SUPREME COURT OF CANADA

CITATION: John Howard Society of Saskatchewan *v.* Saskatchewan (Attorney General), 2025 SCC 6

APPEAL HEARD: October 8 and 9, 2024
JUDGMENT RENDERED: March 14, 2025
DOCKET: 40608

BETWEEN:

John Howard Society of Saskatchewan
Appellant

and

Government of Saskatchewan (Attorney General for Saskatchewan)
Respondent

- and -

Attorney General of Canada,
Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Alberta,
Alberta Prison Justice Society,
Federation of Sovereign Indigenous Nations,
Aboriginal Legal Services Inc.,
British Columbia Civil Liberties Association,
Criminal Lawyers' Association (Ontario),
Queen's Prison Law Clinic,
Association des avocats.es carcéralistes du Québec,
Canadian Civil Liberties Association,
Canadian Prison Law Association and
West Coast Prison Justice Society
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

REASONS FOR JUDGMENT: (paras. 1 to 99)	Wagner C.J. (Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. concurring)
DISSENTING REASONS: (paras. 100 to 297)	Côté J. (Rowe and Jamal JJ. concurring)

John Howard Society of Saskatchewan *Appellant*

v.

Government of Saskatchewan (Attorney General for Saskatchewan) *Respondent*

and

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2025 SCC 6

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Present: Wagner C.J. and Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal, O'Bonsawin and Moreau JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Constitutional law — Charter of Rights — Fundamental justice — Presumption of innocence — Inmate disciplinary proceedings — Standard of proof — Provincial legislation setting applicable standard of proof in inmate disciplinary proceedings at balance of probabilities — Whether inmate disciplinary proceedings where possible sanctions are disciplinary segregation and loss of earned remission are criminal in nature or lead to imposition of true penal consequences — Whether standard of proof on balance of probabilities in inmate disciplinary proceedings infringes right to be presumed innocent until proven guilty — Whether standard of proof on balance of probabilities in inmate disciplinary proceedings infringes principles of fundamental justice — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(d) — The Correctional Services Regulations, 2013, R.R.S., c. C-39.2, Reg. 1, s. 68.

Section 68 of Saskatchewan's *Correctional Services Regulations, 2013* ("*Regulations*") sets at a balance of probabilities the applicable standard of proof in disciplinary proceedings involving inmates in Saskatchewan's provincial correctional institutions who are charged with disciplinary offences. This standard of proof is used in all disciplinary proceedings, including where an inmate is charged with a major

disciplinary offence for which sanctions can include disciplinary segregation for up to 10 days or loss of up to 15 days of earned remission.

Section 68 of the *Regulations* was challenged by the John Howard Society of Saskatchewan. The challenge was initially brought exclusively under s. 7 of the *Charter* on the basis that the residual protection for the presumption of innocence requires proof of guilt beyond a reasonable doubt, as reliance on s. 11(d) of the *Charter* was constrained by the Court's decision in *R. v. Shubley*, [1990] 1 S.C.R. 3, which held that inmate disciplinary proceedings in which disciplinary segregation and loss of earned remission are possible sanctions do not engage s. 11. The application judge held that s. 68 of the *Regulations* does not violate s. 7 of the *Charter* and the Court of Appeal agreed. They concluded that neither the nature of inmate disciplinary proceedings nor the severity of disciplinary segregation and loss of earned remission necessitated the heightened standard of proof. The John Howard Society appeals the s. 7 issue to the Court, and also raises, as a new constitutional issue, the question of whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*.

Held (Côté, Rowe and Jamal JJ. dissenting): The appeal should be allowed, the judgments below set aside and s. 68 of the *Regulations* declared to be of no force or effect.

Per **Wagner** C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ.: Section 68 of the *Regulations* infringes ss. 7 and 11(d) of the *Charter* because it permits the imposition of imprisonment when a reasonable doubt as to the

accused's guilt may exist. Such an infringement cannot be saved by s. 1 of the *Charter*. To the extent that s. 68 of the *Regulations* permits the imposition of disciplinary segregation and loss of earned remission for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect.

The Court can exercise its discretion to consider a new issue of law on appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice. The instant case is one of the exceptional cases where it is appropriate for the Court to exercise its discretion to consider the new constitutional issue raised on appeal, which questions whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*. There is no indication that the Attorney General of Saskatchewan or any other attorney general would be disadvantaged if the Court were to consider the new issue; rather, failing to consider the new issue would create a potential injustice, as there is a risk that unnecessary expenses and delay would result from not considering the issue and the related question of whether *Shubley* remains good law.

Section 11(d) of the *Charter* guarantees all persons charged with an offence the right to be presumed innocent until proven guilty. This presumption requires guilt to be proven beyond a reasonable doubt. Under the tests articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 11 applies to a person charged with an offence when proceedings are criminal in nature or may lead to the imposition of true penal

consequences. The criminal in nature test focuses on the purpose and features of the proceedings themselves and not on the underlying acts that gave rise to the proceedings. The true penal consequence test focuses on the potential impact on the person subject to the proceeding and is always satisfied when there is the possibility of imprisonment.

The Court's decision in *Shubley* held that inmate disciplinary proceedings were not criminal in nature because they lacked the essential characteristics and public accountability purpose of criminal proceedings and did not lead to true penal consequences because disciplinary segregation and loss of earned remission do not constitute a sentence of imprisonment. At the core of *Shubley*'s interpretation of imprisonment is a formalistic adherence to the criminal law's distinction between the sentence of imprisonment imposed on a person and the conditions of imprisonment, a distinction that has been attenuated by subsequent *Charter* jurisprudence. Where an inmate's conditions of imprisonment affect the underlying interests that certain *Charter* rights seek to protect, courts may depart from the formalistic distinction between the sentence and conditions of imprisonment and intervene to give effect to the *Charter*'s purpose. *Shubley*'s application of the true penal consequence test set out in *Wigglesworth* rests on eroded legal foundations. When an inmate faces the risk of disciplinary segregation or loss of earned remission, they face the possibility of additional imprisonment — a true penal consequence. While the decision to depart from a precedent of the Court should not be taken lightly because adherence to precedent furthers values such as the certainty and predictability of the law, *Shubley*'s holding on the true penal consequence test should no longer be considered binding.

Adopting a functional definition of imprisonment gives effect to the liberty-protecting purpose of s. 11. The concept of imprisonment must be defined by reference to its substantive attributes, rather than unduly fixating on the form in which such a consequence is often imposed. Imprisonment under the true penal consequence test must therefore include state-imposed sanctions that, in light of their attributes, represent a deprivation of liberty at least as severe as that resulting from an initial sentence of imprisonment. In assessing whether a sentence of imprisonment and the sanctions in question are equivalent in severity, a court must consider the fact that sentences of imprisonment can include non-carceral punishments that share the fundamental features of significantly curtailing an individual's freedom of movement and segregating them from others.

Both disciplinary segregation and loss of earned remission significantly curtail an inmate's freedom of movement while exacerbating or continuing the inmate's segregation from society and therefore fall within a functional definition of imprisonment. Disciplinary segregation has always been understood as a uniquely severe form of punishment for inmates. While the conditions of disciplinary segregation have evolved over time, this form of punishment by its very nature has the effect of significantly curtailing an inmate's freedom of movement while severely limiting access to human interaction. As for remission, it acts as a *de facto* reduction in an inmate's sentence of imprisonment. The loss of remission as a punishment is therefore functionally equivalent to extending an inmate's sentence of incarceration. Accordingly, both disciplinary segregation and loss of earned remission pass the true

penal consequence test. Because they are available forms of punishment for the commission of a major disciplinary offence, s. 11 of the *Charter* is engaged by those offences. Since s. 68 of the *Regulations* permits findings of guilt for a major disciplinary offence to be made where the offences have not been proven beyond a reasonable doubt, it infringes s. 11(d) of the *Charter*.

Section 7 of the *Charter* provides residual protection for the presumption of innocence. In proceedings where a moral judgment is made and severe liberty-depriving consequences are imposed as punishment, s. 7's residual protection operates to require proof beyond a reasonable doubt. In the instant case, even if s. 11 did not apply, s. 7 would require Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. Accordingly, s. 68 of the *Regulations* also infringes the presumption of innocence protected by s. 7 of the *Charter*. Major disciplinary offence proceedings involve an accusation of moral wrongdoing and the potential imposition of severe liberty-depriving consequences. Because s. 68 of the *Regulations* permits findings of guilt on a lesser standard, s. 7 of the *Charter* is infringed.

In the instant case, while promoting the expeditious resolution of inmate disciplinary proceedings constitutes a pressing and substantial objective, there is an obvious *Charter*-compliant alternative, which is to use the standard of proof beyond a reasonable doubt. As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

Per **Côté**, Rowe and Jamal JJ. (dissenting): The appeal should be dismissed. *Shubley* remains good law and a binding precedent and must be applied in the present case. As in *Shubley*, Saskatchewan's inmate disciplinary proceedings are not criminal in nature but are administrative and designed to regulate and maintain prison order, and the sanctions stemming from the disciplinary proceedings are not true penal consequences within the meaning of s. 11 of the *Charter*. Because the *Wigglesworth* test is not met, s. 11 has no application to Saskatchewan's inmate discipline regime and it is therefore unnecessary to decide whether s. 11(d) is infringed. While s. 7 of the *Charter* is implicated because of the evident engagement of an inmate's liberty interests, there is no infringement because the presumption of innocence as a principle of fundamental justice under s. 7 does not require a standard of proof beyond a reasonable doubt in the context of Saskatchewan's inmate disciplinary process.

There is agreement with the majority that the Court should hear the new constitutional issue of whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter*, as the instant case meets the stringent test for hearing a new issue on appeal. There is no concern with procedural prejudice, and the s. 7 *Charter* analysis of the courts below is intrinsically linked to considerations under s. 11(d). To refuse to hear the issue would be counter to the broader interests of the administration of justice.

Shubley considered the *Wigglesworth* test in the inmate disciplinary context. It remains good law and is a precedent that binds the Court to find that neither

loss of earned remission nor disciplinary segregation in the inmate disciplinary context satisfies the *Wigglesworth* test. The principle of *stare decisis* is a foundational doctrine that calls on courts to stand by previous decisions and not disturb settled matters. This doctrine promotes legal certainty and stability, and the legitimate and efficient exercise of judicial authority. It requires judges to give effect to legal principles that are well settled and depart from them only when there is a proper basis for doing so. *Shubley* should not be overturned on the basis of unworkability or on the basis that its holding has been subject to foundational erosion. First, the fact that provinces may impose different inmate disciplinary mechanisms does not give rise to unworkability: differing levels of protection for inmates in different provinces are to be expected in a federation where the division of powers allows for the creation of different rules concerning the management of correctional facilities in each province alongside of the interpretation of laws by the courts in each province.

Second, *Shubley* has not been subject to foundational erosion. With respect to the criminal in nature prong of the *Wigglesworth* test, recent case law has not changed its focus; the proceeding still remains paramount to the analysis, as it was in *Shubley*. As for the true penal consequence prong of the *Wigglesworth* test, the jurisprudence since *Shubley* has not disturbed its rationale. There has been no major shift in the foundation of *Shubley*'s holding on the loss of earned remission or on segregation. Furthermore, the majority's reliance on s. 10(c) and s. 7 *Charter* jurisprudence to make the point that in other *Charter* contexts the Court has not used a formalistic method of interpretation in maintaining a distinction between a sentence of

imprisonment and conditions of imprisonment is problematic, factually and legally. Factually, each of the cited cases involved severe segregation in separate wings and institutions and a lack of procedural fairness, unlike in the instant case, where inmates subject to segregation are generally confined to their own cells and, for the most part, still have access to cellmates, natural light, and television, and where all inmates facing disciplinary sanctions have access to procedural rights. From a legal standpoint, the s. 10(c) and s. 7 cases predate *Shubley* and therefore cannot be used to overturn a precedent on the basis of foundational erosion, since proper methodology requires that foundational erosion must have occurred after the precedent was decided. As well, the interpretative approaches to s. 10(c) and s. 11 are markedly different, as s. 11 has been given a narrower interpretation.

Section 11 does not apply to Saskatchewan's inmate disciplinary proceedings because it does not satisfy the test set out in *Wigglesworth*. The test is twofold. First, it asks whether the proceedings themselves are criminal in nature. Second, it asks whether a sanction arising from the proceedings can amount to a true penal consequence. Both prongs need not be satisfied to trigger the application of s. 11; one is sufficient. The criminal in nature prong involves an examination of the nature of the proceeding. The underlying act which gave rise to the proceeding is not relevant. The true penal consequences prong involves an examination of the purpose of the sanction in connection with its magnitude, although the magnitude is not determinative. The purpose of the sanction remains the focus of the inquiry to preserve the dichotomy between a sanction within the criminal realm intended to serve the purposes of

denunciation, punishment, and stigma for a wrong done to society at large and a sanction designed to maintain compliance. Regard must be had to whether the magnitude of the sanction is determined by regulatory considerations rather than principles of criminal sentencing.

Saskatchewan's inmate disciplinary proceedings do not meet the two-step test in *Wigglesworth* and therefore do not engage s. 11. They are administrative, not criminal, in nature. They are designed to maintain prison order and provide efficient, yet fair, resolution of misconduct allegations. They are not designed to redress wrongs to society as criminal proceedings are apt to do. This makes the standard of proof set out in s. 68 of the *Regulations* constitutionally compliant, as held in *Shubley*.

Under the criminal in nature prong of the test, the objective of the legislation is to maintain order and discipline in correctional facilities in Saskatchewan. This is in accordance with *Shubley*, where the inmate disciplinary proceedings under review in that case were implicitly aimed at promoting the orderly regulation and over-all good government of correctional institutions. The objective of maintaining order is advanced by the standard of proof that was chosen for the purpose of providing both adequate procedural protection to inmates and administrative agility to administrators of institutions. The process leading to the sanction in *Shubley* was conducted informally, swiftly, in private, and with no court involvement. By contrast, the Saskatchewan inmate discipline regime has more formality in its proceedings: the *Regulations* set out a list of offences, classify them as minor or major and assign

severity of sanction on that basis, and require the prison administration to issue a notice of charge, provide for a full and fair hearing, and prescribe the rights of the inmate in this process. While these factors militate towards a finding of criminal in nature, they alone are insufficient to satisfy the criminal in nature prong. In the present case, there was no arrest or appearance before a court of criminal jurisdiction, no criminal record has resulted from it, and no use of words traditionally associated with the criminal process, such as guilt, acquittal, indictment, summary conviction, prosecution, and accused. There is no basis on which to suggest that these hearings are anything but administrative and regulatory in nature, intended to further the purpose of maintaining internal prison discipline. To hold that these proceedings are criminal in nature would fly in the face of both *Shubley* and *Wigglesworth*.

Under the true penal consequence prong of the test, segregation and loss of remission as possible consequences are at issue. *Shubley* ruled that both sanctions concerned the manner in which the inmate serves their time rather than the imposition of a new sentence and found their purpose to be entirely commensurate with the goal of fostering internal prison discipline. *Shubley* found those sanctions to be not of a magnitude or consequence that would be expected for redressing wrongs done to society at large. Applied to the instant case, the outcome is the same. In *Shubley*, close confinement for five days with a special diet that fulfilled basic nutritional requirements was declared constitutionally compliant; the maximum for that type of close confinement under the Ontario inmate disciplinary scheme was 10 days. In the instant case, the legislation provides for segregation to a cell, unit, or security area for a period

not exceeding 10 days. There is no basis on which to depart from the conclusions reached in *Shubley*. Those conclusions, in conjunction with the purpose of the sanction being clearly of an administrative and regulatory nature, militate against a finding of segregation being a true penal consequence. The purpose of imposing a loss of remission is not to add to an inmate's sentence, but to maintain order within a correctional institution. The application judge rightly referred to the cancellation of earned remission as a tool for prison administration to ensure the orderly running of a prison. The sanction is imposed not to punish or denounce, but to encourage compliance and deter breaches of the facility rules, which makes the consequence non-penal.

Section 7 is engaged but is not infringed by Saskatchewan's inmate disciplinary proceedings because the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, is applied in conjunction with the requirements of procedural fairness that serve as residual protection under s. 7. The test to determine whether there has been a violation of s. 7 of the *Charter* unfolds in three steps: (1) whether there was a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests; (2) the identification and definition of the relevant principle of fundamental justice; and, (3) whether the deprivation was in accordance with the principle of fundamental justice. The first step of the analysis is not under debate in the instant case; when an inmate is faced with a sanction that includes the loss of earned remission and/or disciplinary segregation, there is a direct deprivation of liberty. With respect to the second step, the question is simply whether the presumption

of innocence as a principle of fundamental justice requires application of the criminal standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

As for the third step, the deprivation of liberty stemming from s. 68 of the *Regulations* is in accordance with the principles of fundamental justice at issue. The concern is to ensure that the presumption of innocence within s. 11(d), which firmly operates during a criminal trial, applies at other stages of the criminal law process. Section 7 acts as residual protection of the liberty interests of the accused persons during the criminal process and may, depending on the context, require proof beyond a reasonable doubt outside the trial stage of the criminal process. Two possible requirements that can be of assistance to determine which standard of proof applies under s. 7 are (1) whether the proceeding involves a determination of guilt or (2) whether the proceeding entails serious consequences analogous to a criminal sentence. These two requirements are not met in the instant case. The conclusion reached through the inmate disciplinary process does not amount to a determination of guilt. An inmate disciplinary proceeding cannot be analogized to a criminal trial, where it is incumbent on the prosecution to establish guilt beyond a reasonable doubt. Inmate disciplinary proceedings are administrative in nature, which means that they do not automatically attract the criminal standard of proof nor involve a determination of guilt in the criminal, penal sense. Nor does the language contained in the legislation support the conclusion that an inmate disciplinary proceeding leads to a determination of guilt; the discipline panel will either find that the inmate committed the disciplinary offence or dismiss the charge. The inmate disciplinary proceedings are performing an assessment

of the inmate's conduct to impose the least onerous condition on their residual liberty depending on the seriousness of the offence; the scheme is structured to make severe forms of punishment available only as a consequence of a major disciplinary offence. The inmate discipline regime permits the imposition of a sanction, not a sentence in a criminal context. The sanction, in contrast to a sentence, is not for the purpose of redressing a moral wrong to society, nor does it carry social stigma or profound effects.

In the present case, the procedural guarantees provided to inmates in the legislation are sufficient to ensure a fair process. The Court's jurisprudence clearly indicates that the question of standard of proof under s. 7 can be folded into discussions of procedural fairness and where the standard required by s. 7 is unclear, the presence of strong procedural guarantees may be decisive in determining whether s. 7 is infringed. The procedural guarantees that an inmate faced with disciplinary sanctions may claim include the right to be informed of the facts alleged against them, to a hearing that they can attend, to make arguments, to be represented by counsel, to consult the record, to call witnesses, to cross-examine, to certain rules of evidence, to an adjournment, and to a reasoned decision. Most of these protections are included in the current regime and therefore procedural guarantees offered to the inmates under that regime are sufficient to ensure a fair process as required by s. 7.

Having found no infringement of s. 7 or s. 11(d), there is no need to proceed to an analysis under s. 1 of the *Charter*. However, if s. 68 had not been constitutionally compliant, the s. 1 determination should have been remitted to the

application judge. There is disagreement with the majority's conclusion that s. 68 fails the proportionality test having regard to the standard of proof beyond a reasonable doubt codified for inmate disciplinary proceedings in the federal regime. Such a conclusion fails to account for the province's ability and resources to administer its own prison system. It is not the Court's role to question a province's ability to efficiently administer its correctional institutions on the basis of the legislative choices of the federal government.

Cases Cited

By Wagner C.J.

Overruled: *R. v. Shubley*, [1990] 1 S.C.R. 3; **applied:** *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; **considered:** *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; **referred to:** *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678; *R. v. J.J.*, 2022 SCC 28; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *R. v. Seaboyer*, [1991] 2 S.C.R. 577; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *R. v. Généreux*, [1992] 1 S.C.R. 259; *R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Edwards*, 2024 SCC 15; *Canada (Attorney General) v. Power*, 2024

SCC 26; *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *Jones v. Cunningham*, 371 U.S. 236 (1962); *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79; *Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679; *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118; *Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629.

By Côté J. (dissenting)

R. v. Wigglesworth, [1987] 2 S.C.R. 541; *R. v. Shubley*, [1990] 1 S.C.R. 3; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Pearson*, [1992] 3 S.C.R. 665; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. J.J.*, 2022 SCC 28; *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Brunelle*, 2024 SCC 3; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. Levogiannis*, [1993] 4 S.C.R. 475; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Mills*, [1999] 3 S.C.R. 668; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392; *R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349; *R. v. Samji*, 2017 BCCA 415, 357 C.C.C. (3d) 436; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1; *Canada (Attorney General) v. Power*, 2024 SCC 26; *Auer v. Auer*, 2024 SCC 36; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *British Columbia Civil Liberties Association v.*

Canada (Attorney General), 2019 BCCA 228, 377 C.C.C. (3d) 420; *Canadian Civil Liberties Assn. v. Canada (Attorney General)*, 2019 ONCA 243, 144 O.R. (3d) 641; *R. v. Miller*, [1985] 2 S.C.R. 613; *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459; *R. v. Tutton*, [1989] 1 S.C.R. 1392; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967; *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429; *R. v. White*, [1999] 2 S.C.R. 417; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328; *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612; *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614; *R. v. Gardiner*, [1982] 2 S.C.R. 368; *R. v. Whitty* (1999), 174 Nfld. & P.E.I.R. 77; *R. v. Lyons*, [1987] 2 S.C.R. 309; *R. v. Noble*, [1997] 1 S.C.R. 874; *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3; *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326; *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33; *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642; *R. v.*

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APPEAL from a judgment of the Saskatchewan Court of Appeal (Schwann, Tholl and McCreary JJ.A.), 2022 SKCA 144, 476 D.L.R. (4th) 641, [2022] S.J. No. 449 (Lexis), 2022 CarswellSask 587 (WL), affirming a decision of Layh J., 2021 SKQB 287, [2021] S.J. No. 471 (Lexis), 2021 CarswellSask 651 (WL). Appeal allowed, Côté, Rowe and Jamal JJ. dissenting.

Pierre E. Hawkins and *Michelle Biddulph*, for the appellant.

Katherine Roy and *Laura Mazenc*, for the respondent.

BJ Wray and *Anusha Aruliah*, for the intervener the Attorney General of Canada.

Andrea Bolieiro and *Emily Owens*, for the intervener the Attorney General of Ontario.

Christophe Achdjian and *Jean-Vincent Lacroix*, for the intervener the Attorney General of Quebec.

Chantelle Rajotte and *Trevor Bant*, for the intervener the Attorney General of British Columbia.

Nicholas Trofimuk and *John-Marc Dube*, for the intervener the Attorney General of Alberta.

Avnish Nanda, for the intervener the Alberta Prison Justice Society.

Leif Jensen and *Michael Seed*, for the intervener the Federation of Sovereign Indigenous Nations.

Emily Hill and *Maxwell Hill*, for the intervener the Aboriginal Legal Services Inc.

Alexandra Belley-McKinnon, *Jean-Philippe Groleau* and *Molly Krishtalka*, for the intervener the British Columbia Civil Liberties Association.

Eric S. Neubauer and *Paul Socka*, for the intervener the Criminal Lawyers' Association (Ontario).

Samara Secter and *Wesley Dutcher-Walls*, for the intervener the Queen's Prison Law Clinic.

Louis-Alexandre Hébert-Gosselin, for the intervener Association des avocats.es carcéralistes du Québec.

Erika Anschuetz and *Alexa Biscaro*, for the intervener the Canadian Civil Liberties Association.

Jessica Magonet and *Max McQuaig*, for the intervener the Canadian Prison Law Association.

David Honeyman, for the intervener the West Coast Prison Justice Society.

The judgment of Wagner C.J. and Karakatsanis, Martin, Kasirer, O'Bonsawin and Moreau JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] A fundamental principle of Canadian law is that the guilt of a person charged with an offence must be proven beyond a reasonable doubt before they are punished with imprisonment. This appeal invites this Court to confirm whether such a principle applies to persons behind the walls of correctional institutions who are charged with disciplinary offences. I conclude that it does.

[2] Section 11(d) of the *Canadian Charter of Rights and Freedoms* guarantees all persons "charged with an offence" the right to be presumed innocent until proven guilty. This Court has long held that this presumption requires guilt to be proven beyond a reasonable doubt (see *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 121). This Court has also recognized that s. 7 of the *Charter* provides residual protection for the presumption of innocence in circumstances where s. 11 does not apply (see *R. v. Pearson*, [1992] 3 S.C.R. 665, at p. 688). In proceedings where a moral judgment is made and severe liberty-depriving consequences are imposed as punishment, such as sentencing hearings with contested aggravating factors, s. 7's residual protection operates to require proof beyond a reasonable doubt (*ibid.*, at p. 686; *R. v. D.B.*, 2008 SCC 25, [2008] 2 S.C.R. 3, at paras. 78-80).

[3] The John Howard Society of Saskatchewan ("JHS") argues that s. 68 of Saskatchewan's *Correctional Services Regulations, 2013*, R.R.S., c. C-39.2, Reg. 1 ("*Regulations*"), infringes ss. 7 and 11(d) of the *Charter* because it sets the applicable standard of proof in inmate disciplinary proceedings at a balance of probabilities. This civil standard of proof is used even in circumstances where severe liberty-depriving consequences may be imposed. Under s. 77(1) of Saskatchewan's *Correctional Services Act, 2012*, S.S. 2012, c. C-39.2 ("*Act*"), inmates in provincial correctional institutions who have been found guilty of a "major disciplinary offence" face potential sanctions that include disciplinary segregation for up to 10 days and loss of up to 15 days of earned remission.

[4] JHS initially challenged s. 68 of the *Regulations* exclusively under s. 7 of the *Charter*, arguing that the residual protection for the presumption of innocence requires proof of guilt beyond a reasonable doubt. The courts below disagreed, concluding that neither the nature of inmate disciplinary proceedings nor the severity of disciplinary segregation and loss of earned remission necessitates the heightened standard of proof. Reliance on s. 11(d) of the *Charter* was constrained by this Court's decision in *R. v. Shubley*, [1990] 1 S.C.R. 3, which held that inmate disciplinary proceedings in which disciplinary segregation and loss of earned remission are possible sanctions do not engage s. 11.

[5] Under the tests articulated in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, s. 11 applies to a person "charged with an offence" when the proceedings (a) are criminal in nature or (b) may lead to the imposition of true penal consequences, such as "imprisonment" (pp. 559-61). In *Shubley*, the majority held that Ontario's inmate disciplinary proceedings were not "criminal in nature" because they lacked the essential characteristics and public accountability purpose of criminal proceedings (p. 20). Nor did they lead to "true penal consequences", because disciplinary segregation and loss of earned remission do not constitute a "sentence of imprisonment" (pp. 21-23).

[6] On appeal, JHS asks this Court to overturn *Shubley* and to hold that Saskatchewan's inmate disciplinary proceedings engage s. 11 of the *Charter*. In JHS's submission, the legal foundations of *Shubley* have been eroded by subsequent jurisprudence from this Court that has clarified the requirements of the *Wigglesworth*

tests and emphasized the importance of adopting a functional, rather than a formalistic, understanding of punishment. JHS argues that, if *Shubley* is overturned, s. 11 should apply to Saskatchewan's inmate disciplinary proceedings because they are criminal in nature and may lead to the imposition of true penal consequences.

[7] As I will explain, I agree that *Shubley*'s application of *Wigglesworth*'s true penal consequence test rests on eroded legal foundations. *Shubley*'s conclusion that disciplinary segregation and loss of earned remission do not engage s. 11 because they do not amount to imprisonment has been attenuated by this Court's consistent direction that judges must interpret the *Charter* in a generous, rather than a formalistic, manner that gives effect to the purpose of the right in question. When an inmate faces the risk of disciplinary segregation or loss of earned remission, they face the possibility of additional imprisonment — a true penal consequence.

[8] Section 11 therefore applies to Saskatchewan's inmate disciplinary proceedings involving the adjudication of a "major disciplinary offence". It follows that s. 68 of the *Regulations* infringes s. 11(d) of the *Charter* because it permits the imposition of imprisonment when a reasonable doubt as to the accused's guilt may exist. Moreover, even if I had concluded that s. 11 does not apply, I am satisfied that s. 68 of the *Regulations* also infringes s. 7 of the *Charter*. These infringements cannot be saved by s. 1 of the *Charter*.

[9] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect.

II. Background and Judicial History

A. *Background*

[10] Saskatchewan's inmate disciplinary process is codified by Part VIII of the *Act* and Part XIII of the *Regulations*. Disciplinary offences are enumerated in s. 54 of the *Regulations*. These offences include assault, gang activity, possession of contraband, and theft. Designated correctional staff are empowered to resolve disciplinary issues informally (s. 71 of the *Act*); if this does not occur, the designated staff member may issue a charge for either a "minor" or a "major" disciplinary offence (s. 72 of the *Act*). Section 55 of the *Regulations* specifies which offences are major. Discipline panels use an inquisitorial model of fact-finding and are required to ensure that inmates receive a "full and fair hearing" (s. 60 of the *Regulations*). Inmates are guaranteed a number of procedural protections, including the opportunity to call witnesses and the right to be informed of the charge and of the evidence to be used against them (ss. 56, 61 and 64 of the *Regulations*).

[11] Section 77(1) of the *Act* provides that, after finding that an inmate has committed a major disciplinary offence, the discipline panel may impose "segregation to a cell, unit or security area for a period not exceeding 10 days" (s. 77(1)(d)) or "forfeiture of a period, not exceeding 15 days, of remission earned" (s. 77(1)(h)). Under Saskatchewan's inmate discipline policy, if there are multiple sanctions arising from separate incidents, these sanctions may be imposed consecutively, which means that an inmate's time in disciplinary segregation may exceed 10 consecutive days (Ministry of

Corrections, Policing and Public Safety – Custody, Supervision and Rehabilitation Services, *Inmate Discipline*, last updated November 9, 2023 (online), s. 15.5). The uncontested evidence of the Attorney General of Saskatchewan ("AGS") is that, in 2019, disciplinary segregation and loss of earned remission accounted for 39 percent and 0.3 percent, respectively, of the punishments imposed on inmates (affidavit of Lindsay Tokarski, at para. 12, reproduced in A.R., at p. 79).

[12] Inmates subject to disciplinary segregation in Saskatchewan are only guaranteed one hour out of their cells each day to permit them to shower, exercise, and go outside (affidavit of Lindsay Tokarski, at para. 13). For the other 23 hours of the day, inmates remain in their cells. Inmates in segregation maintain access to health care as well as to elders, chaplains, and program staff. While in segregation, inmates *may* have a cellmate, television, and natural light. This description reflects administrative practice, but these conditions are not guaranteed by the *Act* or *Regulations*.

[13] Earned remission refers to reductions in an inmate's sentence for good behaviour in a correctional institution. Pursuant to s. 99 of the *Act*, an inmate may obtain remission as provided for in Canada's *Prisons and Reformatories Act*, R.S.C. 1985, c. P-20. Under s. 6(1) of the *Prisons and Reformatories Act*, every prisoner serving a sentence will generally "be credited with 15 days of remission of the sentence in respect of each month and with a number of days calculated on a *pro rata* basis in respect of each incomplete month during which the prisoner has earned that remission by obeying prison rules and conditions governing temporary absence and by actively

participating in programs, other than full parole, designed to promote prisoners' rehabilitation and reintegration".

B. *Court of Queen's Bench for Saskatchewan, 2021 SKQB 287 (Layh J.)*

[14] The application judge held that s. 68 of the *Regulations* does not violate s. 7 of the *Charter*. He began his analysis by noting that the AGS had conceded that s. 7 was engaged because s. 77 of the *Act* enumerates consequences, including loss of earned remission and disciplinary segregation, that may deprive inmates of their residual liberties. The central question to be determined was whether a principle of fundamental justice necessitates that disciplinary offences be proven beyond a reasonable doubt before such consequences are imposed. In the application judge's view, JHS sought the recognition of a new principle of fundamental justice. As a result, he examined whether proof beyond a reasonable doubt in inmate disciplinary proceedings meets the test for the recognition of a new principle as articulated in *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571.

[15] The application judge began his analysis by considering the nature of the proceedings. He noted that it was held in *Shubley* that inmate disciplinary proceedings are "not by their nature criminal proceedings" and have a distinct purpose (para. 69; see also para. 70). He believed that *Shubley*'s characterization of such proceedings needed to animate and inform his s. 7 analysis. He went on to reject JHS's argument that *Pearson* and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, stand for the proposition that proof beyond a reasonable doubt is required under s. 7 anytime

proceedings involve a "determination of guilt" (application judge's decision, at para. 31 (emphasis deleted)). The application judge was of the view that this interpretation "stretches the meaning of guilt" and that those cases were simply referring to a guilty verdict in criminal proceedings (para. 75). He emphasized that many proceedings outside of a criminal trial in which serious consequences may be imposed, such as professional discipline and bail hearings, do not require a standard of proof beyond a reasonable doubt.

[16] The application judge further considered whether the severity of the consequences in question warrants a heightened standard of proof under s. 7. He deferred to this Court's conclusion in *Shubley* that loss of earned remission cannot be equated with imprisonment. He likewise found "nothing in the evidence" to suggest that disciplinary segregation in Saskatchewan is "as severe as one might associate with the term 'solitary confinement'" (para. 86). Finally, he highlighted how only federal legislation requires inmate disciplinary offences to be proven beyond a reasonable doubt. This further bolstered the idea that there is no "significant societal consensus" that a heightened standard of proof in inmate disciplinary proceedings is a principle of fundamental justice (para. 95). For these reasons, the application judge rejected the s. 7 claim.

C. *Court of Appeal for Saskatchewan, 2022 SKCA 144, 476 D.L.R. (4th) 641 (Schwann, Tholl and McCreary JJ.A.)*

[17] The Court of Appeal unanimously concluded that s. 68 of the *Regulations* does not infringe s. 7 of the *Charter*. Rather than framing JHS's claim as seeking the recognition of a new principle of fundamental justice, the Court of Appeal framed the issue as being whether the presumption of innocence applies in inmate disciplinary proceedings and, if so, whether it requires a standard of proof beyond a reasonable doubt.

[18] In rejecting JHS's claim, the Court of Appeal first considered the nature of the consequences that such proceedings may have for inmates, focusing on segregation and loss of earned remission. The Court of Appeal noted that the application judge had found that disciplinary segregation is not the "same thing" as solitary confinement and can only extend to 10 days (para. 32). It then held that loss of earned remission is "not the same" as the imposition of an additional period of incarceration and "is not more time in jail" (para. 37). For these reasons, the Court of Appeal concluded that these consequences are of a different nature than "true penal consequences", which lent support to the idea that inmate disciplinary offences do not require the same standard of proof as criminal offences (para. 40).

[19] The Court of Appeal then turned to the question of whether the nature of disciplinary proceedings suggests that the presumption of innocence applies. In making this determination, the Court of Appeal agreed with the application judge's decision to distinguish this case from *Pearson* and *Demers*. In the Court of Appeal's view, these two cases established that the presumption of innocence requires proof of guilt beyond

a reasonable doubt only for criminal offences that attract true penal consequences. The court further noted that *Pearson* held that the presumption of innocence does not require proof beyond a reasonable doubt every time a deprivation of liberty may occur. The Court of Appeal also considered *Shubley*'s conclusion that inmate disciplinary proceedings are administrative, rather than criminal, in nature. In light of these considerations, the court held that the presumption of innocence does not require a standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

III. Issues

[20] This appeal raises the following issues:

1. Does s. 68 of the *Regulations* infringe s. 11(d) of the *Charter*?

2. Does s. 68 of the *Regulations* infringe s. 7 of the *Charter*?

3. If either s. 7 or s. 11(d) is infringed, can s. 68 of the *Regulations* be saved under s. 1 of the *Charter*?

IV. Analysis

A. *Section 11(d) Should Be Considered*

[21] JHS acknowledges that the question of whether s. 68 of the *Regulations* infringes s. 11(d) is a new constitutional issue raised on appeal.

[22] In *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, this Court reiterated that it can exercise its discretion "to consider a new issue of law on the appeal where it is able to do so without procedural prejudice to the opposing party and where the refusal to do so would risk an injustice" (para. 22, quoting *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 33). The burden is on JHS to persuade this Court to exercise its discretion to consider the new issue in light of all of the circumstances (*Guindon*, para. 23). Because JHS raises a new constitutional question, "[t]he Court must be sure that no attorney general has been denied the opportunity to address [it]" (*ibid.*). Consideration of a new issue on appeal is exceptional, and thus this Court's discretion to hear such an issue should not be exercised routinely or lightly.

[23] In my view, this is one of the exceptional cases where it is appropriate for this Court to exercise its discretion to consider the new issue.

[24] On the question of procedural prejudice, there is no indication that the AGS, or any other attorney general, would be disadvantaged if the Court were to consider the new issue. JHS filed a notice of constitutional question containing the new issue on February 9, 2024. The intervening attorneys general have raised no concerns about the consideration of the new issue and have largely focused their submissions on addressing this issue specifically. The AGS argues that it has not had an opportunity to

file evidence that is fully responsive to the arguments on s. 11(d) and s. 1 (R.F., at paras. 109 and 164). However, this argument is unpersuasive because the question of what s. 7 may require in the inmate disciplinary context engages considerations similar to those engaged by the question of whether s. 11 applies. Both inquiries concern the nature of the proceedings at issue and the degree to which an individual's liberty is in jeopardy. Moreover, the possibility of having to justify a s. 7 infringement under s. 1 was at issue in the courts below.

[25] Failing to consider the new issue would also create the potential for injustice. There is a risk that unnecessary expense and delay would result from not considering the question of whether s. 11(d) is infringed and the related question of whether *Shubley* remains good law. As discussed, *Shubley*'s analysis of whether s. 11 applies in the inmate disciplinary context is relevant to the question of whether s. 68 of the *Regulations* infringes s. 7 of the *Charter*. It would therefore be undesirable for this Court to consider s. 7 without first addressing the status of *Shubley*. This risk of unnecessary expense and delay means that there is a strong public interest in deciding the new issue on appeal. As a result, the question of whether s. 11(d) is infringed should be answered first.

[26] I note that, in coming to this conclusion, I am not establishing a principle of broader application for when accused persons raise claims under both ss. 7 and 11(d) (see *R. v. J.J.*, 2022 SCC 28, at para. 115). The methodology for assessing alleged *Charter* breaches is highly context- and fact-specific (*ibid.*; *R. v. Mentuck*, 2001 SCC

76, [2001] 3 S.C.R. 442, at para. 37). It remains true that ss. 7 and 11(d) are "inextricably intertwined" (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 603).

B. *Section 11(d) of the Charter Is Infringed*

(1) Scope of Section 11

[27] Section 11 of the *Charter* enumerates a series of rights possessed by "[a]ny person charged with an offence". In *Wigglesworth*, this Court developed two tests for determining which "offences" will trigger the protections of s. 11. First, s. 11 can be invoked when the proceedings at issue are "criminal in nature" (p. 559). Proceedings of this kind are "intended to promote public order and welfare within a public sphere of activity" and stand in contrast to "private, domestic or disciplinary matters which are regulatory, protective or corrective" (p. 560). Second, s. 11 can be invoked when the proceedings may lead to the imposition of "true penal consequences" (p. 561). Such consequences include "imprisonment" or a "fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline" (*ibid.*).

[28] The key distinction between the two *Wigglesworth* tests was articulated in *Guindon*. In that case, this Court emphasized that "[t]he criminal in nature test focuses on the process while the [true] penal consequences test focuses on its potential impact on the person subject to the proceeding" (para. 50).

[29] Under the criminal in nature test, the focus of the inquiry is not on the underlying acts that gave rise to the proceedings, but is instead on the purpose and features of the proceedings themselves (*Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at paras. 24 and 28-32; *Guindon*, at para. 45). The presence of analogues to the following features of a criminal trial may suggest that the proceedings at issue are criminal in nature: a charge, an information, an arrest, a summons, and a subsequent criminal record (*Martineau*, at para. 45; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 43). Proceedings may be criminal in nature even in circumstances where they have both a public accountability function and a private, disciplinary one (see *R. v. Généreux*, [1992] 1 S.C.R. 259, at p. 281). The purpose of the penalties may also inform the criminal in nature test, but its consideration is often reserved for the true penal consequence test to avoid "unnecessary repetition" (*Guindon*, at para. 52; see also para. 46).

[30] Importantly for our purposes, the true penal consequence test is "always" satisfied when there is the possibility of imprisonment (*Guindon*, at para. 76). Whether other sanctions, such as fines or monetary penalties, are true penal consequences depends on if they are punitive "in purpose or effect" (*ibid.*). A punitive purpose may be discerned if the sanction is determined by the principles of criminal sentencing rather than by regulatory considerations (*ibid.*; *Martineau*, at para. 62). A sanction's effects may be considered punitive once they are "assessed relative to the conduct in question and the regulatory objective" at issue (*Goodwin*, at para. 46). Where the effects of a

sanction are "out of proportion" to what is required to achieve the regulatory purpose, the sanction will likely constitute a true penal consequence (*Guindon*, at para. 77).

[31] As I discuss below, the key question in this case is whether disciplinary segregation and loss of earned remission constitute forms of "imprisonment" under the true penal consequence test. When imprisonment is understood in a functional rather than a formalistic manner, this question must be answered in the affirmative.

(2) Legal Status of *Shubley*

[32] If *Shubley* remains a binding precedent, it must be concluded that disciplinary segregation and loss of earned remission are not true penal consequences. JHS argues that *Shubley* should be overturned for two reasons: (a) reliance on s. 7 of the *Charter* to provide inmates with procedural protections during disciplinary proceedings has proven unworkable; and (b) the legal foundations of *Shubley* have been eroded. I agree with JHS that *Shubley*'s application of the true penal consequence test should be overturned because it rests on eroded legal foundations. It is unnecessary to address the assertion of unworkability and the legal foundations of *Shubley*'s application of the criminal in nature test.

[33] The decision to depart from a precedent of this Court should not be taken lightly. This is because adherence to precedent furthers values such as the certainty and predictability of the law (*R. v. Sullivan*, 2022 SCC 19, [2022] 1 S.C.R. 460, at para. 64). In some exceptional circumstances, however, a compelling reason will outweigh the

benefits of following precedent and justify a departure (see *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at pp. 1352-53, per Lamer C.J., citing *R. v. Bernard*, [1988] 2 S.C.R. 833, at p. 849, per Dickson C.J., dissenting, but not on this point). It is uncontroversial that one such compelling reason is that the rationale for the precedent in question has been eroded due to significant legal change (see *R. v. Edwards*, 2024 SCC 15, at para. 66; *Canada (Attorney General) v. Power*, 2024 SCC 26, at para. 98; see also *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680, at p. 704).

[34] *Shubley* is an example of this type of precedent. When *Shubley* is situated within the full constellation of this Court's subsequent case law on *Charter* interpretation, it is clear that its reasoning in applying the true penal consequence test rested on a formalistic method of interpretation that has since been consistently eschewed.

[35] This Court has overturned precedents that adopted an overly formalistic method of *Charter* interpretation before (see, e.g., *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paras. 16-25; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 30; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61, at paras. 338-47, per Abella J., dissenting, but not on this point).

[36] Legal interpretation becomes formalistic when there is excessive adherence to matters of form at the expense of substance. When formalism is adopted, legal interpretation becomes a "mechanical and sterile categorization process" that

undermines the law's capacity to achieve its underlying purpose and ignores how understandings of legal concepts must adapt in light of varying social contexts (see *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1332).

[37] Avoidance of formalism takes on heightened importance in constitutional interpretation because a constitution's "function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties" (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). For this reason, this Court has insisted that the interpretation of a *Charter* right be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344).

[38] *Shubley*'s application of the true penal consequence test was formalistic in a way that sits in tension with the contemporary legal landscape on *Charter* interpretation. In that case, an inmate argued that his punishment of disciplinary segregation, coupled with the potential loss of earned remission, constituted a form of imprisonment and was therefore a true penal consequence. On the question of disciplinary segregation, the majority simply stated that the inmate experienced "close confinement for five days on a special diet that fulfils basic nutritional requirements" and that this did not constitute imprisonment (p. 21). On the question of loss of earned remission, the majority rejected the argument that it constituted imprisonment by emphasizing that remission does not technically "shorten a sentence [of]

imprisonment" (p. 22). The majority emphasized that both disciplinary segregation and loss of earned remission are confined "to the manner in which the inmate serves his time" and involve "neither punitive fines nor a sentence of imprisonment" (p. 23 (emphasis added)). In saying so, the majority made it clear that it understood *Wigglesworth* as holding that only formal sentences of imprisonment, rather than any form of state-imposed imprisonment, will pass the true penal consequence test.

[39] By conflating the concept of imprisonment with a formal sentence of imprisonment, the majority in *Shubley* narrowed *Wigglesworth*'s holding that "imprisonment" is a true penal consequence that will always trigger s. 11 of the *Charter*. This narrow interpretation reflected a fixation on the *form* in which imprisonment is typically, but not always, imposed under the law. As discussed below, a functional understanding of imprisonment that defines the sanction in light of its substantive attributes is necessary to give effect to s. 11's liberty-protecting purpose.

[40] At the core of *Shubley*'s interpretation of "imprisonment" is a formalistic adherence to the criminal law's distinction between the sentence of imprisonment imposed on a person and the conditions of imprisonment, a distinction that has been attenuated by subsequent *Charter* jurisprudence (see L. Kerr, "Contesting Expertise in Prison Law" (2014), 60 *McGill L.J.* 43, at pp. 62-63). The conditions of imprisonment have traditionally been understood as falling within the purview of correctional institutions, not courts (see *R. v. Zinck*, 2003 SCC 6, [2003] 1 S.C.R. 41, at para. 18). This abstentionist approach to the conditions of imprisonment emerged in part from the

common law's historical view that a person who had been convicted of an offence and sentenced to prison was "devoid of rights" (*May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 23).

[41] However, over time, Canadian courts came to recognize that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law" (*Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 839). This evolution has gradually led to a recognition that, where an inmate's conditions of imprisonment affect the underlying interests that certain *Charter* rights seek to protect, courts may depart from the formalistic distinction between the sentence and conditions of imprisonment and intervene to give effect to the *Charter*'s purpose. While the importance of departing from this distinction was recognized in *Charter* jurisprudence prior to *Shubley*, this approach gained momentum in subsequent case law from this Court.

[42] For example, s. 10(c) of the *Charter* guarantees everyone who is detained the right "to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful". In the foundational case of *R. v. Miller*, [1985] 2 S.C.R. 613, this Court was asked to decide whether *habeas corpus* was available to challenge the validity of an inmate's placement in a special handling unit, described as a "particularly restrictive form of segregated detention" (p. 617). Given the traditional distinction between the sentence and conditions of imprisonment, there was uncertainty over whether a writ of *habeas corpus* was available to challenge an

individual's detention only if release from that detention would restore their "complete liberty" (p. 634). In rejecting this narrow approach, Le Dain J. recognized that the writ needed to be adapted to reflect the "modern realities of confinement in a prison setting" and the importance of "challenging deprivations of liberty" (p. 641). Accordingly, he held that *habeas corpus* should lie "to challenge the validity of a distinct form of confinement or detention in which the actual physical constraint or deprivation of liberty, as distinct from the mere loss of certain privileges, is more restrictive or severe than the normal one in an institution" (*ibid.*). This reasoning was applied in the companion case of *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662, and to other circumstances of administrative segregation in the companion case of *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

[43] This trilogy of cases made it clear that *habeas corpus* can "free inmates from a 'prison within a prison'" (*May*, at para. 27). It also laid the groundwork for *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, which clarified that *habeas corpus* is available to challenge three different deprivations of liberty: ". . . the initial deprivation of liberty, a substantial change in conditions amounting to a further deprivation of liberty, and a continuation of the deprivation of liberty" (p. 464). Following *Shubley*, this Court continued to embrace *Dumas*'s expansive approach to *habeas corpus* with the understanding that it is not "a static, narrow, formalistic remedy" and that it must evolve to achieve its purpose of preventing wrongful restraints on liberty (*May*, at para. 21, quoting *Jones v. Cunningham*, 371 U.S. 236 (1962), at p. 243; see also

Canada (Public Safety and Emergency Preparedness) v. Chhina, 2019 SCC 29, [2019] 2 S.C.R. 467, at para. 19).

[44] This evolution in *habeas corpus* jurisprudence has, subsequent to *Shubley*, influenced the scope of the liberty interest protected by s. 7 of the *Charter*. For instance, in *Cunningham v. Canada*, [1993] 2 S.C.R. 143, this Court considered whether a retrospective change to the parole system violated s. 7. Relying on the reasoning in *Dumas*, this Court confirmed that an offender has an expectation of liberty based on the parole system at the time of sentencing and that a "substantial change" that thwarts this expectation can constitute a deprivation of liberty under s. 7 (p. 151; see also p. 150). In doing so, this Court explicitly rejected the formalistic argument that, once an inmate is incarcerated, there can be "no further impeachment of his liberty interest" (p. 148). This argument "oversimplifie[d] the concept of liberty" by seeking to preserve a rigid distinction between the sentence and conditions of imprisonment (*ibid.*).

[45] Changes to the conditions of imprisonment have also attracted constitutional scrutiny under s. 11(h) of the *Charter*. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, this Court held that some retrospective changes to the conditions of imprisonment can constitute a "punishment" in violation of s. 11(h)'s guarantee against double jeopardy, depending on the degree to which the changes thwart an inmate's "settled expectation of liberty" (para. 60). In making this holding, the Court expanded the test for "punishment", which had previously been limited to the "arsenal of sanctions" that may be imposed during the criminal

sentencing process (para. 50, quoting *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554, at paras. 62 and 65). It did so on the basis that, "from a functional rather than a formalistic perspective, the harshness of punishment has been increased" when there has been a substantial increase in the risk of additional incarceration as a result of retrospective changes to the conditions of imprisonment (para. 52; see also para. 63).

[46] *Whaling*'s embrace of a liberal and purposive interpretation of the *Charter* subsequently prompted this Court to reformulate the test for "punishment" under s. 11(h) and (i) "to carve out a clearer and more meaningful role for the consideration of the impact of a sanction" (*R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 41; see also paras. 36-40).

[47] A common thread running through these cases is that, when interpreting the scope of different *Charter* rights, including s. 11 rights, this Court has rejected formalistic interpretations that seek to preserve an inflexible distinction between the sentence and conditions of imprisonment. Instead, this Court has adopted a purposive method of constitutional interpretation that gives effective protection to the underlying interests that the *Charter* right at issue is intended to secure.

[48] Since the release of *Shubley*, this Court has never reaffirmed the idea that "imprisonment" under the true penal consequence test is limited to a formal sentence of imprisonment (see, e.g., *Martineau*, at para. 57; *Guindon*, at para. 76). In my view, this is because *Shubley*'s application of the true penal consequence test no longer fits within the broader landscape of this Court's jurisprudence. It does not consider how

the concept of imprisonment, when understood functionally, is broad enough to encompass both substantial erosions to an inmate's residual liberties (i.e., disciplinary segregation) and extensions to an inmate's period of incarceration (i.e., loss of earned remission). It is now necessary to depart from the formalistic distinction between the sentence and conditions of imprisonment to ensure that s. 11's fundamental purpose of safeguarding liberty is robustly protected. For this reason, *Shubley*'s holding on the true penal consequence test should no longer be considered binding.

[49] In reaffirming this Court's commitment to purposive constitutional interpretation when interpreting the scope of s. 11, I emphasize that "it is important not to overshoot the actual purpose of the right or freedom in question" (*Big M Drug Mart Ltd.*, at p. 344). *Wigglesworth* exemplifies how a provision's purpose can perform this constraining function in constitutional interpretation, and it remains good law. In that case, the Court adopted a "somewhat narrow definition of the opening words of s. 11" to ensure that the substantive protections offered by s. 11 rights would not vary according to the type of proceeding at issue (p. 558). Such variation risked creating a lack of predictability and clarity in the development of s. 11 jurisprudence, which would undermine s. 11's objective of ensuring strong procedural protections for those who are charged with a criminal offence or who otherwise "may well suffer a deprivation of liberty" as a result of the prosecutorial power of the state (*ibid.*). For that reason, s. 11 was limited to the "most serious offences known to our law, i.e., criminal and penal matters" (*ibid.* (emphasis added)).

[50] As this Court recognized in *K.R.J.*, the true penal consequence test from *Wigglesworth* sets an "indisputably high bar" in order to give effect to s. 11's purpose by limiting the number of offences outside the criminal context that trigger the most robust procedural protections in our legal system (para. 38). However, in setting this high bar, *Wigglesworth* did not suggest that the sanctions recognized as true penal consequences, such as imprisonment, must be understood formalistically. A formalistic interpretation of these sanctions erodes the acknowledgment in *Wigglesworth* that, where non-criminal offences may lead to the imposition of truly punitive consequences, s. 11 should apply to fulfil its liberty-protecting purpose. Adopting a formalistic understanding of sanctions recognized as true penal consequences risks undermining this purpose by allowing the label placed on such sanctions, rather than their impact on individual liberty, to govern the determination of whether s. 11 applies.

[51] I will now explain why major disciplinary offences in Saskatchewan may lead to the imposition of punishments that constitute a form of imprisonment, and therefore pass *Wigglesworth*'s true penal consequence test.

(3) Section 11 Is Engaged by Offences Punishable by Disciplinary Segregation or Loss of Earned Remission

(a) *Meaning of "Imprisonment"*

[52] The key question in this appeal is whether the punishments of disciplinary segregation and loss of earned remission constitute forms of "imprisonment", thereby

satisfying the true penal consequence test and engaging the protections in s. 11 of the *Charter*. Answering this question requires a clarification of the meaning of "imprisonment" under *Wigglesworth*'s true penal consequence test.

[53] At the hearing, the AGS described imprisonment as a "binary" and suggested that an individual cannot be further imprisoned once incarcerated (transcript, day 2, at p. 36). For this reason, the AGS submits that disciplinary segregation and loss of earned remission cannot be understood as forms of imprisonment that trigger s. 11 of the *Charter*. However, this reasoning is rooted in the formalistic distinction between the sentence and conditions of imprisonment, a distinction that, as discussed above, this Court has departed from when interpreting the scope of other *Charter* protections.

[54] Instead, I would take up JHS's invitation and adopt Cory J.'s definition of imprisonment in his dissenting reasons in *Shubley*. Cory J. stated that imprisonment means "the denial of freedom of movement and the segregation or isolation of an inmate from society" (p. 11). He thus defined the concept of imprisonment by reference to its substantive attributes, rather than unduly fixating on the form in which such a consequence is often imposed.

[55] Adopting this functional definition of imprisonment gives effect to the liberty-protecting purpose of s. 11. Imprisonment always satisfies the true penal consequence test and thus triggers s. 11 protections because it is "the most severe deprivation of liberty known to our law" (*Wigglesworth*, at p. 562). Imprisonment under *Wigglesworth*'s true penal consequence test must therefore include state-

imposed sanctions that, in light of their attributes, represent a deprivation of liberty at least as severe as that resulting from an initial sentence of imprisonment. This approach is necessary to ensure that the state cannot simply label forms of imprisonment with euphemisms in order to circumvent the application of s. 11 of the *Charter*.

[56] In assessing whether a sentence of imprisonment and the sanction in question are equivalent in severity, a court must consider the fact that sentences of imprisonment can include non-carceral punishments that share the fundamental features of significantly curtailing an individual's freedom of movement and segregating them from others. For example, some sections of the *Criminal Code*, R.S.C. 1985, c. C-46, treat conditional sentences as sentences of imprisonment (see, e.g., *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 29). This Court has called such sentences "imprisonment without incarceration" (*R. v. Wu*, 2003 SCC 73, [2003] 3 S.C.R. 530, at para. 25).

(b) *Disciplinary Segregation and Loss of Earned Remission Are Forms of Imprisonment*

[57] In this case, we are dealing with sanctions that impose a constraint on an individual's freedom of movement and segregate them from others to a degree at least equivalent to that of a sentence of incarceration.

[58] As Cory J. explained in *Shubley*, disciplinary segregation and loss of earned remission fall within a functional definition of imprisonment and therefore

constitute true penal consequences. Disciplinary segregation involves the use of "[p]risons within prisons" and, when imposed, effectively leads to "an additional violation of whatever residual liberties an inmate may retain" (p. 9). Likewise, loss of earned remission constitutes imprisonment because it has the effect of extending an inmate's period of incarceration and therefore extends the time during which "freedom of movement and the ability to interact with others" are curtailed (p. 11).

[59] A brief historical overview of the manner in which disciplinary segregation and loss of earned remission have been perceived in Canada supports Cory J.'s conclusion and elucidates how both of these punishments have frequently been understood as exceptionally severe deprivations of liberty for those already living within a prison. Unlike most other punishments imposed on inmates, both significantly curtail an inmate's freedom of movement while exacerbating or continuing the inmate's segregation from society. In narrowing the scope of "imprisonment" under *Wigglesworth*'s true penal consequence test to a formal sentence of imprisonment, the majority in *Shubley* failed to meaningfully consider this history.

(i) Disciplinary Segregation

[60] The use of segregation as a disciplinary measure against inmates has been a feature of Canadian correctional institutions since the first penitentiary opened in Kingston in 1835. The legislation applicable at the time referred to the possibility that individuals could be "confined in solitude for misconduct in the Penitentiary" (*An Act*

to provide for the Maintenance and Government of the Provincial Penitentiary, S.U.C. 1834, 4 Will. 4, c. 37, s. 27).

[61] Since that time, disciplinary segregation has been consistently understood as a distinctive form of imprisonment within correctional institutions. For example, after finding that the Kingston Penitentiary had instituted a cruel system of corporal punishment to manage inmate discipline, the Brown Commission recommended in 1849 that persistent rule infractions be punished by segregation instead (*Reports of the Commissioners Appointed to Inquire Into the Conduct, Discipline, & Management of the Provincial Penitentiary*, at p. 288). In discussing segregation, the Commission noted that "the human mind cannot endure protracted imprisonment under this system" (p. 286 (emphasis added)).

[62] Reliance on disciplinary segregation continued following Confederation. The first set of disciplinary regulations issued under *The Penitentiary Act of 1868*, S.C. 1868, c. 75, authorized "[c]onfinement in the penal or separate cells with such diet as the Surgeon shall pronounce sufficient, respect being had to the constitution of the convict, and the length of the period during which he is to be confined" (*Rules and Regulations for the Government of the Penitentiaries of the Dominion of Canada* (1870), s. 361, quoted in M. Jackson, *Prisoners of Isolation: Solitary Confinement in Canada* (1983), at p. 40). In his annual report for the 1891-92 year, the Inspector of Penitentiaries described segregation cells as "the dungeon" (*Report of the Minister of Justice as to Penitentiaries in Canada for the Year Ended 30th June 1892*, reproduced

in *Sessional Papers*, vol. XXVI, No. 10, 3rd Sess., 7th Parl., 1893, No. 18, at p. ix). And while he viewed this "punishment" as being, "as a rule, deserved", he believed that if a short time in the "dungeon do[es] not produce the desired effect, longer confinement there generally results in a greater degree of callousness, stubbornness and resistance to authority" and should therefore be avoided (*ibid.*).

[63] In 1894, the construction of a block of cells that would be used for segregation in the Kingston Penitentiary was completed. The formal name for these cells was the "Prison of Isolation" (Jackson, at pp. 36-37). Regulations promulgated in 1893 stated the criteria for admission:

> Any male convict whose conduct is found to be vicious, or who persists in disobedience to the Rules and Regulations of the Prison, or who is found to exercise a pernicious influence on his fellow convicts may be imprisoned in the Prison of Isolation for an indefinite period not to exceed the unexpired term of the convict's sentence. [Emphasis added.]
>
> (Jackson, at p. 37, quoting *Rules and Regulations Respecting Prisoners of Isolation and the Punishment and Government of Convicts*, s. 1.)

[64] Government reports throughout the 20th century likewise recognized the distinctive quality of disciplinary segregation. The Swackhamer Report of 1972 listed "punitive dissociation" as a punishment that, along with loss of remission and corporal punishment, justified a right of appeal if imposed (*Report of the Commission of Inquiry Into Certain Disturbances at Kingston Penitentiary During April, 1971*, at p. 55). The Vantour Report of 1975 recognized the distinctive function of disciplinary segregation, stating that it "serves to isolate the inmate for a short period and represents a

denunciation of his behaviour" (*Report of the Study Group on Dissociation*, at p. 74). The Vantour Report also highlighted that disciplinary segregation can impact the length of an inmate's period of incarceration because it is "presumed that he will not be granted his earned remission for the period during which he is dissociated" (p. 81).

[65] As well, the 1987 Working Paper No. 5 of the Correctional Law Review noted that "punitive dissociation is still regarded as the most severe disciplinary measure at the disposal of prison officials" ("Correctional Authority and Inmate Rights", in Solicitor General Canada, *Influences on Canadian Correctional Reform: Working Papers of the Correctional Law Review, 1986 to 1988* (2002), 165, at p. 209). It further observed that courts had increasingly intervened in inmate disciplinary matters because "punishments imposed as a result of disciplinary convictions . . . can significantly affect the conditions of confinement (through punitive dissociation)" (p. 197).

[66] This history reveals that disciplinary segregation has always been understood as a uniquely severe form of punishment for inmates. While the conditions of disciplinary segregation have evolved over time, this form of punishment by its very nature has the effect of significantly curtailing an inmate's freedom of movement while severely limiting access to human interaction. As this Court acknowledged in *Cardinal*, regardless of the label placed on inmate segregation, "its effect on the inmate . . . is the same" (p. 654).

[67] This effect is present in Saskatchewan's practice of disciplinary segregation. The AGS concedes that when inmates are subject to disciplinary segregation, they are only guaranteed one hour outside of their cells each day. For the other 23 hours of the day, inmates remain in their cells. While some inmates have a cellmate, television, and natural light, others do not. Where safety concerns exist, inmates can be segregated in more secure units. Accordingly, Saskatchewan's practice of disciplinary segregation shares the fundamental features of significantly curtailing an inmate's residual freedom of movement and exacerbating their segregation from society. It therefore constitutes a distinct form of imprisonment.

(ii) Loss of Earned Remission

[68] Remission has been used in Canadian correctional institutions since *The Penitentiary Act of 1868*, which introduced a scheme that reduced the length of an inmate's sentence as a reward for "good behaviour, diligence and industry" (s. 62; see also D. P. Cole and A. Manson, *Release From Imprisonment: The Law of Sentencing, Parole and Judicial Review* (1990), at p. 163). Since that enactment, government reports have consistently acknowledged that remission acts as a *de facto* reduction in an inmate's sentence of imprisonment and that, by extension, its loss constitutes a lengthening of the inmate's sentence.

[69] For example, the Archambault Commission described earned remission as a "reward of a shorter sentence" (*Report of the Royal Commission to Investigate the Penal System of Canada* (1938), at p. 107). The Commission further explained that

"[w]hen remission has been granted to a prisoner, his sentence has been executed and he is entitled to be discharged and set at liberty, subject, however, to the cancellation for misconduct" (p. 231). When discussing a regulation that denied the granting of remission to those unable to perform labour, the Commission described the effect as follows: ". . . a prisoner who is ill, although of exemplary conduct, serves a longer sentence than a prisoner in good health" (p. 233).

[70] Recognizing the significant liberty interests at stake with loss of remission, the Swackhamer Report recommended that it be one of the few punishments, along with disciplinary segregation, that would be subject to a right of appeal if imposed (p. 55). Moreover, in its 1977 *Report to Parliament*, the Sub-Committee on the Penitentiary System in Canada (part of the Standing Committee on Justice and Legal Affairs), when discussing the difficulties inmates faced when computing the length of their sentence, wrote that sentence length was "modified by the statutory formulas for computing statutory remission and earned remission, both of which affect the time spent in prison" (para. 462 (emphasis added)). In exploring other incentives for good behaviour, the Sub-Committee suggested that "[i]t should even be possible to grant extra 'good time', or earned remission, to such inmates, so that they could, quite literally, work their way out of prison" (para. 529 (emphasis added)).

[71] The 1987 Working Paper No. 5 of the Correctional Law Review described loss of remission as "clearly a very serious disciplinary measure, as it results in more time spent incarcerated" (p. 209). It also observed that court intervention in inmate

disciplinary measures was partially driven by the use of loss of earned remission as a disciplinary sanction, since it "can affect the amount of time an inmate will spend imprisoned" (p. 197).

[72] The effect of loss of earned remission was also recognized by the Honourable D. F. Huyghebaert, Minister of Corrections, Public Safety and Policing, at second reading of the bill he introduced that would ultimately become the *Act*: "Losing remission means the inmate will spend more time in prison, therefore it is particularly important that we provide an opportunity for independent review of those decisions" (Legislative Assembly of Saskatchewan, *Debates and Proceedings (Hansard)*, vol. 54, No. 6A, 1st Sess., 27th Leg., December 13, 2011, at p. 177).

[73] The current federal legislation governing earned remission is explicit about its effect. Section 6(5) of the *Prisons and Reformatories Act* states that "[w]here remission is credited against a sentence being served by a prisoner, . . . the prisoner is entitled to be released from imprisonment before the expiration of the sentence."

[74] This historical overview reveals that the severity of loss of remission as a punishment has been recognized by experts and legislators alike. This is so because this punishment is functionally equivalent to extending an inmate's sentence of incarceration. For an inmate subject to this sanction, additional days of imprisonment have been imposed.

(iii) Summary

[75] In sum, these sources all point to the conclusion that disciplinary segregation and loss of earned remission are forms of imprisonment. Disciplinary segregation is a distinct form of imprisonment because it significantly curtails an inmate's residual freedom of movement and further limits their access to human interaction. Loss of earned remission is also a sanction of imprisonment, since it has the effect of extending an inmate's period of incarceration.

[76] Accordingly, both disciplinary segregation and loss of earned remission pass *Wigglesworth*'s true penal consequence test. Because they are available forms of punishment for the commission of a major disciplinary offence under s. 77(1) of the *Act*, s. 11 of the *Charter* is engaged by those offences. I leave for another day the issue of whether s. 11 of the *Charter* is engaged if an inmate in Saskatchewan commits a minor disciplinary offence.

[77] Finally, I would note that this holding does not mean that s. 11 necessarily applies anytime a person faces a deprivation of liberty by the state as severe as that resulting from a sentence of imprisonment. Section 11 applies only when a person is "charged with an offence" that carries the risk that such consequences will be imposed. This mitigates any concern that, if a functional understanding of imprisonment is embraced for the purposes of the *Wigglesworth* true penal consequence test, s. 11 will become too broad in scope and will apply to *all* proceedings or circumstances involving severe deprivations of liberty by the state.

(4) Section 68 of the *Regulations* Infringes Section 11(d) of the *Charter*

[78] Where an accused person faces penal consequences for an offence, s. 11(d)'s guarantee of the presumption of innocence requires that the state prove every element of the offence beyond a reasonable doubt (*Oakes*, at p. 121; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 196; *R. v. Brown*, 2022 SCC 18, [2022] 1 S.C.R. 374, at para. 99).

[79] Section 68 of the *Regulations* permits findings of guilt for a major disciplinary offence to be made where the offences have not been proven beyond a reasonable doubt. As a result, this provision infringes s. 11(d).

C. *Section 7 of the Charter Is Infringed*

[80] Even if I had concluded that s. 11 does not apply to major disciplinary offences, I am of the opinion that s. 68 of the *Regulations* infringes the presumption of innocence protected under s. 7 of the *Charter*, which, in these circumstances, necessitates the application of a criminal standard of proof.

[81] In *Pearson*, Lamer C.J. made it clear that s. 11(d) of the *Charter* does not "exhaust" the operation of the presumption of innocence and that s. 7 provides independent protection of this principle of fundamental justice in proceedings where s. 11 does not apply (p. 688). This holding built on Dickson C.J.'s observation in *Oakes* that the presumption of innocence is "referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*" (p. 119). The specific requirements of the presumption of innocence, however, vary according to the

context of the proceeding at issue (*Pearson*, at p. 684). This explains why not every proceeding where a s. 7 interest is engaged requires a standard of proof beyond a reasonable doubt (*ibid.*).

[82] Lamer C.J. provided two examples of proceedings where a heightened standard of proof would likely be required to conform with the dictates of s. 7's protection of the presumption of innocence. The first example cited by Lamer C.J., relying on this Court's reasoning in *R. v. Gardiner*, [1982] 2 S.C.R. 368, was sentencing proceedings with contested aggravating factors (*Pearson*, at p. 686). In *Gardiner*, it was held that, at common law, the Crown has a persuasive burden to prove aggravating factors beyond a reasonable doubt (p. 415). In justifying its holding, this Court explained that "[c]rime and punishment are inextricably linked" and that "the facts which justify the sanction are no less important than the facts which justify the conviction" (*ibid.*). In *D.B.*, this Court cited Lamer C.J.'s example in *Pearson* with approval, holding that a provision of the *Youth Criminal Justice Act*, S.C. 2002, c. 1, that relieved the Crown of its burden of proving aggravating factors beyond a reasonable doubt violated the presumption of innocence guaranteed under s. 7 of the *Charter* (paras. 78-82).

[83] The second example cited by Lamer C.J. was civil contempt proceedings. While he recognized that civil contempt may constitute an "offence" that triggers the protections of s. 11 of the *Charter*, he noted that, even if it did not, the presumption of innocence under s. 7 would likely require a criminal standard of proof in these

proceedings (*Pearson*, at pp. 686-87). To support this claim, he noted that both the common law and Quebec civil law require this heightened standard (p. 687).

[84] The features of these two types of proceedings cited in *Pearson* assist in discerning when s. 7's protection of the presumption of innocence will require proof beyond a reasonable doubt. Both circumstances involve proceedings where the state (a) accuses an individual of moral wrongdoing and (b) seeks to punish the individual with severe liberty-depriving consequences for such wrongdoing. And importantly, as Lamer C.J.'s reference to the civil contempt proceedings exemplifies, proceedings that fall outside of the criminal process, strictly speaking, can have both of these features.

[85] This Court's subsequent application of *Pearson* in *Demers* is consistent with this guidance. In that case, this Court considered whether the proceedings outlined in Part XX.1 of the *Criminal Code* with respect to accused who are unfit to stand trial violated s. 7's presumption of innocence guarantee. In declaring that the presumption of innocence was respected, this Court noted that a heightened standard of proof is unnecessary in Review Board disposition proceedings because they do not involve a "determination of guilt or innocence" with respect to an unfit accused, nor do they presume that the accused is dangerous (para. 34). Instead, the Review Board is required to "perform an assessment" of an unfit accused and impose the "least onerous condition on his or her liberty" (*ibid.*). In other words, Review Board proceedings involve no accusation by the state of moral wrongdoing — the first requirement in order for s. 7 to mandate proof beyond a reasonable doubt.

[86] The presumption of innocence under s. 7 of the *Charter* requires Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. First, the preceding analysis shows that major disciplinary offence proceedings in Saskatchewan may lead to the imposition of severe consequences that affect an inmate's residual liberties, satisfying the second requirement outlined in *Pearson*. By functionally elevating the severity of a sentence, both disciplinary segregation and loss of earned remission represent consequences similar to those that result from proving an aggravating factor at sentencing.

[87] Second, disciplinary proceedings also meet the first requirement outlined in *Pearson* since they involve an accusation of moral wrongdoing. It is true that *Shubley*'s analysis of the criminal in nature test established that disciplinary offences do not involve an inmate "being called to account to society for a crime violating the public interest" (p. 20). Assuming, without deciding, that this characterization remains authoritative, I am not convinced that it forecloses a determination that disciplinary proceedings accuse inmates of moral wrongdoing.

[88] For example, civil contempt proceedings meet the two requirements outlined in *Pearson* but arguably do not call an individual to account to society for a crime. As this Court held in *Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, the distinction between criminal contempt and civil contempt is that only the former rests on "the element of public defiance", while the latter is focused on coercion and the protection of private interests (para. 31). Even so, proceedings for civil contempt

involve an accusation of moral wrongdoing because such conduct shows disrespect "for the role and authority of the courts" (*Vidéotron Ltée v. Industries Microlec Produits Électroniques Inc.*, [1992] 2 S.C.R. 1065, at p. 1075).

[89] Similar logic applies to inmate disciplinary proceedings. While such proceedings seek to achieve private, disciplinary objectives, they also serve a public function by signalling moral and social disapproval of certain behaviours while encouraging an inmate's rehabilitation and preparation for re-entry into society. As the Queen's Prison Law Clinic explains, the moral nature of inmate disciplinary regimes has "obvious parallels" with the criminal justice system (I.F., at para. 9).

[90] In sum, major disciplinary offence proceedings involve an accusation of moral wrongdoing and the potential imposition of severe liberty-depriving consequences. As a result, s. 7's protection of the presumption of innocence requires these offences to be proven beyond a reasonable doubt. Because s. 68 of the *Regulations* permits findings of guilt on a lesser standard, s. 7 of the *Charter* is infringed.

D. *The Infringements Are Not Justified Under Section 1 of the Charter*

[91] The AGS has the burden of showing on a balance of probabilities that the limit on ss. 7 and 11(d) of the *Charter* is reasonable and demonstrably justified under s. 1 (*Oakes*, at pp. 135 and 137). Under the *Oakes* test, s. 68's objective must be pressing and substantial and there must be proportionality between this objective and

the chosen means. Proportionality has three requirements: (a) a rational connection between the means and the objective; (b) minimal impairment of the right; and (c) proportionality between the deleterious and salutary effects of the law (pp. 138-39).

[92] While JHS concedes that s. 68 of the *Regulations* has a pressing and substantial objective, there is some variation in how the parties articulate this objective. For example, JHS frames the purpose of using a balance of probabilities standard as being "'to maintain order in the prisons' by utilizing expeditious and informal hearings" (A.F., at para. 106). In contrast, the AGS articulates the provision's objective in different ways: ". . . creating operational efficiencies and improving security in provincial correctional centres"; and "further ensur[ing] a procedurally fair disciplinary review system" (R.F., at paras. 169-70).

[93] To be of value in the *Oakes* test, the purpose of the infringing measure must be characterized appropriately (see *Brown*, at para. 116; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 46). The purpose should not be stated too broadly, nor should it be described too narrowly by simply reiterating the means chosen to achieve it.

[94] In my view, the objective of using a standard of proof on a balance of probabilities is to promote the expeditious resolution of inmate disciplinary proceedings. I agree that this constitutes a pressing and substantial objective. This Court has recognized the importance of preserving efficiency in the administration of

inmate discipline so as to maintain order and promote safety in correctional institutions (*Cardinal*, at pp. 654-55).

[95] A measure will be minimally impairing if there are not any less harmful means of achieving its objective "in a real and substantial manner" (*Brown*, at para. 135, quoting *K.R.J.*, at para. 70, and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 55). Legislatures have a margin of appreciation in selecting the means to achieve the objective, but only insofar as the means chosen impair rights as little as reasonably possible (*Brown*, at para. 135; see also *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at para. 179, per Kasirer J., concurring).

[96] In this case, there is an obvious *Charter*-compliant alternative, which is to use the standard of proof beyond a reasonable doubt. This heightened standard of proof has been used in federal penitentiaries' inmate disciplinary proceedings for decades and is now required by s. 43(3) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (see also *Martineau v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, at p. 128). The AGS has presented no evidence to suggest that this standard has undermined the federal government's capacity to administer prison discipline in an expeditious manner. In fact, s. 28 of the *Corrections and Conditional Release Regulations*, SOR/92-620, requires inmate disciplinary proceedings to take place "as soon as practicable" and, according to *Commissioner's Directive 580: Discipline of Inmates* (June 28, 2021 (online)), these proceedings "will normally take

place within 10 working days of laying of the charge" (s. 30). This suggests that inmate discipline in federal penitentiaries has not become unduly burdened by the use of a standard of proof beyond a reasonable doubt.

[97] As a result, s. 68 of the *Regulations* fails the minimal impairment test and is not saved by s. 1 of the *Charter*.

V. Conclusion

[98] When a person is charged with an offence punishable by disciplinary segregation or loss of earned remission, ss. 7 and 11(d) of the *Charter* require that the offence be proven beyond a reasonable doubt. To the extent that s. 68 of the *Regulations* permits the imposition of these penalties for an inmate disciplinary offence on a lower standard of proof, it is inconsistent with the Constitution and must therefore be declared to be of no force or effect. This declaration must be effective immediately, given that the AGS has not demonstrated that "an immediately effective declaration would endanger a compelling public interest" (*Ontario (Attorney General) v. G*, 2020 SCC 38, [2020] 3 S.C.R. 629, at para. 139).

[99] I would allow the appeal, set aside the judgments below, and declare s. 68 of the *Regulations* to be of no force or effect under s. 52 of the *Constitution Act, 1982*, with costs throughout. JHS seeks special costs, but such costs are exceptional and the circumstances do not, in my view, warrant exercising the Court's discretion to award them.

The reasons of Côté, Rowe and Jamal JJ. were delivered by

CÔTÉ J. —

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I. Overview

[100] This appeal poses the following question: To find that an inmate has committed a disciplinary offence under Saskatchewan's inmate disciplinary proceedings, does the *Canadian Charter of Rights and Freedoms* require proof beyond a reasonable doubt, or is a lesser standard of proof, i.e., on a balance of probabilities, constitutionally compliant?

[101] This question was raised by the John Howard Society of Saskatchewan ("John Howard Society") after it was granted public interest standing to pursue an originating application seeking an order declaring that s. 68 of *The Correctional Services Regulations, 2013*, R.R.S., c. C-39.2, Reg. 1 ("*Regulations*"), is contrary to s. 7 of the *Charter*.

[102] Section 68 provides that the standard of proof[1] for inmate disciplinary proceedings is that of a balance of probabilities. John Howard Society takes particular issue with the disciplinary sanctions of segregation and loss of earned remission, insofar as they stem from disciplinary charges being proven on a standard lower than beyond a reasonable doubt, arguing that the deprivation of liberty stemming from those sanctions constitutionally requires proof beyond a reasonable doubt.

[103] After the Saskatchewan Court of Queen's Bench and the Court of Appeal for Saskatchewan dismissed its s. 7 challenge, John Howard Society was granted leave to appeal to our Court. Since then, John Howard Society has added a new argument: Not only does s. 68 of the *Regulations* violate s. 7 of the *Charter*, but it also violates the presumption of innocence guaranteed by s. 11(d) of the *Charter*.

[104] Our Court must first decide whether to hear the new issue relating to s. 11(d). If we do hear the new issue, we must then decide whether s. 11(d) applies to Saskatchewan's inmate disciplinary proceedings. If it does apply, we must decide whether s. 68 of the *Regulations* infringes s. 11(d). We must also decide whether s. 68 of the *Regulations* infringes the presumption of innocence as a principle of fundamental justice under s. 7.

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[1] While the *Regulations* use the term "burden of proof", it is more accurately described as a "standard of proof", and I will therefore be using that term throughout these reasons.

[105] I am of the view that our Court should hear the new issue, as this case meets the stringent test for hearing a new issue on appeal. As I explain later in these reasons, there is no concern with procedural prejudice, and the s. 7 analysis of the courts below is intrinsically linked to considerations under s. 11(d). Moreover, hearing the new issue provides our Court with the opportunity to clarify the analytical framework applicable under s. 7 and s. 11(d), in the context of the intersection between criminal proceedings and administrative proceedings. To refuse to hear the issue would be counter to the broader interests of the administration of justice.

[106] That being said, I am of the view that s. 11(d) of the *Charter* does not apply to Saskatchewan's inmate disciplinary proceedings. This is because facing a charge of inmate misconduct is not the same as being "charged with an offence" within the meaning of s. 11 of the *Charter*. To arrive at this conclusion, we must apply the test established by our Court in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541. That test sets out how a proceeding can attract the application of s. 11: the proceedings must be criminal in nature or lead to consequences that are considered true penal consequences. We must also be guided by *R. v. Shubley*, [1990] 1 S.C.R. 3, where our Court applied the test set out in *Wigglesworth* and found that inmate disciplinary proceedings that included disciplinary segregation and loss of earned remission as prospective consequences did not engage the application of s. 11. Similarly, in this case the inmate disciplinary proceedings are not criminal in nature — they are administrative in nature and designed to regulate and maintain prison order, not to redress a wrong to society. Further, as in *Shubley*, the sanctions stemming from the disciplinary proceedings are not true penal

consequences within the meaning of s. 11 because their purpose is not to redress a public wrong, but rather to maintain internal discipline within a limited sphere of activity (*Wigglesworth*, at p. 561). Therefore, s. 11 does not apply. To hold differently would require overturning *Shubley*. As I explain below, *Shubley* remains good law. John Howard Society has not demonstrated that it is an unworkable precedent. Nor has it established foundational erosion arising from modification of the criminal in nature test or an evolution in the understanding of segregation and loss of remission.

[107] With respect to s. 7 of the *Charter*, I conclude that it is not infringed by Saskatchewan's inmate disciplinary proceedings. While s. 7 is implicated because of the evident engagement of an inmate's liberty interests, there is no infringement because the presumption of innocence as a principle of fundamental justice under s. 7 does not require a standard of proof beyond a reasonable doubt in the context of Saskatchewan's inmate disciplinary process. This is all the more true when s. 68 of the *Regulations* is combined with the requirements of procedural fairness serving as residual protection under s. 7.

[108] This case engages a narrow question, namely whether the standard of proof selected by Saskatchewan's legislature to apply to the inmate disciplinary proceedings in its correctional institutions violates the presumption of innocence protected by s. 7 or s. 11(d). It does not engage s. 12 of the *Charter*; we are not being asked to declare whether the sanctions at issue amount to cruel and unusual treatment or punishment, either as a general matter or in relation to a particular offender in a particular context.

[109] Having found no breach of s. 7 or s. 11(d), I would dismiss the appeal and uphold the rulings of the Court of Queen's Bench and the Court of Appeal in this matter.

II. Facts

[110] John Howard Society is a non-profit corporation that, among other things, assists persons in their interactions with the criminal justice system. Part of its mandate is to advocate for humane conditions for persons who are incarcerated and to provide assistance on prisoners' rights matters. As such, the organization was granted public interest standing to pursue an order declaring s. 68 of the *Regulations* contrary to s. 7 of the *Charter*. That standing is not challenged in this appeal.

[111] The Government of Saskatchewan operates four provincial correctional centres, along with a remand centre for women. The inmate disciplinary system for offences that occur within those institutions is codified in *The Correctional Services Act, 2012*, S.S. 2012, c. C-39.2 ("*Act*"). If an offence is alleged, a discipline panel is convened within the institution to adjudicate the alleged offence. The panel examines the matter under an inquisitorial system, rather than an adversarial one; it then determines on a balance of probabilities whether the inmate committed the offence.

[112] The standard of proof is set out in s. 68 of the *Regulations*:

Burden of proof

> **68** A discipline panel shall not find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed that offence.

[113] The *Inmate Disciplinary Hearing Manual* describes this standard of proof in the following way:

> In theory, the balance of probabilities means an event either did or did not happen. In practice, there is some flexibility: the decision-maker(s) must determine, based on the evidence before them, whether it is more likely than not that the event happened as described. If it is unclear, or the probability of the event occurring/not occurring are equal, then the balance of probabilities has not been met. Further, when assessing probability, it is important to note that the burden of proof — the obligation to prove one's case — is on the correctional facility to demonstrate the inmate committed the offence, rather than on the inmate to prove that they did not commit the offence. If the panel is unsure, the charge must be dismissed.
>
> Essentially, the question the discipline panel must ask is whether the evidence, facts and arguments demonstrate that it is more likely than not that the inmate committed the offence.
>
> (Saskatchewan, Adult Custody Services, *Inmate Disciplinary Hearing Manual*, June 8, 2021, at p. 25, reproduced in A.R., at p. 137.)

[114] In 2019, approximately 6,201 disciplinary charges were laid within Saskatchewan's four correctional centres for various offences, including: fights, assaults, staff assaults, possession of weapons, possession of other contraband, impairment, disruptive behaviour, disobeying lawful orders, obstructing or interfering with security measures, and uttering threats. There were 3,367 hearings held in Saskatchewan in 2019, amounting to an average of approximately 9 hearings per calendar day.

[115] Disciplinary sanctions are set out in the *Act* and differ in severity based on whether the offence in question was major or minor. For major offences, the sanctions vary: loss of privileges, segregation to a cell, or even forfeiture of a period of remission earned. For minor offences, many similar sanctions exist, though segregation and loss of earned remission cannot be imposed. In 2019, the percentages of sanctions imposed where an inmate was found to have committed a disciplinary offence were as follows: disciplinary segregation (39 percent), loss of privileges (30 percent), confinement to the inmate's cell, room, or unit during leisure time (13 percent), assignment of extra duties (8 percent), restitution (3.5 percent), reprimand (2 percent), and loss of earned remission (0.3 percent).

[116] Before the courts below, John Howard Society argued that s. 68 of the *Regulations* violates s. 7 of the *Charter* because it allows for disciplinary offences allegedly committed by an inmate in a correctional facility to be proven merely on a balance of probabilities, even though the punishment imposed for major offences could be segregation or additional days of incarceration (resulting from a loss of earned remission). John Howard Society argued that because the punishment for committing a disciplinary offence could result in a loss of liberty, s. 7 requires that this offence be proven beyond a reasonable doubt. Therefore, it argued that the lower standard enshrined in s. 68 of the *Regulations* is constitutionally invalid.

III. Judicial History

A. *Court of Queen's Bench of Saskatchewan, 2021 SKQB 287 (Layh J.)*

[117] The application judge dismissed the application, holding that the standard of proof beyond a reasonable doubt is not a principle of fundamental justice in the inmate disciplinary context and therefore s. 68 of the *Regulations* does not violate s. 7 of the *Charter*.

[118] In reference to the legislative framework and the disciplinary process laid out therein, the application judge considered whether John Howard Society had successfully established that a principle of fundamental justice — an existing or a novel one — necessitated proof beyond a reasonable doubt for an inmate to be found responsible for a disciplinary offence. The parties agreed that some of the penalties imposed may deprive inmates of their "liberty" as that term is used in s. 7 of the *Charter*.

[119] The application judge canvassed *Charter* decisions dealing with s. 11. He noted that John Howard Society conceded that s. 11(d) did not apply. He cited *Shubley* as conclusively holding that s. 11 rights do not apply to prison discipline. He noted that McLachlin J. (as she then was) made it clear that the sanction of forfeiture of remission did not deprive inmates of a "right". Instead, cancellation of earned remission amounted to the withholding of a reward, a tool for prison administrators to run an orderly prison. Neither the sanction of forfeiture of remission nor the sanction of segregation involved a punitive fine or imprisonment. The application judge also noted that the Court's characterization of the nature and purpose of prison disciplinary proceedings in *Shubley* animates and informs any possible applicability of s. 7 rights

to such proceedings and that McLachlin J.'s description does not establish that, as a principle of fundamental justice, an inmate's non-compliance with prison rules must be demonstrated only by proof beyond a reasonable doubt.

[120] As regards the standard of proof, the application judge held that merely calling a finding in a proceeding a finding of "guilt" cannot be determinative of the standard of proof. He explained that conduct that attracts consequences — even conduct that would establish guilt pursuant to a criminal charge — does not necessarily have to be proven beyond a reasonable doubt in non-criminal proceedings. He referred to McLachlin J.'s holding in *Shubley*, where she explained that prison discipline is not a call to answer to the public for "a crime violating the public interest", which would ordinarily attract the standard of proof beyond a reasonable doubt, but rather a call "to account to the prison officials for breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules" (p. 20).

[121] With respect to the nature of the penalties, the application judge felt bound to the majority's holding in *Shubley* and found nothing in the evidence to suggest that "segregation" should be equated to "solitary confinement" or "dissociation" (para. 86). Acknowledging the reality of prisons, he said that *Shubley* recognized that prison discipline merits a different understanding and stands distinctly separate from criminal proceedings.

[122] The application judge canvassed other jurisdictions to survey the various standards of proof for prison disciplinary offences, noting that only the legislation

governing federal penitentiaries requires proof beyond a reasonable doubt. In Manitoba, Nova Scotia, and Saskatchewan, an infraction of a prison rule must be proven on a balance of probabilities (para. 94). In Alberta, British Columbia, Prince Edward Island, and Yukon, an employee of the institution must have "reasonable grounds to believe that an inmate has broken a prison rule" (para. 92). New Brunswick, Newfoundland and Labrador, Ontario, Quebec, the Northwest Territories, and Nunavut "seemingly make even less mention of an applicable standard of proof" (para. 93).

B. *Court of Appeal for Saskatchewan, 2022 SKCA 144, 476 D.L.R. (4th) 641 (Schwann, Tholl and McCreary JJ.A.)*

[123] The Court of Appeal dismissed the appeal and upheld the lower court's decision that s. 68 of the *Regulations* does not violate s. 7 of the *Charter*. The Court of Appeal held that the first step of the two-step process in *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, was satisfied, as the government conceded that the inmate discipline regime engages the liberty interests of inmates.

[124] When dealing with determining the second part of the test — whether the interference with or deprivation of liberty accords with the principles of fundamental justice — the Court of Appeal found that the presumption of innocence as a principle of fundamental justice does not require proof beyond a reasonable doubt in the context of the inmate discipline regime. The Court of Appeal did not consider a novel principle

of fundamental justice, as John Howard Society explicitly indicated that the recognition of a new principle was not at issue.

[125] The Court of Appeal undertook its analysis against the backdrop of the overall purpose of the inmate discipline regime. It did this by examining what is at stake for an inmate who is subject to the disciplinary process and the nature of the sanctions themselves.

[126] Like the application judge, the Court of Appeal considered whether conduct that attracts a "consequence" should be proven beyond a reasonable doubt in non-criminal proceedings. John Howard Society had argued that *R. v. Pearson*, [1992] 3 S.C.R. 665, and *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, advanced its position. The Court of Appeal found that they did not, finding instead that the application of the presumption of innocence in a s. 7 *Charter* claim will depend on the circumstances. The court acknowledged that s. 7 rights could clearly apply outside of the criminal sphere, but cautioned that statements addressing such issues in the criminal realm cannot simply be imported and applied directly to other contexts.

[127] The court found that the latter was especially true in the face of *Shubley*, as that case was adjudicated against the backdrop of the prison discipline regime. The Court of Appeal found that the s. 11 analysis from *Shubley* was relevant to the s. 7 analysis in this case and held that where there is overlap between s. 7 and s. 11, those portions of the analyses can be considered together, referring to *R. v. J.J.*, 2022 SCC 28. The Court of Appeal noted that while the presumption of innocence has long been

recognized as a principle of fundamental justice under s. 7, it is expressly protected in s. 11(d), meaning that there is a unique interplay between this principle and other applicable *Charter* provisions. The court concluded that the presumption of innocence cannot be extended to require proof beyond a reasonable doubt for offences under the inmate discipline regime, as the possible liberty infringement arises from a proceeding that has an administrative, not criminal, nature and purpose.

IV. Issues

[128] The issues on appeal are as follows:

1. Should John Howard Society be permitted to raise a new issue on appeal?

2. How should the Court approach this case?

3. Does s. 11 of the *Charter* apply to Saskatchewan's inmate disciplinary proceedings?

4. Does s. 68 of the *Regulations* infringe s. 11(d) of the *Charter*?

5. Does s. 68 of the *Regulations* violate s. 7 of the *Charter*?

6. If s. 68 of the *Regulations* infringes s. 7 or s. 11(d) of the *Charter*, is that infringement justified under s. 1?

V. Analysis

A. *Should John Howard Society Be Permitted To Raise a New Issue on Appeal?*

[129] This question pertains to a new constitutional issue raised before this Court. John Howard Society concedes that the question of whether *Shubley* remains good law — and by extension whether s. 68 of the *Regulations* infringes s. 11(d) of the *Charter* — is a new issue on appeal (A.F., at para. 7). Before the application judge and the Court of Appeal, John Howard Society did not raise s. 11(d), but rather based its challenge on s. 7, alleging that the presumption of innocence operates as a principle of fundamental justice in a non-criminal setting. In fact, in its application for leave to appeal to our Court, John Howard Society explicitly recognized that s. 11(d) of the *Charter* does not apply to inmate disciplinary hearings.

[130] That being said, whether to hear a new constitutional issue on appeal is a matter of discretion for our Court, as was reiterated in *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3. Pursuant to *Guindon*, at para. 22, the Court can use its discretion to hear a new issue only in rare cases and if two conditions are met:

(1) Doing so will cause no procedural prejudice to the opposing party.

(2) The refusal to consider the issue would risk an injustice.

[131] The test is a stringent one, as the Court's discretion should not be exercised "routinely or lightly" (*Guindon*, at para. 22). The Court may take multiple considerations into account when assessing whether it should hear a new issue, including "the state of the record, fairness to all parties, the importance of having the issue resolved by this Court, its suitability for decision and the broader interests of the administration of justice" (para. 20). New constitutional questions engage additional considerations as the Court must ensure that no attorney general has been denied the opportunity to address the question (para. 23).

[132] Although our Court will agree to hear a new question only in one of those "rare cases" (*Guindon*, at para. 37; *R. v. Bird*, 2019 SCC 7, [2019] 1 S.C.R. 409, at para. 147), I am of the view that it should exercise its discretion and decide the new issue raised by John Howard Society in this instance.

[133] With respect to the state of the record, both the respondent and the intervener the Attorney General of Quebec argue that it would be unwise for our Court to decide a new question that raises the issue of overturning a precedent without having the evidentiary record to support or oppose such a change in the law. However, before the courts below, the respondent based its s. 7 argument on considerations connected to s. 11(d). In fact, before our Court, the respondent argued that the Court of Appeal was correct in stating at para. 55 that "principles of trial fairness and the accused's right to make a full answer and defence are expressions of procedural principles of

fundamental justice under s. 7, and are also embodied in s. 11(d)" (R.F., at para. 51). Therefore, the respondent had the opportunity to produce the evidence that it needed to support its argument.

[134] Further, given that it is John Howard Society that is asking this Court to overturn one of its precedents, it, therefore, has the burden to produce evidence supporting the evolution in the foundational legislative and social facts in relation to inmate discipline. In these circumstances, any gap in the evidence is also prejudicial to John Howard Society.

[135] Regarding the question of procedural prejudice, it should first be noted John Howard Society issued a notice of constitutional question, including the new issue, on February 9, 2024 (A.R., at p. 73). Therefore, the respondent cannot reasonably argue that it was denied the opportunity to respond to the new question. To the contrary, the respondent and the other attorneys general all submitted factums addressing the new issue raised by John Howard Society without any indication that they would be disadvantaged if the Court were to consider it. In particular, when questioned at the hearing, the respondent was unable to point to any concrete prejudice that could result from the new issue being heard.

[136] Refusing to hear this new question would also be incompatible with the broader interest of the administration of justice and may cause a potential injustice. First, there is a risk of unnecessary expense and delay in not considering the question of whether *Shubley* remains good law. How this Court answers one question will have

significant implications for the other question. In my view, it would be disproportionate for this Court to consider whether s. 7 is infringed and then refuse to consider the status of *Shubley*. It should not be forgotten that John Howard Society is acting to clarify the rights of prisoners, most of whom do not have the financial resources to undertake this type of proceeding. Significant costs would have to be incurred to initiate new proceedings to challenge *Shubley*. Second, if our Court were to accept John Howard Society's submission that *Shubley* should be overturned, delaying such a decision would possibly result in continued infringement of inmates' s. 11 rights. There is a strong public interest in deciding the new issue on appeal.

[137] I will now proceed to address the constitutional issues by first examining the appropriate methodology for assessing infringements under s. 7 and s. 11(d) of the *Charter*.

B. *How Should the Court Approach This Case?*

[138] Before our Court, not only did John Howard Society choose to raise a new issue on appeal respecting s. 11(d), but it presented this claim as the main one, thus relegating the claim under s. 7 to a residual analysis in case *Shubley* were to be upheld and confirmed (A.F., at para. 68). Given this framing, I discuss how the Court should approach this case; I am of the view that s. 7 and s. 11(d) should be considered separately, with s. 11(d) considered first.

[139] Our Court has written extensively on s. 7 in relation to the specific provisions of ss. 8 to 14 of the *Charter*. In fact, in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, the Court concluded that ss. 8 to 14 "are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice" (p. 502). Consequently, it is not uncommon for s. 7 of the *Charter* to be invoked at the same time as one or more of the guarantees set out in ss. 8 to 14 (*R. v. Brunelle*, 2024 SCC 3, at para. 69). As it was reiterated recently by O'Bonsawin J. in *Brunelle*, this Court has consistently rejected the premise that such provisions should always be assessed together and has preferred a highly contextual and fact-specific approach to deciding the correct methodology when assessing multiple *Charter* breaches (para. 70, citing *J.J.*, at para. 115).

[140] The more particular question of how to analyze *Charter* breaches when violations are alleged under both s. 7 and s. 11 is discussed in *J.J.* In that case, Wagner C.J. and Moldaver J., writing for the majority, held that since s. 7 and s. 11(d) are "inextricably intertwined", they must be assessed together where they are co-extensive and separately where a concern falls specifically under one of the rights (para. 114, citing *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 536-38; *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, at p. 460; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 494; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, at para. 19; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443; *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 69).

[141] In the present case, the question of the analytical framework for s. 7 and s. 11(d) arises from a different angle. In *J.J.*, it was not disputed that both s. 7 and s. 11(d) could be invoked by the respondent in order for the Court to assess whether the impugned provisions compromised the right to a fair trial and the right to make full answer and defence. Conversely, in the present case, the issue is whether s. 11(d) applies to the Saskatchewan inmate discipline regime. Thus, before observing the guidance in *J.J.* on whether s. 7 and s. 11(d) should be assessed together or separately, this Court must first determine whether s. 11(d) can actually apply. If it can, only then will it be necessary to consider whether the rights are co-extensive or not.

C. *Does Section 11 of the Charter Apply to Saskatchewan's Inmate Disciplinary Proceedings?*

(1) Introduction

[142] Section 11 of the *Charter* contains a variety of procedural protections for persons "charged with an offence". The text reads as follows:

> **11** Any person charged with an offence has the right
>
> **(a)** to be informed without unreasonable delay of the specific offence;
>
> **(b)** to be tried within a reasonable time;
>
> **(c)** not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> **(d)** to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

> **(e)** not to be denied reasonable bail without just cause;
>
> **(f)** except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> **(g)** not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> **(h)** if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again;

[143] These protections are available to those charged with criminal offences. In *Wigglesworth*, Wilson J. wrote that the "rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted" (p. 554).

[144] An offence under the *Criminal Code*, R.S.C. 1985, c. C-46, will always attract the application of s. 11. To determine whether s. 11 applies to another process, a court must ask whether the "proceeding is, by its very nature, criminal," or whether "a 'true penal consequence' flows from the sanction" — this is known as the "*Wigglesworth* test" (*Wigglesworth*, at pp. 554-55 and 559; *Guindon*, at para. 44; *Martineau v. M.N.R.*, 2004 SCC 81, [2004] 3 S.C.R. 737, at para. 19). This framework recognizes that in a penal proceeding, a person is charged with a criminal offence and faces serious sanctions intended to maintain public order and redress a wrong done to

society at large (*Wigglesworth*, at p. 561; *Shubley*, at p. 20; *Guindon*, at para. 45). It also recognizes that, in contrast, a non-penal proceeding involves "regulatory, protective or corrective" matters "primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" (*Wigglesworth*, at p. 560; *Martineau*, at para. 57).

[145] Maintaining this distinction between the criminal law context and the administrative and regulatory contexts is in keeping with our Court's deliberate adoption of a "somewhat narrow definition of the opening words of s. 11" (*Wigglesworth*, at p. 558; *Guindon*, at para. 44). It is also in keeping with our Court's jurisprudence cautioning against the direct application of criminal justice standards outside of the criminal law context (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at paras. 87-88).

(2) The *Wigglesworth* Test

[146] Deciphering when a proceeding is by its very nature criminal or where a true penal consequence flows from the sanction is not always straightforward. As noted, there can be occasions where a proceeding or a sanction arising from that proceeding will attract the application of s. 11, even outside of the pure criminal law context. To make the determination of whether an individual has been "charged with an offence" within the meaning of s. 11, our Court developed the *Wigglesworth* test and later elaborated on it in *Martineau*.

[147] In *Wigglesworth*, the question centred on whether a "major service offence" heard before the RCMP Service Court engaged s. 11. While the RCMP Service Court was not a criminal court, the proceedings could have given rise to a sanction of up to one year of imprisonment for an RCMP member. That case prompted Wilson J., writing for the Court, to set out a test to determine the *threshold* question of the application of s. 11. The test is twofold. First, it asks whether the proceedings themselves are "criminal in nature". Second, it asks whether a sanction arising from the proceedings can amount to a "true penal consequence". Both prongs need not be satisfied to trigger the application of s. 11; one is sufficient.

(a) *The Criminal in Nature Prong of the Test*

[148] To satisfy the criminal in nature prong, the proceeding in question lies at the heart of the analysis. The underlying act which gave rise to the proceeding is not relevant.

[149] When considering the nature of the proceeding, it is important to bear in mind the jurisprudential backdrop. As Wilson J. stated in *Wigglesworth*, to attract s. 11 protection, the matter must be "intended to promote public order and welfare within a public sphere of activity", which is in contrast to "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity" (pp. 559-60).

[150] In our Court's most recent pronouncement on this prong of the test, in *Guindon*, Rothstein and Cromwell JJ., writing for the majority, found that Ms. Guindon was not "charged with an offence" within the meaning of s. 11 when the Minister of National Revenue assessed her for penalties under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), s. 163.2, because proceedings under that provision of the *Income Tax Act* were of an administrative nature (para. 5). Rothstein and Cromwell JJ. provided a helpful jurisprudential overview of the principles underlying this prong of the test at para. 51:

> The criminal in nature test asks whether the proceedings by which a penalty is imposed are criminal. The test is not concerned with the nature of the underlying act. As Wilson J. stated in *Wigglesworth*, the test is whether a matter "fall[s] within s. 11 . . . because by its very nature it is a criminal proceeding": p. 559 (emphasis added). This was confirmed in *Shubley*, at pp. 18-19, where McLachlin J. (as she then was) stated explicitly: "The question of whether proceedings are criminal in nature is concerned not with the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves" (emphasis added). Fish J., writing for the Court in *Martineau*, reaffirmed the conclusion in *Shubley* that the criminal in nature test is concerned solely with the proceedings themselves: see paras. 18-19. The text of s. 11 supports this conclusion. As Wilson J. noted in *Wigglesworth*:
>
> > Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. [p. 555]

[151] It is clear that the nature of the proceeding is the sole and central focus of this prong. Both *Martineau* and *Guindon* provide helpful general guidance as to how to carry out an analysis under this prong. Despite the fact that *Martineau* concerned a

civil collection mechanism in the customs context and *Guindon* concerned an administrative monetary penalty in the income tax realm, this guidance can still be used in other administrative and regulatory contexts, such as an inmate disciplinary process.

[152] In *Martineau*, Fish J. identified three criteria as helpful to consider under this prong: (1) the objectives of the legislation; (2) the purpose of the sanction; and (3) the process leading to the sanction (paras. 19-24). It is important to emphasize that the process is the focus of the analysis at this step, not the nature of the underlying act. Therefore, assessing whether the "traditional hallmarks" of a criminal proceeding exist in the impugned administrative proceeding can be helpful to this inquiry (*Guindon*, at para. 63; see also *Martineau*, at para. 45).

(b) *The True Penal Consequences Prong of the Test*

[153] While the criminal in nature prong involves an examination of the nature of the proceeding, the true penal consequences prong involves an examination of the purpose of the sanction in connection with its magnitude, although, as I explain below, the magnitude is not determinative. The purpose of the sanction remains the focus of the inquiry to preserve the dichotomy between a sanction within the criminal realm intended to serve the purposes of denunciation, punishment, and stigma for a wrong done to society at large and a sanction designed to maintain compliance (*Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, at para. 44; *Wigglesworth*, at p. 561; *Guindon*, at paras. 83-85). Accordingly, penalties arising from criminal or quasi-criminal offences are by their nature penal because the purpose of

those sanctions is to promote public order and welfare within a public sphere of activity (*Martineau*, at para. 21). By contrast, sanctions of an administrative — private, internal, disciplinary — nature are not criminal (para. 22). Administrative and regulatory penalties and sanctions that do not seek to redress a wrong to society are not penal unless the *Wigglesworth* test is met.

[154] Differentiating the purposes of penalties is important in the determination of whether a sanction arising from a proceeding is a "true penal consequence". In *Wigglesworth*, Wilson J. opted to use the phrase "true penal consequences" rather than merely "penal consequences". That distinction was made to reinforce the high bar that must be met before an administrative or regulatory sanction can be deemed to be truly penal in nature. A sanction is truly penal in nature when "by its magnitude [it] would appear to be imposed for the purpose of redressing the wrong done to society at large rather than for the maintenance of internal discipline within the limited sphere of activity" (p. 561). If traditional criminal law sentencing principles, such as denunciation, retribution, or an assessment of moral blameworthiness, are at play — or if the sanction seems aimed at redressing a wrong to society — the sanction can be viewed as "truly penal in nature" (*R. v. Cross*, 2006 NSCA 30, 241 N.S.R. (2d) 349, at paras. 30-31; *R. v. Samji*, 2017 BCCA 415, 357 C.C.C. (3d) 436, at para. 51; *Sivia v. British Columbia (Superintendent of Motor Vehicles)*, 2014 BCCA 79, 55 B.C.L.R. (5th) 1, at para. 142). If stigma is associated with the sanction, this will militate in favour of the sanction being classified as truly penal in nature (*Guindon*, at paras. 76, 84 and 89; *Whaling*, at para. 47; *Martineau*, at para. 64).

[155] In addition to the purpose, the magnitude of the sanction is relevant to the analysis, but not determinative (*Guindon*, at para. 77). Regard must be had to whether the magnitude of the sanction is determined by regulatory considerations rather than by principles of criminal sentencing (para. 76), and ultimately it will be a weighing exercise, taking into account the size and scope of a prospective sanction. To what extent a sanction's magnitude impacts the analysis will depend on the facts of a given case.

[156] Our Court has previously recognized the high bar required to attract the application of s. 11 in non-criminal matters, as stated in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 38:

> . . . the "true penal consequence" test sets an indisputably high bar, it was developed to determine whether a person is nonetheless "charged with an offence" even if he or she is the subject of proceedings *outside* the criminal context. Within the criminal law context, the concerns motivating a narrow construction of "penal consequences" or "punishment" largely fall away. [Emphasis in original.]

[157] This underscores that the test seeks to preserve the narrow focus of s. 11 on procedural protections within the criminal law context. When it comes to conducting a s. 11 analysis, this backdrop is important to bear in mind. Similarly important to consider is distinguishing between a penalty that seeks to punish or denounce (truly penal in nature) and a penalty that aims to deter (non-penal, or administrative) (*Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176, 333 D.L.R. (4th) 1, at para. 74).

(c) *Application of the Test in Wigglesworth*

[158] In *Wigglesworth*, Wilson J. held that the RCMP internal proceedings were not "criminal in nature" because they were designed to "regulate conduct within a limited private sphere of activity" (p. 562). While the first prong of the test was not met, she did find that the second prong was met because the administrative proceeding could involve "true penal consequences" with the imprisonment of an RCMP member for up to one year. She found it to be one of the rare cases where there was a conflict between the two prongs of the test, but ruled that in such cases, the true penal consequences prong must take precedence over the criminal in nature prong (*ibid.*).

(3) Application of *Wigglesworth* in *Shubley*

[159] The *Wigglesworth* test formed the basis of the analysis in *Shubley*. In that case, the issue was whether Ontario's inmate disciplinary proceedings attracted the application of s. 11. Under the Ontario regime, when an inmate was subject to a disciplinary proceeding, he or she would be brought before the detention centre superintendent, who would hear the facts pertaining to the alleged misconduct before making a finding and imposing a penalty, as the case may be. In *Shubley*, the inmate was brought before the superintendent, who decided that the misconduct had occurred and ordered the inmate to be placed in solitary confinement for five days with a restricted diet (p. 13). The inmate later sought the protections of s. 11.

[160] To determine whether the inmate discipline regime existing in Ontario at that time attracted the protection of s. 11, our Court applied the *Wigglesworth* test. Writing for the majority, McLachlin J. held that the criminal in nature prong was not met because the proceeding's purpose was not to "mete out criminal punishment, but to maintain order in the prison" (p. 20). The fact that the proceedings were informal, swift, and in private stood in contrast to how a court would operate and therefore militated against a finding that the proceeding was "criminal in nature" (*ibid.*). Turning to the true penal consequence prong, McLachlin J. found that neither close confinement nor loss of remission is a true penal consequence. Of the latter, she said it "does not constitute the imposition of a sentence of imprisonment", opting to instead view it as a "loss of a privilege" (p. 23). She said both were confined to "the manner in which the inmate serves his time" and involved neither a punitive fine nor a sentence of imprisonment (*ibid.*). In reference to the magnitude of the sanctions, she held both to be "entirely commensurate with the goal of fostering internal prison discipline and . . . not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (*ibid.*). Accordingly, s. 11 did not apply in that case.

(4) Is *Shubley* Still Good Law?

[161] When seeking leave to this court, John Howard Society expressly acknowledged that *Shubley* "found that s. 11 does not apply to inmate discipline proceedings" (Appellant's memorandum of argument, reproduced in the application for leave to appeal, at p. 68). Having moved away from that position, John Howard

Society now asks us to overturn *Shubley*. To do this, it points to the framework for departing from a precedent, which has since been cited by our Court in *Canada (Attorney General) v. Power*, 2024 SCC 26, at paras. 98 and 209, and *Auer v. Auer*, 2024 SCC 36, at para. 32.

[162] John Howard Society argues that the threshold for overturning a precedent has been met. This issue must first be addressed before deciding on the applicability of s. 11. For the reasons that follow, I am of the view that John Howard Society has not demonstrated the required basis on which to overturn *Shubley*. I have also had the advantage of reading the reasons of the majority and, with great respect, I disagree with their conclusion and the reasoning underlying it, as I explain more fully below.

(a) *Governing Principles for Overturning a Precedent*

[163] The principle of *stare decisis* is a foundational doctrine that calls on courts to stand by previous decisions and not disturb settled matters. This doctrine promotes legal certainty and stability (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 20, 270 and 281; R. J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 147), the rule of law (*Vavilov*, at paras. 260 and 281), and the legitimate and efficient exercise of judicial authority (*Watkins v. Olafson*, [1989] 2 S.C.R. 750, at pp. 760-61). It requires judges to give effect to legal principles that are well settled and depart from them only when there is a proper basis for doing so.

[164] Under the framework advanced by John Howard Society, there are three bases on which to depart from a precedent: (1) the precedent at issue was rendered without regard to a binding authority or a relevant statute, *per incuriam*; (2) the precedent has proven unworkable; or (3) the precedent's rationale has been eroded by societal or legal change. Only the last two are at issue in this appeal.

[165] To be "unworkable", a precedent must undermine at least one of the purposes that *stare decisis* is intended to promote: legal certainty, the rule of law, and judicial efficiency. Legal certainty will be undermined when a precedent is "unclear and unduly complex" (*Vavilov*, at para. 21). The rule of law will be undermined when a precedent makes the law indeterminate or subject to a judge's personal preferences, rather than a principled framework. Judicial efficiency will be undermined when a precedent is unnecessarily complex or cumbersome to the point where it unnecessarily drains judicial resources.

[166] To meet the threshold of foundational erosion, a party seeking to overturn a precedent must demonstrate either (1) societal change or (2) legal change. A societal change can include when fundamental change to societal conditions in the social, economic, or technological realm undermines the precedent's rationale, making it moot or inconsistent with contemporary societal norms. A legal change can arise from constitutional amendments, such as the introduction of the *Charter*, or when incremental jurisprudential change amounts to "attenuating" the precedent.

(b) *Reasons Advanced To Overturn Shubley*

[167] John Howard Society urges us to overturn *Shubley* on the basis that it has become "unworkable" and because its holding has been subject to "foundational erosion". It says that two trends underlie its position.

[168] First, regarding "unworkability", by denying the application of s. 11 to inmate disciplinary proceedings, *Shubley* has left such proceedings subject to *Charter* scrutiny under s. 7 only. This has led to "vastly inconsistent" conceptions of the requirements of the principles of fundamental justice across the country, resulting in a patchwork of procedural protections for inmates depending on which jurisdiction they find themselves in (A.F., at para. 11). Therefore, legal certainty and the rule of law are implicated and make the precedent unworkable (paras. 15-17, 20-22 and 26).

[169] Second, regarding "foundational erosion", John Howard Society suggests that the *Wigglesworth* test has evolved since its application in *Shubley*, so much so that the result would be different today (A.F., at paras. 11, 13 and 28). Additionally, there has been a profound evolution in the way that delayed release and solitary confinement are viewed in the jurisprudence. Consequently, the majority's reasoning in *Shubley* with respect to the non-application of s. 11 is subject to foundational erosion and is no longer correct (paras. 11 and 33).

[170] For its part, the majority finds that *Shubley*'s conclusion that disciplinary segregation and loss of earned remission are not true penal consequences was formed on the basis of an overly formalistic interpretation of what constitutes "imprisonment".

That approach, they say, is no longer consistent with case law in the wake of *Shubley* (paras. 40-41).

(c) *Shubley Remains Good Law*

[171] If *Shubley* remains good law, it is a precedent that binds our Court to find that neither loss of earned remission nor disciplinary segregation in the inmate disciplinary context satisfies the *Wigglesworth* test. Indeed, even the majority acknowledges this in its reasons (para. 32). For the reasons that follow, I am of the view that *Shubley* remains good law. I am not persuaded by the arguments advanced to the contrary.

(i) Unworkability

[172] John Howard Society's first argument — that *Shubley* has led to a patchwork of provisions and uneven procedural protections across the country resulting from different statutory schemes and varied results from courts and therefore has eroded the rule of law — is unconvincing. Differing levels of protection for inmates in different provinces are to be expected in a federation where the division of powers allows for the creation of different rules concerning the management of correctional facilities in each province alongside of the interpretation of laws by the courts in each province. The fact that provinces may impose different inmate disciplinary mechanisms does not give rise to unworkability. Rather, it is a function of our federation. Similarly, the application of s. 7 is a fact-driven exercise tailored to the

circumstances of a given case. For its part, the majority finds it unnecessary to address the assertion that *Shubley* should be overturned on the basis of unworkability (para. 32).

(ii) Erosion of Legal Foundation

1. *Erosion of the Legal Foundation of the Criminal in Nature Prong*

[173] John Howard Society's second argument — that *Shubley* is subject to foundational erosion — is equally unconvincing. To make this point, John Howard Society first submits that the criminal in nature prong of the *Wigglesworth* test has been modified by *Martineau* and *Guindon*, such that inmate disciplinary proceedings now meet what it calls the "modern test" (A.F., at para. 33). It argues that *Shubley* focussed on the extent of the procedural protections imparted to the regime by the legislature, whereas *Martineau* and *Guindon* shifted the focus from formality and the procedural protections inherent in the regime to the objectives and purpose of the process and sanction (paras. 39-40).

[174] I do not agree. Neither *Martineau* nor *Guindon* changed the focus of the criminal in nature prong, which remains squarely on the nature of the proceeding. In both cases, our Court highlighted the importance of factors relating to the proceeding in question: the objectives of the legislation, the purpose of the sanction, and the process leading to the imposition of the sanction (*Martineau*, at para. 24). Consequently, the proceeding still remains paramount to the analysis, as it was in the *Shubley* analysis.

[175] I agree with the following statement, made by the intervener the Attorney General of British Columbia: "In articulating [the *Martineau*] criteria, Fish J. was not displacing or modifying the *Wigglesworth* 'criminal in nature' test. To the contrary, Fish J. grounded these criteria in *Wigglesworth* and *Shubley*. He was elaborating upon *Shubley*, not modifying it" (I.F., at para. 39). The Attorney General also rightly points out that our Court subsequently characterized *Guindon* as a reaffirmation of the *Wigglesworth* test (*Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at para. 40).

[176] For its part, the majority does not address the foundational erosion of the criminal in nature prong (para. 32).

2. *Erosion of the True Penal Consequences Prong*

[177] The second point that John Howard Society makes in support of its argument that *Shubley* is subject to foundational erosion is that increasing judicial scrutiny of the actions of prison officials and confinement conditions has led to an evolution in the jurisprudence that has eroded *Shubley*'s foundation (A.F., at para. 33). The majority is of the view that *Shubley*'s interpretation of *Wigglesworth*'s true penal consequences prong rests on an eroded legal foundation, as it relies on a formalistic method of interpretation that has since been consistently eschewed (paras. 32 and 34).

[178] Respectfully, I am not persuaded by either line of reasoning. Let me explain.

[179] The jurisprudence since *Shubley* has not disturbed its rationale. For instance, with regard to loss of earned remission, both John Howard Society and the majority cite *Whaling*. In that case, a legislative scheme provided for the retrospective application of the abolition of early parole to offenders already serving sentences. It was challenged on the basis that it violated the *Charter*'s s. 11(h) guarantee not to be punished again. Our Court found that there was a breach of s. 11(h) because the retroactive nature of the change disturbed an inmate's "settled expectation of liberty" (para. 63). The majority also cites *Cunningham v. Canada*, [1993] 2 S.C.R. 143, where our Court considered whether retrospective changes to the parole system violated s. 7 of the *Charter*. Putting aside the fact that *Cunningham* actually *upheld* the constitutionality of the legislative changes and that the case concerned s. 7 as opposed to s. 11, I am of the view that neither *Whaling* nor *Cunningham* is comparable to the instant case.

[180] Loss of earned remission is not akin to a retroactive legislative change to a sentence already being served. In *Shubley*, McLachlin J. succinctly described remission and its relationship to a sentence (at pp. 22-23):

> Remission does not shorten a sentence for imprisonment; that can be done only by appeal. Rather, it permits an inmate who has "applied himself industriously" to the prison program, to serve part of his sentence outside the prison. The privilege of remission (it is not a right) is conferred as a matter of prison administration to provide incentives to inmates to rehabilitate themselves and co-operate in the orderly running of the prison. The removal of that privilege for conduct that violates these standards is equally a matter of internal prison discipline. Forfeiture of remission does not constitute the imposition of a sentence of imprisonment by the

> superintendent, but merely represents the loss of a privilege dependent on good behaviour. [Citations omitted.]

[181] In other words, reliance on *Whaling*, in particular, fails to consider that an inmate housed in a correctional facility understands the rules of that facility. In the instant case, the *Regulations* require that inmates be advised of the correctional facility's rules and disciplinary procedures as soon "as is reasonably practicable" (s. 6(1)). Should the inmate abide by those rules, they will earn remission. Should the inmate not abide by those rules, there is a possibility that earned remission will be lost. This is an individual exercise, unlike the blanket application at play in *Whaling*. Therefore, I see no major shift in the foundation of *Shubley*'s holding on the loss of earned remission.

[182] Regarding segregation, John Howard Society further suggests that in the time that has elapsed since *Shubley*, "there has been significant jurisprudential movement in consideration of the punitive nature of solitary confinement", including appellate decisions moving away from the view of solitary confinement as "a benign administrative sanction" (A.F., at paras. 64-65).

[183] I do not accept the premise of John Howard Society's assertion that *Shubley* characterized segregation as "a benign administrative sanction", nor do I accept that the appellate court cases cited by John Howard Society — *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228, 377 C.C.C. (3d) 420 ("*BCCLA*"), and *Canadian Civil Liberties Assn. v. Canada (Attorney General)*,

2019 ONCA 243, 144 O.R. (3d) 641 ("*CCLA*") — represent the type of sea change required to overturn *Shubley*.

[184] In both of those cases, the appellate courts were seized with a provision of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20, that authorized an institutional head to order an inmate incarcerated in a federal penitentiary to be confined indefinitely in "administrative segregation" for safety or security reasons.

[185] The *Act* in the instant case provides that administrative segregation is available in cases where an inmate jeopardizes the security of the correctional facility or the safety of the inmates, staff members or the public, or in such cases where an inmate's presence in the general inmate population would interfere with an investigation or would jeopardize the inmate's own safety (s. 58). Administrative segregation differs from disciplinary segregation, which is a punishment for committing a disciplinary offence or offences.

[186] Those decisions address administrative segregation as opposed to disciplinary segregation, which is the focus of the instant case, but that fact aside, the concern in those decisions is the constitutionality of provisions authorizing *indefinite confinement in administrative segregation*. Both courts found prolonged administrative confinement — segregation beyond 15 days — not to survive constitutional scrutiny (*BCCLA*, at paras. 148 and 151; *CCLA*, at paras. 4 and 150). Both cases found administrative segregation of up to 15 days to be constitutionally compliant, with the Court of Appeal for British Columbia calling it a "defensible standard" (*BCCLA*, at

paras. 16, 146 and 151; *CCLA*, at paras. 4 and 150). The appellant in *Shubley* had been placed in solitary confinement for a period of five days with a restricted diet. Consequently, the foundational erosion required to overturn *Shubley* has not been established.

[187] I also note that in *BCCLA*, the Court of Appeal for British Columbia made a point of stating that the issue it confronted had been decided in the courts below on the basis of an "extensive record" (para. 14). This stands in contrast to the instant case, particularly as regards to John Howard Society's claims that foundational erosion requires our Court to no longer apply *Shubley*. The assertions being made about the nature of disciplinary segregation are not based on any factual findings in the courts below. In fact, the application judge made an explicit factual finding that disciplinary segregation in Saskatchewan did not constitute what John Howard Society calls "solitary confinement" (para. 86). I am of the view that such assertions are contested factual issues and that they are best resolved on evidence in trial courts. In both *BCCLA* and *CCLA*, expert evidence was relied upon. This is in contrast to the instant case, where John Howard Society relies on those cases in place of factual findings or evidence. While the findings in those cases may be relevant to consider, they should not be instructive to the current case, nor do they, on their own, provide a sufficient basis on which to disturb *Shubley*.

[188] Before addressing the majority reasons on this point, I raise one final consideration. John Howard Society suggests that foundational erosion has occurred

since *Shubley* was decided because of the evolution in the judicial treatment of segregation generally. However, it is clear from Cory J.'s dissenting reasons in *Shubley*, as well as from other case law that I will outline in the paragraphs below, such as the trilogy, that at the time *Shubley* was decided there was an understanding of the various degrees of liberty deprivation that may occur within a prison. For instance, Cory J. in *Shubley* stated that the "grievous effects of solitary confinement have been almost instinctively appreciated since imprisonment was devised as a means of punishment. . . . Close or solitary confinement is a severe form of punishment" (p. 9). It is clear that courts were alive to the severity of segregation at the time *Shubley* was decided. This further undercuts the argument that the manner in which courts have treated segregation in the wake of *Shubley* is sufficient to overturn it on the basis of foundational erosion. It also demonstrates that the reasoning relied upon in *BCCLA* and *CCLA* is not novel.

[189] The majority reasons rely on s. 10(c) and s. 7 jurisprudence to make the point that in other *Charter* contexts our Court has not used a formalistic method of interpretation in maintaining a distinction between a sentence of imprisonment and conditions of imprisonment. While that may not be suggesting that these cases have direct application to the instant case, I respectfully find reliance on that line of jurisprudence to be problematic, factually and legally.

[190] Section 10(c) of the *Charter* guarantees everyone the right to have the validity of their detention determined by way of *habeas corpus* and to be released if

the detention is found to be unlawful. In citing a trilogy of cases — *R. v. Miller*, [1985] 2 S.C.R. 613, *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662, and *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 — the majority posits that they collectively stand for the proposition that our Court has ruled that administrative segregation is a distinct form of imprisonment, which undermines *Shubley*'s holding as a result (paras. 42-43). The majority further cites *Dumas v. Leclerc Institute*, [1986] 2 S.C.R. 459, as a case in which an expansive approach to *habeas corpus* was taken. Respectfully, both the trilogy and *Dumas* present factual and legal differences that are not possible to ignore in this instance.

[191] Factually, each of the trilogy cases involved severe segregation in separate wings and institutions and a lack of procedural fairness.

[192] In *Miller*, an inmate was transferred to another institution and placed in administrative segregation in a special handling unit following a disturbance in his penitentiary. He was advised that he had been placed there because of his participation in the disturbance but was never given any opportunity to confront the evidence, if any, of his involvement in the incident.

[193] In *Morin*, an inmate charged with murder following the death of a fellow inmate was confined to a special handling unit in another institution. After being acquitted of the murder charge, he remained in segregation, and his request to be transferred back to a medium security institution was refused. This prompted his application to the Superior Court for a writ of *habeas corpus*. On appeal, the sole issue

was whether a superior court had jurisdiction to issue a writ of *habeas corpus* to determine the validity of the confinement of an inmate of a federal penitentiary in a special handling unit.

[194] In *Cardinal*, the inmates were allegedly involved in a hostage-taking incident within their penitentiary, which led to criminal charges and a transfer to another institution, where they were placed in administrative dissociation or segregation on the ground that it was necessary for the maintenance of good order and discipline in the institution. The Director declined to conduct an independent inquiry, instead opting to rely on the words of a fellow warden. When the Segregation Review Board recommended that the appellants be released from administrative segregation into the general prison population, the Director refused to comply. He did not inform the inmates of his reasons for refusal, nor did he give them an opportunity to be heard. They challenged their confinement by applications for *habeas corpus*.

[195] In each of the cited cases, severe segregation in separate wings and institutions combined with a lack of procedural fairness was at issue. The same cannot be said about the regime in the instant case, where the application judge found that inmates subject to segregation are generally confined to their own cells and, for the most part, still have access to cellmates, natural light, and television (in cases where there was a television in the cell prior to the segregation) (paras. 23 and 85). Further, all inmates facing disciplinary sanctions in Saskatchewan have access to procedural rights. As for *Dumas*, the appeal centred around an application for *habeas corpus* made

further to the appellant's day parole being revoked as a result of accusations of prison disciplinary offences. It did not involve segregation, and, in any event, our Court ruled that the appellant had no right to *habeas corpus* (p. 465).

[196] From a legal standpoint, I am of the view that in the present instance these cases have — to say the least — attenuated value for two reasons. First, each of the trilogy cases was decided in 1985, and *Dumas* was decided in 1986, which means that they predate *Shubley* by five years and four years, respectively. To overturn a precedent on the basis of foundational erosion, proper methodology requires that foundational erosion must have occurred *after* the precedent was decided (*R. v. Tutton*, [1989] 1 S.C.R. 1392, at pp. 1410-11, per Wilson J.; *R. v. Bernard*, [1988] 2 S.C.R. 833, at pp. 855-56, per Dickson C.J., dissenting, but not on this point; *R. v. Hynes*, 2001 SCC 82, [2001] 3 S.C.R. 623, at paras. 116 and 119, per Major J., dissenting, but not on this point; *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438, at para. 24; *R. v. Alex*, 2017 SCC 37, [2017] 1 S.C.R. 967, at para. 95, per Rowe J., dissenting, but not on this point). In other words, the source of the erosion must be rooted in *subsequent* case law. To suggest otherwise would mean that this Court can rewrite prior jurisprudence that it believes was simply "wrong". Such an approach runs counter to the purposes of *stare decisis* and its foundational underpinnings of providing legal certainty and stability by way of a principled approach to overturning a precedent.

[197] Second, even putting aside the issue of the erosion having occurred before the precedent was even decided, I respectfully remain unconvinced because the

interpretative approaches to s. 10(c) and s. 11 are markedly different. Section 10(c) of the *Charter* guarantees everyone the right to have the validity of their detention determined by way of *habeas corpus* and to be released if the detention is found to be unlawful. *Habeas corpus* concerns itself with the "protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty", is "broad", and is not "a static, narrow, formalistic remedy" (*Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29, [2019] 2 S.C.R. 467, at paras. 19 and 21, quoting *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 21). It should therefore come as no surprise that *Dumas* continued to widen the availability of *habeas corpus*, even if the ultimate disposition in that case was to deny *habeas corpus* to the appellant (p. 465).

[198] By contrast, s. 11 has been given a "narrower interpretation" as the rights contained therein "are available to persons prosecuted by the State for public offences involving punitive sanctions" (*Wigglesworth*, at p. 554). Specifically, Wilson J. expressed concern for the "future coherent development" of s. 11 "if it is made applicable to a wide variety of proceedings" (p. 558). This reflects the narrow interpretation that our Court has adopted in every s. 11 analysis. I understand the majority as sharing the concern that "s. 11 will become too broad in scope" (para. 77). On this point, I agree.

[199] Finally, as noted earlier, the trilogy and *Dumas* and the other historical sources cited by the majority were all available to our Court at the time *Shubley* was

decided. When our Court found that the right to strike is inherent in s. 2(d) of the *Charter* in *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, Rothstein J. and Wagner J. (as he then was) dissented in part, stating:

> Many of the sources identified by the majority existed at the time this Court rendered its decisions in the Labour Trilogy. For instance, the history of strike activity in Canada and abroad canvassed by the majority at paras. 36 to 55 was information available to this Court when it considered the Labour Trilogy appeals. It cannot now form the basis for an entirely different result than that reached by this Court in 1987. The criterion that, in order for a precedent to be overruled, there must be "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" ([*Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101], at para. 42) is manifestly unsatisfied. [para. 143]

[200] I agree entirely with that sentiment, as expressed then, and respectfully suggest that the same could be considered in the instant case. The cases the majority reasons now seek to rely on as a basis for overturning *Shubley* existed at the time and did not prevent the majority in *Shubley* from taking the position that it did. This must be respected.

[201] For the foregoing reasons, I reject the reasons advanced to overturn *Shubley*. *Shubley* remains good law and a binding precedent. Therefore, we must apply it in the present case.

D. *Does Section 68 of the Regulations Infringe Section 11(d) of the Charter?*

(1) Application of the *Wigglesworth* Test in This Case

[202] As already noted, *Shubley* found that the Ontario inmate discipline regime was not subject to the application of s. 11. But *Shubley* also pointed out the following (at p. 18):

> . . . the logic of *R. v. Wigglesworth* is to proceed not by a category approach, but by application of the general principles there laid down. Thus, one must examine whether the particular proceedings here at issue meet the tests set forth in *R. v. Wigglesworth*.

[203] Therefore, I proceed to the analysis.

(a) *The Criminal in Nature Prong of the Test*

[204] In *Shubley*, McLachlin J. noted the fact that the conduct giving rise to the proceeding had no bearing on her analysis. She found that the Ontario inmate in that case was being called to account to the prison officials for a breach of his obligation as an inmate of the prison to conduct himself in accordance with prison rules. She found that he was not being called to account to society (p. 20).

[205] McLachlin J. analyzed the proceedings as lacking the "essential characteristics of a proceeding on a public, criminal offence" (p. 20). In reference to their purpose, she said it was not to "mete out criminal punishment, but to maintain order in the prison" (*ibid.*). In surveying the traditional hallmarks of a criminal proceeding, she noted that the proceedings were informal, swift, and in private, with no court involvement. She found that they did not meet *Wigglesworth*'s standard that

they be "of a public nature, intended to promote public order and welfare within a public sphere of activity" (*Wigglesworth*, at p. 560; *Shubley*, at p. 20).

[206] I find no substantial difference between the circumstances present in *Shubley* and those in the instant case. This is so even with the use of the elaborated *Martineau* criteria, which I will now proceed to consider in the same sequence as Rothstein and Cromwell JJ. did in *Guindon*. In that case, they first considered two *Martineau* factors (the objectives of the legislation and the process leading to the imposition of the sanction) under the criminal in nature prong, and they left the final factor (the purpose of the sanction) for consideration under the true penal consequences prong (para. 52). However, as Rothstein and Cromwell JJ. emphasized, while there will "inevitably [be] some overlap in the analysis" between the criminal in nature prong and the true penal consequences prong, they are separate and have independent value (para. 49).

(i) Objectives of the Legislation

[207] When the objectives of the legislation are considered, the question is whether the *Regulations* and/or the *Act* provide for a penal proceeding that is criminal in nature, as noted by the Court of Appeal at para. 3:

> The inmate disciplinary system for offences that occur within those institutions is codified in detail in Part VIII of *The Correctional Services Act, 2012*, SS 2012, c C-39.2 [*CS Act*], and Part XIII of *The Correctional Services Regulations, 2013*, RRS c C-39.2 Reg 1 [*Regulations*]. Disciplinary offences are divided into minor and major offences: s. 72 and

> s. 73(2)(a) of the *CS Act* and s. 50, s. 54, and s. 55 of the *Regulations*. The hearing process differs on the basis of this classification, but not in a manner relevant to this appeal. The [standard] of proof is the same for both categories of offences. [First text in brackets in original.]

[208] Both the application judge and the Court of Appeal found that the overall purpose of the inmate discipline regime established in the aforementioned sections of the *Act* and the *Regulations* is "to maintain order, security, and safety in the institutions" (C.A. reasons, at para. 30; application judge's reasons, at paras. 1 and 69-71; ss. 3(d) and 23 to 25 of the *Act*).

[209] John Howard Society suggests that the purpose of the legislation is to "create a world separate from society" (A.F., at para. 43), though later it conceded that the purpose of s. 68 of the *Regulations* is "to maintain order in the prisons" by utilizing expeditious and informal hearings and that this constitutes a pressing and substantial objective (para. 106). The respondent argues that the objectives of the legislation are to "creat[e] operational efficiencies and improv[e] security in provincial correctional centres" and to ensure "a procedurally fair disciplinary review system" (R.F., at paras. 169-70).

[210] I agree with the courts below, as well as with both the respondent and John Howard Society's later concession, that the objective of the legislation is to maintain order and discipline in correctional facilities in Saskatchewan. This is in accordance with *Shubley*, where the Court upheld the decision of the Ontario Court of Appeal in finding that the inmate disciplinary proceedings under review in that case

were "implicitly aimed at promoting the orderly regulation and over-all good government of correctional institutions" (p. 16).

[211] As noted by the Court of Appeal in this case, "[g]iven the high volume of offences that occur in correctional facilities, and the need to deal with them quickly, an efficient, yet fair, system is required" (para. 30). The objective of maintaining order is advanced by the standard of proof that was chosen for the purpose of providing both adequate procedural protection to inmates and administrative agility to administrators of institutions.

(ii) The Process Leading to the Sanction

[212] As was the case in *Martineau* and *Guindon*, this point in the analysis is an opportune time to consider the extent to which the proceeding bears the traditional hallmarks of a criminal proceeding. In *Guindon*, Rothstein and Cromwell JJ. stated the following, at para. 63:

> Fish J. referred to some of the relevant considerations in *Martineau*, including whether the process involved the laying of a charge, an arrest, a summons to appear before a court of criminal jurisdiction, and whether a finding of responsibility leads to a criminal record: para. 45. The use of words traditionally associated with the criminal process, such as "guilt", "acquittal", "indictment", "summary conviction", "prosecution", and "accused", can be a helpful indication as to whether a provision refers to criminal proceedings.

[213] In *Shubley*, a superintendent of an Ontario prison could determine by way of an informal hearing on the day following the alleged misconduct whether an inmate had committed misconduct and impose one or more penalties (s. 31 of Regulation 649, R.R.O. 1980; *Shubley*, at pp. 13 and 21-22). McLachlin J. noted that the proceeding in that case lacked "the essential characteristics of a proceeding on a public, criminal offence" because its "purpose [was] not to mete out criminal punishment, but to maintain order in the prison" (p. 20). She noted that the proceeding was conducted informally, swiftly, in private, and with no court involvement. She also noted that the purpose of the proceeding was not to call the inmate "to account to society for a crime violating the public interest" (*ibid.*).

[214] By contrast, the Saskatchewan inmate discipline regime has more formality in its proceedings. For instance, the *Regulations* set out a list of offences, classify them as minor or major, and assign severity of sanction on that basis. The *Regulations* require the prison administration to issue a notice of charge, provide for a full and fair hearing, and prescribe the rights of the inmate in this process. While there is no right to call witnesses and the panel is not bound by the rules of evidence, the inmate may question witnesses or request additional ones, and a record of decisions is mandated to be kept (ss. 50 to 71 of the *Regulations*).

[215] While these factors militate towards a finding that the proceeding in this case was criminal in nature, they alone are insufficient to satisfy the criminal in nature prong. John Howard Society argues that there are sufficient traditional hallmarks of a

criminal process in this case (A.F., at para. 55). I disagree. In the present case, there was no arrest, there was no appearance before a court of criminal jurisdiction, no criminal record has resulted from it, and none of the words Fish J. listed in the above excerpt were used. There is no basis on which to suggest that these hearings are anything but administrative and regulatory in nature, intended to further the purpose of maintaining internal prison discipline.

(iii) Conclusion on the Criminal in Nature Prong

[216] To hold that these proceedings are criminal in nature would fly in the face of both *Shubley* and *Wigglesworth*, which require us to distinguish between proceedings "of a public nature, intended to promote public order and welfare within a public sphere of activity" and administrative — private, internal, or disciplinary — proceedings (*Wigglesworth*, at p. 560).

[217] McLachlin J. was right to find that "[p]rison discipline proceedings must be expeditious and informal if the crises that inevitably occur in centres of incarceration are to be avoided" (*Shubley*, at p. 24). She found that conferring s. 11 rights on inmates facing internal disciplinary proceedings "would be to make the task of those charged with maintaining order in our prisons immeasurably more difficult" (*ibid.*).

[218] I agree with both statements and find that the criminal in nature prong is not satisfied here. Therefore, I conclude that Saskatchewan's inmate disciplinary proceedings are not criminal in nature.

(b) *The True Penal Consequence Prong of the Test*

[219] In *Shubley*, McLachlin J. found that Ontario's internal disciplinary proceedings did not satisfy this prong. The sanction at issue was "close confinement for five days on a special diet that fulfils basic nutritional requirements" (p. 21). Though it was not invoked in *Shubley*, loss of earned remission was an available sanction within the regime and was subject to analysis (p. 22). She found that the loss of earned remission did not constitute imprisonment because it was the removal of a privilege dependent on good behaviour and did not constitute the imposition of a sentence (pp. 22-23). She found both sanctions to be "entirely commensurate with the goal of fostering internal prison discipline and . . . not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (p. 23).

[220] In the instant case, segregation and loss of remission as possible consequences are at issue. Segregation in this regime is provided as a sanction for major disciplinary offences. Section 77(1)(d) of the *Act* provides for "segregation to a cell, unit or security area for a period not exceeding 10 days". Loss of earned remission is also available as a sanction for major disciplinary offences. Section 77(1)(h) provides for "forfeiture of a period, not exceeding 15 days, of remission earned". We now turn to the analysis of the purpose of the sanctions and their magnitude.

(i) <u>Purpose of the Sanction</u>

[221] As noted, I have already considered two *Martineau* factors (the objectives of the legislation and the process leading to the sanction) under the criminal in nature prong. This mirrors the analytical approach taken by Rothstein and Cromwell JJ. in *Guindon*. Now, I turn to the third *Martineau* factor: the purpose of the sanction.

[222] John Howard Society urges us to find the purpose of the sanction to be similar to that of a criminal sanction: deterrence and denunciation, separation from society, recognition of harm done through offending, and an emphasis on offender responsibility (A.F., at para. 47).

[223] As noted earlier, regard to the purpose of the sanction should guide the analysis. The sanction's magnitude is also relevant, though not determinative. We must ask whether the sanction intends to serve the criminal law purposes of denunciation, punishment, and stigma for a wrong done to society at large, as opposed to serving the purpose of maintaining compliance (*Whaling*, at para. 44; *Wigglesworth*, at p. 561; *Guindon*, at paras. 83-85). We must also ask whether the sanction seeks to promote public order and welfare within a public sphere of activity or seek to redress a wrong to society, or by contrast whether it furthers the purpose of private, internal, and disciplinary objectives.

[224] A significant line of jurisprudence reiterates that it will be a rare case where one prong of the *Wigglesworth* test is met but the other is not (*Wigglesworth*, at p. 561; *Martineau*, at para. 57; *Guindon*, at para. 46). This highlights the very high bar the

Wigglesworth test imposes to preserve our Court's narrow interpretation of s. 11 application beyond the criminal law context.

[225] *Wigglesworth* was one of those rare cases, because the sanction arising from the proceeding was up to one year of imprisonment. McLachlin J. decided that *Shubley* was not one of those rare cases, ruling that both sanctions concerned "the manner in which the inmate serves his time" rather than consisting of the imposition of a new sentence (p. 23). She also found their purpose to be "entirely commensurate with the goal of fostering internal prison discipline" (*ibid.*).

[226] I see no basis on which to disturb McLachlin J.'s holdings. Applied to the instant case, the outcome is the same. The purpose of disciplinary segregation and loss of earned remission is not to impose a sanction to "redres[s] wrongs done to society at large" (*Shubley*, at p. 23). The sanctions amount to seeking to foster discipline within correctional facilities in Saskatchewan, and as such, they are non-penal consequences within the context of existing sentences. Likewise, she found those sanctions to be "not of a magnitude or consequence that would be expected for redressing wrongs done to society at large" (p. 23). This reasoning applies to the instant case.

(ii) Consideration of the Impugned Sanctions

[227] As stated, the purpose of the sanction must guide the analysis. In addition, alongside of the magnitude of the sanctions, consideration of both the jurisprudential

treatment of the sanctions and how they are used in Saskatchewan provides helpful context when an analysis is carried out under this prong.

1. *Segregation*

[228] In *Shubley*, close confinement for five days with a special diet that fulfilled basic nutritional requirements was declared constitutionally compliant. The maximum available period for that type of close confinement under the Ontario inmate disciplinary scheme was 10 days (p. 22). In the instant case, the *Act* provides for segregation to a cell, unit, or security area for a period not exceeding 10 days (s. 77(1)(d)).

[229] The application judge made the following findings on the conditions for segregated inmates in Saskatchewan at para. 23 of his reasons:

> Unless safety concerns exist, inmates remain on their unit and are not placed in more secure units. Inmates are permitted a minimum of one hour of leisure time outside their cells each day when they can make phone calls (unless they have received a sanction of loss of telephone privileges), shower, engage with other inmates, watch television, exercise and spend time outside. Commonly, the cells have natural light by way of windows and sanctioned inmates often have a cellmate. Inmates have access to health care and can request to see a nurse at any time. Inmates also have access to Elders, Chaplains and program staff.

[230] The courts below did not find this segregation to be the same thing as solitary confinement. The application judge stated the following, at para. 86:

> I find nothing in the evidence to suggest that what Corrections calls "segregation" is as severe as one might associate with the term "solitary confinement" or "dissociation." In some situations, segregating a prisoner from other prisoners may be for the safety of all, including the offending inmate. I must decide this application on the facts before the court. Those facts do not raise "segregation" in Saskatchewan's correctional centres to the level of concern that [John Howard Society] suggests.

The Court of Appeal stated the following, at para. 32:

> The John Howard Society submits that segregation is a harsh sanction. It cites *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228, 377 CCC (3d) 420, for the proposition that legislation that permits prolonged, indefinite segregation "constitute[s] cruel and unusual treatment . . ." (at para 95). It also points to *Corporation of the Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243 at para 68, 433 DLR (4th) 157, which found that any period of solitary confinement exceeding 15 days represents cruel and unusual punishment. However, the segregation that is utilized as a sanction under the *CS Act* is neither indefinite nor was it found by the Chambers judge to be the same thing as solitary confinement. Section 77(1)(c) and s. 77(1)(d) of the *CS Act* limit the period of confinement or segregation to 10 days. [Brackets in original.]

[231] These findings stand in contrast to the position taken by the majority reasons in the instant case, which cite a number of reports dating back to the 1800s relating to segregation (paras. 60-65). The historical developments surveyed by the majority reasons include the opening of the Kingston penitentiary in 1835 (para. 60), an 1891-92 report on segregation that labelled the segregation cells as "the dungeon" (para. 62), the 1894 construction of a segregation wing in the Kingston penitentiary labelled as the "Prison of Isolation" (para. 63), and successive 20th century reports that emphasized the isolating nature of segregation (paras. 64-65). The majority says that while disciplinary segregation has evolved over time, its nature has the effect of

curtailing an inmate's residual freedom of movement while exacerbating their segregation from society, thus making it a distinct form of imprisonment (paras. 66-67). He states that this effect is present in Saskatchewan's practice of disciplinary segregation (para. 67).

[232] First, it is noteworthy that the reports cited by the Chief Justice writing for the majority are not in the record before this Court, and therefore the respondent did not have an opportunity to respond to them. Second, the information surveyed by the majority would have, in large part, been available at the time *Shubley* was decided, yet it did not stop the majority in that case from rendering the decision that it did. This is a point that the Chief Justice himself, along with Rothstein J., made in *Saskatchewan Federation of Labour*, as I noted earlier, when they stated in their dissenting reasons that reliance on historical reports "cannot now form the basis for an entirely different result than that reached by this Court" (para. 143). I agree.

[233] With great respect, this line of reasoning, where there is properly admitted evidence in the record, would be better suited to a case that invokes s. 12 of the *Charter*. This is not the case, and in my view the factual findings made by the application judge are owed deference, particularly in the absence of evidence to the contrary. There is no basis on which to depart from the conclusions reached in *Shubley*. Those conclusions, in conjunction with the purpose of the sanction being clearly of an administrative and regulatory nature, militate against a finding of segregation being a true penal consequence.

2. *Loss of Earned Remission*

[234] In *Shubley*, an inmate in Ontario could lose up to 15 days of earned remission (p. 22). The same is true in the instant case (s. 77(1)(h) of the *Act*). At the outset, I agree with the Court of Appeal that even though loss of earned remission was imposed in only 0.3 percent of disciplinary cases in 2019, it remains an available sanction and therefore is subject to scrutiny (para. 35).

[235] As the Court of Appeal noted, generally an inmate serving a sentence within a provincial correctional centre is credited with 15 days of remission against their sentence for every month that they serve (para. 36).

[236] John Howard Society relies on our Court's findings in *Whaling* to suggest that remission constitutes part of an inmate's "settled expectation of liberty" (para. 63). But, as stated earlier, this fails to take into account the nature of remission. It is *earned*, not automatically, but by way of good behaviour. This underscores its purpose: it exists to foster better inmate conduct and thus maintain order within correctional facilities. It should come as no surprise that if good behaviour is not consistent, some of that remission could be taken away. McLachlin J. makes this very point in *Shubley* (at pp. 22-23) and underscores that is a privilege, not a right.

[237] The purpose of imposing a loss of remission is not to add to an inmate's sentence. It is to maintain order within a correctional institution. The application judge rightly referred to the cancellation of earned remission as "a tool for prison

administration to ensure the orderly running of a prison" (para. 71). The sanction is imposed not to punish or denounce, but rather to encourage compliance and deter breaches of the facility rules. This makes the consequence non-penal.

(iii) Conclusion on the True Penal Consequences Prong

[238] To find that these sanctions amount to true penal consequences would not be in keeping with *Shubley*. Having determined that *Shubley* remains good law, our Court is bound to follow it.

[239] However, even beyond *Shubley*, a fresh analysis of the *Wigglesworth* test would lead me to the same conclusion, that is, that neither sanction amounts to a true penal consequence because neither sanction's purpose is to redress a public wrong, nor is it to impose punishment or promote denunciation. Therefore, I find that the segregation and loss of earned remission within Saskatchewan's inmate discipline regime do not constitute true penal consequences.

(2) Conclusion: Neither Prong of the *Wigglesworth* Test Is Met

[240] I conclude that neither the criminal in nature prong nor the true penal consequences prong of the *Wigglesworth* test is met. Therefore, an inmate facing disciplinary sanctions in Saskatchewan is not "charged with an offence" within the meaning of s. 11. Because the *Wigglesworth* test is not met, s. 11 has no application to

Saskatchewan's inmate discipline regime. It is therefore unnecessary to decide whether s. 11(d) is infringed.

E. *Does Section 68 of the Regulations Violate Section 7 of the Charter?*

[241] Given my finding that the inmate disciplinary proceedings do not meet the two-step test in *Wigglesworth* and therefore do not engage s. 11, the question remains whether similar safeguards are available to inmates under s. 7 of the *Charter*.

[242] Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[243] Its purpose was well described by the Court in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 77:

> . . . the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against [those] deprivation[s] of life, liberty and security of the person . . . "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (*G. (J.)*, at para. 65).

[244] The test to determine whether there has been a violation of s. 7 unfolds in three steps (*R. v. White*, [1999] 2 S.C.R. 417, at para. 38):

(1) First, was there a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests?

(2) If so, one must identify and define the relevant principle of fundamental justice.

(3) Finally, was the deprivation in accordance with the principle of fundamental justice?

(1) Step One: The Deprivation of Liberty

[245] The first step of the analysis pursuant to s. 7 is not under debate in the instant case. It has been conceded by the respondent that the liberty interests of inmates are engaged (R.F., at para. 6). I agree. In a prison environment, inmates retain certain residual liberties and "there may be significant degrees of deprivation of liberty" within a penitentiary environment (*Miller*, at p. 637). As a result, when an inmate is faced with a sanction that includes the loss of earned remission and/or disciplinary segregation, there is a direct deprivation of liberty.

(2) Step Two: Identify the Principle of Fundamental Justice

[246] It is undisputed that the presumption of innocence is a principle of fundamental justice guaranteed by s. 7 in the criminal context. In that regard, writing for the majority of the Court in *Pearson*, Lamer C.J. quoted *R. v. Oakes*, [1986] 1

S.C.R. 103, at p. 119, to state that the presumption of innocence, "[a]lthough protected expressly in s. 11(*d*) of the *Charter* . . . is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*" (p. 683 (emphasis added)). The fact that s. 11(d) applies "in its strict evidentiary sense at trial" does not undercut the fact that the presumption of innocence found in s. 7 is a "broad substantive principle" that applies "throughout the criminal justice process" (*Pearson*, at pp. 683 and 687).

[247] In the instant case, John Howard Society has explicitly stated before the courts below that *it was not* seeking recognition of a new principle of fundamental justice (see C.A. reasons, at para. 68). Rather, before our Court, John Howard Society argues that the presumption of innocence found in s. 7 of the *Charter* extends to the inmate discipline regime and requires proof beyond a reasonable doubt. The respondent agrees that the presumption of innocence is an applicable principle of fundamental justice when one decides to deprive inmates of their residual liberty. The respondent disagrees, however, that this principle of fundamental justice requires the application of the criminal standard of proof beyond a reasonable doubt.

[248] Consequently, the question before us is simply whether the presumption of innocence as a principle of fundamental justice requires application of the criminal standard of proof beyond a reasonable doubt in inmate disciplinary proceedings.

(3) Step Three: Was the Deprivation in Accordance With the Principles of Fundamental Justice?

[249] In its reasons, the majority finds that s. 7 of the *Charter* would require Saskatchewan's proceedings for major disciplinary offences to use a criminal standard of proof. It draws from *Pearson* two requirements of assistance when discerning whether proof beyond a reasonable doubt will be required under s. 7: proceedings where the state (1) accuses an individual of moral wrongdoing and (2) seeks to punish the individual with severe liberty-depriving consequences for such wrongdoing (para. 84). It concludes that major disciplinary offence proceedings meet those two requirements.

[250] Respectfully, I do not agree with that conclusion nor with that reading of *Pearson*. I do not find any requirement in *Pearson* suggesting that proof beyond a reasonable doubt is required when a proceeding both seeks to punish an individual for a moral wrongdoing and impose severe liberty-depriving consequences for such wrongdoing. Not only do I disagree that *Pearson* stands for that proposition but I am also of the view that the implications of such an approach would be far-reaching and problematic. To accept that interpretation would be to risk displacing long-standing flexible evidentiary rules for summary proceedings and legislated standards of proof that ensure the efficiency of criminal and non-criminal proceedings.

[251] Interim release proceedings provide a salient example of my point. Every day, courts across Canada grapple with proceedings to decide if those who stand accused of crimes by the state should be released while they await trial. As it was said by our Court in *R. v. St-Cloud*, 2015 SCC 27, [2015] 2 S.C.R. 328, these summary

proceedings require "more flexible rules of evidence" to assess the strength of the prosecution's cases (para. 57). As such, at that stage, the Crown is not obliged to prove beyond a reasonable doubt that the accused committed the offence for which he or she is charged (para. 58). An accused person in an interim release proceeding has been accused by the state of a moral wrong and faces severe liberty-depriving consequences should his or her application for judicial interim release not be granted. The seriousness of the offence can contribute to the denial of bail, leading to incarceration. This is a severe a deprivation of liberty, although the person is presumed innocent.

[252] Applying a proof beyond a reasonable doubt standard here would mean that the flexibility necessary in such proceedings would be displaced with the effect of neglecting the other objectives, namely the protection or safety of the public, and maintaining the confidence of the public in the administration of justice (*St-Cloud*, at paras. 1-2). In my view, this is why the Court of Appeal correctly insisted that "all that can be taken from *Pearson*, and adapted into the present case, is the idea that the application of the presumption of innocence in a s. 7 *Charter* claim will depend on the circumstances" (para. 50).

[253] Another example of the far-reaching impact of this line of reasoning can be seen in the immigration context, which is by its very nature administrative, not criminal. For example, Division 4 of Part 1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, sets out rules of inadmissibility for permanent residents and foreign nationals. Specifically, s. 36(1) sets out the grounds on which a permanent

resident or a foreign national is inadmissible for serious criminality, including when he or she has committed an act outside Canada that is an offence in the place where it was committed and that, if it was committed in Canada, would constitute an offence under an act of Parliament punishable by a maximum term of imprisonment of at least 10 years (s. 36(1)(c)). The *Immigration and Refugee Protection Act* sets out that the determination of whether a permanent resident has committed an act described in s. 36(1)(c) is to be based on a balance of probabilities (s. 36(3)(d)). It is conceivable that such a non-criminal, administrative proceeding could attract the application of s. 7's presumption of innocence because there is both a moral wrong (violation of immigration laws, or the underlying serious criminality itself) and severe liberty deprivation (deportation or inadmission). This extension of the residual presumption of innocence to non-criminal, administrative proceedings surely was not contemplated by *Pearson*.

[254] Moreover, and with respect, I do not agree that civil contempt fits within what is framed as the two requirements from *Pearson*. For one thing, civil contempt is not an accusation by the state; rather, it rests on the power of the courts, *not the state*, to enforce their process and maintain their dignity and respect (*Carey v. Laiken*, 2015 SCC 17, [2015] 2 S.C.R. 79, at para. 30, citing *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901, at p. 931). In addition, the purpose of civil contempt is not to punish an individual with severe liberty-depriving consequences, but rather to, first and foremost, declare a party as having acted in defiance of a court order (*Carey*, at para. 30, citing *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2

S.C.R. 612, at para. 35, cited in *Bell ExpressVu Limited Partnership v. Torroni*, 2009 ONCA 85, 94 O.R. (3d) 614, at para. 20).

[255] Therefore, I suggest the following analysis to decide whether a beyond a reasonable doubt standard is required under s. 7. The concern, as articulated in a variety of cases decided by our Court, is to ensure that the presumption of innocence within s. 11(d), which firmly operates during a criminal trial, applies at other stages of the criminal law process. Section 7, therefore, acts as residual protection of the liberty interests of the accused persons during the criminal process and may, depending on the context, require proof beyond a reasonable doubt outside the trial stage of the criminal process. A correct interpretation of *Pearson* suggests that the *only* possible requirements that can be drawn from that case and of assistance to determine which standard of proof applies under s. 7 are (1) whether the proceeding involves a determination of guilt or (2) whether the proceeding entails serious consequences analogous to a criminal sentence (pp. 685-86). As these two requirements are not met in this case, I am of the view that the deprivation of liberty stemming from s. 68 of the *Regulations* is in accordance with the principles of fundamental justice at issue.

(a) *The Principles Governing Pearson*

[256] John Howard Society relies on jurisprudence of this Court, with particular reliance on *Pearson* and *Demers*, to argue that the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, can be extended to require proof beyond a reasonable doubt in a prison discipline setting. Much like the Court of Appeal,

I am of the view that these decisions do not assist John Howard Society's position. The jurisprudence seeks to ensure that the presumption of innocence under s. 7 addresses residual liberty in a contextual manner at other stages of the criminal law process, up until sentencing. In doing so, our Court recognized, for instance, that proof beyond a reasonable doubt is required when aggravating factors are contested in the sentencing process following a criminal trial. The inmate disciplinary process, however, cannot be understood as equivalent to the sentencing process. Let me further explain.

[257] In *R. v. Gardiner*, [1982] 2 S.C.R. 368, a pre-*Charter* case, our Court was faced with deciding whether facts relied upon to support a lengthier sentence at a sentencing hearing following a guilty plea to a charge of assault causing bodily harm should be proven on the higher standard of proof beyond a reasonable doubt, or whether the standard of proof on a balance of probabilities was sufficient. The Crown in that case relied heavily on American authorities to suggest the existence of a "sharp demarcation between the trial process and the sentencing process" (p. 406). It was of the view that "[o]nce a plea or finding of guilty is entered the presumption of innocence no longer operates and the necessity of the full panoply of procedural protection for the accused ceases" (*ibid.*). By contrast, the offender argued that from his "point of view, sentencing is the most critical part of the whole trial process, . . . and the standard of proof required with respect to controverted facts should not be relaxed at this point" (*ibid.*).

[258] Dickson J. (as he then was) agreed with the offender. On sentencing, he noted that the "stakes are high for society and for the individual. . . . A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable" (*Gardiner*, at p. 414). This imperative is amplified in the face of the reality that "the vast majority of offenders plead guilty", therefore requiring the sentencing judge to "get his [or her] facts after plea" (*ibid.*). As such, he stated the following:

> To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a phase of the trial process" ([J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97], at p. 107). Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court. [Emphasis added; p. 415.]

[259] The importance of ensuring that accused persons have the benefit of the presumption of innocence throughout the criminal trial process, not just the trial itself, is clear from Dickson J.'s reasons (*Gardiner*, at p. 415). As chief justice, writing for our Court in *Oakes*, he picked up on a similar thread at pp. 119-20 of those reasons:

> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(*d*) of the *Charter*, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter* (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, *per* Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces

> grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise. [Emphasis added.]

[260] The Attorney General of Alberta argues that the unique social stigma and ostracism that come along with a criminal conviction — in addition to the loss of liberty — form part of the unique rationale for why a higher standard of proof is required by the presumption of innocence under s. 7. I agree. This is particularly the case at sentencing when a person who, as Dickson C.J. put it, has been presumed to be a "decent and law-abiding membe[r] of the community" until convicted now faces the "ultimate jeopardy" as he or she is being sentenced (*Oakes*, at p. 120; *Pearson*, at p. 686, quoting *Gardiner*, at p. 415).

[261] In *Pearson*, our Court was seized with a *Charter* challenge of a provision of the *Criminal Code* which precluded bail for certain narcotics-related offences, among others. Writing for the majority, Lamer C.J. found that the impugned provision would not violate s. 7 unless it were found that it failed to meet the procedural requirements of s. 11(e). In reaching this conclusion, he expanded on the presumption of innocence under s. 7.

[262] Lamer C.J. noted the express protection of the presumption of innocence in s. 11(d) of the *Charter*, but reiterated Dickson C.J.'s conclusion in *Oakes* that the presumption of innocence extends beyond s. 11(d) and is "referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the *Charter*". At several junctures, Lamer C.J. referenced s. 11(d)'s operation at the trial of an accused person while stressing that this does not "exhaust the operation in the criminal process of the presumption of innocence as a principle of fundamental justice" (*Pearson*, at p. 683). Then, the question was to determine which standard of proof comes into play when the presumption of innocence under s. 7 is triggered.

[263] For Lamer C.J., this was a contextual consideration. Not every deprivation of life, liberty, and security of the person requires the standard of proof beyond a reasonable doubt (*R. v. Whitty* (1999), 174 Nfld. & P.E.I.R. 77 (Nfld. C.A.), at paras. 26 and 48-49). The principles of fundamental justice "are not immutable; rather, they vary according to the context in which they are invoked" (*R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361). As Lamer C.J. explained in *Pearson*, "[w]hile the presumption [of innocence under s. 7] is pervasive in the criminal process, its particular requirements will vary according to the context in which it comes to be applied" (p. 684).

[264] He went on to note that the "[e]xamples are legion of how the various stages of the criminal process have accommodated themselves to the fundamental principle that the assumed innocence of an accused or a suspect is the starting point for any proposed interference with that person's life, liberty or security of the person"

(p. 685 (emphasis added)). In sum, the residual application of the presumption of innocence protected under s. 7 of the *Charter* is flexible and does not automatically require proof beyond a reasonable doubt.

(i) Determination of Guilt

[265] When discussing whether s. 7 would require proof beyond a reasonable doubt, Lamer C.J. suggested that it would be required when a particular step of the criminal process involves a determination of guilt (*Pearson*, at p. 685). These comments were relied upon by our Court in *R. v. Noble*, [1997] 1 S.C.R. 874, when it refused to consider that proof beyond a reasonable doubt was required in the context of the appeal of a conviction because "the presumption of innocence does not operate with the same vigour" when a guilty verdict has been entered and it is no longer incumbent on the Crown to establish guilt (paras. 107-8).

[266] This was also a consideration in *Demers* when our Court had to decide whether Part XX.1 of the *Criminal Code* violated the s. 7 presumption of innocence. In that case, the appellant argued that it had been violated in two ways: first, by treating accused persons unfit to stand trial as offenders without taking into account that it had not been proved beyond a reasonable doubt that they had indeed committed a criminal offence, and second, by subjecting permanently unfit accused to the criminal justice system during an indeterminable period (para. 32). Our Court dismissed those arguments, finding that the "deprivation of the unfit accused's liberty accords with the presumption of innocence as a principle of fundamental justice" because the Review

Board proceedings under that Part of the *Criminal Code* did not involve a determination of guilt: "They simply require[d] the Review Board to perform an assessment of the accused and impose the least onerous condition on his or her liberty" (paras. 33-34).

[267] John Howard Society argues the conclusion reached through the inmate disciplinary process amounts to a determination of guilt. I do not agree. An inmate disciplinary proceeding cannot be analogized to a criminal trial, where it is incumbent on the prosecution to establish guilt beyond a reasonable doubt (*Noble*, at para. 108). In fact, inmate disciplinary proceedings are administrative in nature, which means that they do not automatically attract the criminal standard of proof nor involve a determination of guilt in the criminal, penal sense (*Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at p. 629). Nor does the language contained in the *Act* support the conclusion that an inmate disciplinary proceeding leads to a determination of "guilt". At the conclusion of an inmate disciplinary proceeding, an inmate is not declared "guilty" or "innocent", but rather the discipline panel will either "find that the inmate committed the disciplinary offence" or "dismiss the charge" (s. 75 of the *Act*).

[268] A determination of guilt, as contemplated by *Pearson*, involves more than simply a conclusion at the end of a process to determine if a person has done what it is alleged was done. Such a determination is reached to hold a person accountable for a wrong that society has determined is worthy of punishment. Additionally, a criminal

conviction carries unique social stigma and transforms a person from a law abiding citizen into a convicted criminal. That is not the case in an administrative setting.

[269] I find the nature of the inmate disciplinary process to be analogous to the role of the Review Board in *Demers,* which performed an administrative role. Much like in *Demers*, the inmate disciplinary proceedings in this case are "perform[ing] an assessment" of the inmate's conduct to impose "the least onerous condition" on their residual liberty depending on the seriousness of the offence. This is true because Saskatchewan's scheme is structured to make severe forms of punishment, such as those under appeal in the instant case, available only as a consequence of a "major disciplinary offence" (s. 77 of the *Act*).

(ii) Serious Consequences Analogous to a Criminal Sentence

[270] Further, in *Pearson,* Lamer C.J. considered two examples where s. 7 would require proof beyond a reasonable doubt, outside of a criminal trial, as an illustration of the "pervasive presence of the broad substantive principle throughout the criminal process" (p. 687): (1) in the context of contested aggravating factors at sentencing and (2) in the context of civil contempt. As to this latter example, for the reasons I explain above, I would be cautious about giving too much weight to this incidental remark, as civil contempt proceedings are readily distinguishable from the facts at issue. However, the first example relates to the criminal process and has been incorporated into our Court's jurisprudence, namely in *R. v. D.B.,* 2008 SCC 25, [2008] 2 S.C.R. 3. Therefore, it warrants greater consideration.

[271] Lamer C.J. explained the following with respect to the standard of proof required for aggravating factors during the sentencing process:

> The presumption of innocence as set out in s. 11(*d*) arguably has no application at the sentencing stage of the trial. However, it is clear law that where the Crown advances aggravating facts in sentencing which are contested, the Crown must establish those facts beyond reasonable doubt: *R. v. Gardiner*, [1982] 2 S.C.R. 368. The Court in *Gardiner* cited with approval at p. 415 the following passage from J. A. Olah, "Sentencing: The Last Frontier of the Criminal Law" (1980), 16 C.R. (3d) 97, at p. 121:
>
> > . . . because the sentencing process poses **the ultimate jeopardy to an individual** . . . in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process.
>
> Although, of course, *Gardiner* was not a *Charter* case, the problem it confronted can readily be restated in terms of ss. 7 and 11(*d*) of the *Charter*. While the presumption of innocence as specifically articulated in s. 11(*d*) may not cover the question of the standard of proof of contested aggravating facts at sentencing, the broader substantive principle in s. 7 almost certainly would. The specific application of the right would take account of the serious consequences adverted to in the passage from Olah, cited by the Court in *Gardiner*. [Emphasis added.]
>
> (*Pearson*, at p. 686; see also *D.B.*, at para. 80.)

[272] John Howard Society relies on these statements to argue that the "serious consequences" to which an inmate is exposed are similar to those facing an accused when aggravating facts are contested in the sentencing process. With respect, this analogy is flawed. I do not agree that this concern can be extended to the imposition of an inmate's disciplinary sanction, which clearly differs from the handing down of a sentence by a criminal court. It is clear that, in *Pearson*, the main concern for our Court

was the availability of protection for persons being sentenced following a finding of criminal guilt.

[273] The "serious consequences" referenced in *Pearson*, drawn from *Gardiner*, are in relation to the criminal sentencing process. It was understood in both cases that a person who is going to be sentenced following conviction faces the "ultimate jeopardy" (*Gardiner*, at p. 415; *Pearson*, at p. 686). As a result of the seriousness of the sanction that could flow from the imposition of a sentence, our Court was concerned with ensuring those sanctions be based on a higher standard of proof stemming from the presumption of innocence found within s. 7. By contrast, Saskatchewan's inmate disciplinary proceedings are not tantamount to a sentencing proceeding following a criminal conviction.

[274] The Saskatchewan inmate discipline regime permits the imposition of a sanction, not a sentence in a criminal context. For the reasons I have laid out in the above s. 11 analysis, the sanction, in contrast to a sentence, is not for the purpose of redressing a moral wrong to society. Nor does it carry social stigma or the profound effects, or the "ultimate jeopardy", that *Pearson* and *Gardiner* warned of. As such, the comments from *Pearson* have no application in this context. The foregoing also supports the conclusion that s. 7 does not require proof beyond a reasonable doubt with respect to inmate disciplinary proceedings.

[275] Finally, John Howard Society submits that the sanctions at issue are harsh. However, John Howard Society was not prevented from making those arguments on

the basis of s. 12 of the *Charter* before the courts below. I reiterate that we must decide this case on the narrow question before us respecting the standard of proof. This is not a s. 12 case. I am in agreement with the application judge at para. 86 of his reasons: we must decide the application on the facts before us and on the arguments advanced. John Howard Society has not made its arguments based on s. 12. We must defer to the factual findings of the courts below, and we must maintain our focus on ss. 11(d) and 7 in our analysis. With respect, emphasizing the functional analysis of the severity of the sanction on s. 7 would change the nature of the constitutional challenge before us.

(4) Inmate Disciplinary Records Should Only Be Used in Future Sentencing Hearings if Proven Beyond a Reasonable Doubt

[276] John Howard Society and some interveners further argue that because disciplinary records can be treated as aggravating at future sentencing hearings, it would only make logical and practical sense that s. 7 requires proof beyond a reasonable doubt. I am sympathetic to these concerns.

[277] Aggravating factors that the Crown seeks to rely upon at sentencing must be proven beyond a reasonable doubt (*D.B.*, at paras. 78-80, citing *Pearson*, at p. 686, and *Gardiner*, at pp. 414-15). Nothing in these reasons changes that longstanding holding of our Court. As such, if reliance on disciplinary records is sought in future sentencing hearings, the decision-maker must bear in mind the standard on which those records were proven.

[278] Like any aggravating factor that has not already been proven beyond a reasonable doubt at sentencing, inmate disciplinary records originally proven on a balance of probabilities will need to be established beyond a reasonable doubt at sentencing to avoid an injustice to an offender.

(5) The Procedural Guarantees of the *Correctional Services Act* Are Sufficient To Ensure a Fair Process

[279] Our Court's jurisprudence clearly indicates that the question of standard of proof under s. 7 can be folded into discussions of procedural fairness (*Lyons*, at p. 361; *Gardiner*, at pp. 415-16). Consequently, consideration of the procedural safeguards available, if any, can be relevant to the inquiry. Although I recognize that the identification of the available procedural safeguards with respect to inmate disciplinary proceedings must remain an analytical question distinct from that of the standard of proof required under s. 7, the two analyses do not operate in isolation either. In cases where the standard required by s. 7 is unclear, the presence of strong procedural guarantees may be decisive in determining whether s. 7 is infringed. In the present case, I am of the view that the procedural guarantees provided to inmates in the *Act* are sufficient to ensure a fair process.

[280] In general terms, procedural fairness requires a fair process, having regard to the nature of the proceedings at stake (*Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326, at para. 20), although it does not guarantee the most favourable procedure or a perfect process (*Ruby v. Canada*

(Solicitor General), 2002 SCC 75, [2002] 4 S.C.R. 3, at para. 46; *Canada (Citizenship and Immigration) v. Harkat*, 2014 SCC 37, [2014] 2 S.C.R. 33, at paras. 43 and 69).

[281] This Court has noted that inmate disciplinary proceedings "must be expeditious and informal if the crises that inevitably occur in centres of incarceration are to be avoided" (*Shubley*, at p. 24; see also *Cardinal*, at p. 654; *Matsqui*, at p. 630). In that regard, the comments made by MacGuigan J. of the Federal Court of Appeal in *Howard v. Stony Mountain Institution*, [1984] 2 F.C. 642, at pp. 681-82, are particularly instructive:

> [In penitentiaries,] [o]rder is both more necessary and more fragile than in even military and police contexts, and its restoration, when disturbed, becomes a matter of frightening immediacy.
>
> It would be an ill-informed court that was not aware of the necessity for immediate response by prison authorities to breaches of prison order and it would be a rash one that would deny them the means to react effectively.
>
> But not every feature of present disciplinary practice is objectively necessary for immediate disciplinary purposes. The mere convenience of the authorities will serve as no justification . . . . Even what may be necessary but nevertheless delayable cannot be given priority. All that is not immediately necessary must certainly yield to the fullest exigencies of liberty.

[282] As I mentioned earlier in these reasons, approximately 6,201 disciplinary charges were laid across the province in 2019, and 3,367 disciplinary hearings were held, averaging about 9 hearings per day (R.F., at para. 73, referring to the affidavit of L. Tokarski). Offences such as physical attacks and drug-related offences, are of particular concern because they pose a danger to the charged inmate as well as to other

inmates and staff (paras. 74-75). I agree with the respondent's submission that the use of the criminal standard of proof beyond a reasonable doubt may seriously erode the efficiency required in the inmate disciplinary system because of the time-intensive nature of investigating and proving offences on that standard (para. 76).

[283] Of course, as the Court of Appeal noted, "practicality, convenience, and efficiency cannot come at the expense of the principles of fundamental justice" (para. 30, citing *R. v. Ndhlovu*, 2022 SCC 38, at paras. 78 and 103). Indeed, when the liberty interest of an inmate is engaged by the discipline regime, the principles of fundamental justice incorporate the protections of the common law duty of procedural fairness (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paras. 113-15; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at pp. 212-13; *Lyons*, at p. 361; *Ruby*, at para. 39).

[284] In the particular context of prison discipline, it is all the more important to strike a balance between the need for procedural fairness and the need to ensure fast and efficient proceedings in order to maintain order in a correctional institution. Thus, it is not surprising that in *Perron v. Canada (Attorney General)*, 2020 FC 741, the Federal Court found that [TRANSLATION] "the requirements relating to procedural fairness are less stringent for disciplinary offences in correctional facilities" (para. 165).

[285] Consequently, the question is whether the procedural safeguards in place in Saskatchewan's legislative and regulatory scheme deprive inmates of their liberty in

a manner that accords with the presumption of innocence protected under s. 7. This question needs to be answered while keeping in mind that s. 7 entitles inmates to procedural fairness.

[286] Providing guidance respecting procedural fairness in the context of prison discipline, Professors Patrice Garant and Paule Halley drew from the rules of *audi alteram partem* (the right to be heard) and *nemo judex in sua causa* (the right to impartial treatment) to identify several procedural guarantees that an inmate faced with disciplinary sanctions may claim, such as:

> [TRANSLATION] . . . the right to be informed [of the facts alleged against him or her], the right to a hearing that he or she can attend, the right to make his or her arguments, the right to be represented by counsel, the right to consult the record, the right to call witnesses, the right to cross-examine, the right to certain rules of evidence, the right to an adjournment, the right to a reasoned decision, etc.
>
> ("L'article 7 de la Charte canadienne et la discipline carcérale" (1989), 20 *R.G.D.* 599, at p. 615)

Although these guarantees are not absolute, they are nonetheless available when

> [TRANSLATION] [t]he inmate who has been deprived of his or her liberty or security . . . demonstrate[s] that in the particular circumstances of the case he or she should be granted this right. [p. 615]

[287] In the instant case, most of the protections mentioned above are included in the current regime of the *Act*. Therefore, I have no difficulty in finding that the

procedural guarantees offered to the inmates under that regime are sufficient to ensure a fair process as required by s. 7 of the *Charter*.

[288] The guiding principles of the *Act* set out that inmates must "comply with correctional facility rules" but "are entitled to fair treatment" (s. 3(d) and (e)). Section 60(1) of the *Regulations* stipulates that inmates will be provided with a full and fair hearing and that a thorough and objective inquiry will be conducted into all matters relating to the charge. In addition, inmates have the right to be present at the hearing (unless their presence would jeopardize someone's safety, they waive this right, or their presence would be disruptive); the right to be advised as to the nature and factual basis of the charge; the right to respond to the charge; the right to present information relevant to their defence of the charge (s. 61(1) of the *Regulations*); and, the right to appeal any decision (ss. 79 and 80 of the *Act*).

[289] It is in this context that the impugned provision, s. 68 of the *Regulations*, sets out that "[a] discipline panel shall not find an inmate responsible for a disciplinary offence unless it is satisfied on a balance of probabilities that the inmate committed that offence." It is also worth referring to the excerpt from the *Inmate Disciplinary Hearing Manual* quoted above in para. 113 of these reasons that provides guidance to discipline panels on the nature of this standard of proof. In addition, the Government of Saskatchewan has implemented seven of the nine recommendations set out in the 2019 Ombudsman's report, most of which go to providing inmates with more access to

evidence and resources to mount a defence and eliminating the bias of panel members (see Ombudsman Saskatchewan, *Annual Report 2019* (2020)).

[290] In the present case, inmates are subject to a discipline system in order to ensure that the correctional facility operates in a safe and efficient manner. Within this system, they are provided with rights that allow them to make full answer and defence to the allegations of misconduct. The disciplinary scheme provided for in the *Act* may not be ideal, but it is far from clear that inmates' liberty interests are limited more than what is required for the operation of a safe correctional facility.

(6) Conclusion on Section 7

[291] Proof beyond a reasonable doubt is not required in the context of Saskatchewan's inmate disciplinary proceedings under s. 7, and the procedural guarantees provided for in the *Act* are sufficient to ensure a fair process. Thus, the standard of proof provided for in s. 68 of the *Regulations* does not infringe s. 7.

F. *Are Any Possible Infringements of Section 7 or Section 11(d) of the Charter Justified Under Section 1?*

[292] Having found no infringement of s. 7 or s. 11(d), I am of the view that there is no need to proceed to a s. 1 analysis. This was also the approach taken by the courts below, having found no infringement of s. 7. However, if I had been of the opinion that s. 68 was not constitutionally compliant, I, as did the Court of Appeal below, would

have remitted the s. 1 determination to the application judge. On that basis and with respect, I cannot agree with the majority's conclusion that s. 68 fails the proportionality test having regard to the standard of proof beyond a reasonable doubt codified for inmate disciplinary proceedings in the federal regime. I am of the view that such a conclusion fails to account for the province's ability and resources to administer its own prison system. It is not our Court's role to question a province's ability to efficiently administer its correctional institutions on the basis of the legislative choices of the federal government.

VI. Conclusion

[293] Saskatchewan's inmate disciplinary proceedings are administrative, not criminal, in nature. They are designed to maintain prison order and provide efficient, yet fair, resolution of misconduct allegations. They are not designed to redress wrongs to society as criminal proceedings are apt to do. This makes the standard of proof set out in s. 68 of the *Regulations* constitutionally compliant, as our Court previously held in *Shubley*.

[294] Section 11 does not apply to Saskatchewan's inmate disciplinary proceedings. Having found that the proceedings are not criminal in nature and the sanctions are not true penal consequences, I am of the opinion that to face a charge of inmate misconduct is not akin to being "charged with an offence" within the meaning of s. 11 of the *Charter*.

[295] Section 7 is engaged but is not infringed. This is because the presumption of innocence, as a principle of fundamental justice guaranteed by s. 7, is applied in conjunction with the requirements of procedural fairness that serve as residual protection under s. 7. As demonstrated, these combined guarantees are sufficient to ensure respect of the principles of fundamental justice in Saskatchewan's inmate disciplinary proceedings.

[296] Having found no breach of either s. 11(d) or s. 7, I would dismiss the appeal and find s. 68 of the *Regulations* constitutional.

[297] I would not allow costs because the respondent has not sought any against John Howard Society.

Appeal allowed with costs throughout, CÔTÉ, ROWE *and* JAMAL JJ. *dissenting.*

Solicitors for the appellant: John Howard Society of Saskatchewan, Regina; Greenspan Humphrey Weinstein, Toronto.

Solicitor for the respondent: Ministry of Justice (SK), Legal Services Division, Regina.

Solicitors for the intervener the Attorney General of Canada: Department of Justice Canada, British Columbia Region — National Litigation Sector, Vancouver; Department of Justice Canada, Ontario Region — National Litigation Sector, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Civil Law Division — Constitutional Law Branch — Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Ministère de la Justice du Québec — Direction du droit constitutionnel et autochtone, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General (British Columbia) — Legal Services Branch, Vancouver.

Solicitors for the intervener the Attorney General of Alberta: Alberta Justice — Constitutional and Aboriginal Law, Edmonton; Alberta Justice — Civil Law, Edmonton.

Solicitors for the intervener the Alberta Prison Justice Society: Nanda & Company, Edmonton.

Solicitors for the intervener Federation of Sovereign Indigenous Nations: LeBlanc Jensen, Regina; Sunchild Law, Battleford, Sask.

Solicitor for the intervener Aboriginal Legal Services Inc.: Aboriginal Legal Services, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Neubauer Law, Toronto; Embry Dann, Toronto.

Solicitors for the intervener the Queen's Prison Law Clinic: Addario Law Group, Toronto.

Solicitors for the intervener Association des avocats.es carcéralistes du Québec: Trudel Johnston & Lespérance, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Norton Rose Fulbright Canada, Ottawa.

Solicitor for the intervener the Canadian Prison Law Association: Prisoners' Legal Services, Burnaby.

Solicitors for the intervener the West Coast Prison Justice Society: Rice Harbut Elliott, Vancouver.