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COURT OF APPEAL FILE NO. CA45092

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COURT OF APPEAL
REGISTRY

ON APPEAL FROM the Order of the Honourable Mr. Justice Leask of the Supreme
Court of British Columbia pronounced on January 17, 2018

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
THE JOHN HOWARD SOCIETY OF CANADA

RESPONDENTS
(PLAINTIFFS)

AND

ATTORNEY GENERAL OF CANADA

APPELLANT
(DEFENDANT)

APPELLANT'S REPLY

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REPLY TO THE RESPONDENTS' STATEMENT OF FACTS

1. Where the respondents make judgmental statements in their Facts, Canada says such statements are not proper and does not agree with them. Further, Canada does not agree with the conclusions and characterizations set out in paragraphs 1, 2, 12, 14, 15, 25-29, 32, 34, 35, 36, 38 and 41-43 of the respondents' factum.

REPLY TO THE RESPONDENTS' SECTION 7 ARGUMENT

2. The respondents frame the objective of administrative segregation too broadly. The purpose of administrative segregation, in the context of the overall objective of the correctional system, is as set out in paragraphs 26-28 of the appellant's factum.

3. A contextual interpretation of "other inmates" supports the conclusion that the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA] does not mandate the complete isolation of inmates in administrative segregation. First, not requiring the absolute isolation of segregated inmates furthers the purpose and guiding principles of the correctional system as set out at ss. 3 and 4 of the CCRA, and respects the *Canadian Charter of Rights and Freedoms* [Charter] rights.¹ Second, the term "other inmates" with this same meaning is used elsewhere in the CCRA.²

4. The correctional system's purposes and principles also supports Canada's submission that the CCRA does not authorize prolonged placements in administrative segregation. While the administrative segregation provisions authorize indefinite placements, the trial judge found that it was the combination of indefinite and prolonged placements that violated s. 7 of the Charter.³

5. The trial judge based his finding that internal review violated s. 7 of the Charter on an erroneous understanding of the review scheme, namely that it is a review of the Warden's initial placement decision. Properly understood, the review is of the inmate's case at the time of the review, and in the circumstances as they have evolved since the initial placement decision or previous review. In his concerns respecting the review

¹ CCRA ss. 3, 4.

² CCRA s. 73.

³ RFJ paras. 327-330, 609, Appeal Record [AR] Tab 4, pp. 118-119, 187-188.

scheme, the trial judge showed his misapprehension: "The warden effectively sits in judgment of his or her own decision," and confirmed it in his declaration that the institutional head is both the judge and prosecutor in his own cause.⁴

6. The state has no interest in placing an inmate in administrative segregation. *Hunter* and *Currie* are distinguishable.⁵ The state has an interest, respectively, in authorizing a search pursuant to its investigatory mandate and in maintaining inmate discipline. While there may be disagreement over facts between correctional officials and inmates in many contexts, including placement in administrative segregation, such disagreement alone does not require an external arbiter. A placement decision is about whether or not there is a danger; questions about whether an accusation has been sufficiently made out and just desserts play no part.

7. Like all other *Charter* rights, the *CCRA* need not expressly affirm the right to counsel in relation to review hearings or other matters. The *CCRA* neither disallows nor makes discretionary the right to counsel at review hearings.

8. The respondents cannot seek a declaration that the administrative segregation provisions are grossly disproportionate without a cross-appeal.⁶ Alternatively, and in any event, the trial judge found that there was no violation of s. 12, the standard being the same as gross disproportionality under s. 7.⁷

REPLY TO THE RESPONDENTS' SECTION 15 ARGUMENT

9. The trial judge found that while administrative segregation has a significant impact on women, the substantially smaller number of incarcerated women allows CSC to provide individualized and greater mental health treatment, resulting in no

⁴ RFJ paras. 353, 609, AR Tab 4, pp. 125, 187-188.

⁵ *Hunter v. Southam*, [1984] 2 S.C.R. 145; *Currie v. Alberta (Edmonton Remand Centre)*, 2006 ABQB 858.

⁶ *Kehler v. Corp. of the District of Surrey*, 70 B.C.L.R. (2d) 381, 1992 CanLII 574 at para. 4 (BCCA) leave to appeal to SCC refused *Kehler v. Surrey (District)* (S.C.C.), [1992] S.C.C.A. No. 462.

⁷ RFJ para. 534, AR Tab 4, p. 169; *R v. Malmo-Levine*, 2003 SCC 74 at paras. 160-161 cited in *R v. Lloyd*, 2016 SCC 13 at para. 42.

disproportionate effect of administrative segregation on women inmates.⁸ It follows then that administrative segregation can be administered constitutionally.

10. The trial judge found that segregation has a disproportionate effect on inmates with mental illness and/or disability. In particular, he found that the definition of serious mental illness in CD 709 was both unclear and too narrow.⁹ He further found that health professionals lack the diagnostic skills to determine whether a mental disorder exists and, if it does, whether segregation will be unduly problematic for an inmate.¹⁰

11. The trial judge also found that the administrative segregation provisions fail to respond to the actual needs of mentally ill inmates, and instead impose burdens in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage. He found that CSC failed to track the number of inmates with mental disabilities, making it difficult or impossible for CSC to conduct principled planning with respect to that population. The trial judge further concluded that inmate intake screening on admission to a federal institution and to administrative segregation are problematic, and that CSC's mental health monitoring and supports are insufficient.¹¹

12. The trial judge stated that CSC must recognize, as a serious health issue, the magnitude and importance of the mentally ill, cognitively impaired, and potentially self-harming and suicidal contingent in federal penitentiaries. To adequately address their needs, CSC requires more medically trained staff, more facilities for treatment, and substantially increased funding.¹²

13. None of these findings lead to the conclusion that the administrative segregation provisions are incapable of being administered constitutionally. Rather, they speak to CSC's failure to meet the legislative standards described in ss. 85 to 87 of the *CCRA*.¹³

⁸ RFJ paras. 457-461, 463, AR Tab 4, pp. 151-153.

⁹ RFJ paras. 496, 500-511, 522, AR Tab 4, pp. 161-164, 167.

¹⁰ RFJ para. 505, AR Tab 4, p. 163.

¹¹ RFJ paras. 513-514, 519-522, AR Tab 4, pp. 165-167.

¹² RFJ para. 523, AR Tab 4, p. 167.

¹³ *CCRA* ss. 85-87.

If CSC has not met these standards, then it this Court may declare that CSC has breached its obligations under s. 31-33 and 37 of the *CCRA*.

REPLY TO THE RESPONDENTS' REMEDIES ARGUMENT

14. If a law produces an unconstitutional effect, the usual remedy lies under s. 52(1) of the *Constitution*.¹⁴ If, however, the *Charter* breach complained of is not as a consequence of the legislation but rather, is the result of unconstitutional actions committed under valid laws, then the remedy lies under s. 24(1) of the *Charter*.

15. Despite the trial judge making no finding of systemic infringements of inmates' *Charter* rights resulting from CSC's administration of the administrative segregation provisions, the respondents contend that violations of inmates' rights have taken place at such length and in such numbers as to be the necessary result of the administrative segregation provisions.

16. Even if the Court were to determine that in the administration of the administrative segregation provisions, multiple *Charter* violations occurred in various circumstances, for the reasons stated in the appellant's factum, this does not justify striking down those provisions as they can be constitutionally applied. Both *Little Sisters* and *Morgentaler* support this conclusion.¹⁵

17. The Supreme Court of Canada's decision in *Ewert v. Canada (Correctional Service)* is illustrative.¹⁶ In that case, the majority held that the *CCRA*'s purposes and principles must be considered in interpreting its provisions. Specifically, s. 4(g) of the *CCRA* should be understood as a direction to advance substantive equality for Aboriginal offenders.¹⁷ Applying s. 4(g) to s. 24(1) of the *CCRA*, the majority declared that CSC had not met the required legislative standard in relation to psychological

¹⁴ Respondents' Factum, 18 June 2018, para. 134.

¹⁵ *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2; *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

¹⁶ *Ewert v. Canada (Correctional Service)*, 2018 SCC 30 at para. 29 [*Ewert*].

¹⁷ *Ewert*, at paras. 38-39, 53, 55, 59.

actuarial risk assessment tools in not having taken reasonable steps to ensure they are as accurate, up to date, and complete as possible for Indigenous offenders.¹⁸

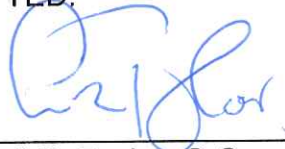
18. Subsections 4(c) and 4(g) of the *CCRA* help define the scope of CSC's obligations. When administering the Act, CSC must use measures consistent with the protection of society, staff members, and inmates and that are limited to what is necessary and proportionate to attain the Act's purposes. Further, when implementing the administrative segregation provisions, CSC must respect gender, ethnic, cultural and linguistic differences, and be responsive to the special needs of women, Aboriginal peoples, and persons requiring mental health care. If CSC has not met these legislative standards, this Court may find that CSC has breached its obligations under ss. 31-33 and 37.

REPLY TO THE RESPONDENT'S COSTS ARGUMENT

19. The respondents are not entitled to special costs on a full indemnity basis, or to costs in any event of the cause. Costs should follow the event.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: June 25, 2018.



Mitchell R. Taylor, Q.C.
Solicitor for the Appellant

¹⁸ *Ewert*, at paras. 51, 62, 64-67, 90.

LIST OF AUTHORITIES

Authorities	Page # in factum	Para # in factum
<i>Currie v. Canada (Attorney General)</i> , 2012 BCSC 1587	2	6
<i>Ewert v. Canada</i> , 2018 SCC 30	4, 5	17
<i>Hunter v Southam</i> , [1984] 2 S.C.R. 145	2	6
<i>Kehler v. Corp. of the District of Surrey</i> , 70 B.C.L.R. (2d) 381, 1992 CanLII 574 (BCCA)	2	8
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<i>R v. Malmö-Levine</i> , 2003 SCC 74	2	8
<i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	4	16

APPENDIX: ENACTMENTS

Corrections and Conditional Release Act S.C. 1992, c. 20	Loi sur le système correctionnel et la mise en liberté sous condition L.C. 1992, ch. 20
<p>Purpose of correctional system</p> <p>3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by</p> <p>(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and</p> <p>(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.</p> <p>Paramount consideration</p> <p>3.1 The protection of society is the paramount consideration for the Service in the corrections process.</p>	<p>But du système correctionnel</p> <p>3 Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.</p> <p>Critère prépondérant</p> <p>3.1 La protection de la société est le critère prépondérant appliqué par le Service dans le cadre du processus correctionnel.</p>
<p>Principles that guide Service</p> <p>4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:</p> <p>(a) the sentence is carried out having regard to all relevant available information, including the stated reasons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and</p>	<p>Principes de fonctionnement</p> <p>4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :</p> <p>a) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment les motifs et recommandations donnés par le juge qui l'a prononcée, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine ou fournis par</p>

comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;

(b) the Service enhances its effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system and through communication about its correctional policies and programs to victims, offenders and the public;

(c) the Service uses measures that are consistent with the protection of society, staff members and offenders and that are limited to only what is necessary and proportionate to attain the purposes of this Act;

(d) offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;

(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;

(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(g) correctional policies, programs and practices respect gender, ethnic, cultural and linguistic differences and are responsive to the special needs of women, aboriginal peoples, persons requiring mental health care and other groups;

les victimes, les délinquants ou d'autres éléments du système de justice pénale, ainsi que les directives ou observations de la Commission des libérations

b) il accroît son efficacité et sa transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux victimes et aux délinquants qu'au public;

c) il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, ne vont pas au-delà de ce qui est nécessaire et proportionnel aux objectifs de la présente loi;

d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;

e) il facilite la participation du public aux questions relatives à ses activités;

f) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles et linguistiques, ainsi qu'entre les sexes, et tiennent compte des besoins propres aux femmes, aux autochtones, aux personnes nécessitant des soins de santé mentale et à d'autres groupes;

<p>(h) offenders are expected to obey penitentiary rules and conditions governing temporary absences, work release, parole, statutory release and long-term supervision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and</p> <p>(i) staff members are properly selected and trained and are given</p> <p>(i) appropriate career development opportunities,</p> <p>(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and</p> <p>(iii) opportunities to participate in the development of correctional policies and programs.</p>	<p>h) il est attendu que les délinquants observent les règlements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur, des libérations conditionnelles ou d'office et des ordonnances de surveillance de longue durée et participent activement à la réalisation des objectifs énoncés dans leur plan correctionnel, notamment les programmes favorisant leur réadaptation et leur réinsertion sociale;</p> <p>i) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.</p>
<p>Assembly and association</p> <p>73 Inmates are entitled to reasonable opportunities to assemble peacefully and associate with other inmates within the penitentiary, subject to such reasonable limits as are prescribed for protecting the security of the penitentiary or the safety of persons.</p>	<p>Liberté d'association et de reunion</p> <p>73 Dans les limites raisonnables fixées par règlement pour assurer la sécurité de quiconque ou du pénitencier, les détenus doivent avoir, à l'intérieur du pénitencier, la possibilité de s'associer ou de participer à des réunions pacifiques.</p>
<p>Health Care</p> <p>Definitions</p> <p>85 In sections 86 and 87,</p> <p>health care means medical care, dental care and mental health care, provided</p>	<p>Services de santé</p> <p>Définitions</p> <p>85 Les définitions qui suivent s'appliquent aux articles 86 et 87.</p> <p>soins de santé Soins médicaux, dentaires et de santé mentale dispensés</p>

<p>by registered health care professionals; (<i>soins de santé</i>)</p> <p>mental health care means the care of a disorder of thought, mood, perception, orientation or memory that significantly impairs judgment, behaviour, the capacity to recognize reality or the ability to meet the ordinary demands of life; (<i>soins de santé mentale</i>)</p> <p>treatment means health care treatment. (<i>Version anglaise seulement</i>)</p>	<p>par des professionnels de la santé agréés. (<i>health care</i>)</p> <p>soins de santé mentale Traitement des troubles de la pensée, de l'humeur, de la perception, de l'orientation ou de la mémoire qui altèrent considérablement le jugement, le comportement, le sens de la réalité ou l'aptitude à faire face aux exigences normales de la vie. (<i>mental health care</i>)</p>
<p>Obligations of Service</p> <p>86 (1) The Service shall provide every inmate with</p> <p>(a) essential health care; and</p> <p>(b) reasonable access to non-essential mental health care that will contribute to the inmate's rehabilitation and successful reintegration into the community.</p> <p>Standards</p> <p>(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.</p>	<p>Obligation du Service</p> <p>86 (1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la mesure du possible, aux soins qui peuvent faciliter sa réadaptation et sa réinsertion sociale.</p> <p>Qualité des soins</p> <p>(2) La prestation des soins de santé doit satisfaire aux normes professionnelles reconnues.</p>
<p>Service to consider health factors</p> <p>87 The Service shall take into consideration an offender's state of health and health care needs</p> <p>(a) in all decisions affecting the offender, including decisions relating to placement, transfer, administrative segregation and disciplinary matters; and</p>	<p>État de santé du délinquant</p> <p>87 Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son isolement préventif ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.</p>

(b) in the preparation of the offender for release and the supervision of the offender.	
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