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Employing Older Prisoner Empirical Data to Test a Novel s. 7 Charter Claim

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This article builds the case for expanding s. 7 of the Charter of Canadian Rights and Freedoms to apply to prison regulations and decisions in the specific context of an aging prison population. As original empirical data shows, prisons are highly insensitive to age-related problems, and inappropriate or insufficient medical treatment receives official sanction from a wide range of correctional documents. The stark inadequacies of the current system endanger older prisoners' security of the person, and sometimes their lives, in ways that violate their rights under s. 7, since the deprivations they suffer result from legislative policies and state conduct that are by turn arbitrary, overbroad, and grossly disproportionate. While s. 7 has not been used to review such administrative documents or actions before, such a review is both feasible and highly desirable given the current lack of substantial access to justice by prisoners, their heightened vulnerability, and the evolution of the section 7 jurisprudence.

Cet article tente d'expliquer pourquoi l'article 7 de la Charte canadienne des droits et libertés devrait s'appliquer aux règlements et aux décisions dans les prisons dans le contexte particulier du vieillissement de la population carcérale. Comme le montrent les données empiriques originales, les prisons sont très insensibles aux problèmes liés à l'âge, et les traitements médicaux inappropriés ou insuffisants sont officiellement sanctionnés dans de nombreux documents correctionnels. Les insuffisances flagrantes du système actuel mettent en danger la sécurité des détenus âgés, et parfois leur vie, d'une manière qui viole leurs droits protégés par l'article 7, puisque les privations dont ils souffrent résultent de politiques législatives et d'une conduite de l'État qui sont à la fois arbitraires, imprécises et grossièrement disproportionnées. Bien que l'article 7 n'ait jamais été utilisé pour examiner de tels documents ou mesures administratives, un tel examen est à la fois faisable et hautement souhaitable étant donné le grave manque actuel d'accès à la justice pour les détenus, leur vulnérabilité accrue et l'évolution de la jurisprudence relative à l'article 7.

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Introduction

For a long time, prisoners were a forgotten group of people. Despite legislation in place to ensure their rights,¹ and despite the work of a number of scholars and activists,² prisoners' rights have often been thought to cease after sentencing. What happens in prisons goes on behind closed doors with a minimum of external oversight, and so it is unsurprising that

1. *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA]; *Conditional Release Regulations*, SOR/ 96-602 [CCRR].

2. See e.g., Michael Jackson, *Justice behind the Walls*, (Vancouver/Toronto: Douglas & McIntyre, 2001) at 576–583. [Jackson, *Justice behind the Walls*]; Debra Parkes & Kim Pate, "Effective Oversight of Women's Prison," (April 2006) 48:2 Can J Corr 251; Lisa Kerr, "Contesting Prison Expertise Law," (2014) 60:1 McGill LJ 43 [Kerr].

Canadian prisoners have endured serious problems: mental illness goes untreated, solitary confinement is used to excess, suicides and other deaths are improperly investigated, and there is a general disregard for the rule of law behind bars.

Times are changing, and we have reasons to be hopeful. The Office of the Correctional Investigator, the ombudsman for Canada's federal prisons, has been doing great work in identifying major correctional problems and human rights breaches.³ The media has been paying attention, and is rightly appalled to discover that people are dying in prison, being beaten by correctional officers, and taking their own lives in solitary confinement.⁴ The British Columbia Civil Liberties Association and John Howard Societies challenged the use of solitary confinement under s. 7, s. 12, and s. 15 of the *Canadian Charter of Rights and Freedoms*.⁵ The BC Supreme Court decided, in part, in favour of the complainants, heavily relying on significant social science evidence. The Court stated that the *CCRA* provisions on solitary confinement violate s. 7 because they allow for prolonged, indefinite isolation, there is no independent review of the decision to place individuals in segregation, and the prisoners have no right to counsel at segregation review decisions. The provisions also violate s. 15 because they allow for the segregation of mentally ill individuals, and they have a discriminatory effect on Indigenous prisoners. However, no violation of s. 12 was found.⁶ In Ontario, class actions have been brought regarding the placement of young prisoners in segregation and the frequent use of lockdowns.⁷ Legal Aid Ontario's Policy and Research Department has prioritized prison law in its 2015–2019 plan, and it has

3. Howard Sapers, Office of the Correctional Investigator Annual Report 2010–2011, online: <www.oci-bec.gc.ca> [Sapers, OCI, 2010–2011], Howard Sapers, Office of the Correctional Investigator Annual Report 2014–2015, online: <www.oci-bec.gc.ca> [Sapers, OCI, 2014–2015].

4. Patrick White, "Keeping inmates in isolation 'not reasonable,' Alberta judge ruled," *The Globe and Mail* (18 August 2016); Patrick White, "Documents reveal troubling details about long-term solitary confinement," *The Globe and Mail* (24 April 2016); Patrick White, "Mother seeks justice for son's death while in solitary confinement," *The Globe and Mail* (17 February 2016); Patrick White, "Ontario government reviewing solitary confinement in prisons," *The Globe and Mail* (26 March 2015); Editorial, "Ban long-term solitary confinement," *Toronto Star* (16 May 2016); Sara Mojtehdzadeh, "Woman who died in prison complained of being tied to her bed, advocates say," *Toronto Star* (7 July 2016); Patrick White "Inmate was justified in stabbing other prisoners, Ontario judge says," *The Globe and Mail* (19 July 2016).

5. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

6. *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 at paras 160-254 [BCCLA].

7. Patrick White, "Ontario inmates file class-action lawsuit for relentless lockdowns," *The Globe and Mail* (15 August 2016); Sean Fine, "Ontario government sued for putting youth in solitary confinement," *The Globe and Mail* (4 November 2015).

been conducting consultations for prison law reform. In 2016, it also finalized a test case strategy focused on five main points, namely access to health care, issues related to segregation, availability of rehabilitative programming, and constitutional challenges both to the Dangerous Offenders provisions in the *Corrections and Conditional Release Act*, and to arbitrary and discriminatory law and practices which prevent the reintegration and release into society of some prisoners.⁸

Meanwhile, courts are becoming comfortable with an expanded use of the *Charter*. Under s. 7, courts are more willing to review matters of policy and to intervene to correct governmental injustice. Judges have begun to see how social science evidence can help them better understand issues outside the courts' area of expertise,⁹ and they are increasingly using empirical data to identify the systemic issues that affect claimants and to craft appropriate remedies. It follows that this is a good moment to raise awareness of underexplored correctional problems and to propose new legal claims that could help to correct some of the injustices that currently prevail in prison.

The federal correctional system (which incarcerates people sentenced to over two years in prison) currently houses about 15,000 individuals across the country.¹⁰ In 2012, 2,000 of these were people over the age of 50,¹¹ double the rate from the previous decade.¹² By the fall of 2015, that number had increased to 25% of prisoners,¹³ despite the fact that, overall, the general prison population has remained at a steady number.¹⁴ It will likely continue to rise over the next few decades, owing to the effects of longer sentences, the increased hurdles raised in obtaining parole, and the aging of the baby boomers. Meanwhile, non-prisoner studies have established that older people in general have distinct problems compared to younger individuals, that older people have significantly more illnesses, and that they are affected more seriously even by those illnesses that occur

8. Legal Aid Ontario, LAO's Prison Law Test Case Strategy, online: <<http://www.legalaid.on.ca/en/info/testcases-prison-law.asp>>.

9. See, e.g., *Canada (AG) v PHS Comm Serv Soc*, [2011] 3 SCR 134 [PHS]; *Bedford v Canada*, 2013 SCC 72 [Bedford]; *Carter v Attorney General of Canada*, 2015 SCC 5 [Carter]

10. Information obtained from CSC from their Offender Management Database, July 2012.

11. Sapers, OCI, 2010–2011, *supra* note 3 at 11.

12. Sapers, OCI, 2014–2015, *supra* note 3 at 10-11.

13. *Ibid.*

14. Cheryl Marie Webster & Anthony N Doob, "Penal Reform 'Canadian Style': Fiscal Responsibility and Decarceration in Alberta, Canada," (2014) 16:1 Punishment & Society 3, Figure 1.

in all age groups.¹⁵ Despite this reality, there has been no recent Canadian study conducted with older prisoners that is external to the Correctional Service of Canada [CSC], which is the managing institution for the federal correctional system.

For these reasons, I decided to dedicate my research efforts to looking into the challenges faced by this understudied and vulnerable group of prisoners, and so in 2015 I concluded an empirical study with 197 older Canadian prisoners at all levels of security in seven federal institutions in Ontario. The findings of this study provide evidence that correctional policies and decisions may be damaging to health, and sometimes even life-threatening, when applied to older prisoners with their heightened needs. Further, as I reviewed the remedial mechanisms prisoners have to complain about inadequate treatment, it became clear that the rights of these individuals are often left unprotected.

Advancing the rights of older prisoners will require a holistic approach. The democratic process needs to be involved, better legislation needs to be passed, CSC policies need to be restructured, and prisoners' access to legal remedial mechanisms needs to be increased. In this article, I will only address this last issue, which I will do by building an argument that s. 7 of the *Canadian Charter of Rights and Freedoms*¹⁶—the right not to be deprived of life, liberty and security of the person other than in accordance with the principles of fundamental justice—could provide the basis of a legal challenge to some of CSC's rules and regulations as they apply to older prisoners.

I begin by offering an overview of the challenges faced by older incarcerated individuals as these challenges have emerged from my study. I also provide a review of the remedial mechanisms available to incarcerated individuals and assess their limitations. I then provide a summary of the application of s. 7 to date, separately addressing the entitlements that it protects, the sources of infringement that are subject to review, and the principles of fundamental justice. Next, I apply the s. 7 framework to the issues emerging from my study, with a view to testing its potential to

15. Christine K Cassel, Jarvey J Cohen & Eric B Larson, *Geriatric medicine: An Evidence-Based Approach* (New York: Springer, 2003) at 361-365, 509, 921 [Cassel et al]; James A. Blackburn & Catherine N Dulmus, *Handbook on gerontology: evidence-based approaches to theory, practice, and policy*, 2007 (Hoboken: Wiley) [Blackburn & Dulmus]; M McKenna et al, "Assessing the burden of disease in the United States using disability-adjusted life years," 2005 28:5 AJPM 415; FC Andrade, "Measuring the impact of diabetes on life expectancy and disability-free life expectancy among older adults in Mexico" (2009) Series B Journal of Gerontology 32; C Jagger et al, "The burden of diseases on disability-free life expectancy in later life," 2007, 62 AJ Gerontology, Biological Sciences & Medical Sciences 408.

16. *Charter*, *supra* note 5, s 7.

advance older prisoners' rights. I conclude by arguing that while s. 7 is by no means the only rights-conferring mechanism that will need to be used to improve the lives of older prisoners, it is nonetheless a workable and important one. A willingness on the part of courts to consider these matters under the *Charter* would help bring visibility to incarceration problems and give a much-needed push to extend these conversations into the legislative and governmental arenas.

I. *The issue of senior treatment in Canadian penitentiaries*

1. *Aging and the culture of correctional resistance to change*

Parliament has recognized that certain groups, notably women and Aboriginal people, constitute vulnerable prison populations,¹⁷ and has acknowledged that members of these groups have specific medical and programming needs, which must be fulfilled in order to ensure substantive equality. However, older people are not recognized as a special-needs population, either in the legislation, or by the CSC in its internal documents, despite the fact that seniors are acknowledged in the community as having significantly more health problems than younger populations. The medical literature has also confirmed the fact that most health problems have a higher impact on seniors than they do on younger people.¹⁸

The study I concluded in 2015 involved a sample of 197 individuals from seven federal prisons in Ontario, including minimum-, medium-, and maximum-security institutions. The lower limit used to qualify a prisoner as "older" was the age of 50, because prior research had established that incarcerated individuals suffer from health problems that are typical of non-incarcerated people who are ten to fifteen years older.¹⁹ I conducted structured interviews that reviewed issues pertaining to their health problems and the treatments available in prison, their programming needs, their relationships, and their experiences of discipline and victimization. Using SPSS, a software platform used for quantitative research, I determined the percentages, frequencies, and correlations for over 70 variables regarding different problems, all of them associated with aging in the community, as they affect this group of people. By comparing the results with the treatment reportedly available behind bars, I concluded that the correctional system is not prepared to deal with the heightened

17. *CCRA*, *supra* note 1, s 4(h).

18. Cassel et al, *supra* note 15; Blackburn & Dulmus, *supra* note 15; McKenna et al, *supra* note 15.

19. Ronald Aday, "Golden Years Behind Bars: Special Programs and Facilities for Elderly Inmates" (1994) 58:2 *Federal Probation* 47 at 48; Correctional Service Canada, *Older Offenders in the Custody of the Correctional Service Canada*, 2014, online: <<http://www.csc-scc.gc.ca/research/005008-rs14-21-eng.shtml>>.

needs of older prisoners. In particular, the medical, mental health, social, and disciplinary policies, as well as administrative decisions of prison officials, are made and applied using a “one-size-fits-all” approach.

The study identified a number of issues that rendered older prisoners highly susceptible to chronic illnesses, disability, victimization, and isolation; at the same time, it also found that they had much shorter records of disciplinary problems.²⁰ Medical care appeared inadequate and reportedly increased the challenges these individuals faced. The following are some of the problems noted in the study:

- 99% of the individuals suffered from at least one chronic condition, including arthritis, cancer, multiple sclerosis, dementia, Lou Gehrig’s disease, and the effects of stroke.
- 54% of the participants reported a physical disability.
- Over 80% of the disabled individuals reported being in chronic pain, which is significantly more than those not reporting a disability.
- While 50% of those reporting chronic pain mentioned taking prescribed medication for it, only 20% said it was effective.
- The only medication available, for all types of pain, was Tylenol 3.²¹
- Prescribed medication needed to be picked up daily, in person, from the infirmary. In three institutions the line formed outside, year-round, and the older prisoners were often the last to pick it up because younger individuals would regularly cut in line.
- Four institutions did not have a nurse on site at all times.
- Some institutions did not have appropriate infrastructure, such as elevators, handrails, and disability-friendly washrooms or showers.
- Only 27% of the participants mentioned receiving the medical items they needed (i.e. an extra pillow for back pain, orthopedic shoes, canes or walkers etc.), while only 6% had a peer caregiver assigned.
- There was a statistically relevant connection between disability and both peer abuse (threats, stigma, and physical abuse) and staff abuse. The latter manifested mostly as name calling or pranks (such as officers hiding inmates’ wheelchairs or canes).

20. For the methodology used and the limitations of the study see Adelina Iftene, “The Pains of Incarceration: Aging, Rights & Policy in Federal Penitentiaries,” (2017) 59:1 Can J Corr 63 [Iftene].

21. In the community Tylenol 3 is used for mild to moderate pain, MedBroadcast, online: <<http://www.medbroadcast.com/>>. In prison it was used sometimes for treating pain caused by terminal cancer.

- A few individuals were terminally ill.
- There were no palliative care units.
- Some institutions allowed palliative care to be administered on an individual basis. Individuals receiving this treatment were generally given morphine and were excused from some prison activities, such as work and walks to the canteen. However, there was no palliative care team available, and family visits were just as restricted as for the general population.
- Terminally ill prisoners were housed in the same units with everybody else.
- Regardless of how sick they were, all prisoners had to undergo the same system to see a doctor. They had to put in a request to see the nurse. They would be called a few days later and sometimes sent to the doctor. After the general physician had seen them, they were sometimes placed on a list to see a specialist. This could take up to two years.

On the other hand, participants reported low rates of disciplinary incidents:

- 23% reported spending time in segregation after turning 50, of which only 20% was for violent behavior.
- Most of those reporting spending time in segregation also reported being diagnosed with a mental illness.
- 31% reported they had been charged with a disciplinary offence, of which only 6.5% were violent offences. Similarly, most of those reporting being charged, also reported a mental illness.²²

Based on the findings in this study, as well as the reports of the Office of the Correctional Investigator (OCI),²³ it appears that there is an unaddressed gap between the needs of older prisoners and the treatment they are receiving.

Before this study was conducted, the first to raise concerns regarding aging prisoners was the OCI.²⁴ The OCI is a governmental agency independent of the CSC, and it makes regular assessments of how prisoners' rights are being upheld. It has produced valuable reports regarding the main issues that arise in prison, and it has provided guidelines that, if

22. A complete account of the findings is provided in Iftene, *supra* note 20 and Adelina Iftene, "Unlocking the Doors to Canadian Older Inmate Mental Health Data: Rates & Potential Legal Responses," (2016) 47 *Intl JL & Psychiatry* 36 [Iftene, "Unlocking the Doors"].

23. Sapers, OCI, 2010–2011, *supra* note 3; Howard Sapers, Office of the Correctional Investigator, "Annual Report of the Office of the Correctional Investigator 2011–2012," online: <<http://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx>>. [Sapers, OCI, 2011–2012].

24. Sapers, OCI, 2010–2011, *ibid* at 20–25.

implemented, would bring the CSC in line with its legal obligations. The OCI's mandate is entrenched in the Corrections and Conditional Release Act (CCRA),²⁵ which provides that the CSC has an obligation to respond to all OCI reports.²⁶ However, the CSC has not been particularly responsive so far. For example, the reply documents are often late,²⁷ and the responses are often short and dismissive—along the lines of, “There are no funds for that,” or “We are already doing that,”²⁸—and matters affecting older prisoners are no exception.

2. *Prisoners' rights in a legal vacuum*

Under these circumstances, Justice Arbour's warning remains relevant: “There is little hope that the Rule of Law will implement itself in the correctional culture without assistance and control from the Parliament and the courts.”²⁹ However, rights-based legal challenges have so far been scarce in the prison context compared to what has happened outside it, even though it is in an all-controlling institution like a prison that rights are most likely to be suppressed.

The majority of prison claims are required to follow the internal institutional procedure of the Correctional Services of Canada. Like all other correctional matters, these procedures are regulated by the *Correctional and Conditional Release Act*,³⁰ its principal regulations,³¹ and the *Offender Complaints and Grievances Directive*.³² Senior prisoners may, and often do, bring their grievances before the related administrative boards. Some of the inmates interviewed had filled out more than ten grievances within the last few years, and they had not received a reply to most of them. These internal procedures must be exhausted—as they are,

25. *CCRA*, *supra* note 1, ss 157-196.

26. CSC's historic passivity regarding the OCI's policy recommendations is documented by Michael Jackson in Jackson, *Justice behind the Walls*, *supra* note 2 at 576-583.

27. For example, the CSC's reply to the Office of the Correctional Investigator Report, “Inquiry into the Death of Ashley Smith” (2007), online: <<http://www.oci-bec.gc.ca/cnt/rpt/index-eng.aspx>> [OCI, “Ashley Smith”] was issued in December 2014. Out of 104 recommendations, about 10 led to some new developments (see the CSC reply on the Correctional Service Canada site, online: <<http://www.csc-ccc.gc.ca/publications/rocides/grid3-eng.shtml>>).

28. See, e.g., the replies to the most recent annual reports: “Response of the Correctional Service of Canada to the Annual Report of the Correctional Investigator 2013–2014” [Response of the CSC 2013–2014]; “Response of the Correctional Service of Canada to the Annual Report of the Correctional Investigator 2011–2012,” Correctional Service Canada, online: <<http://www.csc-ccc.gc.ca/publications/index-eng.shtml>> [Response of the CSC 2011–2012].

29. The Honorable Louise Arbour Commissioner, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works and Government Services, 1996) at 182.

30. *CCRA*, *supra* note 1, ss 90-91.

31. *CCRR*, *supra* note 1, ss. 74-82.

32. *CD 081, Offender Complaints and Grievances* (2008); online: <<http://www.csc-ccc.gc.ca/acts-and-regulations/005006-0001-eng.shtml>>.

for instance, when a prisoner receives a negative reply at the last level of the grievance system—before a prisoner can have access to a judicial review in federal court.

The shortcomings of the grievance procedure have been noted by courts, scholars, and lawyers.³³ In *May v. Ferndale* the Supreme Court first underlined the concern that the Commissioner's policies should not be left for review by internal boards who are actually subordinated to the Commissioner.³⁴ In the same case, the SCC allowed prisoners direct access to court when filing a *habeas corpus* complaint, meaning this as a way of boosting the remedial mechanisms available and to ensure better protection of the remainder of the prisoners' liberty. What is more, the *CCRA* and the *CCRR* do not set out grounds on which the grievances may be reviewed, nor do they prescribe any remedies. Added to this is the fact that grievance decisions are not legally enforceable, which puts the fairness and the effectiveness of this procedure into doubt.

In the *Arbour Report*, moreover, the grievance system was powerfully criticized for its inefficiency.³⁵ Likewise, in its 2004–2005 report, the OCI held that the grievance system was dysfunctional when it came to “expeditiously resolving the grievances of the offenders especially at the national level.”³⁶ The system was again criticized by the investigator in 2007 after the death of Ashley Smith in the corresponding “Report on a Preventable Death.” Ms. Smith filed seven complaints in August 2007, some of which were answered only after her death in October 2007. In her complaints, she asked for hygienic items, but her requests were denied because she supposedly did not use the items appropriately.³⁷ As a result of these events, the CSC appointed Professor David Mullan to review its grievance procedures and make recommendations for improvement. He found that the process was egregiously lengthy and bureaucratic and that it seldom brought a satisfactory resolution.³⁸

Under these circumstances, it is doubtful that senior prisoners can effectively assert their rights by following the path prescribed by the grievance system. First, the very effectiveness of the procedure is still

33. For a perspective on the historic failures of the grievance system, see Jackson, *Justice behind the Walls*, *supra* note 2 at 576-593.

34. *May v Ferndale Institution*, 2005 SCC 82 at paras 63-72 [*May*].

35. *Arbour*, *supra* note 29 at 150-151.

36. Howard Sapers, “Annual Report of the Office of the Correctional Investigator 2004–2005,” Office of the Correctional Investigator, online: <www.oci-bec.gc.ca>. [Sapers, OCI, 2004–2005].

37. OCI, “Ashley Smith,” *supra* note 27.

38. David Mullan, “Report of the External Review of the Correctional Services of Canada Offender Complaints and Grievances Process,” 13 July 2010; For another example of failures of the system see Parkes & Pate, *supra* note 2 at 259.

in doubt. Second, even when grievances are positively resolved, the administrative responses do not constitute legal precedent. Thus, while they may indirectly bring seniors' issues to the attention of officials, they will not, by themselves, result in the implementation of more favorable treatment for older prisoners.³⁹ Third, prisoners' substantive access to courts is severely restricted, and even when they do make it before a judge, it has been noted that courts tend to be highly deferential to governmental decisions when reviewing prison cases.⁴⁰ Thus, while statutes like the *CCRA* are "more amendable to judicial review"⁴¹ than *Charter* rights because they contain more precise standards for the rights they purport to guarantee, in practice this process seldom leads to success. Judicial deference to administrative decision-makers in the prison context has been apparent even in the post-*Charter* era. For example, decisions that do not involve constitutional issues have generally been reviewed on a reasonableness standard, which entails a high level of deference. In view of all this, it is not surprising that the outcomes for claimants are often negative.⁴²

Fortunately, the requirement to exhaust internal procedures does not apply to *Charter* or *habeas corpus* applications.⁴³ Given the issues with the grievance system, the endemic problems associated with managing older offenders, and rights violations which often rise to a high or very high degree of seriousness, I will argue in the coming sections of this paper that *Charter* challenges brought directly to court can be an important avenue for dealing with some troubling aspects of seniors' incarceration.

In the course of a *Charter* challenge, an individual claimant has to argue that there has been a rights violation in the specific circumstances of a particular case. The empirical data now available proves that there are systemic issues endangering the life and security of older people, which are a result of CSC's decisions and procedures. This will offer valuable context to any individual case and provide courts with an opportunity to devise remedies under s. 52 or even s. 24(1) of the *Charter* with the

39. *Bordage v Archambault Institution*, (2000) 204 FTR 133; *Pinkney v Canada (Correctional Services)*, 2001 FCT 1053.

40. Kerr, *supra* note 2 at 56-58.

41. Debra Parkes, "A Prisoners' Charter?: Reflections on Prisoner Litigation under the *Canadian Charter of Rights and Freedoms*," (2007) 40 UBCL Rev 629 at 637.

42. See, e.g., *Fitzgerald v William Head Institution*, [1994] BCJ No 1534 (BCSC); *Legere v Canada*, (1997) 133 FTR 77 (FCTD); *Harms v Canada (Correctional Service)*, (2000) 195 FTR 144 (FCTD); *Tehrankari v Canada (Attorney General)*, [2000] 38 CR (5th) 43 (FCTD); *Boudreau v Canada (Attorney General)*, [2000] FCJ No 2016 (FCTD); *Durie v Canada (Attorney General)*, (2001) 201 FTR 8 (FCTD); *Dupras v Kent Institution*, [2001] FCJ No 968 (FCTD).

43. *Johnston v Centre regional de reception*, [1995] RJQ 3000; *Doran v Canada (Correctional Services)* (1996), 108 FTR 93; *Fortin v Donnacona Institution* (1997), 153 FTR 84.

potential to address systemic issues. As a result, a handful of successful cases could be enough to put the system on a path to positive reform. (Such reform would include—but would not be limited to—the abolition of unconstitutional prison directives that contain harmful practices, institutional changes to the infrastructure, health care services and programming to reflect the different needs of elderly prisoners, and better avenues for decarcerating certain older individuals.) Moreover, while only federal courts can conduct judicial reviews of administrative decisions, some *Charter* challenges are under the concurrent jurisdiction of both superior and federal courts.⁴⁴ Superior courts, which tend by their nature to have the broadest jurisdiction on *Charter* matters, may thus be more open and better suited than federal courts to deal with problems involving prisons. After all, superior courts are the ones hearing sentencing cases and other criminal matters, so that they have usually been exposed to issues related to imprisonment and to the limitations people face in prisons.

I have argued elsewhere that some issues impacting the senior prison population may give rise to a *Charter* challenge under s. 12 (which protects the right to be free from cruel and unusual treatment and punishment).⁴⁵ However, the success of such claims depends largely on whether courts will be more open to applying s. 12 to conditions of imprisonment (rather than mainly limiting it to sentences), and perhaps to lowering the “grossly disproportionate” standard, which is arguably too high.⁴⁶ Parkes has argued that this test has proven difficult for prisoners to meet and that “most of the analytical work involving prison conditions is done under s. 7.”⁴⁷ This is why there is also a need to develop the protection available to prisoners under s. 7.

3. Summary

The number of people aging in prison is growing. These people make up a highly vulnerable population, presenting a host of heightened physical and mental health needs. A number of the current CSC protocols and practices fall short of responding to these specific needs, as most services have been

44. For the jurisdiction to hear *Charter* challenges and the advantages of choosing a superior court as a forum, see especially Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 2005 (Toronto: Irwin Law) [Sharpe & Roach] at 120-122; Ian Greene, *The Charter of Rights and Freedoms. 30+ Years of Decisions that Shape Canadian Life* (Toronto: James Lorimer & Company, 2014) at 220-225; Don Stuart, *Charter Justice in Canadian Criminal Law*, 6th ed, (Toronto: Carswell, 2014) at 31-37.

45. Ifene, “Unlocking the Doors,” *supra* note 22.

46. *Ibid.* Consistent with this, see *BCCLA*, *supra* note 6 at para 270, where segregation was found not to violate s 12 despite findings that it has significant negative effects on individuals.

47. Parkes, *supra* note 41 at 659.

designed with a younger population in mind.⁴⁸ To make matters worse, when requesting accommodation or attempting to vindicate their rights, seniors face significant difficulties in accessing administrative and legal remedial mechanisms. Thus, empirical evidence pertaining to the realities of aging in prisons should be used to bring to court innovative claims that could help improve the lives of incarcerated elderly people. For this purpose, s. 7 of the *Charter* may prove to be an especially useful tool. Below I provide a brief overview of the framework currently used in a s. 7 analysis, which I then proceed to apply to specific issues related to older prisoners.

II. *Section 7: current application*

1. *What was it designed for?*

Section 7 of the *Charter* guarantees that everyone has “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”⁴⁹ Section 7 has been described as “the ‘great’ legal right,”⁵⁰ and as “one of the most fertile, even protean, sections of the *Charter*, as its very general language made it the source for numerous constitutional claims that might be difficult to assert under other sections of the *Charter*.”⁵¹

The evolution of the application of s. 7 has marked spectacular transitions, which I will briefly summarize below. I will focus on three distinct elements of the s. 7 analysis: the entitlements to which it applies, the sources of deprivation that are amenable to *Charter* scrutiny, and the principles of fundamental justice that need to be engaged for a successful claim.

2. *Entitlement: Life, liberty and security of the person*

Numerous rights recognized under s. 7 are procedural in nature and pertain to the realm of criminal justice, where physical liberty is threatened by the

48. This is not to say that the current services meet the needs of younger prisoners. There is a significant body of literature pointing out systemic shortcomings across age groups (see, e.g., Jackson, *Justice behind Walls*, *supra* note 2; Parkes & Pate, *supra* note 2, etc.). However, older people have elevated needs because of their added age-related predisposition to disease and disability, and their particular needs have yet to enter discussions around correctional reforms. Because of these differences, the already problematic correctional environment may be even more strenuous for older bodies.

49. *Charter*, *supra* note 15, s 7.

50. Benjamin L Berger & James Stribopoulos, “The Constitution of Criminal Justice in Canada,” in Benjamin L Berger & James Stribopoulos, *Unsettled Legacy. Thirty Years of Criminal Justice under the Charter* (Markham: LexisNexis, 2012) 3 at 7.

51. Hamish Stewart, *Principles of Fundamental Justice* (Toronto: Irwin Law, 2012) at 307 [Stewart, *Principles of Fundamental Justice*].

possibility of imprisonment.⁵² Starting with the *Motor Vehicle Reference*,⁵³ s. 7 protection was slowly extended to substantive rights within the criminal justice system,⁵⁴ then to rights within the larger area of the administration of justice,⁵⁵ and finally to issues outside the realm of the administration of justice altogether, as “s. 7 should protect all Charter values, not just legal rights.”⁵⁶

This expansion also allowed for a diversification in what would offend the right to life, liberty and security of the person, as this came to include the right to be free from state-induced stress⁵⁷ and the right to make autonomous choices. Such personal choices have thus far been related to where one could live,⁵⁸ what medical treatment⁵⁹ to give to one’s children, whether to terminate one’s pregnancy,⁶⁰ and ultimately to choose assisted death in certain circumstances.⁶¹

3. *Cause of the deprivation*

In order to trigger s. 7, the infringement of protected rights needs to be brought about by state action, which includes “laws and regulations, as well as actions of the police and other governmental officials in their treatment of individuals,”⁶² and these must be sufficiently connected to the breach. To establish a causal link, a claimant needs to show that there is relationship of “sufficient causation” between a law or the action of a state agent and the deprivation.⁶³ The “sufficient connection” test was reinforced in *Bedford* as the Supreme Court of Canada accepted the respondents’

52. Examples of these procedural rights include the right to silence (*R v Hebert* (1990), 77 CR 3d 145 (SCC) [*Hebert*]; *R v Singh*, [2007] 3 SCR 405 [*Singh*]), the right against self-incrimination (*R v White*, [1999] 2 SCR 417), the right to disclosure of the prosecutor’s case (*R v Stinchcombe*, [1991] 3 SCR 326, 68 CCC (3d) 1 [*Stinchcombe*]), and others.

53. *Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at para 52 [*MVR*]. The position was reinforced in *Reference re ss 193 and 195.1(1)(c) of the Criminal Code (Man)*, [1990] SCJ No 52, [1990] 1 SCR 1123 [*The Solicitation Reference*].

54. *R v Vaillancourt* (1987) 60 CR (3d) 280 (SCC); *R v Martineau* (1990) 79 CR (3d) 129 (SCC) [*Martineau*]; *United States v Burns*, 2001 SCC 7. [*Burns*]; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 [*Chaoulli*]; *PHS*, *supra* note 9.

55. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 58 [*G(J)*].

56. *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 63 (minority opinion). [*Godbout*]; *Winnipeg Child and Family Services V KLW*, [2000] 2 SCR 519 at paras 86-87 [*KLW*].

57. *G(J)*, *supra* note 55, *Blencoe v British Columbia*, [2000] 2 SCR 307 [*Blencoe*]; *R v DB*, [2008] 2 SCR 3 [*DB*].

58. *Godbout*, *supra* note 56.

59. *R v Parker*, (2000) 146 CCC (3d) 193 (Ont CA) [*Parker*].

60. *R v Morgentaler*, [1988] 1 SCR 30 [*Morgentaler*] (most notably Wilson J’s separate opinion).

61. *Carter*, *supra* note 9.

62. *RWDSU, Local 580 v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at para 196 [*Dolphin Delivery*].

63. *Blencoe*, *supra* note 57 at para 60; *R v Suresh*, 2002 SCC 1 at para 54 [*Suresh*]; *Burns*, *supra* note 54 at para 57.

position arguing for the maintenance of the “sufficient connection” test instead of the Crown’s argument for a “necessary connection” test.⁶⁴

Early *Charter* jurisprudence excluded matters of policy from the application of s. 7. Policy was often understood as the actions of the executive branch aimed at uniformly regulating a given matter of public interest, and for such actions the government would be held accountable by the people rather than the courts.⁶⁵ Pieces of legislation, such as criminal provisions, would be subject to *Charter* review, but the underlying policy rationale that led to the enactment of those provisions was not.⁶⁶

However, many subsequent cases were infused with underlying policy considerations.⁶⁷ The express refusal to intervene on policy matters was completely abandoned after *Chaoulli*,⁶⁸ where the court found that a Quebec law which prohibited access to private health insurance was endangering lives because the public healthcare system was flawed. Courts were soon showing a willingness to review not just legislation with policy impact, but policy documents of administrative bodies which they found akin to legislation, including municipal by-laws,⁶⁹ collective agreements,⁷⁰ and rules of regulatory bodies.⁷¹ The SCC developed a framework for separating what it called “legislative policies” (i.e., rules of the executive with binding effects on those to whom they apply) from “administrative/internal guidelines.”⁷²

Section 7 has never quite become the tool for promoting socio economic rights that many scholars supporting court reviews of social

64. *Bedford*, *supra* note 9 at para 75; *Bedford*, *supra* note 9 (Factum of the Respondent at para 65-66). I am indebted to Alan Young for generously sharing this factum with me.

65. *MVR*, *supra* note 53 at para 119.

66. *Ibid* at paras 115, 128.

67. *Martineau*, *supra* note 54; *R v Daviault*, [1994] 2 SCR 63 [*Daviault*]; *Morgentaler*, *supra* note 60; *Rodriguez v British Columbia (Attorney General)*, [1993] 2 SCR 519 [*Rodriguez*], *Solicitation Reference*, *supra* note 53; *Goudbout*, *supra* note 58.

68. *Chaoulli*, *supra* note 54. The decision was rendered under the *Quebec Charter* and not the *Canadian Charter*. Nonetheless, the non-binding minority opinions addressed the potential implications of this decision on s 7 at paras 109153) and *Chaoulli* was later applied by courts in s 7 analyses (*PHS*, *supra* note 8 at para 84; *Bedford*, *supra* note 8 at paras 98 & 118; *Carter*, *supra* note 8 at para 64).

69. *Victoria (City) v Adams*, 2008 BCSC 1363, 2009 BCCA 563 [*Adams*]; *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084; *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 SCR 141.

70. *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211.

71. *Black v Law Society of Alberta*, [1989] 1 SCR 591; *Great Vancouver Transport Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 [*GVTA*].

72. *GVTA*, *ibid* at para 53.

policies hoped it would.⁷³ However, courts' willingness to review these policies did add another layer of complexity to the debate surrounding what could cause an infringement of someone's s. 7 rights. While for a long time, the only rights reviewable under s. 7 were negative rights (the obligation of the state not to intervene), *Chaoulli* re-opened an older debate regarding positive rights (the obligation of the state to take action).⁷⁴ Some courts have recognized, in limited circumstances, certain positive rights under s. 7 concerning state-funded counselling in child proceedings,⁷⁵ the erection of a shelter in a public park,⁷⁶ and the obligation of a minister to grant a discretionary exemption for a safe-injection clinic to function.⁷⁷ The same position was taken by the dissent in *Gosselin*, a case which involved the state's constitutional obligations regarding the distribution of welfare benefits, and which is considered the leading case on positive rights under s. 7.⁷⁸ While the majority in *Gosselin* found that the state had no such obligation to the claimant, they stated that there might be limited circumstances where the state would have an obligation to take action, remarking that "an affirmative right to basic subsistence might one day be protected under s. 7."⁷⁹

The recognition of substantive rights under s. 7, the courts' willingness to review policy matters, and the attempt to include socio-economic rights and other positive rights under the s. 7 analysis have developed together in the jurisprudence. In light of the progressively more inclusive

73. Margot Young "Social Justice and the *Charter*: Comparison and Choice" (2013) 50 Osgoode Hall LJ 669 [Young, "Social Justice"]; Marie-Eve Sylvestre, "The Redistributive Potential of Section 7 of the Canadian Charter: Incorporating Socio-economic Context in Criminal Law and in the Adjudication of Rights" (2012) 42:3 Ottawa L Rev 389; Martha Jackman, "The Last Line of Defence for [Which?] Citizens: Accountability, Equality, and the Rights to Health Care under *Chaoulli*," (2006) 44:2 Osgoode Hall LJ 349.

74. See, e.g., Margot Young, "Sleeping Rough and Shooting Up: Taking British Columbia's Urban Justice Issues to Court" [Young, "Sleeping Rough"] in Martha Jackman & Bruce Porter, *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 413-441.

75. *G(J)*, *supra* note 55.

76. *Adams*, *supra* note 69.

77. *PHS*, *supra* note 8.

78. *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 319 [*Gosselin*].

79. *Ibid* at para 83. The discussion of positive rights under s 7 is complicated. This is a brief overview, and not an attempt to exhaust the topic. For more in-depth discussion on the matter see e.g. Young, "Social Justice," *supra* note 73; Sylvestre, *supra* note 73; Jackman, *supra* note 73; Vanessa A MacDonnell, "The Protective Function and Section 7 of the Canadian Charter of Rights and Freedoms" (2012) 17:1 Rev Const Studies 53; Cara Wilkie & Meryl Zisman Gary, "Positive and Negative Rights under the Charter: Closing the Divide to Advance Equality" (2011) 30 Windsor Rev Legal & Soc Issues 37; Mel Cousins, "Health Care and Human Rights after *Auton* and *Chaoulli*" (2009) 54 McGill LJ 717; Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2012) 42:3 Ottawa L Rev 411; Young, "Sleeping Rough," *supra* note 74; Jamie Cameron, "Positive Obligations under Sections 15 and 7 of the Charter: A Comment on *Gosselin v. Québec*" (2003) 20 SCLR (2d) 65 [Cameron, "Positive Obligations"].

s. 7 jurisprudence, courts will likely continue to take scholarly criticism to heart, and the list of potential sources and causes of s. 7 breaches is probably not closed.

4. *Principles of fundamental justice*

State action (or sometimes inaction) which infringes on someone's life, liberty or security of the person will only trigger an application of s. 7 if it is in breach of a principle of fundamental justice. What the principles of fundamental justice are, is to this day controversial and sometimes confusing.⁸⁰

The principles of fundamental justice analysis developed, for substantive rights, as a balancing exercise between the rationale of the law and the rights it infringed.⁸¹ The balancing of rights became an important aspect of applying self-standing principles with the rise of “the proportionality triumvirate.”⁸² The principles making up this triumvirate, namely arbitrariness (that is, when a law bears no relationship to the purpose of the legislation),⁸³ overbreadth (when a law is broader than necessary to achieve its purpose)⁸⁴ and gross disproportionality (when a law's effects on rights are extreme)⁸⁵ are currently recognized as the main substantive principles of fundamental justice.

As part of the analysis under these three principles, courts have increasingly employed empirical social science evidence in order to evaluate whether the purpose of the legislation is connected to its effects, and to evaluate the impact of the provisions on individual rights. For example, the Court of Appeal in *Bedford* used this kind of data to show that three provisions of the Criminal Code—those prohibiting the operation of common bawdy-houses, living off the avails of prostitution, and communicating in public for the purpose of prostitution—had very little effectiveness in preventing harm and public nuisance, but increased the risks to sex workers.⁸⁶ On this basis, the court found the provisions

80. On this matter see, e.g., Alan N Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law,” [Alan Young, “Done Nothing Wrong”] in Jamie Cameron & James Stribopoulos, *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham: LexisNexis, 2008) at 441–511 [Cameron & Stribopoulos].

81. *MVR*, *supra* note 53; *Rodriguez*, *supra* note 67 at para 141; *R v Malmo-Levine*, [2003] 3 SCR 571 at paras 110–122 [*Malmo-Levine*]; *Canadian Foundation for Children, Youth, and the Law v Canada*, [2004] 1 SCR 76 at para 8 [*CFCYL*].

82. Nader R Hasan, “Three Theories of Principles of Fundamental Justice” (2013) 63:2 SCLR 339 at 363.

83. *Bedford*, *supra* note 9 at para 111, *Carter*, *supra* note 9 at para 83.

84. *Carter*, *supra* note 9 at para 85.

85. *Bedford*, *supra* note 9 at para 125; *Carter*, *supra* note 9 at para 89.

86. *Criminal Code*, RSC 1985, c-46, ss 220, 212 (1)(j), & 213 (1)(c).

overbroad and grossly disproportionate.⁸⁷ On further appeal in *Bedford*, the SCC confirmed the purposive nature of these principles of fundamental justice as well as the balancing analyses they require. At the same time, however, it made clear that the effectiveness of law was not to be considered in the analysis; rather, the purpose of the law was simply to be balanced against the rights infringed.⁸⁸ More recent cases have confirmed that the analysis of these three principles of fundamental justice is to be conducted by searching for a disconnect between the purpose of the law and its effects, and not by assessing the usefulness or the wisdom of the purpose. Larger societal considerations are also not integrated at this stage of the analysis.⁸⁹

Substantive principles of fundamental justice have mostly been analyzed in cases where the source of a breach was a legislative provision. In the context of administrative decisions that infringe s. 7 rights, the principle of fundamental justice analysis does not always appear to follow the same route.⁹⁰ Stewart suggests that when a discretionary state decision based on a statute is challenged, without a challenge to the statute itself, there is in fact no need to engage with the principles of fundamental justice.⁹¹ In such cases, he argues, the balancing is to be done on a case-by-case basis: “although the proper balancing of interests is not a principle of fundamental justice applicable in reviewing legislation, it appears to be a principle of fundamental justice applicable in the review of particular discretionary decisions.”⁹²

5. Summary

Section 7 no longer applies solely to matters related to criminal justice or even the administration of justice. For example, s. 7 has been found to apply in cases of improper access to medical treatment, state-induced stress, and the deprivation of autonomous choice over one’s body. Causes of the deprivation can include both legislative and non-legislative actions, leading courts to engage actively with policy matters. Moreover, reviews under s. 7 have been increasingly infused with notions pertaining to social justice and citizens’ welfare (as, e.g., in *G(J)*, *PHS*, and the minority opinion in *Gosselin*). These developments in the analysis of

87. *Canada (Attorney General) v Bedford*, 2012 ONCA 186 at paras 143-150 [*Bedford*, CA].

88. *Bedford*, *supra* note 9 at para 123.

89. *Carter*, *supra* note 9 at paras. 71-98; *R v Moriarty*, 2015 SCC 55 at paras 24, 30 [*Moriarty*]; *R v KRJ*, 2016 SCC 2016 at para 139 [*KRJ*].

90. *Suresh*, *supra* note 63 at paras 54-75; *Burns*, *supra* note 54 at paras 85-124; but see *PHS*, *supra* note 9 at paras 129-136, where the principles against overbreadth and arbitrariness were considered.

91. Stewart, *Principles of Fundamental Justice*, *supra* note 51 at 113-118.

92. *Ibid* at 113.

principles of fundamental justice make way for a viable s. 7 argument in the prison context. Purpose-based principles of fundamental justice have been identified as the main substantive principles, often applied by courts in relation to social science empirical evidence. By balancing different interests, courts have concluded that certain pieces of legislation are arbitrary, overbroad, or disproportionate. According to the recent jurisprudence, where the breach is caused by state conduct rather than legislation, there might not be a need to identify a specific principle of fundamental justice. Rather, a general balancing of interests would suffice.

III. *Applying s. 7 to prison directives, decisions, and practices*

In this section, I argue that s. 7 of the *Charter* provides a viable avenue for prisoners seeking to advance their rights. Section 7 has limitations which make its application in the prison context challenging. However, the breadth of the provision, the emergence of positive rights in the jurisprudence, the interpretation courts have given to “law” and “state action,” their willingness to consider policy issues, and the success of empirical evidence in supporting recent s. 7 cases, all make this section well-suited to offer protection for seniors whose rights are breached by prison policies and procedures.

While s. 7 has been used in prison litigation before, it was in very different contexts from what is envisioned here.⁹³ Some successful s. 7 challenges have won rights for prisoners with respect to disciplinary hearings⁹⁴ and s. 7 violations have been found in cases of involuntary transfers.⁹⁵ Both of these cases concerned procedural rights, and the few cases asserting substantive rights under s. 7 have largely been unsuccessful.⁹⁶ A significant exception to this trend was the recent *BCCLA* case, under appeal at the time of writing, where the *CCRA* provisions allowing for *indefinite* administrative segregation were found in breach of s. 7. In other words, solitary confinement in itself was not unconstitutional as long as the legislation provided for a cap on it.⁹⁷ The lack of appropriate

93. For a comprehensive review of s 7 cases in the prison context see Parkes, *supra* note 41 at 642-651.

94. *Pickard v Mountain Institution* (1994), 30 CR (4th) 399, 75 FTR 147 (TD).

95. *DeMaria v Canada (Regional Transfer Board and warden of Joyceville Institution)*, [1988] 2 FC 480 (FCTD); *Storey v William Head Institution*, [1997] FCJ No 1768 (TD); *May, supra* note 34.

96. *Piche v Canada (Solicitor General)*, (1984), 17 CCC (3d) 1, *aff'd* (1989) 47 CCC (CA) [*Piche*]; *Williams v Canada (Commissioner of Corrections)*, [1993] FCJ No 646 (TD); *Protective Custody Inmates, Kent Institution v Kent Institution*, [1991] FCJ No 1539 (CA); *Fieldhouse v Canada* (1995), 40 CR (4th) 263 (BCCA) [*Fieldhouse*]. For a successful s 7 challenge see *Criminal Trial Lawyers Assn v Alberta (Solicitor General)*, 2004 ABQB 534. For a critique of the *Fieldhouse* decision, see Allan Manson, “*Fieldhouse* and the Diminution of Charter Scrutiny,” (1994) 33:4 CR 358.

97. *BCCLA, supra* note 5 at paras 88-177.

medical treatment in prison was also challenged under s. 7, but it was settled out of court.⁹⁸ It is my contention that in the context of older prisoners, a substantive s. 7 argument may have a different fate, mostly because the argument would be supported by empirical evidence.⁹⁹ In the past, courts have used empirical data to find breaches of different groups' s. 7 rights (e.g., sex-workers),¹⁰⁰ and older offenders' legal situations should similarly improve with the emergence of empirical data pointing to the threat that some prison practices pose to the life and security of the person.

1. *Entitlement: Life and security of the person*

The first step in triggering the application of s. 7 is to show that legislative or non-legislative state action infringes on the right to life, liberty, or security of the person. Such decisions have generally been made on a case-by-case basis,¹⁰¹ although when such a decision will likely occur can still be inferred from the existing case law.

Section 7 has been interpreted to protect physical liberty, the right not to be exposed to health risks, control over one's body, and psychological integrity.¹⁰² For example, transferring a prisoner to a higher form of security can be a deprivation of his right to physical liberty.¹⁰³ Restrictions on therapeutic abortion were also found to offend s. 7 in that they created health risks to the woman, depriving her of security of the person by potentially endangering her life.¹⁰⁴ The right to security of the person has also been breached by allowing teachers and parents to physically discipline children,¹⁰⁵ by restricting someone's control over their body through a prohibition on assisted suicide,¹⁰⁶ by administrative delays in adjudicating a complaint before a human rights tribunal,¹⁰⁷ or by imposing psychological stress.¹⁰⁸ While there is no general right to medical healthcare under s. 7,¹⁰⁹ it has been decided that provisions which

98. See Parkes, *supra* note 41 at 649-650.

99. Parkes argues that part of the challenge to successful prison litigation is a lack of research external to the CSC; see Parkes, *supra* note 41 at 668. In *BCCLA* the partial success was also owed to the large amount of empirical data introduced by the complainants regarding the effects of solitary confinement on individuals, *BCCLA*, *supra* note 5.

100. See, e.g., *Bedford*, *supra* note 9; Kerr discusses the importance of empirical research in *Charter* cases in Kerr, *supra* note 2 at 76-91.

101. Sharpe & Roach, *supra* note 44 at 224.

102. Peter Hogg, *The Constitutional Law of Canada* (Toronto: Carswell, 2013) at 47-7-47-19.

103. *May*, *supra* note 34.

104. *Morgentaler*, *supra* note 60.

105. *CFCYL*, *supra* note 81.

106. *Rodriguez*, *supra* note 67; *Carter*, *supra* note 9.

107. *Blencoe*, *supra* note 57.

108. *G(J)*, *supra* note 55; *DB*, *supra* note 57.

109. Sharpe & Roach, *supra* note 44 at 220.

endanger health, such as serious and widespread delays in the healthcare system, do infringe the right to life and security of the person.¹¹⁰

Looking at the context of older prisoners, most seniors suffer from a mixture of conditions: 35% reported between 1 and 5 conditions, 27% between 6 and 7, and 27% between 8 and 16. Many of these conditions, while not unique to the elderly, do occur significantly more often in older age groups—these include mental health problems, chronic pain, physical disability, cancer, diabetes, digestive problems, circulatory issues, heart conditions, risk of stroke and cardiac arrest, digestive problems, and polypharmacy, among others—and they have a more intense impact on an older body than on a younger one.¹¹¹ Thus, older people are more likely to be in need of medical care, and the lack of appropriate treatment for such a host of conditions disproportionately affects this group.

The study indicated that the failure to address such medical issues among this age group, whether physical or mental, has led to an acceleration of disease and an accumulation of other illnesses.¹¹² Institutional responses, which include segregation, also appear to be both a consequence and a cause of accelerated physical and mental illnesses. The main problems that may endanger the lives and health of older prisoners (and so violate their right to security of the person) are presented below. The problems identified are systemic, but they can also be tied to individual cases.

a. *Medical diets*

Properly adjusted diets were not readily available for people with chronic conditions such as diabetes (which was reported by 35% of the sample). For these people, the lack of an adequate diet can not only aggravate their illness, but it can be the difference between life and death.¹¹³

b. *Medical devices*

Medical devices and supplies were not readily available for people with disabilities or other mobility problems (reported by 54% of the sample). Only 6% reported receiving regular help with their mobility issues, and only 30% reported receiving the items they requested to ease their living situation (such as walkers, extra pillows, braces, etc.). The lack of medical devices created a vicious cycle that endangered people's lives and personal security. There was a statistically relevant connection between the number

110. Chaoulli, *supra* note 54; Morgentaler, *supra* note 60; PHS, *supra* note 9; Carter, *supra* note 9.

111. Cassel et al, *supra* note 15; Andrade, *supra* note 15, Jagger et al, *supra* note 15.

112. Adelina Iftene, "Elderly Inmates in Canadian Prisons: Specific Needs and Institutional & Legal Responses," PhD Dissertation [unpublished], Queen's University Archives, at 141-178 [Iftene, "Elderly Inmates"].

113. For an extensive description of the findings related to older offenders, see *ibid.*

of medical conditions and the likelihood of having them left unaddressed. Unaddressed medical conditions, in turn, were statistically connected to an increase in sleeping problems. Sleeping problems themselves appeared to be causing or aggravating mental conditions. For example, 40% of the sample reported at least one diagnosis of mental illness, and 70% of these reported having constant problems falling asleep. 45% of those not reporting a mental illness also reported difficulties sleeping, mostly because of noise and their own anxiety. Finally, mental illness appeared to increase the risk of suicide, and of being disciplined or sent to segregation. Punitive responses could, in turn, be traced to negative impacts on both mental and physical well-being.

c. *Mental health treatment*

The mental health professionals available were insufficient. In one institution, there was one psychologist available for 600 inmates. In three institutions, people were entitled to three psychological counselling sessions for the duration of their stay in that prison, which could be as long as fifteen years. In one of the largest institutions, all 33 participants reported that the psychiatrist would not see anyone unless they reported being suicidal; however, if they were suicidal, they would then be sent to segregation. As a result, only 5% of the overall 30% (i.e., one in six) of participants reporting suicidal ideation asked for help, mostly due to fear of being placed in solitary confinement. Whether they were suicidal or not, people reporting mental illnesses appeared more likely to have spent time in segregation than those not reporting mental illness. In particular, 64% of those reporting mental illnesses had spent time in segregation since turning 50, in contrast to the 36% who reported being segregated but did not report suffering from psychiatric conditions. In addition, those reporting mental illnesses appeared more predisposed to be victims of peer abuse (i.e. 70% versus 40% for those who did not report mental problems).¹¹⁴

d. *Pain treatment*

48% reported being in constant severe pain, and, among those treated for it, 43% reported that the treatment was ineffective. The only pain medication available was Tylenol 3, which was used to treat everything from arthritis to terminal cancer pain. The study also confirmed a statistical relationship between undertreated pain and sleep problems, which were connected to mental health problems.

114. For a discussion regarding the gap between seniors' mental health issues and the available correctional treatment, see Iftene, "Unlocking the Doors," *supra* note 22.

e. *Medical personnel and medication pick-up protocol*

Limited access to medical treatment is caused by the limited availability of medical personnel. 76% of the study's participants had requested a consult with a specialist since turning 50, with wait times ranging from 3 months (e.g., for dentists) to 3 years (e.g., for cardiologists). When prisoners felt sick, regardless the intensity or nature of the illness they needed to file a request to see the nurse, and the average wait time was two days. In some cases, people suffering from painful tooth abscesses had to wait weeks to be seen by a dentist. Some chronically or terminally ill people received very little palliative care, and access to escorts to take them to a community hospital was limited because of resources. In half of the institutions I visited, a nurse was not available after 5 pm.

The effects of delay in receiving medical treatment are jarringly reflected in the case of John, a 62-year old individual incarcerated in a penitentiary in Southern Ontario. He reported having been diagnosed with a number of conditions, including heart disease, circulatory problems (thrombosis) and an aneurysm in his right leg. At the time of our interview, he was taking six prescription pills daily, and the pills needed to be picked up in person each morning. The line for medication pick-up formed outdoors, in the yard of the penitentiary, during all seasons. Each prisoner had to stand in line from 8 to 9 am on most days. John complained that he was not given a chair to sit on because he did not have a physical disability. He reported that his waiting time was always approximately an hour, regardless of when he lined up, because younger prisoners would regularly cut in line. As well, in order to see a nurse or a doctor, each prisoner had to file a request that generally took two days to be answered, irrespective of the treatment sought or the degree of urgency. In the last six months before the interview, John filed a request complaining of chest pains. Even though he reported that his medical history was present in the nurse's file, he waited for two days to see the doctor, by which time the pains had subsided. During the month prior to the interview, John's leg aneurysm burst. Because of the remote location of the institution, it is customary to take prisoners in urgent need of help to the hospital in a CSC van rather than calling an ambulance. The prisoner reported that because the van left at a time when the shift was changing, the van stopped at the gate and waited 15 minutes for the guards to switch places before they left for the hospital.

The institutional practice that requires all individuals to wait standing in line outdoors to pick up their medication exposes prisoners with frail health to increased risks. For example, an older individual commonly

suffers from a greater number of conditions and disabilities.¹¹⁵ In addition, older people are more likely to wait in line longer than their younger peers, especially since they reported being regularly bullied and cut off in line.¹¹⁶ While having a 30-year-old wait half an hour for headache medication might not raise issues, having a 60-year-old do the same thing for antibiotics to treat his reoccurring pneumonia, or for blood thinners to treat his leg aneurysm, does cause concern. This practice thus poses a risk to both the physical health and the personal security of these older individuals as they are always exposed to the increased stress of facing death and injury for not having their medical needs properly addressed at any given time. Restrictions and delays in such health care have been recognized as posing risks to life and security of the person in other contexts, notably in *Morgentaler*¹¹⁷ and *Chaoulli*,¹¹⁸ and these cases should apply by analogy.

2. Causal sources of the deprivation

To summarize, the following issues pertaining to the management of chronic diseases were identified above as endangering prisoners' life and security of the person: the use of segregation for mentally ill prisoners; insufficient numbers of medical personnel, particularly mental health specialists; lack of appropriate medical diets; restricted availability or lack of medical supplies for those suffering from disabilities; and limited medication for chronic pain.

However, an infringement of the right to life and security of the person is not on its own sufficient to make out a s. 7 claim. The claimant still needs to show a sufficient causal connection between the infringement and the legislative or non-legislative action of the state. Cases such as *Operation Dismantle*¹¹⁹ established early on that what endangers the life or security of a person must be legislative provisions, decisions, or actions of the executive or administrative branches of the government.

The sources of the breaches that endanger the life and personal security of older prisoners can be placed into two categories, each of which satisfies this requirement in a different way. The sources are either Commissioner's Directives (CD), Standing Operating Procedures (SOP), and other general

115. The most common diseases were arthritis (51%), severe heart problems (24%), hypertension (42%), circulation (20%), foot problems (17%), back problems (32%), diabetes (27%), and digestive problems (25%). All of these have been associated with aging in the medical literature. 54% of the participants also reported mobility problems, which similarly occurs more often with aging. See Iftene, "Elderly Inmates," *supra* note 112 at 91.

116. 32% have been cut in line regularly, 28% have been threatened, 29% hit or pushed, and 45% ridiculed (see Iftene, "Elderly Inmates," *supra* note 112 at 113).

117. *Morgentaler*, *supra* note 60.

118. *Chaoulli*, *supra* note 54.

119. *Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 50.

documents referred to as “frameworks,” all of which are akin to legislation, or prison practices and officials’ discretionary decisions, which are state conduct.

a. *Sources of the deprivations*

First, the data collected from the study shows that a significant number of older individuals suffer from a mental illness, and these individuals have been sent to segregation significantly more often than those who have not reported a mental illness. Segregation of the mentally ill is allowed by a number of Commissioner’s Directives. *CD 843 Management of Self-injurious Inmates and Suicidal Behavior*, in essence, legitimizes the use of segregation as a response to mental illness.¹²⁰ *CD 589 Discipline of Inmates*¹²¹ does not mention mental illness as a criterion to be considered when deciding whether to use segregation as part of discipline.¹²² As shown, mental illness is correlated to disciplinary charges. Mentally ill people likely have a harder time complying with prison rules and often end up in disciplinary segregation, which in turn may aggravate their mental health status.

While *CD 709 Administrative Segregation* mentions that this type of segregation should not “normally” be used for mentally ill prisoners, it does not prohibit the practice.¹²³ In fact, the institutional standing orders use “suicide watch” to mean administrative segregation. In particular, in response to an *Access to Information* request, I was informed that “there is

120. *CD 843 Management of Inmate Self-Injurious and Suicidal Behavior*, Correctional Service Canada, online: <www.csc-ccc.gc.ca> [CD 843]. In the recent *BCCLA*, the court decided that the *CCRA* provisions allowing for administrative segregation for mentally ill prisoners are in violation of s 15 of the *Charter*; *BCCLA*, *supra* note 5 at para 522. The decision is at the moment of writing under appeal. However, even if upheld, the ruling will have no impact on the practice of placing mentally ill prisoners in other forms of isolation (that can be justified as “medical” in addition to simply correctional), such as observation cells etc. On that point, see Sheila Wildeman, “The other solitary: Psychiatric isolation needs to end, too,” *The Globe and Mail* (31 January 2018), online: <<https://www.theglobeandmail.com/opinion/the-other-solitary-abusing-mental-health-based-confinement/article37806269/>>.

121. *CD 589 Discipline of Inmates* (2015), Correctional Service Canada, online: <www.csc-ccc.gc.ca> [CD 589].

122. Administrative and disciplinary segregation are based on two different types of reasons. Disciplinary segregation is used as punishment for a disciplinary offence, and it is limited to 30 days (*CCRA*, *supra* note 1, s 44(1)). In contrast, administrative segregation is used for an indefinite number of reasons, including prevention, undesirable behavior, self-harm, and protection against other prisoners. There is no time limitation on its use. (*CCRA*, *supra* note 1, s 31).

123. *CD 707 Administrative Segregation* (2015), Correctional Service Canada, online: <www.csc-ccc.gc.ca> [CD 707]. Currently, the policy regarding solitary confinement is undergoing some changes. Bill C-59 attempts to limit the amount of time people are locked up in segregation for, and recommends that severely mentally ill prisoners not be placed in segregation. However, without outright prohibiting the practice for any mentally ill prisoners, and without defining “severely,” it is unclear if the bill will have any positive effects on this group of people.

no separate regulation from *CD 709* for segregating mentally ill or suicidal prisoners.”¹²⁴ The only difference is that they need to be under supervision while segregated in accordance with *CD 843*. Through the same *Access to Information Act* request, I was provided with the Standing Orders for Use of Administrative Segregation for Joyceville Institution, Collins Bay Institution, and Millhaven Institution. All three standing orders essentially provided that the “suicide watch cells are located in administrative segregation” and that self-harm incidents are to be treated as “security incidents” in accordance with the relevant CDs, including *CD 709*.¹²⁵ They also mentioned that the first response for any security incident is administrative segregation, and the mental status of the individual will be checked only on the next working day. After being checked, the individual may continue to remain in segregation even if diagnosed with a mental illness.¹²⁶

Second, improper treatment of mental illness exists in the larger context of insufficient access to medical specialists. Lack of timely and efficient access to specialist care endangers the lives of prisoners and exposes them to health risks. The CSC Health Services compiles the list of medical positions to be filled in correctional institutions, and the number of people to be hired is decided at the Regional Health Service level. Hiring decisions are then approved by each Regional Director of the CSC Health Services Department. However, according to the current hiring protocol of the CSC for Ontario, Warkworth Institution, a prison housing 600 prisoners of whom nearly 200 are over the age of 50, employs one physician and one psychologist. It does not disclose the number of nurses.¹²⁷ Other Ontario institutions have between three and five psychologists available, but none has more than one physician, and Bath Institution has no physician. The Regional Hospital also has one physician and no psychologist,¹²⁸ and no social workers or occupational therapists are available in any institution except Bath. A psychiatrist occasionally visits each regional institution based on its clinic’s hours of operation, but

124. Document A-2015-00641. These documents and explanations were obtained in May 2016 through an *Access to Information Act* request.

125. Standing Order No 709, Administrative Segregation, Collins Bay Institution, 2016; Standing Order No 709, Administrative Segregation, Joyceville Institution, 2015; Standing Order No 709, Administrative Segregation, Millhaven Institution, 2016. Obtained through an *Access to Information Act* request, May 2016.

126. Standing Order No 709, Administrative Segregation, Collins Bay Institution, 2016, at 38; Standing Order No. 709; Administrative Segregation, Joyceville Institution, 2015, at 53-54.

127. Document A-2015-00641. These documents and explanations were obtained in May 2016, through an *Access to Information Act* request.

128. *Ibid.*

each institution is served by only one psychiatrist, with most institutions sharing the same psychiatrist.¹²⁹ This reality explains the responses from the study's participants that the psychiatrist is generally available for only 5 minutes every second year or so and that their main role is to assess suicide risk. It also explains the waiting time for seeing a nurse or a specialist even for emergency situations. It thus appears that CSC is understaffed in key medical fields, which is ultimately a CSC decision. The Office of the Correctional Investigator has similarly found that the number of mental health specialists available is insufficient to deal with the overwhelming number of cases.¹³⁰

Third, many older prisoners are on medical diets that they claim are inappropriate. While *CD 880, Food Services*¹³¹ requires that medical diets be available, *SOP 800-01 Food Services—Central Feeding*¹³² states that the regular food served should be adapted to meet most therapeutic diets. Hence, all people on a medical diet receive the same meal, which is made for the most serious type of illnesses, even if some individuals do not need such a strict diet. This high-level policy entails that all inmates in need of a medical diet are deprived of nutrition regardless of their actual needs. It is thus not surprising that most participants stated that they cannot live on such a diet.

Fourth, the method of distributing medication which forces people to stand in a pick-up line each morning, regardless of the ailment, is regulated by the *Distribution and Administration of Medication Guidelines*.¹³³ While this document allows medication to be taken to inmates in some cases, it does not specify any circumstances in which this is to be done. The document also requires that prescription medication be picked up daily in person,¹³⁴ and the section dealing with the “appropriate setting” for the dispensary only mentions that it needs to be a secure place with sufficient lighting to store the medication.¹³⁵ Four options for medication distribution are listed, one of them being an “external window.” Thus, in such situations, the line may form outside, and the prisoners will have to line up and wait to

129. *Ibid.*

130. Sapers, OCI, 2010–2011, *supra* note 3; Sapers, OCI, 2011–2012, *supra* note 23.

131. *CD 880, Food Services*, (2000), Correctional Service Canada, online; <www.csc-scc.gc.ca> [*CD 880*].

132. *SOP 800-01 Food Services—Central Feeding (2000)*, Correctional Service Canada, online: <www.csc-scc.gc.ca> [SOP 800-01].

133. Correctional Service Canada, Health Sector, “Medication Distribution and Administration,” 10 July 2014, obtained through *Access to Information Act* request, May 2016 [CSC, “Medication Distribution”].

134. *Ibid* at 13.

135. *Ibid* at 5.

receive the medication regardless of the weather conditions. The location of each pill dispensation window was approved for each institution by its respective warden about fifteen years ago. Based on information received through the *Access to Information Act*, at least two institutions included in my study, Bath and Warkworth Institutions, have exterior pick-up windows.¹³⁶ This information reinforces the claims of prisoners that they have to line up outside to pick up their daily medication, regardless of or the weather and of how sick they are.

Fifth, medical equipment and supplies that older prisoners need to deal with their chronic pain and diseases are not available, or else their availability is severely restricted. The *National Essential Healthcare Framework* is a document created by the CSC's Health Care Department and signed by the Deputy Commissioner that, among other things, lists the supplies that may be prescribed by a physician to sick prisoners.¹³⁷ Annex A lists a number of items that may be granted, such as walkers and canes, and forbids items such as medical mattresses, extra pillows or blankets, heated pads, and orthopedic shoes. However, all of these items are used to manage chronic pain, poor circulation, and foot diseases that are associated with aging in the community.¹³⁸ In addition, the document mentions that other items need "special authorization from the Warden or the regional director, based on the recommendation of the institutional physician or dentist along with the medical justification for the request." This delegation of decision-making power explains the study's finding that access to supplies was much more difficult in some institutions than in others, despite the similar incidence of medical conditions. The breadth of the framework, as well as individual Wardens' decisions not to grant supplies, are legally problematic and they endanger the health and security of the person of individuals who are in pain or have mobility issues.

By the same token, access to medication that is commonly used to manage chronic pain and other diseases is severely limited. The *CSC National Drug Formulary* is the official list of medication available, and it is signed off by the Commissioner and the Health Care Deputy Commissioner.¹³⁹ This document confirms that the only prescription painkillers available in penitentiaries are Tylenol 3 and, in special

136. Document A-2015-00640, Access to Information Request Notification, May 2016.

137. Correctional Service Canada, *National Essential Healthcare Framework*, 23 July 2015. This document was obtained in April 2016 through an *Access to Information Act* request [CSC, *Healthcare Framework*].

138. Ifene, *supra* note 20 at 72.

139. Correctional Service Canada, *National Drug Formulary* [CSC, *Formulary*]. This document was obtained in April 2016 through an *Access to Information Act* request.

cases, methadone.¹⁴⁰ It also provides that all community prescriptions for painkillers will be changed to Tylenol 3, since it is the cheapest compound.¹⁴¹ For comparison purposes, in the community, Tylenol 3 is used to manage only mild to moderate pain, but nothing higher than that.¹⁴² According to the responses to this study, as well as the medical review conducted by the Office of the Correctional Investigator,¹⁴³ the available medication is insufficient to manage the varied types of chronic pain that individuals suffer from, especially if they are older.

b. *The nature of the sources of deprivation*

Even though both legislation and state conduct are reviewable under s. 7, it is important to establish the nature of the source of each breach. The principles of fundamental justice analysis and the opportunities for public standing may be different depending on whether the source of the breach is legislation or state conduct. Also, state conduct, unlike legislative breaches, cannot be justified under s. 1. Finally, for legislative breaches remedies are granted under s. 52, while for breaches by state conduct they are granted under s. 24.

Directives and Frameworks as Legislative Sources

Most documents identified as potential sources of breaches are policy-ridden in the sense that they contain rules or guidelines that emanate from an agency to which governmental power has been delegated, and that regulate the activity of that agency alone.¹⁴⁴

The Commissioner's Directives and the Standing Operating Procedures, however, are what the SCC has described in *Greater Vancouver Transportation Authority [GVTA]* as "legislative policy."¹⁴⁵ *GVTA* dealt with a Charter challenge to the policies of two state-regulated bus companies. These policies restricted the advertising opportunities on the companies' buses based on certain criteria and thus violated the claimants' right to free speech and to equal treatment. The court dealt at length with the nature of the policies that constituted the sources of the

140. *Ibid* at 35-36.

141. *Ibid* at 57.

142. Tylenol 3 "is used to treat mild-to-moderate pain associated with conditions such as headache, dental pain, muscle pain, painful menstruation, pain following an accident, and pain following operations" (MedBroadcast, online: <<http://www.medbroadcast.com/>>).

143. Office of the Correctional Investigator, "National Drug Formulary Investigation," 2015, online: <www.oci-bec.gc.ca>.

144. *GVTA*, *supra* note 71 at para 58.

145. *Ibid* at para 53.

potential breaches. Citing *Davidson*,¹⁴⁶ *Eldridge*,¹⁴⁷ and *Therens*,¹⁴⁸ the court stressed the importance of differentiating between policies that are legislative in nature and those that are administrative in nature.¹⁴⁹ Policies identified as legislative are to be treated as law for the purpose of *Charter* analysis, despite having their origin somewhere other than in Parliament or the legislature.

To assess whether a governmental policy is legislative in nature, *GVT* articulated a concise framework, based on the rulings in the earlier cases. The court acknowledged that there are sources of law other than Parliamentary statutes and gave examples of municipal by-laws, collective agreements, and the rules of regulatory bodies.¹⁵⁰ Thus, a law is not strictly defined by its origin, but rather by its characteristics.¹⁵¹ In assessing the nature of a governmental source, the court set out the following criteria for identifying legislative policy: the rule is given by an agent authorized by a statute to regulate its activity, the rules are binding on those to whom they apply and are of general application, and they are sufficiently accessible and precise. Such rules basically preclude arbitrary state action and provide individuals and government entities with sufficient information as to how they should conduct themselves. At the same time, administrative policies are “informal” and tend to be strictly internal, lack accessibility, and often take the shape of guidelines or “interpretative aids.”¹⁵² Guidelines of this sort cannot be relied on in court to defend a challenged prohibition.¹⁵³ The SCC found that the bus companies’ policy limiting advertising was in effect law for the purposes of *Charter* scrutiny.¹⁵⁴

Based on this framework, the Commissioner’s directives and procedures are for all purposes the equivalent of law. *CCRA* delegates to the Commissioner the authority to make rules that are binding on staff and prisoners,¹⁵⁵ and it gives him the ability to decide which rules are binding.¹⁵⁶ Moreover, *CCRA* often makes reference to Commissioner’s Directives, and requires that the legislative provisions apply in accordance with the rules developed in the CDs. The rules contained in the CDs have significant

146. *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038.

147. *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

148. *R v Therens*, [1985] 1 SCR 613.

149. *GVT*, *supra* note 71 at para 50.

150. *Ibid* at para 53

151. Hogg, *supra* note 102.

152. *GVT*, *supra* note 71 at paras 58-68.

153. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para 85 [*Little Sisters*].

154. *GVT*, *supra* note 71 at paras 67-73.

155. *CCRA*, *supra* note 1, ss 96-98.

156. *Ibid*, s 88.

consequences and a high potential to infringe the rights of prisoners, as they regulate most aspects of prison life, including the creation of disciplinary offences and sanctions.¹⁵⁷ Finally, the requirement of accessibility and precision is attached to the rules created by the Commissioner by the *CCRA* itself.¹⁵⁸ Thus, both the directives and procedures are available online to the public, and in print to prisoners. The standing operating procedures fill in the regulatory details corresponding to the issues outlined by the directives. However, they are of equally general application, they are widely accessible, and they are binding on those to whom they apply. They are for the directives what the *Corrections and Conditional Release Regulation* is for the *CCRA*: a binding framework that expands on the application of certain provisions. Under such circumstances there is little doubt that the directives and standing operating procedures are legislative in nature and subject to *Charter* scrutiny on this basis.

More controversial, however, is the analysis of prison guidelines and frameworks under the *Charter*. These documents do not meet all the required characteristics of legislative policies. The frameworks may appear as “interpretative aids,” they are strictly internal and they offer advice to medical personnel on what items they may or may not use. They are not readily accessible: in fact I needed to apply under the *Access to Information Act* to obtain all of them. In *Little Sisters* the court decided that the manual providing guidelines to customs officers on which items should be confiscated was an administrative policy document, and in itself it was not subjected to *Charter* scrutiny. Instead, the arbitrary decisions based on this document could be challenged individually.¹⁵⁹

The manual dismissed as an unreviewable guideline in *Little Sisters* gave concrete examples of which items were prohibited, and in this it is similar to the CSC framework that prohibits certain medical items for disabled individuals,¹⁶⁰ or that only allows certain medication in prisons.¹⁶¹ However, the prison environment presents a set of characteristics that would make these administrative documents similar in effect to legislative policy and thus amenable to *Charter* review.

In the prison environment, products are available only if CSC purchases them. Therefore, despite the fact that a medical doctor could in theory prescribe medications other than those in the *Drug Formulary*, or recommend a medical item that is not available in the *Essential*

157. *Ibid*, s 40.

158. *Ibid*, s 88.

159. *Little Sisters*, *supra* note 153 at para 85.

160. CSC, *Healthcare Framework*, *supra* note 137.

161. CSC, *Formulary*, *supra* note 139.

Healthcare Framework, that doctor's decision would have no effect. The fact that these items are not provided for in the framework means they do not exist in the CSC stock. Thus, while the CSC frameworks may look similar to other administrative policies that help implement rules and regulations, because the correctional system is a closed environment, they go beyond simple aids. Rather, they make it impossible for professionals to use their individual judgement in making decisions. In the language of *GVTA*, these frameworks often de facto "preclude arbitrary decisions."¹⁶² Thus, the rules in this framework are mandatory not by their nature, but by their effect: what is not included in the framework is not prohibited, but it is not available either. A similar dynamic exists at the institutional level. For example, the standing orders regulating the use of segregation in each institution emanate from the warden, and they effectively limit the discretion of front-line workers in making decisions regarding the use of administrative segregation.

Another factor in assessing whether such frameworks are amenable to *Charter* review is their effect on those to whom they apply. For prisoners, prison rules have significant legal power and impact, with the difference that these "laws" are largely removed, in a practical sense, from parliamentary or judicial scrutiny. Prisoners cannot get around the rules that deny them healthcare, because their very position deprives them of any autonomy to look for healthcare elsewhere. For instance, if a prisoner sends a friend to pick up medication, the friend will not be permitted to deliver it. If he attempts to purchase a medical item or medication from the black market, he will be charged with a disciplinary offence. Needless to say, the prisoner cannot remove himself from the environment regulated by these frameworks, so he can only use what the frameworks make available to him.

Based on the effect these frameworks have on prisoners' rights and the fact that they preclude other types of discretionary decision-making, they should be viewed as legislative policy. They do not fit with all *GVTA* criteria simply because CSC chose not to make them easily accessible and to use the language of guidelines. This deliberate choice should not allow the agency to insulate binding documents from *Charter* review.

Administrative Decisions as State Conduct

Some breaches can be traced back to discretionary decisions made by senior correctional officials. For instance, the Hiring Protocol is a document emanating from the regional director who has discretion in setting the

162. *GVTA*, *supra* note 71 at para 53.

number of positions available. I have argued above that this document is one of the sources of the breach that occurs due to insufficient medical personnel. The hiring protocol is closer in nature to a discretionary agency decision and would qualify as state conduct for the purpose of *Charter* review. The harm that may result due to insufficient medical services is sufficiently connected to the director's decision not to hire enough personnel to provide such services.

Similarly, the decisions of the warden to withhold medical items that are listed as available for medical prescription by the *Essential Healthcare Framework* should be reviewable as state conduct. According to the framework, all items that are theoretically available for medical personnel to prescribe must be approved at the warden's discretion. Thus, when the framework fails to list certain drugs or prohibits certain items, it is the framework that is the source of the breach. When the items are available according to the framework, but are rejected at the warden's discretion (as in Warkworth Institution, where there is a blanket prohibition on the prescription of any medical items or devices) then the source of the breach is the warden's decision.

Prison Practices as State Conduct

A group of practices has never been analyzed as a source of breaches of s. 7 substantive rights. However, in the context of imprisonment, it would be extremely detrimental to the rights of prisoners to let injurious practices elude *Charter* scrutiny just because it may be difficult to trace them back to a particular source.

The practice of having older prisoners stand in line for hours, outdoors, to pick up their daily medication likely originates from the decision of a warden at some point in time. However, in most cases records of such decisions cannot be located or identified,¹⁶³ and the practices are currently rooted in nothing but mere routine and a guideline that suggests that the practice is allowed.¹⁶⁴ The difficulties in locating such sources do not make the practice less harmful or less binding on the individual to whom it applies. A sufficient connection undeniably exists between the general prison setting for medication pick-up and an increased chance of harm to sick individuals due to prolonged periods of standing outdoors, in bad weather.

163. Through an *Access to Information Act* request I was informed that the decisions as to where to place the location of medication dispensing windows were made decades ago and the relevant documents cannot be located any longer.

164. CSC, "Medication Distribution," *supra* note 133.

There is some evidence that prison practices would be reviewable in court. First, while there have been no successful s. 7 prison cases to date holding that administrative prison practices caused a s. 7 deprivation of life or liberty, such cases have been brought to court. Even though they failed, it was not because the prison practice was not a valid source or because it did not bear sufficient causal connection to the breach. Indeed, controversial cases such as *Bergeron*¹⁶⁵ (where prison officers did not keep their side of a deal with a prisoner), *Piche*¹⁶⁶ (which concerned the practice of double-bunking), *Fieldhouse*¹⁶⁷ (which concerned compulsory urinalyses in the absence of individualized suspicion) failed because the court could not find a sufficient deprivation of security of the person or a principle of fundamental justice that was breached. The validity of the source and the causal link was never questioned.

Second, written and unwritten abusive state procedures have been acknowledged as violating s. 7 in the context of procedural rights.¹⁶⁸ Thus, the isolated or systemic practice of police officers who interrogate people without informing them of their rights may lead to a breach of the right to silence as protected by s. 7. While procedural and substantive issues are conceptually distinct under s. 7, courts have applied an identical analysis. Hence, a distinction between sources of causation would not be an explanation for this situation.

Third, prison rules and practices have been recognized as unconstitutional under other sections of the *Charter*, notably s. 12. In *Trang*, for instance, the complainants were forced to use stained underwear, were double-bunked and deprived of appropriate food. This treatment was found to violate s. 12, despite the fact that the causal source was neither an identifiable administrative decision nor a piece of legislation.¹⁶⁹

In this context, the prison practices that endanger the life or security of the person should be reviewed as state conduct for the purpose of the s. 7 analysis.

State Inaction as a Causal Source

Both legislative and state-conduct breaches are sometimes caused by the state's refusal to do something, and in this way the rights affected take the shape of positive rights: for example, failure to provide medication,

165. *Bergeron v Quebec*, (1995) 127 DLR (4th) 458 (QC CA).

166. *Piche*, *supra* note 96.

167. *Fieldhouse*, *supra* note 96.

168. See e.g. *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44, 2010 SCC 3 [*Khadr*].

169. *Trang v Alberta (Edmonton Remand Centre)*, 2010 ABQB 6; See also *Munoz v Alberta*, 2004 ABQB 769.

access to medical services, or adequate medical diets might violate a positive right. Whether the state can be asked under s. 7 to do something, as opposed to not do something, is still a controversial question.

In general, positive rights have been associated with socio economic rights. In *Gosselin*¹⁷⁰ for example, this issue arose in the context of courts interfering with a democratic institution's welfare policy, and amounted to the question of whether the state had a monetary performance obligation to a group of people. Social rights often include the right to healthcare, to food, and to decent living conditions. On the other hand, civil rights are generally legal rights: the right to life, to be free from cruel and unusual treatment and torture etc. It appears that positive rights are yet to receive full recognition under s. 7 because they are seen as different in nature from negative rights: they are seen as socio-economic as opposed to civil. At the moment, there is a lingering controversy over the extent to which s. 7 covers socio economic rights, but there is an undeniable inclination among courts and scholars to recognize that the right to life and security of the person can in fact be breached by the failure of the state to ensure socio economic rights such as food, shelter, and health care, at least in some circumstances.¹⁷¹

Regardless of whether courts will include socio economic rights under s. 7 in the future, the controversy should not extend to the positive rights that matter in the prison context. A prisoner's positive rights are not socio-economic. In the prison context, the right to health care and to appropriate living conditions is closer to a civil right than to a social right, as the state's initial act of incarceration led to the lack of access to health care. A prisoner is taken under the full control of the state and he is (by law) deprived of any meaningful choice or opportunity to ensure his health or subsistence needs. In such a context, the failure of the state to provide health care equals a death sentence. The prisoner, once deprived of any autonomy by incarceration, has little use for the right to have the state not otherwise intrude in his life. Thus, the state must ensure that it has rules and procedures in place that provide for adequate health care, food, and accommodation, in accordance with the realities faced by the individual at his particular stage in life.

Young has argued that "choice of medical treatment should be treated as a fundamental right to autonomous decision-making" and thus protected

170. *Gosselin*, *supra* note 78.

171. Jackman, *supra* note 73; Sylvestre, *supra* note 73; Young, "Social Justice," *supra* note 73.

under s. 7.¹⁷² With *Chaoulli*, *PHS*, and *Carter*, it appears that the court has done just that. It would be counterintuitive, to say the least, if the *Charter* were to protect the choice of medical treatment without also ensuring the positive obligation of the state to provide appropriate medical treatment in situations where autonomous decision-making is completely negated by incarceration.

c. *Principles of fundamental justice*

As discussed above, a deprivation of life, liberty, and security of the person constitutes a s. 7 breach only if the deprivation is also not in accordance with the principles of fundamental justice.

For legislative sources

Carter,¹⁷³ *Bedford*,¹⁷⁴ and *PHS*¹⁷⁵ are particularly useful decisions in illustrating the application of the purpose-based principles of fundamental justice. The principles prohibiting arbitrariness, overbreadth, and gross disproportionality have been deemed the main substantive principles of fundamental justice. All three of these principles engage with the objective of the law under review, and the first step in this analysis is to identify the objective or the purpose of the law.¹⁷⁶

Moriarity provides significant guidance when it comes to identifying the objective of a law. From the outset, the search for the law's objective must focus on the ends of the law, rather than the means chosen by the legislature. Nonetheless, the effects, which are essentially the means through which the objective is fulfilled, must also be identified, because the principle of fundamental justice analysis is concerned with a disconnect between the objective and the effects.¹⁷⁷ The objective can be identified by looking at the legislative text, the context in which it was rendered, legislative history, and judicial interpretation.¹⁷⁸ The objective should be framed in terms that are precise and concise, not too broad and not too

172. Alan Young, "Deprivations of Liberty: The Impact of the Charter on Substantive Criminal Law," in Berger & Stribopoulos, *supra* note 50, 105-143, at 113.

173. *Carter*, *supra* note 9.

174. *Bedford*, *supra* note 9; *Bedford CA*, *supra* note 87. Both the CA and the SCC found the principle against gross disproportionality and overbreadth to be violated. However, they balanced different elements to reach that conclusion. For an in-depth analyses of the different elements, see Hamish Stewart, "*Bedford v. Canada: Prostitution and Fundamental Justice*," (2011) 57 Crim LQ 197 [Stewart]; Hamish Stewart, "*Bedford and the Structure of Section 7*," (2015) 60:3 McGill LJ 575 [Stewart, "*Bedford*"].

175. *PHS*, *supra* note 8.

176. *Carter*, *supra* note 9 at para 73; *Bedford*, *supra* note 9 at para 123.

177. *Moriarity*, *supra* note 89 at paras 24-25.

178. *KRJ*, *supra* note 89 at para 64.

narrow.¹⁷⁹ At this stage of the analysis, the effectiveness of the measures taken or the wisdom of the objective are not of concern to the court; the purpose of the legislation is taken at face value and the focus is on how the effects of the law are connected to its goals. Other considerations that might justify the means used, such as broader moral values, or social and public interests are also not brought in at this stage. Instead they are analyzed under s. 1.¹⁸⁰

To establish why certain measures are being adopted as part of the correctional governmental policy, I have looked at the *CCRA*, as the act which delegated regulatory power to CSC, and at the explanation found in each particular CSC document. While each policy rests on slightly different reasoning, the overarching purpose behind any kind of correctional regulation is, according to the *CCRA*, to carry out sentences in a safe and humane manner and to help with the rehabilitation and community reintegration of offenders.¹⁸¹ We can infer that each correctional policy would serve at least one of these purposes, in addition to other potential purposes.

Directives pertaining to the use of segregation

The *Discipline of Inmates* directive states that the goal of the policy is to “encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary,” through a process that contributed to their rehabilitation and reintegration, and promoted compliance with prison rules.¹⁸² The *Administrative Segregation* directive states as a purpose the maintenance of the safety of staff and prisoners.¹⁸³ The *Management of Inmate Self-Injurious Behavior and Suicidal Acts* directive makes it its goal “to ensure the safety of inmates who are self-injurious or suicidal using the least restrictive measures for the purpose of preserving life and preventing serious bodily injury, while maintaining the dignity of the inmate in a safe and secure environment.”¹⁸⁴

The goal of disciplinary segregation is thus to help prisoners to rehabilitate by maintaining order in the institution and furthering compliance with the rules. This is aligned with the *CCRA*’s overarching goal of promoting the safe rehabilitation of prisoners. Perhaps disciplinary

179. *Carter*, *supra* note 9 at para 76; *Moriarity*, *supra* note 89 at para 28; *KRJ*, *supra* note 89 at para 63.

180. *R v Swain*, (1991) 1 SCR 933 at 977; *Carter*, *supra* note 9 at para 79; *Moriarity*, *supra* note 89 at para 30.

181. *CCRA*, *supra* note 1, s 3.

182. *CD 580*, *supra* note 121.

183. *CD 707*, *supra* note 123.

184. *CD 843*, *supra* note 120.

confinement may further rehabilitation for most prisoners who are not mentally ill; however, the directive also applies to mentally ill prisoners, who respond differently to solitary confinement. These methods have no therapeutic value in such cases. Rather, they may perpetuate a cycle of mental illness, and actually prevent the individual from healing and rehabilitating.¹⁸⁵

When discussing the purpose of the prohibition on assisted suicide, the court in *Carter* found the law overbroad because “the effects [of the law] support the objective in a general way, but it takes away rights that bear no relationship to the objective.”¹⁸⁶ Thus, because this directive is used to discipline mentally ill prisoners, who are more strongly affected by solitary confinement and other disciplinary tools than healthier prisoners, the directive breaches rights in a wider manner than initially contemplated. The problem is not that the discipline of mentally ill prisoners does not lead to their rehabilitation, because the effectiveness of the means cannot be considered at this stage of the analysis.¹⁸⁷ The problem is that, quite apart from the fact that these measures fail to support their rehabilitation, there is a negative impact on the well-being of individuals with mental illness when they are subject to disciplinary measures created for those without mental illness. The rights of prisoners with mental illness are affected “in manner not connected to the mischief contemplated by the legislature.”¹⁸⁸ The provisions are thus overbroad.

Administrative segregation is used to ensure the safety of the institution, and thereby a proper rehabilitative environment. According to my study, however, this type of segregation is disproportionately used to contain mentally ill prisoners. To the extent to which mentally ill prisoners may be restless and create issues within the institution, this could be a valid reason, but the validity of an objective is irrelevant to the s. 7 analysis.¹⁸⁹ What does matter is that an individual’s mental health is significantly affected by the used of solitary confinement.¹⁹⁰ Furthermore, when prisoners whose mental status has deteriorated are returned to the general population, their behavior is likely to be worse rather than better. Hence, as the study shows, they will then have to be put back in solitary confinement. In such situations, the safety of the institution is only

185. See, e.g., Iftene, “Unlocking the Doors,” *supra* note 22.

186. *Carter*, *supra* note 9 at para 85.

187. *Moriarity*, *supra* note 89 at para 30.

188. *Carter*, *supra* note 9 at para 85.

189. *Moriarity*, *supra* note 89 at para 30.

190. See above, and also see Ivan Zinger, Cherami Wichmann & DA Andrews, “The Psychological Effects of 60 Days in Administrative Segregation” (2001) 43:1 Can J Crim 47 [Zinger et al].

temporarily ensured, the rights of mentally ill prisoners are breached, and the institution becomes an unsafe place over the long term. Seen alongside the negative impact on prisoners' rights, this shows that "the impact is out of sync"¹⁹¹ with the goals of the directive, meaning that the directive is likely both overbroad and grossly disproportionate.

Finally, solitary confinement is meant to ensure the safety of individuals pre-disposed to self-harm, according to the *Management of Self-Injurious Behavior Directive*. The reality, however, is that most of the people who self-harm are mentally ill and their mental illness is likely to increase in solitary confinement.¹⁹² It may be that in the short term these individuals are safe because they cannot harm themselves,¹⁹³ but they are placed at risk by the long-term effects of solitary confinement on mentally ill people. Because the effects of the document directing that self-injurious prisoners be placed in segregation has a strong negative effect on their mental health, the provisions are grossly disproportionate in that their long-term injurious effects go well beyond the benefits of temporarily shielding them from self-harm.

Food directives and standing operating procedures

The stated purpose of the *Food Services* directives and procedures is to "provide direction for the delivery of quality food services to the institutions of the Correctional Service of Canada and set guidelines for the contribution of Food Services to institutional programs and activities," but I believe this purpose to be too narrowly defined.¹⁹⁴ *Carter* has warned against defining an objective too narrowly by essentially reiterating the words in the documents.¹⁹⁵ Similarly, *Moriarity* rejected a narrow purpose for the prosecution of civil offences in military personnel in favour of framing their objective in a way that relates more closely to the larger goals of military service.¹⁹⁶

Looking at the goals of the *CCRA*¹⁹⁷ and CSC's priorities,¹⁹⁸ it is better to say that the purpose is to "provide humane custody and supervision to

191. *Carter*, *supra* note 9 at para 89.

192. See Iftene, "Unlocking the Doors," *supra* note 22.

193. The short-term safety of suicidal individuals placed in solitary confinement is questionable. There have been incidents of suicide committed while on suicide watch, the most notorious being Ashley Smith. See OCI, "Ashley Smith," *supra* note 27. The effectiveness of a measure is, however, beyond the scope of the principles of fundamental justice analysis.

194. *CD 880*, *supra* note 131.

195. *Carter*, *supra* note 9 at para 76; *Moriarity*, *supra* note 89 at para 28.

196. *Moriarity*, *supra* note 89 at para 48.

197. *CCRA*, *supra* note 1, s 3.

198. Correctional Service Canada, "Our Priorities," online: <<http://www.csc-scc.gc.ca/about-us/006-0002-eng.shtml>>.

offenders,” and quality food is a means to that end. However, a “one-size-fits all” medical diet, with little to no nutritional value, cannot be described as quality food, and it forces prisoners to eat the regular, more filling food which may harm them. It can be argued that the potential effects of a uniform medical diet are disconnected from the purpose of providing “humane custody”¹⁹⁹ and that the provisions are arbitrary.

Drug Formulary and Essential Healthcare Framework

Two frameworks elaborate on the medical services and medication that are generally available to federally incarcerated prisoners if prescribed by a medical practitioner and, in some cases, if they are also approved by the warden at his discretion. The *Essential Healthcare Framework* prohibits outright a whole set of medical devices and items, widely used in the community to manage chronic pain and disability, such as orthopedic mattresses, pillows, orthopedic shoes, etc. *The Drug Formulary*, by exhaustively listing the medication available, limits the range of painkillers to essentially Tylenol 3.

The *Essential Healthcare Framework*, in its preamble, discusses the purpose of the two documents. It states that this document exists in furtherance of CSC’s mandate to “provide every inmate with essential healthcare and reasonable access to non-essential mental health care.” It provides that the purpose of the policy is “to promote quality and consistency in health services across the country and allows CSC to make decisions based on monitoring and analyzing the effectiveness and efficiency of essential health services.”²⁰⁰

However, based on the *Carter* framework,²⁰¹ this stated “purpose” is in fact a means for attaining a larger objective. Considering the goals set out in the *CCRA*,²⁰² as well as the CSC’s stated mission “to encourage individual responsibility, promote healthy reintegration, and contribute to safe communities,”²⁰³ it seems rather that the purpose of the essential healthcare regulation is to ensure that individuals in CSC charge are given the means to a healthy rehabilitation and reintegration back into the community. The uniform regulation of health services is the means through which this larger objective is achieved.

199. *Carter*, *supra* note 9 at para 83 defined arbitrariness as the disconnection between the effects and the purpose of a law. See also *Bedford*, *supra* note 9 at para 111.

200. CSC, *Healthcare Framework*, *supra* note 137 at 1.

201. *Carter*, *supra* note 9 at para 76.

202. *CCRA*, *supra* note 1, s 3.

203. CSC, *Healthcare Framework*, *supra* note 137 at 1.

It is difficult to see how the objective of healthy rehabilitation is being served by restricting access to medical items and medication that can help manage chronic conditions. Social science data from this study shows that people whose conditions are inappropriately addressed tend to have more disciplinary incidents, and this is clearly not conducive to rehabilitation. This non-management of chronic conditions is disconnected from the purpose of rehabilitating and reintegrating individuals, which means that the frameworks limiting access to medical items are arbitrary.

There might no doubt be larger societal interests or benefits to the public that might justify limits on the available healthcare, or, in the case of the *Food Services* directive, on the diets served. However, this analysis is not conducted at the principles of fundamental justice level. Rather, it is conducted at the justification of the breach level, under s. 1.²⁰⁴

For non-legislative state conduct

A warden's decisions to withhold medical items needed by prisoners or a regional director's decision to limit the number of professionals, as well as prison practices that force prisoners to stand outdoors to pick up their medication, are non-legislative state actions.

As previously explained, the current jurisprudence makes it somewhat unclear whether the courts would feel compelled to identify a principle of fundamental justice in the case of a breach by state conduct, or whether they would simply balance the effects of the decision against the rights of the accused. While courts have sometimes maintained the need to identify a principle,²⁰⁵ there are a considerable number of examples to the contrary. In these cases, the courts have simply looked at the breaches that occurred, reiterated the rights at issue, and reviewed the conduct and its effects,²⁰⁶ focusing on societal considerations that are more common in an analysis under s. 1 than under s. 7.²⁰⁷

Based on a free balancing analysis, courts should have no difficulty concluding that, for instance, the decision to limit medical personnel has devastating effects on the lives of older prisoners. However, as I describe below, the outcome of a s. 1 analysis in s. 7 cases is still an "unknown" due to the little jurisprudence on the matter. The outcome of a s. 7 free

204. *Swain*, *supra* note 180 at 977; *Carter*, *supra* note 9 at para 79; *Moriarity*, *supra* note 89 at para 30.

205. *PHS*, *supra* note 9 at paras 129-136.

206. See, e.g., *Suresh*, *supra* note 63 at paras 54-75; *Burns*, *supra* note 54 at paras 85-124; *Khadr*, *supra* note 167 at paras 22-26.

207. See for instance *Lake v Canada (Minister of Justice)* [2008] 1 SCR 761 at para 40; *Canada (Justice) v Fischbacher*, [2009] 3 SCR 170 at para 39.

balancing exercise in state-action based violations, which appear to involve s. 1 elements, is equally difficult to predict.

d. *Section 1*

Once a legislative provision has been found to breach a *Charter* right, the state is given the opportunity, according to s. 1 of the *Charter*, to prove that the breach was justified by showing that the provisions in question are in furtherance of a pressing objective, and that the means chosen were proportional to that objective. To evaluate the justification provided, courts apply the *Oakes* framework: they first assess the importance of the objective and then they inquire into the proportionality of the law. At this second stage, courts evaluate whether the means chosen are rationally connected to the objective of the law, whether they minimally impair the right in question, and whether there is proportionality between the deleterious and salutary effects of the law.²⁰⁸

Section 1 has proven to be of limited application once a violation of s. 7 rights has been found. Section 1 essentially allows for an inquiry into competing social interests, and because s. 7 rights are fundamental, it is difficult to reach the conclusion that competing social interests can override them.²⁰⁹ What is more, the principle of fundamental justice analysis, which is an integral part of s. 7, partially overlaps with s. 1 analysis. *Bedford* held that it will be difficult to justify a law “that runs afoul of the principles of fundamental justice and is thus inherently flawed.”²¹⁰

More recently, however, *Carter* and *KRJ* held that there is a limited number of circumstances where the state will be able to provide justification for a s. 7 breach. In particular, the principles of fundamental justice analysis does not contain a public good inquiry,²¹¹ while s. 1 allows for a “normative and contextual balancing of the interests of society with those of the groups in question.”²¹² Subsequently, in *Michaud*, the Ontario Court of Appeal found a s. 1 justification for a s. 7 violation, though it occurred in a very different context from the one analyzed here.²¹³ Nonetheless, these cases suggest that, from now on, the proportionality test in s. 1, and in particular the weighing of the deleterious and salutary effects of a law, may be of use to the state.

208. *R v Oakes*, [1986] 1 SCR 103.

209. *MVR*, *supra* note 53 at 518; *G(J)*, *supra* note 55 at para 99; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66.

210. *Bedford*, *supra* note 9 at para 96.

211. *Carter*, *supra* note 9 at para 95.

212. *KRJ*, *supra* note 89 at para 139.

213. *R. v Michaud*, 2015 ONCA 585 at paras 81-145.

Section 1 only applies to legislation.²¹⁴ Thus, in cases where the senior officials' decisions or prison practices are found unconstitutional, Canada will never be able to justify them under s. 1.²¹⁵ However, considering that the directives and certain prison frameworks are for all purposes legislative in effect, the state may attempt a s. 1 justification in those cases.

It is difficult to predict what arguments the CSC would advance to justify their policies, or how successful these arguments would be. The CSC often responds to policy criticism from the Office of the Correctional Investigator by flatly denying that their practices are flawed, without offering any concrete justification. When they do provide justifications, these revolve around security concerns and budgetary restrictions. CSC often offers a blanket justification, stating that, based on their assessment and using the resources at their disposal, their methods were the best to fulfill CSC's mission.²¹⁶

The CSC has often been criticized for its extended use of administrative segregation and for employing it to manage mentally ill prisoners, practices which are sanctioned by a host of Commissioner's Directives.²¹⁷ CSC would likely allege that certain individuals cannot be managed in the general population and that for their own safety and that of other prisoners, they need to be isolated, sometimes for very long times, whether or not they are mentally ill. While such policies may have a pressing objective (namely that of ensuring the safety of the institution), there is an argument to be made that the means chosen are not proportionate. On one hand, these measure more than minimally impair the rights they affect, and on the other, their salutary effects are not greater than the deleterious ones. This study shows that both administrative and disciplinary segregation are disproportionately used on individuals who are physically and mentally ill, while other studies have shown that segregation has no therapeutic value, that it increases mental deterioration, and that it leads to a high

214. *Charter*, *supra* note 5, s 1.

215. However, as mentioned above, the analysis at the principles of fundamental justice stage of a s. 7 claim involving a breach caused by state conduct appears to involve a free balancing exercise which implicates societal interest considerations akin to those followed in a s 1 analysis. Thus, even if reviewed at different stages in the analyses, there are similarities between the issues at play in both legislation- and state-conduct-based claims.

216. See, e.g., Correctional Service Canada, "Response of the CSC to the 39th Annual report of the Correctional Investigator"; Correctional Service Canada, "Response of the Correctional Service of Canada to the 38th Annual Report of the Correctional Investigator 2010-2011," online: <<http://www.csc-scc.gc.ca/publications/ci10-11/index-eng.shtml>>. All responses to the OCI's reports follow similar pattern, and they are available at <www.csc-css.gc.ca>.

217. *CD 707*, *supra* note 123; *CD 843*, *supra* note 120; *CD 580*, *supra* note 121.

rate of suicide attempts.²¹⁸ Thus, upon return to the general population, individuals who have been held in segregation will be even sicker and even more unstable.²¹⁹ What these individuals need is access to psychiatric care and treatment, either in the institution, in the Regional Treatment Centre,²²⁰ or in a community hospital. These options, which are both more humane and more effective in the long term, are in fact available. Considering the devastating effects of segregation on the mentally ill, policies that subject them to the practice do not minimally impair their rights. Also, because the positive “managing” effects are temporary, these individuals may be rendered even more unstable over the long term, putting the salutary effects out of all proportion to the deleterious ones.

The second policy CSC might try to justify is their limitation on medical items and pain medication as per the *Essential Healthcare Framework*²²¹ and *National Drug Formulary*.²²² When it comes to limiting access to drugs, the number one justification is likely also security. It often happens that drugs are stolen and trafficked in prison, and the availability of strong narcotics would fuel these practices. However, the study suggested that senior inmates, who are highly affected by these practices, in fact have much shorter lists of disciplinary charges as well as good relations with staff members. For example, since turning 50, only 31% of the inmates interviewed reported a disciplinary charge, with only 6% of these charges being for violent behavior. On the other hand, only 6.1% reported poor relations with staff members. Thus, for this particular group, a drop in security in favor of holistic palliative care or a more permissive drug policy should not be too difficult to arrange. One could imagine the creation of seniors-only units, where security concerns would be lower, and where a better drug policy could be in place. It thus cannot be said that a blanket prohibition on medically necessary drugs is only minimally impairing elderly prisoners’ rights.

Finally, a potential justification that CSC might offer for its practice of withholding medical items, drugs, and tailored medical diets, would revolve around budgetary restrictions. However, it has never been accepted in Canada that the state can save money at a direct cost to people’s well-

218. Zinger et al, *supra* note 189; Sapers, OCI, 2014–2015, *supra* note 3 at 25-31; OCI, “Ashley Smith,” *supra* note 27.

219. See Iftene, “Elderly Inmates,” *supra* note 111 at 171-175.

220. Regional Treatment Centres are CSC Institutions where prisoners with acute mental illnesses are treated. There is one in every region and most of them are accredited psychiatric facilities. For a general description, see Correctional Service Canada, Institutional Profiles, online: <<http://www.csc-ccc.gc.ca/institutions/index-eng.shtml>>.

221. CSC, *Healthcare Framework*, *supra* note 137.

222. CSC, *Formulary*, *supra* note 139.

being and safety. A financial justification has only once been accepted under s. 1, and that was in a very different context.²²³ It is doubtful that any court would justify threats to life and security of the person because the government is facing budgetary restrictions.

All this allows the conclusion that while the state may attempt to justify *prima facie* unconstitutional legislative policies as the best way to ensure security based on the resources available, they may not be successful. The extreme effects of such policies, at least on older individuals, combined with the availability of better solutions to achieve the same results, would make such justifications unfeasible.

e. *Summary*

There are a number of issues that could endanger the life and security of the person with regards to older prisoners, including the use of segregation for mentally ill prisoners; the insufficient number of medical personnel, in particular mental health specialists; a lack of appropriate medical diets; restricted availability or lack of medical supplies for those suffering from disabilities; and limited medication opinions for chronic pain.

These breaches are caused by practices specifically requested or sanctioned by administrative documents or decisions, such as Commissioner's Directives, Standing Operating Procedures, or wardens' decisions. The directives apply in prison with the force of law and they should be reviewed under s. 7 in the same way as policy-creating legislation is currently reviewed. Administrative decisions and prison practices should be reviewable as state conduct. Moreover, based on the available empirical data, the breaches of rights caused by legislative policies are not in accordance with the purpose-based principles of fundamental justice, namely arbitrariness, gross disproportionality, and overbreadth. Equally, it is unlikely that these policies could be justified by the state under s. 1.

It is my contention that the above claims, whether together or separate, could provide the basis of a successful constitutional challenge under s. 7 of the *Charter*. The ability to prove a systemic problem will make for a stronger claim in an individual case, and it will allow for remedies that transcend the particular claimant.

223. *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66. It is also worth noting that in *Gordon v Canada (Attorney General)*, 2016 ONCA 625 at para 316, the Ontario Court of Appeal accepted an economic justification under its s 1 analysis in respect of wage-restraint legislation. However, this was done in an *obiter* passage. The majority found no s 2(d) breach.

IV. *Conclusion: The contribution of a successful s. 7 Charter argument to an age-sensitive prison environment*

The issues presented by this study fit under the umbrella of a number of *Charter* challenges, especially those based on the right to life and security of the person. The aim of this article has been to show that a s. 7 argument is feasible. While in the past many *Charter* challenges were as unsuccessful as other types of prison litigation, the empirical data available should help to build stronger arguments in favor of enhanced protection of the rights of elderly prisoner. The application of s. 7 itself has known significant jurisprudential expansion in recent years, and the willingness of courts to apply s. 7 to policy matters, to rely on empirical data in order to establish corresponding deprivations and breaches of the principles of fundamental justice, and to consider positive rights under this section, renders a s. 7 challenge of prison procedures significantly more likely to succeed.

That being said, bringing the type of claim proposed here will not be easy. It will require prisoners willing to sue the government, and they will need access to legal advice and support to do so. Litigation is also expensive, and there is a lot at stake for claimants in a case like this.²²⁴ However, in the absence of other viable options (which is owed in large part to the failure of legislators and governments to address these matters voluntarily) and in view of the increase in older prisoners with declining health, such claims will eventually arise. Moreover, courts have allowed for public standing in *Charter* challenges to unconstitutional legislative provisions,²²⁵ and in such cases a prisoner claimant would not even be needed. While views on this are conflicting, public standing may also be allowed for challenges to state conduct.²²⁶ It will then be up to courts to seize the opportunity and require the government to fulfill its constitutional duties towards its most vulnerable populations.

When s. 7 violations occur as a result of state conduct, remedies will generally be granted under s. 24, whereas when it results from a legislative violation, remedies under s. 52 apply.²²⁷ It is sometimes considered that

224. For the barriers faced by prisoner litigants see Parkes, *supra* note 41 at 667.

225. *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 51. *BCCLA*, *supra* note 5.

226. In *Chaudhary v Attorney General of Canada et al*, 22010 ONSC 6092 at paras 19-25, the judge specifically expressed his uncertainty regarding the application of public standing to cases where s 24 remedies are sought (thus cases where state conduct is at issue); however, in *Conseil scolaire francophone de la Colombie-Britannique v British Columbia (Education)*, 2016 BCSC 1764 at paras 1123-1131, the judge allowed public standing for individuals seeking s 24 remedies. Public standing was granted to the BC Civil Liberties Association and the John Howard Society by BCSC in a prison case currently being heard in court, challenging the use of segregation.

227. *GVTA*, *supra* note 71 at para 87.

only s. 52 remedies have the potential for systemic effects.²²⁸ For instance, a finding that the CD allowing the use of segregation for mentally ill people or the framework banning medical items needed by older people is unconstitutional would force CSC to redraft these documents. This would benefit all individuals affected by the policies they contain.

However, courts have proven that they are able and willing to provide creative remedies under s. 24(1) that go beyond the claimant.²²⁹ We can thus imagine how a court might use the opportunity of a *Charter* challenge to prison practices to further systemic change in Canada's prison. For example, if the court finds that the decision to limit the hiring of medical personnel is unconstitutional, it could order CSC to employ more mental health specialists, based for instance on community standards. As Roach has argued, there is no reason courts cannot grant positive remedies under the *Charter*.²³⁰

Finally, even if courts are not willing to provide a positive remedy, a mere recognition—as through a declaration under either s. 24 or s. 52—that a practice or directive violates *Charter* rights could go a long way towards pushing the matter onto legislators' tables.

228. *Ibid* at para 88.

229. The most notable case is *Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62.

230. Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" in Colleen Flood, Kent Roach & Lorne Sossin, *Access to care, access to justice: the legal debate over private health insurance in Canada*, (Toronto: University of Toronto Press, 2005) at 184-201.

