Court File No. T-539-20

FEDERAL COURT

BETWEEN:

**CANADIAN CIVIL LIBERTIES ASSOCIATION,
CANADIAN PRISON LAW ASSOCIATION
HIV & AIDS LEGAL CLINIC ONTARIO,
HIV LEGAL NETWORK,
& SEAN JOHNSTON**

Applicants (Moving Parties)

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent

**AMENDED MOTION RECORD
(Mandatory Interlocutory Injunction)**

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VOLUME 1

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**NOTICE OF MOTION
(Mandatory Interlocutory Injunction)**

TAKE NOTICE THAT the Applicants will make a motion the Court, at a time and date to be fixed by the Court, by telephone or video conference.

THE MOTION IS FOR:

1. A mandatory injunction requiring that the Correctional Service of Canada ("CSC")

   a) Identify those prisoners who

      i. due to age or medical condition are particularly at risk of contracting COVID-19 and of experiencing severe adverse effects if they do become infected;

      ii. have been assessed as low risk if released; and/or

      iii. are eligible for statutory release within the next six months and have not been referred to the Parole Board of Canada;

   b) Determine which of the prisoners described in paragraph (a) are eligible to apply for medical unescorted absences (UTAs) and/or parole by exception;

c) For those prisoners described in paragraph (a)(i) who are ineligible to apply for medical UTAs due to their security classification, review that classification and reassess their eligibility;

d) For all prisoners who are determined to be eligible to apply for medical UTAs and/or parole by exception, inquire whether they wish to seek release;

e) If so, initiate the application (presumptively for a medical UTA) and within 30 days conduct the reviews and gather the information required for an Assessment for Decision. For greater certainty, this includes:

i. Obtaining relevant medical information, subject to the prisoner's consent which CSC shall facilitate communicating to health care providers;

ii. For prisoners who are not able to identify a private residence at which they could stay if leave were granted, working with community housing providers to seek to secure a space;

iii. Regularly reviewing proposed release plans and updating them if and as additional information becomes available;

f) Ensure that all prisoners designated minimum security are housed in minimum security facilities and that all healing lodge space is utilized;

g) Use existing cell space to reduce prisoner populations in regional reception centres, and canvass prisoners to determine if there is interest in inter-regional transfers to reduce crowding;

h) Develop a plan for institutional depopulation, including the implementation of the measures set out above, provide that plan to the applicants and the Court, and report on its progress;

i) Develop a plan for the care and wellbeing of prisoners who are determined not to be appropriate candidates for release in the event of a further outbreak, particularly those whose morbidity and mortality risk is heightened due to age or underlying medical condition.

THE GROUNDS FOR THIS MOTION ARE:

a) Coronavirus disease 2019 (COVID-19) is an ongoing global pandemic. In Canada alone, there are just under 129,000 known cases, more than 9,100 of which have resulted in death.

b) There is currently no COVID-specific treatment or therapy, and no vaccine to protect against the novel coronavirus that causes it. Efforts to combat COVID-19 are therefore focused on preventing infection and slowing the spread of the disease. Practising physical distancing and avoiding of closed and crowded environments and close and prolonged contact with others are by far the most effective measures to mitigate the risk of infection.

c) These measures are difficult if not impossible to implement in congregate living environments, including correctional facilities. Correctional facilities are therefore at heightened risk of experiencing outbreaks of COVID-19. In addition, there is a greater prevalence among prisoners than the population at large of conditions that increase both morbidity and mortality in relation to COVID-19;

d) CSC has already experienced outbreaks of COVID-19 at five of its institutions. Two prisoners have died, and an additional 358 have tested positive along with a number of CSC staff members;

e) There are currently no identified active cases of COVID-19 within CSC institutions. This corresponds with greatly reduced infection rates in the broader Canadian public, achieved through unprecedented public health initiatives to “flatten the curve”. Experts predict, however, that there will be a resurgence or second wave of COVID-19 in the months ahead. As infection rates among the broader public rise, so to does the risk that COVID-19 will again enter CSC institutions;

f) The *Corrections and Conditional Release Act*, SC 1992, c 20 (“*CCRA*”), imposes a number of duties on CSC. CSC is required to take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe and healthful (section

70); to provide prisoners with essential health care that conforms to professionally accepted standards (section 86); and to take into consideration a prisoner's state of health and health care needs in all decisions affecting the prisoner (section 87).

g) Reducing prison populations wherever possible consistent with public safety decreases the risk of outbreaks within correctional facilities and thus helps to ensure a safe and healthful environment. Releasing prisoners protects the health not only of those who are released but also those who continue to live and work in correctional facilities, as well as the public more generally. It also enables those who are released to access essential health care, namely the ability to reduce their risk of infection through physical distancing.

h) The applicants have brought an application for an order that, among a variety of other things, would require CSC to comply with its statutory duties by taking "proactive and systematic steps to reduce the population of prisoners in its institutions to the greatest extent possible consistent with public safety, giving precedence to those who are particularly vulnerable to COVID-19 due to age or underlying health conditions."

i) If that order were to issue, it would in effect require CSC to make use of the statutory mechanisms available under the *CCRA* to release prisoners wherever it would be safe to do so.

j) Applications for release via those mechanisms take time to process and prepare. Should the court grant the relief sought in the underlying application, there will therefore inevitably be some period of delay in effectively implementing it unless steps are taken in advance. Such delay may well result in prisoners who are ultimately found to be appropriate candidates for release being detained longer than necessary and unduly and avoidably exposed to the risks of COVID-19;

k) Granting the relief sought on this motion will ensure that in the event the applicants prevail on the underlying application, CSC will be in a position to render decisions

on applications for release, or in appropriate cases refer those applications to the Parole Board of Canada;

l) The applicants meet the test for a mandatory interlocutory injunction;

m) Such further and other grounds as counsel may advise and this Honourable Court permits.

THE APPLICANTS RELY ON:

a) *Corrections and Conditional Release Act*, SC 1992, c 20, sections 3, 4, 70, 85, 86, 87, 102, 115, 117 and 121;

b) *Corrections and Conditional Release Regulations*, SOR/92-620, sections 83 and 155;

c) *Canadian Charter of Rights and Freedoms*, sections 7, 9, 12, 15, and 24(1);

d) *Federal Courts Act*, RS 1985, c F-7, sections 18(1) and 18.1.

THE MOTION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:

a) The affidavit of Adelina Iftene, affirmed May 13, 2020;

b) The affidavit of Aaron Orkin, affirmed June 8, 2020;

c) The affidavit of David Fisman, affirmed July 21, 2020;

d) The affidavit of Lisa Kerr, affirmed July 16, 2020;

e) Such further and other further and other evidence as counsel may advise and this Honourable Court permit.

Dated at Toronto this 9th day of September, 2020.

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**APPLICANTS' MEMORANDUM OF FACT AND LAW
(Motion for Interlocutory Injunction)**

PART I - STATEMENT OF FACTS

A. Overview

1. Congregate living facilities, including correctional institutions, are at heightened risk of experiencing outbreaks of COVID-19. Infection spreads quickly in closed and often crowded communal environments where individuals are in close and prolonged contact and physical distancing is exceedingly difficult to maintain. Prisoners are constrained in their ability to protect themselves from infection both as a result of their incarceration and because risk mitigation measures generally depend on action or assistance from correctional authorities and officials. In addition, prisoners as a class are disproportionately vulnerable to COVID-19 due to the prevalence of health conditions that increase both morbidity and mortality.

2. The Correctional Service of Canada ("CSC") has already experienced outbreaks of COVID-19 at five of its institutions. Tragically, two prisoners have died as a result of contracting

COVID-19, and an additional 358 have tested positive.[1] As of April 26, 2020, the known rate of infection among CSC prisoners was over nine times higher than the known rate of infection in the broader population, even though the first reported case among prisoners emerged much later.[2] In addition, 142 CSC staff have also reportedly tested positive for COVID-19.[3]

3. There are at present no identified active cases of COVID-19 among prisoners in CSC institutions. This corresponds with a significant decrease in the number of new cases identified each day in the Canadian population more generally. Public health measures aimed at "flattening the curve" of COVID-19 infections appear to have been largely successful – at least for the time being. According to expert epidemiological evidence, however, there is a strong likelihood of a resurgence or second wave of COVID-19 infections in Canada over the coming months.

4. The applicants have brought an application for an order that CSC implement a number of measures to protect the health and wellbeing of prisoners in relation to COVID-19. These include taking "proactive and systematic steps to reduce the population of prisoners in its institutions to the greatest extent possible consistent with public safety, giving precedence to those who are particularly vulnerable to COVID-19 due to age or underlying health conditions." In other words, on the underlying application, the applicants seek an order requiring CSC to make use of the statutory mechanisms available under the *Corrections and Conditional Release Act* ("*CCRA*")[4] to release prisoners wherever it would be safe to do so.

5. The timeframes established by policy contemplate that in the ordinary course, applications for release may take weeks and even months to process and prepare. Should the court grant the relief sought in the underlying application, there will inevitably be some period of delay in effectively implementing it unless steps are taken in advance and the usual timeframes are appropriately abbreviated. This motion is aimed at ensuring that in the event the applicants prevail, CSC will be in a position promptly to render decisions or refer applications to the Parole Board, at least in priority cases.

1 CSC, Inmate COVID-19 testing in federal correctional institutions, August 27, 2020.
2 Affidavit of Adelina Iftene, para 12 [Applicants' Application Record ("AAR"), Volume 2, Tab 7, p 297].
3 CSC, Update on COVID-19: June 25, 2020.
4 S.C. 1992, c. 20.

B. The COVID-19 Pandemic

6. COVID-19, the disease caused by novel coronavirus SARS-CoV-2, has been declared a global pandemic. In Canada alone as of August 28, 2020 it has caused the death of 9,108 individuals and is known to have infected an additional 118,250, although the true number of cases is almost certainly significantly higher. Those who are elderly and/or have underlying health conditions such as diabetes, lung or cardiovascular disease, or compromised immunity are particularly vulnerable both to contracting COVID-19 and suffering severe adverse effects – including death – as a result.[5]

7. There is at present no COVID-specific treatment or therapy, and no vaccine to protect against the virus that causes it. Effectively combatting COVID-19 therefore depends on measures that reduce transmission rates. These measures are essential to protecting individuals' health, and in particular the health of the elderly and those with underlying health conditions. They are also essential to ensuring that the health care system maintains sufficient resources and capacity to provide acute care to those who need it.[6]

8. Physical distancing – that is, maintaining at least two metres between individuals and avoiding crowds, closed spaces, close contact, and continual contact (the "four Cs") are the most effective means of slowing the spread of COVID-19.[7]

9. Screening individuals for symptoms also assists, but its effectiveness is limited. One of the particular challenges associated with the novel coronavirus is the significance of pre-symptomatic and asymptomatic transmission. Individuals are infective, and potentially most infective, prior to the onset of symptoms. In addition, a significant percentage of those who are infected will remain asymptomatic or only mildly symptomatic. Many of the known "super-spreader" events involved transmission from individuals who were not experiencing symptoms

[5] Affidavit of Dr. David Fisman at paras 40-42 [AAR, Volume 2, Tab 9, pp 457-458].

[6] Affidavit of Dr. Aaron Orkin at paras 22-23 [AAR, Volume 2, Tab 8, p 435].

[7] Affidavit of Dr. Aaron Orkin at para 24 [AAR, Volume 2, Tab 8, p 436]; Affidavit of Dr. David Fisman at paras 23 and 31 [AAR, Volume 2, Tab 9, pp 542, 545].

at the time, and who therefore would not have been identified through screening. Testing and contract tracing, although vitally important, are subject to the same frailties.[8]

10. Where it is impossible to maintain physical distancing or avoid the four Cs, the use of personal protective equipment such as masks, proper hand hygiene, and regular disinfecting of shared surfaces can also aid in reducing the rate of transmission. These are, however, secondary interventions aimed at reducing the transmission within a population of a given density. They are by definition less effective than reducing population density. Further, even the limited effectiveness of these interventions can be overwhelmed as the viral load increases in a high-density environment. From both a population and an individual health perspective, there is simply no substitute for appropriate physical distancing.[9]

11. By implementing physical distancing measures and avoiding the four Cs we have succeeded in flattening the curve of COVID-19 infections in the Canadian population at large. As restrictions are progressively eased, it is tempting to imagine that the pandemic is largely behind us. In flattening the curve, however, we have also extended it. The overwhelming majority of Canadians remain at risk of infection.[10]

12. There is a strong likelihood of a second wave of infections in Canada over the months ahead, as climatic conditions change and we increasingly move back into closed and often crowded environments – including newly reopened schools and businesses.[11] Indeed, some provinces are already reporting increasing numbers of new cases.[12] Experience elsewhere has demonstrated only too clearly how quickly outbreaks in the population at large can occur and spread. As the rate of infection increases in the general population in Canada, so to does the likelihood that COVID-19 will again be brought into CSC institutions – with potentially far-reaching and devastating effects.

8 Affidavit of Dr. David Fisman at para 24 [AAR, Volume 2, Tab 9, pp 543-544].

9 Affidavit of Dr. Aaron Orkin at para 39 [AAR, Volume 2, Tab 8, p 443]

10 Affidavit of Dr. David Fisman at para 11 [AAR, Volume 2, Tab 9, p 540].

11 Affidavit of Dr. David Fisman at paras 28-35 [AAR, Volume 2, Tab 9, pp 543-546].

12 See Public Health Ontario, "Daily Epidemiological Summary", September 3, 2020; Government of Alberta, COVID-19 Alberta Statistics, September 2, 2020; BC Centre for Disease Control, British Columbia Weekly COVID-19 Surveillance Report, September 3, 2020.

13. It is now abundantly, and tragically, well-established that outbreaks of COVID-19 are far more likely to occur and are difficult to contain within congregate living and work environments. This is particularly true of congregate living environments – such as correctional facilities – that have a high concentration of individuals; close quarters; shared facilities for food preparation, eating, toileting and hygiene, recreation and telecommunications; and/or staff who move in and out of and between living quarters and may unwittingly act as vectors of infection.[13]

14. COVID-19 poses an especially serious risk for prisoners in CSC institutions not only because of the nature of the penitentiary environment but also the prevalence of pre-existing vulnerabilities among the federal prison population.

15. In general, the health status of prisoners is comparable to that of persons 10-15 years their senior who are not imprisoned. In other words, 50 years of age for prisoners roughly corresponds to 65 years of age for persons outside of prisons. Currently, 25 percent of federal prisoners are over the age of 50. There is also a higher prevalence of cardiovascular disease, asthma and other respiratory diseases, diabetes, HIV and hepatitis C virus infection among people in prison than among the population as a whole. Prisoners are thus at greater risk both of contracting COVID-19, and of experiencing more severe outcomes, including death, as a result of infection.[14]

C. Depopulating Prisons Mitigates the Risks of COVID-19

16. Reducing prison populations wherever possible is critical to reduce the risk and extent of COVID-19 outbreaks, irrespective of other interventions.[15] Releasing prisoners reduces the population density within correctional facilities and therefore reduces the risk of infection both for those who are released and those who remain.

17. Reducing prison populations also safeguards the health of the population as a whole. Outbreaks within prisons can not only strain local health care resources but also spark further outbreaks in the community at large. For this reason:

[13] Affidavit of Dr. Aaron Orkin at para 27 [AAR, Volume 2, Tab 8, p 436].

[14] Affidavit of Dr. Adelina Iftene at paras 6, 9, 15 [AAR, Volume 2, Tab 7, pp 294, 295-296, 298]

[15] Affidavit of Dr. Aaron Orkin at paras 43 [AAR, Volume 2, Tab 8, p 445]

> Every person who is discharged from a correctional facility to a private residence is an opportunity to flatten the curve and improve health for the individual involved, other inmates in the facility in question, staff at the facility in question, and the public. …
>
> From a medical and population health perspective, it is in the best interest of the community at large that an aggressive approach be taken to depopulating custodial facilities.[16]

18. The importance and urgency of prison depopulation to mitigate the risks of COVID-19 are widely recognized. Through an Inter-Agency Standing Committee, the WHO and the Office of the United Nations High Commissioner for Human Rights have issued an interim guidance document calling for a number of preventative measures to protect persons deprived of their liberty from the spread of COVID-19. One of their primary recommendations is that public authorities take immediate measures to reduce the population in prisons, with priority given to individuals with underlying health conditions, low risk profiles, or imminent release dates.[17]

19. Correctional authorities in over 40 countries around the world have reported depopulating correctional facilities by releasing individuals in response to COVID-19. Within Canada, provincial correctional authorities in British Columbia, Alberta, Manitoba, Ontario, Nova Scotia, Prince Edward Island and Newfoundland have also taken proactive steps to release prisoners following the onset of the pandemic. In Ontario, for example, the Ministry of the Solicitor General has issued Temporary Access Passes to intermittent prisoners, and proactively performed temporary absence reviews for prisoners with less than 30 days remaining on their sentences. Through these and other measures, Ontario reduced the number of prisoners across the province by nearly 30 percent between March 12, 2020 and April 15, 2020.[18]

20. In marked contrast to provincial correctional authorities, CSC does not appear to have taken any meaningful steps to reduce the population of prisoners within its institutions. In his June 19, 2020 COVID-19 Status Update, the Correctional Investigator observed that the decline of approximately 700 inmates (about 5% of the total inmate population) since the start of the pandemic was largely due to fewer revocations and a decrease in warrant of committal admission (down approximately 500 cases since the pandemic was declared) rather than any major increase

16 Affidavit of Dr. Aaron Orkin at paras 53-54 [AAR, Volume 2, Tab 8, p 448].

17 Affidavit of Lisa Kerr at paras 3-4 [AAR, Volume 3, Tab 11, p 1158].

18 Affidavit of Lisa Kerr [AAR, Volume 3, Tab 11, pp 1158-1162].

in releases.[19] The Correctional Investigator also observed that as courts resume operations, the number of warrant of committal admissions – and thus the total federal prison population – is expected to increase again.[20]

21. Instead, CSC focused its efforts on minimizing the risk of introducing COVID-19 to institutions. On March 30, 2020, CSC announced the suspension of all visits to prisoners, temporary absences (except for medical escorts) and work releases. Prison gyms, libraries and other communal spaces were closed, programs were suspended, and modified routines were implemented across the country, with time out of cell generally restricted to two to four hours. Even more onerous and restrictive regimes were imposed at institutions experiencing outbreaks. Access to the yard and fresh air exercise were extremely curtailed or suspended outright, and prisoners were confined to their cells for extended periods.[21]

22. These conditions persisted for months. In June, the Correctional Investigator found that "restrictions imposed by the pandemic show little sign of abatement. Indefinite lockdowns or extended periods of cellular isolation continue at many facilities, even those that have not experienced an outbreak." The Correctional Investigator went on to note that some of the restrictions imposed "reach beyond measures or controls contemplated in either domestic or international law."[22]

23. These measures had a profoundly detrimental impact on prisoners, not only making their time in custody significantly more onerous but also potentially prolonging it. The successful completion of programming and temporary absences are significant factors in decisions about security classification and parole – but of course, prisoners were unable to avail themselves of those opportunities while restrictions were in place. Further, while these restrictions were

[19] Office of the Correctional Investigator, "COVID-19 Status Update - June 19, 2020" at p 8, Exhibit "H" to the Affidavit of Lisa Kerr [AAR, Volume 3, Tab 11(H), p 1240].

[20] *Ibid*.

[21] Office of the Correctional Investigator, "COVID-19 Status Update – April 23, 2020" at p 3, Exhibit "I" to the Affidavit of Lisa Kerr [AAR, Volume 3, Tab 11(I), p 1245].

[22] Office of the Correctional Investigator, "COVID-19 Status Update - June 19, 2020" at p 7, Exhibit "H" to the Affidavit of Lisa Kerr [AAR, Volume 3, Tab 11(H), p 1239].

ostensibly imposed for the purpose of mitigating the risk of infection, they have been gravely injurious to prisoners' physical and mental health.

24. CSC has now begun to ease these restrictions. Notably, CSC institutions across the country are now once again open to visitors. CSC's website also indicates that programming and activities are being resumed and employees transitioned back into the workplace, though it is unclear to what extent this has been achieved.[23]

25. Removing these restrictions as fully and as quickly as possible is essential to safeguarding both the legal rights and the health and wellbeing of prisoners. The conditions imposed in response to the first wave of COVID-19 infections are simply not sustainable, nor – as the applicants assert in the underlying motion – can the resulting *Charter* breaches be justified unless CSC has taken meaningful steps to reduce prisoner populations. At the same time, as activities resume and movement in and out of CSC institutions increases, so too does the risk of COVID-19 transmission within those facilities. Assuming that the restrictions previously imposed played some role in attenuating the spread of COVID-19, smaller populations will be required in order for those restrictions to be relaxed safely. Expert evidence suggests that if mitigation measures are relaxed without reducing the inmate population, the second wave of outbreaks in correctional facilities will be larger than those experienced to date.[24]

26. In his June 19, 2020 COVID-19 Status update, the Correctional Investigator called for "an overall lifting of restrictions on conditions of confinement and a return to some kind of 'normality' in institutional routines".[25] He went on to observe that

> In anticipation of the pandemic, greater and closer collaboration between CSC and the Board could have been expected. *There simply was no advanced, coherent or concerted effort or plan in place to thin the federal prison population in order to slow the transmission of COVID-19 in federal corrections.* Many provincial correctional authorities led the way in this regard, with no apparent or lasting impact on public safety. The federal response in this respect has been slow, contradictory, confused and deficient.

[23] CSC's transition to the new normal, August 6, 2020.

[24] Affidavit of Dr. Aaron Orkin at para 61 [AAR, Volume 2, Tab 8, p 450].

[25] Office of the Correctional Investigator, "COVID-19 Status Update - June 19, 2020" at p 7, Exhibit "H" to the Affidavit of Lisa Kerr [AAR, Volume 3, Tab 11(H), p 1239].

> *This is a situation that can be easily resolved now that the virus spread has appeared to have been contained and before the expected next wave*.[26]

27. Time is of the essence. COVID-19 outbreaks are characterized by exponential growth in infection. In other words, one or two cases do not slowly evolve into three, four or five cases but instead rapidly become 10 or 12 and then dozens if not hundreds. Exponential growth of COVID-19 is especially hard to prevent because a large proportion of cases are asymptomatic and initial infections can therefore go unnoticed. The opportunities for intervention are extremely narrow, and immediate and decisive action must be taken when the number of infections is still limited and the problem appears to be controllable.[27]

D. Mechanisms for Release Under the *Corrections and Conditional Release Act*

28. The *CCRA* establishes a number of mechanisms for the release of prisoners while they continue to serve their sentences, including unescorted temporary absences and parole by exception.

i. Unescorted Temporary Absence

29. Pursuant to subsection 115(1) of the *CCRA*, prisoners are eligible to apply for release on an unescorted temporary absence ("UTA") if they have served a prescribed minimum portion of their sentence: (a) for life and indeterminate sentences, the portion of the sentence to be served to reach full parole eligibility less three years, or (b) in all other cases, the greater of six months or one half of the period to be served before full parole eligibility.[28] Prisoners who have been classified as maximum security and those who have been detained beyond their statutory release date are not eligible to apply for UTAs, although those who have been referred by CSC for

[26] *Ibid* at pp 8-9 [AAR, Tab 11(H), pp 1240-1241]. [Emphasis added.]

[27] Affidavit of Dr. Aaron Orkin at para 30 [AAR, Volume 2, Tab 8, p 437].

[28] *CCRA* s 115(1). These requirements do not apply in the case of an offender whose life or health is in danger and for whom a UTA is necessary in order to administer emergency medical treatment (*CCRA* s 115(2)). Eligibility is subject to narrow exceptions set out in para 9 of CD 710-3, namely cases where indeterminate sentences are imposed for offences that occurred prior to August 1, 1997; cases where life and indeterminate sentences are followed by determinate sentences; and cases where prisoners are subject to orders under the *Immigration Act* or *Immigration and Refugee Protection Act* and have not reached their full parole eligibility.

detention remain eligible unless and until their detention is ordered by the Parole Board of Canada.[29]

30. Commissioner's Directive 710-3 ("CD 710-3") requires that every inmate be advised in writing of his or her eligibility for UTAs.[30]

31. Section 116 of the *CCRA* confers on the CSC Commissioner or the head of a CSC institution[31] broad discretion to authorize the indefinite UTA of any eligible prisoner where, in the opinion of the Commissioner or institutional head, the following criteria are met:

(a) the offender will not, by reoffending, present an undue risk to society during the absence;

(b) it is desirable for the offender to be absent from the penitentiary for medical reasons;

(c) the offender's behaviour while under sentence does not preclude authorizing the absence;

(d) a structured plan for the absence has been prepared.

32. Section 155 of the *Corrections and Conditional Release Regulations* ("*CCRR*") further provides that for the purposes of sections 116 and 117 of the *CCRA*, the releasing authority may authorize an unescorted temporary absence for medical reasons to allow the prisoner to "undergo medical examination or treatment that cannot reasonably be provided in the penitentiary."[32]

33. CD 710-3 sets out the process for completing an application for a medical UTA of more than 72 hours' duration. Upon receipt of the inmate's Application for Temporary Absence (CSC/SCC 1078), the Primary Worker will:

- review the application against the objectives of the Correctional Plan;
- interview the inmate to discuss the proposed temporary absence;

29 *CCRA* section 115(3); CD 710-3, paras 11-12.

30 CD 710-3, para 7.

31 While section 116 provides that authority to grant UTAs to certain classes of prisoners (those serving life or indeterminate sentences or sentences for offences set out in Schedule I or II to the *CCRA*) rests with the Parole Board of Canada, the Board has delegated that authority to institutional heads pursuant to s 117(1) of the *CCRA* in relation to all medical UTAs. See Commissioner's Directive 710-3, Appendix C: Granting Authority, para 9.

32 *Corrections and Conditional Release Regulations*, SOR/92-620, s 155.

- review the inmate's progress against the Correctional Plan, assess the level of risk involved in the proposed absence and the need for the imposition of conditions pursuant to subsection 161(2) of the *CCRR* in order to manage the risk;
- review victim information as well as any victim statement(s) provided pursuant to subsection 133(3.1) of the CCRA;
- request a Community Strategy;
- upon receipt of the Community Strategy, complete the Assessment for Decision *no later than 60 days following submission of the inmate's application.*[33]

34. The institutional head is then required to make a decision as soon as possible, but *no later than 10 days after the completion of the Assessment for Decision.*[34]

35. A temporary absence application may be reviewed following a negative decision. Where a temporary absence is sought for administrative, community service, family contact, or personal development purposes, any subsequent review of an application will not be conducted until at least six months have elapsed since the negative decision, unless significant changes have occurred and the application is supported by the Case Management Team. That restriction does not apply, however, to UTAs sought for medical reasons.[35] In other words, the decision to deny an application for a medical UTA can be reviewed at any time.

ii. Parole By Exception

36. Section 102 of the *CCRA* provides that the Parole Board of Canada may grant parole to an offender if, in its opinion,

> (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
>
> (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

37. Section 121 of the *CCRA* provides that, subject to section 102, parole may be granted at any time to an inmate who is not serving a life or indeterminate sentence and whose physical or mental health is likely to suffer serious damage if they continue to be held in confinement, or for

[33] CD 710-3, paras 22 and 25. [Emphasis added.]

[34] CD 710-3, para 28. [Emphasis added.]

[35] CD 710-3, para 29.

whom continued confinement would constitute an excessive hardship that was not foreseeable at the time their sentence was imposed.[36]

38. While the decision whether to grant parole by exception rests with the Parole Board, institutional officials play a significant role in preparing parole by exception applications. As set out in Commissioner's Directive 712-1 ("CD 712-1"), the institutional Parole Officer will consider all release options for inmates who meet the criteria identified in section 121 of the *CCRA*. Although the inmate is generally required to submit the application for parole by exception, that does not apply where the inmate is mentally or physically incapable of doing so or urgent circumstances require flexibility.[37]

39. Where parole by exception is proposed for health-related reasons, the institutional Parole Officer is required to initiate the pre-release process and complete the Assessment for Decision. The rationale for release must be "clearly supported by medical/psychiatric evidence."[38]

PART II – ISSUES

40. The sole issue to be determined on this motion is whether the applicants have met the test for a mandatory interlocutory injunction. As set out by the Supreme Court of Canada in *R v Canadian Broadcasting Corporation* this test requires that the applicants demonstrate:

(a) a strong *prima facie* case that they will succeed on the underlying application;
(b) that irreparable harm will result if the relief is not granted; and
(c) that the balance of convenience favours granting the injunction.[39]

36 *CCRA* ss 121(1)(b) and (c) and 121(2).
37 CD 712-1, paras 48 and 50.
38 CD 712-1, para 51.
39 *R v Canadian Broadcasting Corp.*, 2018 SCC 5 at para 18.

PART III – ARGUMENT

A. Strong *Prima Facie* Case

41. The applicants have brought an application for judicial review seeking, *inter alia*, an order in the nature of *mandamus* or pursuant to s 24(1) of the *Canadian Charter of Rights and Freedoms* requiring CSC to take proactive and systemic steps in response to COVID-19 to reduce the population of prisoners in CSC institutions to the greatest extent possible consistent with public safety, with precedence given to those who are particularly vulnerable to COVID-19 due to age or underlying health conditions.

42. There is a strong likelihood that the applicants will succeed on that application.[40]

i. CSC's Statutory Obligations

43. Section 70 of the *CCRA* provides that CSC "shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity." Section 86 requires CSC to provide prisoners with essential health care that conforms to professionally accepted standards, while section 87 requires that it take into consideration a prisoner's state of health and health care needs in (a) all decisions affecting the prisoner, including decisions relating to placement, transfer and confinement in a structured intervention unit, and (b) the preparation of the prisoner for release and the supervision of the prisoner.

44. Further, the purpose of the federal correctional system, as set out in section 3 of the *CCRA*, is to contribute to the maintenance of a just, peaceful and safe society by, *inter alia*, carrying out sentences imposed by courts through the safe and humane custody and supervision of prisoners. Section 4 of the *CCRA* sets out a number of principles that guide CSC in achieving that purpose, including that the sentence is carried out having regard to all relevant available information; that CSC uses the least restrictive measures consistent with the protection of

[40] *R v Canadian Broadcasting Corp.*, *supra* at para 18.

society, staff members and prisoners; and that CSC considers alternatives to custody in a penitentiary.

45. This Court has repeatedly found CSC to be in breach of its duty to provide a safe and healthy environment in circumstances where it permitted or caused inmates to be exposed to conditions that impaired their health.

46. In *Maljkovich v Canada*, this Court found that the CSC institution owed a duty of care to Mr. Maljkovich under section 70 of the *CCRA* and section 83 of the *CCRR* as well as the common law to incarcerate him in conditions that were healthful and that did not cause him to suffer physical discomfort and upset. The institution failed to fulfill that duty to the extent that it did not take reasonable steps to enforce its smoking policy or otherwise ensure that Mr. Maljkovich, who was allergic to cigarette smoke, was not exposed to second-hand smoke. While there was evidence that retrofitting air circulation systems to ensure that air from smoking areas was not circulated into non-smoking areas would be prohibitively expensive, this Court found that CSC could have taken other less expensive and reasonable steps, including better monitoring of non-smoking areas or the possible installation of smoke detectors. There was no evidence that any of those options were explored.[41]

47. In *Gates v Canada*, this Court found that CSC had failed to meet the requirements of sections 86(1)(a) and 87(a) of the *CCRA* and section 83 of the *CCRR* by allowing temperatures in the Temporary Detention Unit ("TDU") in one of its facilities to fall below healthy levels.[42] The evidence was that there was often an accumulation of cigarette smoke in the area caused by inmates smoking in their cells, contrary to CSC policy. There were apparently no fans to ventilate the area; instead, exterior doors were simply kept open all day and sometimes all night, including during the winter months. The applicants, many of whom had illnesses such as HIV or Hepatitis C that made them especially susceptible to cold, were denied additional blankets or clothing to help them stay warm.[43] The Court held that the duty to provide a safe and healthy living environment under section 70 of the *CCRA* and s 83 of the *CCRR* includes providing

41 *Maljkovich v Canada*, 2005 FC 1398 at para 19.

42 *Gates v Canada*, 2007 FC 1058.

43 *Ibid*. at paras 4-6.

adequate heat, and granted the applicants' judicial review for a declaration and mandatory injunction to maintain the temperature in the TDU at prescribed minimum levels.[44] This followed from an interlocutory injunction requiring effectively the same.[45]

48. Notably, the health impairments at issue in these cases – although concerning – were far less severe than the potential consequences of exposure to COVID-19.

49. In *Latham v Canada*, this Court considered a motion for release from a CSC facility due to the pandemic. It ultimately determined that the motion was premature, Mr. Latham having not yet made a formal application for release pursuant to any of the mechanisms available under the *CCRA*. The Court did accept, however, that in the abstract, "the failure to provide adequate health care or the failure to protect the health and safety of inmates may under certain circumstances constitute a breach of one's section 7 rights", and that "[s]uch a failure would also constitute a breach of an institution's statutory duty to provide a safe and healthful environment for prisoners [pursuant to] sections 70, 86, 87 of the *CCRA*."[46] It further accepted that "decision-makers must exercise their discretion in light of the COVID-19 situation in a manner that conforms to the *Charter*".[47]

50. The Court also expressed considerable sympathy for Mr. Latham's situation, and opined that in the context of the global pandemic and having regard to the reality of congregate living facilities such as prisons, "what may well be required is a novel approach to individuals at risk while protecting the public interest in a safe and healthy environment."[48] The "ongoing pandemic requires our correctional institutions and the courts that supervise their decisions to employ new ways to account for the specific risks posed by the virus."[49]

51. As described in detail above, numerous correctional authorities around the world and across Canada have already adopted prompt and coordinated responses to protect the health and safety of both prisoners and the public in the context of COVID-19. The efforts undertaken by

44 *Ibid*. at paras 12-14, 41.
45 *Ibid*. at para 1.
46 *Latham v Canada*, 2020 FC 670 at paras 59-60. [Citations omitted.]
47 *Ibid* at para 61. [Citations omitted.]
48 *Ibid*. at para 29.
49 *Ibid* at para 80.

those authorities to release prisoners from custody demonstrates the reasonableness of such measures in ensuring a safe and healthful prison environment and protecting prisoners' health.

52. In addition, and as the Court in *Latham* observed, new risk-based approaches have been adopted in the context of bail and sentencing decisions that address the reality of COVID-19 under the *Criminal Code*. These too demonstrate the reasonableness of granting release where public safety concerns are addressed, and of exercising restraint in imposing additional custody where the principles of sentencing can otherwise be satisfied. They also highlight the necessity and effects of considering the impact of COVID-19 on prisoner health at both individual and population levels – as well as the health of those who work in correctional facilities and the public more generally – in making decisions with regard to custody.

a) Bail

53. COVID-19 has repeatedly been held to be a material change in circumstances warranting bail review under section 520 of the *Criminal Code* – in other words, reconsideration of the need to order the detention of the accused in custody pending trial.[50] It has also altered the courts' approach to that assessment.

54. As the court explained in *R v Rajan*, COVID-19 requires "a reconfiguring and a rethinking of the application of the tertiary ground for detention of accused persons"[51] – that is, whether detention is necessary to maintain confidence in the administration of justice, having regard to all the circumstances.[52] "In the world we are living in, the proper application of the tertiary ground for refusing an accused bail has been radically altered. … The dangers to the prison population – both inmates and staff – posed by the risk of contagion have reordered the usual calculus. The tertiary ground must, for the time being, be looked at in a new light."[53]

55. Applying that reordered calculus, the court concluded that "the threat, if not the actuality of COVID-19, goes a long way to cancelling out the traditional basis for tertiary ground detention."

50 See *e.g. R v Nelson*, 2020 ONSC 1728 at para 39 ("I am more than satisfied that the prevailing health crisis required this court to consider whether Mr. Nelson should be released from custody into house arrest");

51 *R v Ranjan*, 2020 ONSC 2118 at para 74.

52 *Criminal Code*, RSC 1985 c C-46, s 515(10)(c).

53 *Ibid*. at paras 38-40.

> The Canadian public understands the momentous nature of this crisis and would be greatly concerned for the health of inmates and staff in institutional settings. In the public's mind, the real and tangible threat of contracting the virus may well supplant the otherwise negative reaction to the release of an accused person. The public is not short-sighted but would look at the long-term reputation of the administration of justice. In the face of the pandemic, bail release, in the absence of primary or secondary ground concerns, may well not shake the confidence of the public.[54]

56. In other cases courts have held that where detention is not required on the primary ground (to ensure that the accused attends court) and concerns under the secondary ground (protection of the public) can be addressed, then "in most cases, to maintain confidence in the administration of justice, release on stringent terms ought to be ordered, notwithstanding the strength of the usual four factors that might otherwise justify detention on the tertiary ground."[55]

57. While some courts have required the accused seeking release to adduce evidence of particular vulnerability due to personal characteristics or underlying health conditions,[56] others have rejected that approach.[57] In *R v J.R.*, the court held that with respect to the tertiary ground, the issue was not simply whether the applicant's release would be beneficial to him; reducing the prison population benefits not only inmates but also correctional staff and the public as a whole.[58] The applicant's health was therefore relevant but not dispositive. The court went on to hold that "during this pandemic, reasonable members of the public would expect the courts to give significant weight to the public health implications of incarcerating individuals."[59]

58. Courts in other cases have similarly had regard to the inextricable link between prison health and public health and the broader benefits of releasing individuals from custody. In *R v T.L.* the court held that:

> It is in the interests of society as a whole, as well as the inmate population, to release people who can be properly supervised outside the institutions. It better protects those who must be housed in the institutions (because there are no other reasonable options), those who work in the institutions (because they perform an essential service), and our

54 *Ibid.* at paras 69-70.

55 *R v S.A.*, 2020 ONSC 2946 at para 102. See also *R v J.R.*, 2020 ONSC 1938 at para 47*; R v Ali*, 2020 ONSC 2374 at para 98.

56 See *e.g. R. v. Nelson*, 2020 ONSC 1728; *R. v. Davidson*, 2020 ONSC 2775; *R v Phunstok*, 2020 ONSC 2158.

57 See *e.g. R. v. C.J.*, 2020 ONSC 1933; *R v Seegobinsingh*, 2020 ONSC 2274.

58 *R v J.R.*, 2020 ONSC 1938 at para 45.

59 *Ibid*. at para 47.

> whole community (because we can ill-afford to have breakouts of infection in institutions, requiring increased correctional staffing, increased medical staffing, and increased demand on other scarce resources).[60]

59. In *R v Kazman*, Harvison-Young J.A. ordered the release pending appeal of an accused who, by virtue of age and underlying health conditions, was more vulnerable to suffering complications and requiring hospitalization if he contracted COVID-19. After noting that it would be difficult if not impossible for him to practice social distancing to reduce his risk if he were detained, she went on to observe that:

> As the public health authorities have emphasized at this time, the need for social distancing is not only a question of protecting a given individual but also the community at large. In the prison context, a COVID-19 outbreak may turn into wider community spread as prison staff return home. As we are repeatedly hearing during this pandemic, the wider the spread, the greater the pressure will be for scarce medical resources.[61]

b) Sentencing

60. The pandemic has also altered the courts' approach to crafting a fit sentence. In several cases, courts that might or would otherwise have imposed brief custodial sentences have instead determined that a sentence of time served would be appropriate in the context of COVID-19.[62]

61. In *R v Hearns*, the court accepted that a sentence of time served, for which the accused was granted credit of 33 months and 11 days, was fit and appropriate for the offence of aggravated assault. The court acknowledged that the gravity of the crime and the accused's lengthy criminal record called for a "substantial term of incarceration", and that in normal circumstances the period of pre-sentence custody "might be seen by some to fall short of reflecting the seriousness of the offence and moral blameworthiness of the offender." [63] As the Court observed, however, the COVID-19 pandemic is not a normal circumstance.

60 *R v T.L.*, 2020 ONSC 1885 at para 36.

61 *R v Kazman*, 2020 ONCA 251 at para 18. See also *R v Shingoose*, 2020 SKCA 45 at para 52.

62 *R v Studd*, 2020 ONSC 2810; *R v Dakin*, 2020 ONCJ 202; *R v Kandhai*, 2020 ONSC 1611. See also *R v Laurin*, [2020] O.J. No 1226 at para 75 (although the court ultimately imposed a three-year custodial sentence for dangerous driving causing death, she noted that had she determined that only a few months of custody were required to meet the goals of sentencing, she would have had "little hesitation in reducing the sentence to reflect time served" given the risks associated with COVID-19).

63 *R v Hearns*, 2020 ONSC 2365 at para 10.

62. In considering the effect of COVID-19 on sentencing, the court made the following observations:

> Clearly, the pandemic does not do away with the well-established statutory and common law principles. However, the pandemic may impact on the application of those principles. It may soften the requirement of parity with precedent. The current circumstances are without precedent. Until recently, courts were not concerned with the potential spread of a deadly pathogen in custodial institutions.
>
> COVID-19 also affects our conception of the fitness of sentence. Fitness is similar to proportionality, but not co-extensive with it. Proportionality dictates that the sentence should be no more than is necessary to reflect the gravity of the crime and the moral blameworthiness of the offender. Fitness looks at a broader host of factors. A sentence may be fit even if it is not perfectly proportionate. Fitness looks, not only at the length of a sentence, but the conditions under which it is served. As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure.
>
> Consideration of these circumstances might justify a departure from the usual range of sentence, such as that contemplated in *R. v. Lacasse*, 2015 SCC 64, para 58. …
>
> The "specific circumstances of each case" would, in today's environment, include the ramifications of the current health crisis.[64]

63. The court concluded that where "a period of time served can address sentencing principles, *even imperfectly*, our sense of humanity tells us that release from prison is a fit and appropriate response.[65]

64. In other cases, courts have imposed shorter custodial sentences than they otherwise would or might have given the accused's state of health and vulnerability to contracting the virus and suffering complications. In *R v Bell*, the court imposed a sentence "at the very low range or just outside the range" for the offences at issue on an accused who had asthma and a heart condition, and for whom incarceration during the pandemic would be significantly more onerous.[66] In *R v Yzerman*, the court accepted the defence position on sentencing,

64 *Ibid*. at paras 15-18. [Quotation omitted.]

65 *Ibid.* at para 24. [Emphasis in original.]

66 *R v Bell*, 2020 ONSC 2632 at paras 43, 49.

notwithstanding that the Crown's position was "closer to the mark", on the basis that COVID-19 posed a greater risk to the accused who was HIV-positive. [67]

65. Reduced sentences have also been imposed in cases where there was no evidence that the accused was particularly susceptible.[68] In *R v M.W.*, the court noted the "genuine concern for a second wave of the virus in the late fall or early winter" and held that the "risk that the pandemic poses to inmates remains a factor the courts will consider in fixing the terms of a custodial sentence."[69] Finding that both the heightened risk of infection and the restrictions imposed during the pandemic would render any additional period of custody unusually harsh, the court reduced the accused's custodial sentence by three months.[70] This brought the accused's net sentence to three months, which permitted it to be served intermittently[71] – and, as noted above, Ontario correctional authorities have taken steps to release prisoners serving intermittent sentences on temporary absence permits in appropriate cases.

66. To be clear, COVID-19 is not dispositive. There are of course also cases in which accused have been denied bail or had custodial sentences imposed notwithstanding the risks posed by the pandemic and the conditions of detention imposed to try to contain its spread. As numerous judges have taken pains to emphasize, there is no suggestion that the COVID-19 pandemic grants a "get-out-of-jail-free card" to prisoners on remand or those serving sentences. The risks posed by the pandemic do not justify release where public safety concerns cannot be adequately addressed, nor a sentence that fails to accord with the principles of parity and proportionality.

67. COVID-19 is, however, a relevant and indeed significant factor in courts' (re)assessment of the need for, impact of, and/or appropriate duration of detention in custody. While it does not displace the principles that apply to bail and sentencing, it alters the manner in which they are applied. Whereas pre-trial detention might previously have been justified in order to maintain public confidence in the administration of justice, the personal and population-level risks

67 *R v Yzerman*, 2020 ONCJ 224 at para 13.

68 See *R v Durance*, 2020 ONCJ 236 at paras 61-62; *R v Vaughan*, 2020 ONSC 3942.

69 *R v M.W.*, 2020 ONSC 3513 at para 50.

70 *Ibid* at para 51.

71 *Ibid* at paras 55-56.

associated with COVID-19 now militate in favour of release to achieve the same goal. Similarly, it may be appropriate to reduce what would otherwise be a fit sentence given that detention during the pandemic is significantly more onerous than it otherwise would be.

68. These cases clearly establish that:

a) where doing so is consistent with the protection of public safety, promptly releasing prisoners from correctional facilities and taking steps to maintain lower than normal in-custody counts are eminently reasonable measures to assist in ensuring a safe and healthful environment for those who continue to live and work within those facilities;

b) the impacts of COVID-19 on prisoner health must be taken into account in decisions concerning custody; and

c) where those impacts are taken into account, they will in appropriate cases warrant alternatives to custody, or reductions in the amount of time to be served in a correctional facility.

69. Notably, many of the decisions cited above were made on the basis of a limited evidentiary record concerning the risks of COVID-19 in correctional facilities – and indeed, in many cases on the basis of judicial notice.[72] Here, the applicants have filed a comprehensive record, including extensive expert evidence concerning those risks as well as the impacts of depopulation.

70. Given both the law and the evidence, there is a strong likelihood that the applicants will ultimately be successful in proving the allegations set out in the originating notice of application.[73]

ii. Charter Remedy

71. As noted above, this Court has already accepted that in certain circumstances, the failure to ensure a safe and healthful environment may constitute a breach of prisoners' rights under section 7 of the *Charter*. In the context of the COVID-19 pandemic, that failure significantly increases the risks to prisoners' security of the person and indeed their lives.

[72] See *e.g. R v C.J.*, *supra* at para 9.

[73] *Canadian Broadcasting Corp*, *supra* at para 18.

72. Harm need not be manifest or inevitable in order to engage section 7 of the *Charter*; an increased risk of harm is sufficient to establish an infringement.[74] Further, government action need not be the only or even the dominant cause of that risk. All the applicants need show is a sufficient causal connection between the state action and the prejudice suffered. That burden is met where the state action contributes to the harm.[75] Here, while CSC is obviously not itself the immediate source of the risk to prisoners' health, there is a sufficient causal connection between CSC's failure to take all reasonable steps to ensure a safe and healthful environment – including through reducing prisoner populations – and the risk to prisoners' section 7 interests to establish the deprivation.

73. The violation of these rights is not in accordance with the principles of fundamental justice. Where public safety does not require incarceration, avoidable exposure to and the potential consequences of contracting COVID-19 would be both arbitrary and grossly disproportionate to the principles and purposes of custodial sentences.[76] As the Supreme Court stressed in *Bedford*, these principles do not measure the percentage of the population that is negatively impacted; the analysis is "qualitative, not quantitative." The question under section 7 is whether anyone's life, liberty or security of the person has been infringed or denied, and an arbitrary or grossly disproportionate effect on one individual is sufficient to establish a breach.[77] Here, therefore, the applicants need only show that a single prisoner has suffered or can reasonably be expected to suffer impairments of their security of the person in order to make out the section 7 claim.

74. The section 7 breach cannot be justified. In reviewing state action that engages the *Charter*, the court should apply "a robust proportionality analysis consistent with administrative law principles".[78] An administrative decision will be reasonable if it "reflects a proportionate balancing of the *Charter* protection with the statutory objective at issue."[79] The court must be

[74] *United States of America v Burns*, 2001 SCC 7 at paras 59-60; *Suresh v Canada*, 2002 SCC 1 at para 55.

[75] *Canada v Bedford*, 2013 SCC 72 at para 76; *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at paras 19, 21.

[76] *Bedford*, *supra* at paras 111, 120.

[77] *Bedford*, *supra* at para 123.

[78] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 3.

[79] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 79.

satisfied that the decision limits the *Charter* right "as little as reasonably possible" in light of the applicable statutory objectives, and consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully.[80] If there was an alternative "*reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives" the decision is disproportionate.[81] The reviewing court is also required to weigh the severity of the interference with *Charter* rights against the benefits to its statutory objectives.[82]

75. Here there simply is no balance. CSC's failure to ensure a safe and healthful environment, including through depopulation where safe and appropriate, undermines rather than benefits its primary objective of contributing to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the *safe and humane* custody and supervision of prisoners. Certainly, it cannot be said to have limited prisoners' section 7 rights as little as possible in light of the alternatives reasonably available.[83]

76. Section 24(1) of the *Charter* confers a broad discretion on the court to craft a just and appropriate remedy that meaningfully vindicates *Charter* rights. The forms of relief available under section 24(1) include *mandamus*.[84] Thus, even if the Court does not accept that CSC has failed to fulfill its statutory duties, it can nevertheless grant the relief sought pursuant to section 24(1). This is underscored by the court's observation in *Latham* that "[w]ithin the context of the COVID-19 pandemic, I would think that the flexibility inherent in subsection 24(1) allows courts to tailor remedies that account for the particularities and risks posed by an unprecedented global pandemic with wide-ranging consequences."[85]

80 *Ibid* at paras 80-81.

81 *Ibid* at para 81.

82 *Ibid* at paras 82, 85.

83 As set out above, numerous other correctional authorities and courts have found that in the context of COVID-19 and where it can be done safely, prison depopulating corrections facilities is entirely reasonable and may indeed be required to maintain public confidence in the administration of justice.

84 *PHS Community Services*, 2011 SCC 44 at para 150

85 *Latham*, *supra* at para 58.

B. Irreparable Harm

77. Irreparable harm is harm that cannot be avoided or cured.[86] To establish irreparable harm, there must be evidence that demonstrates a real probability that unavoidable harm will result unless a stay is granted. Assumptions, speculations and hypotheticals will ordinarily carry no weight.[87]

78. In these unprecedented times, it is difficult if not impossible to avoid being at least somewhat speculative. Circumstances in relation to COVID-19 are rapidly evolving and the future course of the pandemic is far from certain. The applicants acknowledge there is some slim possibility that events could unfold in such a way that denying the injunction would not cause irreparable harm. For example, a vaccine could be discovered and made widely available much sooner than anticipated, or the predicted resurgence might not materialize. The weight of evidence, however, is that a second and potentially much more serious wave of COVID-19 infections will arrive sometime in the months ahead. If it does, and if – as anticipated – COVID-19 is again brought into CSC institutions, refusing the injunction will cause irreparable harm.

79. If the applicants succeed on the underlying application, CSC will be required to use the release mechanisms available to depopulate its institutions to the extent possible consistent with public safety. If steps are not completed or even begun to be taken in advance, and if the ordinary timeframes continue to apply despite unprecedented circumstances, it will be weeks if not months before CSC is in a position either to decide an application for release or transmit it to the Parole Board.

80. Any delay in deciding applications for release will almost certainly result in prisoners who are ultimately found to be appropriate candidates for release being detained in custody – and exposed to the risks of COVID-19 – far longer than necessary. Success on the underlying application would be hollow indeed if delays in gathering and processing the requisite

86 *British Columbia Civil Liberties Association v Canada (Citizenship and Immigration)*, 2016 FC 1223 at para 16.

87 *Glooscap Heritage Society v Canada* 2012 FCA 255 at para 31.

information meant that prisoners who otherwise could and should have been released were detained in custody while outbreaks raged.

C. Balance of Convenience

81. The inconvenience that granting the injunction will cause to CSC is minimal. The applicants are not seeking that any releases be ordered, nor that any particular outcome and any specific case be directed. Rather, the applicants are simply seeking to have CSC take the requisite steps to process applications for release so that it is prepared to decide those applications and consider alternatives to custody in a penitentiary.

82. This does not significantly increase the duties that already lie on CSC. CSC's guiding principles direct that it consider alternatives to custody in a penitentiary. Further, CSC is required to initiate some applications for release on medical grounds, and process all such applications within prescribed timeframes. The effect of the injunction would simply be that CSC was required to take more proactive steps in initiating applications, and to process them within shorter timeframes.

83. The inconvenience caused by denying injunction would be far greater. It is clear that the harm to prisoners described above significantly outweighs the administrative inconvenience to CSC. In addition, there is a strong public interest in CSC, if so ordered, being able promptly to effect the release of prisoners in the event of a further outbreak. As set out above, depopulating prisons protects the health not only of the prisoners who remain but also staff and their families and the public more generally.

84. Further, to the extent that there are increased administrative costs or burdens associated with processing applications for release, it would be far more convenient for those to be borne now, while infection rates are low and the pandemic has been at least temporarily contained, rather than later if there is a resurgence.

PART IV - ORDER SOUGHT

85. The applicants seek a mandatory injunction requiring that CSC

a) Identify those prisoners who

i. due to age or medical condition are particularly at risk of contracting COVID-19 and of experiencing severe adverse effects if they do become infected;

ii. have been assessed as low risk if released; and/or

iii. are eligible for statutory release within the next six months and have not been referred to the Parole Board of Canada;

b) Determine which of the prisoners described in paragraph (a) are eligible to apply for medical unescorted absences (UTAs) and/or parole by exception;

c) For those prisoners described in paragraph (a)(i) who are ineligible to apply for medical UTAs due to their security classification, review that classification and reassess their eligibility;

d) For all prisoners who are determined to be eligible to apply for medical UTAs and/or parole by exception, inquire whether they wish to seek release;

e) If so, initiate the application (presumptively for a medical UTA) and within 30 days conduct the reviews and gather the information required for an Assessment for Decision. For greater certainty, this includes:

i. Obtaining relevant medical information, subject to the prisoner's consent which CSC shall facilitate communicating to health care providers;

ii. For prisoners who are not able to identify a private residence at which they could stay if leave were granted, working with community housing providers to seek to secure a space;

iii. Regularly reviewing proposed release plans and updating them if and as additional information becomes available;

f) Ensure that all prisoners designated minimum security are housed in minimum security facilities and that all healing lodge space is utilized;

g) Use existing cell space to reduce prisoner populations in regional reception centres, and canvass prisoners to determine if there is interest in inter-regional transfers to reduce crowding;

h) Develop a plan for institutional depopulation, including the implementation of the measures set out above, provide that plan to the applicants and the Court, and report on its progress;

i) Develop a plan for the care and wellbeing of prisoners who are determined not to be appropriate candidates for release in the event of a further outbreak, particularly those whose morbidity and mortality risk is heightened due to age or underlying medical condition.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of September, 2020.

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PART V – AUTHORITIES RELIED ON

Cases

1. *R v Canadian Broadcasting Corp.*, 2018 SCC 5.
2. *Maljkovich v Canada*, 2005 FC 1398.
3. *Gates v Canada*, 2007 FC 1058.
4. *Latham v Canada*, 2020 FC 670.
5. *R v Nelson*, 2020 ONSC 1728.
6. *R v Ranjan*, 2020 ONSC 2118.
7. *R v S.A.*, 2020 ONSC 2946.
8. *R v J.R.*, 2020 ONSC 1938.
9. *R v Ali*, 2020 ONSC 2374.
10. *R v Davidson*, 2020 ONSC 2775.
11. *R v Phunstok*, 2020 ONSC 2158.
12. *R v C.J.*, 2020 ONSC 1933.
13. *R v Seegobinsingh*, 2020 ONSC 2274.
14. *R v T.L.*, 2020 ONSC 1885.
15. *R v Kazman*, 2020 ONCA 251.
16. *R v Shingoose*, 2020 SKCA 45.
17. *R v Studd*, 2020 ONSC 2810.
18. *R v Dakin*, 2020 ONCJ 202.

19. *R v Kandhai*, 2020 ONSC 1611.

20. *R v Laurin*, [2020] O.J. No 1226.

21. *R v Hearns*, 2020 ONSC 2365.

22. *R v Bell*, 2020 ONSC 2632.

23. *R v Yzerman*, 2020 ONCJ 224.

24. *R v Durance*, 2020 ONCJ 236.

25. *R v Vaughan*, 2020 ONSC 3942.

26. *R v M.W.*, 2020 ONSC 3513.

27. *United States of America v Burns*, 2001 SCC 7.

28. *Suresh v Canada*, 2002 SCC 1.

29. *Canada v Bedford*, 2013 SCC 72.

30. *Canada (Prime Minister) v Khadr*, 2010 SCC 3.

31. *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

32. *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

33. *PHS Community Services*, 2011 SCC 44.

34. *British Columbia Civil Liberties Association v Canada (Citizenship and Immigration)*, 2016 FC 1223.

35. *Glooscap Heritage Society v Canada* 2012 FCA 255.

Secondary Materials

1. Commissioner’s Directive 710-3

2. Commissioner’s Directive 712-1

APPENDIX A – STATUTORY AND REGULATORY PROVISIONS

Corrections and Conditional Release Act, SC 1992, c 20

3 The purpose of the federal correctional system 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.

3 Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appro- priés dans les pénitenciers ou dans la collectivité, à la ré-adaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

3.1 The protection of society is the paramount consideration for the Service in the corrections process.

3.1 La protection de la société est le critère prépondérant appliqué par le Service dans le cadre du processus correctionnel.

4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:

(a) the sentence is carried out having regard to all relevant available information, including the stated rea-sons and recommendations of the sentencing judge, the nature and gravity of the offence, the degree of responsibility of the offender, information from the trial or sentencing process, the release policies of and comments from the Parole Board of Canada and information obtained from victims, offenders and other components of the criminal justice system;

(b) the Service enhances its effectiveness and openness through the timely exchange of relevant information with

4 Le Service est guidé, dans l'exécution du mandat visé à l'article 3, par les principes suivants :

a) l'exécution de la peine tient compte de toute information pertinente dont le Service dispose, notamment les motifs et recommandations donnés par le juge qui l'a prononcée, la nature et la gravité de l'infraction, le degré de responsabilité du délinquant, les renseignements obtenus au cours du procès ou de la détermination de la peine ou fournis par les victimes, les délin- quants ou d'autres éléments du système de justice pénale, ainsi que les directives ou observations de la Commission des libérations conditionnelles du Canada en ce qui touche la libération;

b) il accroît son efficacité et sa

victims, offenders and other components of the criminal justice system and through communication about its correctional policies and programs to victims, offenders and the public;

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

(c.1) the Service considers alternatives to custody in a penitentiary, including the alternatives referred to in sections 29 and 81;

(c.2) the Service ensures the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;

(d) 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;

(e) the Service facilitates the involvement of members of the public in matters relating to the operations of the Service;

(f) correctional decisions are made in a forthright and fair manner, with access by the offender to an effective grievance procedure;

(g) 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

transparence par l'échange, au moment opportun, de renseignements utiles avec les victimes, les délinquants et les autres éléments du système de justice pénale ainsi que par la communication de ses directives d'orientation générale et programmes correctionnels tant aux victimes et aux délinquants qu'au public;

c) il prend les mesures qui, compte tenu de la protection de la société, des agents et des délinquants, sont les moins privatives de liberté;

c.1) il envisage des solutions de rechange à la mise sous garde dans un pénitencier, notamment celles pré- vues aux articles 29 et 81;

c.2) il assure la prestation efficace des programmes offerts aux délinquants, notamment les programmes correctionnels et les programmes d'éducation, de formation professionnelle et de bénévolat, en vue d'améliorer l'accès aux solutions de rechange à la mise sous garde dans un pénitencier et de promouvoir la réadaptation;

d) le délinquant continue à jouir des droits reconnus à tout citoyen, sauf de ceux dont la suppression ou la restriction légitime est une conséquence nécessaire de la peine qui lui est infligée;

e) il facilite la participation du public aux questions relatives à ses activités;

f) ses décisions doivent être claires et équitables, les délinquants ayant accès à des mécanismes efficaces de règlement de griefs;

g) ses directives d'orientation générale, programmes et pratiques respectent les différences ethniques, culturelles,

groups;

(h) offenders are expected to obey penitentiary rules and conditions governing temporary absences, work release, parole, statutory release and long-term super- vision and to actively participate in meeting the objectives of their correctional plans, including by participating in programs designed to promote their rehabilitation and reintegration; and

(i) staff members are properly selected and trained and are given

(i) appropriate career development opportunities,

(ii) good working conditions, including a workplace environment that is free of practices that undermine a person's sense of personal dignity, and

(iii) opportunities to participate in the development of correctional policies and programs.

religieuses et linguistiques, ainsi qu'entre les sexes, l'orientation sexuelle, l'identité et l'expres- sion de genre, et tiennent compte des besoins propres aux femmes, aux Autochtones, aux minorités visibles, aux personnes nécessitant des soins de santé mentale et à d'autres groupes;

h) il est attendu que les délinquants observent les rè- glements pénitentiaires et les conditions d'octroi des permissions de sortir, des placements à l'extérieur, des libérations conditionnelles ou d'office et des ordon- nances de surveillance de longue durée et participent activement à la réalisation des objectifs énoncés dans leur plan correctionnel, notamment les programmes favorisant leur réadaptation et leur réinsertion sociale;

i) il veille au bon recrutement et à la bonne formation de ses agents, leur offre de bonnes conditions de travail dans un milieu exempt de pratiques portant atteinte à la dignité humaine, un plan de carrière avec la possibilité de se perfectionner ainsi que l'occasion de participer à l'élaboration des directives d'orientation générale et programmes correctionnels.

69 No person shall administer, instigate, consent to or acquiesce in any cruel, inhumane or degrading treatment or punishment of an offender.

69 Il est interdit de faire subir un traitement inhumain, cruel ou dégradant à un délinquant, d'y consentir ou d'encourager un tel traitement.

70 The Service shall take all reasonable steps to ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity.

70 Le Service prend toutes mesures utiles pour que le milieu de vie et de travail des détenus et les conditions de travail des agents soient sains, sécuritaires et exempts de pratiques portant atteinte à la dignité humaine.

86 (1) The Service shall provide every inmate with

(a) essential health care; and

(b) reasonable access to non-essential health care.

(2) The provision of health care under subsection (1) shall conform to professionally accepted standards.

86 (1) Le Service veille à ce que chaque détenu reçoive les soins de santé essentiels et qu'il ait accès, dans la me- sure du possible, aux soins de santé non essentiels.

(2) La prestation des soins de santé doit satisfaire aux normes professionnelles reconnues.

87 The Service shall take into consideration an offender's state of health and health care needs

(a) in all decisions affecting the offender, including decisions relating to placement, transfer, confinement in a structured intervention unit and disciplinary matters; and

(b) in the preparation of the offender for release and the supervision of the offender.

87 Les décisions concernant un délinquant, notamment en ce qui touche son placement, son transfèrement, son incarcération dans une unité d'intervention structurée ou toute question disciplinaire, ainsi que les mesures préparatoires à sa mise en liberté et à sa surveillance durant celle-ci, doivent tenir compte de son état de santé et des soins qu'il requiert.

102 The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

102 La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

115 (1) Subject to subsection (2), the portion of a sentence that must be served before an offender serving a sentence in a penitentiary may be released on an unescorted temporary absence is

115 (1) Sous réserve du paragraphe (2), le temps d'épreuve que doit purger le délinquant dans un pénitencier pour l'obtention d'une permission de sortir sans escorte est :

(a)in the case of an offender serving a life sentence, other than an offender referred to in paragraph (a.1), the period required to be served by the offender to reach the offender's full parole eligibility date less three years;

(a.1) in the case of an offender described in subsection 746.1(3) of the *Criminal Code*, the longer of

(i) the period that expires when all but one fifth of the period of imprisonment the offender is to serve without eligibility for parole has been served, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(b) in the case of an offender serving a sentence for an indeterminate period, other than an offender referred to in paragraph (b.1), the longer of

(i) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with section 761 of the *Criminal Code*, less three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years;

(b.1) in the case of an offender serving a sentence for an indeterminate period as of the date on which this paragraph comes into force, the longer of

a) dans le cas d'un délinquant — autre que celui visé à l'alinéa a.1) — purgeant une peine d'emprisonnement à perpétuité, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale;

a.1) dans le cas d'un délinquant visé au paragraphe 746.1(3) du *Code criminel*, la période qui se termine au dernier cinquième du délai préalable à l'admissibilité à la libération conditionnelle ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément au paragraphe 120.2(2);

b) dans le cas d'un délinquant — autre que celui visé à l'alinéa b.1) — purgeant une peine d'emprisonnement d'une durée indéterminée, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale déterminée conformément à l'article 761 du *Code criminel* ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libé- ration conditionnelle totale déterminée conformément au paragraphe 120.2(2);

b.1) dans le cas d'un délinquant purgeant, à l'entrée en vigueur du présent alinéa, une peine d'emprisonnement d'une durée indéterminée, trois ans ou, si elle est supérieure, la période qui se termine trois ans avant l'admissibilité à la libération conditionnelle totale dé- terminée conformément au paragraphe 120.2(2);

c) dans les autres cas, la plus longue des périodes sui- vantes : six mois ou la moitié de la période précédant son admissibilité à la libération

(i) three years, and

(ii) the period required to be served by the offender to reach the offender's full parole eligibility date, determined in accordance with subsection 120.2(2), less three years; and

(c) in any other case, the longer of

(i) six months, and

(ii) one half of the period required to be served by the offender to reach their full parole eligibility date.

(2) Subsection (1) does not apply to an offender whose life or health is in danger and for whom an unescorted temporary absence is required in order to administer emergency medical treatment.

(3) Offenders who, pursuant to subsection 30(1) and the regulations made under paragraph 96(z.6), are classified as maximum security offenders are not eligible for an unescorted temporary absence.

conditionnelle totale.

(2) Le paragraphe (1) ne s'applique pas dans les cas où la vie ou la santé du délinquant est en danger et où il est urgent de lui accorder une permission de sortir sans escorte pour recevoir un traitement médical.

(3) Les délinquants qui, en vertu du paragraphe 30(1) et des règlements d'application de l'alinéa 96z.6), font partie de la catégorie dite « à sécurité maximale » ne sont pas admissibles aux permissions de sortir sans escorte.

116 (1) The Board may authorize the unescorted temporary absence of an offender referred to in paragraph 107(1)(e) where, in the opinion of the Board,

(a) the offender will not, by reoffending, present an undue risk to society during the absence;

(b) it is desirable for the offender to be absent from the penitentiary for medical, administrative, community service, family contact, including parental responsibilities, personal development for rehabilitative purposes or compassionate reasons;

(c) the offender's behaviour while under sentence does not preclude authorizing

116 (1) La Commission peut autoriser le délinquant vi- sé à l'alinéa 107(1)e) à sortir sans escorte lorsque, à son avis, les conditions suivantes sont remplies :

a) une récidive du délinquant pendant la sortie ne présentera pas un risque inacceptable pour la société;

b) elle l'estime souhaitable pour des raisons médicales, administratives, de compassion ou en vue d'un service à la collectivité, ou du perfectionnement personnel lié à la réadaptation du délinquant, ou pour lui permettre d'établir ou d'entretenir des rapports fami- liaux notamment en ce qui touche ses responsabilités parentales;

the absence; and

a structured plan for the absence has been prepared.

(2) The Commissioner or the institutional head may authorize the unescorted temporary absence of an offender, other than an offender referred to in paragraph 107(1)(e), where, in the opinion of the Commissioner or the institutional head, as the case may be, the criteria set out in paragraphs (1)(a) to (d) are met.

(3) An unescorted temporary absence for medical rea- sons may be authorized for an unlimited period.

…

117 (1) The Board may confer on the Commissioner or the institutional head, for such period and subject to such conditions as it specifies, any of its powers under section 116 in respect of any class of offenders or class of absences.

121 (1) Subject to section 102 — and despite sections 119 to 120.3 of this Act, sections 746.1 and 761 of the *Criminal Code*, subsection 226.1(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act* and any order made under section 743.6 of the *Criminal Code* or section 226.2 of the *National Defence Act* — parole may be granted at any time to an offender

(a) who is terminally ill;

(b) whose physical or mental health is likely to suffer serious damage if the offender continues to be held in confinement;

c) sa conduite pendant la détention ne justifie pas un refus;

d) un projet de sortie structuré a été établi.

(2) Le commissaire ou le directeur du pénitencier peut accorder une permission de sortir sans escorte à tout dé- linquant, autre qu'un délinquant visé à l'alinéa 107(1)e), lorsque, à son avis, ces mêmes conditions sont remplies.

(3) Les permissions de sortir sans escorte pour raisons médicales peuvent être accordées pour une période illi- mitée.

…

117 (1) La Commission peut déléguer au commissaire ou au directeur du pénitencier les pouvoirs que lui confère l'article 116; la délégation peut porter sur l'une ou l'autre des différentes catégories de délinquants ou sur l'un ou l'autre des différents types de permission de sortir et être assortie de modalités, notamment temporelles.

121 (1) Sous réserve de l'article 102 mais par dérogation aux articles 119 à 120.3 de la présente loi, aux articles .1 et 761 du *Code criminel*, au paragraphe 226.1(2) de la *Loi sur la défense nationale* et au paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, et même si le temps d'épreuve a été fixé par le tribunal en application de l'article 743.6 du *Code criminel* ou de l'article 226.2 de la *Loi sur la défense nationale*, le délinquant peut bénéficier de la libération conditionnelle dans les cas suivants :

a) il est malade en phase terminale;

b) sa santé physique ou mentale risque

(c) for whom continued confinement would constitute an excessive hardship that was not reasonably foresee- able at the time the offender was sentenced; or

(d) who is the subject of an order of surrender under the *Extradition Act* and who is to be detained until surrendered.

(2) Paragraphs (1)(b) to (d) do not apply to an offender who is

(a) serving a life sentence imposed as a minimum punishment or commuted from a sentence of death; or

(b) serving, in a penitentiary, a sentence for an indeterminate period.

d'être gravement compromise si la détention se poursuit;

c) l'incarcération constitue pour lui une contrainte excessive difficilement prévisible au moment de sa condamnation;

d) il fait l'objet d'un arrêté d'extradition pris aux termes de la *Loi sur l'extradition* et est incarcéré jusqu'à son extradition.

(2) Les alinéas (1)b) à d) ne s'appliquent pas aux délin- quants qui purgent :

a) une peine d'emprisonnement à perpétuité infligée comme peine minimale;

b) une peine de mort commuée en emprisonnement à perpétuité;

c) une peine de détention dans un pénitencier pour une période indéterminée.

Corrections and Conditional Release Regulations, SOR/92-620

83(1) The Service shall, to ensure a safe and healthful penitentiary environment, ensure that all applicable federal health, safety, sanitation and fire laws are complied with in each penitentiary and that every penitentiary is inspected regularly by the persons responsible for enforcing those laws.

(2) The Service shall take all reasonable steps to ensure the safety of every inmate...

155 For the purposes of sections 116 and 117 of the Act,the releasing authority may authorize an unescorted temporary absence of an offender

(a) for medical reasons to allow the offender to undergo medical examination or treatment that cannot reasonably be

83(1) Pour assurer un milieu pénitentiaire sain et sécuritaire, le Service doit veiller à ce que chaque pénitencier soit conforme aux exigences des lois fédérales applicables en matière de santé, de sécurité, d'hygiène et de prévention des incendies et qu'il soit inspecté régulièrement par les responsables de l'application de ces lois.

(2) Le Service doit prendre toutes les mesures utiles pour que la sécurité de chaque détenu soit garantie…

155 Pour l'application des articles 116 et 117 de la Loi, l'autorité compétente peut accorder au délinquant une permission de sortir sans surveillance dans l'un des cas suivants :

a) pour des raisons médicales, afin de lui permettre de subir un examen ou un

provided in the penitentiary;

…

traitement médical qui ne peut raisonnablement être effectué au pénitencier;

…

Court File No. T-539-20

FEDERAL COURT

BETWEEN:

CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN PRISON LAW ASSOCIATION HIV & AIDS LEGAL CLINIC ONTARIO, HIV LEGAL NETWORK & SEAN JOHNSTON

Applicants (Moving Parties)

– and –

THE ATTORNEY GENERAL OF CANADA

Respondent

AMENDED MOTION RECORD
(Mandatory Interlocutory Injunction)

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