COURT OF APPEAL FOR ONTARIO

CITATION: Francis v. Ontario, 2021 ONCA 197
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Doherty, Nordheimer and Harvison Young JJ.A.

BETWEEN

Conrey Francis

Plaintiff (Respondent)

and

Her Majesty the Queen in Right of Ontario

Defendant (Appellant)

Alexandra Clark, Victoria Yankou, Hera Evans, Sean Hanley, Tanya Jemec and Matthew Chung, for the appellant

James Sayce, Charles Hatt and Nathalie Gondek, for the respondent

Matthew Horner and Insiya Essajee, for the intervener Ontario Human Rights Commission

Jonathan Lisus, Zain Naqi and Philip Underwood, for the intervener Canadian Civil Liberties Association

Heard: December 18, 2020 by video conference

On appeal from the judgment of Justice Paul M. Perell of the Superior Court of Justice dated April 20, 2020, with reasons reported at 2020 ONSC 1644.

Doherty and Nordheimer JJ.A.:

I. OVERVIEW

[1] Her Majesty the Queen in Right of Ontario ("Ontario") appeals from the summary judgment granted by the motion judge in which he found that Ontario owed a duty of care to the respondent, and his fellow class members, arising from the system of administrative segregation used in Ontario's correctional institutions between April 20, 2015 and September 18, 2018. The motion judge also found that Ontario had breached that duty of care. The motion judge further concluded that Ontario's system of administrative segregation breached the rights of the respondent, and his fellow class members, under ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*. As a consequence of these breaches, the motion judge awarded aggregate *Charter* damages against Ontario in the amount of $30 million.

[2] Ontario raises three principal issues in its challenge to the motion judge's conclusions:

1. The motion judge erred in holding Ontario liable in negligence.
2. The motion judge erred in finding that detaining seriously mentally ill inmates in administrative segregation violated ss. 7 and 12 of the *Charter*.
3. The motion judge erred in awarding *Charter* damages.

[3] For the following reasons, we would dismiss the appeal.

II. BACKGROUND

[4] The use of administrative segregation in Ontario's correctional institutions is authorized by *General*, R.R.O. 1990, Reg. 778 ("Regulation 778") promulgated under the *Ministry of Correctional Services Act,* R.S.O. 1990, c. M.22, s. 60(1). Section 34(1) of Regulation 778 grants the Superintendent of a correctional institution the authority to place an inmate in administrative segregation when:

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.

[5] As found by the motion judge, the respondent suffers from serious mental illness. He was held in the Toronto South Detention Centre for over two years on remand while awaiting trial on charges relating to a bank robbery. He was ultimately acquitted of all charges.

[6] During his incarceration, the respondent was placed in administrative segregation twice, once for eight days. On both occasions he was alleged to have refused to take mental health medication that had caused him negative side-effects in the past. Correctional officials considered this conduct to constitute "refusing to

follow an order", which they determined justified a placement in administrative segregation. As found by the motion judge, the respondent's experience in administrative segregation was excruciating; his anxiety was out of control; he felt terrorized and was in a state of delirium and shock.

[7] In 2017, the respondent commenced this proceeding as a class action. He sought declarations that his, and the class members', rights under the *Charter* had been infringed by Ontario's system of administrative segregation and that Ontario was liable in negligence. The respondent sought damages in negligence and under s. 24 of the *Charter*. He also sought punitive damages.

[8] The class action was certified on consent by order dated September 18, 2018. The class in this case is made up of two groups. One group is made up of inmates who are seriously mentally ill, such as the respondent ("SMI Inmates"). The other group is made up of those inmates, who may not be acutely unwell, but who were left in segregation for 15 or more consecutive days ("Prolonged Inmates").

[9] Administrative segregation in Ontario consists of isolation in a small cell for 22 hours or more with no meaningful human contact. The cells have hard metal doors with a slot or "hatch" through which food is passed and basic communication may occur. Some cells have a window, which is usually frosted. The evidence shows that the cells are often filthy and covered in bodily fluids. Inmates face

indefinite isolation and have no effective means of influencing their fate. Administrative segregation in Ontario may fairly be described by its more common expression, "solitary confinement".

[10] Ontario does not appeal any findings of fact about its practice of administrative segregation. The motion judge found the conditions of administrative segregation in Ontario were "the same or very similar" as those in the federal system, which this Court has twice found to constitute cruel and unusual treatment, in *Canadian Civil Liberties Association v. Canada (Attorney General),* 2019 ONCA 243, 144 O.R. (3d) 641 (“*CCLA*”), leave to appeal granted but appeal discontinued, [2019] S.C.C.A. No. 96, and *Brazeau v. Canada (Attorney General),* 2020 ONCA 184, 149 O.R. (3d) 705 (“*Brazeau/Reddock*”).

[11] Ontario uses solitary confinement for varying reasons including managing inmates’ special needs and challenging behaviours. However, the mentally ill are markedly overrepresented among inmates subjected to administrative segregation. This overrepresentation is demonstrated by the fact that 43% of all admissions into segregation had a mental health alert on their file. These mentally ill inmates spend on average 30% more time in administrative segregation than other inmates. Considering this evidence, the motion judge found as a fact that Ontario "routinely placed inmates with mental health or suicide risk alerts on file in administrative segregation”.

[12] Over time, changes in the system of administrative segregation have been made by Ontario, at least some of which resulted from public interest remedies ordered by the Ontario Human Rights Tribunal as part of a settlement of other proceedings. Ontario also appointed an Independent Expert on Human Rights and Corrections, who found failings in Ontario's compliance with its own policies. Ontario undertook other reviews, which continued to find problems in the system.

[13] For example, an internal review in 2016 noted the harms caused by solitary confinement; that Ontario's administrative segregation practices qualified as solitary confinement; and that there was a need for reforms. In mid-2018, the Ontario Legislature passed the *Correctional Services and Reintegration Act, 2018*, S.O. 2018, c. 6, Sched. 2. Among other things the legislation: (a) banned administrative segregation for mentally ill and other vulnerable inmates; (b) imposed a cap on the duration of administrative segregation for all inmates; and, (c) provided an independent review of all segregation placements. The legislation received Royal Assent on May 7, 2018, but it has yet to be proclaimed into force.

[14] In summarizing his view on the improvements in Ontario's system and practices, the motion judge observed that "Ontario's good words were not always followed by corresponding good deeds."

III. THE DECISION BELOW

[15] The motion judge gave lengthy reasons for his conclusions. He spent considerable time reviewing the evidence that was before him, including the expert evidence. We do not need to repeat his review as there appears to be little dispute regarding what that evidence reveals.

[16] Following that evidentiary review, the motion judge made a number of what he referred to as “major” findings of fact. Those findings (at para. 269) may be summarized as follows:

Administrative segregation

- Administrative segregation as practiced in Ontario constitutes solitary confinement within the meaning of the United Nations Standard Minimum Rules for the Treatment of Prisoners (“Nelson Mandela Rules”).
- The Nelson 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.

State of knowledge regarding solitary confinement

- 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 ultimately codified in 2001 by the Nelson Mandela Rules at a 15-day maximum, it was known that no prisoners should undergo prolonged administrative segregation.
- Ontario knew about the growing condemnation of: (a) placing seriously mentally ill 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 had occurred within Ontario.
- Ontario knew that there was a worldwide consensus that solitary confinement should be a last resort for securing the safety of a correctional institution.

The effects of solitary confinement

- A placement in administrative segregation can and does cause physical and mental harm, particularly to inmates that have serious pre-existing psychiatric illness.

- 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 48 hours.
- Without exception, a placement in administrative segregation of an inmate with serious mental illness causes a minimum level of harm to the inmate.
- Without exception, a placement in administrative segregation of an inmate for more than 15 days causes a minimum level of harm to the inmate.

Practice in Ontario regarding solitary confinement

- Ontario 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.
- Many inmates are placed in administrative segregation contrary to Ontario's own policy directives.

[17] The motion judge then moved to consider whether there had been a breach of ss. 7 and 12 of the *Charter* arising from Ontario's system of administrative segregation, both with respect to the respondent and with respect to the members of the class. He concluded that there had been. It does not appear that Ontario contested that breaches had occurred with respect to the respondent. Rather, Ontario submitted that such breaches had not been demonstrated on a class-wide basis. The motion judge disagreed.

[18] The motion judge found that the evidence revealed that, once a placement in administrative segregation has become prolonged, the stress and anxiety is serious and thus the security of the person guaranteed by s. 7 of the *Charter* was engaged. The motion judge also concluded that administrative segregation creates an increased risk of suicide for all class members, thereby infringing the right to life under s. 7 of the *Charter*.

[19] The motion judge moved to consider whether these infringements complied with the principles of fundamental justice. He concluded that they did not. The

motion judge found that, 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”. He therefore concluded that administrative segregation as practiced in Ontario was overbroad. The motion judge also found that the effects of administrative segregation were grossly disproportionate to the purposes of administrative segregation. Lastly, the motion judge found that, absent an independent timely review procedure, confinement in administrative segregation of any inmate violated procedural due process rights under s. 7 of the *Charter*.

[20] The motion judge then considered s. 12 of the *Charter*, that is, whether Ontario’s system of administrative segregation constituted cruel and unusual punishment. On this issue, the motion judge said, at para. 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. 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." Demonstrating that a treatment or punishment was merely excessive is not sufficient to ground a finding that section 12 has been violated. [Footnotes omitted.]

[21] The motion judge rejected Ontario’s position that this determination was inherently an individual one that could not be made on a class-wide basis. He found

that the evidence established that a placement in administrative segregation, as it was administered by Ontario during the class period, was a cruel and unusual treatment of the class members, both the serious mentally ill inmates and the inmates who were administratively segregated for 15 or more days. The motion judge found support for at least part of this conclusion in the decision of this court in *CCLA*, where administrative segregation placements of more than 15 consecutive days were found to infringe s. 12 of the *Charter*. The motion judge also concluded that these infringements were not saved under s. 1 of the *Charter*.

[22] The motion judge moved from the *Charter* claims to consider the claim in negligence. On this issue, the motion judge considered Ontario's submissions that:

- The duty of care alleged by the respondent was not a recognized duty of care that fell within the category of cases where a duty of care by correctional officers to inmates had been recognized.
- In any event, the respondent had not proven the standard of care or a breach of the standard of care.
- The respondent's negligence claim was essentially a challenge to policy decisions that are immune from liability.
- In addition to the common law principles relating to policy decisions, the respondent's negligence claim was precluded by Crown immunity and was extinguished by s. 11 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019 c. 7, Sched. 17 ("*CLPA*").

[23] The motion judge rejected each of Ontario's submissions. He found that Ontario did owe a duty of care to the respondent and the class members. In doing so, the motion judge distinguished this court's decision in *Brazeau/Reddock* where it was found, at para 120, that a claim in systemic negligence could not be made out because the primary negligence claim was "negligence at the policy-making level".

[24] The motion judge rejected Ontario's claim that the decisions in question were policy decisions. Rather, he found that they were operational decisions that did not escape liability, if negligently undertaken.

[25] Ultimately, the motion judge concluded that Ontario owed a duty of care to the respondent and the class members, which Ontario had breached. He said, at para. 468:

> In the 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.

[26] Lastly, the motion judge found that the claim was not precluded by the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27, ("*PACA*"), or

extinguished by virtue of the *CLPA*, which replaced the *PACA* on July 1, 2019 with retroactive effect.[1]

[27] Having found liability both in negligence and under the *Charter*, the motion judge then dealt with the issue of damages. With respect to the *Charter*, the motion judge rejected Ontario's position that a declaration of constitutional invalidity would be sufficient relief. He found, based in part on this court's conclusions about *Charter* damages in *Brazeau/Reddock*, that damages were appropriate for the *Charter* breaches that he had found.

[28] The motion judge considered the difficulty in assessing the proper amount to award for damages for a breach of the *Charter*. In the end, he concluded that an award of aggregate damages in the amount of $30 million was appropriate. The motion judge declined to separately assess the damages for negligence, other than to say that any amount for damages for negligence would be subsumed in the award of aggregate damages for the *Charter* breaches. The motion judge declined to award punitive damages.

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[1] As discussed later in these reasons, s. 11 of the *CLPA* extinguishes certain claims that were commenced before the *CLPA* came into force.

IV. ANALYSIS

[29] We begin our analysis with the issues raised respecting the alleged *Charter* breaches. We do so because, in our view, the present claims more appropriately find their foundation in the *Charter,* than in the law of negligence.

***CHARTER* ISSUES**

[30] Ontario submits that the motion judge erred in holding the *Charter* rights of SMI Inmates were infringed by detention of any length in administrative segregation. Ontario also contends the motion judge erred in awarding *Charter* damages.

A. Did the motion judge err in finding that detaining SMI Inmates in administrative segregation violated ss. 7 and 12 of the *Charter*?

[31] As outlined above, the class consisted of inmates who had been held in administrative segregation in Ontario jails between April 2015 and September 2018. The class was divided into two groups:

- SMI Inmates who were subjected to administrative segregation for any period of time; and
- Prolonged Inmates who were subjected to administrative segregation for 15 or more consecutive days.

[32] SMI Inmates were defined using two criteria. First, they had been diagnosed, either before or during their incarceration, as suffering from one or more of the

mental disorders listed in the class definition. Second, their disorders had manifested themselves in one of the ways set down in the appendix to the class definition. These disorders included chronic and severe suicidal ideation, chronic and severe self-injury, and significant impairment in judgment, thinking, mood or communication.

[33] The motion judge found that:

- any confinement of SMI Inmates in administrative segregation violated their rights under ss. 7 and 12 of the *Charter*;
- the confinement of any inmate in administrative segregation for more than 15 consecutive days infringed their rights under ss. 7 and 12 of the *Charter*; and
- absent an independent timely review procedure, confinement in administrative segregation of any inmate violated procedural due process rights under s. 7 of the *Charter*.

[34] Ontario accepts the motion judge's finding that administrative segregation for more than 15 consecutive days violates ss. 7 and 12 of the *Charter*. Ontario also accepts that the absence of a timely independent review process violates s. 7 of the *Charter*. Both concessions reflect the decision in *CCLA*, at paras. 2 and 68, in which this court held detention in administrative segregation for more than 15 consecutive days violated s. 12. The application judge in *CCLA* had held the

absence of a timely independent review process violated s. 7: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, 140 O.R. (3d) 342 ("*CCLA (ONSC)*"), at paras. 155-156, rev'd on other grounds, 2019 ONCA 243. That finding was not challenged on the appeal to this court.

[35] Ontario does submit, however, that the motion judge erred in holding the s. 7 and s. 12 rights of SMI Inmates were breached when those inmates were placed in administrative segregation, regardless of the duration of that placement. Counsel submits that none of the previous administrative segregation cases have held that detention in administrative segregation for any period of time constitutes a *Charter* violation. These cases include the motion judge's own ruling in *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888, 431 C.R.R. (2d) 136, ("*Brazeau (ONSC)*"), at paras. 313-318, rev'd on other grounds, 2020 ONCA 184. In *Brazeau (ONSC)*, the motion judge found the s. 7 and s. 12 rights of SMI Inmates were breached after 30 or 60 days of administrative segregation, depending on whether the segregation was voluntary or involuntary. Neither party took issue with that finding on the appeal to this court: *Brazeau/Reddock*.

[36] Ontario further submits this court specifically declined in *CCLA* to find that subjecting an inmate with mental illness to administrative segregation of any length breached the s. 12 right of those inmates: at paras. 62-67. Ontario contends that the motion judge was bound by *CCLA* unless the evidence in this case was

materially different on the relevant issue. Ontario argues there was no meaningful difference in the evidence.

[37] We do not read *CCLA* as deciding this issue. In *CCLA*, the applicant sought a declaration that the sections of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, authorizing administrative segregation were unconstitutional and rendered of no force and effect by s. 52 of the *Constitution Act, 1982*. Benotto J.A., for the court, concluded that detaining any inmate in administrative segregation for more than 15 consecutive days breached that inmate's constitutional rights under s. 12 of the *Charter*: at paras. 4-5. She next considered whether administrative segregation, as it applied to certain specific identified groups of inmates, contravened the *Charter*. One group was described as inmates "suffering from mental illness". After reviewing the provisions and policies referable to mentally ill inmates, Benotto J.A. said, at para. 66:

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

> therefore remains to be determined another day. [Emphasis added.]

[38] In this case, unlike *CCLA*, the nature of the mental illnesses suffered by the class members and the manifestation of those illnesses were part of the class definition of SMI Inmates. SMI Inmates all suffer from diagnosed serious mental disorders. Furthermore, those disorders have manifested themselves in significant impairments and/or chronic and severe suicidal ideation or self-injury. In short, SMI Inmates are clearly seriously mentally ill.

[39] By virtue of the class definition, the motion judge was required to consider, not the impact of administrative segregation on all inmates who might suffer some form of mental illness, but rather the impact on those who fell within the specific limits of the definition provided. That definition allowed the motion judge to "identify those inmates whose particular mental illnesses are of such a kind as to render administrative segregation of any length of time cruel and unusual", as this court put it in *CCLA*, at para. 66.

[40] The motion judge repeatedly referred to "seriously mentally ill" inmates in his findings. He clearly appreciated that all of the SMI Inmates suffered from serious, active, ongoing mental illnesses. It was in respect of that specific group the motion judge found any time spent in administrative segregation constituted cruel and unusual treatment.

[41] Nothing in *CCLA* is inconsistent with the motion judge's finding in respect of the SMI Inmates. To the contrary, as counsel for the respondent submitted, the words from *CCLA*, at para. 66 quoted above, presaged the very finding made by the motion judge in respect of the SMI Inmates.

[42] Ontario also relies on the motion judge's ruling in *Brazeau (ONSC)*, released about a year before his decision in this case. *Brazeau (ONSC)* was a class action brought by seriously mentally ill inmates confined in federal jails. The class definition in *Brazeau (ONSC)* was very similar to the definition of SMI Inmates in this case: see *Brazeau (ONSC)*, at paras. 4-8.

[43] In *Brazeau (ONSC)*, the plaintiffs argued that any period of administrative segregation breached the s. 7 and s.12 rights of the seriously mentally ill inmates who made up the class: at para. 12. The evidence in *Brazeau (ONSC)* was much the same as the evidence in this case.

[44] In his ruling in *Brazeau (ONSC)*, the motion judge described the harm caused by administrative segregation to seriously mentally ill inmates as beginning "almost immediately after the doors are shut on the isolation cell": at para. 313. He went on, however, to find the evidence established a breach of ss. 7 and 12 of the *Charter* on a class-wide basis only after 30 or 60 days, depending on whether the inmate had voluntarily gone into administrative segregation: at paras. 312-314.

[45] This court decided *CCLA* after the motion judge's ruling in *Brazeau (ONSC)*. As indicated above, *CCLA* placed a 15-day cap on administrative segregation for all inmates. The 15-day cap set in *CCLA* overtook the motion judge's finding in *Brazeau (ONSC)*, setting a 30 or 60-day cap in respect of seriously mentally ill inmates. Clearly, the physical and psychological harm caused by administrative segregation is exacerbated by serious mental illness. It must follow from the holding in *CCLA* that if all inmates suffer cruel and unusual treatment after 15 consecutive days in administrative segregation, seriously mentally ill inmates suffer cruel and unusual treatment at some point before 15 days. The 30 and 60-day caps fixed in *Brazeau (ONSC)* had to be adjusted downward in light of *CCLA*.

[46] In his reasons in this case, the motion judge acknowledged, at paras. 333-334, that after *CCLA* the administrative segregation of any inmate for more than 15 days was unconstitutional. He proceeded to determine, that in respect of SMI Inmates, administrative segregation for any period of time violated ss. 7 and 12. In light of the 30 and 60-day caps he had set in *Brazeau (ONSC)*, it might have been helpful for the motion judge to indicate why a cap of something less than 15 days in respect of SMI Inmates would not satisfy constitutional requirements. His failure to address that specific question does not, however, amount to reversible error.

[47] The question for this court is not whether the motion judge's findings are entirely consistent with his earlier findings in *Brazeau (ONSC)*. Nor is this court ultimately concerned with whether the motion judge adequately explained any

inconsistency that may exist in his factual findings in the two cases. This ground of appeal turns on whether the motion judge's finding, that placing SMI Inmates in administrative segregation for any period violates ss. 7 and 12, is justified in law and reasonably available on the evidence.

[48] Ontario does not suggest the motion judge misstated the law relating to s. 7 or s. 12 of the *Charter*. His factual findings in respect of the SMI Inmates are supported by the evidence. In particular, the evidence of Dr. Chaimowitz and Dr. Grassian, reviewed at length by the motion judge, supports the finding that administrative segregation of SMI Inmates for any period of time violates their *Charter* rights under ss. 7 and 12. Nor does the motion judge's different finding in *Brazeau (ONSC)* on virtually the same evidence compel the conclusion that his finding in this case cannot reasonably be supported by the evidence. With the benefit of the decision in *CCLA*, the motion judge's "error", if there be one, lies in the "considerable leeway" given to the correctional authorities by the 30 and 60-day caps established in *Brazeau (ONSC)*: *Brazeau/Reddock*, at para. 70.

[49] We would not interfere with the motion judge's holding that the s. 7 and s. 12 rights of the SMI Inmates were breached when those inmates were placed in administrative segregation.

B. Did the motion judge err in awarding *Charter* damages?

[50] The motion judge awarded aggregate *Charter* damages of $30 million, without prejudice to the right of each class member to claim further compensation in an individual issues trial. The motion judge also indicated, at paras. 618-620, that any damage award for negligence would be included in, and not in addition to, the $30 million award for *Charter* damages.

(i) The context

[51] Before turning to Ontario's argument that damages were not an "appropriate and just" remedy under s. 24(1) of the *Charter*, it is helpful to describe the regulatory scheme under which administrative segregation operates in Ontario jails and the nature of the *Charter* breaches giving rise to the claim for *Charter* damages.

[52] Ontario's administrative segregation regime is not the direct product of legislation. There is no statute compelling the creation or use of administrative segregation in Ontario jails. Those jails are created and operated under the authority of the *Ministry of Correctional Services Act*. Sub-sections 20(1.1), (2), and (3) make the Superintendent or a designated deputy superintendent responsible for the administration of the jail and the custody and supervision of the inmates. Section 60(1) creates a broad regulation-making power in respect of the management of correctional institutions and the treatment and control of inmates.

[53] Regulation 778 addresses many aspects of the management and operation of provincial jails. Section 2(1) makes the Superintendent responsible for "the care, health, discipline, safety and custody of the inmates". Section 34(1) empowers the Superintendent to place an inmate in segregation for various reasons, including inmate safety, the safety of others, or the security of the institution. Section 34.0.1 goes on to provide for internal reviews of the status of persons held in administrative segregation. Section 34(5) of the regulation contemplated administrative segregation for more than 30 consecutive days but was deleted in November 2019 when Regulation 778 was amended by *General*, O. Reg. 363/19. As the motion judge noted, at paras. 149-150, beyond these few provisions, the regulation sheds no light on the specifics of the administrative segregation regime, as operated in Ontario jails. There is not even a definition of segregation.

[54] Through the years, including during the class period, Ontario issued various ministerial directives and policies fleshing out the details of its administrative segregation regime, as summarized by the motion judge, at paras. 154-173. These directives and policies have, to some extent, ameliorated the conditions and circumstances giving rise to the *Charter* breaches the motion judge found. Unfortunately, as observed by the motion judge, at para. 269: "Many inmates are placed in administrative segregation contrary to Ontario's own policy directives."

[55] Whatever changes Ontario has made to its administrative segregation regime, and however faithfully those changes have been implemented, five

fundamental facts crucial to the constitutional arguments remained constant features of administrative segregation, as practised in Ontario jails throughout the claim period:

- administrative segregation, as practised in Ontario, fell squarely within the widely accepted definition of solitary confinement;
- SMI Inmates could be placed in administrative segregation;
- placement of inmates in administrative segregation was indefinite;
- there was no “hard cap” limiting the maximum time period for which an inmate could be held in administrative segregation; and
- no inmate held in administrative segregation had access to timely, independent reviews of that status.

[56] The five facts set out above were crucial to the motion judge’s ultimate conclusion that the s. 7 and s. 12 rights of all inmates within the class were routinely and consistently infringed throughout the entire class period. The nature and seriousness of the *Charter* breaches identified by the motion judge, particularly the s. 12 breach, were necessarily central to whether damages provided an “appropriate and just” remedy for those *Charter* violations: *Brazeau/Reddock*, at para. 72.

(ii) Applicable legal principles

[57] An examination of any claim to *Charter* damages begins with the oft-quoted words of McLachlin C.J.C in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 4:

> I conclude that damages may be awarded for a *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfil one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages. [Emphasis added.]

[58] The third step identified in *Ward* is the focus of this case. As explained in *Ward*, the Crown may defeat an otherwise viable claim to *Charter* damages by demonstrating countervailing factors, rendering damages an inappropriate or unjust remedy: at para. 33. *Ward* refers to the availability of alternative remedies and "concerns for good governance" as two examples of countervailing factors: at paras. 32-38. Ontario relies on "good governance" concerns in its argument that damages are an inappropriate remedy in this case.

[59] *Ward* uses the terms "good governance" and "effective governance" interchangeably. It does not offer a definition of either. Generally speaking, good governance concerns describe the potentially negative impact of *Charter* damage

awards on the conduct of state actors charged with the responsibility of enacting laws and implementing and enforcing those duly enacted laws. The concern is that state actors will be deterred from performing those functions if they fear that, at some future point, a court will declare those duly enacted laws unconstitutional and award damages for acts done relying on the authority of the now unconstitutional laws: *Ward*, at paras. 39-41; *Henry v. British Columbia (A.G.)*, 2015 SCC 24, [2015] 2 S.C.R. 214, at paras. 39-41.

[60] *Ward* makes it clear that good governance concerns do not necessarily defeat a claim for damages. State conduct that is sufficiently blameworthy will give rise to *Charter* damages despite good governance concerns. For example, a law passed in bad faith will not be immunized from *Charter* damages by good governance concerns. To the contrary, awarding *Charter* damages for state actions based on laws enacted in bad faith promotes good governance. The blameworthiness threshold referred to in *Ward* is not a single bright line but will vary with the nature of the state conduct giving rise, both to the *Charter* violations and the good governance claim: see *Ward*, at paras. 39-43; *Brazeau/Reddock*, at paras. 66-67.

(iii) The *Brazeau/Reddock Charter* damages analysis

[61] The *Ward* principles governing *Charter* damages were considered in the context of administrative segregation in federal prisons in *Brazeau/Reddock*. In the

cases of both Mr. Brazeau and Mr. Reddock, the motion judge had awarded aggregate *Charter* damages of $20 million for breaches of ss. 7 and 12 of the *Charter*: *Brazeau (ONSC)*, at para. 445; *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, 441 C.R.R. (2d) 1 ("*Reddock (ONSC)"*), at paras. 397, 486, rev'd on other grounds, 2020 ONCA 184. In Mr. Reddock's appeal, this court upheld that award in respect of inmates held in administrative segregation for more than 15 consecutive days: *Brazeau/Reddock*, at paras. 102-104. In Mr. Brazeau's appeal, this court agreed that seriously ill inmates who had been unconstitutionally held in administrative segregation were entitled to *Charter* damages. The court further determined that the motion judge attached certain improper conditions to the damage award he made. The court remitted that issue to the motion judge for reconsideration. He subsequently confirmed an award of $20 million in aggregate damages: *Brazeau/Reddock*, at paras. 105-113; *Brazeau v. Canada (Attorney General)*, 2020 ONSC 3272.

[62] The evidence, arguments and findings in *Brazeau/Reddock* relevant to the *Charter* damage claims were very similar to the evidence, arguments and findings made here. As in this case, the appropriateness of damages as a *Charter* remedy in *Brazeau/Reddock* turned on whether good governance concerns should preclude a damage award and, if so, whether the state conduct was sufficiently blameworthy to override those concerns. Finally, as in this case, the regulatory scheme in *Brazeau/Reddock* giving rise to the *Charter* breaches was an amalgam

of general statutory powers, a broadly worded regulation, and a series of policies and operational decisions implemented by the correctional authorities.

[63] Ontario accepts the *Brazeau/Reddock* analysis with one important exception. Ontario argues that, when considering the blameworthiness of Ontario's conduct for the purposes of step three in *Ward*, the court must consider only prior judicial pronouncements referable to the constitutionality of the conduct in issue. Ontario argues that the court in *Brazeau/Reddock* erred in looking to non-judicial sources, such as international norms, and the opinion and reports of experts, when assessing the blameworthiness of Ontario's conduct.

[64] The respondent submits that, if good governance concerns are engaged, *Brazeau/Reddock* applies and fully supports the damage award made by the motion judge. The respondent also submits, relying on *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, 447 D.L.R. (4th) 1 ("*CSF*"), that good governance concerns are not even in play because Ontario's administrative segregation regime is a product of executive decision-making and not any duly enacted laws.

(iv) Is the *Brazeau/Reddock* analysis determinative?

[65] The *Brazeau/Reddock* analysis is central to the *Charter* damage arguments made in this case. *Brazeau/Reddock* follows the four-step trail cut in *Ward*: *Brazeau/Reddock*, at paras. 39-40, 46-72, 100-101. The court, applying earlier

authority, accepted good governance concerns were not limited to actions flowing directly from the enactment of legislation, but could arise in the context of a regulatory scheme involving statutes, regulations, and government policies. The court said, at paras. 56 and 59:

> We accept that at the third stage of the Ward test, the more general good governance concern does come into play in both *Brazeau* and *Reddock*. These are class-wide claims that do not rest upon proof of individual or specific acts of maladministration. They challenge the regulatory scheme and the systemic practices and policies adopted by the correctional authorities in the application of the [relevant legislation].

…

> When a regulatory scheme is challenged, the state is entitled to assert that "concerns for good governance" immunity must be considered. The regulatory regime is the sort of policy choice for which, in the words of *Ward*, "the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance". [Citation omitted.]

[66] Having determined that state actions done in the implementation of a regulatory scheme could give rise to good governance concerns, the court next considered, at para. 67, when those state actions would be viewed as sufficiently blameworthy to remove any legitimate good governance concerns:

> As we are dealing with a regulatory regime premised on administrative segregation of indeterminate duration rather than legislation requiring that result, we consider it appropriate to apply the minimum threshold of fault described in *Ward*, namely, "a clear disregard for the claimant's *Charter* rights". [Citation omitted.]

[67] *Brazeau/Reddock* analogized the “clear disregard” standard to criminal law notions of recklessness and wilful blindness. Both concepts contemplate knowledge of a risk and unjustifiable risk-taking: *Brazeau/Reddock*, at para. 87.

[68] Finally, the court turned to the evidence relevant to whether the correctional officials, on an institutional level, had been reckless or wilfully blind as to the unconstitutional effects of administrative segregation. The court referred to evidence offered by the respondent from a wide variety of international and domestic sources. That evidence revealed a well-established, longstanding consensus that prolonged administrative segregation, as well as administrative segregation of seriously mentally ill inmates, resulted in serious physical and psychological harm to those inmates: *Brazeau/Reddock*, at paras. 74-99. The court concluded, at para. 100:

> In our view, Canada’s failure to alter its administrative segregation policies in the face of this mounting and concerted criticism from the medical profession, a Royal Commission, a coroner’s inquest, the Correctional Investigator, and various international agencies meets the standard of a “clear disregard for *Charter* rights”.

[69] On the findings of the motion judge in *Brazeau (ONSC)* and *Reddock (ONSC)*, as confirmed by this court in *Brazeau/Reddock*, Canada maintained an administrative segregation regime in the face of overwhelming evidence that the regime imperiled the constitutional rights of inmates. Given the reckless disregard

for those rights, Canada could not successfully advance good governance concerns in answer to the damage claim advanced by the inmates.

[70] As set out above, Ontario takes issue with the *Charter* damage analysis in *Brazeau/Reddock*, only to the extent that the court looked to sources other than Canadian judicial precedents when determining whether the state conduct showed a clear disregard for the constitutional rights of inmates. Ontario argues that the blameworthiness of its conduct had to be measured only against what Canadian courts had said about the constitutionality of administrative segregation. Ontario maintains the unconstitutionality of administrative segregation in Canada was not apparent until this court's decision in *CCLA* in March 2019, after the close of the class period.[2]

[71] Ontario, as an intervener, unsuccessfully made this argument in *Brazeau/Reddock*. Assuming we can and should reconsider the merits of the argument on this appeal, we are satisfied the argument must fail.

[72] State conduct showing a "clear disregard" for the unconstitutional consequences of that conduct is the antithesis of good governance. As explained in *Brazeau/Reddock*, a finding that the state clearly disregarded the unconstitutional consequences of its actions is predicated on a finding of

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[2] It should be noted that the application judge in *CCLA* had found a breach of inmates' procedural due process rights in his reasons released in December 2017: *CCLA (ONSC)*, at para. 155.

recklessness or wilful blindness. Both require an appreciation of the risk that the impugned state action will infringe constitutional rights. When deciding whether correctional authorities acted with a “clear disregard” for the unconstitutional consequences of their actions, it is appropriate to take into account reliable information available to correctional authorities which, as a matter of common sense and logic, sheds light on the existence and degree of the risk of unconstitutional consequences flowing from administrative segregation.

[73] For example, there was a great deal of expert evidence speaking to the longstanding knowledge in Canada, and internationally, of the very serious harmful effects of solitary confinement, particularly on the seriously mentally ill. Similarly, the evidence was replete with studies, reports and recommendations indicating the consequences of solitary confinement fell within the meaning of cruel and unusual treatment, as the phrase is used internationally and in the *Charter*. Most of that information was readily available to correctional authorities and would inform their appreciation of the risk that administrative segregation in provincial jails caused physical and mental consequences falling within the meaning of cruel and unusual treatment and denied inmates procedural due process.

[74] Ontario contends that, as only the courts can interpret and apply the constitution, only judicial pronouncements are relevant to whether state conduct shows a clear disregard for constitutional rights. There is no doubt only courts can authoritatively interpret the constitution. Constitutional interpretation is, however,

not the same thing as assessing the degree of risk that a certain course of conduct will result in the infringement of constitutional rights. Ontario cannot turn a blind eye to overwhelming evidence of the unconstitutionality of its actions just because a court has yet to pronounce on that which is obvious.

[75] Judicial pronouncements on the constitutionality of government action go further than identifying a risk of a constitutional violation. They establish the reality of the violation. Other kinds of evidence, while not capable of establishing a violation, provide a basis against which the risk that certain state conduct violates well-established constitutional norms can be assessed. Ontario's submission operates from the faulty presumption that the risk of constitutional breach can be measured only after the breach is formally proclaimed by way of judicial pronouncements.

[76] Applying the third step in *Ward*, the motion judge had to consider whether Ontario had demonstrated that good governance concerns made damages inappropriate. To establish the countervailing good governance concerns, Ontario had to show its conduct was not sufficiently blameworthy to negate any good governance concerns. In the context of a regulatory scheme, blameworthiness is equated with a clear disregard for the unconstitutional consequences of administrative segregation. To assess blameworthiness, the motion judge needed evidence about the physical and mental effects of administrative segregation on

inmates, and what the correctional authorities could reasonably be taken to have known about those effects.

[77] The respondent produced a substantial body of evidence from both national and international sources, demonstrating the serious harms flowing from administrative segregation. Much the same evidence was heard in *Brazeau/Reddock*. Like the motion judge in this case, and the court in *Brazeau/Reddock*, we are satisfied that Ontario was aware of the very real risk, if not the very real likelihood, that administrative segregation, as practised in Ontario jails, routinely violated the constitutional rights of inmates.

[78] The information relied on in *Brazeau/Reddock* and by the motion judge in this case was properly considered in assessing the blameworthiness of Ontario's actions at the third step of the *Ward* inquiry. That material fully justified the conclusion that Ontario's clear disregard for the *Charter* rights of the inmates precluded any reliance on those good governance concerns.

[79] The analysis to this point is enough to dispose of Ontario's appeal from the damages award. Simply put, *Brazeau/Reddock* controls. On that authority, damages for the *Charter* breaches were an "appropriate and just" remedy. We would affirm the damage award made by the motion judge. We note that the quantum of the damage award was not challenged on appeal.

(v) Are good governance concerns in play?

[80] While it is unnecessary for the purpose of determining the appeal, we will briefly address the respondent's argument that good governance claims are not germane on the evidence adduced in this case. The respondent submits that administrative segregation in Ontario is the product of ministerial policies and management level operational decisions, rather than any specific statutory mandate. The respondent contends that good governance concerns arise only where state actors engage in conduct dictated by a statute which is subsequently held to be unconstitutional: see e.g. *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405.

[81] The motion judge accepted this argument, at para. 571:

> [I]n 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, *Mackin* does not apply in the circumstances of the immediate case.

[82] The motion judge is correct in indicating that there is no statutory provision mandating administrative segregation in Ontario jails. There is no statute that directs correctional authorities to use administrative segregation or directs correctional authorities as to how administrative segregation is to be used in controlling the prisoner population.

[83] We also accept that, in cases in which there is a direct cause and effect between the statutory provision and the unconstitutional conduct, good governance concerns operate at their strongest: see e.g. *Mackin*. In *Brazeau/Reddock*, and other cases, this court has accepted the relevance of good governance arguments when unconstitutional state conduct is traced to a regulatory scheme that is part statute, part regulation, and part policy. The respondent submits the recent decision of the Supreme Court of Canada in *CSF* makes it clear that the good governance concerns identified in *Ward* apply only to actions taken to enforce a statutory provision.

[84] CSF is the French language school board in British Columbia. It sued the British Columbia government, alleging that several aspects of the provincial educational funding provided to CSF infringed minority language educational rights under s. 23 of the *Charter*. The case was factually complex, to put it mildly. The trial judge found several *Charter* breaches, including one based on the failure of the government to adequately fund the transportation needs of CSF. The trial judge awarded *Charter* damages for that breach. The British Columbia Court of Appeal reversed, holding that good governance concerns rendered *Charter* damages an inappropriate remedy: *CSF*, at para. 49.

[85] Wagner C.J.C., speaking for a seven-person majority, restored the trial judge's award. The Chief Justice drew a distinction between actions or decisions made under laws that were duly enacted, but subsequently declared to be invalid,

and actions taken pursuant to the government's own policies. He explained, at para. 177, that only actions taken under duly enacted legislation could be shielded from *Charter* damages by good governance concerns:

> The enactment of laws is the fundamental role of legislatures, and the courts must not act so as to have a chilling effect on the legislatures' actions in this regard. When the legislative branch enacts a law, it confers powers on the executive branch. In contrast, a minister's decisions respecting school transportation are not a "source" of duty for the government in the same way as a law. When the executive branch adopts a government policy, it confers powers on itself. In light of this distinction, there is good reason not to extend the limited government immunity to government policies.

[86] The two-person dissent took issue with the distinction made between laws and government policies. The dissent saw good governance concerns as relevant to state action intended to carry out the functions of government. Those functions could be carried out by way of statutory enactments, but also by way of government policies. The minority opined, at para. 294:

> Again, the focus should not be on the *vehicle* of state action but rather the *purpose* of the immunity. Whether the state acts through legislation, regulations, or policies, the rationale behind the immunity is that the state should be able to carry out its functions without the threat of damages, absent some threshold of misconduct. Policymaking is clearly a key state function.

[87] The Chief Justice's reasons in *CSF*, distinguishing between actions in furtherance of a statutory authority and government policies, make the argument advanced by the respondent and accepted by the motion judge more formidable.

It is difficult, however, to know, based on *CSF*, where the line is drawn between state action taken in furtherance of policies and state action made or taken under laws. In *CSF*, at para. 169, the Chief Justice quoted, with approval, from *Ward*, at para. 40:

> [T]he 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. [Emphasis added.]

[88] In *CSF*, at para. 169, the Chief Justice explained that the references to "policy-making" in *Ward* referred to "government policies that are based on laws". *CSF* contemplates that some action based on government policies can raise good governance concerns.

[89] We would think that most government policies are based on laws in some way or another. The connection between a duly enacted law and a policy may be much more tenuous in some circumstances than others. Certainly, the link between Ontario's administrative segregation regime and any statutory authority is tenuous. It may be, as the link between government action and duly enacted legislation becomes more tenuous or indirect, the level of blameworthiness of the state conduct needed to negate good governance concerns will decrease.

[90] In some cases, the evidence may go so far as to show no meaningful connection between any statutory authority and the governmental policies giving

rise to the unconstitutional actions. In that case, it cannot be said that any state actor relied on a statutory authority to do anything. The good governance concerns described in *Ward* are predicated on an assumed reliance on some statutory authority as the justification for the impugned state conduct.

[91] It may be that the majority in *CSF* intended to limit good governance concerns to cases like *Mackin*, where the unconstitutional conduct is compelled by the terms of the statute. The majority does not, however, say so, and its approving reference to passages from *Ward*, which specifically include government policies, suggests otherwise. Nor does the analysis of the majority in *Henry*, a case where the unconstitutional conduct flowed from prosecutorial misconduct, support limiting good governance concerns to cases like *Mackin*.

[92] In our view, the law in Ontario remains as set down in *Brazeau/Reddock*. Good governance concerns at step three of *Ward* may be raised if government policies, which precipitated unconstitutional actions, can be sufficiently connected to statutory provisions (or perhaps provisions in a regulation): see *CSF*, at para. 178.

[93] As it is unnecessary to attempt a definitive interpretation of *CSF* for the purposes of this appeal, we decline to do so. The *Charter* damages award is fully justified on the *Brazeau/Reddock* analysis.

THE NEGLIGENCE CLAIM

[94] While it is not technically necessary to consider the negligence claim in light of our conclusions regarding the *Charter* claim, we do so for the sake of completeness, recognizing that the matter was analyzed in detail by the motion judge and was fully argued before us. We are also conscious of the fact that another court might reach a different conclusion on the *Charter* issues and would then need to address the claim in negligence. It may also transpire that another court would take a different view of whether the damages award for *Charter* breaches should or should not subsume the damages award for negligence.

C. Did the motion judge err in holding Ontario liable in negligence?

[95] Ontario submits that the motion judge erred in finding that a duty of care arose out of Ontario's statutory duties and in finding that the respondent's claim was not extinguished or precluded by the *CLPA* or the *PACA* respectively.

(vi) The foundation for the negligence claim

[96] The motion judge undertook a lengthy review of the arguments surrounding whether a systemic negligence claim could be made out against Ontario on the facts of this case. He ultimately concluded that it could. The motion judge found that a duty of care arose from Ontario's statutory duties and its relationship with the inmates.

[97] Ontario challenges that conclusion largely on the basis that this court had already determined in *Brazeau/Reddock* that a systemic negligence claim could not be established. We note that *Brazeau/Reddock* dealt with the federal correctional system, not the provincial correctional system.

[98] We do not agree that this court's decision in *Brazeau/Reddock* has predetermined the outcome in this case. The decision in *Brazeau/Reddock* turned principally on the way in which the plaintiff had pleaded his case. In particular, this court found that the plaintiff had rested his systemic negligence claim on a pleading that challenged what this court found to be policy decisions. Since policy decisions are immune from suit, the negligence claim in that case had to fail. This court said, at para. 120:

> 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.

[99] The pleadings in this case are different from the ones in *Brazeau/Reddock*. That difference arises in two respects. The first involves the class definition in this case. The class comprises two groups, as we have set out above – SMI Inmates who were subjected to administrative segregation for any length of time and Prolonged Inmates who were subjected to administrative segregation for periods of 15 or more consecutive days. The class does not include all the other inmates

who may have been subject to administrative segregation in different circumstances or for different reasons.

[100] The second difference is that the amended statement of claim in this case focuses on the implementation of administrative segregation in Ontario institutions. It relies on decisions and actions that are of an operational nature. Indeed, the amended statement of claim makes frequent reference to Ontario's responsibility for the "operation" of its correctional facilities. Specific allegations are made respecting negligence in operational decisions including:

- failing to remove class members from administrative segregation in a timely fashion in order to avoid permanent injury;
- over-relying on administrative segregation for administrative purposes within the correctional institutions;
- failing to investigate or report ongoing harm suffered by class members;
- failing to adequately supervise the correctional institutions, including their administration and activities;
- failing to adequately, properly, and effectively, supervise the conduct of its employees, representatives, and agents to ensure that the class members would not suffer unreasonable harm; and
- failing to properly exercise discretion in determining an appropriate length of time for class members to spend in administrative segregation.

[101] Based on these, and other, allegations of negligence, and in reliance on the evidence before him, the motion judge concluded, at para. 449:

> 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.

[102] As we have said, the motion judge engaged in a lengthy analysis of whether a duty of care arose in this case. We generally agree with that analysis. On the first branch of the test from *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, the *prima facie* duty test, there is clearly a close relationship between Ontario and the inmates (i.e. proximity) that would support a basis for finding a duty of care. It is well-established that governments owe a duty of care to individuals while they are in custody: *MacLean v. The Queen,* [1973] S.C.R. 2, at p. 7. Ontario does not dispute that is the case.

[103] It follows, from the nature of the relationship, that actions taken which result in injury to an inmate could be reasonably foreseeable. Again, that is accepted to be the case on an individual basis, and we see no principled reason why that could not be the case on a class basis. If identical action is taken regarding the inmate population, or a subset of that population, and harm results, it is as foreseeable on a group-wide basis as it is on an individual basis.

[104] That then leads to the second branch of the *Cooper v. Hobart* test, which is whether there are residual policy considerations that would militate against a

finding of a duty of care. Those considerations lead to the issue of policy versus operational matters, about which we will have more to say when we come to the next issue, that is, the application of the *CLPA*. At the risk of foretelling our conclusion on that issue, we will say that we view the actions taken in this case, that form the basis of the negligence claim, to be tied to operational as opposed to policy matters.

[105] As earlier noted, this court ruled against a systemic negligence claim in *Brazeau/Reddock* because it found, at para. 120: “Rather, the duty alleged arises from different acts in different circumstances and in relation to different individuals.”

[106] As we have mentioned above, the actions alleged in this case do not constitute different acts in different circumstances. Rather, what is challenged, at the very core of this claim, is the same act being undertaken, that is, placing inmates in administrative segregation in two specific circumstances where it is said that injury will naturally result. The first circumstance is where SMI Inmates are placed in administrative segregation for any length of time. The second circumstance is where Prolonged Inmates are placed in administrative segregation for a period of 15 or more consecutive days. The expert evidence establishes that both of these actions will give rise to injury or harm to each and every involved individual.

[107] There is no reason in principle to adopt an approach to these claims that requires each individual inmate to commence their own action in order to seek relief for the resulting harm. Indeed, such a result would run counter to the very purpose behind the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[108] Such a result would also be contrary to the approach taken in other similar types of claims. The motion judge refers to two such examples. In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184, the Supreme Court of Canada upheld a class action which alleged systemic negligence in the operation of a residential school for the deaf and blind. Similarly, in *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50, this court certified a class action involving a claim of systemic negligence in the operation of a residential school.

[109] In both of those cases, the same obstacle was sought to be erected to allowing a class claim, that is, that the individual circumstances would have to be examined in order to determine whether the duty of care had been breached. In both cases, that effort failed. As McLachlin C.J.C. said in *Rumley*, at para. 30:

> 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.

[110] Similarly, in this case, the actions of Superintendents directing, or allowing, the SMI Inmates and the Prolonged Inmates to be subjected to administrative segregation can be determined without reference to their individual circumstances. In other words, those actions are capable of being determined on an institution-wide basis through the institution's own records. The institution's records will establish which inmates were subjected to administrative segregation and, of those individuals, who falls within either the SMI Inmates or Prolonged Inmates groups. We repeat that the expert evidence then establishes that harm will be occasioned to each and every individual in both of those groups. While individual circumstances may ultimately be relevant to the proof of individual levels of damages, they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all: *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, 130 O.R. (3d) 241, at para. 75, leave to appeal refused, [2016] S.C.C.A. No. 255.

(vii) The *Crown Liability and Proceedings Act, 2019*

[111] Having determined that a claim of systemic negligence does lie in this case, we must address Ontario's submission that any such claim is barred by virtue of the *CLPA*.

[112] On April 11, 2019, the provincial government tabled Bill 100, *An Act to implement Budget measures and to enact, amend and repeal various statutes*, 1st

Sess., 42nd Parl., Ontario, 2019, its omnibus budget bill, the short title of which was "*Protecting What Matters Most Act (Budget Measures), 2019*". In keeping with what appears to have become a practice in recent times, Bill 100 did not deal solely with budget matters. Rather, the Bill was 178 pages long, contained 61 schedules, and affected 199 separate statutes. Included in Bill 100, as schedule 17, was the *CLPA*. Bill 100 received Royal Assent on May 29, 2019.

[113] Sections 11(4) and 11(5) of the *CLPA* are of particular relevance to the issue in this case. They read:

> (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.
>
> (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.

[114] The legislation speaks to whether it applies to any current or future claim. Section 11(8) provides that a "proceeding that may not be maintained under subsection (7) is deemed to have been dismissed, without costs, on the day on which the cause of action is extinguished under subsection (1), (2), (3) or (4)". Further, s. 31(4) provides that "[s]ection 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". Simply put, the legislation has immediate and retroactive effect.

[115] The motion judge considered the application of the *CLPA* and concluded that it did not preclude the respondent's claim for systemic negligence. In reaching that conclusion, the motion judge found that the *CLPA* simply codified the existing law regarding Crown immunity and the policy/operational dichotomy that rendered the Crown immune from liability for the former, but not the latter. The motion judge also found that Ontario's conduct in this case was operational in nature, not a policy matter.

[116] Ontario challenges the motion judge's conclusion that the *CLPA* simply codifies the existing law on Crown immunity. Ontario says that, while a goal of the statute was to codify existing law, it was also a goal of the statute to "clarify" the

existing law. In particular, Ontario argues that the statute intended to clarify what constitutes a policy matter as opposed to an operational matter.

[117] In support of its submissions on the proper interpretation, Ontario points to one case that has since been decided under the *CLPA*, namely, *Seelster Farms v. Her Majesty the Queen and OLG*, 2020 ONSC 4013, 68 C.C.L.T. (4th) 104, where Emery J. said, at para. 117:

> The *CLPA* removes the distinction between decisions that are policy decisions, and decisions that are operational in nature, made for the purpose of implementing or carrying out a government policy or program. The language used in [subsection 11(5)(c)] extends the traditional immunity afforded to policy decisions to those decisions made to implement a policy matter to decisions that include the termination of that policy, and any notice or other relief claimed by affected parties. The lines of analysis have been moved by the *CLPA* for the purpose of determining Crown immunity from questioning whether the decision was one of policy or if it was operational in nature, to whether it was made in good faith.

[118] With respect, the above language does not clarify the policy/operational dichotomy; it eliminates it.

[119] The respondent says that the decision in *Seelster Farms* stands alone in its interpretation of the *CLPA*. The intervener, Canadian Civil Liberties Association, agrees. It points to three other cases – *Barker v. Barker*, 2020 ONSC 3746, at paras. 1262-1263; *Cirillo v. Ontario*, 2020 ONSC 3983, at para. 13; and *Leroux v. Ontario*, 2020 ONSC 1994, 63 C.C.L.T. (4th) 219, at para. 29 – in which the

opposite conclusion was reached or, at least, intimated. As will become apparent, we do not share the view expressed in *Seelster Farms* as to the effect of the legislation, although we understand how that view could arise on the face of the wording used in s. 11.

[120] The respondent buttresses his position as to the intention of the legislation by pointing to the explanation given by the Attorney General at the time that the legislation was introduced. The Attorney General told the Legislature, in part, that: "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."[3]

[121] Ontario responds by saying that the comments made by the Attorney General must be read in their entire context and repeats the fact that the Attorney General also explained that the legislation was intended to "clarify" the current state of the law.

[122] We approach our analysis of this issue with two specific principles of statutory interpretation in mind. They are:

- The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act,

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[3] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 42nd Parl., 1st Sess., No. 97 (29 April 2019), at p. 4555 (Hon. Caroline Mulroney).

the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.

- There is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent: *Canada (Attorney General) v. Thouin,* 2017 SCC 46, [2017] 2 S.C.R. 184, at para. 19.

[123] In considering the proper interpretation of the statute, we are also mindful of the genesis of statutes that address the issue of Crown immunity from suit. That genesis was explained in *Just v. British Columbia*, [1989] 2 S.C.R. 1228, where Cory J. said, at p. 1239:

> The early governmental immunity from tortious liability became intolerable. This led to the enactment of legislation which in general imposed liability on the Crown for its acts as though it were a person. However, the Crown is not a person and must be free to govern and make true policy decisions without becoming subject to tort liability as a result of those decisions. On the other hand, complete Crown immunity should not be restored by having every government decision designated as one of "policy".

[124] In our view, Ontario's submission as to the proper interpretation of the *CLPA* comes perilously close to adopting precisely what Cory J. cautioned against, that is, characterizing every government decision as policy. This results from the interpretation that Ontario asks be given to s. 11, and, more particularly, to these words from s. 11(5)(c): "the manner in which a program, project or other initiative is carried out".

[125] Ontario's interpretation would give those words almost limitless application which would, in turn, dramatically change the current state of the law. Indeed, Ontario accepts that, at common law, decisions as to how government programs are to be "carried out" might well have been characterized as "operational" decisions to which no immunity applies. However, Ontario submits that the intent of s. 11(5)(c) is to reverse that situation. That result would give a rather expansive meaning to the word "clarify".

[126] Ontario then attempts to limit the consequences of this submission by saying that it does not seek to immunize all government action from negligence claims "as many government acts and omissions do not fall within its ambit". Ontario does not, though, explain how its submission as to the proper interpretation of the statute would allow for that result.

[127] It is s. 11(5)(c) of the *CLPA* that is at the heart of the interpretive issue. We would not give it the broad interpretation that Ontario urges in this case. We reach that conclusion for a number of reasons. First and foremost is the principle, that we set out above, that there is a presumption that the common law remains unchanged absent a clear and unequivocal expression of legislative intent. In our view, the combination of ss. 11(4) and (5) fails to achieve that clear and unequivocal expression. Sub-section 11(4) expressly references matters of policy. Sub-section 11(5) then purports to define what a policy matter may include. It follows that this definition must be predicated on maintaining the policy/operational

separation. Had the intention been to do otherwise, the legislation could have expressly said so. For example, s. 11(5)(c) could have opened with "…the manner in which a program, project or other initiative is carried out, including operational decisions regarding,…" if the intent had been to expand the policy label to the extent that Ontario now submits.

[128] Second, to adopt Ontario's expansive meaning of s. 11(5)(c) of the *CLPA* would directly offend the purpose behind statutes limiting Crown immunity, as explained by Cory J. in *Just*. There is, in fact, no limitation to the effect of the expansive meaning urged by Ontario in this case. Its logical conclusion would include virtually any step taken by the provincial government in carrying out any "program, project or other initiative". Indeed, this is precisely the conclusion reached in *Seelster Farms*. The difficulty with that approach is aptly expressed by McLachlin C.J.C. in *R. v. Imperial Tobacco Canada Ltd.,* 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 76: "[e]xempting all government actions from liability would result in intolerable outcomes."

[129] Third, to adopt Ontario's expansive meaning would require a conclusion either that the Attorney General, at the time, did not understand the effect of the legislation being introduced, or that she misled the Legislature as to its intention and effect. Neither of those conclusions should be drawn absent there being no alternative explanation. In contrast, an interpretation of the *CLPA* that maintains

the existing separation between policy decisions and operational decisions takes the Attorney General at her word.

[130] Applying that approach to this case, we accept that the provincial government can adopt a policy of using administrative segregation in its correctional facilities. That is a policy matter, and its advisability is a matter for the government alone to determine, albeit within limits. We also consider it to be a policy matter for the government to decide who will implement administrative segregation, in the sense that it is open to the government to delegate the details and manner of implementation of the policy to the Superintendents of the various correctional facilities, as opposed to having those details determined, for example, by the relevant Ministry officials.

[131] However, how the policy is actually applied, that is, its process at ground level, is not a policy matter. That is an operational matter, like any number of other operational matters that the Superintendent of a correctional institution has to determine on a day-to-day basis.

[132] This line between policy and operational matters may be illustrated by adapting an example used by counsel for the Canadian Civil Liberties Association. If the provincial government decides that it wishes to provide public transit between two towns in Ontario, that is a policy decision. If the provincial government decides that it is going to provide that public transit through buses rather than trains, that

is also a policy decision. However, how those buses actually transport people is an operational matter.

[133] This conclusion is, in our view, consistent with the prevailing authorities on the distinction between policy and operation – admittedly a distinction that courts have found “notoriously difficult to decide”: *Imperial Tobacco*, at para. 78.

[134] A review of the case law demonstrates that government immunity from tort claims relates only to what is referred to as “true” or “core” policy decisions. The rationale for this immunity was to allow governments ample scope to make decisions based upon social, political and economic factors, without being exposed to tort liability for those decisions.

[135] In discussing this point in his reasons in *Just*, at pp. 1241-42, Cory J. references the decision of the High Court of Australia in *Sutherland Shire Council v. Heyman*, [1985] HCA 41, 157 C.L.R. 424, at paras. 38-39, *per* Mason J., which also discussed the policy/operation distinction. In that decision, it was noted that budgetary allocations and constraints cannot be the subject of a tort claim. However, the court noted that it would be different when a court is called upon to review “action or inaction that is merely the product of administrative direction”.

[136] The decision in *Just* went on to consider other situations, including the inspections of lighthouses or aircraft manufacturing, and the difference between decisions regarding the funding of such inspections (policy) and the conduct of

those inspections (operation). In applying these principles to the facts of the case before him, which was the inspection of a rock slope beside a highway, Cory J. found that the inspections were “manifestations of the implementation of the policy decision to inspect and were operational in nature”: at p. 1246.

[137] The policy/operation distinction was also discussed in *Imperial Tobacco*. In explaining the distinction, McLachlin C.J.C. again focussed on whether the decision in question was the result of “social, economic, and political” considerations: at para. 87. McLachlin C.J.C. concluded on the issue of policy as follows, at para. 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.

[138] McLachlin C.J.C. also repeated the observation, from U.S. case law, that “employees working at the operational level are not usually involved in making policy choices”: at para. 89.

[139] In our view, Superintendents (or their staff) are such employees. Regulation 778 reflects a policy of permitting administrative segregation. However, in deciding to place class members in administrative segregation, Superintendents were implementing that policy and, thus, their decisions were operational in nature. In

doing so, we would note, their decisions did not revolve around social, economic or political considerations.

[140] In this case, s. 11(5)(c) of the *CLPA* does not protect Ontario from the actual results that flow from the implementation of its administrative segregation policy. On that point, we note that Regulation 778 does not contain any definition of what constitutes segregation, nor does it impose any caps on the length of such segregation or stipulate the manner in which segregation is to be affected, nor does it cover a myriad of other matters regarding how segregation will actually be employed. All of these details are left for the individual Superintendent to determine.

[141] If a Superintendent applies the policy on administrative segregation to an inmate in a negligent manner, that is, in a manner that causes injury or harm, then Ontario is liable for that injury or harm. This negligence could include applying segregation in a manner that constitutes solitary confinement; applying segregation to seriously mentally ill inmates; imposing segregation for periods of 15 days or more on any inmate; and other like decisions that run contrary to established medical evidence as to the consequences. Such a result is beyond the reach of any expanded definition of policy contained in s. 11(5)(c) of the *CLPA* as we would interpret it.

(viii) The *Proceedings Against the Crown Act*

[142] One last technical point needs to be addressed with respect to this issue. Ontario asserts that the respondent's claim is fundamentally flawed because it does not advance specific allegations of tortious conduct by individual Crown servants, for whom Ontario would be vicariously liable. Rather, Ontario says that the claim advanced is effectively one of direct liability from which Ontario is immune under s. 5 of the *PACA.*[4] Ontario is only liable for indirect claims, under s. 5(1), which reads, in part:

> [T]he 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;

[143] The motion judge addressed this argument in his reasons and rejected it. He said, at para. 485:

> 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.

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[4] Section 31(3) of the *CLPA* continues the application of the *PACA* to claims made prior to s. 31 coming into force.

[144] We agree with the motion judge's determination of this issue. On a fair reading of the amended statement of claim, it is clear that the allegations being made against Ontario arise from its vicarious liability for the negligent acts of its servants. The amended statement of claim expressly references Regulation 778, by which administrative segregation decisions are left to the individual Superintendents. It is also clear from the amended statement of claim that the negligent acts are those of servants of Ontario. It is axiomatic to point out that Ontario can only operate through the actions of individuals.

[145] There is no absolute requirement that the individual servants of the Crown, who undertake the negligent acts, must be named in the proceeding. Section 5(2) of the *PACA* simply says that no proceeding can be brought against the Crown "unless a proceeding in tort in respect of such act or omission may be brought against that servant or agent" (emphasis added). The section does not require that the proceeding must be brought against that servant or agent.

[146] We accept that best practices in pleadings might suggest that the negligent individual, from whom vicarious liability arises, be named as a party, at least in a case where only one event or individual is involved. However, this is a class proceeding in which collective claims are made. As the motion judge pointed out, it is impractical to expect a representative plaintiff, advancing a claim covering a class period of almost three and one-half years, with class members in 32

correctional institutions, to name all of the individuals involved in the collectively negligent acts.

[147] As an alternative, best practices in pleadings might suggest naming a John and Jane Doe to represent all of those individuals in such situations, but the failure to do so is not fatal to the claim. On this point, we repeat the often-cited principle that a statement of claim is to be read "as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies*": Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 451.

V. CONCLUSION

[148] The appeal is dismissed. The respondent is entitled to his costs of the appeal in the agreed amount of $50,000 inclusive of disbursements and HST.

Released: March 31, 2021 DD

Whitten J.A.

I agree. Harrison Young J.A.