immunity is “clear disregard” for *Charter* rights. Drawing on criminal law principles, we view the *Ward* fault standard of “clear disregard” for *Charter* rights as analogous to recklessness or wilful blindness. In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at pp. 584-85, the court defined those standards by explaining that “[t]he culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to

inquire when he knows there is reason for inquiry." A "clear disregard" for *Charter* rights connotes either proceeding with a course of action in the face of a known risk that the *Charter* will be violated or by deliberately failing to inquire about the likelihood of a *Charter* breach when the state knows that there is a good reason to inquire.

[88] In assessing Canada's fault in failing to respect the *Charter* rights of inmates to be free from cruel and unusual punishment, it is therefore important to consider the failure of Canada's correctional authorities to respond positively to pleas for limiting the use of solitary confinement, which has been frequently pointed out and criticized.

[89] While a 15-day upper limit only gradually emerged as a firm standard in or around 2011, there was an earlier recognition that prolonged solitary confinement was harmful and there were repeated recommendations that it be eliminated or only used for as short a time as possible. Canada refused to accept any limit or cap. By 2011, the UN Special Rapporteur recommended the 15-day cap that was finally adopted by the General Assembly in 2015 as part of the Mandela Rules. As we have noted, Canada participated in the adoption of the Mandela Rules. Similarly, Canada chose to ignore repeated recommendations for some form of independent review of administrative segregation. Canada also continued to place inmates suffering from mental illness in administrative segregation despite repeated warnings of the harm that this practice caused.

[90] The importance of independent review has been internally and externally flagged for the CSC for nearly a quarter of a century: the Arbour Commission's 1996 report, a 1997 report of a CSC task force on segregation, and subsequent reports of the Correctional Investigator in 2002-3, 2005-6, 2014-2015, 2016-17 have all either recommended the adoption of independent review mechanisms or identified lack of independent review as an area of serious concern. As long ago as 1996, the Arbour Report noted that "[f]ailing a willingness to put segregation under judicial supervision, I would recommend that segregation decisions made at an institutional level be subject to confirmation within five days by an independent adjudicator": at p. 105. As recently as a suspension of invalidity decision last year in the *CCLA* litigation, this court lamented Canada's failure to implement such an independent review system: 2019 ONCA 342, 375 C.C.C. (3d) 544, at paras. 19- 22.

[91] The motion judge concluded his detailed review of Canada's refusal to make any changes to administrative segregations in *Brazeau* as follows, at paras. 130- 31:

> For decades, the Federal Government's regime for administrative segregation has been criticized for the absence of a robust and timely adjudicative review process for placements in administrative segregation infused with the rule of law. 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.

> 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.

[92] Those findings are well supported by the record. For over 30 years, Canada's correctional authorities have steadfastly refused to heed warnings about the harm caused by administrative segregation and the need for independent review. The 1996 Arbour Report, at p. 105, noted the failure of the correctional authorities to pay attention to legal and *Charter* standards:

> 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.

[93] The 1997 report of the CSC Task Force on Administrative Segregation reviewed evidence of a casual attitude towards the demands of the law by CSC staff and managers, echoing the Arbour Report's assertion that the CSC "has a culture that does not respect the 'Rule of Law'": *Commitment to Legal Compliance, Fair Decisions and Effective Results: Reviewing Administrative Segregation*: Task Force Report (March 1997), at p. 13. The Task Force went on to recommend rigorous enhancements to the administrative segregation process

and experimenting with models of independent adjudication as proposed by the Arbour Report: at pp. 33-41.

[94] The 2004-5 Correctional Investigator's Report observed, at p. 24, that the Department of Public Safety and Emergency Preparedness Canada undertook its own evaluation and recommended that the CSC "implement and test models of independent adjudication, but again this recommendation was rejected by the organization."

[95] The 2005-6 Report observed, at p. 16: "After years of calls for fundamental reforms, the Correctional Service continues to place offenders in administrative segregation and other more restrictive environments as its main tool for resolving disputes and tensions in penitentiaries." The Report noted that despite the fact that the Arbour Report concluded that the administrative segregation regime conflicts with Canada's broader *Charter* culture, that independent review was required, and that similar recommendations had been made by others, "the Correctional Service has consistently rejected independent adjudication and continues to this day to argue that an enhanced internal segregation review process can achieve fairness and compliance with the rule of law": at p. 16.

[96] The 2006-7 Report stated, at p. 11:

> After years of calls for fundamental reforms, the Correctional Service continues to place offenders in administrative segregation and other restrictive environments as its main tool for resolving disputes and

> tensions in penitentiaries. Over the last 10 years, several internal and external reports have noted fairness and non-compliance issues related to the management or administration of segregation. They have recommended the independent adjudication of segregation cases as the only way to effectively promote legal compliance in this area. The Correctional Service has consistently rejected independent adjudication and continues to argue that an enhanced internal segregation review process can achieve fairness and compliance with the rule of law.

[97] The 2009-10 Report states, at pp. 13-14:

> 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. […] 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.

[98] The 2014-15 Report, at pp. 15-16, described the CSC's response to the Ashley Smith Inquest, including the recommendation to limit administrative segregation to 15 days, as "frustrating and disappointing" and one that "simply misses the mark".

[99] The need to respond positively to the Ashley Smith Inquest recommendations did not go unnoticed, even at the highest levels of government. Prime Minister Trudeau's 2015 mandate letter to Minister of Justice Wilson-Raybould stated that it was government policy to implement the "recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness."

[100] In our view, Canada's failure to alter its administrative segregation policies in the face of this mounting and concerted criticism from the medical profession, a Royal Commission, a coroner's inquest, the Correctional Investigator, and various international agencies meets the standard of a "clear disregard for *Charter* rights".

[101] We are satisfied that this "clear disregard" dates back to at least the start dates for these claims: July 20, 2009 for inmates suffering from mental illness, in *Brazeau*, and March 3, 2011 for all other inmates, in *Reddock*. Canada was repeatedly told of the harm administrative segregation caused, of the need to impose a cap on the length of time inmates were subjected to the practice, of the need not to use administrative segregation for inmates suffering from mental illness, and of the need for proper independent review of administrative segregation decisions. Canada was repeatedly told that its policies and practices caused serious harm to inmates and amounted to cruel and unusual treatment.

Canada had to know that there was a serious risk that its administrative segregation practices and policies failed to meet the standards of the *Charter* under both ss. 7 and 12. In our view, the respondents have established the "clear disregard" fault threshold applies in these cases. Thus, Canada is not insulated from liability for *Charter* damages by countervailing good governance considerations.

(5) Quantum of Damages and Damages for "Structural Changes"

[102] The motion judge concluded in *Reddock* that the class members had all suffered a "base level of damages" that could be determined without the need for proof from individual class members. These damages were awarded on an aggregate basis pursuant to s. 24 of the *Class Proceedings Act*, *1992*, S.O. 1992, c. 6 ("*CPA*"), applying *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 341 O.A.C. 338, and *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, 130 O.R. (3d) 241, leave to appeal refused, [2016] S.C.C.A. No. 255. The motion judge, at para. 486 of *Reddock*, fixed the amount at $20 million for the three functions *Ward* holds to be pertinent, namely: vindication, deterrence and compensation. The compensatory portion of that award was $9 million calculated on the basis of $500 for each inmate placed in administrative segregation for more than 15 days: at paras. 381, 396. After deduction of legal fees and disbursements, the amount remaining is to be distributed to the class members pursuant to s. 24(2) of the *CPA*: at para. 492.

[103] We would not interfere with the premises of the damage award. Damages for the vindication of the class members' rights are suitable. A measure of deterrence damages is also warranted given the resistance of the correctional authorities to change, and while the *CCRA* has been amended and the SIUs introduced, there remain issues of implementation of the new scheme. Base compensation calculated on the basis of $500 for each inmate seems modest given the motion judge's findings of the harm the inmates suffered.

[104] The motion judge's order contemplates a second stage of individual issues trials as contemplated by s. 25 of the *CPA*: at paras. 500-5. There is no reason to interfere with that aspect of the judgment.

[105] In *Brazeau*, the motion judge also awarded $20 million as a base level of damages. He found that entire amount to be appropriate for vindication and deterrence and left the issue of compensation for the individual issues stage of the proceedings. He then took the unusual course, at paras. 458-59, of ordering that the $20 million, after deduction for legal fees and disbursements, be used by Canada for "additional mental health or program resources for structural changes to penal institutions as the court on further motion may direct."

[106] The motion judge erred in law in making this order.

[107] First, he did so on his own motion and without submissions from the parties as to the appropriateness of such an order. The rights of both the class

members and Canada were affected by the order and they should have been given the opportunity to argue the point. The order was, to say the least, unusual, and by making it without the benefit of submissions from the parties, the motion judge denied them procedural fairness.

[108] Second, the motion judge erred in his interpretation of s. 26 of the *CPA*. At para. 459, the motion judge stated:

> Pursuant to s. 26 (7) of the Act, the court shall supervise the execution of judgments and the distribution of awards. 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 read these provisions as empowering the court to order that the aggregate damages not be distributed to individual Class Members but rather distributed for the benefit of all Class Members.

[109] We disagree with that interpretation. The only provision made in s. 26 for the distribution of aggregate damages to any person other than the class members is found in ss. 26(4)-(6), which allows for cy-près distribution of remaining funds other than to class members after efforts have been made to distribute the award to class members. That is not the situation in this case. The rest of s. 26 contemplates distribution of the award of aggregate damages to class members.

[110] Third, the order made by the motion judge ran afoul of the principle set out in *Doucet-Boudreau*, at para. 56, that *Charter* remedies “must employ means that

are legitimate within the framework of our constitutional democracy"; "respect the relationships with and separation of functions among the legislature, the executive and the judiciary"; and that courts must not "depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes."

[111] As *Doucet-Boudreau* itself shows, there is room in some situations for innovative remedies that include ongoing, post-judgment involvement by the court to ensure compliance with the *Charter*. At issue in that case was the affirmative promise of s. 23 of the *Charter* for minority language education in the urgent context of cultural erosion of minority rights through assimilation: at paras. 38-40. The Supreme Court upheld the propriety of a trial judge maintaining jurisdiction to receive reports to monitor the government's progress in establishing the required facilities. The Supreme Court noted that the reporting order preserved and reinforced the capacity of the educational authorities in providing school facilities as mandated by the relevant legislation: at para. 68.

[112] But the order at issue in the *Brazeau* appeal is not a "reporting order" to monitor state compliance with a defined affirmative right; the order made in this case provides for a much more active form of judicial involvement. The motion judge assumed the power to direct the state to divert a damage award for harm suffered and use the damages as he saw fit to provide such "additional mental health or program resources for structural changes to penal institutions": at

paras. 456-59. That order was not fair to either the class or Canada and it amounted to an unjustifiable assumption of judicial control over a complex public institution. It was not an "appropriate and just remedy" and therefore it must be set aside.

[113] We were invited to maintain the aggregate damage award of $20 million and order it distributed to the class members. Given the serious error of law made by the motion judge, we set aside his award of damages and remit the issue of damages to be determined on proper principles.

(6) Systemic Negligence

[114] Canada argues that the motion judge erred in *Reddock* in his analysis of the duty of care in relation to systemic negligence. We agree with that submission, but as the damages awarded by the motion judge are sustainable as *Charter* damages, and as we view *Charter* damages to be the more appropriate remedy, our consideration of the systemic negligence issue will be brief.

[115] The portion of the respondents' statement of claim relied on by the motion judge pleads that there is a recognized class-wide duty of care owed by the CSC to inmates with respect to the "design, organization, administration and staffing of the Federal Institutions, as well as the policies and procedures applied therein": *Reddock*, at para. 398, referring to para. 60 of the fresh as further amended statement of claim. The motion judge recognized the need to "prune" aspects of

this claim because they related to the "area of core law-making and policy-making that is immune from a negligence claim": at paras. 406, 409. He went on to find, at para. 411, that

> 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 Federal Government's duty of care is, in part, commensurate with its *Charter* obligations."

[116] In our view, both the duty pleaded by the respondent and the duty found by the motion judge differ significantly from the established general duty of care that correctional institutions are "to take reasonable care for [a prisoner's] safety as a person in their custody": *MacLean v. The Queen*, [1973] S.C.R. 2, at p. 7. *MacLean* involved a claim for personal injuries sustained as a result of an accident at a prison farm, the equivalent of a workplace accident. The Supreme Court found that the guard in charge of the operation was negligent in the way he supervised and directed the work and that the Crown was vicariously liable: at p. 7.

[117] *MacLean* concerned the straightforward application of a routinely recognized common law duty of care to the prison setting. It did not involve the operation of a system, the design of policies and procedures, or the violation of *Charter* rights. The duty found by the motion judge is a novel duty that essentially rests upon principles of public law and *Charter* rights. The same analysis applies

to another duty referred to by the motion judge, namely the "duty to take reasonable care to avoid causing foreseeable mental injury": at para. 463.

[118] The duty identified by the motion judge was a novel duty that required careful scrutiny, particularly in the context of this class action. It can only succeed if systemic in nature and cannot succeed if based upon a series of discrete breaches of duty to individual inmates. The two-stage test from *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, must be considered: does the nature of the parties' relationship create a *prima facie* duty of care, and if so, is the duty negated by residual policy concerns?

[119] The motion judge accepted that cases such as *Cooper*; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; and *Eliopoulos (Litigation Trustee) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 514, 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": at paras. 423-24. Yet what he labels to be "operational" failings, at para. 414, essentially amount to criticisms of the Correctional Service's policies in relation to the use of administrative segregation. This is the very same failure to have in place policies

to avoid the harm and corresponds with his characterization of the duty as being to avoid breaching the class members' *Charter* rights.

[120] While individual inmates have a cause of action for specific individual acts of negligence on the *MacLean* principle, a class-wide duty of care can only be made out if the duty relates to the avoidance of the same harm for each class member. This is not a case where the class-wide duty of care is said to arise from a single incident or act, for example an air crash or train derailment. Rather, the duty alleged arises from different acts in different circumstances and in relation to different individuals. Those acts can be identified as being the same only because they all arise from the implementation of a particular policy or regulatory regime regarding the management of prisons. The primary negligence claim in the amended statement of claim is negligence at the policy-making level. Negligence at the operational level is alleged as an alternative and that would turn on individual circumstances. Negligence at the policy level leads directly to the *Edwards*, *Cooper*, and *Eliopoulos* exclusion of a duty of care for matters of policy.

[121] The class can challenge those policies as contravening the *Charter* under proper *Charter* analysis, but can only succeed in damages if the test for *Charter* damages is met. *Ward*, at para. 43, holds that "the threshold for liability under the *Charter* must be distinct and autonomous from that developed under private law". That means that the law of negligence cannot be used to short-circuit that

analysis where the damages flow from a *Charter* breach. It follows that the motion judge erred when he stated that the systemic negligence claim provided "a way for Class Counsel to circumvent the Federal Government's argument based on the principle from *Mackin*, […]. which principle would immunize the Federal Government from liability under s. 24 (1)": at para. 10; see also para.376.

[122] We conclude, accordingly, that as the claims for damages, properly understood, arise from breaches of the *Charter*, *Charter* analysis and consideration of the availability of *Charter* damages is the appropriate remedy.

(7) Causation

[123] In the *Reddock* appeal, Canada submits that the motion judge breached procedural fairness by ruling on causation in negligence although causation had not been certified as a common issue. Canada submits that causation in negligence is an inherently individual issue.

[124] This issue is moot. As the systemic negligence claim fails, it is unnecessary for us to deal at any length with the issue of causation.

E. DISPOSITION

[125] Accordingly, the *Brazeau* appeal is allowed, but only with respect to the aggregate damage award and that issue is remitted to the motion judge for reconsideration. The *Reddock* appeal is allowed, but only with respect to para. 8 of the judgment finding Canada liable in negligence. Having achieved substantial

success, the respondents are entitled to costs. They submitted a joint bill and are entitled to costs fixed at $75,017.31 inclusive of disbursements and taxes.

Released: March 9, 2020

"Robert J. Sharpe J.A."
"R.G. Juriansz J.A."
"I agree Gary Trotter J.A."