Court File No: 35791

IN THE SUPREME COURT OF FLAVELLE
(ON APPEAL FROM THE COURT OF APPEAL OF FALCONER)

B E T W E E N :

CORPORATION OF THE FLAVELLIAN CIVIL LIBERTIES ASSOCIATION

- and -

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

FACTUM OF THE APPELLANT

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PART I – OVERVIEW

1. Solitary confinement[1] inflicts severe physical, emotional and psychological harm on prisoners, who are among the most vulnerable and overlooked people in Flavellian society. Solitary confinement has been a mainstay of Flavelle's prison administration for decades.[2] At the heart of the problem is ambiguous correctional legislation that gives the Correctional Services of Flavelle ("CSF") virtually unfettered authority to determine when and under what conditions to segregate inmates for non-punitive reasons ("administrative segregation"). In late 2017, the Flavellian Supreme Court struck down Flavelle's administrative segregation regime, the *Segregation Act,* because it authorized CSF to impose prolonged and indefinite solitary confinement without external oversight in violation of s. 7 of the *Flavellian Charter of Rights and Freedoms* ("*Charter*").

2. In January of 2018, Flavelle replaced the *Segregation Act* with a new system of non-punitive segregation, under the *Structured Intervention Act* ("*SIA*" or "the Act"). While different in name, the Act maintains the structural deficiencies of its predecessor: it imposes no time limit on segregation and confers to CSF virtually unfettered decision-making power over segregated inmates. As a result, inmates may still be subject to prolonged and indefinite solitary confinement at CSF's discretion. While the Act now provides for external oversight, it comes far too late to be of any assistance to prisoners. Because the *SIA* permits prolonged and indefinite solitary confinement and does not conform with the principles of fundamental justice, it violates ss. 7 and 12 of the *Charter*. Neither of these infringements can be justified under s. 1. Accordingly, the Act is unconstitutional and should be declared of no force or effect.

[1] "Solitary confinement" refers to isolation for 22 hours or more per day without meaningful human contact.
[2] Official Problem at paras 2, 4, 16.

PART II – FACTS

HISTORY OF SEGREGATION IN FLAVELLE

3. Under the old *Segregation Act*, CSF employees could segregate prisoners for disciplinary or administrative (non-punitive) reasons. In 2017, 7% of prisoners in Falconer were segregated.[3] The *Segregation Act* set strict time limits for disciplinary segregation but gave broad discretion to prison officials to determine the duration of administrative segregation. Inmates could be either voluntarily or involuntarily admitted to administrative segregation. Once there, many would sit in small windowless cells for over 22 hours a day in total isolation.[4]

4. In 2017, this Court struck down the *Segregation Act* because it violated s. 7 of the *Charter*.[5] The Court's analysis focused on three aspects of the legislation. First, the Act permitted officials to segregate inmates for 22 hours per day with minimal human contact. Second, inmates often did not know when, or if, they would be released from segregation. Third, CSF's segregation decisions were not subject to independent review. These constitutional deficiencies were not justified by the objectives of improving institutional safety and security.[6]

5. In response to this Court's ruling, the Government of Flavelle implemented a new administrative segregation regime under the *Structured Intervention Act*. The new Act purports to address the old regime's shortfalls by offering each segregated prisoner four hours outside of his or her cell, or "structured intervention unit" ("SIU"), and the opportunity to interact with others for two hours each day.[7] The new Act does not impose a time limit on segregation and only provides independent review of segregation placements after 90 days.[8]

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[3] Official Problem at para 16(o).
[4] Official Problem at para 4.
[5] Official Problem at para 3.
[6] Official Problem at paras 2-4.
[7] *SIA*, s 36(1).
[8] *SIA*, s 36(1).

SEGREGATION IN FLAVELLE IS SOLITARY CONFINEMENT

The *Segregation Act*

6. The General Assembly of the United Nations' Standard Minimum Rules for the Treatment of Prisoners ("Mandela Rules"), define "solitary confinement" as segregation for at least 22 hours per day without meaningful human contact.[9] CSF's official stance has always been and remains that Flavelle has never employed solitary confinement in its institutions. However, at trial, Dr. A.R. Smith reported that the prolonged isolation of segregated inmates in highly restrictive conditions has been common practice in Flavelle for decades.[10]

7. While the *Segregation Act* required officials to release inmates from administrative segregation at "the earliest appropriate time," in practice, prisoners often found themselves in segregation indefinitely. At trial, former CSF Officer S. Holao testified that, while working for CSF, she "didn't fully understand what rights [prisoners] had and what the process was legally supposed to be."[11] Officer Holao further attested that segregated inmates face a heightened risk of assault upon return to general population, and therefore would often only be released from segregation if they could be transferred to another institution. Inmates would languish in isolation for several more months while awaiting transfers.[12]

8. Despite the fact that mentally ill inmates are segregated at disproportionate rates, [13] CSF officials have a history of engaging superficially with inmates' mental health.[14] While the *Segregation Act* required regular mental health checks, Officer Holao explained that "the mental health worker would tap the door and ask them how they are through the food slot. The inmate

[9] UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015) at Rule 43 [Mandela Rules], BOA, Tab 1.
[10] Official Problem at para 16.
[11] Official Problem at para 20.
[12] Official Problem at paras 16(k), 18, 19.
[13] Official Problem at para 16(i).
[14] Official Problem at para 16(j).

would give a one word answer usually, 'Good' or 'I'm fine'. Then that would be it."[15] The ramifications of inadequate mental health monitoring are compounded by the fact that inmates are often not forthcoming about their mental health due to widespread mistrust of CSF staff.[16]

The *SIA*

9. While the new Act, the *SIA,* offers segregated inmates more out-of-cell time and opportunities to interact with others, these privileges are subject to a number of broadly-drafted legislative exceptions set out in s 37(1). For instance, prison officials are authorized to withhold inmates' statutory rights if an inmate refuses to leave his cell or fails to comply with reasonable instructions to ensure safety. CSF officials can also leave inmates isolated in SIUs for 22 hours or more per day in a non-exhaustive list of "prescribed circumstances," which includes, "among other things," riots, fires, and work refusals.[17]

10. Under the *SIA,* a prison official can still keep an inmate in structured intervention for an indefinite period, so long as the official determines that reintegrating the inmate "would jeopardize the safety of the inmate or any other person or the security of the penitentiary" or "would interfere with an investigation that could lead to a criminal charge or … a serious disciplinary offence."[18] In making this determination, the Act sets out several factors for the institutional head to consider,[19] including "any consideration that he or she considers relevant."[20]

11. Review of ongoing structured intervention placements is left to CSF for the first three months of an inmate's segregation. Under the *SIA,* the first opportunity for independent review

[15] Official Problem at para 21.
[16] Official Problem at para 16(f).
[17] *SIA*, s 37(1).
[18] Official Problem at para 11.
[19] Considerations include: the inmate's correctional plan, the appropriateness of the inmate's confinement in the penitentiary, and the appropriateness of the inmate's security classification: see *SIA*, s 37.41(2).
[20] Official Problem at para 11.

does not come until 90 days after an inmate has been segregated.[21] Apart from an initial check immediately upon transfer to a SIU, mental health evaluations are not mandated by the Act until harm manifests in a segregated inmate and is detected by CSF staff, who, in turn, notify health care staff. While registered health professionals can recommend that segregation be altered or terminated out of concern for an inmate's health, these recommendations are not binding.[22]

SOLITARY CONFINEMENT CAUSES SERIOUS HARM

12. Solitary confinement causes severe and often irreversible harm. Dr. Smith described the harms, which include stress-related reactions (decreased appetite, trembling and a sense of impending emotional breakdown); sleep disturbances; heightened anxiety and depression; hyperresponsivity to stimuli; aggression and impulse control issues; cognitive dysfunction; hallucinations; and increased suicidality and self-harm.[23] Harms can manifest quickly: solitary confinement can change brain activity and cause symptomatology within seven days.[24] Given these negative effects, the Mandela Rules prohibit solitary confinement of an indefinite duration or lasting longer than 15 consecutive days in any circumstance.[25]

13. All of the harms described in Dr. Smith's report occur at higher rates in individuals who are segregated than in those in the general population. At least one-third, and up to 90%, of inmates subjected to prolonged solitary confinement will experience harm.[26] The majority of self-injurious incidents in prisons also occur in the most secluded areas of the penitentiary, such as segregation cells.[27]

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[21] Official Problem at para 12.
[22] *SIA*, ss 37.11 and 37.2.
[23] Official Problem at para 16(c).
[24] Official Problem at para 16(a).
[25] UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015) at Rule 43 [Mandela Rules], BOA, Tab 1.
[26] Official Problem at para 16(b).
[27] Official Problem at para 16(h).

PART III – JUDICIAL HISTORY

14. Justice Shek of the Superior Court of Falconer held that the Act infringes both ss. 7 and 12 of the *Charter* in a manner that cannot be justified under s. 1.[28] Accepting the expert evidence of Dr. Smith and the witness testimony of Officer Holao, Justice Shek found that the Act deprives inmates in structured intervention of their rights to liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Specifically, she held that the Act was overbroad, since, while waiting for institutional transfers, inmates could be held indefinitely in SIUs for reasons related to systemic delays and a lack of resources.[29] Justice Shek also found that structured intervention imposes inhumane treatment and places vulnerable inmates in circumstances where they are likely to experience mental illness and self-harm. She noted that, despite the likely reality that not every inmate placed in structured intervention will be similarly affected, the exceptions in s. 37(1) of the Act make prolonged solitary confinement possible. This, she found, was sufficient to violate s. 12.[30] Because the *Charter* infringements were so serious, Justice Shek imposed a 15-day time limit on inmates' placements in SIUs.[31]

15. A majority of the Falconer Court of Appeal overturned Justice Shek's decision. Justice Tsui, in dissent, would have upheld Justice Shek's decision on the s. 7 violation.[32] Justice Wang, writing for the majority of the Court of Appeal, held that neither ss. 7 or 12 was violated.[33] While Justice Wang found that inmates' liberty was deprived by a placement in a SIU, he noted this deprivation accorded with the principles of fundamental justice because "the independent review is a fair process which ensures that placement in an SIU was for reasons of safety or to prevent

[28] Official Problem at para 24.
[29] Official Problem at para 27.
[30] Official Problem at para 25.
[31] Official Problem at para 29.
[32] Official Problem at para 31.
[33] Official Problem at para 30.

interference with an investigation."[34] Justice Wang noted in *obiter* that, even if he had found s. 7 to be violated, he would be inclined to find the violation justified under s. 1, since the government is owed deference regarding prison management.[35]

PART IV – ISSUES ON APPEAL

16. The Appellant's argument will proceed as follows: first, as a threshold matter, the *SIA* authorizes prolonged and indefinite solitary confinement because it does not cure the constitutional infirmities of the *Segregation Act.* Second, the FCLA takes the following positions with respect to the issues presented on appeal:

A. The *SIA* violates s. 7 of the *Charter* because it deprives inmates of their rights to liberty and security of the person in a manner that is overbroad and procedurally unfair.
B. The *SIA* violates s. 12 of the *Charter* because it authorizes the prolonged and indefinite solitary confinement of inmates in structured intervention.
C. Neither infringement is justified under s. 1 of the *Charter.*

PART V – STATEMENT OF ARGUMENT

THE *SIA* PERMITS PROLONGED AND INDEFINITE SOLITARY CONFINEMENT TO CONTINUE

17. The *SIA* purports to cure the *Segregation* Act's constitutional deficiencies by affording prisoners increased rights and fettering CSF officers' discretion. The *Segregation Act* expressly authorized isolation for 22 hours per day, whereas the *SIA* offers inmates four hours of out-of-cell time and two hours of human interaction per day. However, these privileges are subject to a

[34] Official Problem at para 32.
[35] Official Problem at para 33.

list of exceptions that is non-exhaustive,[36] not specifically prescribed[37] and unconstrained by meaningful limits.[38] Accordingly, the fulfillment of these rights remains entirely at the discretion of CSF. The exceptions enumerated in s. 37(1) of the Act include situations that are likely to be rare, such as fires, but others that are entirely foreseeable, like a prisoner's refusal to leave his or her cell[39] or failure to comply with "reasonable" instructions to ensure safety or security.[40] Further, the fact that the provisions are non-exhaustive, indicated by the language "among other things", significantly expands the scope of CSF's discretion. Finally, like the *Segregation Act*, the *SIA* imposes no time limit on how long a prisoner may be held in structured intervention.

18. The *SIA* authorizes prolonged and indefinite solitary confinement. The Act grants CSF broad discretion over an open-ended list of situations where it is permissible to keep an inmate in isolation and fails to place any meaningful constraints on that discretion—most notably, a time limit on structured intervention. Read cumulatively, the *SIA* authorizes CSF to keep inmates in SIUs for more than 22 hours per day for prolonged and indefinite periods without violating the Act.

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[36] *SIA*, s 37(1)(c) lists "prescribed circumstances" in which it is acceptable for CSF to deny an inmate in structured intervention their allotted out-of-cell time and opportunity to interact with others. The list includes a catch-all exception, "among other things", which enables CSF to expand the provision's scope to catch other situations where it deems it appropriate to leave prisoners isolated in a SIU: see Official Problem at para 10.

[37] *SIA*, s 37(1) (b), for example, relies on the vague recurring justifications of "safety and security" to refuse an inmate their out-of-cell time and meaningful human interaction: see Official Problem at para 10.

[38] *SIA*, s 37(1)(c) states that "prescribed circumstances" must be limited to "what is reasonably required for security purposes." Just like "at the earliest appropriate time", CSF officials will fill in the content of this broad limitation.

[39] In *Bacon v Surrey Pretrial Services Centre,* an inmate in prolonged segregation eventually became depressed and began to refuse his daily allotted out-of-cell time. As a result of having adjusted to isolation, he had become uncomfortable around other people and would begin to "panic when he hear[d] keys in the door", further contributing to his desire not to leave his cell: see *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805 at paras 71, 104, BOA, Tab 2.

[40] Flavelle's over-segregation of the mentally ill suggests that these inmates are already often deemed to be unable to interact safely with others. It is reasonably foreseeable that similar justifications will be employed to keep mentally ill inmates isolated once segregated under the exception in s 37(1)(b).

THE *SIA* VIOLATES S. 7 OF THE *CHARTER*

19. Legislation violates s. 7 where it causes a deprivation of life, liberty or security of the person in a manner that does not conform to the principles of fundamental justice.[41] The requisite standard of causation is "sufficient causal connection"[42] and the inquiry is qualitative, rather than quantitative, meaning that the effect of legislation on just one person suffices to establish a s. 7 breach.[43] Like the *Segregation Act*, the *SIA* permits prolonged and indefinite solitary confinement, which deprives inmates of their rights to liberty and security of the person. Neither deprivation accords with the principles of fundamental justice.

The *SIA* Deprives Inmates of Their Rights to Liberty

20. As the courts below found, the Act engages inmates' liberty interests because it enables prison staff to place and keep them in SIUs without their consent. Indeed, as the Supreme Court of Canada confirmed in *May v Ferndale Institution*, there is "no question" that transferring an inmate to a more restrictive institutional setting constitutes a deprivation of liberty.[44]

The Deprivation of Liberty is Serious

21. Placing an inmate in a SIU entails a serious deprivation of liberty. SIUs impose the most restrictive conditions of any carceral regime in Flavelle—SIUs are a "prison within a prison."[45] As the Court of Appeal for Ontario concluded in *Boone v Ontario*, segregation constitutes "a serious deprivation of liberty."[46] While any deprivation of liberty, no matter its severity, suffices

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[41] *Flavellian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11.
[42] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 75, BOA, Tab 3.
[43] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 127, BOA, Tab 3.
[44] *May v Ferndale Institution*, 2005 SCC 82 at para 76, BOA, Tab 4.
[45] *R v Olson*, 62 OR (2d) 321, 1987 CarswellOnt 1402 at para 40 (ONCA), BOA, Tab 5.
[46] *Boone v Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515 at para 2, BOA, Tab 6. See also *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491 at para 87

to establish a s. 7 violation, more serious deprivations are more difficult to justify at the principles of fundamental justice and s. 1 stages.

The *SIA* Deprives Inmates of Their Rights to Security of the Person

22. Security of the person encompasses both physical and psychological integrity. Legislation violates the right to security of the person where it causes physical or serious psychological suffering[47] or where it has the likely effect of impairing a person's health.[48] In this case, the Act does both.

Solitary Confinement Causes Physical and Serious Psychological Harm

23. There is a "sufficient causal connection"[49] between solitary confinement and physical and serious psychological suffering. Empirical studies show that solitary confinement frequently causes physical suffering (in the form of increased self-harm and assault by other inmates) as well as severe psychological reactions.[50] Threats to psychological integrity need not rise to the level of nervous shock or psychiatric illness in order to impinge on security of the person—they must simply be greater than ordinary stress or anxiety.[51] The psychological reactions listed in Dr. Smith's report far exceed ordinary stress and anxiety.

24. None of the evidence before this Court severs the causal link between solitary confinement and the harms listed in Dr. Smith's report. Chief Justice McLachlin was clear in *Bedford* the standard of causation under s. 7 "does not require that the impugned government

("admitting or maintaining an inmate in administrative segregation amounts to a significant deprivation of liberty"), BOA, Tab 7.
[47] *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 64, BOA, Tab 8.
[48] *R v Monney*, [1999] 1 SCR 652 at para 55, 171 DLR (4th) 1 (SCC), BOA, Tab 9, citing *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422 (SCC), BOA, Tab 10.
[49] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 76, BOA, Tab 3.
[50] Official Problem at paras 16(c), (k).
[51] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 60, 177 DLR (4th) 124 (SCC), BOA, Tab 11.

action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities."[52] Dr. Smith's evidence supports a reasonable inference, drawn on a balance of probabilities, that solitary confinement causes physical and serious psychological suffering. Neither the fact that inmates in structured intervention may be predisposed to mental illness, nor the possibility that some inmates may not experience solitary confinement's effects, interfere with this reasonable inference.

Solitary Confinement is Likely to Impair Inmates' Health

25. Security of the person also encompasses the right to be free from the threat of suffering.[53] Accordingly, "state action which has the likely effect of impairing a person's health engages the fundamental right under s. 7 to security of the person."[54] Thus, beyond actual suffering inflicted upon inmates, the fact that inmates in solitary confinement are likely to experience harm suffices to constitute a deprivation of security of the person.

26. The likelihood that solitary confinement will impair inmates' health is further compounded by insufficient medical care afforded to inmates. The failure to provide necessary medical care in prisons has been held to engage the right to security of the person.[55] While s. 37 of the *SIA* provides for health professionals to make recommendations to the institutional head to alter structured intervention out of concern for an inmate's health, these recommendations are not binding. Given CSF's history of performing inadequate mental health checks and inmates'

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[52] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 76, BOA, Tab 3. citing *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 21, BOA, Tab 12.
[53] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 207, 17 DLR (4th) 422 (SCC), BOA, Tab 10. See also *United States v Burns*, 2001 SCC 7 at para 60 (in the extradition context, "[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition")(emphasis in original), BOA, Tab 13.
[54] *R v Monney*, [1999] 1 SCR 652 at para 55, 171 DLR (4th) 1 (SCC), BOA, Tab 9. See also *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paras 111-124, BOA, Tab 14.
[55] *R v Poirier*, 2016 ONCA 582 at paras 77 and 82, BOA, Tab 15. See also *R v Monney*, [1999] 1 SCR 652 at para 56, 171 DLR (4th) 1 (SCC), BOA, Tab 9; Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019) at 100.

distrust of correctional staff, it is also reasonable to infer that some mental health issues will go undetected. Accordingly, it is likely that segregated inmates will not receive the medical care they need, which elevates the probability that solitary confinement will impair their health.

Neither Deprivation Accords with the Principles of Fundamental Justice

27. The principles of fundamental justice are the basic principles of our judicial system and legal process. They relate to the values that underpin our constitutional order and can be found in the basic tenets of our legal system.[56] The principles of fundamental justice demand that laws that interfere with the rights to life, liberty or security of the person not be arbitrary, overbroad or grossly disproportionate in their effects. They also require procedural fairness regarding the circumstances and consequences of a law's intrusion on s. 7-protected interests.[57]

28. The Court of Appeal erred in holding that the Act adheres to the principles of fundamental justice. In fact, the Act offends the principles of fundamental justice for two main reasons: it is overbroad and does not guarantee sufficient procedural fairness. While the legislation is also grossly disproportionate in its effects, courts generally analyze grossly disproportionate punishment under s. 12 rather than s. 7.[58] Accordingly, arguments relating to gross disproportionality are addressed in the s. 12 portion of this factum.

The SIA is Overbroad

29. The legislation does not accord with the principles of fundamental justice because it is overbroad. The overbreadth inquiry is concerned with legislation that "goes too far and interferes

[56] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 503, 512-513, 60 DLR (4th) 397 (SCC), BOA, Tab 16.
[57] *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at para 19, BOA, Tab 17, citing *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 113, BOA, Tab 18.
[58] *R v Malmo-Levine*, 2003 SCC 74 at para 160, BOA, Tab 19; *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 72-73, BOA, Tab 20.

with some conduct that bears no connection to its objective."[59] Here, the stated objectives of the Act are to increase safety for correctional workers and offenders in the prison and to preserve the integrity of ongoing investigations.[60]

30. The *SIA* is overbroad because prolonged solitary confinement is not connected to the Act's objectives. While the short-term separation of inmates who pose or face real and imminent danger may increase safety in some instances, prolonged solitary confinement undermines safety by inflicting serious harm upon inmates.[61] In addition, structured intervention (short-term or prolonged) actually undermines institutional security by increasing resentment and assault risk. Finally, while inmates may initially be placed in SIUs for safety or investigation-related reasons, they are often left in segregation for months due to the difficulty of institutional transfers.[62] These administrative reasons are not connected to the Act's objectives.

The SIA *Does Not Meet the Standard of Procedural Fairness Demanded by the Principles of Fundamental Justice*

31. The principles of fundamental justice demand that the procedures for making decisions that interfere with life, liberty or security of the person be fair. The inquiry is context-specific, and asks whether the procedures for making the impugned decision are fundamentally unfair to the affected person, given the context and seriousness of the violation.[63] For a procedure to be sufficiently fair under s. 7, it must at minimum satisfy the common law duty of fairness.[64]

32. At common law, the more important a decision is to the life of the affected person, and the greater the decision's impact on that person, the more stringent the mandated procedural

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[59] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 101, BOA, Tab 3.
[60] Official Problem at paras 6, 8.
[61] See *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 326, BOA, Tab 21, aff'd 2019 BCCA 228 at para 165, BOA, Tab 22.
[62] Official Problem at paras 16(k), 18, 19.
[63] *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at paras 19-22, BOA, Tab 17.
[64] *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 at 212-13, 17 DLR (4th) 422 (SCC), BOA, Tab 10.

protections will be.[65] The decision to maintain an inmate in segregation carries immense personal significance and impacts virtually every aspect of the inmate's life. Accordingly, the decision attracts "a robust duty of procedural fairness."[66] In *Hamm v Attorney General*, Justice Veit went even further, concluding that the process for a decision to segregate an inmate "should mirror the process in the justice system whereby a court sentences a convict to a prison sentence."[67]

33. It is well-established that the right to be heard by an independent and impartial tribunal is a principle of fundamental justice.[68] Given that the decision to maintain an inmate in segregation attracts an enhanced duty of procedural fairness, the principles of fundamental justice demand, at minimum, that the decision be subject to meaningful independent review.[69] This conforms with the Mandela Rules, which stipulate that solitary confinement shall be subject to independent review.[70] As the Supreme Court of Canada noted in *Suresh*, the principles of fundamental justice "cannot be considered in isolation from the international norms which they reflect."[71]

34. Internal review by CSF clearly does not satisfy the requirement for independent review and external review that occurs 90 days after an inmate has been placed into a SIU occurs too late. With respect, Justice Wang's holding at the Court of Appeal that "the independent review is a fair process which ensures that placement in an SIU was for reasons of safety or to prevent interference with an investigation"[72] is unsatisfactory. After 90 days, irreversible harm will likely

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[65] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 118, BOA, Tab 18; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25, 174 DLR (4th) 193 (SCC), BOA, Tab 23.
[66] *Canadian Civil Liberties Association v Canada,* 2017 ONSC 7491 at para 146, BOA, Tab 7. See also *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 67 ("A high level of procedural fairness is required in the process leading to the decision to place an inmate in solitary confinement"), BOA, Tab 24.
[67] *Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440 at para 68, BOA, Tab 24.
[68] *Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267 at para 38, 130 DLR (4th) 1 (SCC), BOA, Tab 25.
[69] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 410, BOA, Tab 21, aff'd 2019 BCCA 228 at para 192, BOA, Tab 22. See also *Canadian Civil Liberties Association v Canada*, 2017 ONSC 7491 at para 155, BOA, Tab 7.
[70] Mandela Rules at Rule 45, BOA, Tab 1.
[71] *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 59, BOA, Tab 18.
[72] Official Problem at para 32.

have already occurred. Regardless of the initial justification for an inmate's placement into a SIU, independent review must ensure that the reasons for continuing that placement are connected to the Act's objectives. Given that solitary confinement can change brain activity and cause symptomatology within seven days, independent review must occur at the earliest possible time, and at the very least within seven days, in order to be meaningful. Without this procedural element, the Act cannot meet the standard of procedural fairness demanded by the principles of fundamental justice.

THE *SIA* VIOLATES S. 12 OF THE *CHARTER*

35. Section 12 of the *Charter* protects against cruel and unusual treatment or punishment.[73] Punishment is any "consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable,"[74] while treatment is any active state process involving an exercise of state control over an individual.[75] The Attorney General of Flavelle has rightly conceded that segregation under the *SIA* constitutes treatment. A law will violate s. 12 where it imposes treatment that is grossly disproportionate to what would ordinarily be appropriate in the circumstances, or where the law's reasonably foreseeable applications would impose such treatment.[76]

36. The Falconer Court of Appeal erred in holding that the *SIA* does not impose cruel and unusual treatment. Because the *SIA* maintains the constitutional deficiencies of its predecessor—including no time limit, wide discretion afforded to prison officials, and inadequate legislative

[73] *Flavellian Charter of Rights and Freedoms*, s 12, Part I of the Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11.
[74] *R v KRJ,* 2016 SCC 31 at para 41, BOA, Tab 26.
[75] See *Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519 at 611, 107 DLR (4th) 342 (SCC), BOA, Tab 27.
[76] *R v Lloyd,* 2016 SCC 13 at para 22, BOA, Tab 28.

safeguards—prolonged and indefinite solitary confinement remains permissible and likely under the legislation. Prolonged and indefinite solitary confinement causes severe and expected harm and contravenes both international norms and Flavellian societal standards of decency. Accordingly, the *SIA* authorizes CSF to impose cruel and unusual treatment in violation of s. 12.

By Failing to Incorporate a Time Limit and Constrain the Discretion of Prison Officials, the *SIA* Expressly Authorizes Prolonged and Indefinite Solitary Confinement

37. At issue in this appeal is the constitutionality of the *SIA* — not of the individual exercises of discretion under the legislation. It is the Appellant's position that the Act's conferral of broad discretion to impose solitary confinement without meaningfully constraining its duration is a fatal constitutional deficiency that merits invalidation of the legislation.

38. In *Slaight Communications v Davidson*, Justice Lamer (as he then was), writing for a unanimous Court on this point, distinguished between two forms of statutory conferrals of discretion: those that "expressly or by necessary implication" authorize infringements of the *Charter* and therefore ought to be struck down, and those that merely use language broad enough to encompass *Charter*-infringing conduct and therefore ought to be read down.[77]

39. The *SIA* expressly or by necessary implication authorizes *Charter*-infringing conduct by permitting prolonged and indefinite solitary confinement.[78] The enumerated exceptions in s. 37(1) of the Act, discussed in the first portion of the Appellant's argument, are instances where the solitary confinement of an inmate in a SIU is expressly prescribed by law.[79] The prolonged and indefinite nature of solitary confinement is authorized by necessary implication from the

[77] *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038, 1989 CarswellNat 193 at para 90 (SCC), BOA, Tab 29.
[78] *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038, 1989 CarswellNat 193 at para 90 (SCC), BOA, Tab 29.
[79] *R v Seed,* 2011 SKCA 75 at paras 18, 20, BOA, Tab 30.

absence of a time limit on structured intervention, or on any of the enumerated exceptions. In the face of an extensive evidentiary record of unconstitutional application, "it is not enough merely to provide a structure that *could* be applied in a constitutional manner."[80] Such is particularly the case where fundamental rights, like the right to be free from cruel and unusual treatment, are at stake.[81] Vaguely-drafted and discretionary limits are constitutionally insufficient, given CSF's mired history. The *SIA* "demands sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights."[82]

The Segregation Act *Forecasts the Reasonably Foreseeable Application of the* SIA

40. As Chief Justice McLachlin stated in *R v Nur,* "refusing to consider the reasonably foreseeable impacts of an impugned law would dramatically curtail the reach of the *Charter.*"[83] Given the absence of meaningful difference between the two Acts, past practice under the *Segregation Act* is relevant to establish the reasonably foreseeable application of the *SIA.*[84]

41. Because the *SIA* confers significant discretion on prison officials without meaningful constraints, legislators apparently sought to rely on the sound exercise of discretion by prison officials to avoid future rights violations. But past practice under the *Segregation Act*—which also relied on discretion to prevent prolonged isolation—demonstrates how discretion in the segregation context often operates to the detriment of prisoners. The *Segregation Act* required prison officials to release inmates from segregation at "the earliest appropriate time,"[85] but Dr. Smith's report establishes that prisoners often spent prolonged periods in solitary confinement.

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[80] *Little Sisters Book & Art Emporium v Canada,* 2000 SCC 69 at para 204, Iacobucci J, dissenting, BOA, Tab 31.
[81] *Little Sisters Book & Art Emporium v Canada,* 2000 SCC 69 at para 204, Iacobucci J, dissenting, BOA, Tab 31.
[82] *Little Sisters Book & Art Emporium v Canada,* 2000 SCC 69 at para 204, Iacobucci J, dissenting, BOA, Tab 31.
[83] *R v Nur,* 2015 SCC 15 at para 63, BOA, Tab 32.
[84] In the mandatory minimum context, Chief Justice McLachlin authorized trial judges to consider reported cases of punishment under a law to assess the reasonably foreseeable scope of the law: see *R v Nur* at para 72, BOA, Tab 32.
[85] Official Problem at para 4.

This reality was rooted in the broad language of the law, but exacerbated by the institutional culture of Flavelle's prisons, in which officials demonstrated disregard for segregated inmates' well-being when interpreting and applying discretionary provisions under the legislation.[86] In her testimony, Officer Holao described a general lack of preoccupation among her colleagues with the release of inmates from segregation.[87] There is no reason to believe that the *SIA*'s malleable exceptions will not become the norm, resulting once again in prolonged and indefinite solitary confinement. Given this history, it is reasonably foreseeable that discretion under the *SIA* will be applied in the same harmful way that it was under the *Segregation Act*.

42. The Supreme Court of Canada has held that Parliament cannot shift the burden of drafting constitutional legislation onto the officials tasked with applying that legislation. In the mandatory minimum context, the Court held in *R v Nur* that prosecutorial discretion cannot save a mandatory minimum that would otherwise be cruel and unusual as applied to a reasonable hypothetical offender.[88] In other words, Parliament was not entitled to rely on the hope that prosecutors would act to avoid prosecuting offenders for whom the mandatory minimum would be grossly disproportionate. In the words of Chief Justice McLachlin, "[t]he constitutionality of a statutory provision cannot rest on the expectation that the Crown will always act properly."[89] Because the *SIA* authorizes prolonged and indefinite solitary confinement,[90] the law's constitutionality rests on the hope that prison officials will avoid any unconstitutional outcomes. Given the history of segregation in Flavelle, such reliance is improper.

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[86] Official Problem at paras 16, 18.
[87] Official Problem at paras 18-20.
[88] *R v Nur,* 2015 SCC 15 at para 91, BOA, Tab 32.
[89] *R v Nur,* 2015 SCC 15 at paras 85-97, BOA, Tab 32.
[90] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at paras 113-115 (the conferral of administrative discretion in the absence of a prohibition does "not preclude the possibility" of prolonged isolation and therefore violates s. 12), BOA, Tab 33.

Prolonged and Indefinite Solitary Confinement is Cruel and Unusual in Violation of S.12

43. Treatment is cruel and unusual where it is grossly disproportionate or so excessive as to outrage societal standards of decency.[91] It is not necessary that a law impose grossly disproportionate treatment on *all* individuals subject to its application to violate s. 12.[92] The effect of a punishment or treatment, not the justifications for imposing it, drives the analysis. [93] Under s. 12, courts generally engage in a benchmark analysis, assessing the departure of impugned treatment from ordinary or "appropriate" treatment in the circumstances.[94] But recent case law considering solitary confinement establishes that the focus in such cases can be on the effect of the conduct in question without engaging in a formal benchmark analysis.[95] Finally, what is considered cruel and unusual evolves over time, in response to changing societal norms.[96]

Solitary Confinement Violates Modern Societal Norms

44. Many punishments that were once thought acceptable for inmates—forced sterilization, the death penalty, and lobotomies to 'treat' mental illness—are considered abhorrent by today's

[91] *R v Boudreault*, 2018 SCC 58 at para 45, BOA, Tab 34, citing *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 7 (SCC), BOA, Tab 35.
[92] *R v Ferguson,* 2008 SCC 6 at para 38, BOA, Tab 36.
[93] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 92, quoting Lamer J in *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 96: "a punishment is or is not cruel and unusual irrespective of why the violation has taken place", BOA, Tab 33.
[94] *Ogiamien v Ontario (Community Safety and Correctional Services),* 2017 ONCA 667 at para 10, BOA, Tab 37.
[95] *Toure v Canada (Public Safety & Emergency Preparedness),* 2018 ONCA 681 at paras 59-61, BOA, Tab 37, leave to appeal to SCC refused [2018] SCCA 436.
[96] *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 7 (SCC), BOA, Tab 35.

societal standards. Solitary confinement has undergone a similar evolution,[97] evidenced both by the Mandela Rules[98] and recent court decisions.

45. Even before the *Charter*'s enactment, courts had begun to recognize that solitary confinement flies in the face of standards of decency and is incompatible with human dignity.[99] The Federal Court's pre-*Charter* decision in *R v McCann*—holding that the solitary confinement of inmates in a penitentiary imposed cruel and unusual punishment in violation of s. 2(b) of the Canadian *Bill of Rights*—is the first in a long line of cases.[100] In *Bacon v Surrey Pretrial Services Centre,* the solitary confinement of a prisoner was found to violate s. 12, partly because it had "significantly threaten[ed] his psychological integrity and well-being."[101] In *R v Boone,* Justice Blair, for the Ontario Court of Appeal, noted the "growing recognition over the last half-century that solitary confinement is a very severe form of incarceration, and one that has a lasting psychological impact on prisoners."[102] In *R v Prystay,* Justice Pentelechuk of the Court of Queen's Bench of Alberta found that the prolonged isolation of an inmate violated s. 12*,* concluding that "[s]egregation ravages the body and mind" and "[t]here is growing discomfort over its continued use as a quick solution to complex problems."[103]

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[97] The treatment of solitary confinement has become considerably more stringent in the jurisprudence since it was found to be acceptable treatment for a serial killer in 1987: see *R v Olson*, 62 OR (2d) 321, 1987 CarswellOnt 1402, BOA, Tab 5, distinguished in *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 101, BOA, Tab 33

[98] Several courts have relied on the Mandela Rules as evincing a shift in societal norms under s. 12: see e.g. *Ogiamien v Ontario (Community Safety and Correctional Services),* 2016 ONSC 3080 at para 215, BOA, Tab 39, and *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 29, BOA, Tab 38.

[99] *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 10 (SCC) (a punishment that "does not comport with human dignity" would be cruel and unusual), BOA, Tab 35.

[100] *R v McCann*, [1976] 1 FC 570 at para 95, 1975 CarswellNat 108 (FCTD), BOA, Tab 40.

[101] *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805 at para 353, BOA, Tab 2.

[102] *R v Boone,* 2014 ONCA 515 at para 3, BOA, Tab 6.

[103] *R v Prystay,* 2019 ABQB 8 at para 128, BOA, Tab 41.

46. Finally, in two recent cases – *BCCLA v Canada* ("*BCCLA*")[104] and *CCLA v Canada* ("*CCLA"*)[105] – courts struck down a system of administrative segregation parallel to the one that existed under the prior *Segregation Act* because it permitted prolonged and indefinite solitary confinement. In *CCLA,* the Ontario Court of Appeal applied the Mandela Rules, finding that administrative segregation lasting longer than 15 days is cruel and unusual treatment.[106]

Prolonged Solitary Confinement Causes Serious Harm

47. Prolonged isolation, defined under the Mandela Rules as exceeding 15 days, causes foreseeable and expected adverse health effects. Human beings require meaningful social interaction and environmental stimulus to maintain psychological health.[107] Solitary confinement thwarts this human "need to connect" and undermines prisoners' psychological and physical well-being.[108] The consequences are devastating. Prolonged isolation exacerbates pre-existing psychological conditions and creates new ones in inmates with no known prior history of mental illness.[109] Prisoners in solitary confinement experience a combination of distressing symptoms, including insomnia, anxiety, perceptual distortions, cognitive dysfunction, aggression, and suicidal ideation.[110] All of the harms experienced by prisoners in solitary confinement are disproportionate to those experienced in ordinary conditions of confinement.[111]

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[104] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62, BOA, Tab 21, aff'd in part 2019 BCCA 228, BOA, Tab 22.
[105] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243, BOA, Tab 33.
[106] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 150, BOA, Tab 33.
[107] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 182, BOA, Tab 21.
[108] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 182, BOA, Tab 21.
[109] Official Problem at para 16(e).
[110] Official Problem at para 16(c).
[111] Official Problem at para 16(a).

48. Once inmates are released, the harms generally persist. Prolonged isolation leaves inmates with no choice but to adjust to life in an asocial world.[112] Upon release, inmates have trouble coping with the stimulation and social demands of ordinary prison life, which become noxious and irritating.[113] Segregated inmates frequently develop problems with impulse control and aggression, becoming violent and self-harming,[114] and attempt suicide at twice the rate of other prisoners.[115] Apart from the threat they pose to the individuals themselves, such behaviours only make it more likely that inmates will be flagged as being a threat to safety and security and placed back into isolation.

49. The consequences of isolation are particularly severe for those with pre-existing mental health conditions. Despite the fact that solitary confinement subjects mentally ill individuals and those with a history of self-injury to a heightened risk of permanent harm, Dr. Smith reported that inmates with pre-existing conditions are segregated in Flavelle at disproportionately high rates.[116] Disturbingly, CSF's over-segregation of the mentally ill and vulnerable suggests that the institution replaces proper mental health care with isolation.

50. International norms under the Mandela Rules, which were unanimously adopted by the United Nations' General Assembly, suggest a 15-day cap on solitary confinement — a standard that the British Columbia Supreme Court held to be "generous but defensible."[117] Although

[112] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 183, BOA, Tab 21
[113] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 183, BOA, Tab 21
[114] Official Problem at para 16(c).
[115] Official Problem at para 16(a).
[116] Official Problem at para 16(j).
[117] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 558, BOA, Tab 21

solitary confinement can alter brain functioning and cause harm within days,[118] the medical literature establishes that after 15 days of segregation, the harms can become irreversible. [119]

Indefinite Solitary Confinement Exacerbates Prolonged Solitary Confinement's Harms

51. When prisoners are not informed of the duration of their segregation, the consequences of solitary confinement become even more severe. In *R v McCann,* inmates testified that the most difficult aspect of solitary confinement is "the fact that you did not know why you were there or for how long."[120] Similarly, in *BCCLA*, Justice Leask accepted that many inmates feel that the worst part of solitary confinement is not knowing when it will end.[121] In *R v Prystay,* Justice Pentelechuk found that the indefinite segregation of an inmate contributed to "intense feelings of helplessness and hopelessness."[122] For this reason, the Mandela Rules prohibit indefinite solitary confinement in any circumstance.[123] A system of segregation that permits solitary confinement must impose limits on the duration of segregation to comply with s. 12.

Legislative Safeguards Are Inadequate to Prevent Harm

52. The *SIA* purports to curtail the harms of structured intervention by including increased legislative safeguards. None of these safeguards are sufficient to ensure that the legislation's application does not result in cruel and unusual treatment.

53. Phrases like "no other reasonable alternative"[124] or "what is reasonably required for security purposes"[125] do not save the legislation from violating s. 12. As the Ontario Court of

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[118] Official Problem at para 16(a).
[119] *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, UNGAOR, 66th Sess, UN Doc A/66/268 (2011).
[120] *R v McCann*, [1976] 1 FC 570 at para 79, 1975 CarswellNat 108 (FCTD), BOA, Tab 40.
[121] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 at para 158, BOA, Tab 21.
[122] *R v Prystay,* 2019 ABQB 8 at para 65, BOA, Tab 41.
[123] Mandela Rules at Rule 43.
[124] SIA, s 34(1).
[125] SIA s 37(1)(c).

Appeal recognized in *CCLA,* such caveats do not preclude the possibility that a prison official, exercising conferred discretion, will apply the Act and nonetheless conclude that it is "reasonable" to subject an inmate to prolonged solitary confinement.[126] In *CCLA,* the Court of Appeal expressly rejected the argument that similarly-drafted safeguards were sufficient to prevent rights violations and imposed a strict 15-day time limit on segregation.[127]

54. The *SIA* also purports to regulate the length of structured intervention by imposing some external review of placements in a SIU but, at 90 days after an inmate is first segregated, independent review comes far too late to be considered meaningful. By then, an inmate in solitary confinement would have exceeded the Mandela Rules' 15-day cap by 75 days. Where legislation permits prolonged solitary confinement, however, even meaningful independent review, which is not failsafe, cannot save it from violating s. 12.[128] Only a hard cap accords with the absolute nature of s. 12's prohibition.[129]

55. The *SIA* further purports to prevent severe mental health consequences for segregated inmates by introducing guidelines for mental health assessment.[130] These guidelines are insufficient to protect inmates in a SIU. The Act does not require institutional heads to consider an inmate's health either when admitting an inmate to a SIU or during reviews of ongoing placements.[131] In *CCLA,* the Ontario Court of Appeal found that legislation which mandated

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[126] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 113, BOA, Tab 33.
[127] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at paras 102-115, 150, BOA, Tab 33.
[128] This is in contrast to the immigration detention context, where potentially indefinite detention is not necessarily cruel and unusual if an inmate has a meaningful opportunity to challenge the continued detention: see *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at paras 107, 110, BOA, Tab 17.
[129] Scholars and courts alike have opined that s. 12 may be the only absolute right, limitations of which could never be justified: see *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 124, BOA, Tab 33, quoting Peter Hogg, *Constitutional Law of Canada,* 5th ed, Vol 2 (Toronto: Carswell, 2007) at 158-159.
[130] SIA, s 37.1.
[131] Official Problem at para 9.

only that an institutional head "consider" an inmate's health in making segregation decisions violated s. 12, because the legislation effectively authorized the decisionmaker to prioritize other considerations over the inmate's health.[132] Under the *SIA*, institutional heads are not even required to *consider* an inmate's health when making segregation decisions.

56. Apart from an initial assessment immediately following a transfer to a SIU, the Act does not provide for an evaluation by a mental health care professional until harm has occurred and been noticed by staff,[133] and CSF officials can ignore the recommendations of mental health professionals with respect to inmates in structured intervention.[134] These statutory deficiencies are particularly troubling because psychological symptoms often do not present outwardly and inmates' widespread mistrust of institutional staff inhibits them from communicating openly about their mental health.[135] Furthermore, CSF has previously demonstrated an unwillingness to engage meaningfully with inmates' mental health, even when mandated to do so under the *Segregation Act*: mental health checks under the old regime were "perfunctory, non-private and often done through the food slot of the cell door."[136] Effectively, nothing in the *SIA* is sufficient to prevent segregated inmates from suffering the harms of prolonged isolation.

This Challenge is the Proper Avenue to Address the Constitutional Deficiencies of the *SIA*

57. The evidentiary record in this case undermines the justification for the "hands-off" approach that courts have traditionally taken to prisons—deference which underlies Justice Wang's analysis at the Court of Appeal. [137] In Flavelle, there exists a pattern of correctional

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[132] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 105, BOA, Tab 33.
[133] Apart from the initial assessment, further mental health checks are not mandated until CSF personnel notice and report that an inmate is experiencing a mental decline or engaging in self-injurious behaviour: see SIA, s 37.1.
[134] SIA, ss 37.3(2), (6).
[135] Official Problem at para 16(f).
[136] Official Problem at para 16(j).
[137] Official Problem at para 33. See also *R v Aziga,* 2008 CarswellOnt 4619 at para 34, 78, WCB (2d) 410, BOA, Tab 42. citing *Maltby v Saskatchewan (Attorney General),* [1982] SJ No 871 at paras 20, 41, 1982 CarswellSask

legislation that authorizes CSF to prioritize institutional concerns over the *Charter* rights of prisoners. With the *SIA,* Parliament has shown its decided unwillingness to legislate in a manner that prevents future rights violations. This Court has the chance to cure a systemic and structural problem only made worse by judicial deference.

58. It is also no answer to say that a remedy lies in individual attacks to the Act's application. As leading scholar Lisa Kerr describes, *Charter* violations are notoriously difficult for prisoners to prove on their own.[138] Prisoners face considerable access to justice barriers and may never be able to place themselves before the courts.[139] Further, without the resources that public interest standing can amass,[140] claimants struggle to challenge the decisions of prison officials, who come to the courtroom as de facto experts, justifying abusive policy and practice by pointing to concerns of safety and security.[141] This Court should not wait for future rights violations to take place. With excessive deference comes an absence of judicial protection, while inmates remain among the most "vulnerable to majoritarian indifference and excesses of State power."[142]

NEITHER VIOLATION CAN BE JUSTIFIED UNDER SECTION 1 OF THE *CHARTER*

59. The Supreme Court of Canada has repeatedly disclaimed the possibility that a s. 7 or 12 violation could ever survive a s. 1 analysis—given the incredible importance of the interests these rights protect, the Court has speculated that it is unlikely that a law that violates ss. 7 or 12 could ever be found to be minimally impairing.[143] This case is not the exception to the rule.

441(Sask QB), BOA, Tab 43; *Almrei v Canada (Attorney General),* 2003 OJ No 5198, 2003 CarswellOnt 5129 at para 18 (Ont SCJ), BOA, Tab 44.

[138] Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 at 45.

[139] *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 3, McIntyre J, dissenting (SCC).

[140] Debra Parkes, "A Prisoners' Charter: Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629 at 667.

[141] Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43 at 45.

[142] Michael Jackson, "Cruel and Unusual Treatment or Punishment" (1982) UBC L Rev 189 at 212.

[143] *BC Motor Vehicle Act*, [1985] 2 SCR 486 at 518, 60 DLR (4th) 397 (SCC), BOA, Tab 16; *R v Heywood*, [1994] 3 SCR 761 at 802, 120 DLR (4th) 348 (SCC), BOA, Tab 45; *R v Ruzic*, 2001 SCC 24 at para 92, BOA, Tab 46; *New*

60. To justify the violations of ss. 7 and 12, Flavelle must demonstrate that the Act has a pressing and substantial objective and that its effects are proportional to that objective.[144] A law is proportionate if its means are rationally connected to its objective, it minimally impairs the right(s) in question, and it is balanced in its effects.[145] With respect, such a showing is not possible. The FCLA acknowledges that the challenges of improving safety and security in prisons mandate the humane segregation of some inmates in defined circumstances for limited periods. However, a law that permits the unnecessary harms of prolonged and indefinite solitary confinement can never be justified in a free and democratic society.

The *SIA* Does Not Pursue its Objectives Through Proportionate Means

61. The FCLA concedes that the *SIA*'s objectives—increasing safety and preserving the integrity of ongoing investigations—meet the traditionally low bar of "pressing and substantial."[146] However, the Act does not pursue those objectives through proportionate means.

The SIA is not rationally connected to its objectives

62. Prolonged and indefinite solitary confinement, as permitted under the *SIA*, is not rationally connected to the Act's objectives.[147] First, solitary confinement inflicts severe and often permanent harm upon inmates, especially where it is prolonged.[148] Second, a placement in a SIU, irrespective of conditions of isolation, undermines institutional security by heightening

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Brunswick (Minister of Health and Community Services) v G(J), [1999] 3 SCR 46 at para 99, 177 DLR (4th) 124 (SCC), BOA, Tab 11; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66, BOA, Tab 17; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 128, BOA, Tab 18; *R v Nur,* 2015 SCC 15 at para 111, BOA, Tab 32.

[144] *R v Oakes,* [1986] 1 SCR 103 at paras 73-74, 26 DLR (4th) 200 (SCC), BOA, Tab 47.

[145] *R v Oakes,* [1986] 1 SCR 103 at para 74, 26 DLR (4th) 200 (SCC), BOA, Tab 47.

[146] Peter Hogg, *Constitutional Law of Canada,* 5th ed, Vol 2 (Scarborough: Carswell, 2007) at 62.

[147] Flavelle "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": see *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CarswellQue 119 at para 153 (SCC).

[148] Official Problem at para 16(c), (g).

the risk of assault within the prison.[149] Third, the absence of timely and ongoing independent review of CSF officials' decisions under the *SIA* bears no relation to the Act's objectives.

The SIA is not minimally impairing

63. The Supreme Court of Canada has opined that it is unlikely that an overbroad law can ever withstand the minimal impairment analysis.[150] Here, the Act is firmly incapable of passing the minimal impairment test because there exist other less impairing alternatives available to CSF to respond to safety and investigation-related concerns within prisons. While the FCLA accepts that the exigencies of prison administration demand that CSF be able to remove inmates from general population in certain circumstances, there is no justification for subjecting inmates to prolonged and indefinite solitary confinement and its associated harms.[151]

64. Flavelle has devoted considerable resources towards the structured intervention system,[152] but has not shown why such resources could not be put toward less impairing alternatives. In *BCCLA,* Justice Leask considered a variety of alternatives to prolonged administrative segregation under minimal impairment that are applicable to this case.[153] They include: increased mental health care placements for those with pre-existing conditions, mediation (to resolve inter-personal conflict), changes in unit, or improvements to the currently-broken process for transferring inmates to other institutions.

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[149] Official Problem at para 16(k).
[150] *R v Heywood*, [1994] 3 SCR 761 at 802-03, 120 DLR (4th) 348 (SCC), BOA, Tab 45.
[151] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at para 557, BOA, Tab 21.
[152] Official Problem at para 6.
[153] *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at paras 557-99, BOA, Tab 21.

65. Finally, the Act is not minimally impairing because it does not impair the right to procedural fairness as little as possible.[154] Flavelle has not demonstrated that increased procedural fairness in the way of early and ongoing independent oversight of segregation decisions would infeasible. The Act would also be more procedurally fair if it mandated that CSF decisionmakers consider health when making segregation decisions and provide ongoing mental health assessment of inmates in structured intervention. Such procedural guarantees would in no way compromise pursuit of the Act's objectives.

The SIA's salutary effects do not outweigh its deleterious effects

66. The severe and life-altering psychological impacts of prolonged isolation carry the potential for permanent harm, including self-injury and suicide. Such harms would be extremely difficult to justify in a free and democratic society. Not only are the deleterious effects of the *SIA* significant, but the evidence calls into question whether prolonged segregation has any positive impact on safety or security at all. The well-documented harms of prolonged isolation easily outweigh any marginal benefits that may result from the practice.

PART VI – ORDER REQUESTED

67. Section 12 is a particularization of the rights protected under s. 7.[155] Even if this court were to conclude that the Act does not impose grossly disproportionate treatment in violation of s. 12, it should nonetheless find that it violates s. 7 on the other grounds presented, and order the requested relief on that basis. The FCLA asks this Court for a declaration that 1) structured intervention lasting longer than 15 days, as permitted under the *SIA,* violates ss. 7 and 12 of the

[154] *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at paras 70, 87, 93, BOA, Tab 17. See also Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019) at 365-366.
[155] *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 502-503, 60 DLR (4th) 397, BOA, Tab 16.

Charter and cannot be justified under s. 1 and 3) the *SIA* is of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the *Constitution Act, 1982*. [156]

68. The FCLA asks that the relevant provisions be struck down in their entirety as being of no force or effect, rather than read down or read in.[157] The remedy chosen to cure the constitutional defect must not "unacceptably intrude into the legislative sphere."[158] It is the FCLA's position that reading down would involve substantial "ad hoc" policy choices that would encroach upon Parliament's lawmaking role. [159] The FCLA recognizes that Parliament should be entitled to deference in crafting a regime that incorporates the requisite constitutional minimums for segregation.[160]

69. This Court has the benefit of an extensive record of rights violations made possible by the empowering correctional legislation. In such a case, "the only choice to ensure full protection of the constitutional rights at stake is to invalidate the legislation and invite Parliament to remedy the constitutional infirmities."[161]

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2019.

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Spence Colburn / Julie Lowenstein

[156] *Constitution Act, 1982*, s 52(1), being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11.
[157] *R v Ferguson,* 2006 SCC 6 at paras 49-50, BOA, Tab 36.
[158] *R v Heywood,* [1994] 3 SCR 761 at 804, 120 DLR (4th) 348 (SCC), BOA, Tab 45.
[159] *Schachter v Canada,* [1992] 2 SCR 679, 1992 CarswellNat 1006 at para 57 (SCC), BOA, Tab 49.
[160] *R v Ferguson,* 2008 SCC 6 at para 50, BOA, Tab 36.
[161] *Little Sisters Book & Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 at para 167, Iacobucci J, dissenting, BOA, Tab 31.

PART VII – TABLE OF AUTHORITIES

JURISPRUDENCE

	Case	Paragraph(s)
1	*Almrei v Canada (Attorney General),* 2003 OJ No 5198, 2003 CarswellOnt 5129 (Ont SCJ)	57
2	*Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805	17, 45
3	*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193	32
4	*Boone v Ontario (Community Safety and Correctional Services)*, 2014 ONCA 515	21, 45
5	*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62	30, 33, 46, 47, 48, 50, 51
6	*British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228	30, 33, 46
7	*Canada (Attorney General) v Bedford*, 2013 SCC 72	19, 23, 24, 29
8	*Canada (Prime Minister) v Khadr*, 2010 SCC 3	24
9	*Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243	42, 43, 44, 46, 53, 54, 55
10	*Carter v Canada (Attorney General)*, 2015 SCC 5	22
11	*Chaoulli v Quebec (Attorney General)*, 2005 SCC 35	25
12	*Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9	27, 31, 54, 59, 65
13	*Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491	21, 32, 33
14	*Hamm v Attorney General of Canada (Edmonton Institution)*, 2016 ABQB 440	32
15	*Maltby v Saskatchewan (Attorney General),* [1982] SJ No 87, 1982 CarswellSask 441(Sask QB)	57
16	*May v Ferndale Institution*, 2005 SCC 82	20
17	*New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 (SCC)	23, 59
18	*Ogiamien v Ontario (Community Safety and Correctional Services),* 2016 ONSC 3080	44
19	*Ogiamien v Ontario (Community Safety and Correctional Services),* 2017 ONCA 667	43
20	*R v Boudreault*, 2018 SCC 58	43
21	*R v Ferguson,* 2008 SCC 6	43, 68
22	*R v Heywood*, [1994] 3 SCR 761 (SCC), 120 DLR (4th) 348	59, 63
23	*R v KRJ,* 2016 SCC 31	35
24	*R v Lloyd,* 2016 SCC 13	35
25	*R v Malmo-Levine*, 2003 SCC 74	28
26	*R v McCann*, [1976] 1 FC 570, 1975 CarswellNat 108 (FCTD)	45, 51
27	*R v Monney*, [1999] 1 SCR 652, 171 DLR (4th) 1 (SCC)	22, 25, 26

28	*R v Nur,* 2015 SCC 15	40, 42, 59
29	*R v Oakes,* [1986] 1 SCR 103, 26 DLR (4th) 200 (SCC)	60
30	*R v Olson*, 1987 CarswellOnt 1402, 62 OR (2d) 321 (ONCA)	21, 44
31	*R v Poirier*, 2016 ONCA 58	26
32	*R v Prystay,* 2019 ABQB 8	45, 51
33	*R v Safarzadeh-Markhali*, 2016 SCC 14	28
34	*R v Seed,* 2011 SKCA 75	39
35	*R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 (SCC)	43, 45, 58
36	*Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 60 DLR (4th) 397	27, 59, 67
37	*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CarswellQue 119 (SCC)	62
38	*Rodriguez v British Columbia (Attorney General),* [1993] 3 SCR 519, 107 DLR (4th) 342 (SCC)	35
39	*Ruffo v Conseil de la magistrature*, [1995] 4 SCR 267, 130 DLR (4th) 1 (SCC)	33
40	*Schachter v Canada,* [1992] 2 SCR 679, 1992 CarswellNat 1006	68
41	*Singh v. Minister of Employment and Immigration*, [1985] 1 SCR 177, 17 DLR (4th) 422 (SCC)	22, 25, 31
42	*Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038, 1989 CarswellNat 193 (SCC)	38, 39
43	*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1	27, 32, 33, 59
44	*Toure v Canada (Public Safety & Emergency Preparedness),* 2018 ONCA 681	43
45	*United States v Burns*, 2001 SCC 7	25

LEGISLATION

	Legislation	**Paragraph(s)**
1	*Constitution Act, 1982*, s 52(1), being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11 **52.** (1) The Constitution of Flavelle is the supreme law of Flavelle, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.	67
2	*Flavellian Charter of Rights and Freedoms*, s 7, Part I of the Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11 **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	19

3	*Flavellian Charter of Rights and Freedoms*, s 12, Part I of the Constitution Act, 1982, being Schedule B to the Flavelle Act 1982 (UK), 1982, c 11 **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	35

SECONDARY SOURCES

	Source	**Paragraph(s)**
1	Debra Parkes, "A Prisoners' Charter: Reflections on Prisoner Litigation under the Canadian Charter of Rights and Freedoms" (2007) 40 UBC L Rev 629	58
2	Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2019)	26, 65
3	Lisa Kerr, "Contesting Expertise in Prison Law" (2014) 60:1 McGill LJ 43	58
4	Michael Jackson, "Cruel and Unusual Treatment or Punishment" (1982) UBC L Rev 189	58
5	Peter Hogg, *Constitutional Law of Canada,* 5th ed, Vol 2 (Toronto: Carswell, 2007)	54, 61
6	UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015)	12, 33, 44, 51