Court File No: 35791

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

BETWEEN:

CORPORATION OF THE FLAVELLIAN CIVIL LIBERTIES ASSOCIATION
Appellant

and

FLAVELLE (ATTORNEY GENERAL)
Respondent

FACTUM OF THE RESPONDENT

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PART I – OVERVIEW AND FACTS

A. OVERVIEW

1. In 2018, the Flavelle Parliament passed the *Structured Intervention Act* (the *"SIA"*) as a careful, thorough and proportionate response to the Supreme Court of Flavelle's 2017 decision to strike down the *Segregation Act.* The *SIA* enables prison staff to transfer incarcerated individuals from the general population of prisons into Structured Intervention Units ("SIU") to protect their safety or to separate witnesses to prevent interference with ongoing investigations.[1] The *SIA* protects the rights of inmates under the *Flavelle Charter of Rights and Freedoms* ("*Charter"*) by providing inmates with daily meaningful human contact in SIUs and by introducing robust structural safeguards to ensure that inmate wellbeing is monitored and protected. Parliament has invested over $300 million in order to implement this new system.[2]

2. The Falconer Court of Appeal correctly concluded that the *SIA* does not violate section 7. Any deprivation of liberty or security of the person under the *SIA* accords with the principles of fundamental justice. The *SIA* is not overbroad. Segregation that limits an inmate's liberty is only authorized by the *SIA* when safety or witness separation warrants such treatment. Furthermore, the system of prompt and routine review established under the *SIA* ensures that an inmate's confinement to a SIU is procedurally fair.

3. The *SIA* does not violate section 12. Constrained prison staff discretion and robust review procedures under the *SIA* ensure that treatment of inmates in SIUs is not cruel and unusual.

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[1] *Structured Intervention Act*, s. 34(1).
[2] Official Problem at para 6.

4. Flavelle has considered and responded to shortcomings of the past segregation regime. It has drafted a comprehensive plan to ensure that the interests of inmates are respected in SIUs and it is investing considerable resources to implement this plan. Flavelle's new approach to maintaining safe and well-ordered prisons under the *SIA* should be upheld as constitutional by this Court.

B. FACTS

i. The Role of Segregation in Flavelle's Prison System

5. Parliament seeks to create secure prisons where investigations can proceed without disruption and where the *Charter* rights of inmates are protected.[3] To achieve this objective, Parliament enacted the *SIA* in 2018. This legislation animates the discretion of Correctional Services of Flavelle ("CSF") officials while putting in place robust procedural safeguards to ensure that SIUs are used as a measure of last resort.

6. SIUs are a vital mechanism for prison staff to respond to safety risks that are inherent to the prison system. Between 2013 and 2017, 33% of inmates detained in the general population of Flavelle prisons were threatened with assault by other inmates, 20% were assaulted, and 9% were assaulted multiple times.[4] In 2017, the majority of inmates confined under the *Segregation Act* were voluntarily admitted because they felt threatened in the general population.[5] Evidence provided by CSF officer Ms. Holao indicates that separating inmates through transfer between institutions can be logistically difficult and takes time.[6] The SIU system gives prison staff an emergency tool to mitigate immediate safety threats by separating inmates from the general population where they

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[3] Official Problem at para 8.
[4] Official Problem at paras 16(r) and 16(s).
[5] Official Problem at para 16(o).
[6] Official Problem at para 19.

are at risk of assault. Additionally, the SIU system allows staff to separate inmates who are witnesses or parties to an investigation that could lead to criminal charges or charges of a serious disciplinary offence.

ii. The Previous System of Segregation

7. A system of segregation is important for maintaining inmate safety and the integrity of ongoing investigations. However, these interests must be balanced against any negative impacts that segregation could have on inmates. The *Segregation Act* failed to strike this balance and it was declared unconstitutional under section 7 of the *Charter* by the Supreme Court of Flavelle.[7]

8. Under the *Segregation Act*, inmates were placed in their cells for upwards of 22 hours per day with minimal opportunity for human interaction.[8] Administrative segregation was subject to internal review and the *Segregation Act* mandated health monitoring of segregated inmates.[9] However, the system of review did not include external independent review and mental health monitoring was cursory, often conducted through food slots.[10]

9. A five-year study (2013-2017) by Dr. Smith of inmates placed in segregation under the *Segregation Act* was admitted as evidence by the application judge.[11] The observations and conclusions in this study are not predictive of the impacts that the SIUs system will have on inmates because they are drawn from the old segregation regime.

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[7] Official Problem at para 3.
[8] Official Problem at para 4.
[9] Official Problem at paras 4 and 16(j).
[10] Official Problem at paras 4 and 16(j).
[11] Official Problem at para 15.

10. This study observed that inmates placed in segregation for 22 hours per day experienced psychiatric and psychological health problems at higher rates than inmates in the general population.[12] The study also observed that the majority of self-injurious incidents in correctional facilities occurred when inmates were isolated in administrative segregation, observation or clinical seclusion cells.[13]

11. However, Dr. Smith qualified these observations by noting that inmates in administrative segregation were more than twice as likely to have histories of self-harm and were 31% more likely to have a pre-existing mental health issue, implying that some of the health symptoms observed in the study are not causally linked to segregation.[14]

iii. Understanding the Structured Intervention Act

12. The *SIA* addresses the deficiencies of the previous system, improving conditions of segregation and introducing structural safeguards to protect the wellbeing of inmates. This reform has brought Flavelle's system of segregation in line with the *Charter*. To support the success of the SIU system, the government of Flavelle has invested $300 million towards creating SIUs and allocated $58 million annually to staff SIUs.[15]

13. The *SIA* authorizes prison staff to separate an inmate from the general population and to place them in a SIU under prescribed circumstances. First, the staff member must be satisfied that there is "no reasonable alternative to the inmate's confinement in a [SIU]."[16] Second, the staff member must have "reasonable grounds" to believe either that (a) "an inmate has acted, has attempted to act or intends to act in a manner that

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[12] Official Problem at para 16(a) and (b).
[13] Official Problem at para 14.h.
[14] Official Problem at para 16(i).
[15] Official Problem at para 6.
[16] *Structured Intervention Act,* s. 34(1).

jeopardizes the safety of any person or the security of a penitentiary and allowing the inmate to be in the mainstream inmate population would jeopardize [those safety concerns]", (b) that "allowing the inmate to be in the mainstream inmate population would jeopardize the inmate's safety", or (c) that allowing them to be in the general inmate population would "interfere with an investigation that could lead to a criminal charge or a charge of a serious disciplinary offence."[17]

14. Inmates in SIUs have the same rights as other inmates, except for those rights that cannot be exercised due to limitations specific to SIUs or security requirements.[18] The Obligations of Service set out in section 36(1) of the *SIA* require that inmates in SIUs get an opportunity to spend at least four hours outside of their cells each day and that they get an opportunity to spend at least two hours of that time interacting with others through activities such as programing to help them progress towards the objectives of their correctional plan or reintegration into the general inmate population.[19]

15. These requirements are subject to only three exceptions aimed at protecting inmate autonomy and the security of correctional facilities. Section 37(1)(a) allows inmates to refuse the opportunity to leave their cell or spend time with others.[20] Prison staff are delegated discretion under section 37(1)(b) to limit the amount of time an inmate spends outside of their cell with others when an inmate disobeys reasonable instructions to ensure their safety.[21] Lastly, under section 37(1)(c) prison staff can limit an inmate's time outside of their cell or time with others to the extent that it is reasonably required for

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[17] *Structured Intervention Act,* s. 34(1).
[18] *Structured Intervention Act,* s. 35.
[19] *Structured Intervention Act,* s. 36(1).
[20] *Structured Intervention Act,* s. 37(1)(a).
[21] *Structured Intervention Act,* s. 37(1)(b).

security purposes in prescribed circumstances such as natural disasters, fires, riots and work refusals as defined under section 128 of the *Canada Labour Code*.[22]

16. An inmate's continued placement in a SIU is subject to regular review. A Correctional Services of Flavelle (CSF) official will review placement of an inmate within five workdays of an initial placement, and every thirty days thereafter.[23] The Commissioner of Corrections (the Commissioner) will also review the placement within sixty days.

17. If an inmate is in a SIU for over thirty days after the Commissioner's review, an independent external decision-maker appointed by the Minister of Correctional Services (the Minister) must review and approve their continued segregation.[24] This decision-maker must have knowledge of administrative decision-making and cannot have been employed by the CSF in the previous five years.[25] This independent external review is binding.[26]

18. At each stage of review, reviewing authorities must consider whether returning an inmate to the general population would jeopardize their safety, the safety of others, or the security of the correctional facility and whether it would interfere with any ongoing investigations into a criminal or serious disciplinary offences.[27]

19. The *SIA* establishes procedures to protect the mental health of inmates in SIUs. The legislation requires the CSF to ensure that measures are taken to provide for ongoing

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[22] *Structured Intervention Act,* s. 37(1)(c).
[23] Official Problem at para 12.
[24] Official Problem at para 12.
[25] *Structured Intervention Act,* s. 37.6(1) and (2).
[26] Official Problem at para 12.
[27] *Structured Intervention Act,* s. 37.41(1).

monitoring of the health of inmates in SIUs.[28] Inmates must be referred to health services for a mental health assessment with 24 hours of their initial transfer to a SIU and subsequently must be visited daily by a staff member.[29] Staff must refer inmates to health services if they have reason to believe confinement in a SIU is affecting their health.[30] Registered health care professionals are given authority under the *SIA* to recommend that treatment of an inmate in a SIU be altered or that an inmate be removed from a SIU for health reasons.[31]

20. Upon such a recommendation, the head of a prison institution must review the inmate's confinement as soon as is practicable.[32] If the facility head makes a determination that goes against recommendations made by a health professional, a unique review procedure is engaged. A committee of staff superior to the facility head must reassess the individual's treatment in an SIU based on a report by a second registered health care professional.[33]

21. The *SIA* follows the spirit of international standards set out in the Mandela Rules, while responding to the operational realities of prison administration. [34] Rule 45 states that "segregation for over 22 hours should only ever be used in exceptional cases as a last resort."[35] The *SIA* sets the maximum time that inmates can spend in their cells at 20 hours per day, and only allows this time to be extended where there is reasonable safety justification under section 37(1). Rule 43 further prohibits indefinite or prolonged solitary

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[28] *Structured Intervention Act,* s. 37.1(1).
[29] *Structured Intervention Act,* s. 37.1(2).
[30] *Structured Intervention Act,* s. 37.11.
[31] *Structured Intervention Act,* s. 37.2.
[32] *Structured Intervention Act,* s. 37.3(2).
[33] *Structured Intervention Act,* s. 37.3(6).
[34] UNGAOR, 70th Sess, UN Doc A/Res/70/175 (17 December 2015) [Mandela Rules], BOA, Tab 1.
[35] Mandela Rule 45, BOA, Tab 1.

confinement – defined as segregation for over 22 hours per day for over 15 consecutive days.[36] While the *SIA* leaves some room for prolonged solitary confinement, the strong structural safeguards in the *SIA* only authorize such treatment in extreme circumstances where a prolonged safety threat exists.

C. JUDICIAL HISTORY

22. At trial, Shek J held that the structure of the SIU system violates the *Charter* in two ways. It authorizes cruel and unusual treatment in violation of section 12 and it infringes section 7 by engaging the liberty and security of person interests of inmates in an overbroad manner.[37] She held that neither of these *Charter* violations could be justified under section 1. As a remedy she imposed a 15-day limit on placement of inmates in SIUs.[38]

23. The majority of the Falconer Court of Appeal overturned Shek J's decision, holding that the *SIA* does not violate sections 7 or 12. Wang JA writing for the majority stated that while the *SIA* engaged liberty and security of the person, it did so in a procedurally fair manner because the *SIA* contains a "fair" review process that "ensures that placement in a SIU [is] for reasons of safety or to prevent interference with an investigation."[39] In *obiter,* Wang JA indicated that if these rights were infringed they could be justified under section 1 because the government serves a complex policy role in managing correctional services and is therefore owed a "great deal of deference" under section 1.[40] He found that creating safer prisons and protecting ongoing investigations

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[36] Mandela Rule 43, BOA, Tab 1.
[37] Official Problem at para 24.
[38] Official Problem at paras 28-29.
[39] Official Problem at para 32.
[40] Official Problem at para 33.

was a "significant public good."[41]

24. Tsui JA dissented from the majority of the Falconer Court of Appeal, arguing that the *SIA* violates section 7 in a manner that is not justifiable under section 1. However, she agreed with the majority that the treatment of inmates in SIUs did not meet the "high and context-specific" threshold of cruel and unusual punishment under section 12.[42]

PART II – ISSUES ON APPEAL

25. The Attorney General of Flavelle takes the following positions with respect to the issues on appeal:

(b) The *Structured Intervention Act* does not infringe section 7 of the *Charter*;

(c) The *Structured Intervention Act* does not infringe section 12 of the *Charter*; and,

(d) Any Infringement of section 7 is justified under section 1 of the *Charter.*

PART III – STATEMENT OF ARGUMENT

A. THE STRUCTURED INTERVENTION ACT DOES NOT VIOLATE S. 7

26. The *SIA* respects the section 7 rights of inmates.[43] The *SIA* does not authorize interference with psychological security of the person. Moreover, while the SIU system deprives inmates of liberty, this deprivation complies with the principles of fundamental justice. The contention by the Flavellian Civil Liberties Association ("FCLA") that inmate section 7 interests are deprived in an overbroad or procedurally unfair manner cannot be sustained.

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[41] Official Problem at para 33.
[42] Official Problem at para 35.
[43] *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.

i. S. 7 Engagement

a. The SIA Engages Inmates' Residual Liberty Interest

27. Flavelle recognizes that involuntary placement of inmates within Structured Intervention Units deprives inmates of liberty.[44] This deprivation is the product of a carefully crafted legislative regime that is well tailored to the important objectives of maintaining safe and secure prisons and protecting the integrity of ongoing investigations.

b. The SIA Does Not Engage Inmates' Security of the Person Interest

28. The FCLA claims that the *SIA* engages security of the person.[45] This claim cannot withstand scrutiny. Security of the person is engaged only where state action "has a serious and profound effect on a person's psychological integrity" beyond "ordinary stress or anxiety."[46] The factual record in this case is insufficient to rationally support the conclusion that SIU placement imposes this psychological toll on inmates.

29. The FCLA's argument relies on evidence accumulated under a defunct regime that differs in important respects from the *SIA*. The empirical findings of Dr. Smith's expert report are inextricably linked to the *Segregation Act*, which restricted inmates to their cells for 22 hour per day.[47] In contrast, the *SIA* generally offers inmates a minimum of 4 hours outside of their cells.[48] Where the *SIA* authorizes confinement for over 22 hours per day, confinement is subject to mental health monitoring that is more robust

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[44] *May v Ferndale Institution*, 2005 SCC 82 at para 76, BOA, Tab 4.
[45] Appellant Factum at para 23.
[46] *New Brunswick (Minister of Health and Community Services) v G(J)*, 1999 3 SCR 46 at para 60, BOA, Tab 11.
[47] Official Problem at para 16(m).
[48] *Structured Intervention Act,* s.36(1)(a).

than that required under the *Segregation Act.* Therefore, Dr. Smith's findings are not predictive of the impacts of the SIU system.

30. Furthermore, the elements of Dr. Smith's expert report dealing with the general prison population cast doubt on the FCLA's claim that the SIU system will increase rates of psychological harm. Many of the effects of segregation observed by Dr. Smith also occur in the general prison population, which suggests that the causal landscape is too complex to assign full responsibility for these impacts to segregation.[49]

ii. The Deprivation is in Accordance with the Principles of Fundamental Justice

a. The SIA Has Two Compelling Objectives

31. The *SIA* aims to achieve two important objectives. It seeks to 1) secure the safety of inmates and prison staff and 2) to protect the integrity of ongoing investigations into criminal or serious disciplinary offences.[50]

b. The SIA is Not Overbroad

32. A law is overbroad when it authorizes a deprivation of life, liberty, or security of the person that "bears no relation to its objective."[51] To establish overbreadth, the FCLA must show that the *SIA* applies to at least one inmate whose presence in a SIU does not advance either of the objectives outlined above. This claim cannot be supported. Placement of an inmate in a SIU is only legislatively authorized on the basis of safety or the preservation of ongoing investigations and is therefore well tailored to the SIA's legislative objectives.

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[49] Official Problem at para 16(d).
[50] Official Problem at para 7.
[51] *Canada (Attorney General) v Bedford,* 2013 SCC 72 at para 112, BOA, Tab 3.

33. The FCLA contends that the *SIA* is overbroad because it authorizes extended SIU placement when "short-term" placement is sufficient to secure the *SIA*'s purposes.[52] This argument is premised upon the notion that safety threats in prisons can always be ameliorated within a defined timeline. This position belies the complex, dynamic risk factors and administrative challenges that confront CSF officials.

34. The FCLA's position, if accepted, would leave a considerable gap in the CSF's ability to preserve institutional safety. It would preclude CSF officials from separating inmates from the general population who, for a period beyond 15 days, refuse to behave in a manner that allow for safe interaction with others. The FCLA's position would require CSF officials to subject inmates or staff to known safety threats that could be avoided through continued segregation. This is incompatible with the safety objective of the *SIA*.

35. The FCLA further argues that the *SIA* is overbroad because it allows for extension of an inmate's confinement in a SIU due to administrative challenges. To support this argument, the FCLA cites testimony from Ms. Holao, which indicated that difficulties transferring inmates between institutions extended the confinement of inmates under the *Segregation Act*. This position overlooks the fact that inmate transfer may be the most effective mechanism to separate an inmate from an ongoing threat to their safety present in the general population.[53] Navigating administrative challenges such as transfer delays is therefore related to the objective of protecting inmate safety.

36. Similarly in *Ogiamien v Ontario,* the Court of Appeal for Ontario held that the use of lockdowns in a prison with staff shortages was related to the safety objective of the

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[52] Appellant Factum at para 30.
[53] Official Problem at para 18.

Corrections and Conditional Release Act. The Court held that "even lockdowns imposed because of staff shortages have as their underlying purposes security and safety."[54] The administrative fact of staff shortages was a valid consideration in determining whether a lockdown was required for institutional safety. The holding in *Ogiamien* is dispositive of the claim that space for administrative considerations under the *SIA* renders the legislation overbroad.

37. It is worth noting that while administrative factors may support continued placement in a SIU compliant with the Obligations of Services, the same administrative consideration may not meet the higher justificatory hurdles required to justify denial of the Obligations of Service under the exceptions in section 37(1). A detailed discussion of the scope of the authority given to prison officials under section 37(1) is provided below in the Respondent's section 12 arguments.

iii. The SIA is Procedurally Fair

38. The FCLA contends that the review procedures under the *SIA* authorizing continued placement of inmates in SIUs are not procedurally fair. It is common ground on this appeal that maintaining an inmate within a SIU attracts a duty of procedural fairness.[55] Flavelle recognizes its constitutional duty to ensure review procedures are in place that make an inmate's continued SIU placement fair, however, this obligation is satisfied by the *SIA*.

39. The *SIA* discharges this duty by establishing a comprehensive system for the review of SIU placements. Given the technical nature of prison administration, the *SIA*

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[54] *Ogiamien v Ontario,* 2017 ONCA 667 at para 83, BOA, Tab 37.
[55] *Cardinal v Kent Institution,* [1985] 2 SCR 643 at para 14, 24 DLR (4th) 44 (SCC), BOA, Tab 50.

review procedure, which includes internal review, robust mental health assessment, and the promise of binding external review at a fixed date, constitutes a fair process.

a. The Strength of the Duty of Procedural Fairness In This Case Attracts Moderate Procedural Safeguards

40. Procedural fairness is not a fixed duty. As L'Heureux-Dubé J remarked in *Knight v Indian Head School Division No. 19*, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case."[56] The demands placed on a decision-making body by the duty of procedural fairness depend on the nature and function of the decision-maker in question.[57] Sensitivity to this variability is particularly important in the prison context, where dynamic risk factors present serious threats whose amelioration requires swift and decisive action.[58]

41. The nature of the decision at issue affects the stringency of the duty of procedural fairness.[59] Decision-making bodies performing a judicial function attract a more stringent duty of procedural fairness than those who make policy assessments.[60]

42. The SIA does not empower CSF officials to perform a judicial or quasi-judicial function. Review of continued SIU placement involves expert assessment of the safety risks presented in a particular factual context. Courts have recognized that such an objective evaluation does not constitute judicial or quasi-judicial review. In *Oliver v Canada (Attorney General)*, Graham J held that the decision to elevate an inmate's

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[56] *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 682, 69 DLR (4th) 489 (SCC), BOA, Tab 51.
[57] *Martineau v Matsqui Institution* [1980] 1 SCR 602 at 628-629, 106 DLR (3d) 385 (SCC), BOA, Tab 52.
[58] *Maltby v Saskatchewan (Attorney General),* 1982 CarswellSask 441 at para 20, 143 DLR (3d) 649 (SKQB), BOA, Tab 43.
[59] *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 23, 174 DLR (4th) 193 (SCC), BOA, Tab 23.
[60] *Knight v Indian Head School Division No. 19*, [1990] 1 SCR 653 at 683, 69 DLR (4th) 489 (SCC), BOA, Tab 51.

security level was unlike a judicial determination because it did not involve a finding of guilt.[61] Analogously, a decision to maintain an inmate in a SIU is an administrative safety assessment, not an evaluation of culpability.

43. In *R v Hamm,* Veit J held that a "high level" duty of procedural fairness applied to the decision to place inmates in administrative segregation because of its immense significance to an inmate.[62] The FCLA argues that this holding supports a strong duty of procedural fairness in this case. However, Veit J's conclusion was made with respect to an administrative segregation system similar to the *Segregation Act.* Her reasoning was premised upon the extremely onerousness conditions of confinement on the record in that case. While the *SIA* effects a deprivation of residual liberty, it provides inmates with opportunities to interact with others and to work towards their correctional plan that were absent under the administrative segregation regime at issue in *Hamm*.

b. Review Procedures Under the SIA Discharge the Duty of Procedural Fairness

44. This Court should affirm Wang JA's holding that the *SIA* is procedurally fair.[63] As the Falconer Court of Appeal noted in its decision below, the *SIA* contains concrete procedural safeguards sufficient to create a fair system of review. Even if this Court finds that a robust duty of procedural fairness applies in this case, such a duty is discharged by these concrete review procedures.

45. In *British Columbia Civil Liberties Association v Canada (Attorney General),* Leask J held that review procedures in Canada's system of administrative segregation were not procedurally fair because they allowed a warden to review his own decision to

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[61] *Oliver v Canada (Attorney General),* 2010 ONSC 3976 at paras 66-67, BOA, Tab 53.
[62] *R v Hamm*, 2016 ABQB 440 at para 67, BOA, Tab 24.
[63] Official Problem at para 32.

place an inmate in segregation.[64] The *SIA* does not contain this procedural defect. The initial decision to place an inmate in a SIU is made by a staff member on the front line of managing a prison. A CSF official, the Commissioner and an independent external decision-maker subsequently review this placement. The distinction between the original staff member and the decision-makers who conduct placement review ameliorates concerns about impartiality and undue deference.

46. The mental health assessment provided for under sections 37.1 and 37.2 of the *SIA* imposes further oversight on the decision to maintain an inmate within a SIU.[65] Should this assessment yield the conclusion that the inmate's conditions of confinement should be altered or terminated, the institutional head must either follow this recommendation, or, by declining to do so, trigger a review by a committee comprised of staff members whose rank supersedes the institutional head. This independent committee represents an additional justificatory requirement to the maintenance of an inmate in a SIU where this confinement is found to negatively impact an inmate's mental health.

47. This Court should not accept the FCLA argument that procedural fairness requires external review within seven days of SIU placement.[66] As the Court noted in *Charkaoui,* "the procedures required to conform with the principles of fundamental justice must reflect the exigencies of the security context."[67] The prospect of giving review authority to non-CSF officials in the period immediately following a placement decision undermines the legislative objectives of the *SIA*. The *SIA* vests authority in CSF officials

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[64] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2018 BCSC 62 para 355, BOA, Tab 21, appealed on a different issue in 2019 BCCA 228, BOA, Tab 22.
[65] *Structured Intervention Act,* ss. 37.1 and 37.2.
[66] Appellant Factum at para 34.
[67] *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at para 27, BOA, Tab 17.

to review SIU placements in five working days of an initial placement because they are uniquely suited to assess the existence and extent of safety threats within prisons. SIU placement decisions depend upon features of the institutional population and the inmates' relationship to this population. These considerations are specific to particular institutions and are dynamic.[68] Their identification and assessment requires the expertise possessed by CSF officials.

48. The FCLA's position amounts to a claim that the CSF is incapable of fairly and openly reviewing placement decisions. The Court should decline to affirm this extraordinary repudiation of the CSF. The FCLA's position runs contrary to case law emphasising the importance of deferring to the expertise of prison administrators.[69] In *Leblanc v Canada (Attorney General)* the Court stated, "there can be no competition between the expertise of the prison administrators and that of the judges with respect to the administration of penitentiaries."[70]

49. There is good reason for this deference. In many cases, the special training and experience of CSF officials is required to effectively analyze the dynamic, contextual, and institution-specific risk factors that militate in favour of or against returning an inmate to a prison's general population.

B. THE *STRUCTURED INTERVENTION ACT* DOES NOT VIOLATE S. 12

50. The Falconer Court of Appeal correctly concluded that the *SIA* does not violate s. 12 of the *Charter*. Section 12 protects individuals from "cruel and unusual treatment or

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[68] *British Columbia Civil Liberties Association,* 2019 BCCA 228 at para 189. BOA, Tab 22.
[69] *R v Farrell,* 2011 ONSC 2160 at paras 47-48, BOA, Tab 54; *R v Marriott,* 2014 NSCA 28 at para 39, BOA, Tab 55; *R v CCN,* 2018 ABPC 148 at para 40, BOA, Tab 56.
[70] *Leblanc v Canada (Attorney General),* 2006 FC 1337 at para 27, BOA, Tab 57.

punishment."[71] The *SIA* does not authorize cruel and unusual treatment because it carefully constrains the authority of prison staff to administer segregation.

i. The SIA Engages s. 12

51. Section 12 is engaged when an individual is "subject to treatment or punishment at the hands of the state."[72] The test for section 12 infringement is the same regardless of whether state action constitutes treatment or punishment.[73] Flavelle concedes that a placing an inmate in a SIU is an exercise of state power that constitutes treatment within the meaning of section 12.

ii. The SIA Does Not Authorize Cruel and Unusual Treatment

a. The Threshold to Establish Cruel and Unusual Treatment is High

52. Section 12 jurisprudence has clearly established that "cruel and unusual" is a demanding and stringent standard. Treatment will only meet this high bar if it is "grossly disproportionate to what would have been appropriate" or if it is "so excessive as to outrage standards of decency."[74] Treatment that is merely excessive or disproportionate is insufficient to ground a section 12 claim.[75] Courts have recognized that segregation within a prison is not *per se* cruel and unusual treatment, but like anything else, it can become so if it is so excessive as to outrage standards of decency.[76]

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[71] *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.
[72] *Rodriguez v British Columbia* (Attorney General), [1993] 3 SCR 519 at 609, 107 DLR (4th) 342 (SCC), BOA, Tab 27.
[73] *R v Olson,* 1987 CarswellOnt 1402 at para 38, 62 OR (2d) 321 (ONCA), BOA, Tab 5; *Toure v Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681 at para 58, BOA, Tab 38.
[74] *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 87 (SCC), BOA, Tab 35; *R v Morrisey,* 2000 SCC 39 at para 26, BOA, Tab 58; *R v Boudreault,* 2018 SCC 58 at para 45, BOA, Tab 34.
[75] *Ogiamien v Ontario (Community Safety and Correctional Services),* 2017 ONCA 667 at para 9, BOA, Tab 37.
[76] *R v Olson*, 1987 CarswellOnt 1402 at para 40, 62 OR (2d) 321 (ONCA), BOA, Tab 5; *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 101, BOA, Tab 33.

53. The inquiry under section 12 is contextual and fact-specific.[77] It looks at whether the treatment at issue strays so far from treatment that society would anticipate or deem "appropriate" in a particular context that it shocks the communal conscience.[78] Applying this test in in *R v Marriot*, the Nova Scotia Court of Appeal explained that where segregation practices within prisons are challenged under section 12, the analysis is "heavily fact-specific; the conditions, duration and reasons for segregation must all be considered." [79]

b. Segregation for Over 22 Hours Complies with s. 12 in Some Circumstances

54. Courts have routinely held that segregation for over 22 hours is not cruel and unusual where an inmate posed a serious danger to prison staff or other inmates.[80] In *R v Marriot* the Court held that administrative segregation for 22-23 hours per day for months at a time did not amount to cruel and unusual treatment because the segregation was "for the purpose of internal order, discipline and security."[81] In *McArthur v Regina Correctional Centre,* an inmate was placed in administrative segregation and then returned to the general prison population on three occasions. In each instance upon his return, he disrupted the safety and order of the institution by threatening and assaulting staff, destroying government property or dealing narcotics in the institution. Based on this

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[77] *R v Smith,* [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 88 (SCC), BOA, Tab 35.
[78] *Canadian Civil Liberties Association v Canada (Attorney General),* 2019 ONCA 243 at para 92, BOA, Tab 33; *R v Smith,* [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 111 (SCC), BOA, Tab 35.
[79] *R v Marriott,* 2014 NSCA 28 at para 38, BOA, Tab 55.
[80] See *R v Marriot,* 2014 NSCA 28, BOA, Tab 55; *R v Aziga,* [2008] OJ No 3052, 2008 CanLII 39222 (ONSC), BOA, Tab 42; *McArthur v Regina Correctional Centre,* 56 CCC (3d) 151, 1990 CarswellSask 227 (SKQB), BOA, Tab 59; *Bacon v Surrey Pretrial Services Centre (Warden),* 2010 BCSC 805, BOA, Tab 2.
[81] *R v Marriott,* 2014 NSCA 28 at paras 26 and 41, BOA, Tab 55.

pattern of behaviour, the Court determined that his continued confinement for 22 hours per day was not cruel and unusual treatment.[82]

55. Additionally, segregation for over 22 hours per day has been has upheld under section 12 where it protects an inmate from harm. In *R v Olson,* the Court of Appeal for Ontario held that segregation of an inmate for 23 hours per day complied with section 12 because prison officials had evidence that the inmate's life would be in "immediate danger" in the general prison population.[83]

56. Flavelle recognizes that "cruel and unusual" treatment under section 12 is an evolving standard that may shift as society progresses.[84] Recent research such as the study by Dr. Smith suggests that segregation for extended periods of time without meaningful human contact can negatively impact inmate mental health.[85] While this new understanding of the effects of segregation has restricted the circumstances in which this treatment is appropriate, safety threats in the general prison population continue to influence section 12 analysis. This leaves space for some segregation of this nature in extreme circumstances.

57. In *British Columbia Civil Liberties Association v Canada (Attorney General),* the British Columbia Court of Appeal had evidence similar Dr. Smith's study. The Court in that case nevertheless recognized that "the significant challenges associated with preserving life and maintaining institutional order" mean "the humane segregation of some inmates will be both necessary and justified in defined circumstances and for

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[82] *McArthur v Regina Correctional Centre,* 56 CCC (3d) 151, 1990 CarswellSask 227 at paras 6 and 28 (SKQB), BOA, Tab 59.
[83] *R v Olson*, 1987 CarswellOnt 1402 at para 30, 62 OR (2d) 321 (ONCA), BOA, Tab 5.
[84] *R v Smith*, [1987] 1 SCR 1045, 1987 CarswellBC 198 at para 7 (SCC), BOA, Tab 35.
[85] Official Problem at para 16(b).

limited periods."[86] Segregated for over 22 hours for extended periods of time, though difficult for inmates, will not be grossly disproportionate or contrary to society's standards of decency where it is responsive to well-founded safety concerns.

c. S. 37(1) Confers Discretion Compliant with s. 12

58. This appeal concerns the constitutionality of the *SIA* on its face. The FCLA takes the position that the discretion given to prison staff through the exceptions in section 37(1) invalidates the legislation by authorizing unconstitutional conduct.[87] This position misinterprets the boundaries of the discretion delegated to prison staff under section 37(1). This provision only authorizes confinement of inmates for over 20 hours where reasonable safety concerns support such treatment. This discretion is consistent with case law showing that in circumstances of exigent safety risks, segregation for over 22 hours for prolonged periods of time is does not violate section 12.

59. In *Slaight Comminications v Davidson,* Lamer J (as he then was) wrote for the majority and held that legislation conferring discretion cannot be interpreted as granting power to infringe the *Charter* unless "that power is expressly conferred or necessarily implied." Where legislation confers imprecise discretion it "must be interpreted as not allowing *Charter* rights to be infringed."[88] Section 37(1) does not confer authority to violate section 12 expressly or by necessary implication. Any ambiguity in the scope of discretion under the provision should be interpreted in favour of *Charter* compliance.

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[86] *British Columbia Civil Liberties Association v Canada (Attorney General),* 2019 BCCA 228 at para 2, BOA, Tab 22.
[87] Appellant Factum at paras 38-39.
[88] *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038, 1989 CarswellNat 193 at para 90, BOA, Tab 29.

60. The *SIA* gives prison staff narrow authority to restrict the time that an inmate has outside of their cell below four hours or to restrict their time interacting with others below two hours. Under section 37(1)(b), they may exercise this power when an inmate "does not comply with reasonable instructions to ensure their safety or that of any other person or the security of the penitentiary."[89] Additionally, section 37(1)(c) gives prison staff authority to limit an inmate's time outside of their cell or with others in "prescribed circumstances" to the extent that is "reasonably required for security purposes."[90]

61. The term "reasonable" in these provisions requires prison staff to exercise their discretion to limit an inmate's time outside of their cell in a manner that is appropriate in a given circumstance. However, as Rand J explained in *Roncorelli v Duplessis,* this discretion must be exercised in a manner consistent with the empowering statute's "lines or objects."[91] In this case, discretion must be exercised in a manner consistent with the objective of protecting the safety of inmates and institutional security.

62. Furthermore, prison staff can only exercise their discretion under these provisions when the conditions listed in the statutory text are satisfied. Section 37(1)(c) lists natural disasters, fires, riots and work refusals under the section 128 of the *Canada Labour Code* as examples of "prescribed circumstances" where prison staff can restrict an inmate's time outside of their cell.[92] These listed circumstances are all unusual events that strain the ability of prison staff to maintain institution security and create physical danger in the

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[89] *Structured Intervention Act,* s. 37(1)(b).
[90] *Structured Intervention Act,* s. 37(1)(c).
[91] *Roncarelli v Duplessis*, [1959] SCR 121 at 140, 16 DLR (2d) 689 (SCC), BOA, Tab 60.
[92] Under s. 128(2) of the *Canada Labour Code* federal employees are not permitted to refuse to work or to perform an activity if "the refusal puts the life, health or safety of another person directly in danger" nor are they allowed to cease work due to a believe that "normal conditions of employment" constitute a danger. For this reason "work refusals" in s. 37(1)(c) of the *SIA* refers to an abnormal occurrence; *Canadian Labour Code,* RSC, 1985, c L-2, s 128.

general inmate population. Under *ejusdem generis*, the general term "prescribed circumstances" should be read as only encompassing circumstances that share the common characteristics of the items listed in section 37(1)(c).[93] For instance, a power outage would fit within the scope this category of circumstances because it is an abnormal occurrence and darkness could limit the ability of prison staff to ensure that inmates interact safely. In contrast, ongoing limitations on the ability of prison staff to mitigate dangers such as finite resources cannot form the basis of section 37(1)(c) discretion.

63. Given that the discretion delegated under section 37(1) is confined to circumstances where there are overriding safety risks, this discretion only authorizes treatment consistent with section 12.

d. SIA Review Procedures Mean that SIU Placement is not Indefinite

64. The FCLA argues that segregation under the *SIA* is cruel and unusual because it is potentially indefinite.[94] While the *SIA* does not set a firm limit on the length of time that an inmate can spend in a SIU, review procedures under the *SIA* ensure that an inmate's time in a SIU is strictly limited.

65. The Supreme Court of Canada in *Charkauoi* held that immigration detention for extended periods of time was not cruel and unusual because it was subject to a "meaningful process of ongoing review."[95] Similarly, the maintenance of an inmate in a SIU is reviewed on an ongoing basis beginning five days after placement and continuing

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[93] Ruth Sullivan, *Statutory Interpretation 3rd ed* (Toronto: Irwin Law, 2016) at 141.
[94] Appellant Factum at para 51.
[95] *Charkaoui v Canada (Citizenship and Immigration,* 2007 SCC 9 at para 107, BOA, Tab 17.

every 30 days thereafter.[96] This ongoing review is supplemented by the authority given to health professionals to instigate review of an inmate's confinement as soon as is practicable where an inmate shows signs that SIU placement is impacting their health.

66. The FCLA suggests that inmates do not have a meaningful opportunity to appeal their placement in a SIU because independent-external review occurs 90 days after an inmate's initial placement, when international standards prohibit solitary confinement for over 15 days.[97] However, as was discussed in the section 7 procedural fairness analysis above, CSF officials and health professionals are best positioned to evaluate whether inmates should be reintegrated into the general prison population because they are trained to evaluate prison safety and inmate health respectively. Courts should be hesitant to question the expertise and discretion of prison administrators.[98]

e. The Mandela Rules Are Note Determinative in s. 12 Analysis

67. The FCLA argues that the treatment of inmates under the *SIA* is cruel and unusual because section 37(1) leaves open the possibility that inmates will be segregated for over 22 hours per day for over 15 consecutive days, which is prohibited as prolonged solitary confinement under the Mandela Rules.[99] While the Mandela Rules can inform a court's understanding of society's standards of decency, no country has signed onto the Mandela Rules, and they are not binding on Flavellian courts.[100]

68. Courts have been clear that the threshold "so excessive as to outrage standards of decency" should not be taken out of context or equated with standards derived from

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[96] Official Problem at para 12.
[97] Appellant Factum at para 54.
[98] *R v Aziga,* [2008] OJ No 3052, 2008 CanLII 39222 at para 52 (ONSC), BOA, Tab 42.
[99] Appellant Factum at para 47 and 50; Mandela Rules 43.
[100] *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen,* 2017 ONSC 7491 at para 48, BOA, Tab 7, aff'd in 2019 ONCA 243 at para 29, BOA, Tab 33.

opinion polls.[101] These words are "intended to underline the very exceptional nature of circumstances" where section 12 applies.[102] "Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour." [103] Therefore, this Court is not bound by the norms articulated in the Mandela Rules.

C. ANY INFRINGEMENT OF S. 7 IS JUSTIED UNDER S. 1

71. If this Court finds a section 12 violation in this case, Flavelle concedes that such a violation will not be justified under section 1. The threshold of gross disproportionality under section 12 is so high that a law that meets this threshold is likely also disproportionate under section 1.

72. Flavelle also recognizes the difficulties associated with justifying a section 7 violation under section 1. A law that offends the principles of fundamental justice admittedly bears a serious blemish. However, in *Carter v Canada*, the Supreme Court of Canada noted the possibility that legislation that offends section 7 can nonetheless be justified under section 1. The logical space to condemn a provision under the former section while justifying it under the latter comes from the different perspectives of the two inquiries. Under section 7, the inquiry concerns the law's interaction with the rights of the claimant alone. Society's reasons for wanting to secure the legislative objective have no relevance at this stage. At section 1, by contrast, courts may weigh *Charter* breaches against the public goods yielded by an unconstitutional law.

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[101] *United States v Burns,* 2001 SCC 7 at paras 66, BOA, Tab 46; *Bacon v Surrey Pretrial Services Centre*, 2010 BCSC 805 at para 301, BOA, Tab 2; *R v Drumonde*, 2019 ONSC 1005 at para 37, BOA, Tab 61.
[102] *United States v Burns,* 2001 SCC 7 at paras 66, BOA, Tab 13.
[103] *United States v Burns,* 2001 SCC 7 at para 67, BOA, Tab, quoting *S v Makwanyane*, 1995 (3) SA 391 (South Africa Constitutional Ct) at para 88, BOA, Tab 62.

73. This argument will be particularly potent where the "competing social interests" that the law aims to secure "are themselves protected under the *Charter*."[104] Indeed, the Court of Appeal for Ontario in *R v Michaud* situated a law which required trucks to have a speed limiter set to a maximum speed of 105 kilometers per hour fit into this logical space under section 1 as the benefits of this law for other drivers on the road out weighed the dangers it posed to the plaintiff truck driver.[105]

74. The impugned provision falls within the logical space contemplated by the Supreme Court of Canada in *Carter*. Even if the *SIA* fails to conform with the principles of fundamental justice in its interaction with particular claimants, it is justified by the goods which it confers to the public of Flavelle at large. The community of Flavelle benefits from a SIU system that mitigates the violent conflict endemic to prison populations and that allows investigations into criminal conduct within prisons to be responsibly completed. In the decision below, Wang JA found that there was "significant public good" flowing from the *SIA* as all inmates benefit from limitation of safety threats in Flavelle's prisons and all Flavellians benefit from a system that protects the integrity of ongoing investigations.[106]

i. A Deferential Approach is Appropriate

75. A deferential approach should be used to assess whether the *SIA* is justified under section 1. In cases like this one with "interlocking and interacting interests and considerations", courts owe deference to policy makers because they have institutional

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[104] *Carter v Canada (Attorney General*) [2015] 1 SCR 331 at para 95, BOA, Tab 8.
[105] *R v Michaud,* 2015 ONCA 585 at para 143, BOA, Tab 63.
[106] Official Problem at para 33.

competence that puts them in a better position to evaluate policy alternatives.[107] In the decision below, Wang JA recognized that Parliament serves a "complex policy role" in managing Flavelle's correctional services, balancing "the interests of public safety, the interests of offender safety, and the process of justice."[108] Courts should be "extremely careful not to unnecessarily interfere with the administration of detention facilities."[109]

ii. The Objectives of the SIA are Pressing and Substantial

76. The *SIA* serves two objectives. First, the *SIA* aims to increase safety for inmates and prison staff, and second it aims to prevent interference with ongoing investigations for criminal or serious disciplinary offences.[110] Both of objectives are important to maintaining the efficacy and integrity of Flavelle's justice system and are therefore pressing and substantial. Moreover, courts have previously recognized fostering safety in correctional facilities as a pressing and substantial objective.[111]

iii. Any Breach of s. 7 Rights is Rationally Connected to the SIA's Objectives

77. Any limitation of section 7 rights is rationally connected to the *SIA's* objective of protecting inmate safety and the safety of prison staff. At this stage, a court needs only to be satisfied that it is "reasonable to suppose" that limiting the right "may further the goal, not that it will do so."[112] Both the exceptions under section 37(1) permitting confinement

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[107] *M v H,* [1999] 2 SCR 3 at para 78, 171 DLR (4th) 577 (SCC), BOA, Tab 64; *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 53, BOA, Tab 65; *JTI Macdonald Corp v Canada (Attorney General),* 2007 SCC 30 at para 41, BOA, Tab 66; *Carter v Canada,* 2015 SCC 5 at para 98, BOA, Tab 8; *Pushpanathan v Canada (Minister of Citizenship and Immigration),* [1998] 1 SCR 982 at para 36, 160 DLR (4th) 193 (SCC), BOA, Tab 67.
[108] Official Problem at para 31.
[109] *R v CCN,* 2018 ABPC 148 at para 40, BOA, Tab 56, citing *R v Marriott*, 2014 NSCA 28 at para 39, BOA, Tab 55.
[110] Official Problem at paras 6-7.
[111] *R v Seed,* 2011 SKCA 75 at para 111, BOA, Tab 30.
[112] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 48, BOA, Tab 65.

of inmates for over 20 hours per day, and the legislation's initial internal review procedures ensure that inmates are placed in SIUs when safety requires it and are only reintegrated into the general population when it is safe to do so.

iv. The SIA Minimally Impairs s. 7 Rights

78. At this stage of the analysis the inquiry turns on whether the *SIA* impairs inmate rights no more than is necessary to accomplish its objectives. Given the deference owed to the government in this case, the *SIA* structure need only fall within "a range of reasonable [policy] alternatives"; it need not be "perfectly calibrated."[113]

79. The *SIA* strikes an appropriate balance between promoting well-ordered prisons and protecting the *Charter* interests of inmates. The *SIA* provides inmates with daily opportunities for meaningful human interaction and introduces mental health review and enables health professionals to initiate changes to an inmate's confinement conditions for health reasons. Any more severe limitation on the discretion afforded to prison staff to place inmates in SIUs would threaten inmate safety or risk undermining ongoing investigations.

80. The FCLA suggest that placing a 15-day cap on solitary confinement and external review within seven days of placement would be less impairing on inmate rights.[114] However, such a firm time limit would prevent the *SIA* from accomplishing its objectives. The safety risks endemic to prisons cannot always be resolved in 15 days. At trial, Ms. Halao testified that segregation can increase tension between an inmate and the general population, making it more dangerous for that inmate to return to the general

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[113] *Alberta v Hutterian Brethren of Wilson Colony,* 2009 SCC 37 at para 37, BOA, Tab 65.
[114] Appellant Factum at paras 63-65.

population.[115] If the CSF is to protect inmates, it must be able to use its powers under the *SIA* for the duration of reasonable safety threats.

81. Furthermore, external review at seven days would impede Parliament's ability to secure the *SIA's* objectives. The success of the SIU system requires an appreciation of complex risk factors endemic to prisons. External review in the aftermath of placement would seriously reduce the quality of this decision-making, undermining the *SIA*'s objectives.

v. The Salutary Effects of the SIU System are Proportionate the System's Deleterious Effects

82. Well-ordered institutions that are safe for inmates and staff provide an important public good. The SIU system provides a crucial tool of last resort for CSF officials to manage the safety of inmates in Flavelle's prisons. The safeguards within the *SIA* ensure that negative impacts on inmate health are only allowed when a greater safety threat exists outside of confinement. Under section 37.3(2), where conditions of confinement are observed to impact an inmate's mental health, declining to respond to these impacts is only permitted under the *SIA* after two reviewing authorities provided with recommendations from two separate health professionals accept that the reasons for maintaining confinement outweigh individual health concerns. In conclusion, any infringement of section 7 that occurs under the *SIA* is demonstrably justified in a free and democratic society.

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[115] Official Problem at para 16.

PART IV – ORDER SOUGHT

83. It is respectfully requests that the appeal not be allowed and that the *Structured Intervention Act* be declared consistent with the *Falvellian Charter of Rights and Freedoms.*

PART V – TABLE OF AUTHORITIES

D. JURISPRUDENCE

Case Authority	***Paragraph(s)***
Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37	75, 77, 78
Bacon v Surrey Pretrial Services Centre, 2010 BCSC 805	70
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 174 DLR (4th) 193 (SCC).	41
British Columbia Civil Liberties Association v Canada (Attorney General), 2018 BCSC 62.	45
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Cardinal v Kent Institution, [1985] 2 SCR 643, 24 DLR (4th) 44 (SCC).	38
Canada (Attorney General) v Bedford, 2013 SCC 72.	32
Canadian Civil Liberties Association v Canada (Attorney General), 2019 ONCA 243.	52, 53, 67
Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9.	47, 65
Bacon v Surrey Pretrial Services Centre (Warden), 2010 BCSC 805.	54
JTI Macdonald Corp v Canada (Attorney General), 2007 SCC 30.	75
Knight v Indian Head School Division No. 19, [1990] 1 SCR 653, 69 DLR (4th) 489 (SCC).	40, 41
Leblanc v Canada (Attorney General), 2006 FC 1337.	48
Maltby v Saskatchewan (Attorney General), 1982 CarswellSask 441, 143 DLR (3d) 649 (SKQB).	40
Martineau v Matsqui Institution [1980] 1 SCR 602, 106 DLR (3d) 385 (SCC).	40
May v Ferndale Institution, 2005 SCC 82.	24
McArthur v Regina Correctional Centre, 56 CCC (3d) 151, 1990 CarswellSask 227 (SKQB).	54, 55
M v H, [1999] 2 SCR 3, 171 DLR (4th) 577 (SCC).	75
New Brunswick (Minister of Health and Community Services) v G(J), 1999 3 SCR 46, 177 DLR (4th) 124.	28
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Oliver v Canada (Attorney General), 2010 ONSC 3976.	42
R v Aziga, [2008] OJ No 3052, 2008 CanLII 39222 (ONSC).	54, 66
R v Boudreault, 2018 SCC 58.	52
R v CCN, 2018 ABPC 148.	48, 75
R v Drumonde, 2019 ONSC 1005	70
R v Farrell, 2011 ONSC 2160.	48
R v Hamm, 2016 ABQB 440.	43
R v Michaud, 2015 ONCA 585.	73

E. LEGISLATION

Flavellian Charter of Rights and Freedoms,* 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.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

***Canadian Labour Code,* RSC, 1985, c L-2**

128 (1) Subject to this section, an employee may refuse to use or operate a machine or thing, to work in a place or to perform an activity, if the employee while at work has reasonable cause to believe that **(a)** the use or operation of the machine or thing constitutes a danger to the employee or to another employee; **(b)** a condition exists in the place that constitutes a danger to the employee; or **(c)** the performance of the activity constitutes a danger to the employee or to another employee.	**128 (1)** Sous réserve des autres dispositions du présent article, l'employé au travail peut refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche s'il a des motifs raisonnables de croire que, selon le cas: **(a)** l'utilisation ou le fonctionnement de la machine ou de la chose constitue un danger pour lui-même ou un autre employé; **(b)** il est dangereux pour lui de travailler dans le lieu; **(c)** l'accomplissement de la tâche constitue un danger pour lui-même

(2) An employee may not, under this section, refuse to use or operate a machine or thing, to work in a place or to perform an activity if **(a)** the refusal puts the life, health or safety of another person directly in danger; or **(b)** the danger referred to in subsection (1) is a normal condition of employment.	ou un autre employé. **(2)** L'employé ne peut invoquer le présent article pour refuser d'utiliser ou de faire fonctionner une machine ou une chose, de travailler dans un lieu ou d'accomplir une tâche lorsque, selon le cas : **(a)** son refus met directement en danger la vie, la santé ou la sécurité d'une autre personne; **(b)** le danger visé au paragraphe (1) constitue une condition normale de son emploi.

F. SECONDARY SOURCES

Source	***Paragraph(s)***
Ruth Sullivan, *Statutory Interpretation 3rd ed* (Toronto: Irwin Law, 2016).	62

Court File No: 35791

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

BETWEEN:

THE FALCONER CIVIL LIBERTIES ASSOCIATION
Appellant

and

FLAVELLE (ATTORNEY GENERAL)
Respondent

FACTUM OF THE APPELLANT

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