Court of Queen's Bench of Alberta

Citation: R v Prystay, 2019 ABQB 8

Date: 20190104
Docket: 160895967Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Ryan Prystay

Accused

Reasons for Judgment
of the
Honourable Madam Justice Dawn Pentelechuk

I. Introduction

[1] On October 1, 2018, Ryan Prystay pleaded guilty to the following charges arising from an incident on August 2, 2016:

- possession of methamphetamine – s 4(1) of the *CDSA*,
- failing to stop a motor vehicle while being pursued by a peace officer – s 249.1(1) of the *Criminal Code*,
- unlawfully maiming or wounding a law enforcement animal while it is aiding a law enforcement officer – s 445.01(1) of the *Criminal Code*,
- possession of a loaded firearm – s 95(1) of the *Criminal Code*, and
- possession of a weapon (a handgun) for a dangerous purpose – s 88(1) of the *Criminal Code*.

[2] Following his arrest on August 2, 2016, Prystay was placed in the Edmonton Remand Center (ERC), where he remained for the next 28 ½ months.

[3] On March 30, 2017, following an assault on another inmate, Prystay was placed in administrative segregation (AS), remaining there until May 15, 2018, a total period of 13 ½ months.

[4] While not challenging his initial placement in AS, Prystay alleges a breach of his s 7 and s 12 *Charter* rights for his indefinite placement in AS and seeks a stay of proceedings or a sentence reduction under s 24(1) of the *Charter*.

[5] In October 2018, a *voir dire* was held in relation to Prystay's Stay Application. I heard evidence from Mr. Prystay, Ian Lalonde (Director of Programs at the ERC), and Steven Phillips (Director of the ERC). I heard no evidence from Alberta Health Services (AHS), the entity responsible for inmate health and treatment.

[6] The matter was then adjourned to December 18, 2018 to obtain a psychiatric (FACS) assessment and a Gladue Report.

[7] On December 18, 2018, I delivered my oral decision with written reasons to follow. I found that Prystay had met his onus of establishing a breach of his s 12 *Charter* rights. While this was not the "clearest of cases" justifying a stay of proceedings, I concluded a reduction of his sentence was the appropriate remedy. These are my reasons.

II. Section 7 and 12-*Charter*

[8] Section 7 protects the right to life, liberty, and security of the person, while section 12 protects against cruel and unusual treatment or punishment.

[9] The Supreme Court of Canada in ***R v Malmo-Levine***, 2003 SCC 74 at paras 159-160, [2003] 3 SCR 571, informs us that the standard is the same whether assessing a potential breach under s 7 or s 12. Because the *Charter* must be interpreted in a coherent fashion, the constitutional standard to establish a breach of s 7 is not lessened or lowered. It is the same standard as for s 12. In fact, ss 8-12 of the *Charter* provide specific illustrations of the principles of fundamental justice in s 7.

[10] My analysis focusses on s 12, and because I have concluded Prystay's s 12 *Charter* right was breached, it is unnecessary to assess any breach under s 7.

[11] It is indisputable that Prystay's placement in indefinite administrative segregation is "treatment" that engages s 12. The question is whether that treatment was cruel and unusual in the circumstances of this case.

[12] The threshold is high. To establish a s 12 breach, treatment cannot be merely disproportionate or excessive. It must be "abhorrent or intolerable" or "outrage standards of decency." The test was recently summarized by the Supreme Court of Canada in ***R v Boudreault***, 2018 SCC 58 at para 126:

> This Court has recognized that treatment or punishment will rise to the level of being cruel and unusual where it "is so excessive as to outrage standards of decency" (R. v. Smith, [1987] 1 S.C.R. 1045, at p. 1072, citing Miller v. The Queen, [1977] 2 S.C.R. 680). In R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773, McLachlin C.J. explained that a sentence will offend s. 12 only where it is

> "grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender" (para. 39). It is therefore not sufficient that a sentence be "merely excessive"; to be cruel and unusual, it must be disproportionate to the point of being "abhorrent or intolerable", such that it is incompatible with human dignity (R. v. Lloyd, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 24; Smith, at p. 1072; R. v. Morrisey, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 26).

[13] Much of the s 12 *Charter* jurisprudence has developed through challenges to mandatory minimum sentences. In ***R v Smith***, [1987] 1 SCR 1045 at p 1068, 40 DLR (4^{th}) 435, the mandatory minimum sentence for importing cocaine was challenged. Although Lamer J analyzed the question in the context of punishment and not treatment, the following considerations outlined are nonetheless instructive in answering the ultimate question in this instance:

(1) is the punishment such that it goes beyond what is necessary, to achieve a legitimate penal aim?

(2) is it unnecessary because there are adequate alternatives?

(3) is it unacceptable to a large segment of the population?

(4) is it such that it cannot be applied upon a rational basis and accordance with ascertained or ascertainable standards?

(5) is it arbitrarily imposed?

(6) is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution? and

(7) is it in accord with public standards of decency or propriety?

[14] While adopting these same considerations, McIntyre J, in dissent, synthesized them into three main considerations and concluded a punishment will be cruel and unusual and in violation of s 12 if it has any one or more of the following characteristics:

1) the punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

2) the punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

3) the punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance brings with ascertained or ascertainable standards.

[15] None of these considerations are required parts of a rigid test and no single fact determines the outcome: ***Boudreault*** at para 48.

[16] This is an admittedly high standard that must be assessed contextually. In ***R v Wiles***, 2005 SCC 84 at para 5, [2005] 3 SCR 895, the Supreme Court considered whether a mandatory firearms prohibition flowing from a conviction for cannabis production constituted cruel and unusual punishment. The Supreme Court outlined the following factors to be considered in deciding whether the punishment is grossly disproportionate:

- the gravity of the offence,
- the personal characteristics of the offender,
- the particular circumstances of the case,
- the actual effect of the treatment or punishment on the individual,
- relevant penological goals and sentencing principles,
- the existence of valid alternatives to the treatment or punishment imposed.

III. Prystay's Indefinite Placement in Administrative Segregation is Cruel and Unusual Treatment

[17] I conclude Mr. Prystay's placement in administrative segregation constitutes cruel and unusual punishment for the following reasons: the excessive length of his placement (13.5 months); the adverse effects AS had on his physical and psychological health; and finally, because Prystay was not afforded procedural fairness and his indefinite placement was not imposed in accordance with ascertainable standards.

[18] Before addressing these bases in more detail, it is helpful to provide an overview of an inmate's day to day existence at the ERC while in general population, administrative segregation, or disciplinary segregation.

General Population, Administrative Segregation and Disciplinary Segregation at the ERC

[19] It has long been recognized that time served in remand or pre-trial custody is more onerous than time served in a penitentiary after sentencing. Not only is the environment harsher, with limited access to programs, but pre-trial custody does not count toward parole eligibility or statutory release: ***R v Sooch***, 2008 ABCA 186 at para 11, 433 AR 270; ***R v Summers***, 2014 SCC 26 at para 26, [2014] 1 SCR 575; ***R v Adams***, 2016 ABQB 648 at para 29, [2017] 4 WWR 741.

[20] The new Edmonton Remand Center opened in 2013. Currently, it houses 1600 men and women. There are "Max Pod" units to house inmates placed in either administrative or disciplinary segregation. At any given time, an average 100 inmates are in segregation at the ERC.

[21] The majority of ERC inmates are housed in general population (GP). The cells measure 7.5 feet wide by 12.5 feet long by 8 feet high. Generally, two inmates are assigned to a cell. Each cell has a bunkbed, a desk with a bench, a toilet and a sink. Each cell has a radio that accesses four pre-determined channels.

[22] When the ERC was built, every cell (including those in Max Pod) was wired for a television. Despite ERC senior management fully supporting televisions in the cells, this initiative has stalled for political reasons and has never been implemented.

[23] GP inmates normally have up to 11 hours of common area time when not confined to their cell. The inmates are free to socialize with others in the common area. Each GP unit has

two televisions, each with a choice of 24 channels. GP units have an outdoor yard where inmates play handball or basketball and an adjacent exercise room with treadmills, stationary bikes, and chin up and pull up bars.

[24] In GP, inmates can access academic and life skills programming dealing with addictions, anger management, parenting, health and wellness and release planning. Programs encompass most of the day and are delivered in a classroom setting.

[25] Inmates have access to novels, magazines, newspapers, legal texts, board games and puzzles. If they have money in their account, they are able to order snacks, pens, crayons and paper from the canteen. Inmates may be assigned work and in exchange, may receive a canteen credit.

[26] While any time served in remand is considered "hard time," time served in disciplinary or administrative segregation is particularly oppressive. It is defined by severe restrictions placed on an inmate's mobility, activity and meaningful human contact.

[27] While disciplinary segregation (DS) is punishment, the ERC witnesses emphasized that AS is *not* punishment and that segregated inmates have the same rights and privileges as other inmates. However, the operational reality while in the ERC is that one's experience in either form of segregation is drastically different than one's experience in GP.

Segregation involves severe restrictions on mobility

[28] Inmates in either form of segregation are confined to their cell for 23 hours a day. Most are in single cells. They have two half-hour blocks outside of their cell during each 24 hour period. If an inmate is designated a cleaner for the unit, they may have an additional one to two hours outside their cell. Movement is strictly controlled. ERC staff are separated from the inmates by a steel and glass wall.

[29] During these half hour slots, inmates can shower, exercise, watch television or use the phone in the "fresh air" room. Most inmates remain alone during these activities. These half hour blocks are offered at different times each morning and afternoon, and if the inmate declines the time offered, they forfeit their opportunity to leave their cell. AS inmates may have visits, through CCTV, outside of these half hour periods.

[30] Those in segregation have no access to an outdoor courtyard or an exercise room, only a 10 by 20 foot "fresh air room". The room has a two by three foot barred and screened window. Access to fresh air is a seasonal concept, as the window often remains closed during the winter months. Each of the three tiers in the Max Pod unit has a fresh air room.

[31] In ***R v Blanchard***, 2017 ABQB 369, Macklin J heard a stay application based on Blanchard's experience in AS at the ERC. Although the circumstances are factually distinguishable, Macklin J concluded at para 223 that Blanchard's s 7 and s 12 *Charter* rights had been breached for reasons including:

- severely limited physical recreational opportunities and mental stimulation,
- inadequate food and lack of appropriate utensils,
- difficulty in obtaining new eyeglasses,

- difficulty in obtaining new hearing aids,
- denial of medication on one occasion,
- lack of confidentiality in Mr. Blanchard's RFIs,
- verbal abuse by some CPOs and their condonation of verbal abuse by fellow inmates,
- provision of Mr. Blanchard's criminal record by the CPOs to fellow inmates,
- F bombing, urine dumping and food tampering to the extent it was encouraged or condoned by the guards, and
- apparent failure by the ERC to take steps to investigate certain serious allegations made against CPOs.

[32] Macklin J was particularly critical of the lack of physical exercise, fresh air, and mental stimulation afforded inmates in AS. At para 230, he stated:

> Further, the exercise time and the available stimuli for inmates in the max pod units are wholly inadequate, particularly given the 23 hour lockup in a 90 square foot cell. I do not understand why efforts are not made to ensure that inmates in these units are provided with sufficient legitimate exercise time and stimulation for their physical and mental wellbeing. The provision of a television and adequate reading material as well as other mental stimuli would do nothing but assist in both creating a more humane environment and possibly reducing conflict. With respect to the initial plan to install television sets in each cell and the subsequent reversal of that decision, it was never explained why the funds in the IWF which were sufficient to fund the installations could still not be used for that purpose. Inmates should also be afforded real exercise time with proper exercise equipment and, when the weather permits, time in the real fresh air as opposed to a "fresh air room." Notwithstanding the fact that inmates at the ERC are lawfully in custody, they are presumed innocent until proven guilty and there is no basis to punish them by depriving them of reasonable living conditions except to the extent necessary to address safety and security concerns.

[33] The answer to Macklin J's query as to why inmates in segregation are not provided with sufficient exercise time or exposure to the outdoors was disclosed in the application before me. The new ERC was not designed to provide an outdoor courtyard or an exercise room to inmates in segregation. "Fresh air" rooms met the minimum standard.

[34] This was an unfortunate decision. As a result, there is no logistical way to provide inmates in segregation with access to a secure, outdoor courtyard or a proper gym.

Segregation provides limited opportunities for mental stimulation

[35] The fresh air room contains the only television and telephone on the tier, so access is limited to one of the two half hour breaks.

[36] Inmates in AS can request self-study modules on a variety of topics but have no access to group counselling or group programming. The modules are not reviewed or marked and they are limited in number.

[37] As explained by Mr. Lalonde, the ERC considered Macklin J's comments in ***Blanchard*** and in October 2017, issued a memo entitled "Enhancing Mental Health and Physical Stimulation for Inmates in Segregation" which was distributed to all staff at ERC. The memo outlines seven changes that have since been implemented for those in administrative segregation:

- a stationary bike installed in each fresh air room,
- exercise posters posted on all max pod units,
- independent self-study courses listed and posted on all max pod units,
- board games and puzzles available to inmates based on acceptable behaviour,
- increasing and adding items made available to inmates such as books, Sudoku, puzzles, crossword puzzles and adult coloring books,
- book exchange offered every Sunday, and
- increased magazine subscriptions.

[38] While these enhancements are to be commended, they are insufficient to ameliorate the deleterious effects from extended time in AS. Both Phillips and Lalonde recognize that more can and should be done. The logical starting point is installing televisions in the cells as originally planned. This step would most certainly reduce inmate boredom and in turn, possibly reduce violence.

Segregation eliminates meaningful human contact

[39] Arguably, it is the lack of meaningful human contact that is the most pernicious consequence of placement in segregation. Human beings are not meant to be isolated, particularly for extended periods. The longer a person is isolated, the more challenging it is to relate to others in an acceptable way and to form any type of meaningful relationship.

[40] In ***British Columbia Civil Liberties Association v Canada (Attorney General) (BCCL)***, 2018 BCSC 62 (currently under appeal), the Court was urged to end the practice of administrative segregation as it is currently practiced in federal penitentiaries in Canada. The Plaintiffs argued AS is contrary to ss 7, 9, 10, 12 and 15 of the *Charter*.

[41] ***BCCL*** is the most recent, comprehensive assessment of the over-use of AS, particularly with Indigenous inmates and those suffering from mental illness, of its negative effects on inmates, and of its review processes that lack procedural fairness. Leask J heard extensive evidence from 12 experts and 18 former and current correctional staff and inmates. Leask J concludes that inmates in AS are confined without meaningful human contact, and as currently practiced in Canada, AS conforms to the definition of solitary confinement found in the Mandela Rules.

[42] In segregation, meals are eaten in the cell and delivered through the slot in the door as is an inmate's medication, or any requested program modules.

[43] AHS and ERC staff generally communicate with the inmate through their cell door. Inmates communicate with each other through the ventilation grates. During the half hour

breaks, the staff remain behind a glass and steel enclosure. Most inmates, including Prystay, take their breaks alone.

[44] While inmates in AS may be able to have CCTV visits outside of their scheduled breaks, for inmates like Prystay, who had pre-existing mental health issues and no community support for much of his placement, the isolation is magnified.

[45] In DS, inmates cannot access canteen, and they may be limited in the programs, books and puzzles they can access, and the personal effects they can have in their cell. They are permitted to use the phone during their breaks, but are not allowed visits. The differences between DS and AS are indeed minor.

[46] The essential characteristics of both forms of segregation are severe restriction on mobility, activity and the virtual elimination of meaningful human contact. Regardless of the name, both forms of segregation are a form of solitary confinement and are contraindicated to a successful return to GP and the outside community. As summarized in ***BCCL*** at para 330:

> I have no hesitation in concluding that rather than prepare inmates for their return to the general population, prolonged placements in segregation have the opposite effect of making them more dangerous both within the institutions' walls and in the community outside.

[47] These conditions are unacceptable to a large segment of the population and offend public standards of decency and propriety. Given the design limitations inherent with the Max Pod units at the ERC and the decision not to install televisions in the cells, access to fresh air and regular exercise and opportunities for mental stimulation remain extremely limited. This reality underscores the need to ensure inmates do not spend more time in AS than absolutely necessary.

A. How long is too long?

[48] The first ***Smith*** factor looks at whether the punishment or treatment goes beyond what is necessary to achieve a legitimate penal aim. To reiterate, Prystay does not challenge his initial placement in AS. His conduct against a fellow inmate warranted this action. The legitimate penal aim in placing Prystay in AS was to ensure the safety and security of other inmates and staff. As outlined below, placement in AS for 13 ½ months went well beyond what was necessary to achieve this legitimate aim.

[49] Of note, an inmate cannot be placed in DS for more than 14 days at a time: *Correctional Institute Regulation*, Alta Reg 205/2001, s 46. In contrast, neither the *Corrections and Conditional Release Act*, s 1992, c 20 (*CCRA*), nor its regulations, mandate any limit on placement in AS.

[50] In Prystay's case, the ERC was guided by its internal policy 11-10-01 on administrative segregation (since amended) which reads in part:

> Placement on an indefinite basis is a result of documented information that prior disciplinary measures including punishment levied by the hearing adjudicator have not corrected the problem.

[51] It would have been gratifying to have heard some evidence on the rationale behind a strict 14-day limit for placement in DS, while permitting indefinite placement in AS.

[52] We have known for more than 20 years that the indefinite nature of AS is particularly challenging for inmates. In her 1996 report of the *Commission of Inquiry into certain events at the Prison for Women in Kingston*, Justice Arbour severely criticized conditions in segregation in federal institutions. She noted, at page 81:

> The most objectionable feature of this lengthy detention in segregation was its indefiniteness. The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation.

[53] Twenty two years later, the debate continued in ***BCCL***. Echoing the conclusions of Justice Arbour, Leask J, at para 159, concludes that for many inmates, the worst part of AS is its indefinite nature, and the uncertainty of not knowing when they will be released.

[54] In ***BCCL***, various reports prepared by the Office of the Correctional Investigator (OCI) were heavily relied on. For the most part, the government witnesses accepted the statistics and facts reflected in the reports, but the court in any event concluded the reports were admissible under the principled approach to hearsay, noting that the correctional investigator is not a compellable witness under the *CCRA*.

[55] As outlined in ***BCCL*** at para 64, the OCI reports provide these sobering statistics:

- the average length of stay in segregation has decreased for all inmates from 40 days in 2005-2006 to 27 days in 2014-2015 to 22 days in 2017;
- aboriginal inmates have longer stays in segregation;
- aboriginal inmates are more likely to have been in segregation;
- segregated inmates have higher rates of self-injury;
- aboriginal inmates in segregation have elevated rates of self-injury as compared to non-aboriginal inmates;

[56] As of 2017, the current average stay in AS is 22 days. Prystay remained in AS for over 400 days. Neither Phillips nor Lalonde was able to provide the average length of stay in AS at the ERC. Stays over a year are "not unheard of." In ***BCCL***, Extensive evidence was heard on the efficacy of the 15-day limit for AS. Notably, the government's expert, Dr. Genreau, recommended a 60-day limit.

[57] Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*, 1st Sess, 42nd Parl, 2018 (second reading December 4, 2018) [Bill C-83], regrettably does *not* set a maximum duration for what is now labelled "structured intervention."

[58] AS continues to be utilized in correctional institutions like the ERC at an alarming rate and for alarming lengths of time. It is a powerfully tempting way for institutions contending with inadequate funding and staffing shortages to address challenging circumstances within inmate populations. It is often used as a punitive measure to circumvent the more onerous due process requirements of disciplinary segregation.

[59] To be clear, I recognize that the challenges institutions like the ERC faces are significant. The ERC houses some extremely dangerous individuals. There are rival gang affiliates under the same roof. There are inmates with serious mental health issues and inmates who specifically request to be placed in segregation for their own safety.

[60] Prystay has been incarcerated a good portion of his adult life. He has not always been a model inmate. He is "institutionalized" and has learned to survive and navigate a prison milieu. The March 2017 assault resulted in the inmate receiving treatment in hospital for facial injuries. Prystay had been written up for various incidents before, some more serious than others. But as stated by Lalonde, "at some point you have to take a chance because you cannot keep an inmate in segregation forever."

[61] During his placement in AS, Prystay demonstrated consistent good behaviour. Starting in April 2017, and every month thereafter, the correctional officers recommended his return to GS. This apparently carried no weight with ERC senior management. Instead, they focussed on Prystay's past behaviour as the justification for his indefinite placement. When the decision was finally made to re-integrate Prsytay into GP, he first exercised with a compatible inmate during his half hour breaks. He then roomed with an inmate. That process took several months and was without incident. While this gradual process makes sense, I am unconvinced it could not have been successfully implemented months before.

[62] A free and democratic society demands that human dignity and humane treatment and punishment be afforded to all Canadians, including those in the penal system. These basic values cannot be sacrificed in the name of convenience and expediency. Informed Canadians understand individuals like Prystay will at some point, be released back to the community. An extended placement in AS does nothing to facilitate his successful reintegration. Lalonde and Phillips both acknowledge this. Having concluded that Prystay's stay in AS was demonstrably excessive, I now turn to the effects this placement had on him.

B. Effects of Indefinite Placement on Prystay

[63] I found Prystay to be credible in his evidence regarding his time in AS. There was ample opportunity to embellish his complaints. He did not do so.

[64] Prystay does not complain about the quality of his meals, his bed linens, or his issued clothing. Nor does he allege emotional or physical abuse at the hands of the correctional officers. To the contrary, he says he developed a decent rapport with the officers on the ground, who supported his return to general population.

[65] His complaints focus on the length of time he was kept in AS and the lack of feedback from ERC senior management as to what he needed to do or when his placement in AS would end if good behaviour continued. This triggered intense feelings of helplessness and hopelessness. Not until his review of December 3, 2017, almost nine months after being placed in AS, was Prystay provided feedback on the steps necessary for his return to GP. This lack of communication hardly incentivizes inmates to good behaviour. The cruel irony is that the longer an inmate is kept in AS, the more likely frustration and a sense of futility will trigger impulsive and negative behaviour, which in turn provides the evidence to justify continued indefinite placement.

[66] The majority of his time in administrative segregation, Prystay was alone in a cell. Most of the time, there was a clear window in his cell which faced the Edmonton Young Offender

Centre. For approximately three weeks, he was in his cell with a frosted window. The fresh air room provided a limited view of the outdoors.

[67] Prystay did work as a cleaner for some of his time in AS. This is considered a privilege in AS. It is not clear whether inmates in AS receive a canteen credit as compensation for work performed. If this is the protocol, it did not apply to Prsystay as a long standing restitution order for damage to a television meant any monies coming in would be applied to restitution. As a result, Prystay did not have access to canteen until Phillips crafted an agreement with Prystay in April 2018, that if he continued to display good behaviour, he could keep 50% of any funds coming in, in order to access canteen.

[68] Despite having a few additional hours outside his cell when working as a cleaner, Prystay suffered from extreme stress, anxiety, sleeplessness, depression and paranoia. He experienced auditory hallucinations and physical symptoms including chest pain, back pain and body aches.

[69] Both Lalonde and Phillips testified they had no concerns regarding Prystay's mental health while he remained in AS. This is hardly surprising, as the checks and balances to ensure an inmate's mental health is not in serious decline are tenuous and inmates are reluctant to report significant mental health issues.

[70] Prystay has suffered from anxiety, depression and sleeplessness since he was a young boy. He is medicated for depression and attention deficit hyper-activity disorder (ADHD). He has had drug addiction issues since he was 13. He was subjected to abuse and neglect as a child.

[71] Prystay was once placed on suicide watch in 2013. Prystay testified that reporting suicidal thoughts or severe mental health problems only made the situation in AS worse. Inmates were at risk of being placed in the mental health unit in a cell stripped of everything but a mattress and being forced to wear a restraint jacket or "baby dolls." This reluctance by inmates to report significant mental health concerns was noted in ***BCCL*** at para 233:

> Mr. Patterson testified that many inmates are concerned about being labelled as having mental health issues for fear they will be sent to a treatment center. Dr. Koopman similarly testified that not only may inmates not be inclined to answer questions about mental health truthfully but they may be psychologically in a state of denial.

[72] Although the ERC policies mandated daily checks by correctional staff, a nurse and a psychologist, these inquiries were cursory and made through the cell door. The policies also mandated that those checks by correctional staff be noted in an inmate's case notes. No such notations were identified in Prystay's chart. Any notations made by AHS staff were kept in a separate file, not accessible by ERC staff. With no record and the limited communication permitted between AHS and ERC staff, I am not satisfied that the necessary checks were conducted to ensure Prystay's psychological health. Further, the senior management who made the decisions on Prystay's stay rarely interacted with him. Lalonde had one meeting with Prystay in August 2017 and Phillips had one meeting with him on May 1, 2018, shortly before his release.

[73] Marginalized inmates, without strong family and community supports or inmates with underlying mental health or addiction issues, would find feel the effects of isolation in AS particularly acutely.

[74] Mr. Prystay did not receive calls or visits until he began corresponding with his current girlfriend, sometime in late 2017. The opportunities for mental stimulation were limited. Prsystay repeated the same program modules over and over, in an effort "not to rot."

[75] In ***BCCL***, Leask J heard expert evidence that the indeterminacy of segregation placements increases painfulness, frustration, depression and the sense of hopelessness: at para 159.

[76] Indeed, Prystay testified to these same feelings. As unfolded in ***BCCL,*** debate continues on whether or not AS is harmful to inmates and the proper scientific method for determining that issue. After summarizing the expert evidence in detail, Leask J concluded, at para 247, that inmates subject to AS are at significant risk of serious psychological harm:

> I find as a fact that administrative segregation as enacted by s. 31 of the CCRA is a form of solitary confinement that places all Canadian federal inmates subject to it at significant risk of serious psychological harm, including mental pain and suffering, and increased incidence of self-harm and suicide. Some of the specific harms include anxiety, withdrawal, hypersensitivity, cognitive dysfunction, hallucinations, loss of control, irritability, aggression, rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behaviour. The risks of these harms are intensified in the case of mentally ill inmates. However, all inmates subject to segregation are subject to the risk of harm to some degree.

[77] For inmates in AS, common psychiatric symptoms include:

- hypersensitivity to external stimuli,
- perceptual distortions and hallucinations,
- panic attacks,
- cognitive difficulties including difficulty with thinking, concentration and memory,
- paranoia,
- lack of impulse control.

[78] The experts in ***BCCL*** agreed that those inmates with inherent vulnerabilities, such as existing mental health issues or cognitive deficits are more likely to be adversely impacted: at para 180. Lalonde conceded that long term AS is "not the healthiest," and Phillips acknowledged "it is well documented" that AS can cause or exacerbate mental health issues.

[79] I did not have the benefit of any expert evidence on the impact of AS on one's mental health in general, nor any expert evidence on the specific impact AS had on Prystay's psychological functioning. Crown counsel argues it is impossible to determine what adverse effects were likely caused by Mr. Prystay's pre-existing conditions as opposed to his long term placement in AS, and therefore, there is no real evidence he has been permanently impacted at all. As such, Crown counsel argues his experience in AS does not meet the necessary threshold of cruel and unusual treatment.

[80] While the FACS assessment notes that Prystay suffers from some psychotic symptoms, Dr. Cadsky could not opine on how Prsytay's mental state was affected by being in segregation.

[81] Proving mental injury does not require that Prystay prove that his condition meets the threshold of a recognizable psychiatric illness, nor is it necessary that he call expert evidence to support his claim: ***Saadati v Moorhead***, 2017 SCC 28, [2017] 1 SCR 543. Indeed, requiring inmates like Prystay to call expert evidence in applications like this one would be onerous and impractical.

[82] I accept Prystay's evidence that while in AS, he suffered from auditory hallucinations, paranoia, difficulties sleeping, anxiety and chest pain, feelings of hopelessness, increased anti-social feelings. Given his pre-existing mental health issues and the sheer length of time spent in AS, I conclude he was at increased risk of suffering some degree of permanent impact.

[83] Despite Prystay not having demonstrated permanent psychological injury caused by his stay in AS, I have no hesitation in concluding that while in AS, he suffered mental injury and physical symptoms and his placement put him at significant risk of permanent psychological injury.

[84] Finally, I conclude that Prystay's placement was devoid of procedural fairness and appropriate oversight, and on the evidence, his ongoing placement was not justified.

Prystay's indefinite placement was devoid of procedural fairness

[85] In ***Cardinal v Director of Kent Institution***, [1985] 2 SCR 643, 24 DLR (4th) 44, the Supreme Court of Canada concluded that prisoners are owed a duty of procedural fairness. In this case, certain prisoners were alleged to have been involved in a serious hostage taking incident and were placed in segregation as a result. The Segregation Review Board eventually recommended their release back to general population but the Director of the institution refused to do so, in order to maintain good order and discipline in the institution.

[86] Although ***Cardinal*** assessed the duty of procedural fairness in the context of a judicial review application, it is nonetheless instructive in this instance, as it provides a baseline from which to assess the process utilized at the ERC.

[87] The Supreme Court concluded the Director was not obliged to make independent inquiries regarding the prisoners' involvement and was entitled to rely on information he received from others. However, the Director was obliged to provide reasons for his decision and give the prisoners, however informal, the opportunity to be heard.

[88] In ***BCCL***, the AS review process in federal institutions was reviewed for procedural fairness. The Plaintiffs called for an independent review of segregation placement decisions. In response, the Government argued external oversight was not required to ensure procedural fairness and that such a requirement could jeopardize the security of correctional institutions. They argued only those individuals with detailed knowledge and expertise with respect to the safety and security concerns at issue, as well as the culture and particular personalities and behaviours of the inmates, should be making segregation placement decisions.

[89] As Leask J concludes at para 355, the statutory regime permits the warden (or director) to be the judge in their own cause with respect to placement decisions. At the very least, this creates a reasonable apprehension of bias. Noting that concerns regarding institutional bias have resulted in independent adjudication in disciplinary decisions, Leask J concludes these same concerns

mandate independent adjudication in segregation review hearings where credibility of information must be weighed and competing interests balanced. Further, at para 391, he concludes that the open-ended nature of placements underscores the need for independent adjudication and a need for institutional staff to demonstrate no reasonable alternatives exist:

> There is, as well, a feature specific to administrative segregation that further demands independent adjudication: the open-ended nature of placements. In circumstances where an inmate remains in segregation until the warden determines he or she should be released, it is especially important that the statutory criteria for segregation be rigorously applied. An independent adjudicator is best placed to ensure that robust inquiry occurs at segregation reviews and that institutional staff and administrators make the case for segregation by demonstrating that there are no reasonable alternatives.

[90] I find this reasoning to be compelling.

[91] In contrast, the AS review process at the ERC is not independent and does not involve any type of hearing, let alone a hearing with counsel.

[92] At the ERC, each inmate in AS is reviewed weekly by the segregation review committee. The committee is chaired by Mr. Lalonde and is comprised of unit officers, correctional workers, unit supervisors, security and intelligence and a psychologist.

[93] The committee has access to *ORCA*, the data system kept on all inmates within the correctional system, and any Request for Information Forms (RFIs) submitted by the inmate.

[94] The committee chair has the final say. A recommendation is generated. A report is printed with the various recommendations and reviewed by Phillips each Friday "to see if they make sense." Phillips may, in his discretion, access information on *ORCA*. He may support or over-ride the review committee's decision.

[95] Once an inmate has been segregated for 90 days, they are subject to a more robust review by Phillips but there is still no hearing or forum to allow an inmate to make submissions directly to the decision makers or to ask or answer questions. There is a right of appeal to the prison ombudsman, but I heard no evidence on this process or how inmates are informed of it.

[96] According to Lalonde, Prystay was kept in AS because of ongoing concerns for the safety of staff and other inmates. His committee pointed to the March 2017 assault and other assaultive behaviour, Prystay's drug addiction and his non-compliance with staff directions.

[97] Phillips took over as Director of the ERC in March 2017, just as Prystay was placed in AS. Phillips admits that it took him six to eight months to familiarize himself with the policies, procedures and personnel at the ERC. In acclimatizing to his new position, I am left with the clear impression that Prystay's weekly reviews by the segregation review committee and by Phillips were perfunctory.

[98] Despite completing multiple Request for Information forms (RFIs) asking why he was being detained in AS, the responses for the first eight months failed to provide Prystay with any reasons why management viewed him as an ongoing risk, or what he needed to do to return to GP. The response of April 19, 2017 is illustrative:

> RESPONSE: You were involved in a serious assault on another inmate and at this time you will remain on A/S status. You continue to be reviewed weekly.

[99] When questioned why Prsytay continued to remain in AS, Phillips repeatedly stated his concern rested with Prystay "downplaying, deflecting, and minimizing" his actions. He felt Prystay was not accepting full responsibility for his actions.

[100] This was curious evidence. First, Prsytay *did* admit responsibility for the March 2017 assault. It is clear the other inmate entered his cell. He maintained he acted in self-defence and I heard no evidence to refute this. Second, the only evident sources that grounded Phillips' concern were the RFIs completed by Prystay, and the correctional officers that interacted with him on a daily basis. Lalonde met with Prystay only once, in August 2017. Phillips, the ultimate decision maker, did not meet with him until May 1, 2018.

[101] While it might be argued it is impractical for the Director to meet regularly with the 100 or so inmates housed in AS, the countervailing argument is this demonstrates AS is utilized too frequently and for excessive periods of time.

[102] Having reviewed the many RFIs completed by Prsytay, I see no compelling evidence of "downplaying, deflecting or minimizing" his actions. While at times displaying frustration, Prsytay's submissions are invariably polite and respectful. Other than a few isolated comparisons between his behaviour and that of other inmates, Phillips's assertion is not borne out.

[103] However, Prystay does question his continued placement and indicates his desire to return to GP so he can complete some programs and get into Bootcamp, the ERC's marquis program for inmates ready to make a change in their lives. He also requests to be returned to BMU (Behavioural Modification Unit). This was a separate unit that existed for a time at the ERC that served as a bridge between administrative segregation and general population. The BMU was closed sometime in 2017 before Phillips' arrival due to bed shortages and because BMU was not as successful in changing inmate behaviour as hoped. Unfortunately, the reasons it did not work were not disclosed.

[104] Further, Phillips' assertion is incongruent with the notes made by the correctional officers who dealt with Prystay on a regular basis. With a few isolated exceptions, Prystay was noted to display good behaviour. He was polite with staff and kept a clean cell. It is worth repeating that from April 2017, the officers consistently recommended he be returned to GP.

[105] Unfortunately, it appears Prystay's expressed desire to return to GP in order to make positive changes and the officer's first-hand observations were never seriously considered in the exercise of management's discretion.

[106] Prsytay received his first 90 day review on June 28, 2017. Prsytay had submitted a two page letter outlining his desire to attend Bootcamp and to change his negative behaviours. He indicates, "I understand that behaving the way I did the night of March 30/17 was not the appropriate course of action to take if I am to change my life." He indicates he has started back on anti-depressants. He concludes his letter by asking for a shot at redemption:

> In closing here sir, no matter what your decision rendered, my personal choice will remain the same, I want this and need it so that I can get outta this place and salvage whats left of my life that up to this point has been less than enviable. I hope you can see a reason to help me with what is my shot at redemption. Thank you for your time and consideration.

[107] Phillips' response is cursory and concludes:

> Due to this concern for other offenders we will not jeopardize their safety by placing you back in the general population at this time.

[108] In July, Prystay retained legal counsel to assist in his release from AS. Through July and August, Prystay continued to submit RFIs, requesting clarification on management's position regarding his return to GP. Phillips responded on September 6, 2017, apologizing for his delay in responding due to Prystay's RFIs being temporarily misplaced. Phillips quoted from a letter issued to Prystay's counsel and indicated steps would be taken to remove him from administrative segregation "once he has demonstrated continual positive behaviour."

[109] This is a meaningless statement given Prystay *had* at that point, demonstrated continual positive behaviour for five months. It is analogous to an employer telling their employee that their performance is continually being monitored and if they continue to do excellent work on a consistent basis, they will receive a raise. The employee would expect to know how their work is to be measured and *when* that raise will be provided.

[110] Prsytay's next 90 day review was due on September 30, 2017. It was not completed until December 3, 2017. The delay was due to Phillips' decision to obtain Prystay's behavioral history. It was only the second time Phillips made such a request since arriving at the ERC.

[111] Based on the evidence of Lalonde and Phillips, I find the primary motivation in requesting this history was to obtain additional information to justify Prystay's continued placement in AS. Of interest, the history does not reveal any of the inmate's personal antecedents nor his health status.

[112] The report, completed in late October 2017, outlines 27 incidents ranging from relatively benign to more serious.

[113] One incident outlined was the murder of an inmate at the ERC in 2013. Although three inmates were originally implicated (including Prystay), only one inmate was convicted. The charges against Prystay were stayed and the police file was closed. Prystay continues to deny any involvement in the murder. Despite this, Phillips suspected Prystay had some involvement.

[114] Phillips learned that the day after the murder, and after learning he was implicated, Prystay broke a window and apparently told ERC officers "he had nothing to lose." As he testified, Phillips felt this action was inconsistent with innocence:

> The information I had was the Mr. Prystay was present in the room with another inmate. The other inmate had essentially taken the rap for it because the other inmate was going to the—he was already going to the federal system, so he took responsibility for what happened. Mr. Prystay had continually said that he had no involvement. He was not the one that did it. The matter was stayed. But I had concerns because the day after that incident happened, based on reviewing case notes, is that he had damaged a window in his cell because he thought he had nothing to lose. And to me that was concerning because if there was a murder in his cell and he had nothing to do with it, why would you—why would you act like that the day after the murder saying you had nothing to lose? So I think he had some involvement. I'm not a detective nor an investigator so—but that was weighing heavily on my mind as well.

[115] In late November 2017, Phillips requested that his Director of Security see what information the Edmonton Police Service would provide regarding Prystay's suspected role in

the murder. It was unclear in the evidence what, if any, cogent information was provided in response to Phillips' further inquiries.

[116] Prystay's apparent involvement in the murder came up repeatedly in Phillips' evidence. Given this belief took center stage in Phillips' decision to maintain Prystay's indefinite placement in AS, Prystay should have been told of Phillips' suspicion and been given an opportunity to respond.

[117] Prystay's 90 day reviews were problematic. Phillips acknowledges that improvements have been made to the review process to ensure that 90 day reviews are completed on time and that more fulsome responses are provided rather than a "boilerplate reply."

[118] It is conceded that prior to December 3, 2017, no thought was given to providing Prystay with the reasons why he continued to be kept in AS or what the Director needed to see in order for Prystay to transition back to GP. The responses simply said some version of "due to your assaultive behaviour, placement will continue."

[119] Further, Prsytay was never given an end date as to when, if his good behavior continued, he would be transitioned back to GP, or what steps he needed to take to facilitate this.

[120] Phillips testified that in late 2017, he began to sense a change in Prystay's demeanor and attitude, where he began to accept responsibility for his actions and take positive steps. He did not *observe* these changes, but *sensed* them from Prystay's written submissions.

[121] He noted that Prystay had begun to take some courses, had connected with someone in the community and expressed interest in attending Bootcamp. However, with the exception of his new relationship with his girlfriend, all of these indicators were present many months prior.

[122] It is difficult to conceive how the decision that an inmate no longer presents a risk is based in large part on that inmate's written submissions. Given the Director receives 400 RFIs each week, and many more after a long weekend, there is little opportunity to carefully assess the contents of the RFI.

[123] Until late 2017, the decision makers never asked Prystay to respond to particular questions or concerns. He was never interviewed. There was no hearing. Prystay's submissions were shots in the dark and he had no option but to hope something he wrote would resonate.

[124] There is no rational basis to this approach, nor can it be said an inmate's continued placement in AS is in accordance with ascertainable standards. If, in the Director's opinion, the appropriate change of attitude and demeanor is evident, the inmate might be returned to GP. If the inmate fails to address the points the Director is looking for, or worse, is inarticulate or illiterate, there is not much hope for release.

[125] It was never explained why ERC management felt comfortable starting Prystay's re-integration process in early 2018, but not before. I reject that the reason was Prystay's change of demeanor and attitude as evidenced through the contents of his RFIs. Although both Lalonde and Phillips deny Prystay's *habeas corpus* application had any bearing on their decision to start the re-integration process in early 2018, I conclude this is an inescapable inference.

[126] Most disappointing is that the ERC could have requested a psychological assessment of Prystay to determine whether he continued to pose a risk to other inmates or staff. Surely this would have provided some objective evidence on which to assess ongoing risk. For reasons not explained, this was not done.

[127] I find Prystay's indefinite placement went far beyond what was necessary to achieve a legitimate penal aim of the safety and security of staff and other inmates. There was no objective basis supporting ERC's belief that he presented an ongoing risk, nor was his placement imposed under any ascertainable standards.

IV. Conclusion on *Charter* Breach

[128] Societal views on what is acceptable treatment or punishment evolve over time. Forced sterilization, residential schools, lobotomies to treat mental disorders, corporal punishment in schools and the death penalty are all examples of treatment once considered acceptable. Segregation ravages the body and the mind. There is growing discomfort over its continued use as a quick solution to complex problems.

[129] Informed Canadians also realize that indefinite placement in segregation thwarts an inmate's chance of successfully re-integrating into society. Certainly Canadians find abhorrent that someone should remain in segregation for months or even years. Perhaps one day, segregation will be ended. Until then, recognizing that inmates have no political clout or influence, robust judicial oversight is the means of ensuring the constitutionally protected right to be free of cruel and unusual punishment or treatment is not sacrificed in the name of convenience or expediency.

[130] It is not hopelessly idealistic to expect that if segregation is to remain as part of our correctional fabric, every effort is made to improve the restrictions on mobility, mental stimulation and meaningful human contact. Nor is it unrealistic or impractical to expect that correctional institutions demonstrate procedural fairness in the decision to *place* an inmate in segregation and that a robust process is in place to ensure the inmate is released to general population as soon as possible.

[131] In the circumstances of this case, including the length of Prystay's placement in AS (13 ½ months), his evidence (which I accept) of the psychological and physical effects of that placement, and the absence of procedural fairness and ascertainable standards in its implementation, a s 12 breach is made out.

[132] Having established a *Charter* breach, the next question is what, if any, remedy is appropriate. Before addressing this issue, I will review the joint submission on sentencing presented by counsel for the Crown and defence and review the gravity of the offences and Mr. Prystay's personal circumstances.

III. Sentence

The Gravity of the offences

[133] The gravity of Prystay's offences is high. Prystay failed to stop his vehicle for police. He was followed by Air 1, the Edmonton Police Service sky policing helicopter for over an hour and observed to be driving left of center, weaving in and out of traffic and travelling through red lights. Eventually, a covert "stop-stick" was utilized to puncture and flatten one of the tires to his vehicle. More than 12 officers were involved in trying to stop Prystay in his flight from police.

[134] When ordered to stop, Prystay fled on foot. Police dog "Jagger" was deployed to apprehend Prystay. Prystay continued to resist, fighting and wrestling the dog. The dog received cuts to his snout. Prystay was hospitalized for treatment of injuries to his hand and arm, receiving 27 stitches.

[135] During the chase, Prystay dropped some Methamphetamine. An additional 79.4 grams of the drug were found in the vehicle as well as $800 in cash. A loaded .22 Calibre handgun and ammunition was also found in the vehicle.

[136] Prystay was high on methamphetamine when he committed these crimes.

Personal circumstances of the offender

[137] Mr. Prystay is 36 years of age and has a lengthy criminal record dating back to 1999 when he was a youth. Most of his convictions are for drug and property offences but he does have two convictions reflecting violence: assault causing bodily harm in June of 2003 and assault on a peace officer in June 2009. Prior to the subject offences, his most recent convictions were on June 13, 2017 for mischief, break and enter with intent, and possession of property obtained by crime. His global sentence was 435 days imprisonment.

[138] Prystay's paternal grandmother was Metis. The extent of any First Nation's heritage is unknown. A Gladue Report was prepared, but I am unable to discern clear Gladue factors that inform why Mr. Prystay is again before the Courts. He describes his heritage as "Ukrainian – English – Scottish – Metis" and says he was raised "pure white."

[139] Nonetheless, the Report provides a robust review of his difficult and troubled upbringing which includes a young life exposed to abuse by his step-father, exposure to criminal behaviour and drug culture by his father and his father's gang affiliates, and the complete absence of structure and pro-social role models. It is not surprising, then, that Mr. Prystay does not have significant family support. The only collateral contact reached was his mother. His parents and siblings live in Ontario. He has not seen his family since 2003.

[140] Born in Thunder Bay, Ontario, his parents separated when he was four. He has a full and two half siblings. Prystay's father abused and sold marihuana and was eventually incarcerated. His mother became involved with Prystay's current step-father, who was abusive towards him. At age nine, he began to spend more and more time with his biological father and by age 13, was living with his father full time.

[141] Prystay's father had affiliations with a gang and criminal activity. Prystay was soon initiated into the gang culture and began selling drugs. Their home often had visitors and people crashing. There was frequent drug use. Prystay has struggled with drug additions since he was 13 years old, first using marijuana, and then sniffing Ritalin. By age 14, he was using cocaine, and was introduced to that drug by his father's gang affiliates. Clearly, his criminal behaviour is fuelled by his drug addictions.

[142] When he was 15, Prystay had a friend over. Both were high on drugs. The two got hold of some firearms which were frequently in the home. Prystay reports he accidentally shot his friend in the abdomen. A criminal conviction followed. This appears to have been a turning point in Prystay's life. He was ostracized and thought of as a crack head. He briefly returned to live with his mother and secured employment, but returned to his father's house and to criminal activity.

[143] At age 28, methamphetamine replaced crack cocaine as his drug of choice. He admits to occasionally using fentanyl. He has never attended addiction treatment programming but indicates his willingness and desire to do so.

[144] Mr. Prystay is a few credits short of obtaining his high school diploma and has limited employment experience with roofing, carpentry, masonry, and food preparation.

[145] For the last year he has been in a relationship with a woman he met while in remand. She is employed and indicates she will not tolerate Prystay's continued drug use. Their relationship has not been tested outside of custody and the health of that relationship is a matter of some debate. As succinctly stated by Dr. Cadsky in the FACS assessment:

> Mr. Prystay is inculcated into a pattern of stimulant drug abuse and theft and knows no other lifestyle on the streets. He is skilled at living his life in institutions and had repeated a pattern of returning after only brief periods of freedom. It will be extremely difficult for Prystay to break this pattern.

[146] Nonetheless, Dr. Cadsky is optimistic that Mr. Prystay can overcome his meth habit just as he has overcome his cocaine addiction. His current ADHD medication lessens his craving for meth.

[147] Mr. Prystay's prognosis for a successful, long term return to the community and a pro-social lifestyle where he finds employment and a supportive community is very guarded. Nonetheless, I agree with Dr. Cadsky that Mr. Prystay should be afforded every opportunity to engage in meaningful treatment for his addiction issues and to receive the ongoing psychiatric support he needs.

[148] Perhaps at 36 years of age, Mr. Prystay finally realizes that his past actions have not served him well and that creating a new life will depend first and foremost on overcoming his addictions. Mr. Prystay strikes me as an intelligent man, and despite extensive drug abuse over more than half his life, he thankfully displays no permanent cognitive impairments.

The joint submission is a fit and appropriate sentence

[149] I am satisfied that the joint submission presented by Crown and defence counsel, for a global sentence of 4 years and 10 months, is a fit and appropriate sentence that does not call the administration of justice into disrepute. The proposed sentence is calculated as follows:

- Possession of methamphetamine – s. 4(1) of the CDSA – 4 months imprisonment (consecutive);
- Failing to stop a motor vehicle while being pursued by a peace office – s. 249.1(1) of the *Criminal Code* – 12 months imprisonment plus a 1 year driving prohibition (consecutive);
- Unlawfully maiming or wounding a law enforcement animal while it is aiding a law enforcement officer – s. 445.01(1) of the *Criminal Code* – statutory minimum 6 months imprisonment (consecutive);
- Possession of a loaded firearm – s. 95(1) of the *Criminal Code* – 3 years imprisonment plus a 10 year weapons prohibition under s. 109 of the *Criminal* (consecutive);
- Possession of a weapon (a handgun) for a dangerous purpose – s. 88(1) of the *Criminal Code* – 30 days imprisonment (concurrent).

[150] I grant an order for forfeiture of the narcotics and handgun seized. Any other personal items are to be returned to Mr. Prystay.

[151] I further accede to the Crown's request for a DNA order in relation to Mr. Prystay's conviction under s. 445.01(1) of the *Criminal Code*.

[152] Having accepted the joint submission, and having concluded Prystay's s 12 *Charter* rights were breached, I must now determine the appropriate remedy, if any.

III. Remedies available under s 24(1) of the *Charter*

[153] Under s 24 of the *Charter*, when someone's *Charter* rights have been infringed, the court has discretion to grant whatever remedy it considers appropriate and just in the circumstances. When there has been an abuse of process in a criminal law proceeding prior to sentencing, the most common remedies are a stay in proceedings or a reduction in sentence.

A stay is not appropriate

[154] The Supreme Court of Canada in ***R. v. Babos***, 2014 SCC 16, [2014] 1 SCR 309, remains the leading case on the test for granting a stay for an abuse of process. In ***Babos,*** the Court observed that a stay of proceedings is a drastic remedy as it permanently halts prosecution of an accused, thereby frustrating the truth-seeking function of the trial and depriving the public at large of the opportunity to see justice done on the merits. Nonetheless, stays may be granted on rare occasions in the clearest of cases involving offensive conduct. A stay is not warranted to redress past wrongs but may be granted where no alternative remedy capable of adequately dissociating the justice system from the impugned conduct is available.

[155] Here, it is not argued that the alleged misconduct threatened trial fairness. Instead, Prystay asks that a stay be considered under the residual category of abuse, being conduct that risks undermining the integrity of the judicial process: see ***Babos*** at para 31.

[156] To meet this test, Mr. Prystay must establish that:

1) the state has engaged in conduct that is offensive to societal notions of fair play and decency, and prejudice to the integrity of the justice system would be manifested, perpetuated or aggravated by the outcome of the trial;
2) there is no alternative remedy capable of adequately disassociating the justice system from the impugned state conduct going forward; and
3) the balance tips in favour of granting the stay, for example to denounce misconduct and preserve the integrity of the justice system despite society's interest in having a final decision on the merits.

[157] As set out in ***Babos*** at para 41, the final factor requires consideration of the nature and seriousness of the impugned conduct, whether it is isolated or, alternatively, reflects a systemic and ongoing problem. It also considers the circumstances of the accused, the charges he faces and the interest of society in having the charges determined on the merits. When the residual category is invoked as it is here, this balancing stage is particularly important.

[158] Sadly, Prystay's experience in administrative segregation is not an isolated incident. Alberta courts have previously focussed a lens on the use of administrative segregation at the

ERC: see ***Blanchard*** and ***Trang v Alberta (Edmonton Remand Centre)***, 2010 ABQB 6, 475 AR 1 for example.

[159] The same concerns surface repeatedly and progress appears halting at best. This is compelling evidence that a systemic problem exists. But this is not the determinative factor and I must balance Prystay's treatment against the seriousness of the underlying offences, his criminal record, and society's interest in having the charges disposed of on the merits.

[160] As a stay is only to be granted in the "clearest of cases," there are relatively few cases where a stay of proceedings was granted due to an abuse of process. As one example, in ***R v Bellusci***, 2012 SCC 44, [2012] 2 SCR 509, an inmate stood charged with uttering threats to a prison guard. The trial judge granted a stay of proceedings because the prison guard had not only provoked the inmate, but had grievously assaulted him while he was chained and defenceless. A stay of proceedings has also been granted where there has been an abuse of process due to entrapment, such as in ***R v Mack***, [1988] 2 SCR 903, 90 NR 173, where the police informer made numerous and persistent requests of the appellant over six months, including threatening him and offering large sums of money.

[161] On the other hand, Macklin J. in ***Blanchard*** decided that the treatment of Blanchard in AS was not the "clearest of cases" warranting a stay of proceedings.

[162] Similarly, while I find the evidence here to be shocking and deeply disturbing, these circumstances fall short of the "clearest of cases," especially since a reduction in sentence can be fashioned so as to provide an appropriate remedy.

A reduction in sentence is appropriate

[163] In all the circumstances of this case, I would have reduced Mr. Prystay's sentence to time served, but it is not in Mr. Prystay's interests to do so. The sentence fashioned provides Mr. Prystay with appropriate time to engage with Alberta Health Services – Transition Team and to arrange for placement in a residential treatment facility. He has clearly expressed his desire to attend a residential rehabilitation facility. He has never done so. Through the sentence imposed, it is my aim to facilitate, to the extent possible, Prystay's admission into a residential treatment program immediately following the completion of his sentence and thereafter, the engagement of available community resources to provide the transitional support and psychiatric treatment, as recommended in the FACS assessment and as particularized in the Gladue Report.

[164] It is agreed that Mr. Prystay's time in general population remand will be credited at a rate of 1.5 for each day served. Crown counsel argued that because part of the time spent in AS was utilized as time served toward the sentence imposed on his June 2017 convictions, I cannot consider the entire period spent in AS between March 17, 2017 and May 15, 2018 , as to do so would double count credit for those days. I was provided with no authority supporting this argument but defence counsel did not seriously contest this approach. Even though Prystay received only the standard credit for the AS days utilized, I agree it is appropriate to credit Prystay with only the time served in AS not otherwise utilized as time served on sentencing on his June 2017 convictions.

[165] Therefore, of the remaining 363 days served in AS between May 18, 2017 and May 15, 2018, I conclude an appropriate remedy is enhanced credit at a rate of 3.75 for each day served. The net sentence is 77 days remaining to be served. The calculation of his sentence is attached to these reasons as Appendix "A."

Heard on the 1st through 10th days of October, 2018 and the 18th day of December, 2018.
Dated at the City of Edmonton, Alberta, this 4th day of January, 2019.

Dawn Pentelechuk
J.C.Q.B.A.

Appearances:

Christian Lim
for the Crown

Amanda Hart-Dowhun
for the Accused

Appendix “A”

Joint Submission:

Global sentence: 4 years 10 months (1764 days)

Time in administrative segregation (May 18, 2017 – May 15, 2018) = 363 days credited at 3.75 = 1361 days.

Remaining time in general population: May 16, 2018 – December 18, 2018 = 217 days credited at 1.5: = 326 days.

Total Credit: 1687 days.

Net sentence:

1764 days less time credited (1687 days):

Remaining time to be served = 77 days.