GRAND MOOT 2019

CORRECTIONAL SEGREGATION & THE *CHARTER*

Flavellian Civil Liberties Association v Flavelle (Attorney General)

Official Problem

Official Problem by Alysa Holmes & Su Rao

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[1] Flavelle is a parliamentary democracy with a system of government, constitution, judicial system, statute law and common law history similar to that of Canada. Falconer is a province of Flavelle.

[2] For the past decade, the use of administrative segregation in Flavellian correctional facilities has been the subject of significant social and legal debate. Under the previous Flavellian system of administrative segregation, which was administered pursuant to the *Segregation Act*, inmates could be placed in small segregation cells on the basis of various non-disciplinary grounds, including the safety of staff and inmates and the security of the institution.

[3] In late 2017, the Supreme Court of Flavelle, the highest court in the land, declared Flavelle's system of administrative segregation in correctional facilities to be unconstitutional under the *Flavellian Charter of Rights and Freedoms* [the "*Charter*"].[1] Specifically, the Court found that the previous system of segregation under the *Segregation Act* was unconstitutional as it infringed section 7 of the *Charter* in a manner which could not be justified under section 1.

[4] The Supreme Court of Flavelle considered many factors in reaching its finding that the previous system had infringed section 7. Pursuant to the *Segregation Act*, inmates placed in administrative segregation could be confined to their small cells for a maximum of 22 hours per day with minimal opportunity for human interaction. Unlike the strict 30-day limit governing the parallel system of disciplinary segregation, inmates detained in administrative segregation could be held there indefinitely, as long as they were released at the earliest appropriate time. While an inmate's continued placement in administrative segregation was subject to various internal review procedures, this system provided no opportunity for external review.

[5] In response to this ruling, the Flavellian Parliament passed new legislation entitled the *Structured Intervention Act* [the "*SIA*"], which replaces the previous system of administrative and disciplinary segregation with a new system of Structured Intervention Units ["SIUs"].

[1] The *Flavellian Charter of Rights and Freedoms* is identical in structure and analysis to the *Canadian Charter of Rights and Freedoms*.

This new legislation came into force on January 1st, 2018, and replaces the *Segregation Act* in its entirety.

[6] In enacting this legislation, the Minister of Public Safety, Ms. Mano, stated that the purpose of the *SIA* is to increase safety for correctional workers and increase safety for offenders inside and outside of segregation. Ms. Mano noted that the government has invested $300 million to replace current administrative segregation facilities with SIUs and has earmarked an annual budget of roughly $58 million to staff them. The total Flavellian budget for all correctional services is $2.5 billion.

[7] Pursuant to the *SIA*, correctional facilities in Flavelle may separate inmates from the general institutional population on the basis of the following criteria:

> **Transfer to unit**
>
> **34(1)** A staff member may authorize the transfer of an inmate into a structured intervention unit only if the staff member is satisfied that there is no reasonable alternative to the inmate's confinement in a structured intervention unit and the staff member believes on reasonable grounds that
>
> (a) The inmate has acted, has attempted to act or intends to act in a manner that 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 the safety of any person or the security of the penitentiary;
>
> (b) allowing the inmate to be in the mainstream inmate population would jeopardize the inmate's safety; or
>
> (c) allowing the inmate to be in the mainstream inmate population would interfere with an investigation that could lead to a criminal charge or a charge of a serious disciplinary offence.

[8] In presenting the *SIA*, Minister Mano stated "while 34(a) and 34(b) of the *SIA* work to preserve the safety of our institutions, 34(c) works to ensure the integrity of the justice system. As an example, 34(c) can be used to separate multiple witnesses from each other or separate victims from the accused. This works to prevent witness tampering and decreases risks to ongoing investigations".

[9] While confined in an SIU, inmates are placed in small sparsely furnished cells, each containing a single small window. Although a transfer into an SIU involves removing the inmate from general population, this transfer does not involve a further limitation of the inmate's rights, except where provided by the *SIA*. Pursuant to the *SIA*:

> **Inmates' Rights**
>
> **35** An inmate in a structured intervention unit has the same rights as other inmates, except for those that cannot be exercised due to limitations specific to the structured intervention unit or security requirements.

[10] Under this new legislation, inmates placed in SIUs are entitled to a minimum of four (4) hours outside their cell, not including the inmate's shower time; a minimum of two (2) of these hours must be allotted to provide inmates with the opportunity to interact with others. Nevertheless, compliance with these minimum requirements is subject to a number of exceptions, including where the inmate refuses the opportunity or does not comply with reasonable instructions to ensure safety.

> **Obligations of Service**
>
> **36(1)** The Service shall, every day, between the hours of 7:00 a.m. and 10:00 p.m., provide an inmate in a structured intervention unit
>
> (a) an opportunity to spend a minimum of four hours outside the inmate's cell; and
>
> (b) an opportunity to interact, for a minimum of two hours, with others, through activities including, but not limited to,
>
> (i) programs, interventions and services that encourage the inmate to make progress towards the objectives of their correctional plan or that support the inmate's reintegration into the mainstream inmate population, and
>
> (ii) leisure time.

Exceptions

37(1) Paragraph 36(1)(a) or (b), as the case may be, does not apply

(a) if the inmate refuses to avail themselves of the opportunity referred to in that paragraph;

(b) if the inmate, at the time the opportunity referred to in that paragraph is provided to them, does not comply with reasonable instructions to ensure their safety or that of any other person or the security of the penitentiary; or

(c) in the prescribed circumstances, which circumstances may include, among other things, natural disasters, fires, riots and work refusals under section 128 of the *Canada Labour Code*, and those circumstances must be limited to what is reasonably required for security purposes.

[11] While there is no hard limit to how long inmates may be confined in an SIU, the decision to maintain an inmate in an SIU is subject to a system of regular review. The review to determine if an inmate should remain in an SIU is based on the criteria articulated in 37.41 of the *SIA*, which is excerpted below. In determining the safety of an inmate, the decisionmaker has the discretion to consider the inmates' mental and physical health.

Grounds

37.41(1) The institutional head, the Commissioner or the committee may determine that an inmate should remain in a structured intervention unit only if they believe on reasonable grounds that allowing the inmate's reintegration into the mainstream inmate population

(a) would jeopardize the safety of the inmate or any other person or the security of the penitentiary; or

(b) would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence.

Factors

(2) In making the determination, the institutional head, the Commissioner or the committee, as the case may be, shall take into account

(a) the inmate's correctional plan;

(b) the appropriateness of the inmate's confinement in the penitentiary;

(c) the appropriateness of the inmate's security classification; and

(d) any other consideration that he or she considers relevant.

Appointment of independent external decision-maker

37.6(1) The Minister shall appoint one or more persons to be independent external decision-makers.

Eligibility

(2) To be eligible for appointment as an independent external decision-maker, a person must have knowledge of administrative decision-making processes in general. A person is not eligible for appointment as an independent external decision-maker if the person was, at any time, in the previous five years a staff member or appointed under subsection 6(1).

[12] An inmates' placement in an SIU must be internally reviewed by the Flavellian Correctional Service within five (5) working days of the initial placement, and every thirty (30) days thereafter, in addition to a review of the placement decision by the Commissioner of Corrections sixty (60) days after the inmate's initial placement in an SIU. If the inmate is not moved back into general population within thirty (30) days of the Commissioner's review, the inmate's continued placement in an SIU is subject to an external review by an independent decision-maker. This decision is binding.

[13] The *SIA* also provides various safeguards to address concerns about the mental health of inmates placed in SIUs. Primarily, the *SIA* stipulates that inmates confined in an SIU must receive daily visits by correctional staff or other persons engaged by the Service. While these daily visits are intended to assist in the ongoing monitoring of the health of inmates confined in an SIU, the *SIA* does not require these daily visits to be performed by a healthcare professional.

Ongoing monitoring

37.1(1) The Service shall ensure that measures are taken to provide for the ongoing monitoring of the health of inmates in a structured intervention unit.

Mental health assessment and daily visits

(2) The Service shall ensure that the measures include

(a) a referral of the inmate's case, within 24 hours after the inmate's transfer into the structured intervention unit, to the portion of the Service that administers health care for the purpose of conducting a mental health assessment of the inmate; and

(b) a visit to the inmate at least once every day by a staff member or a person engaged by the Service.

Mental health assessment

37.11 If a staff member or a person engaged by the Service believes that the confinement of an inmate in a structured intervention unit is having detrimental impacts on the inmate's health, the staff member or person shall refer, in the prescribed manner, the inmate's case to the portion of the Service that administers health care. Grounds for the belief include the inmate

(a) refusing to interact with others;

(b) engaging in self-injurious behaviour;

(c) showing symptoms of a drug overdose; and

(d) showing signs of emotional distress or exhibiting behaviour that suggests that they are in urgent need of mental health care.

Recommendations to institutional head

37.2 A registered health care professional employed or engaged by the Service may, for health reasons, recommend to the institutional head that the conditions of confinement of the inmate in a structured intervention unit be altered or that the inmate not remain in the unit.

Conditions of confinement

37.3(2) As soon as practicable after the registered health care professional referred to in section 37.2 has recommended, for health reasons, that the inmate not remain in the unit, or that the conditions of confinement be altered, the institutional head shall determine if the inmate should remain in the unit, or if the inmate's conditions of confinement in the unit should be altered.

37.3(6) If the institutional head determines that an inmate should remain in the structured intervention unit, or that the inmate's conditions of confinement in the unit should not be altered, a committee established by the Commissioner and consisting of staff members who hold a position higher in rank than that of institutional head shall determine if the inmate should remain in the unit or if the inmate's conditions of confinement in the unit should be altered. The decision of the Committee shall be based on the recommendations of a registered health care professional different than the one relied upon under 37.3(2).

[14] The Flavellian Civil Liberties Association [the "FCLA"] is a non-profit advocacy group operating in the province of Falconer. The FCLA has challenged the constitutionality of the *SIA* on the basis that it is in breach of sections 7 and 12 of the *Charter*. There is no individual plaintiff involved in this case, and the *SIA* has not been the subject of any previous constitutional challenges.

Expert Report

[15] At trial, the FCLA called Dr. A.R. Smith, a psychiatrist and a leading researcher on the psychological impact of solitary confinement on inmates, as an expert witness. Dr. Smith is the author of "Isolated Incidents", a comprehensive report on the use and effects of solitary confinement in Flavelle. This report, which Dr. Smith presented at trial, places particular emphasis on the negative effects of prolonged solitary confinement. The key parts of this report are excerpted below.

Isolated Incidents*: *A Report on the Effects of Solitary Confinement in Flavelle
By Dr. A.R. Smith

[16] Despite the Correctional Service of Flavelle's [the "CSF"] official stance that Flavelle has never employed 'solitary confinement' in its institutions, the isolation of inmates in highly restrictive conditions for extended periods of time has been common practice in Flavelle for decades. Under Flavelle's former system of administrative and disciplinary segregation, inmates could be confined in small cells for upwards of 22 hours per day, with minimal opportunity for human interaction. According to the international standards set by the Mandela Rules, solitary confinement, defined as confinement for 22 hours or more per day without meaningful human contact, amounts to torture where it is prolonged or indefinite. A detention in solitary confinement is considered prolonged where it lasts longer than 15 consecutive days. While, to the extent that it authorizes prolonged solitary confinement, Flavelle's system of administrative and disciplinary segregation places inmates at an increased risk of harm, these risks are further exacerbated by the culture of non-compliance with legislative guidelines and disregard for procedural fairness that exists within the CSF. This culture of non-compliance was observed to varying extents across all correctional facilities included in the sample.

Findings

This report arises out of a 5-year study (2013-2017) examining both the immediate and long-term psychological and physical impacts on Flavellian inmates detained in solitary confinement for upwards of 22 hours per day, which produced the following results:

a) Detention in solitary confinement has serious adverse health effects on inmates and results in a higher rate of psychiatric and psychological health problems than detention in general population. Solitary confinement can change brain activity and result in symptomatology within seven days.

b) Between one-third and 90% of inmates experience some negative impacts of prolonged solitary confinement. This range represents the wide variance in experiences across different institutions.

c) Inmates who have been detained in solitary confinement may develop a range of symptoms, including increased sensitivity to stimuli, panic attacks, paranoia, memory loss, and impulsiveness. Empirical studies have identified a wide range of frequently occurring adverse psychological reactions to solitary confinement, including: stress-related reactions (such as decreased appetite, trembling hands, sweating palms, heart palpitations, and a sense of impending emotional breakdown); sleep disturbances (including nightmares and sleeplessness); heightened levels of anxiety and panic; irritability, aggression, and rage; paranoia, ruminations, and violent fantasies; cognitive dysfunction, hypersensitivity to stimuli, and visual and auditory hallucinations; decreased emotional control, mood swings, lethargy, flattened affect, and depression; increased suicidality and instances of self-harm.

d) Many of the quantifiable effects of segregation also occur in inmates incarcerated in general population.

e) Detention in solitary confinement not only exacerbates symptoms in inmates with pre-existing mental illnesses, but may also cause psychological symptoms to occur in otherwise healthy inmates.

f) Prisoners are often not forthcoming about their mental health due to a mistrust of correctional services staff and administration.

g) The effects of solitary confinement may be long-term or permanent in those who are confined in these conditions for prolonged periods of time, particularly if they are young or have pre-existing mental health conditions.

h) The majority of self-injurious incidents occur in the most isolated areas of the prison, namely, solitary confinement, observation and clinical seclusion cells.

i) Inmates in administrative segregation are two times more likely than other inmates to have a previous history of self-injury and attempted suicide, and 31% more likely than other inmates to have a pre-existing mental health issue.

j) While the legislation in effect at the time of the study (the *Segregation Act*) required mental health monitoring, this was not adequately done. The daily required visits by health care professionals were perfunctory, non-private, and often done through the food slot of the cell door.

k) The procedural safeguards outlined in the previous scheme of administrative segregation were not always adequately implemented. In particular, inmates could be placed in administrative indefinitely, awaiting a transfer to another facility. This would happen because an inmate's placement in administrative segregation often creates tension or conflict between that individual and the other inmates in general population. As a result, inmates confined in administrative segregation are at an increased risk of inter-inmate conflict, including a heightened risk of assault, upon release back into the general population. As a result of this increased vulnerability, inmates confined in administrative segregation are usually only released if they can be transferred to another institution. Since the wait-time for a transfer to be approved is significant, inmates may languish in segregation for months while waiting for a transfer.

l) The experience of disciplinary segregation does not reduce subsequent prison inmate misconduct, which suggests that it may not be an effective institutional practice.

m) This study was done on a sample of inmates who were confined for 22 hours per day. The current legislation allows individuals four hours of social interaction each day, which is roughly equivalent to the amount of personal time the average non-incarcerated individual has on a day of work.

n) Many of the individuals who experienced self-harm and higher rates of violence after segregation were predisposed to such behaviour regardless. Many of the inmates confined in administrative segregation are placed there because they are at risk to others or to themselves.

o) In 2017, roughly 7% of all inmates in Falconer were detained in either administrative or disciplinary segregation. The majority of inmates placed in administrative segregation were voluntarily admitted.

p) Between 2014-2015, 25% of all male inmates and 4% of all female inmates in general population had been voluntarily admitted into administrative segregation for their own safety at some point during their current period of incarceration.

q) Segregation carries with it increased costs to the system. An offender in minimum security costs about $130 per day, an offender in medium security costs about $206 per day, and an offender in maximum security costs about $254 daily. The cost of detaining an offender in segregation is between $891-$1,775 per day.

r) During the course of the study, 33% of inmates detained in general population were threatened with assault by other inmates. 17.6% of inmates stated that they had been repeatedly threatened by other inmates.

s) During the study, 20% of inmates detained in general population reported being physically assaulted by other inmates. 9% of inmates reported repeated assaults by other inmates.

t) During the course of the study, many inmates who had requested and been denied placement in administrative segregation were also victims of assault and threats. 53% of inmates who had requested placement in administrative segregation and been denied by prison administrators subsequently experienced a physical assault; 64% of such inmates subsequently experienced threats.

Witness Testimony

[17] At trial, the FCLA brought forward a former Flavelle Correctional Services Officer, Ms. S. Holao. Ms. S. Holao had been a Correctional Services Officer for 10 years, ultimately leaving that job a month prior to the enactment of the *SIA*. She gave extensive testimony at trial, some of which is excerpted below:

[18] "Yes, we knew there were some rules about how long someone could stay in administrative segregation. Of course, inmates couldn't be held there too long. But you know, once someone got put in administrative segregation it got hard to bring them back out. It wasn't that we were trying to keep them there, it was just hard to put them back into general population. Often, if an inmate was in administrative segregation, even if it wasn't voluntary, the other inmates would see it as a reason to attack that inmate. Since it wouldn't be safe to put the inmate back into general population with a high risk of being attacked, we would try to transfer them. [...]"

[19] "Transferring someone to another correctional facility is hard and takes so much time. We often didn't know how long it would take. Resultantly, an inmate in administrative segregation could be there indefinitely, until they were transferred to another institution. [...]"

[20] "It was difficult to watch how some of the inmates were treated. When I first started, I didn't fully understand what rights they had and what the process was legally supposed to be. I only knew what I saw. It was only when I was there longer that I realized what was going wrong. [...]"

[21] "In particular, we would rarely do proper mental health checks on the inmates. They were supposed to be checked on regularly by a mental health professional. To me, I thought that would mean someone would actually talk to them. Nope. If they were in segregation, we would often just do everything through the food slot. The mental health worker would tap the door and ask them how they are through the food slot. The inmate would give a one word answer usually, "Good" or "I'm fine". Then that would be it. That was it for the mental health check. They wouldn't even see their face. Wouldn't even look them in the eye. [...]"

[22] “So they would just be alone. If they were in school, we might slip their class work through the food slot. But they wouldn’t really be able to ask the teacher follow up questions about it. If there was any type of programming for the other inmates, there was no real way for us to deliver this to someone in segregation. So those in general population might have some session on parenting skills or an employment program, but there was no substitute if you were in segregation. [...]”

Judicial History

[23] At trial, Justice Shek found that the FCLA was well positioned to make this claim and had public interest standing to pursue it. The issue of FCLA’s public interest standing was not appealed by the government and is not an issue on appeal before the Supreme Court of Flavelle.

[24] At trial, Shek J accepted Dr. Smith and Ms. Holao’s evidence and ultimately found that the legislation infringed both section 7 and section 12 of the Flavellian *Charter* in a manner that could not be justified under section 1.

[25] With respect to section 12, Shek J found that the structure of the SIUs constitutes cruel and unusual punishment. Shek J stated that “despite the limits on confinement provided in section 36(1)” of the *SIA* and “the existence of both an internal and external process of review”, the exceptions outlined in section 37(1) of the *SIA* “create the possibility” that an inmate placed in an SIU may be subjected to conditions of prolonged solitary confinement. While Shek J acknowledged that this was a “mere possibility” and would not occur in every application of the legislation, she ultimately held that “this potential [is] sufficient to establish a breach of section 12 of the *Charter*”. According to Shek J, “it outrages the standards of decency that an inmate could be placed in an SIU for their own safety, but still be treated in an inhumane manner where they are deprived of control over human interactions”. As well, she determined that the circumstances of confinement in an SIU were “grossly disproportionate” because they place vulnerable inmates, many of whom already have a history of mental illness and self-harm, in “a position where they are likely to

experience highly exacerbated mental stress and instances of self-harm". Thus, Shek J found that section 12 was infringed.

[26] With respect to section 7, Shek J held that the structure of the SIUs also engages inmates' liberty and security of the person interests. Shek J stated that the liberty interest was engaged as "inmates can be placed in these units without their consent and they cannot choose to leave the SIU when they would like". The security of the person interest was engaged due to the harms that Dr. A.R. Smith detailed in his report. Per Shek J, the seriousness of the psychological and physical harms of being in segregation were "significant and had a rapid onset". While Shek J noted the "government [was] moving in the right direction" by granting inmates confined in an SIU four hours of human interaction, it would "not be sufficient" to overcome the harms from the 20 hours of complete isolation they would experience in a day.

[27] Shek J found that the new system of SIUs interferes with inmates' liberty and security of the person interests under section 7 in a manner that does not accord with the principles of fundamental justice. While Shek J found that the purpose of the *SIA* was to increase inmate safety, she found that the legislation did not address the fact that inmates placed in SIUs could be held there indefinitely while they waited for a transfer to another correctional facility. Shek J found the legislation to be overbroad, as inmates who continued to be confined in SIUs while simply waiting for a transfer were "not being held to further inmate safety", but rather due to systemic delays and a lack of resources.

[28] Per Shek J, infringements of sections 7 and 12 of the *Charter* are "very serious and cannot be easily justified by section 1". Given the seriousness of infringements of such rights, Shek J stated that "no legislation which infringes sections 7 or 12 could ever be found to be minimally impairing". As a result, the infringements were not upheld under section 1.

[29] Having found the above *Charter* violations, Shek J held that the appropriate remedy was to impose a 15-day limit on inmates' placements in an SIU.

[30] The decision of Shek J was appealed by the Flavellian government and heard by a three-judge panel at the Falconer Court of Appeal. Wang JA, writing for the majority, found that

even without a 15-day limit the *SIA* did not infringe either section 7 or section 12, and even so, any infringement could be justified under section 1 of the Flavellian *Charter*.

[31] Conversely, Tsui JA upheld Shek J's decision on section 7 and section 1, but found there was no section 12 infringement present.

[32] Wang JA and the majority of the court agreed with Tsui JA's dissenting opinion, and held that the *SIA* did not infringe section 12. However, with respect to section 7, the majority held that while placement in an SIU engaged inmates' liberty interests, they were engaged in a manner consistent with the principles of fundamental justice. Per Wang JA, inmates' liberty interests were engaged because "they were not always voluntarily placed in an SIU". However, per Wang JA, this accorded with the principles of fundamental justice because "having regard to the nature of the circumstances, 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".

[33] Wang JA held that even if a section 7 infringement was found, "the government is owed a great deal of deference throughout the section 1 analysis". He noted that this was an instance where the government had a difficult role of managing correctional services throughout Flavelle. Per Wang JA, "this role places the government in a complex policy role in which it must balance the interests of public safety, the interests of offender safety, and the process of justice". Wang JA noted that "such a case had been contemplated by the Supreme Court of Canada in *Carter v Canada*, which state[d] that "public good" could provide a section 1 justification for a section 7 infringement".[2] In this case, Wang JA found that there was "significant public good" flowing from preserving the safety of inmates and preventing interference with ongoing investigations. It would be "detrimental to the public good" if the courts interfered with the government's attempts to invest in creating safer prisons. Although some inmates may be confined in an SIU longer than they would choose to remain, releasing

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[2] *Carter v Canada*, 2015 SCC 5, 1 SCR 331 at para 95: "However, in some situations the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the Charter. More particularly, in cases such as this where the competing societal interests are themselves protected under the Charter, a restriction on s. 7 rights may in the end be found to be proportionate to its objective".

these inmates back into the general population before it is safe poses a significant risk to the safety of staff, inmates, and the institution. Given the complexity of this situation, Wang JA found that by enacting the *SIA* the government had provided a “proportionate and reasonable legislative response which prioritizes inmate safety”. Resultantly, Wang JA ultimately upheld any section 7 infringement under section 1.

[34] Tsui JA dissented in part and found that the legislation infringed section 7. Tsui JA upheld the reasoning of Shek J with respect to inmates’ liberty and security of the person being deprived in a manner which is overbroad in relation to the stated purpose of the law.

[35] However, Tsui JA did not consider this to be cruel and unusual punishment within the meaning of section 12. She noted that the threshold for cruel and unusual punishment is “high and context-specific”. Per Tsui JA, in the current context, SIUs “do not outrage standards of decency nor are they intolerable to society”. Given that section 7 was infringed, Tsui JA held that the infringement could not be justified under section 1. Tsui JA recognized that “while the legislative scheme [did] improve upon the previous one, it [did] not go far enough”. Tsui JA noted that “it was commendable that the Flavelle government was being responsive and investing significant public resources into reforming segregation”. However, she ultimately held that “the *SIA* is not minimally impairing in its current form, as it deprives inmates of their liberty and security of the person in a manner that seriously impairs their fundamental rights”. As a result, she would have held that the section 7 infringement could not be justified by section 1.

[36] Following the decision by the Falconer Court of Appeal, the FCLA appealed the decision to the Supreme Court of Flavelle. This is the highest court in the land of Flavelle, whose decisions are binding on all other Flavellian courts. Leave to appeal was granted on the following legal issues:

1. Does the *Structured Intervention Act* infringe section 7 of the *Charter*?
2. Does the *Structured Intervention Act* infringe section 12 of the *Charter*?
3. If yes, can either of these infringements be justified under section 1 of the *Charter*?

Appendix I: Definitions & Terminology

For the purposes of this problem:

"administrative segregation" refers to the previous non-disciplinary system of segregation in Flavellian correctional facilities which was governed by the *Segregation Act*. Pursuant to this legislation, inmates may be confined in small cells for a maximum of 22 hours per day with minimal opportunity for human interaction. Inmates may be placed in administrative segregation on the basis of various non-disciplinary grounds, including the safety of staff and inmates and the security of the institution.

"correctional plan" refers to a document that outlines a risk management strategy for each inmate, specifying the required interventions and monitoring techniques required to address areas associated with the inmate's risk to re-offend. The plan usually involves certain restrictions on movement and actions, as well as commitments to participate in constructive activities such as jobs and programs. Since each inmate has different needs and problems, each plan is different.

"disciplinary segregation" refers to the previous disciplinary system of segregation in Flavellian correctional facilities which was governed by the *Segregation Act*. Pursuant to this legislation, inmates may be confined in small cells for a maximum of 22 hours per day with minimal opportunity for human interaction. Inmates may be placed in disciplinary segregation on the basis of various disciplinary offences, including, *inter alia.*, disobeying a justifiable order of a staff member, wilful or reckless damage or destruction of property that is not the inmate's, and theft.

"prolonged" refers to a period of confinement lasting in excess of 15 consecutive days.

"segregation" refers to both administrative and disciplinary segregation.

"solitary confinement" means confinement in restrictive conditions for 22 hours per day or more with minimal opportunity for human interaction.

Appendix II: Relevant Provisions of the *Structured Intervention Act*

Transfer to unit

34(1) A staff member may authorize the transfer of an inmate into a structured intervention unit only if the staff member is satisfied that there is no reasonable alternative to the inmate's confinement in a structured intervention unit and the staff member believes on reasonable grounds that

(a) The inmate has acted, has attempted to act or intends to act in a manner that 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 the safety of any person or the security of the penitentiary;

(b) allowing the inmate to be in the mainstream inmate population would jeopardize the inmate's safety; or

(c) allowing the inmate to be in the mainstream inmate population would interfere with an investigation that could lead to a criminal charge or a charge of a serious disciplinary offence.

Inmates' Rights

35 An inmate in a structured intervention unit has the same rights as other inmates, except for those that cannot be exercised due to limitations specific to the structured intervention unit or security requirements.

Obligations of Service

36(1) The Service shall, every day, between the hours of 7:00 a.m. and 10:00 p.m., provide an inmate in a structured intervention unit

(a) an opportunity to spend a minimum of four hours outside the inmate's cell; and

(b) an opportunity to interact, for a minimum of two hours, with others, through activities including, but not limited to,

(i) programs, interventions and services that encourage the inmate to make progress towards the objectives of their correctional plan or that support the inmate's reintegration into the mainstream inmate population, and

(ii) leisure time.

Exceptions

37(1) Paragraph 36(1)(a) or (b), as the case may be, does not apply

(a) if the inmate refuses to avail themselves of the opportunity referred to in that paragraph;

(b) if the inmate, at the time the opportunity referred to in that paragraph is provided to them, does not comply with reasonable instructions to ensure their safety or that of any other person or the security of the penitentiary; or

(c) in the prescribed circumstances, which circumstances may include, among other things, natural disasters, fires, riots and work refusals under section 128 of the *Canada Labour Code*, and those circumstances must be limited to what is reasonably required for security purposes.

Grounds

37.41(1) The institutional head, the Commissioner or the committee may determine that an inmate should remain in a structured intervention unit only if they believe on reasonable grounds that allowing the inmate's reintegration into the mainstream inmate population

(a) would jeopardize the safety of the inmate or any other person or the security of the penitentiary; or

(b) would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence.

Factors

(2) In making the determination, the institutional head, the Commissioner or the committee, as the case may be, shall take into account

(a) the inmate's correctional plan;

(b) the appropriateness of the inmate's confinement in the penitentiary;

(c) the appropriateness of the inmate's security classification; and

(d) any other consideration that he or she considers relevant.

Appointment of independent external decision-maker

37.6(1) The Minister shall appoint one or more persons to be independent external decision-makers.

Eligibility

(2) To be eligible for appointment as an independent external decision-maker, a person must have knowledge of administrative decision-making processes in general. A person is not eligible for appointment as an independent external decision-maker if the person was, at any time, in the previous five years a staff member or appointed under subsection 6(1).

Ongoing monitoring

37.1(1) The Service shall ensure that measures are taken to provide for the ongoing monitoring of the health of inmates in a structured intervention unit.

Mental health assessment and daily visits

(2) The Service shall ensure that the measures include

(a) a referral of the inmate's case, within 24 hours after the inmate's transfer into the structured intervention unit, to the portion of the Service that administers health care for the purpose of conducting a mental health assessment of the inmate; and

(b) a visit to the inmate at least once every day by a staff member or a person engaged by the Service.

Mental health assessment

37.11 If a staff member or a person engaged by the Service believes that the confinement of an inmate in a structured intervention unit is having detrimental impacts on the inmate's health, the staff member or person shall refer, in the prescribed manner, the inmate's case to the portion of the Service that administers health care. Grounds for the belief include the inmate

(a) refusing to interact with others;

(b) engaging in self-injurious behaviour;

(c) showing symptoms of a drug overdose; and

(d) showing signs of emotional distress or exhibiting behaviour that suggests that they are in urgent need of mental health care.

Recommendations to institutional head

37.2 A registered health care professional employed or engaged by the Service may, for health reasons, recommend to the institutional head that the conditions of confinement of the inmate in a structured intervention unit be altered or that the inmate not remain in the unit.

Conditions of confinement

37.3(2) As soon as practicable after the registered health care professional referred to in section 37.2 has recommended, for health reasons, that the inmate not remain in the unit, or that the conditions of confinement be altered, the institutional head shall determine if the inmate should remain in the unit, or if the inmate's conditions of confinement in the unit should be altered.

37.3(6) If the institutional head determines that an inmate should remain in the structured intervention unit, or that the inmate's conditions of confinement in the unit should not be altered, a committee established by the Commissioner and consisting of staff members who hold a position higher in rank than that of institutional head shall determine if the inmate should remain in the unit or if the inmate's conditions of confinement in the unit should be altered. The decision of the Committee shall be based on the recommendations of a registered health care professional different than the one relied upon under 37.3(2).