Federal Court Cour fédérale

Date: 20190614

Docket: T-385-19

Citation: 2019 FC 817

Ottawa, Ontario, June 14, 2019

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOEY TOUTSAINT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This case highlights once again the challenges presented by the incarceration of mentally disordered offenders in Canada's prison system. In that context, it is not surprising that the Applicant is an Indigenous man with an appalling personal history of deprivation and abuse, as they are shockingly overrepresented in our jails and, in particular, in the type of solitary confinement institutionally known as administrative segregation.

[2] Other courts have determined that the prolonged use of administrative segregation in general, and especially in the case of mentally disordered offenders, contravenes Canada's *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] The question in this case is not, however, whether the Applicant's *Charter* rights have been infringed by his prolonged segregation, but whether the Court should intervene with the management of his incarceration by ordering the Correctional Service of Canada (CSC) to transfer him to a penitentiary that also serves as an acute care psychiatric hospital pending the outcome of his discrimination complaint to the Canadian Human Rights Commission (CHRC).

[4] For the reasons that follow, I decline to issue the mandatory interlocutory injunction the Applicant requests. This is because he has failed to meet the stringent requirements for the grant of an injunction requiring action by the opposing party. I am not persuaded that the Court should override the assessment of the mental health team at the institution in which the Applicant is presently held, namely that the transfer would be contrary to his best interests and disrupt his treatment plan.

[5] A decision to transfer the Applicant to a hospital setting remains open to the Respondent and has been made to address his needs in the past. Nothing in my judgment and reasons should be interpreted as preventing such a decision from being made again. Indeed, I would urge the correctional officials responsible for the management of the Applicant's detention and care to consider whether, based on the evidence presented in this case, the time has come to once again

consider his transfer to a more therapeutic setting. But, in my view, that is a decision to be made by the mental health professionals within CSC and not by the Court.

II. **Background and Evidence**

[6] The Applicant, Mr. Joey Toutsaint, is a 32 year old Dene man from Black Lake Denesuline Nation in Saskatchewan with multiple mental and behavioural disorders, a history of personal trauma and a long history of self-harm. He was declared to be a dangerous offender in 2015 and sentenced to an indeterminate period of detention. He is currently serving his sentence as a federal maximum security inmate at Saskatchewan Penitentiary in Prince Albert, Saskatchewan.

[7] On February 27, 2019, Mr. Toutsaint filed a Notice of Application, pursuant to section 44 of the *Federal Courts Act*, RSC 1985, c F-7, seeking the following relief:

1. An injunction pursuant to section 44 of the *Federal Courts Act*, requiring CSC to refrain from discriminating against the Applicant, and specifically requiring CSC to:
    i. Transfer the Applicant immediately to the Regional Psychiatric Centre in Saskatoon, Saskatchewan;
    ii. Provide the Applicant with regular intensive one-on-one therapy to address his past trauma and grief counselling to address his past losses; and
    iii. Provide the Applicant with regular access to Dene cultural practices, including sweats and pipe ceremonies, and access to an Indigenous Elder.
2. Such other relief as this Honourable Court may deem just.

[8] Pending the hearing of the application on an expedited basis, and in view of assertions that the Applicant was a suicide risk, an order was issued on March 14, 2019 requiring that the Applicant should remain as he was in the prison health care unit and was to be checked on an hourly basis, and more frequently as circumstances required. Officials at the Prince Albert penitentiary were to inform counsel and the Court of any material change in the Applicant's condition and circumstances. Further orders relating to the reporting requirement were issued on March 15, 2019, March 19, 2019 and March 26, 2019, and again on May 27, 2019.

[9] The Applicant seeks to be transferred to the Regional Psychiatric Centre (RPC) in Saskatoon, Saskatchewan until his human rights complaint is resolved. RPC is a penitentiary administered by CSC. Part of it is also an acute care hospital registered under Saskatchewan's *Mental Health Services Act*, SS 1984-85-86, c M-13.1, as amended.

[10] A December 2017 Report by Dr. John Bradford prepared for CSC describes the mental health challenges in dealing with the correctional population and makes a number of recommendations for managing those challenges. Dr. Bradford is an independent forensic psychiatrist with a distinguished professional and academic record and a long history of working with mentally disordered offenders. His Report provides a statistical overview comparing the mental health of prisoners and the non-offender population; the prevalence of major psychiatric disorders is much higher among the prisoner population. The Report describes the system of regional treatment centres administered by CSC and makes a series of recommendations for improving CSC's capacity to provide treatment for mentally disordered offenders. I found the Report to be very helpful in understanding the context in which this application arises. While I

can't cover the full import of the Report in these reasons, I have drawn the information in the following paragraph from it.

[11] CSC has five Regional Treatment Centres (RTC) located in British Columbia, the Prairies, Ontario, Quebec and the Maritimes. The Applicant has been placed in several of them during his adult correctional history. Of the five centres, the only custom built mental health treatment centre is RPC in Saskatoon, although there is a partially custom built facility in Abbotsford, B.C. and one at Bath, Ontario. The RPC has a total of 184 beds, including 60 psychiatric hospital beds. The Bradford Report points to a shortage of mental health personnel within the system, one of the consequences of which is the overuse of segregation and seclusion. Efforts to rely on transfers to provincial forensic psychiatric facilities have diminished when demands exceeded capacity. Dr. Bradford states that there is some evidence that the provision of residential programs and crisis centre units actually increased the demand for inpatient psychiatric care. He recommends a pilot project in which the number of beds at the RTC in Ontario be reduced by 30% and staffing levels increased. Among other concerns noted by Dr. Bradford is the integration of inmates with varying security levels in the treatment centres and the management of those with behavioural problems who cannot get along with the general population.

[12] In this proceeding, the Applicant asks the Court to "require CSC to refrain from discriminating" against him and, specifically, to intervene in the transfer and treatment decision making processes within CSC to order his transfer to RPC, to order the type of therapy he would receive there and to order regular access to Dene cultural practices. The Court generally has no

involvement in CSC's transfer process, other than in applications for judicial review of transfer decisions contrary to inmates' wishes. Every transfer between penitentiaries is a discretionary administrative decision: *McLeod v Canada (Attorney General)*, 2018 FC 1148 at para 10. The Court also normally has no involvement in treatment decisions made by CSC health care professionals or spiritual advisors.

[13] Mr. Toutsaint, like so many offenders, has had a tragic and troubled personal history. He lost his mother at a young age. He had little contact with his father while growing up and met him again as an adult only when they found themselves in the same penitentiary. That was not a positive experience. The loss of his grandmother was particularly traumatic as she had been a primary caregiver for him. His first language was Dene and he did not begin to learn English until he was placed in provincial youth custody at 16. He entered CSC custody at the age of 18 in 2005. At the time of his dangerous offender designation, he had amassed a record of 74 criminal convictions.

[14] The Applicant's involvement with the criminal justice system was described in stark terms by the Saskatchewan Court of Appeal in *R v Toutsaint*, 2015 SKCA 117. The synopsis provided by the Court of Appeal, at paragraph 3, is instructive on the present application, as it points to some of the challenges faced by the correctional authorities in dealing with Mr. Toutsaint's disorders. Among other concerns, the Court noted that Mr. Toutsaint:

> - Had nearly 30 convictions for violent, sexual, threatening or weapons-related offenses;
>
> - Had spent most of his adult life in prison, and the majority of that time had been spent in segregation, on a voluntary or involuntary basis;

- Had never completed any programming geared toward his rehabilitation, had no interest in any programming that could reduce his risk factors and preferred segregation to any other proposal;

- Was uncooperative or threateningly disruptive with his health care providers; did not comply with treatment directions and had either sold or given away medications prescribed to him;

- Had denounced aboriginal elders and refused to avail himself of their assistance or advice;

- Had little or no family support and had never been visited or called by anyone while he was imprisoned;

- Had to be disarmed by fellow inmates – for their own protection – when he fashioned or acquired a weapon while residing with the general prison population.

[15] The Court also noted that:

- Due to his intractable, violent behavior, CSC had considered transferring Mr. Toutsaint to the special handling unit reserved for the most unmanageable offenders in the federal correction system;

- When released from custody at warrant expiry, he had been subjected to *Criminal Code* restraining orders in the interests of public safety; and

- When released into the community, he violated or breached his bail, probation or restraining orders, usually within weeks.

[16] The assessments of the psychologist and psychiatrist who provided reports to the sentencing judge were, as described in the Court of Appeal judgment at paragraphs 5 to 8, that Mr. Toutsaint remained at high risk to reoffend violently and sexually. Both noted that Mr. Toutsaint had told them that he would not participate in programming to reduce his risk of reoffending. He preferred to remain in segregation. The court appointed psychologist described Mr. Toutsaint "as highly dominant and overly aggressive" and entirely unresponsive to

treatment. He concluded that his violent and threatening conduct while incarcerated was purposive – to get what he wanted. While the psychiatrist retained by Mr. Toutsaint, Dr. Mela, thought that there had been some improvement in his behavior prior to sentencing, the Court of Appeal concluded that this was based on the Applicant providing untruthful information. Among other things, the Court noted, Mr. Toutsaint had sabotaged his own treatment by selling his prescribed medication to other inmates shortly after he was assessed by the psychiatrist. The psychiatrist's report was included in the evidence the Applicant submitted in this proceeding.

[17] The Applicant has glossed over this record in describing his history in the correctional system. Nonetheless, whether it was due to his own preference or to his pattern of violent and disruptive conduct, the Applicant has spent some 2,180 days, and counting, in administrative segregation. He has been frequently moved between regular living units and segregation units at his own request, or as a protective custody prisoner, and has also spent many days in observation units when threatening self-harm. The observation units are, if anything, even more isolating than segregation units, despite the constant surveillance.

[18] The Applicant has, from time to time, been placed in regional psychiatric and treatment centres operated by CSC, with mixed results. On some occasions, he has regressed, refused to engage in treatment and continued to self-harm or has been aggressive and threatening towards other offenders, "muscling" or pressuring them for their medication. He has also been aggressive and threatening towards staff, including medical professionals.

[19] Since the summer of 2016, the Applicant has been held at nine different institutions in six different provinces, as CSC attempted to find a facility that could cope with his treatment needs and behavioural problems. He has been at Saskatchewan Penitentiary since August 2018.

[20] In this application, Mr. Toutsaint relies on his own extensive affidavit evidence, with numerous exhibits drawn from his institutional records. Other documentary evidence in support of the application was introduced through several affidavits of one of his legal representatives. In his evidence, Mr. Toutsaint describes a horrendous history of abuse at the hands of both inmates and guards in youth and adult custody. This includes sexual and physical assaults at the hands of other inmates, which he believes were facilitated by guards, as well as beatings by guards and aggressive interventions by Emergency Response Teams (ERTs). Whether accurate or not, it is clear that Mr. Toutsaint believes his recollection of these events to be true and this has made it difficult for him to trust and interact with correctional officers and some, but not all, mental health personnel.

[21] Mr. Toutsaint suffers from a number of mental illnesses. The most recent assessment conducted by Dr. Alsaf Masood, Mr. Toutsaint's treating CSC psychiatrist, dated February 21, 2019 diagnosed him with the following illnesses:

(i) attention deficit hyperactivity disorder;

(ii) polysubstance use disorder;

(iii) mood disorder unspecified;

(iv) post-traumatic stress disorder [PTSD]; and

(v) mixed personality disorder (antisocial and borderline personality disorders).

[22] Dr. Masood has also recognized that Mr. Toutsaint may suffer from Fetal Alcohol Spectrum Disorders, although that diagnosis has yet to be confirmed. If confirmed, Dr. Masood was of the opinion that it would not make a significant difference in the Applicant's treatment.

[23] The Respondent relied on the evidence of Dr. Masood and that of Mr. Robin Finlayson, chief psychologist at Saskatchewan Penitentiary. Dr. Masood and Mr. Finlayson were cross-examined at length on their affidavits. In their assessment, Mr. Toutsaint would be better served by remaining where he has developed some degree of a relationship with the mental health team, rather than to start afresh at RPC. They maintained that position under vigorous cross-examination. Their evidence is not without inconsistencies, contradictions and other weaknesses. However, on the whole, I found it persuasive.

[24] Mr. Toutsaint began to self-harm in 2006 and has since had numerous self-harming incidents, which have become more frequent in recent years. Mr. Toutsaint describes being fearful of correctional officers, especially the ERTs, which are often called in when he is threatening self-harm and is in possession of a razor blade or other weapon. Mr. Toutsaint's evidence is that the ERT response actually increases his likelihood of self-harming, as does his continuing exposure to administrative segregation. He acknowledges often preferring segregation to being in the general population and has requested being placed in observation cells when fearful that he will self-harm.

[25] Mr. Toutsaint's evidence is also that CSC has failed to allow him to engage in meaningful spiritual practices. He says that he has been deprived of Dene cultural practices in

most institutions in which he has been placed, and at Saskatchewan Penitentiary, where there are Dene Elders, he contends that CSC has limited his access to both the type of practices he prefers and to a frequency that would be meaningful. For example, since his arrival in August 2018, he has yet to participate in a sweat and has only participated in five or so pipe ceremonies. He does not find smudging, or spiritual cleansing, which has been provided, to be meaningful.

[26] Saskatchewan Penitentiary does have a sweat lodge in a fenced off corner of the prison yard. A photograph of it is in the 2017-2018 Correctional Investigator Report included in the record. It appears from the evidence that its use was constrained by a number of practical difficulties during Mr. Toutsaint's stay there, not the least of which was the cold northern Saskatchewan winter. But it also appears that he may have been denied a sweat because of his behavioural problems.

[27] Since June 2018, Mr. Toutsaint has been asking CSC to transfer him to RPC. Mr. Toutsaint claims that he needs to be transferred to a therapeutic environment and that his mental health and spiritual needs can best be met at RPC. Mr. Toutsaint has not received any formal responses to his transfer requests but is aware that his treatment team has advised against it.

[28] Mr. Toutsaint was previously transferred to RPC in 2015 for approximately 6 weeks on an emergency basis; in 2016 for approximately 6 months after a referral for treatment; and again in 2017 for approximately 2 months following a transfer between institutions. The evidence is that his time at RPC met with mixed results. Though he states that he was able to get meaningful

treatment and interactions at RPC, the record is that he also self-harmed and fought with other inmates there. As noted above, he has also been placed in other treatment centres.

[29] On May 6, 2018, Mr. Toutsaint filed a complaint with the CHRC in which he alleges that CSC has discriminated against him on the basis of race, national or ethnic origin, colour, religion, and disability (namely, his mental illnesses).

[30] Also in May 2018, Mr. Toutsaint slashed his neck and severed his jugular vein while being held in segregation at the Quebec Regional Reception Centre. Mr. Toutsaint's evidence is that he was feeling distressed and threatened to hurt himself because the guards were giving him a hard time about him calling his legal representative. He states that while he calmed down when CSC promised not to call in the ERT, he proceeded to slash his neck after seeing ERT members crouched outside his cell. Mr. Toutsaint spent nine days in hospital recovering after emergency surgery.

[31] Shortly after this incident, as part of his CHRC complaint process, Mr. Toutsaint met with Dr. Jon Wesley Boyd, a board certified psychiatrist from Massachusetts and Associate Professor at Harvard Medical School. Mr. Toutsaint's legal representative arranged this evaluation. Dr. Boyd met with Mr. Toutsaint for 2 hours on July 20, 2018 and submitted his first assessment on October 29, 2018. Dr. Boyd had an approximately 70 minute phone conversation with Mr. Toussaint on January 3, 2019 and submitted a follow-up assessment on January 19, 2019.

[32] Dr. Boyd agreed with CSC's diagnoses and further diagnosed Mr. Toutsaint with Major Depressive Disorder (MDD) and PTSD. PTSD was not initially diagnosed by Dr. Masood, but he agreed with Dr. Boyd in his latest assessment. Dr. Boyd writes that these diagnoses make Mr. Toutsaint ineligible for administrative segregation under "Commissioner's Directive 709: Administrative Segregation".

[33] Dr. Boyd's reports were introduced as exhibits to the affidavits of one of Mr. Toutsaint's legal representatives and as exhibits to Mr. Toutsaint's affidavits. As a result, they were not subject to cross-examination. The reports contain statements which the Court considers to be in the nature of advocacy. Dr. Boyd, for example, questioned whether the failure to diagnose Mr. Toutsaint with MDD was due to CSC policy for mental health clinicians to avoid diagnosing inmates with conditions that would be exclusionary under CD 709. There is no evidence in the record to support that allegation and it would be contrary to their ethical obligations.

[34] That said, the ethical dilemmas created by dual loyalties to patient and employer in the CSC environment have been recognized. The 2017-2018 Correctional Investigator Report observed in its discussion of health care in federal corrections that CSC health services do not have true clinical independence.

[35] While Dr. Masood agreed with Dr. Boyd's PTSD diagnosis, he continues to disagree that Mr. Toutsaint suffers from MDD, and that view was shared by the lead psychologist at the penitentiary, Mr. Finlayson. There are indications in the record that Mr. Toutsaint has been

observed by other mental health staff to be depressed, and at least one report questions whether he suffered from MDD. But, no diagnosis exists other than Dr. Boyd's.

[36] Mr. Finlayson signs off on reports stating that Mr. Toutsaint may stay in segregation under CD 709. This practice is arguably contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules. The Rules prohibit medical professionals from being involved in disciplinary sanctions or restrictive measures. I make no finding on whether there has been a breach of either CD 709 or the principles. Mr. Finlayson's evidence is that he did not support the use of segregation or observation units as sanctions, but to protect Mr. Toutsaint from self-harm.

[37] As noted, both Dr. Masood and Mr. Finlayson were cross-examined extensively for this application. Among other questions put to them, they were closely examined on whether their assessments of Mr. Toutsaint's treatment needs were coloured by their duties of loyalty to their employer. Both affiants denied that to be the case.

[38] The Applicant also filed the affidavit of Dr. Melady Preece, a clinical psychologist and Assistant Professor in the Faculty of Medicine at the University of British Columbia. The affidavit attaches a four page report that she provided to the Applicant's legal team on March 13, 2019. Dr. Preece has expertise in mood disorders and PTSD, has worked with people who engage in self-harm and has conducted assessments of incarcerated individuals.

[39] Dr. Preece had no personal interactions with Mr. Toutsaint but was provided with a number of documents relating to his institutional history a few days before she was asked to provide her report. Her report, based on the assumption that Mr. Toutsaint's affidavit is a true representation of how he experiences the environment at the penitentiary, responds to a series of questions regarding the appropriateness of the mental health treatment plan developed for Mr. Toutsaint. The report was, in my view, of limited value on this application.

[40] Mr. Toutsaint submits that his transfer to RPC is necessary to prevent further harm to himself while his CHRC complaint is resolved. Specifically, he fears further harm, including a risk of suicide, further self-mutilation, psychological damage and loss of liberty. The Respondent contends that the weight of the evidence supports the conclusion that Mr. Toutsaint can presently best be cared for at Saskatchewan Penitentiary.

[41] The members of his treatment team do not support a transfer to RPC at this time but recognize that this may yet again be assessed as necessary to meet his treatment needs. At the heart of this application, therefore, is the following question: who is best suited to make that determination – the Court, at Mr. Toutsaint's request, supported by the assessments of independent experts who have had limited or no contact with him, or the CSC mental health professionals who have ongoing contact with him and responsibility for his present treatment plan?

III. **Issues**

[42] Based on the materials filed and the Parties' submissions, the Court must determine the following issues:

1. Whether the Court has jurisdiction to issue the relief sought;
2. Whether Mr. Toutsaint has satisfied the test for an interlocutory injunction.

IV. **Relevant Legislation**

[43] *Federal Courts Act* section 44 grants this Court the jurisdiction to grant injunctions "in all cases in which it appears to the court to be just or convenient to do so":

***Mandamus*, injunction, specific performance or appointment of receiver**	***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**
44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.	**44** Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

[44] Subsection 3(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] outlines prohibited grounds of discrimination:

Prohibited grounds of discrimination	**Motifs de distinction illicite**
3 (1) For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.	**3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

[45] CHRA section 5 outlines what may constitute a discriminatory practice:

Denial of good, service, facility or accommodation	**Refus de biens, de services, d'installations ou d'hébergement**
5 It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public	**5** Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public :
(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or	**a)** d'en priver un individu;

(b) to differentiate adversely in relation to any individual,	**b)** de le défavoriser à l'occasion de leur fourniture.
on a prohibited ground of discrimination.	

[46] CHRA section 15 outlines the onus that a responding party must meet, once a *prima facie* case of discrimination is established, to show that they have accommodated the needs of the complainant to the point of undue hardship:

Exceptions	**Exceptions**
15 (1) It is not a discriminatory practice if	**15 (1)** Ne constituent pas des actes discriminatoires :
(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.	**g)** le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.
Accommodation of needs	**Besoins des individus**
(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be	**(2)** Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une

considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.	personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

[47] Transfers between penitentiaries are made under paragraph 29(a) of the *Corrections and Conditional Release Act*, SC 1992, c-20 [CCRA] and are subject to the factors set out in section 28, which includes "the safety of that person and other persons in the penitentiary" and "the availability of appropriate programs and services and the person's willingness to participate in those programs."

[48] The CCRA permits CSC to place an inmate in administrative segregation. The inmate is normally permitted out of his or her cell for a minimum of two hours per day, plus time for a daily shower. The purpose of administrative segregation, as explained in CCRA subsection 31(1), is "to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates."

[49] CCRA subsection 31 (3) gives the institutional head the discretion to order administrative segregation if certain conditions are met:

Grounds for confining inmate in administrative segregation	**Motifs d'isolement préventif**

31 (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that	**31 (3)** Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas :
(a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;	**a)** que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité;
(b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or	**b)** que son maintien parmi les autres détenus nuirait au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2);
(c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.	**c)** que son maintien parmi les autres détenus mettrait en danger sa sécurité.

[50] CCRA sections 36 and 37 deal with the rights of inmates who are placed in administrative segregation:

Visits to inmate

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

Idem

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

Inmate rights

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

(i) limitations specific to the administrative segregation area, or

(ii) security requirements.

Visites par un professionnel de la santé

36 (1) Le détenu en isolement préventif reçoit au moins une fois par jour la visite d'un professionnel de la santé agréé.

Visites par le directeur

(2) Le directeur visite l'aire d'isolement au moins une fois par jour et, sur demande, rencontre tout détenu qui s'y trouve.

Droits du détenu

37 Le détenu en isolement préventif jouit, compte tenu des contraintes inhérentes à l'isolement et des impératifs de sécurité, des mêmes droits et conditions que ceux dont bénéficient les autres détenus du pénitencier.

[51] CCRA section 87(a) requires the institutional head to consider the inmate's health, including his or her mental health, when making the decision to place or maintain the inmate in administrative segregation.

[52] CCRA sections 97 and 98 authorize the creation of Rules and Commissioner's Directives, some of which govern the practice of administrative segregation. Paragraph 19 of CD 709 precludes administrative segregation for those who meet certain criteria, including those "with serious mental illness with significant impairment." The policy defines that as including symptoms associated with psychotic, major depressive and bipolar disorders resulting in significant impairment in functioning.

[53] Commissioner's Directive 710-2-3, entitled "Guidelines for Inmate Transfer Processes," provides at section 43:

> Prior to a transfer for admission to psychiatric hospital care in a CSC Treatment Centre, or admission to Intermediate Mental Health Care within a Treatment Centre or other institution, the inmate must meet the clinical admission criteria in accordance with the Admission and Discharge Guidelines listed in the Integrated Mental Health Guidelines.

[54] Article 10.2 of the *Integrated Mental Health Guidelines* provides that "non-emergency referrals to Psychiatric Hospital and Intermediate Mental Health Care are coordinated through the Mental Health Team at the offender's mainstream institution, who will ensure that the referral is appropriate and adheres to the admission guidelines." In this instance, as noted above, the Mental Health Team at the Applicant's institution does not support his transfer to RPC.

V. **Preliminary issue**

[55] At the hearing of this matter on April 10, 2019, counsel for the Attorney General of Canada unexpectedly advised the Court that they were under the belief that the proceedings that day related to a motion for interlocutory relief within an application, with further proceedings on the actual application to follow. Counsel for Mr. Toutsaint responded that they had proceeded on the understanding that the hearing was on their application for a mandatory interlocutory injunction pending the determination of the CHRC complaint.

[56] Counsel for the Attorney General stated that certain decisions they had made in preparation for the hearing, such as foregoing cross examinations and not questioning the Court's jurisdiction to grant relief under *Federal Courts Act* section 44, were made to accommodate the hearing of the motion on an expedited basis, and that they would not make such decisions in the broader application when "in the fullness of time that is perfected and set down for hearing." Counsel for the Attorney General also stated that they may have sought to file more evidence and may have wished to cross-examine Dr. Preece and Nicole Kief, a legal advocate for Mr. Toutsaint, on her several affidavits. They would not, however, have attempted to cross-examine the Applicant under any circumstances, given his mental disorders.

[57] The confusion over the nature of the proceedings may have arisen because the originating document, filed on February 27, 2019, is a Notice of Application. It contemplated what may be described as a free-standing application for an injunction under *Federal Courts Act* section 44 and CHRA sections 3 and 5. A case management order was issued on February 28, 2019. The

matter was set down for hearing as a motion at the General Sittings in Vancouver on March 5, 2019 and was then adjourned at the Respondent's request to allow it more time to prepare. A case management judge was appointed on the same date.

[58] By Order dated March 14, 2019, the Court stated it was "becoming clearer that an expedited hearing process diminishes the necessity of interim injunctive relief" and that the Court had been advised "that the Respondent will forego cross examination in order to assist with an expedited hearing." I understand these words to mean that the Court had addressed the potential need for interim relief under Rule 373 of the *Federal Courts Rules*, SOR/98-106.

[59] In a further order dated March 26, 2019, the Court adjourned "[t]he hearing of the application for an injunction…*sine die*." In an Order dated March 28, 2019, the Court considered that "the hearing of the injunction application was originally scheduled for March 28, 2019," and ordered that "[t]he parties [were] to make themselves available anytime during the week of April 8 to 12, 2019 for a one day hearing of the injunction application."

[60] In refusing the Attorney General's request to file further affidavit evidence, the March 28, 2019 Order stated that "the injunction motion was intended to proceed as an expedited hearing." However, the Order refers to the proceeding as an "injunction application" in a number of paragraphs. Further, the Court directed on April 1, 2019, that "the injunction application will be heard on Wednesday, April 10, 2019…for a duration of one day."

[61] It is not clear to the Court what the Respondent considered would be the actual application that would follow the April 10, 2019 hearing. The relief being sought was a mandatory interlocutory injunction pending the determination of the CHRC complaint. The Court does not have jurisdiction to deal with the merits of the Applicant's complaint to the CHRC, other than through an application for judicial review after a decision on the complaint has been rendered. The Court could grant an interlocutory injunction under Rule 373 of the *Federal Courts Rules* pending the outcome of those proceedings but could not usurp the jurisdiction of the CHRC to consider the complaint, or for that matter, that of the Canadian Human Rights Tribunal (CHRT) if the complaint was referred to them for determination.

[62] It appears that the Respondent may have assumed that the proceedings were in the nature of the interim relief contemplated by Rule 373. But that was clearly not the Applicant's understanding, nor that of the Court in the case management proceedings leading up to the April 10, 2019 hearing. It is regrettable that counsel for the Attorney General did not seek to clarify their understanding until the injunction hearing itself, as their understanding is not supported by the record. In any event, I am satisfied that the Respondent has suffered no prejudice by the procedure followed.

[63] I advised counsel for the Attorney General at the hearing that I would take their submissions under consideration but that they should be prepared to argue the merits of the motion. They were, and they did. Counsel advised that they were "ready to oppose the application for the injunction of the relief sought in the application and in the notice of motion."

[64] In the result, the Attorney General did not challenge the Court's jurisdiction to issue the remedy sought under *Federal Courts Act* section 44. This Court must still be satisfied that it has the jurisdiction to issue any remedy that Mr. Toutsaint seeks before it can proceed to determine the matter. Given the lack of a challenge on that ground, the Court can deal with it without extensive reasons.

[65] This Court is empowered by Parliament to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so": *Federal Courts Act*, s 44. The courts have previously accepted that section 44 gives the Federal Court jurisdiction to grant interlocutory injunctions for proceedings before the CHRC: *Colasimone v Canada (Attorney General)*, 2017 FC 953 at para 7; *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 at para 37, 157 DLR (4th) 385.

[66] In the circumstances and absent any argument to the contrary, I am satisfied that the Court has jurisdiction to grant the relief Mr. Toutsaint seeks. The question remains whether the relief should be granted.

[67] I note that this proceeding differs from the motion considered in *Boulachanis v Canada (Attorney General)*, 2019 FC 456, a decision brought to my attention by Applicant's counsel after the hearing. The underlying matter in that case was an application for judicial review before the Federal Court of a refusal to transfer the applicant from a male institution to a female institution. A mandatory interlocutory injunction was granted by the motions judge on a

determination that the applicant had demonstrated a strong *prima facie* case of discrimination, would suffer irreparable harm if not transferred and enjoyed the balance of convenience.

[68] The transfer order was appealed to the Federal Court of Appeal, which granted a stay pending the outcome of the judicial review in the Federal Court: *Canada (Procureur Général) c Boulachanis*, 2019 CAF 100. I note that the Court of Appeal stay decision suggests that the motions judge did not have sufficient evidence of harm and did not sufficiently consider Ms. Boulachanis's escape risk. In the circumstances, I do not consider the decision at first instance to be helpful in deciding this matter.

VI. **Analysis**

[69] The nature of the relief Mr. Toutsaint seeks is mandatory in that, if granted, it would force the Respondent to take action in accordance with the terms of the order. At the outset, I would note that the Court will not consider Mr. Toutsaint's general claim for relief "requiring CSC to refrain from discriminating against the Applicant." This particular claim was not argued during the April 10, 2019 hearing. Further, as a government institution, CSC is obliged to respect both the *Charter* and the CHRA. It is not this Court's role to reiterate this point absent a finding of discrimination, which is the very issue currently before the CHRC. This Court's only consideration is whether Mr. Toutsaint meets the test required for the Court to grant other relief while this determination unfolds.

[70] To issue an interlocutory injunction regarding the other requested relief, the Court must be satisfied that Mr. Toutsaint meets the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR*].

A. *Strong prima facie case*

[71] Under the first branch of the *RJR* test, it would have been sufficient for Mr. Toutsaint to demonstrate that there was a serious question to be tried in the underlying matter (i.e., the CHRC complaint). It would then be necessary for him to demonstrate that he would suffer irreparable harm if this Court did not grant the relief he seeks. Mr. Toutsaint would then have to show that the balance of convenience favours granting the injunction.

[72] However, in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*CBC 2018*], the Supreme Court of Canada clarified that in the case of an application for a mandatory interlocutory injunction, the Applicant must demonstrate that he has a strong *prima facie* case. This is because the potentially severe consequences for the Respondent require a more in depth review of the merits of the underlying matter at the interlocutory stage. Here, the grant of a mandatory interlocutory injunction would disrupt the Respondent's offender management procedures and impose additional costs. See *Colasimone*, above at para 14.

[73] The Supreme Court of Canada articulated what is meant by a strong *prima facie* case at paragraph 17 of *CBC 2018*:

> This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a

> "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[74] In the result, to establish a strong *prima facie* case of discrimination, the Applicant must show that it is very likely that he can demonstrate that he had a characteristic protected from discrimination by the CHRA, that he experienced an adverse impact and that the protected characteristic was a factor in the adverse impact: *Lafrenière v Via Rail Canada Inc,* 2017 CHRT 29 at para 22.

[75] The Applicant argues that he has a strong *prima facie* case that is likely to succeed before the CHRC and the CHRT. He contends that at the relevant times, he had characteristics protected from discrimination; namely, that he is Indigenous and suffers from mental disability. Mr. Toutsaint points to his prolonged periods of administrative segregation and the resulting exacerbated symptoms of his mental illnesses as evidence of the adverse impact he has experienced. He contends that his protected characteristics were a factor in that adverse impact. In particular, they have made him unable to integrate into the general prison population in the several institutions in which he has been placed. He says that he is in need of trauma therapy in an environment where health care staff are available at all times and are trained to deal with serious mental illnesses and risks of suicide.

[76] The effects of administrative segregation were addressed in an Ontario Superior Court of Justice decision: *Canadian Civil Liberties Association v Canada (Attorney General)*, 2017 ONSC 749. In brief, the Court found that administrative segregation:

> - Amounted to a significant deprivation of liberty beyond that which necessarily flowed from imprisonment;
>
> - Imposed psychological stress capable of causing serious permanent negative mental health effects;
>
> - Caused sensory deprivation and can alter brain activity shortly after admission; and
>
> - Posed a serious risk of negative psychological effects when prolonged.

[77] The Superior Court held that the use of prolonged segregation breached *Charter* section 7, requiring a declaration of invalidity: at paras 272–273. On appeal, the Ontario Court of Appeal upheld the decision at first instance in part but declared that sections 31–37 of the CCRA also violated the protection against cruel and unusual treatment in *Charter* section 12, could not be justified under section 1 and were of no force and effect: 2019 ONCA 243 at paras 119, 126, 130, 150.

[78] An extensive review of the jurisprudence relating to the placement of mentally ill inmates in administrative segregation can also be found in *Brazeau v Canada (Attorney General)*, 2019 ONSC 1888, a case in which summary judgment was granted in a class action for breach of the class members' *Charter* section 7 rights. See also *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62, in which the Supreme Court of British Columbia found that CSC's administrative segregation regime perpetuates the disadvantage faced by

Indigenous prisoners as they are overrepresented therein due to factors associated with their social history, including gang affiliation and entrenched violence.

[79] The CHRC, in its 2015 Annual Report, advised that administrative segregation should only be used in exceptional circumstances, as a last resort, for a very brief time, and never with inmates with serious mental health issues.

[80] There is no question that in his complaint to the CHRC, the Applicant will be able to point to the large body of evidence that has accumulated pointing to the adverse effects of administrative segregation, notwithstanding that it has often been his preference rather than admission to the general population of the institutions in which he has been held. The onus will then shift to the Respondent to show that it has made efforts to reasonably accommodate, and that it would cause undue hardship to eliminate the use of segregation in the Applicant's case.

[81] This case is analogous, the Applicant argues, to *Tekano v Canada (Attorney General)*, 2010 FC 818, in which this Court, on judicial review, quashed the CHRC's refusal to refer a complaint to the CHRT. There are factual similarities to the present matter in that Mr. Tekano resisted treatment and often preferred administrative segregation to being in living units with other prisoners. He also had a serious criminal record and was violent and threatening to other prisoners, correctional staff and medical personnel. Mr. Tekano alleged in his complaint that CSC failed to accommodate his mental disability by repeatedly placing him in segregation or isolation. He had spent time at the Pacific RTC, but he was transferred back to a maximum security institution because he had been violent towards the mental health staff. The Commission

accepted the investigator's report that CSC was accommodating Mr. Tekano's disabilities. Madame Justice Gauthier held that the decision to dismiss the claim on the ground that it did not warrant further inquiry was not within the range of acceptable outcomes on the facts and the law.

[82] According to the CHRC's 2015 Annual Report to Parliament, Mr. Tekano was ultimately sent again to a RTC where he was able to receive medication, therapy and treatment for his mental health issues, and where he reduced his self-harming. As far as the Court could determine from the record, this was not as a result of a mandatory interlocutory injunction but rather because of a treatment decision by CSC.

[83] I accept that the weight of evidence is very much against the use of administrative segregation in general, and particularly in the case of mentally ill offenders. The evidence is that it is disproportionally used in the case of Indigenous offenders. There is no doubt, based on the evidence presented, that prolonged confinement in administrative segregation or protective isolation can have profoundly deleterious effects on inmates. The use of segregation also amounts to what is referred to in the literature and jurisprudence as a "prison within a prison." That implicates offenders' liberty interests notwithstanding that they are serving sentences in detention.

[84] The Respondent contends that the case they have to answer is not about administrative segregation and that they would have approached the matter very differently if it was. The Notice of Application before the Court is not for an order to prevent the use of segregation by CSC in general or specifically in the Applicant's case, but for his mandatory transfer from Saskatchewan

Penitentiary to RPC, for collateral relief relating to the nature of the treatment he receives and for access to Dene cultural practices.

[85] In reply, counsel for the Applicant argued that while they had not sought an order to prevent the use of segregation, such a remedy was encompassed within the clause of "such other relief as this honourable court may deem just," included in the Notice of Application. I agree with the Respondent that a "such other relief" clause is not meant to be construed so broadly, but rather is meant to cover incidental or collateral matters related to the main relief sought. In this instance, a finding against the use of administrative segregation would be neither incidental nor collateral.

[86] As noted above, while RPC as a whole is administered by CSC as a penitentiary, part of the centre is an acute care hospital licensed under provincial legislation. The evidence is that Saskatchewan Penitentiary uses both administrative segregation and observation cells, whereas RPC uses the latter when there are critical circumstances involving imminent danger. While the cells are similar, the observation cells have fewer amenities and the inmate is not permitted personal items, as they would be in segregation. The inmate under observation because of self-harming is also required to wear a simple smock, or "baby doll," instead of the normal clothing he would be permitted in segregation. At times, the treatment centres also employ physical or "Pinel" restraints to prevent inmate patients from harming themselves or others. The Applicant was confined in Pinel restraints for an extended period of time while at a centre in Quebec.

[87] The Respondent's position, in essence, is that mental health care decisions, such as those mandated by the *Saskatchewan Mental Health Services Act*, should be made by mental health care professionals who are treating the inmate patient and not by others, including this Court: *Colasimone,* above, at para 12. And where there is evidence of accommodation, as here, the Respondent argues, the Applicant fails to make out a strong *prima facie* case of discrimination.

[88] I agree with the Respondent that the Applicant is asking that the Court substitute its judgment for that of the medical experts who are treating Mr. Toutsaint. Moreover, it is premature, as the Respondent argues, to conclude that the Applicant is very likely to succeed on his complaint to the CHRC. The complaint is at a very early stage of the process and has yet to result in referral to an inquiry. There is considerable evidence before the Court on this application of efforts to accommodate the very serious challenges presented by Mr. Toutsaint's mental and behavioural disorders, such as through transfers to other institutions, including RPC and other treatment centres. That these efforts to date have not proven to be successful beyond supporting brief periods of stability does not preclude a finding of reasonable accommodation. The evidence shows an active and substantial therapeutic program administered by qualified medical professionals attempting to address the Applicant's needs. Is it realistic to conclude that they will be resolved by a transfer to RPC, when that has not proven to be the answer in the past?

[89] To grant the relief requested, I would be required to distinguish the judgment of my colleague, Madame Justice McDonald, in *Colasimone,* above, or disagree with it in a manner consistent with the principles of judicial comity. To issue the injunction could lead this Court into an area which it is ill-fitted to manage. As Madame Justice McDonald states in *Colasimone,*

at paragraph 12, "[t]his Court is not in any position to substitute its decision for that of medical experts who have assessed the Applicant." I appreciate that the Applicant has sought to overcome that disqualification by submitting the expert views of Dr. Boyd and Dr. Preece, but for the reasons mentioned above, I am not persuaded that I should give their opinions greater weight than the CSC experts who have had greater contact with the Applicant.

[90] *Colasimone,* as here, was a case seeking injunctive relief from this Court to compel the CSC to provide services to Mr. Colasimone, including a transfer to a RTC pending the resolution of his human rights complaint to the CHRC. Madame Justice McDonald concluded that Mr. Colasimone was not entitled to mandatory injunctive relief, applying the higher threshold on the serious issue branch of the tripartite test.

[91] I note that in *Drennan v Canada (Attorney General),* 2008 FC 10, Madame Justice Mactavish accepted that the Court had jurisdiction to grant limited injunctive relief pending the exercise of the CHRC's screening function. She declined to grant a transfer to a different facility within CSC as had been requested. Justice Mactavish also stressed, at paragraph 24, that in the particular circumstances of that case – the offender was to be released in three weeks – she was not making a determination of whether his human rights complaint should ultimately succeed. She did find that Mr. Drennan had raised a serious issue about the accommodation provided to deal with his physical disability, quadriplegia, and that he would suffer irreparable harm in the short time before his release because of the inadequacy of the accommodation provided. The Court was not persuaded that he would suffer irreparable harm if he was not transferred to a

RTC. In the circumstances, the balance of convenience lay in his favour. Given the significant factual differences, *Drennan* is of little assistance in addressing the issues in this case.

[92] The treating mental health care professionals providing care to Mr. Toutsaint are licensed under provincial legislation and subject to their regulatory bodies. Their treatment of patients within their care must adhere to the standards of the licensing bodies. As described in cross-examination by Mr. Finlayson, the lead psychologist responsible for Mr. Toutsaint's treatment at Saskatchewan Penitentiary, his loyalty is to the college that he practices under and to the clients he works with. Dr. Masood, the consultant psychiatrist who has diagnosed Mr. Toutsaint and is responsible for his overall treatment plan, gave similar evidence.

[93] The evidence is that the mental health team that is actually providing treatment to Mr. Toutsaint at Saskatchewan Penitentiary does not support his transfer to RPC. They believe that it would actually be harmful to him. In their view, he is not ready in terms of engaging and participating in therapy and he requires stability. His history of prior transfers to RPC also does not support a conclusion that he would do better there. It is questionable that he would achieve a greater degree of stability at RPC given the disruption that has accompanied his prior transfers.

[94] A transfer to RPC would also, in Dr. Masood's opinion, constitute negative reinforcement of the Applicant's behavioural problems. The priority was to address his self-harming behaviour through focused, trauma-based therapy and to try to improve his interpersonal relationships. The evidence from Mr. Finlayson is that they have the mental health personnel in place to carry out the treatment plan and to build what he described as a

"therapeutic alliance" with Mr. Toutsaint. These arrangements are not perfect. Dr. Masood, for example, conducts his "visits" with Mr. Toutsaint by video conference, as he is based in Saskatoon. Contacts with mental health workers at Prince Albert are often through the cell door or in a booth with a barrier between the offender and the worker. Nonetheless, the weight of the evidence is that moving the Applicant would jeopardize the progress they have made thus far. There is no assurance that a transfer to RPC would achieve better results. It is not a panacea for the Applicant's problems.

[95] In addition to the evidence of his treating psychiatrist and psychologist, the Respondent submitted the affidavit evidence of Lisa Barton, who directed the Aboriginal intervention program, including the Dene program, at Saskatchewan Penitentiary. Mr. Toutsaint has access to a Dene Elder from his home community of Black Lake who can conduct traditional cultural and spiritual practices. The evidence of the availability of such access is mixed. In at least one instance, a pipe ceremony being arranged was cancelled by the Elder after Mr. Toutsaint brandished a weapon. On another occasion, cold and snow interfered with plans to conduct a sweat. The Applicant objected to the use of that evidence as hearsay. In my view, the emails in which it is found are admissible under the business records exception to the hearsay rule. While the availability of such ceremonies has clearly fallen short of Mr. Toutsaint's expectations, the evidence of the efforts to provide them may support a finding of reasonable accommodation. But that is not a matter for the Court to determine on this application.

[96] Considering the Applicant's evidence and submissions, I am not persuaded that he has established a strong *prima facie* case that he is likely to succeed in the underlying complaint to

the CHRC. While that conclusion is sufficient to dispose of the application before the Court, I think it appropriate to comment on the other aspects of the tripartite test.

B. *Irreparable harm*

[97] The Applicant contends that the irreparable harms he is at risk of suffering are suicide, further self-mutilation, irreversible psychological damage and loss of liberty. These harms are irreparable, he argues, as they cannot be remedied by damages – particularly the risk of suicide. There is a very real risk that he could die before the completion of his human rights complaint if he is not transferred to a treatment centre where he feels safe and can engage in meaningful interaction and in his cultural and spiritual practices. Should he remain in a maximum security institution until the final determination of his complaint, there is a realistic probability that he will suffer further psychological deterioration that could be permanent. Moreover, each day his liberty is restricted in administrative segregation is a day he suffers irreparable harm, as the time can never be made up.

[98] Both Dr. Masood and Mr. Finlayson were of the opinion that Mr. Toutsaint's risk of suicide is low. Dr. Masood's evidence was that during his contacts with Mr. Toutsaint, he was never concerned about the risk of suicide to the point that he would have considered it to be of imminent danger. Had he done so, he testified, he would have certified the Applicant under the provisions of the *Mental Health Services Act.* It is worth noting here that a transfer to RPC does not require certification.

[99] The Applicant's self-harming was chronic but not done with the intention of killing himself, in Dr. Masood's view. Mr. Finlayson supported that assessment and testified that when Mr. Toutsaint had cut his own neck, the experience was extremely traumatizing. He told Mr. Finlayson that he had no intention of dying and could recall the incident in detail. In contrast to the neck slashing, which occurred at a Quebec institution, Mr. Toutsaint's self-harming at Saskatchewan Penitentiary was in the form of repeatedly cutting and reopening the same area on his arm. Mr. Finlayson described this as "non-suicidal self-injury," to which Mr. Toutsaint resorted as a method to cope with frustration and other emotions. While that in itself was considered serious and required intervention, the medical staff was confident that it could be managed. The only practical means to do so in some instances, however, was placement in an observation cell or physical restraints.

[100] The use of self-harming as a coping mechanism could also be construed as a form of manipulation, as Mr. Toutsaint's counsel acknowledged during argument. Mr. Finlayson discounted that possibility during his cross-examination. But there are indications in the record that Mr. Toutsaint resorted to self-harming or threatening self-harm or suicide when he did not get medications he preferred, access to canteen supplies rather than regular meals or some other accommodation in his favour. In a diagnostic review with Dr. Masood on October 18, 2018, the Applicant attributed the self-harming behaviour to mood instability and using those behaviours to prove a point, get heard and to bargain and achieve his demands. That also is consistent with the Saskatchewan Court of Appeal's findings in 2015 based on expert medical opinion.

[101] The law governing irreparable harm was discussed by Stratas JA in *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31:

> To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence carry no weight.
>
> [Citations omitted]

[102] In *Colasimone*, above, the applicant had attempted to commit suicide on two occasions. Justice McDonald was not prepared to find a risk of irreparable harm pending the completion of the CHRC process. She concluded, at paragraph 21, that the institution had appropriate measures in place to protect the applicant from himself if he attempts self-harm.

[103] In this matter, there is compelling evidence that the Applicant is likely to continue to harm himself. But it is not clear that this risk would be reduced if he were transferred to RPC as he was in the past. Moreover, given his history of institutional misbehaviour, it is equally likely that he would continue to act out at RPC and that the treatment team there would be compelled to place him in observation cells similar to those in which he spends much of his time at Saskatchewan Penitentiary.

[104] In the circumstances, and despite the extensive evidence marshalled by his counsel, I am not prepared to find that the Applicant would suffer irreparable harm if the injunction sought was not granted.

C. *Balance of convenience*

[105] The Applicant submits that the balance of convenience favours granting the injunction on the ground that his death by suicide before the final determination of his case, if the injunction were not granted, would indisputably be more inconvenient to the Applicant than transferring him would be to CSC, if the injunction were granted. Granting the injunction, the Applicant argues, would support the purposes of the CCRA, which include carrying out sentences in a safe and humane manner, and would meet CSC's obligation to provide every inmate with essential mental health care.

[106] The Applicant contends that any additional cost to CSC of transferring him to RPC and providing him with treatment there until the final determination of his human rights complaint is trivial in comparison to his serious risk of death, psychological harm and further restriction of liberty. Counsel argued that CSC could simply build more capacity if the current number of available beds was insufficient.

[107] The Respondent submits that the evidence of the present treatment team establishes that the risk of suicide and self-harm is better mitigated in the current environment than it could be at RPC, owing in part to the Applicant's own behavioural issues. This assessment, the Respondent argues, is based on comprehensive and day-to-day knowledge of, and interactions with, the Applicant, and it should be preferred to the Applicant's evidence.

[108] In my view, the effects of ordering a transfer cannot be discounted as trivial. Among other things, the treatment relationship that the Applicant has with the mental health professionals at his present institution would be disrupted. Moreover, CSC would be required to relocate and house the Applicant at RPC, potentially displacing or preventing another inmate from having access to the treatment facilities. The transfer would not be temporary but prolonged, as it would take some time for the CHRC to determine whether to refer the complaint to an inquiry and, if referred, for the inquiry to be held and a decision rendered. The order requested is for the duration of that process.

[109] The Court must also be mindful of the broader public interest, including the safety and security of CSC institutions and of all persons within those institutions. The Applicant has shown little inclination to modify his behaviour and to actively participate in a treatment regime.

[110] In the circumstances, the balance of convenience rests with the Respondent.

D. *Conclusion*

[111] As Dr. Bradford states in the introduction to his December 2017 report: "[t]he administration of a correctional facility providing mental health care is a difficult balancing act between delivering the appropriate mental health assessment and treatment services and providing a security umbrella." That balancing act is not facilitated in my view by the unnecessary intervention of the courts. The issues addressed by Dr. Bradford in his report are systemic in nature and require a systemic response.

[112] The Applicant has failed to demonstrate that he has a strong *prima facie* case in the underlying complaint to the CHRC or that he would suffer irreparable harm if the injunction were not granted. Weighing the competing interests, the balance of convenience rests with the Respondent. The application is, therefore, dismissed. However, as indicated at the beginning of these reasons, I urge the correctional officials to consider whether the time has come to reassess whether Mr. Toutsaint could benefit from another period within the RPC's therapeutic environment.

VII. **Costs**

[113] No costs were requested.

JUDGMENT IN T-385-19

THIS COURT ORDERS that:

1. the application is dismissed, and
2. no costs are awarded.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-385-19
STYLE OF CAUSE:	JOEY TOUTSAINT V ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 10, 2019
JUDGMENT AND REASONS:	MOSLEY J.
DATED:	JUNE 14, 2019

APPEARANCES:

Deborah Charles	FOR THE APPLICANT
Stephen McLachlin Thomas Bean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Prisoners' Legal Services Barrister & Solicitor Burnaby, British Columbia	FOR THE APPLICANT
Deputy Attorney General of Canada Saskatoon, Saskatchewan	FOR THE RESPONDENT