CITATION: Francis v. Ontario, 2020 ONSC 1644
COURT FILE NO.: CV-18-591719CP
DATE: 2020/04/20

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
CONREY FRANCIS Plaintiff	)	*James Sayce, Charles Hatt* and *Nathalie Gondek* for the Plaintiff
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO Defendant	)	*Victoria Yankou, Alexandra Clark, Tanya Jemec, Andrea Bolieiro,* and *Hera Evans* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: January 20-24, 2020

PERELL, J.

REASONS FOR DECISION

> People are imprisoned for years without trial, ...: this is called *elimination of unreliable elements*. Such phraseology is needed if one wants to name things without calling up mental pictures of them.
> G.W. Orwell, *Politics and the English Language.*[1]

A. Introduction 3
B. Evidentiary Record 8
1. Testimonial and Documentary Evidence 8
2. The Admissibility of the Evidence of Ms. Cusack, Mr. Davidson, Ms. Ebel, Mr. Francis, and Mr. Mohamed 13
3. The Hearsay Exception for Public Documents 14
4. The Interim and Final Reports of Professor Hannah-Moffat 15
5. The Role of *Stare Decisis* in the Immediate Case 18
C. Is the Case Suitable for Summary Judgment? 18

[1] See G.W. Orwell, "Politics and the English Language" in *The Penguin Essays of George Orwell* (Penguin Books: Middlesex, England, 1968).

D. The History of Solitary Confinement 22
1. A Survey History and Historiography of Solitary Confinement and Administrative Segregation up until the Commencement of the Class Period (April 20, 2015) 22
2. The History of Administrative Segregation in Ontario after April 20, 2015 31
E. Legal History of Administrative Segregation Jurisprudence 36
F. Ontario's Correctional Institutions 45
1. *The Ministry of Correctional Services Act* 45
2. The Regulatory Scheme and Policy in Ontario for Administrative Segregation 51
(a) *Ontario Regulation* 778 51
(b) Ministry Policy Documents 54
3. Inmate Demographics 57
4. The Circumstances of Administrative Segregation 58
5. The Inmates' Evidence 59
(a) Mr. Davidson 59
(b) Ms. Ebel 59
(c) Mr. Francis 59
(d) Mr. Mohamed 60
(e) Ms. Cusack's Evidence 61
6. Administrative Segregation Placements in Practice 61
7. The Expert Evidence on Administrative Segregation 62
(a) Dr. Austin (plaintiff witness) 63
(b) Dr. Coyle (plaintiff witness) 64
(c) Dr. Chaimowitz (plaintiff witness) 65
(d) Dr. Dvoskin (defence witness) 66
(e) Dr. Grassian (plaintiff witness) 67
(f) Dr. Haney (plaintiff witness) 68
(g) Dr. Labrecque (defence witness) 69
(h) Dr. Morgan (defence witness) 69
G. Major Findings of Fact 70
H. The Limitation Period 73
I. The Request to Amend the Class Period and Extend the Class Definition 75
J. Has Ontario Contravened Sections 7 and 12 of the *Charter?* 76
1. The Section 7 (Right to Life, Liberty, and Security of the Person) – Substantive Claim 76
2. The Section 7 (Right to Life, Liberty, and Security of the Person) – Due Process Claim 81
3. The Section 12 of the *Charter* (Cruel and Unusual Treatment) Claim 83
K. Section 1 of the *Charter* 85
L. The *Proceedings Against the Crown Act* and the *Crown Liability and Proceedings Act, 2019* 87
M. Is Ontario Liable for Negligence? 88
1. Introduction and Overview of Ontario's Arguments 88

2. Duty of Care Analysis for Public Authorities: General Principles 94
3. Proximity and Sources of a Duty of Care 96
4. The Scope of Liability for Policy Decisions 98
5. The Court of Appeal's Decision in *Reddock v. Canada (Attorney General)*, ... 107
6. Residual Policy Factors Negating a Duty of Care 110
7. Systemic Negligence 111
8. Duty of Care Conclusion 114
9. Are the Class Members' Negligence Claims Precluded by s. 5 of the Former *Proceedings Against the Crown Act?* 115
10. Are the Class Members' Negligence Claims Precluded by s. 11 of the *Crown Liability and Proceedings Act, 2019?* 117
11. Standard of Care Analysis. 122
12. Causation and Class-Wide Damages for Negligence 125
N. Remedies 125
1. Introduction 125
2. Sections 24 and 52 of the *Charter* and the Availability of *Charter* Damages 126
(a) General Principles 126
(b) The Availability of *Charter* Damages in the Immediate Case: Part One 134
(c) The Availability of *Charter* Damages in the Immediate Case: Part Two 138
(d) Quantification of *Charter* Damages 140
(e) The Interrelationship between Common Law Damages and *Charter* Damages 143
3. Aggregate Damages 144
4. Punitive Damages 146
O. Conclusion 148

A. Introduction

[1]. If one wants to name things without calling up mental pictures of them, call a prison a correctional institution. Pursuant to the *Ministry of Correctional Services Act*[2] and *Ont. Reg. 778*[3], the Defendant Her Majesty the Queen in Right of Ontario ("Ontario") operates correctional institutions across the province. Ontario's civil servants who operate the prisons use administrative segregation. If one wants to name things without calling up mental pictures of them administrative segregation is solitary confinement. It is a dungeon inside a prison.

[2]. This is a summary judgment motion in this certified class action under the *Class*

[2] R.S.O. 1990, c. M.22.
[3] R.R.O 1990, 778 (*General made under the Ministry of Correctional Services Act*).

Proceedings Act, 1992[4]. The Class Members are prisoners of the correctional institutions. The Class Members allege that they were and are the victims of negligence and contraventions of the *Canadian Charter of Rights and Freedoms*.[5]

[3]. The Plaintiff, Conrey Francis, was an inmate of the Toronto South Detention Centre. He was placed in administrative segregation. In his certified class action,[6] Mr. Francis alleges that Ontario was negligent and that Ontario breached his and other inmates' rights under sections 7 and 12 of the *Charter*. Mr. Francis and the Class Members seek common law damages and so-called *Charter* damages pursuant to section 24 of the *Charter.*

[4]. The Class Members are two partially overlapping subsets of the universal set of inmates at the correctional institutions. More precisely, the Class Members are: (a) inmates who had a serious mental illness and were placed in administrative segregation for any period of days (the "SMI Inmates"); and, or, (b) inmates who were placed in administrative segregation for 15 or more days (the "Prolonged Inmates"). Thus, the class is defined as follows:[7]

> All current and former inmates, who were alive as of April 20, 2015:
>
> **I. Inmates with a Serious Mental Illness**
>
> (a) who were subjected to Administrative Segregation for any length of time at one of the Correctional Institutions between January 1, 2009 and the date of certification;
>
> (b) who were diagnosed by a medical doctor before or during their incarceration with at least one of the following disorders, as defined in the relevant Diagnostic and Statistics Manual of Mental Disorders ("DSM"):
>
> > Schizophrenia (all sub-types), Delusional disorder, Schizophreniform disorder, Schizoaffective disorder, Brief psychotic disorder, Substance-induced psychotic disorder (excluding intoxications and withdrawal), Psychotic disorder not otherwise specified, Major depressive disorders, Bipolar disorder I, Bipolar disorder II, Neurocognitive disorders and/or Delirium, Dementia and Amnestic and Other Cognitive Disorders, Post-Traumatic Stress Disorder; Obsessive Compulsive Disorder; or Borderline Personality Disorder;
>
> and who suffered from their disorder, in a manner described in Appendix "A", and,
>
> (c) who reported such diagnosis and suffering to the Defendant's agents before or during their Administrative Segregation (the "SMI Inmates");
>
> or,
>
> **II. Inmates in Prolonged Administrative Segregation**
>
> who were subjected to Administrative Segregation for 15 or more consecutive days ("Prolonged Administrative Segregation") at one of the Correctional Institutions between January 1, 2009 and the date of certification (the "Prolonged Inmates")

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[4] S.O. 1992, c. 6.
[5] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
[6] *Francis v. Ontario*, 2018 ONSC 5430.
[7] The class definition is modelled after but is not precisely the same as the class definitions in *Brazeau v. Attorney General (Canada)* 2019 ONSC 1888 varied 2020 ONCA 184 and *Reddock v. Canada (Attorney General)* 2019 ONSC 5053, varied 2020 ONCA 184.

(together the "Class Members").

"Correctional Institutions" are correctional institutions as defined in the *Ministry of Correctional Services Act,* R.S.O. 1990, c. M.22, excluding the St. Lawrence Valley Correctional and Treatment Centre.

"Inmates" are inmates as defined in the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22.

"Administrative Segregation" refers to segregation as outlined in section 34 of Regulation 778, R.R.O. 1990 under *Ministry of Correctional Services Act,* R.S.O. 1990, c. M.22.

Appendix "A" states as follows:

- Significant impairment in judgment (including all of the following: the inability to make decisions, confusion, and disorientation);
- Significant impairment in thinking (including both paranoia and delusions that make the offender a danger to self or others);
- Significant impairment in mood (including constant depressed mood plus helplessness and hopelessness; agitation; manic mood that interferes with ability to effectively interact with other offenders or staff);
- Significant impairment in communications that interferes with ability to effectively interact with other offenders or staff; hallucinations; delusions; or severe obsessional rituals that interferes with ability to effectively interact with other offenders or staff;
- Chronic and severe suicidal ideation resulting in increased risk for suicide attempts; or
- Chronic and severe self-injury.

[5]. As defined, the Class Period begins on January 1, 2009. However, as the discussion later will reveal, for limitation periods and for other matters including class size, Class Period, Class Definition, scope of the common issues, determination of the standard of care, and the calculation of damages, it shall be important to keep in mind that the action was commenced on April 20, 2017 by Statement of Claim. Thus, the limitation period tolled on April 20, 2017. Using a two-year limitation period, the resultant appropriate Class Period is the 41 months from April 20, 2015 to September 18, 2018.

[6]. The action was certified as a class proceeding on September 18, 2018.[8]

[7]. The following common issues were certified:

Systemic Negligence

(a) By the operation and management of the Correctional Institutions from January 1, 2009 to the date of certification, did the Defendant owe a duty of care to the Class Members?

(b) If the answer to (a) is yes, what is the nature of that duty of care?

(c) By the use of Administrative Segregation and/or Prolonged Administrative Segregation at the Correctional Institutions from January 1, 2009 to the date of certification, did the Defendant breach

[8] *Francis v. Ontario*, 2018 ONSC 5430.

a duty of care owed to some or all of the Class Members?

Sections 7 & 12 of the Charter

(d) Did the use of Administrative Segregation deprive the SMI Inmates of security of the person under s. 7 of the *Charter*?

(e) Did the use of Prolonged Administrative Segregation deprive the Prolonged Inmates of security of the person under s. 7 of the *Charter*?

(f) If the answer to (d) or (e) is "yes", does the deprivation fail to accord with the principles of fundamental justice for some or all of the Class Members?

(g) If the answer to either question in (f) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Administrative Segregation or Prolonged Administrative Segregation and the reason indicated for such placement was:

(i) at their own request;

(ii) for their own protection, including protection for medical reasons;

(iii) to protect the security of the institution or safety of others, including protection for medical reasons;

(iv) for alleged misconduct of a serious nature; or

(v) for any other reason?

(h) Does the deprivation of liberty under s. 7 of the *Charter* fail to accord with the principles of fundamental justice for some or all of the Class Members?

(i) If the answer to (h) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Administrative Segregation or Prolonged Administrative Segregation and the reason indicated for such placement was:

(i) at their own request;

(ii) for their own protection, including protection for medical reasons;

(iii) to protect the security of the institution or safety of others, including protection for medical reasons;

(iv) for alleged misconduct of a serious nature; or

(v) for any other reason?

(j) Did the use of Prolonged Administrative Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the Prolonged Inmates where the Prolonged Inmates were placed in Administrative Segregation and the reason indicated for such placement was:

(i) at their own request;

(ii) for their own protection, including protection for medical reasons;

(iii) to protect the security of the institution or safety of others, including protection for medical reasons;

(iv) for alleged misconduct of a serious nature; or

(v) for any other reason?

(k) Did the use of Administrative Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the SMI Inmates where the SMI Inmates were placed in Administrative Segregation and the reason indicated for such placement was:

(i) at their own request;

(ii) for their own protection, including protection for medical reasons;

(iii) to protect the security of the institution or safety of others, including protection for medical reasons;

(iv) for alleged misconduct of a serious nature; or

(v) for any other reason?

(l) If the answer to questions (g), (i), (j) or (k) is "yes", were such violation(s) justified under section 1 of the *Charter*?

(m) If the answer to question (l) is "no", are damages pursuant to section 24(1) of the *Charter* an appropriate remedy?

Aggregate damages

(n) Is this an appropriate case for an award of aggregate damages pursuant to section 24(1) of the *Class Proceedings Act, 1992*?

(o) If the answer to (n) is "yes", what is the appropriate quantum of such damages?

Punitive damages

(p) Does the conduct of the Defendant merit an award of punitive damages?

(q) If the answer to (p) is "yes", what quantum should be awarded for punitive damages?

Limitation period

(r) What limitation period or limitation periods apply to the causes of action advanced in this case?

(s) What circumstances are relevant to determining when the limitation period or limitation periods referred to in question (r) begin to run?

[8]. To answer the common issues, there are seven major topics for which I must have findings of fact and law.

a. First, there is the issue of whether the case is suitable for summary judgment. Ontario contents that this action is inappropriate for a summary judgment. I foreshadow to say, that I shall be deciding the case, and I shall not be sending it on to a trial.

b. Second, there is the matter of making findings of fact both: (a) macroscopically, which involves making findings about the history of solitary confinement, including its legal history; and also, (b) microscopically, which involves making findings about how administration segregation was practiced in Ontario and about what Ontario knew about the history of solitary confinement and its relationship to administrative segregation.

c. Third, there is the issue of what is the limitation period. Deciding this issue has an effect on the Class Period, class size, and on the determination of the common issues. I foreshadow to say that on this issue, I agree with Ontario's conclusion, which, as I have already noted above, is that the limitation period tolled on April 20, 2017.

d. Fourth, there is the issue of whether Ontario has contravened sections 7 and 12 of the *Charter*. I foreshadow that my conclusion to this issue is: yes, it did.

e. Fifth, there is the issue of whether the infringements of the *Charter* in the immediate case are justified under section 1 of the *Charter*. I foreshadow that my conclusion is: no, the *Charter* breaches are not justifiable.

f. Sixth, there is the issue of whether Ontario is liable for negligence. I foreshadow that my conclusion is: yes, it was culpably negligent. For the negligence cause of action, there are a myriad of issues that have to be addressed, including the questions: (a) Have the elements of a common law negligence claim been proven including the duty of care element? (b) What is the difference between a policy decision and operational activity? (c) What is the nature of Crown immunity? (d) Is Mr. Francis' negligence claim precluded by s. 5 of the *Proceedings Against the Crown Act;*[9] (e) Does s. 11 of the *Crown Liability and Proceedings Act, 2019,*[10] which replaced the *Proceedings Against the Crown Act,* change the law about Crown immunity? (f) Is Mr. Francis' negligence claim precluded by s. 11 of the *Crown Liability and Proceedings Act, 2019,*; and, (g) What, if anything, makes the case at bar different than *Reddock v. Canada (Attorney General),*[11] where the Court of Appeal reversed my finding of systemic negligence in a comparable case against the Canadian Correctional Service (the Federal Government)?

g. Seventh, there is the issue of remedies and the availability of *Charter* damages and common law damages to the Class Members. I foreshadow that my conclusion is to award the Class Members an aggregate damages award of $30.0 million without prejudice to claims for further compensation at individual issues trials.

B. Evidentiary Record

1. Testimonial and Documentary Evidence

[9]. The 15,569-page evidentiary record for the summary judgment motion consisted of: (a) Mr. Francis' seven volume Motion Record (4,258 pages); (b) Mr. Francis' Supplementary Motion Record (70 pages); (c) Mr. Francis's two-volume Reply Record for Summary Judgment (1,208 pages); (d) Ontario's four-volume Responding Motion record (2,541 pages); (e) Ontario's Cross-motion Record for limitation period issues (25 pages); (f) the nine volume Transcript and Exhibit Brief (5,818 pages); and (g) the three volume Undertakings and Exhibits Brief (1,649 pages).[12]

[10]. Mr. Francis supported his summary judgment motion with:

- the affidavits of **James Austin** dated December 6, 2018 and July 11, 2019. Dr. Austin was

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[9] R.S.O. 1990, c. P. 27.
[10] S.O. 2019, c. 7, Sched. 17.
[11] 2019 ONSC 5053, varied 2020 ONCA 184.
[12] Mr. Francis's factum was 182 pages. His reply factum was 60 pages. His submission about the Hannah-Moffat report was 24 pages. His Supplementary Factum was 37 pages. His Reply Supplementary Factum was 9 pages. Ontario's responding factum was 200 pages. Its submission about the Hannah-Moffat report was 13 pages. Its Supplementary Factum was 26 pages. There were 18 volumes of Books of Authorities totalling 9,349 pages.

cross-examined. Dr. Austin has an over 50-year career as a sociologist studying correctional institutions in the United States. He received his PhD in sociology from the University of California at Davis. For five years, he worked as a correctional sociologist at Stateville and Joliet prisons in Illinois. He has conducted studies of the use of segregation in Alabama, California, Colorado, Georgia, Kentucky, Illinois, Maryland, Mississippi, New Mexico, New York, Ohio, Oklahoma, South Carolina, and for the U.S. Federal Bureau of Prisons. He is a former chair of the National Policy Council for the American Society of Criminology.

- the affidavit of **Michael Bryan** dated October 11, 2017. Mr. Bryan was an inmate of Maplehurst Correctional Complex, Elgin Middlesex Detention Centre, and Toronto East Detention Centre. He passed away before he could be cross-examined. For the purposes of this summary judgment motion, I shall disregard his affidavit.

- the affidavit of **Gary Chaimowitz** dated December 6, 2018. Dr. Chaimowitz was cross-examined. Dr. Chaimowitz is a professor at McMaster University, in Hamilton, Ontario, and he is the department head of the Forensic Psychiatry Program at St. Joseph's Healthcare in Hamilton. He is a medical doctor and certified in psychiatry by the Royal College of Physicians of Canada. He has worked in forensic psychiatry since 1994. He has treated inmates of federal penitentiaries and Ontario prisons, many of whom had been placed in administrative segregation. He provided expert evidence in: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[13] *Brazeau v. Attorney General (Canada)*[14] and *Reddock v. Canada (Attorney General)*.[15]

- the affidavit of **Andrew Coyle**, PhD (Faculty of Law, University of Edinburgh), dated December 6, 2018. Dr. Coyle was cross-examined. Dr. Coyle is an emeritus professor of King's College at the University of London. Before his distinguished academic career, Dr. Coyle was the warden (governor) of three major prisons in Scotland, including Peterhead Prison, a maximum-security institution for Scotland's most dangerous prisoners. Between 1991 and 1997, he was the governor of Brixton Prison in London, a maximum-security institution. He was the founding director of the International Centre for Prison Studies, whose mission is to conduct research on prison policy, prison management, and prison reform. He has been retained by prison administrations across the world and has visited high-security prisons in over sixty countries. He drafted the European Prison Rules (2006), and he was an adviser to the United Nations in its review of the UN Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules). He was on the drafting team for the Nelson Mandela Rules. In Canada, he was a witness at the coroner's inquiry into the death of Ashley Smith. In Canada, he provided expert opinions in: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[16] *British Columbia Civil Liberties Association v. Canada (Attorney General)*,[17] and *Reddock v. Canada*

[13] 2017 ONSC 7491, varied 2019 ONCA 243.
[14] 2019 ONSC 1888, varied 2020 ONCA 184.
[15] 2019 ONSC 5053, varied 2020 ONCA 184.
[16] 2017 ONSC 7491, varied 2019 ONCA 243.
[17] 2018 BCSC 62, varied 2019 BCCA 228.

(Attorney General).[18]

- the affidavit of **Bernadette Cusack** dated July 11, 2019. Ms. Cusack was cross-examined. Ms. Cusack is a registered nurse who was employed by the Ontario Ministry of Community Safety and Correctional Services at the North Bay Jail between November 2011 and April 2013. She has a BA (York University) in English, a Masters' Degree (University of Mississippi) and a BSc. (nursing) from Kansas University.

- the affidavit of **David Davidson** dated October 10, 2017. Mr. Davidson was cross-examined. Mr. Davidson was an inmate at the Maplehurst Correction Complex.

- the affidavit of **Krista Ebel** dated October 11, 2017. Ms. Ebel was cross-examined. Ms. Ebel was an inmate at the Owen Sound Jail and the Vanier Centre for Women.

- the affidavit of **Conrey Francis** dated December 7, 2018. Mr. Francis is the Representative Plaintiff. Mr. Francis was cross-examined. He was an inmate at the Toronto South Correctional Centre.

- the affidavits of **Stuart Grassian** dated December 7, 2018 and July 10, 2019. Dr. Grassian was cross-examined. Dr. Grassian is a board-certified psychiatrist, licensed to practice medicine in Massachusetts, U.S. with over 40 years of experience, including a 25-year tenure at Harvard Medical School. Dr. Grassian has been involved in the observation and assessment of over 400 inmates who had experienced solitary confinement. Many of the assessments were made during an inmate's placement in solitary confinement. Dr. Grassian is a scholar about the psychiatric effects of solitary confinement, having written in 1983 a seminal article in the *American Journal of Psychiatry*. In 2006, Dr. Grassian published another article reviewing the academic literature on solitary confinement. He has consulted on solitary confinement, mental health issues and conditions of confinement in Florida, New York, Ohio, Pennsylvania, Texas, and Wisconsin. Dr. Grassian has been qualified to give expert evidence on the harms of solitary confinement by the courts of Ontario and British Columbia. He was a witness in *British Columbia Civil Liberties Association v. Canada (Attorney General),*[19] *Brazeau v. Attorney General (Canada)*[20] and *Reddock v. Canada (Attorney General).*[21] His scholarly work was referred to in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen.*[22]

- the affidavit of **Craig Haney** dated July 12, 2019. Mr. Haney was cross-examined. Dr. Haney is the former President of the University of California, Santa Cruz, and he is a Distinguished Professor of Psychology at that university. His specialty is psychology and law. He has a B.A. degree in psychology for the University of Pennsylvania, an M.A. and a Ph.D. in psychology and a J.D. degree from Stanford University. He has studied the

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[18] 2019 ONSC 5053, varied 2020 ONCA 184.
[19] 2018 BCSC 62, varied 2019 BCCA 228.
[20] 2019 ONSC 1888, varied 2020 ONCA 184.
[21] 2019 ONSC 5053, varied 2020 ONCA 184.
[22] 2017 ONSC 7491, varied 2019 ONCA 243.

psychological effects of imprisonment at correctional institutions, including solitary confinement. Amongst his published works is *Reforming Punishment: Psychological Limits to the Pains of Imprisonment*.[23] In Canada, he was a witness in *British Columbia Civil Liberties Association v. Canada (Attorney General)*[24] and *Brazeau v. Attorney General (Canada)*.[25]

- the affidavits of **Catherine MacDonald** dated December 7, 2018 and July 15, 2019. Ms. MacDonald is a legal assistant/clerk with Koskie Minsky LLP, Class Counsel. Ms. MacDonald delivered an extensive brief of documents about administrative segregation.

- the reports of **Kelly Hannah-Moffat**, which was appended to the affidavit of David Rosenberg (see below). Professor Hannah-Moffat has a Ph.D. in criminology, is a Vice-President of the University of Toronto, a professor of sociology and criminology, and she is the former director of the Centre of Criminology and Sociolegal Studies at the University of Toronto. She was a policy advisor to Madame Justice Arbour on the *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. Professor Hannah-Moffat was an expert witness for the Office of the Ontario Coroner at the Ashely Smith Inquest. Professor Hannah-Moffat was appointed by Ontario to be the Independent Expert on Human Rights and Corrections to provide impartial advice to assist with the implementation of the terms of the agreement in the Human Rights Commission proceedings in the matter of the complaint of Christina Jahn.

- the affidavit of **Ahmed Mohamed** dated October 6, 2017. Mr Mohamed was cross-examined. Mr. Mohamed was an inmate of the Niagara Detention Centre and the Central North Correction Centre ("Penetang").

- the affidavit of **Nosakhare Ohenhen** dated October 12, 2017. Mr. Ohenhen was an inmate at several correctional institutions in Ontario. Class Counsel lost contact with him and was unable to produce Mr. Ohenhen for cross-examination. For the purposes of this summary judgment motion, I shall disregard Mr. Ohenhen's affidavit.

- the affidavit of **David Rosenfeld** dated December 5, 2019. Mr. Rosenfeld is a partner with Koskie Minsky LLP, Class Counsel. He appended to his affidavit the reports of Professor Hannah-Moffat (see above).

[11]. Ontario resisted the summary judgment motion with:

- the affidavit of **Lana Armstrong** dated May 28, 2019. Ms. Armstrong was cross-examined. Ms. Armstrong is a civil servant employed by Ontario. She is the Manager of Social Work Services for the Ministry of the Solicitor General at the Toronto South Detention Centre. She supervises the social workers and staff of the Programs Department

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[23] American Psychological Association Books, 2006.
[24] 2018 BCSC 62, varied 2019 BCCA 228.
[25] 2019 ONSC 1888, varied 2020 ONCA 184.

at the Centre.

- the affidavit of **Joel Dvoskin** dated May 29, 2019. Dr. Dvoskin was cross-examined. Dr. Dvoskin is a clinical, forensic, and correctional psychologist. He is an assistant professor in the Department of Psychiatry at the University of Arizona, College of Medicine. He is a Fellow of the American Psychological Association and also of the American Psychology-Law Society. Dr. Dvoskin has treated inmates in correctional institutions in the United States and currently has a full-time private practice of forensic psychology, which includes consultation in the provision of mental health and criminal justice services.

- the affidavit of **Michael Kirk** dated May 29, 2019. Mr. Kirk was cross-examined. Mr. Kirk is a civil servant employed by Ontario. He is the Supervisor of the Strategic Analysis Unit in the Research, Analytics and Innovation Branch within the Strategic Policy, Research and Innovation Division of the Ministry of the Solicitor General.

- the affidavit of **Ryan Labrecque** dated May 28, 2019. Dr. Labrecque was cross-examined. Dr. Labrecque is a criminologist and an assistant professor in the Department of Criminal Justice at the University of Central Florida. He has published articles on restrictive housing and was commissioned by the American National Institute of Justice to write a White Paper on the use and function of administrative segregation in the United States. He has worked in correctional institutions in the United States as a correctional officer, mental health counselor, juvenile program specialist, correctional social worker, and a probation and parole officer.

- the affidavit of **Robert Dean Morgan** dated May 28, 2019. Dr. Morgan was cross-examined. Dr. Morgan is a forensic psychologist, who has 20 years' of experience providing correctional and forensic services to inmates. He is the Department Chairman and the John G. Skeleton, Jr. Regents Endowed Professor in Psychological Sciences and the Director of the Institute for Forensic Sciences at Texas Tech University. He has authored or co-authored over 95 publications, including a 2016 study of the magnitude of health and mental health effects experienced by inmates in administrative segregation. He co-developed a treatment program for inmates placed in segregated housing units. In Canada, he was a witness in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*[26] and *Brazeau v. Attorney General (Canada).*[27] His academic works were discussed in the other Canadian cases about administrative segregation.

- the affidavit of **Jodi Melnychuk** dated May 28, 2019. Ms. Melnychuk was cross-examined. Ms. Melnychuk is a civil servant employed by Ontario, who began her career in 2003. She has held position with various ministries including: Economic Development and Trade; Citizenship and Immigration; Municipal Affairs and Housing; Health and Long-Term Care; and the Cabinet Office. She is the Director of Operational Policy and Procedures within the Corrections Modernization Division of the Ministry of the Solicitor

[26] 2017 ONSC 7491, varied 2019 ONCA 243.
[27] 2019 ONSC 1888, varied 2020 ONCA 184.

General. She oversees the modernization of the policies governing the functioning of Ontario's correctional institutions.

- the affidavit of **Daryl Pitfield** dated May 29, 2019. Mr. Pitfield was cross-examined. Mr. Pitfield is a civil servant employed by Ontario, who worked as a correctional officer at the Sault St. Marie Jail for the Ministry of the Attorney General for thirty years. He began his career with the Ministry in 1987, where he worked as a correctional officer for approximately 16 years. At present, he is the Director of Institutional Operations at the Ministry.

- the affidavit of **Steven F. Small** dated May 27, 2019. Mr. Small was cross-examined. Mr. Small is a civil servant employed by Ontario, who worked with the Ministry of Community Safety and Correctional Services, now the Ministry of the Solicitor General, for over thirty years. Most recently, he was the Assistant Deputy Minister of Institutional Services from 2008 until his retirement on December 31, 2015.

- the affidavit of **Joy Stevenson** dated May 29, 2019. Ms. Stevenson was cross-examined. Ms. Stevenson is a civil servant employed by Ontario. She is the Director of Finance/Chief Financial Officer, Business & Financial Planning Branch for the Ministry of the Solicitor General.

2. The Admissibility of the Evidence of Ms. Cusack, Mr. Davidson, Ms. Ebel, Mr. Francis, and Mr. Mohamed

[12]. Ontario submits that the affidavit evidence of Ms. Cusack, Mr. Davidson, Ms. Ebel, Mr. Francis, and Mr. Mohamed is inadmissible because it was improper reply evidence. Ontario says that in Ontario's responding motion material, it did not introduce any new issues or enlarge any issue that could not have been reasonably been anticipated by Mr. Francis and, therefore, the reply evidence of Nurse Cusack and of the inmate affiants is not proper and should be given no weight.

[13]. To determine the merits of Ontario's objection, it should be noted that the affidavits of these inmate witnesses were originally prepared for the certification motion. However, after certification was granted, their affidavits were not included in Mr. Francis' motion record for the summary judgment motion. Mr. Francis believed that the evidence from these deponents was not necessary, because Ontario had already consented to the common issues, and he thought the issue of commonality had been put to bed. However, in its responding materials on the summary judgment motion, Ontario challenged the commonality of the experience of the inmates, and Mr. Francis responded by delivering the inmates' affidavits in his reply materials and the affidavit of Nurse Cusack.

[14]. Without objecting to the delivery of the affidavits, Ontario cross-examined the affiants for the purposes of the summary judgment motion. In my opinion by doing so, Ontario waived its technical objection to the use of the evidence at the summary judgment motion.

[15]. It should also be noted that some of the evidence given by the inmates in their affidavits and under cross-examination about the circumstances of administrative segregation is corroborated by the evidence of Ontario's own witnesses

[16]. With this background to Ontario's objection, my view is that there is no merit at all to Ontario's objection. The inmate's evidence is admissible, as is Nurse Crusack's evidence. At its highest, Ontario's objection is a highly technically objection, and, if I needed to, I would exercise my discretion to admit their evidence for the purposes of the summary judgment motion. Ontario suffered no prejudice, and it exercised its right to cross-examine the affiants. It is a great stretch in the circumstances of the immediate case to suggest that Mr. Francis split his case. Ironically, Ontario needs the inmate's evidence in support of its argument that there is no common experience of administrative segregation.

3. The Hearsay Exception for Public Documents

[17]. Ontario submits that the documentary evidence of Ms. MacDonald is not admissible. As noted above, Ms. MacDonald swore two affidavits, one dated December 7, 2018 and a second dated July 15, 2019. The first affidavit attaches 82 exhibits, and the second attaches 21 exhibits. Most of the exhibits are documents that are available on the Internet.

[18]. The exhibits attached to Ms. MacDonald's affidavits include, among other things: (a) copies of Ontario's legislative and regulatory documents; (b) transcripts of Legislative business published in *Hansard*; (b) documents associated with the Human Rights Commission proceedings in the matter of the complaint of Christina Jahn; (c) reports of the Ombudsman of Ontario; (d) the reports of Howard Sapers, who was Ontario's Cabinet-appointed Independent Advisor on Corrections Reform; (e) the reports of Professor Hannah-Moffat, Ontario's Cabinet-appointed Independent Expert on human rights and corrections; (f) reports of the Ontario Human Rights Commissioner; (g) reports of the Auditor General of Ontario; (h) reports of the Federal Correctional Investigator; (i) official records or reports tabled with the United Nations' General Assembly; (j) coroner's inquest reports; and (k) the report of *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*.

[19]. In my opinion, all of these documents are admissible on this summary judgment motion.

[20]. All the documents in Ms. MacDonald's affidavits are admissible as proof of Ontario's state of knowledge about administrative segregation and about administrative segregations' association with solitary confinement. For example, it passes beyond the borders of the preposterous for Ontario to submit that it did know about the events - which occurred in Ontario - that led to Justice Arbour's report of *Commission of Inquiry into Certain Events at the Prison for Women in Kingston.* Ontario undoubtedly knew about Justice Arbour's findings and recommendations in formulating its own policies and procedures for administrative segregation.

[21]. Most if not all of the documents are also admissible for the truth of their contents pursuant to the public document's exception or to the principled exception to the rule against hearsay based on necessity and the reliability of the hearsay evidence.[28] I disagree with Ontario's argument that the documents are unreliable. For example, the documents associated with *R. v. Capay*,[29] discussed below, including a judgment in a court proceeding in Ontario that describes Mr. Capay's

[28] *R. v. Khelawon*, 2006 SCC 57.
[29] 2019 ONSC 535.

confinement at an Ontario correctional institution, are as reliable as the affair is notorious.

[22]. The criteria for the public documents exception to the rule against hearsay are: (a) the document is made by a public official; (b) the public official made the document in discharge of a public duty; (c) the document was made with the intent that it be a permanent record; and (d) the document is available to the public.[30] This criteria is satisfied in the circumstances of the immediate case for many of the documents proffered by Ms. MacDonald.

[23]. I appreciate that in other cases, including other class actions, the public documents exception to the rule against hearsay has not be applied to prove negligence,[31] but all that those cases demonstrate is that the criteria for the application of the exception were not satisfied in those cases. In contrast, the criteria are satisfied in the case at bar for many if not all of the documents proffered by Ms. MacDonald.

[24]. What should not be lost sight of in a discussion of the reports and the documentary evidence about the use of administrative segregation inside or outside of Ontario is that in the immediate case, I have the *viva voce* evidence of the lived experience of both the inmates, who testified about their experiences in Ontario prisons, and I have the *viva voce* evidence of Ontario's civil servants, who supervised, administered, or actually worked in Ontario's prisons. Based on that evidence from inmates and civil servants; *i.e.*, without resort to the exception to the hearsay rule for public documents, it can be found as a fact that Ontario used solitary confinement in its correctional institutions and facts can also be found about how and why Ontario used administrative segregation in such a manner.

[25]. In the immediate case, based on the evidence of the inmates and civil servants who lived in worked in Ontario's correctional institutions, it is possible to find the facts about the why, where, when, how, by whom, and to whom of solitary confinement and administrative segregation. The documentary evidence confirms or corroborates the evidence of both Mr. Francis' and Ontario' witnesses.

4. The Interim and Final Reports of Professor Hannah-Moffat

[26]. As the factual narrative about events in Ontario, described later in these Reasons for Decision, will reveal, there was a settlement agreement between Ontario and the Ontario Human Rights Commission that was associated with a human rights complaint by Christina Jahn, who was an inmate in an Ontario correctional institution. As a part of the settlement, Ontario appointed Professor Hannah-Moffat Ontario as an Independent Expert on Human Rights and Corrections. As part of the settlement, Professor Hannah-Moffat delivered an interim investigative report. Her

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[30] *Levac v. James*, 2016 ONSC 7727 at para. 115-117, rev'd on other grounds 2017 ONCA 842; *Robb Estate v. St. Joseph's Health Care Centre*, [1998] O.J. No. 5394 (Gen. Div.), aff'd, [2001] O.J. No. 4605 (C.A.); *R. v. P.(A.)*, [1996] O.J. No. 2986 at para. 15 (C.A.).

[31] *Barton v. Nova Scotia (Attorney General)*, 2014 NSSC 192; *R v. Dykstra*, [2008] O.J. No. 2745.(S.C.J.); *Radke v. MS (Litigation guardian of)*, [2005] B.C.J. No. 2077 (BCSC), aff'd [2007] B.C.J. No. 753 (BCCA), *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540, leave to appeal refused, [2005] S.C.C.A. No. 545; *Rumley v. British Columbia*, 2003 BCSC 234; *Bartmanovich v. Manitoba*, 2001 MBQB 190; *Robb Estate v. St Joseph's Health Care Centre*, [1998] O.J. No. 5394 (Gen. Div.), aff'd, [2001] O.J. No. 4605 (C.A.).

interim report was made an exhibit in Mr. Francis' reply material for the summary judgment motion. In her interim report, Professor Hannah-Moffat made findings that criticize Ontario's operation of administrative segregation.

[27]. Before the hearing of the summary judgment motion, Professor Hannah-Moffat's final report was pending, and Mr. Francis brought a motion to cross-examine her in aid of the motion. Although she had been a plaintiff's witness in other proceedings, she declined to be a voluntary witness because there was a confidentiality clause in her engagement for Ontario as an Independent Expert on Human Rights and Corrections.

[28]. Ontario opposed Professor Hannah-Moffat testifying for the summary judgment motion. Ontario indicated that, if necessary, it would move to quash any summons. Ontario did not, however, oppose or it, at least, did not strenuously oppose the delivery of her Final Report for use on the summary judgment motion.

[29]. At Mr. Francis's motion to compel Professor Hannah-Moffat's attendance as a witness in aid of the summary judgment motion, I ordered her Final Report to be delivered to Class Counsel for filing and use on the summary judgment motion as soon as it was delivered to Ontario. I, however, did not schedule an examination of Professor Hannah-Moffat.[32] In my Reasons for Decision, I stated at paragraphs 49 to 54:

> 49. In other words, the primary reason that Dr. Hannah-Moffat has been summonsed is that she can testify about the present and about whether Ontario has complied with the Jahn Settlements. Class Counsel submitted that only Dr. Hannah-Moffat can provide an appropriate level of detail with respect to adherence to the Jahn Settlement, whether Ontario has taken reform seriously and what remedy the Court should employ in responding to Ontario's continuing *Charter* breaches should Mr. Francis succeed on his summary judgment motion.
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> 50. Class Counsel confirmed during oral argument that Dr. Hannah-Moffat was being proffered as a witness for a precise purpose. Class Counsel confirmed, however, that apart for this purpose it was not necessary to have her give evidence at all in the sense that Mr. Francis' could succeed on his summary judgment motion based on the approaching 10,000-page evidentiary record that already exists. Dr. Hannah-Moffat's evidence might, so to speak, guild the lily of Mr. Francis' case, but with or without her Interim and Final Report, her testimony was not necessary evidence.
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> 51. With this more precise understanding of the purpose of Dr. Hannah-Moffat's evidence, if the primary reason for summonsing Dr. Hannah-Moffat is describing Ontario's compliance or non-compliance with the Jahn Settlement as part of a discussion of continuing breaches, then all that is proportionately required is to have the Final Report made a part of the record for the summary judgment motion. The Final Report, just as her Interim Report, can speak for itself. The filing of what is a public report avoids any debate about public interest privilege and keeps the scheduling of the summary judgment motion on schedule.
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> 52. In any event, evidence about continuing breaches presupposes a finding that Ontario has in the past systemically breached its fiduciary duties, its duties of care, and its *Charter* obligations. The nuclear core of Mr. Francis' class action is about proving systemic misfeasance in the use of administrative segregation in Ontario's prisons in a past beginning in 1985. Proportionate to the importance and complexity of the issues in the immediate case, the precise matters for which Dr.

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[32] *Francis v. Ontario*, 2019 ONSC 5782.

> Hannah-Moffat has been summonsed can be more than adequately addressed by her just filing the Final Report.
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> 53. If it turns out that Ontario is found liable for breaches of the *Charter* and the court wishes to fashion remedies other than the award of money then perhaps Dr. Hannah-Moffat might be summoned.
>
> 54. For the present purposes of the summary judgment motion, all that is required is that Dr. Hannah-Moffat deliver her report before the return of the motion. If the report cannot be delivered in time, then I will entertain an adjournment request or a request to have Dr. Hannah-Moffat summonsed as a witness at the summary judgment motion.

[30]. On the summary judgment motion, Ontario submitted that since it did not have opportunity to cross-examine Professor Hannah-Moffat, I, therefore, should give no weight to the information found in her reports. Ontario ignored the irony that it was Ontario that had opposed Professor Hannah-Moffat being a witness that could be cross-examined.

[31]. Ontario also submitted that Professor Hannah-Moffat's reports were of limited or of no utility given that they largely concerned events after the Class Period. That submission, however, is not true given that the events associated with Ms. Jahn and her settlement occurred before and during the Class Period.

[32]. Once again, Ontario's submission about the utility of the Hannah-Moffat reports was ironical. Although it submitted that I should give no weight to her reports, Ontario appeared to rely on them in support of its argument, discussed in more detail below, that Ontario's failings, if any, were policy failings, for which as a public authority it is immune from tort liability, as distinct from operational failures, for which it might be liable for negligence. Moreover, Ontario relied on Professor Hannah-Moffat's observation that Ontario had made commendable efforts to fulfill its settlement obligations and had made important and laudable changes related to its treatment of mentally ill inmates.

[33]. In my opinion, both of Professor Hannah-Moffat's reports are admissible. I shall give Professor Hannah-Moffat's reports the weight they deserve, and I shall endeavour not to use them for some improper purpose.

[34]. I agree with Ontario that it is not my task to determine whether Ontario breached the terms of the Jahn Settlement agreement. I agree with Ontario that any non-compliance with the Jahn Settlement agreement does not as a matter of law amount to a finding of negligence or breach of the *Charter*. I agree with Ontario that Professor Hannah-Moffat's reports cannot be used as a basis to expand the Class Period and the Class Definition. I agree with Ontario that what it did or did not do after the Class Period is of little utility to determining whether it had a duty of care or whether it breached the duty of care on a class-wide basis before or during the Class Period.

[35]. I, however, do not agree that Professor Hannah-Moffat's knowledge and information about the operation of correctional institutions is irrelevant to determining whether there is a duty of care and about the standard of care against which to measure the conduct of a government charged with the responsibility of operating penitentiaries, prisons, or jails. I agree with Ontario that Professor Hannah-Moffat has a contribution to make in the difficult issue of determining what is a policy decision and what is operational activity.

5. The Role of *Stare Decisis* in the Immediate Case

[36]. Mr. Frances relies on the doctrine of *stare decisis*, the fundamental doctrine of the common law that like cases should be decided alike in support of his summary judgment motion. He argues that the case at bar is factually and legally the same as the four cases of: (a) *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*[33]; (b) *British Columbia Civil Liberties Assn. v. Canada (Attorney General),*[34] (c) *Brazeau v. Attorney General (Canada);*[35], and (d) *Reddock v. Canada (Attorney General)*[36] and, therefore, Mr. Francis submits that his case should be decided in the same ways.

[37]. Mr. Frances would indeed be entitled to rely on the doctrine of *stare decisis*, if I were to find as a fact that the essential facts of the immediate case are the same as the facts of those cases I, however, agree with Ontario's submissions that I cannot use the doctrine of *stare decisis* to find the facts of the immediate case.

[38]. I agree with Ontario that *stare decisis* is a doctrine about the application of the law and not a doctrine about the finding of facts. I agree, and I am bound to agree, with what Justices Côté and Brown explained in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*,[37] that questions of law forming part of the *ratio decidendi* of a decision are binding on lower courts as a matter of *stare decisis* but that *stare decisis* cannot relieve a judge from engaging in independent fact-finding because a lower court must apply the decisions of higher courts to the facts before it. I shall, therefore, find the facts first and I shall not rely on the doctrine of *stare decisis* to find the facts.

[39]. As I shall explain below, I do find the proven essential facts of the immediate case are the same as the facts in the four cases. It, therefore, would be appropriate to use the doctrine of *stare decisis* to decide the immediate case. That said, I do not intend to rely on *stare decisis* to decide Mr. Francis' case and I shall decide it as it if were essentially a case of first instance.

[40]. I simply say that the doctrine is an alternative basis to come to the legal decisions that I have reached in the immediate case. In all events, this decision does not depend upon the doctrine of *stare decisis* to prove the facts.

C. Is the Case Suitable for Summary Judgment?

[41]. Ontario submits that this proceeding is not suitable for summary judgment. It submits that: (a) there are genuine issues requiring a trial; (b) there are conflicts in the expert evidence, including disagreements regarding the sufficiency of the methodology and the validity of the studies used to

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[33] 2017 ONSC 7491, varied 2019 ONCA 243.
[34] 2018 BCSC 62, varied 2019 BCCA 228.
[35] 2019 ONSC 1888, varied 2020 ONCA 184.
[36] 2019 ONSC 5053, varied 2020 ONCA 184.
[37] 2016 SCC 47 at para 71, See also: *Allergan Inc v. Canada (Minister of Health)*, 2012 FCA 308; *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49 at paras 24-25; *R v. Comeau*, 2018 SCC 15 at para 26; *R v. Chan*, 2019 ONSC 783 at para. 39.

ground the allegations of harm; and (c) there conflicts in the parties' evidentiary record.

[42]. Ontario submits that Mr. Francis relies on an evidentiary record that is severely lacking in reliability or in applicability across the class and, therefore, a fair determination of the merits is impossible. Ontario submits that Mr. Francis has not provided a sufficient evidentiary record for his assertions of class-wide harms and class-wide damages. Ontario submits that when a person challenges the constitutionality of state action, he or she must provide an adequate factual basis or the challenge must fail,[38] and Ontario submits, once again, that Mr. Francis' evidentiary record is inadequate for a determination of the *Charter* issues in the immediate case.

[43]. For the reasons that follow, I disagree that there is an inadequate evidentiary record and that the case is inappropriate for a summary judgment.

[44]. Rule 20.04(2)(a) of the *Rules of Civil Procedure* provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[45]. *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[39] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[40]

[46]. Under rule 20.02(1), the affidavits for a summary judgment motion may be made on information and belief, but on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. The principles governing the admissibility of evidence are the same as apply at trial save for the limited exception of permitting an affidavit made on information and

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[38] *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para. 22; *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at p. 1100; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 at pp. 361-62, 366; *R. v. Edwards Books and Art Ltd*, [1986] 2 SCR 713 at p. 767-68.

[39] *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11; *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc*. (1994), 18 O.R. (3d) 481 (C.A.).

[40] *Toronto-Dominion Bank v. 466888 Ontario Ltd.*, 2010 ONSC 3798.

belief.[41] Where an affidavit relied upon in support of a motion for summary judgment does not state the source of the information and the fact of the deponent's belief, the court may nevertheless rely upon the substance of the exhibits to the affidavit in evaluating the merits of the case.[42] However, evidence of an expert witness may not be provided by the information and belief evidence of an affiant because the responding party should have the opportunity to cross-examine the expert.[43]

[47]. In *Hryniak v. Mauldin*[44] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[45] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[48]. If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings and to fairly and justly adjudicate the issues in the case.[46]

[49]. If a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial; this will be the case when the summary judgment process: (a) allows the judge to make the necessary findings of fact; (b) allows the judge to apply the law to the facts; and (c) is a proportionate, more expeditious and less expensive means to achieve a just result.[47] The motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to make a fair and just determination.[48]

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[41] *Sanzone v. Schecter*, 2016 ONCA 566 at para. 15; *Caithesan v. Amjad*, 2016 ONSC 5720 at para. 24.
[42] *Carevest Capital Inc. v. North Tech Electronics Ltd.*, 2010 ONSC 1290 at para. 16 (Div. Ct.).
[43] *Dutton v. Hospitality Equity Corp.*, [1994] O.J. No. 1071(Gen. Div.).
[44] 2014 SCC 7.
[45] 2014 SCC 8.
[46] *Campana v. The City of Mississauga*, 2016 ONSC 3421; *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.
[47] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49 and 50.
[48] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 51-55; *Wise v. Abbott Laboratories, Ltd.*, 2016 ONSC 7275 at paras. 320-336; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784 at paras. 122-131.

[50]. Turning to the case at bar, although there are numerous issues, there is no paucity of evidence to resolve them, and, while there is a great deal of factual and legal work that has been done by the parties and that needs to be completed by the court, there is no need that the work be completed by a trial process. The issues are capable of being fairly and proportionately resolved by a motion procedure. I do not need the attributes of a trial process to enable me to make a fair and just determination, and I note that apart from lacking the more leisurely pace of a trial, this 5-day summary judgment motion was much like a trial. By affidavit, each side called all the witnesses they needed. The witnesses were intensely cross-examined. There were transcripts and exhibit briefs and lawyers delivered comprehensive factual and legal argument.

[51]. Associate Chief Justice Marrocco in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*[49] decided substantial issues about administrative segregation by an application procedure, and, in my opinion, it is in the interests of justice to decide the common issues in the immediate case by a summary motion procedure.

[52]. I see no reason to depart from the decisions that I made in *Brazeau* and in *Reddock* that although there are many genuine issues, they do not for fairness or for any other reason require a trial and the genuine issues may be determined by means of a summary judgment motion.

[53]. Further, it does not follow from the indisputable truth that the Class Members, as individuals, have different personal and social histories, different mental or physical health needs, different incompatibles, and different reasons for their segregation, that a trial as opposed to a summary judgment motion is required to determine whether Ontario contravened the *Charter* by placing inmates in administrative segregation without a meaningful review procedure. Associate Chief Justice Marrocco and the Court of Appeal were able to decide these issues without a trial in *Canadian Civil Liberties Assn.*, and I was able to decide similar issues in *Brazeau* and in *Reddock* on a summary judgment motion. On the appeals in *Brazeau* and in *Reddock*, the Ontario Court of Appeal held that I had not erred in deciding those cases on a summary judgment motion.

[54]. Nor is a trial required to determine the issue of the application of limitation periods, the general causation issue, the issue of the vicarious liability of Ontario, the duty of care and the breach of the duty of care issues, the issue of the availability of aggregate damages, or the issue of whether there is a base level of damages suffered when a Class Member is placed is placed in administrative segregation.

[55]. Nor does it follow that a trial is required to determine the fundamentally legal issues about the principles from *Vancouver (City) v. Ward* [50] and *Mackin v. New Brunswick (Minister of Finance)*,[51] about the availability of *Charter* damages. I have copious evidence to determine the *Charter* issues. The same can be said about the issues associated with the duty of care in negligence, Crown immunity, and the interpretation of the *Proceedings Against the Crown Act*,[52]

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[49] 2017 ONSC 7491, varied 2019 ONCA 243.
[50] 2010 SCC 27.
[51] 2002 SCC 13.
[52] R.S.O. 1990 c. P.27.

or the *Crown Liability and Proceedings Act, 2019*.[53]

[56]. Nor is a trial required to determine whether Ontario has a duty of care to the Class Members. Indeed, this issue, which is heavily nuanced with legal principles, might have been decided on a Rule 21 motion, which depending on what branch of the rule is relied on, can be decided based on the pleadings and without evidence. In the immediate case, of course, I have had copious evidence about the Ontario's responsibilities and the surrounding circumstances. I also have sufficient evidence to determine whether or not Ontario is liable for systemic negligence.

[57]. I conclude that the case at bar is an appropriate case for a summary judgment.

D. The History of Solitary Confinement

1. A Survey History and Historiography of Solitary Confinement and Administrative Segregation up until the Commencement of the Class Period (April 20, 2015)

[58]. Mr. Francis alleges that by the use of administrative segregation, Ontario both breached the *Charter* and also was negligent. To determine the merits of these claims, it is necessary to understand what Ontario knew about administrative segregation, colloquially referred to as solitary confinement, at the commencement of and throughout the Class Period, which because of limitation periods begins April 20, 2015. In this section of my Reasons for Decision, I shall provide a historiography and a history of solitary confinement and administrative segregation up until the commencement of the Class Period (April 20, 2015). In the next section, I shall continue the description of the history throughout the Class Period.

[59]. In paragraphs 85-131 of my decision in *Brazeau v. Attorney General (Canada)*,[54] I set out a historiography and a survey history of solitary confinement and administrative segregation in Canada and in other jurisdictions based on historical documents. This survey applies equally to the immediate case, and I shall incorporate it.

[60]. I add new paragraphs to the history to reflect evidence in the immediate case that focuses on the particular situation in Ontario. Of particular importance to the findings of fact in the immediate case are: (a) the 2008 report of the Ontario Auditor General; (b) the Jahn Settlement documents with the Ontario Human Rights Commission; and (c) Ontario's own comprehensive internal review of administrative segregation policy.

[61]. With the additional accounts of significant events in Ontario, the survey history is set out below, as follows, continuing the paragraph numbering from *Brazeau* and noting the new entries in unnumbered paragraphs:

> 85. The history of solitary confinement and the study of its use in Canada and around the world are important parts of the factual background to this summary judgment motion and […] and

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[53] S.O. 2019 c. 7, Sched. 7.
[54] 2019 ONSC 1888, varied 2020 ONCA 184. I used a similar approach in *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, varied 2020 ONCA 184.

particularly relevant to their claims for *Charter* damages. This history is surveyed in this part of the Reasons for Decision.

86. As it happens, the history and historiography of solitary confinement and the history of the juridical, sociological, penological, and medical studies of solitary confinement are part of a body of scientific knowledge that is also a part of the factual narrative for the immediate case. And, as it happens, several witnesses, such as Dr. Grassian **[New**: a witness for Mr. Francis in the immediate case**]**, Professor Jackson, Professor Mendez, Dr. Rivera, and Dr. Morgan **[New**: a witness for Ontario in the immediate case**]**, apart from their involvement in the immediate case as experts, had roles to play in the history and historiography of solitary confinement.

87. The early history of solitary confinement and its effect on prisoners is described by Justice Miller in the 1890 decision of the U.S. Supreme Court in *Re Medley*[55], Justice Miller stated:

> Solitary confinement as a punishment for crime has a very interesting history of its own, in almost all countries where imprisonment is one of the means of punishment. In a very exhaustive article on this subject in the *American Cyclopedia*, Volume XIII, under the word "Prison" this history is given. In that article it is said that the first plan adopted when public attention was called to the evils of congregating persons in masses without employment, was the solitary prison connected with the Hospital San Michele at Rome, in 1703, but little known prior to the experiment in Walnut Street Penitentiary in Philadelphia in 1787. The peculiarities of this system were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size, so arranged that he had no direct intercourse with or sight of any human being, and no employment or instruction. Other prisons on the same plan, which were less liberal in the size of their cells and the perfection of their appliances, were erected in Massachusetts, New Jersey, Maryland and some of the other States. But experience demonstrated that there were serious objections to it. A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane, others, still, committed suicide, while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community It became evident that some changes must be made in the system, and the separate system was originated by the Philadelphia Society for Ameliorating the Miseries of Public Prisons, founded in 1787.

88. In 1829, the Philadelphia Prison in Pennsylvania, U.S. was one of the early adopters of the notion that prisoners could be rehabilitated by confinement in conditions of extreme isolation and separation from other prisoners in the penitentiary. It was theorized that the solitary confinement would inspire reflection and penitence and lead to the rehabilitation of the convicts. As practiced in the Philadelphia Prison solitary separation was very severe. Inmates were hooded when brought into the institution so as not to see or be seen by other inmates as they were led to their cells where they were to reside in isolation.

89. After his tour of North America, Charles Dickens in 1850, in his *American Notes for General Circulation* wrote about the penitentiaries in Philadelphia:[56]

> In the outskirts, stands a great prison, called the Eastern Penitentiary: conducted on a plan peculiar to the state of Pennsylvania. The system here, is rigid, strict, and hopeless solitary confinement. I believe it, in its effects, to be cruel and wrong.
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> In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of Prison Discipline, and those

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[55] 134 U.S. 160 at pp. 167-168.

[56] *American Notes for General Circulation* by Charles Dickens, transcribed from the 1913 Chapman & Hall, Ltd. edition by David Price, The Project Gutenberg eBook https://www.gutenberg.org/files/675/675-h/675-h.htm

> benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has a right to inflict upon his fellow-creature. I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear; therefore I the more denounce it, as a secret punishment which slumbering humanity is not roused up to stay. I hesitated once, debating with myself, whether, if I had the power of saying 'Yes' or 'No,' I would allow it to be tried in certain cases, where the terms of imprisonment were short; but now, I solemnly declare, that with no rewards or honours could I walk a happy man beneath the open sky by day, or lie me down upon my bed at night, with the consciousness that one human creature, for any length of time, no matter what, lay suffering this unknown punishment in his silent cell, and I the cause, or I consenting to it in the least degree.

90. A less extreme version of isolated confinement was adopted in New York State and at Canada's Kingston Penitentiary **[<u>New:</u>** which is in Ontario and] which opened in 1835. However, because of experience from countries around the world that solitary confinement was causing psychiatric and physical illness and disease, by the 1900s the practice of solitary confinement as an institution-wide practice fell out of use in North America and elsewhere.

91. Although the scientific explanation for the harm caused by solitary confinement is a product of the later part of the twentieth century, that solitary confinements could have dire psychiatric consequences has been appreciated for well over a century.

92. Although solitary confinement declined as a general practice for all inmates in a penitentiary, it continued to be used as a special practice within penitentiaries in the United States, Canada, and across the world.

93. Prompted, in part, by events during the Second World War and the Korean War associated with the treatment of prisoners of war, the use of solitary confinement was heavily scrutinized and investigated by social scientists, and a consensus began to build that it was a harsh practice that in some places and in some conditions was tantamount to torture.

94. The scientific study of solitary confinement can be placed within the larger study of the psychological significance of social contact and on medical and psychiatric study of the effects of isolation and small group confinement. The study of the psychiatric effects of restricted environmental stimulation have been studied, among others, by the military (submarine service, polar exploration, brainwashing, and interrogation), by the aeronautical industry (long-term flight and space travel), and medical practitioners (patients in long-term traction, in iron lungs, and in blinding eye-patches following surgery). In Canada, funded by the United States' Central Intelligence Agency, researchers at McGill University (and at Harvard University) studied the medical effects of sensory deprivation. There is an enormous academic literature about solitary confinement and associated topics.

95. The prison conditions of captured combatants and of civilians was studied by world organizations. In 1957, the UN Economic and Social Counsel adopted the *Standard Minimum Rules for the Treatment of Prisoners* for the humane operation of prisons in accordance with human rights and the rule of law.

96. In Canada, under the now repealed *Penitentiary Act*, the practice of segregating and isolating an inmate was known as "dissociation," and it was governed by the now repealed *Penitentiary Service Regulations.* It took some time, but eventually, administrative segregation became the subject of judicial scrutiny and of law reform.

97. In the 1970s, in *McCann v. The Queen,*[57] Jack McCann, an inmate of the British Columbia Penitentiary, who had been in administrative segregation (dissociation) for 754 days in what was sardonically known as the "Penthouse" of the British Columbia Penitentiary and seven other inmates who had been placed in administrative segregation for extended periods of time successfully challenged the practice as cruel and unusual punishment contrary to s. 2(b) of the *Canadian Bill of Rights*. Professor Jackson was the academic advisor to the plaintiffs' counsel and interviewed a group of prisoners who had been placed in the Penthouse, which was located at the top floor of the penitentiary. Professor Jackson's account of the interviews reads like a non-fiction version of Kafka's *the Penal Colony*.

98. Around the same time as the McCann litigation, the matter of the use of segregation in particular and the management of penitentiaries generally became the subject of study and law reform by the Federal Government. In the 1970s, the Solicitor General appointed James Vantour to deliver a report on the use of segregation, and after riots at the Kingston Penitentiary, an all-party House of Commons subcommittee chaired by Mark MacGuigan delivered a report about the federal penitentiary system. The subcommittee endorsed a recommendation of the Vantour Report that placements in segregation be reviewed by review boards.

99. In 1980, in *Martineau v. Matsqui Disciplinary Bd.*,[58] the Supreme Court held that the decisions of penitentiary authorities were subject to judicial review oversight and an administrative law duty to act fairly.

100. After the enactment of the *Charter* in 1982, the Federal Government ordered a review of the federal laws regarding penitentiaries. The Correctional Law Review reported that the regulation of administrative segregation, then known as dissociation, was deficient.

101. In 1983, Dr. Grassian (a witness for Messrs. Brazeau and Kift in the immediate case) **[New:** also a witness in Mr. Francis's case**]** published his very influential article in the *American Journal of Psychiatry* entitled *Psychopathological Effects of Solitary Confinement.*[59] The article reported on the effects of solitary confinement on inmates and identified a syndrome caused by solitary confinement.

102. On December 10, 1984, the United Nations General Assembly adopted the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment* (1465 UNTS 85), which Canada ratified on July 24, 1987. The Convention prohibits torture and cruel, inhuman, or degrading treatment or punishment and imposes on each state party affirmative obligations to prevent such acts in any territory under its jurisdiction.

103. In 1985, in *Cardinal v. Director of Kent Institution*,[60] the Supreme Court held that the duty to act fairly applied to decisions about administrative segregation.

104. In 1990, the Federal Government released a comprehensive consultation package about amendments to the corrections law, which was followed by the enactment in 1992 of the *Corrections and Conditional Release Act* and its regulations.

105. In 1996, the Honourable Louise Arbour released the report of *Commission of Inquiry into Certain Events at the Prison for Women in Kingston*. The Arbour Commission investigated an incident in the Prison for Women in Kingston. In the incident, four Correctional Service officers were attacked by a group of inmates, five staff members were taken hostage, two inmates were killed, the institution was locked down, and the inmates were effectively left in administration segregation for an extended time because the officers refused to unlock the range of cells.

106. In her report, Justice Arbour set out the report of the penitentiary's psychologists of the effect

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[57] [1976] 1 F.C. 570 (T.D.).
[58] [1980] 1 S.C.R. 602.
[59] (1983), 140 *Am. J. Psychiatry*1450.
[60] [1985] 2 S.C.R. 643.

of prolonged segregation on the mental health of the women inmates. The psychologists report stated:

> Many of the symptoms currently observed are typical effects of long-term isolation and sensory deprivation. […] The following symptoms have been observed: perceptual distortions, auditory and visual hallucinations, flashbacks, increased sensitivity and startle response, concentration difficulties and subsequent effect on school work, emotional distress due to the extreme boredom and monotony, anxiety, particularly associated with leaving the cell or seg area, generalized emotional lability at times, fear that they are "going crazy" or "losing their minds" because of limited interaction with others which results in lack of external frames of reference, low mood and generalized sense of hopelessness.

[New:] In her report, Justice Arbour commented on harm that is caused by indefinite, prolonged segregation; she stated:

> In my opinion the most objectionable feature of administrative segregation, at least on the basis of what I have learned during this inquiry, is its indeterminate, prolonged duration, which often does not conform to the legal standards. The management of administrative segregation that I have observed is inconsistent with the *Charter* culture which permeates other branches of the administration of criminal justice.

107. The Arbour Commission, found that the rule of law was not a feature of the administration of the penitentiary, and, among other things, the Commission recommended: (a) for administrative segregation, the initial segregation be for a maximum of three days followed by a review for further segregation up to a maximum of thirty days; (b) an inmate not spend more than sixty non-consecutive days in segregation in a year; (c) after thirty days or if the days served in segregation during a year approached sixty, the Correctional Service should employ other options or the Correctional Service should apply to a court for a determination of the necessity of further segregation.

108. Following the Arbour Commission, the Correctional Service established the Task Force on Administrative Segregation. From 1998-2006, Professor Jackson was an independent member of the Task Force, an advisory group for the Commissioner. The Task Force's mandate was to address the recommendations of the Arbour Commission. The Task Force visited every segregation unit within the Correctional Service and provided advice to the Commissioner. The task force made findings about the operational realities of administrative segregation and made recommendations for practice reforms. In his expert's report for the case at bar, Professor Jackson stated that the systemic problems that the Task Force identified in relation to the treatment of mentally ill inmates were by and large not implemented and the problems continued.

109. There were other investigations of penitentiary practices in the years following Justice Arbour's report that made recommendations similar to those made by Justice Arbour's Commission including the Correctional Services Working Group on Human Rights chaired by Max Yalden (1997); the House of Commons Standing Committee on Justice and Human Rights which produced a report in 2000, and the Canadian Human Rights Commission, which in 2003 released a report entitled *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women*.

110. In 2006, Dr. Grassian **[New:** a witness for Mr. Francis in the immediate case**]** published an article entitled *Psychiatric Effects of Solitary Confinement*.[61] The article was an extensive review of the academic literature about the medical effects of solitary confinement and it updated the work that he had completed for his journal article in 1983.

111. On December 13, 2006, the United Nations General Assembly adopted the *Convention on the Rights of Persons with Disabilities* (GA. Res. 61/106), which Canada ratified on March 11, 2010.

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[61] (2006), 22 *Washington University Journal of Law and Policy* 325.

Article 14 of the Convention provides that State parties should ensure that "the existence of a disability shall in no case justify a deprivation of liberty" and that persons with disabilities who are deprived of their liberty "shall be treated in compliance with the objectives and principles in the present Convention, including by provision of reasonable accommodation."

112. On October 19, 2007, Ashley Smith, who was nineteen year's old and an inmate at the Grand Valley Institution for Women **[New**: in Kitchener, Ontario**]** committed suicide in her segregation cell. There was a coroner's inquest. Ms. Smith committed suicide after extended periods in administrative segregation. In 2013, the coroner's jury delivered over a hundred recommendations including: (a) improving the conditions of administrative segregation; (b) requiring that both the institutional head of the penitentiary and also a mental health professional visit the inmate daily; (c) abolishing indefinite solitary confinement; (d) prohibiting placing a female inmate in segregation for periods in excess of fifteen days and for more than sixty days in a calendar year; (e) that female inmates with serious mental health issues be placed in a treatment facility not a security-focused penitentiary.

113. The Correctional Service rejected the jury's recommendations in the Ashley Smith inquiry. The CSC stated that the adoption of the recommendations would cause undue risk to the safe management of the correctional system. In its *Response to the Coroner's Inquest Touching the Death of Ashley Smith*, the Federal Government did, however, accept that long periods in administrative segregation was not conducive to the inmate's health or to meeting the goals of the correctional planning process.

114. In 2008, the Corrections Investigator (then Howard Sapers) did an investigation of the Ashley Smith tragedy, and he released a report dated June 28, 2008, entitled *A Preventable Death*. The Corrections Investigator concluded that Ms. Smith's death was preventable. He stated that had there been an independent adjudicator and a detailed review of the case alternatives would have been implemented to placing Ms. Smith in administrative segregation. He recommended that the immediate implementation of independent adjudication of segregation placements of inmates with mental health concerns, to be completed within 30 days of the placement, with the adjudicator's decision to be forwarded to the regional deputy commissioner.

[New:] In 2008, the Auditor General of Ontario reported that more than 50% of all Ontario correctional institutions were found non-compliant with the Administrative Segregation Policy, including documenting required periodic checks on suicidal inmates and daily search requirements for segregation areas.

115. In his 2009-2010 Annual Report, the Corrections Investigator noted the continuing problems associated with mentally ill inmates being placed in administrative segregation. The report stated:

> In the past year, I have been very clear on the point that mentally disordered offenders should not be held in segregation or in conditions approaching solitary confinement. Segregation is not therapeutic. In too many cases, segregation worsens underlying mental health issues. Solitary confinement places inmates alone in a cell for 23 hours a day with little sensory or mental stimulation, sometimes for months at a time. Deprived of meaningful social contact and interaction with others, the prisoner in solitary confinement may withdraw, "act out" or regress. Research suggests that between one-third and as many as 90% of prisoners experience some adverse symptoms in solitary confinement, including insomnia, confusion, feelings of hopelessness and despair, hallucinations, distorted perceptions and psychosis.
>
> […] There is growing international recognition and expert consensus that the use of solitary confinement should be prohibited for mentally ill prisoners and that it should never be used as a substitute for appropriate mental health care.

116. Corrections Canada declined to implement the recommendations of the Correctional Investigator. Instead, it undertook to arrange an external review of its practices associated with administrative segregation. It retained, Dr. Rivera (another witness in the immediate proceeding for Messrs. Brazeau and Kift) to prepare a report.

117. In May 2010, Dr. Rivera published her findings and recommendations in a report entitled Operational Examination of Long-Term Segregation and Segregation Placements of Inmates with Mental Health Concerns in the Correctional Service of Canada. She recommended, among other things, a reduction in the use of administrative segregation, particularly for prisoners with mental health issues, the development of alternatives to administrative segregation, and improvements to the physical and operational conditions of segregation.

118. While Dr. Rivera was undertaking her review, on August 13, 2010, Edward Snowshoe, a 22-year-old Aboriginal man who suffered from serious mental illness, committed suicide in a segregation cell at Edmonton Institution after spending 162 days in administrative segregation. The Honourable Justice James K. Wheatley, an Alberta Provincial Court Judge, conducted an inquiry and reported to the Minister of Justice and Attorney General of Canada. He concluded that the review procedure for administrative segregation had not functioned properly and that Mr. Snowshoe's plight while in administrative had gone unnoticed.

119. In August 2011, Professor Mendez, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment submitted an interim report to the United Nations General Assembly with respect to solitary confinement. (Cruel Inhuman and or Degrading Treatment is referred to as "CIDT".) Solitary confinement was defined as the physical and social isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. The Special Rapporteur concluded that in certain circumstances solitary confinement constituted torture as defined in Article 1 of the of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or constituted CIDT as Defined in Articles 1 and 16 of the Convention and Article 7 of the International Covenant on Civil and Political Rights.

120. Here it may be noted that as a matter of international law, the Federal Government has agreed to be bound by the provisions of both the Convention against Torture and the International Covenant on Civil and Political Rights.

121. In his 2011 Report to the General Assembly, the Special Rapporteur stated that solitary confinement reduces meaningful social contact to an absolute minimum and that the resulting level of social stimulus is insufficient to allow the individual to remain in a reasonable state of mental health. He states that, if the insufficient social stimulus is occurs for even a few days, brain activity shifts toward an abnormal pattern. The Special Rapporteur wrote:

> Negative health effects can occur after only a few days in solitary confinement and the health risks rise with each additional day spent in such conditions. Experts who have examined the impact of solitary confinement have found three common elements that are inherently present in solitary confinement: social isolation, minimal environmental stimulation and "minimal opportunity for social interaction". Research can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia, and psychosis and self-harm.

122. The Special Rapporteur specified that the circumstances where solitary confinement amounted to torture or CIDT were: (a) where the physical conditions were so poor and the regime so strict that they lead to severe mental and physical pain or suffering of individuals subject to the confinement; (b) the confinement was of indefinite duration; and (c) the confinement was prolonged. The Special Rapporteur reported that the placement in solitary confinement of any duration of persons with mental disabilities was CITD.

123. The Special Rapporteur concluded that given the negative psychological and physiological effects of solitary confinement, which can manifest after only a few days, the practice should only be used in exceptional circumstances, as a last resort, for as short a time as possible, and subject to minimum procedural safeguards. He recommended an absolute prohibition on indefinite solitary confinement and on placements exceeding fifteen consecutive days and the abolition of its use for persons with mental disabilities.

124. In the 2010-2011 Annual Report of the Correctional Investigator, the Correctional Investigator stated that: the practice of placing mentally ill offenders or those at risk of suicide or serious self-injury in prolonged segregation must stop; the Correctional Service's approach to preventing deaths

in custody must change; that inmates with mental health issues in long-term administrative segregation (beyond 60 days) were not being independently and expertly monitored; and there was not enough practical alternatives such as intermediate mental health care units to end the practice of placing inmates with mental health problems in long-term segregation.

125 In the 2011-2012 Annual Report, the Correctional Investigator recommended an absolute prohibition of placing mentally ill offenders and those at risk of suicide or serious self-injury in prolonged segregation. He said that this was in keeping with Canada's domestic and international human rights commitments.

[New:] Christina Jahn was an inmate in an Ontario correctional institution. In 2012, Ms. Jahn, who suffered from mental illness, substance abuse addiction, and cancer, filed a *Human Rights Code* complaint application about her placements in administrative segregation. In 2001 and 2012, she had been placed in administrative segregation for a collective period of 210 days.

[New:] In 2013, Ms. Jahn and Ontario signed a settlement agreement, and the parties agreed to ten public interest remedies to improve the conditions for individuals with mental illness held in provincial correctional institutions. The ten remedies were: (1) Female Inmate Report - a report on how to best serve female inmates with major mental illness; (2) implementing a Mental Health Screening Tool; (3) Physician Contract Review - reviewing the terms of the contracts with psychiatric physician; (4) the development of Physician Treatment Plans for inmates with a major mental illness ; (5) Disciplinary Segregation Policy Review - a review of policies and practices and amendment of the Inmate Management Policy on Discipline and Misconduct; (6) Administrative Segregation Policy Review – a review of policies and practices regarding the management of inmates housed in segregation and amendments segregation policies to require, among other things, that segregation of inmates with mental illness shall not be used unless the Ministry can demonstrate alternatives to segregation have been considered and rejected because they would cause undue hardship; (7) Mental Illness Assessment - providing a baseline assessment and conducting an assessment prior to each 5-day segregation review; (8) Training - delivering a training program on mental health issues to front line staff and mangers that specifically addresses, among other things, human rights obligations and the need to accommodate inmates with mental illness; (9) Handbook Revision - reviewing and revising its Inmate Handbook to reflect the rights and responsibilities of inmates; and (10) Detention Centre Report - preparing a statistical report concerning the number of female inmates at the Ottawa Carleton Detention Centre placed in segregation for 30 continuous days and/or in excess of 60 aggregate days in one year.

[New:] Under the Jahn Settlement Agreement, Ontario acknowledge administrative segregation can have an adverse impact on inmates with mental illness. It committed to completing a review of policies and practices regarding the management of inmates in administrative segregation, in consultation with a mental health expert, within 12 months; and Ontario committed to amending the Administrative Segregation Policy: (a) to preclude the segregation of inmates with mental illness, unless the Ministry could demonstrate alternatives to segregation have been considered and rejected because they would cause undue hardship; (b) to consider alternatives to 5 and 30-day reviews when the segregated inmate has mental illness and for 30-day reviews to consider whether a treatment plan is in place that could help the inmate leave segregation; (c) to require notice to the Assistant Deputy Minister, Institutional Services, whenever any inmate has been segregated in excess of 60 days in one year; and (d) to require the provision or offer of a baseline assessment by a physician for inmates with mental health issues, or a psychiatrist for inmates with major mental illness, with follow up before each successive 5-day review.

[New:] The scope of the Jahn Settlement was not limited to administrative segregation. It addressed: (a) policies related to disciplinary segregation; (b) access to mental health services; (c) mental health training; (d) mental health screening and access to treatment; (e) awareness of individuals with mental health disabilities; and (f) revisions to the Inmate Handbook.

[New:] In his 2013/14 annual report, the Ontario Ombudsman stated that in many cases, correctional institution staff do not conduct the required reviews and some senior staff were not even aware of the review and reporting requirements.

[New:] In 2014/2015, the Ombudsman received more complaints from inmates, conducted further investigations, and made similar findings. The Ombudsman's 2017/18 annual report noted that the operational problems continued.

126. In the 2014-2015 Annual Report, the Correctional Investigator recommended prohibiting segregation in excess of fifteen days for inmates suffering from serious mental illness. The Correctional Investigator objected to the fact that administrative segregation was being used as a punitive measure to circumvent the more onerous due process requirements of the disciplinary segregation system. He recommended that the *Corrections and Conditional Release Act* be amended to significantly limit the use of administrative segregation for young offenders and for the mentally ill and to impose a maximum of no more than 30 continuous days of administrative segregation with judicial oversight or independent adjudication for a subsequent stay beyond the initial thirty day placement.

127. In 2015, the United Nations General Assembly acted on the reports of the Special Rapporteur. His opinions informed the United Nations' decision to update the *Standard Minimum Rules for the Treatment of Prisoners*. The revised rules were unanimously adopted by the UN General Assembly in 2015. These rules are known as the Nelson Mandela Rules" in honor of Mandela who spent twenty-seven years in prison, the first eighteen of which were on Robben Island, South Africa, where Mandala was placed in solitary confinement.

128. Rule 43 of the revised Mandela Rules states:

> *Rule 43*
>
> (1) In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:
>
> (a) indefinite solitary confinement;
>
> (b) prolonged solitary confinement;
>
> (c) placement of a prisoner in a dark or constantly lit cell ...

[New:] Rules 44 and 45 of the Mandela Rules state:

> *Rule 44*
>
> For the purpose of these rules, solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.
>
> *Rule 45*
>
> Solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority. It shall not be imposed by virtue of a prisoner's sentence.

[New:] In 2015, the Ontario Human Rights Commission filed a contravention application, alleging Ontario had not complied with the 2013 Jahn Settlement. Ontario responded with an addendum to the public interest remedies requiring it to provide a two-page "Segregation Handout" to segregated inmates describing their rights, the Ministry's review and reporting requirements, and mental health requirements. Public reporting was also required under the new public interest remedies.

[New:] In March 2015, Ontario announced a comprehensive internal review of segregation policy in its correctional facilities and by September 2015, Ontario completed revisions to its Administrative Segregation policy.

2. The History of Administrative Segregation in Ontario after April 20, 2015

[62]. In this section of my Reasons for Decision, I shall continue the survey history and historiography of solitary confinement and administrative segregation during the Class Period from April 20, 2015 to September 18, 2018. I shall also mention some subsequent developments.

[63]. In this section, I shall once again note events that have a particular focus on the situation in Ontario. Of particular importance to the findings of fact in the immediate case are; (a) the Jahn Settlement documents with the Ontario Human Rights Commission including the reports of Professor Hannah-Moffat; (b) Ontario's comprehensive internal review of segregation policy including the *2016 Internal Review*; (c) the 2016 recommendation of the Ontario Ombudsman; (d) the 2017 report of the Ontario Ombudsman, *Out of Oversight, Out of Mind*; (e) the matter of Adam Capay, whose plight was discovered by the Ontario Human Rights Commission; and (f) the work of Howard Sapers, who was appointed by Ontario as an independent reviewer of correctional institution policies.

[64]. Thus, continuing the survey history, in January 2016, the Ontario Human Rights Commission filed a report about administrative segregation in Ontario. The report identified: (a) a lack of housing options; (b) inadequate staff; and (c) discriminatory treatment of inmates with mental health disabilities. The Commission recommended the abolition of administrative segregation at least until strict time limits and external oversight protections were implemented.

[65]. In the winter and spring of 2016, it became public knowledge that inmates at the Ottawa-Carleton Detention Centre were being housed in shower cells within the segregation units, and the practice persisted even after a task force to address it was formed.

[66]. In April 2016, the Ontario Ombudsman recommended that Ontario abolish indefinite segregation; *i.e.*, segregation for more than 15 days. The Ombudsman was critical of the review process for placements, and the Ombudsman recommended that an independent external panel should review all segregations.

[67]. The comprehensive internal review, mentioned in the section above, that was announced in March 2015 occurred in four phases between March 2015 and August 2016. The review included: (a) improving statistical tracking of the use of segregation; (b) the completion of a literature review and jurisdictional scan; (c) a review of current practices and training; (d) external stakeholder consultations; (e) an audit check of institutional compliance; (f) a compliance review by the Correctional Services Oversight and Investigations ("CSOI") unit; and (g) the completion of a draft report.

[68]. During the Ministry's internal review, The Operational Manager Steering Committee and the Ontario Public Service Employees Union Corrections made submissions to the Comprehensive Segregation Review and noted that inmates with mental health problems were being segregated for lengthy periods of time with very little or no help from Ontario's Mental Health Department. These groups recommended that inmates with mental health problems not be placed into segregation.

[69]. In August 2016, the Ministry finished its internal Comprehensive Review Process and

prepared a report for internal review. The *2016 Internal Report* was not made public until this litigation. The 2016 *Internal Report* noted that the use of segregation in correctional institutions was the subject of national and international public attention. It referred to the Christina Jahn litigation and the Edward Snowshoe and Ashley Smith cases, where inmates had committed suicide in federal penitentiaries while in prolonged administrative segregation.

[70]. The *2016 Internal Report* noted harms caused by prolonged administrative segregation. The report stated:

> Research exploring the detrimental effects of segregation has typically focused on prolonged segregation (i.e. defined as segregation greater than 15 consecutive days), where inmates are confined for approximately 23 hours per day. This research has found segregation of this duration to be psychologically harmful to inmates. For example, prolonged segregation has been associated with increased anxiety, aggression, depression, perceptual distortions, cognitive disturbances, and psychosis. For individuals with mental illnesses, segregation was found to significantly exacerbate symptoms resulting in increased need for crisis care or emergency psychiatric hospitalizations. There is also a documented increase in the prevalence of suicides and suicidal attempts in individuals with mental illnesses subject to segregation, particularly in the remand populations. The UN Committee Against Torture (CAT) and the UN Commission on Human Rights have been critical of practices involving prolonged segregation and have stated that these practices may amount to treatment in violation of the prohibition against torture and inhuman treatment. Thus, the results of this body of research support the calls for the reform of segregation practices in Ontario.

[71]. The *2016 Internal Report* noted that: (a) Ontario's administrative segregation practices qualified as solitary confinement; (b) administrative segregation could have serious adverse mental health consequences; and (c) administrative segregation was not being used as a method of last resort. The report called for reforms. The *2016 Internal Report* stated:

> The Ministry accepts that the current segregation practices in Ontario may fall under the UN definition of solitary confinement and acknowledges that prolonged periods of solitary confinement can have a serious and detrimental effect on an individual's mental health.
>
> With the implementation of the action items of this report, the Ministry will: (i) limit the use of segregation as much as possible and truly make it a method of last resort; and (ii) ensure that the conditions in segregation are improved so that, when fully implemented, the harmful effects of solitary confinement are minimized.
>
> The Ministry will work towards the end state of ensuring that it no longer houses any inmates in conditions that meet the UN definition of solitary confinement.

[72]. On October 7, 2016, the plight of Mr. Capay was discovered by the Chief Commissioner of the Ontario Human Rights Commission, Renu Mandhane, during her tour of the Thunder Bay Jail.

[73]. Amongst the most distressing and disgraceful incidents in the history of administrative segregation in Canada is the matter of Adam Capay, a young member of Lac Seul First Nation whose murder charges in *R. v. Capay*,[62] were stayed because of his experience in administrative segregation. The Capay incident occurred at an Ontario correctional institution. His plight in

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[62] 2019 ONSC 535.

solitary confinement was discovered and revealed by the Ontario Ombudsman, who published a report on segregation practices in provincially run institutions.

[74]. Ms. Mandhane discovered that Mr. Capay had been held on remand in continuous segregation since June 2012 in the basement of a 90-year old jail, confined to his cell for at least 23 hours per day, with limited or no human contact. The lights in his cell were illuminated 24 hours per day, 7 days a week. Mr. Capay was suffering very serious mental disabilities in memory, cognition, speech. He had not been provided with regular or meaningful mental health treatment.

[75]. Although Mr. Capay had been charged with murder, his charge was subsequently stayed by the Ontario Superior Court in view of the multiple and egregious breaches of his *Charter* rights. Mr. Justice Fregeau, who stayed the murder charges, observed that the segregation review process for Mr. Capay was worthless at the institutional and regional levels.

[76]. Following the revelations of the Capay incident, on October 17, 2016, Ontario issued a press release announcing it would be appointing an independent reviewer to reform current policies and practices with respect to administrative segregation. Ontario appointed Howard Sapers, the former Federal Correctional Investigator and one of the most knowledgeable Canadians on prison reform. He was appointed as Ontario's Independent Advisor on Corrections Reform on January 2017. He was asked to provide advice to Ontario on administrative segregation.

[77]. After his appointment, Mr. Sapers reviewed the Ministry's research, analysis and consultations. He asked for and received data from the Ministry. He reviewed the Jahn Settlement documents. He reviewed submissions from the Ontario Human Rights Commission. He considered the Ministry's public announcements and the steps taken by the Ministry following the announcements. Mr. Saper's team met with external stakeholders, interviewed staff, attended briefings, and visited numerous institutions. Mr. Sapers received written submissions from the public and from NGOs. He, however, did not meet with frontline staff, inmates, or the family of inmates.

[78]. In March 2017, Mr. Sapers delivered his first report entitled *Segregation in Ontario* to the Ontario government.[63]

[79]. Mr. Sapers reported that 43% of all admissions to segregation had a mental health alert on their file. He reported that during 2015/2016, over 1,000 inmates spent 30 or more continuous days in segregation and that the average time spent in segregation for these inmates was 104 days. For the calendar year of 2016, he reported that the duration of segregation for individual inmates had ranged from 1 day to over 1,500 days.

[80]. Mr. Sapers found, among other things, that: (a) access to programs and services for the majority of segregated inmates was severely restricted and for some was non-existent; (b) some segregated inmates were not permitted to leave their cells for days on end; (c) at most institutions,

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[63] Mr. Saper's Report comes within the hearsay exception for public documents. The document was made by a public official in discharge of a public duty with the intent that it be a permanent record and it was made available to the public.

the required five-day physician assessments for segregated inmates with mental illness was not taking place; (d) a significant proportion of five-day and 30-day segregation reviews were inadequate or incomplete; (e) there was no independent review of the placements in administrative segregation; (f) segregation was frequently used as the default tool to manage individuals with a variety of special needs and challenging behaviours without first exploring alternative; (g) while the average of inmate population had decreased in Ontario, the numbers in administrative segregation in Ontario had increased; and (h) Ontario's correctional policies were inadequate and outdated.

[81]. In April 2017, the Ombudsman reported on his office's investigation into the tracking of inmates in segregation and the inadequacy of Ontario's review process. The Ombudsman had launched the investigation in December 2016, in response to *R. v. Capay*.[64] The Ombudsman's investigation report, *Out of Oversight, Out of Mind* (2017), was scathing in its criticism. The report stated:

> Our investigation found that these mandated reviews often fail to rigorously evaluate an inmate's placement and instead become *pro forma* exercises. We found instances where the information in an inmate's segregation reports was sparse and contradictory. Senior Ministry officials failed to consistently review the 30-day reports generated by correctional facilities and regional Ministry staff. And many of the frontline employees we interviewed expressed concerns that the segregation reporting framework is inefficient, repetitive, and fails to ensure procedural protections for segregated inmates.
>
> While I am hopeful that incremental improvements to the existing segregation review process will dramatically improve oversight of segregation placements, my Office's experience provides ample evidence that correctional staff routinely fail to comply with segregation regulation and policy. This failure makes any protections provided by regulation and policy meaningless and potentially denies inmates their common law right of procedural fairness.

[82]. The Ombudsman noted that Ontario had taken no steps to implement his recommendations from a year earlier regarding independent, external review and had done very little to improve the existing review process.

[83]. On May 4, 2017, Ontario released the Sapers Report. The Minister stated in the announcement that the province accepts the findings of the report and will address each of its recommendations. Specific commitments included; (a) new legislation to be tabled in Fall 2017, defining segregation according to international standards; and (b) an enhanced model of independent oversight and governance including segregation.

[84]. In September 2017, the Ontario Human Rights Commission filed another application with respect to the 2013 Jahn Settlement's public interest remedies. The Commission alleged that Ontario was failing to: (a) prohibit the segregation of mentally ill inmates; (b) provide required mental health assessments and services; and (c) accurately document, review and report on segregation in Ontario's correctional institutions.

[85]. In January 2018, the Ontario Human Rights Commission's contravention application in the

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[64] 2019 ONSC 535.

Jahn matter was settled with another consent Order. The new Order imposed new requirements on Ontario, particularly around the collection and reporting of data. The 2018 Public Interest Remedies included a requirement that the definition of segregation in policy documents include all circumstances in which inmates are physically isolated and confined in a cell for 22 hours.

[86]. The 2018 Jahn Consent Order required Ontario to appoint an Independent Reviewer to monitor compliance with its terms and an Independent Expert on human rights and corrections to advise Ontario. Justice David Cole was appointed the Independent Reviewer to monitor the government's compliance with settlement agreements, and Professor Hannah-Moffat was appointed the Independent Expert on Human Rights and Corrections.

[87]. Professor Hannah-Moffat's role was to provide impartial advice to assist with the implementation of the terms of the agreement. The focus of Professor Hannah-Moffat's work was on the tracking of inmates placed in segregation and on the release of public data regarding administrative segregation placements.

[88]. Thus, in February 2018, Professor Hannah-Moffat was appointed as Ontario's Independent Expert on human rights and corrections for one year in February 2018. She was subsequently re-appointed for a second year in February 2019.

[89]. On May 7, 2018, Bill 6, *An Act to enact the Ministry of Community Safety and Correctional Services Act, 2018 and the Correctional Services and Reintegration Act, 2018* received Royal Assent. The legislation: (a) banned administrative segregation for mentally ill and other vulnerable inmates; (b) imposed a cap for on the duration of administrative segregation for regular inmates; and, (c) provided an independent review of all segregation placements. Ontario has to date not proclaimed the legislation in force.

[90]. Professor Hannah-Moffat's interim report evaluating Ontario's progress in complying with the 2018 Jahn Consent Order was published in February 2019. The Report stated:

> The available data suggest […] that segregation remains a routine approach to population management, including for those with identified mental health concerns.
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> […]
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> The 30-day report for September 2018 shows that for those who had segregation placements lasting 30 or more days, a higher proportion of female inmates (80%) were reported as having identified mental health concerns, than were men (60%). These rates of individuals with identified mental health concerns in conditions of prolonged segregation are troubling.
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> […]
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> I remain concerned about the use of disciplinary segregation for those with identified mental health concerns. Given that those awaiting the adjudication of an institutional misconduct will be held in administrative segregation, it is not clear how the Order's requirement to not segregate those with identified mental health needs will be met in this circumstance.
>
> […]
>
> The [Administrative Segregation Policy] maintains the centrality of administrative segregation to prison management and the segregation of those with identified mental health concerns remains permissible to the point of undue hardship. Despite this caveat, operationally Ontario does not have a process for consistently conducting and documenting the undue hardship analysis. Therefore, I

> remain concerned that this provision will have a negligible effect on the Province's use of segregation.

[91]. In December 2018, Ontario terminated Mr. Sapers' appointment as Ontario's Independent Advisor on corrections reform.

[92]. In June 2019, the Federal Government's Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess., 42nd Parl., 2019, received royal assent, and entered into force in November 2019. That federal legislation replaces ss. 31-37 of the *Corrections and Conditional Release Act* with a scheme of "Structured Intervention Units" ("SIUs") that are to provide inmates with four hours a day out of their cells and at least two hours of meaningful human contact in place of administrative segregation, as well as a mechanism for independent review.

[93]. In December 2019, Professor Hannah-Moffat delivered her Final Report, which was dated December 3, 2019. She included the findings of her interim report.

[94]. In her Final Report, Professor Hannah-Moffat made the following additional findings, amongst others: (a) Ontario was non-compliant with its own policy requirement to consider alternatives to the point of undue hardship; (b) Ontario had not yet produced clear and consistent policies, procedures, and definitions of segregation, restrictive confinement, mental health, and associated alerts; (c) there was a lack of clarity as what constitutes mental illness and how and when it should be identified with most mental health screening occurring at admission while the onset of mental health issues can occur at any time; (d) Ontario does not have clear segregation tracking policies; (e) Ontario was failing to monitor inmates' state of health to identify those for whom administrative segregation would be severely detrimental including self-injury and suicidality; (f) reports to the Minister and the Assistant Deputy Minister for inmates at 30 days and 60 aggregate days of segregation lacked meaningful documentation regarding accommodation or undue hardship; (g) the 5, 10 and 14 day segregation reviews were completed by reviewers who were not sufficiently external nor independent to the Ministry; and (h) the review decisions did not fulsomely consider alternatives to administrative segregation.

E. Legal History of Administrative Segregation Jurisprudence

[95]. The case at bar is one of five Canadian cases that have explored the legality of administrative segregation in Canadian penal institutions. The other four cases are: (a) *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*;[65] (b) *British Columbia Civil Liberties Association v. Canada (Attorney General)*[66] (c) *Brazeau v. Canada (Attorney General)*;[67] and (d) *Reddock v. Canada (Attorney General)*.[68] The *Brazeau* and the *Reddock* cases are class action cases that I am managing.

[96]. It is necessary to review the legal history of these cases about administrative segregation,

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[65] 2017 ONSC 7491, varied 2019 ONCA 243.
[66] 2018 BCSC 62, varied 2019 BCCA 228.
[67] 2019 ONSC 1888, varied 2020 ONCA 184.
[68] 2019 ONSC 5053, varied 2020 ONCA 184.

because these four cases are also a part of the factual background of the immediate case. Most particularly, the legal history is relevant to the factual issues associated with Ontario's defences to both the alleged *Charter* violations and also its defences to the negligence claim. For a variety of reasons that will become more apparent during the legal analysis portion of these Reasons for Decision, this case law is also critical to the legal analysis.

[97]. The legal history of the four cases follows in this section of my Reasons for Decision. The discussion of the legal history is integrated with the procedural history of Mr. Francis' case.

[98]. I also note that the legal history continued while this decision was under reserve, and I, therefore, requested Counsel to submit supplementary factums about the significance of the Court of Appeal's decision in the *Brazeau* and *Reddock* cases, which decision was released after the five-days of argument of the summary judgment motion in the immediate case.

[99]. On **January 27, 2015**, in Ontario, in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, the Canadian Civil Liberties Association, a national organization established in 1964 to protect and promote respect for and observance of fundamental human rights and civil liberties, sued the Federal Government. In its action, the Association submitted that the legislation that authorizes administrative segregation in federal penitentiaries is contrary to the *Charter*. The Association sought a declaration that sections 31-37 of the federal *Corrections and Conditional Release Act,*[69] which permit the Correctional Service to remove an inmate from the general population of inmates in a penitentiary for a non-disciplinary reason, are invalid because they infringe sections 7, 11 (h) and 12 of the *Charter*.

[100]. In **2016** in *Brazeau v. Canada (Attorney General)*, Christopher Brazeau and David Kift commenced a proposed class action against the federal government. They were inmates of federal penitentiaries suffering from serious mental health problems. They alleged breaches of sections 7, 9, and/or 12 of the *Canadian Charter of Rights and Freedoms*, and in particular, they alleged that the Federal Government had failed to provide Class Members with access to healthcare.

[101]. On **December 12, 2016,** *Brazeau v. Attorney General (Canada)* was certified on consent as a class action.[70] Messrs. Brazeau and Kift subsequently brought a summary judgment motion, discussed below.

[102]. On **March 3, 2017**, Jullian Jordeal Reddock, an inmate of federal penitentiaries, sued the Federal Government. He alleged breaches of inmates' rights in federal correctional institutions, including their rights under sections 7, 9, 11(h) and 12 of the *Canadian Charter of Rights and Freedoms*. Mr. Reddock alleged that by subjecting inmates to prolonged administrative segregation pursuant to sections 31 to 37 of the *Corrections and Conditional Release Act,*[71] the inmates' rights have been violated.

[103]. On **April 20, 2017**, in the case at bar, Mr. Francis commenced his action and delivered his

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[69] S.C. 1992, c. 20.
[70] 2016 ONSC 7836.
[71] S.C. 1992, c. 20.

Statement of Claim making similar allegations to those in *Brazeau* and *Reddock* about the use of administrative segregation in Ontario's correctional institutions.

[104]. In **2017**, in British Columbia, in *British Columbia Civil Liberties Association v. Canada (Attorney General),* the British Columbia Civil Liberties Association and the John Howard Society of Canada sued the Federal Government challenging the federal government's administrative segregation legislation as contrary to the *Charter*.

[105]. On **December 18, 2017**, Associate Chief Justice Marrocco released his decision in *Corporation of the Canadian Civil Liberties Association*. He held that the administrative segregation sections of the *Canadian Corrections and Release Act* contravened section 7 of the *Charter*, and the contravention could not be saved under s. 1 of the *Charter*.[72] He concluded, however, that the legislation authorizing administrative segregation was not contrary to sections 11 (h) and 12 of the *Charter*. Based on the section 7 violation, he directed the Federal Government to redraft the legislation to make it compliant with the *Charter*.

[106]. Associate Chief Justice Marrocco made the following factual and legal findings: (a) the Mandela Rules promulgated by the United Nations represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined; (b) as practiced by the Correctional Service, administrative segregation was what the Mandela Rules referred to as solitary confinement; (c) the placing of an inmate in in administrative segregation imposes a psychological stress, quite capable of producing serious permanent observable negative mental health effects; (d) reputable Canadian medical organizations such as the Canadian Medical Association, the College of Family Physicians of Canada, the Registered Nurses Association of Ontario regard administrative segregation as a harmful practice; (e) the harmful effects of sensory deprivation caused by solitary confinement can occur as early as forty-eight hours after segregation; (f) administrative segregation can change brain activity and becomes symptomatic within seven days or less; (g) administrative segregation of fifteen days duration posed a serious risk of psychological harm; (h) administrative segregation exacerbates existing mental illness; (i) prolonged administrative segregation poses a serious risk of negative psychological effects; (j) keeping a person in administrative segregation for an indefinite prolonged period exposes that person to abnormal psychological stress and will, if the stay continues indefinitely, result in permanent psychological harm; (k) the practice of keeping an inmate in administrative segregation for a prolonged period is harmful and offside responsible medical opinion; and, (l) lack of independent review of the warden's decisions amounted to virtually no accountability for the decision to segregate.

[107]. The Association appealed Associate Chief Justice Marrocco's dismissal of the claims that were based on sections 11 (h) and 12 of the *Charter*, and on the appeal, it submitted that the *Corrections and Conditional Release Act* contravened section 7 of the *Charter* for the additional reasons that it was grossly disproportionate and overbroad. The Federal Government did not cross-appeal.

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[72] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491.

[108]. Notably, Ontario was granted intervenor status and participated in the Association's appeal of Associate Chief Justice Marrocco's decision.

[109]. On **January 17, 2018**, in *British Columbia Civil Liberties Association*[73] Justice Leask of the British Columbia Supreme Court held that the administrative segregation sections of the federal *Corrections and Conditional Release Act* contravened section 7 and section 15 of the *Charter*, and the contraventions could not be saved under s. 1 of the *Charter*.[74]

[110]. Justice Leask declared ss. 31-33 and 37 of the *Corrections and Conditional Release Act* to be of no force and effect. He did not find a breach of sections 9 and 12 of the *Charter*. Justice Leask suspended his declaratory order for twelve months and ordered the Federal Government to redraft the legislation within twelve months.

[111]. It is worth noting that Justice Leask went further then Associate Chief Justice Marrocco in concluding that review process for placements in administrative segregation was inadequate because he required the initial review to be conducted by an external adjudicator; *i.e*., someone independent of the Correctional Service.

[112]. With respect to section 7 (and also section 15) of the *Charter* Justice Leask made the following factual and legal findings: (a) administrative segregation conforms to the definition of solitary confinement found in the Mandela Rules; (b) administrative segregation is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide; (c) some of the specific harms of administrative segregation include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour; (d) the risks of these harms are intensified in the case of mentally ill inmates; however, all inmates subject to segregation are subject to the risk of harm to some degree; (e) the indeterminacy of administrative segregation is a particularly problematic feature that exacerbates its painfulness, increases frustration, and intensifies the depression and hopelessness that is often generated in the restrictive environments that characterize segregation; (f) while many of the acute symptoms of mental illness caused by administrative segregation are likely to subside upon termination of segregation, many inmates are likely to suffer permanent harm as a result of their confinement; (g) the harm of administrative segregation is most commonly manifested by a continued intolerance of social interaction, which has adverse repercussions for an inmates' ability to successfully readjust to the social environment of the prison general population and to the broader community upon release from prison; (h) negative health effects from administrative segregation can occur after only a few days in segregation, and those harms increase as the duration of the time spent in segregation increases; (i) although the fifteen-day maximum prescribed by the Mandela Rules is a generous standard given the overwhelming evidence that even within that space of time an individual can suffer severe psychological harm; nevertheless, it is a defensible standard; (j) the history of solitary

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[73] 2018 BCSC 62, varied 2019 BCCA 228.
[74] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62.

confinement in the United States and more particularly in Germany, demonstrates that these harmful effects have been recognized since the late 19th and early 20th centuries; (k) inmates with mental disabilities are over-represented in administrative segregation; (l) CD 709 is deficient because its definition of serious mental illness was both unclear and too narrow and intermingled symptoms and diagnoses; (m) the Federal Government's processes for dealing with mentally ill inmates were deficient and failed to appreciate the size and seriousness of the health issue; (n) isolating inmates was not necessary to achieve the safety and security objectives of administrative segregation; and (o) prolonged periods of administrative segregation was unnecessary to eliminate the safety and security issues and this could be achieved by alternative measures.

[113]. At the *BC Civil Liberties Assn* trial, the Federal Government conceded that sections 31-33 and 37 of the *Corrections and Conditional Release Act* engaged the inmates' liberty interest, but Justice Leask concluded that their interests in life and security of the person were also engaged. Justice Leask concluded that the impugned sections of the *Corrections and Conditional Release Act* authorized the indefinite and prolonged use of administrative segregation and the inmate's rights under section 7 of the *Charter* were violated.

[114]. Justice Leask concluded that the impugned provisions contravened section 7 because their interference with life, liberty, and the security of the person were overbroad because: (a) the harm caused by prolonged confinement in administrative segregation undermines the maintenance of institutional security as well as the ultimate goal of achieving public protection by fostering the rehabilitation of offenders and their successful reintegration into the community; (b) prolonged confinement in administrative segregation is not necessary to achieve the safety or security objectives that trigger its use and less harmful measures would achieve the objectives underlying the legislation; and (c) there was no rational connection between the legitimate security needs and the authority to keep inmates in what amounts to solitary confinement for prolonged months or even years.

[115]. Pausing here, for the discussion later in these Reasons for Decision about remedies, it is worth pointing out that Justice Leask did not address the application of s. 24 (1) of the *Charter* to the circumstances of *British Columbia Civil Liberties Association*. The remedy sought by the Association was a declaration of invalidity pursuant to s. 52 (1) of the *Constitution Act, 1982*. *Charter* damages was not a material issue in the *British Columbia Civil Liberties Association* case.

[116]. The Federal Government appealed Justice Leask's decision to the British Columbia Court of Appeal, but it did not appeal his ruling that the review provisions of the *Corrections and Conditional Release Act* did not pass *Charter* scrutiny. It submitted, however, that Justice Leask had erred by failing to conclude that any *Charter* violations were justified under s. 1 of the *Charter*.

[117]. Meanwhile on **June 21, 2018**, the *Reddock v. Canada (Attorney General)* action was certified as a class proceedings,[75] and Mr. Reddock subsequently brought a summary judgment motion, discussed below.

[118]. Thus, in the case at bar, Mr. Francis's case, while appellate decisions were pending in

[75] 2018 ONSC 3914.

Corporation of the Canadian Civil Liberties Association and *British Columbia Civil Liberties Association* and summary judgment motions were pending in *Brazeau* and *Reddock*, Mr. Francis sought certification of his action against Ontario. On **September 18, 2018**, on consent, Mr. Francis' action was certified as a class proceeding.

[119]. After Mr. Francis's case was certified, the *Brazeau* summary judgment motion was heard in February 2019 and on **March 25, 2019**, I released my decision in the summary judgment motion in *Brazeau*. The Federal Government appealed my decision.

[120]. Based on the evidence on the summary judgment motion in *Brazeau*, I made the following findings of fact: (a) in practice and in experience, there is no meaningful difference between administrative segregation and solitary confinement as it is known around the world; (b) a placement in administrative segregation can cause and does cause physical and mental harm to inmates, particularly to inmates that have serious pre-existing psychiatric illness; (c) a placement in administrative segregation imposes severe psychological stress, and for inmates who have or who develop serious mental illnesses a prolonged placement may cause permanent harm; (d) negative health effects from administrative segregation can occur within a few days in segregation and those harms increase as the duration of the time in administrative segregation increases; (e) some of the specific harms of administrative segregation include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour; (f) depending on its duration, a placement of a seriously mentally ill inmate in administrative segregation is deleterious to the purpose of rehabilitating the inmate and returning him or her to the society outside the penitentiary. Prolonged administrative segregation may impair the mentally ill inmate's capacity to return to society as a law-abiding citizen; (g) a placement in administrative segregation of a seriously ill inmate is contrary to one the purposes of the Correctional Service under s. 5 of the *Corrections and Conditional Release Act*; namely; that of assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community; (h) administrative segregation has the potentiality and the actuality of causing serious physical and serious psychological harm to any inmate and the potentiality and actuality of serious physical and serious psychological harm is particularly acute for those already suffering from serious mental illnesses and disabilities; (i) without regard to whether the inmate suffers from a mental illness but especially for inmates that do suffer from a serious mental illness, if not a consensus about the precise duration of acceptable solitary confinement, there is a strongly prevalent view that prolonged and especially indeterminately prolonged solitary confinement should not be allowed and that there should be a maximum time-limit for an inmate being kept in administrative segregation; and (j) the Federal Government had no explanation justifying responding to a security problem with solitary confinement for potentially indefinite periods of time and without a constitutionally adequate system of adjudicative review.

[121]. In *Brazeau*, I concluded, among other things, that: (a) there was a class-wide breach of section 7 of the *Charter* because the review process for administrative segregation contravened the *Charter*; (b) the psychological stress and harm caused by administrative segregation infringes the security of the person of the inmate and there was a breach of section 7 and of section 12 of the

Charter for those Class Members who were involuntarily placed in administrative segregation for more than thirty days; (c) there was a breach of section 7 and section 12 of the *Charter* for those Class Members who were voluntarily placed in administrative segregation for more than sixty days; (d) notwithstanding the principles from *Mackin v. New Brunswick (Minister of Finance)*,[76] vindication and deterrence damages are available to the whole class under section 24 (1) of the *Charter* for the breach of section 7 of the *Charter* regarding the inadequate review procedure for placements in administrative segregation; (e) vindication and deterrence damages were also available to the subclasses that suffered a breach of sections 7 and 12 of the *Charter*; (f) as a result of the *Charter* breaches, there were aggregate *Charter* damages for vindication and deterrence of $20.0 million, which was to be distributed, less Class Counsel's approved legal fees and disbursements, in the form of additional mental health or program resources for structural changes to penal institutions as the court on further motion may direct; (g) The *Charter* damages awards were without prejudice to any individual Class Member's claim at an individual issues trial to assert that his or her treatment was contrary to sections 7 and 12 of the *Charter* in his or her particular circumstances; and (h) the Federal Government was not liable for punitive damages on a class-wide basis but may be liable for punitive damages after the *Charter* damages are determined at the individual issues trials.

[122]. A few days after my decision in *Brazeau*, the appeal decision in *Corporation of the Canadian Civil Liberties Association* was released on **March 28, 2019**.[77] On the appeal (Justice Benotto, and Chief Justice Strathy and Justice Roberts, concurring), the Ontario Court of Appeal affirmed Associate Chief Justice Marrocco's ruling that the administrative segregation sections of the *Canadian Corrections and Release Act* contravened section 7 of the *Charter*. Further, the Court agreed with him that there was no violation of s. 11 (h) of the *Charter* but reversing him, the Court of Appeal held that the provisions in the *Corrections and Conditional Release Act* that authorized prolonged administrative segregation infringed s. 12 of the *Charter* and the infringement was not justified under s. 1 of the *Charter*. The Court held that a remedy pursuant to the superior court's inherent jurisdiction and pursuant s. 52 (1) of the *Constitution Act, 1982* was appropriate.

[123]. On the Association's appeal in *Canadian Civil Liberties Association*, the Court of Appeal accepted Associate Chief Justice Marrocco's conclusions that it could not be categorically shown that inmates aged 18-21, those with mental illness, and those placed in segregation for their own protection were harmed by any placement in administrative segregation. But, disagreeing with Associate Chief Justice Marrocco the Court of Appeal concluded categorically that prolonged administrative segregation of any inmate for more than fifteen consecutive days was unconstitutional as a cruel and unusual treatment contrary to s. 12 of the *Charter*.

[124]. The Ontario Court of Appeal accepted that prolonged administrative segregation poses a serious risk of negative psychological effects and that these negative effects although not always observable are a foreseeable and an expected result from the abnormal psychological stress of administrative segregation that will cause permanent psychological harm if the placement continues indefinitely. The Court of Appeal found that prolonged administrative segregation has

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[76] 2002 SCC 13.
[77] 2019 ONCA 243.

the potential to cause serious harm that could be permanent.

[125]. The Court of Appeal rejected Ontario's submission that a section 12 analysis of what counts as cruel and unusual treatment was a fundamentally individual issue.[78] In its decision in *Corporation of the Canadian Civil Liberties Association*, the Court of Appeal held that the federal Act governing segregation unjustifiably infringed *Charter* s. 12 to the extent that it permitted inmates to be placed in prolonged administrative segregation for periods longer than 15 consecutive days.

[126]. On **June 24, 2019**, the British Columbia Court of Appeal in a judgment written by Justice Groberman,[79] (Justices Willcock and Fitch concurring) varied Justice Leask's decision in *British Columbia Civil Liberties Association v. Canada (Attorney General)* on matters not pertinent to the immediate case. The decision that there had been a violation of s. 7 of the *Charter* was affirmed.

[127]. In *British Columbia Civil Liberties Association*, the British Columbia Court of Appeal affirmed Justice Leask's findings that: (a) the practice of administrative segregation as confinement for 22 hours or more a day without meaningful human contact constitutes "solitary confinement" as defined in the Mandela Rules; (b) administrative segregation puts inmates at increased risk of self-harm and suicide; (c) inmates suffer permanent psychological harm as a result of spending time in administrative segregation; (d) the harm caused by prolonged confinement in administrative segregation undermines the maintenance of institutional security as well as the ultimate goal of achieving public protection by fostering the rehabilitation of offenders and their successful reintegration into the community; and (e) prolonged confinement in administrative segregation is not necessary to achieve the safety or security objectives that trigger its use.[80]

[128]. In **July 2019**, the summary judgment motion in *Reddock*, was argued, and on **August 29, 2019**, I released my decision granting a summary judgment.[81]

[129]. Based on the evidence on the summary judgment motion in *Reddock*, I came to the same factual conclusions that I had found in *Brazeau*, and in addition, I made the following additional findings of fact: (a) placement in administrative segregation for more than fifteen days causes serious physical and mental harm; (b) the risk of that harm happens immediately upon the placement into administrative segregation and the risk is actualized into harm in some Class Members immediately and in the rest of the Class Members by no later than fifteen days; (c) solitary confinement has been associated with serious mental illness and with the exacerbation of the symptoms of those with pre-existing mental health problems; (d) the historical record shows how harmful and dysfunctional has been the practice of isolating inmates from meaningful human and humane contact; and the more recent academic literature is consistent and confirmatory of the

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[78] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2019 ONCA 243 at paras. 93-94.
[79] *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228.
[80] *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228 at paras. 13-15.
[81] *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, varied 2020 ONCA 184.

fact that prolonged administrative segregation causes physical and psychiatric harm.[82]

[130]. In *Reddock*, I concluded that section 7 of the *Charter* was breached on a class-wide basis because of an inadequate system of review for placements in administrative segregation. I found that prolonged administrative segregation violated inmates' rights to both life and security of the person, not in accordance with the principles of fundamental justice. I found a common section 12 *Charter* breach at 15 days.

[131]. In *Reddock,* with respect to the cause of action in negligence, I found that the Federal Government was negligent in its use of prolonged Administrative Segregation. I found it breached its duty of care because: (a) administrative segregation should be the last resort in order to satisfy safety and security concerns; (b) administrative segregation should not be indeterminate; (c) administrative segregation should be as short as possible; (d) it should not be prolonged and any segregation that was the equivalent of solitary confinement should be capped and not extend beyond fifteen days; (e) it should never be used as a punishment or a substitute for disciplinary segregation; (f) it should comply with the Mandela Rules; and (g) it should not be used when the inmate was an adolescent, pregnant, or seriously mentally ill.

[132]. In *Reddock*, I awarded aggregate base-level compensatory damages for the *Charter* breach and for negligence with individual issues trials to follow.

[133]. The Federal Government appealed my decision in *Reddock,* and the Court of Appeal ordered that the appeal be heard along with the appeal in *Brazeau*.

[134]. On **December 16, 2019**, the Federal Government sought leave to appeal to the Supreme Court of Canada in *Corporation of the Canadian Civil Liberties Association*.

[135]. In **January 2020**, the Ontario Court of Appeal heard argument in *Brazeau* and in *Reddock*. Ontario was granted intervenor status. The Court reserved its decision.

[136]. On **January 20-24, 2020**, Mr. Francis' summary judgment motion was argued. I reserved judgment.

[137]. On **February 13, 2020**, the Supreme Court of Canada granted leave to appeal in *Canadian Civil Liberties Association*[83] and in *British Columbia Civil Liberties Association*.[84] The appeals are to be heard together.

[138]. On **March 9, 2020**, the Ontario Court of Appeal released its decision in *Brazeau* and *Reddock*. In the main, the Court upheld but varied the decisions in both cases. The Court dismissed the argument that the cases were inappropriate for a summary judgment. For the purposes of the appeal, the Federal Government had accepted that unless reversed by the Supreme Court the *Corporation of the Canadian Civil Liberties Association,* was binding and that, for the purposes

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[82] *Reddock v. Canada (Attorney General),* 2019 ONSC 5053 at paras. 189-198, varied 2020 ONCA 184.
[83] *Canada (Attorney General) v. Canadian Civil Liberties Assn.*, [2019] S.C.C.A. No. 96.
[84] *Canada (Attorney General) v. British Columbia Civil Liberties Assn*., [2019] S.C.C.A. No. 308.

of the appeals, breaches of s. 7 and 12 of the *Charter* had been proven in both *Brazeau* and *Reddock*. Thus, the substantive issues on the appeal concerned the negligence cause of action in *Reddock* and *Charter* damages award made in both cases.

[139]. In the result, the Court of Appeal varied the decision in *Reddock* by striking out the negligence claim. The damages award in *Reddock* was affirmed. The *Brazeau* judgment was varied only with respect to the aggregate damage award and that issue was remitted to me for reconsideration. In effect, the Court concluded that the *Charter* damages award was appropriate in *Brazeau* but not the manner of its distribution.

F. Ontario's Correctional Institutions

1. *The Ministry of Correctional Services Act*

[140]. Ontario's Minister of Correctional Services has numerous responsibilities associated with the custody of remanded or convicted persons placed in correctional institutions. The *Ministry of Correctional Services Act*[85] provides for the establishment or continuance of correctional institutions in Ontario. Section 14.2 of the Act allows the Minister to establish "maximum security custody programs, in which restrictions are continuously imposed on the liberty of inmates by physical barriers, close staff supervision or limited access to the community."

[141]. For present purposes, the following provisions of the *Ministry of Correctional Services Act* are pertinent:

> *Definitions*
>
> 1. In this Act,
>
> […]
>
> correctional institution" means a correctional institution established or continued under section 14, whether it is operated or maintained by the Ministry or by a contractor, but does not include a place of open custody, a place of secure custody, a place of temporary detention or a lock-up established under section 16.1 of the Police Services Act;
>
> "correctional service" means a service provided for the purpose of carrying out the function or objects of the Ministry, including the operation and maintenance of correctional institutions;
>
> […]
>
> "inmate" means a person confined in a correctional institution or otherwise detained in lawful custody under a court order, but does not include a young person within the meaning of the *Young Offenders Act (Canada)* or the *Youth Criminal Justice Act (Canada)* unless he or she,
>
> (a) has been transferred to ordinary court under the *Young Offenders Act (Canada)*, or
>
> (b) receives an adult sentence within the meaning of the *Youth Criminal Justice Act (Canada)*;
>
> "Minister" means the Minister of Correctional Services;

[85] R.S.O. 1990, c. M.22.

"Ministry" means the Ministry of Correctional Services;

[…]

Ministry continued

2 (1) The ministry of the public service known as the Ministry of Correctional Services and in French as ministère des Services correctionnels is continued.

(2) The Minister shall preside over and have charge of the Ministry

Deputy Minister

3. The Lieutenant Governor in Council shall appoint a Deputy Minister of Correctional Services who shall be the deputy head of the Ministry.

Duties of Minister

4 The Minister is responsible for the administration of this Act and any Acts that are assigned to him or her by the Legislature or by the Lieutenant Governor in Council.

Functions of Ministry

5 It is the function of the Ministry to supervise the detention and release of inmates, parolees and probationers and to create for them an environment in which they may achieve changes in attitude by providing training, treatment and services designed to afford them opportunities for successful personal and social adjustment in the community, and, without limiting the generality of the foregoing, the objects of the Ministry are to,

(a) provide for the custody of persons awaiting trial or convicted of offences;

(b) establish, maintain and operate correctional institutions;

(c) provide programs and facilities designed to assist in the rehabilitation of inmates;

(d) establish and operate a system of parole;

(e) provide probation services;

(f) provide supervision of non-custodial dispositions, where appropriate; and

(g) provide programs for the prevention of crime.

Employees

6 Such employees as are required from time to time for the proper conduct of the Ministry may be appointed under Part III of the *Public Service of Ontario Act, 2006*.

Delegation of Minister's powers

7. Where, under this or any other Act, a power or duty is granted to or vested in the Minister, he or she may in writing delegate that power or duty to the Deputy Minister, or to any officer or officers of the Ministry, subject to such limitations, restrictions, conditions and requirements as the Minister may set out in the delegation

[…]

Designation of peace officers

11(1) The Minister may designate in writing,

(a) a person who is an employee in the Ministry to be a peace officer while performing the person's duties and functions; or

(b) a class or classes of persons from among the persons described in clause (a), to be peace officers while performing their duties and functions,

and may set out in the designation any conditions or limitations to which it is subject.

[…]

Protection from personal liability

12 (1) No action or other proceeding for damages shall be instituted against the Deputy Minister or any officer or employee of the Ministry or anyone acting under his or her authority for any act done in good faith in the execution or intended execution of his or her duty or for any alleged neglect or default in the execution in good faith of his or her duty or for any act of an inmate, parolee or probationer while under his or her custody and supervision.

Idem

(2) Subsection (1) does not, by reason of subsection 8 (3) of the *Crown Liability and Proceedings Act, 2019*, relieve the Crown of liability in respect of a tort committed by a person mentioned in subsection (1) to which it would otherwise be subject, and the Crown is liable under that Act for any such tort in a like manner as if subsection (1) had not been enacted.

[…]

Correctional institutions

14 (1) The correctional institutions existing immediately before the coming into force of the Revised Statutes of Ontario, 1990 continue to exist as correctional institutions.

Idem

(2) The Lieutenant Governor in Council may, by order, establish or discontinue a correctional institution.

[…]

Maximum and medium security custody programs

14.2 The Minister may establish in correctional institutions,

(a) maximum security custody programs, in which restrictions are continuously imposed on the liberty of inmates by physical barriers, close staff supervision or limited access to the community; and

(b) medium security custody programs, in which restrictions that are less stringent than in a maximum security custody program are imposed on the liberty of inmates.

[…]

Custody before sentencing

15.1 A person who is lawfully detained in a correctional institution but not sentenced to imprisonment may be detained in any correctional institution, as directed by the Ministry, or in the custody of a provincial bailiff or other person employed in a correctional institution.

Sentence to correctional institution

16 (1) The court before which a person is convicted under an Act of the Legislature of an offence punishable by imprisonment may sentence the person to imprisonment in a correctional institution.

Same

(2) A person who has been sentenced to imprisonment in a correctional institution may be detained in any correctional institution, as directed by the Ministry, or in the custody of a provincial bailiff or other person employed in a correctional institution.

[…]

Superintendent of correctional institution

20 (1) The Minister shall, for each correctional institution, designate one or more superintendents

of the institution.

Responsibility for administration

(1.1) The superintendent shall be responsible for the administration of the correctional institution.

Duties

(2) The superintendent shall receive into the institution every person delivered under lawful authority for detention in the institution and is responsible for the custody and supervision of such person until his or her term of imprisonment is completed or until the person is transferred or otherwise discharged in due course of law.

Deputy superintendent

(3) The Minister may designate one or more deputy superintendents of a correctional institution to be responsible for the administration of the institution when the superintendent, by reason of absence, illness or other cause, is unable to carry out his or her duties.

Limitations

(4) A designation under subsection (1) or (3) may be subject to such limitations, restrictions, conditions and requirements as the Minister may set out in the designation.

Persons designated

(5) A person designated under subsection (1) or (3) may be an employee of the Ministry or any other person.

[…]

Inspection, investigation

22 (1) The Minister may designate any person as an inspector to make such inspection or investigation as the Minister may require in connection with the administration of this Act, and any person employed in the Ministry who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation may be dismissed for cause from employment.

Offence for obstructing inspection

(2) A contractor or employee of a contractor who obstructs an inspection or investigation or withholds, destroys, conceals or refuses to furnish any information or thing required by an inspector for the purposes of the inspection or investigation is guilty of an offence and on conviction is liable to a fine of not more than $5,000. .

Ministerial inquiry

23(1) The Minister may, by order, appoint a person to make an inquiry into any matter to which this Act applies as may be specified in the Minister's order and the person so appointed shall report the result of the inquiry to the Minister.

Application of Public Inquiries Act, 2009

(2) Section 33 of the *Public Inquiries Act, 2009* applies to the inquiry.

[…]

Hospitalization and mental examinations

Medical treatment

24 (1) Where an inmate requires medical treatment that cannot be supplied at the correctional institution, the superintendent shall arrange for the inmate to be conveyed to a hospital or other health facility.

Psychiatric treatment

(2) Where an inmate requires hospitalization in a psychiatric facility under the *Mental Health Act*, the superintendent shall arrange for the inmate to be conveyed to a psychiatric facility.

Mental examination

(3) The superintendent may direct that an examination be made of an inmate by a psychiatrist or psychologist for the purpose of assessing the emotional and mental condition of the inmate.

Rehabilitation programs

25 The Minister may establish rehabilitation programs under which inmates may be granted the privilege of continuing to work at their regular employment, obtaining new employment, attending academic institutions, or participating in any other program that the Minister may consider advisable in order that such persons may have a better opportunity for rehabilitation.

[,,,]

Custody

27.1 An inmate shall be deemed to be in the custody of a correctional institution for the purposes of this Act even if he or she is not on the premises of the correctional institution, so long as he or she is in the custody of a correctional officer.

[…]

Application of Statutory Powers Procedure Act

58 Despite anything in the *Statutory Powers Procedure Act*, that Act does not apply to proceedings,

(a) for the discipline or transfer of inmates.

(a.1) for the determination of earned remission of inmates.

(b) for the grievances of inmates.

(c) REPEALED: 2009, c. 33, Sched. 9, s. 8 (9).

(d) for the authorization of temporary absences for inmates; or

(e) of the Ontario Parole Board.

Member of Legislative Assembly

59 Every member of the Legislative Assembly of Ontario is entitled to enter and inspect any correctional institution or community resource centre established or designated under this Act, whether it is operated or maintained by the Ministry or by a contractor, for any purpose related to the member's duties and responsibilities as a member of the Legislative Assembly, unless the Minister determines that the correctional institution or community resource centre is insecure or an emergency condition exists in it

Regulations

60 (1) The Lieutenant Governor in Council may make regulations,

(a) respecting the operation, management and inspection of correctional institutions;

[…]

(e) respecting the treatment, training, employment, discipline, control, grievances and privileges of inmates;

[…]

(l) respecting the duties and powers of directors, superintendents, probation officers, parole officers, correctional officers, other persons employed in the administration of this Act and volunteers;

> (l.1) prescribing standards of professional ethics for persons employed in the administration of this Act and requiring compliance with those standards;
>
> […]
>
> (r) providing for the assessment of inmates;
>
> […]
>
> (s) prescribing grooming and appearance standards for inmates serving sentences in correctional institutions that are relevant to the security of those institutions or to the health or safety of persons, and requiring compliance with those standards;
>
> (t) providing for the monitoring, intercepting or blocking of communications of any kind between an inmate of a correctional institution and another inmate or other person, where reasonable for protecting the security of the institution or the safety of persons;
>
> (t.1) prescribing procedures for carrying out searches in correctional institutions;
>
> […]
>
> […]
>
> *Discipline*
>
> (5) The fact that an inmate is alleged to have committed an act or omission that is an offence under an Act of Canada or Ontario does not prevent disciplinary procedures from being taken against him or her in respect of the act or omission in accordance with the regulations made under clause (1) (e).

[142]. During the Class Period, there were a total of 32 correctional institutions operating in Ontario. With the exception of St Lawrence Valley Correctional and Treatment Centre, all of them are within the scope of this class proceeding.

[143]. The correctional institutions vary in age, location, layout, capacity and supervision model, which are factors in inmate placement. The oldest institution is the Brockville Jail, which was built in 1842. The two newest institutions, South West Detention Centre and Toronto South Detention Centre, which have a capacity of over 1,100 inmates, were built in 2014. The smallest institution, with a capacity of 23 inmates, is the Fort Frances Jail.

[144]. Pursuant to the *Ministry of Correctional Services Act*, the Minister may appoint at least one Superintendent for each correctional institution. The Superintendent is responsible for the management and administration of the correctional institution and for the care, health, discipline, safety and custody of all of the inmates under his or her authority. Superintendents are required to administer the correctional institutions in accordance with the Act, the Regulations and any instructions issued from time to time by the Minister to the Superintendent.

[145]. Superintendents are required by the *Ministry of Correctional Services Act* to receive into the correctional institutions every person delivered under lawful authority for detention until that person's term of imprisonment is completed, or they are transferred or otherwise discharged from custody. This differs from the federal system where, for example, an institutional head may refuse to receive a sentenced individual into the penitentiary if a medical certificate is not complete.

2. The Regulatory Scheme and Policy in Ontario for Administrative Segregation

(a) *Ontario Regulation* 778

[146]. The use of administrative segregation in Ontario's correctional institutions is authorized by *Ontario Regulation* 778. For the purposes of this summary judgment motion, the following provisions of the regulation are pertinent:

> *Definitions*
>
> 1. In this Regulation,
>
> "employee" means an employee of the Ministry or of a contractor;
>
> "clinic" or "hospital" means that part of an institution set aside for the care and treatment of inmates who are physically or mentally ill;
>
> "contraband" means unauthorized property in the possession of an inmate;
>
> "health care professional" means a member of the College of Physicians and Surgeons of Ontario or of the College of Nurses of Ontario;
>
> "officer" means an employee who is directly involved in the care, health, discipline, safety and custody of an inmate and includes a bailiff appointed under the Act;
>
> "Superintendent" includes a Director of a correctional institution
>
> *Duties of Superintendent, Health Care Professionals, Employees*
>
> 2. (1) The Superintendent of a correctional institution is responsible for the management of the institution and for the care, health, discipline, safety and custody of the inmates under the Superintendent's authority, and, without limiting the generality of the foregoing, the Superintendent shall,
>
> (a) supervise the admission and release of each inmate from the institution;
>
> (b) supervise the recording, guarding and disposition of inmate property;
>
> (c) conduct reviews in discipline cases;
>
> (d) supervise the admission and conduct of persons visiting the institution; and
>
> (e) supervise the searches conducted on inmates and employees.
>
> (2) The Superintendent shall,
>
> (a) administer the institution in accordance with the Act, the regulations and any instructions issued from time to time by the Minister to the Superintendent;
>
> (b) issue to the employees of the institution such directions as may be necessary to fulfil the responsibilities of a Superintendent;
>
> (c) establish administrative procedures to be followed on the admission, discharge, escape, illness or death of an inmate and on the assignment of employees' and inmates' duties; and
>
> (d) ensure that inmates are informed of their duties and privileges while in the care and custody of the Superintendent.
>
> 3. Any power, duty or function conferred or imposed upon or exercised by a Superintendent under the Act or this Regulation may be delegated by the Superintendent to any person or persons to act as designated representative of the Superintendent for the purpose of the effective administration of the Act and the delegation shall be subject to such limitations, restrictions, conditions and requirements as the Superintendent considers necessary for the purpose.

4. (1) There shall be one or more health care professionals in each institution to be responsible for the provision of health care services within the institution and to control and direct the medical and surgical treatment of all inmates.

(2) The health care professional shall ensure that every inmate receives a medical examination as soon as possible after admission to the institution.

(3) The health care professional shall immediately report to the Superintendent whenever the health care professional determines that an inmate is seriously ill.

(4) When an inmate is injured, a health care professional shall,

(a) examine the inmate's injuries;

(b) ensure such treatment as seems advisable; and

(c) make a written report to the Superintendent concerning the nature of the injury and the treatment provided.

[…]

31. (1) Where an inmate is alleged to have committed a misconduct, the Superintendent shall decide, as soon as possible, whether or not the inmate committed the misconduct.

(2) Before making a decision under subsection (1), the Superintendent shall ensure that the inmate is notified of the allegation and is given an opportunity for an interview, which shall be held not later than ten days after the day on which the alleged misconduct became known to the Superintendent, to discuss the allegation with the Superintendent.

[…]

(5) The Superintendent may, during an interview held under subsection (2), adjourn the interview, but no such adjournment shall be for more than three clear days, except with the consent of the inmate.

(6) The Superintendent shall inform the inmate within two days after the day of the interview concerning the Superintendent's decision, the reasons for the decision and the disciplinary measure imposed, if any.

[…]

32. (1) Where the Superintendent determines that an inmate has committed a misconduct, the Superintendent may impose one or more of the following disciplinary measures:

1. Loss of all or some privileges for a period not greater than 120 days including the privilege of purchasing items from the institutional canteen.

2. A change of program or work activity.

3. A change of security status.

4. A reprimand.

5.Revocation of a temporary absence permit.

(2) Where the Superintendent determines that an inmate has committed a misconduct of a serious nature, the Superintendent may impose, in addition to any of the disciplinary measures imposed in subsection (1), one of the following disciplinary measures:

1. Disciplinary segregation for a definite period of not greater than 15 days.

2. Disciplinary segregation for an indefinite period of not greater than 15 days.

[…]

Segregation

34. (1) The Superintendent may place an inmate in segregation if,

> (a) in the opinion of the Superintendent, the inmate is in need of protection;
>
> (b) in the opinion of the Superintendent, the inmate must be segregated to protect the security of the institution or the safety of other inmates;
>
> (c) the inmate is alleged to have committed a misconduct of a serious nature; or
>
> (d) the inmate requests to be placed in segregation.
>
> (2) When an inmate is placed in segregation under clause (1) (c), the Superintendent shall conduct a preliminary review of the inmate's case within twenty-four hours after the inmate has been placed in segregation and where the Superintendent is of the opinion that the continued segregation of the inmate is not warranted, the Superintendent shall release the inmate from segregation.
>
> (3) The Superintendent shall review the circumstances of each inmate who is placed in segregation at least once in every five-day period to determine whether the continued segregation of the inmate is warranted.
>
> (4) An inmate who is placed in segregation under this section retains, as far as practicable, the same benefits and privileges as if the inmate were not placed in segregation.
>
> (5) Where an inmate is placed in segregation for a continuous period of thirty days, the Superintendent shall report to the Minister the reasons for the continued segregation of the inmate.

[147]. *Ont. Reg. 778* does not place a time limit on placements in administrative segregation. Section 34(5) of the regulation contemplates placements of over 30 consecutive days. In contrast, if an inmate is placed in disciplinary segregation pursuant to s. 32(2) because of serious misconduct, the disciplinary segregation cannot be for a definite or indefinite period of greater than 15 days.

[148]. As may be noted, *Ont. Reg. 778* requires reviews of an administrative segregation placement, as follows: (a) the Superintendent is to conduct a preliminary review of an inmate's case within 24 hours when that inmate is placed in segregation for allegations of misconduct; (b) the Superintendent reviews the circumstances of each inmate placed in administrative segregation every 5 days; and (c) the Superintendent is to report to the Minister the reasons for continued segregation, if an inmate is placed in segregation for a continuous period of 30 days.

[149]. It should be noted that *Ont. Reg. 788* is rudimentary in its regulation. It does not contain: (a) an operational definition of segregation; (b) restrictions on the daily time any inmate spends in segregation; (c) guidelines for the placement of inmates with serious mental illness; (d) standards for physical and mental health care; (e) standards with respect to education or rehabilitation services for the inmates; (f) standards with respect the cell's physical properties; and standards with respect to meaningful human contact with others.

[150]. *Ont. Reg. 788* does not elucidate what participation rights, if any, are available for inmates with respect to the Superintendent's periodic 5-day reviews. The implementation and operational decisions with respect to these aspects of administrative segregation are to be found outside of *Ont. Reg. 788.*

[151]. In this last regard, it is particularly important to note for the discussion later in these Reasons for Decision that until 2018, segregation meant a placement in a "segregation unit", but the circumstances of being in a segregation for an inmate, in terms of isolation, interaction with others, mental or physical exercise, mental or health care was a matter of custom and practice and not regulation. It was only in 2018 that a placement in segregation was defined based on the

psychological experience of the placement and that it was recognized that segregation as it was being practiced was a confinement where an inmate was restricted in his or her movement and association with others for 22 hours or more a day.

[152]. In 2019, by *Ont. Reg.* 363/19, Ontario revised *Ont. Reg. 778* to add the following provisions:

> 34.0.1 (1) The Superintendent shall,
>
> > (a) conduct a preliminary review of the case of an inmate who is held in segregation conditions under subsection 34 (1) within twenty-four hours after the holding of the inmate in segregation conditions commenced; and
> >
> > (b) release the inmate from being held in segregation conditions if the Superintendent is of the opinion that continuing to hold the inmate in segregation conditions is not warranted.
>
> (2) The Minister shall,
>
> > (a) review the circumstances of each inmate held in segregation conditions under subsection 34 (1) no later than,
> >
> > > (i) the fifth consecutive day the inmate is held in such conditions, and
> > >
> > > (ii) each fifth consecutive day the inmate is held in such conditions following the day on which a review is held under this section; and
> >
> > (b) order that the inmate be released from being held in segregation conditions, if the Minister is of the opinion that continuing to hold the inmate in segregation conditions is not warranted.
>
> (3) If the Minister has delegated the Minister's functions under subsection (2), the person delegated to shall report to the Minister the reasons for continuing to hold an inmate in segregation conditions no later than the 15th consecutive day the inmate is held in such conditions.
>
> 34.0.2 (1) A delegation of the Minister's functions under subsection 34.0.1 (2) shall comply with the following rules:
>
> > 1. The person delegated to must not be a Superintendent or someone who reports directly or indirectly to a Superintendent.
> >
> > 2. The delegation may be subject to such limitations, restrictions, conditions and requirements as the Minister may set out in the delegation.
> >
> > 3. The functions shall not be exercised by anyone who was involved in,
> >
> > > i. the Superintendent's decision to hold the inmate in segregation conditions under subsection 34 (1), or
> > >
> > > ii. the Superintendent's preliminary review of the case of the inmate under subsection 34.0.1 (1).
>
> (2) The Minister may delegate the Minister's function of receiving reports under subsection 34.0.1 (3) to the Deputy Minister, subject to such limitations, restrictions, conditions and requirements as the Minister may set out in the delegation.

(b) **Ministry Policy Documents**

[153]. Turning then to the regulation of administrative segregation outside of *Ont. Reg. 788,* While there are other Ministry policies that affect administrative segregation, the central policy relating to the placement of inmates and conditions of confinement in administrative segregation is the *Policy for Special Management Inmates*.

[154]. For present purposes, the first relevant *Policy for Special Management Inmates* was the policy dated July 2005. Under this policy, Special Management Inmates are inmates who require special care or more intensive supervision, including: (a) inmates who are at risk of suicide; (b) inmates who have a health care problem; (c) inmates who have a mental impairment; or (d) inmates who may require close monitoring or a special management strategy.

[155]. Pursuant to the 2005 Policy, Special Management Inmates were housed in: (a) the general population: (b) in a special needs unit; (c) in disciplinary segregation; or (d) in administrative segregation.

[156]. The placement of Special Management Inmates in administrative segregation under the 2005 Policy was restricted to inmates "whose behaviour, status or physical or mental condition presents a sufficiently high degree of risk to themselves or to others to preclude common association with inmates either in the general population or in a special needs unit".

[157]. Under the 2005 Policy, administrative segregation was also used for inmates who were involved in criminal investigations or investigations of misconducts of a serious nature where their continuing presence might have been prejudicial to the investigation.

[158]. The 2005 Policy required that the decision to house an inmate in administrative segregation be made based on a comprehensive review of each individual case. The 2005 Policy stipulated that whenever possible, health care staff were to perform a medical examination both before an inmate is admitted to segregation and upon the release of the inmate from segregation. The 2005 Policy required senior administration and health care staff to conduct ongoing monitoring of segregation units. A member of senior administration was required to visit inmates in these units at least once in every three-day period. The Operational Manager and health care staff were to visit segregation units daily and program staff were to visit inmates upon the completion of a written request.

[159]. Under the 2005 Policy, inmates housed in administrative segregation were afforded the same rights and privileges as inmates in general population, unless there were reasonable and compelling reasons not to do so.

[160]. Ontario submits that introducing a new policy, or changing an existing policy, requires the Assistant Deputy Minister to consider its impact on operating costs, staffing, and feasibility of any required capital improvements. Ontario submits that any significant changes to the overall use and operation of administrative segregation would require significant new government funding because any substantial change would require changes to the infrastructure of the correctional institutions as well as the hiring and training of new staff.

[161]. In January 2011, the *Policy for Special Management Inmates* was updated to provide for access to televisions in administrative segregation units where feasible.

[162]. In September 2015, the *Policy for Special Management Inmates* policy was revised to better address the placement of inmates with mental illness or other *Human Rights Code*-related needs in segregation.

[163]. The September 2015 Policy acknowledged the Ministry's duty to accommodate inmates' *Human Rights Code*-related needs short of undue hardship. The September 2015 policy included

a new emphasis on an individual assessment of each special management inmate's needs and circumstances. Inmates with mental illness could not be placed in segregation under the new policy, unless all other housing alternatives had been considered and rejected because they would cause undue hardship to the Ministry.

[164]. When an inmate was placed in administrative segregation, the September 2015 Policy contained increased mental health monitoring and required a mental health provider to visit the inmate daily. If an inmate placed in administrative segregation had a mental illness, a mental health provider was to review the inmate at a minimum every 24 hours. In addition, before each 5-day review, a physician or psychiatrist was required to assess the inmate's mental illness under the September 2015 Policy

[165]. Under the September 2015 Policy, the authority to determine whether the undue hardship threshold was met rested with the Regional Director or designate.

[166]. On October 17, 2016, the Assistant Deputy Minister issued a memorandum to all institutional staff containing four directives; namely: (a) administrative segregation must only be used as a measure of last resort, and the use of administration segregation requires that all other alternatives be explored prior to placement; (b) the use of disciplinary segregation must be limited to a maximum of 15 consecutive days; (c) internal weekly multi-disciplinary segregation review committees must be created in each correctional institution (These committees assist in reintegration efforts, explore alternative housing options and discuss strategies for improving conditions of confinement for inmates who are placed in segregation); and (d) the loss of all privileges sanction for inmates held in disciplinary segregation was to be eliminated.

[167]. In December 2016, the *Policy for Special Management Inmates* was updated to recognize the requirements of the Assistant Deputy Minister's Directive.

[168]. Between January 2017 and July 2018, the Ministry created specialized units at 15 Correctional Institutions. After receiving approval from Treasurer Board, the Ministry hired 239 additional staff to improve the conditions of confinement for inmates placed in segregation through increased pro-social interaction, more time of out cell and individual rehabilitation programming for the seven institutions with the highest rates of long-term segregation placements. Segregation managers were appointed at the seven institutions. After receiving approval from Treasury Board an additional 246 staff were hired to increase support for inmates with mental health needs, including those inmates placed in segregation.

[169]. In May 2018, Ontario enacted the *Correctional Services Transformation Act* (Bill 6), but the legislation has never been proclaimed in force. The legislation would introduce the *Ministry of Community Safety and Correctional Services Act, 2018* and the *Correctional Services and Reintegration Act, 2018* and make related amendments to other statutes. This legislation was debated in the legislature, passed and received Royal Assent on May 7, 2018. However, Ontario has not taken the final step of proclaiming the legislation into force.

[170]. The *Correctional Services Transformation Act* complies with the Mandela Rules, noted above. The statute prohibits prisoners with serious mental illness from being segregated, and it places a 15-day limit on administrative segregation. The statute, which it should be recalled is not

in force, mandates minimum aspects of health care provision, including timelines, for segregated inmates, and, its provides segregated inmates with a hearing before an "Independent Review Panel" in several circumstances, including where they have been segregated for five consecutive days for non-disciplinary reasons or 30 aggregate days in the most recent 365-day period.

[171]. On July 6, 2018, the *Policy for Special Management Inmates* was revised again.

[172]. The July 2018 Policy reiterated that inmates are to be held in administrative segregation as a last resort. The July 2018 Policy implemented a requirement to track all segregation placements electronically and defined additional housing options that are an alternative to segregation. The July 2018 Policy added procedural steps before and during an inmate's placement in segregation, including a requirement that staff check the Ministry's electronic database to see whether there are indications that the inmate has mental health concerns or other *Human Rights Code*-related needs.

[173]. The July 2018 Policy detailed the types of mental health services that are to be offered to inmates in segregation and the required reviews of segregation placements. It specifically requires that inmates with mental illness who are placed in segregation are to be assessed by a mental health provider at a minimum once every 24 hours.

3. Inmate Demographics

[174]. The inmate population of Ontario's correctional institutions includes: (a) inmate's remanded into custody pending a court appearance; (b) inmates transferred from a from federal penitentiaries in custody pending a further court appearance or pending release; (c) inmates imprisoned under a custodial sentence of less than two years; (d) inmates whose parole has been revoked; (e) inmates detained on behalf of the Canadian Border Services Agency; (f) inmates, held on lock-up; i.e., inmates held on behalf of a municipality for a maximum of 24-hours; (g) inmates held pending the execution of an arrest warrant; (h) inmates whose long-term supervision orders have been suspended; and (i) inmates who are found unfit to stand trial or who are not criminally responsible pending a ruling of the Ontario Review Board or a transfer to a psychiatric hospital.

[175]. The majority of persons imprisoned in Ontario's correctional institutions are being held on remand pending the disposition of criminal charges. The median length of remand is 10 days. There is a high turnover rate in the inmate population. For example, for the 2018/19 fiscal year, there were 50,491 admissions to correctional institutions and 50,129 institutional releases. On daily average, there are approximately 7,445 inmates in custody in the correctional institutions across the province.

[176]. Remanded inmates are a challenge to deal with. They suffer from the stress of the incident leading to their arrest, the stress of the arrest, and the stress of imprisonment. Many are addicts and substance abusers that may be experiencing withdrawal symptoms. Many are suffering from mental illness. Many inmates require monitoring to stabilize them sufficiently before a longer-term placement decision can be made. Many inmates pose a danger to other inmates and to correctional staff. Many inmates are targets for harm from other inmates and require protective custody due to the nature of their offences, such as certain high-profile sexual offences or terrorism offences. Some inmates are targets for harm due to their occupations; visualize, police officers, correctional officers or lawyers are targets for violence at the hands of other inmates.

[177]. The demands and pressures on the correctional staff to maintain the safety and security of the correctional institution are extreme, and there is the challenge that many inmates are incompatible because of racism or rival gang memberships, and these inmates cannot be safely housed in close proximity with one another. For example, with only 5 available general population units and only 2.5 protective custody units available, on September 4, 2018, the Toronto East Detention Centre had to accommodate 55 inmates who had gang affiliations with 31 different gangs.

[178]. Ontario's inmate population is much more fluid than in federal penitentiaries, where prisoners serve sentences of more than two years. Ontario's Correctional Institutions must manage this complex population, including those who are violent and volatile, those who have suffered trauma, and those who are at risk, or suffering with addictions or with mental health issues, often in the absence of vital information about inmates' criminal or medical history.

[179]. In May 2018, an electronic data regarding placements in administrative segregation became available to Ontario. This database reveals that in the 4.5 months between May 1, 2018 and September 18, 2018, there were there were 21,085 inmates in custody of which approximately 6,300 inmates were placed in administrative segregation.

[180]. Without a review of each medical file, it is not possible to determine how many of the 6,300 inmates placed in administrative segregation had a serious mental illness within the class definition for the SMI (Serious Mental Illness) Class.

[181]. The Sapers Report, mentioned above, states that in 2017, 43% of those in segregation had a mental health alert on file. A mental health alert is recorded on an inmate's file if the inmate: (a) has a history of a mental health disability; (b) is showing signs of, or has disclosed thoughts about self-harm or suicide; or (c) is demonstrating behaviour that may suggest a mental illness.

[182]. Of the 6,300 inmates placed in administrative segregation during the 4.5 month period, 1,472 spent 15 days or more in administrative segregation. For the period before May 2018, without a review of each individual inmate file, it is not possible to enumerate the number of days of an inmate's imprisonment was in administrative segregation.

[183]. In her interim report, Professor Hannah-Moffat stated in September 2018, for those who were in segregation for 30 or more days, 80% of the women and 60% of men had identified mental health concerns.

4. The Circumstances of Administrative Segregation

[184]. The mental and physical circumstances of a placement in administrative segregation in Ontario are the same or very similar to the circumstances of a placement in administrative segregation in a federal penitentiary. A characteristic of administrative segregation as practiced in federal penitentiaries and at Ontario's correction institutions is that the inmate is in isolation in a austere small cell for 22 hours or more with no meaningful human contact. This confinement is colloquially known as "solitary confinement."

[185]. The photographs of the cells used for administrative segregation in federal or in provincial

correctional institutions reveal no significant differences in the physical layout or accoutrements of an administrative segregation cell. Ontario admitted that the same cells were used for security and safety reasons as used for disciplinary punishment.

[186]. The segregation cells are small. Some are windowless or have frosted opaque windows. The cells tend to be ill kept and be fouled with excrement and blood. The cells are separated from the outside by a metal door with a slot or hatch for food and communication purposes. In some institutions there has been the practice of never turning off the lights in the administrative segregation cell.

[187]. In Ontario's *2016 Internal Report*, Ontario noted that current segregation practices in Ontario may fall under the United Nations definition of solitary confinement.

5. The Inmates' Evidence

(a) Mr. Davidson

[188]. Mr. Davidson suffers from Post-Traumatic Stress Disorder ("PTSD"). In August 2014, he was imprisoned at Maplehurst Correction Complex having been convicted of a criminal offence. He is Indigenous, and while in the general cells, he was harassed by racist inmates. He was placed in protective custody. In December 2016, he broke his finger and was transferred to administrative segregation.

[189]. The cell was approximately 7.5 feet x 8 feet in size. There were no windows. He was allowed to leave the cell every other day for thirty minutes for a shower, phone call, and time in the yard. He did not have books, magazines, a radio, or a television. He was confined for 30 days. His PTSD worsened significantly.

(b) Ms. Ebel

[190]. Ms. Ebel suffers from Obsessive Compulsive Disorder ("OCD"). In 2007, after her conviction for a criminal offence, Ms. Abel was imprisoned at Owen Sound Jail. In December 2007, she was transferred to the Vanier Centre for Women. After her arrival at Vanier, she suffered a ruptured hernia and underwent emergency surgery. After the surgery, she was placed for five days in a small cell with a frosted window. She believed that this was administrative segregation cell, but during cross-examination she admitted that this was not the case.

[191]. In any event, for the first two days, she was not allowed to leave the cell. No medical personnel came to check on her, and she had to ask a guard to take her to a nurse. Although she asked, there was no explanation as to why she was not in an infirmary. For the last three days, she was allowed out for 15 minutes each day. The confinement exacerbated her OCD. She continues to suffer and has frequent nightmares. She suffers from anxiety.

(c) Mr. Francis

[192]. Mr. Francis, the Representative Plaintiff, (born September 13, 1965) spent 2.5 years in the Toronto South Correctional Centre for a bank robbery charge for which he was ultimately

acquitted. Before his imprisonment, he was being treated for a serious psychiatric illness. Mr. Francis has had prior experiences with administrative segregation having been detained in several provincial correctional institutions as well as in federal penitentiaries. He spent a year in segregation at the federal Warkworth Institution. At Toronto South, he was placed on a "special needs" range.

[193]. While at Toronto South, Mr. Francis was twice placed in administrative segregation, first for 8 days, the second for two days. Both placements were imposed for disobeying the order of a Correctional Officer. Mr. Francis states that the placements were because he refused to take "Seroquel," a psychiatric drug.

[194]. Mr. Francis was provided with written notice of the allegations, and he was interviewed. He was found not guilty of the first misconduct allegation, and he was released from segregation. Mr. Francis admitted to the second allegation of misconduct, and then he was released from segregation with a reprimand.

[195]. For Mr. Francis, the experience in segregation was excruciating. The cell was filthy. He had no meaningful human contact during his confinement. The window of his cell was opaque, and he could not see outside. He received no treatment for his psychiatric illness which was exacerbated by his solitary confinement. His anxiety was out of control. He felt terrorized, and he was in state of delirium and shock. He testified that to this day, he continues to receive psychiatric treatment because of the effects of his experience in segregation.

(d) **Mr. Mohamed**

[196]. In October 2015, Mr. Mohamed was arrested, and pending trial, he was imprisoned at Niagara Detention Centre. In December 2016, he pled guilty, and he was then imprisoned at Central North Correction Centre until June 2017.

[197]. While he was at Niagara Detention Centre, he was placed in administrative segregation five times. The first placement was for one week after a racist motivated attack. Three more one-week placements followed after he was again attacked. Then, in December 2016, another attack and a 30-day placement in administrative segregation.

[198]. The segregation cells were filthy. Mr. Mohamed asked for cleaning supplies to clean his cell, but he was never given any. There was a small window. He did not have a television or any reading materials. He was allowed out of the cell for 20 minutes per day to shower or to go to the yard. He experienced panic attacks and suicidal ideation. After 30 days, he begged to be released, but he was told he had to remain segregated because prison staff could not place any additional prisoners in protective custody.

[199]. Before Mr. Mohamed was placed in administrative segregation, he did not have mental health issues. After his release from segregation, he was diagnosed with anxiety and depression, and he developed a sleep disorder. These symptoms continue.

(e) **Ms. Cusack's Evidence**

[200]. Nurse Cusack described the conditions of administrative segregation at the North Bail Jail. She said the conditions were terrible. The cells had no windows. Lights in the cells were never turned off. Inmates in the segregation range were frequently not allowed out of their cells at all. They were given no books and no access to television. Delusional and psychotic inmates regularly went un-medicated while in administrative segregation.

[201]. She felt that management was interfering with her ability to do her job. There was little medical monitoring, and she says that she was discouraged from attending to the nursing needs of the inmates. The one available doctor visited the segregation range once per week and would only spend minutes with the inmates.

[202]. She observed the mental health of the inmates deteriorating. She complained to the superintendents of the jail, but her concerns were not addressed. She complained to the head of nursing at the Ministry and to the Regional Director. She did not receive responses to her correspondence.

6. Administrative Segregation Placements in Practice

[203]. Mr. Small testified that Ontario's policies on administrative segregation were similar to those of other Canadian provinces.

[204]. Mr. Small testified that a Superintendent or a designate must weigh numerous risks and contingencies in determining whether to authorize or continue a placement in administrative segregation. He said that each case required its own assessment in accordance with myriad factors including: (a) the reason for the inmate's imprisonment; (b) the nature of the offence and the notoriety of the inmate having been charged; (c) the inmate's imprisonment history and history of being a security risk; (d) whether the inmate has any history of predatory behaviour toward vulnerable inmates; (e) whether the inmate is vulnerable to, or has been the victim of, assault or other personal abuse; (f) the current inmate population; (g) the inmate's compatibility with other inmates; (h) the inmates gang affiliations; (i) the availability of segregation and other types of cells; and (j) the physical design of the institution (which affects the alternative housing available).

[205]. The evidence on this motion revealed that the Superintendent has choices about the placement of inmates. Depending on the particular institution, several or all of the following alternatives may be available for placements of an inmate other than in administrative segregation: (a) supportive care units; (b) special needs units; (c) mental health assessment units; (d) stabilization units; (e) managed clinical care units; (f) behavior management units; (g) infirmaries; (h) medical units; (i) mental health enhanced segregation units; (j) direct supervision protective custody units; (k) indirect supervision protective custody units; and since 2018, (l) enhanced segregation units. These alternatives would not fall within the definition of solitary confinement unless they were mismanaged.

[206]. Inmates in Ontario's correctional institutions are sometimes transferred between institutions when security or compatibility concerns require it. Ontario's witnesses conceded that most correctional institutions are a short drive away from another institution and that transfers take

place often.

[207]. Some inmates request to be placed in administrative segregation, and this is recognized in *Ont. Reg. 778*. Some inmates placed in administrative segregation may refuse to leave, and correctional staff will not use physical force to remove them. Inmates choose administrative segregation for a variety of idiosyncratic reasons including a preference for this form of imprisonment to the regime of being within the general population of the institution. Some inmates prefer administrative segregation to the alternative of housing in protective housing units because there is a stigma associated with a placement in protective custody.

[208]. The evidence shows that Ontario increased its use of segregation over the Class Period. At the commencement of the Class Period approximately 5% of the prison population experienced administrative segregation. This increased to around 7%, which is a 40 % increase over the Class Period. Almost half of those who placed in administrative segregation had mental health alerts including suicide risks on their prison files.

7. The Expert Evidence on Administrative Segregation

[209]. Mr. Francis proffered the evidence of Dr. Austin, Dr. Coyle, Dr. Chaimowitz, Dr. Grassian, and Dr. Haney, five expert witnesses, on the nature of administrative segregation.

[210]. Ontario submitted that little or no weight should be given to expert opinions the evidence of Dr. Austin, Dr. Coyle, Dr. Chaimowitz, Dr. Grassian, Dr. Haney, because none of these witnesses worked as a psychiatrist in any Ontario correctional institution and none of these witnesses had conducted studies analyzing the conditions in Ontario correctional institutions in comparison to other institutions. Ontario submits that these witnesses' criticisms of Ontario's use of administrative segregation is based solely on a review of the Ministry's segregation policies, and not on any observations of how those policies are implemented by correctional staff.

[211]. I disagree with this bald and unsubstantiated general attack on the evidence of Mr. Francis' expert witnesses. Dr. Austin, Dr. Coyle, Dr. Chaimowitz, Dr. Grassian, and Dr. Haney, were very well qualified, and they had ample information from which to form their opinions about administrative segregation in Ontario, which Ontario admitted is much like the administrative segregation as it is administered in the institutions known by Dr. Austin, Dr. Coyle, Dr. Chaimowitz, Dr. Grassian, and Dr. Haney.

[212]. Ontario proffered the evidence of Dr. Dvoskin, Dr. Labrecque, and Dr. Morgan, three expert witnesses on the nature of administrative segregation.

[213]. For the reasons set out below, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little weight to the evidence of Dr. Dvoskin.

[214]. For the reasons set out below, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little weight to the evidence of Dr. Morgan.

[215]. For the reasons set out below, I did not find the evidence of Dr. Labrecque particularly helpful, and, once again, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little weight to the evidence of Dr. Labrecque.

(a) **Dr. Austin (plaintiff witness)**

[216]. Dr. Austin reviewed Ontario's policies on administrative segregation with a focus on inmates with mental health problems who were placed in segregation for security reasons.

[217]. Dr. Austin reviewed Ontario's statistics and policies on administrative segregation, and he calculated that, 7% of the total population, were in segregation as of November 14, 2017 and 54% of inmates in segregation had documented mental health concerns.

[218]. Dr. Austin observed that many American jurisdictions had stopped the practice of placing mentally ill inmates into administrative segregation. In these jurisdictions, prisoners diagnosed with a significant mental illness are assigned to a secure mental health unit, where they can receive appropriate treatment. He said that administrative segregation should not be used as a placement for a mentally ill inmate or for an inmate who required protective custody.

[219]. Dr. Austin provided nine examples of prison systems, with which he had personal experience, that had abolished the segregation of seriously mentally ill inmates; namely: Alabama (24th by population), California (1st by population), Colorado (21st by population), Florida (3rd by population), Georgia (8th by population), New Mexico (36th by population), New York (4th by population), South Carolina (23rd by population), and Washington (13th by population). He identified Kentucky (26th by population) as a state in which the screening mechanisms are designed to ensure rapid admission to secure mental health housing unit and the avoidance of placement in punitive segregation units.

[220]. I parenthetically note that: (a) Dr. Dvoskin provided three additional examples of states that had segregation exemptions for the seriously mentally ill; namely: Illinois (6th by population), Ohio (7th by population), and Wisconsin (20th by population); and (b) Dr. Labrecque provided an additional three examples; namely: Maine (42nd by population), Nebraska (37th by population) and Oregon (27th by population). I parenthetically note that at least six of the largest ten American states by population (1, 3, 4, 6, 7, and 8) have abolished the segregation of seriously mentally ill inmates.

[221]. Based on his review of the data from Ontario, it was Dr. Austin's opinion, that in Ontario most of the inmates with mental health problems did not pose a security threat and that the placement data revealed that Ontario had insufficient alternative accommodation capacity for these inmates. Dr. Austin noted that Ontario's policy permitted the placement of inmates who require protective custody into administrative segregation, which, he opined, is inappropriate. He said that Ontario's policy allowed inmates with mental health problems to inappropriately be placed in administrative segregation.

[222]. Dr. Austin opined that the unjustified or inappropriate use of segregation: (a) deprived inmates of basic prisoner rights and freedoms; (b) interrupted rehabilitative programs; (c) reduced ability to gain pretrial release; (d) increased the length of sentence stay; (e) caused or aggregated mental health problems; and, (f) increased recidivism rates and risk to public safety. He said that over time, the unnecessary use of segregation would not improve safety and would negatively impact rehabilitative programs and recidivism rates. He said that over time, the unnecessary use of segregation would not improve safety and would negatively impact rehabilitative programs and

recidivism rates.

[223]. Dr. Austin observed that Ontario does not require an independent review of administrative segregation placements and that none of the reviews give any decision-making authority to a mental health professional. He noted that mentally ill inmates may be placed in administrative segregation for indeterminate durations as long as all alternatives were exhausted up to the point of undue hardship. He noted, however, that what counted for undue hardship was undefined. He testified that most American states have bars on the use of segregation for the seriously mentally ill and he opined that Ontario's policies were seriously deficient in this regard.

[224]. Ontario submitted that Dr. Austin has no experience working in Canadian penitentiaries or in any provincial correctional institutions, and none of his publications focus on the correctional system in Canada or in Ontario. Further, Ontario submits that Dr. Austin's references to the policies in the United States are not comparable to the circumstances in Ontario which Dr. Austin has never analyzed. It submits that to the extent that Dr. Austin has analyzed data from Ontario it is unrepresentative and incorrect. It submits that his report demonstrates a lack of care in interpreting and reporting on the Ministry's segregation data as provided by Ontario's correctional institutions. Ontario submits that for these reasons, the Court ought to give little or no weight to Dr. Austin's conclusions about the extent to which Ontario's use of administrative segregation aligns with that of other jurisdictions.

[225]. Each and every of these arguments by Ontario was not made out, and I accept Dr. Austin's evidence as probative and of assistance to the decisions I must reach in the immediate case.

(b) **Dr. Coyle (plaintiff witness)**

[226]. Dr. Coyle was one of the drafters of the Nelson Mandela Rules, and relying on these rules as a national and international standard for the management of prisoners, and his over twenty year career as a prison adviser and his longer career as an academic, consultant, and prison-policy reformer, Dr. Coyle reviewed the policy documents of Ontario's Ministry of Community Safety and Correctional Services and also Mr. Saper's report *Segregation in Ontario: Independent Review of Ontario Corrections*. Dr. Coyle opined about whether Ontario was meeting the standards for the use and implementation of administrative segregation.

[227]. Dr. Coyle testified about international and regional standards regarding the use of solitary confinement. He opined that international standards: (a) prohibit solitary confinement beyond 15 days for all prisoners; (b) prohibit solitary confinement of certain vulnerable prisoners, including those with mental disabilities, for any length of time; and, (c) require solitary confinement to be used only ever as a tool of last resort. (These standards are embodied in the Mandela Rules.), Professor Coyle acknowledged, however, that most of the policy instruments that he examined do not set out a maximum time limit for the use of solitary confinement nor do they set out an absolute prohibition in the case of prisoners with mental or physical disabilities.

[228]. Dr. Coyle testified that the minimum standards were set out in Rules 43-45 of the Nelson Mandela Rules. He said that the internationally agreed standards were that: (a) solitary confinement shall be permitted only as a disposition of last resort; (b) should not exceed more than 15 consecutive days; and, (c) should never be applied to prisoners with mental or physical

disabilities, women, or children. He said that there were alternatives to the use of administrative segregation, and he used as an example what he described as the less than ideal alternative of Close Supervision Centres ("CSC"), which were a part of the prison system in England and Wales. In his view, this less than perfect alternative was still a preferable model to administrative segregation as implemented in Ontario.

[229]. Dr. Coyle provided a list of principles that should be followed for the good operational management of prisoners held in maximum security conditions. He said prisoner treatment should be humane, and he noted that the manner in which a society treats its prisoners is a reflection of its deepest values. He stated that the number of prisoners under the highest levels of security conditions should be kept to a minimum. There should be a clear well-defined system for identifying which prisons should be placed in high security conditions, and there should be a regular and meaningful monitoring and review process. The conditions of segregation should be decent and humane, and Dr. Coyle said that there should be clear protocols for the use of administrative segregation.

[230]. After his review of Ontario's policy documents, it was Dr. Coyle's opinion that Ontario's use of administrative segregation was deficient because: (a) there was an excessively broad definition of those who may be held in segregation because they require special management, including individuals with mental illness or at risk of suicide; (b) these inmates should not be held in administrative segregation; (c) the required reviews of placements were worthless or non-existent; and, (d) crucially, the Policy and Procedures manual fails to make provision for any independent review or oversight of the placements.

[231]. Ontario, once again, submitted that little weigh should be given to Dr. Coyle's evidence. In particular, Ontario submitted that the judgments from the European Court of Human Rights, which were relied on by Dr. Coyle, do not support his opinion about international consensus on the use of solitary confinement and, therefore, his review of these judgments should also be given no weight. Ontario submitted that Dr. Coyle's evidence with respect to the alternative to administrative segregation of Close Supervision Centres ("CSCs") in England and Wales, did not displace the use of solitary confinement.

[232]. Each and every of these arguments by Ontario was not made out, and I accept Dr. Coyle's evidence as probative and of assistance to the decisions I must reach in the immediate case.

(c) **Dr. Chaimowitz (plaintiff witness)**

[233]. Based on his own observations, Dr. Chaimowitz said that administrative segregation was harmful. He said that the holding of mentally ill inmates in segregation was a very stressful experience that could produce long-lasting negative psychological effects. He said that detaining a person with a major mental illness in solitary confinement for an extended period of time without substantial psychiatric treatment was highly inappropriate.

[234]. Dr. Chaimowitz said harm crystallized upon the placement and increased in relation to the duration of the placement. The longer the segregation, the worse was the harm. In Dr. Chaimowitz's opinion, although there would be some variability from person to person, any inmate placed in administrative segregation would suffer a base level of harm.

[235]. Dr. Chaimowitz testified that there is a base level of harm that would be suffered by every Class Member. He testified that every inmate placed in administrative segregation endures a painful experience. He said that this was the general consensus of the scientists since at least 2009.

[236]. Dr. Chaimowitz provided a methodology for determining a base level of damages for the class as a whole and he identified factors that in his opinion should govern individual assessments of damages. The major variables in the methodology were the severity of length of the confinement and the severity of the inmate's symptoms.

[237]. Ontario submitted that Dr. Chaimowitz does not have any expertise in creating a methodology for calculating damages as he purports to do for the Class Members' claims. It submits that what Dr. Chaimowitz's method does not demonstrate is that damages can be assessed on a class-wide basis for the Class Member Inmates with a Serious Mental Illness.

[238]. I disagree with Ontario's criticisms of Dr. Chaimowitz's evidence. I accept it as probative and helpful in reaching the findings of fact set out later in these Reasons for decision.

[239]. For present purposes, I need not comment on the merits of Dr. Chaimowitz's methodology for individual assessments of damages, which is a matter for another day. For present purposes, I accept Dr. Chaimowitz's opinion, which is confirmed by others, that any inmate placed in administrative segregation would suffer a base level of harm. As for quantifying those damages, I shall not be using Dr. Chaimowitz' methodology for determining a base level of damages and it remains to be determined what methodology, if any, would be useful to govern individual assessments of damages.

(d) **Dr. Dvoskin (defence witness)**

[240]. For the reasons that follow, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little to no weight to the evidence of Dr. Dvoskin.

[241]. Dr. Dvoskin testified that solitary confinement, which he would define as total isolation from human contact and mental stimulation does not exist in North America. According to Dr. Dvoskin, all of Adam Capay, Ashley Smith, Edward Snowshoe, the affiants on this motion, and all of the other people who suffered or died in administrative segregation were not in solitary confinement.

[242]. Since no one was suggesting that administrative segregation was a form of total isolation Dr. Dvoskin's opinion was essentially useless for this summary judgment motion.

[243]. Dr. Dvoskin disagreed with Dr. Grassian's opinion about the consequences of solitary confinement and Dr. Dvoskin said the symptoms of a syndrome was fictional. This opinion, however, contradicted Dr. Dvoskin's own evidence in the American case of *Madrid v. Gomez*, where he acknowledged the syndrome existed. His opinion is also belied by observations for decades, if not centuries, that solitary confinement has devastatingly adverse psychiatric consequences that certainly can be described as a real syndrome.

[244]. Dr. Dvoskin's opinion also contradicted or was inconsistent and incompatible with his own testimony that: (a) many inmates with serious mental illness will clinically deteriorate and not

improve when placed in administrative segregation; (b) prisoners in "supermax confinement" in U.S. extreme maximum security penitentiaries suffer harm from the extreme limitations on their liberty; (c) an inmate who is acutely psychotic, suicidal or otherwise in the midst of a psychiatric crisis, should not be placed in administrative segregation, except in the most extraordinary or dangerous circumstances; (d) inmates with serious mental illness should be allotted 10 to 15 hours per week of unstructured therapeutic activities in addition to at least another 10 hours a week of unstructured exercise or recreation time; and, (e) there is general consensus among clinicians that placement of inmates with serious mental illnesses in administrative segregation is contraindicated because many of these inmates' psychiatric conditions will clinically deteriorate or not improve.

[245]. Thus, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little weight to the evidence of Dr. Dvoskin.

(e) **Dr. Grassian (plaintiff witness)**

[246]. Dr. Grassian was retained to provide an opinion regarding the psychiatric effects of solitary confinement with a particular emphasis on the effects of prolonged confinement (longer than 15 consecutive days) on inmates diagnosed with mental illness.

[247]. Dr. Grassian explained that for decades extending to centuries, it has been known that humans suffer profoundly deleterious effects on their mental functioning if isolated from social stimulation. He noted that in the history of penal institutions, the incidence of mental disturbances among prisoners detained in solitary confinements was so great that the approach was abandoned for the general prison population.

[248]. Based on his own studies and observations of inmates who had been confined in solitary confinement for at most 15 consecutive days, he identified a psychiatric syndrome caused by the confinement. The syndrome was independent of pre-existing psychiatric illness and aggravated existing mental illnesses. The syndrome produced a spectrum of symptoms of stupor and delirium.

[249]. It is worth emphasizing that Dr. Grassian's own observations, which were supported by the academic literature and studies of others, discovered that the syndrome developed in less than 15 days of solitary confinement.

[250]. Dr. Grassian's observations revealed that after a placement in segregation, an inmate in solitary confinement became increasing incapable of processing external stimuli and became hyper-sensitive and agitated by even ordinary levels of stimulation. An inmate in solitary confinement for prolonged periods of time was unable to concentrate, focus, and had impaired alertness and problems with impulse control. Such inmates became subject to hallucinations, distortions, disorientation, illusions and paranoia. Serious clinical depression even to the point of suicide was a frequent consequence of solitary confinement and inmates in solitary confinement often develop serious anxiety disorders. Mental activity fluctuated between extremes of stupor and lethargy to extreme agitation and manic behaviour.

[251]. Dr. Grassian stated that solitary confinement caused physiological harm and could have permanent adverse effects on brain function including an increased likelihood of developing dementia later in life. Psychiatric pathology and brain dysfunction are notable within just a few

days. He said that individual with diagnosed mental illness are particularly vulnerable and will suffer greater psychiatric harm. He said that medical research had confirmed that solitary confinement was toxic to brain function. He said that the mentally ill will suffer more and more permanent psychiatric harm from a solitary confinement. He said that the effect on the mentally ill will be so immediate and so inevitable that any use of solitary confinement with such individual is increasingly being entirely forbidden in many institutions.

[252]. Thus, Dr. Grassian opined that: (a) solitary confinement causes harm to every inmate subjected to it; (b) inmates suffering from serious mental health problems are particularly vulnerable to harm if placed in segregation and will suffer a base level of harm and greater psychiatric harm than other prisoners; (c) while some inmates who have experienced prolonged administrative segregation will suffer more than others, they all will suffer a base level of harm as a result of solitary confinement; and, (d) solitary confinement interferes with psychiatric treatment for those who require it.

[253]. Dr. Grassian stated that the intensity of the symptoms or consequences of the solitary confinement will vary, all inmates will develop the same syndrome if they are exposed to conditions of solitary confinement. Dr. Grassian testified that increased light, reading materials, access to televisions or other stimuli does not ameliorate the toxicity of solitary confinement.

[254]. Ontario submitted that Dr. Grassian's evidence should be given no weight because it was based on his 1983 article in the *American Journal of Psychiatry*, which summarizes his clinical observations of just 14 inmates held at Walpole, Massachusetts under highly restrictive conditions of confinement. Ontario notes that the article has been criticized in the literature for its limited scope and for the potential for response bias in the interviews he conducted with the inmates. Ontario submits that the analysis from the article and from the other studies relied on by Dr. Grassian cannot be extrapolated to the circumstances of administrative segregation in Ontario that were not directly investigated by Dr. Grassian.

[255]. I am not persuaded by any of Ontario's criticisms of Dr. Grassian's opinion. I accept his evidence as probative and of assistance to the decisions I must reach in the immediate case.

(f) **Dr. Haney (plaintiff witness)**

[256]. Dr. Haney conducted a broad and systematic review of the literature in order to demonstrate that Dr. Morgan's evidence ignored or discounted most of the extensive literature on the harmful effects of solitary confinement. Dr. Haney's evidence was that a proper review of the literature shows that scientists have independently and consistently reached almost identical conclusions about the negative effects of social isolation in general and solitary confinement in particular. He said there was a consensus in the scientist community and professional organizations about the damaging effects of solitary confinement. Dr. Haney said that Dr. Morgan's "extreme views" are an outlier against this settled and well-substantiated consensus.

[257]. Dr. Haney's conclusions on the psychological effects of isolated conditions of confinement are based on his work over the past several decades, including: (a) interviews with prison staff and assessments of confined prisoners; (b) data collected from isolation units; (c) prison records, files and other documentation; and, (d) a review of the academic literature. His opinions accord with

Dr. Grassian's views and the vast majority of those expressed in the published literature.

[258]. Ontario submitted that Dr. Haney's evidence should be given no weight because his work is based on investigations of the most restrictive conditions of confinement in the United States, and, thus, his views on administrative segregation have been shaped by very different circumstances and, therefore, should be given little to no weight.

[259]. I disagree with Ontario's submission. As with Dr. Grassian, Dr. Haney's experience has not been limited to situations that do not compare with the circumstances of Ontario prisons. Rather, he has studied the psychological effects of various conditions across a broad range of institutional settings including: (a) juvenile facilities; (b) adult jails, prisons and penitentiaries; (c) solitary and supermax confinement units; and (d) overcrowded prisons and prison systems. In the course of his decades of research, writing, and consulting work he has toured and inspected U.S. federal prisons, U.S. state-run prisons in twenty-one different states, as well as institutions in Canada, Cuba, England, Hungary, Mexico and Russia. Dr. Haney is amply qualified to testify about administrative segregation as it is practiced in Ontario.

[260]. In *Brazeau*, I found Dr. Haney's review of the academic literature and his opinion on the harms of administrative segregation to inmates, particular mentally ill inmates, persuasive, I find it persuasive again in the immediate case.

(g) **Dr. Labrecque (defence witness)**

[261]. Dr. Labrecque reviewed and compared policies and statutes about segregating inmates in Canada and in the United States. He reviewed policies from 47 state or federal jurisdictions in the United States and from 4 provincial or federal Canadian jurisdictions. He opined that these policies and statutes generally aligned with Ontario's policies regarding administrative segregation.

[262]. Dr. Labrecque's review, however, was not particularly helpful, because of methodological flaws and unreliability and because he had no way of knowing whether or not the policies were being performed or being honoured in their breach as appears to be the case with Ontario's practices.

[263]. For what it is worth, Dr. Labrecque conceded that there is always a risk of harm for inmates placed in administrative segregation.

(h) **Dr. Morgan (defence witness)**

[264]. For the reasons that follow, save for his evidence that accords with the evidence of Mr. Frances' experts, I give little weight to the evidence of Dr. Morgan.

[265]. It was Dr. Morgan's opinion that not every inmate placed in administrative segregation would suffer serious harm.

[266]. For example, it was Dr. Morgan's opinion, that an inmate at the Californian Pelican Bay penitentiary who had been in solitary confinement for 28 years had suffered no harm. However, under cross-examination, Dr. Morgan agreed that administrative segregation carries the universal risk of severe harm and he agreed that some inmates with serious mental illness will be harmed by

a placement in administrative segregation.

[267]. Contrary to Dr. Morgan's opinion, there was ample evidence that that every inmate and especially inmates with a serious mental illness suffer psychological harm from a placement in administrative segregation that is independent from the harm they are already suffering from their pre-existing mental illnesses. There was ample evidence that every inmate placed in administrative segregation for 15 consecutive days or more suffers severe psychological harm.

G. Major Findings of Fact

[268]. Based on the *viva voce* evidence of the witnesses, the documentary evidence, the experts' evidence and experts' reports in the immediate case, and as I shall explain further in the legal analysis that follows, I make the major findings of fact set out below. Other complementary or supplementary findings of fact are found throughout these Reasons for Decision.

[269]. My major findings of fact are as follows:

- In practice and in experience, there was no meaningful difference between administrative segregation in Ontario and solitary confinement as it is defined around the world.

- Administrative segregation as practiced in Ontario constitutes solitary confinement within the meaning of the Mandela Rules.

- The Mandela Rules promulgated by the United Nations represent an international consensus of proper principles and practices in the management of prisons and the treatment of those confined in prisons.

- Well before year 2000, it was widely known across the world, in Canada, and in Ontario that placing inmates into solitary confinement caused serious harm. Before year 2000, it was known that an empowered independent review was needed of any placement in administrative segregation. Before year 2000, it was known that mentally ill prisoners should not be placed in administrative segregation and that alternatives should be developed for them as necessary to maintain the security of the prison or penitentiary. Before year 2000 and as ultimately codified in 2001 by the Mandela Rules at a 15 day maximum, it was known that no prisoners should undergo prolonged administrative segregation.

- Throughout the Class Period, Ontario knew precisely what it was doing with respect to the use of administrative segregation, and it knew what other jurisdictions were doing with respect to the use of administrative segregation in their correctional institutions and with respect to the treatment of the mentally ill. It also knew about the development of alternatives to administrative segregation and about prison reform developments to ensure the humane treatment of inmates.

- Throughout the Class Period, Ontario knew about the growing condemnation of: (a) placing seriously mentally inmates in solitary confinement; and (b) placing inmates in prolonged solitary confinement. Ontario knew about the tragic incidents associated with

prolonged solitary confinement, some of which incidents had occurred within Ontario's boundaries.

- Throughout the Class Period, Ontario knew that there was a worldwide consensus that solitary confinement should be a last resort for securing the safety of a correctional institution.

- Ontario knew that there was a worldwide consensus that solitary confinement should never be used for certain inmates, including the seriously mentally ill, and Ontario knew that there was a worldwide consensus that prolonged solitary confinement was contrary to what the United Nations had set as the *Standard Minimum Rules for the Treatment of Prisoners* (the revised Mandela Rules).

- Because of its nature and the harm it causes, a placement in administrative segregation engages an inmate's residual liberty interest, his or her interest in security of the person, and because of the increased risk of suicide, it engages the inmate's right not to be deprived of life.

- A placement in administrative segregation can and does cause physical and mental harm, particularly to inmates that have serious pre-existing psychiatric illness. The degree of mental injury is severe and rises above the ordinary annoyances, anxieties and fears that come with living in civil society.

- Negative health effects from administrative segregation occur within a few days in administrative segregation as it is practised in Ontario.

- Some of the specific harms of administrative segregation include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour

- Detaining an inmate in administrative segregation for more than 15 consecutive days imposes psychological stress capable of producing serious, and even permanent negative effects on mental health. The harmful effects of administrative segregation can occur within forty-eight hours. Detaining an inmate in administrative segregation for more than 15 consecutive days poses a significant risk of serious psychological harm. A placement in administrative segregation puts inmates at an increased risk of self-harm and suicide.

- Without exception, a placement in administrative segregation of an inmate with serious mental illness causes a minimum level of harm to the inmate. Additional harm may be suffered depending on the idiosyncratic personality of the inmate.

- Without exception, a placement in administrative segregation of an inmate for more than fifteen days causes a minimum level of harm to the inmate. Additional harm may be suffered depending on the idiosyncratic personality of the inmate. Some inmates are more resilient than others but all placements in administrative segregation for more than 15 days

are damaging.

- Ontario's practice of detaining an inmate in administrative segregation for more than 15 consecutive days is offside responsible medical opinion.

- Prisoners with serious mental illness should not be placed in administrative segregation. Ontario, however, routinely placed inmates with mental health or suicide risk alerts on file in administrative segregation.

- Up until 2015, Ontario's Administrative Segregation Policy did not require a physician, psychiatrist, or other mental health worker to assess a segregated inmate's mental wellbeing. Rather, the policy indicated that a pre and post-segregation medical examination should be performed whenever possible.

- Ontario has habitually placed mentally ill inmates in administrative segregation and will only remove and relocate them only after negative psychological effects or suicidal ideation manifest themselves.

- Many inmates are placed in administrative segregation contrary to Ontario's own policy directives. For example, pursuant to the Administrative Segregation Policy, the seriously mentally ill (or even the elderly, infirm or injured) are advertently or inadvertently placed in administrative segregation rather than in a clinical environment where they may receive treatment.

- Throughout the Class Period, across many issues at the operational level, including placement review and reporting of placements in administrative segregation, Ontario routinely and habitually failed to comply with accepted standards or even its own written policy. Ontario's administrative segregation policy directives are frequently ignored in practice.

- Because of the deficiencies of the review system associated with placements in administrative segregation, Ontario's placement of any inmate for any period of time is a contravention of the inmate's rights under section 7 of the *Charter* that is not saved by section 1 of the *Charter*.

- Ontario's placing an inmate with serious mental illness in administrative segregation for any period of time is a contravention of the inmate's rights under section 12 of the *Charter* that is not saved by section 1 of the Charter.

- Ontario's placing an inmate in administrative segregation for a period of more than fifteen days is a contravention of the inmate's rights under section 12 of the *Charter* that is not saved by section 1 of the *Charter*.

- Ontario's correctional institutions frequently did not comply with its own administrative segregation policies.

- Ontario was very slow to respond to the growing international recognition and expert

consensus that the use of solitary confinement should be prohibited for mentally ill prisoners and that it should never be used as a substitute for appropriate mental health care.

- Ontario was frequently non-compliant with its own policy requirement to consider alternatives to administrative segregation to the point of undue hardship.

- Ontario was very and unduly slow to respond to the reports of Justice Arbour and others that indeterminate prolonged administrative segregation does not conform to legal standards, and Ontario was very and unduly slow to reform its policies and practices with respect to the use of administrative segregation particularly with respect to the mentally ill.

- Notwithstanding that it had acknowledged that prolonged periods of solitary confinement can have serious and detrimental effects on a prisoner's mental health, Ontario was very and unduly slow in responding to the consensus that prolonged administrative segregation should be prohibited including the recommendation of Ontario's Ombudsman that segregation for more than 15 days be prohibited.

- Ontario was very and unduly slow to respond to investigations and inquiries that concluded that its segregation review practices were incomplete, inadequate, or inefficient and that correctional staff routinely failed to comply with segregation regulation and policies.

- Ontario's placing an inmate with serious mental illness in administrative segregation for any period of time is negligent.

- Ontario's placing an inmate in administrative segregation for more than fifteen days is negligent.

H. The Limitation Period

[270]. Section 7 of *Proceedings Against the Crown Act*,[86] which was in force when Mr. Francis commenced his action, imposes a requirement that actions against Ontario (the Crown) be preceded by notice of the claim. Although the *Proceedings Against the Crown Act* has been repealed and replaced by the *Crown Liability and Proceedings Against the Crown Act*, pursuant to the transitional provisions, s. 7 continues to apply with respect to actions that were started before the replacement statute came into force.[87] Section 7 states:

> *Notice of claim*
>
> 7 (1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no

[86] R.S.O. 1990 c. P. 27.

[87] *Noddle v. Ontario (Ministry of Health)*, 2019 ONSC 7337. As noted later in these reasons for decision, the *Proceedings Against the Crown Act* was repealed on July 1, 2019 and replaced by the *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, Sched. 17, s. 18(1), which states: "No proceeding that includes a claim for damages may be brought against the Crown unless, at least 60 days before the commencement of the proceeding, the claimant serves on the Crown, in accordance with section 15, notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose."

> action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.
>
> *Limitation period extended*
>
> (2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.
>
> […]

[271]. On December 9, 2016, Mr. Francis gave notice to Ontario of his proposed class action pursuant to s. 7 of the *Proceedings Against the Crown Act*. After the required notice period, he served his Statement of Claim to commence the action. The Statement of Claim was issued on April 20, 2017.

[272]. There is no dispute between the parties that the basic limitation period under the *Limitations Act, 2002*,[88] for the Class Members' claims is two years for both the negligence claim and also for the alleged *Charter* breaches. However, there is a dispute between the parties about when the limitation period stopped barring claims; i.e., there is a dispute about what claims were barred by the limitation period. Mr. Francis says the date is December 9, 2014 based on his notice given pursuant to s.7 of the *Proceedings Against the Crown Act*. In contrast, Ontario submits that the date is April 20, 2015 based on the issuance of the Statement of Claim. If Ontario's position is correct, the number of Class Members is smaller.

[273]. I agree with Ontario's submission that that the limitation period in this proceeding was not tolled as soon as Mr. Francis filed the notice of his claim. It continued to run against claimants until the Statement of Claim was issued. Under s. 7(1) of the *Proceedings Against the Crown Act,* a claimant must serve notice of the claim at least 60 days before commencing a claim against the Crown (Ontario). However, the notice itself does not effect the limitation period, and there is nothing in the Act that suggests that the notice has this effect. Indeed, what is in the Act suggests the opposite, *i.e.*, that the giving of the notice does not end the running of the limitation period.

[274]. In one circumstance, the delivery of the notice may extend the limitation period, but the notice does not toll the limitation period, which continues to run and to bar claims. An extension of the limitation period is provided for in s. 7(2) of Act which states:

> *Limitation period extended*
>
> (2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.

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[88] S.O. 2002, c 24, Sched B.

[275]. Section 7(2) does not apply in the circumstances of the immediate case.

[276]. Mr. Francis did not issue the Statement of Claim until April 20, 2017, which is 133 days after providing notice. The limitation period for the claims of the Class Members was not tolled until the Statement of Claim was issued on April 20, 2017. The limitation period might have been tolled as early as 90 days after the delivery of the notice, but the limitation period for the putative Class Members is defined by the issuance of the Statement of Claim.

[277]. The Statement of Claim tolls the limitation period for the Class, and thus, it follows that the presumptive limitation period under the *Limitations Act, 2002* would bar the Class Members' common issue claims before April 20, 2015, which is two years before the filing of the Statement of Claim.

[278]. This ruling on limitation periods has an effect on the Class Period and on the common issues that I must decide. The effect on the Class Period is that it should be redefined to be the period between April 20, 2015 and the date of certification September 18, 2018. As certified, the questions pose a time period "from January 1, 2009." My limitations period ruling, however, has the practical and legal effect of narrowing the scope of the common issues to focus on conduct commencing "from April 20, 2015." Therefore, the analysis that follows will use that date for determining the common issues about *Charter* breaches and about negligence.

[279]. Ultimately, however, apart from class size, the legal and factual analysis is not much affected by the Class Period as it has been redefined because of these limitation period considerations. I say this because, as it turns out, my major findings of fact, which I have set out above, were the factual circumstances that existed in Ontario before and at least from January 1, 2009. Even class size, will not be affected to the extent that Class Members who experienced administrative segregation before April 20, 2015 may have claims at individual issues trials if they establish that their claims could not have been discovered before April 20, 2015.

[280]. Whether a Class Member could rebut the presumption that his or her claim has been discovered by proving that his or her claim was not discoverable is a matter of individual issues trials. In *Brazeau v. Attorney General (Canada)*[89] and in *Reddock v. Canada (Attorney General)*,[90] which were class actions about administrative segregation in federal penitentiaries, I preserved the right of individual Class Members whose claims were presumptively statute-barred to rebut the presumption at individual issues trials. I shall adopt the same approach in the immediate case.

I. The Request to Amend the Class Period and Extend the Class Definition

[281]. In *Brazeau v. Attorney General (Canada)*[91] and in *Reddock v. Canada (Attorney General)*,[92] the class definition extended to the present, which is to say to the time of the summary judgment motions. Mr. Francis requests that the Class Period in the immediate case be extended

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[89] 2019 ONSC 1888, varied 2020 ONCA 184.
[90] 2019 ONSC 5053, varied 2020 ONCA 184.
[91] 2019 ONSC 1888, varied 2020 ONCA 184.
[92] 2019 ONSC 5053, varied 2020 ONCA 184.

to the present.

[282]. I agree with Ontario, however, that this is not appropriate, and it is particularly not appropriate in circumstances where Ontario consented to the certification of the action as a class action with a defined Class Period.

[283]. The certification order fixed the class definition. As a matter of due process, in the absence of the defendant's consent, a plaintiff must move to amend the certification order. In the immediate case, there is no motion to amend the certification order, as required by s. 8(3) of the *Class Proceedings Act, 1992*. To grant summary judgment in favour of an extended class would amount to granting a motion that no party has brought and this would breach procedural fairness.[93]

[284]. I, therefore, shall not be revising the class definition by extending the Class Period.

J. Has Ontario Contravened Sections 7 and 12 of the *Charter?*

1. The Section 7 (Right to Life, Liberty, and Security of the Person) – Substantive Claim

[285]. Sections 1 and 7 of the *Charter* state:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> […]
>
> 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.

[286]. To demonstrate that government action has infringed section 7 of the *Charter*, a plaintiff must demonstrate that: (a) the government action interferes with or deprives individuals of life, liberty, or security of the person; and (b) the deprivation is not in accordance with a principles of fundamental justice.[94]

[287]. To demonstrate that government action has infringed section 7 of the *Charter*, a plaintiff must identify and define the relevant principles of fundamental justice that apply, and then show that the infringement or deprivation of rights does not accord with the identified principles.[95]

[288]. There is no dispute that the inmates of correctional institutions are protected by the *Charter*.[96] Mr. Francis submits that in its actions in placing seriously mentally ill inmates (SMI Inmates) in administrative segregation and in placing inmates (Prolonged Inmates) in administrative segregation for more than 15 days, Ontario has contravened the Class Members'

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[93] *Barker v. Barker*, 2018 ONCA 255, at paras 11-12, 15-18.
[94] *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.
[95] *R. v. Malmo-Levine*, 2003 SCC 74 *R v. White*, [1999] 2 S.C.R. 417.
[96] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 40.

rights under section 7 of the *Charter*. In determining the merits of this substantive claim under section 7 of the *Charter*, the first issue to address is whether administrative segregation deprives inmates of life, liberty, or security of the person.

[289]. Imprisonment and the imminent threat of imprisonment engage the liberty interest under section 7 of the *Charter*.[97] This was conceded by Ontario; Ontario concedes that a placement in administrative segregation engages the liberty interest. Every prisoner retains a residual liberty right under section 7 of the *Charter* relating to the nature of his imprisonment.[98]

[290]. In *R. v. Boone*,[99] the Ontario Court of Appeal noted that a decision to transfer an inmate to the more restrictive institutional setting of administrative segregation is a significant deprivation of the inmate's residual liberty interests and therefore engages section 7 of the *Charter*.[100] The Court of Appeal also stated that there has been a growing recognition that solitary confinement is a very severe form of imprisonment that can have a lasting psychological impact on prisoners.[101]

[291]. However, Ontario submits that Mr. Francis has not established a deprivation of security of the person or a deprivation of life on a class-wide basis with respect to the placement of inmates into administrative segregation.

[292]. In this last regard, it is worth noting and worth emphasizing that Ontario does not assert that - on an individual basis - administrative segregation could not or does not engage the right to security of the person or the right to life interest of section 7 of the *Charter*. Its argument focuses on whether Mr. Francis has demonstrated - a class-wide - deprivation of security of the person or the right to life interest.

[293]. I disagree with Ontario's submission. In my opinion, Mr. Francis has demonstrated a class-wide deprivation of security of the person and a class-wide deprivation of the right to life interest.

[294]. To demonstrate an interference with security of the person, the plaintiff must show either interference with bodily integrity and autonomy, including deprivation of control over one's body, or serious state-imposed psychological stress.[102] Government action deprives or infringes the security of the person when it seriously impairs one's physical or mental health or causes severe psychological harm.[103] To constitute an infringement to a person's security of the person, the impact of the government action on psychological integrity need not rise to the level of nervous shock or psychiatric illness, but it must be greater than ordinary stress or anxiety.[104] State imposed serious psychological stress constitutes a breach of security of the person.[105]

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[97] *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
[98] *R. v. Gamble*, [1988] 2 S.C.R. 595 at p. 645; *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602 at p. 625.
[99] 2014 ONCA 515.
[100] See also *May v. Ferndale Institution*, 2005 SCC 82; *R v. Miller*, [1985] 2 S.C.R. 613.
[101] *R. v. Boone*, 2014 ONCA 515 at para. 3.
[102] *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876 at para 52.
[103] *Carter v. Canada (Attorney General)*, 2015 SCC 5.
[104] *New Brunswick (Minister of Health and Community Services)* v. G. (J.), [1999] 3 S.C.R. 46 at para. 60.
[105] *Blencoe v. B.C. (Human Rights Commission).*, 2000 SCC 44.

[295]. In *R. v. Morgentaler*,[106] *Chaoulli v. Canada*,[107] *Canada (AG) v. PHS Community Services Society*,[108] and *Carter v. Canada*,[109] which all involved state interference to access to medical treatment, the Supreme Court held that a risk of harm is sufficient to engage the right to security of the person and that state interference with a woman's access to medical treatment constituted a deprivation of security of the person. In *Bedford v. Canada*,[110] the Supreme Court ruled that legislation that increases sex workers' risk of harm constitutes unlawful interference with security of the person.

[296]. In the immediate case, it has been proven that a placement in administrative segregation causes severe psychological distress, including anxiety, hypersensitivity, cognitive dysfunction, significant impairment of ability to communicate; hallucinations, delusions, loss of control, severe obsessional rituals, irritability, aggression, depression, rage, paranoia, panic attacks, psychosis, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. There are new psychological symptoms and exacerbated psychiatric conditions in those with diagnosed or undiagnosed mental illnesses. The negative health effects from administrative segregation can occur within a few days of segregation and those harms increase as the duration of the time in administrative segregation increases and the expert evidence in the immediate case establishes that there is physical and mental harm from prolonged administrative segregation, which is to say that every inmate placed in administrative segregation for more than fifteen days suffers a base level of psychiatric and physical harm. While a particular inmate will suffer differentially from his or her placement in administrative segregation, they will also suffer to some degree and there is a base level of suffering that all will suffer from a placement in administrative segregation for more than fifteen days.

[297]. In a factual finding that was upheld by the Ontario Court of Appeal in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[111], Associate Chief Justice Marrocco concluded that keeping a person in administrative segregation exposes that person to abnormal psychological stress.

[298]. The evidence in the immediate case reveals that once a placement in administrative segregation has become prolonged, the stress and anxiety is serious and to borrow the language of the Supreme Court in *Mustapha v. Culligan of Canada Ltd*.[112] and *Saadati v. Moorhead*,[113] the stress and anxiety is above the ordinary annoyances, anxieties and fears that come with living in a penitentiary.

[299]. In *Mustapha* and in *Saadati*, the Supreme Court spoke about the comparator of stress and anxiety in a civil society, but the point to emphasize is that to be a compensable harm, the stress

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[106] [1988] 1 S.C.R. 30.
[107] 2005 SCC 35.
[108] 2011 SCC 44.
[109] 2015 SCC 5.
[110] 2013 SCC 72.
[111] 2017 ONSC 7491 at para. 175, varied 2019 ONCA 243.
[112] 2008 SCC 27.
[113] 2017 SCC 28.

and anxiety must be serious and extraordinary. The evidence in the immediate case reveals that the stress and anxiety from prolonged administrative segregation rises to the level that the inmate suffers a mental shock that is a compensable harm. The evidence on this summary judgment motion reveals that there was a minimal level of harm suffered by all Class Members for administrative segregations of more than fifteen days and the suffering would continue and grow as the duration of segregation lengthened.

[300]. I conclude that the right to security of the person is engaged in the immediate case.

[301]. Turning to the right to life, it is engaged where a law or government action directly or indirectly imposes death or an increased risk of death on a person.[114] In *Brazeau*, I concluded that that the placement of a mentally ill inmate in administrative segregation engages the inmate's right not to be deprived of life because of the increased risk of suicide. The evidence in the immediate case establishes that administrative segregation creates an increased risk of suicide for all Class Members, thereby infringing the right to life under section 7 of the *Charter*.

[302]. Having determined in the immediate case that state action interferes with or deprives the inmates placed in administrative segregation of life, liberty, or security of the person, the next issue is whether the deprivation is not in accordance with a principle of fundamental justice.

[303]. Principles of fundamental justice are basic tenets of the Canadian legal system.[115] To establish that a rule or principle is a principle of fundamental justice, the plaintiff must show that it is a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.[116]

[304]. The principles of fundamental justice are concerned not only with the interests of the person who claims that his or her liberty has been limited but with the protection of society; fundamental justice requires a fair balance, both procedurally and substantively, between these interests.[117]

[305]. A principle of fundamental justice can be established through international law, if the international law is shown to be a principle that is part of international customary law or is incorporated into Canadian domestic law in some way.[118]

[306]. A principle of fundamental justice is the overbreadth principle. A principle of fundamental justice is that laws infringing on life, liberty or security of the person must not be overbroad, which

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[114] *Carter v. Canada (Attorney General)*, 2015 SCC 5.
[115] *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.
[116] *R. v. Malmo-Levine*, 2003 SCC 74; *R v. White*, [1999] 2 S.C.R. 417.
[117] *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at pp. 151-2 *per* McLachlin, J.; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at pp. 502-3 *per* Lamer, J.; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at p. 212 *per* Wilson, J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at p. 828 *per* Iacobucci, J.
[118] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62.

is to say that there is no rational connection between the purpose of the impugned provisions and some of its impacts.[119]

[307]. To establish that a law is overbroad, a claimant must establish that the law deprives some persons of their life, liberty, or security of the person for reasons unrelated to the purpose of the measure.[120] In other words, it is "arbitrary in part".[121] In still other words, an overbroad law "goes too far and interferes with some conduct that bears no connection to its objective".[122] Considerations of alternative measures is, however, not a part of an overbreadth analysis; the place for that consideration is in the *Charter* section 1 analysis.[123]

[308]. In the *British Columbia Civil Liberties Association*, Justice Leask ruled that administrative segregation, which he equated to solitary confinements, is overbroad in two respects; he stated at paragraphs 326 and 327 of his decision:[124]

> 326. … I find that the impugned provisions are overbroad in two respects First, while temporary segregation is rationally connected to the objective of security and safety, prolonged segregation, which the provisions also permit, inflicts harm on inmates and ultimately undermines institutional security. Second, the provisions define segregation overly restrictively and authorize solitary confinement in circumstances where some lesser form of restriction would achieve the objective of the provision.
>
> 327. Prolonged segregation is both unnecessary for and, indeed, even inconsistent with, the objective of maintaining institutional security and personal safety. While the separation of inmates can be justified for the limited time it legitimately takes to make alternative arrangements to ensure inmate safety or enable an investigation, indefinite and prolonged segregation with its attendant harms is simply not necessary to enable such steps to be taken. To my mind, there is no rational connection between, for example, the legitimate need for CSC to have the authority to separate inmates who have a conflict with one another and the authority to keep one or both in segregation indefinitely for periods of months or even years.

[309]. Based on the evidence and my findings of fact in the immediate case, and for the two reasons expressed by Justice Leask, I conclude that administrative segregation as it is practiced in Ontario's correctional institutions is overbroad. While temporary segregation is rationally connected to the objective of security and safety, a mode of temporary segregation that amounts to solitary confinement is not rationally connected to the objective of security and safety; rather, this mode of segregation degrades security and safety.

[310]. Another principle of fundamental justice is the grossly disproportionate principle. The idea of this principle of fundamental justice is that the effect of a law or of a state actor's conduct that engages the life, liberty, or the security of the person should not be grossly disproportionate with

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[119] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 72, 85-88*; Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 93-119*; British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228.
[120] *R v. Safarzadeh-Markhali*, 2016 SCC 14 at para 22.
[121] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 112.
[122] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 101.
[123] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 121-122, 126.
[124] *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 at paras. 326-327.

the law's purposes so that the law or conduct cannot be rationally supported.

[311]. The gross disproportionality analysis under section 7 of the *Charter* is concerned with whether a law's effects on life liberty or security of the person is fundamentally out of sync with the law's objectives[125] Gross disproportionality is only made out in "extreme cases" where the connection between a law's effect and its purpose is "entirely outside the norms accepted in our free and democratic society."[126] The threshold for gross disproportionality is the same under section 7 as it is under section 12 of the *Charter*.[127]

[312]. Ontario submits that Mr. Frances has not established that the effect of administrative segregation as compared to its objective is grossly disproportionate for the entire Class. The premise of this argument is that the evidence shows that the effects of administrative segregation vary from inmate to inmate and, therefore, the effects of administrative segregation cannot be grossly disproportionate on a class-wide basis but only on an individual basis.

[313]. Ontario's argument fails on the facts. The effects of an administrative segregation that is the same as a solitary confinement does affect all the Class Members. The facts establish that the effects of administrative segregation are grossly disproportionate to the purposes of administrative segregation. The effect of placing a seriously mentally ill inmate in solitary confinement and the effect of placing an inmate in administrative segregation for more than 15 days, both of which entail dire psychiatric consequences and immediate harm, is grossly disproportionate to the purposes of securing the safety of the prison. The treatment is incongruent with the purposes of administrative segregation. The collective that is the SMI Inmates and the Prolonged Inmates suffer needlessly and purposelessly.

[314]. There is also the fact that the threshold for gross disproportionality is the same under section 7 as it is under section 12 of the *Charter* and for the reasons set out below, I conclude that s. 12 of the *Charter* is breached in the circumstances of the immediate case.

[315]. I conclude that administrative segregation as it is practiced in Ontario contravenes Section 7 of the *Charter*.

2. The Section 7 (Right to Life, Liberty, and Security of the Person) – Due Process Claim

[316]. Mr. Francis submits that because Ontario does not provide a *Charter* compliant system of review of placements in administrative segregation, it has contravened section 7 of the *Charter*.

[317]. In *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[128] Associate Chief Justice Marrocco set out the procedural fairness requirements for reviews of administrative segregation placements. He explained that to be compliant with section 7 of the

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[125] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 12.
[126] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 120.
[127] *R. v. Malmo-Levine*, 2003 SCC 74 at para 160.
[128] 2017 ONSC 7491 at para. 175, varied (but not on this point) 2019 ONCA 243.

Charter, the review process must have an independent and impartial reviewer who: (a) is not chosen by the person who made the placement decision; (b) is not a subordinate of the person who made the placement decision; (c) is outside the circle of influence of the person who made the placement decision; and (d) has the authority to override the decision of the person who made the decision.

[318]. As noted above, Associate Chief Justice Marrocco did not go as far as Justice Leask later went in *British Columbia Civil Liberties Association v. Canada (Attorney General)*[129] in determining what was required for a *Charter* compliant review. In that case, Justice Leask concluded that the review process for placements in administrative segregation was inadequate because the initial review was not conducted by an external adjudicator; *i.e*., someone truly independent of the Correctional Service.

[319]. I conclude that Ontario's system of reviewing placements in administrative segregation was and is not *Charter* compliant.

[320]. Up until 2015, Ontario's policy required the Superintendent or designate to conduct a five-day review to determine whether the inmate's continued segregation is warranted. This is not an independent review. Before, 2015, there was no 24-hour review for inmates who were placed in administrative segregation for non-misconduct reasons.

[321]. Under the 2011 version of the Administrative Segregation Policy where an inmate was segregated for 30 continuous days, a report was to be submitted to the Regional Director. Then, the Regional Director was required to review the 30-day report and discuss any concerns with the Superintendent. There was no requirement to send any reporting beyond the Regional Director. In practice, the evidence establishes that the reviews were largely superficial, perfunctory, and sometimes non-existent.

[322]. A review after an inmate has already been in administrative segregation for 30 continuous days comes too late to mitigate the harm caused by the placement. An independent review that comes too late is not *Charter* compliant.

[323]. Ontario's policy for the administration of administrative segregation has never provided for an independent review process of placements in segregation. Ontario concedes this to be the case, but Ontario says that it could not have known and did not know that this was the case until Associate Chief Justice Marrocco delivered his decision about administrative segregation in federal penitentiaries.

[324]. Further, Ontario submits that there is insufficient evidence to justify a finding of a class-wide infringement of section 7 of the *Charter*. Ontario makes this submission notwithstanding: (a) the examples of individual cases such as the abhorrent history of the failures to review Mr. Capay's placement in administrative segregation described by Justice Fregeau in *R. v. Capay*;[130] (b) the evidence from the inmates in the immediate case; (c) the analysis in the other recent cases that

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[129] 2018 BCSC 62, varied 2019 BCCA 228.
[130] 2019 ONSC 535.

have considered how administrative segregation should be reviewed; and (d) the evidence from the reports of Mr. Sapers, (e) the evidence from the reports of the Ontario Ombudsmen; (f) the evidence from the reports of Professor Hannah-Moffatt; and (g) the evidence from others, including Ontario's own witnesses about how administrative segregation is actually reviewed in Ontario correctional institutions. I disagree, there is ample evidence to justify a finding of a class-wide infringement of section 7 of the *Charter*.

[325]. Ontario's submissions of blissful ignorance of the systemic harm it was causing and of insufficient proof are untenable. Justice Arbour, amongst many others, had conspicuously and vociferously identified problems with the matter of reviewing placements into segregation. There were frequent inquiries, investigations, and reports across the country that were conspicuous about the lack of due process in reviewing placements into administrative segregation. Ontario knew about all of the issues associated with a review process for not only disciplinary segregation but for administrative segregation.

[326]. I find as a fact that Ontario does not provide a *Charter* compliant system of review of placements in administrative segregation, and it has contravened section 7 of the *Charter*. There is more than sufficient evidence to justify a class-wide infringement of section 7 of the *Charter*. There was more than isolated failures of the system; there was a systems-wide failure both in design, implementation, and in practice.

3. The Section 12 of the *Charter* (Cruel and Unusual Treatment) Claim

[327]. Section 12 of the *Charter* states:

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment

[328]. Where it is alleged that section 12 of the *Charter* has been breached, the plaintiff has the burden of establishing that a given treatment or punishment constitutes cruel and unusual punishment on a balance of probabilities.[131]

[329]. To demonstrate a violation of section 12, a plaintiff must show that the treatment or punishment is grossly disproportionate in the circumstances, such that it would outrage society's sense of decency".[132] Gross disproportionality is only made out in "extreme cases" where the connection between a law's effect and its purpose is "entirely outside the norms accepted in our free and democratic society."[133] Demonstrating that a treatment or punishment was merely excessive is not sufficient to ground a finding that section 12 has been violated.[134]

[330]. In determining whether there has been a breach of section 12 of the *Charter*, the court must consider whether the treatment goes beyond what is necessary to achieve a legislative aim, whether there are adequate alternatives, whether the treatment is arbitrary and whether it has a value or a

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[131] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 95.
[132] *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 at p. 1055; *R. v. Lloyd*, 2016 SCC 13 at para. 24.
[133] *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 120.
[134] *R. v. Nur*, 2015 SCC 15 at para 39.

social purpose. Other considerations include whether the treatment is unacceptable to a large segment of the population, whether it accords with public standards of decency or propriety, whether it shocks the general conscience and whether it is unusually severe and hence degrading to human dignity and worth.[135]

[331]. A section 12 analysis involves a two-step inquiry in which a comparison is made between the actual treatment and what would be appropriate treatment in the circumstances."[136] The first step establishes a benchmark by reviewing the appropriate treatment under the circumstances. The second step looks at the effect of the actual treatment and requires the court to determine the extent of the departure from the benchmark. Where the effect of the impugned treatment is grossly disproportionate as compared to the benchmark of what is appropriate under the circumstances, section 12 breach will be established.[137]

[332]. In the case at bar, Ontario's first position is that the comparative analysis required under section 12 of the *Charter* is inherently individual in nature and while it can be performed on an individual basis, it cannot be applied on a class-wide basis. In other words, Ontario submits that whether a placement in administrative segregation is cruel and unusual treatment requires an assessment of the situation and circumstance of the individual inmate, which will necessarily vary from case to case, inmate to inmate, and from institution to institution.

[333]. In *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[138]the Ontario Court of Appeal found that administrative segregation placements of more than 15 consecutive days infringed *Charter* s. 12. That was a universal, that is to say a non-individualistic, finding for the collective of inmates placed in administrative segregation. Based on my findings of fact in the immediate case, I could find as a matter of *stare decisis*, that same result in the case at bar for both the Inmates with a Serious Mental Illness (the SMI Inmates) and the Inmates in Prolonged Administrative segregation (the Prolonged Inmates).

[334]. Without relying on *stare decision*, the evidence in the immediate case establishes that a placement in administrative segregation, as it is administered by Ontario's civil servants during the Class Period, was a cruel and unusual treatment of the inmates of both the SMI Inmates and the Prolonged Inmates.

[335]. The appropriate treatment of the Class Members, which would <u>not</u> have had the purpose of disciplining or punishing these inmates but of protecting them and others, would be to segregate the inmate but not to impose the grossly disproportionate treatment of solitary confinement for more than fifteen days. For the SMI Inmates the optimum treatment would be to put them in a therapeutic environment but appropriate treatments to address the safety concerns could have been less than the optimum and there were several alternatives that would have been appropriate.

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[135] *R. v. Smith (Edward Dewey),* [1987] 1 S.C.R. 1045 at p. 1068.
[136] *Ogiamien v. Ontario (Community Safety and Correctional Services),* 2017 ONCA 667 at para. 10.
[137] *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* 2019 ONCA 243 at paras 90-92.
[138] 2019 ONCA 243.

[336]. The actual treatment of placing a seriously mentally ill inmate into solitary confinement is an enormous departure from the benchmark of what is adequate, especially in circumstances where the evidence establishes that there was an inadequate review system, and frequent inadequate monitoring, and frequent inadequate mental health care.

[337]. In *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[139] the Court of Appeal declined to make a finding that for inmates with mental illness administrative segregation placements of any duration amount to cruel and unusual treatment. The Court of Appeal stated that it could not make this determination based on the available evidence before it. In the case at bar, however, I can go further than the Court of Appeal because I have a great deal of evidence. Based on the evidence in the immediate case, I conclude that for the SMI Inmates, any placement in administrative segregation that is the equivalent of solitary confinement amounts to cruel and unusual treatment.

K. Section 1 of the *Charter*

[338]. I have concluded that Ontario has breached on a class-wide basis, the Class Members' *Charter* rights under sections 7 and 12 of the *Charter*. This brings the discussion to section 1 of the *Charter*, which states that the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[339]. In *R. v. Oakes,*[140] the Supreme Court of Canada held that to establish that a limit is reasonable and demonstrably justified in a free and democratic society: (a) the objective of the limit must be of sufficient importance to override a constitutionally protected right or freedom and at a minimum the objective must relate to a concern that are pressing and substantial in a free and democratic society; and (b) the means of implementing that objective are reasonable and demonstrably justified, which involves a proportionality test balancing the interest of society with those of individuals and groups.

[340]. The components of the proportionality test are that: (a) the means must be carefully designed for the objective and not be arbitrary, unfair, or based on irrational considerations; they must be rationally connected to the objective; (b) the means must impair as little as possible the right or freedom in question; (c) the effect of the means must be proportionate to its objective.

[341]. The justification analysis is both normative and also contextual and requires that courts balance the interests of society with those of individuals and groups."[141] The court must adopt a "flexible contextual approach" that takes into account the full factual context in which the case arises.[142] Underlying the purpose of section 1 of the *Charter* is the recognition that there may be circumstances in which a contravention of a person's *Charter* rights is justified in order to protect

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[139] 2019 ONCA 243.
[140] [1986] 1 S.C.R. 103.
[141] *Frank v. Canada (Attorney General)*, 2019 SCC 1; *R v. KRJ*, 2016 SCC 31.
[142] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 84 per Gonthier J., dissenting (but not on this point).

other vital values in a free and democratic society.

[342]. In the immediate case, for example, while all of the many different types of segregation or isolation of inmates could be said to be an infringement of the inmate's liberty interest, not all of them could be said to be unjustifiable in a free and democratic society. The notion of administrative segregation is not categorically, universally, or inevitably an unjustifiable contravention of section 7 or 12 of the *Charter.* That said, when administrative segregation becomes solitary confinement in the manner it has in the immediate case, it cannot be justified under the *Oakes* test.

[343]. As the judges in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen,*[143] and *British Columbia Civil Liberties Association v. Canada (Attorney General),*[144] have recognized, there is no need or justification or necessity to secure the safety of a correctional institution, including the safety of any and all of its inhabitants, by isolating an inmate for more than fifteen days or making the isolation the equivalent of solitary confinement. To isolate an inmate in this manner substitutes new safety risks and unnecessarily causes severe and potentially permanent psychological harm to inmates who are not meant to be punished by the placement but to be protected from harm or from doing harm.

[344]. The use of prolonged administrative segregation is particularly harsh for inmates who are known or ought to be known to have serious mental illnesses where the placement is imminently life threatening and could be regarded as torture. Little to none of this is rationally connected to securing the safety of the institution and is inimical to many of the other purposes of a penal facility.

[345]. Moreover, there is no explanation and accordingly no justification as to why the conditions of administrative segregation are so brutal when it is known and has been known for well over a century that isolation from meaningful human contact even for short periods of time is horror and horrible.

[346]. Further, solitary confinement is not minimally impairing. Ontario has already employed other types of segregation units that do not deny the inmates sufficient meaningful human contact, and the evidence in the immediate case is that the provision of these alternatives would not require significant infrastructure changes and indeed might actually save money. Ontario's experts conceded that, generally speaking, prolonged administrative segregation is more expensive than other types of segregation.

[347]. Consequently, the infringements of the *Charter* in the immediate case are not justified under section 1 of the *Charter*. I, therefore, conclude that Ontario has breached sections 7 and 12 of the *Charter*. I shall consider the matter of remedies for the *Charter* breach after I discuss Mr. Francis' cause of action in negligence.

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[143] 2017 ONSC 7491, varied 2019 ONCA 243.
[144] 2018 BCSC 62, varied 2019 BCCA 228.

L. The *Proceedings Against the Crown Act* and the *Crown Liability and Proceedings Act, 2019*.

[348]. In the next major part of these Reasons for Decision, I shall address, Mr. Francis' cause of action in negligence. However, before doing so, it is necessary to introduce the *Crown Liability and Proceedings Act, 2019*[145] to the analysis and to the discussion. It is necessary to foreshadow the significance of this statute to the overall dispute between the parties about the negligence cause of action. It was conceded that the statute does not affect the just-discussed breach of *Charter* claims.

[349]. When Mr. Francis began his proposed class action, his action was governed by the *Proceedings Against the Crown Act*.[146] During the course of the action, namely on July 1, 2019, the *Proceedings Against the Crown Act* was repealed and it was replaced by the *Crown Liability and Proceedings Act, 2019*.[147] The transitional provisions of the replacement statute are in section 31, which states:

> *Transition*
>
> *Application of Act to claims*
>
> 31 (1) This Act applies with respect to a claim against the Crown or an officer, employee or agent of the Crown regardless of when the claim arose, except as provided in subsection (3).
>
> *Application of Act to new proceedings*
>
> (2) This Act applies with respect to a proceeding commenced by the Crown, or against the Crown or an officer, employee or agent of the Crown, on or after the day this section comes into force, regardless of when the facts on which the proceeding is based occurred or are alleged to have occurred.
>
> *Application of former Act to existing proceedings*
>
> (3) Subject to subsection (4), the *Proceedings Against the Crown Act*, as it read immediately before its repeal, continues to apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force, and to the claims included in those proceedings.
>
> *Exception, extinguishment of causes of action*
>
> (4) Section 11 and the extinguishment of causes of action and dismissal of proceedings under that section apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force.

[350]. The legal situation is complicated with respect to the effect of the replacement statute on Mr. Francis' negligence claim. For Mr. Francis' negligence cause of action, the application of the transition provisions of the *Crown Liability and Proceedings Act, 2019* means that insofar as there are issues about Crown Immunity – and as the discussion below will reveal there are some serious contested issues about Crown Immunity – subject to the effect of section 11 of the replacement statute, the former *Proceedings Against the Crown Act*, as it read immediately before its repeal,

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[145] S.O. 2019, c. 7, Sched. 17.
[146] R.S.O. 1990, c. P. 27.
[147] S.O. 2019, c. 7, Sched. 17.

continues to apply.

[351]. Thus, with respect to the contested issue of the scope of Crown immunity, pursuant to s.11(3) of the replacement statute, it is s. 5 of the former Act that applies but s. 11(3) is subject to s. 11(4) which makes the former act subject to the extinguishment of causes of action and dismissal of proceedings as provided for in the *Crown Liability and Proceedings Act, 2019.*

[352]. However, there is a substantial disagreement between the parties about what in application s.11 of the *Crown Liability and Proceedings Act, 2019* means. In addition to arguing that s. 11 does not apply at all, Mr. Francis submits that s. 11 of the *Crown Liability and Proceedings Act, 2019* codifies the law that would have applied under the former *Proceedings Against the Crown Act.*

[353]. Mr. Francis submits that s. 11 of the replacement statute does no more than codify and continue the law that had previously existed with respect to Crown immunity and in the circumstances of the immediate case, the codified law does not extinguish his tort cause of action. In short, Mr. Francis submits that s. 11 clarifies but does not change the law about Crown immunity and the law about what has been labelled the policy - operational dichotomy, which I shall describe and discuss below.

[354]. Ontario's position is that s. 11 of the replacement statute, which has the effect of extinguishing and dismissing certain tort actions, is operative in the circumstances of the immediate case leading to a dismissal of the class action. As the discussion below will reveal, whatever the affect of s.11 of the replacement statute, is at least connected to the law about Crown immunity and the policy - operational dichotomy.

[355]. For present purposes, I shall not immediately resolve the dispute about the new *Crown Liability and Proceedings Act, 2019* because that is better addressed later in these Reasons for Decision after the previously existing law about Crown immunity is described. I shall address this topic below under the title "Are the Class Members' Negligence Claims Precluded by s. 11 of the *Crown Liability and Proceedings Act, 2019*?".

M. Is Ontario Liable for Negligence?

1. Introduction and Overview of Ontario's Arguments

[356]. Mr. Francis submits that Ontario is liable to the Class Members for common law systemic negligence.

[357]. Ontario, however, submits that Mr. Francis and the Class Members cannot make out across the class the constituent elements of a negligence claim and that, in addition, it has statutory and common law defences to the negligence claim.

[358]. Ontario submits that it has no class-wide duty of care to the inmates it imprisons at its correctional institutions. It submits that the duty of care alleged by Mr. Francis is not a recognized duty of care, which is to say that Ontario submits that the systemic negligence duty of care allegations of the immediate case do not fall within the category of cases where a duty of care by

correctional officers to inmates has been recognized.

[359]. Further, Ontario submits that Mr. Francis has not proven the standard of care or a breach of the standard of care. And it submits that Mr. Francis cannot prove causation of harm and quantification of harm on a class-wide basis.

[360]. Ontario characterizes the alleged duty of care in the immediate case as a duty not to be negligent in establishing policies about administrative segregation. It submits, however, that negligence allegations relating to policy decisions do not fall within a recognized duty of care to inmates. Further, Ontario submits that the duty of care alleged by Mr. Francis would fail the legal analysis employed by Canadian courts to establish the existence of a new duty of care.[148] It submits that there is no proximate relationship for which it would fair to impose a duty of care, and Ontario submits that if there is a *prima facie* duty of care, public policy factors negate the existence of it.

[361]. Ontario argues that Mr. Francis' negligence claim is essentially a challenge to policy decisions about the placement of the inmates in a specific type of custody, the location and number of staff within an institution, the provision of an independent review of segregation placements, and the programming provided to inmates placed in segregation. It submits that these aspects of the work of a correctional institution are policy matters for which there is no duty of care supporting a cause of action in negligence.[149]

[362]. Ontario submits that the availability of or restriction on the use of administrative segregation, including permitting its use for certain groups of inmates or for certain periods of time, are policy decisions that have significant financial implications involving facilities, staffing, and infrastructure changes.

[363]. Ontario submits that implementing a hard cap on the length of time that all inmates can be housed in administrative segregation is a policy decision immune for liability. It submits that to make such fundamental changes to Ontario's segregation policy, the Ministry would require significantly increased funding from Treasury Board.

[364]. Ontario submits that inmate placement decisions are made at the individual inmate and discrete institution level, where there might be liability for negligence in individual cases, but there is not a class-wide basis for liability. Relying on *Coumont v. Canada (Correctional Services),*[150]

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[148] *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63; *Saadati v. Moorhead*, 2017 SCC 28; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42; *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5; *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27; *Design Services Ltd. v. Canada*, 2008 SCC 22; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38; *Childs v. Desormeaux*, 2006 SCC 18; *Odhavji Estate v. Woodhouse*, 2003 SCC 69; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80; *Cooper v. Hobart*, 2001 SCC 79; *Ingles v. Tutkaluk*, 2000 SCC 12; *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.)*; Haig v. Bamford*, [1976] 1 S.C.R. 466. *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

[149] *Wolf v. Ontario (Attorney General)*, 2012 ONSC 72; *Russell v. Canada*, 2000 BCSC 650; *Coumont v. Canada (Correctional Service)*, [1994] F.C.J. No 655.

[150] [1994] F.C.J. No. 655 (Fed. Ct.).

and *Wolf v. Ontario (Attorney General),*[151] and now the Court of Appeal's decision in *Reddock v. Canada (Attorney General),*[152] Ontario submits that Mr. Francis' action focuses on the policy decisions of Ontario with respect to the use of administrative segregation and these policy decisions are immune from review. It submits that Ontario's use of administrative segregation is not an operational matter that can be changed at the institutional level with existing funding. Thus, Ontario submits that Mr. Francis and the Class Members have no cause of action for negligence with respect to Ontario's conduct in the immediate case, all of which conduct can be characterized as making legislative or policy decisions or individual not class-wide decisions.

[365]. Moreover, Ontario submits that in addition to the common law principles relating to policy decisions, Mr. Francis' negligence claim is precluded by Crown immunity and is not available under the *Proceedings Against the Crown Act* and is extinguished by s. 11 of the *Crown Liability and Proceedings Act, 2019,*[153] which, as noted above, subject to certain transitional provisions, replaced the *Proceedings Against the Crown Act*.[154]

[366]. For the discussion that follows, it is helpful to keep in mind that Ontario makes three discrete Crown immunity arguments. The first argument is based on the policy-operational dichotomy that I shall discuss below.

[367]. The second argument is based on s. 5 of the *Proceedings Against the Crown Act,*[155] which was in force when Mr. Francis commenced his action (See now s. 8 of the *Crown Liability and Proceedings Act, 2019,*[156]*)* and which, as noted earlier, in this decision continues to apply albeit subject to the effect of s. 11 of the replacement statute.

[368]. Section 5 continues the immunization of the government from direct liability on its own account but makes the Crown liable in respect of tortious acts or omissions committed by its servants or agents if a proceeding in tort could be brought against that servant or agent directly.[157] Under s. 5, a claim against the Crown in tort can only be based on an act or omission of a servant or agent of the Crown. In the immediate case, Ontario submits that the inmates' claim in negligence is a claim of direct liability and that a claim of direct liability is precluded by Crown immunity.

[369]. Ontario's third argument is based on s. 11 (extinguishment of causes of action respecting certain governmental functions) and s. 34 (the transition provision) of the *Crown Liability and Proceedings Act, 2019,*[158] which replaced the *Proceedings Against the Crown Act*.

[370]. For both of Ontario's arguments, the following provisions of the former *Proceedings Against the Crown Act*, are pertinent:

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[151] 2010 ONSC 72.
[152] 2020 ONCA 184, varying 2019 ONSC 5053.
[153] S.O. 2019 c. 7, Sched. 7.
[154] R.S.O. 1990, c. P. 27.
[155] R.S.O. 1990 c. P.27.
[156] S.O. 2019 c. 7, Sched. 7.
[157] *C.R. v. Ontario*, 2019 ONSC 2734; *Canada (Attorney General) v. Thouin*, 2017 SCC 46.
[158] S.O. 2019 c. 7, Sched. 7.

Liability in tort

5 (1) Except as otherwise provided in this Act, and despite section 71 of the *Legislation Act, 2006*, the Crown is subject to all liabilities in tort to which, if it were a person of full age and capacity, it would be subject,

(a) in respect of a tort committed by any of its servants or agents;

(b) in respect of a breach of the duties that one owes to one's servants or agents by reason of being their employer;

(c) in respect of any breach of the duties attaching to the ownership, occupation, possession or control of property; and

(d) under any statute, or under any regulation or by-law made or passed under the authority of any statute.

Where proceedings in tort lie

(2) No proceeding shall be brought against the Crown under clause (1) (a) in respect of an act or omission of a servant or agent of the Crown unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent or the personal representative of the servant or agent.

[…]

[371]. For Ontario's arguments, the following provisions of the new *Crown Liability and Proceedings Act, 2019* are pertinent:

Extinguishment of causes of action respecting certain governmental functions

Acts of a legislative nature

11 (1) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care while exercising or intending to exercise powers or performing or intending to perform duties or functions of a legislative nature, including the development or introduction of a bill, the enactment of an Act or the making of a regulation.

[…]

Policy decisions

(4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

Same, policy matters

(5) For the purposes of subsection (4), a policy matter includes,

(a) the creation, design, establishment, redesign or modification of a program, project or other initiative, including,

(i) the terms, scope or features of the program, project or other initiative,

(ii) the eligibility or exclusion of any person or entity or class of persons or entities to participate in the program, project or other initiative, or the requirements or limits of such participation, or

(iii) limits on the duration of the program, project or other initiative, including any discretionary right to terminate or amend the operation of the program, project or other initiative;

(b) the funding of a program, project or other initiative, including,

(i) providing or ceasing to provide such funding,

(ii) increasing or reducing the amount of funding provided,

(iii) including, not including, amending or removing any terms or conditions in relation to such funding, or

(iv) reducing or cancelling any funding previously provided or committed in support of the program, project or other initiative;

(c) the manner in which a program, project or other initiative is carried out, including,

(i) the carrying out, on behalf of the Crown, of some or all of a program, project or other initiative by another person or entity, including a Crown agency, Crown corporation, transfer payment recipient or independent contractor,

(ii) the terms and conditions under which the person or entity will carry out such activities,

(iii) the Crown's degree of supervision or control over the person or entity in relation to such activities, or

(iv) the existence or content of any policies, management procedures or oversight mechanisms concerning the program, project or other initiative;

(d) the termination of a program, project or other initiative, including the amount of notice or other relief to be provided to affected members of the public as a result of the termination;

(e) the making of such regulatory decisions as may be prescribed; and

(f) any other policy matter that may be prescribed.

[…]

Common law defences unaffected

(9) Nothing in this section shall be read as abrogating or limiting any defence or immunity which the Crown or an officer, employee or agent of the Crown may raise at common law.

[…]

Exception, extinguishment of causes of action

31(4) Section 11 and the extinguishment of causes of action and dismissal of proceedings under that section apply with respect to proceedings commenced against the Crown or an officer, employee or agent of the Crown before the day this section came into force.

[372]. Ontario's defence arguments keep on coming. Ontario also submits that neither a standard of care nor a breach of the standard has been proven in the immediate case and that causation of harm has not been proven as well.

[373]. Thus, Ontario challenges all of the elements of a negligence claim (duty of care, standard of care, breach of the standard of care, causation, and damages) and raises three Crown immunity defences.

[374]. With this background to the negligence issues demarcated by Ontario's arguments, there are eight major issues to examine; visualize:

a. First, there is the issue of examining the sources of a duty of care when the defendant is a government or public authority.

b. Second, there is the issue of the significance of policy decisions to whether a duty of care exists, which is a critical consideration in the immediate case having regard to Ontario's submissions that it has no duty of care to the inmates because it was or would be making policy decisions.

c. Third, there is the issue of whether there are any residual policy reasons that would negate a *prima facie* duty of care.

d. Fourth, there is the matter of examining the nature of systemic negligence because Mr. Francis' allegation in the immediate case is that Ontario breached a duty of care to all the inmates, while Ontario argues that there is not a duty of care common to the class but only a duty of care in individual cases.

e. Fifth, there is the issue of whether Ontario benefits from *Crown* immunity under s.5 of the former *Proceedings Against the Crown Act*.

f. Sixth, there is the issue of the interpretation and application of s. 11 of the *Crown Liability and Proceedings Act*.

g. Seventh, there are the standard of care issues.

h. Eighth there are the causation and damage issues.

[375]. To answer these issues, I shall approach the case at bar as a case of first instance. I shall undertake a duty of care analysis, and I shall analysis each of elements of a negligence claim and all of Ontario's Crown immunity defence arguments.

[376]. By way of foreshadowing, for the reasons that follow, the ultimate conclusions of my analysis are that:

a. Ontario has and had a *prima facie* duty of care to all the inmates of its correctional institutions.

b. The duty of care is not negated by public policy matters.

c. The duty of care was and is a class-wide duty of care.

d. Mr. Francis' negligence claim is not precluded by Crown immunity.

e. The standard of care can be articulated on a class-wide basis.

f. Ontario breached the standard of care.

g. The breach of the standard of care caused every Class Member to suffer some compensable damages.

h. Additional damages may be proven at individual issues trials.

2. Duty of Care Analysis for Public Authorities: General Principles

[377]. In Canada, if the relationship between the plaintiff and the defendant does not fall within a recognized class of negligence cases where the defendants have a duty of care to others, then whether a duty of care to another exists involves satisfying the requirements of a three-step test of: (a) foreseeability, in the sense that the defendant ought to have contemplated that the plaintiff would be affected by the defendant's conduct; (b) sufficient proximity, in the sense that the relationship between the plaintiff and the defendant is sufficiently close *prima facie* to give rise to a duty of care; and (c) the absence of overriding policy considerations that would negate any *prima facie* duty established by foreseeability and proximity.

[378]. Thus, in a new category of case whether a relationship giving rise to a duty of care exists depends on foreseeability and proximity, moderated by policy concerns.[159]

[379]. To determine the foreseeability element, the court asks whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act.[160] A reasonable foreseeability analysis requires only that the general harm, not its manner of incidence, be reasonably foreseeable.[161]

[380]. Proximity focuses on the type of relationship between the plaintiff and defendant and asks whether this relationship is sufficiently close that the defendant may reasonably be said to owe the plaintiff a duty to take care not to injure him or her.[162] Proximate relationships giving rise to a duty of care are of such a nature as the defendant in conducting his or her affairs may be said to be under an obligation to be mindful of the plaintiff's legitimate interests.[163] The proximity inquiry probes whether it would be unjust or unfair to hold the defendant subject to a duty of care having regard to the nature of the relationship between the defendant and the plaintiff.[164]

[381]. The focus of the proximity probe is on the nature of the relationship between victim and alleged wrongdoer and the question is whether the relationship is one where the imposition of legal liability for the wrongdoer's actions would be appropriate.[165] Proximity focuses on the connection between the defendant's undertaking, the breach of which is the wrongful act, and the loss claimed.[166]

[382]. The proximity analysis involves considering factors such as expectations, representations,

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[159] *Anns v. Merton London Borough Council,* [1978] A.C. 728 (H.L.)*; Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27 at para. 4.
[160] *Cooper v. Hobart*, 2001 SCC 79 at para. 30.
[161] *Bingley v. Morrison Fuels, a Division of 503373 Ontario Ltd.*, 2009 ONCA 319 at para. 24.
[162] *Donoghue v. Stevenson,* [1932] A.C. 562 (H.L.); *Eliopoulos v. Ontario (Minister of Health & Long-Term Care)* (2006), 82 OR (3d) 321 (CA), leave to appeal to SCC ref'd [2006] SCCA No 514.
[163] *Odhavji Estate v. Woodhouse,* 2003 SCC 69 at para. 49; *Hercules Managements Ltd. v. Ernst & Young,* [1997] 2 SCR 165 at para. 24.
[164] *Syl Apps Secure Treatment Centre v. D. (B.),* 2007 SCC 38 at para. 26.
[165] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 23.
[166] *Deloitte & Touche v. Livent Inc. (Receiver of),* 2017 SCC 63.

reliance, and property or other interests involved.[167] Proximity is not concerned with how intimate the plaintiff and defendant were or with their physical proximity, so much as with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed.[168] The proximity analysis is intended to be sufficiently flexible to capture all relevant circumstances that might in any given case go to seeking out the close and direct relationship that is the hallmark of the common law duty of care.[169] It needs to be emphasized that the proximity analysis of the first stage of the duty of care test involves policy issues because it asks the normative question of whether the relationship is sufficiently close to give rise to a legal duty.[170]

[383]. Moving on to the final stage of the duty of care analysis, if the plaintiff establishes a *prima facie* duty of care, the evidentiary burden of showing countervailing policy considerations shifts to the defendant, following the general rule that the party asserting a point should be required to establish it.[171] Policy concerns raised against imposing a duty of care must be more than speculative, and a real potential for negative consequences must be apparent.[172]

[384]. The final stage of the analysis is not concerned with the type of relationship between the plaintiff and the defendant. At this stage of the analysis, the question to be asked is whether there exist broad policy considerations that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the plaintiff and the defendant such that the imposition of a duty would be fair.[173]

[385]. The final stage of the analysis is about the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.[174] If the recognition of a novel duty of care conflicts with an overarching public duty and if it raises a real potential for negative policy consequences, the duty of care may be negated.[175]

[386]. In the immediate case, the relationship between the plaintiff and the defendant is the relationship between the inmates of correctional institutions, the Class Members, and Ontario, the public authority that establishes prisons, sets the policies for the prisons, and administers the prisons.

[387]. When the conduct of a public authority is in issue, the legislative scheme that governs the public authority must be examined to determine whether a private law duty should be imposed in

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[167] *Cooper v. Hobart*, 2001 SCC 79 at para. 34; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 23; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 50.
[168] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at para. 29.
[169] *Saadati v. Moorhead*, 2017 SCC 28 at para. 24.
[170] *Cooper v. Hobart*, 2001 SCC 79 at paras. 25-30.
[171] *Childs v. Desormeaux*, 2006 SCC 18 at para. 13.
[172] *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 at paras. 47-48; *Fullowka v. Pinkerton's of Canada Ltd*., 2010 SCC 5 at para. 57.
[173] *Cooper v. Hobart*, 2001 SCC 79 at para. 37; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 51.
[174] *Cooper v. Hobart*, 2001 at para. 37; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 51.
[175] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42; *Fullowka v. Pinkerton's of Canada Ltd*, 2010 SCC 5.

the circumstances.[176] Only in certain circumstances will a public authority owe a private law duty of care towards individuals.[177]

[388]. When the defendant is a statutory actor, the allegation of negligence must be also be analyzed having regard to the distinction between a government's policy decisions, which are sometimes described as non-operational decisions, and its operational decisions. Carelessness in legislating is not actionable and that type of carelessness is a matter for the electorate not the judiciary.[178] Canadian law holds that legislative and core policy decisions by government actors are not actionable in negligence.[179]

[389]. As will be discussed in more detail below, under Canadian law, generally speaking and with some exceptions, a government or public authority is not liable for the failure to legislate or about its core policy decisions that are dictated by economic, financial, political, and social factors or about infrastructure decisions or about the allocation of public resources.[180]

3. Proximity and Sources of a Duty of Care

[390]. With this background to the general principles of a duty of care analysis in the context of governments and public authorities, I turn to the first major issue of examining the sources of a duty of care when the defendant is a public authority.

[391]. In *R. v. Imperial Tobacco*,[181] Chief Justice McLachlin observed that there are three situations to examine in determining whether a public authority has a duty of care to a plaintiff. The first is the situation where the duty of care is alleged to arise explicitly or by implication from a statutory scheme. The second is the situation where the duty of care is alleged to arise from interactions between the plaintiff and the public authority and the duty of care is not negated by the statute. The third situation is where the duty of care is alleged to arise both from the public authority's statutory duties and also from its interactions with the plaintiff.

[392]. When the defendant is a statutory actor, the allegation of negligence must be analyzed in the context of the statutory scheme.[182] The purpose of the analysis is to determine whether there is proximity between the plaintiff and the public authority, and the statutory scheme is the root of the proximity analysis.[183] The statutory scheme must be examined to determine whether it establishes a direct relationship between the public body and the plaintiff and conversely whether the statutory

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[176] *Fullowka v. Pinkerton's of Canada Ltd*, 2010 SCC 5; *Ingles v. Tutkaluk Construction Ltd*., 2000 SCC 12
[177] *Ingles v. Tutkaluk Construction Ltd*., 2000 SCC 12.
[178] *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957.
[179] *R. v. Imperial Tobacco*, 2011 SCC 42; *Holland v. Saskatchewan*, 2008 SCC 42; *Cooper v. Hobart*, 2001 SCC 79; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12.
[180] *Cirillo v. Ontario*, 2019 ONSC 3066; *CUPE v. Ontario*, 2017 ONSC 4874, aff'd 2018 ONCA 309; *Conley v. Chippewas of the Thames First Nation Chief*, 2015 ONSC 404; *Tanudjaja v. Canada (Attorney General)*, 2014 ONCA 852; *Ontario v. Phaneuf*, 2010 ONCA 901; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35; *Kwong v. R.*, [1978] A.J. No. 594 (C.A.); aff'd [1979], 2 S.C.R. 1010.
[181] 2011 SCC 42 at paras. 43-46.
[182] *Rausch v. Pickering (City)*, 2013 ONCA 740.
[183] *Cooper v. Hobart*, 2001 SCC 79 at para.43; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 at para.9;

scheme forecloses the existence of a proximate relationship and a common law duty of care between the plaintiff and statutory actor or public authority.

[393]. When the defendant is a statutory actor, other relevant factors to the proximity analysis are: (a) reliance; (b) whether the statute provides adequate alternative remedies for a person injured by his or her interaction with the public authority;[184] and, (c) whether the recognition of a duty of care would conflict with an overarching statutory or public duty.[185]

[394]. Thus, a public authority's duty of care may arise from an express or implied statutory duty or it may arise as a matter of the common law through the conduct and interaction of the public authority or government body with its citizens.[186] In addition to a statutory duty of care set out in the governing legislation, there may be a common law duty of care that arises by virtue of interactions between the statutory actor and a private individual.[187]

[395]. Thus, where the defendant is a statutory actor, the proximity inquiry will focus initially on the applicable legislative scheme and secondly, on the interactions, if any, between the regulator or governmental authority and the putative plaintiff.[188] Once the statutory actor has direct interaction with the individual in the operation or implementation of a policy, a duty of care may arise, particularly where the safety of the individual is at risk.[189] And a duty of care may arise from a combination of the two situations; *i.e.,* the third situation mentioned by Chief Justice McLachlin.

[396]. In the immediate case, the statutory scheme that provides for administrative segregation is *Ministry of Correctional Services Act*[190] and *Ont. Reg. 778* (*General*)[191]which are set out earlier in these Reasons for Decision. Under the statutory regime governing the immediate case, there is an express duty for the superintendent, health care, professionals, and the staff of the correctional institutions to be responsible for the care, health, discipline, safety, and custody of the inmates of the correctional institution. Thus, in the immediate case, the statutory scheme does establish a direct and proximate relationship between the Class Members.

[397]. Further, there is nothing in the the statutory scheme that forecloses the existence of a common law duty of care claim against Ontario by the inmates it holds in custody. In the immediate case, Ontario's duty of care arises from an express or implied statutory duty.

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[184] *Rausch v. Pickering (City)*, 2013 ONCA 740.
[185] *Cooper v. Hobart*, 2001 SCC 79 at para. 43; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38 at para. 28.
[186] *Rausch v. Pickering (City)*, 2013 ONCA 740.
[187] *R. v. Imperial Tobacco*, 2011 SCC 42 at paras. 43-45; *Rausch v. Pickering (City)*, 2013 ONCA 740.
[188] *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, at para. 75; *Williams v. Toronto (City)*, 2016 ONCA 666 at para. 18; *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, leave to appeal to the S.C.C. ref'd [2015] S.C.C.A. No. 227; *Grand River Enterprises Six Nations Ltd. v. Canada (Attorney General)*, 2017 ONCA 526.
[189] *Finney v. Barreau du Quebec*, [2004] 2 S.C.R. 17; *Heaslip Estate v. Mansfield Ski Club Inc*., 2009 ONCA 594; *Sauer v. Canada (Attorney General)*, 2007 ONCA 454; *Paradis Honey Ltd. v. Canada (Attorney General)*, 2015 FCA 89, leave to appeal to the S.C.C. ref'd [2015] S.C.C.A. No. 227.
[190] R.S.O. 1990, c. M.22.
[191] R.R.O 1990,

[398]. Ontario actually concedes that this duty of care exists on an individual basis. This is not much of a concession because there have been numerous cases where individual inmates have successfully advanced negligence claims against prison and penitentiary authorities. However, Ontario challenges that the duty of care exists on a collective or class-wide basis. It advances this challenge essentially as a factual matter associated with an alleged absence of a proof of commonality. As I shall explain later, a duty of care by an institution can be owed to a collective, which is the situation in the case at bar both as a matter of theory and as a matter of evidence.

[399]. Turning to the common law sources of proximity and ignoring the statutory provisions in the immediate case, the type or relationship between Ontario and the inmates of its correctional institutions is more than sufficiently close to give rise to a duty of care.

[400]. In the immediate case, it is beyond reasonably foreseeable toward approaching a certainty of foreseeability and proximity that Ontario should be under an obligation to be mindful of the legitimate interests of persons whose liberty, safety, and security of the person it totally controls.

[401]. In the immediate case, where one party to a relationship controls the totality of the nature of the daily activities and liberty and security of the other, in both the physical and the legal sense, one might say that the inmates and Ontario have a very high degree of proximity. As already noted, Ontario does not deny this proximity on an individual basis, but Ontario denies it to the collective of inmates it totally controls, which respectfully I say is an indefensible position as I shall explain further below.

[402]. The relationship in the immediate case is one where the imposition of legal liability for breaching the duty of care would be appropriate and reasonably expected. In the immediate case, giving the interactions between the inmates and Ontario's civil servants that supervise and care for the inmates, there is a proximate relationship the gives rise to a duty of care.

[403]. Thus, in the immediate case, we have the third situation envisioned by Chief Justice McLachlin; namely: a *prima facie* duty of care arising both from the public authority's statutory duties and from its interaction with the inmates.

4. The Scope of Liability for Policy Decisions

[404]. The above conclusion, however, does not end the duty of care analysis, because turning to the second major issue, when a statutory actor or public authority is alleged to owe a duty of care, the court must consider whether the impugned conduct is: (a) a core policy decision dictated by financial, economic, social or political factors or constraints, for which statutory actors or public authorities are accountable to the electorate; or (b) operational conduct based on administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness, for which the public authority may be liable for negligence.[192]

[405]. In *Reddock v. Canada (Attorney General),*[193] I held that the negligence of the Federal

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[192] *Brown v. British Columbia (Minister of Transportation and Highways),* [1994] 1 S.C.R. 420 at p. 434.
[193] 2019 ONSC 5053, varied 2020 ONCA 184.

Government with respect to its use of administrative segregation was operational because the duties of the Crown servants did not involve a balancing of economic, social and political considerations but rather involved carelessness in implementing government policy decisions. The Court of Appeal reversed my negligence finding, and Ontario submits that the Court of Appeal's decision is on all fours with the immediate case and supports Ontario' arguments and entirely defeats Mr. Francis's systemic negligence claim. For reasons that I shall explain in the next section of these Reasons for Decision, the Court of Appeal's decision in *Reddock*, however, does not foreclose a systemic negligence claim in the immediate case.

[406]. For the immediate purposes of this part of the duty of care analysis, I shall, ignore my decision in *Reddock*, which I confess did not involve a detailed enough examination of the policy versus operational issues, and I shall consider the matter afresh and examine more closely than I did in *Reddock*, Ontario's arguments that the deployment of administrative segregation in the immediate case was a policy decision for which Ontario is not exposed to tort liability.

[407]. The seed of the policy-operational dichotomy was the Supreme Court of Canada's decision in *Welbridge Holdings Ltd. v. Greater Winnipeg.*[194] The policy-operational dichotomy[195] was fashioned in England by the House of Lords in *Anns v. Merton London Borough Council*.[196] It was then accepted by the Supreme Court of Canada in *Kamloops (City of) v. Nielsen.*[197] The dichotomy was then elucidated by the Supreme Court in *Just v. British Columbia,*[198] *Brown v. British Columbia (Minister of Transportation and Highways),*[199] *Swinamer v. Nova Scotia (Attorney General),*[200] *R. v. Imperial Tobacco Canada Ltd*.,[201] and, most recently the dichotomy was applied by the Supreme Court of Canada in *Kosoian v. Société de transport de Montréal*.[202]

[408]. In *Welbridge Holdings Ltd. v. Greater Winnipeg,*[203] the Supreme Court noted the risk of being injured from the exercise of legislative or adjudicative authority is a general public risk and not one for which compensation can be supported on the basis of a private duty of care.

[409]. In *Welbridge Holdings*, the City of Winnipeg amended a by-law to permit the construction of an apartment building on Wellbridge Holding's property. Wellbridge Holdings obtained a building permit and hired a general contractor, but construction stopped when, the bylaw was declared illegal for procedural irregularity. The City revoked the building permit. In a judgment written by Justice Bora Laskin, the Supreme Court held that Wellbridge Holdings did not have a

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[194] [1971] S.C.R. 957 at p. 970.
[195] Professor Lewis Klar has written several excellent articles on the topic; see: L. Klar, "Extending the Tort Liability of Public Authorities" (1990), 2 Alta. L. Rev. 648; L. Klar, "Case Comment: Falling Boulders, Falling Trees and Icy Highways: The Policy/Operational Test Revisited" (1994), 33 Alta. L. Rev. 167; L. Klar, "*R. v. Imperial Tobacco Ltd*.: More Restrictions on Public Authority Tort Liability" (2012), 50 Alta. L. Rev. 157.
[196] [1978] A.C. 728 (H.L.).
[197] [1984] 2 S.C.R. 2.
[198] [1989] 2 S.C.R. 1228 at p. 1240.
[199] [1994] 1 S.C.R. 420 at p. 441.
[200] [1994] 1 S.C.R. 445
[201] 2011 SCC 42.
[202] 2019 SCC 59.
[203] [1971] S.C.R. 957 at p. 970.

cause of action in negligence. Justice Laskin stated:

> A rezoning application merely invokes the defendant's legislative authority and does not bring the applicant in respect of his particular interest into any private nexus with the defendant, whose concern is a public one in respect of the matter brought before it. …. I would adapt to the present case what the late Mr. Justice Jackson said in dissent in *Dalehite v. United States* [(1953), 346 U.S. 15.], at p. 59 (a case concerned with the *Federal Tort Claims Act, 1946*, of the United States), as follows:
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> > When a [municipality] exerts governmental authority in a manner which legally binds one or many, [it] is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such [municipality] shall be controlled solely by the statutory or administrative mandate and not by the added threat of private damage suits. (The words in brackets are mine).
>
> The defendant is a municipal corporation with a variety of functions, some legislative, some with also a quasi-judicial component … and some administrative or ministerial, or perhaps better categorized as business powers. In exercising the latter, the defendant may undoubtedly (subject to statutory qualification) incur liabilities in contract and in tort, including liability in negligence. There may, therefore, be an individualization of responsibility for negligence in the exercise of business powers which does not exist when the defendant acts in a legislative capacity or performs a quasi-judicial duty.
>
> [….] A municipality at what may be called the operating level is different in kind from the same municipality at the legislative or quasi-judicial level where it is exercising discretionary statutory authority. In exercising such authority, a municipality (no less than a provincial Legislature or the Parliament of Canada) may act beyond its powers in the ultimate view of a court, albeit it acted on the advice of counsel. It would be incredible to say in such circumstances that it owed a duty of care giving rise to liability in damages for its breach. […]

[410]. In *Just*, Justice Cory, who also wrote the judgment in *Swinamer*, stated that true policy decisions should be exempt from tort claims so that governments are not restricted in making decisions based on social, political or economic factors. However, the Supreme Court in *Just* and *Swimmer*, just as Justice Laskin did in *Welbridge*, accepted that governments are not immune from negligence claims, and liability for compensatory damages for negligence was appropriate when the injury derived from acts done at what Justice Laskin had called the operating level.[204]

[411]. Thus, public authorities may be liable for their negligent operational decisions and for careless conduct in implementing legislation or policy.[205] In *Just*, the Supreme Court recognized that a government or public authority may be liable for a negligent failure to act in accordance with an established policy where it was reasonably foreseeable that failure to do so will cause physical harm to the plaintiff. [206]

[412]. In *Brown v. British Columbia (Minister of Transportation and Highways)*,[207] the Supreme Court noted that policy decisions can arise at any level of the government hierarchy because it was the nature of the decision that had to be scrutinized, not the person who makes the decision. In the

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[204] See also: *Holland v. Saskatchewan*,2008 SCC 42 at para. 9; *Eisenberg v. Toronto (City)*, 2019 ONSC 7312.
[205] *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42; *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2.
[206] *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Heaslip Estate v. Mansfield Ski Club Inc*., 2009 ONCA 594.
[207] [1994] 1 S.C.R. 420 at p. 441.

immediate case, because the statute and the regulations are so rudimentary and so much was done by Ministry policy directions or by prison officials, Ontario much relies on the fact that it is the nature of the decision not the augustness of the decision maker that matters in determining what is a policy decision.

[413]. In *Brown,* Justice Cory noted that the operational area where a government or public authority may be exposed to liability for negligence is concerned with the practical implementation of the formulated policies. The operational area mainly covers the performance or carrying out of a policy decisions made on the basis of administrative direction, expert or professional opinion, technical standards, or general standards of reasonableness. After a legislative or policy decision is made, the government or public authority may be liable in negligence for the manner in which it implements that decision.[208]

[414]. An example of the distinction between legislation/policy and implementation is provided by the recent decision of the Supreme Court of Canada in *Kosoian v. Société de transport de Montréal*,[209] which applied *Welbridge Holdings Ltd. v. Greater Winnipeg* and *R. v. Imperial Tobacco*,[210] which is discussed below.

[415]. In this case, Ms. Kosoian was arrested by a police officer after she refused to obey his order to hold on to the handrail while she was on a descending escalator in a subway station. She was charged pursuant to a municipal by-law for disobeying a pictogram that depicted that the escalator handrail should be held, and she was also charged for hindering the police in the execution of duty. After being acquitted in the Municipal Court, Ms. Kosoian instituted a civil action against the police officer and against the public authority. Reversing the trial judge and the Québec Court of Appeal, the Supreme Court found the police office and the public authority liable for civil delict which is akin to common law negligence.

[416]. For present purposes, the key point in the *Kosoian* judgment, written by Justice Côté,[211] is her discussion of the distinction between policy, for which a public authority was immune from civil liability, and the implementation of policy, for which a public authority would be exposed to liability. In *Kosoian,* the public authority was found liable because it had implemented its by-law by improperly training police officers about the enforcement of the by-law. Justice Côté stated at paragraphs 107 and 108.

> 107. In the present case, the STM argues that it enjoys the public law relative immunity that attaches to the exercise of a regulatory power (see *Entreprises Sibeca*, at para. 27; *Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957, at pp. 966 and 968-70). A legal person established in the public interest generally incurs no civil liability where it makes or passes a regulation or by-law that is subsequently held to be invalid, unless its decision to do so was made in bad faith or was irrational

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[208] *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145; *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Laurentide Motels Ltd. v. Beauport (City*), [1989] 1 S.C.R. 705; *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2.

[209] 2019 SCC 59.

[210] 2011 SCC 42 at para. 72.

[211] Chief Justice Wagner and Justices Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin concurring.

> (*Entreprises Sibeca*, at paras. 23-27; *Papachronis v. Ste-Anne-de-Bellevue (Ville)*, 2007 QCCA 770, 38 M.P.L.R. (4th) 161, at para. 25; *Hétu and Duplessis*, vol. 2, at pp. 11152-57; see also, outside the municipal context, *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 90; *Hinse v. Canada (Attorney General)*, 2015 SCC 35, [2015] 2 S.C.R. 621, at para. 23). The purpose of this immunity is to preserve the latitude that a legal person established in the public interest must have in order to make policy decisions in the interests of the community (*Entreprises Sibeca*, at para. 24; *Welbridge*, at p. 968; *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705, at pp. 722 and 725).
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> 108. In the case at bar, however, this relative immunity is of no assistance to the STM. As I explained above, Ms. Kosoian's civil liability action is based not on the invalidity of By-law R-036, but rather on its improper application both by the STM, which developed training that was legally incorrect, and by one of its inspectors, Constable Camacho, who applied the inaccurate information he obtained during that training. ….

[417]. In the immediate case, the alleged misconduct of the civil servants managing administrative segregation in Ontario prisons appears as operational in nature as the alleged misconduct in *Kosoian,* but for present purposes of analysis, I shall accept that it is not that easy to decide on which side of the line the immediate case falls. The problem is that it sometimes difficult to determine when government actors are engaged in activities for which they are not exposed to negligence claims.

[418]. In *R. v. Imperial Tobacco*,[212] Chief Justice McLachlin observed that "the question of what constitutes a policy decision that is generally protected from negligence liability is a vexed one, upon which much judicial ink has been spilled." As Professor Klar noted twenty-six years ago: "Reflection reveals that governmental activities do not neatly divide into policy decision making, on the one hand, and policy implementation, on the other, because inherent in each are elements of the other."[213]

[419]. In *R. v. Imperial Tobacco Canada Ltd.*, the Supreme Court wrestled with how to differentiate policy decisions for which a government or public authority would be immune from a negligence claim and operational decisions for which it could be liable in negligence.

[420]. In *R. v. Imperial Tobacco Canada Ltd.*, the Supreme Court was actually considering two cases in which Health Canada had been joined as a third party by defendant tobacco companies seeking contribution and indemnity. In the first case, *British Columbia v. Imperial Tobacco Canada Ltd.*, British Columbia sued Imperial Tobacco and 13 other tobacco companies for reimbursement of the health care costs from tobacco-related illnesses. In third party proceedings, Imperial sued Canada in negligence. In the second case, *Knight v. Imperial Tobacco Canada Ltd.*, a class of consumers injured by misrepresentations about tobacco products sued Imperial Tobacco and, once again, it sued Canada in negligence for contribution and indemnity.

[421]. Canada successfully moved to have the third-party claims dismissed for failure to show a reasonable cause of action. In *Imperial Tobacco,* Chief Justice McLachlin, who wrote the

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[212] 2011 SCC 42 at para. 72.
[213] L. Klar, "Case Comment: Falling Boulders, Falling Trees and Icy Highways: The Policy/Operational Test Revisited" (1994), 33 Alta. L. Rev. 167 at p. 167.

judgment for the Court, noted that one approach to the policy-operational dichotomy, which had not been followed much in Canada was to treat decisions that had an element of discretion as exempt from liability unless the decision was irrational. A second approach, which was used in Canada, was to focus on the nature of policy decisions and whether they raise genuine social, economic, and political considerations. Chief Justice McLachlin concluded that certain of these decisions, which is labelled "core policy" decisions would be immune from a negligence claim. She stated at paragraph 90 of her judgment:

> 90. I conclude that "core policy" government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. This approach is consistent with the basic thrust of Canadian cases on the issue, although it emphasizes positive features of policy decisions, instead of relying exclusively on the quality of being "non-operational". It is also supported by the insights of emerging jurisprudence here and elsewhere. This said, it does not purport to be a litmus test. Difficult cases may be expected to arise from time to time where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability. A black and white test that will provide a ready and irrefutable answer for every decision in the infinite variety of decisions that government actors may produce is likely chimerical. Nevertheless, most government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable.

[422]. *Imperial Tobacco* is currently the leading case on the policy-operational dichotomy, and applying its principles to the immediate case, I conclude that what occurred with respect to the decisions that Ontario made about the practice of administrative segregation in Ontario as a form of solitary confinement, if they were decisions at all, then they were:

a. operational, not core policy decisions; or,

b. decisions within the chimerical territory of legal characterization of policy but falling on the side of an operational matter for which it is just and fair that Ontario should be exposed to tort liability as opposed to electoral evaluation; or,

c. core policy decisions that were so unnecessary or irrational that the decisions could be said to be made in bad faith having regard to what Ontario knew about the history and the effects of solitary decision, including, among other things, the reports from (a) the Arbour Commission; (b) the Ashley Smith Coroner's Jury; (c) the Ontario Human Rights Commission; (d) the Ontario Ombudsman; (e) Mr. Sapers; (f) its own internal investigations and consultation; and (g) Professor Hanna-Moffat and what Ontario knew about: (h) Canadian jurisprudence; (i) international law: (j) UN conventions; (k) the Mandela Rules; (l) the consensus of the medical, scientific, and prison reform communities; and (m) the deaths by suicide by inmates in solitary confinement in prisons and penitentiaries located - in Ontario.

[423]. Thus, in my opinion: (a) the impugned actions of Ontario's civil servants are not core policy decision but they are operational in nature and Ontario is not immune from a negligence claim; or (b) conversely, if the impugned actions of Ontario's civil servants appear to be core policy decisions, then the decisions are of the difficult to decide type, where the degree of policy involved is not sufficient to trigger protection from negligence; or (c) if the impugned actions of Ontario civil servants are core policy decisions, then they were irrationally or in bad faith disqualifying

Ontario from the immunity for policy decisions. I also conclude that at least some of the misconduct by Ontario was not tied to decision-making, it was purely operational misconduct.

[424]. In the immediate case, a source of confusion about whether Ontario was engaged in operational and implementation decisions as opposed to legislative or policy decisions is that Mr. Francis pleaded in part and argued that Ontario's failures were acts of omission such as a failure to enact policies and practices to ensure the responsible use of administrative segregation. It was, therefore, understandable that Ontario would respond with the gotcha-submission that it could not be liable for policy decisions. The debate then focused on whether the decisions about how, when, where, why, and how long to place inmates in administrations were operational decisions, which I find them to be, or core policy decisions, which is what Ontario submitted them to be.

[425]. However, Class Counsel's jurisprudentially ill-advised choice of words of talking in terms of policy should not obscure that the pleaded material facts upon which Mr. Francis' cause of action rests and the proven material facts support a case for operational systemic negligence. The case at bar falls into any and all of the situations where the decisions do not qualify as immunized from liability as policy decisions.

[426]. That the case at bar is about operational decisions is revealed by the evidence that many of the problems associated with administrating administrative segregation had nothing to do with making capital and infrastructure investments in the correctional facilities and there was evidence that if financial investments were made they would save money for the provincial government. Many of the problems in the immediate case arose because Ontario habitually and frequently was non-compliant with its own policies and was very and unduly slow in responding to its own operational failures. Ontario was very and unduly slow to act on own knowledge of the operational failures of itself and of others in the community of correctional institutions.

[427]. That the impugned activities and conduct in the immediate case are in the territory of operations or operational decisions is also revealed by the circumstance that on an individual basis, there is well established case law that supports the conclusion that Ontario had a duty of care to individual inmates of the same kind that Mr. Francis alleges, and in the immediate case, he has proven those duties were frequently, habitually, and systemically breached. With respect to the individual claims, Ontario does not dispute that it has a duty of care to individual inmates and it does not take cover that it was just making policy decisions. I conclude that the situation is much the same for the collective of inmates; Ontario has a duty of care to them, and it cannot take cover under the policy-operational dichotomy.

[428]. While it is undoubtably the case that in interactions between individual inmates and Ontario's civil servants, including wardens, correctional officers, and prison staff it is easier to identify as operational and not policy, it does not follow that because the impugned conduct in the immediate case is between the collective of inmates and the collective of civil servants that were in charge of the correctional institutions, there is no duty of care to the collective of inmates owed by the collective of civil servants It does not follow, as Ontario would have it, that what would be operational misconduct at the individual level cannot occur at the collective level, which concerns the overall administration and management of all the correctional institutions including lockups, jails, prisons, and penitentiaries.

[429]. Further, Ontario's argument is proven fallacious because it leads to the absurd conclusion that a public authority can immunize its operational conduct by simply dressing it up as a policy decision. Chief Justice McLachlin had this fallacy in mind in *R. v. Imperial Tobacco* where she said that difficult cases may arise where it is not easy to decide whether the degree of "policy" involved suffices for protection from negligence liability and that a litmus test for demarcating policy and operational decisions is likely to be chimerical. Justice Cory, in *Just v. British Columbia,*[214] had this fallacy in mind when he said that "complete Crown immunity should not be restored by having every governing decision designated as one of 'policy'". None of the Supreme Court judgments would define policy decisions so widely that operations or operational decisions cease to exist.

[430]. As noted above, Ontario relies on *Coumont v. Canada (Correctional Services),*[215] and *Wolf v. Ontario (Attorney General),*[216] and now the Court of Appeal's decision in *Reddock v. Canada (Attorney General),*[217]to argue that Mr. Francis' action focuses on core policy decisions with respect to the use of administrative segregation and these policy decisions are immune from review.

[431]. *Coumont* and *Wolf* are indeed decisions were correctional officers were found to have been immune from liability about conduct found to be policy oriented as opposed to operational conduct. However, neither case is binding on me. Moreover, and more to the point, the cases are factually distinguishable based on the evidence in the immediate case and neither case is a considered treatment of the issue of the policy-operational dichotomy.

[432]. In *Coumont,* while in custody in a federal penitentiary, Mr. Coumont was stabbed by his girlfriend's ex-husband, who was a fellow inmate. Mr. Coumont sued Canada for negligence with respect to placing him in close proximity to a dangerously incompatible inmate. He also alleged that the Correctional Service was negligent for placing him in administrative segregation as the way to protect him from further attacks. The case was tried by Justice Denault who accepted that, generally speaking, the Correctional Service had a duty of care to the inmates. In this regard, Justice Denault relied on Justice Cullen's decision in *Abbott v. Her Majesty the Queen*[218] where Justice Cullen stated at pages 117-118:

> Liability for negligence is assessed on the basis of a breach of a duty of care arising from a foreseeable and unreasonable risk of harm to one person created by the act or omission of another. I agree with counsel for the plaintiff's submission that there is a legal duty of care between guards and inmates. Inmates are closely and directly affected by actions of guards; they are under the care and control of guards while incarcerated. Although I do not dispute that there are limits on this duty of care, the fact that these individuals are incarcerated does not mean there is no duty of care. Further, guards have discretion to act in various circumstances, however, that discretion cannot be exercised carelessly or unreasonably. As such, I would also accept that there is a sufficient relationship in terms of proximity and neighbourhood to the extent that carelessness by a guard

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[214] [1989] 2 S.C.R. 1228 at pp. 1239-1241.
[215] [1994] F.C.J. No. 655 (Fed. Ct. T.D.).
[216] 2010 ONSC 72.
[217] 2020 ONCA 184, varying 2019 ONSC 5053.
[218] [1993] F.C.J. 673 (Fed. Ct. T.D.)

> through act(s) or omission(s) would likely cause damage that was reasonably foreseeable.

[433]. Pausing here, Justice Denault's decision is not of much assistance to Ontario because it supports the general proposition that prison authorities do have a duty of care to inmates.

[434]. Moving on, Justice Denault dismissed the negligence claim with respect to Mr. Coumont's placement near his girlfriend's ex-husband because there was no evidence that Mr. Coumont had alerted penitentiary staff about the dangerous incompatibility. Thus, the dismissal of the negligence claim in Coumont can be explained simply on factual grounds, which as precedents go, makes it not of much assistance to Ontario in the immediate case.

[435]. In what is more pertinent to the immediate case because it does relate to the policy-operational dichotomy, Justice Denault also dismissed the claim with respect to the alleged negligence in the placements in administrative segregation. He did this in a one-paragraph application of the policy operational dichotomy. In paragraph 47 of his decision, relying only on *Just v. British Columbia*,[219] Justice Denault stated:

> 47. I also cannot see how the decision to place the plaintiff in protective custody might be found negligent. Whether the plaintiff was forced into protective custody, which he alleges, or whether it was his own decision, as the defendant maintains, the decision clearly had regard to the reasonably foreseeable risk of injury he would face in the general population and met the correctional officials' obligation to ensure his safety. In my opinion, what is at the heart of the plaintiff's complaint is his belief that the options available to him in Kent in the circumstances of his case were so limited that he had no choice but to enter protective custody and to suffer the consequences which would be imposed upon him by his fellow inmates because of the rules of the "con code". While unfortunate, the jurisprudence clearly indicates that the decision to provide three types of custody (segregation, protective custody, and general population) may be characterised as a "true policy decision" and is immune from the application of negligence law.

[436]. Thus, *Coumont* accepts the policy-operational dichotomy, but the decision does not explore it and the case has nothing to say about the systemic mismanagement of administrative segregation. In the result, the case is of little to no assistance in propping up Ontario's argument.

[437]. As an authority to support Ontario's argument, *Wolf v. Ontario (Attorney General)*, which applied *Coumont,* is also very weak. In this case, Mr. Wolf was a self-represented litigant who was convicted of fraud and imprisoned. After he served his term, he sued Ontario, amongst others. Mr. Wolf alleged that the conditions and the policies associated with his confinement in prison were negligent including an allegation that the institution maintained extended periods of lockdowns. He had grievances with respect to meals, eating utensils, mattresses, recreational programs, and shower arrangements. Ontario moved to have his claim dismissed for failure to show a reasonable cause of action and Justice Pollock dismissed his action. There is a brief, two paragraph, application of the policy-operational dichotomy with *Coumont* being the principal authority. Justice Pollack stated at paragraphs 31 and 32 of her judgment:

> 31. Mr. Wolf claims that the he was placed in unsanitary conditions, without the benefit of programs, and without proper surveillance. He complains about the 'Unit' he was placed in, and who was placed

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[219] [1989] 2 S.C.R. 1228 at p. 1240.

> in there with him. The Crown Defendants submit that our courts have held that decisions made with respect to the types of custody are true policy decisions that do not establish a duty of care. They refer to the case of *Coumont v. Canada (Correctional Services*), which held that:
>
> > While unfortunate, the jurisprudence clearly indicates that the decision to provide three types of custody (segregation, protective custody, and general population) may be characterised as a "true policy decision" and is immune from the application of negligence law.
>
> 32 It is submitted that Mr. Wolf's claims with respect to the types of meals, the number of phones, the lack of panic buttons, the lack of suitable recreational activities, the conditions of the facility and his placement with the general inmate population, relate to decisions made based on budgetary constraints and considerations, and are 'true policy' decisions. The courts have consistently held that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints.

[438]. Unlike Justice Pollack, I have had the benefit of an argument from a represented plaintiff and this is a summary judgment motion that extended five days, much different from a pleadings motion. I have super abundant evidence and case law briefs of thousands of pages of caselaw. The evidence in the immediate case establishes that that conduct of Ontario's civil servants was operational in nature and was not a core-policy decision. The pleaded material facts of the systemic negligence claim advanced against Ontario is not a claim of negligence at the policy-making level.

5. The Court of Appeal's Decision in *Reddock v. Canada (Attorney General),*

[439]. This brings the discussion to the Court of Appeal's decision in *Reddock v. Canada (Attorney General),*[220] which obviously is binding on me. As noted above, Ontario submits that the Court of Appeal's decision supports Ontario' arguments and entirely defeats Mr. Francis's systemic negligence claim. Mr. Francis submits, however, that the case is distinguishable as a matters of pleading, facts, and law.

[440]. I agree with Mr. Francis that *Reddock* is distinguishable in its outcome about negligence from the immediate case. And I shall now explain that upon close analysis, the Court of Appeal's decision in *Reddock* rather supports the legal viability of a systemic negligence claim against Ontario in the immediate case at an operational level.

[441]. This explanation requires a close reading of what the Court of Appeal said and what it actually decided in *Reddock*. The explanation also requires an appreciation of what the Court of Appeal did not say and did not do. For instance, it actually did not do a duty of care analysis or explore the subtleties and difficulties of the policy-operational dichotomy. It focussed on the errors in my own duty of care analysis. To be fair and not to avoid addressing where I was found to have erred in *Reddock*, the Court of Appeal did not need to do a fulsome analysis. Because of its decision about *Charter* damages, the Court itself said it would be brief in discussing the negligence claim. That said, what the Court of Appeal said was not *obiter dicta*. *Reddock* is binding dicta about a systemic negligence claim against a public authority. That said, the authority of the case does not go so far as Ontario submits and the case does not preclude a finding of systemic negligence in the

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[220] 2020 ONCA 184, varying 2019 ONSC 5053.

immediate case.

[442]. For the purposes of my explanation of the significance of the Court of Appeal's decision in *Reddock*, for immediate purposes, I accept that I erred in *Reddock* and I shall follow its lessons as I am obliged to do.

[443]. The Court of Appeal addressed Mr. Reddock's negligence claim is seven paragraphs of its 125-paragraph decision. The Court stated at paragraphs 114 to 120:

> *Systemic Negligence*
>
> 114. Canada argues that the motion judge erred in *Reddock* in his analysis of the duty of care in relation to systemic negligence. We agree with that submission, but as the damages awarded by the motion judge are sustainable as *Charter* damages, and as we view *Charter* damages to be the more appropriate remedy, our consideration of the systemic negligence issue will be brief.
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> 115. The portion of the respondents' statement of claim relied on by the motion judge pleads that there is a recognized class-wide duty of care owed by the CSC to inmates with respect to the "design, organization, administration and staffing of the Federal Institutions, as well as the policies and procedures applied therein": *Reddock*, at para. 398, referring to para. 60 of the fresh as further amended statement of claim. The motion judge recognized the need to "prune" aspects of this claim because they related to the "area of core law-making and policy-making that is immune from a negligence claim": at paras. 406, 409. He went on to find, at para. 411, that through Corrections Canada, the Federal Government had a duty of care not to operate a system of administration segregation that caused harm to the inmates and a duty of care not to violate the inmates' *Charter* rights. [...] The Federal Government's duty of care is, in part, commensurate with its *Charter* obligations."
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> 116. In our view, both the duty pleaded by the respondent and the duty found by the motion judge differ significantly from the established general duty of care that correctional institutions are "to take reasonable care for [a prisoner's] safety as a person in their custody": *MacLean v. The Queen*, [1973] S.C.R. 2, at p. 7. MacLean involved a claim for personal injuries sustained as a result of an accident at a prison farm, the equivalent of a workplace accident. The Supreme Court found that the guard in charge of the operation was negligent in the way he supervised and directed the work and that the Crown was vicariously liable: at p. 7.
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> 117. MacLean concerned the straightforward application of a routinely recognized common law duty of care to the prison setting. It did not involve the operation of a system, the design of policies and procedures, or the violation of *Charter* rights. The duty found by the motion judge is a novel duty that essentially rests upon principles of public law and *Charter* rights. The same analysis applies to another duty referred to by the motion judge, namely the "duty to take reasonable care to avoid causing foreseeable mental injury": at para. 463.
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> 118. The duty identified by the motion judge was a novel duty that required careful scrutiny, particularly in the context of this class action. It can only succeed if systemic in nature and cannot succeed if based upon a series of discrete breaches of duty to individual inmates. The two-stage test from *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, must be considered: does the nature of the parties' relationship create a *prima facie* duty of care, and if so, is the duty negated by residual policy concerns?
>
> 119. The motion judge accepted that cases such as *Cooper; Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; and *Eliopoulos (Litigation Trustee) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 514, foreclose Mr. Reddock's systemic negligence claim based on "allegations that the Federal Government owed a duty of care with respect to the staffing of the penitentiaries or with respect to the law making or policy making function including the responsibility to have in place safeguards and policies to prevent the harms associated with administrative segregation": at

> paras. 423-24. Yet what he labels to be "operational" failings, at para. 414, essentially amount to criticisms of the Correctional Service's policies in relation to the use of administrative segregation. This is the very same failure to have in place policies to avoid the harm and corresponds with his characterization of the duty as being to avoid breaching the class members' *Charter* rights.
>
> 120. While individual inmates have a cause of action for specific individual acts of negligence on the MacLean principle, a class-wide duty of care can only be made out if the duty relates to the avoidance of the same harm for each class member. This is not a case where the class-wide duty of care is said to arise from a single incident or act, for example an air crash or train derailment. Rather, the duty alleged arises from different acts in different circumstances and in relation to different individuals. Those acts can be identified as being the same only because they all arise from the implementation of a particular policy or regulatory regime regarding the management of prisons. The primary negligence claim in the amended statement of claim is negligence at the policy-making level. Negligence at the operational level is alleged as an alternative and that would turn on individual circumstances. Negligence at the policy level leads directly to the *Edwards*, *Cooper*, and Eliopoulos exclusion of a duty of care for matters of policy.

[444]. What the Court of Appeal essentially said is that I erred in finding systemic negligence based on a duty of care that was actually pleaded to be operational in nature. The Court, however, did not categorically conclude that a public authority could not be liable for systemic negligence in the operation of a prison or penitentiary. In my opinion, the immediate case is one such case where the pleaded material facts of systemic negligence at an operational level have been proven. The immediate case is thus distinguishable from *Reddock* on its facts.

[445]. In *Reddock*, while I understood the policy versus operational dichotomy, I apparently erred by not doing a proper analysis of systemic negligence. In particular, I erred by extrapolating a duty of care and operational negligence from the established general duty of care that correctional institutions are to take reasonable care for a prisoner's safety as a person in their custody. [221] The Court of Appeal noted that both the duty pleaded and the duty that I found differed from the established duty of care cases where prison authorities have a duty of care to inmates. It is to be noted, however, that the Court of Appeal does not suggest or even hint that those established cases were wrongly decided because the public authority could take cover of having just made policy decisions.

[446]. As a corollary to this error, the Court of Appeal said that I also erred in *Reddock* in not regarding the case as a novel duty of care case. The Court of Appeal points out that the duty I identified was a novel duty that required careful scrutiny, and the Court pointed out that as a novel claim, Mr. Reddock's claim could only succeed if both systemic and also systemic at an operational level. The Court then noted that although I concluded that there was a systemic negligence at an operational level, the acts that had been pleaded as negligent and that I had found to be class-wide operational failures "can be identified as being the same only because they all arise from the implementation of a particular policy or regulatory regime regarding the management of prisons." Thus, the Court of Appeal criticized that in the guise of finding an operational failure, I had, in truth, only found negligence at the policy level which "leads directly to the *Edwards*, *Cooper*, and *Eliopoulos* exclusion of a duty of care for matters of policy."

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[221] *MacLean v. The Queen*, [1973] S.C.R. 2 at p. 7.

[447]. It is important to note, once again, that the Court of Appeal does not categorically say that a systemic negligence claim against a public authority is impossible. The Court of Appeal does not suggest that everything that a public authority does at a systems level is the implementation of policy.

[448]. And with these observations about what the Court of Appeal decided and did not decide in its *Reddock* decision, I can apply the lessons of the Court of Appeal's decision to the circumstances of the immediate case. As the above length discussion reveals, I have avoided the errors that I was found to have made in my *Reddock* decision. I have not extrapolated Ontario's duty of care from established negligence cases involving individual claimants. I have rather treated the duty of care issue in the immediate case as a novel case, and I have undertaken a fulsome duty of care analysis and a fulsome analysis of the policy versus operational dichotomy. And I have undertaken, as the discussion below will reveal, a fulsome analysis of the nature of systemic negligence claims against public authorities.

[449]. In the immediate case, there may have been some negligence at the core policy-making level for which Ontario, as a public authority, has no duty of care (although it remains accountable to the electorate for its policy making negligence). But my findings of fact and my legal analysis reveal that there was also negligence at the non-core policy level and also systemic and routine negligence at the purely operational level of the day-to-day management of a correctional institution where Ontario has a class wide duties. In the immediate case, Ontario was systemically and routinely negligent in the operation of administrative segregation in violation of Ontario's own policies and practices.

[450]. In all events, in the immediate case, there was no policy or core policy that has been identified that insulates Ontario from its conduct of operating and implementing administrative segregation as a form of solitary confinement.

[451]. Ironically, to the extent that Ontario developed core policies about administrative segregation, it was in the direction of accepting Mr. Francis' criticisms and the worldwide consensus condemning making administrative segregation a form of solitary confinement and condemning its use for particularly vulnerable inmates, including inmates with serious mental health problems.

[452]. Indeed, Ontario has enacted – but not proclaimed in force - legislation that prohibits solitary confinement. I would not go so far as Mr. Francis, who argues that the not proclaimed in force statute is itself an admission of negligence, but there is not now and there never has been a statute in Ontario that said that it was Ontario's public policy decision to chose and to design administrative segregation as a form of solitary confinement contrary to the Mandela Rules as a means to maintain the security of a correctional institute.

[453]. I, therefore, conclude that the first two steps of a new duty of care analysis reveal that Ontario has a *prima facie* duty of care to the Class Members of the immediate case.

6. Residual Policy Factors Negating a Duty of Care

[454]. Turning now to the third major issue, it is whether there are any residual policy reasons

that would negate a *prima facie* duty of care. The policy-operational dichotomy may be considered a residual policy factor, but I have already dealt with that policy factor above. Ontario asserts that there is another policy factor engaged in the immediate case. Ontario asserts that where a *prima facie* duty of care conflicts with an overarching statutory or public duty, this may constitute a compelling policy reason for negating proximity.[222]

[455]. Ontario submits that recognizing a duty of care in the immediate case would create a conflict with Ontario's responsibility under *Ont. Reg.* 778 to effectively manage and operate Correctional Institutions. In particular, Ontario submits that if inmates who must be segregated to protect the security of the institution or the safety of other inmates can no longer be placed in administrative segregation, there may be a risk to the effective management of correctional institutions.

[456]. This argument is not supported by the evidence, and this argument is belied by the fact that many jurisdictions have already found ways or are finding ways to manage their correctional institutions and maintain security without using solitary confinement.

[457]. Further, Ontario's argument is belied by the fact that Ontario is one of those jurisdictions committed to finding other approaches and has already taken steps in the direction of no longer using administrative segregation that amounts to solitary confinement. Unfortunately, its words have not been matched with deeds.

[458]. Further still, Ontario's argument is belied by the analysis in the *Charter* portions of these Reasons for Decision where the use of administrative segregation for the purposes of securing the safety of the prison was found to be an breach of the inmates' *Charter* rights that could not be justified under Section 1 of the Charter.

[459]. Moreover, Ontario's argument is belied by the evidence that shows that it has been known for a long time that using solitary confinement is an effective and deleterious way to operate a penitentiary or prison. In short, Ontario has not shown that residual policy factors negate the *prima facia* duty of care established in the immediate case.

7. Systemic Negligence

[460]. Turning now to the fourth major issue, this is the matter of examining the nature of the negligence alleged in the immediate case. Mr. Francis' allegation is that Ontario breached a duty of care to all of the inmates who are Class Members, while Ontario argues that there is not a duty of care common to the class. Thus, the debate in the immediate case is about the nature of systemic negligence claims of the type advanced by Mr. Francis' on behalf of the Class Members.

[461]. In the realm of class action litigation, the idea of systemic negligence has been used as a means for a group, whose members might have individual claims, to sue as a collective and present

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[222] *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 44; *Followka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5 at para. 39; *Syl Apps Secure Treatment Centre v. D. (B.)*, 2007 SCC 38 at para. 28.

a certifiable common issue.

[462]. For example, in the cardinal systemic negligence case of *Rumley v. British Columbia*,[223] the putative class members were students at the Jericho Hill School, a province operated residential school for the deaf and blind. The students had suffered sexual abuse while at the school. The students, who would have had individual claims, however, needed a class action to access justice. On an appeal of the certification decision in *Rumley*, the Supreme Court of Canada upheld the certification of the following question:

> Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents or other students at the school?

[463]. On the appeal, the provincial government argued that the question was not a common one. The government submitted that ultimately liability would depend on whether the standard of care was breached with respect to each individual student and there was no collective answer. In the Supreme Court of Canada, Chief Justice McLachlin disagreed, and she held that there was a way that a group could sue as a collective by proving systemic negligence. She stated at paragraphs 29 and 30 of her judgment:

> 29. There is clearly something to the appellant's [the province] argument that a court should avoid framing commonality between class members in overly broad terms. …. Inevitably such an action would ultimately break down into individual proceedings. ….
>
> 30. I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence -- "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

[464]. The key takeaways from this passage of Chief Justice McLachlin's judgment are that systemic negligence provides a means for a group to formulate a common issue that would justify certification of a class action. This may make the individual component of the class action more difficult for the individual class members to show causation than if the proven breach was an individual breach as opposed to a systemic one, but the representative plaintiff is entitled to shape the negligence claim to make it more amenable to a collective action.

[465]. However, what should not be taken away from the above passage is the idea that the Chief

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[223] 2001 SCC 69.

Justice was defining a systemic breach exclusively as an organization failing to take reasonable measures in its operation or management. In *Rumley* acts of omission caused the systems failure, but systemic breaches can arise by acts of commission. Systemic negligence involves carelessness in the creation, management, or operation of a system that causes harm to individuals and to groups of individuals and that can involve both acts of omission and acts of commission.

[466]. *Rumley* was followed in *Cloud v. Canada*,[224] another cardinal systemic negligence case, once again involving abuse at a school, this time at the Mohawk Institute Residential School, one of the infamous Indian Residential Schools. The action was against Canada, amongst others, who were responsible for running the school. The lower courts, including a majority of the Ontario Divisional Court did not certify the action, because they saw no common issues. Rather, the lower courts viewed the case as one in which the alleged negligence and breach of fiduciary duty claims were idiosyncratic and not common across the class.

[467]. However, Justice Cullity, who dissented in the Ontario Divisional Court and the Ontario Court of Appeal, which agreed with Justice Cullity, saw commonality in the systemic negligence claim in the way the school was operated. In this regard, Justice Goudge, (Justices Catzman and Moldaver concurring) stated at paragraphs 58 to 60 of his judgment:

> 58. The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in *Hollick, supra*, exemplifies, the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.
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> 59. The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by *Rumley*, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a 42-year period. Here, in analogous circumstances, the negligence claim covers only 16 years, from 1953 to 1969.
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> 60. The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues for the purposes of s. 5(1)(c).

[468]. Much the same observations can be made about the systemic negligence case at bar. In the

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[224] (2004) 73 O.R. (3d) 401 (C.A.), leave to appeal to SCC ref'd, [2005] SCCA No. 50

immediate case, (a) there is a duty owed to all the inmates in the way that Ontario runs its correctional institutions; *i.e.*, a responsibility across the corrections system for the collective of inmates in the system; (b) the standard of care for running the whole system, even an evolving standard of care, can be determined; and (c) there is a proven failure to meet the standard of care; *i.e.* there is systemic negligence.

[469]. In the case at bar, the duty of care is at the operational level across the system and it can be identified, as can the standard of care. In the case at bar whether the standard of care has been breached, and general causation, can be identified on a class-wide basis because of the systemic negligence claim.

[470]. In some cases, but, as the discussion below will reveal, specific causation of resulting damages and the quantification of damages may not be determinable on a class-wide basis in a systemic negligence case, but in the immediate case, specific causation of a minimum level of harm can be determined on a class-wide basis. In the immediate case, there is a minimum level of harm common to each inmate, and if a particular inmate suffered more harm, then he or she will have to prove causation of that harm at the individual issues trial.

[471]. While it is probably not appreciated, a product's liability class action could be viewed as an example of systemic negligence. The manufacturer's system breaks down, and the manufacturer manufacturers a defective and harmful product. Systemic negligence claims are about the breakdown of systems, and systems may be designed at a policy level, but they may breakdown at an operational level across the system, which is what occurred in the immediate case.

[472]. Thus, there is no merit to Ontario's argument that there is no class-wide duty of care, which argument fails to appreciate the significance and the substance of Mr. Francis' systemic negligence claim. In my opinion, Mr. Francis has proven routine and habitual operational failures of systemic negligence.

8. Duty of Care Conclusion

[473]. One final note before concluding the duty of care analysis. The note is that the analyses of the duty of care in the immediate case are independent of the circumstance that Ontario has contravened the *Charter* rights of the inmates.

[474]. I agree with Ontario's submission that although state action can give rise to both *Charter* and negligence claims, there is no duty of care to prevent a breach of *Charter* rights. The general principle from *Saskatchewan Wheat Pool*[225] is that there is no nominate tort for the negligent breach of a statutory duty. However, the breach of a statutory duty may be relevant to determining whether the defendant breached his or her common law duties of care to the plaintiff.

[475]. In the immediate case, the breach of the inmate's *Charter* rights does not *per se* create a duty of care, but it does demonstrate the Ontario's civil servants were negligent in their operational responsibilities with respect to administrative segregation. The *Charter* analysis also reveals that

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[225] [1983] 1 S.C.R. 205.

there are no residual policy factors to negate the *prima facia* duty of care established in the immediate case.

[476]. To conclude this part, in my opinion, Ontario had a duty of care not to operate a system of administration segregation that caused harm to the inmates. Ontario operated administrative segregation in a way that unnecessarily caused harm to the inmates and the Class Members suffered harm because of a systemic failure by Ontario's civil servants and prison staff exercising due care in administering their statutory and regulatory authority.

[477]. As it happens, coincidentally, the duty of care is, in part, commensurate with Ontario's *Charter* obligations.

9. Are the Class Members' Negligence Claims Precluded by s. 5 of the Former *Proceedings Against the Crown Act?*

[478]. Historically, at common law, the Crown was entirely immune from liability in tort and no cause of action could be asserted against the Crown; i.e. against the government. However, the federal government and the provinces introduced statutes to place limits on this immunity and to move the legal position of the Crown and its servants closer to other Canadian litigants[226] In *Mattick Estate v. Ontario (Minister of Health)*,[227] the Ontario Court of Appeal described the statutory right to sue the Crown as being an accepted part of our legal landscape.

[479]. I would add that the right to sue the Crown is arguably another principle of fundamental justice as a basic tenets of the Canadian legal system. If that argument is true, then it may be that Ontario cannot now constitutionally restore and revive an absolute immunity from tort liability, but I need not decide that issue to decide the case at bar. (I do note that recently Justice Belobaba in *Leroux v. Ontario*,[228] a case that I shall discuss further below, held that it was not plain and obvious that s. 11 of the *Crown Liability and Proceedings Act, 2019* would survive a constitutionality change for interfering with the core jurisdiction of the superior court.)

[480]. In Ontario, in 1963, the *Proceedings Against the Crown Act* narrowed Crown immunity, which is to say that Ontario followed the trend across Canada to permit some tort actions against government.

[481]. With respect to tort claims, under the *Proceedings Against the Crown Act*, the Crown is immunized from direct liability but may be liable in respect of tortious acts or omissions committed by its servants or agents if a proceeding in tort could be brought against that servant or agent directly. In effect, the *Proceedings Against the Crown Act* introduced a statutory form of vicarious liability where governments would be responsible for the tortious wrongdoing of their civil servants.

[482]. In the immediate case, however, Ontario submits that Mr. Francis' claims are claims of

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[226] *Canada (Attorney General) v. Thouin*, 2017 SCC 46.
[227] (2001), 52 O.R. (3d) 221 at para. 14 (C.A.).
[228] 2020 ONSC 1994.

direct liability against Ontario for failing to reform segregation, for failing to implement an independent review process and for not placing a cap or prohibition on administration segregation placements. Ontario's direct liability argument closely resembles its argument about the policy-operational dichotomy. Thus, Ontario submits that Mr. Francis's claim of systemic negligence is a claim of direct Crown liability and this claim is foreclosed by Crown immunity.

[483]. Ontario submits that it is not liable for policy decisions and would only be liable if prison staff failed to take reasonable care for a person in their custody. Ontario submits that Mr. Francis has not made allegations against specific Crown employees, servants or agents. Ontario submits that Mr. Francis' claim cannot be characterized as engaging the statutory vicarious liability of the Crown. Ontario submits that a proper claim of vicarious liability requires a pleading that: (a) identifies specific individual Crown actors owing a duty of care to the Class Members; (b) specifies the nature of such a duty of care; and (c) specifies the alleged breaches of that duty.

[484]. It appears that Ontario cynically accepts that it is possible to have a negligence claim that would not be a foreclosed claim of direct liability, if the individual civil servants whose conduct is impugned were named. This is a cynical concession, because it obviously is impossible or impractical for a Representative Plaintiff with a Class Period of almost 3.5 years and Class Members in 32 correctional institutions to name individual villains. Like many of Ontario's arguments on this summary judgment motion, it would appear that Ontario is attempting to immunize itself from any form of liability just because the claim made against it is brought by a collective as opposed to a claim being brought by an individual.

[485]. For the reasons expressed above, however, Ontario's argument fails. The duty of care analysis reveals that Ontario has a proximate relationship with the collective of inmates in its institutions and that there is a collective duty of care. The discussion above shows that the case at bar is about the operational decisions of Ontario's civil servants not about core policy decisions, which is another way of saying that the case at bar is not a direct negligence claim precluded by Crown immunity. The discussion above about systemic negligence reveals that it is not necessary to name the individual civil servants whose collective conduct led to a system-wide breach of the duty of care and system-wide harm to the collective of inmates.

[486]. Moreover, Ontario's direct liability argument once again reveals a misunderstanding about the nature of systemic negligence claims. These claims do not change the legal nature of negligence and rather are a means for a collective or group to assert claims. There was no requirement in *Rumley* or *Cloud,* the systemic negligence cases described above, that would make the negligence action dependant upon calling out particular civil servants. The negligence was systemic involving a breakdown of the system.

[487]. Mr. Francis' claim as an individual is a claim that is possible pursuant to s. 5 of the former *Proceedings Against the Crown Act.* It does not by some *hocus pocus* of allegedly deficient pleadings become a claim outside of s. 5. Mr. Francis acts as a representative plaintiff for a group with similar claims and injuries suffered as a result of the collective misdeeds of civil servants who have mismanaged the system of correctional institutions.

[488]. Mr. Francis's claim is not a claim of direct negligence. Rather, it is a negligence claim permitted by s. 5 of the *Proceedings Against the Crown Act*. It is not precluded by Crown

immunity.

10. Are the Class Members' Negligence Claims Precluded by s. 11 of the *Crown Liability and Proceedings Act, 2019?*

[489]. As foreshadowed several times above, Ontario submits that in addition to the common law principles relating to core policy decisions, Mr. Francis' negligence claim is extinguished by ss. 11(1), (4) and (5) of the *Crown Liability and Proceedings Act, 2019,*[229]

[490]. Further, Ontario submits that s. 11 of the *Crown Liability and Proceedings Act, 2019* affects the Class Members' substantive rights retroactively. It says that the presumption that a statute affecting substantive rights should apply only prospectively, has no application because s.31(4) of the *Crown Liability and Proceedings Act, 2019* states that any cause of action captured by s. 11 is extinguished as of July 1, 2019. Ontario says that this express language discloses the legislature's intent to extinguish the causes of action asserted by Mr. Francis in this proceeding.[230] Ontario submits that if a retroactive law comes into force, while an action is pending, the court is bound to apply it.[231]

[491]. In particular, Ontario submits that s. 11 extinguishes Mr. Francis' tort claim. In this regard, Ontario characterizes Mr. Francis' negligence claim as alleging that Ontario's failed to make decisions respecting "policy matters" as defined in s. 11 (5) of the *Crown Liability and Proceedings Act, 2019*. It says that policy includes decisions about the funding and the design of a "program" and the manner in which that "program" is to be carried out, including the "existence or content" of any policies in respect of that "program". It submits that the term "program" encompasses the legislative scheme authorizing and governing the use of administrative segregation in the immediate case.

[492]. Mr. Francis, however, submits, also as foreshadowed several times above, that these provisions of the *Crown Liability and Proceedings Act, 2019* do not change the common law, but rather are a codification of the law that previously existed. Mr. Francis argues that the policy-operational dichotomy that underlies s. 11 should be decided in his favour. He submits that what Ontario did was not a "policy matter" and, therefore, his claim is not distinguished by s. 11 of the *Crown Liability and Proceedings Act, 2019.*

[493]. In asserting that s. 11 is no more than a codification of the policy-operational dichotomy, Mr. Francis relies on the circumstance that the time of the enactment of the *Crown Liability and Proceedings Act, 2019,* the former Attorney General, explained in the House that the Act would "clarify the scope of government liability" and that its purpose was to "clarify and codify

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[229] S.O. 2019 c. 7, Sched. 7.
[230] *CNG Producing Co v. Alberta (Provincial Treasurer)*, 2002 ABCA 207.
[231] *Régie des rentes du Québec v. Canada Bread Company Ltd*, 2013 SCC 46 at para 54, per Chief Justice McLachlin CJC, dissenting, but not on this point; *CNG Producing Co v. Alberta (Provincial Treasurer*), 2002 ABCA 207.

established principles of law."[232] The Honourable Caroline Mulroney stated in the Legislature:

> The *Proceedings Against the Crown Act* has been on the books since 1963, and case law has evolved significantly since then. Principles of law that have been emphasized over and over again by the Supreme Court of Canada are now being codified into our law. […] The proposal, if adopted, will enshrine the Supreme Court of Canada's decision that government policy decisions cannot give rise to liability for negligence. This is an established principle of law. The purpose of our amendment and of our proposed legislation is simply to clarify and codify established principles of law.[233]
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> […]
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> In this case what the legislation does is it codifies existing case law set by the Supreme Court that states that good faith policy decisions by governments are not judiciable in this case.[234]

[494]. Just prior to the legislative debate about the *Crown Liability and Proceedings Act, 2019,* on April 14, 2019, Ms. Mulroney also issued the following statement regarding the purpose and intention of the legislation:

> As the Supreme Court has previously and consistently held 'there is general agreement in the common law world that government policy decisions are not justiciable and cannot give rise to tort liability'. The proposed bill enshrines and clarifies that concept in an attempt to reduce frivolous and unmeritorious claims, saving time and money for the courts and taxpayers.

[495]. Ontario responds, however, that while in some respects the provisions of s. 11 are a codification, in other respects s. 11 does more. As Ontario opaquely would have it, s. 11 supplements the existing common law defences in a manner that clarifies how those defences apply. Ontario submits that the *Crown Liability and Proceedings Act, 2019* clarifies that Mr. Francis and the Class Members have no cause of action in negligence relating to administrative segregation policies or to any decisions concerning the manner in which those policies have been carried out. Ontario argues that the former Attorney General's statements concerning "codification" and "clarification" speak to different aspects of s. 11. It submits that s. 11 "codifies" only the principle that there is no liability in negligence for the enactment of legislation or the exercise of delegated legislative authority.[235]

[496]. Ontario submits that ss. 11(4) and (5) clarify the common law principle that the Crown is not liable in negligence in respect of good faith policy decisions. It says that legislation does this by defining in non-exhaustive terms, what may constitute a policy matter. Ontario submits that 11(9) makes it clear that s. 11 exists alongside, but does not displace, the immunity for core policy decisions at common law.

[497]. Returning to Mr. Francis' side of the debate, he submits that if accepted by the court,

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[232] Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 94 (16 April 2019) at p. 4401 (Hon. C. Mulroney).
[233] Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 94 (16 April 2019) at p. 4401 (Hon. C. Mulroney).
[234]Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 94 (16 April 2019) at p. 4401 (Hon. C. Mulroney).
[235] *Williams v. Canada (Attorney General)*, 2009 ONCA 378 leave to appeal to SCC ref'd, [2009] S.C.C.A. No. 298.

Ontario's interpretation of the *Crown Liability and Proceeding Act, 1992*, particularly its submission that subsection 11 (5) clarifies the scope of Crown immunity for policy decisions, there would be a large expansion of Crown immunity than established by the common law negligence cases. He submits that Ontario is asserting a change in the common law, but he argues that this can only be done clearly, which is not the case in the immediate case. Further, he submits that if the operation of administrative segregation as solitary confinement is a "program," then any operational misconduct by Ontario's agents, servants or employees would now be immune from negligence liability and this is not a clarification of existing law but an alteration of it. He submits that far from merely clarifying the exceptions to common law immunity, Ontario's interpretation would eliminate the exceptions and restore a comprehensive Crown immunity from tort actions in negligence. Placed in the context of the discussion above about *R. v. Imperial Tobacco*,[236] what Mr. Francis is asserting is that his case falls on the operational side of the policy-operational dichotomy and section 11 of the *Crown Liability and Proceeding Act, 1992* goes no further than that.

[498]. My own analysis favours Mr. Francis's argument. Ontario's obvious aspirations for ascribing meaning to the word "program," however, actually beg the interpretative question in the immediate case. The dispute between the parties is essentially a matter of statutory interpretation with Mr. Francis arguing that s. 11 is a codification and Ontario opaquely arguing that s. 11 is a substantive change to the law, which, of course, Ontario is entitled to do if so inclined and subject to being constitutionally compliant.

[499]. It is obvious why Ontario would like to describe its policies with respect to administrative segregation as a "program," which is a term used but not a defined in s. 11 of the *Crown Liability and Proceedings Act, 2019*. It is obvious what Ontario desires because the word "program" is so general in its connotations and denotations that any government conduct that has some element of deliberation or planning would come within the meaning of a program and hence within the defence and immunity provided by s. 11 of the Act. Ontario's aspiration is to weaponize the policy-operational dichotomy in its favour.

[500]. Dictionary definitions reveal how expansive is the notion of a program. The *Oxford English Dictionary* defines a "program" as "a definite plan or scheme of any intended proceedings; an outline or abstract of something to be done (whether in writing or not)."[237] Ddefinitions in other dictionaries share this sense of a "program" as a scheme prescribing acts that may be taken to achieve a particular result; namely (a) a set of related measures or activities with a long-term aim;[238] (b) a course of activities or actions taken to achieve a certain result;[239] and (c) a schedule or system under which action may be taken toward a desired goal.[240]

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[236] 2011 SCC 42 at paras. 43-46.
[237] *Oxford English Dictionary*, 2nd ed (Oxford: Claredon Press, 1989) *sub verbo* "programme".
[238] *Oxford Dictionary of Current English* (Oxford: Oxford University Press, 2001) *sub verbo* "programme" ,; *Concise Oxford English Dictionary* (Oxford: Oxford University Press, 2011) sub verbo "programme".
[239] *Paperback Oxford Canadian Dictionary* (Toronto, Ontario, Oxford University Press: 2006) *sub verbo* "program".
[240] *Webster's Third New International Dictionary of the English Language* (Springfield, Mass: Merriam-Webster, 2002) *sub verbo* "program".

[501]. Ultimately, the issue in the immediate case is not resolved by the aspirations of the litigants but by the exercise of statutory interpretation. Statutory interpretation entails discerning legislative intent by examining the words of a statute in their entire context and in their grammatical and ordinary sense, in harmony with the statute's scheme and object."[241] A court must find the authentic meaning of legislation dispassionately and objectively examining its text, context and purpose.[242] A court must not rewrite an Act under the guise of interpreting it, so as to not usurp the legislative function.[243]

[502]. One of the canons of statutory interpretation is that there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent.[244]

[503]. Another cannon of interpretation - for Crown immunity in particular - is that legislature must use express language in a statute to remove Crown immunity unless it can be inferred that the purpose of the statute would be wholly frustrated if the Crown were not bound.[245] Crown immunity, which originated in the common law, can be overridden only with clear and unequivocal legislative language and it is up to the courts to give meaning to legislative provisions that narrow the limits of the immunity and to determine its scope, where necessary.[246]

[504]. Applying the principles of statutory interpretation to s. 11 of the *Crown Liability and Proceedings Act, 2019,* which is the successor to the *Proceedings Against the Crown Act,* one can ascertain that the overall purpose of Act is to reduce Crown immunity. Because of statutes, like the *Proceedings Against the Crown Act,* Crown immunity continues to exist, but these statutes, however, provide for some tort proceedings against the Crown with respect to the activities of Crown servants.

[505]. In my opinion, Ontario's interpretation of the word program and its interpretation of s. 11 of the *Crown Liability and Proceedings Act, 2019* does not examine the words of s. 11 in their entire context of the Act and in their grammatical and ordinary sense, in harmony with the statute's scheme and object. The purpose of this *Act* and its predecessor was to intrude upon the principle of Crown immunity and to define the limits of that intrusion. Ontario's interpretation of s. 11 would eliminate the intrusions. Given the very expansive definition it promotes for what counts as a policy decision, Ontario's interpretation would extinguish actions against the Crown for negligence, but that would be contrary to one of the major purposes of the *Proceedings Against the Crown Act* and its replacement statute, the *Crown Liability and Proceedings Act, 2019*. These Acts did not create or establish Crown Immunity, there were designed to restrict it and to bring the

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[241] *British Columbia v. Philip Morris International, Inc*, 2018 SCC 36. See also *Legislation Act, 2006,* S.O. 2006, c. 21, Sched F, s 64(1).
[242] *Canada v. Cheema*, 2018 FCA 45.
[243] *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47.
[244] *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 19; *Lizotte v. Aviva Insurance Co. of Canada*, 2016 SCC 52 at para. 56; *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 at para. 39; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at p. 1077; *D'Mello v. Law Society of Upper Canada*, 2014 ONCA 912 at paras. 11-19; *Evans v. Gonder*, 2010 ONCA 172 at para. 40.
[245] *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3; *Canada (Attorney General) v. Thouin*, 2017 SCC 46
[246] *Canada (Attorney General) v. Thouin*, 2017 SCC 46.

Crown more in line with the other defendants in Ontario who are not protected by immunities for their tortious conduct.

[506]. There is no doubt that the *Crown Liability and Proceedings Act, 2019* binds the Crown[247] and the Act's overall purpose is to intrude upon Crown immunity, but Ontario's interpretation, would virtually restore Crown immunity for tort claims given the expansive definition of what is a program. In contrast, Mr. Francis' interpretation codifies the case law and maintains the *status quo* at common law that had been established by the *Proceedings Against the Crown Act*. Mr. Francis' interpretation is supported by the presumption that the common law (in this case, the law about the liability of public authorities) remains unchanged, absent a clear and unequivocal expression of legislative intent.

[507]. I agree with Mr. Francis that the purpose of s.11 was to codify the scope of the intrusion on Crown liability that maintained or continued a government's or a public authority's immunity from causes of action respecting certain governmental functions. The language of s. 11 appears to reflect the state of the law reached by *R. v. Imperial Tobacco*.[248] So interpreted, s. 11 leaves intact the distinction between core policy matters, for which a government or public authority is not exposed to tort liability and non-core policy decisions and operational decisions for which the government or a public authority is exposed to liability. Ontario's interpretation would change the common law and virtually eliminate the policy-operational dichotomy and make all provincial government activities policy and thus immune from tort claims.

[508]. Put shortly, as a matter of statutory interpretation and as a matter of the factual and legal findings discussed above, Ontario is not protected by s. 11 of the *Crown Liability and Proceedings Act, 2019*. However it might be dressed up by policy documents, Ontario's conduct was operational. Ontario's conduct falls outside of the ambit of s. 11, properly interpreted, and its liability for misconduct is not extinguished.

[509]. There is also a second and mutually exclusive reason for concluding that s. 11 of the *Crown Liability and Proceedings Act, 2019* that is suggested and that I would adopt from Justice Belobaba's recent decision in *Leroux v. Ontario*.[249]

[510]. In *Leroux*, a class action against Ontario, after Justice Belobaba had certified a negligence claim with respect to the operation of a social assistance program,[250] the province enacted the *Crown Liability and Proceedings Act, 2019*, which as noted above has retroactive effect. At the direction of the Divisional Court, which was hearing an appeal from the certification decision, the certification motion was remitted to Justice Belobaba to reconsider whether the Representative Plaintiff still satisfied the cause of action criterion. Justice Belobaba concluded that it was not plain and obvious that the *Crown Liability and Proceedings Act, 2019* had barred the operational negligence claim. In reaching his decision, Justice Belobaba, among other things, focussed on the

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[247] S.O. 2019, sched. 17, s.2.
[248] 2011 SCC 42 at paras. 43-46.
[249] 2020 ONSC 1994.
[250] 2018 ONSC 6452.

language of s. 11(4) of the Act, which for convenience, I repeat below with emphasis added:

> 11 (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

[511]. Focusing on the element of s. 11 (4) that focuses on making a decision or failing to make a decision, Justice Belobaba reasoned that in the case before him it was not plain and obvious that Ontario's misconduct was a product of decision making and hence immunized from liability by s. 11 (4) of the *Crown Liability and Proceedings Act, 2019.* In other words, it was not plain and obvious that even by its own language that s. 11 (4) applied to foreclose the Representative Plaintiff's negligence claim. Justice Belobaba stated at paragraph 15 of his decision:

> 15. In other words, given the "decision" requirement in s. 11(4), it is possible that the CLPA may not even apply on the facts herein. Or, the defendant may still plead that the alleged instances of operational negligence were in fact the result of specific decisions (or of failures to make a decision) by certain individuals. At this stage of the proceeding, however, it cannot be said that the operational negligence claim does not disclose a cause of action under s. 5(1)(a) of the CPA.

[512]. Returning to the case at bar, assuming that s. 11 (4) applies as proposed by Ontario, then in my opinion, s. 11 (4) only immunizes Ontario for negligence in policy decision making. In the immediate case, Ontario's negligence goes far beyond negligent decision making.

[513]. Because of these conclusions, it is not necessary for me to consider Mr. Francis' arguments that; (a) s. 11 is not available to Ontario because the section does not have retrospective effect; (b) s. 11 should be read down because it conflicts with the *Class Proceedings Act, 1992*; and (c) s. 11 id not available to Ontario's because its policy decisions were made in bad faith.

11. Standard of Care Analysis.

[514]. The next issues to address are; (a) determining the standard of care that applies to Ontario's duty of care; and (b) then determining whether Ontario breached the standard of care.

[515]. Ontario's general position is that Mr. Francis had not proven or established what was the standard of care to which Ontario's conduct should be measured. Ontario also submits that the expert evidence does not establish that Ontario is an "outlier" in terms of its laws or policies governing administrative segregation. In other words, Ontario met the standard of a reasonable administrator of a prison system.

[516]. Thus, Ontario submitted that there are many other jurisdictions whose laws and policies contain no 15-day cap on the duration of administrative segregation, no prohibition on its use for inmates with serious mental illness, and other jurisdictions have similar processes for segregation reviews.

[517]. Relying on Dr. Labrecque's review of the administrative segregation policies for Alberta, British Columbia, Nova Scotia, Québec and Canada's federal system, Ontario submitted that its laws and policies were similar to those in the other Canadian jurisdictions in terms of operational definitions, placement criteria, review procedures, provisions for mentally ill offenders, conditions

of confinement and time limits. Ontario submitted that its policies were largely similar to over half of the policies from the United States that Dr. Labrecque had reviewed.

[518]. Relying on Dr. Labrecque's review, Ontario submitted that none of the policies from the Canadian jurisdictions contained maximum time limits for administrative segregation placements and only the federal penitentiary system had a complete prohibition on placing inmates with serious mental illness or who are at risk for engaging in self-injury or suicide in administrative segregation. Ontario essentially was arguing that its practices met the standard of care.

[519]. Ontario submits that Mr. Francis has not led sufficient evidence to establish the nature of the standard of care, nor has he led evidence to establish a Class-wide breach of a standard of care. Ontario submits that its met the standard of reasonable care considering: (a) its obligation to protect the safety of other inmates, correctional staff and the security of the correctional institutions; and (b) budgetary limits on personnel and capital investments.

[520]. Ontario submits that on a class-wide basis, it cannot be said that a placement in administrative segregation, or that maintaining such a placement for more than 15 days, is unreasonable once the level of risk is balanced and the discretion that should be afforded to specialized staff is considered. Ontario submits that Mr. Francis fails to acknowledge the Ministry's Suicide Prevention policies that expressly provide that correctional staff must make all reasonable efforts to identify any potentially suicidal inmate and take all reasonable precautions to ensure appropriate interventions are put in place immediately.

[521]. Notwithstanding Ontario's arguments, I conclude that the standard of care for the Class Period has been proven in the immediate case and that the evidence demonstrates that Ontario fell below the standard. Ontario's policies to the extent that they had them or to the extent that they failed to have them systemically fell below the standard of care for correctional institutions. If Ontario is immune for these policies or absence of policies, which I find not to the case for the reasons expressed above, it matters not, because Ontario's practices independent of its policies systemically fell below the standard of care for correctional institutions and its negligence has been proven.

[522]. To establish a breach of the standard of care, the nature and scope of the standard of care must first be articulated.[251] Expert evidence assists the trier of fact to determine the nature of the standard of care and its breach.[252] However, the standard of care must always be assessed based on what is reasonable in the circumstances.[253] Defining what is reasonable conduct at a specific point in time varies and "depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards".[254]

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[251] *Fullowka v. Pinkerton's of Canada Ltd*, 2010 SCC 5.
[252] *Bergen v. Guliker Estate*, 2015 BCCA 283.
[253] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.
[254] *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201.

[523]. In the immediate case, the Class Period begins on April 20, 2015 and ends on September 18, 2018. Based on the evidence in the immediate case, it is possible to describe what was the standard of care for the entirety of the Class Period. In this regard, it needs to be emphasized that Ontario was not hermetically sealed off from what was known in Canada and across the world about solitary confinement. Ontario knew a great deal and many of the news-worthy events about solitary confinement occurred in Ontario, some in federal penitentiaries located in Ontario and some in Ontario's own correctional institutions.

[524]. By April 20, 2015: (a) the *Charter* had been enacted, which called on all Canadian jurisdictions to reflect on whether their state conduct conformed with the *Charter*; (b) the Arbour Commission and others had identified the deficiencies in the systems to review placements in administrative segregation; (c) many scientists, numerous commissions, ombudsmen, inspectors, many professional organizations, and political organizations such as the United Nations had identified the harms caused by solitary confinement and its inappropriateness for young persons, pregnant women, and the seriously mentally ill; (d) the Mandela rules had been enacted, revisited and revised; (e) many alternatives to solitary confinement had been developed to address the safety and security needs of correctional institutions; (e) there were shocking examples of the mismanagement of administrative segregation some of which were perpetrated by the federal government in penitentiaries in Ontario and some of which were perpetrated by Ontario in its own correctional institutions; (f) while there was a debate about what precisely should be the maximum duration of administrative segregation for safety and security purposes, there was near unanimity that the seriously mentally ill should not be placed in prolonged administrative segregation; (g) while there was a debate about what precisely should be the maximum duration of administrative segregation for safety and security purposes, there was virtual unanimity that there should be a hard-cap on the duration of administrative segregation; (h) there were vociferous calls for reform; and, (i) there were some government initiatives to reform administrative segregation, although in Ontario's case the response was, generally speaking, inadequate, slow, late, and reluctant bordering on the stubborn.

[525]. I repeat that having regard to the great deal that Ontario knew about administrative segregation as it was being implemented in Ontario, which was virtually identical to how it was implemented in federal penitentiaries, Ontario's response was below the standard of care. By 2015, Ontario should have: (a) revised its system for the review of placements in administrative segregation; (b) not placed seriously mentally ill inmates in administrative segregation; (c) improved its screening so that the mental condition of inmates was not ignored and that their mental health and prognosis became a meaningful factor in any placement decision; and (d) implemented a hard cap on the length of time a person can be left in administrative segregation.

[526]. As far back as the 1990's, Ontario knew that there should be some temporal limit on administrative segregation. In 1996, Justice Arbour had recommended a 30-day limit. In 2015, the Ashley Smith Ashley Smith Coroner's Jury (a jury of Ontario citizens) had recommended a 15-day limit. In 2015, the Nelson Mandela Rules set a 15-day limit. In 2015, the Registered Nurses Association recommended a 15-day limit. In 2016, Ontario's Internal Segregation Report recognized a 15-day limit. In 2016, the Ontario Human Rights Commission, the Ombudsman, and the College of Family Physicians of Canada recommended a 15-day limit. Throughout, Ontario maintained the possibility of indefinite solitary confinement while imposing a time limit on disciplinary segregation.

[527]. Ontario submitted that it could not be faulted for not imposing a hard cap on the duration of administrative segregation because it was not until the Court of Appeal's decision in *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*,[255] that it was determined that more than fifteen days of confinement in administrative segregation was a cruel and unusual treatment.

[528]. Ontario can, however, be faulted. For it to say that it did not know until 2019 what the precise limit should be is no justification for not imposing some limit, which it did not do. And for it to say that it did not know until 2019 that the limit was no more than 15 days for administrative segregation provides no excuse and rather is a damning confession that it was legally and morally reprehensible for Ontario to use administrative segregation, which was, amongst other things, for the purpose of providing protective custody to the inmates placed in administrative segregation, in a manner that was worse for the inmate then had she or he been segregated for disciplinary reasons where there was a hard-cap on the duration of the confinement.

[529]. In the immediate case, there was a duty of care, a standard of care, and based on the findings of fact, Ontario breached the standard of care.

12. Causation and Class-Wide Damages for Negligence

[530]. In the immediate case, based on the evidence described above, the findings of fact, and for the reasons expressed above, a minimum level of compensable harm has been established that was caused by Ontario's negligence.

[531]. I conclude that Mr. Francis has proven a class-wide systemic negligence claim.

N. Remedies

1. Introduction

[532]. Ontario makes three main arguments about remedies; namely:

- First Ontario argues that the inmates cannot achieve so-called *Charter* damages under s.24(1) of the *Charter* for the contraventions of sections 7 and 12 of the *Charter*. It submits that the appropriate remedy to address these kind of violations in the case at bar is a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*.

- Second, Ontario argues that damages for negligence cannot be determined on a class-wide basis and must await individual issues trials. Ontario argues that damages for negligence cannot be assessed on a class-wide basis because a damages assessment is inherently idiosyncratic and there are corresponding defences such as voluntary assumption of risk or contributory negligence, which could negate or lessen the damages awarded. Moreover, when there is prior injury or other causes of loss such as physical or mental illnesses,

[255] 2019 ONCA 243.

addiction, childhood family abuse and prior imprisonments, the court must untangle the different sources of damage. Ontario submits that the most basic principle of tort law is that the plaintiff be placed in the position he or she would have been in had the tort not been committed, which is an individual and not a collective assessment of loss.

- Third, Ontario argues that in the circumstances of the immediate case an aggregate damages award cannot be made under the *Class Proceedings Act, 1992*, s. 24.

[533]. For the reasons that follow, I disagree with all three of Ontario's submissions.

2. Sections 24 and 52 of the *Charter* and the Availability of *Charter* Damages

(a) General Principles

[534]. Charter Remedies in civil cases are associated with s. 52 of the *Constitution Act, 1982* and s. 24 (1) of the *Charter.*

[535]. Section 52 (1) of the *Constitution Act, 1982* states:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any other law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

[536]. Section 52 (1) of the *Constitution Act, 1982*, does not provide personal remedies. It envisions a declaratory remedy when a law in its purpose or effect violates the Constitution of Canada including the *Charter*. Pursuant to s. 52 (1) of the *Constitution Act, 1982,* when a law contravenes the Constitution or the *Charter*, a court exercising its inherent powers may: (a) declare the law invalid; (b) strike down the law in whole or in part severing the tainted provisions; (c) read down the law, which is to say interpret it in a way that makes it compliant with the *Charter*; (d) read into the law to make it complaint with the *Charter*; (e) grant exemptions to the operation of the law;[256] and, or (f) suspend the operation of the declaratory orders of invalidity until the government has the opportunity to enact a constitutionally valid law.[257]

[537]. Section 24 (1) of the *Charter* is a remedies provision for violations of the *Charter*, which does provide personal remedies; it states:

> *ENFORCEMENT OF GUARANTEED RIGHTS AND FREEDOMS/ Exclusion of evidence bringing administration of justice into disrepute*
>
> 24 (1) Anyone whose rights or freedoms, as guaranteed by the Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

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[256] *Schacter v. Canada*, [1992] 2 S.C.R. 679.
[257] *Schacter v. Canada*, [1992] 2 S.C.R. 679; *Canada (Attorney General) v. Hislop*, 2007 SCC 10.

[538]. Section 24 (1) provides remedies for government conduct that violate the *Charter*.[258] Section 24 (1) of the *Charter* authorizes a court of competent jurisdiction to grant a personal remedy to anyone whose *Charter* rights have been infringed or denied.[259] Section 24 (1) of the *Charter* can be invoked only by a party alleging a violation of that party's personal constitutional rights.[260]

[539]. Section 24 (1) of the *Charter* is to be given a generous and purposive interpretation and application. The nature of the s. 24 (1) remedy is a matter for a court of competent jurisdiction to fashion. It is for the court functionally or purposely to design substantive legal remedies for *Charter* violations independent of, but informed by, the substantive common and civil law. The remedies of s. 24 (1) are new substantive legal territory and are to be developed incrementally without a pre-determined formula. Section 24 (1) gives the court a wide discretion to fashion meaningful remedies.[261]

[540]. Section 24 (1) provides the court with an extremely broad discretion - but not an unfettered or unguided discretion - to determine what remedy is appropriate and just in the circumstances of a particular case.[262] A *Charter* remedy will: (a) meaningfully vindicate *Charter* rights; (b) employ means that respect the different roles of governments and courts in the Canadian constitutional democracy; (c) be a judicial remedy that vindicates the *Charter* right within the function and powers of a court; and (d) be fair to the government actor against whom the order is made.[263]

[541]. In *Doucet-Boudreau v. Nova Scotia (Minister of Education),*[264] Justices Iacobucci and Arbour stated at paragraph 87:

> 87. Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. The meaningful protection of *Charter* rights, and in particular the enforcement of s. 23 rights, may in some cases require the introduction of novel remedies. A superior court may craft any remedy that it considers appropriate and just in the circumstances. In doing so, courts should be mindful of their roles as constitutional arbiters and the limits of their institutional capacities. Reviewing courts, for their part, must show considerable deference to trial judges' choice of remedy, and should refrain from using hindsight to perfect a remedy. A reviewing court should only interfere where the trial judge has committed an error of law or principle.

[542]. Justices Iacobucci and Arbour described at paragraphs 55 – 59 what is "an appropriate and

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[258] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[259] *R. v. Ferguson*, 2008 SCC 6; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 at paras. 15-22.
[260] *British Columbia Civil Liberties Assn. v. Canada (Attorney General)*, 2019 BCCA 228 at paras. 225-272; *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen* 2017 ONSC 7491 at para. 19, varied on other grounds, 2019 ONCA 243.
[261] *Doucet-Boudrea v. Nova Scotia*, [2003] 3 S.C.R. 3.
[262] *Vancouver (City) v. Ward*, 2010 SCC 27 at paras. 17 -19; *Mills v. The Queen*, [1986] 1 S.C.R. 863 at p. 965
[263] *Vancouver (City) v. Ward*, 2010 SCC 27 at para. 20; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62.
[264] 2003 SCC 62 at para. 87.

just remedy" under section 24 (1) of the *Charter*, as follows:

> 55. First, an appropriate and just remedy in the circumstances of a *Charter* claim is one that meaningfully vindicates the rights and freedoms of the claimants. Naturally, this will take account of the nature of the right that has been violated and the situation of the claimant. A meaningful remedy must be relevant to the experience of the claimant and must address the circumstances in which the right was infringed or denied. An ineffective remedy, on one which was "smothered in procedural delays and difficulties", is not a meaningful vindication of the right and therefore no appropriate and just (see *Dunedin*, *supra*, at para. 20, McLachlin C.J. citing *Mills*, *supra*, at p. 882, *per* Lamer J. (as he then was)).
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> 56. Second, an appropriate and just remedy must employ means that are legitimate within the framework of our constitutional democracy. As discussed above, a court ordering a *Charter* remedy must strive to respect the relationships with and separation of functions among the legislature, the executive and the judiciary. This is not to say that there is a bright line separating these functions in all cases. A remedy may be appropriate and just notwithstanding that it might touch on functions that are principally assigned to the executive. The essential point is that the courts must not, in making orders under s. 24 (1), depart unduly or unnecessarily from their role of adjudicating disputes and granting remedies that address the matter of those disputes.
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> 57. Third, an appropriate and just remedy is a judicial one which vindicates the right while invoking the powers of a court. It will not be appropriate for a court to leap into the kinds of decisions and functions for which its design and expertise are manifestly unsuited. The capacities and competence of the courts can be inferred, in part, from the tasks with which they are normally charged and for which they have developed procedures and precedent.
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> 58. Fourth, an appropriate and just remedy is one that, after ensuring that the right of the claimant is fully vindicated, is also fair to the party against whom the order is made. The remedy should not impose substantial hardships that are unrelated to securing the right.
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> 59. Finally, it must be remembered that s. 24 is part of a constitutional scheme for the vindication of fundamental rights and freedoms enshrined in the *Charter*. As such, s. 24, because of its broad language and the myriad of roles it may play in cases, should be allowed to evolve to meet the challenges and circumstances of those cases. That evolution may require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.

[543]. In *Vancouver (City) v. Ward*,[265] the Supreme Court of Canada held that *Charter* damages may be available in appropriate cases where they would serve a functional purpose in remedying a *Charter* violation. Damages under s. 24 (1) of the *Charter*, however, are not common law damages, but the distinct remedy of damages shaped by constitutional principles.

[544]. In *Vancouver (City) v. Ward*, Chief Justice McLachlin set out a four-step enquiry to determine whether *Charter* damages may be awarded under s. 24 (1) of the *Charter*. The enquiry involved:

i. First, the claimant must establish that his or her *Charter* right has been breached.

ii. Second, the claimant must establish that damages are an "appropriate and just"

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[265] 2010 SCC 27.

remedy, having regard to whether they would serve one or more of the functions of compensation, vindication, or deterrence. Compensation focuses on remedying the claimant's personal losses, physical, psychological, pecuniary, and non-pecuniary. As far as possible, the claimant should be placed in the same position as if his or her *Charter* rights had not been breached. Vindication remedies the harm caused to society, such as impaired public confidence and diminished faith in the efficacy of constitutional protections. Deterrence serves to influence government behaviour to ensure future compliance with the *Charter*.

iii. Third, the government may establish that countervailing factors, such as alternative remedies and concerns for good governance negate exposure to civil liability or render a damages award inappropriate or unjust in the circumstances. If other remedies adequately meet the need for compensation, vindication and/or deterrence, a further award of damages under s. 24 (1) would serve no function and it would not be appropriate and just. A concurrent action in tort, or other private law claim, will bar *Charter* damages if it would result in double compensation.

iv. The fourth step is the determination of quantum. The quantum will be determined based on evidence of pecuniary or non-pecuniary loss, as well as in light of the other functional purposes of s. 24 (1), such as vindication and deterrence.

[545]. The individual making a claim for *Charter* damages bears the initial burden of satisfying the first two steps of the *Ward* test, and then the onus shifts to the state to show that countervailing factors, such as alternative remedies and concerns for good governance negate exposure to civil liability or render a damages award inappropriate or unjust in the circumstances.[266]

[546]. In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*,[267] the British Columbia Court of Appeal stated that while the relevant considerations under the third step are not closed, the Supreme Court of Canada has focussed on two in particular: (a) the existence of alternative remedies; and (b) concerns for good governance.

[547]. The British Columbia Court of Appeal discussed the heaviness of this burden in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*,[268] where the Court stated at paragraphs 282-283:

> 282. […] But, as "it is for the state to show that other remedies are available in the particular case that will sufficiently address the breach" (*Ward* at para. 35), one commentator has suggested "[i]n general, declarations will only be an adequate alternative remedy in situations where there is no compensable tangible or intangible loss and no need to deter future *Charter* violations" (K. Roach, *Constitutional Remedies in Canada* (Toronto: Thomson Reuters) (loose-leaf updated 2017, release 30), c. 11 at 33).
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> 283. Concerns for good governance may also render *Charter* damages inappropriate or unjust. While

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[266] *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2018 BCCA 305, leave to S.C.C. granted, 2018, [2018] S.C.C.A. No. 411; *Henry v. British Columbia (Attorney General)*, 2015 SCC 24 at para. 37.
[267] 2018 BCCA 305 at para. 281, leave to S.C.C. granted, 2018, [2018] S.C.C.A. No. 411.
[268] 2018 BCCA 305 at paras. 282-283, leave to S.C.C. granted, 2018, [2018] S.C.C.A. No. 411.

> the state bears the burden of establishing that functional concerns should preclude an award of damages, "the availability of *Charter* damages [is] circumscribed through the establishment of a high threshold" in certain circumstances: *Henry* at para. 41. In such instances, the onus is on the state to demonstrate that the nature of the *Charter*-breaching conduct in the case at hand falls within the scope of any proposed limited immunity. Once the state has established that the context engages a limited immunity, or what *Henry* calls a "*per se* liability threshold", a claimant may then demonstrate that his or her case meets the applicable test to overcome the liability threshold to recover damages.

[548]. In the Court of Appeal's decision in *Reddock v. Canada (Attorney General),*[269] discussed several times above, the Court of Appeal explained that the availability of private law remedies was not a preclusive factor but rather was a redundancy factor that might make *Charter* damages inappropriate and unjust.

> 43. We are not persuaded that the mere existence or possibility of a tort claim precluded the motion judge from awarding *Charter* damages. *Ward* does not establish a firm rule that a court should not award *Charter* damages simply because there is a possible private law claim for the same damages. The concern expressed with respect to alternative remedies is the need to avoid duplication and double recovery. *Ward* contemplates concurrent claims for private law and *Charte*r damages, provided an award of *Charter* damages is not "duplicative": at para. 35. If there is another avenue to damages, "a <u>further</u> award of damages under s. 24(1) would serve no function and would not be 'appropriate and just'" (emphasis added): at para. 34. Nor does *Ward* create a hierarchy of remedies with *Charter* remedies coming last. A claimant is not required to "show that she has exhausted all other recourses": at para. 35. The evidentiary burden is the reverse. It is for the state "to show that other remedies are available in the particular case that will sufficiently address the breach": at para. 35.

[549]. The case law, animated by general principles of public law, had developed a limitation or qualification to the availability of *Charter* damages under s. 24 (1) of the *Charter* in circumstances where a court has made a declaratory order striking down a law on the grounds that it violates the *Charter*. This limitation or qualification is associated with *Mackin v. New Brunswick (Minister of Finance)*.[270] In its decision in *Reddock*, the Court of Appeal stated that *Mackin* considerations have been subsumed in the third step of the *Ward* test for *Charter* damages.[271]

[550]. In *Mackin*, the Supreme Court of Canada held that according to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional. The rationale for this limitation is that government actors acting in good faith pursuant to what is the express law of country should not be exposed to monetary liability when the law is later found to be unconstitutional. The *Mackin* principle applies where a challenge is made that a law is contrary to the *Charter* and also where the challenge is to some action taken under legislation that is said to infringe a *Charter* right and relief is sought pursuant to s. 24 (1) of the *Charter*.[272]

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[269] 2020 ONCA 184 varying 2019 ONSC 5053.
[270] *Mackin v. New Brunswick (Minister of Finance*), 2002 SCC 13.
[271] 2020 ONCA 184 at para. 55 varying 2019 ONSC 5053.
[272] (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 441.

[551]. In *Mackin*, Justice Gonthier (Justices L'Heureux-Dubé, Iacobucci, Major, and Arbour concurring) stated at paragraphs 78-82:

> 78. According to a general rule of public law, absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional (*Welbridge Holdings Ltd. v. Greater Winnipeg*, [1971] S.C.R. 957; *Central Canada Potash Co. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42). In other words, "[i]nvalidity of governmental action, without more, clearly should not be a basis for liability for harm caused by the action" (K. C. Davis, *Administrative Law Treatise* (1958), vol. 3, at p. 487). In the legal sense, therefore, both public officials and legislative bodies enjoy limited immunity against actions in civil liability based on the fact that a legislative instrument is invalid. With respect to the possibility that a legislative assembly will be held liable for enacting a statute that is subsequently declared unconstitutional, R. Dussault and L. Borgeat confirmed in their *Administrative Law: A Treatise* (2nd ed. 1990), vol. 5, at p. 177, that:
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> > In our parliamentary system of government, Parliament or a legislature of a province cannot be held liable for anything it does in exercising its legislative powers. The law is the source of duty, as much for citizens as for the Administration, and while a wrong and damaging failure to respect the law may for anyone raise a liability, it is hard to imagine that either Parliament or a legislature can as the lawmaker be held accountable for harm caused to an individual following the enactment of legislation. [Footnotes omitted.]
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> 79. However, as I stated in *Guimond v. Quebec (Attorney General), supra*, since the adoption of the *Charte*r, a plaintiff is no longer restricted to an action in damages based on the general law of civil liability. In theory, a plaintiff could seek compensatory and punitive damages by way of "appropriate and just" remedy under s. 24(1) of the *Charte*r. The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context. Thus, the government and its representatives are required to exercise their powers in good faith and to respect the "established and indisputable" laws that define the constitutional rights of individuals. However, if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional, they will not be liable. Otherwise, the effectiveness and efficiency of government action would be excessively constrained. Laws must be given their full force and effect as long as they are not declared invalid. Thus, it is only in the event of conduct that is clearly wrong, in bad faith or an abuse of power that damages may be awarded (*Crown Trust Co. v. The Queen in Right of Ontario* (1986), 26 D.L.R. (4th) 41 (Ont. Div. Ct.)).
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> 80. Thus, it is against this backdrop that we must read the following comments made by Lamer C.J. in *Schachter, supra*, at p. 720:
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> > An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.
>
> 81. In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the *Charter* cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*.
>
> 82. Applying these principles to the situation before us, it is clear that the respondents are not entitled

> to damages merely because the enactment of Bill 7 was unconstitutional. On the other hand, I do not find any evidence that might suggest that the government of New Brunswick acted negligently, in bad faith or by abusing its powers. […] Consequently, it may not reasonably be suggested that the government of New Brunswick displayed negligence, bad faith or wilful blindness with respect to its constitutional obligations at that time.

[552]. In *Vancouver (City) v. Ward*,[273] Chief Justice McLachlin explained the rationales behind the *Mackin* principle at paragraphs 40-41 as follows:

> 40. The *Mackin* principle recognizes that the state must be afforded some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform. Legislative and policy-making functions are one such area of state activity. The immunity is justified because the law does not wish to chill the exercise of policy-making discretion. As Gonthier J. explained:
>
> > The limited immunity given to government is specifically a means of creating a balance between the protection of constitutional rights and the need for effective government. In other words, this doctrine makes it possible to determine whether a remedy is appropriate and just in the circumstances. Consequently, the reasons that inform the general principle of public law are also relevant in a *Charter* context.
>
> 41. The government argues that the *Mackin* principle applies in this case, and, in the absence of state conduct that is at least "clearly wrong", bars Mr. Ward's claim. I cannot accept this submission. *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid – applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case.

[553]. As Chief Justice McLachin explains in the context of state action, *Mackin* stands for the principle that state action taken under a statute that is subsequently declared invalid may not give rise to *Charter* damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down.

[554]. The *Mackin* principle immunizes the government from a claim for *Charter* damages under s. 24 (1) of the *Charter* but admits of exceptions if the government conduct pierces a threshold of accountability for fault.

[555]. In *Abbey v. Ontario (Community and Social Services)*,[274] the Ontario Divisional Court held that the list of exemptions to the *Mackin* principle; *i.e.*, defined as conduct that is clearly wrong, in bad faith or an abuse of power, are a closed list and no additional exceptions are to be added to the list. However, in *Wynberg v. Ontario*,[275] the Ontario Court of Appeal interpreted *Mackin* more liberally and more in line with the letter and spirit of the Supreme Court of Canada's decisions about the development of s. 24 (1) of the *Charter*. In *Wynberg*, the Court (Justices Goudge, Simmons and Gillese) at paragraph 202 did not mention conduct that is clearly wrong and included

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[273] 2010 SCC 27.
[274] 2018 ONSC 1899 (Div. Ct.).
[275] (2006), 82 O.R. (3d) 561 at para. 202 (C.A.), leave to appeal to S.C.C. ref'd [2006] S.C.C.A. No. 441.

negligence amongst the exemptions to the *Mackin* principle; the Court stated:

> 202. Absent bad faith, abuse of power, negligence or willful blindness in respect of its constitutional obligations, damages are not available as a remedy in conjunction with a declaration of unconstitutionality. As the trial judge made no such findings on the part of Ontario, it was an error in principle to award damages in conjunction with declaratory relief. […] [emphasis added]

[556]. In *Mackin*, itself it may be noted that while, Justice Gonthier referred initially in paragraph 79 to conduct that is clearly wrong, in bad faith or an abuse of power; however, when he actually applied the *Mackin* principle in paragraph 82, he said that the exceptions did not apply because the conduct of the province did not display negligence, bad faith, or wilful blindness with respect to its constitutional obligations.

[557]. In the Court of Appeal's decision in *Reddock v. Canada (Attorney General)*,[276] the Court explained that the critical question at stage three of the *Ward* analysis is whether the state is sufficient at fault to lift its immunity from *Charter* damages, and the Court noted that the fault threshold required to trigger liability had been variously described in the case law. And the Court noted that different situations of *Charter* violations may call for different thresholds. The Court of Appeal stated at paragraphs 63-66 of its decision:

> 63. […] The question at stage three of *Ward* is whether the state is sufficiently at fault to warrant lifting its *prima facie* good governance immunity.
>
> 64. […] The court in *Mackin* used various terms to describe the fault threshold required to trigger liability. At one point, the court referred to the general public law principle that in such cases, there is no liability unless the enactment of the law was "clearly wrong, in bad faith or an abuse of power": at para. 78. The court also said the government and its representatives will not be liable "if they act in good faith and without abusing their power under prevailing law and only subsequently are their acts found to be unconstitutional": at para. 79. At three other points in the judgment, the court refers to "negligence": at para. 82 ("negligently, in bad faith or by abusing its powers" and "negligence, bad faith or wilful blindness") and at para. 83 ("a negligent or unreasonable attitude on the part of government").
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> 65. The earlier decision in *Guimond v. Quebec (Attorney General)*, [1996] 3 S.C.R. 347, at para. 17, cites similar language: "no cause of action exists for the conduct of [government actors] when acting within the authority of the legislation in the absence of any allegation of wrongful conduct, bad faith, negligence or collateral purpose." Subsequent cases have similarly included negligence as an appropriate fault threshold. One such case is *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 441, in which this court held, at para. 202, that "[a]bsent bad faith, abuse of power, negligence or wilful blindness in respect of its constitutional obligations, damages are not available as a remedy in conjunction with a declaration of unconstitutionality" (emphasis added). Another is *Sagharian v. Ontario (Education)*, 2008 ONCA 411, 172 C.R.R. (2d) 105, leave to appeal refused, [2008] S.C.C.A. No. 350, which summarized *Mackin* as holding that "the respondents were not entitled to damages merely because the enactment of the legislation at issue was unconstitutional, finding no evidence that the government acted negligently, abusively, or in bad faith" (emphasis in original): at para. 34.
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> 66. In *Ward*, the Chief Justice said that where good governance concerns arise, "a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate": at para. 43. However, "[d]ifferent situations may call for different thresholds" in a manner analogous to private

[276] 2020 ONCA 184 varying 2019 ONSC 5053.

> law, ranging from malice for malicious prosecution to negligence for claims based on inadequate police investigation: at para. 43.

[558]. For the *Brazeau and Reddock* cases, the Court of Appeal settled on the "clear disregard" test as the fault threshold required to trigger liability and the Court described the nature of the clear disregard standard. The Court stated at paragraph 87 of its decision.

> 87. As we have stated, in this case the minimum fault threshold required to overcome the claim of good governance immunity is "clear disregard" for *Charter* rights. Drawing on criminal law principles, we view the *Ward* fault standard of "clear disregard" for *Charter* rights as analogous to recklessness or wilful blindness. In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, at pp. 584-85, the court defined those standards by explaining that "[t]he culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry." A "clear disregard" for *Charter* rights connotes either proceeding with a course of action in the face of a known risk that the *Charter* will be violated or by deliberately failing to inquire about the likelihood of a *Charter* breach when the state knows that there is a good reason to inquire.

(b) **The Availability of *Charter* Damages in the Immediate Case: Part One**

[559]. Ontario submits that *Charter* damages are not available in the circumstances of the immediate case, and it submits that the only appropriate and just remedy is a s.52 declaration, suspended for a period of 12 months. As I shall now explain, *Charter* damages are available in the circumstances of the immediate case.

[560]. Applying the four steps of the *Vancouver (City) v. Ward* analysis to the circumstances of the immediate case first, all the Class Members have established that their *Charter* rights have been breached.

[561]. Moving to the second step, all the Class Members have established that damages are an appropriate and just remedy having regard to the functions of vindication, deterrence, and compensation. The evidence, as summarized by the major findings of fact, calls out for vindication, deterrence, and especially compensation. The Class Members' *Charter* rights to life, liberty, and security of the person and the right not to be subjected to a cruel and unusual treatment have been violated and the Class Members' have suffered personal injuries.

[562]. Moving to the third step, has Ontario established that there are countervailing factors that would justify not making a damages award? This is a major theatre of litigation war in the immediate case.

[563]. The third step brings the analysis and the discussion to: (a) the principle from *Mackin v. New Brunswick (Minister of Finance)*,[277] which, if applicable, would preclude the Class Members in the immediate case from a *Charter* damages award under s. 24 (1) of the *Charter*; and (b) any other countervailing factors that would preclude the availability of *Charter* damages.

[564]. Ontario asserts that that the *Mackin* principles applies because the courts in *Canadian Civil*

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[277] 2002 SCC 13.

Liberties and *British Columbia Civil Liberties* made declaratory orders under s. 52 of the *Charter* that reveal that the *Charter* contraventions associated with administrative segregation in federal penitentiaries – which contraventions are identical to Ontario's contraventions in the immediate case with respect to its correctional institutions – do not arise from maladministration but are inherent or inborn in the legislation and regulations that authorize administrative segregation. Thus, Ontario submits that the *Mackin* principle is triggered to preclude other than a declaratory remedy unless the exceptions to the *Mackin* principle apply. Ontario then submits that the exceptions to the *Mackin* principle do not apply because its conduct was not clearly wrong, in bad faith, or an abuse of power. Ontario submits that its alleged negligence, which it also denies, is not enough to raise an exception to the *Mackin* principle.

[565]. I do not agree with Ontario's arguments. I do not agree that the *Mackin* principle applies and alternatively if the *Mackin* principle has been triggered, the exemptions to the principle also have been triggered in the circumstances of the immediate case. In either event, the *Mackin* principle does not apply to preclude *Charter* damages in the immediate case nor are there other countervailing factors that would preclude *Charter* damages.

[566]. I have six reasons for my opinion that the *Mackin* principle does not apply in the circumstances of the immediate case. The first reason is the explanation that I gave in in *Reddock* as to why the principle does not apply and why it was not meant to apply to circumstances like those of the immediate case. However, because *Reddock* and *Brazeau* have now been scrutinized by the Court of Appeal and it has made its own analysis and explanation of the availability of *Charter* damages, I shall not rely on what I said in *Reddock*. Rather, I shall rely on what the Court of Appeal said in *Brazeau* and *Reddock*, where in the result, the Court upheld my decision that *Charter* damages were available.

[567]. I shall discuss the Court of Appeal's decision in the next section of these Reasons for Decision. In this part of the judgment, I shall offer the five additional reasons or explanations why *Charter* damages are available in the immediate case.

[568]. The first of my five additional reasons begins with the observation that while the courts in *Canadian Civil Liberties Association* and *British Columbia Civil Liberties Association* may have found as a fact that the wrongdoing in those cases did not arise from maladministration but from the legislation, the factual circumstances and my finding of facts in the immediate case establish that the harm in the immediate case was caused by more than the mere enactment or application of a law.

[569]. In the immediate case there is evidence of conduct, *i.e.*, government action, that both contravenes *Charter* rights and that causes harm that does not arise from the mere application of the statutory provisions that govern administrative segregation in Ontario, which as noted early are very rudimentary and leave much to the civil servants managing Ontario's correctional institutions.

[570]. The second of my five additional reasons begins with the observation that in *Mackin*, the Supreme Court of Canada held that according to a general rule of public law, the courts will not award damages for the harm suffered from the application of a law that is subsequently declared to be unconstitutional. In the immediate case, however, Mr. Francis is not asking that any laws be

declared unconstitutional and no laws need be declared unconstitutional.

[571]. Put somewhat differently, in the immediate case, Ontario's civil servants cannot take cover with the argument that they thought they were acting in accordance with a lawful law. The very rudimentary legislation, regulations, and policy directives, in Ontario that did authorize administrative segregation, did not compel the civil servants to operate administrative segregation in ways that breached sections 7 and 12 of the *Charter*. Thus, the *Mackin* does not apply in the circumstances of the immediate case.

[572]. The third of my five additional reasons begins with the observation that the *Mackin* principle is a subset of the third step of the *Ward* test, which permits the government to establish countervailing factors, such as alternative remedies and concerns for good governance to negate exposure to civil liability or to render a damages award inappropriate or unjust in the circumstances.

[573]. However, that there may exist countervailing factors to negate civil liability just begs the question of whether having regard to the countervailing factor, a damages award would be inappropriate or unjust in the circumstances. In other words, metaphorically speaking *the Mackin* principle is not the tail wagging the dog. It is not the most important part of the *Ward* test, it is a subsidiary part that places a very heavy burden on the government actor to show not only that countervailing factors exist but that those countervailing factors justify an immunity from a damages award to compensate a person who has met the burden of the first two steps of the *Ward* test.

[574]. In the immediate case, Mr. Francis has met the onus of establishing that the inmates' *Charter* rights have been violated and he met the onus of establishing that damages are appropriate and just remedy. However, Ontario's submission, relying on the *Mackin* principle, that a declaration of constitutional invalidity would be a fair and just alternative does not meet the onus of demonstrating an overriding countervailing factor that would justify an immunity from paying compensation for the harm Ontario caused.

[575]. In the immediate case, the use of a declaration would not fulfill any of the functions of *Charter* damages. Most particularly, a declaration in the immediate case ignores the fact that the inmates actually suffered damages that are compensable and these damages have been available in numerous individual cases, where presumably Ontario and the Federal Government could have made the argument that is being made in the immediate case that a declaration would be a sufficient remedial response. A declaration would fail to satisfy the need for compensation or provide meaningful deterrence of future breaches of the *Charter* right.

[576]. Continuing on the topic of alternatives to *Charter* damages, I note here that in its supplemental factum about the significance of the *Reddock* decision, Ontario relies on another purported alternative to *Charter* damages. It submits that the criminal law remedies, which have been granted to inmates as a result of their unlawful placement into administrative segregation, such as stays of criminal charges or reduced sentences are an adequate remedy.

[577]. In my opinion, once again, the criminal law remedies, which are obviously a case by case matter, do not fulfill the functions of *Charter* damages when an individual or a collective of

individuals has been injured. Mr. Capay, who would have been a Class Member had he not opted out to pursue his individual claims, received a stay of murder charges because of the breach of his *Charter* rights, is an example of how the criminal law remedies should not preclude a claim for *Charter* damages.

[578]. The fourth of my five additional reasons why the *Mackin* principle does not apply is inspired by an argument in Mr. Francis' Reply Factum, where he submitted, in effect, that the *Mackin* principle is a public law complement to the principles discussed above that draw a distinction between government legislative activities, including its core policy decisions, and government operational and implementational decisions.

[579]. In other words, the idea behind the *Mackin* principle is that the law should not chill the exercise of policy-making discretion. Mr. Francis points out in his factum that *Mackin* was just this type of case where a provincial government was exercising a policy decision and enacted legislation, subsequently struck down, that abolished the system of supernumerary judges in New Brunswick. Mr. Francis accepts *Macklin* as applying to government policy decisions, but he goes on to argue that in the immediate case, Ontario's misconduct is in the operational area for which the *Mackin* principle would be inappropriate. I adopt this argument as a reason why the *Mackin* principle does not apply in the immediate case.

[580]. The fifth of my additional reasons why the *Mackin* principle does not apply and why *Charter* damages are available is that the exemptions to the principle apply in the circumstances of the immediate case. I conclude that Ontario's conduct is clearly wrong, and it amounts to negligence, all of which trigger the exemptions. As explained earlier in this decision, Ontario has been negligent. Ontario's conduct triggers the exemptions to the *Mackin* principle.

[581]. Ontario knew about the problems associated with administrative segregation for decades and some of the signal and significant events of the history of administrative segregation occurred in penitentiaries and prisons located in Ontario. As early as 1992, Ontario's policies recognized that segregation should be avoided wherever possible with more humane options to be preferred. With the first Jahn Settlement in 2013, Ontario has tried to reform its use of administrative segregation, but it has been dilatory in doing so and its negligence and breaches of the standard of care have been habitual, continual, and continuous. Ontario has fallen short in fulfilling the promises or undertakings it made, to do better and to reform its practices particularly its treatment of mentally ill inmates. It has promised to reform its correctional institutions, but it has fallen short in carrying out its promises.

[582]. Ontario's conduct may be considered in terms of what it promised, what it knew to problems or mistakes, what the statistics show, and what the reports of its own experts reveal. Ontario's conduct may also be compared to the more fulsome and successful efforts made by other jurisdictions to respond to the criticisms of administrative segregation that amounts to solitary confinement. The steps taken by others demonstrate that reforms are feasible without major changes to the infrastructure of the correctional institutions.

[583]. The finding of facts in the immediate case are such that I can conclude that Ontario's conduct was not only clearly wrong in individual cases, the conduct was, systemically and on a class-wide basis, clearly harmful and clearly wrong. As I have explained above, the conduct of

Ontario's civil servants, for which Ontario is responsible, was negligent and falls within the definition of conduct that was clearly wrong, and especially clearly wrong having regard to what Ontario knew about the consequences of solitary confinement. Thus, the exemptions built into the *Mackin* principle apply and the Class Members are not foreclosed from a remedy under s. 24 (1) of the *Charter*.

(c) **The Availability of *Charter* Damages in the Immediate Case: Part Two**

[584]. I now return to the first reason or explanation of why *Charter* damages are available in the immediate case, which focusses on the Court of Appeal's decision in the *Brazeau* and *Reddock* appeals.[278]

[585]. In *Brazeau* and *Reddock*, the Court of Appeal held that Canada could not discharge its onus at step three of the *Ward* test to show that *Charter* damages would be inappropriate or unjust. In the Court's opinion, the possibility of a tort claim in negligence (which as noted above the Court decided was not available) and the availability of declaratory relief for a *Charter* breach did not make an award of *Charter* damages inappropriate or unjust. Moreover, and this is the critical determination of the Court, the defendant Canada's conduct met the fault threshold of "clear disregard" that would exempt the case from the *Mackin* principle.

[586]. Not surprisingly, in the immediate case, chanting a list of Ontario's dilatory, inefficient, incomplete, intransigent and obtuse responses to what was known around the world, in Canada, and in Ontario about solitary confinement, Mr. Francis argues that Ontario's conduct is more egregious that Canada's conduct in *Brazeau* and *Reddock* and, therefore, *Charter* damages should be awarded. Not surprising Ontario submits that its conduct does not met the clear disregard standard.

[587]. Ontario submits that the Court of Appeal erred in its explanation and application of the *Mackin* principle and that it the Court erroneously lowered the standard for the fault threshold for which it would be appropriate to make a government liable for damages under s. 24 (1) of the *Charter*. It submits that the Court of Appeal erred in law and should have applied the standard set in *Hislop v. Canada (Attorney General)*,[279] where damages were not awarded retroactively for a breach in the equality provisions of the *Charter* by the failure to extend survivor benefits to same-sex partners. Ontario says applying the *Hislop* standard, it would be liable only if it were shown to have disregarded established and indisputable judicial precedent. Ontario submits that in the immediate case, there was a change in the law and no existing judicial precedent that it violated and, therefore, it should not be liable for damages. Ontario submits that the Court of Appeal erred in law by recalibrating the threshold to a standard of a clear disregard for the claimant's *Charter* rights.

[588]. For what it is worth, I do not agree that the Court of Appeal erred in law, but, in any event, if it did, that is a matter for the Supreme Court of Canada. I am bound by the Court of Appeals' decision in *Reddock* about the fault threshold to apply in the immediate case. For the reasons

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[278] 2020 ONCA 184.
[279] (2004), 73 OR (3d) 641 (C.A.) at paras 137-141, aff'd 2007 SCC 10 at paras 101-103., 110, 115.

expressed above, the evidence in the immediate case demonstrates that Ontario has displayed a clear disregard for the Class Members' *Charter* rights.

[589]. It is embarrassing, or it should be embarrassing, that Ontario relies on such paltry things as the fact that beginning in 2011, the Special Management Inmates policy was revised to improve conditions of confinement by providing for access to televisions in administrative segregation units wherever feasible. Ignoring the feeble "wherever feasible" limitation, neither television, books, magazines, radio, telephones, or computers, negates the effects of being confined in a small cell for twenty-two to twenty-four hours a day without meaningful human contact and without adequate health care.

[590]. Instead of being embarrassed by the Human Rights Commission making settlement orders in a human rights complaint by a mentally and physically ill inmate, Ontario takes pride in the Jahn Settlement that limited the use of administrative segregation for inmates with mental illness to instances where all other alternatives had been considered and then rejected as causing undue hardship. This pride misses the point that Ontario has been unable to satisfy all the terms of the Jahn Settlement Orders. This pride also totally misses the point that the world consensus was not to just limit the use of solitary confinement for the mentally ill; the consensus was that solitary confinement should not be used at all for the mentally ill.

[591]. Notwithstanding Ontario's patting itself on the back for what undoubtedly were improvements and fixes for many administrative and management problems of its own making, much of the changes made by Ontario were tokenism, relabelling, and political spin, of the type admonished by George Orwell as the phraseology needed if one wants to name things without calling up mental pictures of them.

[592]. In *Brazeau and Reddock,* the Court of Appeal described the clear disregard threshold as analogous to recklessness or to wilful blindness. The Court stated that a "clear disregard" for *Charter* rights connotes either proceeding with a course of action in the face of a known risk that the *Charter* will be violated or by deliberately failing to inquire about the likelihood of a *Charter* breach when the state knows that there is a good reason to inquire."

[593]. In the immediate case, Ontario did not need to inquire whether the *Charter* was likely to be breached. There was overwhelming evidence including Royal Commissions, coroner's inquests, court decisions, investigations by Ombudsman *etc*. that reveal that Ontario knew that its use of administrative segregation as a type of solitary confinement was more than a risk of *Charter* violations; it knew that it had actualized the risk. Ontario was willfully blind to the harm it knew it was causing. The notion of wilful blindness is sometimes positively attributed to Lord Admiral Nelson who courageously ignored the approach of the Spanish Armada by placing his telescope to his blind eye. He went forward to engage the Armada and it was a glorious victory. There is nothing glorious in the immediate case in Ontario's response to what it must surely have known was solitary confinement and unnecessary solitary confinement because there were less brutal ways to maintain the security of its prisons.

[594]. I do not impute any malign intent, and Ontario should be commended for its consultations with experts and for its commitment to and for the steps it took to improve its use of administrative segregation and to improve the operation of its correctional institutions, but good deeds are not

atonement for the bad deeds of recklessly disregarding the *Charter* rights of the inmates and, as noted, above Ontario's good words were not always followed by corresponding good deeds.

[595]. This explanation and the other five additional explanations, set out above, complete the analysis of the first three steps of the *Ward* test. The conclusion is that *Charter* damages are available in the immediate case. Moving on the fourth step of the *Ward* test, all that remains in the *Vancouver (City) v. Ward* analysis is to quantify the *Charter* damages.

[596]. As I shall explain further below, I conclude that there is a base level of *Charter* damages that can be assessed in the aggregate and that I value at $30.0 million. This base level award is for vindication, deterrence, and for compensation for the *Charter* breaches inclusive of pre-judgment interest, and the award should be distributed to the Class Members equally after the deduction of fees, disbursements, *etc*.

(d) **Quantification of *Charter* Damages**

[597]. I turn now to the quantification of the Class Members' *Charter* Damages. This assessment is on a class-wide basis, subject to the right of each Class Members to have an individual issues trial or assessment procedure to determine their idiosyncratic entitlement to damages for the *Charter* breaches.

[598]. Class Counsel requests base-level compensatory damages of: (a) $2,500 per inmate for members of the Inmate in Prolonged Administration Class, for an award of approximately $16.3 million in the aggregate; and; (b) $5,000 per inmate for members of the Inmates with a Serious Mentally Illness Class, for an award of approximately $53.0 million in the aggregate. In addition, Class Counsel requests $62.0 million for vindication and deterrence damages for a total award of approximately $131.0 million.

[599]. While there is no doubt that each Class Member has an idiosyncratic and unique response to the experience of having been placed in administrative segregation, Class Counsel submits that there is a base level of harm suffered by all the Class Members. I agree. However, I do not agree that the award should be $131.0 million.

[600]. I conclude that there is a base level of *Charter* damages that I would value at $30.0 million across the class. This base level award is for: compensation, vindication, and deterrence for the breaches of the *Charter* and it is inclusive of pre-judgment interest.

[601]. It is true that each Class Member has a unique or idiosyncratic claim for a remedy for having his or her *Charter* rights violated. It is also true that the totality of all the discrete claims of the Class Members can only be determined after individual issues trial, which is to say that an aggregate assessment of the totality of the Class Member's claims is not possible. However, while the totality of the Class Members' *Charter* damages claims cannot be determined in the aggregate on this summary judgment motion, there is a foundation for a base level of *Charter* damages that can be awarded to the class on this summary judgment motion.

[602]. The contravention of any of the *Charter* breaches would on a class-wide basis support vindication and deterrence damages, even if every member of the class could not be said to have

suffered physical or psychiatric harm from the violation of his or her *Charter* rights. However, in the immediate case all of the Class Members suffered personal injuries. As a result of the Supreme Court of Canada's decision in *Saadati v. Moorhead*,[280] about damages for mental harm, I am able to decide without requiring a trial that there is a base level of compensatory harm for the contraventions of the *Charter* or for negligence.

[603]. Before *Saadati v. Moorhead* decision, the conventional view was that recovery for mental injury required a claimant to prove with expert medical opinion evidence a recognized psychiatric illness, which came to mean an illness within the classification of mental disorders contained in the *Diagnostic and Statistical Manual of Mental Disorders* ("DSM"), published by the American Psychiatric Association, and the *International Statistical Classification of Diseases and Related Health Problems* ("ICD"), published by the World Health Organization. After *Saadati v. Moorhead*, while an expert's opinion is relevant, it is not a necessity. After *Saadati* to establish a compensable mental injury, the claimant need not prove that he or she was suffering a recognized psychiatric illness. Rather, the claimant needs to prove that as a result of the defendant's negligence he or she suffered a mental disturbance that is serious and prolonged and that rises above the ordinary annoyances, anxieties and fears that come with living in civil society.

[604]. In the case at bar, I am satisfied from the evidence that for every Class Member, the stress and anxiety of administrative segregation was serious and prolonged and above the ordinary annoyances, anxieties and fears that come with living in a prison. In the immediate case, the Class Members of the Inmates with Serious Mental Illness Class were by definition suffering from a DSM level mental illness. The placement into administrative segregation just added to their misery and pain and their suffering is worthy of compensation.

[605]. There is, however, no established formula or juridical science to assessing *Charter* damages. I agree with what Justice Sharpe and Professor Roach say in their book, R.J. Sharpe and K. Roach¸ *The Charter of Rights and Freedoms*, (Toronto: Irwin Law, 2009) at pp. 384-5

> It can be extremely difficult to measure in money terms the amount appropriate to compensate the plaintiff for physical injuries or for damages to reputation, dignity, or privacy or simply for the violation of a *Charter* right. Translating into money the extent of the injury amounts to little more than sophisticated guesswork. In many cases, the damage suffered as a result of a *Charter* violation will fall into this intangible territory. The rights and freedoms guaranteed by the *Charter* are abstract and intangible and thus assessment of the extent of the injury in monetary terms will often be difficult. Low awards for the violation of a *Charter* right might trivialize the right while high awards may create an unjustified windfall for the applicant.

[606]. In *Brazeau*, which concerned administrative segregation in federal penitentiaries, I awarded *Charter* damages of $20.0 million for vindication and deterrence. There was no award for prejudgment interest.[281] In *Reddock*, another case about administrative segregation, I awarded $20.0 million for vindication, deterrence, and compensation plus pre-judgment interest ($1,120,797).

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[280] 2017 SCC 28.
[281] *Brazeau v. Attorney General (Canada)*, 2019 ONSC 3426

[607]. In *Reddock*, I assessed the compensatory portion of the award as having a value of $500 for each placement in administrative segregation for more than fifteen days. On a class-wide basis, I valued the compensatory portion of the award as having a value of approximately $9 million. Once pre-judgment interest was added and Class Counsel's fees and disbursements subtracted, each Class Member would receive a minimum award of $2,200.

[608]. In the immediate case, I shall award $30.0 million without allocation between, vindication, deterrence, and compensation and I mean the award to be inclusive of pre-judgment interest.

[609]. In arriving at $30.0 million, I reject the approach suggested by Class Counsel. What Class Counsel suggested was essentially based on the *Reddock* precedent, but the precedent became supercharged on steroids because in its *Reddock* decision, the Court of Appeal in a passing comment mentioned that the compensatory portion of the aggregate award was modest given the harm the inmates suffered. Class Counsel took the passing comment as a direction from the Court of Appeal to increase the compensatory part of *Charter* damages in cases about administrative segregation.

[610]. The Court of Appeal made no such direction and established no principle. *Charter* damages must be determined on a case by case basis. The Court of Appeal did not suggest that the $21.0 million in *Reddock* award was too low. Moreover, the base-level award in *Reddock* was meant to be just a base-level award. and it reserved the inmates' right to idiosyncratically make claims for more compensation at their individual issues trials. In my opinion, it would be an error in principle to develop an approach that would produce a result that overstated the defendant's base level of liability.

[611]. In the immediate case, based on the available evidence, an award of $30.0 million understates Ontario's exposure as demonstrated by the circumstances that Class Counsel submits that the award should be approximately four times as much.

[612]. As I said above, there is no established formula or juridical science to assessing *Charter* damages. And I now add that there cannot be and there should not be an established formula for assessing *Charter* damages especially in the context of a class action. The remedial assessment will very much depend upon the circumstances of each case and will be an amalgam of legal and public policy factors associated with deterrence, vindication, compensation, good governance, and respect for the different roles of governments and courts.

[613]. Contrasting the immediate case with the results in *Brazeau* and *Reddock* makes the point that a formulistic approach is not appropriate. In *Brazeau,* the award was designed to achieve vindication and deterrence, but not compensation, on a class-wide basis with respect to *Charter* breaches in the administration of a national penitentiary system involving 43 penal institutions, including 15 community correctional centres, and 5 Regional Treatment Centres with a daily relatively stable and long-term population of approximately 14,000 inmates. The Court of Appeal, without suggesting that the gross amount of the award was inappropriate, however, has ordered that the damages award in *Brazeau* be reconsidered. In *Reddock,* the award was for all of vindication, deterrence and compensation for the same national penitentiary system with a class size of approximately 9,000 inmates, and once again the Court did not suggest that the gross amount of the award was inappropriate. In the immediate case, if I were to adopt Class Counsel's

approach, based on a passing comment in the *Brazeau* and *Reddock*, there would be an award - before the calculation of pre-judgment interest - of approximately $130.1 million for compensation, vindication and deterrence with respect to a provincial prison system of 32 institutions with a daily churning population of approximately 7.500 inmates in custody and a class size of approximately 11,167 inmates.

[614]. In the immediate case, I do not adopt the approach of *Brazeau*, which has been remitted for reconsideration. I do not adopt the approach of *Reddock*, which was appropriate for a national system, which has similarities but also major differences from Ontario's provincial system. There was no direction from the Court of Appeal that the courts should apply some sort of formula in arriving at a *Charter* remedy. I do not attempt to rationalize the outcomes. I shall exercise my jurisdiction to fashion a s. 24 (1) remedy appropriate for the circumstances of the immediate case.

[615]. In the immediate case, I am awarding $30.0 million for all of compensation, pre-judgment interest, deterrence and vindication. I make this award because based on the particular circumstances of the immediate case, in my opinion, anything less: (a) would not achieve deterrence, vindication, and compensation on a class-wide basis; and (b) would not achieve the purposes of the *Class Proceedings Act, 1992*, which are access to justice and behaviour modification, and awarding more: (c) is not necessary, because there will be individual issues trials or assessments to determine the appropriate amount of compensation for the harms suffered individually; and (d) it is not prudent or fair to the defendant Ontario, because awarding more runs the risk of overstating its liability.

[616]. I also alert counsel that *Brazeau* and *Reddock* should not be taken as precedents for the approval of the Class Counsel's fees that are to be deducted from the Class Members' base-level awards.

[617]. I, therefore, quantify the base-level of *Charter* damages as $30.0 million, all inclusive.

(e) **The Interrelationship between Common Law Damages and *Charter* Damages**

[618]. I shall not quantify the class-wide damages for negligence save to say that it is less than $30.0 million and that it represents the compensatory portion of the *Charter* damages award.

[619]. There is no double counting; the award for negligence is not cumulative or additional to the *Charter* damages; it is rather a part of the *Charter* award. In other words, if Ontario pays $30.0 million, then it will have discharged its base-level liability for *Charter* damages and for systemic negligence.

[620]. In the immediate case, given that the Ontario Court of Appeal's decision in *Brazeau and Reddock* will likely be appealed and join ranks with the appeals pending in the Supreme Court of Canada in *Canadian Civil Liberties Association* and *British Columbia Civil Liberties Association,* Ontario will undoubtedly appeal the decision in the immediate case. If on appeal, Ontario succeeds in overturning my findings of both contraventions of the *Charter* and also systemic negligence, then it would not have been necessary for me to have assessed the base-level award of damages for negligence. On appeal, only if Ontario succeeds in overturning the findings of contraventions of the *Charter* and but not the finding of negligence, would it be necessary for me to calculate the

compensatory award for negligence. If that happens, then the Court of Appeal can remit the matter for calculation of the base-level negligence award, which until then is subsumed by the *Charter* damages award.

3. Aggregate Damages

[621]. It follows from the above discussion that aggregate damages of $30.0 million are available in the circumstances of the immediate case.

[622]. Section 24 of the *Class Proceedings Act, 2002* states:

> *Aggregate assessment of monetary relief*
>
> 24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> *Average or proportional application*
>
> (2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.
>
> *Idem*
>
> (3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.
>
> *Court to determine whether individual claims need to be made*
>
> (4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.
>
> *Procedures for determining claims*
>
> (5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.
>
> *Idem*
>
> (6) In specifying procedures under subsection (5), the court shall minimize the burden on class members, and, for the purpose, the court may authorize,
>
> (a) the use of standardized proof of claim forms;
>
> (b) the receipt of affidavit or other documentary evidence; and
>
> (c) the auditing of claims on a sampling or other basis.
>
> *Time limits for making claims*
>
> (7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

> *Idem*
>
> (8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.
>
> *Extension of time*
>
> (9) The court may give leave under subsection (8) if it is satisfied that,
>
> (a) there are apparent grounds for relief;
>
> (b) the delay was not caused by any fault of the person seeking the relief; and
>
> (c) the defendant would not suffer substantial prejudice if leave were given.
>
> *Court may amend subs. (1) judgment*
>
> (10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

[623]. For an aggregate assessment of damages to be available under s. 24 of the *Class Proceedings Act, 1992*, no questions of fact or law other than those relating to the assessment of monetary relief must remain to be determined in order to establish the amount of the defendant's monetary liability.[282] In *Ramdath v. George Brown College of Applied Arts and Technology*,[283] Justice Belobaba stated at paragraph 1:

> 1. Aggregate damages are essential to the continuing viability of the class action. If all or part of the defendant's monetary liability to class members can be fairly and reasonably determined without proof by individual class members, then class action judges should do so routinely and without hesitation. Aggregate damage awards should be more the norm, than the exception. Otherwise, the potential of the class action for enhancing access to justice will not be realized.

[624]. On appeal, in *Ramdath*, the Court of Appeal endorsed Justice Belobaba's approach to the quantification of agreement damages. Justice Belobaba held that provided that the liability of the defendant was not overstated, the standard of proof of aggregate damages did not have to achieve the same degree of accuracy as in an ordinary action and instead the standard was whether the damages could be reasonably determined without proof by individual class members.

[625]. In *Ramdath*, the Court of Appeal noted in that it is desirable to award aggregate damages where the criteria under s. 24 (1) are met in order to make the class action an effective instrument to provide access to justice and the the standard to meet in determining whether an aggregate assessment will be ordered is reasonableness.[284] The Court of Appeal also noted that provided that Defendant's total liability is not over-stated, an aggregate damages methodology will be reasonable if some members of the class are over-compensated and some are under-compensated.[285]

[626]. In *Good v. Toronto*,[286] a class action where political protestors alleged that their *Charter*

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[282] *Bennett v. Hydro One Inc*., 2017 ONSC 7065 at para. 104.
[283] 2014 ONSC 3066 at para. 1, aff'd 2015 ONCA 921. With respect to the trial aggregate assessment, see also supplementary reasons, *Ramdath v. George Brown College of Applied Arts and Technology*, 2014 ONSC 4215.
[284] 2015 ONCA 921 at para. 76.
[285] 2015 ONCA 921 at para. 51.
[286] 2016 ONCA 250 at para. 75, leave to appeal to the S.C.C. ref'd [2016] S.C.C.A. No. 255.

rights had been violated, the Court of Appeal stated:

> s. 24 (1) [of the *Class Proceedings Act, 1992*] asks whether the aggregated or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para 73 that "it does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under section 9 of the *Charter*, a minimum award of damages in a certain amount is justified.

[627]. Thus, the court may award aggregate damages under s. 24(1)(c) of the *Class Proceedings Act, 2002* if the evidence put forward by class counsel is sufficiently reliable to permit a just determination of all or part of the defendant's monetary liability without proof by individual class members.

[628]. In deciding whether aggregate damages should be awarded in whole or in part, the court should consider: (a) the reliability of the non-individualized evidence that is being presented; whether the use of this evidence will result in any unfairness or injustice to the defendant (for example, by overstating the defendant's liability); and whether the denial of an aggregate approach will result in a wrong eluding an effective remedy and thus a denial of access to justice.[287]

[629]. In the immediate case, monetary relief is claimed on behalf of all class members. In the immediate case, for the reasons set out above, no questions of fact or law remain to be determined other than those relating to the assessment of monetary relief for which the evidence establishes that a base level of damages can be assessed across the whole class. The aggregate of these damages can be determined without proof by individual class members. The aggregate assessment of the base level award will not result in any unfairness or injustice to the defendant. The aggregate assessment will not overstate Ontario's liability.

4. Punitive Damages

[630]. For the reasons that follow, I conclude that although in individual cases, Ontario may be liable for punitive damages after the *Charter* damages and damages for systemic negligence are determined at the individual issues trials, it is not liable for punitive damages on a class-wide basis.

[631]. Justice Binnie examined the liability for and the quantification of punitive damages in the leading case of *Whiten v. Pilot Insurance Co*.[288] In that case, the Supreme Court of Canada restored a punitive damages award of $1.0 million made by a jury in an action against an insurer who had breached its duty of good faith and fair dealing to its insured. In paragraph 94 of his judgment, in the context of how a court should charge a jury about punitive damages, Justice Binnie explained the nature of punitive damages. He stated:

> 94. [I]t would be helpful if the trial judge's charge to the jury included words to convey an

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[287] *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at paras. 47-52.
[288] 2002 SCC 18.

> understanding of the following points, even at the risk of some repetition for emphasis. (1) Punitive damages are very much the exception rather than the rule, (2) imposed only if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[632]. It follows from Justice Binnie's remarks that an assessment of punitive damages requires: first, a determination that there has been high-handed, malicious, arbitrary or highly reprehensible conduct that departs to a marked degree from ordinary standards of decent behaviour; and second that the punitive damages be given in an amount that is no greater than necessary to rationally accomplish their non-compensatory purposes of retribution, deterrence, and denunciation. These assessments require an requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation. An analysis of these ensures that punitive damages are rational and in an amount that is not greater than is necessary to accomplish their purposes of retribution, deterrence, and denunciation.

[633]. In the case at bar, as I did in *Brazeau* and in *Reddock*, I shall in the first instance assume without deciding that the conduct of the Correctional Service on a class-wide basis departs to a marked degree from the ordinary standards of decent behaviour that would justify an award of punitive damages. With that assumption, the question becomes what amount of punitive damages is rationally necessary to serve the purposes of retribution, deterrence, and denunciation.

[634]. In the immediate case, given that I have awarded $30.0 million all inclusive on a class-wide basis for *Charter* and concurrently for negligence, which can serve the similar purposes of retribution, deterrence, and denunciation, the answer to the question is that with the availability of this *Charter* remedy and common law damages, the purposes of an award of punitive damages have already been served.

[635]. In the case at bar, I also dismiss the claim for class-wide punitive damages for a second reason. Although, once again, punitive damages may be warranted in individual cases, on a class-wide, I cannot conclude that conduct of the civil servants for which Ontario is vicariously liable departs to a marked degree from the ordinary standards of decent behaviour that would justify an award of punitive damages.

[636]. Although the conduct of the civil servants was clearly wrong on a class-wide basis or was in clear disregard of the Class Members' *Charter* rights on a class-wide basis, for the purpose of applying the *Mackin* principle, this does not warrant an additional punitive damages award especially in circumstances when *Charter* damages for vindication and deterrence are being awarded. Thus, I shall not make a class-wide award of punitive damages.

O. Conclusion

[637]. By way of summary of the major conclusions:

- Subject to rebutting the presumption that their individual claims for damages are statute-barred, the claims of Class Members imprisoned in administrative segregation before April 20, 2015 are statute-barred.

- For the purposes of this summary judgment motion, the Class Period should not be extended beyond September 18, 2018, and, therefore, inmates imprisoned after September 18, 2018 are not Class Members.

- In additional to individual cases where an inmate has been denied due process and his or her *Charter* rights were contravened, Ontario's review system for placements in administrative segregation, contravenes the Class Members' rights under section 7 of the *Charter*.

- Ontario's placing of a Class Member with a serious mental illness (SMI Inmates) in administrative segregation for any period of time contravenes the Class Member's rights under sections 7 and 12 of the *Charter*.

- Ontario's placing a Class Member in administrative segregation for more than fifteen days contravenes the Class Member's rights under sections 7 and 12 of the *Charter.*

- Ontario's placing a Class Member with serious mental illness in administrative segregation (SMI Inmates) for any period of time is negligent.

- Ontario's placing a Class Member (Prolonged Inmates) in administrative segregation for more than fifteen days is negligent.

- Ontario is liable for the negligence of its civil servants, and Ontario is not protected by Crown immunity. In the circumstance of this case, Ontario does not enjoy crown immunity under the *Proceedings Against the Crown Act*,[289] or pursuant to the *Crown Liability and Proceedings Act, 2019*[290] for the negligence of its civil servants.

- A placement in administrative segregation of a Class Member with a serious mental illness (SMI Inmates) in administrative segregation causes a minimum level of compensable harm

[289] R.S.O. 1990, c. P.27.
[290] S.O. 2019, c. 7, Sched. 7.

to him or her. Additional compensable harm may be suffered by the Class Member depending on his or her idiosyncratic personality. Some inmates are more resilient than others, but all placements in administrative segregation of an SMI Inmate causes compensable harm.

- A placement in administrative segregation for more than fifteen days causes a minimum level of compensable harm to a Class Member (Prolonged Inmates). Additional compensable harm may be suffered by the Class Member depending on his or her idiosyncratic personality. Some inmates are more resilient than others, but all placements in administrative segregation of a Prolonged Inmate for more than 15 days causes compensable harm.

- The Class Members are entitled to an aggregate damages award of $30.0 million without prejudice to claims for further compensation at individual issues trials.

- The aggregate damages award of $30.0 million is to be distributed less Class Counsel's fees and expenses pursuant to a distribution plan as the court may approve after a fairness and fee approval hearing.

- The procedure for the individual issues trials shall be determined on motion by court order.

[638]. The answers to the common issues are as follows:

Common Issue	**Answer**
(a) By the operation and management of the Correctional Institutions from [~~January 1, 2009~~] April 20, 2015 to the date of certification, did the Defendant owe a duty of care to the Class Members?	Yes, as discussed above.
(b) If the answer to (a) is yes, what is the nature of that duty of care?	See discussion above.
(c) By the use of Administrative Segregation and/or Prolonged Administrative Segregation at the Correctional Institutions from [~~January 1, 2009~~] April 20, 2015 to the date of certification, did the Defendant breach a duty of care owed to some or all of the Class Members?	Yes, as discussed above.
(d) Did the use of Administrative Segregation deprive the SMI Inmates of security of the person under s. 7 of the *Charter*?	Yes
(e) Did the use of Prolonged Administrative Segregation deprive the Prolonged Inmates of security of the person under s. 7 of the *Charter*?	Yes
(f) If the answer to (d) or (e) is "yes", does the deprivation fail to accord with the principles of fundamental justice for some or all of the Class Members?	Yes
(g) If the answer to either question in (f) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Administrative Segregation or Prolonged Administrative Segregation and the reason indicated for such placement was: (i) at their own request; (ii)	Yes

for their own protection, including protection for medical reasons; (iii) to protect the security of the institution or safety of others, including protection for medical reasons; (iv) for alleged misconduct of a serious nature; or (v) for any other reason?	
(h) Does the deprivation of liberty under s. 7 of the *Charter* fail to accord with the principles of fundamental justice for some or all of the Class Members?	Yes
(i) If the answer to (h) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Administrative Segregation or Prolonged Administrative Segregation and the reason indicated for such placement was: (i) at their own request; (ii) for their own protection, including protection for medical reasons; (iii) to protect the security of the institution or safety of others, including protection for medical reasons; (iv) for alleged misconduct of a serious nature; or (v) for any other reason?	Yes
(j) Did the use of Prolonged Administrative Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the Prolonged Inmates where the Prolonged Inmates were placed in Administrative Segregation and the reason indicated for such placement was: (i) at their own request; (ii) for their own protection, including protection for medical reasons; (iii) to protect the security of the institution or safety of others, including protection for medical reasons; (iv) for alleged misconduct of a serious nature; or (v) for any other reason?	Yes
Did the use of Administrative Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the SMI Inmates where the SMI Inmates were placed in Administrative Segregation and the reason indicated for such placement was: (i) at their own request; (ii) for their own protection, including protection for medical reasons; (iii) to protect the security of the institution or safety of others, including protection for medical reasons; (iv) for alleged misconduct of a serious nature; or (v) for any other reason?	Yes
(l) If the answer to questions (g), (i), (j) or (k) is "yes", were such violation(s) justified under section 1 of the *Charter*?	No
(m) If the answer to question (l) is "no", are damages pursuant to section 24(1) of the *Charter* an appropriate remedy?	Yes
(n) Is this an appropriate case for an award of aggregate damages pursuant to section 24(1) of the *Class Proceedings Act, 1992*?	Yes
(o) If the answer to (n) is "yes", what is the appropriate quantum of such damages?	$30.0 million as discussed above.
(p) Does the conduct of the Defendant merit an award	No.

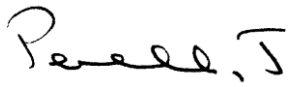
of punitive damages?	
(q) If the answer to (p) is "yes", what quantum should be awarded for punitive damages?	N/A
(r) What limitation period or limitation periods apply to the causes of action advanced in this case?	Subject to rebutting the presumption that their individual claims for damages are statute-barred, the claims of Class Members imprisoned in administrative segregation before April 20, 2015 are statute-barred.
(s) What circumstances are relevant to determining when the limitation period or limitation periods referred to in question (r) begin to run?	N/A

[639]. What remains to be determined are: (a) a protocol for the individual issues trials; and (b) a distribution program for the base level award of aggregate damages for the *Charter* breaches and for negligence. These matters may be resolved at a case management conference or by motion, if necessary.

[640]. If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of Mr. Francis within thirty days of the release of these reasons for decision, followed by Ontario's submissions within a further thirty days.

[641]. In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[642]. The parties may and should submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.



Perell, J.

Released: April 20, 2020

CITATION: Francis v. Ontario, 2020 ONSC 1644
COURT FILE NO.: CV-18-591719CP
DATE: 2020/04/20

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CONREY FRANCIS

Plaintiff

– and –

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

REASONS FOR DECISION

PERELL J.

Released: April 20, 2020