SUPREME COURT OF NOVA SCOTIA
Citation: *Adams v. Nova Institution*, 2021 NSSC 313

Date: 20211112
Docket: Tru. No. 498177
Registry: Truro

Between:

Lisa Adams

Applicant

v.

Warden of Nova Institution for Women,
Correctional Services Canada and
Attorney General of Canada

Respondents

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	November 9, 2020, in Truro, Nova Scotia
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **November 18, 2021**
Final Written Submissions:	June 25, 2021
Counsel:	**Jessica Rose and Emma Halpern**, counsel for the Applicant Lisa Adams **Ami Assignon**, counsel for the Respondents Warden of Nova Institution for Women, Correctional Services Canada and Attorney General of Canada **Jack Townsend**, counsel for the Attorney General of Nova Scotia on a watching brief

By the Court:

INTRODUCTION

[1] The Applicant, Lisa Adams, was an inmate at the Nova Institution for Women (the "**Nova Institution**"). On May 6, 2020, Nova Institution's Acting Warden, Claude Demers (the "**Warden**"), had reasonable grounds for believing that Ms. Adams was carrying contraband in her vagina. He authorized Ms. Adams' placement in a "dry cell" pursuant to section 51(b) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, as amended (the "***CCRA***").

[2] A "dry cell" is the place within a prison where a unique form of solitary confinement occurs. Inmates reasonably suspected of carrying contraband in a "body cavity" are separated, strip searched and placed alone in a cell on the expectation that the contraband will be "expelled".[1] It is called a "dry cell" because there are no plumbing fixtures, and the water is turned off.

[3] Once isolated in a dry cell, the inmate is afforded no privacy, allowed minimal social interaction, and kept under constant observation so that any suspected contraband will not be hidden, destroyed, or manipulated. The inmate remains in dry cell until any suspected contraband is expelled or circumstances dispel any reasonable expectation the contraband will be expelled.

[4] Ms. Adams acknowledged that the Warden had reasonable grounds for believing she was carrying contraband in her vagina. Indeed, there was considerable evidence to support the Warden's belief. Among other things, she admitted to smuggling a tobacco cigarette into the penitentiary in her vagina. In addition, testing revealed traces of methamphetamine (crystal meth) in the room where Ms. Adams was housed within Nova Institution. That said, after detained in dry cell, Ms. Adams adamantly and consistently denied carrying any contraband in her vagina.

[5] On May 22, 2020, Ms. Adams was released from dry cell after a pelvic examination demonstrated that, in fact, she was not carrying any contraband in her vagina. By that time, she had spent more than 15 days in the dry cell.

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[1] Quotation marks are used to highlight certain words that appear in the relevant provisions of the *CCRA* and therefore have a particular purpose and meaning in the statutory scheme.

[6] In sum, the Warden (or "institutional head", to use the language found in the *CCRA*) had reasonable grounds for suspecting Ms. Adams was carrying contraband in her vagina. However, 15 days of dry cell detention eventually proved those suspicions wrong.

[7] During Ms. Adams' time in dry cell, the record shows that she suffered emotionally and psychologically. She also suffered needlessly – and not simply because Ms. Adams was not actually concealing contraband in her vagina. More importantly for the purposes of this proceeding, Ms. Adams and the Federal Crown agree that the original decision to place Ms. Adams' in dry cell was unlawful, as were the decisions which kept her there for 15 days.

[8] Despite agreement that Ms. Adams' dry cell detention was unlawful, a dispute subsists around *why* Ms. Adams' detention was unlawful.

[9] Ms. Adams says that her dry cell detention was unlawful because the enabling provisions in the *CCRA* (sections 51 and 52) violate sections 7, 8, 12, and 15 of the *Canadian Charter of Rights and Freedoms* (the "***Charter***") and are unconstitutional. She asks that they be declared void and of no effect.

[10] The Respondents Corrections Services Canada, the Attorney General of Canada and the Warden argue that Nova Institution's staff (including Nova Institution's acting Warden) failed to properly administer or apply the statutory scheme in a lawful manner. In this decision, I refer to the Respondents collectively referred to as the "**Federal Crown**" although, where necessary for identification purposes, I will refer to the Warden separately. In submissions filed October 30, 2020, the Federal Crown wrote at paragraph 53:

> …it is conceded that section 51 was not applied properly when it was decided to place the applicant in a dry cell for the reason that she was suspected of concealing contraband in her vagina.

[11] However, the Federal Crown continues, the dry cell provisions of the *CCRA* cannot be condemned as unconstitutional because "section 51 does not contemplate the placement in a dry cell of a female that is suspected of concealing contraband in her vagina."[2] The Federal Crown argues that the problem in Ms.

[2] Written submissions filed October 30, 2020 at paragraph 53.

Adams' case was "maladministration"[3] and not a constitutional failure within the *CCRA*. Nova Institution staff simply failed to understand the limits of their statutory authority. No evidence was filed as to whether Nova Institution's alleged misunderstanding was a single, isolated incidence or whether it reflected a more common occurrence within penitentiaries generally.

[12] The Warden did not file an affidavit and takes no position in this proceeding. He neither agreed nor disagreed with the Federal Crown's use of the term "maladministration" in connection with Ms. Adams' dry cell detention.

[13] That said, the Federal Crown's legal arguments were largely dedicated to a preliminary jurisdictional issue. Ms. Adams was released from dry cell a few days after commencing this application. From a strictly doctrinal perspective, the only available remedy in an application for *habeas corpus* is release from unlawful detention. Therefore, the Federal Crown says, within the strict confines of *habeas corpus*, Ms. Adams' release exhausted all remedial options; eliminated any live controversy; and rendered this proceeding moot. In the circumstances, the Federal Crown concludes that the Court should decline any residual jurisdiction to adjudicate upon Ms. Adams' *Charter* claims. As part of this argument, the Federal Crown points to other procedural and evidentiary problems which arise if the Court allows complex, constitutional matters to be litigated within the highly specialized and often accelerated process of *habeas corpus*.

[14] For the reasons which follow, I find that:

1. Despite the fact that Ms. Adams commenced this proceeding as an application for *habeas corpus* and despite Ms. Adams being released from dry cell after these proceedings were commenced, the matter is not moot. Cases in which release from detention do not render an application for *habeas corpus* moot should be rare and exceptional.

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[3] For the purposes of this constitutional argument, the word "maladministration" can be traced back to the Supreme Court of Canada's decision in *Little Sisters Book & Art Emporium* v *Canada (Minister of Justice)*, 2000 SCC 69 ("***Little Sisters No. 1***") When describing the position of the appellants who were challenging the constitutionality of the customs legislation, Justice Binnie wrote "The appellants say a regulatory structure that is open to the level of *maladministration* described in the trial judgment is unconstitutionally under protective of their constitutional rights and should be struck down in its entirety." (at paragraph 71, emphasis added) Although originally used in summarizing one party's legal argument, subsequent jurisprudence uses the word "maladministration" to draw a distinction between enabling legislation and administrative actions taken under the enabling legislation. And, more specifically, to highlight the fact that administrative actions (or operational decisions) which violate the *Charter* may not necessarily render the enabling statute itself unconstitutional. See, for example, *Canada (Citizenship and Immigration)* v *Canadian Council for Refugees*, 2021 FCA 72 at paragraph 88.

However, this is one such rare and exceptional case. The Court's residual discretion is engaged to consider Ms. Adams' *Charter* claims.

2. Section 51 of the *CCRA*, as informed by the statutory definition of "body cavity" under section 46 of the *CCRA*, offends section 15 of the *Charter* and is not saved by section 1 of the *Charter*; and

3. In terms of remedy, as indicated, the Federal Crown acknowledges that dry cell detention where contraband is reasonably suspected of being carried in a vagina is unlawful. It describes Ms. Adams' dry cell detention as "maladministration". If the dry cell provisions of the *CCRA* are deemed unconstitutional, the Federal Crown proposes a tailored remedy in which section 51(b) is read down such that it is of no force or effect to the extent it applies to inmates suspected of carrying contraband in the vagina. The Federal Crown's admissions and remedial proposal mitigates the *Charter* violation under the *CCRA*, as currently drafted, and helps prevent any future breach. However, respectfully, it oversimplifies the problem and fails to recognize the fact that the search and seizure provisions of the *CCRA* were drafted in an integrated and internally cohesive manner. They work together to, among other things, prevent the importation of contraband into a prison. In doing so, they seek to maintain prison security and preserve order while, at the same time, ensuring that conditions of detention remain safe and humane for the inmate population generally and those inmates who place their own health at grave risk when carrying contraband in a vagina. In this case, the issue is not limited to section 51(b). Section 51 generally is affected. The statutory definition of "body cavity" under section 46 is also implicated. Other provisions in the *CCRA* are similarly engaged. Moreover, eliminating dry cell detention as an appropriate response to suspected contraband carried in a vagina does *not* mean that it is suddenly permissible for an inmate to carry contraband in a vagina. It is not. Carrying contraband in a vagina represents a very serious threat to security, health, and safety within a prison; and it remains an offence under the *CCRA*. If the Federal Crown's tailored remedy is accepted, how might prison administrators properly and effectively respond under what remains in the *CCRA* where there is a reasonable suspicion that contraband is being carried in a vagina? The risk cannot simply be ignored. Indeed, the facts in this case reveal at least

> some of the problems which begin to surface if a more comprehensive assessment is not undertaken. In my view, a tailored remedy focussed only on the dry cell provisions in section 51(b) (and otherwise ignoring the broader statutory scheme) is unsafe. At the same time, these issues and policy decisions which arise are for Parliament, not the Court. Parliament should be afforded the opportunity to assess the implications associated with the identified *Charter* breach and develop an appropriate legislative response. Thus, section 51(b), as informed by the definition of "body cavity" under section 46, is declared to be of no force and effect, but the declaration is suspended for a period of 6 months from the date of this decision.

ISSUE 1: SHOULD THE COURT DECLINE JURISDICTION TO DETERMINE THE CONSTITUTIONAL ISSUES IN THE CONTEXT OF THIS APPLICATION FOR *HABEAS CORPUS*?

[15] The ancient writ of *habeas corpus* springs from the same elemental beliefs which underpin the rule of law. Both reflect a commitment to equality before the law and a deep aversion to the arbitrary exercise of power. Over the centuries, *habeas corpus* has come to be recognized as a dominant force guarding the fundamental right to individual liberty against unlawful detention by the state (see, for example, *Khela* v *Mission Institution*, 2014 SCC 24 ("***Khela***"), at paragraphs 27 – 30; *Canada (Public Safety and Emergency Preparedness)* v *Chhina*, 2019 SCC 29, at paragraphs 19 – 30 ("***Chhina***"); and *G. (D.)* v *Bowden Institution*, 2016 ABCA 52, at paragraphs 105 – 122)[4] While written in the context of a *Charter* challenge of certain provisions of Canada's *Extradition Act*, the following words from Chief Justice McLachlin in *United States* v *Ferras*, 2006 SCC 33, resonate with equal force when explaining the significance of *habeas corpus* in a free and democratic society (paragraph 19):

> It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process. The idea is as old as the *Magna Carta* (1215), Clause 39 of which provided: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals, or by the law of the land."

[4] See, for example, Judith Farbey and R. J. Sharpe with Simon Atrill, *The Law of Habeas Corpus* (3rd ed), pages 1 – 17 and William F. Duker, "The English origins of the writ of habeas corpus: A peculiar path to fame" (1978), 53 N.Y.U.L.R. 983.

[16] The importance of *habeas corpus* among Canada's basic rights and freedoms is so significant as to warrant special recognition in the *Charter*. Section 10(c) of the *Charter* states that "Everyone has the right on arrest or detention to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

[17] Given the clear connection between *habeas corpus* and the notion of detention, the writ plays a vital role in corrections law where the issue of detention (including the treatment of persons who are already lawfully detained) looms large. *Habeas corpus* has become an accessible and expeditious method for imprisoned persons to challenge unlawful restraint or detention.

[18] However, the scope of *habeas corpus* within corrections law is limited by several important qualifications, including:

1. *Habeas corpus* is not an alternative method for challenging the legality of a conviction (*May* v *Ferndale Institution*, 2005 SCC 82, at paragraphs 36, referred to below as "***May***"). It is also not available as a method of dodging other, proper channels for pursing such things as bail, parole, or similar forms of legislated release where there is already a complete, comprehensive and expert procedure (*May* at paragraph 50; *Khela* at paragraph 42; *R* v *Pearson*, [1992] 3 S.C.R. 665; and *Haug* v *Warden of Dorchester Institution*, 2020 NBCA 32 ("***Haug***") at paragraph 28);

2. Once convicted and incarcerated, an inmate's personal autonomy and liberty is already, justifiably restricted. Thus, the writ of *habeas corpus* responds only to the incremental or residual loss of liberty which an inmate faces following imprisonment (*May* at paragraphs 27 – 28). In *Dumas* v *Centre de detention Leclerc de Laval*, [1986] 2 S.C.R. 459, the Supreme Court of Canada elucidated on the nature of the residual loss of liberty by noting that there must be a substantial change in conditions amounting to a further deprivation caused by the imprisonment itself (at page 464); and

3. *Habeas corpus* seeks to address unlawful detention. It does not promote the general cause of "freedom" in every form of human experience. Thus, the liberty interest protected by *habeas corpus*

involves some form of physical restraint or confinement.[5] Attempts to exploit the writ of *habeas corpus* as some cure-all or panacea for any restriction, no matter how trivial, has been rejected as harmful to the proper administration of justice (see *Miller* at paragraph 36; *Haug* at paragraph 22; *Brewer* v *Her Majesty the Queen*, 2020 NSSC 308 ("***Brewer***") at paragraph 32; *R* v *Latham*, 2018 ABCA 308 at paragraph 7; *Larente* v *Bonnefogel*, 2018 ABQB 82 ("***Larente***") at paragraph 15; *Lee* v *Canada (Attorney General)*, 2018 ABQB 40 ("***Lee***"), at paragraph 211; and *Ewanchuk* v *Canada (Attorney General)*, 2017 ABQB 237 ("***Ewanchuk***") at paragraph 51). There are a number of good reasons to limit the types of detention which can be properly addressed through an application for *habeas corpus*. They include:

a. The fact that applications for *habeas corpus* race to the top of the Court's docket and often occur at a highly accelerated pace. Nova Scotia Civil Procedure Rule 7.13(1) states: "*Habeas corpus* takes priority over all other business of the court."[6] This sense of urgency is created precisely because the underlying issues around liberty and unlawful detention are pressing and worthy of the Court's immediate attention. The same cannot be said of any minor or trivial infringement of privileges. Moreover, from the perspective of Court administration and the just determination of disputes, significant problems arise if any perceived infringement of liberty is given priority under the aegis of *habeas corpus* and rushed through to final adjudication; and

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[5] The notion of "liberty" within the context of *habeas corpus* generally, and within correctional institutions in particular, is distinct from the wider notion of liberty expressed under section 7 of the Charter. Under section 7, "liberty" is not limited to mere freedom from physical restraint but expands to include, for example, making decisions which are of fundamental personal importance. (e.g. *R.* v *Morgentaler*, (1988), [1988] 1 S.C.R. 30 (S.C.C.)) In *Brewer*, Campbell, J. acknowledged the possibility that the reach of *habeas corpus* may extend beyond physical restraint. He wrote at paragraph 33: "It is conceivable that issues that do not deal with physical confinement or restraint may be addressed to *habeas corpus*. The denial of the most basic services or the necessities of life as opposed to loss of privileges may rise or descend to become issues of liberty and attract *habeas corpus* scrutiny" (at para 33)

[6] Similarly, Rule 7.13(2) enumerates a number of steps that a judge must take "immediately" upon an application for *habeas corpus* being filed. See also *May* at paragraph 69, and *Brown* v *Canada (Public Safety)*, 2018 ONCA 14, at paragraphs 21 – 22.

b. There are often alternate procedures by which other concerns or complaints may be adjudicated including, for example, judicial review or internal complaints processes developed within a correctional facility.

[19] Having said that, administrative segregation"[7] has been recognized as often being worthy of the Court's attention because inmates are separated from the general prison population and subjected to more significant restrictions of their liberty. It has been described by the Supreme Court of Canada in *R* v *Miller*, [1985], 2 S.C.R. 613 ("***Miller***") as a "prison within a prison" (at paragraph 32). In *Miller*, the Supreme Court of Canada wrote:

> I do not say that *habeas corpus* should lie to challenge any and all conditions of confinement in a penitentiary or prison, including the loss of any privilege enjoyed by the general inmate population. But it should lie in my opinion to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution. [paragraph 35]

[20] In addition, more recent jurisprudence is replete with commentary as to the potentially serious and damaging effects associated with solitary confinement (see, for example, *Pratt* v *Nova Scotia (Attorney General)*, 2020 NSCA 39 ("***Pratt***"), at paragraph 60; *Wilcox* v *Alberta*, 2020 ABCA 104 ("***Wilcox***") at paragraphs 21 – 23 and 48 - 49; *Corporation of the Canadian Civil Liberties Association* v *Her Majesty the Queen*, 2019 ONCA 243 ("***CCCLA***"), and *British Columbia Civil Liberties Association* v *Canada (Attorney General)*, 2019 BCCA 228 ("***BCCLA***")). Leave to appeal to the Supreme Court of Canada has been granted in both CCCLA ([2019] SCCA No 96) and BCCLA ([2019] SCCA No 308), with the Supreme Court of Canada directing that these two matters be heard together.

[21] There is one further preliminary but important point to emphasize at the outset: because *habeas corpus* is dedicated to addressing unlawful deprivations of an inmate's residual physical liberty, the remedy is release. (See *Khela* at paragraphs 42 and 55; *Haug* at para 31; and *Fraser* v *Kent Institution* (1997), 130 C.C.C.(3d) 393 (B.C.C.A.) at paragraph 22).

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[7] The terms used in correctional facilities to describe the various forms of segregation can differ. They include "disciplinary segregation", "closed confinement", "solitary confinement" and "dry cell". The circumstances under which the variants of segregation occur will differ but they all share the common feature of isolating an inmate in a separate cell and imposing more significant restrictions on liberty than otherwise exist in the prison setting.

[22] The remedial reach of *habeas corpus* is important. In the vast majority of cases, release will serve to bring an end to any controversy which might properly be resolved through the writ of *habeas corpus*.

[23] Still, a residual discretion remains. Rare cases arise in which the Court might seek to adjudicate on the underlying issues despite the inmate's release from detention. It becomes necessary to distinguish those cases in which the remedy of release eliminates the underlying controversy from those exceptional cases where, despite release, alternative remedies (e.g. ancillary, declaratory relief) might still be pursued through the *habeas corpus* procedure. See, for example, *Wilcox* and *A.H.* v *Fraser Health Authority*, 2019 BCSC 227 ("***A.H.* v *Fraser Health***") where the issues were sufficiently important as to justify granting declaratory constitutional relief even though the applicant had been released from her conditions of detention.

[24] One of the reasons release from detention might not preclude the possibility of ancillary remedies through a *habeas corpus* application is that applications which legitimately raise concerns around an unlawful detention would be automatically and unceremoniously defeated simply by releasing the detained inmate. Release becomes a method for avoiding scrutiny. Unlawful detentions might be perpetuated (or repeated) by simply releasing the inmate before judicial oversight can occur. In *Pratt*, the Nova Scotia Court of Appeal succinctly described the problem of escaping determination of legitimate claims which are "subject to repetition yet evasive of review because individual circumstances in prisons can quickly change before appellate review of the challenged decision" (at paragraph 8). On this issue, I note that while the Crown described the circumstances around Ms. Adams' detention as "maladministration", no specific evidence was tendered to establish that, in fact, Ms. Adams' experience was a singular or isolated incident or, alternatively, whether other women have been similarly detained in dry cell for the same reason.

[25] The Federal Crown refers to a "large body of jurisprudence throughout Canada supporting the principle that the only available remedy in a *habeas corpus* application is release".[8] This body of jurisprudence centres in Alberta and the Federal Crown quotes specifically from *Larente* where Henderson, J. states: "the only remedy that may result from a *habeas corpus* application is release…Declaratory relief is not available via *habeas corpus*" (at paragraph 10).

[8] Federal Crown's written submissions filed October 30, 2020, paragraph 5.

[26] The Federal Crown also quotes from the Alberta Court of Appeal decision in *Trang* v *Alberta (Director, Edmonton Remand Centre),* 2007 ABCA 263 ("***Trang***"), for the proposition that declarations "may not be granted where the dispute has become academic, or will have no practical effect on resolving any remaining issues between the parties" (paragraph 15; see also paragraphs 16 – 18 of *Trang*).

[27] Respectfully, the Alberta jurisprudence relied upon by the Federal Crown is distinguishable and does not support a categorical ban on granting ancillary declaratory relief in the context of a *habeas corpus* proceeding where the prisoner has already been released from detention.

[28] As to *Larente*:

1. In *Larente*, Henderson, J cites *Khela* in support of the proposition that "the only remedy that may result from a *habeas corpus* application is release" (paragraph 10) As indicated above, that statement is true, in terms of strictly defining the remedial scope of *habeas corpus* alone. However, in *Khela*, the Supreme Court of Canada also stresses that a person found to have been unlawfully detained must be released and his/her liberty restored but does not limit or extinguish the Court's ability to grant ancillary relief in appropriate circumstances even where the release has already been achieved (paragraphs 27 – 30). These statements echo similar comments from the earlier Supreme Court of Canada decision in *R* v *Gamble*, [1988] 2 S.C.R. 595 ("***Gamble***").

2. In support of the further statement at paragraph 10 of *Larente* that "Declaratory relief is not available via *habeas corpus*", Henderson, J. cites *Ewanchuk* and *McCargar* v *Canada*, 2017 ABQB 416 ("*McCargar*").[9] However, in my view, *Ewanchuk* stands primarily for the widely accepted proposition that vague, declaratory relief involving trivial complaints should not be entertained in the context of an application for *habeas corpus*. Similarly, *McCargar* confirms the equally justifiable proposition that *habeas corpus* should not be exploited as an expedited means of seeking stand-alone declaratory relief without any reasonable connection to the underlying liberty

[9] Henderson, J also cites *Chung* v *Alberta* (Attorney General), 2017 ABQB 456 but the conclusions in this decision are again, dependent upon the findings in *Ewanchuk* and *McCargar* (see paragraphs 13 and 14).

interests which activate the writ (at paragraph 48). The considerations change significantly where, as here, the underlying facts and relief sought implicate the sort of fundamental issues around personal liberty that arise in cases involving administrative segregation or, as here, dry cells.

3. Tellingly, in *Larente*, Henderson, J. left open the issue of when declaratory relief might yet be granted as part of an application for *habeas corpus* (where the remedy is otherwise limited to release). He concluded his decision by giving Mr. Larente time to respond to a number of outstanding questions including "Why, in law, *habeas corpus* may be used as a basis for the Court to make declarations?" (at paragraph 18).

[29] As to *Trang*, the Alberta Court of Appeal rejected the request for ancillary declaratory relief after the release of detained prisoners had occurred. However, the following distinguishing features are important:

1. *Trang* was expressly decided outside the confines of *habeas corpus*. By way of background, a number of incarcerated persons filed applications for *habeas corpus* to address numerous complaints ranging from the type of entertainment made available to them to the vans being used to transport them to and from judicial proceedings. The Chambers Judge declared certain aspects of the transportation breached the applicants' section 7 *Charter* rights. The issues which concerned the Chambers Judge included such things as protrusions, sharp corners and edges in the inmate compartments of the transportation vans even though, with one exception, there was no direct evidence that any of the applicants suffered any inconvenience or discomfort (paragraphs 5-6). The Crown made numerous attempts to dismiss the *habeas corpus* proceedings on the basis that the inmates' release rendered the matter moot. These efforts failed. Indeed, an earlier decision of the Alberta Court of Appeal concluded that there remained a "live controversy" between the parties (*Trang* v *Alberta (Director, Edmonton Remand Centre)*, 2005 ABCA 66). Thus, the arguments around release and mootness within the context of *habeas corpus* were clearly *res judicata* and off-limits. In the subsequent decision relied upon by the Federal Crown, the Alberta

Court of Appeal expressly noted that "the issue of mootness should not be re-opened at this time" (paragraph 11);

2. The facts in *Trang* are extremely unique. By the time this matter came before the Alberta Court of Appeal, all charges had been stayed, effectively bringing the underlying criminal proceedings to an end. All of the applicants had been released from custody. Moreover, during the life of the proceedings, one applicant had served his entire sentence and could no longer argue that a breach of section 7 rights might assist with sentencing; another applicant had died; and another was deported. In addition, the declaration being sought by the applicants was criticized as overly generic given the facts that:

    a. There were no findings as to which prisoners were transported in which vans on which date;

    b. There was no finding as to whether any of the applicants were actually exposed to the defects identified by the Chambers Judge; and

    c. There was no finding that any of them actually suffered any prejudice.

    Faced with these facts, the Court concluded that: "The relief granted is theoretical and abstract, and of no practical use to any of the applicants" (at paragraph 17). The Court further noted the allegations were based on a "thin record" and emphasized that "Declaratory relief in abstract inquisitorial proceedings such as these is not appropriate where concrete legal proceedings by directly affected third parties can address the issues" (paragraph 19). These facts are clearly distinguishable from the circumstances facing Ms. Adams in this case. Among other things, Ms. Adams' dry cell experience was much more excruciating than the comparatively trivial complaints in *Trang*. Moreover, and unlike *Trang*, all parties concede that the deprivation of liberty in Ms. Adams' case was unlawful. Further, Ms. Adams remained an inmate at Nova Institution as at the date of the hearing. Finally, Ms. Adams' position turns exclusively on the constitutionality of the underlying legislation.

[30] Importantly, the recent decision of the Alberta Court of Appeal in *Wilcox* also confirms a more expansive and generous view. In that decision, Mr. Wilcox was placed in solitary confinement immediately upon his arrival at the Edmonton Detention Centre. He remained in solitary confinement for 13 months. While still in solitary confinement, Mr. Wilcox filed an application for *habeas corpus*. By decision rendered March 22, 2019, the Notice of Application was struck on account of what were said to be fatal deficiencies. Mr. Wilcox appealed. On April 17, 2019, Mr. Wilcox was released from solitary confinement. His appeal was only heard about six months later. Because Mr. Wilcox had already been released, the question of mootness arose on appeal. Writing for the Court, Greckol, J.A. concluded at paragraph 27:

> …despite its mootness, this appeal should be decided. The gathering evidence and judicial consideration of placement in solitary confinement confirm that the issues raised in this appeal are of sufficient importance that they ought to be decided. The rationale articulated in *Khela* for deciding that case applies: the placement of prisoners directly into solitary confinement at the ERC is a circumstance that can arise time and again, yet be beyond the reach of appellate review because the challenge to the placement never reaches appeal as a live issue. The law needs to be clarified in the instant case.

[31] This more expansive view is similar to the perspective taken by the Nova Scotia Court of Appeal in *Pratt* and *Richards*.

[32] In sum, the issue is not whether the Court has jurisdiction to grant ancillary relief in the context of an application for *habeas corpus*. Rather, the issue is how to draw the line separating those rare cases where release in a *habeas corpus* application may be insufficient (e.g. the Court should accept jurisdiction to consider ancillary, declaratory relief) and the vast majority of cases where release is sufficient, ending the dispute and rendering the matter moot.

[33] To be clear, this is not to say that ancillary, declaratory relief is required for (or even relevant to) every application for *habeas corpus* which involves closed confinement or administrative segregation. In my view, and as indicated, it would be the rare and exceptional case where release does not bring an application for *habeas corpus* to an end. By the same token, it cannot be automatically and categorically ruled out as a possibility.

[34] In the facts of this case and strictly speaking, the remedial reach of *habeas corpus* was reached when Ms. Adams was released from dry cell. Nevertheless,

the Court retains the residual jurisdiction to grant declaratory relief in appropriate circumstances.

[35] In drawing a line which determines which *habeas corpus* cases might merit ancillary (including declaratory) relief notwithstanding release from detention, the two-step test for mootness set out in the seminal case of *Borowski* v *Canada (Attorney General)*, [1989] 1 S.C.R. 342 ("***Borowski***") applies.

[36] The two steps which comprise the *Borowski* test are:

1. To determine whether a question of law requires the Court to examine whether an intervening effect has rendered the issues moot and eliminated any live, legal dispute or, alternatively, whether a concrete, live dispute continues to exist as between the parties; and

2. The second step is discretionary in nature. It enables the Court to "decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard" (*Doucet Boudreau* v *Nova Scotia (Department of Education)*, 2003 SCC 62 ("***Doucet-Boudreau***"), at paragraph 17).

[37] It is the second step of the *Borowski* test which is normally engaged when the applicant has already been released in the context of an application for *habeas corpus*. This is consistent with the decision of the Nova Scotia Court of Appeal in *Pratt* (at paragraph 8). While Pratt focussed primarily on the question of procedural fairness, I note a similar conclusion was reached in *A.H.* v *Fraser Health Authority* where broader constitutional issues were also raised within the context of an application for *habeas corpus*. Warren, J. concluded at paragraph 127:

> For purpose of the *habeas corpus* aspect of the proceeding, it is not necessary to find that the detention was also unlawful because it was procedurally unfair or unreasonable. F.H.A.'s conduct in detaining A.H. for nearly a year without judicial authorization was a flagrant overstepping of its authority under the *AGA* [British Columbia's *Adult Guardianship Act*]. It would be pointless to entertain a debate about whether the detention could be justified on grounds that it was carried out in a manner that was procedurally fair or reasonable because both of those inquiries assume the existence of the jurisdiction to detain. For the reasons already expressed, there is no reasonable interpretation of the *AGA* that would authorize a designated agency to detain someone, without judicial authorization, for nearly a year. For the reasons expressed below, F.H.A.'s conduct in detaining

> A.H. was not only procedurally unfair, it also was such as to justify findings of very serious *Charter* violations.

[38] I note that the second step of the *Borowski* test is sufficiently robust to consider and weigh the impact of certain additional factors including:

1. The concern around whether the underlying issues are sufficiently important and prone to repetition but evasive of review, as indicated; and

2. The additional concerns raised by the Federal Crown including:

    a. The need to ensure that the declaratory remedy remains a rare occurrence in the context of *habeas corpus* proceedings and is not exploited to pursue complaints around privileges or matters which are far removed from the protected liberty interest and/or trespass upon matters properly pursued through another procedure or forum; and

    b. Addressing and balancing the unique procedural and evidentiary problems which arise when litigating *Charter* issues in the context of an application for *habeas corpus*.

[39] In *C.S.J.L.M.* v *Nova Scotia (Community Services)*, 2019 NSCA 59 ("***C.S.J.L.M.***"), Chief Justice Wood summarized the three basic rationales which inform the second step of the *Borowski* test and which determine whether the Court will exercise its discretion to hear a matter even if it is deemed moot under the first step of *Borowski*. They are:

> 1. Necessity for an adversarial context which is a fundamental tenet of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome.
>
> 2. The importance of conserving scarce judicial resources and considering whether the circumstances of the dispute justify applying those resources to its resolution.
>
> 3. Sensitivity to the courts' adjudicative role and ensuring that it will not intrude into the role of the legislative branch by pronouncing judgments in the absence of a dispute affecting the rights of litigants.

[at paragraph 10][10]

[40] I turn now to apply the three rationales in the second step of *Borowski* in the specific circumstances of this case.

An Adversarial Context and a Live Issue

[41] In my view, a live issue exists as between the parties. Conflicting positions and vigorous advocacy attests to the ongoing adversarial context.

[42] In *Nova Scotia (Community Services)*, the Nova Scotia Court of Appeal determined that there was no genuine adversarial context as the parties were largely in agreement on the underlying facts. Intervening amendments to the governing statute further removed any residual controversy (at paragraphs 64 – 65).

[43] By contrast, the parties in this dispute agree only on the fact that, for the purposes of this proceeding, Ms. Adams' detention in dry cell was unlawful. As indicated, they disagree on the more critical issue as to why the decision to place Ms. Adams in dry cell detention was unlawful. This controversy sparks a live issue between these parties, the significance of which becomes elevated given the serious consequences associated with the decision to place Ms. Adams in dry cell.

[44] The following chronology briefly summarizes Ms. Adams' personal experience in dry cell detention and exemplifies the concern expressed in cases such as *Pratt*, *Wilcox*, *CCCLA* and *BCCLA*:

1. May 2, 2020: Ms. Adams was caught using methamphetamine (crystal meth) at a community residential facility in Cape Breton and immediately returned to the Nova Institution. Prior to her return, Ms. Adams was subjected to a body scan. At that time, the persons reading and interpreting the body scan images expressed no concerns around contraband being hidden in a body cavity;

[10]In *Doucet Boudreau* v *Nova Scotia (Department of Education)*, 2003 SCC 62 ("***Doucet-Boudreau***"), the Supreme Court of Canada again recognized and applied the existence of a residual discretion to adjudicate upon matters where the live controversy between the parties ceased to exist (paragraphs 17 – 22). See also *Nova Scotia (Community Services)* v *Nova Scotia (Attorney General)*, 2017 NSCA 73 ("***Nova Scotia (Community Services)***"), where the Nova Scotia Court of Appeal discussed *Borowski* at length and determined the matter largely on the basis that there was no adversarial context.

2. May 5, 2020: Ms. Adams was caught smoking a tobacco cigarette which she admitted to smuggling into the institution in her vagina. Subsequent testing in Ms. Adams' residence at Nova Institution suggested the presence of methamphetamine on Ms. Adams' personal items, among other things. At that time, personnel at the Cape Breton residential facility were asked to re-check Ms. Adams' original body scan. This time, they concluded that body scan images revealed multiple, round packages resembling balloons concealed in Ms. Adams' vagina. The fact that the prior review of the same body scan did not raise any concern as to the presence of contraband (let alone multiple round packages) was attributed to the inexperience of the person who originally reviewed the images. Nevertheless, it should be noted that subsequent toxicology reports received after Ms. Adams' release from dry cell expressed the opinion that "it is reasonable to conclude the offender used meta-amphetamine after May 2, 2020" (i.e. after Ms. Adams had actually returned to Nova Institution);

3. May 6, 2020: Armed with the new information suggesting that Ms. Adams smuggled contraband into the Nova Institution, all parties agree that acting Warden Claude Demers developed the reasonable belief that Ms. Adams had concealed contraband in her vagina. That belief should be viewed in the context of the facts in the preceding paragraph. Setting aside the subsequent decision to keep Ms. Adams in dry cell and notwithstanding Ms. Adams' insistence that she was not carrying contraband in her vagina while detained in dry cell, the evidence is more than sufficient to justify the parties' agreement that the Warden's belief was reasonable in the circumstances.

   Based on the Warden's reasonable belief, he authorized Ms. Adams' placement in dry cell. He immediately communicated both his decision and the reasons for his decision to Jay Pyke (Correction Service of Canada's Regional Deputy Commissioner – Atlantic Region) and Adele MacInnes Meagher (Assistant to the Regional Deputy Commissioner – Atlantic Region and former Warden at Nova Institution);

4. May 7, 2020: A mental health clinic note indicated that Ms. Adams was considered low risk for suicide and self injury. However, it also

noted mental health issues including "her disclosed history of suicide attempt her heightened level of anxiety or inability to regulate her emotions effectively without support". This note was consistent with a Mental Health Triage and Assessment Report also dated May 7, 2020 which confirmed, among other things, "5 suicide attempts by hanging, medication and tying a bag over her head". That note also confirmed Ms. Adams' historic and lengthy use of crystal meth. In any event, the clinic note recommended regular monitoring and further recommended that Ms. Adams "have a chair with the back to perform her grounding exercises when experiencing anxiety". It does not appear that this small comfort (i.e. a chair to help with her grounding exercises) was offered to Ms. Adams for at least a week. On May 14, 2020, Ms. Adams herself repeated the request for a chair to assist with her grounding exercises;

5. May 9, 2020: A Search Authorization after a 72-hour re-evaluation recommended that Ms. Adams remain in dry cell because there was "no change in information to the original search authorization" and no contraband retrieved;

6. May 10, 2020: Ms. Adams was observed placing a blanket over her head. Ms. Adams complied with a request to remove the blanket. She was then seen quietly rocking on her bed. Notes taken by prison staff indicate that Ms. Adams also faced "great mental distress" due to the lack of privacy afforded to her when urinating or attempting to have a bowel movement. Later this day, Ms. Adams' mental health declined further. Staff notes indicate that Ms. Adams "had difficulty articulating clear responses and appeared to be overwhelmed by interaction staring into the distance rocking grabbing her hair and not responding when asked if she would like to see someone from mental health." Her condition subsequently improved to the point that she was able to have her first bowel movement while being monitored in the dry cell. No contraband was found at this time or on any other future occasion. Later that day, Ms. Adams had a shower and is then recorded as feeling "almost like a human again";

7. May 11, 2020: An observation report from Nova Institution's health services again noted that a "prolonged stay in such an environment

would likely result in a deterioration of the mental stability of this client";

8. May 12, 2020: Ms. Adams initially consented to an X-ray to disprove the presence of contraband in her vagina and allow for her release from dry cell. However, staff notes indicate the physician refused to proceed on the basis that Ms. Adams' consent was coerced and invalid because she was "given the ultimatum to go through with this nonmedical procedural or remain in isolation". In other words, like and odd, Catch-22 logical maze, Ms. Adams' overwhelming wish to be released from dry cell somehow prevented her from consenting to a procedure that would allow her to fulfill that wish (i.e. release);

9. May 13, 2020: Ms. Adams was offered a pelvic examination as a means of disproving the presence of contraband in her vagina. Unfortunately, by this time, her mental health had deteriorated to the point that she was unable to process the suggestion. Staff reports from that day describe Ms. Adams as being "unable to have a coherent conversation" and that she kept repeating "I'm stuck … I'm stuck in the middle … I'm stuck in the middle" and "I don't know … I don't know … I don't know if I am here". Ms. Adams was also reported to be "talking to somebody" and "speaking incomprehensible words". A separate mental health clinic note indicated that Ms. Adams was "not able to communicate" and "speaking in a low pressured voice but her speech was nonsensical and disorganized." This report continued by noting that "Ms. Adams also seems to be responding to possible tactile hallucinations in that she was continuously rubbing her hands up and down her arms however this could be also be an attempt to self soothe". It concluded by describing Ms. Adams as being in a dissociative state "silently staring at the wall and twirling a strand of her hair". She was said to be "pale, eyes were red and hair was messy". Subsequent reports written later that day suggest an improvement in her condition;

10. May 14, 2020: Ms. Adams was prescribed clonazepam on the basis that it was "essential to prevent disassociation and suicide attempts".

11. May 15, 2020: Ms. Adams sat up on the edge of her bed started rocking and appeared to be upset. On this occasion, staff notes record

Ms. Adams as saying she felt "stuck in a box" and upset that everything she wanted to do had to be authorized. She was offered yard time but declined the offer. She was also offered use of the shower but declined. She is reported to have eventually broken down crying, saying "I can't do this. I take my glasses off and can't see anyone and I just hear people everywhere." The same report then describes Ms. Adams bending over in the dry cell with her arms folded across her chest, quietly crying;

12. May 17, 2020: A mental health clinic note indicates that Ms. Adams was sitting on the edge of her bed rocking from side to side crying and pulling at her hair. The same note states that Ms. Adams "was speaking aloud saying they might as well just kill me now, I just want to die." Ms. Adams was described as appearing distressed and disheveled; and complained of "living like a caged animal";

13. May 18, 2020: Nova Institution staff report that Ms. Adams contemplated writing suicide notes but tore them up. Staff notes further say that Ms. Adams "shared the dark thought that if she were to die in custody an autopsy would be completed and she would be exonerated of the accusations being made against her."

14. May 20, 2020: A pelvic examination is conducted by a qualified medical practitioner and with Ms. Adams' consent. Unlike the earlier attempt to conduct an X-ray, no issues were raised regarding Ms. Adams' ability to consent to this examination. The physician confirmed that there was no contraband in Ms. Adams' vagina. A bowel movement later that day again tested negative for any contraband;

15. May 22, 2020: Acting Warden Demers authorizes Ms. Adams' release from dry cell.

[45] Suffice it to say that Ms. Adams' complaints are neither abstract nor trivial nor minor. Rather, they touch upon matters that strike at the heart of the sort of fundamental rights *habeas corpus* was created to protect. And it bears repeating that there remains an important, legitimate dispute over whether her unlawful detention was the result of unconstitutional legislation or "maladministration".

[46] Further, even though Ms. Adams was released from dry cell shortly after this application was filed, she remained an inmate and vulnerable to the uncertainties of the dry cell process identified in this proceeding.

[47] At this point, it is appropriate to address one of the Federal Crown's primary concerns. The process of *habeas corpus* is accelerated and highly specialized. Applications for *habeas corpus* are given top priority and race to the top of the Court's docket. Nova Scotia *Civil Procedure Rule* 7.13(1) states: "*Habeas corpus* takes priority over all other business of the court."[11]

[48] The Federal Crown submits that litigating complex disputes, including the constitutionality of legislation, requires a degree of time necessary to assemble expert evidence and permit sober reflection. The Federal Crown notes that the fast-track speed with which applications for *habeas corpus* are litigated cannot easily coexist with the more relaxed timeframes available under the *Civil Procedure Rules* to exchange expert opinion evidence in advance of a hearing. (See Nova Scotia *Civil Procedure Rule* 55)

[49] Beyond that practical issue of time, the Federal Crown also relies upon *Toure* v *Canada (Public Safety & Emergency Preparedness)*, 2018 ONCA 681, where the Ontario Court of Appeal expressed concern that the "stark contrast" between:

1. On the one hand, a typical application for *habeas corpus* where the onus falls largely upon the authorities to justify the legality of the detention; and

2. On the other hand, a *Charter* claim where the onus falls, in the first instance, upon the applicant to establish an evidentiary foundation sufficient to support the high bar associated with this type of proceeding.

[50] As the Ontario Court of Appeal wrote in *Toure*, the difference "makes it difficult to hear both *habeas corpus* and *Charter* claims together in an expeditious manner while also providing the necessary evidentiary foundation" (at paragraph 79).

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[11] Similarly, Rule 7.13(2) enumerates a number of steps that a judge must take "immediately" upon an application for *habeas corpus* being filed. See also *May* at paragraph 69, and *Brown* v *Canada (Public Safety)*, 2018 ONCA 14, at paragraphs 21 – 22.

[51] To illustrate the evidentiary point, the Federal Crown describes the evidence before this Court as scant and devoid of any expert opinion, particularly when compared against the extensive record (including expert reports) filed in:

1. The case of *CCCLA* where the Ontario Court of Appeal considered certain provisions of the *CCRA* authorizing administrative segregation and concluded that "prolonged administrative segregation of any inmate, which is segregation for more than 15 consecutive days, does not survive constitutional scrutiny under section 12 [of the *Charter*]." (paragraph 4);

2. The case of *BCCLA* where the British Columbia Court of Appeal agreed, among other things, that sections 31 – 33 and 37 of the *CCRA* were of "no force and effect because those provisions authorize: (a) the prolonged, indefinite administrative segregation of inmates: (b) institutional heads to sit in review of their own segregation decisions; and (c) the internal review of segregation decisions." In this decision the Court further declared that "inmates have a constitutional right to be represented by counsel at segregation review hearings" (at paragraph 5).

[52] However, respectfully, in the particular circumstances of this case, the concerns raised by the Federal Crown (while legitimate) are insufficient to require the Court to decline jurisdiction. My reasons include:

1. The key threshold issue which divides the parties turns on a question of statutory interpretation. The Federal Crown says that the impugned provisions of the *CCRA* must be interpreted so as to exclude the possibility of women being placed in dry cell for concealing contraband in their vagina. The Federal Crown explains that "Section 51 [an impugned dry cell provision of the *CCRA*] requires the "expectation that the contraband will be expelled". This means that a dry cell can only be used to recover contraband ingested or hidden in the rectal area."[12] Therefore, the impugned dry cell provisions must necessarily exclude contraband concealed in a vagina even though:

[12] Federal Crown's written submissions filed October 30, 2020, paragraph 58.

a. Section 46 of the *CCRA* specifically defines "body cavity" as including *either* the "rectum *or* vagina" (emphasis added);

b. Section 51 of the *CCRA* authorizing dry cell detention does not refer to contraband being concealed in the "rectum" alone. It refers to "body cavity" which, again, is statutorily defined as including rectum or vagina.

Under this interpretation, placing Ms. Adams in dry cell is better characterized as "maladministration" by Nova Institution staff – not constitutionally defective legislation. I return to the merits of this argument below. However, on the preliminary jurisdictional issue, I am satisfied that the more narrow question of statutory interpretation can be fairly adjudicated in this proceeding;

2. While the *habeas corpus* process is normally an accelerated process, that was not the case here. Ms. Adams was released from dry cell on May 22, 2020 - shortly after she filed her application for *habeas corpus* on May 19, 2020. Any initial urgency vanished when Ms. Adams was released from dry cell. The parties subsequently appeared in Court and agreed upon a schedule to hear this matter. The initial hearing date was October 5, 2020, subsequently adjourned to November 9, 2020 – almost six months after the Notice was originally filed. All parties were afforded both an opportunity to establish a mutually acceptable schedule and a timeline which unfolded over months, not days. The schedule is more relaxed than would be acceptable in a typical *habeas corpus* application. Moreover, if either party sought additional time to introduce expert opinion evidence, they had the opportunity to make that request. Neither side expressed any specific concern regarding the schedule; and there is no evidence before me that either party was denied time to file expert opinion evidence or was forced to accept deadlines which they considered prejudicial;

3. The Federal Crown correctly notes that unique procedural and evidentiary problems arise when litigating *Charter* claims in the context of an application for *habeas corpus*. In the circumstances of this case, conflicting evidentiary burdens are mitigated because the

Federal Crown admits Ms. Adams' detention was unlawful for the purposes of this proceeding; and

4. In written submissions, the Federal Crown says that "there are more appropriate procedures, such as tort or *Charter* challenge, available to Ms. Adams"[13] However, when asked during oral argument if the Federal Crown reserved the right to allege *res judicata* if Ms. Adams discontinued the current application and commenced a different procedure, counsel for the Federal Crown indicated that she did not have instructions. Thus, the merits of Ms. Adams' constitutional claims were placed at risk (and might become evasive of review) if the Court declined jurisdiction.

[53] Related to this issue, the Supreme Court of Canada has cautioned that "*Charter* decisions should not and must not be made in a factual vacuum." (In *MacKay* v *Manitoba*, [1989] 2 SCR 357, referred to as "***MacKay***", at paragraph 9) The Court further observed that "In light of the importance and the impact that these decisions may have in the future, the Courts have every right to expect and indeed insist upon the careful preparation and presentation of the factual basis in most *Charter* cases." (*MacKay*, at paragraph 8)

[54] In *MacKay*, the appellants challenged the constitutionality of certain provisions in Manitoba's *Elections Finances Act*, S.M. 1982-83-84, c. 45. The Supreme Court of Canada observed that "there has been not one particle of evidence put before the Court" (at paragraph 12). The Court further observed that the appellants, in oral argument, relied mainly upon "a number of unsubstantiated propositions". At trial and before the Manitoba Court of Appeal and again at the Supreme Court of Canada, the constitutional challenge was dismissed.

[55] Distilled to its essence, *MacKay* stands for the proposition that constitutional challenges devoid of evidence and a proper factual foundation will be dismissed. That is a risk necessarily borne by the party advancing the claim. These issues speak to the strength (or weakness) of Ms. Adams' claims as a relevant factor in deciding whether to accept jurisdiction. The Federal Crown's written submissions implicitly acknowledge this conclusion. At paragraphs 52 and 53 of their written submissions filed September 29, 2020, the Federal Crown states:

> The presentation of facts is essential to a proper consideration of *Charter* issues. A decision on the *Charter* issues raised by Ms. Adams must be carefully

[13] Federal Crown's written submissions filed September 29, 2020, paragraph 70.

> considered in light of the importance and impact the decision from this court could have in the future.
>
> Any *Charter* decisions made in the case at hand would be made in the factual vacuum. Ms. Adams cannot simply import factual findings from the British Columbia Court of Appeal in [*British Columbia Civil Liberties Association* v *Canada (Attorney General)*, 2018 BCSC 62] and from the Ontario Court of Appeal in *Corporation of the Canadian Civil Liberties Association* v *Her Majesty the Queen*, 2019 ONSC 243], two cases that dealt with different sections of the CCRA and that will undergo a review of the Supreme Court of Canada.

[56] The Federal Crown repeats that argument at paragraphs 21 and 22 of its written submissions filed October 30, 2020:

> The Applicant further cites *BCCLA* and *CCLA* and then makes the unfounded and not relied upon evidence extrapolation that the conclusion of the course in these jurisdictions as they relate to administrative segregation apply to a dry cell placement.
>
> The Applicant's allegation of systemic maladministration is based on scant evidence.

[57] In short, the Federal Crown criticizes the lack of evidence presented by Ms. Adams and describe it as neither cogent nor persuasive. They suggest that the record before the Court is incapable of sustaining Ms. Adams' *Charter* claims. Respectfully, these are arguments which respond to Ms. Adams' *Charter* claims. They are not a basis for declining jurisdiction to determine those claims.

Scarcity of Judicial Resources

[58] One of the Federal Crown's arguments is that: "Where concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the *Canadian Charter*. It is not useful to use the Court's resources to delve into *Charter* questions since the question of legality of the detention has been resolved."[14] In support of this conclusion, the Respondents rely upon paragraph 135 from the decision of Deschamps and Abella, JJ. in *Multani* v *Commission Scolaire Marguerite-Bourgeoys*, 2006 SCC 6 ("***Multani***"). At paragraph 135, Deschamps and Abella, JJ noted:

> The scope of the *Canadian Charter* is broad. Section 52 guarantees the supremacy of the Constitution of Canada. This incomparable tool can be used to

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[14] Federal Crown's written submissions filed September 29, 2020, paragraph 39

> invalidate laws that infringe fundamental rights and are not justified by societal goals of fundamental importance. However, where the concepts specific to administrative law are sufficient to resolve a dispute, it is unnecessary to resort to the *Canadian Charter*.

[59] Respectfully, the Federal Crown's reliance on this passage in *Multani* is misplaced. The majority decision was written by Charron, J. (McLachlin C.J.C., Bastarache, Binnie and Fish JJ. concurring); and it did not share Justice Deschamp's view on the primacy of administrative law in the circumstances. For the majority, Charron, J. concluded that the administrative law standard was not applicable and, instead, focussed on constitutional principles to determine the case. For example, at paragraph 16, she wrote:

> With respect for the opinion of Deschamps and Abella JJ., I am of the view that this approach could well reduce the fundamental rights and freedoms guaranteed by the *Canadian Charter* to mere administrative law principles or, at the very least, cause confusion between the two. It is not surprising that the values underlying the rights and freedoms guaranteed by the *Canadian Charter* form part — and sometimes even an integral part — of the laws to which we are subject. However, the fact that an issue relating to constitutional rights is raised in an administrative context does not mean that the constitutional law standards must be dissolved into the administrative law standards. The rights and freedoms guaranteed by the *Canadian Charter* establish a *minimum* constitutional protection that must be taken into account by the legislature and by every person or body subject to the *Canadian Charter*. The role of constitutional law is therefore to define the scope of the protection of these rights and freedoms. An infringement of a protected right will be found to be constitutional only if it meets the requirements of s. 1 of the *Canadian Charter*. Moreover, as Dickson C.J. noted in *Slaight Communications Inc.* v *Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.), the more sophisticated and structured analysis of s. 1 is the proper framework within which to review the values protected by the Canadian *Charter* (see also *Attis* v *New Brunswick District No. 15 Board of Education*, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter *Ross*], at para. 32). Since, as I will explain below, it is the compliance of the commissioners' decision with the requirements of the Canadian *Charter* that is central to this appeal, it is my opinion that the Court of Appeal's analysis of the standard of review was inadequate and that it leads to an erroneous conclusion.

[60] Finally on the issue of scarce judicial resources, in *Nova Scotia (Community Services)*, the Nova Scotia Court of Appeal elaborated on the second element by noting at paragraph 67 that:

> The lack of an adversarial context informs the second rationale. The courts are full of live controversies, with real issues impacting upon the lives of real litigants. It is hardly a secret that the administration of justice is often criticized

> for backlogs and delay. Before adding a time consuming constitutional reference to the docket, it is "preferable to wait and determine the point in a genuine adversarial context".

[61] The existence of a genuine adversarial context similarly informs whether scarce judicial resources should be expended to resolve the dispute. I am satisfied that resolving the legal uncertainty which exists here will achieve a tangible and practical benefit for these parties and others within the prison system. The issues raised by the parties and the significance of these issues within the correctional system are important and certainly sufficient to merit the Court's attention.

Not Intruding on The Legislative Branch by Pronouncing Judgments in the Absence of a Genuine Dispute

[62] There is an important issue with respect to statutory interpretation which I address below. However, resolution of that issue is determined on the basis of the governing law; within the context of the Court's proper role as the adjudicative branch of government; and, importantly, within the context of a genuine dispute.

Conclusion on Declaratory Relief (and Constitutional Claims) in an Application for *Habeas Corpus*

[63] In the particular circumstances of this case and for the reasons given above, I am not prepared to decline jurisdiction to determine the *Charter* issues raised by Ms. Adams. In my view, this is one of the rare and exceptional cases in which the applicant seeking *habeas corpus* is entitled to seek declaratory relief.

ISSUE 2: INTERPRETING THE TERM "BODY CAVITY" UNDER SECTIONS 51 AND 52 OF THE *CCRA*

[64] The Federal Crown argues that:

1. Dry cell detention was never intended as a response to contraband concealed in a vagina because the impugned sections of the *CCRA*, if properly interpreted, do not contemplate that possibility. Put slightly differently, the Federal Crown argues that dry cell detention is for the purpose of retrieving contraband which is reasonably suspected of being concealed in the rectum only, and not the vagina. In the context of the dry cell provisions, that statutory intention is achieved by excluding "vagina" from the statutory definition of "body cavity" under section 46 of the *CCRA.* I discuss the Federal Crown's

arguments in greater detail below. However, very briefly, the Federal Crown says that for the purposes of dry cell detention under section 51(b), the statutory definition of "body cavity" must necessarily narrow to mean "rectum" only, with the words "or vagina" being eliminated. The chain of reasoning is:

a. Dry cell detention under section 51(b) requires an "expectation that the contraband will be expelled"; and

b. There can be no legitimate expectation that contraband could be expelled by a vagina;

c. Therefore, for the purposes of section 51(b) alone, the statutory definition of "body cavity" in section 46 must necessarily be restricted to meaning rectum, and cannot include vagina.

2. The decision to detain Ms. Adams in dry cell and leave her there for more than 15 days was an isolated and localized (not systemic) incident of "maladministration". Nova Institution staff failed to properly interpret and administer the dry cell provisions of the *CCRA* when they placed Ms. Adams in dry cell under the suspicion of concealing contraband in her vagina. The Federal Crown states that this failure does not render the impugned provision of the *CCRA* unconstitutional because the Supreme Court of Canada's decision in *Little Sisters Book & Art Emporium* v *Canada (Minister of Justice)*, 2000 SCC 69 ("***Little Sisters No. 1***") stands for the proposition that if an impugned provision is capable of being administered constitutionally, it is constitutionally valid.

I begin by reviewing the statutory scheme in the *CCRA*. I then consider the relevant principles of statutory construction applied directly to the impugned dry cell provisions, including an assessment of the presumption around constitutionality. I conclude with an examination of the Federal Crown's arguments regarding *Little Sisters No. 1* and the obligation to exercise a statutory grant of discretion in a constitutional manner.

The Statutory Scheme

[65] The *CCRA* describes the purposes of the correctional system and the paramount consideration of the correctional service at sections 3 and 3.1. The system's purpose, as set out at section 3, is to "contribute to the maintenance of a just, peaceful and safe society" by "(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) 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."

[66] Section 3.1 provides that "The protection of society is the paramount consideration for the Service in the corrections process."

[67] Section 4 enumerates the "principles that guide the Service in achieving the purpose referred to in section 3". They include:

1. "the Service uses the least restrictive measures consistent with the protection of society, staff members and offenders" (section 4(c));

2. "offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted" (section 4(d)); and

3. "correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups" (section 4(g)).

[68] These broad purpose provisions contribute to the interpretation of the specific set of provisions governing the search for, and seizure of, contraband – including the use of dry cells.

[69] The *CCRA* makes it clear that possession of contraband is clearly prohibited and constitutes a summary conviction offence (Section 45).

[70] Sections 46 – 67 of the *CCRA* are broadly entitled "Search and Seizure" and, generally speaking, contain the statutory authorization to:

1. Search for contraband in a variety of circumstances and using a variety of methods including non-invasive search, frisk search, strip search, body cavity search, X-ray, dry cell, and urinalysis; and

2. Seize contraband, when found.

[71] It is apparent that Parliament intended to craft a coordinated and internally cohesive approach.

[72] "Contraband" is broadly defined in section 2(1) as meaning:

> "(a) an intoxicant,
>
> (b) a weapon or a component thereof, ammunition for a weapon, and anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person, when possessed without prior authorization,
>
> (c) an explosive or a bomb or a component thereof,
>
> (d) currency over any applicable prescribed limit, when possessed without prior authorization, and
>
> (e) any item not described in paragraphs (a) to (d) that could jeopardize the security of a penitentiary or the safety of persons, when that item is possessed without prior authorization; (*objets interdits*)"

[73] The "Search and Seizure" sections may be broken down further as follows:

1. **Definitions**: Section 46 contains a number of definitions applicable to the process of searching for and, if found, seizing contraband;

2. **Searches**: The following subheadings deal with searches within a penitentiary setting:

    a. Searches of Inmates: Sections 47 – 57;

    b. Searches of Cells: Section 58;

    c. Searches of Visitors: Sections 59 – 60;

    d. Searches of Vehicles: Section 61

    e. Warnings to be Posted: Section 62; and

    f. Searches of Staff: Sections 63 – 64.

    It is important to distinguish the statutory authority to search for contraband within a prison setting from the statutory authority to seize contraband. Certain provisions reference seizing contraband as a

statutory precondition for conducting a search. For example, section 52 authorizes the "body cavity search" of an inmate where, among other things, it is "necessary in order to find *or seize* the contraband" (emphasis added). Similarly, section 53(1)(b) permits a frisk search or strip search of all inmates in a prison where, among other things, it is necessary in order to seize the contraband and avert the danger" to human life or safety or to the security of the penitentiary in accordance with section 53(1)(a). However, to be clear, these sections simply clarify the conditions under which a search may occur withing a prison setting. The statutory authority to physically *seize* contraband is addressed in section 65, discussed below.

3. **Seizure**: Section 65(1) confers the broad authority "to seize contraband found in the course of a search conducted pursuant to sections 47 to 64, except a body cavity search or a search described in paragraph 51(a) [an x-ray]."

[74] Focusing more closely on the issue of contraband concealed in a "body cavity", the statutory process of searching and seizing may be summarized as follows:

1. The *CCRA* only addresses the process for searching and seizing contraband concealed in the body cavity of an inmate. It does not extend to prison staff or visitors to the prison, for example;

2. The terms "body cavity" and "body cavity search" for the purposes of sections 47 to 67 are defined at section 46 as follows:

   "'body cavity' means the rectum or vagina";

   "'body cavity search' means the physical probing of a body cavity, in the prescribed manner..."

3. The specter of carrying contraband into a prison though a "body cavity" first emerges at section 50 with the provision that "[w]here a staff member believes on reasonable grounds that an inmate is carrying contraband in a body cavity, the staff member may not seize or attempt to seize that contraband, but shall inform the institutional head."

4. There are three statutory options to find (or search for) the contraband: X-ray; dry cell; and body cavity search. Two (X-ray and body cavity search) require inmate consent, among other things. The third (dry cell) does not involve consent from the inmate. The more specific statutory requirements:

    a. X-ray (section 51(a)): Where an institutional head is satisfied that there are reasonable grounds to believe an inmate "has ingested or is carrying contraband in a body cavity", the institutional head may authorize in writing the use of an X-ray machine by a qualified X-ray technician. However, consent must be obtained from both the inmate and a qualified medical practitioner (section 51(a));

    b. Dry cell (section 51(b)): An institutional head may authorize dry cell detention where the following three statutory conditions are met:

        i. There are reasonable grounds to believe an inmate has ingested or is carrying contraband in a body cavity;

        ii. There is an "expectation that the contraband will be expelled"; and

        iii. Notice must be given to "the penitentiary's medical staff" when the institutional head authorizes dry cell detention.

    I note that dry cell detention does not require either the inmate's consent or the involvement of a qualified medical practitioner. In fact, dry cell appears as the only direct and clear option available to an institutional head to seize contraband carried in a body cavity without inmate consent; and

    c. Body Cavity Search (section 52): Where an institutional head is satisfied that there are reasonable grounds to believe an inmate is carrying contraband in a body cavity, the institutional head may also authorize in

writing a body cavity search. However, the following additional conditions apply:

i. The institutional head must be satisfied there are reasonable grounds to believe a body cavity search "is necessary in order to find or seize the contraband";

ii. The body cavity search must be "conducted by a qualified medical practitioner": and

iii. The inmate's consent must be obtained.

5. As to the process of seizing contraband, section 65(1) generally enables a staff member to seize contraband "found in the course of a search conducted pursuant to sections 47 to 64". This obviously includes contraband carried or concealed in a "body cavity" under sections 51 and 52. However, the following two exceptions apply:

   a. The X-ray procedure under section 51(a) is restricted to *finding* contraband in a body cavity. A staff member may not seize contraband found by x-ray (section 65(1));

   b. A staff member may not seize contraband found during a body cavity search. Rather, "A *medical practitioner* conducting a body cavity search may seize contraband or evidence relating to a disciplinary or criminal offence found in the course of that search." (section 65(2), emphasis added)

6. No qualifications or exceptions apply with respect to the ability of a staff member to seize contraband found during dry cell detention.

Interpreting the Statutory Provisions Regarding Dry Cell Detention

[75] The caselaw contains little commentary on the meaning of the dry cell provisions in the *CCRA.*

[76] In *R* v *Johnson*, 2016 ONSC 3947, the court remarked that a dry cell "is, as its name implies, a cell without water. It is a small cell with no toilet and no sink... Prisoners who are to be searched are placed in a 'dry cell' to ensure there is no

destruction or elimination of evidence from the person or clothing of the prisoner" (at paragraph 37). In *R* v *Multani*, 2017 BCPC 210, the Court said, "The purpose of such a placement is to prevent the prisoner from flushing anything down the toilet should the prisoner excrete anything while in custody" (at paragraph 31).

[77] Unfortunately, these descriptions as to the purpose of dry cell detention do not assist in interpreting the statutory preconditions (or restrictions) surrounding the decision to authorize dry cell detention under section 51(b).

[78] In my view, it necessary to turn to principles of statutory construction, beginning with Driedger's "modern principle":

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (LexisNexis, 2014) at §2.1 ("***Sullivan on the Construction of Statutes***").

Iacobucci, J affirmed this principle in *Bell ExpressVu Limited Partnership* v *Rex*, [2002] 2 SCR 559 at paragraphs 26 – 30).

[79] The point of departure is the statutory wording. Recall that dry cell detention under section 51(b) requires that each of the following conditions be met:

1. "reasonable grounds to believe that an inmate has ingested contraband or is carrying contraband in a body cavity";

2. "the expectation that the contraband will be expelled"; and

3. "notice to the penitentiary medical staff".

[80] Again, it is agreed that the institutional head had a reasonable belief Ms. Adams was carrying contraband in her vagina. Furthermore, under section 46, "'body cavity' means vagina or rectum". In short, there is no confusion or controversy around the need for reasonable grounds to believe an inmate has ingested or is carrying contraband. However, for the purposes of section 51(b) alone, there is a dispute around the meaning of the term "body cavity".

[81] As to the second statutory precondition, there is a dispute over how an institution head develops an "expectation that the contraband will be expelled" and whether that requirement must necessarily narrow the statutory definition of "body

cavity" under section 46 so that it no longer means "vagina or rectum" but, instead, means "rectum and not vagina".

[82] As to the third statutory requirement, there is no dispute around the meaning or need to notify the penitentiary's medical staff when the institutional head authorizes dry cell detention.

[83] Ultimately, the issues can be distilled to the following related questions:

1. How does an institutional head develop an "expectation" that contraband will be "expelled" for both the initial authorization of dry cell detention under section 51(b) and, subsequently, for the inmate's ongoing detention in dry cell?

2. What does it mean to "expel" contraband from a body cavity for the purposes of section 51(b)?

3. Does the requirement for an "expectation" that the contraband will be "expelled" narrow the statutory definition of "body cavity" for the purposes of dry detention under section 51(b)?

[84] These questions are important given the Federal Crown's position that "the expectation that the contraband will be expelled" limits both:

1. The term "body cavity" in section 46 becomes limited to "rectum" alone (and excludes "vagina") for the purposes of section 51(b) only; and

2. The process of expelling contraband (and the related expectation that contraband will be expelled) revolves entirely around the involuntary movements of the digestive tract. That is, the only permissible "expectation" under section 51(b) is one which recognizes that contraband can only be "expelled" through the digestive tract.

[85] In its written submissions, the Federal Crown explains that the reference in section 51(b) to an "expectation that the contraband will be expelled":

> means that a dry cell can only be used to recover contraband ingested or hidden in the rectal area.[15]

[15] Federal Crown's written submissions filed October 30, 2021, paragraph 58.

[86] The Federal Crown repeatedly confirmed this proposed interpretation in its written submissions:

1. "The proper interpretation of section 51 is that it only authorizes a placement in a dry cell where inmates suspected of concealing goods in their digestive tract."[16]

2. The dry cell provisions of the *CCRA* "do not contemplate the placement in a dry cell of a female inmate that is suspected of concealing contraband in her vagina."[17]

3. The "expectation that the contraband will be expelled" in section 51(b) of the *CCRA*:

> means that a dry cell can only be used to recover contraband ingested or hidden in the rectal area. The nature of the digestive system makes it so that the placement will not be indefinite.[18]

[87] Respectfully, I am unable to accept the Federal Crown's proposed, narrow interpretation of "body cavity" for the purposes of section 51(b) alone; with the broader and explicit statutory definition applying everywhere else in the *CCRA*. This conclusion is supported by the eight reasons which follow.

[88] First, the ordinary meaning of "body cavity" in section 51(b) is precise and unequivocal. It "means rectum or vagina", in no uncertain terms. Moreover, the section 46 definition of "body cavity" does not appear in the general interpretation provisions (section 2 of the *CCRA*). Rather, the definitions at section 46 were specifically and expressly created for the search provisions of sections 47 to 67. Nothing in section 51, or anywhere else in the *CCRA*, suggests that the clear and express definition of "body cavity" becomes narrower in section 51(b) than in any other provision.

[89] Second, the Federal Crown acknowledges that the statutory definition under section 46 (i.e. that "'body cavity' means rectum or vagina") applies consistently through the *CCRA*. However, the Federal Crown argues, this meaning suddenly splinters into two different meanings in section 51: the consistent, statutory meaning for section 51(a) (use of an X-ray machine) but a different, more narrow meaning under section 51(b) (dry cell). Respectfully, if the legislature had

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[16] Federal Crown's written submissions filed October 30, 2020, paragraph 64.
[17] Federal Crown's written submissions filed October 30, 2021, at paragraph 53
[18] Federal Crown's written submissions filed October 30, 2021 at paragraph 58

intended that "body cavity" meant one thing for section 51(a) and another thing for section 51(b), it would not have used the same term in the preamble for both subsections; suggesting the same term applies equally to (and has a consistent meaning for) both subsections.

[90] On this, there is nothing in the broad definition of "contraband" (section 2(1)) that would exclude carrying contraband in the vagina. Nor could there be because even the Federal Crown acknowledges that certain provisions of the search and seizure provisions contemplate the possibility that "contraband" could be carried in the vagina (see, for example, sections 51(a) and 52).

[91] Third, when interpreting a statutory definition, *Sullivan on the Construction of Statutes* says, "[t]he legislature dictates that, for the purpose of interpreting certain legislation, the defined term is to be given the stipulated meaning." (at §4.31)

[92] In the case of an exhaustive definition, "generally introduced by the verb 'means'", *Sullivan on the Construction of Statutes* confirms that "the statutory definition displaces any understanding of the term based on dictionary definitions or linguistic intuition."(at §4.34)

[93] The definition of "body cavity" in section 46 is an exhaustive one. A "body cavity" is one of two things: either a rectum or vagina. There is no language to the effect of the word "includes" that might denote a non-exhaustive definition (*Sullivan on the Construction of Statutes* at §§4.38-39). Nor is there any language to suggest that the statutory definition narrows for section 51(b) (dry cell) alone but is otherwise consistent throughout the statute.

[94] The *Interpretation Act*, RSC 1985, c I-21, provides that "[d]efinitions or rules of interpretation in an enactment apply to all the provisions of the enactment, including the provisions that contain those definitions or rules of interpretation" (section 15(1)). Further, an interpretation section "shall be read and construed ... as being applicable only if a contrary intention does not appear" (section 15(2)(a)). As *Sullivan on the Construction of Statutes* notes, "[d]efinitions generally apply throughout the Act in which they appear, which entails that the defined term has the same meaning throughout unless the context indicates otherwise..." (at §4.48. See also *MiningWatch Canada* v *Canada (Fisheries and Oceans)*, 2010 SCC 2 at paragraph 29)

[95] These principles suggest that some basis is required in the text to modify the application of a definition within its own statute. Respectfully, I do not conclude that any such basis exists in this case.

[96] Fourth, as to the "expectation that the contraband will be expelled", the synonyms for the verb "expel" in the jurisprudence include:

1. "emerge" (*R* v *Poirier*, 2014 ONSC 3117, at paragraph 44);
2. "came out" (*R* v *Dhami*, 2016 BCSC 2341, at paragraph 21);
3. "excrete" (*R* v *Multani*, 2017 BCPC 210, at paragraph 31);
4. "evacuate" (*R* v *Baichoo*, 2020 ONSC 232, at paragraph 26);
5. "pass" (*R* v *Adler*, 2020 ONCA 246, at paragraph 9); and
6. "produce" (*R* v *Hopkins*, [2018] NJ No 136 (Prov Ct), at paragraph 1).

None of these synonyms suggest that the expectation of expelling contraband necessarily narrows to rectum only or involves the involuntary movements of the digestive tract. Similarly, none exclude the vagina.

[97] As a matter of linguistics, the word "expel" is defined in the *Shorter Oxford* as "[t]o drive out; to eject by force" (*Shorter Oxford English Dictionary on Historical Principles*, 3d ed (Oxford, 1987), vol 1 at 705). The *Concise Oxford* gives "force out or eject (a thing from its container etc.)" (*Concise Oxford Dictionary*, 9th ed., (Oxford, 1995) at 474). Neither definition assists the Federal Crown's argument that the section 51(b) is predicated upon (or creates an expectation of) involuntary movements such as peristalsis or the automatic functioning of the digestive tract.

[98] Fifth, assuming for the purposes of dry cell detention that an "expectation that the contraband will be expelled" involves involuntary, biological functions, I am unable to take judicial notice of the Federal Crown's proposition that only the rectum (but not the vagina) satisfies this criterion.

[99] In *R* v *Find*, [2001] 1 S.C.R. 863 ("*Find*"), the Supreme Court of Canada summarized the "Morgan criteria" used to determine when the Court might take judicial notice (paragraph 48):

> Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[100] There are cases in which judicial notice is taken of certain biological facts. For example, in in *Brooks* v *Canada Safeway Ltd*, [1989] 1 SCR 1219, the Supreme Court of Canada held that "[d]iscrimination on the basis of pregnancy is a form of sex discrimination because of the basic biological fact that only women have the capacity to become pregnant" (at paragraph 38). Similarly, in *MAM* v *WHN*, [1980] NSJ No 46 (NS Fam Ct), the court took judicial notice of the fertilization process for human embryos.

[101] The same might be said of the basic biological fact that menstrual cycles and menopause are experienced by women; and that blood (uterine lining) is discharged or expelled through the vagina following a menstrual cycle. Indeed, Standing Order 566-7 dated March 25, 2020 specifies Dry Cell Procedures for the Nova Institution. The Crown notes that this form is required under the Commissioner's Directive 566-7 related to "Searching of Offenders". This directive was issued under sections 97 and 98 of the *CCRA* which authorize the Commissioner of Corrections to make policies concerning the management of penitentiaries. Notably, Standing Order 566-7 for Nova Institution was approved by the Commissioner and authored by the Warden (acting Warden Claude Demers) – i.e. the same person who authorized Ms. Adams' dry cell detention and whose decisions in this case are described as "maladministration" by the Federal Crown.

[102] Standing Order 566-7 again refers only to contraband being carried in a "body cavity", without the splintered definition offered by the Federal Crown. Of greater interest for the purposes of this proceeding, Standing Order 566-7 is not limited to the notion that contraband might only be carried in a rectum. For example, this Standing Order states "If the inmate is menstruating, staff must ensure a means of disposal of the sanitary product and provision of replacement products as needed. *The sanitary product shall be searched prior to disposal*" (emphasis added). Clearly, Standing Order 566-7 contemplates contraband being concealed in (and expelled through) the vagina during menstruation.

[103] Sixth, although the manner by which waste is expelled through the rectum and vagina may be driven by involuntary bodily functions, the process can also involve conscious or deliberate actions including, for example, any intentional

strain associated with bowel movements or the use and disposal of sanitary products during menstruation. To say that only involuntary actions may form the "expectation" that waste (including contraband) will be expelled from a body cavity ignores these realities.

[104] In my view, for the purposes of dry cell detention under section 51(b) of the *CCRA*, the "expectation" that contraband will be "expelled" through a "body cavity" must be driven by normal bodily functions through which waste is typically expelled from either a rectum or vagina. Of course, this includes but is not limited to an involuntary bowel movement.

[105] At this stage, it is necessary to comment briefly upon the presumption that legislatures are presumed to be acting in a constitutional manner when enacting statutes. Where two alternative interpretations are reasonably available, the Courts are to prefer the interpretation which preserves a statute's constitutionality. In *R* v *Raham*, 2010 ONCA 206, the constitutional issue related to whether an offence could reasonably be interpreted as a strict liability offence. The Court found:

> 37 ... Courts, when interpreting legislation, will presume that the Legislature acted within the limits of its constitutional powers and not in violation of the *Charter*... This presumption does not entitle a court to rewrite legislation to avoid a finding of unconstitutionality. It does dictate, however, that if legislation can be reasonably interpreted in a manner that preserves its constitutionality, that interpretation must be preferred over one which would render the legislation unconstitutional. Because of the presumption of constitutionality, it will take very clear language to create an absolute liability offence that is potentially punishable by incarceration.
>
> 38 In this case, the presumption in favour of a constitutional interpretation means that if the offence charged against the respondent can reasonably be interpreted as a strict liability offence, it must be so interpreted even if it could also reasonably be interpreted as an absolute liability offence.
>
> [emphasis added]

[106] I engage in a more fulsome constitutional analysis below. For present purposes, suffice it to say that, in my view, this presumption does not apply here. There is no textual support for the Federal Crown's argument which would effectively strike the words "or vagina" from the section 46 definition of "body cavity", solely for the purposes of dry cell confinement. It is well-established that the Court cannot simply rewrite a statutory provision. Given the absence of evidentiary support for the Federal Crown's preferred definition of "body cavity",

accepting the Federal Crown's argument would amount to rewriting the legislation to read down the definition.

[107] Seventh, in my view, the various search and seizure provisions contained within the *CCRA* are designed to operate in an integrated, coordinated and internally coherent way. Thus, identical language is used in different provisions to describe, for example, how various levels of staff respond to the potential presence of contraband in a penitentiary. As to the concern that an inmate may be carrying contraband in a body cavity:

1. Section 50 requires a staff member to inform the institutional head where they "believes on reasonable grounds that an inmate is carrying contraband in a body cavity". There is no dispute that section 50 obliges staff to report to the institutional head reasonable suspicions that a female inmate is carrying contraband in either a rectum or vagina, consistent with the statutory definition in section 46;

2. Section 51 identifies two options available to an institutional head when satisfied that, among other things, "there are reasonable grounds to believe that an inmate … is carrying contraband in a body cavity". The language is virtually identical to section 50;

3. The two options available to the institutional head under section 51 are X-ray (section 51(a)) and dry cell (section 51(b)). Both are subject to the statutory precondition that "there are reasonable grounds to believe that an inmate … is carrying contraband in a body cavity". However, notably, an x-ray procedure until section 51(a) requires inmate consent; and

4. Section 52 provides a third option for an institutional head who "is satisfied that there are reasonable grounds to believe that an inmate is carrying contraband in a body cavity": a body cavity search. Note that this statutory precondition is the same in section 51. However, a body cavity search under section 52 establishes three further preconditions. First, the body cavity search must be "necessary in order to find or seize the contraband". Second, the body cavity search must be conducted by a qualified medical practitioner. Third, the inmate's consent must be obtained.

[108] If the Federal Crown's arguments are accepted, identical statutory language would be afforded the same meaning except for section 51(b) which would operate differently. In particular:

1. For the purposes of section 50, "carrying contraband in a body cavity" would include contraband being carried in a rectum or vagina;

2. For the purposes of section 51(a), "carrying contraband in a body cavity" would include contraband being carried in a rectum or vagina;

3. For the purposes of section 52, "carrying contraband in a body cavity" would include contraband being carried in a rectum or vagina.

[109] However, for the purposes of section 51(b), "carrying contraband in a body cavity" would not include contraband being carried in a rectum or vagina, even though the language is the same. Instead, these words would be limited to contraband being carried in a rectum.

[110] In my view, had Parliament intended the phrase "carrying contraband in a body cavity" to mean something different, depending on the section being discussed, it would not have used identical language and it would not have attached a specific, statutory definition to the term "body cavity".

[111] Eighth, if section 51(b) is interpreted to eliminate dry cell as a viable method for recovering contraband reasonably suspected of being carried in a vagina, how are institutional staff to address the threat associated with contraband being smuggled into the penitentiary in a vagina? The remaining options which are contained within the search and seizure provisions of the *CCRA* are of limited utility. An x-ray under section 51(a) requires inmate consent and only enable to staff to locate, not seize or recover, contraband (section 65(1)). Section 65(2) enables a medical practitioner to seize contraband found in the course of a body cavity search under section 52; however, a body cavity search requires inmate consent.

[112] The dangers associated with contraband being imported into a prison through a body cavity (including the vagina) are extant, serious and undermines the security of the institution, to say nothing of the health and safety of the prison population. As indicated, the search and seizure provisions developed by Parliament in the *CCRA* are integrated, internally coherent and seek to address the identified risks, including smuggling contraband in a vagina. In circumstances

where prison staff reasonably suspect contraband is being carried in a vagina, I do not find that Parliament intended that their ability to search for and/or seize this contraband would be ultimately dependent on inmate consent. I return to this issue below when discussing remedy.

[113] Overall, in my view, the Court usurps the role of Parliament if it presumes to differentiate the scope of section 51(b) despite identical statutory language in other provisions; a common, statutory definition for "body cavity"; and the *CCRA*'s integrated, internally cohesive scheme to search for, and seize, contraband.

[114] The legislature determines the search and seizure options available within a penitentiary, including detention in dry cell. The legislature (not the Courts) has the resources and broad-based expertise to integrate these options and properly calibrate their impact on the safety and security of those whose interests are affected – including staff, inmates, and society at large. Respectfully, these are legislative choices that are for Parliament to make, not the Court.

[115] Finally, and while not determinative, I am compelled to note that the Federal Crown's proposed interpretation is inconsistent with their own forms and policies.

[116] The materials before the Court include a form entitled "Search Authorization" and identified as form "CSC/SCC 1366 (R-2017-06)". It is a two-page form separated into 4 sections:

1. Section A (page 1 of 2) entitled "Request for Authorization"[19]: In this section, a member of the prison staff provides information to the institutional head in support of a request "to perform a search to detect the presence of contraband or evidence". Section A of the standard form is not specifically limited to any particular type of search (e.g. an X-ray or dry cell or body cavity search or strip search etc.);

2. Section B (page 2 of 2) entitled "Authorization to Perform a Search": In this section the institutional head confirms whether they have reasonable grounds to believe a search is authorized and, if such grounds exist, the type of search being authorized. As to the existence of reasonable grounds, a number of "check boxes" are offered.

[19] I note that the materials filed with the Court originally authorizing Ms. Adams' detention in dry cell is missing page 1 of this standard form.

However, for the purposes of this proceeding, the relevant "grounds" are limited to the following two options:

a. The inmate "has ingested contraband";

b. The inmate "is suspected of carrying contraband in a body cavity"

As to the type of search being authorized and again for the purposes of this proceeding, the form confirms only the following options:

a. "X-ray search (CCRA 51(a))";

b. "Dry cell (CCRA, 51(b))"; and

c. "Body cavity search (CCRA, 52)".

3. Section C (page 2 of 2) entitled "Declaration": In this section, the inmate acknowledges that she has "been promptly informed of the reasons for the search". In addition, and in the case of X-ray and body cavity search, the inmate is asked to acknowledge that she has "been given reasonable opportunity to retain and instruct counsel". There is no similar acknowledgement regarding legal counsel required for dry cell.[20] There is also a box to tick if the "subject refused to sign Declaration";

4. Section D (page 2 of 2) entitled "Consent": This section is also signed by the inmate and completed in the case of an X-ray or body cavity search where an inmate's consent is required under the *CCRA*. It does not apply to dry cell detention where an inmate's consent is not required.

[117] Overall, the CSC standard form uses the statutorily defined term "body cavity" and neither distinguishes between vagina or rectum nor limits the term "body cavity" to rectum for the purposes of dry cell detention. Moreover, it does not hint that the words "on the expectation that the contraband will be expelled" drive the more nuanced statutory definition of "body cavity" as offered by the Federal Crown in this proceeding.

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[20] Note, however, that Commissioner's Directive 566-7 indicates that an inmate "will be provided with the opportunity to retain and instruct legal counsel without delay upon placement in dry cell".

[118] Sections 25 and 26 of this Directive are entitled "Use of X-Ray *and* Dry Cell" (emphasis added). Note that this Directive addresses the two procedures contained in section 51 of the *CCRA* (X-ray under section 51(a) and dry cell detention under section 51(b)) together. And the singular term "body cavity" is used in connection with both procedures. There is nothing to suggest that the meaning of the term "body cavity" is different depending on the procedure being undertaken. In particular, there is nothing in this Directive to suggest that:

1. Under section 51(a), an X-ray may be used to find contraband in either the rectum or vagina, consistent with the statutory definition of "body cavity"; and

2. Under section 51(b), dry cell detention is permitted only in an effort to find/seize contraband in the rectum and not the vagina.

[119] Rather, sections 25 and 26 of the Directive permit either x-ray or detention in dry cell "where the Institutional Head is satisfied that there are reasonable grounds to believe that an inmate has ingested contraband or is carrying contraband in a *body cavity*" (emphasis added).

[120] Annex E of this Directive entitled "Dry Cell Procedures" does show a focus on toilet and refers to bowel movements. Moreover, throughout the inmate's detention in dry cell, prison staff at the Nova Institution keep detailed notes called "Statement/Observation Reports". Those notes similarly reveal a particular interest in any attempts to eliminate waste into a specialized toilet called a "Banned Substances Recovery Equipment" ("**BSRE**"). BSRE is designed to facilitate the collection and analysis of bodily waste created during dry cell detention. This is not particularly surprising given that the statutory definition of "body cavity" does include rectum.

[121] However, the penultimate paragraph in Annex E describing the purpose of dry cell does not suggest that the process is limited to bowel movements. Rather, it is expressed in broader terms, consistent with the *CCRA*:

> Once it is determined that contraband may have been *expelled*, the Correctional Officer will notify the Correctional Manager and initiate the process of operating the dry cell apparatus, putting on the protective equipment and searching for the contraband. Any contraband retrieved will be handed over to the Security Intelligence Officer or placed in an evidence locker. Chain of custody procedures must be adhered to."
>
> [emphasis added]

[122] In sum, I respectfully disagree with the Federal Crown's interpretation of the term "body cavity" for the purposes of section 51(b) of the *CCRA* alone. In my view, the definition of the term "body cavity means rectum or vagina" as indicated in section 46. Thus, the term "body cavity" (as found in the preamble to section 51 of the *CCRA*) retains the same, consistent meaning for the two subsections which follow: section 51(a) (X-ray) and section 51(b) (dry cell).

ISSUE 3: *LITTLE SISTERS NO. 1*

[123] The Federal Crown relies upon *Little Sisters No. 1* for the proposition that the dry cell provisions in the *CCRA* should not be condemned as unconstitutional on the following grounds:

1. Ms. Adams' experience is better characterized as an isolated instance where an individual decision maker failed to exercise their statutory authority in a way that respects the *Charter*; and

2. In these circumstances, the Court does not invalidate legislation. Rather, it presumes that a grant of statutory authority will be applied or administered in a manner which results in minimal impairment to *Charter* rights.

[124] Given the arguments advanced by the Federal Crown, it is helpful to review *Little Sisters No. 1* in some detail.

[125] In *Little Sisters No. 1*, the Supreme Court of Canada examined the constitutionality of certain provisions in the *Customs Act* which created an administrative process permitting customs officers to intercept, review and exclude from importation certain goods deemed to be "obscene". The appellants in that case advanced two main constitutional arguments:

1. Under Code 9956(a) of Schedule VII of the *Customs Tariff*, obscenity was defined by express reference to section 163(8) of the *Criminal Code* which stated that **"**any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene." The Supreme Court of Canada authoritatively interpreted this definition in *R* v *Butler*, [1992] 1 S.C.R. 452 ("***Butler***"). Binnie, J for the majority in *Little Sisters No.*

1 also noted an important problem that provided additional context to the arguments being advanced:

> No constitutional question was stated regarding the validity or constitutional limits of s. 163 of the *Criminal Code*. The absence of notice of such a constitutional question precludes the wide-ranging reconsideration of *Butler* sought by the appellants and some of the interveners (even if the Court were to conclude that such a reconsideration is either necessary or desirable).
>
> [at paragraph 53]

Regardless, the appellants argued that the customs legislation, on its face, was unconstitutional because the interpretation of "obscene" targeted the gay and lesbian community, leaving members of that community "disproportionately vulnerable to sexual censorship" (*Little Sisters No. 1*, paragraph 53); and

2. The procedures established under the legislation were "so cumbersome and procedurally defective that it is incapable of being administered consistently with protection of their *Charter* rights." (*Little Sisters No. 1*, paragraph 43)

[126] As to the first argument, Justice Binnie concluded that: "the legislative core of the *Customs Tariff* prohibition, i.e., imported material that meets the obscenity provisions of s. 163 of the *Criminal Code* as interpreted in *Butler*, survives *Charter* scrutiny in the context of gay and lesbian culture" (at paragraph 69).

[127] The second argument advanced by the appellants in *Little Sisters No. 1* focussed on the review procedures established under the impugned legislation, that is, a more practical concern around how the statutory scheme was administered or applied in practice. The majority held that the legislation was "quite capable of being administered in a manner that respects *Charter* rights." (at paragraph 44) Justice Binnie provided the following guidance as to how this issue is to be approached (at paragraph 73):

> The initial question, however, is whether the Customs legislation itself contains procedures that infringe *Charter* rights, as in *Morgentaler*, or whether the problem here is implementation, aggravated by administrative constraints such as limited budgets and lack of qualified personnel, as found by the trial judge.

[128] At paragraph 108, Justice Binnie repeated this direction:

> It is therefore convenient, before addressing the *Morgentaler* issue, to determine whether their equality rights have been infringed and if so whether the source of the problem is the Customs legislation itself, as the appellants contend, or whether the problem described by the trial judge resulted from the unconstitutional conduct of Customs officials exercising powers under constitutional legislation.

[129] In *Little Sisters No. 1*, Justice Binnie concluded at paragraph 150:

> As stated, the Customs legislation outlines a skeletal scheme consisting of a border inspection, a classification procedure for tariff purposes, and a system of both internal and judicial appeals from a prohibition based on a finding of obscenity. The inspection and classification provisions are inherent in any border control, and are valid unless the appellants can establish a constitutional right to open borders, which they have not done. The re-determination and appeal provisions are inserted for the importer's benefit. It is difficult to envisage how the Crown could achieve its legitimate objective at the border, or be fair to the public interest expressed through the obscenity provisions of the *Criminal Code* as well as the interests of the importers of expressive material, without such a system. It is clear that the statutory scheme required supplementary measures by regulation or ministerial direction beyond the skeletal provisions that were made. The operation of the statutory scheme, as found by the trial judge, created a barrier to free expression that exceeded the government's legitimate objectives, but that is a matter for regulatory or administrative not necessarily legislative action. In my view the basic statutory scheme set forth in the Customs legislation, properly implemented by the government within the powers granted by Parliament, was capable of being administered with minimal impairment of the s. 2(b) rights of importers, apart from the reverse onus provision which should be declared inapplicable to the obscenity issue for the reasons previously mentioned.
>
> [emphasis added]

[130] In this case, the Federal Crown argues that the Warden (institutional head) and Nova Institution staff similarly failed to exercise their authority under section 51(b) in a way which fully respects *Charter* rights.

[131] Importantly, and unlike *Little Sister No. 1*, the Federal Crown's argument is dependent upon a particular interpretation of the governing statute. In particular, the Federal Crown's operating premise is that the term "body cavity" [21] for the purposes of section 51(b) is:

1. Unique to dry cell detention (section 51(b));

2. Different from the statutory definition in section 46; and

[21] See paragraphs 85 – 87 above.

3. Different from the way that same term is interpreted elsewhere in the *CCRA*.

[132] As indicated above, the Federal Crown proposes that the term "body cavity" as found in the preamble of section 51 means:

1. Rectum or vagina for the purposes of section 51(a) enabling an X-ray to find contraband;

2. Rectum only (and excludes vagina) for the purposes of section 51(b) authorizing dry cell detention.

[133] For the reasons given, I do not accept the Federal Crown's proposed interpretation. Rather, I have concluded that the term "body cavity" has the same, consistent meaning for both sections 51(a) and (b). "Body cavity means the rectum or vagina", as section 46 of the *CCRA* says.

[134] Thus, the problem is not the manner in which persons acting under a statutory grant apply or administer their authority. Rather, the problem lies in the proper interpretation of the legislation itself. And as the Federal Court of Appeal observed in *McCague* v *Canada (Minister of National Defence)*, 2001 FCA 228: "It is the duty of the courts, and not of government officials, to determine the proper interpretation of a statute" (paragraph 37).

[135] For that reason, the constitutional analysis is not driven by *Little Sisters No. 1* or the manner in which a statutory grant of authority is administered. Rather, the point of departure in this case is the constitutional validity of the dry cell provisions of the *CCRA*. That is, the threshold issue is the language of the statute itself, and not how the relevant provisions are administered.[22]

ISSUE 4: CONSTITUTIONAL ANALYSIS

[136] Ms. Adams says that sections 51 and 52 of the *CCRA* infringe sections 7, 8, 12, and 15 of the *Charter* and asks that they be declared void and of no effect.

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[22] For the same reason, it is not necessary to delve into a debate which has arisen regarding the application of *Little Sisters No. 1* in matters involving administrative segregation or detention. Compare the Ontario Court of Appeal's decision in *CCCLA* and the British Columbia Court of Appeal's decision in *BCCLA* against the Federal Court of Appeal's decision in *Brown* v *Canada (Citizenship and Immigration)*, 2020 FCA 130 ("***Brown***"), leave to appeal denied, [2020] SCCA No 385 and, in particular, paragraphs 78-80. The Federal Crown's written submissions cite the trial decision in *Brown* (2017 FC 710) but not the appellate decision.

[137] I begin with section 15(1) which states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[138] The section 15 analysis is broken down into two stages:

> Stage 1: Whether, on its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground; and
>
> Stage 2: Whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating their disadvantage.

(*Kahkewistahaw First Nation* v *Taypotat*, 2015 SCC 30, at paragraphs 19 – 20, and *Fraser* v *Canada (Attorney General)*, 2020 SCC 28 ("***Fraser* v *Canada (AG)***"), at paragraphs 52 – 75).

[139] With respect to the first stage of the analysis, in *Fraser* v *Canada (AG)*, the majority explained that "in order for a law to create a distinction based on prohibited grounds through its effects, it must have a disproportionate impact on members of a protected group" (at paragraph 52). The majority further noted, *inter alia*, that "disproportionate impact can be established if members of protected groups are denied benefits or forced to take on burdens more frequently than others" (at paragraph 55). The analysis is the same, regardless of whether the alleged discrimination is direct or experienced as an "adverse effect". (at paragraph 50)

[140] As to whether the impugned sections of the *CCRA* raised an issue regarding discrimination on the basis of sex, the Federal Crown's written submissions were reduced to the following paragraph:

> The Applicant's section 15 argument is premised on the idea that section 51 will be applied, as it was in the Applicant's case, to women suspected of concealing contraband in their vagina, which has the potential to lead to prolonged periods in a dry cell. As discussed above, *the proper interpretation of section 51* is that it only authorizes a placement in a dry cell where inmates are suspected of concealing goods in their digestive tract. The Applicant has presented no evidence that there would be a difference in the time spent in the dry cell for women

> compared to men where contraband is suspected to have been concealed in the digestive tract.[23] [emphasis added]

[141] Again, the Federal Crown's constitutional arguments regarding section 15 of the *Charter* are predicated upon a particular statutory interpretation of "body cavity" which I have not accepted for the reasons provided above.

[142] In my view, section 51(b) of the *CCRA* has a disproportionate effect on women. Female inmates reasonably suspected of carrying contraband in their vagina are forced to take on additional burdens in terms of both the risk of dry cell detention and the length of dry cell detention. Including "vagina" within the definition of "body cavity" for the purposes of dry cell detention, means that the differential, negative harm facing women is distinct and significant because:

1. The predominantly involuntary menstrual process by which bodily fluids or waste (including contraband) might be expelled through the vagina is not as frequent as through the digestive tract. As such, women may become subjected to longer periods of dry cell detention where reasonably suspected of carrying contraband in a vagina – as was the case with Ms. Adams. The records show that Ms. Adams experienced a number of bowel movements but was not released from dry cell because, again, she was being detained under suspicion of carrying contraband in her vagina; and

2. With menopause, the risk of prolonged detention in dry cell is significantly higher and potentially indeterminate.

[143] As to the second stage of the section 15 analysis, the issue becomes whether the dry cell provisions of the *CCRA* fail to respond to the actual capacities and needs of women and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.

[144] The disadvantage here is the negative consequences for women who are reasonably suspected of carrying contraband in their vagina and, for that reason alone, become subject to protracted dry cell detention. The length of their dry cell detention may, for example, extend well beyond that facing men suspected of carrying contraband in their rectum.

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[23] Federal Crown's written submissions filed October 30, 2020, paragraph 64.

[145] The statute fails to respond to the actual needs of women who face this discriminatory effect and also has the effect of exacerbating their disadvantage in the form of longer periods of dry cell detention.

[146] It might be argued that section 51(b) of the *CCRA* responds to the problem by requiring that notice be given to penitentiary medical staff as a statutory precondition of any dry cell detention. Moreover, section 86 of the *CCRA* entitles every inmate to essential health care and reasonable access to non-essential health care, all in accordance with professionally accepted standards. Finally, section 87 of the *CCRA* mandates that an inmate's health and health care needs be taken into account in all decisions relating to, among other things, confinement in dry cell.

[147] The discriminatory impact on female inmates suspected of carrying contraband in their vagina does not vanish under these statutory provisions designed to secure medical oversight and treatment. The prohibited form of discrimination, as described above, is based on sex. Access to health care neither addresses nor eliminates that concern. Indeed, while section 87 requires that an inmate's "health and health needs" be considered, the discriminatory impact based on sex (i.e. dry cell detention for women suspected of carrying contraband in their vagina) may well (and often will) occur *before* the need for medical intervention becomes apparent. And notice to penitentiary medical staff under section 51(b) merely ensures that they are aware of the detention and in a position to observe the inmate for adverse effects – as opposed to ensuring discriminatory impact is not perpetuated or exacerbated.

[148] In my view, section 51(b) of the *CCRA* as informed by the statutory definitions in section 46 of the *CCRA* breaches section 15 of the *Charter*.

[149] Having found a breach, the analysis progresses to an assessment of whether the impugned legislation is saved under section 1 of the *Charter*. Section 1 states:

> 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.

[150] Limitations of a *Charter* right are deemed reasonable and justified if they satisfy the following two-branch test first articulated at paragraphs 69 – 70 of *R* v *Oakes*, [1986] 1 S.C.R. 103 ("***Oakes***"):

1. 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 is pressing and substantial in a free and democratic society; and

2. The means of implementing that objective must be reasonable and demonstrably justified which, in turn, involves a proportionality test balancing the interests of society against those of individuals and groups.

[151] As to the second branch of the test, proportionality is measured by reference to the following three requirements:

1. The legislated measure must be rationally connected to the statutory objective. In *RJR-MacDonald Inc.* v *Canada (Attorney General),* [1995] 3 SCR 199, McLachlin, J (as she then was) described this requirement as "a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose" (at paragraph 153). The government does not need to show, with certainty, that the impugned statutory limit will further the identified benefit. Rather, the government must simply show that it is reasonable to suppose so. The evidentiary hurdle is not high or "particularly onerous" (see *Trociuk* v *British Columbia (Attorney General)*, 2003 SCC 34, at paragraph 34).

2. The impugned law must minimally impair the right in question. In *R* v *J. (K.R.)*, 2016 SCC 31, Karakatsanis J for the majority wrote:

> [70] The question at this second stage is whether the 2012 amendments are minimally impairing, in the sense that "the limit on the right is reasonably tailored to the objective" (*Carter*, at para. 102). It is only when there are alternative, less harmful means of achieving the government's objective "in a real and substantial manner" that a law should fail the minimal impairment test (*Alberta* v *Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55).

3. There must be proportionality between the deleterious and salutary effects of the impugned law. (*RJR-MacDonald*, at paragraph 60, citing *Oakes*)

[152] At the section 1 stage of the analysis, the onus of proof shifts to the state to demonstrate that the infringement is reasonable and justified, on the balance of probabilities.

[153] The Federal Crown offered no written submissions regarding section 1 of the *Charter*. As indicated, the Federal Crown's submissions were devoted primarily to the concerns around *habeas corpus* as the appropriate procedural vehicle and, secondly, to the argument that the *CCRA*'s dry cell provisions did not infringe the *Charter*. Thus, the Federal Crown did not deem it necessary to address section 1 or the *Oakes* test. From that perspective, it might be argued that the Federal Crown failed to acknowledge or satisfy its burden.

[154] In any event, as to the first part of the section 1 test, the dry cell provisions of the *CCRA* seek to prevent the smuggling of contraband into the penitentiary setting. The presence and use of contraband threatens both the maintenance of order within the prison and the safety of the inmates – including those who risk their own health by concealing contraband in a body cavity. In my view, these are pressing and substantial objectives, consistent with the legislative purpose of maintaining a just, peaceful and safe society by carrying out sentences in a manner which ensures the "safe and humane custody and supervision of offenders" (*CCRA*, section 3).

[155] As to the issue of proportionality, in my view, there are less harmful means of achieving the government's objective than dry celling women suspected of carrying contraband in their vagina. The dry cell provisions of the *CCRA* establish the same statutory response for contraband suspected of being concealed in a vagina as in a rectum – with both body parts being melded into a single term "body cavity". Yet, the biological process by which contraband might be expelled or otherwise escape from the rectum is different from the vagina. The expectation that contraband might be expelled from the vagina is similarly different, and so is the risk of a more severe period of dry cell detention for women reasonably suspected of carrying contraband in their vagina. To treat "vagina" and "rectum" as the same "body cavity" for the purposes of dry cell detention cannot be said to be minimally impairing or the least drastic necessary to achieve the legislative objective. And again, the Federal Crown has not advanced any argument or alternatives to the contrary.

[156] In sum, section 51(b) as informed by the statutory definition of "body cavity" under section 46 breaches section 15 of the *Charter* and is neither reasonable nor justified under section 1.

[157] In light of this finding, I do not deem it necessary to engage in a further analysis as to whether the dry cell provisions of the *CCRA* breach other provisions of the *Charter*. However, in *obiter* and unlike the decisions in *CCCLA* and *BCCLA*, there was no expert opinion placed before me in support of arguments around, for instance, cruel and unusual punishment contrary to section 12 of the *Charter*. Absent expert evidence, I would not be prepared to simply infer or take judicial notice as to the actual impact of dry cell detention (or administrative segregation) in a manner which is sufficiently certain as to invalidate legislation and undermine the statutory regime established by Parliament.

ISSUE 5: REMEDY

[158] Section 52(1) of the *Constitution Act*, 1982 provides:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[159] *In Ontario (Attorney General)* v *G*, 2020 SCC 38 ("***Ontario (A.G.)* v *G***"), the Supreme Court of Canada established the following two-stage test for crafting an appropriate remedy where legislation contravenes the *Charter*:

1. "The first step … in a given case is determining the extent of the legislation's inconsistency with the Constitution. Courts should bear in mind both "the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1"" (at paragraph 108). By precisely identifying the nature and extent of the *Charter* violation, the Court is better able to develop a response which is tailored to mend the problem;

2. The second step involves identifying the appropriate form of declaration in the circumstances. Three related comments are germane to this stage of the analysis:

    a. In *Ontario (A.G.)* v *G*, the Supreme Court of Canada cautioned that "To ensure the public has the benefit of enacted legislation, remedies of reading down, reading

in, and severance, tailored to the breadth of the violation, should be employed when possible so that the constitutional aspects of legislation are preserved" (at paragraph 112). The majority referred to these particular forms of declarations as "tailored remedies" which, in turn, reflect a concern for the various, sometimes opposing pressures which inform the public interest and enliven the rule of law. The majority observed:

> This Court has recognized that adherence to the principle of the rule of law means that the impact of legislation, even unconstitutional legislation, extends beyond those whose rights are violated — it is bad for all of society for unconstitutional legislation to "remain on the books" …. But the public interest cuts both ways — the public is also entitled to the benefit of legislation, which individuals rely upon to organize their lives and protect them from harm …. Laws validly enacted by democratically elected legislatures "are generally passed for the common good" and there is accordingly a "public interest" in legislation that "weighs heavily in the balance" of remedial discretion. [paragraph 96]

b. At the same time, the Court recognized that "if granted in the wrong circumstances, tailored remedies can intrude on the legislative sphere" (at paragraph 114). The primacy of the legislative branch must be respected; and the Court should not presume to legislate from the bench. "If it appears unlikely that the legislature would have enacted the tailored version of the statute, tailoring the remedy would not conform to its policy choice and would therefore undermine parliamentary sovereignty" (at paragraph 114). Thus, circumstances will arise where the only appropriate remedy is to declare the offending legislation invalid and of no force or effect;

c. If the legislation is to declared invalid and of no force or effect, the majority cautioned against automatically invoking the residual discretion to suspend the effect of the declaration to give the legislature time to remedy the breach. Suspending or delaying the invalidity of

unconstitutional legislation should not be the default position. Indeed, the majority observed that a suspension would be a rare occurrence. (at paragraph 132). That said, the following factors inform the exercise of the residual discretion to suspend a declaration of invalidity:

i. The government bears the onus of demonstrating that "an immediately effective declaration would have a limiting effect on the legislature's ability to set policy." (at paragraph 130);

ii. The Court balances the competing interests. The Court wrote at paragraph 131:

> The benefit achieved (or harm avoided) by the suspension must then be transparently weighed against countervailing fundamental remedial principles, namely the principles that *Charter* rights should be safeguarded through effective remedies and that the public has an interest in constitutionally compliant legislation. This includes considering factors such as the significance of the rights infringement (*Bedford*, at para. 167) — for example, the weight given to ongoing rights infringement will be especially heavy when criminal jeopardy is at stake — and the potential that the suspension will create harm such as legal uncertainty (Leckey, at pp. 594-95).

[160] Finally, the majority confirmed that the following fundamental principles apply at both stages of the analysis:

> A. *Charter* rights should be safeguarded through effective remedies.
>
> B. The public has an interest in the constitutional compliance of legislation.
>
> C. The public is entitled to the benefit of legislation.
>
> D. Courts and legislatures play different institutional roles.
>
> [at paragraph 94]

[161] As to the first step in the analysis, the Federal Crown submits that the *Charter* issues in play are specific to section 51(b) and that:

> …the court can identify the constitutional defect with precision and that the legislature would have enacted s. 51(b) to apply to inmates where the institutional

> head is satisfied that there are reasonable grounds to believe that an inmate has ingested contraband or is carrying contraband in the rectum. A declaration reading down s. 51(b) such that it is of no force or effect to the extent it applies to inmates suspected of carrying contraband in the vagina would effectively vindicate and protect *Charter* rights without interfering with aspects of the statute's operation unaffected by the finding of unconstitutionality. Section 51(b) is essential to maintaining the safety of all inmates and staff's and the security of the institution. Without s. 51(b), penitentiaries would become more dangerous and lives (both inmate and staff) would be at greater risk.

[162] Respectfully, the constitutional defect cannot be confined to section 51(b). Recall from paragraphs 88 - 113 above that a central consideration is the interpretation of the term "body cavity". The impact of that issue ripples beyond section 51(b).

[163] For the purposes of section 51, the term "body cavity" is found in the preamble. If an institutional head is satisfied that "there are reasonable grounds to believe that an inmate has ingested contraband or is carrying contraband in a body cavity", the institutional head may authorize either:

1. An X-ray under section 51(a), subject to certain other preconditions including inmate consent;

2. Dry cell detention under section 51(b), subject to certain other preconditions which do not include inmate consent but involve "the expectation the contraband will be expelled"

[164] Thus, the preamble to section 51 establishes the statutory precondition (i.e. that an inmate has ingested or is carrying contraband in a "body cavity") which then enables the institutional head to invoke one of two options. That statutory precondition applies to both section 51(a) and section 51(b) – not simply section 51(b). As indicated above, I do not find that Parliament intended the term "body cavity" to have one meaning for section 51(a) and another for section 51(b). Parliament created a more consistent and internally coherent response to the problem of carrying contraband in a body cavity. Section 51(a) (X-ray) creates a mechanism to search for contraband within a "body cavity". Sections 51(b) (dry cell) creates mechanisms to both search and seize contraband in a "body cavity" - or, possibly, disprove that any such contraband is present.

[165] In my view, the legislative defect when considered under section 15 of the *Charter* arises in the meaning and scope of the term "body cavity" as used in section 51 and as informed by its statutory definition in section 46.

[166] I turn now to the second step in the analysis: fashioning a remedy or identifying the appropriate form of declaration, bearing in mind that *Ontario (A.G.)* v *G* and *R* v *Appulonappa*, 2015 SCC 59, support a "tailored remedy" and indicate that a suspension should be rare and granted where it is the only appropriate remedy. In this case, the Federal Crown submits that the "tailored remedy" of reading down section 51(b) of the *CCRA* and declaring that it is of no force or effect to the extent it applies to inmates suspected of carrying contraband in the vagina is sufficient in the circumstances.

[167] In addressing the issue of remedy, I note the following:

1. The presence of contraband in a prison setting:

    a. Poses a very serious threat to security and order within the institution; and

    b. Compromises the safety of staff and inmates, including those inmates who place their own health at grievous risk when resorting to smuggling contraband in a "body cavity".

    For these reasons, the goals of detection (or search), and recovery (or seizure) are critical when it comes to preventing the importation and use of contraband into a penitentiary;

2. The search and seizure provisions of the *CCRA* identify numerous ways in which contraband might be smuggled into or, alternatively, located within a penitentiary. They also provide options for either preventing those risks or responding when those risks actually materialize (i.e., contraband is found or its presence is reasonably suspected). These statutory provisions represent Parliament's attempt to address the problem of contraband and they operate in a coordinated, integrated and internally consistent manner. Thus, for example, the term "body cavity" is defined in section 46 and is found in several sections of the search and seizure provisions. As indicated, section 51 provides options for searching and seizing contraband

being carried in a "body cavity". Section 52 provides another option in the form of a "body cavity search", which term is also defined in section 46. Sections 50 and 65 also address the issue of searching for, and seizing, contraband being carried in a "body cavity";

3. Inmates introducing contraband into the general inmate population by carrying it in a "body cavity" (including the vagina) represents an offence under the provisions of the *CCRA* which places the health and security of the institution (including those who live and work within the institution) at risk. The fact that placing those inmates into dry cell under section 51(b) of the *CCRA* contravenes section 15 of the *Charter* does not mean that the practise of smuggling contraband in a vagina is suddenly permissible. It is not. However, the *Charter* violation in respect of section 51(b) raises related concerns as to how the remaining provisions of the *CCRA* might effectively respond to the clear risks which arise when contraband is reasonably suspected of being carried in a vagina. What is the institution to do where this occurs? Section 51(a) (X-ray) is of limited utility given that it requires inmate consent and, in any event, only enables prison officials to actually confirm (or exclude) the presence of contraband. Section 52 (body cavity search) also requires inmate consent. The institutional head may request a body cavity search but to what end, if the inmate refuses consent? In light of the *Charter* breach and, indeed, the Federal Crown's statement that dry cell is not an acceptable response to the problem of carrying contraband in a vagina, an important issue arises as to how the institution might effectively respond. Section 34(1)(a) of the *CCRA* (permitting administrative segregation or solitary confinement) emerges as a potentially problematic option. It states:

> A staff member may authorize the transfer of an inmate into a structured intervention unit under subsection 29.01(1) only if the staff member is satisfied that there is no reasonable alternative to the inmate's confinement in a structured intervention unit and the staff member believes on reasonable grounds that:
>
> (a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the safety of any person or the security of a penitentiary and allowing the inmate to be in the mainstream inmate population would jeopardize the safety of any person or the security of the penitentiary.

Indeed, the facts in this case might be interpreted as raising the specter of administrative segregation as a disciplinary or punitive response to contraband being carried in a vagina. On May 9, 2020 (3 days after Ms. Adams was placed in dry cell), the Warden emailed Jay Pyke (Correction Service of Canada's Regional Deputy Commissioner – Atlantic Region) and Adele MacInnes Meagher (Assistant to the Regional Deputy Commissioner – Atlantic Region and former Warden at Nova Institution), among others. He wrote:

> As per CD566-7 I am informing you that we are maintaining Ms. Adams in our dry cell as *she has not turned over* the balloons concealed in her vagina, which we believe contains methamphetamines. [emphasis added]

No responding concern was expressed to the Warden's suggestion that Ms. Adams remain in dry cell until she "turned over" the suspected contraband. These words might be interpreted as suggesting that dry cell be used as a more coercive means to ensure suspected contraband is surrendered. For the purposes of this decision, it is not necessary to make any particular findings regarding this communication except that they expose the problems which may emerge in the effort to prevent the infiltration of contraband into a penitentiary if the Court begins to narrowly and selectively excise or alter components of an otherwise coordinated and integrated statutory scheme, without sufficient regard to the broader policy issue at play.

4. Parliament has access to a wide spectrum of opinions and expertise when developing legislation. By contrast, litigation in Canada occurs through an adversarial process in which the evidence is limited to that which the parties themselves place before the Court. Parliament has the resources and democratic authority to develop a coordinated and integrated legislative response to the critical goal of searching for, and seizing, contraband in a penitentiary. By contrast, the Courts are entrusted with the duty to interpret legislation, not create it.

[168] I acknowledge that the Federal Crown's admission that dry cell detention for a person reasonably suspected of carrying contraband in a vagina is, under the current version of the *CCRA*, unlawful and should not occur. This admission mitigates the problem and helps ensure Ms. Adams' experience will not be repeated. However, in my view, reading down the meaning of "body cavity" for

the purposes of section 51(b) alone (notwithstanding the broader, statutory meaning which would apply throughout the *CCRA*) strays into the legislative sphere. Having created a comprehensive and integrated approach to the very important issue of searching for, and seizing, contraband under the *CCRA* (including contraband in a "body cavity"), it appears unlikely that the legislature would have enacted a tailored version of section 51(a) (dry cell) that is unique, inconsistent with other parts of the statute, and that leaves open the important question of how an institutional head might effectively respond where a person reasonably suspected of carrying contraband in her vagina refuses to cooperate with any further investigations. At a minimum, these issues involve policy choices and complexities that are for Parliament, and not the Court, to decide.

[169] This is a rare occasion where suspending the declaration of invalidity is necessary in order for Parliament to consider and, if appropriate, develop a legislative response. Section 51(b) of the *CCRA* as informed by the definition of "body cavity" in section 46 is deemed invalid and of no binding force or effect; however, this declaration is suspended for a period of 6 months.

Keith, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Adams v. Nova Institution*, 2021 NSSC 313

Date: 20211112
Docket: Tru. No. 498177
Registry: Truro

Between:

Lisa Adams

Applicant

v.

Warden of Nova Institution for Women,
Correctional Services Canada and
Attorney General of Canada

Respondents

ERRATUM

Judge:	The Honourable Justice John A. Keith
Heard:	November 9, 2020, in Truro, Nova Scotia
Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated November 18, 2021
Final Written Submissions:	June 25, 2021
Counsel:	**Jessica Rose and Emma Halpern**, counsel for the Applicant Lisa Adams **Ami Assignon**, counsel for the Respondents Warden of Nova Institution for Women, Correctional Services Canada and Attorney General of Canada **Jack Townsend**, counsel for the Attorney General of Nova Scotia on a watching brief

Erratum:

The reference to “section 51” in the final sentence of paragraph 14, bullet 3., on page 6, has been changed to “section 51(b)”.