COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Civil Liberties Association v. Canada (Attorney General), 2019 ONCA 243
DATE: 20190328
DOCKET: C64841

Strathy C.J.O., Benotto and Roberts JJ.A.

BETWEEN

Corporation of the Canadian Civil Liberties Association

Applicant (Appellant)

and

Her Majesty the Queen as represented by the Attorney General of Canada

Respondent (Respondent)

Jonathan Lisus, H. Michael Rosenberg, Larissa Moscu and Charlotte-Anne Malischewski, for the appellant

Kathryn Hucal, John Provart and Bradley Bechard, for the respondent

Michael Dunn and Andrea Bolieiro, for the intervener Attorney General of Ontario

Matthew Horner and Nika Farahani, for the intervener Ontario Human Rights Commission

Heard: November 20, 2018

On appeal from the order of Associate Chief Justice Frank Marrocco of the Superior Court of Justice, dated December 18, 2017, with reasons reported at 2017 ONSC 7491, 140 O.R. (3d) 342.

Benotto J.A.:

[1] The distinguishing feature of solitary confinement is the elimination of meaningful social interaction or stimulus. It has the potential to cause serious harm

which could be permanent. Federal legislation permits its use in penitentiaries across Canada. It is called "administrative segregation" and is permitted to maintain safety and security or to conduct investigations. The appellant, the Canadian Civil Liberties Association ("CCLA"), submits that ss. 31-37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act"), the legislative provisions authorizing administrative segregation, are unconstitutional.

[2] The CCLA was partially successful in the Superior Court. The application judge found that the legislation authorizing administrative segregation violates s. 7 of the *Canadian Charter of Rights and Freedoms* because it does not provide for an independent review of the decision to place an inmate in administrative segregation. The respondent, the Attorney General of Canada ("AGC"), does not challenge this finding on appeal.

[3] On appeal, the CCLA argues that ss. 31-37 of the Act violate s. 12 and s. 11(h) of the *Charter*. The CCLA also raises a new s. 7 argument. The CCLA seeks a broader declaration from this court banning the practice entirely for certain inmates (those aged 18-21, those with mental illness, and those placed in segregation for their own protection) and otherwise placing a cap of 15 consecutive days on administrative segregation for all inmates.

[4] As I will explain, I accept the conclusions of the application judge with respect to inmates aged 18-21, those with mental illness, and those placed in

segregation for their own protection. However, prolonged administrative segregation of any inmate, which is segregation for more than 15 consecutive days, does not survive constitutional scrutiny under s. 12.

[5] I reach this conclusion because prolonged administrative segregation causes foreseeable and expected harm which may be permanent and which cannot be detected through monitoring until it has already occurred. Legislative safeguards are inadequate to avoid the risk of harm. In my view, this outrages standards of decency and amounts to cruel and unusual treatment. I conclude that the provisions in the Act authorizing prolonged administrative segregation infringe s. 12 and the infringement cannot be justified under s. 1. It follows that a remedy under s. 52(1) of the *Constitution Act, 1982* is appropriate.

[6] To demonstrate my conclusions, I describe administrative segregation, outline the evidence concerning the harm caused and the inability of monitoring or other legislative safeguards to prevent the risk of harm. I explain why ss. 31-37 of the Act infringe s. 12 of the *Charter,* and why the infringement cannot be justified under s. 1. I also briefly address the CCLA's s. 11(h) and s. 7 arguments.

BACKGROUND

The legislative scheme

[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).

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

Nature of administrative segregation

[19] The discretion to order administrative segregation rests with the institutional head, usually the prison warden or his or her delegate. Once that discretion is exercised, the inmate is placed in a segregated prison cell and remains there indefinitely until the institutional head decides to order release. The inmate is to be allowed out of his or her cell for a minimum of two hours daily, including one hour for exercise outdoors, and must also be given an opportunity to take a daily shower. At all other times the inmate remains locked in his or her cell, except if there is a lockdown when they do not leave their cells at all.

[20] As I have noted, the distinguishing feature of administrative segregation is the elimination of meaningful social interaction or stimulus. The photographic evidence adduced by the CCLA in this case depicts a small cell where the inmate is held. It contains a narrow platform with a thin mattress overtop, a toilet, a sink,

maybe or maybe not a small table, maybe or maybe not a small window. The heavy steel door has a small food slot a few feet off the ground. It is often through this food slot that interactions with staff and health personnel take place.

[21] The affiants in these proceedings provided evidence about the horrific effects of administrative segregation that – it is submitted – outrages Canadian standards of decency.

International norms regarding solitary confinement

[22] For many years, the international community has urged limitations on the use of solitary confinement, and in particular, prolonged solitary confinement, which is defined as solitary confinement for more than 15 consecutive days. International organizations also object to any use of solitary confinement on juveniles and inmates with mental illness.

[23] The United Nations has recently adopted rules governing the treatment of prisoners: the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015) (the "Mandela Rules"). The Mandela Rules are an authoritative interpretation of international rules including the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, UNTS 1465 (entered into force 26 June 1987, ratified by Canada 24 June 1987). The Mandela Rules define solitary confinement as

confinement of a prisoner "for 22 hours or more a day without meaningful human contact." They prohibit the use of prolonged solitary confinement, which is confinement for a period in excess of 15 days, and provide that solitary confinement should "be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review".

[24] The CCLA has also pointed to statements such as *The Istanbul Statement on the Use and Effects of Solitary Confinement* adopted by a panel of experts at the International Psychological Trauma Symposium (9 December 2007), which indicates that solitary confinement should only be used in very exceptional cases, for as short a time as possible, only as a last resort and should be absolutely prohibited for certain populations including mentally ill prisoners and children under the age of 18. In 2013, the Inter-American Commission on Human Rights stressed that prolonged or indefinite isolation through solitary confinement may never be a legitimate instrument in the hands of the state.

[25] In the court below, the AGC submitted that the CSC does not practice what the Mandela Rules referred to as solitary confinement. It pointed to the fact that federal inmates in Canada are allowed out of their cell for more than two hours per day because, in addition to the two hours, they are also allowed a daily shower. The application judge sensibly rejected this submission and concluded that the CSC is using administrative segregation in a way captured by the term "solitary confinement" as defined in the Mandela Rules. The application judge also found

that the evidence of perfunctory contact between inmates in segregation and CSC staff did not constitute "meaningful" human contact.

[26] In making those findings, the application judge relied on the expert evidence of Juan E. Méndez, a professor of human rights law at the Washington College of Law. Professor Méndez previously taught at Georgetown Law School and the Johns Hopkins School of Advanced International Studies and teaches regularly at the University of Oxford. He was the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment from November 2010 until October 31, 2016.

[27] Professor Méndez explained that the essence of solitary confinement is a lack of meaningful social contact with the result that social stimulus is insufficient to allow the individual to remain in a reasonable state of mental health. When individuals are deprived of social stimulation, they become incapable of maintaining an adequate state of alertness and attention to their environment. If this occurs for even a few days, brain activity shifts toward an abnormal pattern.

[28] Professor Méndez also explained that the Mandela Rules represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined. The application judge accepted this evidence. At para. 59, he stated:

> Professor [Méndez's] position concerning more than 15 days in segregation evolved from a contextual analysis

> to a hard and fast rule because the international community came to a consensus view about this in December 2015 when the United Nations approved the Mandela Rules revision. Professor [Méndez's] view of the 15-day limit has been informed by the international consensus achieved in 2015. His current view in this regard is largely like limitations suggested domestically by the Arbour Commission and the *Ashley Smith Inquest*.

[29] While not binding on Canada, Canadian representatives had a role in drafting the Mandela Rules. The rules reflect a general shift in social views regarding acceptable treatment or punishment. Public perceptions of the appropriate way to treat inmates have evolved, thanks in large part to the efforts of inmates and their advocates. What was once considered acceptable – the death penalty for example – is no longer. Today, as society has become informed about the harm caused by solitary confinement, the public's views have changed. In *R. v. Prystay*, 2019 ABQB 8, Pentelechuk J. (as she then was) said, at para. 128:

> Societal views on what is acceptable treatment or punishment evolve over time. Forced sterilization, residential schools, lobotomies to treat mental disorders, corporal punishment in schools and the death penalty are all examples of treatment once considered acceptable. Segregation ravages the body and the mind. There is growing discomfort over its continued use as a quick solution to complex problems.

PROCEEDINGS BELOW

Application to the Superior Court

[30] The CCLA applied to the Superior Court alleging that ss. 31-37 of the Act violate ss. 12, 11(h) and 7 of the *Charter*.

[31] First, the CCLA argued that administrative segregation of young adults aged 18-21 and inmates suffering from mental illness, as well as prolonged administrative segregation of any inmate beyond 15 days, constitutes cruel and unusual treatment or punishment contrary to s. 12. The CCLA put forth evidence that administrative segregation would be detrimental for young persons because their brains are still maturing; those with mental illness are particularly vulnerable to harm from administrative segregation; and prolonged segregation poses a serious risk of negative psychological effects, such that a legislative scheme that permits it amounts to cruel and unusual treatment or punishment.

[32] Second, the CCLA argued that the practice of segregating inmates for their own protection amounts to an additional form of punishment, contrary to the prohibition against double jeopardy enshrined in s. 11(h) of the *Charter*.

[33] Finally, the CCLA alleged that the Act infringes s. 7 of the *Charter* in a manner that is grossly disproportionate, arbitrary and lacking in procedural fairness, contrary to the principles of fundamental justice. Though the record before this court is not entirely clear, it appears the CCLA made two distinct s. 7

arguments. First, the CCLA argued that the legislative scheme authorizing administrative segregation is not in accordance with the principles of fundamental justice because it is grossly disproportionate. Second, the CCLA argued that the legislative scheme for reviewing segregation decisions is arbitrary and procedurally unfair because the scheme does not provide for independent oversight of the institutional head.

Decision of the application judge

[34] At the outset, the application judge found that the CCLA, which has public interest standing, could not seek a remedy under s. 24(1) of the *Charter* because its own constitutional rights were not at issue. Instead, he held that the CCLA could only seek relief under s. 52(1) of the *Constitution Act, 1982*, and that such relief would only be available if the CCLA could show that the Act itself was unconstitutional.

[35] On this basis, the application judge concluded that the administration of the statutory scheme was not the material issue. While flawless administration was not a reason to refuse a declaration of invalidity pursuant to s. 52(1), individual cases of maladministration did not prove that the statute was incapable of constitutional administration. Citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 71, the application judge

held that, as a matter of law, Parliament was entitled to assume that its enactments will be applied constitutionally by the public service.

[36] The application judge rejected the CCLA's submissions with respect to s. 12 of the *Charter*.

[37] He was not satisfied that the evidence proved that because the brain of a person aged 18 to 21 continues to develop, that person is vulnerable to severe termination of development if exposed to administrative segregation.

[38] With respect to inmates with mental illness, the application judge found that the existing legislative scheme and relevant Commissioner's Directives provide adequate protection because there are limits on placing inmates with mental illness in administrative segregation. Specifically, s. 87(a) of the Act requires the institutional head and the independent reviewer to consider the inmate's health, including the inmate's mental health, when making the decision to place or maintain the inmate in administrative segregation.

[39] With respect to prolonged administrative segregation, the application judge found that there were serious risks of negative psychological harm that could occur as early as 48 hours after segregation and were exacerbated by prolonged segregation. The application judge also noted that negative psychological effects may not be observable and that the current regime waits for negative psychological

effects to manifest in a recognizable observable form before supporting or removing the inmate.

[40] Despite these findings, the application judge concluded that prolonged administrative segregation did not amount to cruel and unusual punishment or treatment in part because monitoring can identify when an inmate's condition is deteriorating. At para. 269, the application judge stated:

> If effective monitoring is possible and I believe it is and if section 87(a) is applied as the *Corrections and Conditional Release Act* requires, then I do not believe the current legislative scheme which permits prolonged administrative segregation must inevitably result in the treatment of an inmate which is grossly disproportionate to the safety risk the inmate presents.

[41] With respect to the CCLA's s. 11(h) claim, the application judge rejected the argument that placing an inmate in administrative segregation changes the nature of the inmate's incarceration and imposes a harsher sanction than that contemplated at sentencing. The CCLA's s. 11(h) claim was dismissed on this basis.

[42] Finally, the application judge dismissed the CCLA's s. 7 gross disproportionality argument because, in his view, s. 7 "cannot find a treatment or punishment disproportionate where it passes the test under section 12": at para. 267, relying on *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 160. However, the application judge concluded there was a breach

of s. 7 of the *Charter* because there was no independent review of the decision to segregate an inmate and the breach was not saved by s. 1. He declared ss. 31-37 of the Act of no force and effect to the extent of this breach, but suspended the declaration of invalidity for one year, until December 18, 2018, to provide Parliament time to enact an appropriate legislative response. As noted above, the AGC does not challenge the application judge's s. 7 decision.

LEGISLATIVE PROCESS

[43] Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, amends ss. 31-37 of the Act. It was introduced in the House of Commons on October 16, 2018 and passed third reading on March 18, 2019. It is currently before the Senate.

[44] Under Bill C-83, the Commissioner of Corrections may designate a penitentiary or any area in a penitentiary as a "structured intervention unit". These units function similarly to "administrative segregation". The purpose of such units is said to be to:

> (a) provide an appropriate living environment for an inmate who cannot be maintained in the mainstream inmate population for security or other reasons; and
>
> (b) provide the inmate with an opportunity for meaningful human contact and an opportunity to participate in programs and to have access to services that respond to the inmate's specific needs and the risks posed by the inmate.

[45] Under the proposed new system, those in structured intervention units will be given the opportunity to spend a minimum of four hours a day outside their cell, including a minimum of two hours a day interacting with others. The Bill does not place a cap on the number of consecutive days an inmate may spend in a structured intervention unit. Instead, it mandates that there be ongoing monitoring of the health of those in structured intervention units.

[46] The change in legislation was not completed by the December 18, 2018 deadline imposed by the application judge.

[47] The AGC moved to extend the deadline. This court granted an extension of time to enable the legislative process to be completed: 2018 ONCA 1038. The declaration of invalidity set out in para. 2 of the application judge's order is suspended until April 30, 2019.

ISSUES ON APPEAL

[48] On appeal, the CCLA seeks:

- a declaration that ss. 31-37 of the Act infringe s. 12 of the *Charter*, or alternatively s. 7, and are of no force and effect to the extent that they authorize administrative segregation of persons aged 18-21 and those diagnosed with a mental illness, as well as prolonged administrative segregation (more than 15 consecutive days) of any person; and

- a declaration that s. 31(3) of the Act infringes s. 11(h) of the *Charter* and is of no force and effect to the extent that it authorizes administrative segregation of persons for their own protection.

[49] The intervener the Ontario Human Rights Commission ("OHRC") supports the CCLA's position

[50] The AGC submits that the legislation, on its face or in its necessary effects, does not breach ss. 12, 11(h) or 7 of the *Charter* (other than on the basis found by the application judge).

[51] The AGC points to a number of features of the legislation to support its position. It stresses that it can only be used when the safety of any person or the security of a penitentiary is in jeopardy or during the investigation of a possible criminal or serious disciplinary charge. It can only be used if there is no reasonable alternative. The inmate must be released from segregation at the earliest appropriate time. The legislation expressly prohibits the use of cruel, inhumane or degrading treatment. Properly interpreted, says the AGC, the legislation requires an inmate's health care needs to be taken into account in both placement and review decisions.

[52] The AGC also relies on the application judge's finding about the sufficiency of monitoring. It argues that monitoring is sufficient to identify when an inmate's health may be impacted. If there is such an impact, the legislation requires a

balancing of the harm to the inmate of continued segregation against safety and security risks.

[53] In these circumstances, the AGC submits that the challenged provisions do not themselves violate *Charter* rights and so there is no basis for a s. 52(1) remedy.

[54] The intervener Attorney General of Ontario ("AGO") supports the position of the AGC.

ANALYSIS

[55] In my view, the determinative issue on this appeal is s. 12. I will address the issues as follows:

1. Do ss. 31-37 of the Act infringe s. 12 of the *Charter?*
2. If so, can the infringement be justified under s. 1?
3. If the infringement cannot be justified, what is the appropriate remedy?
4. Is s. 11(h) violated?
5. Is s. 7 violated?

[56] At the outset, I note that the standard of review for questions of law is correctness, while findings of fact are owed deference unless it can be established that the application judge made a palpable and overriding error: *Housen v. Nikolaisen,* 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10.

Issue 1: Do ss. 31-37 of the Act infringe s. 12 of the *Charter*?

[57] Section 12 of the *Charter* provides:

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

[58] There is a high threshold for establishing that punishment or treatment is cruel and unusual. In *Ogiamien v. Ontario (Community Safety and Correctional Services*, 2017 ONCA 667, 355 C.C.C. (3d) 41, Laskin J.A. said, at para. 9:

> "[C]ruel and unusual" is a high bar to meet. The Supreme Court has used various expressions to describe this high bar: "so excessive as to outrage standards of decency"; "grossly disproportionate to what would have been appropriate"; "grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable". The point underlying these expressions is that merely excessive treatment or disproportionate treatment is not enough to establish a s. 12 violation. In the context of punishment, the Supreme Court has cautioned against stigmatizing every excessive or every disproportionate sentence as being a constitutional violation. So too with treatment.

[59] Recently in *R. v. Boudreault*, 2018 SCC 58, 369 C.C.C. (3d) 358, the court when considering the mandatory victim surcharge scheme in the context of s. 12 said at para. 94:

> ...the impact and effect of the surcharge, taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable. Put differently, they are cruel and unusual and, therefore, violate s. 12.

[60] The CCLA argues in this court, as it did in the court below, that three aspects of administrative segregation infringe s. 12: segregation of inmates aged 18-21; segregation of inmates suffering from mental illness; and prolonged segregation of all inmates. I will deal with each of these points in turn.

Persons aged 18-21

[61] With respect to segregation of persons aged 18-21, the application judge was not satisfied on the evidence presented that because their brains were still developing, they were "vulnerable to severe termination of development if exposed to administrative segregation": at para. 211. The CCLA has not challenged this finding on appeal but states that the application judge erred by requiring that the termination of development be "severe". There was no evidence of termination of development before 15 days. In my view, this is fatal to the appeal on this issue and I would not interfere with the application judge's conclusion.

Persons with mental illness

[62] The application judge was satisfied that the legislative scheme, as properly interpreted and applied, did not offend s. 12 insofar as it permits subjecting inmates with mental illness to administrative segregation.

[63] In reaching that conclusion, he examined Commissioner's Directive 709 and s. 87(a) of the Act. He found there was an inconsistency between the directive and s. 87(a). On the one hand, para. 19 of CD-709 precludes administrative

segregation for those who meet certain criteria, including those with "serious mental illness with significant impairment". On the other hand, s. 87(a) states that the offender's state of health "shall" be taken into account with respect to administrative segregation. The application judge found that CD-709 creates a risk that the institutional head will exercise his or her discretion in a way that contravenes s. 87(a), because the directive implies that a mentally ill inmate not falling within the class described in the directive can be placed in administrative segregation.

[64] He also found there was ambiguity in the legislation. Section 31(3) (which specifies the basis on which the institutional head may order that an inmate be placed in administrative segregation) and s. 32 (which specifies the factors the institutional head shall consider in the decision whether to release an inmate) do not reference mental health as a consideration for the admission to or release from administrative segregation. However, s. 87(a) stipulates that an inmate's mental health must be taken into consideration in decisions relating to administrative segregation.

[65] The application judge resolved the ambiguity and inconsistency through an exercise in statutory interpretation. I agree with the application judge's interpretation of the statute. The institutional head has a discretion to place an inmate in administrative segregation, which seems clear from the use of the word "may" in s. 31(3), and must when exercising that discretion take into account s.

87(a) of the Act. Similarly, as found by the application judge, the independent reviewer, necessitated under s. 7 of the *Charter*, is also making a discretionary decision concerning whether to continue administrative segregation and must also consider s. 87(a). Neither is to inhibit the exercise of their individual discretion by assuming that inmates not captured in para. 19 of CD-709 are eligible for placement in administrative segregation regardless of the state of their mental health. Neither can ignore an inmate's mental health and decide to segregate solely based on the criteria in s. 31(3) of the Act.

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

[67] Based on the record as it presently exists, I would not therefore make the determination sought by the CCLA on this issue.

Prolonged segregation (more than 15 consecutive days)

[68] I come to a different conclusion than the application judge with respect to prolonged administrative segregation, which for these purposes is considered segregation for any continuous period longer than 15 days.

[69] The application judge declined to make a declaration that an inmate may never be segregated for more than 15 days. Although he accepted that prolonged administrative segregation causes foreseeable and expected harm, he found that it did not amount to cruel and unusual punishment or treatment.

[70] In determining whether "the serious permanent observable negative mental health effects consequent upon prolonged administrative segregation [were] grossly disproportionate" (para. 263), the application judge considered a hypothetical situation. He concluded that the current legislative scheme, which permits prolonged segregation, would not "inevitably result in the treatment of an inmate which is grossly disproportionate to the safety risk the inmate presents": at para. 269. He reached this conclusion on the basis that effective monitoring is possible and that s. 87(a) requires an inmate's health, including an inmate's mental health, to be taken into consideration in deciding whether to place or maintain an inmate in segregation.

[71] As I will explain, the application judge erred in relying on the monitoring of inmates in administrative segregation to find the Act constitutionally compliant. The

evidence is that prolonged administrative segregation causes foreseeable and expected harm and that monitoring only detects harm once it has already occurred – it does not predict or prevent it. As I will also explain, the application judge engaged in the wrong comparative exercise in assessing whether there was a s. 12 breach. Finally, I will explain why the safeguards in the legislation are inadequate, such that the legislation itself infringes s. 12. First, however, I will review the application judge's factual findings on the harmful effects of prolonged administrative segregation, which I accept.

(i) Prolonged segregation causes foreseeable and expected harm

[72] There was considerable expert evidence before the application judge about the harmful effects of administrative segregation. This included evidence about the particularly severe effects of prolonged segregation.

[73] The application judge made findings that administrative segregation:

- amounts to a significant deprivation of liberty – it places the inmate in a prison located within the prison;
- imposes a psychological stress capable of producing serious permanent observable negative mental health effects;
- is harmful;
- causes sensory deprivation and has harmful effects as early as 48 hours after admission;

- can alter brain activity and result in symptoms within seven days; and
- poses a serious risk of negative psychological effects when prolonged and is offside responsible medical opinion.

[74] The application judge accepted the evidence of Professor Méndez that brain activity shifts toward an abnormal pattern within days.

[75] He also accepted the evidence of Dr. Hannah-Moffat. She is a professor of sociology, former director of the Centre of Criminology and Sociolegal Studies at the University of Toronto. She was policy advisor to Justice Arbour's Commission of Inquiry into Certain Events at the Prison for Women in Kingston in April 1994, and expert witness in the Ashley Smith inquest.

[76] Dr. Hannah-Moffat spoke of the negative effects of administrative segregation. In particular, she described the following effects of administrative segregation, both short-term and prolonged, as established in the literature:

- prisoners experience the isolated conditions of solitary confinement, sensory deprivation, and constant lockdown status very negatively and stressfully;
- segregated prisoners who are already experiencing mental health problems, have a history of suicide attempts, and have high levels of hopelessness, are more likely to report suicidal ideation;
- long-term segregation may lead to the development of previously undetected psychiatric symptoms;

- segregation appears to be a significant risk factor for the development of psychiatric symptoms including depression and suicidal ideation;
- antipsychotic medication loses some effectiveness on people in segregation;
- prisoners who experience isolation report experiencing anger, hatred, bitterness, boredom, stress, loss of the sense of reality, suicidal thoughts, trouble sleeping, impaired concentration, confusion, depression, and hallucinations;
- prolonged isolation may negatively affect women's ability to cope with incarceration;
- segregation has repeatedly been linked to appetite and sleep problems, anxiety, panic, rage, loss of control, depersonalization, paranoia, hallucinations, self-mutilation, increased rates of suicide and self-harm, an increased level of violence against others, and higher rates of frustration;
- isolation can produce emotional damage, declines in mental functioning, depersonalization, hallucination, and delusion;
- segregation may lead to cognitive-behavioral problems among prisoners: difficulty solving interpersonal problems, unawareness of the consequences of their actions, inability to make positive choices, and a tendency to display disregard for others as a result of being socially unaware and impulsive;

- segregation can produce a vicious cycle where a prisoner's extreme behaviour leads to an increase in physical altercations with prison staff, which ultimately increases the level of frustration and violence;
- prisoners who are denied normal social contact with others on a long-term basis experience heightened levels of anxiety, increased risk of panic attacks, and a sense of impending emotional breakdown; and
- prisoners housed in segregation may lose the ability to limit and control their own behaviour, relying instead on the prison structure to manage their conduct. Others in extreme forms of restricted isolation may become severely apathetic and lethargic resulting in an inability to initiate behavior.

[77] Based on the evidence he accepted, the application judge found that "prolonged administrative segregation poses a serious risk of negative psychological effects": at para. 248. These negative effects are "foreseeable and expected", "may not be observable", result from "abnormal psychological stress and will if the stay continues indefinitely result in permanent psychological harm": at paras. 240, 241, 252.

(ii) Ineffectiveness of monitoring to prevent harm

[78] Despite these findings, the application judge dismissed the CCLA's s. 12 claim. He grounded his dismissal in part on the effectiveness of monitoring to

detect harm, even though he found that harm may not always be observable. He stated at paras. 260 and 269-270:

> I accept that the Correctional Service of Canada can adequately monitor inmates who are in administrative segregation to identify when an inmate's physical and mental health is deteriorating.
>
> [...]
>
> If effective monitoring is possible and I believe it is and if section 87(a) is applied as the *Corrections and Conditional Release Act* requires, then I do not believe the current legislative scheme which permits prolonged administrative segregation must inevitably result in the treatment of an inmate which is grossly disproportionate to the safety risk the inmate presents.
>
> Accordingly, I am not prepared to find that the legislative scheme providing for administrative segregation in the *Corrections and Conditional Release Act* is contrary to section 12 of the *Charter of Rights and Freedoms* because it does not contain a hard cap on the length of time that an inmate can be administratively segregated. [Emphasis added.]

[79] The practical effect of monitoring combined with a proper application of s. 87(a) is that it allows the CSC to remove an inmate from administrative segregation *only after* they have detected decompensation *which has already occurred*. In other words, monitoring, while effective at identifying inmates who have suffered harm, is ineffective at preventing it. The application judge appears to acknowledge this at para. 255:

> Despite section 87(a) of the legislative scheme, the current regime waits for the negative psychological

> effects to manifest in the form of some recognizable observable form of mental decompensation or suicidal ideation before supporting or perhaps removing the inmate. In other words, the person is not removed or supported until it is obvious that they have been harmed. [Emphasis added.]

[80] This is consistent with the evidence of Dr. Robert Morgan, a psychologist and academic from Texas whose testimony was relied on by the AGC. He indicated that monitoring detects harm that has already occurred. He said that "conducting daily health care visits, that include verbal interaction with inmates...provides a high likelihood of detecting inmates that are suffering impaired or decompensated mental health functioning".

[81] In conclusion, the application judge's error in relying on the effectiveness of monitoring undermines his conclusion that ss. 31-37 do not breach s. 12 insofar as they permit prolonged segregation.

(iii) Proper comparator

[82] Section 12, which prohibits cruel and unusual treatment and punishment, involves a comparative approach. In my view, the application judge also erred in his s. 12 analysis in applying the wrong comparative approach.

[83] In this case, the application judge did not determine whether administrative segregation should be considered treatment or punishment. Nor did he need to. As set out below, little in this case turns on the distinction.

[84] Punishment requires the claimant to show that the state action at issue: (i) is a consequence of conviction and part of a sanction; and either (ii) is in furtherance of sentencing purposes and principles; or (iii) has a significant impact on the claimant's liberty or security: *Boudreault*, at para. 39.

[85] In *Ogiamien*, Laskin J.A. determined that a prison lockdown was a case about "treatment". In my view, administrative segregation is treatment, not punishment. It is not part of a sanction, not in furtherance of sentencing objectives.

[86] In any event, the test to establish a violation of s. 12 is the same whether the court considers administrative segregation "punishment" or "treatment": *R. v. Olson* (1987), 62 O.R. (2d) 321 (C.A.), at p. 336, aff'd, [1989] 1 S.C.R. 296; *Ogiamien*, at para. 7. In either case, the punishment or treatment must be "so excessive as to outrage standards of decency" or "grossly disproportionate to what would have been appropriate". The analysis is an inherently comparative exercise, measuring the punishment or treatment experienced against the punishment or treatment that is appropriate in the circumstances.

[87] In this case, the application judge compared the effect of the treatment to the purpose of or reason for the treatment in a hypothetical scenario. The hypothetical involved an inmate segregated for his own protection for more than 15 days, as a result of which an outbreak of violence was prevented.

[88] The application judge then asked the following question at para. 265: "[i]s this treatment so excessive that it outrages Canadian standards of decency and so disproportionate to the purpose for which it was made that Canadians find it abhorrent or intolerable?" On his comparative analysis, he found that the effects of prolonged segregation were not invariably grossly disproportionate to its purpose.

[89] This approach is not consistent with the directions from this court on the proper interpretation of s. 12.

[90] In *Ogiamien*, at para. 10, Laskin J.A. said that there is a two-step process to determine whether treatment is cruel and unusual:

> The first step establishes a benchmark. In this case step one looks at the treatment of [the inmate] under "appropriate" prison conditions—that is their treatment under ordinary conditions in the remand units when there were no lockdowns. Step two assesses the extent of the departure from the benchmark. In this case step two looks at the effect of the lockdowns on [the inmate]'s treatment. If the effect of the lockdowns resulted in treatment that was grossly disproportionate to their treatment under ordinary conditions then their s.12 rights would be violated.

[91] In *Toure v. Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681, 40 Admin. L.R. (6th) 261, at para. 59, leave to appeal refused [2018] S.C.C.A. 436, LaForme J.A. said that *Ogiamien* did not set out the only possible manner of assessing s. 12 claims involving treatment. Instead he affirmed at para.

61 that "a determination of whether treatment is cruel and unusual requires a focus on the effect of the conduct in question – does it give rise to cruel and unusual treatment?" (emphasis added.)

[92] As *Ogiamien* and *Toure* make clear, the proper comparison is between the actual treatment against what would be appropriate in the circumstances. Laskin J.A. noted in *Ogiamien*, at para. 62, that the *reason* for the lockdowns, and whether the reasons were legitimate, was beside the point – what mattered was the *effect* of the lockdowns. He referred to the point made by Lamer J. in *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1077 that "a punishment is or is not cruel and unusual irrespective of why the violation has taken place".

[93] I pause here to consider the AGO's submission that, under *Ogiamien* and *Toure*, the s. 12 comparative analysis is "fundamentally individual" in nature. The need to consider "actual treatment", the AGO says, means a court must determine the effect of prolonged segregation on individual inmates. Only then can the court assess whether the effect of the treatment in each individual's case is grossly disproportionate. Since the CCLA cannot show that inmates held in prolonged administrative segregation invariably suffer grossly disproportionate effects, the AGO argues its s. 12 claim is doomed to fail.

[94] I reject this submission. In *Ogiamien* and *Toure,* individual inmates brought s. 12 claims seeking s. 24(1) relief. The applicants in *Ogiamien* were subject to

frequent prison lockdowns. The applicant in *Toure* was an immigration detainee detained in a maximum security jail. Since these individuals each sought a personal remedy, the s. 12 analysis necessarily turned on detailed evidence of the treatment they endured. Hence the analysis was individual in nature.

[95] *Ogiamien* and *Toure* make no broader pronouncement, however, on the nature of the s. 12 analysis in other contexts. The guidance they provide is on the proper comparators to use in determining whether treatment is grossly disproportionate. I therefore disagree that the s. 12 analysis is "fundamentally individual" in the manner the AGO suggests.

[96] In this case, the application judge's approach was problematic in that he engaged the wrong comparative analysis by comparing the actual treatment to the purpose for the treatment rather than following the comparative analysis set out in *Ogiamien* and *Toure.*

[97] In my view, a proper comparative exercise must consider the effects of prolonged administrative segregation against incarceration in an ordinary prison range. This is precisely what the expert evidence adduced in this case addresses. Compared to the treatment of inmates in general population, the evidence reveals that inmates held in prolonged administrative segregation are at risk of severe and often enduring negative health consequences.

[98] This evidence led the application judge to conclude that, where administrative segregation exceeds 15 consecutive days, inmates face "foreseeable and expected" harm. As he stated at para. 254, "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." Inmates under normal prison conditions are not exposed to harm of this sort.

[99] The effect of prolonged administrative segregation is thus grossly disproportionate treatment because it exposes inmates to a risk of serious and potentially permanent psychological harm.

[100] I turn next to consider the AGC's argument that the Act is nonetheless constitutional because of the safeguards it contains. Before doing so, however, I will briefly address the point made by the AGC and the AGO, citing this court's decision in *R. v. Olson*, that administrative segregation is not *per se* unconstitutional. The inmate in *Olson* had been held in administrative segregation for five years. He brought a *habeas corpus* application seeking release on the basis that his segregation infringed s. 12 of the *Charter*. At p. 336, this court rejected his claim:

> Segregation to a prison within a prison is not, *per se*, cruel and unusual treatment. However, undoubtedly for the appellant, like anyone else, it may become so if it is so excessive as to outrage standards of decency. In my view, having regard to all of the evidence presented, such a case has not been made out.

[101] *Olson* is of little assistance in determining the issues raised on this appeal. I say this for three reasons. First, the court in *Olson* had no expert evidence before it on the effects of administrative segregation on either the inmate himself or on other inmates. By contrast, the volume of direct and expert evidence adduced in the present appeal is considerable. Second, this appeal is being heard more than 30 years after *Olson* was decided, in a markedly different social and legal landscape as demonstrated by developments in scholarly research and international law: see *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para 47. Finally, the court in *Olson* deliberately left open the possibility that administrative segregation "may become [cruel and unusual] if it is so excessive as to outrage standards of decency."

(iv) The safeguards in the Act are inadequate

[102] I turn now to consider the AGC's argument that, when properly interpreted, the safeguards contained in the Act render it capable of constitutional compliance and thus not in breach of s. 12. Here the court must consider whether the law on its face or in its necessary effects is unconstitutional.

[103] The application judge accepted that the legislation does not violate s. 12. As explained above, he held that the institutional head must apply s. 87(a) when exercising his or her discretion under s. 31(3) and s. 32 to place or maintain an inmate in administrative segregation. He was of the view that in applying s. 87(a),

the institutional head engages in a balancing exercise, whereby the security needs of employees and inmates in the general population are balanced with the psychological harm to the administratively segregated inmate.

[104] In my view, the application judge's reliance on s. 87(a) to say that the legislative scheme does not breach s. 12 is misplaced.

[105] Under s. 87(a), the institutional head need only "consider" the inmate's health in deciding whether to place an inmate in, or remove an inmate from, administrative segregation. The word "consider" is significant. It implies that the inmate's health is merely one consideration among others. It is not the paramount consideration. By structuring the institutional head's discretion in this way, s. 87(a) authorizes prioritizing other considerations over the inmate's health, so long as the inmate's health forms part of the decision-making process. Thus, even when properly applied, s. 87(a) does not protect against the risk of an inmate suffering cruel and unusual treatment.

[106] I am strengthened in my conclusion by considering the argument raised by the OHRC on this issue. The OHRC points to *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, and *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, in arguing that the application judge erred by incorporating into his analysis, "the presumption" that the CSC "will exercise their discretion under s. 87(a) ... to avoid any unconstitutional result".

[107] Both *Nur* and *Appulonappa* address the issue of discretion in the context of a constitutional challenge to legislation. In *Nur*, it was argued that the provision imposing a mandatory minimum sentence was not unconstitutional because the Crown had the ability to elect to proceed summarily and thereby avoid the mandatory minimum sentence in the indictable offence. The Supreme Court rejected that argument. It held that prosecutorial discretion to proceed summarily could not save the unconstitutional mandatory minimum.

[108] *Appulonappa* was a case involving s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which creates an offence of human smuggling. The court found that the provision was unconstitutionally overbroad contrary to s. 7 insofar as it captured humanitarian efforts, mutual aid amongst asylum-seekers and individuals who assisted close family members. The court found that s. 117(4), which required that the Attorney General must consent for a prosecution to proceed under s. 117, could not save the provision because it was not impossible that the Attorney General could consent to prosecution in a case that was overbroad of the legislative purpose.

[109] I recognize that *Nur* and *Appulonappa* are different in that *Nur* involved a s. 12 challenge to mandatory minimum legislation, while *Appulonappa* involved a s. 7 overbreadth challenge to an offence provision in the *Criminal Code*. This appeal raises a unique s. 12 challenge to permissive legislation which authorizes but does not mandate prolonged administrative segregation.

[110] Nevertheless, I find the guidance from the Supreme Court in *Nur* and particularly in *Appulonappa* apposite. As the Supreme Court stated in *Appulonappa,* at para. 74:

> Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment. [Emphasis added.]

[111] On appeal, the AGC points to additional legislative safeguards besides s. 87(a) that it says are sufficient to render the Act constitutional. For instance, s. 31(2) requires the institutional head to release an inmate from segregation at the "earliest appropriate time". Section 31(3) states that administrative segregation can only be used if there is "no reasonable alternative". Section 69 of the Act expressly prohibits the use of "cruel, inhumane or degrading treatment or punishment". These provisions, the AGC submits, guard against the risk of grossly disproportionate treatment if properly applied by the institutional head. The Act is therefore capable of constitutional compliance.

[112] I disagree.

[113] I accept that ss. 31(2) and 31(3) offer meaningful guidance to the institutional head when making segregation decisions. Yet it is not impossible for the institutional head to apply ss. 31(2) and 31(3) and conclude that the earliest appropriate time to release an inmate who was administratively segregated as a last resort is after 15 consecutive days. These provisions therefore do not avoid the risk of grossly disproportionate treatment.

[114] Section 69 is declaratory in nature. It bars cruel, inhumane and degrading treatment but does not set a standard for what would constitute such treatment. The provision is not a safeguard against grossly disproportionate treatment.

[115] Even when conscientiously applied by the institutional head, ss. 31(2), 31(3) and 69 do not preclude the possibility of prolonged administrative segregation. I conclude that the legislative safeguards are inadequate to render the Act constitutional.

(v) Sections 31-37 of the Act infringe s. 12

[116] As I have mentioned, the application judge considered *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* and concluded that any problems with the scheme of administrative segregation were the results of maladministration, not unconstitutionality of the legislation. At para. 26, the application judge concluded:

> Individual cases of maladministration where Correctional Service of Canada personnel contravene Correctional

> Service of Canada policies and in so doing violate an inmate's *Charter* rights do not prove that the *Corrections and Conditional Release Act* is incapable of constitutional administration.

[117] I disagree that this is a case of maladministration. In my view, this is not a *Little Sisters* situation.

[118] The court in *Little Sisters* found that discrimination suffered by the appellants was not the result of an unconstitutional statute and that the statutory provisions, on their face, did not infringe s. 15. The problem in *Little Sisters* was the manner in which the provisions were enforced. There, the Supreme Court of Canada concluded that the appellant's s. 15 rights had been breached because of how the statute was administered but found that the statute was itself valid.

[119] Such is not the case here. Prolonged administrative segregation subjects inmates to grossly disproportionate treatment. As I have explained, ss. 31-37 of the Act authorize and do not safeguard against such treatment. Thus, the Act infringes s. 12.

Issue 2: Is the infringement justified under s. 1?

[120] Section 1 of the *Charter* states:

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

[121] The AGC submits that any *Charter* infringement occasioned by the impugned provisions is justified under s. 1 by addressing the factors outlined in *R. v. Oakes,* [1986] 1 S.C.R. 103.

[122] The objective of administrative segregation is put forth by the AGC as follows:

> ... to ensure the safety of persons in and the security of the penitentiary by exceptional recourse to removing an inmate from the general population when there are no reasonable alternatives and to do so for the shortest time possible to achieve the statutory ends.

[123] The AGC submits that administrative segregation is a rational way to prevent potential death, injury, or jeopardy to security. The statutory safeguards relating to the admission to and release from administrative segregation ensure that any *Charter* infringement is minimal. The AGC submits that alternatives such as "Close Supervision Centres", suggested by the CCLA's expert Professor Coyle, and the Scottish Model, are not more appropriate or less harmful means of achieving the legislative goals. In terms of proportionality, it is submitted that saving lives and ensuring safety and security outweigh the potential and uncertain deleterious effects on the rights of inmates placed in administrative segregation.

[124] I leave for another day the threshold issue of whether – in the context of current moral norms – s.1 is *ever* available to justify a s. 12 breach. As Peter Hogg

observes in *Constitutional Law of Canada,* 5th ed., Vol. 2 (Toronto: Carswell, 2007), at pp. 158-159:

> It may simply be the failure of my imagination, but I find it difficult to accept that the right not to be subjected to any "cruel and unusual treatment or punishment" could ever be justifiably limited. This may be an absolute right. Perhaps it is the only one.

[125] I am aware that recently the Supreme Court has said that, while rare, s. 1 may justify a breach under s. 7: see *R. v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 144. No cases are put forward where s. 1 justifies a s.12 breach.

[126] In any event, here the AGC has not met its onus to justify prolonged administrative segregation. The submissions of the AGC speak generally to the need for prison staff to respond quickly to a dynamic and dangerous situation. However, the provisions in the Act which authorize prolonged segregation beyond 15 consecutive days do not minimally impair the s. 12 rights of inmates. On the contrary. They expose the inmates to the risk of severe and potentially permanent psychological harm. Consequently, the infringement is not justified under s. 1.

Issue 3: What is the appropriate remedy?

[127] The CCLA submits that a s. 52(1) remedy is available if the provisions in the Act authorizing prolonged administrative segregation are found to infringe s. 12.

[128] Section 52(1) of the *Constitution Act, 1982* provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[129] Having found that ss. 31-37 of the Act infringe s. 12 and the infringement cannot be justified under s. 1, I conclude that the appropriate remedy lies under s. 52(1). There is no need to consider the CCLA's alternative argument for relief under s. 24(1).

[130] Pursuant to s. 52(1), I would declare ss. 31-37 of the Act to be of no force and effect to the extent that they authorize prolonged administrative segregation.

Issue 4: Is s. 11(h) violated?

[131] Section 11(h) of the *Charter* provides:

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

[132] The CCLA submits that s. 31(3) violates s. 11(h) of the *Charter* for inmates in need of protection because administrative segregation constitutes further punishment.

[133] This section permits the institutional head to place an inmate in administrative segregation where allowing the inmate to associate with other inmates would jeopardize the inmate's safety:

> 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; [Emphasis added.]

[134] It was argued below that s. 31(3) violates s. 11(h) because it can be used to segregate and thereby punish inmates who have done nothing to threaten the safety of the institution or any other person – such as in the case of inmates who identify as LGBTQ and are voluntarily or involuntarily being placed in administrative segregation for their own protection. In those circumstances, the nature of the inmate's incarceration is changed and a harsher sanction is imposed than what was contemplated at the time of sentencing.

[135] The application judge rejected these arguments and concluded that s. 11(h) did not apply because administrative segregation for the purposes of protecting an inmate: (1) did not prolong the duration of an inmate's sentence; (2) did not retrospectively frustrate an inmate's reasonable expectation of liberty; (3) was not a sanction under the *Criminal Code* and did not arise from a criminal proceeding; (4) was reasonably foreseeable at the time of sentencing for those such as informants, Crown witnesses, and others who are incompatible with other inmates; and (5) was not imposed for the purpose or principles of sentencing.

[136] The CCLA submits that for prisoners who have done nothing wrong and are segregated for their own protection, administrative segregation, which is harsh and punitive, constitutes an additional punishment for purposes of s. 11(h). Indefinite segregation fundamentally changes the nature of incarceration beyond that imposed at sentencing. Inmates cannot be taken to have expected to be segregated in a manner that is "offside responsible medical opinion" and carries a real risk of harm. A non-disciplinary prison proceeding can be punitive for the purposes of s. 11(h).

[137] The CCLA relies primarily on *Whaling v. Canada (Attorney General),* 2014 SCC 20, [2014] 1 S.C.R. 392, in arguing that s. 31(3) violates the prohibition against imposing "punishment... again". In *Whaling*, the court revisited the Supreme Court's prior evolving jurisprudence on s. 11(h), including: *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *R. v. Shubley*, [1990] 1 S.C.R. 3.

[138] In *Whaling*, what was at issue was the retrospective application of the repeal of the accelerated parole review, or APR. The court stated that "the dominant consideration in each case will ... be the extent to which an offender's settled expectation of liberty has been thwarted by retrospective legislative action": at para. 60. The court concluded that there was a violation of s. 11(h). The effect of repealing APR retrospectively was to delay the applicants' eligibility for early day parole even though APR was in effect when they were convicted.

[139] According to *Whaling*, s. 11(h) may be engaged even where there is no second proceeding but where a person is "punished again". As *Whaling* indicates, the scope of "punishment" in the context of s. 11(h) has expanded over the years.

[140] Under *Rodgers,* "the consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is imposed in furtherance of the purpose and principles of sentencing": at para. 63. Here, the additional "punishment" is said to be a change in the conditions of imprisonment for the purpose of protecting the inmate's safety and not for the purpose or principles of sentencing.

[141] In *Whaling*, Wagner J. noted that the problem with the *Rodgers* test is that it does not assist in identifying situations in which, from a functional rather than a formalistic perspective, the harshness of the punishment has been increased: at para. 42. He also noted that "[g]enerally speaking, offenders have constitutionally protected expectations as to the duration, but not the condition, of their sentences": at para. 57.

[142] *Whaling* expressly deals with retrospective legislative changes to the parole system. Here, there is no change to the system of administrative segregation under the Act that results in changes to the length of an inmate's incarceration. Assuming that the "offender's settled expectation of liberty" is relevant even where there is

no retrospective legislative action, the application judge found that there was no frustration of an inmate's reasonable expectation of liberty.

[143] As I see no error in the application judge's analysis with respect to s. 11(h), I would dismiss the CCLA's claim on this issue.

Issue 5: Is s. 7 violated?

[144] Section 7 of the *Charter* provides:

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

[145] The CCLA submits that, if the provisions of the Act authorizing administrative segregation of inmates aged 18-21 and inmates with mental illness are found not to infringe s. 12, they nonetheless infringe s. 7 on the basis of gross disproportionality and overbreadth. I will deal with each argument in turn.

[146] The CCLA advanced a s. 7 argument based on gross disproportionality before the application judge. In dismissing it summarily, the application judge held that s. 7 "cannot find a treatment or punishment disproportionate where it passes the test under section 12": at para. 267. The application judge relied on *R. v. Malmo-Levine*, where the Supreme Court considered this issue at para. 160:

> Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12

> but a lesser degree of proportionality suffices under s. 7 would render incoherent the scheme of interconnected "legal rights" set out in ss. 7 to 14 of the Charter by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

[147] I agree with the application judge that *Malmo-Levine* is dispositive of this issue. Though the analysis under s. 7 and s. 12 is different, the standard of gross disproportionality is the same. The CCLA's s. 7 argument therefore cannot succeed where it has failed on s. 12.

[148] The second argument advanced by the CCLA under s. 7 is that the provisions authorizing administrative segregation are contrary to the principles of fundamental justice because they are overbroad. As the AGC points out, this argument was not advanced before the application judge. As a general rule, this court will decline to decide new issues on appeal. In *R. v. Roach*, 2009 ONCA 156, 246 O.A.C. 96, Doherty J.A. stated at para. 6:

> Generally speaking, appeal courts will not entertain arguments not made at trial. That general rule applies to constitutional arguments raised for the first time on appeal regardless of whether the arguments invoke the remedial powers of s. 24 of the *Charter* or the nullifying power in s. 52(1) of the *Constitution Act, 1982*. [Citations omitted.]

[149] Although an appellate court has the discretion to permit new arguments, including *Charter* arguments, I am not satisfied that the overbreadth argument can be fully, effectively and fairly addressed on appeal. We do not have the benefit of

the application judge's vetting of issues and reasoned analysis, which are fundamental premises of the appeal process: see *Roach*, at para. 8.

CONCLUSION

[150] I would allow the appeal in part and declare that administrative segregation longer than 15 consecutive days as provided for in ss. 31-37 of the *Corrections and Conditional Release Act* violates s. 12 of the *Charter*, cannot be justified under s. 1, and are of no force and effect to the extent of the violation. This declaration shall take effect 15 days from the date of the release of this judgment.

Released: GS MAR 2 8 2019

M.L. Benotto J.A.

I agree. G.R. Strathy C.J.O.

I agree. J.B. Roberts J.A.