Federal Court  Cour fédérale

Date: 20180129

Dockets: T-1892-14
T-756-14
T-2101-14
T-2137-14
T-2222-14
T-144-16

Citation: 2018 FC 94

Ottawa, Ontario, January 29, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JEAN GUÉRIN
JARROD SHOOK
JAMES DRUCE
JOHN ALKERTON
MICHAEL FLANNIGAN
CHRISTOPHER ROCHELEAU
JOHANNE BARITEAU
GAÉTAN ST-GERMAIN
JEFF EWERT

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] Six applications for judicial review were made by nine applicants. All of them challenge the regime for payment of inmates in penitentiaries, but from different angles.

[2] However, all six applications have the same procedural basis. Under section 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the applicants are seeking a declaratory judgment and making a claim for relief.

[3] Specifically, three instruments are being challenged before this Court:

a) The *Corrections and Conditional Release Regulations* (SOR/92-620) as modified in 2013 (SOR/2013-181) [the Regulations]

b) *Commissioner's Directive 730: Offender Program Assignments and Inmate Payments*

c) *Commissioner's Directive 860: Offender's Money*

[4] No legislative provisions are being put to a constitutional challenge. In fact, the inmate pay system implemented in 2013 is attacked from several sides, but never by challenging the enabling statute:

a) It is argued that the Regulations and Commissioner's Directives 730 and 860 are inconsistent with the letter, spirit, and objectives of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [the Act].

b) It is argued that the pay system, as described in the Regulations and Commissioner's Directive's 730 and 860, violates the *Canadian Charter of Rights and Freedoms*

(*Constitution Act, 1982*, Schedule B of the *Canada Act 1982* (U.K.), 1982, c 11 [the Charter]:

i) A breach of the liberty and security of the person under section 7 is alleged.

ii) A breach of the right not to be subjected to any cruel and unusual treatment or punishment under section 12 is alleged.

c) It is argued that the Regulations and Commissioner's Directives 730 and 860 are inconsistent with section 7 of the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. It is also argued that these domestic instruments are inconsistent with Conventions 29 and 105 of the International Labour Organization.

d) It is argued that there is an employer–employee relationship with the inmates working in penitentiaries, such that Part III of the *Canada Labour Code* (RSC 1985, c L-2) applies to them. This would mean that the respondent would have to reimburse the amounts deducted under the Regulations and Commissioner's Directives. It is also argued that there is an employer–employee relationship and that the pay decrease should be considered a constructive dismissal. Lastly, it is argued that subsection 104.1(7) of the Regulations is unreasonable. This is the provision that allows an institution head to reduce a deduction or payment provided for elsewhere when certain conditions are met. Moreover, the applicants are asking that the decisions denying this relief measure be struck down.

I. Preliminary remarks

[5] Before proceeding any further, it is best to do a bit of housekeeping relating to the makeup and management of these files.

[6] Following two orders by Prothonotary Tabib, who was responsible for managing the proceedings, several files were grouped together to be addressed and heard together. The first order was rendered on October 26, 2015, to group six files and nine applicants. An order rendered on February 18, 2016, and amended on March 8, 2016, abandoned one of the six files, but replaced it with another one. These six cases presented by nine applicants are the ones before this Court.

[7] It was ordered that all exhibits be filed with docket T-1892-14, assigned to Jean Guérin. The dockets are organized as follows:

T-1892-14	Jean Guérin
T-756-14	Jarrod Shook James Druce John Alkerton Michael Flannigan
T-2101-14	Christopher Rocheleau
T-2137-14	Johanne Bariteau
T-2222-14	Gaétan St-Germain
T-144-16	Jeff Ewert

[8] The submissions made by the applicants' lawyers are valid for and apply to all of them. Accordingly, although the applications for judicial review in the cases before this Court were signed by different lawyers, these lawyers divided up the work to take turns dealing with

submissions that apply to everyone. This way of dividing the work avoided repetition and made for an orderly hearing. This Court is grateful for the parties' lawyers for dividing the work in this way. A copy of the reasons for decision in the main docket will be filed with each docket. The decision and reasons apply to all dockets.

II. Facts

[9] The facts at the origin of this case are as follows. The entire case revolves around inmates' pay in federal institutions. The applicants are complaining that their pay was reduced by 30% in October 2013. They submit that these deductions are *ultra vires* the enabling statute, or unconstitutional or in violation of the *Canada Labour Code*, or that they constitute a "constructive dismissal". They also argue that these deductions are inconsistent with certain international instruments.

[10] Before 1981, the pay system in place was considered a "reward for good conduct and general participation in programs, rather than a direct return for work performance at an assigned job" (Inmate Pay System, Correctional Service of Canada [CSC], April 1981). There were five levels of pay from $1.30/day to $2.30/day.

[11] CSC decided to create a new inmate pay system in 1981. The brochure shows that CSC wanted to pay inmates for their work, but also to pay the inmates who were participating in education and vocational programs.

[12] Different pay scales were created for work, vocational programs and education, and inmates in psychiatric centres; the work and the education and vocational program categories had breakdowns by institution security level (maximum, medium, and minimum), with four pay levels each. There were also four pay levels for inmates in psychiatric centres. Inmates who did not work received $1.60/day. Inmates who worked earned a minimum of $3.15/day in maximum security institutions and up to $7.55/day in minimum security institutions (it is explained that the daily rate of pay is higher in minimum security institutions to motivate inmates to achieve a lower security classification through their behaviour). The scale for inmates in vocational or education programs went from $3.15/day to a maximum of $6.45/day. For inmates who worked, compensation was based on their job, since jobs were listed, defined, and classified. It was possible to progress within each level in two increments of $0.55/day.

[13] The minimum wage of $3.15 per day apparently corresponded to the disposable income of a single person earning the "federal" minimum wage of $3.50/hour in 1981.

[14] The system introduced in 1981 was the most generous, since subsequent revisions never raised the pay under this system. Rates were decreased in 1986 (the evidence does not state by how much). In 1989, the different rates for different institution security levels were eliminated. In 1994, Commissioner's Directive 730 was amended to link inmates' pay rates to their individual correctional plan objectives.

[15] Currently, the rates set out in Commissioner's Directive 730 are as follows:

Level A: $6.90/day

Level B: $6.35/day

Level C: $5.80/day

Level D: $5.25/day

An allowance of $1.00/day is paid to inmates not participating in any programs. An allowance of $2.50/day is paid to inmates who are unable to participate in any programs for reasons outside their control. Each inmate's pay level is reviewed under the terms of the Directive, taking into account several criteria: punctuality, performance in meeting expectations, participation in the correctional plan, general behaviour, etc. Inmates can thus move between pay levels.

[16] Inmates are paid independently of the program in which they participate under their individual correctional plan. One inmate may be paid a higher daily rate for a vocational program than another inmate with a work assignment. The correctional plan is established at the beginning of the period of incarceration and implemented under Commissioner's Directives 705 and 705-6. It establishes the objectives and expected gains to be achieved in the inmate's rehabilitation. It is used to determine the programs that could contribute to these goals. Inmates' progress is evaluated throughout their sentence.

[17] Correctional programs are structured interventions to reduce recidivism by targeting factors related to offenders' criminal behaviour. According to Michael Bettman, Director General, Offender Programs and Reintegration, CSC, there are different types of programs (August 24, 2015, affidavit). Examples include behaviour modification and accountability programs.

[18] There are structured and unstructured social programs for offenders to acquire skills, knowledge, and experience to contribute to their personal and social growth, sometimes referred to as soft skills or interpersonal skills. They range from programs promoting integration in the community to recreation and leisure. Educational programs provide basic skills up to post-secondary level (however, in these cases, inmates must pay for post-secondary education). Offenders without a grade 12 diploma are invited to participate in this type of program in their correctional plan. There are also vocational (job training) programs. Mr. Bettman testified that they try to develop not only technical skills, but also soft skills: communication, teamwork, organization, time management, and trustworthiness.

[19] Most jobs available fall into two categories. Some jobs are directly related to the institution, such as the canteen, cleaning, and even inmate representation. There are also thousands of offenders participating in CORCAN. Considering the focus on this program, it is worth describing.

[20] CORCAN is a program within the Correctional Service of Canada that aims to rehabilitate offenders (affidavit from Lynn Garrow, Chief Executive Officer). It is set up as a special operating agency within CSC, a designation within the government that allows it to be exempt from certain government policies so that it can be managed on more of a business model to fund its operations. This special operating agency is still a part of CSC. It produces goods and services sold mainly to federal departments (e.g. office furniture, textiles), but also to other organizations.

[21] Ms. Garrow testified that approximately 60% of offenders have employment needs when they enter the federal prison system. These are the needs that CORCAN aims to address. CORCAN is there to increase employability, which may include work habits like getting up and going to work every morning and working as part of a team. It also allows offenders to earn occupational certification and apprenticeships. Not all CORCAN jobs are ideal for entry into the labour market, but they all promote employability through interpersonal skills and work habits.

[22] I find that the importance of promoting employability is contained in the Regulations, which states this purpose in section 105.

[23] CORCAN may be part time, especially because some offenders participate in more than one program at a time. Moreover, CORCAN is not what pays offenders participating in this program. Payment is granted for participation in a variety of programs, including CORCAN. Ms. Garrow noted that for certain apprenticeships with CORCAN, students have to pay. As stated above, the evidence at the hearing showed that the maximum pay is not granted for participating in CORCAN, but for the quality of participation in a variety of programs. Before October 2013, it was possible for CORCAN participants to receive individual and group performance bonuses: for a period of 10 days, pay could go from $69.00 to $138.00. However, these bonuses no longer exist. They were eliminated in October 2013. This is one of the measures disputed in this application.

[24] Of course, the fact that base pay has remained constant over time has diminished purchasing power. This situation has been criticized by the Correctional Investigator, a person

appointed by the Governor in Council (section 158 of the Act) whose mandate is to investigate problems related to the Commissioner's decisions. They produce an annual report under section 192 of the Act. In his 2005–2006 report, the Correctional Investigator noted that per diem amounts for work and participation in programs had not risen in close to 20 years. The canteen basket costing $8.49 in 1981 cost $61.59 in 2006. The Investigator concluded that the per diem amounts for work and programs were insufficient and recommended they be increased immediately.

[25] The applicants are arguing that pay, which had long been decreased, was significantly reduced in 2013. On May 9, 2012, the Minister of Public Safety announced the measures that are being disputed before this Court:

a) the per diem amount was reduced to reflect room and board costs, which the Minister framed as increased accountability of offenders for the costs of their detention;

b) administrative costs associated with managing the inmate telephone system would now be charged to the inmate population;

c) incentive pay for CORCAN programs was eliminated.

These measures reduced pay by 30% in total.

[26] These measures were implemented through the modification of a few instruments:

a) Amendment of the *Corrections and Conditional Release Regulations* (SOR/2013-181) to make it possible to deduct administrative costs associated with the offender telephone system from pay. Subsection 104.1(2) now reads as follows:

6. Subsection 104.1(2) of the Regulations is replaced by the following :	**6. Le paragraphe 104.1(2) du même règlement est remplacé par ce qui suit :**
(2) Deductions may be made under paragraph 78(2)(*a*) of the Act for the purpose of reimbursing Her Majesty in right of Canada for	(2) Les retenues peuvent être effectuées en vertu de l'alinéa 78(2)*a*) de la Loi à titre de remboursement à Sa Majesté du chef du Canada :
(*a*) the costs of food, accommodation and work-related clothing provided to the offender by the Service ; and	*a*) des frais engagés pour l'hébergement et la nourriture du délinquant, ainsi que pour les vêtements de travail que lui fournit le Service ;
(*b*) the administrative costs associated with the access to telephone services provided to the offender by the Service.	*b*) des frais d'administration associés à l'accès aux services téléphoniques que fournit le Service au délinquant.

The amendment was made to add telephone system costs to the deductions for accommodation, food, and work clothing, which were already permitted under section 104.1 of the Regulations. Before October 2013, the Commissioner's Directive already allowed for deductions from pay. They amounted to 25% of pay in excess of $69 per 2 weeks (affidavit from Gregory Hall, Senior Director, Technical Services, November 17, 2014).

b) Commissioner's Directives 730 and 860 produced the results under dispute:

i. Commissioner's Directive 860 was amended on October 1, 2013, to set the deduction at 22% of pay for accommodation and food. The same Directive was amended again on October 24, 2013, to add a deduction of 8% for telephone service costs. This brought deductions to 30% of pay, the maximum permitted under the Act since 1995.

ii. Commissioner's Directive 730 was amended as well, on October 1, 2013, to eliminate performance bonuses.

III. Submissions of the parties

[27] Of course, the applicants are complaining that pay has decreased over time, but they seem to be focusing mainly on the changes to their pay made in October 2013. They say their "income" is unfair and insufficient. They need their pay to purchase items essential to physical and psychological health. They claim that they are required to cover health care and personal hygiene. They want access to sufficient food, they say. Maintaining family connections suffers from diminished resources. Offenders have to pay the victim surcharge under section 737 of the *Criminal Code* (RSC 1985, c C-46), and the possibility of amassing some savings for their future release has faded from sight. Feeling exploited and unvalued, they suffer from physical and psychological insecurity, which is worsened by the contraband and violence in institutions. A summary of testimonies (using affidavits) is attached to the decision [See Appendix A].

[28] As indicated above, the applicants are advancing the following legal bases to justify their remedy:

a) The amendments to the Regulation and Commissioner's Directives are inconsistent with the enabling statute. They are *ultra vires*.

b) These same amendments are unconstitutional, as they violate sections 7 and 12 of the *Charter*, without falling under section 1 as reasonable limits that can be justified in a free and democratic society:

   i. The amendments to the Regulations are allegedly a breach of the right not to be subjected to any cruel and unusual treatment or punishment under section 12.

   ii. The applicants argue that the amendments violate the right to liberty and security of the person, and that this is inconsistent with the principles of fundamental justice.

c) The amendments are allegedly in violation of international instruments pertaining to the treatment of inmates. This argument seems to have transformed itself at the hearing into an item to consider in the examination of the principles of fundamental justice under section 7 of the *Charter*, principles to which the applicants never referred.

d) There is allegedly an employer–employee relationship with the offenders, such that the *Canada Labour Code* would apply. This would result in a requirement to maintain payments at the levels that existed before October 2013. At the very least, the offenders allegedly have an employer–employee relationship allowing for relief for constructive dismissal due to the decreases.

[29] The Attorney General disputes each and every argument presented. Not only is there full compliance with the exercise of discretion conferred by Parliament under section 78 of the Act,

but there is also no constitutional recognition of minimum pay that would result in a violation of sections 7 and 12 of the *Charter*. For section 7, there was not so much as an alleged demonstration of the principles of fundamental justice required for a violation. Moreover, there is no employer–employee relationship in this case. The pay encourages participation in correctional programs: Part III of the *Canada Labour Code* does not apply.

[30] Furthermore, the Attorney General vigorously defends the penitentiary incarceration system. Noting that protecting society remains paramount under the Act (section 3.1 of the Act), the government presents significant evidence concerning the products and services provided to offenders without cost. In fact, they note that in 2013–14, it cost $115,000.00 per inmate per year.

[31] The evidence tends to show that the food provided to offenders complies with Canada's Food Guide; the clothing and hygiene items are more than sufficient, according to the government. The detailed affidavits of five senior officials, four of whom work in institutions, are convincing, according to the respondent, and were unchallenged. This evidence demonstrates that, although not luxurious, the offenders' needs are met adequately. If there are gaps, they were not demonstrated in any way in the case presented to this Court. The list of clothing and replacements available is clear evidence of this. The same applies to access to hygiene items and food.

[32] The Act requires CSC to provide essential health care (section 86 of the Act). Nowhere in the evidence do we see how this care is allegedly not provided. We may speculate that some

health care is not provided appropriately in some instances. But the case before this Court does not reveal any such failure, and it is far from clear how the rates of pay decreased by the October 2013 amendments could affect health care delivery. No systemic failure has been proven. At best, the record shows that one of the applicants complained of having to purchase certain painkillers even though some are prescribed to him, of having to cover the cost of a mouth guard suggested by the institutional dentist but deemed non-essential, and that his losing weight (3.3 kg) resulted in him needing to purchase new clothing outside the replacement periods. Lastly, I note exhibit Z-1, filed with consent, entitled "National Essential Health Services Framework". This document, produced by CSC in July 2015, provides a long list of which healthcare services, medical equipment and supplies, and dental service standards are approved or not.

IV. Analysis

[33] Two comments must be made before we examine the applicants' legal arguments.

[34] First, this Court is not sitting to consider the wisdom of the policy decisions made by the government. Case in point, the system implemented by the government at the time in 1981 seems more generous to inmates in penitentiaries. It also follows a different philosophy. As it explicitly states, the document "Inmate Pay System" submitted as evidence, while not forgetting those in education and vocational programs, aims to "provide inmates with pay according to their job. Under this plan those inmates who participate in assigned employment including education and training, agriculture, institutional services, industrial production, and other recognized employment assignments, will receive a rate of pay designed to recognize their contribution".

The plan was to compile a list of all jobs and their descriptions and to assign pay rates to each one. The evidence does not indicate the extent to which this policy was implemented in the years that followed. However, what we do know is that Parliament adopted subsection 78(1) of the *Corrections and Conditional Release Act* in 1992 (SC 1992, c 20), establishing a correspondence between payment and participation in CSC programs and social reintegration programs. It was not a question of compensation for work performed, as was the case in 1981. This subsection still reads the same today:

Payments to offenders	**Rétribution**
78 (1) For the purpose of	**78 (1)** Le commissaire peut autoriser la rétribution des délinquants, aux taux approuvés par le Conseil du Trésor, afin d'encourager leur participation aux programmes offerts par le Service ou de leur procurer une aide financière pour favoriser leur réinsertion sociale.
(a) encouraging offenders to participate in programs provided by the Service, or **(b)** providing financial assistance to offenders to facilitate their reintegration into the community, the Commissioner may authorize payments to offenders at rates approved by the Treasury Board.	

This is a policy decision, meaning this Court can intervene only if it violates the Constitution. We seem to have moved from payment for work performed to payment for participation in

programs promoting social reintegration; this is Parliament's decision and is not in dispute before this Court.

[35] Second, the Court is required to consider the parties' legal arguments based on the evidence in the record. It is possible that, in a particular case, the government is not fulfilling its duties under the Act. As the Attorney General concedes, the ad-hoc decision is reviewable (for example, *Charbonneau v Canada (Attorney General),* 2013 FC 687). In this case, the applicants, collectively, are challenging a lot more. The remedies sought are not so much the result of the application of certain measures in a given case under specific circumstances as they are a direct attack on the system put in place in 2013.

[36] Thus, the applicants are not arguing the unconstitutionality of section 78 in its current form, in place since 1995. Subsection 78(1) has already been reproduced, and was enacted in 1992. Originally, subsection 78(2) already allowed for deductions from payments. In 1992, it read as follows:

(2) Payments provided for pursuant to subsection (1) may be subject to deductions in accordance with any regulations made under paragraph 96(*z*.2) and any Commissioner's Directives.	**(2)** La rétribution autorisée peut faire l'objet de retenues en conformité avec les règlements d'application de l'alinéa 96*z*.2) ou les directives du commissaire.

The wording of subsection 78(2) was amended in 1995 (S.C. c. 42, s. 20) to prescribe the purposes for which deductions may be made and the maximum amount that may be deducted. Where payment is made—which suggests, of course, that Parliament is considering the possibility that no payment has been made—the Act has provided for more than 20 years that

deductions of up to 30% from payments may be made as “reimbursement” of the costs of accommodation, food and work-related clothing. Subsection 78(2) now reads as follows:

20. Subsection 78(2) of the Act is replaced by the following:	**20. Le paragraphe 78(2) de la même loi est remplacé par ce qui suit :**
(2) Where an offender receives a payment referred to in subsection (1) or income from a prescribed source, the Service may	(2) Dans le cas où un délinquant reçoit la rétribution mentionnée au paragraphe (1) ou tire un revenu d’une source réglementaire, le Service peut :
(a) make deductions from that payment or income in accordance with regulations made under paragraph 96(z.2) and any Commissioner’s Directive; and	*a*) effectuer des retenues en conformité avec les règlements d’application de l’alinéa (96z.2) et les directives du commissaire;
(*b*) require that the offender pay to Her Majesty in right of Canada, in accordance with regulations made pursuant to paragraph 96(*z*.2.1) and as set out in a Commissioner’s Directive, an amount, not exceeding thirty per cent of the gross payment referred to in subsection (1) or gross income, for reimbursement of the costs of the offender’s food and accommodation incurred while the offender was receiving that income or payment, or for reimbursement of the costs of work-related clothing provided to the offender by the Service.	*b*) exiger du délinquant, conformément aux règlements d’application de l’alinéa (96z.2.1), qu’il verse à Sa Majesté du chef du Canada, selon ce qui est fixé par directive du commissaire, jusqu’à trente pour cent de ses rétribution et revenu bruts à titre de remboursement des frais engagés pour son hébergement et sa nourriture pendant la période où il reçoit la rétribution ou tire le revenu ainsi que pour les vêtements de travail que lui fournit le Service.

The amendment to the Regulations allowed for deductions for telephone services costs, which, incidentally, are not provided for in section 78 of the Act. The Act expressly allows such

regulations to be made. So it is against this backdrop that I begin consideration of the legal basis for the applicants' arguments.

A. *Are the Regulations and Commissioner's Directives consistent with the enabling statute?*

[37] As we have just seen, the enabling statute is section 78 of the Act, which has existed in its current form since 1995. Paragraphs 96(*z.2*) and 96(*z.2.1*) merely confer upon the Governor in Council the power to make regulations prescribing the purposes for which deductions may be made and providing for the means of collection. I reproduce the provisions in question below:

(z.2) prescribing the purposes for which deductions may be made pursuant to paragraph 78(2)(a) and prescribing the amount or maximum amount of any deduction, which regulations may authorize the Commissioner to fix the amount or maximum amount of any deduction by Commissioner's Directive;	**z.2)** précisant l'objet des retenues visées à l'alinéa 78(2)a) et en fixant le plafond ou le montant, ou permettant au commissaire de fixer ces derniers par directive;
(z.2.1) providing for the means of collecting the amount referred to in paragraph 78(2)(b), whether by transferring to Her Majesty moneys held in trust accounts established pursuant to paragraph 96(q) or otherwise, and authorizing the Commissioner to fix, by percentage or otherwise, that amount by Commissioner's Directive, and respecting the circumstances under which payment of that amount is not required;	**z.2.1)** prévoyant les modalités de recouvrement de la somme prévue à l'alinéa 78(2)b), notamment le transfert à Sa Majesté de l'argent déposé dans les comptes en fiducie créés conformément à l'alinéa 96q), et permettant au commissaire de prendre des directives pour en fixer le montant — en pourcentage ou autrement — et pour prévoir les circonstances dans lesquelles le versement n'en est pas exigé;

No one disputes the legal source of the Commissioner's Directives authorized under sections 97 and 98 of the Act:

Rules	**Règles d'application**
97 Subject to this Part and the regulations, the Commissioner may make rules	**97** Sous réserve de la présente partie et de ses règlements, le commissaire peut établir des règles concernant :
(a) for the management of the Service;	**a)** la gestion du Service;
(b) for the matters described in section 4; and	**b)** les questions énumérées à l'article 4;
(c) generally for carrying out the purposes and provisions of this Part and the regulations.	**c)** toute autre mesure d'application de cette partie et des règlements.
Commissioner's Directives	**Nature**
98 (1) The Commissioner may designate as Commissioner's Directives any or all rules made under section 97.	**98 (1)** Les règles établies en application de l'article 97 peuvent faire l'objet de directives du commissaire.
Accessibility	**Publicité**
(2) The Commissioner's Directives shall be accessible to offenders, staff members and the public.	**(2)** Les directives doivent être accessibles et peuvent être consultées par les délinquants, les agents et le public.

[38] But the applicants submit that the enabling statute that ostensibly allows the Commissioner to authorize payments but also deductions of up to 30% is limited in spite of section 78. They cite the purposes of the Act, specifically in the second part of section 3, to argue that section 78 does not allow deductions because that would be in conflict with the purpose of the correctional system:

Purpose of correctional system	**But du système correctionnel**
3 The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by	**3** Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.
(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and	
(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.	

This objective is also restated more specifically in sections 5 and 76 of the Act. Moreover, the Act requires programs for female offenders (section 77) and for Aboriginal offenders (section 80), in addition to CSC's duty to "ensure that penitentiaries, the penitentiary environment, the living and working conditions of inmates and the working conditions of staff members are safe, healthful and free of practices that undermine a person's sense of personal dignity" (section 70).

[39] To succeed, the applicants therefore submit that the statutory objective to facilitate the rehabilitation of offenders and their reintegration into the community prevails. It must prevail in two ways. It must prevail over other objectives. Also, it must prevail over section 78, even though this provision specifically provides for the power exercised by the Governor in Council and the Commissioner.

[40] Subordinate legislation is at odds with its enabling statute if it goes beyond the power conferred. Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Carswell, loose-leaf), aptly described this issue at section 13:1100:

> It is a fundamental principle of public law that all governmental action must be supported by a grant of legal authority. With two minor qualifications, the actions and decisions of public officials and institutions that affect the rights of individuals have no legal force or effect unless authorized by a grant of statutory authority, either express or necessarily implied. Neither individuals nor institutions have inherent powers by virtue of the fact that they perform governmental functions. And although it is not a requirement that the legal source of authority be specified on the face of an administrative order, if challenged, it must be possible to identify the supporting legal authorization.

In this case, the power to act is found in section 78. It is this provision that allows regulatory action. Section 3 confers no power to enact subordinate legislation. It is section 78 that authorizes payments for specific purposes, namely to encourage participation in programs. This includes training, work and correctional or social programs. Moreover, where payment is made, the Act specifically authorizes deductions of up to 30%.

[41] As a result, the exercise of the power conferred by section 78, which strictly adheres to the limits imposed by the statute, cannot go beyond this statute. It is even tautological. The action taken by the administration is, on its face, permitted by the enabling section.

[42] But the applicants submit that the administration should have considered the purpose of the correctional system to find that the insufficient remuneration associated with the deductions imposed is inconsistent with the objectives. In my view, the applicants challenge whether or not the delegated authorities ought to have adopted the Regulations. It amounts to saying that a general provision outlining the purposes of the correctional system must prevail over a specific enactment dealing expressly with the power to make regulations within prescribed limits. This is not an ambiguity to be resolved. Essentially, the applicants submit that Parliament erred in enacting section 78 because the exercise of the power granted is, in their view, inconsistent with the purposes of the correctional system.

[43] It is true that is appears possible, exceptionally, to challenge subordinate legislation on the basis of inconsistency with the objective of the enabling statute. The following passage from the decision of the Supreme Court of British Columbia in *Waddell v Governor in Council* ((1983), 8 Admin LR 266, at page 292) was cited by the Supreme Court of Canada in *Katz Group Canada Inc. v Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 SCR 810 [*Katz Group*]:

> In determining whether impugned subordinate legislation has been enacted in conformity with the terms of the parent statutory provision, it is essential to ascertain the scope of the mandate conferred by Parliament, having regard to the purpose(s) or objects(s) of the enactment as a whole. The test of conformity with the Act is not satisfied merely by showing that the delegate stayed

> within the literal (and often broad) terminology of the enabling provision when making subordinate legislation. The power-conferring language must be taken to be qualified by the overriding requirement that the subordinate legislation accord with the purposes and objects of the parent enactment read as a whole.
>
> (paragraph 24)

[44] But whoever seeks to invalidate subordinate legislation by arguing improper purpose faces an uphill battle. To begin with, the onus is on them, and the interpretation to be given will support, if possible, *intra vires*. The task is even harder when the enabling enactment is itself clear. What is more, the *ultra vires* inquiry "does not involve assessing the policy merits of the regulations to determine whether they are 'necessary, wise, or effective in practice'" (*Katz Group*, at para 27). This, in my view, is what is being attempted in this case. Brown and Evans warned that courts "ought not to enter into an assessment of the merits of delegated legislation under the guise of an inquiry about the relevance of factors considered or the propriety of the purpose for which it was enacted" (#15:3261).

[45] There is no doubt that an enactment such as section 3 can be useful in interpreting another section that is otherwise ambiguous. But no authority has been cited, nor do I know of any, that makes it possible to disregard a clear and specific enactment such as section 78 by alleging that the purpose of the Act, set out in section 3, would be better met by ignoring the clear wording of section 78 and proceeding by regulation as permitted.

[46] However, section 78 is far from vague. It was worded by Parliament with exemplary precision. Parliament, which is not presumed to seek to be self-contradictory or inconsistent (*Sullivan on the Construction of Statutes*, Ruth Sullivan, LexisNexis, 6th ed., 9 11.2-11.6;

Interprétation des lois, P.A. Côté et al., Les éditions Thémis, 4th ed., #1150-1165), enacted sections 3 and 78 at the same time in 1992. Parliament expressly provided that deductions of up to 30% could be made. The payments and deductions were set out at the same time as the need to protect the public and facilitate reintegration. In 1995, Parliament specified that deductions of up to 30% could be made from payments authorized to encourage participation in programs and facilitate reintegration and rehabilitation. The overall purpose of the Act, found at section 3 of the Act, that would support the purpose of the correctional system must be understood, to recognize Parliament's consistency and logic, as permitting not only payments but also deductions of up to 30%. The sections must not be read individually, but together. They are part of a whole. P.A. Côté wrote at para 1163 of his treatise that [TRANSLATION] "each part of the Act must be considered in light of the whole, meaning that it is necessary to refer to the other provisions of the Act and avoid interpretations that would render them ineffective or pointless."

[47] What the applicants actually want is for the power conferred by section 78 to be ignored so as to reduce it based on the overall purpose of the correctional system as stated in section 3, thus suggesting that the deduction limit fixed by Parliament is itself too high to facilitate reintegration. For the applicants, the general provision that is section 3 must prevail over the specific provision that is section 78, the exact opposite of the *generalia specialibus non derogant* principle. In *R. v Nabis*, [1975] 2 SCR 485, Justice Beetz held that "legal interpretation must tend to integrate various enactments into a coherent system rather than towards their discontinuity" (p. 494). Yet that is what the applicants claim in their argument on *vires*. Supposedly, there is a conflict between the provision of programs that contribute to offender rehabilitation and reintegration, and payments to encourage participation in these programs and to provide financial

assistance to facilitate reintegration. The applicants submit that their choice in terms of public policy must prevail. Such an argument does not follow from the *vires* of subordinate legislation but rather from the wisdom, necessity and effectiveness of choices of public policy.

[48] One might think that where the enabling enactment is vague, it would be easier to cite the purpose of the statute to show that Parliament did not intend for such use of the power conferred. That is not the case here, quite the opposite.

[49] In my view, there is no actual or potential conflict between the power conferred by section 78 and the objectives of the correctional system. Rather, there is a difference as to the ways to promote public policy. In fact, the regime put in place is not rigid. An inmate can even be exempted, as the Regulations provide for significant flexibility in subsection 104.1(7):

(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities.	**(7)** Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités.

[50] The applicants provided no authority in support of their submission. In my view, this issue was completely disposed of in *Katz Group*, at paragraph 28:

> [28] It is not an inquiry into the underlying "political, economic, social or partisan considerations" (*Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13). Nor does the *vires* of regulations hinge on whether, in the court's view, they will actually succeed at achieving the statutory objectives (*CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2, at p. 12; see also *Jafari*, at p. 602; Keyes, at p. 266). They must be "irrelevant", "extraneous" or "completely unrelated" to the statutory purpose to be found to be *ultra vires* on the basis of inconsistency with statutory purpose (*Alaska Trainship Corp. v. Pacific Pilotage Authority*, [1981] 1 S.C.R. 261; *Re Doctors Hospital and Minister of Health* (1976), 12 O.R. (2d) 164 (Div. Ct.); *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at p. 280; *Jafari*, at p. 604; Brown and Evans, at 15:3261). In effect, although it is possible to strike down regulations as *ultra vires* on this basis, as Dickson J. observed, "it would take an egregious case to warrant such action" (*Thorne's Hardware*, at p. 111).
>
> [Emphasis added]

[51] As I have attempted to demonstrate, section 78 of the Act and the statutory objective set out in section 3 are not inconsistent. The applicants' view that there should be no deductions or that payments to inmates should be generally increased warrants respect in terms of public policy. This view requires, however, the Court to make a determination on the issue of whether the Regulations will succeed at achieving the objectives of the Act in spite of the clear authority to do so provided for by the Act. The applicants' argument strikes me as being much more about the wisdom of enacting legislation allowing deductions of up to 30% than the *vires* of subordinate legislation. It is obviously easy to see that subordinate legislation does not, in any way, go beyond the words of the directly enabling section. Although the wording of the statute dealing with the purpose of the correctional system must also be considered, there is nothing in the subordinate legislation to suggest a case of *ultra vires*. The Regulations and the

Commissioner's Directives are not irrelevant, extraneous or completely unrelated to the purpose of the Act. This is rather an attempt on the part of the applicants to get the Court to consider the appropriateness of the subordinate legislation, which is to be avoided.

[52] The evidence adduced by the applicants is unequivocal: they are affected by deductions from payments and the end of incentive pay. But that is not the issue when dealing with subordinate legislation inconsistent with the enabling statute, with *ultra vires*. The burden of proving that the subordinate legislation is *ultra vires*, unauthorized by section 78, has not been discharged. Regardless of the wisdom of this subordinate legislation, it is *intra vires*, directly permitted by section 78.

B. Are the Regulations and Commissioner's Directives contrary to sections 12 and 7 of the *Canadian Charter of Rights and Freedoms*?

[53] Like the administrative law issues relating to the *vires* of subordinate legislation, constitutional questions are not a matter of impression, or policy choices, either.

[54] The applicants complied, as recognised in *Guindon v Canada*, 2015 SCC 41, [2015] 3 SCR 3 [*Guindon*], with section 57 of the *Federal Courts Act*, which provides that notice must be given to attorneys general when the constitutionality of regulations is in question before the Federal Court. As required by Form 69, the notice must contain the material facts giving rise to the constitutional question and the legal basis for the constitutional question. This makes it possible to establish the specific framework for the debate before this Court. There is no doubt as to the importance of the constitutional notice. As judges Abella and Wagner stated in *Guindon*, the notice allows for the fullest and best evidence possible (para 92) based on the framework set

out by the notice. It is impossible to respond properly and effectively to a constitutional notice if it is imprecise or inconsistent. In fact, the Federal Court of Appeal struck out a notice that was not sufficiently clear or detailed in *Doug Kimoto v Canada (Attorney General),* 2011 FCA 291, 426 NR 69. It must therefore be admitted that the limits created by the notice of constitutional question are rigid.

[55] It seems to me that the notice of constitutional question given in this case covers more than what section 57 requires. It alleges that the subordinate legislation is *ultra vires* and inconsistent with two sections of the *Criminal Code* and with certain international instruments. These are not the questions referred to in section 57, which is about addressing the "constitutional" validity, applicability or operability that is challenged.

[56] Regarding the constitutional questions, they involve sections 12 and 7 of the *Charter*:

a) Section 12: The Regulations and Commissioner's Directives are described as treatment that outrages standards of decency.

b) Section 7: In my view, the notice is less clear when it refers to section 7. While section 7 protects the right to life, liberty and security of the person, the notice simply argues an infringement of the [TRANSLATION] "rights protected by section 7":

   i) [TRANSLATION] "particularly because their effects on the children's right are disproportionate";

   ii) [TRANSLATION] "particularly because they have unfair effects"; and

iii) [TRANSLATION] “particularly because of their effects on the inmates’ right to security”.

The Attorney General did not complain that Form 69 requires setting out the legal basis for each constitutional question and stating the nature of the constitutional principles. Indeed, the notice does not specify the particular right invoked (apart from maybe the reference to the inmates’ security for one of the allegations). But more importantly, it gives no indication of the impugned principles of fundamental justice. Section 7 “protects the right not to be deprived of one’s life, liberty and security of the person when that is done in breach of the principles of fundamental justice” (*Re B.C. Motor Vehicle Act*, [1985] 2 SCR 486, page 500 [*Re Motor Vehicle Act*]). The three interests are distinct, and the principles of fundamental justice are not a protected interest, “but rather a qualifier of the right not to be deprived of life, liberty and security of the person” (page 501). The complainant has the onus of establishing not only an infringement of the protected interest, but also how it constitutes a violation of a principle of fundamental justice. The notice says little about the protected interest and nothing about the principle of fundamental justice. As will be seen, these shortcomings ought to have been noted as well when the applicants presented before the Court their more complete argument.

[57] Constitutional notices must also set out the material facts. Since the facts are important, it would be appropriate at this juncture to comment on those relied upon.

[58] Though it is true that, as alleged, the Act requires CSC to “provide a range of programs designed to address the needs of offenders and contribute to their successful reintegration into

the community" (section 76 of the Act), it is incorrect to argue that [TRANSLATION] "the Correctional Service of Canada must provide inmates with a fair pay system" (constitutional notice, material fact #2). This statement disregards the very wording of the Act that gives the Commissioner the authority to pay inmates and that is not subject to constitutional challenge. Section 78, which is not challenged, does not create a duty, but rather an option. First, subsection 78(1) uses the word "may" and not "shall" as in section 76, which obviously demonstrates how the provisions are different. Second, subsection 78(2) starts with the words "[w]here an offender receives a payment referred to in subsection (1)", which suggests that payments may not be made. The *Interpretation Act*, R.S.C., 1985, c. I-21, states that "[t]he expression 'shall' is to be construed as imperative and the expression 'may' as permissive" (section 11).

[59] In addition, the rates are fixed by the Treasury Board, the only cabinet committee created by statute under the *Financial Administration Act* (R.S.C., 1985, c. F-11; section 5), not CSC. The applicants' claim that, under the Act and its Regulations, CSC [TRANSLATION] "must provide inmates with a fair pay system" is incorrect. A cabinet committee is not a department. CSC and its Commissioner comply with the Treasury Board's decision. Moreover, payments to inmates under section 78 are authorized for the purpose of "encouraging offenders to participate in programs provided by the Service" or "providing financial assistance to offenders to facilitate their reintegration into the community." This is not fair payment for work performed. An inmate studying as part of a CSC program may receive the same daily rate as any inmate who is employed. Similarly, the system under section 78 is completely different from the one in place in the early 1980s, as seen earlier. Under that system, inmates were paid based on their job, with each job having to be listed and described, and with pay rates assigned to each job. That is not

what the Act has provided since its enactment in 1992. Payments may be made to encourage participation in programs or to provide financial assistance to facilitate reintegration. Therefore, the reference to the 1981 system presented by the applicants as a material fact is not as material from the constitutional standpoint as they would have us believe.

[60] Lastly, there is no doubt as to the harshness of deductions of 30%, which affect inmates' ability to set funds aside to facilitate their reintegration. I propose to address each constitutional argument in turn.

(1) Section 12 of the *Charter*

[61] Section 12 of the *Charter* protects against cruel and unusual treatment:

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[62] Therefore, it is important to properly define the issue. The applicants are obviously complaining of insufficient payments. But if payments cut by 30% are not unconstitutional, it is quite clear that the upward adjustments that were not made would not be unconstitutional either. The applicants submit that the payments they receive, including the deductions of 30% now in place, constitute cruel and unusual treatment. It is argued that adjustments should be made to the wages paid in 1981 to satisfy section 12 of the *Charter*. The indexation that did not take place, if I understand correctly, is also a violation of section 12.

[63] To the applicants, the possibility of being deprived of the opportunity to make frequent telephone calls and having private family visits curtailed because the costs are covered by inmates (or their families) whose payment has been reduced constitutes cruel and unusual treatment. According to the applicants, paying a pittance for work constitutes [TRANSLATION] "grossly disproportionate hardship, so excessive as to outrage standards of decency" (memorandum of fact and law, para 58).

[64] In making this claim, the applicants are ignoring the wording of section 78 of the Act. Payment is not compensation for work performed, but rather to encourage participation in programs, including work in the penitentiary or at CORCAN. Participating in programs, including work-based programs, benefits the inmate, who can develop useful skills to help with reintegration into the community, or simply obtain parole by progressing through the Correctional Plan. In other words, the applicants' argument seems to be based on a very different paradigm from the one presented in the Act, which is not being contested. The applicants have good reason to want to avail themselves of the 1981 compensation plan. It would be more favourable to them. However, the Parliament of 1992 preferred a different paradigm, and that is the one that must be considered here. The paradigm from 1992–1995 is not the subject of a constitutional challenge. The only issue is to determine if the decrease in payment, not its abolition, can constitute cruel and unusual treatment within the meaning of section 12 of the *Charter*, even though the Treasury Board was not granted the discretion to set rates. The applicants say that discretion should not have been granted to reduce payment to the maximum provided by the Act.

[65] The Supreme Court of Canada recently pointed out that section 12 sets a high standard (*R. v Nur*, 2015 SCC 15, [2015] 1 SCR 773; in this case, it was a matter of cruel and unusual punishment). It seems that the criterion to be applied is still that identified by the Supreme Court in *R. v Smith (Edward Dewey)*, [1987] 1 SCR 1045 [*Smith*]. Page 1072 reads:

> The limitation at issue here is s. 12 of the *Charter*. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in Miller and Cockriell, supra, where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in *Miller and Cockriell*, supra, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, although the State can impose a punishment, its effect must not be grossly disproportionate to that which would be appropriate.
>
> [Emphasis added]

[66] In fact, in his reasons, Mr. Justice Lamer insisted that excessive or disproportionate punishment is not inherently unconstitutional (page 1072). It must involve a degree of severity that leads to this excess before it can be found that the treatment imposed is an outrage to standards of decency.

[67] Our Court applied this high standard in cases involving allegations of cruel and unusual treatment in penitentiaries ((*Brazeau v Canada (Attorney General)*, 2015 FC 151; *Tyrrell v Canada (Attorney General)*, 2008 FC 42; see also *R. v Olson* (1987), 62 O.R. (2d) 321

(ONCA) where the Court specifically applied the standard of outrage to standards of decency to cruel and unusual treatment).

[68] It is difficult to see how treatment provided for by an Act that is not the subject of a constitutional challenge could be unconstitutional based on the sole fact that the Commissioner exercised the power granted to reduce payment, to the level allowed by Parliament. Nonetheless, independent of this possible issue, the applicants would still have to explain how the decrease in payment could constitute treatment so excessive as to outrage standards of decency. The degree of severity must meet the standard. In *Smith*, Lamer J. gives examples of treatments that are still grossly disproportionate and outrage standards of decency: lashing, lobotomy and castration (page 1074). In *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1 [*Suresh*], the Court applied the standard of outrage to standards of decency and stated that the punishment "must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence." (para 51). Torture falls into this category. Can we realistically claim that decreasing payment to encourage participation in programs, including work in the institution, and to provide financial assistance is equal in severity to the cases to which section 12 of the *Charter* applies? I think not.

[69] There is no reason to think that jurisprudence under section 12 created rigid categories. Moreover, it must be concluded that the *Smith* test cannot be met unless the treatment involves a significant degree of severity. After all, even a disproportionate or excessive punishment does not satisfy the criteria for intervention under section 12.

[70] The applicants focused on the system in place in 1981, which was clearly based on a completely different philosophy than the one implemented in 1992. The current Act states that payment is not intended to provide compensation for work performed, but to encourage participation in programs or provide financial assistance to offenders to help with their reintegration into the community.

[71] It was shown that payment varied in other democratic countries and different Canadian provinces. For example, it was shown that inmates in American federal institutions may or may not (as is the case in Texas) be paid. California inmates are apparently paid an hourly rate of $0.11 to $0.37, and must not exceed $12 and $56 per month. In Great Britain, the minimum payment is set at £4 per week. In New Zealand, “incentive payments” are set at between $0 and $1 per hour.

[72] However, there would first have to be a constitutional requirement to provide payment before even attempting to determine the appropriate amount to avoid contravening section 12 of the *Charter*, involving cruel and unusual treatment so excessive as to outrage standards of decency. This was far from being demonstrated. In fact, it is unclear which “treatment” is being referred to. The issue here is payments considered to be insufficient.

[73] It is more a matter of showing a contravention of section 12 than of the applicants having to ask the Court to call into question Parliament’s choices which allowed the Treasury Board to set the rates. How section 12 creates a positive obligation was never proposed, much less demonstrated, to allow discussion of a treatment that satisfied the terms of section 12.

[74] There is substantial and persuasive evidence that inmates' basic needs are adequately met. For specific cases, it is possible to apply to this Court (*Fabrikant v Canada*, 2013 FCA 212; use of a parka). The issue here is the frustration at not receiving higher payments for personal use, whether it be to use in the canteen, clothing, some hygiene products or for family visits, the cost of which is covered by inmates (or their families). I am far from convinced that this constitutes a treatment without first agreeing that there is a constitutional obligation to pay inmates. I am in no way discussing the merits of paying inmates to encourage their participation in programs and to facilitate their community reintegration, or the amounts to be paid. The only issue is to show that a treatment is involved and that this treatment is cruel and unusual because the amounts paid are not enough to cover purchases beyond what is already provided by the institution. Which "treatment" exactly is being referred to? Not being paid enough to encourage participation in programs that would help with rehabilitation? Not only might one suspect that this does not constitute a treatment suffered, it was also not shown to be so excessive in nature as to outrage standards of decency, as would be the case for lashing, castration, lobotomy or the minimum sentence for certain offences. The more or less severe frustrations caused by payments that were not as generous as expected simply do not stand in the same category in the eyes of the law.

[75] In my opinion, the applicants are seeking to ask this Court to rule on the wisdom of the Commissioner's decision to use discretion granted by the Act, and on the Treasury Board's decision to set the payment rate, the constitutionality of which has not been challenged in this case. It is an invitation that this Court must decline. What is woefully missing here is proof that the payment made is so inadequate as to impose a positive obligation on the government because

the treatment outrages standards of decency, similar to torture, lashing, lobotomy, castration and minimum punishments for minor offences. The burden on the applicants to show the Court that the treatment, if it is such, is so severe as to outrage standards of decency has not been discharged. No authority was even presented to attempt to make an argument, even using a tenuous analogy.

(2) Section 7 of the *Charter*

[76] The applicants also tried to invoke section 7 of the *Charter*, but their attempt ran into a major roadblock. In addition to the somewhat imprecise nature of the argument concerning the interest invoked, it is more the inability to identify principles of fundamental justice that has proved fatal. Once again, the burden was not discharged. The applicants have the burden of persuasion regarding the liberty or security interest and the principles of fundamental justice that were apparently violated. As already noted, the Supreme Court in *Re Motor Vehicle Act* found that "(t)he principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person" (p.501). A challenge under section 7 must address the principles of fundamental justice to be successful.

[77] In their memorandum of fact and law, and at the hearing for this case, the applicants specified that the interests targeted in this file are the right to liberty and the right to security of the person. In my opinion, the real issue was not the effect of an unspecified violation on the rights of children, which was raised in the notice of constitutional question. In any case, no argument was offered in this regard and the applicants' children are not party to the proceeding.

a) *Right to liberty*

[78] It was not easy to establish how the simple fact of having payments that the applicants consider not sufficiently generous, or how reducing the payment that the Commissioner pays inmates, to encourage them to participate in programs or to provide them with financial assistance to help with their social reintegration constitutes an infringement of freedom. I will say it again. The constitutionality of section 78 which only grants discretionary power to make payments for these purposes is not at issue. Nor is the Treasury Board's decision on the payment rates at issue. The applicants are also not claiming a constitutional right to payment while in custody. Instead, they are saying that reducing payment used for lodging and food expenses and to defray the cost of operating their telephone system infringes on their freedom.

[79] Inmates' "residual liberty" is not the issue. (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 34) [*Khela*]. *Khela* and *May v Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82, also cited by the applicants, are cases involving access to *habeas corpus* in the provincial superior court for an inmate whose residual liberty in the penitentiary has been reduced. Both cases involved transfers to high-security facilities (*Khela* indicates that other examples include administrative segregation and incarceration in a special handling unit).

[80] If I understand the applicants' argument correctly, their refusal to work because their payment was reduced could lead to further restriction of their freedom of movement in the institution. One of the applicants refused to continue working, claiming that he had very little motivation to work because he felt exploited. However, this inmate was warned that, during "work hours", inmates who do not participate in regular activities must remain in their cell. The

affiant mentioned being in solitary confinement. However, the evidence shows that this is not "administrative segregation", as described in section 31 of the Act, as may have been suggested, but rather the application of a standing order in Drummond Institution, dealing with the movement of inmates in the institution (affidavit from Mylène Duchemin, program manager at Drummond Institution). Inmates participating in regular activities are allowed to move around, but those not participating must remain in their cells during activity times. Movements can resume outside of activity times. It should also be noted that inmates who had decided to stop working chose to avoid having to remain in their cells for a period of time by simply accepting another job.

[81] I have serious doubts about the liberty interest allegedly infringed upon in this case. I would have thought that restriction of movement in a penitentiary is the norm. It would seem rather strange that someone participating in activities as part of a Correctional Plan could not go to the training or work location. However, when inmates who are not participating in any such activity are required to remain in their cells during this period, it is difficult to see this as a significant infringement of liberty. The applicants seemed to want to consider only residual liberty in claiming an infringement of the liberty interest protected under section 7. If inmates are incarcerated in a prison within the prison, their residual liberty is affected. If they are transferred to a higher-security institution, their residual liberty is affected. However, the evidence in this case was very tenuous. Physical restraint is inherent in imprisonment. Are inmates who are required to remain in their cells when not participating in activities during regular hours being deprived of their residual liberty, considering that they are not confined in this way during other periods?

[82] However, the definition of "liberty" was interpreted rather broadly. In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*], one reads:

> 49. The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (Beare, supra); to produce documents or testify (Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at para. 80, La Forest J., with whom L'Heureux‑Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:
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> > . . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.
>
> [Emphasis added]

[83] Imprisonment constitutes per se a restriction of the freedom of movement. But this is not the issue. Instead, the applicants are claiming that the normal situation for inmates has become an unconstitutional infringement of the right to liberty when they are not allowed to circulate freely in the institution while other inmates are occupied with their training or work activities. Under the circumstances, it is not necessary or wise, given the quality of the evidence, to reach a conclusion because the applicants have completely failed to present any argument to satisfy their

total burden, including demonstrating the violation of principles of fundamental justice. It is preferable to deal with the matter based on the principles of fundamental justice that this practice would involve.

b) *Right to security of the person*

[84] The applicants claim that their psychological integrity was harmed, which would constitute a violation of the security of the person. They claim that the reduced payment prevents them from maintaining their personal hygiene, remaining in frequent contact with their family, contributing to their children's basic needs, and even satisfying their hunger.

[85] However, as indicated above, examination of the evidence leads to the conclusion that all basic needs, from food to hygiene products, are met during incarceration. However, individual preferences are not accommodated and the applicants allege that the payments made do not allow them to make certain choices that they consider important. The math is simple. A 30% reduction of an already modest payment leaves even less money available for small purchases or savings. This inevitably creates discontent. This is the impression that stands out on examination of the evidence. However, we are a long way from the constitutional standard that requires serious psychological stress. *Blencoe* reads:

> 56 The principle that the right to security of the person encompasses serious state-imposed psychological stress has recently been reiterated by this Court in G. (J.), supra. At issue in G. (J.) was whether relieving a parent of the custody of his or her children restricts a parent's right to security of the person. Lamer C.J. held that the parental interest in raising one's children is one of fundamental personal importance. State removal of a child from parental custody thus constitutes direct state interference with the psychological integrity of the parent, amounting to a "gross intrusion" into the private and intimate

> sphere of the parent-child relationship (at para. 61). Lamer C.J. concluded that s. 7 guarantees every parent the right to a fair hearing where the state seeks to obtain custody of their children (at para. 55). However, the former Chief Justice also set boundaries in G. (J.) for cases where one's psychological integrity is infringed upon. He referred to the attempt to delineate such boundaries as "an inexact science" (para. 59).
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> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in Morgentaler, supra, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (G. (J.), at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn.

[86] The serious psychological suffering at issue in *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 [*G. (J.)*] is not at all comparable to that in our case. *G. (J.)* refers to "a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety" (para 60). The issue here is the reduction of payments made to encourage participation in programs intended to help with an inmate's reintegration. The evidence on file does not at all support a serious and profound effect on a person's psychological integrity caused by state interference.

[87] Compare it to the decision in *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR. 429 [*Gosselin*]. This case directly addresses security of the person. Quebec had decided to modify the social assistance scheme to encourage reintegration into the active population. To do so, the allowance payable to persons under 30 was reduced unless they were participating in an education program or a designated work activity.

[88] Ms. Gosselin invoked the security of the person, among other things, claiming to have the right under section 7 to receive "a particular level of social assistance from the state adequate to meet basic needs" (para 75). The Supreme Court refused to read in section 7 the possibility of a basis for a positive state obligation to guarantee adequate living standards. At this stage of the development of the law, economic rights were not included in section 7:

> [81] Even if section 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that section 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, section 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> [Emphasis added]

The door has not been completely closed. Thus, "the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances" could be left open. The Court ruled, "(h)owever, this is not such a case" (subsection 83), and ours is certainly not such a case.

[89] The right to security of the person, within the meaning of section 7, requires serious state-imposed psychological stress. It is difficult to understand how a reduction in the remuneration paid could be elevated to this level. At any rate, the evidence adduced never reached that level. If the plaintiffs wish to claim that the state must guarantee them certain benefits, even when they are incarcerated, they are colliding head on with *Gosselin*. However, as for infringing the right to freedom, the total absence of arguments concerning infringement of the principles of fundamental justice is fatal.

(3) Principles of fundamental justice

[90] In a rather surprising fashion, the plaintiffs did not present in their memorandum of fact and law any argument related to the principles of fundamental justice, although they are at the heart of section 7 of the *Charter*. In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 SCR 331, the Supreme Court of Canada held that "section 7 does not promise that the state will never interfere with a person's life, liberty or security of the person – laws do this all the time – but rather that the state will not do so in a way that violates the principles of fundamental justice" (para 71). In *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176 [*Kazemi*], the Court made the point, emphasizing that "to conclude to a breach of section 7 of the *Charte*r, it must be demonstrated that a principle of fundamental justice has been violated due to the application of subsection 3(1) of the SIA to the claims at issue" (para 135). Also, the Attorney General indicated that the action should be dismissed on this basis alone. She was right.

[91] The Federal Court of Appeal aptly summarized the meaning given to the notion in an authoritative case. *Erasmo v Canada (Attorney General)*, 2015 FCA 129 [*Erasmo*] (leave to appeal refused) states:

> [44] At a more general level, the appellant alleges that the merger provisions are substantively unfair. But that alone does not establish a violation of the principles of fundamental justice.
>
> [45] The principles of fundamental justice are not collections of principles of unfairness or "vague generalizations about what our society considers to be ethical or moral": *R. v. Malmo-Levine*; *R. v. Caine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at paragraphs 112 (per Gonthier and Binnie JJ., for the majority) and 224 (*per* Arbour J., dissenting). They do not lie in the realm of general public policy: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at page 503, 24 D.L.R. (4th) 536. Nor are they "empty vessel[s] to be filled with whatever meaning we might wish from time to time": *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at page 394, 38 D.L.R. (4th) 161 (*per* McIntyre J.).
>
> [46] Instead, the principles of fundamental justice "are to be found in the basic tenets of our legal system": *Re B.C. Motor Vehicle Act*, above at page 503, cited with approval in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, 132 D.L.R. (4th) 56 at paragraph 39; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44 at paragraph 23; *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, 17 C.R. (7th) 87 at paragraph 89; and many others. They are "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice": *R. v. D.B.*, above at paragraphs 46, 61, 67-68, 125, 131 and 138; *R. v. Malmo-Levine*; *R. v. Caine*, above at paragraphs 112-13; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paragraph 139). They are "the shared assumptions upon which our system of justice is grounded" that "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens": *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76 at paragraph 8.
>
> [47] The principles of fundamental justice can invalidate any legislation or actions taken under legislation. In other words, they can trump the principle of Parliamentary supremacy, a principle that has rested at the core of Anglo-Canadian constitutional

> arrangements for over four centuries. For this reason, only the most important, basic values rooted in our time-honoured practices and understandings can possibly qualify as principles of fundamental justice. Unfairness in the colloquial sense, freestanding policy views, or generalized views of what is proper – all matters in the eye of the beholder – cannot qualify as principles of fundamental justice, nor can they perform any part in their discernment or application. Matters such as those are the proper preserve of the politicians we elect.
>
> [Emphasis added]

[92] No attempt to identify the principles of fundamental justice was made in this case, much less a convincing showing how they would apply in these circumstances to the rights to liberty and security of the person. At the hearing, an attempt was made to transform *in extremis* a proposed argument according to which the Regulations and Commissioner's Directives 730 and 860 would not be compliant with section 76 of the Standard Minimum Rules for the Treatment of Prisoners and with certain international conventions on labour law and the principles of fundamental justice.

[93] One can hastily dismiss the argument that domestic laws (the Regulations and the Directives) are not compliant with international laws (Standard Minimum Rules for the Treatment of Prisoners and Conventions 29 and 105 of the International Labour Organization). Regardless of the legal nature of these laws, they are not binding in Canada without a domestic law.

[94] The majority in *Kazemi* stated that "unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process" (para 149).

Canada, like the United Kingdom, has a dualistic treaty system. Recently, the Supreme Court of the United Kingdom succinctly and elegantly exposed the nature of the system in its decision on the United Kingdom's exit from the European Union. The issue was to determine whether an Act of Parliament is necessary to initiate the exit mechanism. In *R (on the application of Miller and another) v Secretary of State for Exiting the European Union*, [2017] UKSC 5; [2017] All ER 593, we read:

> 55. Subject to any restrictions imposed by primary legislation, the general rule is that the power to make or unmake treaties is exercisable without legislative authority and that the exercise of that power is not reviewable by the courts – see *Civil Service Unions* case cited above, at pp 397-398. Lord Coleridge CJ said that the Queen acts "throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority" – *Rustomjee v The Queen* (1876) 2 QBD 69, 74. This principle rests on the so-called dualist theory, which is based on the proposition that international law and domestic law operate in independent spheres. The prerogative power to make treaties depends on two related propositions. The first is that treaties between sovereign states have effect in international law and are not governed by the domestic law of any state. As Lord Kingsdown expressed in *Secretary of State in Council of India v Kamachee Boye Sahaba* (1859) 13 Moo PCC 22, 75, treaties are "governed by other laws than those which municipal courts administer". The second proposition is that, although they are binding on the United Kingdom in international law, treaties are not part of UK law and give rise to no legal rights or obligations in domestic law.
>
> [Emphasis added]

How these instruments are part of Canadian domestic law was not demonstrated. Nowhere in this case is there a claim that these international instruments are part of customary international law.

[95] Despite the limited scope, the applicants also attempted to find principles of fundamental justice in these instruments. The lack of articulation of the principles is fatal in this case. In fact, there was no mention of which principle of fundamental justice was at issue.

[96] In *Kazemi* (para 139), the Supreme Court reiterated this excerpt from *R v Malmo-Levine ; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 [*Malmo-Levine*]:

> 113 The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": Rodriguez, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.
>
> [Emphasis added]

In *Kazemi*, the issue was to determine whether article 14 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85 [the Convention], provided some basis for arguing that domestic law must provide relief even for torture inflicted beyond the borders of Canada. This obligation, created by article 14 of the Convention, constitutes a principle of fundamental justice according to the Kazemi estate.

[97] As we saw in *Malmo-Levine*, the legal principle must be essential to the proper functioning of the justice system; it must also be defined with precision so that it is possible to measure deprivations of life, liberty or security. One is not separate from the other.

[98] In our case, the applicants invoked the United Nations Standard Minimum Rules for the Treatment of Prisoners, which was the subject of a resolution adopted by the General Assembly on December 17, 2015 (UN A/RES/70/175) [the United Nations Resolution]. At the outset, this resolution acknowledges that "[i]n view of the great variety of legal, social, economic and geographical conditions in the world, it is evident that not all of the rules are capable of application in all places and at all times" (Preliminary observation 2). They are not binding. Nevertheless, Rule 103 states that "[t]here shall be a system of equitable remuneration of the work of prisoners", which shall allow prisoners to spend part of their earnings on approved articles and or to send money to their family, and another part should also be set aside by the prison administration to be handed over to the prisoner on his or her release.

[99] The Attorney General argued that this resolution is of no assistance. That is perhaps a strong assertion. However, the power of the instrument is certainly very limited. Not only does the resolution contain its own limits on what one can depart from, as indicated earlier, but a United Nations resolution is not binding. Its Charter also provides recommendations. *Brownlie's Principles of Public International Law*, Oxford University Press, 2012 [*Brownlie*], states :

> General Assembly resolutions are not binding on member states except on certain UN organizational matters. However, when they are concerned with general norms of international law, acceptance by all or most members constitutes *evidence* of the opinions of governments in what is the widest forum for the expression of such opinions. Even when resolutions are framed as general principles, they can provide a basis for the progressive development of the law and, if substantially unanimous, for the speedy consolidation of customary rules. Examples of important 'law-making' resolutions include the General Assembly's Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal; the *Declaration on the Granting of Independence to Colonial Countries and Peoples*; the *Declaration of Legal Principles Governing Activities of States in the*

> *Exploration and Use of Outer Space*; the *Rio Declaration on Environment and Development*, and the *UN Declaration on the Rights of Indigenous Peoples*. In some cases a resolution may have effect as an authoritative interpretation and application of the principles of the Charter: this is true notably of the Friendly Relations Declaration of 1970. But each resolution must be assessed in the light of all the circumstances, including other available evidence of the states' opinions on the point or points in issue.
>
> (p.42)

If it is not in and of itself a source of international law, the United Nations Resolution could result in a rule of customary law. There is no evidence that the United Nations resolution has attained that status through the progressive development referred to by Professor Brownlie.

[100] The actual text of Rule 103 also uses terminology that incorrectly alludes to a legal standard but is instead, as one of the applicant's counsel stated, a text that is limited to defining aspirations ("aspirational"). We are far, it seems to me, from the definition of the principles of fundamental justice in section 7 that require "some consensus that they are vital or fundamental to our societal notion of justice" where "only the most important, basic values rooted in our time-honoured practices and understandings can possibly qualify as principles of fundamental justice" (*Erasmo*, above, paras 46-47). Not only do the international instruments that the applicants cited not rise to this level, but they do not have the desired precision "to yield a manageable standard against which to measure deprivations of life, liberty or security of the person" (*Malmo-Levine*, above, para 113). This was not demonstrated.

[101] The Attorney General referred to two foreign cases to argue that the United Nations resolutions are not binding. I hesitate to give them much weight. In my view, they may simply be

the expression of different legal systems. In *Serra v Lappin*, 600 F.3d 1191 (2010) [*Serra v Lappin*], the Court of Appeals for the Ninth Circuit, in the United States, was to rule on the document that became the United Nations Resolution, the Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955, in Geneva. The Court of Appeals for the Ninth Circuit did not see a source of law in it at the domestic level. Paragraph 5 reads as follows:

> [5] The Standard Minimum Rules for the Treatment of Prisoners ("Standard Minimum Rules")[6] similarly fail as a source of justiciable rights. This document was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1955 "to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions." Standard Minimum Rules 1. It is not a treaty, and it is not binding on the United States. Even if it were a self-executing treaty, the document does not purport to serve as a source of private rights. The "Rules" themselves acknowledge that they are not all "capable of application in all places and at all times," *id.* ¶ 2, and are "not intended to preclude experiment," *id.* ¶ 3. Moreover, the specific rule identified by Plaintiffs as a source of rights declares only that "[t]here shall be a system of equitable remuneration of the work of prisoners" without specifying what wages would qualify. *Id.* ¶ 76(1).

[102] *Serra v Lappin* dealt with an issue similar to ours, as the rates paid to inmates in federal prisons (in this case, in California) were challenged on the basis of the Fifth Amendment to the Constitution. I note that the Court also found that there is no constitutional right to be paid for work performed during incarceration.

[103] In *Collins v State of South Australia*, [1999] SASC 257, the Supreme Court of South Australia examined whether the detention of two people in the same cell (doubling up) was an

infringement of the same instrument. There too, it was agreed that it was not a convention, but rather a useful instrument for interpreting ambiguous terms:

> 22. The Minimum Rules are not a convention, treaty or covenant. They do not impose obligations on signatories. They merely declare principles. Consequently there are no obligations in International Law arising from them.

To me, that seems consistent with British law, which does not accept the international instrument as domestic law, even in the form of a treaty accepted by the Executive. The sovereignty of Parliament is preserved.

[104] Therefore, one can understand that the principles of fundamental justice that permit the invalidation of a law that is validly enacted elsewhere must be of a certain nature. I believe that is what has been expressed in the Supreme Court's case law. In 1985, in *Re B.C. Motor Vehicle Act*, the Court spoke of "the basic tenets of our legal system" (para 31). International law can be a source; in *Suresh*, the limited value of taking them into account was acknowledged:

> 46. The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms": *Burns*, at paras. 79-81; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 348, per Dickson C.J. (dissenting); see also *Re B.C. Motor Vehicle Act*, supra, at p. 512; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1056-57; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 750; and *Baker*, supra.
>
> [Emphasis added]

Brownlie informs us about the nature of *jus cogens* (or *ius cogens*). These are the most fundamental standards from which we cannot depart:

> (A) PEREMPTORY NORM (IUS COGENS)
>
> Jurists have from time to time attempted to classify rules, or rights and duties, on the international plane by using terms like 'fundamental' or, with respect to rights, 'inalienable' or 'inherent'. Such classifications have not had much success, but have intermittently affected the tribunals' interpretation of treaties. But during the 1960s scholarly opinion came to support the view that there can exist overriding norms of international law, referred to as peremptory norms (*ius cogens*). Their key distinguishing feature is their relative indelibility. According to VCLT Article 53, they are rules of customary law that cannot be set aside by treaty or by acquiescence buy only through the formation of a subsequent customary rule of the same character.
>
> (p. 594)

Thus, these standards have special status. *Brownlie* seems to support a certain list from the International Law Commission:

> The ILC provided its own authoritative synopsis in 2006:
>
> (33) *The content of jus cogens*. The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery and the slave trade, genocide, racial discrimination apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination. Also other rules may have a *jus cogens* character inasmuch as they are accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted.
>
> (p. 596)

Without actually believing in an exhaustive list, we clearly see the order of magnitude.

[105] Greater precision will be provided in *Kazemi*. The ratification of a treaty does not, by that fact alone, transform this text into a principle of fundamental justice. If that were the new rule, the Executive—which is responsible, in our legal system, for negotiating and ratifying international agreements—would displace Parliament. That idea is discussed in paras 149 and 150 of *Kazemi*:

> [149] . . .
>
> This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 69; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 172-73; Currie, at p. 235). The appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation.
>
> [150] …
>
> But not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.
>
> [Emphasis added]

[106] The Supreme Court stated that the standard of *jus cogens* can be equated with principles of fundamental justice:

> [151] That being said, I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law. Just as principles of fundamental justice are the "basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 503), *jus cogens* norms are a higher form of customary international law. In the same manner that principles of fundamental justice are principles "upon which there is some consensus that they are vital or fundamental to our societal notion of justice" (*Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 590), *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted (*Bouzari*, at paras. 85-86; van Ert, at p. 29).
>
> [Emphasis added]

But in this case, we are not dealing with *jus cogens* at all (see also *A v Secretary of State for the Home Department* (No 2) [2005] UKHL 71; [2006] 2 AC 221, and *Youssef v Secretary for Foreign and Commonwealth Affairs*, [2016] UKSC 3). The United Nations Resolution has not reached this special status. It does not, by its very wording, constitute a clearly established peremptory norm. I would add that the rule of public international law expressed in a treaty does not strike me as any more useful to the applicants, as there is no such treaty in the case at bar.

[107] Brief reference was also made to *Convention No. 29 concerning forced or compulsory labour*, adopted by the General Conference of the International Labour Organisation (1930). The applicants barely touched on the subject. Indeed, on its face, *Convention No. 29* does not apply to this case, since "any work or service exacted from any person as a consequence of a conviction in a court of law" is excluded for the purposes of the Convention (Article 2). In any event, in the case at bar, it has not been shown that the inmates' work is forced or compulsory labour. As the evidence demonstrated, the inmates who stopped working lost the related pay and no more, and, in the case of Drummond Institution, had to spend working hours in their cells during the week.

[108] Accordingly, I must conclude that the attempt, *in extremis*, to transform a United Nations General Assembly Resolution with no binding effect into a rule of fundamental justice that could fit within the basic tenets of our legal system must fail. Consequently, the argument based on section 7 of the *Canadian Charter of Rights and Freedoms* is rejected.

C. *Do the inmates perform their work under an employer-employee relationship?*

[109] The applicants also sought to draw arguments from their position that inmate participation in work activities (especially for CORCAN) constitutes an employer-employee relationship. If such a relationship were to exist, it would be sufficient to trigger the application of the *Canada Labour Code*.

[110] The applicants argue that, by virtue of subsection 167(1) of the Code, Part III of the Code applies to them. It reads as follows:

Application of Part	**Application de la présente partie**
167 (1) This Part applies	**167 (1)** La présente partie s'applique :
(a) to employment in or in connection with the operation of any federal work, undertaking or business other than a work, undertaking or business of a local or private nature in Yukon, the Northwest Territories or Nunavut;	**a)** à l'emploi dans le cadre d'une entreprise fédérale, à l'exception d'une entreprise de nature locale ou privée au Yukon, dans les Territoires du Nord-Ouest ou au Nunavut;
(b) to and in respect of employees who are employed in or in connection with any federal work, undertaking or	**b)** aux employés qui travaillent dans une telle entreprise;

business described in paragraph (a);	
(c) to and in respect of any employers of the employees described in paragraph (b);	**c)** aux employeurs qui engagent ces employés;
(d) to and in respect of any corporation established to perform any function or duty on behalf of the Government of Canada other than a department as defined in the *Financial Administration Act*; and	**d)** aux personnes morales constituées en vue de l'exercice de certaines attributions pour le compte de l'État canadien, à l'exception d'un ministère au sens de la *Loi sur la gestion des finances publiques*;
(e) to or in respect of any Canadian carrier, as defined in section 2 of the Telecommunications Act, that is an agent of Her Majesty in right of a province.	**e)** à une entreprise canadienne, au sens de la *Loi sur les télécommunications*, qui est mandataire de Sa Majesté du chef d'une province.

As indicated by its title, Part III of the Code deals with standard hours, wages, vacations and holidays. Based on their understanding of section 167, the inmates would be entitled to claim minimum wage under section 178, and the other benefits provided for under Part III. The applicants referred to severance pay (Division XI), unjust dismissal (Division XIV), and group termination of employment (Division IX). Nothing was said about the many other divisions of Part III. For example, the applicants made no mention of leave (annual vacations, general holidays, parental leave, compassionate car leave, leave related to death) or individual terminations of employment (Division X).

[111] If the Code does not apply, it is argued that the common law would provide remedies for the unjust dismissals (inmates in institutions in Quebec appear to be governed by a regime other than the Common Law). Without explanation, it is claimed that the inmates are entitled to

reimbursement for wages lost between the time of dismissal and the time when a new "job", at the same salary, is found. It seems to be suggested that reducing pay is the equivalent of constructive dismissal.

[112] Obviously, the first question is whether Part III of the *Canada Labour Code* applies in the case of inmates participating in work activities. In my view, this cannot be the case.

[113] Section 167 of the Code determines the cases in which Part III can be applied. Paragraph 167(1)(*d*) excludes departments as defined in the *Financial Administration Act*, RSC (1985), c F-11. The Act defines a "department" as the following:

2 In this Act,	**2** Les définitions qui suivent s'appliquent à la présente loi.
…	[…]
department means	ministère
(a) any of the departments named in Schedule I,	**a)** L'un des ministères mentionnés à l'annexe I;
(a.1) any of the divisions or branches of the federal public administration set out in column I of Schedule I.1,	**a.1)** l'un des secteurs de l'administration publique fédérale mentionnés à la colonne I de l'annexe I.1;
(b) a commission under the Inquiries Act that is designated by order of the Governor in Council as a department for the purposes of this Act,	**b)** toute commission nommée sous le régime de la Loi sur les enquêtes désignée comme tel, pour l'application de la présente loi, par décret du gouverneur en conseil;
(c) the staffs of the Senate, House of Commons, Library of Parliament, office of the Senate Ethics Officer, office of	**c)** le personnel du Sénat, celui de la Chambre des communes, celui de la bibliothèque du Parlement, celui du bureau du

the Conflict of Interest and Ethics Commissioner and Parliamentary Protective Service, and	conseiller sénatorial en éthique, celui du bureau du commissaire aux conflits d'intérêts et à l'éthique et celui du Service de protection parlementaire;
(d) any departmental corporation; (ministère)	**d)** tout établissement public. (department)

The Correctional Service of Canada is found in Schedule I of the *Financial Administration Act.* It is a department, and Part III of the *Canada Labour Code* does not apply to it.

[114] The fact that CORCAN is in place for a certain form of work does not change the situation at all. CORCAN is a program, and its activity is an integral part of CSC. Even section 2 of the Regulations recognizes CORCAN as "the part of the Service that is responsible for penitentiary industry". As the evidence shows, CORCAN was designated a "Special Operating Agency" ("organisme de service spécial") within the Canadian machinery of government, which allows it to carry out its activities while remaining exempt from certain control mechanisms imposed by the Treasury Board. CORCAN is a program that is part of CSC. Though it enjoys some autonomy because of its Special Operating Agency status, CORCAN remains an integral part of CSC that helps it to accomplish its mission by offering inmates training and work experience in accordance with their Correctional Plan, with work experience that is as close to reality as possible. CORCAN, as a program, is therefore a part of a department. As such, it is excluded from Part III of the Code.

[115] Other forms of work in the institution follow the same logic. They are all directly related to an institutional program.

[116] Even if it is true, as the applicants argue, that the Code establishes employment standards, the Code still needs to apply to them. We must not invert the proposition and seek to determine that the creation of employment standards engages the Code. The "employment" must be covered by the Code in order for the Code to be engaged. In this case, whether the employees are to be employed by CORCAN or CSC, it is still a department excluded by the operation of section 167 of the Act. The Attorney General was not wrong to recall that employment within a department is strictly governed by three Acts: the *Financial Administration Act*, the *Public Service Employment Act*, SC 2003, c 22, ss 12 and 13, and the *Federal Public Sector Labour Relations Act*, SC 2003, c 22, s 2. Employment within a department is not open to anyone who wants it—such employment is strictly controlled.

[117] The *Public Service Employment Act*, in its preamble, states that "authority to make appointments to and within the public service has been vested in the Public Service Commission, which can delegate this authority to deputy heads". This exclusive authority is confirmed in section 29, and appointments are made on the basis of merit (section 30). Subsection 29(1) reads as follows:

Commission's exclusive authority	**Droit exclusif de nomination**
29 (1) Except as provided in this Act, the Commission has the exclusive authority to make appointments, to or from within the public service, of persons for whose appointment there is no authority in or under any other Act of Parliament.	**29 (1)** Sauf disposition contraire de la présente loi, la Commission a compétence exclusive pour nommer à la fonction publique des personnes, y appartenant ou non, dont la nomination n'est régie par aucune autre loi fédérale.

Nobody has claimed that participation in one of the programs offered by CSC constitutes appointment to a department and therefore to the public service, as defined by the *Public Service Employment Act*.

[118] In *Jolivet v Canada (Correctional Service)*, 2014 FCA 1, the Federal Court of Appeal had to determine if CSC could be compelled to engage in collective bargaining with inmates participating in institutional work programs. Since they are not appointed by the Public Service Commission, the inmates could not seek the remedies set out in the *Federal Public Service Labour Relations Act.* Paragraph 10 of the decision also applies to our situation:

> [10] Although the legislation relating to employment in the public service has evolved since the Econosult case was decided, the fundamental principle that employment in the public service is subject to specific legislated formalities remains valid. Inmates participating in work programs organized by the Correctional Service of Canada have not been appointed to a position in the federal public service. As a result, they are not "employees" within the meaning of the Act.

This means that inmates working in the institution are not employees of CSC within the meaning of the *Public Service Employment Act,* since they were not duly appointed.

[119] Such inmates are, furthermore, not employees under Part I of the Code when they are seeking, in this case, to engage in activities to unionize inmates. In *Canadian Prisoners' Labour Confederation v Correctional Service Canada*, 2015 CIRB 779, the Canada Industrial Relations Board [the CIRB] concluded that Part I of the Code does not apply to inmates because they are excluded under section 6 of the Code, which states that "this Part does not apply in respect of employment by Her Majesty in right of Canada". Unless inmates are determined to be

employees, which is in dispute, the CIRB finds that this type of relationship is excluded. I also share the opinion that "[t]he Code is first intended to cover private federal undertakings as is apparent from the combination of sections 4 and 6 above".

[120] The same reasoning where work in an institution follows its own rules seems to be favoured in provincial courts. In *Re Kaszuba and Salvation Army Sheltered Workshop et al.*, (1983) 41 OR (2d) 316, the Divisional Court of Ontario approved the following passage from the referee's decision:

> If the substance of the relationship is one of rehabilitation, then the mischief which the *Employment Standards Act* has been designed to prevent is not present and a finding that there is no employment relationship within the meaning of the *Employment Standards Act* must be made.

This passage was also specifically approved in *Fenton v Forensic Psychiatric Services Commission*, (1991) 82 DLR (4th) 27 [*Fenton*] by the British Columbia Court of Appeal.

[121] In *Fenton*, the British Columbia Court of Appeal concluded that the work at the Forensic Psychiatric Institute did not constitute employment within the meaning of the *Employment Standards Act*. Ultimately, the Court closely examined the goal of the Act and reached the conclusion that, if the work is for the purposes of rehabilitation and training, the minimum employment standards set out in these acts for "employees" cannot be applied to work with a different purpose.

[122] The applicants argued that it was reasonable to conclude that the payments made for services rendered constituted income, which established an employer–employee relationship.

Unfortunately for the inmates, if that was the case, the Commissioner would have been acting outside of the authority conferred on him by section 78 of the Act. He is only authorized if the payment is for the purpose of encouraging participation in programs or providing financial assistance to facilitate reintegration into the community, and not payment for services rendered. The end result would not support the position of the applicants, but would instead mean that even the reduced payments are *ultra vires.* Certainly, Part III of the Code is of little use to the applicants, unless they show that they are covered by section 167. They have not done so.

[123] The other argument is to claim the existence of an employer–employee relationship without necessarily claiming protection under the Code. The burden of proving that such a relationship exists falls on the applicants.

[124] If I understand the argument correctly, it is that an employer–employee relationship can exist outside of the federal statutory framework. This relationship, once established, would warrant recourse for constructive dismissal. A footnote in the appplicants' factum refers to the decision of *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10, [2015] 1 RCS 500 [*Potter*], without ever formulating or articulating the argument. In *Potter*, an employee was suspended indefinitely, with pay, in the context of negotiation for a buyout. It is the change to the conditions of employment that modifies the employment contract; here, the applicants claim that the reduction in payments made under section 78 of the Act constitutes such a change to the employment contract, thus opening the door to a recourse for constructive dismissal.

[125] This argument fails. The applicants have not in any way proven that there was a violation severe enough to constitute constructive dismissal, as required in *Potter*.

[126] But there is a more fundamental problem with the applicants' argument. The alleged employer–employee relationship, which seems to proceed from common law, clearly requires an employer. In our circumstances, this could only be CORCAN/CSC. As mentioned previously, not just anyone can be employed by a department (which CSC is, and CORCAN is an integral part thereof). The *Public Service Employment Act* sets out the conditions required to establish that employer–employee relationship. Employment does not exist outside the statutory scheme. The decision in *Canada (Attorney General) v Public Service Alliance of Canada*, [1991] 1 SCR 614 seems to establish this proposition. In that case, the issue was the determination of the employment status of teachers at Cowansville Penitentiary. The Solicitor General had privatized this training role and called on agencies in the business sector. As the Court itself stated, the only question was "whether they were Government employees or employees of Econosult", the private agency (page 624).

[127] The Supreme Court examined the same three acts: the *Labour Relations Act*, the *Public Service Employment Act*, and the *Financial Administration Act*. The Court concluded that "(i)n the scheme of labour relations which I have outlined above there is just no place for a species of de facto public servant who is neither fish nor fowl" (page 633). This is the situation proposed by the applicants in our case. Parliament determined who can be a departmental employee and how that status is acquired. The Treasury Board creates the positions, and the Public Service

Commission is entrusted with the exclusive power to appoint persons to those positions, though it can delegate that power. None of this can be disputed.

[128] But there is an even more fundamental issue. This relationship, whatever its nature, must give way to the statute law that specifically governs the offender's relationship that allows a form of payment. Unless section 78 is unconstitutional, it is the law that governs the inmates' circumstances. The common law relationship, if it existed—which is far from being proven—would have to give way.

[129] This is sufficient to dispose of the applicants' allegation regarding the application of the employer–employee relationship. I will add a comment.

[130] The applicants' fundamental premise in this case is that they are paid for their work, and that this establishes an employer–employee relationship. This does not hold up. The premise ignores the clear wording in section 78. It is unambiguous. It is not enough to declare that there is ambiguity—it must be shown. It seems to me that the applicants are seeking not just to establish ambiguity in section 78, but to establish an inherent contradiction between the principles that guide CSC (section 4) as well as the purpose of the correctional system (section 3). No contradiction between section 3 and section 78 has been demonstrated. Section 78 is unequivocal. Unless it is unconstitutional, it must be read with section 3, not in contradistinction to one and the other. It is the work itself which is considered to have benefits under the Act and to contribute to rehabilitation. These programs are offered to help with social reintegration, as required in section 76 of the Act. They can be components of the correctional plan, which has the

goal of facilitating reintegration. But Parliament chose to encourage participation in all programs through payment at rates accepted by the Treasury Board. I do not see how payment as encouragement to participate in programs, including some that are not in any way associated with institutional work or work for CORCAN, could transform into remuneration for the work done, as the applicants argue but have not demonstrated. In the penitentiary, work can take on the character of a privilege *(R v Shubley,* [1990] 1 SCR 3, page 21).

[131] The Supreme Court of Canada, in *671122 Ontario Ltd. v Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 SCR 983, declared its agreement with the Federal Court of Appeal in *Wiebe Door Services Ltd. v M.N.R.*, [1986] 3 FC 553, that in seeking the difference between an employee and an independent contractor, "[w]hat must always occur is a search for the total relationship of the parties" (para 46).

[132] The argument is that the payments made are decreed by the Treasury Board, which is mandated by the Act, and are based on criteria different from the *quid pro quo* of the employment contract. Michael Bettman, Director General, Offender Programs and Reintegration, is unequivocal: payments are made on the basis of participation in the program, whatever form it may take. As he states, "the criteria for the determination of the payment level are not the same as in 'the community' and include the involvement of the inmate in his or her Correctional Plan, his overall institutional behaviour, affiliation with a security threat group, etc." (respondent's file, page 1128, also page 857, para 39).

[133] I do not at all deny that public policy decisions can vary with regard to the payments made to inmates either to increase or reduce them. Some call for amounts greater than those decreed by the Treasury Board. Others find that these payments should be reduced because inmates have their basic needs met by the correctional system. As indicated earlier, the Court cannot express any preference for either side in this debate. It is a policy debate, which the Court cannot resolve without entering that arena. Being a policy debate, the role to be played by a court is a limited one. Some 36 years ago, the Supreme Court set the parameters about that which is an appropriate role for the courts:

> In either case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, continue to govern:
>
> > The Courts will not question the wisdom of enactments… but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.
> >
> > *(Re Motor Vehicle Act*, p. 496-467)

[134] From the outset, the applicants argued that a party must be paid for services rendered (memorandum of fact and law, para 19). The issue left unaddressed was that the payments were not for the work performed. They cannot be, not without running afoul of section 78 of the Act. The fundamental purpose of these employment/employability programs is not production so much as aiding in the rehabilitation and training of the participants. The other issue, no less

significant, is that the *Canada Labour Code* cannot be applied to this case. Seeking to position themselves in a framework that was put in place 36 years ago (1981), which is still supported in many quarters, is of no help to the applicants.

[135] Even if a form of employer–employee relationship could be considered, the applicants did not explain how a decrease in payments to encourage participation in programs, as in this case, could lead to constructive dismissal. What dismissal? Recall that section 78 of the Act provides for possible deductions from payments, as was done in this case for accommodation, food, and telephone service for inmates.

[136] I will reiterate that subsection 104.1(7) of the Regulations allows some flexibility in more difficult cases. It is worth citing again below:

(7) Where the institutional head determines, on the basis of information that is supplied by an offender, that a deduction or payment of an amount that is referred to in this section will unduly interfere with the ability of the offender to meet the objectives of the offender's correctional plan or to meet basic needs or family or parental responsibilities, the institutional head shall reduce or waive the deduction or payment to allow the offender to meet those objectives, needs or responsibilities.	**(7)** Lorsque le directeur du pénitencier détermine, selon les renseignements fournis par le délinquant, que des retenues ou des versements prévus dans le présent article réduiront excessivement la capacité du délinquant d'atteindre les objectifs de son plan correctionnel, de répondre à des besoins essentiels ou de faire face à des responsabilités familiales ou parentales, il réduit les retenues ou les remboursements ou y renonce pour permettre au délinquant d'atteindre ces objectifs, de répondre à ces besoins ou de faire face à ces responsabilités.

The applicants would doubtless prefer more generous wording or easier application to allow for greater flexibility. No arguments have been presented to invalidate this provision. At best, the generic argument is that the text is restrictive and places unreasonable limitations on favourable decisions. In a given case, the decision made under this subsection could be the subject of judicial review. But as long as the test has not changed, it remains the test to comply with. An unreasonable decision or one which violates the rules of procedural fairness can still be challenged.

[137] The Court therefore finds that participation in programs does not constitute an employer–employee relationship under current law.

V. Conclusion

[138] Without even having established that inmates have a constitutional right to payment, the applicants are complaining about the amounts they were paid. The Treasury Board itself decides on the base amount, and this amount is then reduced as authorized by Parliament under section 78 of the Act. Neither the Treasury Board's decision nor section 78 of the Act was challenged on constitutional grounds. The statutory instruments adopted in strict accordance with section 78 cannot be *ultra vires* for a power specifically conferred to do so.

[139] The constitutional challenge did not establish any breach of section 12 of the Charter because the payment made cannot meet the constitutional requirements to qualify as cruel and unusual treatment. In the same way, relying on section 7 is insufficient. Deprivation of liberty or security of the person is doubtful but, more importantly the applicants did not identify, much less

demonstrate, how the principles of fundamental justice had been violated. The burden was on them, and they did not discharge it. Seeking support from the international instruments cited here is of no help in establishing the principles of fundamental justice.

[140] Finally, the argument based on labour law cannot succeed. Here, the applicants contend that because payments were made, there is an employer–employee relationship, which leads to the engagement of the *Canada Labour Code*. However, the applicants are inverting the proposition. Not only is section 78 of the Act unambiguous in establishing that the payments made were to encourage participation in institutional programs and social reintegration, rather than as compensation for work, but the Code also does not apply to departments. Work in the institution is work within the department. This means that, under the Act, payments cannot be made as compensation for work, and inmates also cannot be employees within the meaning of the applicable laws.

[141] Consequently, the application for judicial review must be dismissed. The respondent is entitled to costs. I invite the parties to come to an agreement on an appropriate cost amount. Failing an agreement, submissions limited to three pages shall be made within two weeks of the issuance of this Judgment.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed for the main docket, T-1892-14, as well as the five other dockets heard along with the main dockets;

2. A copy of this judgment and reasons is filed in each of the six dockets, to be used in each docket;

3. Costs are awarded to the respondent. If the parties cannot reach an agreement on a suitable amount, submissions limited to three pages shall be made within two weeks of the issuance of this Judgment.

"Yvan Roy"
Judge

APPENDIX A

Applicants

Affiant	Stated effects	Cross-examination
1. Gaétan St-Germain **Drummond Institution, Quebec**	- Current disposable income is $38 every two weeks. He previously received $69 plus performance incentives, but it is unclear what his disposable income was after deductions.	- Confirmed that the applicant had $4,252 in his inmate trust account in June 2015.
	- Lost motivation to work at CORCAN after incentive cuts, now works in Aboriginal garden.	**Ms. Duchemin's affidavit** : does not need to buy furniture for Aboriginal ceremonies, although outside visitors are charged $5 for food for certain ceremonies;
	- Financially supports his wife and two sons. His wife moved to Drummondville to save on transportation costs.	
	- Buys furniture for aboriginal ceremonies.	
	- Buys phone cards, but cannot afford to call his daughters every day as they would like. One phone call may now cost one day's worth of work.	
2. Johanne Bariteau **Joliette Institution, Quebec**	- Currently receives $42.57 every two weeks before deductions; used to receive $61.20 before deductions.	- Confirmed the applicant had spent $150 on a TV and $50 on air fresheners.
	- Must pay $500 for clothing not provided by the CSC. For example winter boots, because the CSC only provides one pair. She also recently lost	- Confirmed she spent $630 on candy between 2013 and 2015.

Affiant	**Stated effects**	**Cross-examination**
	weight and her clothes no longer fit.	
	- Difficulty affording phone calls with her mother in Panama.	**Ms. Dufour's affidavit :** said she is currently enrolled in CEGEP courses; receives money from outside the prison several times a year; only lost 7 pounds, such that health staff did not think it warranted a clothing change; the mouth protector was only recommended, not deemed essential; hip pain was addressed with prescription medication and physical therapy; and she buys hygiene products at the canteen that are provided for free by the CSC.
	- Cannot afford $700 for a "protecteur buccal."	
	- Difficulty buying hygiene products and medication for hip pain.	
	- Difficulty saving for release.	
	- Salary cuts have lowered her motivation to work.	
3. Jarrod Shook **Collins Bay Institution, Ontario**	- Participated in consultations on pay changes saying they would negatively affect security and reintegration.	
	- Continued to work despite changes, saying some have continued to work out of fear that not working would negatively impact future transfers to lower security or releases.	

Affiant	**Stated effects**	**Cross-examination**
	- Cannot afford to make as many phone calls because he is paying for university courses.	
	- He himself does not have any financial dependents, but he sees other inmates who do that can no longer afford family visits or calls.	
	- Suggests lower pay has meant inmates are turning to illicit activities, which he linked to heroin overdoses. Says he cannot "directly correlate" these events, but suggests economics is a "major factor".	
4. Michael Flannigan, Collins Bay Institution, Ontario	- Worked as a labourer at CORCAN earning Level A pay of $6.90/day plus $2.20/hour incentive pay before deductions.	- Confirmed applicant paid $3000 toward court-ordered fines from 2011 to 2013.
	- Before the changes, he sent money to his mother who helps care for his children and paid his court-ordered fines. He can no longer afford these payments.	
	- Applied for s. 104.1(7) waiver and denied three times.	
	- Has anxiety about future release due to ongoing debts.	
	- Says he was "quietly warned" by a manager that quitting work because of pay cuts would go against his Correctional Plan and charges could be levied against him.	

Affiant	**Stated effects**	**Cross-examination**
	Says he has been "coerced" into continuing to work.	
5. John Alkerton, Collins Bay Institution, Ontario	- Pay changes have made it more difficult for him to save money for his release.	- Confirmed that the applicant saved $80 towards eventual release between July 2012 and July 2015.
	- Feels disrespected and undignified in his work at CORCAN due to the pay changes, but is reluctant to quit because of how it may impact his future prospects for transfer to lower security or conditional release.	- Confirmed the applicant took the position with CORCAN after incentive pay was eliminated.
	- Made a waiver request under s. 104.1(7)	- Confirmed the applicant had paid for personal clothing and shoes not issued by the CSC, as well as reading glasses that were not covered.
6. James Druce, Collins Bay Institution, Ontario	- Pay changes have affected his ability to maintain community ties, save for release, and meet basic needs.	
	- Believes the pay changes are an additional punishment over and above his sentence.	
7. Jean Guérin, Drummond Institution, Québec	- Received $69 biweekly plus performance incentives pre-deductions before pay changes.	- Confirmed the applicant regularly bought cans of soda at the canteen between September 2014 and May 2015. In February 2015, he bought 125 cans, explaining that they are a form of currency in prison and can be exchanged for food such as onions and peppers.
	- He needs to pay for phone calls to his family, including	**Ms. Duchemin's affidavit:** he pays for hygiene products and

Affiant	**Stated effects**	**Cross-examination**
	his children, as well as hygiene products, clothing. He also contributes $200 per private family visit.	clothing he can obtain for free.
	- His daughter's social worker recommended stronger links with him to help address her depression.	
	The loss of performance incentives has lowered his motivation to work.	
	- His s. 104.1(7) waiver request was refused.	
8. Jeffrey Ewert, La Macaza Institution, Quebec	- Currently earns $58 biweekly before deductions. Previously earned level A pay plus performance incentives at CORCAN.	- The respondent's only question on cross-examination was whether the applicant had been placed in administrative segregation and had his pay reduced as a result. He confirmed this occurred, but had since worked his way back up to the top pay level.
	- Must budget carefully to pay for postage, phone calls, clothing, and over-the-counter medications.	**Ms. Prévost's affidavit**: clarified inmate payments and noted that uses for the Inmate Welfare Fund (e.g. cable) are voted on by inmates.
	- He is left with little money to save for release.	
	- Argues that federal inmates pay a higher percentage of their minimum wage earnings for lower quality living accommodations, food, and clothing compared to non-inmates.	
	- Cannot afford to pay for	

Affiant	Stated effects	Cross-examination
	dental work that is not covered by the CSC.	
[BLANK/EN BLANC]	- His s. 104.1(7) waiver request was refused.	**[BLANK/EN BLANC]**

Non-applicants

Affiant	Stated effects	Cross-examination
1. Richard Piché, Drummond Institution, Quebec	- Previously made $135 every two weeks, and now makes $38 biweekly (unclear if pre- or post-deduction).	
	- Cannot afford to call his family as often.	
	- Cannot save money for reintegration and owes money to the state.	
	- Currently calls his contacts to support reintegration every 4-5 months as opposed to every month due to costs.	
2. Michel Cox, La Macaza Institution, Quebec	- Earned $46.50 biweekly before the pay changes, and $21 afterwards (unclear if pre- or post-deduction).	- Confirmed that the applicant's stated $69 medical needs were not prescribed.
	- Feels frustrated by the pay changes and has difficulty paying for basic needs.	- Confirmed the applicant spent $100-170 per month at the canteen from April to June 2015. The applicant noted that in the following months he spent about $15 biweekly.
	- pays approximately $12/month for family visits, $10/month for phone calls, $15/month for canteen, and	**Ms. Prévost's affidavit:** contrary to his statement, he receives $36.27 biweekly in his current account and $4.03

Affiant	**Stated effects**	**Cross-examination**
	$200/year for clothing.	in his savings account.
	- says that he has difficulty afford basic food, hygiene and medication.	
3. Claude Joly, Drummond Institution, Quebec	- Refused to work in prison because he thinks the remuneration amounts to slavery.	**Ms. Duchemin's affidavit:** was never pressured to work for CORCAN and could have applied to other positions; and confirmed that inmates not participating in programs must remain in their cells with the doors locked during business hours and that this is not considered "isolation" under the *CCRA*.
	- He feels the CSC is pressuring him to work at CORCAN because they are understaffed. Because he refused to work, his manager ordered him into "isolement cellulaire", which means he had to remain in his cell with the door locked during business hours when other inmates were working.	
	- To escape this business-hour treatment, he finally accepted a job.	
4. Christopher Cunningham, La Macaza Institution, Quebec	- Previously made $300/month before the pay changes, and now receives $90/month for his work in the kitchen (unclear if pre- or post-deduction).	- The parties agreed to admit several facts respecting Mr. Cunningham, including that he has no medical prescription justifying non-essential medical expenses, that he was released on statutory release in May 2015, and that he bought multiple items at the canteen (nicotine gum, chocolate, chips, etc.)

Affiant	**Stated effects**	**Cross-examination**
	- Feels unmotivated to work due to the pay changes.	**Ms. Prévost's affidavit:** noted that the institution has no record of a state debt that was being paid.
	- Difficulty balancing costs related to health, family, telephone calls, clothing, and debt to state.	
5. Daniel Clermont, La Macaza Institution, Quebec	- Previously made $54 disposable income biweekly before the pay changes, and after the changes makes $36.27 biweekly.	- Confirmed that his medical expenses were not due to a prescription.
	- Feels unmotivated to work due to the pay changes.	- Confirmed that between January and June 2015, he bought about $200 worth of food from the canteen.
	- Buys extra food to supplement his meals.	- Confirmed he had $1,055 in savings.
		Ms. Prévost's affidavit: clarified inmate payments, and noted that several items he said he received for free are not in fact distributed for free.
6. Bernard Armelin, La Macaza Institution, Quebec	- Previously made $62.10 biweekly before the pay changes, and after the changes makes $48.30 biweekly (unclear if pre- or post-deduction).	- Confirmed that his medical expenses were not due to a prescription.
	- States that the pay changes have meant he cannot afford the Christmas canteen, telephone calls, or family visits.	- Confirmed he bought soap and razors at the canteen because the institution-provided options did not meet his needs.
	- Feels broke and depressed	Ms. Prévost's affidavit: clarified inmate payments and

Affiant	**Stated effects**	**Cross-examination**
	and "insecure" with his child.	the fact that he does not need to pay for spiritual services.
7. Inmate no. 3, Institution redacted	- Previously made $54.10 biweekly before the pay changes, and after the changes makes $36 biweekly (unclear if pre- or post-deduction).	- Confirmed that his medical expenses were not due to a prescription.
	- Lost some motivation to work due to the pay changes.	
	- Cannot afford postsecondary courses.	
8. Richard Ryan, La Macaza institution, Quebec	- Previously made $134.00 biweekly before deductions and now makes $25 biweekly before deductions. It appears he may be making less due to a medical condition (no details given).	- Confirmed that his medical expenses were not due to a prescription.
	- The pay changes have reduced inmates' incentive to work.	- Confirmed that he spent $70-$147 per month from January to June 2015 at the canteen. He also bought a TV for $240.
		- Confirmed he bought toothpaste from the canteen because the institution-provided product is poor quality.
		- Confirmed he had $4,264.37 in his accounts, which included money he brought with him when he was incarcerated.
9. Kurt Lauder, La Macaza Institution, Quebec	- Previously made $134.00 biweekly before deductions and now makes $36.27 biweekly before deductions.	The parties agreed to admit one fact respecting Mr. Lauder: that he had $1,118.35 in his inmate trust account.

Affiant	**Stated effects**	**Cross-examination**
	- Lost some motivation to work due to the pay changes. Began taking anti-depressants.	
10. Patrick James Wallace, La Macaza Institution, Quebec	- Previously made $69.00 biweekly before deductions and now makes $36.27 biweekly before deductions.	
	- Difficulty affording telephone calls, family visits, clothing, and postage.	
11. Inmate no. 1, Institution redacted	- Previously made $69.00 biweekly before deductions and now makes $36.00 biweekly before deductions.	- The parties agreed to admit the following facts respecting inmate no. 1:
	- The pay changes affected his ability to send presents to his children and provide food for private family visits.	- his medical expenses were not due to a prescription.
		- From January to July 2015, he spent $400 on food (e.g. chips, soda, etc.) at the canteen.
		- In January 2015, he sent $2,000 to his family.
		- As of July 2015, he had $10,668.01 in his inmate trust account.
		Ms. Prévost's affidavit: clarified inmate payments and confirmed that inmates are not allowed to buy presents to send out of the prison.
12. Inmate no. 2, Institution redacted	- Previously made $58.00 biweekly before deductions and now makes $34 biweekly	- The parties agreed to admit the following facts respecting inmate no. 2:

Affiant	**Stated effects**	**Cross-examination**
	before deductions.	
	- Lost some motivation to work due to the pay changes.	- As of June 2015, he had $1,943.12 in his inmate trust account.
		- Between April 2014 and June 2015, he bought $2,000 worth of products from the canteen.
13. Guy Simard, Drummond Institution, Quebec	- Previously made $69.00 biweekly before deductions and now makes $38 biweekly before deductions.	- Between January 2014 and May 2015, he bought packs of razors for $7.41 (he originally claimed they cost $20)
	- The pay changes have affected his ability to afford telephone calls, canteen products, and shoes.	- He bought other hygiene products at the canteen.
	- Feels frustrated since the pay changes.	**Ms. Duchemin's affidavit:** CSC provides hygiene products such as razors as well as shoes.
	- Difficulty affording support payments for his child.	

FEDERAL COURT
SOLICITORS OF RECORD

DOCKETS:	T-1892-14, T-756-14, T-2101-14, T-2137-14, T-2222-14, T-144-16
STYLE OF CAUSE:	JEAN GUÉRIN, JARROD SHOOK, JAMES DRUCE, JOHN ALKERTON, MICHAEL FLANNIGAN, CHRISTOPHER ROCHELEAU, JOHANNE BARITEAU, GAÉTAN ST-GERMAIN, JEFF EWERT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 6, 2017, FEBRUARY 7, 2017, FEBRUARY 8, 2017
JUDGMENT AND REASONS	ROY J.
DATED:	JANUARY 29, 2018

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