

CITATION: R. v. Whitlock, 2025 ONSC 6006

COURT FILE NO.: CR-24-0038

DATE: 2025-10-24

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HIS MAJESTY THE KING

– and –

Joseph Richard Whitlock, Kulvir Singh
Bhatia and Karn Veer Sandhu

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HEARD: April 8-10, 14-17, 22-25, 29-30;
May 1, 5-9, 26; June 9, 13, 18; Aug 19-20,
2025

RULING – DEFENCE *CHARTER* APPLICATION FOR A STAY OF PROCEEDINGS

CONLAN J.

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I. Overview

[1] In a preferred Indictment dated 27 February 2024, three accused persons, Joseph Richard Whitlock (“Whitlock”), Kulvir Singh Bhatia (“Bhatia”), and Karn Veer Sandhu (“Sandhu”), are charged with (i) committing first-degree murder on the person of Arman Dhillon contrary to section 235(1) of the *Criminal Code* and (ii) attempting to murder Sonia Grewal while using a firearm contrary to section 239(1) of the *Criminal Code*.

[2] The trial with a jury, if it proceeds, is likely to take place sometime in 2026.

[3] On January 6, 2025, this Court, I as the case management judge appointed under section 551.1(1) of the *Criminal Code*, began hearing pre-trial applications.

[4] This ruling relates to the joint defence application for an order staying the proceedings against each accused under section 24(1) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”).

[5] The subject matter of the application is what happened at Maplehurst Correctional Complex (“MCC”) in late December 2023.

[6] There is no dispute that there was a serious incident that occurred at MCC on December 20, 2023. On that date, a correctional officer named Lecinski (“Lecinski”) was assaulted. He was punched in the face by an inmate in Unit 8C, prompting an emergency response that included a code blue.

[7] There is no dispute that none of the three accused in our case had anything at all to do with the assault on Lecinski.

[8] There is no dispute that, ultimately, Superintendent Wong (“Wong”) authorized the deployment of the Institutional Crisis Intervention Team (“ICIT”) over two days, December 22 and 23, 2023. There is no dispute that the ICIT operation involved the extraction and search of every inmate, including the three accused in our case, and every cell on the whole of Unit 8, including the cells of the three accused in our case.

[9] There is no dispute that every inmate, including the three accused in our case, who was extracted from his cell on either December 22 or 23 was restrained with ties around his wrists and escorted by two armed tactical officers and then seated in another area of the institution, facing the wall, and wearing just underwear (boxer shorts).

[10] There is no dispute that every cell, including the cells of the three accused in our case, was searched by officers and then left close to barren. Most items were removed from every cell.

[11] There is no dispute that every inmate, including the three accused in our case, was left without any clothing except the underwear that he was wearing at the time of his extraction until December 24.

II. The Positions of the Defence and the Crown

[12] Prior to assessing the evidence in this matter and making findings of fact, reviewing the law, and applying the law to the facts as found, it would assist the reader for this Court to outline in some detail the positions of the accused/applicants and that of the Crown/respondent.

[13] The following summary of those positions is based on both the written submissions filed by counsel and the supplementary oral submissions delivered by counsel at court on August 19 and 20, 2025.

A. The Defence

[14] The accused/applicants submit that the ICIT deployment was unnecessary, excessive, and disproportionate to the threat that existed at the time of the authorization.

[15] It is submitted that one example of the excessiveness of the operation was the intentional deprivation of clothing for the inmates, including the three accused in our case, for a lengthy period of time.

[16] It is argued that the ICIT deployment was not authorized in a reasonable manner and in compliance with formal requirements, such as the completion of a Threat Level Assessment.

[17] It is argued that the ICIT deployment was carried out in a particularly offensive and unprofessional manner, for example with the taking of a celebratory photograph of Wong and the officers involved.

[18] The accused/applicants submit that the ICIT deployment was carried out in the absence of required documentation that ought to have been completed, such as Use of Force Reports.

[19] It is submitted that staff at MCC not only failed to complete required documentation but, in some instances, falsified documents and, in other instances, colluded by submitting identical reports.

[20] It is argued that the ICIT deployment was carried out in a manner that was contrary to official policy. For example, that it was conducted without a handheld video camera operator being assigned to capture the events.

[21] It is argued that staff at MCC engaged in a cover up because they failed to prepare required reports in a timely manner and only did so months later in response to litigation and a formal investigation by Correctional Services Oversight and Investigations (“CSOI”), the intelligence and investigative body of the Ontario Ministry of the Solicitor General (“Ministry”).

[22] The accused/applicants submit that some of the witnesses who testified at court during the hearing of the application, including senior personnel from MCC and the Ministry, lied about what happened with regard to the ICIT deployment and its aftermath.

[23] An encapsulation of the position of the defence is found at paragraphs 7 and 113-115 of the joint factum dated July 21, 2025, Case Center pages C-1-4562 and C-1-4600, reproduced below:

7. There were no proper grounds for the ICIT deployment – there was no threat. The use of ICIT was unnecessary, excessive, and disproportionate. In its execution, the ICIT extraction operation was inhumane, degrading and was blatantly punishment and retribution against innocent inmates. The search of the cells was unwarranted and improper as virtually all the contents were removed. And, senior and rank and file MCC staff sought to minimize the repercussions for their conduct, engaging in a cover up, with some witnesses providing incredulous explanations for their conduct, with some even admitting to lying and being a part of a cover-up before this Honourable Court. The Applicants respectfully submit that the conduct of MCC employees was an abuse of process. There is no other remedy capable of addressing the abuse in this case other than a stay of proceedings.

..

113. The conduct in this case was so excessive that it shocks the conscience of the public, and it is clearly disproportionate, as there was no identifiable threat justifying the ICIT deployment.

114. Significantly, the conduct undermines the proper administration of justice in this province. For public safety reasons, the criminal justice system permits the state to detain individuals who are presumed innocent while they await trial. There is no compensation for those who are eventually acquitted. However, there is a corresponding obligation on the state to provide for a humane and safe environment while people are warehoused awaiting their trial. Accomplishing this must be a priority for governments that oversee remand institutions. In the case of MCC, courts have consistently found that the state has failed to live up to its obligations. Any remedy fashioned in this case must distance this Honourable Court from and not perpetuate or condone the abuse. A stay of proceedings in this most serious of cases is a precisely calibrated remedy, reserved for situations where lesser measures have failed to address ongoing misconduct that continues to compromise the integrity of the administration of justice in this province.

115. A stay is the only effective option that remains.

[24] The defence submits that what happened here violated the accused persons' rights under sections 7, 8, and 12 of the *Charter*.

[25] In terms of what the appropriate remedy ought to be for these violations, and specifically whether a stay of proceedings is warranted, the submissions of the defence are outlined at paragraphs 102 through 112 of the joint factum, Case Center pages C-1-4597 to C-1-4600, set out below:

102. Under s.522 this Honourable Court detained the Applicants as they are charged with a s. 469 offence. They remain in the care of MCC under the supervision of this Honourable Court. Accordingly, this Honourable Court is the ultimate guardian of the Applicants' liberty (or in this case confinement) and is best suited to fashion a remedy. It is the integrity of this proceeding that is most acutely engaged by the conduct of MCC and where a remedy is available.

103. On the question of remedy, any number of remedies may be available to the Applicants. They are not restricted to one or another. The availability of a remedy will be, in part, determined by the forum. For example, while theoretically possible, damages are typically not awarded in criminal courts even though they can award virtually any remedy under s.24(1). By contrast, Superior Courts (Ontario Superior Court) can hear, determine and award remedies for civil wrongs (which include claims for damages for infringements of the *Charter* under s.24(1)). There is no requirement that the aggrieved person chose or be directed to a particular forum to seek redress. A Superior Court of Criminal Jurisdiction can give a remedy for conduct that can also be compensated for in a civil or administrative proceeding.

104. In the circumstances of abuse of process claims in a criminal case the focus is not so much on the tortious behaviour of the state but rather on trial fairness or the integrity of the justice system. The remedy is fashioned to respond to these concerns. For example, where the complaint is the impact on the fairness of a trial, some evidence may be excluded; where the complaint is the residual ground the remedy will be calibrated to maintain respect for administration of justice. In civil cases, assuming liability, damages focus on the circumstances of the actual harm to the individual plaintiff and aggravating conduct of the defendant.

105. The Applicants in this case seek a remedy in this court that redresses the prejudice to the administration of justice occasioned by the conduct of MCC. The fact that they may sue for damages in civil court is not a bar or an alternate remedy that addresses the wrong perpetrated by the MCC because the civil court does not remedy the damage caused to the integrity of the criminal court processes. Accordingly, the fact of the possibility of a civil action is not an available (alternate) remedy at step two of *Babos*.

106. A stay of proceedings is the only appropriate remedy under the circumstances. While other remedies may be suggested, none will strike at the heart of the issue. Potential lesser remedies the court may consider, but would be inappropriate, could be granting bail pending trial or a reduction in sentence (parole) following a conviction.

107. Bail as a remedy is not responsive to the abuse as it does not address the underlying systemic implications of the conduct. The law allows for pre-trial detention and the court has a direct say in the conditions of confinement. Granting bail pending trial will not send the proper message following a successful abuse of process application regarding the treatment of the inmates. Accused persons are granted bail regularly, doing so in these circumstances will not rectify the larger issue at hand.

108. Further, a reduction in sentence it is not available. Thus, a reduction in time until the applicants are eligible for parole *may* be legally available (it would follow from creating a constitutional exemption to the mandatory period of parole ineligibility). This again does not rectify the issue of ongoing treatment of remand prisoners.

109. A stay of proceedings is the only remedy that is responsive to and works to disentitle the state from a prosecution where it permitted the abuse to occur in the first place.

110. In determining whether a stay should be granted, this Honourable Court should balance the following factors:

- a. The nature and seriousness of the impugned conduct;
- b. Whether the conduct is isolated or reflects a systemic and ongoing problem;
- c. The circumstances of the accused;
- d. The charges they face; and
- e. The interests of society in having the charges disposed of on the merits.

111. The applicants make the following submissions concerning the factors:

- a. The impugned conduct is serious. The MCC staff made a deliberate decision to activate ICIT against the inmates following an incident that had already resolved. This was an unreasonable decision which humiliated the inmates – it was dehumanizing and degrading. To make matters worse, some MCC staff worked together to cover up their behaviour. This factor weighs in favour of a stay.
- b. The conduct is part of pattern of disregard for the welfare of inmates. As noted above, MCC has a recognized history of cruel treatment and poor conditions. No court decision has so far worked to encourage them to change their approach. The staff at MCC has little insight into their fact that the use of ICIT was improper. This favours a stay.
- c. The circumstances of each of the accused are neutral in terms of granting a stay.
- d. The applicants face the most serious charge – first-degree murder. The public has an interest in seeing a determination on the merits in this case. This favours dismissing a stay in favour of fashioning a different remedy.
- e. The final factor – the interests of society in having the charges disposed of on the merits– mirrors many of the considerations in the previous factors. The short-term public clamour for a conviction in a particular case must be considered alongside the longer-term reputé of the administration of justice. Any remedy (or no remedy) other than a stay risks forgiving the impugned conduct, whereas a stay disassociates this Honourable Court's from the impugned conduct. A stay is also the most responsive remedy as MCC has demonstrated that they are

ungovernable. Previous court rulings [sic] have not served to alter the approach to inmate rights. Even in this case, where this Honourable Court issued a clear and unambiguous ruling at the beginning of pre-trial motions in January that the Applicants were to be brought to Court on time every day, Maplehurst has been chronically unable or unwilling to comply with this straightforward and fundamental requirement. The institutional complacency and worsening culture at MCC appears to be unique even as compared to other problematic correctional institutions in Ontario. MCC's repeated and flagrant failure to abide by Court orders suggests that any remedy short of a stay will not adequately get the message across that they are required to follow the law. This favours a stay.

112. While a stay can only be granted in the clearest of cases, the applicants submit that, after balancing all the factors in light of the remedial category and the impact of Maplehurst's actions on the integrity of the justice system, this is a clear case for a stay.

[26] In oral submissions by defence counsel delivered at court on August 19 and 20, 2025, I would summarize the major points made as follows:

- (i) there is no reliable basis for this Court to conclude that Unit 8, or 8C specifically, was out of control before the ICIT deployment;
- (ii) the real decision-maker here, Staff Sergeant Jones ("Jones"), was not a credible witness;
- (iii) both Wong and Jones, among others, did not tell the truth when they testified during the hearing of the within application;
- (iv) there was no reasonable justification for the ICIT deployment;
- (v) the only reason why ICIT was deployed was for retribution against the inmates, including the three accused in our case, because of what happened with Lecinski;
- (vi) Exhibit 2, tab 3, the graphs and charts regarding the temperature inside the relevant area of the correctional facility around the time of the ICIT deployment, are incontrovertible and can only lead to the conclusion that the temperature drop was intentional and punitive against the inmates;
- (vii) it makes no sense that the ICIT deployment was done so that the inmates would not be confined over Christmas because Exhibit 19, the internal memorandum regarding the restrictive confinement directive, shows that the inmates were going to be confined until December 27th in any event;
- (viii) the inmates, including the three accused in our case, were strip-searched without reasonable grounds;

- (ix) the inmates, including the three accused in our case, were exposed to physical force contrary to Ministry policy (see Exhibit 2, tab 18);
- (x) the inmates, including the three accused in our case, were exposed to unreasonable tactics of intimidation and threats, such as the pointing of pepper ball guns at their heads and the caustic speech delivered by ICIT coordinator Martel (“Martel”), and a lack of any respect for basic human dignity, such as having inmates’ private parts exposed for all to see;
- (xi) there was a woeful disregard for proper procedures and paperwork throughout the lead-up to and the carrying out of the ICIT deployment and its aftermath;
- (xii) the inmates, including the three accused in our case, were exposed to an intentional and lengthy deprivation of clothing and bedding;
- (xiii) the entire ICIT deployment was marred by a gross lack of professionalism on the part of Wong and most of his personnel;
- (xiv) the ICIT deployment was also marked by excessive force used by guards against the inmates, including the three accused in our case;
- (xv) in the aftermath of the ICIT deployment, there has been a “cover-up” engaged in by MCC and Ministry officials, evidence intentionally destroyed, false narratives created, lying to the CSOI branch of the Ministry, and collusion among witnesses both before and during the hearing of the within application;
- (xvi) many of the witnesses who testified in court on this application, well beyond Wong and Jones, including senior management officials, did not tell the truth;
- (xvii) MCC is a place that has been engulfed in a toxic culture, a code of silence, and a total disrespect for court orders;
- (xviii) the issues that are before this Court are systemic, evidenced in part by the fact that precious little has happened since the Ministry’s own investigation made very negative findings against many of the individuals involved in the ICIT deployment;
- (xix) staff at the Ministry’s Regional Director office knew about the ICIT activation, and its planned extent, beforehand;
- (xx) regarding Whitlock in particular, he was further maltreated by MCC staff when he was taken to segregation after the second extraction of him from his cell, and in fact, that entire second extraction of Whitlock exposed him to cruel and unusual treatment beyond that endured by most other inmates; and
- (xxi) as Mr. Kapoor put it, the “bargain” was breached here, and only a stay of proceedings is appropriate – the bargain being that we accept that accused persons, though presumed to be innocent, may be detained pretrial, however, in

exchange we expect that they will be treated fairly and humanely and justly while detained.

B. The Crown

[27] The Crown “has conceded that the Applicants’ section 8 rights have been violated insofar as the manner of the search was unreasonable” (paragraph 2 of the Crown’s written submissions dated August 8, 2025, Case Center page B-4599).

[28] The Crown does not concede any other *Charter* violation.

[29] The Crown’s overall position is encapsulated at paragraphs 3-5 and 268-270 of its written submissions, Case Center pages B-4599 to B-4600 and B-4686 to B-4687, reproduced below:

3. The Crown’s position is that there has not been an abuse of process. The conduct of staff at MHCC did not violate the s. 7 rights of the Applicants. The conduct - while properly the subject of some criticism - did not amount to an abuse of process. The conduct of the officers was not so unfair or oppressive that it violated fundamental principles of justice and undermined the integrity of the judicial process.

4. The application does not impugn the conduct of the Ministry of the Attorney General (“MAG”), nor the conduct of any crown attorney, assistant crown attorney, crown counsel, court officer, or police officer. However, the remedy being sought prevents MAG from engaging in the trial process and prevents the community from having the first-degree murder and attempt murder charges resolved on their merits.

5. The focus of this application is the allegation of an abuse of process and violation of the Applicants’ *Charter* rights, not other inmates. This application is a personal process under the style of cause of His Majesty the King and the Applicants. This is *not* a commission of inquiry or class action suit. The Applicants have no remedy for the violation of other inmates’ rights. As will be seen below, the allegations in the application are, for the most part, group oriented. The remedy sought is very individual. A stay functions to prevent the prosecution of the Applicants but does nothing to assist the other inmates nor to improve the carceral system.

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268. In December of 2023, the situation at MHCC had become untenable. There had been a series of violent incidents, including violence perpetrated by the Applicants themselves, which culminated in a serious assault on a staff member. Something had to be done. An experienced staff sergeant recommended a unit wide level four search. The point was to remove any weapons, contraband, and the drugs which claimed so many lives and which undergirds so much violence. It had to be done by the holidays. That meant ICIT activation.

269. It is true that the paperwork is deficient. It is true that some small number of staff members acted unethically. However, insofar as these Applicants are concerned, everything went according to the protocols for ICIT extraction. It is true that Mr. Bhatia and Mr. Sandhu remained without clothing until December 24. For that wrong, their relief can and should be found elsewhere.

270. What is within the purview of this Court is to ensure that the community see the trial for the murder of Arman Dhillon and the attempted murder of Sonia Grewal completed on the merits. A man killed. A woman shot. All in early morning hours outside of their home. The acts of a few in the jail system should not overshadow the loss of a human life or impede the good work done by the police and the work left to be done by the prosecution.

[30] The Crown requests that this Court dismiss the application or, in the alternative, grant some other remedy short of a stay of proceedings under section 24(1) of the *Charter*.

[31] The Crown stresses, correctly in my view, the burden and standard of proof that is applicable here; it is for the accused/applicants to demonstrate, on a balance of probabilities, that their *Charter* rights were violated, and how, and further, that a stay of proceedings under section 24(1) is the appropriate remedy.

[32] The accused/applicants have not met their onus, the Crown submits. They have failed to demonstrate a violation of section 7. They have failed to demonstrate a violation of section 12. They have failed to meet the stringent three-stage test for a stay of proceedings, especially when one remembers that a stay is “the most drastic remedy a criminal court can order” and is reserved for only the “clearest of cases” (on the latter, see paragraphs 223 and 225 of the Crown’s written submissions, Case Center pages B-4672 to B-4673).

[33] Regarding section 7 of the *Charter*, it is submitted by the Crown that the accused/applicants have failed to demonstrate a substantial interference with their physical or psychological integrity and, thus, there can be no finding that there has been a deprivation of liberty or security of the person that does not accord with the principles of fundamental justice. It is further submitted by the Crown that there was no arbitrary or excessive use of force associated with the ICIT deployment (see paragraphs 201 and following of the Crown’s written submissions commencing at Case Center page B-4666).

[34] Regarding section 12 of the *Charter*, the Crown argues that the “high threshold” to establish a violation of section 12 has not been met in this case. In the specific context of a prison setting and in these unique circumstances, there was “nothing abhorrent, intolerable, dehumanizing, or degrading about these circumstances. The conduct was not so egregious as to violate s. 12.” (paragraph 216 of the Crown’s written submissions, Case Center page B-4670).

[35] Also, with regard to section 12, the Crown distinguishes our facts from those in other cases involving inmates at correctional facilities and closes with the following points at paragraphs 220-221 of its written submissions, Case Center page B4672:

220. In both *Biever* and *Ogiamien*, the circumstances which gave rise to the difficult conditions were not of the inmates’ making: pandemic and chronic staff shortages. However, in the case at bar, the unit wide ICIT activation was wholly and completely as a result of inmate conduct. The re-extraction of Mr. Whitlock was entirely of his making or that of his cellmate. The Applicants cannot complain that they were extracted from their cells for searches when the inmates had been engaging in escalating threats, disobedience, and violence against other inmates and staff.

221. The Applicants cannot be both the authors, and beneficiaries, of their own misconduct. The ICIT teams ought not be held to have violated the rights of the inmates when they followed the approved protocols and took enormous steps to ensure inmate health and safety, and only used as much force as was necessary in the circumstances.

[36] Finally, with regard to section 24(1) of the *Charter*, beginning at paragraph 251 of the Crown’s written submissions, Case Center page B-4681, the Crown outlines other available remedies that this Court may consider to be appropriate if there are violations found: (i) a civil remedy of damages, whether through a personal lawsuit against the Government or through participation in a class action; (ii) a reduction in sentence (the period of parole ineligibility) if the accused are found guilty of the lesser offence of second degree murder, and a reduction in sentence for attempted murder; (iii) judicial interim release of the accused; and/or (iv) a judicial declaration of censure.

[37] What follows is a summary of the main points made by Crown counsel during oral submissions delivered at court on August 20, 2025:

- (i) this is a very strong Crown case on its merits;

- (ii) this is a very serious case – a man was hunted down by the accused and shot and killed in a residential area, and his partner was shot and almost killed;
- (iii) the victims, and the community at large, deserve to have this case tried on its merits;
- (iv) this Court must remember that the onus of proof here is on the defence;
- (v) what we are really dealing with here is something that happened at MCC over the course of just two days;
- (vi) there was a history of violence in Unit 8 at MCC, and that history worsened with the Lecinski assault on December 20th;
- (vii) Jones was correct to recommend the activation of ICIT as it would have been unreasonable and dangerous for the correctional officers themselves to search the cells because they were so upset about what had happened with Lecinski;
- (viii) a stay of proceedings is unnecessary here, and it would be inappropriate, because the system has already changed due to Ministry and CSOI team efforts, as evidenced for example with the firing of Wong;
- (ix) a stay of proceedings in this case will not yield anything that is positive;
- (x) there is nothing systemic about what confronts this Court on the within application;
- (xi) there is no ongoing problem here to be addressed, for example, ICIT has not even been used at MCC since December 2023;
- (xii) how would this Court explain to Ms. Grewal, who was shot three times and nearly died, that a stay of proceedings has been entered and, thus, no trial will take place;
- (xiii) these three accused persons were not targeted by the ICIT operation, and there is not a sufficient connection between what happened and the constitutional rights of these accused specifically;
- (xiv) the ICIT Policy and the Use of Force Policy (both found within Exhibit 2) were fully complied with here;
- (xv) there was no excessive force used here;
- (xvi) the defence has failed to discharge its onus to show what techniques ought to have been used by ICIT personnel, if there is a complaint about what techniques they did in fact use;
- (xvii) the unchallenged affidavit evidence of officer Houston demonstrates that the ICIT personnel used acceptable techniques during this activation;

- (xviii) the deprivation of clothing for the inmates was an example of “incompetence” but was not “culpable”;
- (xix) there was no “grand conspiracy here”, and there was no intentional destruction of any evidence;
- (xx) the ICIT deployment was fully justified for the safety of both the staff and the inmates;
- (xxi) Whitlock’s evidence on the within application ought to be completely rejected as he has proven himself to be both an incredible and an unreliable witness, and besides the application as drafted does not even deal with the second extraction of Whitlock from his cell and him being taken to segregation;
- (xxii) this was not a group strip-search at all;
- (xxiii) unlike the situation in *R. v. Ritchie*, 2025 ONSC 4580, where my colleague Justice Woollcombe found *Charter* violations of sections 7, 8, and 12 concerning the same ICIT deployment at MCC, this Court has the benefit of extensive evidence heard over the course of a very lengthy hearing, evidence that is well beyond the CSOI body’s findings, and that additional evidence is in fact more advantageous to the Crown’s position as compared to what was before Woollcombe J.;
- (xxiv) a stay of proceedings is not about punishment of MCC;
- (xxv) where is the evidence that these *Charter* violations, if found, had any meaningful impact on these three accused persons, or any of them – there is none; and
- (xxvi) section 24(1) of the *Charter* is all about individualization, and two of these accused, Bhatia and Sandhu, provided no evidence on the within application.

[38] As Mr. Khorshed put it near the end of the Crown’s oral submissions, a stay of proceedings in this case would amount to an “overwhelming windfall” for the accused.

[39] During oral submissions, this Court asked Mr. Khorshed, **why was ICIT deployed?** The answer was that there was an ongoing threat of a weapon combined with worsening behaviour and hostility of the inmates. “Fear”; “hostility”; “heightened danger” – those were the words used by Crown counsel.

[40] The Crown repeated its section 8 concession during oral submissions – the searches of the cells were carried out in a manner that was unreasonable and without the necessary paperwork having been completed. That is the extent of the Crown’s concession on that issue.

III. Assessment of the Evidence and Findings

A. The Evidence of Leigh-Ann MacDonald

[41] This Court finds as a fact that the ICIT deployment at MCC in late December 2023 was undertaken for one reason and one reason only.

[42] It was done for vengeance. It was done to avenge what had happened with Lecinski. It was done for retribution. It was done to punish all of the inmates in Unit 8 for what had happened with Lecinski. It was done to appease the correctional officers, or some of them who were most unhappy about the vicious assault perpetrated against Lecinski and the seemingly celebratory mood that it engendered among some of the inmate population at MCC.

[43] The ICIT deployment had nothing to do with anything else. It had nothing to do with alleged increased violence on Unit 8. Nothing to do with fear or threat of a weapon. Nothing to do with fear and/or hostility and/or heightened danger on Unit 8.

[44] I believe **Leigh-Ann MacDonald** (“MacDonald”).

[45] Of all of the witnesses who testified at the hearing of this application, I find Ms. MacDonald to have been the closest thing to exemplifying what a judge most appreciates in a witness.

[46] MacDonald is all of the following. An extremely experienced worker in corrections. A very long-time employee at MCC. A person with a wealth of management experience. A person whose conduct was in no way impugned by the CSOI body and, therefore, someone with absolutely no self-interest in the outcome of the application, unlike Wong and Jones as examples of the contrary. A witness whose evidence was not, in any material way, internally inconsistent or contrary to any other evidence that this Court accepts. A witness who showed during her testimony a balance between firmness required of someone who works in corrections and, where appropriate, empathy towards those that she interacts with, including prisoners. A witness who answered every single question put to her, by every lawyer, directly and without regard for how the answer may serve to call into question her own willingness to stand up to her superiors, like Wong for example. A witness who testified with no apparent agenda of any kind. A witness who

was not afraid to say that she cannot say what she cannot say, like when she admitted to the Crown that she cannot say what was in Jones' mind at the time that he recommended the ICIT deployment.

[47] I accept the evidence of MacDonald. Where it differs from the evidence of anyone else, it is her evidence that prevails.

[48] So, what did MacDonald say when she testified, and why is her evidence so important to the outcome of the application such that it is her evidence that comes first in this section of these reasons?

[49] MacDonald has been working in the corrections field for more than thirty years, since 1994. She has always been employed at MCC, except for a four-month stint that she spent in Hamilton.

[50] At MCC, MacDonald has experience as a correctional officer, and as a sergeant, and as a staff sergeant, and as deputy superintendent of programs, and as deputy superintendent of operations.

[51] As a sergeant, MacDonald supervised staff on the floors at MCC. She was also responsible for supervising the segregation unit. She was also the sergeant at the desk that assigns all of the staff across the institution.

[52] Relevant to the ICIT deployment, MacDonald was working at MCC on December 20, 21, and 22, 2023. Although she was there on December 20th, she did not learn about the assault on Lecinski until the early morning on December 21st.

[53] In terms of the reason for the ICIT deployment, MacDonald testified to the following points, all of which this Court accepts:

- (i) there was an early morning meeting at MCC on December 21st, and members of the senior administration team were present for that meeting, including Jones and MacDonald;
- (ii) at that meeting, Jones spoke about how upset and angry the correctional officers were about what had happened to Lecinski;

- (iii) Jones spoke about how the correctional officers felt that senior administration at MCC did not have their backs;
- (iv) Jones spoke about how the correctional officers appeared ready to walk out on the institution;
- (v) Jones stated that, as a result of all of that, a message needed to be sent to the inmates;
- (vi) Jones stated that, to send that message to the inmates, his recommendation was that ICIT be deployed; and
- (vii) her understanding, which came from Jones and from what he said at that meeting, was that ICIT was being requested in order to send a message to the inmates.

[54] MacDonald was very clear in her evidence, and she repeatedly testified, that it was Jones who requested the ICIT deployment; that Jones specifically mentioned the anger and upset among the correctional officers because of what had occurred with Lecinski; that Jones specifically mentioned that the correctional officers felt that the administration did not have their backs; and that Jones expressly stated that a message needed to be sent to the inmates.

[55] This Court accepts all of that evidence from MacDonald.

[56] MacDonald told Mr. Kapoor, in cross-examination, that Jones stated that the inmates needed to be taught a lesson; and that it was important to take steps to support the staff; and that ICIT was required to do that. Jones never mentioned anything about a weapon. He never mentioned anything about any alleged misconduct of inmates prior to December 20th.

[57] This Court accepts all of that evidence from MacDonald.

[58] Mr. Kapoor asked MacDonald, “it was apparent to you that the use of ICIT was to avenge what happened to C.O. Lecinski?”. MacDonald answered, “in that context, yes.” (page 27, lines 12-14 of the transcript of MacDonald’s evidence given on May 6, 2025).

[59] This Court accepts that evidence of MacDonald. This Court finds as a fact that the ICIT deployment was to avenge what had happened to Lecinski and for no other reason.

[60] When MacDonald was cross-examined by the Crown, she once again confirmed that it was the concept of vengeance (the actual word used by Mr. Goldstein was “avenge”) that was

discussed by Jones at the meeting on December 21st when he recommended the deployment of ICIT. She agreed that she told investigators that Jones expressly mentioned how angry and upset the staff were. She agreed that she told investigators that Jones expressly mentioned that the staff felt that senior administration did not have their backs. She agreed that she told investigators that Jones expressly stated that they needed to send a message; they needed ICIT.

[61] Mr. Goldstein then asked MacDonald, “what to send a message to, you don’t know, do you?”, and MacDonald replied, “no, I do not”. She agreed with Mr. Goldstein that a “message” is a fairly ambiguous term (page 56 of the transcript).

[62] This Court finds as a fact that the “what to send a message to” is obvious – the message was being sent to the inmates that ICIT is what happens when one inmate seriously assaults a correctional officer. MacDonald was being very fair in her evidence in essentially acknowledging that she cannot know what was unspoken but was in Jones’ mind during the meeting on December 21st.

[63] Nothing in that exchange between MacDonald and Mr. Goldstein changes the Court’s finding as to why ICIT was activated. It only serves to solidify that finding. ICIT was activated solely for the purpose of avenging what had happened to Lecinski. It was done solely to punish all of the inmates on Unit 8, including the three accused in our case, for what one inmate did to Lecinski and thereby alleviate the anger and upset among the staff.

[64] If there was any other reason for the ICIT activation, it would have been mentioned by Jones, or by someone, during the very meeting of senior administration officials where the ICIT deployment recommendation was being made and discussed. That did not happen according to MacDonald’s evidence, and I accept that evidence.

[65] When MacDonald was cross-examined by Crown counsel, Mr. Goldstein, she showed her even-handedness and her allegiance to the truth. She readily acknowledged that Unit 8 was known to be a violent unit, for example.

[66] Thus, there can be no suggestion that MacDonald’s evidence about the reason for the ICIT deployment is clouded by some unappreciation on her part of the violent reputation of Unit 8. She admitted that reputation.

[67] The fact is, however, that not a word about that was mentioned when Jones was giving the background to his recommendation for the ICIT deployment, and this Court finds that the said reputation and any assaultive or violent incidents, or any misconducts of any kind for that matter, pre-December 20, 2023, had absolutely nothing to do with the ICIT deployment.

[68] When MacDonald was cross-examined by Mr. Goldstein, she showed genuine empathy for those inmates who have overdosed on narcotics and died while in custody at MCC. She cried, provoking some professional courtesy from Mr. Goldstein in asking whether she needed to take a break. This is an example of the balance projected by MacDonald – she is capable of acknowledging the violent reputation of a particular unit at MCC and the firmness required of corrections to deal with that while, at the same time, expressing compassion for those inmates who have lost their lives.

[69] When MacDonald was cross-examined by Mr. Goldstein, she did not attempt to distance herself from the ICIT deployment. In fact, she agreed with Crown counsel that the ICIT deployment was “okay” and was not at all unprecedented in terms of her history at MCC (pages 47-48 of the transcript).

[70] Again, this is a sign of a credible witness. Of course, it will be up to this Court to determine whether this ICIT deployment was “okay”.

[71] MacDonald testified, and this Court accepts, that there was another meeting held on December 21st, which meeting she was present for along with other members of senior management at MCC, including Wong. The main topic discussed at that meeting was restrictive confinement. Wong proposed that the inmates be generally confined to their cells. The plan was to cancel all visits for the inmates and to let only a few inmates out of their cells on each wing of Unit 8 at any given time.

[72] During that meeting, Ms. Frank (“Frank”), a member of the senior management team at MCC, voiced opposition to the idea of restrictive confinement. She asked Wong why some 192 inmates would be punished for the actions of just a few of them. At the time, Frank was one of the deputy superintendents of operations at MCC. MacDonald was also opposed to the proposal

for restrictive confinement as she thought that it was completely unwarranted, however, Frank spoke up before MacDonald could say anything at the meeting.

[73] In giving her evidence on this point, MacDonald did not attempt to portray herself as the person who stood up to Wong. She clearly gave that credit to Frank. It would have been easy for MacDonald to testify that she also voiced opposition to the idea of restrictive confinement of the inmates, and it was clear to this Court that MacDonald, while testifying, felt some disappointment in herself for having failed to have done so at the time. This is an illustration of MacDonald's honesty as a witness.

[74] MacDonald testified, and this Court accepts, that Jones was one of the search captains during the first day of the ICIT deployment, December 22nd. She knows that because she saw the roster of assignments for that day, although she readily acknowledged to Crown counsel, Mr. Goldstein, that the roster could have changed as Jones could have taken himself off as search captain and assigned somebody else to perform that role.

[75] Whether his title was "search captain" or not, there is other evidence, besides that of MacDonald, that supports this Court's finding of fact that Jones was actively involved in the searches on December 22, 2023. That evidence is described later in these reasons.

[76] I pause here to note that the said roster that was reviewed by MacDonald has apparently gone missing. It was not disclosed to any of the counsel in this case, including Crown counsel, even though MacDonald testified, and this Court accepts, that the electronic rosters of staff assignments are expected to be kept and be available to be reviewed going back many years. This is significant because Jones denied in his evidence that he played any role during the ICIT deployment that had anything to do with being a search captain. The electronic rosters of staff assignments would have helped this Court to evaluate the credibility and reliability of Jones' evidence on that point. The electronic rosters are not the only example of missing or lost evidence, or deliberately withheld evidence, in this case. Other examples are outlined later in these reasons. In my view, all of these examples are relevant to the stay of proceedings analysis.

[77] MacDonald testified, and this Court accepts, that there was an awkward moment between her, Sergeant Edgington ("Edgington"), and Wong during the first day of the ICIT deployment, on

December 22nd. Wong was in the hallway where inmates were sitting cross-legged and facing the wall, with ICIT officers, in full tactical gear and carrying weapons, standing and, in some cases, patrolling behind them. Edgington asked MacDonald if Wong was aware that the equipment in that hallway was audio recording. MacDonald replied to Edgington that she did not think that Wong was aware of that. When Wong had exited the hallway, Edgington, in the presence of MacDonald, asked Wong if Wong knew about the audio recording capability. Wong replied that he was not aware of that. Edgington and MacDonald then both looked at Wong and told him that the equipment in that hallway was recording audio. Wong then said something like, “oh shit”. Wong seemed to be very concerned about the fact that the cameras in that hallway were recording audio.

[78] I pause here to note, again, that the said audio recording was not disclosed to any of the counsel in this case. This is another example of lost or missing evidence, or deliberately withheld evidence, relevant to the stay of proceedings analysis.

[79] MacDonald testified, and this Court accepts, that she went on a tour of MCC on December 27th or 28th, along with Wong and another member of the senior administration team at MCC, Ms. Wilson (“Wilson”). During that tour, as they were approaching Unit 8, Wilson told Wong to lay off the “Wongtanamo Bay” comments, an expression that combines Wong’s name with the notorious Guantanamo Bay (the U.S. military base and detention facility located in Cuba). Wong replied something like, “oh shit, you heard about that all the way there?”, and Wilson replied that everybody had heard about it.

[80] MacDonald testified that she did not believe that the use of that term, “Wongtanamo Bay”, was very professional.

[81] This Court would observe that, whatever one thinks about the detention facility at Guantanamo Bay, it is incontrovertible that the facility has been the subject of much controversy and widespread criticism that relates primarily to alleged human rights abuses of the detainees.

[82] MacDonald testified, and this Court accepts, that MCC is a place where communication often breaks down, even among senior management personnel, illustrated by the fact that MacDonald did not even know about the Lecinski assault until the day after it happened –

something that she complained to Wong about at the time. MCC is a place where it is common for complaints to be raised but nothing is done about them. MCC is a place where those who try to do the right thing are ostracized. MCC is a place where those who try to report the misconduct of others are punished. All of these things are a part of the culture at MCC, and that was the case at the time of the ICIT deployment in December 2023, and that was the case before the ICIT deployment, and that has been the case since the ICIT deployment. In fact, the culture at MCC has been generally worsening over time.

B. Other Evidence at the Hearing

Video Evidence

[83] During the hearing, this Court watched a significant amount of **video evidence** (Exhibit

1). On the basis of that evidence, this Court makes the following findings of fact:

- (i) the assault against Lecinski was committed by one male inmate who punched the correctional officer in the face;
- (ii) almost immediately, many correctional officers rushed to the area of the assault;
- (iii) the assailant was removed from the area of the assault and the area was fully contained by the staff in very quick order;
- (iv) of the three accused in our case, only Bhatia was inside the room where the assault occurred, and not in close proximity to the assault and not involved in the assault in any way;
- (v) the ICIT officers were wearing full tactical gear and were armed with visible weapons;
- (vi) the staff in the control module at MCC celebrated the ICIT deployment – they are seen smiling and laughing and mocking the inmates, and they appear to be very pleased to be able to witness the physical escorts of the inmates by ICIT officers as they walk by the control module from the cells area;
- (vii) during the ICIT activation, each inmate, including the three accused in our case, was removed from his cell, with multiple guards assisting with that removal;
- (viii) through the handheld camera video footage that was provided to counsel for Unit 8F, which footage includes audio (note that, for some reason, no other handheld camera video or audio footage was disclosed to any counsel for any other wing of Unit 8 or for any other part of the overall ICIT activation on

December 22 and/or 23, 2023 except for very brief coverage of inmates from Unit 8F sitting inside the hallway after the cells extractions), you can hear ICIT officers yelling demands at inmates, including “get on your knees”, “put your hands in the air”, and “turn around”;

- (ix) each inmate, including the three accused in our case, had his hands/wrists zip-tied together and his arms outstretched in front of him;
- (x) each inmate, including the three accused in our case, was wearing only his boxer shorts while being physically escorted by ICIT officers;
- (xi) each inmate, including the three accused in our case, was physically escorted by two ICIT officers, one on each side of the inmate, out of the cells area;
- (xii) each of the two ICIT officers was holding on to the inmate, including the three accused in our case, as they were walking;
- (xiii) in some instances, the inmates were dragged out of the cells, forcibly, by their feet, on their stomachs;
- (xiv) while being physically escorted by the ICIT officers, some inmates were walking forwards and others were walking backwards;
- (xv) while in the staffing area, Bhatia’s bare buttocks was clearly visible to all of those who were present, as his hands were zip-tied together and his boxer shorts were falling down;
- (xvi) many of the inmates had their bare buttocks exposed, at least partially, during the ICIT deployment;
- (xvii) each inmate, including the three accused in our case, was taken to the hallway and forced to sit on the floor, facing the wall;
- (xviii) when Whitlock was escorted out of the cells area, his boxer shorts were falling down, exposing his bare upper buttocks;
- (xix) there were guards positioned behind the inmates who were sitting on the floor in the hallway;
- (xx) in the hallway, the inmates, including the three accused in our case, were sitting cross-legged and facing the wall, still wearing just their boxer shorts and still with their hands/wrists zip-tied together;
- (xxi) the guards in the hallway were, at times, pointing their weapons (which also act as flashlights) at the backs and at the heads of the inmates;
- (xxii) in the hallway, as guards patrolled the area behind the inmates who were sitting on the floor and facing the wall, the metal detector would frequently sound;

- (xxiii) some inmates, including the three accused in our case and especially Whitlock, appeared to be in physical pain while being escorted by ICIT officers, evidenced through the clear grimaces on their faces for example;
- (xxiv) in the area of the cells during the searches performed by correctional officers, in the absence of the inmates, management personnel including Jones and Wong can be seen at times;
- (xxv) during the searches of the cells, in the absence of the inmates, Wong would frequently fist-bump other staff members, and pat them on their backs or shoulders or chests, and put his arm around them;
- (xxvi) on one occasion, Wong had a photograph taken of himself and the guards up against the wall in the cells area, with Wong crouched down in front of the guards and giving the number one finger sign in the photo;
- (xxvii) immediately after that photograph was taken, Wong clapped his hands and applauded the guards, shook hands with some of the staff members, and gave the thumbs-up sign to some of the staff members;
- (xxviii) during the searches of the cells, they were cleared-out of almost everything;
- (xxix) in most instances, stuff removed from the cells was thrown on to the floor and then placed in large bins;
- (xxx) where the cell was located on the upper level, in most instances the stuff removed from the cell was simply thrown or kicked down to the floor at the lower level;
- (xxxi) when Bhatia was returned to his cell after the searches were completed, he again had his bare buttocks exposed;
- (xxxii) when Whitlock was lifted up to his feet by ICIT officers in the hallway and escorted back to his cell, his boxer shorts were still very low on his waist, exposing his bare upper buttocks;
- (xxxiii) after all of the inmates were returned to their cells at Unit 8B, tactical officers reattended at Whitlock's cell and performed a second extraction;
- (xxxiv) the inmates, including the three accused in our case, were without clothing (except for their boxer shorts) and bedding and most everything that was normally inside their cells from the time of their initial extractions from their cells, which occurred on either December 22 or 23, 2023, until December 24, 2023, as evidenced from when the inmates are seen exiting their cells wearing only their boxer shorts and white towels or small sheets and retrieve their orange jumpsuits in the presence of Wong and Staff Sergeant Thanachayan; and

(xxxv) Bhatia and Whitlock were extracted from their cells on December 22nd, and Sandhu was extracted from his cell on December 23rd.

Nugent

[84] Sergeant **Nugent** testified at the hearing. I accept his evidence that the situation after the Lecinski assault was brought completely under control in a very short period of time. He would know as he was in charge of Unit 8 at the time of the Lecinski assault.

[85] This Court accepts Nugent's evidence that there was no reason to initiate an all-staff call. He had authority to make that call. He did not make that call. That call was made by Jones. That call resulted in only more chaos, Nugent testified, and I believe that evidence as it is consistent with the video evidence.

[86] Nugent testified that he knew/heard absolutely nothing at the time of any weapon or any threat of any weapon. I accept that evidence. That evidence is further reinforcement for the Court's finding of fact that the ICIT activation had zero to do with any weapon or risk of a weapon or threat of a weapon.

[87] Nugent acknowledged to Crown counsel, Mr. Goldstein, that the magnitude of the inmates laughing/cheering/celebrating the Lecinski assault after it happened was bigger than he had ever seen before or since.

[88] Nobody would reasonably argue, however, and the Crown did not do so in this case, that the ICIT deployment was justified on the basis of some inmates being happy about Lecinski having been assaulted. There is certainly no evidence that any of the three accused in our case did anything to celebrate or to cheer on the assault against Lecinski.

Holland

[89] The evidence of Sergeant **Holland**, who was working on Unit 8 on December 20, 21, and 22, 2023, fully supports a finding that the ICIT deployment was unjustified on the basis of anything that was going on at the unit at the time of the activation. This Court makes that finding of fact.

[90] As the night sergeant in charge of Unit 8 on all three of those dates, Holland testified that he had no reason whatsoever to anticipate that something like the ICIT deployment was about to occur.

Amaya

[91] The evidence of correctional officer **Amaya** is a clear example of why this case, this application, is about more than what happened at MCC on two days in late December 2023. With respect, the Crown is wrong to try to limit the scope of the within application to a period of some 48 hours. The untruthfulness of MCC witnesses who testified at court on the within application is relevant to the stay of proceedings analysis.

[92] Amaya did not tell the truth when he testified at court. He was not the only witness who failed to do so.

[93] In actuality, this Court is left with the uncomfortable conclusion that several personnel from MCC gave false evidence at court. I make that conclusion.

[94] Amaya testified that he prepared a report about the searches of the cells that took place on December 22 and 23, 2023. When did he do that? He did that four months later, in April 2024. On April 13th, to be precise. He told this Court that he did that because he heard that other correctional officers were doing that. Nobody told him to do that.

[95] I do not believe that evidence. It defies common sense that a correctional officer would prepare a report about something that happened four months earlier without being instructed to do so. That evidence is also contrary to other evidence adduced at the hearing that I do accept. That other evidence, including the testimony of Wilson, is dealt with later in these reasons.

[96] Amaya first testified that he saw no inmates and no ICIT officers on either December 22 or 23, 2023, when he was involved in the searches of the cells. None. He then stated that he saw some ICIT officers but no inmates. We then watched a video of Amaya and others inside the control module at MCC. That video shows many ICIT officers and many inmates being physically escorted directly past the control module, which module is completely glassed.

[97] It is not possible that Amaya was simply mistaken in his evidence. I find that he intentionally gave incomplete evidence so as to distance himself from the ICIT deployment and in order to try to avoid the embarrassment of the control module's celebration of the ICIT activation and its concurrent mocking of the inmates as they were walked by.

[98] Amaya testified that he left the following items in every single cell that he searched on December 22 and 23, 2023: two blankets, two sheets, a towel, boxer shorts, socks, a t-shirt, and an orange jumpsuit. We know that the said evidence is not the truth. It is not disputed that those items were not left in the cells that were searched. In fact, I would agree with Mr. Greenspan's description of the cells having been "ransacked" by the guards. The video evidence speaks for itself.

[99] Amaya's evidence also grounds another uncomfortable conclusion that this Court makes – senior management at MCC did nothing to correct what they knew to be blatantly incorrect information being provided in official reports filed by staff regarding the ICIT deployment. That gross lack of internal accountability at MCC is relevant to the stay of proceedings analysis.

[100] Amaya's April 2024 typed occurrence report went to, at a minimum, Wong and Staff Sergeant Black ("Black"). There is no controversy about that. Yet, neither Wong nor Black, and not anyone at MCC, and not anyone at the Ministry's Regional Director office, has ever spoken to Amaya about his incorrect information about the extent of the searches of the cells. No one has ever told him that his report is a sham, or is at least inaccurate, because the truth is that inmates were left without any clothing for a lengthy period of time. For Amaya, and he is not the only MCC witness to whom this applies, there has been no accountability at all for his totally inaccurate April 2024 occurrence report, both within MCC itself and within the context of the wider Ministry. This Court cannot ignore that in the overall stay of proceedings analysis.

Cudmore

[101] Correctional Officer **Cudmore** is another MCC witness who did not give truthful evidence at court. He testified that he left inside every single cell that he searched a host of items: bedding, jumpers, shorts, t-shirts, boxers, socks, shoes, newspapers, magazines, canteen purchases, religious items, hygiene cups, and toilet paper. Basically, he stated that he left everything in the cells except for contraband and garbage. That is false.

[102] Like Amaya, Cudmore reported all of his activities in an official typed document dated April 2024. Like Amaya, Cudmore has never been corrected on his misinformation. It is evident to this Court that the said lack of accountability is a systemic problem at MCC.

Tozer

[103] Correctional Officer **Tozer** was a more credible witness than some of the others who testified from MCC. He admitted that it was obvious on December 22 and 23, 2023, when he was touring Unit 8, that the inmates had only their boxer shorts. He personally told management that the inmates had no bedding. He is certain that it was communicated to management that the inmates had no clothing except the boxer shorts that they were wearing. He assumed that management would take care of it.

[104] I accept all of that evidence. This Court finds that it was a notorious fact at MCC, well known to senior administration including Wong, knowledge that existed throughout December 22 and 23 and into the morning of December 24, 2023, that the inmates on Unit 8 had no clothing and no bedding and generally nothing except the boxer shorts that they had on when they were extracted from their cells.

Coffin

[105] Correctional Officer **Coffin** is another MCC witness who did not give truthful evidence at court. He told Mr. A. Robbins that correctional officers should not tease or mock or be disrespectful to inmates. He declared that he has abided by that principle, including during the ICIT deployment. After a video was played in the courtroom, however, a video that clearly shows Coffin looking directly at and smiling and laughing as Whitlock was being escorted by ICIT officers past the control module, Coffin testified that the laughing was due to a coping mechanism that he employs in order to deal with stress – the stress of the Lecinski assault – and also because of his joint pain.

[106] I do not believe that explanation from Coffin. I think that it is absurd. It fails to explain why Coffin was looking directly at Whitlock and pointing in that direction while he was laughing and smiling and carrying on in the control module.

[107] The video speaks for itself. The control module was in the mood to celebrate the ICIT deployment and to mock the prisoners, and that is what its occupants did.

Hurd

[108] Corporal **Hurd** is another MCC witness who did not give truthful evidence at court. He told Mr. Kapoor that he had nothing to do with any searches of any cells on either the 22nd or the 23rd of December, as indicated in his official occurrence report that he prepared and filed in April 2024.

[109] Then Hurd told Mr. Greenspan that he was called-out about that evidence by the CSOI body. He was told by the investigators that his evidence was false, or at least inaccurate, on the basis of clear video surveillance of his involvement in the searches.

[110] Video evidence was then played in the courtroom, clearly showing Hurd's involvement in the searches.

[111] Hurd then stated that he forgot about all of that, including the CSOI investigation findings, when he had testified earlier at court.

[112] I do not believe that evidence. I think that Hurd was hoping that he could avoid being implicated in the searches of the cells and deliberately gave wrong information to the court. In the overall context of the stay of proceedings analysis, this Court cannot ignore the fact that multiple MCC witnesses gave blatantly incorrect or false testimony on the within application in order to downplay their own involvement and to downplay the seriousness of what happened in general. Respectfully, there is much more to this application than 48 hours of time.

[113] Perhaps it was because Hurd wanted to come clean that he later told Mr. A. Robbins that it is true that there was a "cover-up" at MCC regarding the ICIT deployment. He later retracted that in questioning by Crown counsel, Mr. Khoorshed, saying that he was "flustered" by the questions asked of him by defence counsel.

[114] I do find that there was an attempted "cover-up" by MCC management and staff regarding the ICIT deployment, but this Court would never make such a serious finding on the basis of the evidence of Hurd. His evidence is worthless.

Beerdatt

[115] Sergeant **Beerdatt** (now Staff Sergeant) gave evidence that supports how efficient the correctional officers were in speedily bringing the situation under control after the assault on Lecinski. She told Mr. Kapoor that all of the inmates in Unit 8C, which is where the assault on Lecinski took place, were secured back in their cells within a “couple of minutes”, approximately.

[116] With the benefit of being able to watch the video evidence in the courtroom, Beerdatt told Mr. Greenspan that “16 seconds is all it took for us to get control of the Unit”. I accept that evidence.

[117] Beerdatt, in questioning by Mr. Greenspan, stated that she was the Unit 8 manager on December 21st, the day that the decision was made to activate ICIT. She was never asked by anyone whether she thought that ICIT was required. On that day, she never heard about any concerns regarding weapons or threats of any kind on Unit 8. She wrote nothing in the logbook about any such concerns. And no staff under her supervision on Unit 8 brought any such concerns to her attention, and they would have been required to do so. I accept that evidence. That evidence further reinforces this Court’s findings that the ICIT activation was unjustified and was done for a wholly improper purpose – to avenge what had happened to Lecinski.

[118] During cross-examination by the Crown, Beerdatt testified that there were a few notes in the logbook about inmate issues on Unit 8 on December 21st, such as a meal hatch door on a cell being jammed and an inmate refusing to return to his cell. I accept that evidence.

[119] There is no suggestion by the Crown, however, that those types of issues would have justified the ICIT activation.

[120] Beerdatt (who has been at MCC since 2017) told the Crown, Mr. Khoorshed, that she has never seen another all-unit ICIT activation at MCC (like the one that occurred here – all wings of Unit 8 were subjected to the ICIT deployment on December 22 and 23, 2023). I accept that evidence.

Ramirez

[121] Sergeant **Ramirez** (now Staff Sergeant) was one of the search captains on December 22, 2023. He testified that he did not know that the inmates were left with no clothing. He testified that the removal of all clothing from the cells would have been contrary to his express instructions to the correctional officers who were conducting the searches of the cells. He stated that the photograph of Wong with the guards, where Wong is crouched down and giving the number one finger sign (Exhibit 5), is consistent with Wong's general approach in that he was always stressing that MCC was number one; Wong even had a wrestling-style championship belt made to show that MCC was number one in corrections.

[122] I accept that evidence, except for the suggestion that Ramirez did not know that any of the cells were left without any clothing after the searches were completed. The video evidence that was played during the cross-examination of Ramirez by Mr. Greenspan clearly shows Ramirez looking into the cells at Unit 8C, either through the open door or through the window in the closed door. In some instances, he actually entered the cell after the search was completed. In my view, Ramirez would have seen that the cells were essentially barren and had no clothing left behind after the searches were completed.

[123] Ramirez testified that nobody, including himself, was ever reprimanded for the fact that the inmates were left without any clothing for a lengthy period of time. Not on December 27, 2023, when there was a management meeting at MCC that he attended, and not since that date to the time that he testified in court on the within application. Ramirez told Mr. A. Robbins that, since December 23, 2023, there has never been any discussion at MCC about the fact that the inmates were left without any clothing for a lengthy period of time. No directives from management. No policy changes. Nothing. I accept that evidence. Again, this illustrates the gross and pervasive lack of accountability for what happened at MCC in late December 2023.

[124] In fact, it was not until Ramirez testified at court that he first learned, while in the witness box, that the CSOI body made a finding that he misled investigators regarding his role in the searches of the cells. He testified that he received no discipline or consequences or repercussions as a result of that finding. In fact, he now has a higher rank than what he had at the time of the ICIT activation. I accept that evidence. That evidence demonstrates that not only has there been

a total lack of accountability for what happened at MCC in late December 2023 but also that very little has changed even since the CSOI body's investigation was completed. This Court cannot ignore that in the overall context of the stay of proceedings analysis. Again, the application is not confined to a 48-hour period of time.

[125] Ramirez testified about the process that was to be followed as each inmate, who had been extracted from his cell by ICIT officers, was brought past the administration desk in the rotunda area at Unit 8. A package was to be completed for each inmate (Exhibit 7). Four questions were to be asked of each inmate, sometimes by Beerdat and sometimes by Ramirez: (i) whether the inmate had any injuries to report; (ii) whether the inmate consented to a photograph being taken; (iii) whether the inmate wanted to go into protective custody; and (iv) whether the inmate wanted to press criminal charges. The nurse who was present was also to ask some questions of each inmate. I accept that evidence.

[126] The video evidence that was played in court during the testimony of Ramirez, however, makes it plain and obvious that the said procedure was not followed. In most instances, the inmate was asked no questions by anyone at the desk, including the nurse, and the only thing that was done was the taking of a quick photograph.

[127] The evidence of Ramirez, as a whole, supports several troublesome conclusions that this Court makes, including:

- (i) aside from the question of whether the ICIT deployment was justified, once it began it was not carried out as per required protocol, at least not in terms of the searches of the cells and not in terms of the package that was to be completed for each inmate;
- (ii) nobody appears to have taken responsibility for the fact that the inmates were left without any clothing for a lengthy period of time; and
- (iii) since December 24, 2023, when the inmates were finally provided with adequate clothing and bedding, there has been no follow-up of any kind that has been undertaken by management.

Baptist

[128] Then Correctional Officer **Baptist** (now unemployed) is another MCC witness who did not tell the truth at court. He testified that, on December 22, 2023, while he was working on Unit

8A, the inmates were unruly. Some were yelling threats. Some were planning to attack ICIT members if they returned to the area.

[129] I do not accept that evidence. It belies belief in that it is totally inconsistent with the evidence of every other witness who was working at Unit 8 on December 22nd, including the managers. It is also incredible because Baptist did not, at the time, prepare any misconduct reports, incident reports, or occurrence reports of any kind that supported his assertions, although he would have been required to do so. He also did not record anything in the logbook. He also made no handwritten notes of what he allegedly observed. He told Mr. Kapoor that it “slipped [his] mind”, although he was aware at the time that these ICIT officers would be going into the other wings of Unit 8 the very next day, on December 23rd. I do not believe that it slipped his mind. I find that it never happened.

[130] Baptist did not tell the truth to Mr. Lutes, in cross-examination, when he testified that he did not observe the ICIT activation. He did. We know that because we watched the video evidence of him clearly looking at the ICIT officers with the inmates from inside the control module.

[131] The only thing that I accept from the evidence of Baptist is that, once again, there were no repercussions or consequences to him as a result of the CSOI body’s findings that he was not forthright with and provided contradictory information to the investigators. He was not disciplined or reprimanded in any way as a result of those findings. He simply carried on with his work as a correctional officer at MCC until he was dismissed very recently for something unrelated to the ICIT activation and the findings of the CSOI team. This is further evidence of the gross and pervasive lack of accountability for what happened at MCC in late December 2023 and for MCC personnel, like Baptist, having given less than forthright information to the CSOI investigators. This lack of accountability and follow-up is clearly a systemic issue.

Lindstrom

[132] Correctional Officer **Lindstrom** testified. I accept the following evidence from Lindstrom:

- (i) that, on December 23rd, during his tours of Unit 8, he heard complaints from inmates about them having no clothing, and he reported that to Staff Sergeant Urquhart (“Urquhart”) on two occasions;

- (ii) that Urquhart, on both occasions, told Lindstrom that clothing would be provided to the inmates “later”;
- (iii) that the exhaust fans are typically used for air contamination;
- (iv) that, on December 23rd, the exhaust fans were activated at the request of ICIT officers, resulting in the temperature in Unit 8 feeling colder, especially if one was wearing just boxer shorts; and
- (v) that his understanding from speaking to other correctional officers on December 23rd was that they were to remove all property from the cells during the searches, including all clothing and all bedding, essentially everything.

[133] None of this evidence was challenged by the Crown in cross-examination of Lindstrom.

[134] The evidence about being told by Urquhart that clothing for the inmates would be provided at a later time is consistent with the fact that the clothing was not provided until the following day, December 24th. The evidence about the extent of the searches of the cells is consistent with the video evidence which clearly shows that an awful lot of clothing and bedding was being removed from each cell that was searched. The evidence about the temperature in Unit 8 is consistent with the independent HVAC records (Exhibit 2, tab 3). The said records prove that there was a noticeable dip in the temperature (close to 3 degrees) between midday on December 21st and midday on December 24th, with the lowest point being midday on December 23rd, which is the specific day that Lindstrom was speaking about during his testimony on this issue.

[135] Based on the evidence of Lindstrom, two important findings arise. First, I find that management at MCC, Urquhart specifically, knew about the lack of clothing for the inmates well before fresh laundry was finally provided to them on December 24th. Second, I find that the drop in temperature at Unit 8 was deliberate and was a punitive part of the ICIT operation; there is no other explanation for the objective evidence found in the HVAC records other than that offered by Lindstrom.

[136] This Court does not accept all of the evidence given by Lindstrom, however.

[137] He was wrong when he testified that he was not that involved in the searches of the cells – the video evidence played in the courtroom clearly shows that he searched multiple cells in Unit 8E. To his credit, after watching that video evidence, Lindstrom readily admitted that his earlier

testimony on that point was incorrect and, further, he admitted that what he had told the CSOI body on that point was incorrect.

[138] I am also concerned that Lindstrom appears to have colluded with Coffin in violation of the order excluding witnesses that was made during the actual hearing of the application (which order I was careful to bring to the attention of each witness who testified, including Coffin).

[139] The reader will recall the absurd evidence of Coffin who tried to explain his smiling at, laughing at, and mocking of the inmates from the control module as the inmates were being escorted by ICIT officers. Coffin testified before Lindstrom. When Lindstrom testified, he was also shown the video evidence of him laughing at, smiling at, and mocking the inmates as they passed by his position in the control module. Lindstrom offered the exact same explanation as Coffin had – that his behaviour was a stress and trauma response. I do not believe that evidence, and I think that it is likely that the said evidence was the product of some discussion between Coffin and Lindstrom during the currency of the hearing of the application. Just as this Court cannot ignore the giving of untruthful evidence at court by MCC witnesses, this Court cannot ignore the collusion among MCC witnesses. That collusion is relevant to the overall stay of proceedings analysis. The events that are relevant to the within application are not confined to those that precipitated the provision of clothing and bedding to the inmates, including the three accused in our case, on December 24th, as the Crown seems to suggest.

Birring

[140] Interestingly, during his testimony at court, Correctional Officer **Birring** also offered the exact same explanation for his conduct while inside the control module. I do not believe his evidence, which came after that of both Coffin and Lindstrom, and I think that it is likely that Birring's evidence was the product of some discussion between him and Coffin and/or Lindstrom during the court hearing, notwithstanding the order excluding witnesses that was made and which everyone was well aware of.

[141] Birring testified that he has always abided by the Code of Conduct and Professionalism that all of those who work in corrections are required to follow. He stated that he followed that Code on December 22, 2023. Then the video evidence was played in the courtroom, clearly showing Birring laughing at inmates being escorted by ICIT officers, including inmates with their

bare buttocks exposed because their boxer shorts were falling down, and Birring joking around with his fellow workers inside the control module, and Birring actually doing an impersonation of the inmates with their hands outstretched in front of them, zip-tied together at the wrists.

[142] What was Birring's explanation for that behaviour? The stress and trauma of the job. I do not believe that. I think that the said explanation was the product of collusion among MCC control module witnesses in violation of this Court's order excluding witnesses at the hearing of the within application.

[143] Birring, like many others who testified from MCC, has experienced no accountability, has received no repercussions, has received no discipline, has received no follow-up, has experienced nothing actually as a result of anything that he did during the ICIT activation, including for example kicking shoes from the upper level of the cells area to the ground level in order to be removed, not because they were suspected contraband (which he testified he was told to remove from the cells) but because they were simply "in the way" (his words) – we watched that as part of the video evidence of the Unit 8A searches on December 22nd.

[144] Birring has experienced no accountability for anything that he did while mocking the inmates from inside the control module. No accountability for anything found by the CSOI body, where the investigators concluded that Birring had failed to discharge his duties to record the alleged threats from inmates that he supposedly heard. No accountability for him first telling the CSOI body that the fans, if turned on, would have made Unit 8 hotter, not colder, which is obviously inaccurate.

[145] When asked about that by Mr. A. Robbins at court, Birring said that he misinterpreted what he was being asked by the CSOI personnel; somehow, he thought that the investigators' questions were about the month of August (when he was interviewed) instead of the month that the ICIT activation actually occurred, December. Then he told Mr. Robbins that, in fact, he knew when he gave his interview to the CSOI team that he was being asked about the month of December.

[146] Of course he did. He just chose, at first, to give wrong information to the CSOI body. He corrected that later in his interview by the CSOI. And, unfortunately, he chose to give some

wrong information when he testified in court. And nothing has happened to Birring since December 2023, whether before or after he spoke with the CSOI body. This is yet another example of the gross lack of accountability that permeates MCC and the Ministry as a whole. This is a systemic problem that cannot be ignored in the overall context of the stay of proceedings analysis.

Parr

[147] Then Correctional Officer **Parr** (now a Provincial Constable with the Ontario Provincial Police) testified at the hearing of the application; his evidence was very brief. Despite its brevity, however, Parr's evidence is important as it illustrates the problem created by MCC itself in that there is no proper record of what happened during the ICIT activation and its aftermath.

[148] Parr testified, and I accept, that his practice in December 2023 was to make handwritten notes in his Ministry-issued notebook. As he was no longer with the Ministry when he testified at court, he did not have access to those notes. He conceded that, without those notes, he had no memory of certain details of what happened on the day of his involvement, December 22nd.

[149] That makes common sense; specific details would naturally fade over time.

[150] Yet Parr is not alone in this regard. Other witnesses who testified at the hearing, or at least the vast majority of them, did not have any notebooks with them when they came to court. They were not refreshing their memories with any notes that they took at or around the time of the events. If those notebooks exist, that would be news to me. My impression is that the vast majority of the witnesses who testified made no notes at all. Many of them, like Parr, were requested by management to prepare occurrence reports, but that was done four months later, in April 2024. Parr's Occurrence Report (Exhibit 8), dated April 16, 2024, was addressed to Wong and stamped at the bottom by Black, so it is obvious that the occurrence reports were prepared at the direction of management.

[151] This was a major event in the life of MCC. Yet, for the most part, notes were not being taken at the time; records were not being kept; required documents were not being completed; occurrence reports were prepared four months later.

[152] What good is an occurrence report prepared in April 2024 that describes events that happened in late December 2023? Not much, I would say, unless it was prepared with the assistance of other notes or documents of some kind that were created much closer to the time of the ICIT activation. I have no evidence of that.

[153] What was the purpose of having these occurrence reports prepared in April 2024? Regrettably, this Court has concluded that it was to try to create a narrative *ex post facto*. It was an after-the-fact attempt by management at MCC to change the consequences of MCC's actions that were committed in late December 2023, before these occurrence reports were created.

Wilson

[154] I base this conclusion principally on the evidence of **Wilson**. I accept Wilson's evidence. Although he testified much later during the hearing, I now turn to his evidence.

[155] Like MacDonald, Wilson has been working in corrections for a very long time. His career began in August 1989. He has been a correctional officer throughout his career. He was also an ICIT member in the past and, until 2005, a leader of the ICIT team. He was a union negotiator, the vice-president of the union, the health and safety committee co-chair, a leader at MCC in staff training, and a member of the Institutional Security Team at MCC.

[156] Wilson was working at MCC on December 20, 21, and 22, 2023.

[157] Like MacDonald, Wilson described Jones as having a very active role in the searches on December 22, 2023. According to Wilson, Jones was "in charge" on December 22nd. He was the crisis manager, above even the search captains like Ramirez. I accept that evidence.

[158] Wilson testified that December 22nd was like nothing that he had ever witnessed before in his more than 35 years in corrections. He testified that there were senior management officials, like Wong and Jones, in the wings of Unit 8 during the actual searches of the cells, and that was unprecedented. I accept that evidence.

[159] Wilson testified that there were many things that occurred on December 22nd that were abnormal and that had him completely bewildered: there was no briefing when he arrived at Unit 8C to assist with the searches of the cells, which briefing is standard procedure; when he entered

the first cell, he saw that everything had been removed, which is not proper procedure; he saw Wong pumping-up the staff and taking a photograph with the guards, which was “not appropriate” and “not professional” – it was like “staff appreciation day at the wrong place and at the wrong time”; and he heard many persons referring to “Wongtanamo Bay”, which he found to be offensive. I accept all of that evidence.

[160] The whole situation was so distasteful to Wilson that he decided that he could not be a part of it, and he left the area.

[161] According to Wilson, Jones was there, at Unit 8C on December 22nd, during the searches. He was the “supervisor”. I accept that evidence.

[162] Wilson testified that, after December 22nd, he discovered that there were missing electronic records of staff musters (“e-musters”). Some were gone completely, like the e-muster for December 23rd. Others were missing information on them, which information was probably deleted intentionally. These missing e-musters, which records would have shown things like who was present for meetings and what they were assigned to do, were for the period between December 20th and December 28th – just before, during, and for the few days after the ICIT activation. I accept that evidence.

[163] In April 2024, according to Wilson, Black told him to go around and get the staff to prepare reports about the ICIT activation that had occurred four months earlier. Wilson refused to do so, and he said “no” to Black’s request. He told Black that it sounded like “collusion” to him. Wilson testified that it felt like a “cover-up”. I accept that evidence.

[164] In April 2024, according to Wilson, he was asked to prepare a specific intelligence report about Unit 8, for December 22nd and for the time period leading up to December 22nd. He refused to do so. He felt that it was wrong. It seemed to him at the time to be an effort to “create a narrative” to justify the ICIT activation and the searches of the cells. I accept that evidence.

[165] I find that Wilson was correct in what he felt at the time. I find that the requests by management to have occurrence reports and an intelligence report about Unit 8 prepared four months after the ICIT activation were part of an after-the-fact effort by MCC to justify the ICIT deployment on the basis that Unit 8 was somehow out of control, which it was not, and to cover-

up the real reason for the ICIT activation, which was to avenge what had happened to Lecinski and to teach all of the inmates a lesson by punishing them for the vicious actions of one man.

[166] Wilson testified that, after December 22nd, he asked Deputy Superintendent Fernandes (“Fernandes”) what happened with all of the video and audio footage of the ICIT activation. Fernandes told him, “they got rid of it”. I accept that evidence.

[167] I think that it is likely that the video and audio footage of the ICIT activation, apart from the very limited amount that was disclosed to counsel, was intentionally destroyed by someone at MCC. At a minimum, however, even if that finding was not made by this Court, it amounts to gross negligence on the part of MCC that the footage either (i) never existed (which was required by policy to exist) or (ii) it existed but got lost or was deliberately withheld (not disclosed) by MCC.

[168] Wilson testified that the entire ICIT activation has sullied the reputation of hard-working correctional officers like nothing else that he has seen in his lengthy career in corrections. “This is inappropriate”, he stated to Mr. Kapoor. I agree.

[169] Wilson testified that there is a code of silence among senior administrators at MCC. There were managers, including Jones, who were present during the searches, standing by and in many cases actively encouraging what was being done, yet there has been an after-the-fact attempt to pin the blame on some over-zealous correctional officers who went too far. I agree.

[170] During the Crown’s cross-examination of Wilson, it was suggested to the witness that correctional officers may have taken out their anger on the inmates, after the Lecinski assault, and therefore ICIT was required to be activated.

[171] Wilson categorically rejected that suggestion. He described in detail the process that could have been followed if a correctional officer refused to go into a wing of Unit 8, a process that he has personally been involved with given his experience with the leadership of the union, and a process that culminates in the dispute being resolved by the Ministry of Labour, and a process that takes mere hours to be completed and is often completed the same day as the refusal, even if multiple complainants are involved. I accept that evidence.

[172] This Court rejects any suggestion that ICIT was required because the correctional officers could not be trusted to extract the inmates from the cells in order to search the cells in a timely manner.

[173] First, there was no legitimate reason to extract all of the inmates, including the three accused in our case, and to search all of the cells on Unit 8 to begin with. Second, if there was, the process described by Wilson ought to have been followed. Third, it is unreasonable, disingenuous in fact, to suggest that a timely process of searching the cells before Christmas was required, for the benefit of the prisoners, when the plan to have the inmates subjected to restrictive confinement over the holidays was already in the works before the ICIT deployment even began.

[174] In cross-examination by the Crown, Wilson sharply disagreed with the suggestion that security intelligence at the jail is sometimes based on “rumours”. He testified that there has to be a legitimate reason to believe that there is a weapon in order to search for a weapon.

[175] Wilson described an occurrence that happened at MCC in June 2023, six months before the ICIT activation. There was a serious assault involving inmates, leaving lacerations that were suspected to have been caused by weapons. He asked for a level II search, significantly below the level IV search that occurred as part of this ICIT activation in late December 2023. His request was denied by Jones and Ramirez. Wilson used that example to state to the Crown that it is incorrect to say that a weapons search of a unit is lightly granted based on the suspicion of a potential weapon.

[176] I accept that evidence of Wilson. I reject any suggestion that this ICIT activation was justified to search for a weapon. The video evidence of the Lecinski assault speaks for itself. There was clearly no weapon involved. There was nothing happening on Unit 8 that could have given rise to any need, whether based on reasonable grounds or even a lower standard of reasonable suspicion or any measurable standard for that matter, to search all of the cells on Unit 8 for a weapon/weapons on December 22 and 23, 2023, including the cells of the three accused in our case.

[177] In cross-examination by the Crown, Wilson repeated that Jones was the crisis manager who was in charge on December 22nd. I accept that evidence.

[178] Wilson did not hide from the Crown and this Court or minimize his sour relationship with Jones. In cross-examination by the Crown, Wilson acknowledged that he is not on good terms with Jones and has an outstanding grievance that he filed against Jones.

[179] In my view, Wilson was an excellent witness. I accept all of his evidence. It was not internally inconsistent in any way. It was not inconsistent with any other evidence that this Court accepts, including the objective video evidence (when it comes to Jones' involvement on December 22nd, for example).

[180] Without knowing anything about the nature of Wilson's grievance against Jones, there is no reason to think that anything that Wilson said in the courtroom was designed to help him with that grievance. In fact, Wilson's evidence was courageous and probably against his own self-interest. One cannot imagine that he could ever continue in corrections at MCC, certainly not after his evidence is made public. He must have known when testifying that his evidence could very well mark the end of his career in corrections. I think that he honestly said what needed to be said. I believe him. Wilson's evidence is not only relevant in terms of highly unusual and improper things that happened during the ICIT deployment itself but it is also relevant in terms of the events that took place after the ICIT deployment was over, including the lost or missing or deliberately destroyed evidence, the collusion, and the attempted cover-up at MCC. This Court cannot ignore the latter evidence in the overall context of the stay of proceedings analysis. The within application is not about just two days of activity at MCC on December 22 and 23, 2023, as suggested by the Crown.

Poirier

[181] Returning now to the witnesses who testified earlier during the hearing of the application, **Poirier** gave evidence at court. I accept his evidence. It was totally unchallenged by the Crown in cross-examination.

[182] Poirier's evidence amounts to conclusive proof that there was clean laundry available to the inmates after the cells were searched and well before the inmates were finally provided with fresh clothing and bedding on December 24th.

[183] Poirier works in the “crib”, which is a place at MCC responsible for the laundry getting out to the various units. Poirier testified, and this Court accepts, that:

- (i) clean laundry was sent out to Unit 8 on December 22nd;
- (ii) because that was a Friday, it would have been a special request that was made by management as laundry is not normally sent out from the crib on a Friday;
- (iii) normally, the laundry goes to the unit’s multi-purpose room, but here it was left in bins in the hallway because of the ICIT activation; and
- (iv) in addition to the clean laundry that was delivered to Unit 8 and left in bins in the hallway, there is also video evidence, which was played in court, showing clean laundry, including orange jumpsuits, piled-up in the multi-purpose room as of December 22nd.

[184] On the basis of that evidence, this Court finds that fresh laundry, both clothing and bedding, could have been given to the inmates, at least some of them, who had been extracted from their cells as early as immediately afterwards, on December 22nd. Instead, all of the inmates were left with just the boxer shorts that they had on until December 24th. Whitlock and Bhatia could have, and should have, been given the available fresh laundry on December 22nd. Sandhu could have, and should have, been given the available fresh laundry on December 23rd. Instead, all three of the accused in our case had to wait until December 24th to get anything more than the boxer shorts that they were wearing when they were extracted from their cells.

[185] This Court finds, further, that this was not a simple mistake. It is not possible that nobody at MCC knew about the clean laundry that was available. Rather, I find that someone in management at MCC made the deliberate choice to deprive the inmates of the clean laundry that was available for some 24-48 hours, approximately, until the morning of December 24th.

Jones

[186] **Jones** gave extensive evidence during the hearing of the within application. He is now (or was when he testified) under suspension by the Ministry. He does not know why he is under suspension.

[187] Jones is a very experienced corrections worker and manager. His career in corrections began in April 1986. He had been a sergeant at MCC since 2001. He had been a staff sergeant at MCC since 2018.

[188] It was Jones who made the all-staff call after the Lecinski assault. In terms of what is most relevant to the questions that need to be decided by this Court, Jones testified about the following sequence of events and gave the following evidence, in this order:

- (i) on December 20th, he met with Wong and Deputy Superintendent Newhook (“Newhook”);
- (ii) they talked about the possibility of an ICIT activation;
- (iii) Wong asked Jones for his opinion;
- (iv) Jones said to Wong and Newhook that ICIT was a good idea but should be limited to the removal to segregation of those involved in the assault of Lecinski and the transfer-out of MCC of the inmate who punched Lecinski;
- (v) On December 20th, ICIT was activated and did remove from MCC the inmate who punched Lecinski;
- (vi) On December 21st, the required paperwork that should have been there for him to review in the morning, regarding the Lecinski assault and its immediate aftermath, was not there;
- (vii) at the first morning staff muster on December 21st, staff were very upset and angry – they wanted the whole unit searched – they were very hostile towards the inmates – they wanted management to do more – they were concerned about weapons;
- (viii) the same sentiments were expressed by staff at the second morning staff muster on December 21st;
- (ix) Jones met with Wong and Newhook and told them about the sentiments of the staff;
- (x) Wong asked Jones for his opinion;
- (xi) Jones said that ICIT should be deployed for all of Unit 8 in order to search for weapons;
- (xii) it was “the threat of weapons on the unit” that caused him to make the recommendation for the ICIT activation;
- (xiii) “I feel there is always weapons in the unit”, he stated at court;

- (xiv) Wong agreed about ICIT, and Newhook agreed about ICIT, and Wong made the final decision to activate ICIT on the whole of Unit 8;
- (xv) on December 22nd, his role was only to shadow ICIT because he had just been promoted to ICIT coordinator;
- (xvi) he was only observing on December 22nd;
- (xvii) he did not know at the time that the searchers were removing everything from the cells, but he knows that now;
- (xviii) he did not know at the time that the inmates had no clothing, but he knows that now;
- (xix) he did not know at the time that the exhaust fans were turned on, which would make it colder in the winter, but he knows that now;
- (xx) on December 23rd, his role was the same as it was the day before – shadowing ICIT;
- (xxi) he was suspended from his employment as of August 14, 2024, with pay, and he was advised in writing (Exhibit 14) of the reason for the suspension (this evidence given to Mr. Greenspan was contrary to what Jones had said earlier in his testimony about not knowing why he is under suspension);
- (xxii) he completed no reports of any kind in December 2023, and his first report was prepared in April 2024, which he created from his memory of events surrounding the ICIT activation;
- (xxiii) regarding the package of documentation that was required to be prepared and provided to him on December 21st, which had to include use of force reports and a threat assessment report, he has never seen that package since December 21st and has no idea if it was ever done in whole or in part;
- (xxiv) he told the head of ICIT, Martell, that the activation was because of the threat of weapons;
- (xxv) it is true that the formal document prepared by Martell, the SMEAC form (Exhibit 10), says not a word about a weapon or weapons and not a word about the threat of a weapon or weapons;
- (xxvi) he agrees, based on the video evidence presented to him by Mr. Greenspan, that everything was secure and all of the inmates locked-up within 6 minutes of his arrival on Unit 8 after the Lecinski assault;
- (xxvii) he agrees, further, that Unit 8C, in particular, was secure before he even arrived on Unit 8;
- (xxviii) he agrees that he told the CSOI body (July 30, 2024) that he recommended ICIT because of the unruly behaviour of the inmates who had refused to

comply with officers' demands to return to their cells, and that in that interview he said nothing about weapons or the threat of weapons;

- (xxix) later, in cross-examination by the Crown, Jones stated that he did mention the threat of weapons during his CSOI interview on July 30, 2024, and that he told the investigators that the ICIT activation was for both reasons – the threat of weapons and the non-compliance of the inmates;
- (xxx) the staff, on December 20th, wanted retribution and wanted a pound of flesh from the inmates;
- (xxxix) at the time of the ICIT activation starting on December 22nd, the extent of his knowledge about weapons was that he overheard some guards saying to each other, “watch their hands” and “watch for weapons”;
- (xxxii) about 40 hours elapsed between the time that everything was fully secure at MCC and the deployment of ICIT on the whole of Unit 8;
- (xxxiii) during that time period of about 40 hours, there had been no significant incident of non-compliance by any inmate on Unit 8;
- (xxxiv) things had not been diffused, however, because they were still looking for weapons;
- (xxxv) Jones knew nothing about any weapons on Unit 8 (“we were still looking for weapons”, he told Mr. Greenspan, to which counsel asked, “about which you knew nothing?”, and Jones replied, “agreed”);
- (xxxvi) the level IV search that accompanied this ICIT activation required a threat level assessment to be completed in advance, and he knew that at the time, and he did not do one, and he did not ensure that one was done because that was the job of the unit sergeant on duty, and he knows now that one was never done by anyone;
- (xxxvii) this ICIT activation and level IV search also required that a Weapon Search Protocol be completed in advance, and he knew that at the time, and he did not do one, and he did not ensure that one was done because that was the job of the unit sergeant on duty, and he knows now that one was never done by anyone;
- (xxxviii) before ICIT was deployed on the morning of December 22nd, he had no idea if any of the required reports as part of the package that needed to be completed were filed or had even been prepared;
- (xxxix) if the assessments that were required to be prepared in advance of the ICIT deployment had been done, and if any of them had suggested that ICIT was unnecessary, then the ICIT deployment would not have gone ahead;
- (xl) it is true that the staff are what drives the ICIT deployment decision;

- (xli) he never said at any meeting that ICIT was required to send a message to the inmates, or words to that effect;
- (xlii) with prisoner extractions performed by ICIT members, pain is intended to ensure compliance by the inmates;
- (xliii) nobody used metal detectors during the searches of the cells;
- (xliv) metal detectors were available to be used during those searches;
- (xlv) metal detectors would normally be used, and should be used, when one is searching for weapons;
- (xlvi) the lack of clothing for inmates during the ICIT activation was never discussed at MCC, ever, in any way, post-December 2023, even after the CSOI findings were made about the lack of clothing for the inmates during the ICIT activation;
- (xlvii) before ICIT was deployed on day one, December 22nd, on the morning of December 21st, he toured Unit 8 with two then deputy directors of the Ministry, now Director Francovich (“Francovich”) and Deputy Director Cumming;
- (xlvi) during that tour, in the presence of Francovich and the other person, he stated to the guards on duty, “what more do you want?”, and he expressly told them that ICIT was being activated and a search would be conducted;
- (xlix) “what more do you want these ladies to do?”, he said repeatedly to staff members, referring to the upcoming ICIT activation and the search, in the presence of Francovich and the other person, during the tour of Unit 8 on December 21st;
- (l) in cross-examination by the Crown, Jones testified that ICIT was activated because “we thought there were multiple weapons in Unit 8”;
- (li) and, further, Unit 8 was out of control;
- (lii) but the threat of weapons was the only reason for the ICIT deployment; and
- (liii) although, “1000%” the length of time that would have been required to do a level II search was a significant factor in recommending and activating ICIT.

[189] In an effort to better understand Jones’ evidence about why he recommended ICIT on the whole of Unit 8, during the cross-examination of Jones by Mr. Greenspan on April 23, 2025, I asked Jones a question.

[190] I asked him whether ICIT could be recommended and deployed at any time because of the fact that there is always a threat of weapons on the unit (which is what Jones had stated earlier

in his evidence) and because his recommendation for this specific ICIT activation was due to the threat of weapons on the unit (which is what he had said in his earlier evidence). There was no real answer to that question.

[191] The lack of an answer to that question illustrates the fundamental problem with Jones' evidence when it comes to the key issue of the justification for the entire ICIT operation in late December 2023. By his own evidence, there are always weapons in the cells. They are just there, always, or at least there is a threat of them being there. Yet there was no ICIT deployment on December 21st, or the 19th, or earlier in December, or in November, for instance.

[192] What changed on December 20th? Lecinski was assaulted, and it is clear that one inmate did it and he did so without using any weapon. He was swiftly removed from the institution.

[193] What else changed? Jones was overhearing guards saying things like “watch their hands” and “watch for weapons”. This is what pushed the needle over the hump and caused the relatively unprecedented recommendation and implementation of activating ICIT and conducting a level IV search on nearly 200 inmates and their cells in an entire unit of the jail? And doing it without any of the required documentation and assessments having been done?

[194] I do not understand it. If the threat of a weapon was the reason for the ICIT activation, and Jones told Mr. Goldstein that it was the only reason for the deployment, then it was based on just about the flimsiest and scarcest of evidentiary bases that one could imagine.

[195] Unidentified guards saying to one another, overheard by Jones, “watch their hands” and “watch for weapons”. That is the extent of what Jones knew before he made the ICIT recommendation and before the activation commenced the morning of December 22nd – that is his own evidence.

[196] That, presumably, would have been no different than the day before December 20th, the date of the Lecinski assault, because weapons are always there.

[197] Moreover, something so generic, so vague, so nebulous, could not excuse MCC from compliance, even to the slightest degree, with the Ministry's own mandated policy regarding a search for weapons. That policy, titled “Searching for Weapons”, sets out a directive for assessing

threat levels and a protocol to follow when searching for weapons anywhere in the institution, never mind individual cells of inmates (section 1.0).

[198] None of that policy was followed here.

[199] That includes the Threat Level Assessment not having been done (section 6.3). That includes the threat level assessment criteria not having been considered (section 6.4). That includes the absence of any hand-held metal detectors required to be employed during a level IV search (section 6.6.3). That includes no Weapons Search Protocol Checklist having been done (section 6.7). That includes no inmate monitoring having been done (section 6.12); in fact, the inmates were simply rushed past the nursing desk, quickly photographed, placed in the hallway, and then put back in their empty cells in their underwear.

[200] The Ministry's Searching for Weapons Policy is not the only policy that MCC failed to comply with here, to any degree.

[201] Frankly, there are too many violations to mention. Just a few of them are:

- (i) MCC staff contravened section 3.6 of the Searches Policy – these inmates were strip searched and left unclothed (except their underwear) for longer than what was necessary to search their persons and their cells;
- (ii) MCC staff violated section 6.7.5 of the Searches Policy – the video evidence does not always show a minimum of two staff members present during the searches of the cells; and the areas were not left in an orderly and tidy fashion; and inmate personal property was not respected;
- (iii) MCC staff contravened most of the Use of Force Policy, including but not limited to sections 4.18 (when the use of force is authorized) and 4.19 (the requirements of the Use of Force Investigation File);
- (iv) MCC/ICIT staff violated most of the Handheld Digital Video Recording – Institutional Crisis Intervention Team Deployments Policy;
- (v) MCC staff contravened most of the Duty Notebooks Policy;
- (vi) MCC staff violated the entire objective of the Inmate Clothing Policy – to ensure that inmates are treated “in a just and humane manner”; and
- (vii) MCC staff contravened the Laundry Policy in that not only did the inmates not have the enumerated items but they had no items (except their underwear that they were wearing) for 24-48 hours, approximately.

[202] In addition to the violations of several Ministry policies during the ICIT activation and the level IV search, I agree with defence counsel, and I agree with my colleague Justice Woollcombe in Her Honour's decision in *Ritchie*, at paragraphs 107-108, that the strip searches of the inmates that occurred here, during the ICIT members' extractions of the inmates from the cells, were unlawful. The three accused in our case were subjected to unlawful strip searches.

[203] These strip searches were not in accordance with section 24 of Amending Reg. 778 of R.R.O. 1990, Ontario Reg. 316/24, *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22.

[204] That is true whether one assesses the matter in the context of (i) any single strip search of an individual inmate, including Whitlock, Bhatia, and Sandhu, which is governed principally by subsections (1) through (4) of section 24 of that Amending Reg., or whether one assesses the matter in the context of (ii) a strip search of a group of inmates, which is governed principally by subsections (5) through (8) of section 24 of that Amending Reg.

[205] There is no question that what occurred here involved strip searches of the inmates. It must be remembered that the Crown's own witness, **Houston**, who has 24 years of experience in corrections, and who is the Manager of the Customized Training, Accountability and Culture program with the Corrections Centre for Professional Advancement and Training, and who could be considered to be an expert in the workings of ICIT, beginning at paragraph 35 of his affidavit affirmed on April 29, 2024, which affidavit can be found in the Supplementary Book of Documents that was filed on consent of all counsel, describes the process of strip searching the inmates as part of an ICIT deployment.

[206] In the context of the strip searches of these inmates at MCC on December 22 and 23, 2023, including Whitlock, Bhatia, and Sandhu, like Woollcombe J. found in Her Honour's case, I find that:

- (i) there were no reasonable grounds to believe that the accused were carrying contraband that could have been hidden on or within their bodies;
- (ii) there were no reasonable grounds to believe that the strip searches were needed to confirm the existence of contraband and to recover it; and

- (iii) there were no reasonable grounds to believe that using a less intrusive search method, such as a lower-level routine search of the cells, would not have been effective at locating the suspected contraband or was not operationally feasible.

[207] Further, I would add the following finding as well: the strip search of the entire group of inmates on Unit 8 was not limited to as small a group as was reasonably necessary to confirm the existence of contraband or to recover it (a requirement for a valid group strip search under subsection 24(6) of the said Amending Reg.).

[208] Returning now to the Court's assessment of Jones' evidence, I do not accept that the ICIT activation had anything to do with a weapon or a threat of a weapon or the need to search for weapons.

[209] I do not accept that the ICIT activation had anything to do with the general behaviour of the inmates on Unit 8, or some alleged general increase in the level of violence or threats of violence on Unit 8 leading up to December 22nd, or some alleged non-compliance of the inmates with staff demands.

[210] None of these things is supported by the evidence adduced during the hearing of the application. None of these things is consistent with the evidence of MacDonald about what was actually said by Jones during the management meeting on December 21st.

[211] The Crown's submissions about the reason for the ICIT deployment are not even consistent with the evidence of Jones. Although he said other things, at times, to the CSOI body and to this Court, ultimately, in cross-examination by the Crown, Jones testified that the only reason for the ICIT deployment was the threat of weapons at Unit 8. Nothing about "fear" or "hostility" or "heightened danger".

[212] The alleged fear and hostility are simply not borne out by the evidence of those who were actually on duty, in managerial capacities, between the time that Lecinski was assaulted and the time that ICIT was deployed.

[213] The alleged heightened danger is similarly not borne out by the evidence. Broken and jammed hatches on meal doors on cells and concerns about illegal "brews" are not the types of

things that give rise to the need for a full-scale ICIT operation on an entire unit of a correctional facility.

[214] Unquestionably, there were misconduct incidents at Unit 8 that preceded the Lecinski assault and the deployment of ICIT. There have always been misconduct incidents on Unit 8. That area has always been reputed to be relatively violent.

[215] The Crown points to evidence that it says shows an increase in the violence on Unit 8 leading up to December 20, 2023. I do not see it. I have no data about the misconducts and other incidents of concern on other units at MCC, to compare that evidence with Unit 8. I have insufficient data going back far enough to see whether, in fact, things were getting progressively worse on Unit 8.

[216] Besides, if this alleged heightened danger on Unit 8, fueled by the alleged increase in misconducts and other incidents of concern at Unit 8 leading up to December 20th, was a part of why Jones recommended ICIT and why the decision was made to activate ICIT, then he would have said that when he was giving the background to his recommendation at the management meeting on December 21st, with MacDonald there among others. He did not say it. He did not say it because that had nothing to do with it.

[217] In some respects, Jones was a straightforward witness. I cannot, and I do not, conclude that he came to court and just plain lied under oath, like some other witnesses from MCC did.

[218] There are parts of Jones' evidence that I accept, for example, that he toured Unit 8 with Francovich and another person on December 21st and said things in their presence that made it clear that ICIT was about to be activated, and a search would be conducted of Unit 8.

[219] Jones testified that he is personal friends with Francovich, and thus, he has no reason to attribute knowledge to her of the impending ICIT deployment on all of Unit 8 if that was not true.

[220] I do not, however, accept much of Jones' evidence, for the following reasons.

[221] First, he has a strong self-interest in the outcome of this litigation, being currently under suspension and being the person whose recommendation the entire ICIT activation was premised on.

[222] Second, he has not always been consistent, between what he told the CSOI body and what he told this Court, on the key question of why he recommended the ICIT deployment.

[223] Third, on important matters of why he recommended the ICIT deployment, and what he said at management meetings on December 21st, and what involvement he had with the ICIT activation and the searches of the cells, Jones' evidence is inconsistent with that of MacDonald and Wilson, and I accept the evidence of the latter witnesses over that of Jones.

[224] Fourth, on the crucial question of why ICIT was recommended and activated, Jones' evidence in the courtroom itself was internally inconsistent. It was not until well, well into his testimony, after being asked repeatedly by multiple counsel about the reason(s) why ICIT was recommended by him, that Jones told Mr. Goldstein that a significant reason for the recommendation was because it would take too long to conduct a level II search of the cells without the assistance of ICIT.

[225] There is no reasonable explanation for why Jones never mentioned that earlier in his evidence, despite being given many, many opportunities to do so, by multiple counsel over multiple days of testimony, except to say that it is a reflection of the fact that the reason for the ICIT deployment was, for Jones, a moving target.

[226] Fifth, on the issue of his role in the searches of the cells during the ICIT activation, Jones' evidence is inconsistent with the objective video evidence which clearly shows him all around the area during the searches, at times giving directions to other staff, at times looking into the cells, at times nearly entering the cells, at times putting stuff removed from the cells inside bags, at times placing items removed from the cells into bins, at times moving bins around, and so on.

[227] Sixth, on his description of the scene in the immediate aftermath of the Lecinski assault, Jones' evidence is inconsistent with the objective video evidence. It was not complete mayhem and totally out of control on Unit 8, as suggested by Jones early in his testimony at court. To the contrary, as can be clearly seen in the video evidence, and as Beerdat stated in her evidence, 16 seconds is all that it took to get things under control.

[228] Seventh, there were times when Jones' evidence was just plain wrong about the inner workings at MCC, and it left the Court wondering how/why he would say that.

[229] For example, he told Mr. Greenspan that MCC eliminated segregation a few years ago. That is incorrect. We know that Whitlock was put in segregation in late December 2023; that is an incontrovertible fact. Further, this Court cannot ignore that it receives records from MCC all the time, for various accused persons who have been housed at MCC, which show time spent in segregation.

[230] For some reason, Mr. Goldstein, in cross-examination by the Crown, had to present to Jones an actual document generated by MCC, titled “Inmate Housing Placement”, for Jones to acknowledge that segregation is still a very real thing at MCC. He explained to the Crown that his earlier evidence, about segregation no longer existing at MCC for a few years now, referred to the physical place within the institution and not the nature of the confinement. With respect, that makes no sense. I do not accept that explanation.

[231] Eighth and finally, there were things that Jones stated in his evidence that I just cannot believe. For example, he testified that it was not until July 2024 that he first learned that the inmates were left without any clothing during the ICIT activation. Even if it is true that Jones did not personally know, on December 22 and/or 23, 2024, that the inmates had no clothing, I find it impossible to accept that it took more than six months from that time for a senior staff sergeant at MCC to learn, even through the grapevine, that there was a problem with clothing during the ICIT activation.

[232] It is likely that Jones has had a dedicated and successful career in corrections. In late December 2023, however, he exercised terrible judgment, perhaps clouded by what he perceived to be the rabid demands of the staff who, in his own words, drove the bus on what he ultimately recommended and what was decided – the ICIT activation.

[233] This Court finds that there was no valid justification for what was done. It was done to appease the staff and to avenge what happened with Lecinski. It was done to punish all for the misconduct of one.

[234] One final point about Jones’ evidence: without any notes, he prepared an occurrence report about the ICIT decision and activation, dated April 10, 2024 (Exhibit 18). That document

says, at the bottom, that it was requested by Wong. Weapons are not mentioned anywhere in that document.

Wong

[235] **Wong** testified at the hearing of the application. During his testimony, Wong apologized for failing to demand more information at the time that Jones, on December 21st, recommended the ICIT activation.

[236] He should have asked more questions, he said. He should have demanded to have confirmation that all of the required paperwork had been done, he said. He should have demanded more specifics about the grounds to search the cells for weapons, after Jones mentioned his concern for the potential of weapons being on Unit 8, he said.

[237] Wong, now having been fired by the Ministry, admitted to numerous other failings as the Superintendent in charge of the facility at the time of this ICIT activation:

- (i) he failed to make himself aware of and to correct the fact that the inmates were left with nothing but their underwear for a lengthy period of time after the extractions;
- (ii) he failed to demand the preparation of the required Weapons Threat Assessment;
- (iii) he failed to properly communicate with the Office of the Regional Director;
- (iv) he took an improper photograph of himself and the guards after the searches of the cells; and
- (v) he behaved in “poor taste” in fist-bumping staff and celebrating the ICIT deployment.

[238] These admissions are better late than never. And there is a lot more to this story than the actions and omissions of one man. Having said that, unfortunately, Wong still believes that the decision to activate ICIT was justified. He pointed in his evidence to the Ministry policy about ICIT and the fact that ICIT can be used for situations of “contentiousness” and “risk mitigation”.

[239] He did not elaborate in any meaningful way, and he was then forced to admit that, after the Lecinski assault, (i) Unit 8C was all secure in 2 minutes’ time, or less; (ii) Unit 8 was all secure in 10 minutes’ time, or less; and (iii) ICIT hit the ground at MCC some 40 hours later.

[240] He also admitted to Mr. Greenspan that what Jones said to him about weapons was that there may be weapons on Unit 8. That's it.

[241] That Wong thinks that the said "information" is enough to justify an ICIT deployment and level IV search on an entire unit under his control is shocking to this Court. It is outrageous.

[242] Wong admitted to Mr. Greenspan that he said to inmates, after the Lecinski assault, that "nobody touches my officers". In my view, that is proof of the real reason for the ICIT activation – to achieve retribution against the inmates, including the three accused in our case, for what happened to Lecinski.

[243] Wong admitted to Mr. Greenspan that he failed to adhere to the ICIT Policy that the activation be called-off if the situation has been diffused by the time of deployment. Nothing further was checked the morning of December 22nd and, in addition, he knew that "everything was under control" as of the morning of December 21st.

[244] Wong denied to Mr. A. Robbins that any member of management expressed any concern about his idea of restrictive confinement of the inmates for several days over the Christmas holidays in 2023. I do not believe that. I believe the evidence of MacDonald on that issue.

[245] Wong denied to Mr. A. Robbins that he ever had an awkward exchange with MacDonald and Edgington about him being surprised about his own words to inmates in the hallway being audio recorded during the ICIT activation. I do not believe that. I believe the evidence of MacDonald on that issue.

[246] I draw the same conclusion about Wong's denial of his use of the term "Wongtanamo Bay". I find that he used that term. Others used it as well. It was a part of his bravado and machoism at the expense of those in his care and custody.

[247] In cross-examination by the Crown, Wong said that under his stewardship there were many improvements at MCC. The first concrete example that he offered was with regard to delays in prisoners arriving at court.

[248] It was a remarkable statement. It represented either (i) abject ignorance of the chronic delays on the part of MCC that have been the subject of numerous decisions by this Court (see, as

just two recent examples, *R. v. A.B.C.*, 2025 ONSC 3978 and the Court Order that had to be made in the within proceeding, in the context of the within application, which Order was made way back on January 7, 2025; that Order would have been or ought to have been well known to Wong as it was made long before Wong testified and it raised the spectre of MCC being found to be in contempt of court due to the habitual delays in having prisoners, including the three accused in our case, ready to be transported to the courthouse in Milton from MCC on time) and by other judges over the last few years, or alternatively, (ii) an unabashed “middle finger” to the justice system. Whatever it was, it drew the ire of Crown counsel.

[249] In the end, I agree with Crown counsel, Mr. Goldstein, when he accused Wong in cross-examination of being “grossly incompetent”. He was.

Francovich

[250] **Francovich** testified at the hearing of the application. She is a Regional Director at the Ministry. In late December 2023, she was a superior to Wong.

[251] Francovich testified, and I accept, that she toured Unit 8 at MCC on December 21st, with Jones and Cumming. She did not hear Jones say, however, anything about a plan to deploy ICIT.

[252] On this point, I prefer the evidence of Jones over that of Francovich.

[253] I think that Jones’ evidence is more in line with what both he and Francovich said in their testimony – that, during the tour, there were several upset staff who were demanding that their safety be taken more seriously and who were asking Jones what was being done about it. That explains why Jones told them about the plan to activate ICIT and to conduct a search of all of Unit 8, which is a finding I make.

[254] I do believe Francovich, though, when she testified that she could not have known for certain that ICIT was being deployed on all of Unit 8 as of December 22nd because she expected that Wong would have briefed her on that beforehand, which he had not.

[255] Those two findings of fact are not incompatible with each other.

[256] Francovich heard what Jones said during the tour of Unit 8 on December 21st, and she should have made further enquiries, and making those further enquiries would have likely led her to be able to prevent the full-scale ICIT activation on all of Unit 8 beginning on December 22nd, at least without the necessary paperwork that she said (and I accept) she would have insisted upon being completed. At the same time, she did not for certain know what was happening at MCC on December 22 and 23, 2023 because she was not told the full truth by Wong.

[257] I acknowledge that Exhibit 25 is potentially damning evidence against Francovich. It suggests that, as of 5:22 p.m. on December 23rd, she would have known about the ICIT activation on all of Unit 8. That is because the email that she received from MCC at that time included, in its chain of messages, an earlier email from another person at MCC which clearly indicated that ICIT was being deployed on the entirety of Unit 8.

[258] I accept Francovich's evidence, however, that she did not review the whole chain of messages. She probably should have. She was probably careless in not doing so, as she was the Regional Director responsible for MCC at the time and knew that the institution had just gone through a tumultuous incident with the Lecinski assault. But I believe her evidence on this point.

[259] There was an important moment during the cross-examination of Francovich by Crown counsel, Mr. Khoorshed. It set her apart, in my view, from Jones and Wong. Mr. Khoorshed suggested to her that there are always weapons and threats of weapons in a jail setting. She agreed, and she added, "that's why we search".

[260] I wrote down at the time, and I think that it is important, that she did not say anything about ICIT or a level IV search. Unlike Jones and Wong, Francovich does not appear to equate a mere threat of weapons with authority to order a full-scale ICIT activation on some 200 inmates, including the three accused in our case.

[261] Finally, Francovich's evidence is very concerning in that it shows a total lack of accountability on the part of most everyone at MCC with regard to this ICIT activation and all that it entailed.

[262] For example, Francovich stated in her evidence, and I accept, that not even she knew about the *ex post facto* creation of the occurrence reports in April 2024. If the Regional Director

of the Ministry was not aware of that until she testified in court on May 1, 2025, then how can those responsible for the unjustified activation of ICIT, and for the collusion and the cover-up attempts that came afterwards, be held to account for their actions?

[263] There is a systemic problem here, in my opinion. A very serious lack of proper oversight by the Ministry of what happened at MCC in late December 2023 and afterwards, especially once all of the facts started to come out in late March/early April 2024, which is what Francovich stated in her evidence. By that time, no longer could it be said that the Ministry was being misled by a rogue superintendent in Milton.

[264] It would appear that nothing much has really been done apart from firing Wong, suspending Jones with pay, suspending another MCC employee named Urquhart, and supporting the CSOI body in its investigations. There is a systemic lack of accountability and follow-up here, in my view, where the net is cast wider than those main actors at MCC who were behind the ICIT activation. Not only has nothing been done internally at MCC, that I am aware of from the evidence adduced at the hearing, but little has been done at the Ministry level, outside of MCC. The systemic lack of accountability and follow-up, both before and after the CSOI investigators made adverse findings against many of the MCC witnesses, cannot be ignored by this Court in terms of the overall stay of proceedings analysis. Once again, I stress that the within application is not confined to an examination of what happened at MCC over the course of 48 hours, as suggested by Crown counsel.

Newhook

[265] Continuing now with a review of further evidence that this Court heard, Deputy Superintendent of Administration at MCC, **Newhook**, testified at the hearing of the application.

[266] On December 20, 2023, after the Lecinski assault, Newhook met with Wong in his office and requested the involvement of ICIT to transfer out of MCC the offending inmate who had committed the assault. She did not mention anything about ICIT being activated on the whole of Unit 8.

[267] On the morning of December 21st, according to Newhook, Jones asked for a meeting with her and Wong. At that meeting, Jones said that the inmates were very hot and amped-up.

They were acting erratically and were maybe under the influence of something. Jones mentioned something about the need to search the area of Unit 8, and he also mentioned something about the threat of weapons.

[268] In her direct examination by Mr. Kapoor, Newhook demonstrated a very poor recollection of that meeting that she had with Jones and Wong. For many of the questions asked of her, she responded with the phrase, “I don’t recall”. In my opinion, her evidence is not reliable about what Jones said, and did not say, during that brief meeting between Jones and Wong and Newhook. I do not accept her evidence about the details of that meeting.

[269] In fact, in answering questions by Mr. Lutes, Newhook stated that she did not remember, from that meeting with Jones and Wong on December 21st, why ICIT was being recommended.

[270] Newhook went even further than that when she answered later questions put to her at court by Mr. A. Robbins. She stated, then, that she recalled nothing about any mention of a weapon, or even suspicion of or a threat of any weapon, during the meeting that she had with Jones and Wong on December 21st.

[271] I was also concerned about many aspects of the evidence of Newhook.

[272] She did not know, until she testified at court, that there were two separate Local Investigation Reports prepared in this matter – one for the assault against Lecinski and one for the ICIT activation on the whole of Unit 8. Given her role at MCC at the time, it would seem to this Court that Newhook ought to have been aware of that.

[273] Further, with regard to Exhibit 26, the Use of Force Local Investigation Report, at Part D of that Report, Newhook checked of the box that said that the “file is deemed complete”. She admitted to Mr. Lutes, however, that the file was not complete. She completed Exhibit 26 wrongly, she acknowledged. She admitted to Mr. Lutes that she “lied” and that she “misled” the Regional Office of the Ministry in completing the Form in that way.

[274] In addition, Newhook told Mr. Lutes that she did not know that a Threat Level Assessment was required to be done in order to activate ICIT. Given that her role at MCC at the

time included being in charge of staff training about Ministry policies, it would seem to me that Newhook ought to have been aware of that requirement.

[275] Strangely, Newhook later admitted to Mr. Lutes that she told the CSOI body that she knew, at the time, that a Threat Level Assessment was required. After making that admission, Newhook then changed her evidence at court and testified that she did know, in December 2023, that a Threat Level Assessment was required to be done before ICIT was activated. That gave this Court serious concerns about the credibility of Newhook's evidence.

[276] Newhook told Mr. Lutes that she did not learn about the lack of clothing for the inmates until sometime after June 20, 2024, after reading a post on Instagram. Even by the time that Newhook was testifying in the courtroom, she seemed uncertain as to whether the inmates had gone without any clothing on December 22 and/or 23, 2023. She said to Mr. Lutes, "that's the word out there". She also told Mr. Lutes that she knew nothing about the CSOI body's findings that were made against her and had not been disciplined in any way. "I wish it would happen", she said, referring to the discipline that she ought to receive.

[277] As a very senior member of the management team at MCC, Newhook's evidence is a clear example of the total lack of accountability and follow-up that has plagued MCC and the Ministry since late December 2023, with regard to the ICIT activation on Unit 8, both before and after the CSOI body's findings were made.

[278] Only because her evidence on this point is confirmed by a review of Exhibit 28 itself, do I accept Newhook's evidence that the Segregation Form for Whitlock, which Form was completed because Whitlock was placed in segregation between December 22 and 25, 2023, after he was extracted from his cell a second time, was not completed correctly. There are parts of that Form that were required to be completed but which were not fully completed, sections B.1 and E.2 included.

[279] The takeaway from that evidence, in my view, is that the said placement of Whitlock in segregation cannot be adequately explained. From a review of Exhibit 28, as Newhook herself stated, we can only conclude that there were no threats made by Whitlock to ICIT members or to MCC staff that precipitated his placement in segregation.

[280] Exhibit 28 is required to be completed properly every time that an inmate is placed in segregation. Put another way, an inmate should not be placed in segregation without that Form being properly completed. And, although an inmate may be placed in segregation without there having been an instance of misconduct, on a threat of suicide for example, there is no suggestion that the said circumstances existed for Whitlock and, in addition, a hearing would have still been required – that is mandatory, and there was no hearing held for Whitlock. All of that evidence was given by Newhook to Mr. Kapoor in re-examination, and I accept that evidence.

[281] Newhook testified, in cross-examination by the Crown, that the ICIT activation on the whole of Unit 8 was really in the best interests of the inmates. Otherwise, correctional officers may have refused to search the cells. Further, a search other than the level IV search that was done here, with the assistance of ICIT, would have taken much longer to complete, leaving the inmates locked down for a considerable period of time.

[282] This Court simply disagrees with that assessment made by Newhook. It was not in the best interests of some 200 inmates, including the three accused in our case, to be punished for the actions of the one man who had assaulted Lecinski. Further, it is speculation to suggest that correctional officers would have refused to search the cells, even if it was reasonable to search all of the cells on Unit 8 (which I find was not justified). In addition, until the plan was cancelled at the last minute, at the time that the ICIT activation on the whole of Unit 8 was being discussed and approved there was already a plan in place to restrictively confine all of the inmates for a number of days, so it is disingenuous to suggest that this ICIT activation was to provide the inmates with more liberty by getting the searches of the cells completed in short order.

Gauthier

[283] Correctional Officer **Gauthier** testified at the hearing of the application. He has worked in corrections since February 2004, at various jails in Toronto, Hamilton, and Milton. Between June 2006 and February 2025, he was a member of the ICIT team. He was an ICIT team lead between 2008 and February 2025. In 2019, he became a certified instructor in defensive tactics, teaching other correctional officers about how to properly use those tactics.

[284] Gauthier was a very good witness at court. He was not internally inconsistent on anything that he testified about. His evidence was delivered in a straightforward manner and without any hint of self-interest. I accept the following evidence that he gave:

- (i) it is required policy that the audio and video camera and its operator follow the inmates during the ICIT activation, to record all use of force employed against them;
- (ii) that policy was not complied with during this ICIT activation in late December 2023, and it is his experience that the policy is commonly not followed at MCC specifically;
- (iii) in other words, the entire ICIT activation must, by policy, be audio and video recorded, and that was not done here;
- (iv) in fact, during this ICIT activation, because of where the camera was positioned, you could not even see from the camera into the cells during the extraction of the inmates;
- (v) during this ICIT activation at MCC, he personally witnessed excessive force used by two ICIT members against an inmate – he saw two ICIT members repeatedly knee the inmate, 5-7 times each, totally unprovoked by the inmate and while the inmate was on his knees on the ground;
- (vi) also, he observed that, while that inmate was on his knees on the ground, one of the ICIT members head-butted the inmate, with the helmet of the ICIT member striking the bare head of the inmate approximately 7 times;
- (vii) being extremely upset at what he had just witnessed, Gauthier confronted the two ICIT members at the time, and one of the ICIT members told Gauthier that he had planned what had occurred with the inmate (the assault of the inmate);
- (viii) Gauthier told Black that he was uncomfortable with something that he had seen in a cell and wanted to report it, but Black told him to not worry about it and that Black was not concerned about it because the incident had happened inside a cell;
- (ix) afterwards, Gauthier experienced severe mental anguish about what he had seen, and he felt afraid for his own safety, and he was concerned about retribution against himself for reporting what he had seen, and therefore he sought a transfer out of MCC;
- (x) he felt that he would be in trouble for having breached the code of silence that existed at MCC;
- (xi) as an ICIT team lead, having completed 100 or more formal SMEAC Forms, he knows that, if the reason for/purpose of the ICIT activation is to search for a

weapon or weapons or because of a threat of a weapon or weapons, then he would definitely include that in the SMEAC (remember that the SMEAC completed for this ICIT activation, Exhibit 10, says nothing about weapons);

- (xii) there is no fixed rule, however, that the SMEAC Form must include something about weapons if that is in fact the reason for the ICIT activation;
- (xiii) ICIT members are trained in various pain compliance methods, which methods were used during this ICIT activation, like the Nikyo – a technique that locks the joint in the subject’s hand while the subject is forced to separate their fingers;
- (xiv) those pain compliance methods are employed even when the subject (the inmate) is being totally and completely compliant to begin with – that is just a part of the ICIT training;
- (xv) in one of the dayrooms during this ICIT activation, a T16 grenade was used by mistake, instead of what was supposed to be used which was a Number 25 distraction device;
- (xvi) when a T16 grenade is deployed, it saturates oleoresin capsicum (“OC”) spray throughout an area of about 1500 square feet, and ICIT members are required to wear respirators to protect themselves from the OC spray; and
- (xvii) dragging an inmate out of his cell is a part of the ICIT training, and that could be done even for a completely and totally compliant inmate.

[285] None of the above evidence of Gauthier was challenged by the Crown in cross-examination, a rather brief cross-examination in fact.

[286] None of the above evidence of Gauthier is inconsistent with the affidavit evidence of **Houston**, the Crown’s witness. Succinctly put, in terms of use of force techniques employed by ICIT members, Houston’s evidence is that (i) “ICIT members are trained to use only the minimal amount [of force] necessary”, and those techniques include but are not limited to “soft physical techniques”, “hard physical techniques”, “intermediate weapons” such as OC spray, “mechanical restraints”, and “munitions” (see paragraph 23 of Houston’s affidavit), and (ii) “[o]fficers are also trained on a spectrum of techniques that can be used to restrain inmates or encourage compliance if necessary” (see paragraph 46 of Houston’s affidavit).

[287] None of the above evidence of Gauthier is inconsistent with any other evidence that this Court accepts.

[288] The evidence of Gauthier is important for many reasons, including the fact that it is proof of (i) the significant use of force employed by ICIT members during this activation; (ii) the lack of compliance with required policy during this ICIT activation; (iii) the clearly excessive force used by ICIT members against at least one inmate as observed personally by Gauthier; (iv) the failure or refusal of management to do anything about that clearly excessive force; (v) the code of silence that existed at the time at MCC; (vi) management's comfort in knowing that the said clearly excessive force used against at least one inmate would not be of any concern because it happened inside a cell; (vii) the improper use of an unauthorized munition during this ICIT activation; and (viii) the practice of Gauthier, as an experienced team lead for ICIT, to include something about weapons or a threat of weapons in the SMEAC Form if that was actually a reason for the ICIT activation.

[289] The evidence of Gauthier is further support for this Court's finding that this ICIT activation had absolutely nothing to do with weapons or a threat of weapons. If it did, that would have been indicated in the SMEAC Form (Exhibit 10), which it was not.

[290] The evidence of Gauthier also supports a conclusion that this ICIT activation was deliberately not audio and video recorded, as required by policy, or at least that management knew, during the ICIT activation, that the policy was not being adhered to.

[291] That is why Black knew that the incident reported to him by Gauthier would not be of any concern in that it occurred inside a cell and, hence, would not have been captured by any audio and/or video recording. In my opinion, that is the only reasonable inference to be drawn from the evidence of Gauthier about his exchange with Black.

Frank

[292] Then Deputy Superintendent of Operations at MCC, **Frank**, testified at the hearing of the application. Frank has worked in corrections since April 1999, and she has a wealth of management experience at MCC.

[293] Frank testified, and I accept, that, on December 21, 2023, during a meeting of managers at MCC, Jones left the meeting and then returned to say that "the staff are very happy with the plan", referring to what Frank now knows was the plan to activate ICIT on the whole of Unit 8.

[294] In my view, that evidence is further support for this Court's finding that the ICIT activation was to appease the staff and to avenge what had happened to Lecinski.

[295] Frank testified, and I accept, that, later on December 21st, there was a meeting between her, Wong, MacDonald, and Deputy Superintendent Scriven. At that meeting, Frank voiced her opposition to the idea of restrictive confinement of the inmates. She also voiced her opposition to the plan to activate ICIT on the whole of Unit 8. "We can't punish 192 inmates for the behaviour of one or two", she said to the others at that meeting.

[296] According to Frank, which evidence I accept, nothing was said at that meeting about any weapon or any threat of any weapon. Rather, the only things that she heard at that meeting, about the reason(s) for the ICIT activation, were that (i) the inmates would not lock-up and were cheering in the immediate aftermath of the Lecinski assault, to which Frank replied, "so we are surprised that the inmates are behaving like inmates?"; and (ii) Wong saying, "no one touches my staff"; and (iii) Wong saying that ICIT was needed to send a strong message to the inmates.

[297] That evidence of Frank is further support for this Court's finding that the ICIT activation was for one reason and for one reason only – to punish the inmates, including the three accused in our case, and thereby effect vengeance for what had happened to Lecinski.

[298] In fact, Frank expressly agreed with Mr. Kapoor that, at the time, she saw the restrictive confinement and the ICIT activation as being "punishment" for what had happened to Lecinski.

[299] Frank testified, and I accept, that Wong found the term "Wongtanamo Bay" to be funny.

[300] Frank testified, and I accept, that MCC has long had a culture of "communication silos" and "communication gaps", particularly while Wong was the Superintendent. There was a tight nucleus of a select few around Wong and then everybody else, including her.

[301] Frank testified, and I accept, that, on December 22nd, Newhook said in her presence that she had forgotten how much fun it was to "toss cells".

[302] Frank testified, and I accept, that the photograph of Wong with the officers (Exhibit 5), taken after the searches of the cells were completed, was "highly inappropriate", "unprofessional", and "akin to a trophy photo".

[303] Frank was a very good witness at court. She was unchallenged by the Crown in cross-examination. In fact, the cross-examination of Frank by Crown counsel, Mr. Rim, was very, very brief and focused on the term “Wongtanamo Bay”. Frank was honest and direct in saying that she cannot know whether Wong was necessarily proud of that term.

[304] Respectfully, why the Crown would choose to very briefly cross-examine Frank in a way that was designed to rehabilitate, in some small fashion, Wong, I do not understand. Mr. Goldstein, another Crown counsel, had previously attacked Wong as being an incompetent and rogue Superintendent.

Kebede

[305] **Kebede**, the Ministry’s Deputy Regional Director responsible for the oversight of MCC in December 2023 (she was just below Francovich at the time), testified at the hearing of the application.

[306] In terms of Ministry follow-up to what happened at MCC in late December 2023, I found Kebede’s evidence to be very concerning. It is relevant to the overall stay of proceedings analysis.

[307] In direct examination by Mr. Kapoor, Kebede testified that she was not aware of any paperwork deficiencies concerning this ICIT activation until April 2024. That is shocking to this Court – the paperwork deficiencies were so flagrant and so wide-reaching that the Regional Office ought to have known about them because they ought to have demanded to see the required paperwork well before April 2024.

[308] Kebede also told Mr. Kapoor that she has no idea what the Ministry has done about those paperwork failures since April 2024. Again, that is a remarkable admission to hear from the Deputy Director of the Regional Office responsible for the oversight of this specific institution, MCC.

[309] Apparently, Kebede knows of nothing that has been done to address the fact that this ICIT activation was performed without any of the necessary assessments and documentation having been completed and to ensure that it does not/cannot happen again. Respectfully, the

evidence of Kebede makes it unreasonable for the Crown to suggest that the system has already changed for the better since late December 2023.

[310] This Court was struck by the seeming reluctance of Kebede, during her testimony, to call a spade a spade when it comes to Wong. She testified that Wong told her and Francovich, during a Teams online meeting on December 22nd, that ICIT was being deployed only for non-compliant inmates who were behaving badly in that they were throwing food and stuff. When Kebede was shown at court Exhibit 32, the Incident Details document, which document makes it clear that the ICIT deployment was not limited to non-compliant inmates, Kebede was not prepared to say that Wong had lied to her on December 22nd.

[311] If Kebede was telling the truth about the Teams online meeting, which I think she was, then of course Wong lied to her and Francovich on December 22nd. It is obvious.

[312] Further, even after Kebede ought to have known that Wong had lied to her and Francovich on December 22nd, when Kebede was asked by Francovich, in late April 2024, to prepare a formal briefing note on the whole ICIT activation at MCC in late December 2023, Kebede testified that she did one thing in order to prepare that briefing note (filed as Exhibit 33) – she talked with Wong about what had occurred. She talked with nobody else. She reviewed nothing else.

[313] Respectfully, why Wong was thought, in late April 2024, to be a trusted and the exclusive source of information for a briefing note that Kebede's boss had requested her to prepare, a briefing note that Kebede testified she fully expected would go up the chain even further than Francovich and including to the Executive Director of the entire Ministry's operations, I do not understand.

[314] During the cross-examination of Kebede by Mr. A. Robbins, Kebede could not state one single thing that the Regional Office or the Ministry as a whole did after discovering that Wong had provided false information to the Regional Office on December 22nd about the extent of the ICIT deployment that was then occurring at MCC.

[315] Kebede's evidence was that she saw Exhibit 32, the Incident Details document, in late December 2023 or early January 2024. I accept that evidence.

[316] As of that time, therefore, Kebede knew or ought to have known that what had occurred at MCC in late December 2023 was a full-scale ICIT activation on the whole of Unit 8 and not what Wong had told her and Francovich during the Teams online meeting on December 22nd.

[317] Yet, in that context, Kebede could not point to one thing that was done about the obviously false information that had been given to the Regional Office by Wong. That is evidence of the gross lack of accountability here, evidence that this Court cannot ignore in the overall context of the stay of proceedings analysis.

[318] For some reason, in cross-examination of Kebede by the Crown, the Crown attempted to rehabilitate Wong by suggesting to Kebede that maybe Wong had not actually lied to her on December 22nd. Perhaps what Wong said was capable of being interpreted as a statement that ICIT was being deployed on the whole of Unit 8, the Crown suggested.

[319] In answer to a question by the Court as to whether that alternative interpretation suggested by the Crown was, in fact, her interpretation at the time of what Wong said to her and Francovich on December 22nd about the extent of the ICIT deployment, Kebede answered “no”, that was not her interpretation.

[320] In my view, that alternative interpretation was not what Kebede thought at the time, and is not reasonable, and was not intended by Wong.

[321] Wong intended to mislead the Regional Office about the degree of the ICIT deployment, and what he said during the online Teams meeting on December 22nd was that the ICIT members were there to deal only with non-compliant inmates, and that information was false.

Aleksik

[322] The evidence of ICIT member **Aleksik** paints a troubling picture of collusion and cover-up following the ICIT activation at MCC in late December 2023. It also brings into question the level of understanding of ICIT members, at least this member, of their roles.

[323] In talking about his training as an ICIT member, and Aleksik had seven years of experience with ICIT as of December 2023, Aleksik testified that he was specifically trained and taught about section 2 of the *Criminal Code*. When it was pointed out to him that section of the

Criminal Code is a series of definitions, he said that he meant that he was trained about use of force techniques for ICIT members.

[324] Aleksik testified that he told the CSOI body, more than once, that he never shared his ICIT report with anyone. He repeated that to the CSOI investigator even after being warned by the investigator that he must tell the truth.

[325] Aleksik admitted at court that his ICIT report (Exhibit 34) is identical in its wording, in every respect except the name of the author, as that completed and filed by ICIT member Hand. Aleksik then told this Court that he lied to the CSOI investigator.

[326] When asked to explain the obvious collusion between him and Hand, Aleksik testified that the union representative who was there for the interview with the CSOI investigator had told Aleksik to “play dumb”, meaning to lie to the investigator about the collusion between him and Hand.

[327] I do not know if the union representative said that to Aleksik. That person, Figliola, testified at court and denied that he said that. I have trouble accepting Aleksik’s evidence on that point because of his admitted lies to the CSOI investigator.

[328] What I do accept, however, is that Aleksik and Hand colluded with each other. They, contrary to what was required of them, knowingly prepared and filed with Black wholly identical reports about their respective ICIT involvements during this activation at MCC. They did so secretly, although how Black could not have seen that the two reports are identical is beyond me. They did so with the intention of gaining an advantage in that their reports were easier and quicker to prepare that way and so that their accounts would be consistent with each other. That is the very definition of collusion. So, not only does this Court have evidence of collusion among MCC witnesses in terms of what they said in the courtroom but this Court also has evidence of collusion among MCC witnesses in terms of what they filed with management at MCC and in terms of what they presented to the CSOI team. This collusion is relevant to the within application in terms of whether a stay of proceedings should be granted.

[329] What the reader must know is that the collusion here is made worse by the fact that it was these two ICIT members, Aleksik and Hand, that were involved in the grossly excessive force used against the inmate who was being watched by Gauthier – the knee-striking of that inmate.

Ghandour

[330] Then Security Manager and a sergeant at MCC, **Ghandour** testified at the hearing of the application. Her evidence further paints a troubling picture of a cover-up at MCC after the ICIT activation in late December 2023. This Court cannot ignore the cover-up. It is relevant to whether the proceedings ought to be stayed. The within application is not a static snapshot of a 48-hour time period, as the Crown has suggested.

[331] Ghandour is now an intelligence analyst with the Ontario Provincial Police.

[332] Ghandour testified, and I accept, that, as Security Manager at MCC, in mid-January 2024, she received a subpoena for audio and/or video footage concerning the ICIT activation. After seeking direction on how to respond to the subpoena, she was instructed by Deputy Superintendent Fernandes to not disclose any of that footage.

[333] I find that the said instruction from Fernandes to Ghandour was likely approved of by Wong, and Ghandour suggested that in her evidence, and I further find that the said instruction was likely for the purpose of hiding from the requestors the details of the full extent of what happened during the ICIT activation.

[334] Ghandour testified, and I accept, that ultimately, after receiving up to about 20 subpoenas for that footage, MCC disclosed some footage close to the time that she left MCC in June 2024.

[335] Ghandour testified, and I accept, that Black told her that audio and video footage from handheld cameras was captured for all wings of Unit 8 during the entire ICIT activation on December 22 and 23, 2023.

[336] That evidence from Ghandour supports this Court's conclusion that the said audio and video footage from the handheld cameras was either intentionally destroyed by someone at MCC or deliberately withheld from counsel in this proceeding. Either way, this is relevant to whether a stay of proceedings ought to be granted.

[337] Ghandour confirmed for Mr. Lutes, and I accept, that it is possible for someone to delete the content of the handheld camera audio and video footage, either before it gets to the security office at MCC or afterwards. That audio and video footage is supposed to be preserved forever, Ghandour stated in her evidence, and I accept that evidence.

[338] Ghandour told Mr. A. Robbins that she told the truth to the CSOI body when she stated to the investigators that she is certain that she saw handheld camera footage from the entire first day of the ICIT activation, on December 22nd, and that remains the truth today, she said.

[339] I accept that evidence. It follows from that evidence that the said footage from the first day of the ICIT activation was either intentionally destroyed by someone at MCC or has been deliberately withheld from counsel in this proceeding. In other words, if it was not destroyed, it most certainly was not disclosed to counsel. In my view, the only reasonable inference to be drawn is that the said intentional destruction of evidence or deliberate withholding of evidence has been done to cover-up the full extent of what happened at MCC on December 22 and 23, 2023, and that is a relevant consideration for this Court in deciding whether to stay the proceedings.

[340] In a very brief cross-examination of Ghandour by the Crown, none of the above evidence that she gave was challenged in any way by the Crown. The Crown's questioning of her focused on what she observed in the immediate aftermath of the Lecinski assault.

[341] On that issue, Ghandour told the Crown that she heard of no threats from any inmates, and she had no knowledge at the time of any weapon(s) or the threat of any weapon(s) on Unit 8.

[342] Ghandour did add, however, that the situation was chaotic in the immediate aftermath of the assault committed against Lecinski. It was very loud. Some inmates were unruly. Some inmates were banging on the glass. Some inmates were yelling. Some inmates were not complying with staff demands. It was potentially dangerous in the area.

[343] I accept the evidence of Ghandour in cross-examination by the Crown. It does not alter any of the Court's findings, however, about the reason for the ICIT deployment two days later.

Martell

[344] **Martell**, the overall ICIT team leader during the activation on December 22 and 23, 2023, testified at the hearing of the application. The ICIT coordinators were Black and Edgington.

[345] At the commencement of his direct evidence, Martell read from a piece of paper that he was invoking all of the available protections afforded to him under section 5 of the *Canada Evidence Act*. That was his absolute right to do so. That cannot, and that has not, impacted on this Court's assessment of the evidence of Martell.

[346] Martell testified, and I accept, that Jones was the Crisis Manager during the ICIT activation.

[347] Martell testified, and I accept, that ICIT members should have been instructed to preserve the dignity of the inmates by, for example, pulling up their boxer shorts if they were coming down while being physically escorted by ICIT members. That was not done for the three accused in our case, particularly Whitlock and Bhatia.

[348] In fact, we know from the objective video evidence that, if those instructions were indeed given to ICIT members, they certainly were not followed for any of the inmates.

[349] Martell testified, and I accept, that the inmates ought to have been permitted to move around while seated in the hallway during the ICIT activation, but just not to stand up. They should have been permitted to look around, and to stretch their legs, and to move away from the wall that they were facing, and to stretch their arms, and so on.

[350] We know from the objective video evidence, however, that the inmates did not do any of those things, nor would they have felt comfortable doing so given the presence of the armed ICIT members standing and patrolling behind them and, in some instances, pointing their weapons at the inmates' heads and backs.

[351] Martell testified, and I accept, that he knew at the time that there were multiple handheld cameras available to be used during the ICIT deployment, but he added that he could find no staff to operate them. So, knowing that it was against policy to do so, he simply allowed the handheld camera to be put in the corner of the dayroom.

[352] I think that it is absurd to say that no staff could be spared to operate the handheld cameras, including among regular correctional officers. I find that there was no reasonable justification for knowingly violating the policy regarding handheld cameras during ICIT activations.

[353] Martell testified that there was no reason to mention a weapon or a threat of a weapon in the SMEAC Form that he completed (Exhibit 10) because ICIT only does level IV searches and all level IV searches are for weapons.

[354] I do not accept that evidence. I prefer the evidence of Gauthier over that of Martell on the issue of whether it makes sense to include something in the SMEAC Form about weapons if the whole reason for the ICIT activation was to search for weapons.

[355] Besides, Martell is just plain wrong; a reading of the Ministry's Searching for Weapons Policy makes it clear that not every search for a weapon is a level IV search, requiring ICIT involvement. In fact, the policy sets out expressly various levels of a search for weapons (section 6.6). This means that not every level IV search is necessarily a search for weapons. And not every activation of ICIT necessarily involves a search for weapons.

[356] Furthermore, this Court asked Martell the following question in order to clarify his evidence about the SMEAC Form: if he had been told by Jones that the reason for the ICIT activation and the level IV search was a threat of a weapon on Unit 8, would he have included that in the SMEAC Form (Exhibit 10). Martell answered that question, "absolutely" – that he would have included that in the SMEAC Form.

[357] That evidence, which I accept, is further proof of the fact that the ICIT activation and the information supplied to Martell from Jones, who is the one that recommended ICIT, had nothing to do with weapons or the threat of weapons.

[358] Martell testified, and I accept, that he was told nothing by anyone about the ICIT members' repeated knee-strikes against and the repeated head-butting of the inmate who was on his knees on the ground. It appears that the report of Gauthier never went beyond Black, and that is another example of a total lack of accountability stemming from this ICIT activation.

[359] Near the conclusion of Martell's cross-examination by Mr. A. Robbins, Martell was asked about the speech that he gave to all inmates in all wings of Unit 8 after the inmates had been returned to their cells. Martell denied that he said anything like "we will strike you" and/or "we will do this all week".

[360] After the audio recording of that speech was played in the courtroom, Martell admitted that what he heard on that recording was his voice saying, "we will strike you" and "we will do this all week". He added, however, that the recording must have been altered because he did not actually say those things.

[361] In cross-examination by the Crown, the audio recording of that speech by Martell was played again. It was suggested to Martell that he did not say the word "strike" but instead said the word "extract". Martell agreed with that suggestion.

[362] In re-examination of Martell by Mr. Kapoor, Martell was asked whether he told the truth to the Court earlier when he said that the voice he heard in the audio recording said the word "strike", and Martell answered, "yes".

[363] In my opinion, it matters not whether Martell said "strike" or "extract". The most important point is that the said speech by Martell was not part of any training or protocol or policy (which Martell admitted) and was, in my view, an unwarranted and threatening and intimidating address to the inmates.

[364] If I had to find whether Martell is more likely to have said "strike" or "extract", I would say that he is more likely to have said "strike".

[365] I have listened to the audio, and what I hear is the word "strike". I also think that the said word is more consistent with the overall threatening and intimidating tone of the speech. Finally, I think that Martell himself is the best judge of what he heard on the audio recording that was played in the courtroom, as after all it is his voice that he heard, and Martell testified to Mr. Kapoor that he told the truth to the Court when he said that he heard the word "strike".

[366] In cross-examination by Crown counsel, Mr. Goldstein, Martell testified that Jones never mentioned to him anything about a weapon or the threat of a weapon before he drafted the SMEAC

Form. Martell acknowledged, however, that he told CSOI investigators that Jones mentioned something about possible weapons and mentioned something about “riotous behaviour” by the inmates.

[367] This Court prefers the evidence that Martell gave on this point in the courtroom. It is more consistent with what others at MCC (like MacDonald and Frank, as examples) heard, and did not hear, at the time as to the reason for the ICIT activation.

[368] In cross-examination by the Crown, something concerning came out regarding the handheld camera footage from the ICIT activation. Exhibits 37 and 38 were shown to Martell – still photographs of an ICIT member holding a handheld camera on December 22 and December 23, respectively.

[369] I suspect that the Crown’s point was to show that there was some attempt to make use of handheld cameras during some of the ICIT activation. But it begs the question, what happened with that footage? It has not been disclosed to counsel; we know that because Exhibits 37 and 38 are not from wing F of Unit 8, and only handheld camera footage from that particular wing has been disclosed.

[370] Exhibit 41 is another still photograph that was shown to Martell by Mr. Goldstein. It shows an ICIT member holding a handheld camera in the staff area at MCC, during the ICIT activation. Where is that footage, I wonder to myself. It has not been disclosed to counsel.

[371] This Court does not accept Martell’s evidence in cross-examination by the Crown that the use of force techniques employed by ICIT members are not painful unless the inmate chooses to not comply.

[372] I prefer the evidence of Gauthier on that point. It is more consistent with the objective video evidence that was played in the courtroom. It is also more consistent with Jones’ evidence. It is also more consistent with Houston’s evidence. Although Houston speaks in his affidavit about physical techniques used by ICIT officers, including both soft and hard ones, he does not say anywhere in his affidavit that there is no pain caused by any of these physical techniques unless and until the inmate resists and refuses to comply.

Urquhart

[373] Then Sergeant (now Staff Sergeant, after promotion) **Urquhart** testified at the hearing of the application. She is currently under suspension by the Ministry because of her involvement in the ICIT incident and its aftermath.

[374] Her evidence was shocking to the Court.

[375] She said that an “assault package” had to be completed for every inmate who was extracted from his cell during the ICIT activation. Each package had to include six documents that were completed for that inmate. She did not ask any of the inmates on Unit 8, including the three accused in our case, whether he wanted to make a statement, although that was part of the required package and was required by Ministry policy. She testified that she certainly did not ask that question of every inmate or close to every inmate, although she swore an affidavit in another criminal court proceeding which stated that all inmates were asked that question and all declined to provide a statement. She did not ask the inmates, including the three accused in our case, if they wanted to be put into protective custody, although she was required to do so. She did not ask the inmates, including the three accused in our case, if they wanted to press criminal charges, although she was required to do so. She knowingly completed the forms to say that all inmates, including the three accused in our case, declined or refused to provide any statement and also declined to press any criminal charges, even though she never asked either question of any of the inmates. She testified that it was the onus of the inmate to speak up and say whether he wanted to provide a statement or to press criminal charges, without being asked about it.

[376] She also said that it was her job to supervise some of the searches of the cells. She just assumed that the searchers did what they were supposed to do and left for every inmate some clothing and some bedding, but she never checked. We know that the cells were stripped of pretty much everything.

[377] She first testified that all inmates in the cells that she supervised the searches of were left with all of the items that they were entitled to have. She then testified that she is unable to say whether any inmate was left with any of the items that he was entitled to be left with.

[378] She testified that she was not aware at the time that the inmates were being left without any clothing and was not told that by anyone, including Lindstrom. I reject that evidence. It is inconsistent with that of Lindstrom, whose evidence I accept on this point. It is also inconsistent with the objective video evidence that was played in the courtroom, evidence that clearly shows, for example, that she could see inside the empty cells of Unit 8E after the searches were completed on December 23rd.

[379] She also said that the exhaust fans were on in the areas that she supervised the searches. It was “cold”, she said to Mr. A. Robbins. She did nothing about that.

[380] She also said that “sending a message to the inmates” was part of the reason for the ICIT deployment. She saw nothing wrong with that. She heard nothing from anyone at the time about the need to search for any weapon or about any threat of any weapon.

[381] In cross-examination by the Crown, Urquhart agreed that she “falsified” the assault package reports and “falsified” her affidavit in the other criminal court proceeding. She also agreed that, when interviewed by CSOI investigators, she failed to correct her “false reports”. She “lied” when it comes to the assault package reports, she admitted to Crown counsel. Of course, all of this is relevant on the question of whether the proceedings ought to be stayed.

Figliola

[382] **Figliola** (the union representative) testified at the hearing of the application. At the commencement of his evidence-in-chief, his counsel invoked the protections afforded to the witness under section 5 of the *Canada Evidence Act*, section 9 of the *Ontario Evidence Act*, and section 13 of the *Charter*. That is not a factor, in any way, in this Court’s assessment of Figliola’s evidence.

[383] As mentioned above in these reasons, Figliola denied that he told Aleksik to “play dumb” with or to lie to the CSOI investigators about the obvious collusion between Aleksik and Hand.

[384] I am not sure who to believe on this point, Aleksik or Figliola. I make no finding that Figliola either said that or did not say that; it is unnecessary to decide that factual issue in order to adjudicate any of the matters arising within the application.

[385] Figliola attended some 23 interviews of MCC personnel with the CSOI body. He made some comments during the various interviews, including that:

- (i) ICIT members did their job and did it well;
- (ii) ICIT has been dragged through the mud by an unfair media;
- (iii) the Ministry failed to properly defend its employees;
- (iv) the inmates were being improperly characterized in the media as model citizens;
- (v) the whole CSOI investigation was “asinine”; and
- (vi) the whole thing was all about a few inmates making spurious complaints and trying to “get out of jail free”.

[386] Figliola told Mr. Lutes that he still feels all of those sentiments today.

[387] I do not share the sentiments of Figliola. I will leave it at that.

Whitlock

[388] **Whitlock** testified at the hearing of the application. The other two accused, Bhatia and Sandhu, did not testify.

[389] Because of serious concerns that this Court has about the general credibility of Whitlock as a witness, concerns expressed by this Court in reasons for decision on another pretrial application in this proceeding, reasons that do not need to be repeated here because by agreement of counsel they were applied to this application, I generally accept the evidence of Whitlock only insofar as it was corroborated by other evidence that this Court accepts or was otherwise evidence that was not challenged or contested by the Crown.

[390] I accept Whitlock’s evidence that:

- (i) during the ICIT activation, he was strip-searched naked in his cell, in front of his cell mate, and then was permitted to wear only his underwear;
- (ii) the ICIT members did things to him that were painful;
- (iii) during the ICIT activation, he was asked very little by any staff while at the nursing/office area;
- (iv) while forced to sit cross-legged in the hallway, it was very uncomfortable for him;

- (v) the guards in the hallway were pointing their weapons at him;
- (vi) he was extracted from his cell a second time;
- (vii) he was taken to segregation after that second extraction on December 22nd;
- (viii) he stayed in segregation on December 23rd;
- (ix) he stayed in segregation on December 24th;
- (x) he was let out of segregation on December 25th;
- (xi) he never declined to make any statement about the ICIT deployment; and
- (xii) it was cold in his area of Unit 8 during the ICIT deployment.

[391] The rest of the complaints made by Whitlock during his evidence are not accepted by this Court.

[392] Frankly, in my view, none of the evidence of Whitlock was necessary to a determination of the issues raised in the within application.

Black

[393] **Black** testified at the hearing of the application. He was a staff sergeant at MCC in December 2023. He has since been promoted to Acting Deputy Superintendent of Operations.

[394] Black testified, and I accept, that this ICIT activation failed to comply with the Ministry's policy about the use of handheld cameras.

[395] Black testified, and I accept, that he knew about that failure to comply with the said policy during the ICIT activation itself.

[396] Black testified, and I accept, that handheld camera footage for the ICIT activation on December 23rd, for all wings of Unit 8 that were searched on that day, existed and was downloaded at the security office at MCC without any issue. He has no explanation for why none of it has been disclosed to counsel except for very limited footage from Unit 8F.

[397] Black denied that he personally destroyed any handheld camera footage from the ICIT activation. This Court is not prepared to say that he did.

[398] What is clear, however, is that neither Black nor anyone at MCC, to his knowledge, has ever done anything, or caused anything to be done, to find out what happened with the missing handheld camera footage from the ICIT activation. The intentional destruction of evidence concerning the ICIT deployment, or the deliberate withholding of that evidence from counsel in this case, and the total lack of follow-up or accountability at MCC regarding the said missing evidence, are not things that this Court can ignore. These are relevant considerations in the overall stay of proceedings analysis.

[399] Black denied that anybody, including Gauthier, told him anything about excessive force having been used by any ICIT member against any inmate. I do not accept that evidence. I prefer the evidence of Gauthier on that point.

[400] Black testified, and I accept, that he suffered no repercussions or discipline or accountability or follow-up of any kind arising from the CSOI body's findings that he engaged in a code of silence in ignoring what was reported to him about the excessive force used by ICIT members. In fact, he has a higher rank now than he did at the time of the ICIT deployment. Again, the lack of accountability here is gross; it is pervasive; it is systemic in nature.

[401] In cross-examination by the Crown, Black testified that he thought that the ICIT deployment was justified because of the history of violence, non-compliance by inmates, and drugs on Unit 8 and because a search of Unit 8 by correctional officers alone would not have been completed until after the new year.

[402] I respectfully disagree with Black. Besides, these were not Jones' reasons for his ICIT recommendation and not the reasons for the approval of the ICIT activation.

[403] Black told the Crown in cross-examination that what Martell said in his final speech to the inmates was "extract", not "strike". I prefer what Martell himself said more than once in his sworn evidence at court – the word heard in the audio recording is "strike".

Carrabs

[404] The final witness to give *viva voce* evidence at the hearing of the application was **Carrabs**, called to testify by the Crown.

[405] The Crown called Carrabs to rebut some of the controversial evidence given by Whitlock. None of that evidence by Whitlock has been accepted by this Court. Thus, there is no need to summarize the evidence-in-chief of Carrabs.

[406] Carrabs did confirm to Mr. A. Robbins, however, that the Tracking and Observation Report of Whitlock's time in segregation in late December 2023 does not comply with the requirement to indicate on the document why Whitlock was in segregation at the time. I accept that evidence.

[407] Further, according to Carrabs, and I accept this evidence, the records confirm that Whitlock was locked-up in segregation from 13:43 hours on December 22nd through to 14:00 hours on December 25th, without any indication that he was ever let out of his cell for any purpose including a shower (which he should have been, said Carrabs), and without any indication that Whitlock was ever provided with any clothing during that time period (which he should have been, said Carrabs).

IV. The Law

[408] 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. *Charter*, section 7.

[409] Everyone has the right to be secure against unreasonable search or seizure. *Charter*, section 8.

[410] Everyone has the right not to be subjected to any cruel and unusual treatment or punishment. *Charter*, section 12.

[411] Anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. *Charter*, section 24(1).

[412] A stay of proceedings is an available remedy under section 24(1) of the *Charter*, and that remedy is available specifically in the context of prison guard-prisoner interactions. *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509.

[413] The manner in which this application was argued does not require this Court to resolve any differences of opinion about the proper interpretation of sections 7 and 8 of the *Charter*.

[414] In fact, there are no differences of opinion in that regard. Not when it comes to interpretation. The Crown has conceded a violation of section 8. The Crown has not conceded a violation of section 7, however, that lack of concession is not grounded in any conflict about the meaning of that constitutional protection but rather is based on competing factual findings that the Crown urges this Court to make.

[415] Thus, this Court will be relatively brief in terms of the basic legal principles relevant to the sections 7 and 8 *Charter* claims.

[416] On section 7, it is important to remember the following, taken from the instructive decision of Justice Watt, writing for the Court of Appeal for Ontario, in *R. v. Donnelly*, 2016 ONCA 988, 135 O.R. (3d) 336, at paras. 106-109:

- (i) not every compromise of a person's security will come within the reach of section 7;
- (ii) rather, the compromise must be significant enough to warrant constitutional protection;
- (iii) otherwise, we risk trivializing the section 7 *Charter* protection;
- (iv) security of the person protects both the physical and the psychological integrity of the individual;
- (v) for a compromise of security of the person to be established, the state action must have had a serious and profound effect on the person's psychological integrity;
- (vi) regarding the psychological integrity of the claimant, two requirements must be met before the security of the person interest protected by section 7 is engaged: (a) first, the psychological harm must be state imposed, meaning that the harm must result from actions of the state, and (b) second, the psychological harm or prejudice must be serious;
- (vii) in terms of the seriousness of the psychological harm or prejudice, something greater than ordinary stress and anxiety is required; and
- (viii) the effects of the state interference are to be assessed objectively.

[417] Section 7 claims proceed in two steps: (i) first, the claimant must establish on a balance of probabilities that there has been a deprivation of, in our case, security of the person, and (ii) second, the claimant must show that the said deprivation was not in accordance with the principles of fundamental justice. *Ritchie*, at para. 111.

[418] State action that is fairly characterized as a form of corporal punishment or torture will generally amount to a violation of section 7 of the *Charter*.

[419] That is because corporal punishment or torture committed by the state will almost inevitably amount to a finding of a significant deprivation of the subject's physical and psychological integrity (and, thus, the subject's security of the person) and because, as Lamer J., as the Chief Justice then was, stated in *R. v. Smith*, [1987] 1 S.C.R. 1045, at pp. 1073-1074, "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment".

[420] It is well-accepted that Canadians reject state-sanctioned torture in the domestic context; "torture is seen in Canada as fundamentally unjust". *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at paras. 51-52.

[421] Corporal punishment and torture are concepts that are well-accepted as being "fundamentally unjust", fundamentally unfair and incompatible with justice, and "outside the legitimate domain of a criminal justice system", and thus, the significant deprivation of the subject's security of the person that is inherent in forms of corporal punishment and torture cannot be found to be in accordance with the principles of fundamental justice. *Suresh*, at paras. 50-51.

[422] On section 8, it is important to remember the comments of Justice Lamer, as the Chief Justice then was, writing for the majority of the Supreme Court of Canada in the seminal decision in *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278:

- (i) a search will be reasonable if it is authorized by law, if the law itself is reasonable, and if the manner in which the search was carried out is reasonable;
- (ii) where the Crown points to some specific legislative basis for the search in question, like a section of a statute or a regulation, then the search may be held to be unreasonable if it is determined that the search did not properly come within that legislative basis;

- (iii) alternatively, even if the search is determined to have properly come within that legislative basis, the search could still be found to have been unreasonable on the ground that it was carried out in a manner that made it unreasonable.

[423] In our case, unlike sections 7 and 8, there is a difference of opinion about how the defence and the Crown interpret section 12 of the *Charter*, and thus, I will spend some time on that issue below. I will then turn to spend some considerable time dealing with the legal principles that govern a stay of proceedings.

[424] One of the seminal authorities in Canada on the proper interpretation of section 12 of the *Charter* is the decision of Justice Lamer, as the Chief Justice then was, in *Smith*, referred to above in the context of section 7.

[425] These are some of the helpful takeaways from the decision of Justice Lamer at pp. 1062-1072:

- (i) in the early years of the *Canadian Bill of Rights*, section 2(b) of which was one of the origins of what later became section 12 of the *Charter*, the application of the prohibition was limited to the protection against the infliction of excessive and unusual physical pain;
- (ii) the only court decision in Canada that found a treatment or punishment to be cruel and unusual under the *Canadian Bill of Rights* was that of Justice Heald of the Trial Division of the Federal Court in *McCann v. The Queen*, [1976] 1 F.C. 570;
- (iii) interestingly (for our purposes), *McCann* was a case about prison conditions, specifically solitary confinement;
- (iv) Heald J.'s conclusion that the prison conditions in that case amounted to cruel and unusual treatment was based on the view that the conditions served no "positive penal purpose" and, further, they were "not in accord with public standards of decency and propriety", especially given that "adequate alternatives" existed in the prison setting;
- (v) in *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401 (B.C. C.A.), a case dealing with capital punishment in Canada, in dissent, McIntyre J.A., as he then was, found that the words "cruel and unusual" were to be read disjunctively so that "cruel punishments however usual in the ordinary sense of the term could come within the proscription";
- (vi) when that case was decided by the Supreme Court of Canada, however, *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, the majority held that the

words “cruel and unusual”, in section 2(b) of the *Canadian Bill of Rights*, were to be read conjunctively;

- (vii) after 1976, and after the *Charter* was enacted, most of the cases decided were focused on punishment rather than treatment, but regardless, in interpreting the meaning of section 12, those decisions usually resorted to tests similar to those set out by Professor Tarnopolsky, as he then was, in his useful article, “Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?” (1978), 10 *Ottawa L. Rev.* 1, at pages 32-33;
- (viii) reducing and rewording what Professor Tarnopolsky suggested in that article to what is relevant to treatment, and not punishment by way of a potential penalty for a criminal offence for example, one could ask (a) whether the treatment went beyond what was necessary to achieve a legitimate aim; and (b) whether the treatment was unnecessary because there were adequate alternatives; and (c) whether the treatment was unacceptable to a large segment of the population; and (d) whether the treatment could or could not be applied upon a rational basis and in accordance with ascertained or ascertainable standards; and (e) whether the treatment was arbitrarily imposed; and (f) whether the treatment had any value in terms of some social purpose; and (g) whether the treatment was in accord with public standards of decency or propriety; and (h) whether the treatment was of such a character as to shock the general conscience or as to be intolerable in the context of fundamental fairness; and (i) whether the treatment was unusually severe and hence degrading to human dignity and worth;
- (ix) it is clear that Justice Lamer’s reference to Professor Tarnopolsky’s article was in an approving way and that His Honour, as the Chief Justice then was, found it very helpful in terms of understanding the meaning of section 12 of the *Charter*;
- (x) it is also clear that Justice Lamer agreed with the “Laskin approach as set out in *Miller and Cockriell*” – that approach being to treat the phrase “cruel and unusual” as a “compendious expression of a norm”, rather than get caught-up in a debate as to whether the words should be read disjunctively or conjunctively;
- (xi) in the opinion of Justice Lamer, and the following is found in that section of His Honour’s judgment under the heading “*The meaning of s. 12*”, a judgment concurred in by Chief Justice Dickson and not, on these points, disagreed with by any of the other justices who took part in the appeal, (a) the power of the state to impose a punishment or treatment on an individual has limits; (b) in reviewing that power, it is relevant whether it was necessary for the state to do what it did in order to attain some legitimate end, and it is also relevant whether the requisite procedure was followed; (c) the protection afforded by section 12 governs the quality of the treatment or punishment and is concerned with the effect that it may have on the person on whom it is imposed; (d) a key question for a reviewing court will be whether the punishment (and, in our case,

treatment) was so excessive as to outrage standards of decency, as Chief Justice Laskin observed in *Miller and Cockriell*, at page 688; (e) put another way, one could ask oneself whether the treatment was grossly disproportionate to what would have been appropriate in the circumstances; and (f) to amount to a violation of section 12, something more than mere excessiveness is required.

[426] I find the judgment of Justice Lamer, as the Chief Justice then was, in *Smith* to be very helpful. I cannot help but be amazed that it was written in the very early days of *Charter* jurisprudence in this country. Nearly forty years later, in my view, that decision remains a very thorough and highly instructive resource for judges in understanding the meaning of section 12.

[427] There are well more than 1000 court decisions across Canada that have cited *Smith* approvingly, particularly the judgment written by Justice Lamer, since 1987, including many decisions of the Supreme Court of Canada and of various appellate courts across the country.

[428] These subsequent decisions that have relied on *Smith* for guidance include many cases dealing with treatment (as opposed to punishment), and treatment in the prison context, and those decided by our Court of Appeal for Ontario specifically. To illustrate the point, just three examples are: *R. v. Olson*, 62 O.R. (2d) 321 (Ont. C.A.); *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, 416 D.L.R. (4th) 124 (Ont. C.A.); and *Canadian Civil Liberties Association v. Canada*, 2019 ONCA 243, 144 O.R. (3d) 641 (C.A.).

[429] In this Court's decision on section 12, I will follow the recipe provided by Justice Lamer, as the Chief Justice then was, in *Smith*, including consideration of the questions posed by Professor Tarnopolsky, as he then was, and I will also be bound by the helpful summary of the legal framework outlined by Justice Laskin, for the Court of Appeal for Ontario, at paragraphs 7 through 10 of *Ogiamien*, set out below:

[7] Although Ogiamien and Nguyen claimed violations of sections 7 and 9 of the Charter, the focus of their application was s.12. Section 12 of the *Charter* guarantees that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment". This case is about treatment, not punishment. The lockdowns at Maplehurst were "an exercise of state control" over Ogiamien and Nguyen and amounted to "treatment" under s. 12: *Rodriguez v British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p.611. And this court has held that the test to establish a violation of s. 12 is the same for treatment as it is for

punishment: *R. v. Olson* (1987), 62 (O.R. (2nd) 321 (C.A.) at p. 336, aff'd, 1989 CanLII 120 (SCC), [1989] 1 S.C.R. 296.

[8] To establish a violation of s. 12 a claimant need not show separately that the treatment is both cruel and unusual. The words “cruel” and “unusual” colour each other and together express a standard or norm. See *Miller and Cockriell v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680, at pp. 689-690.

[9] But “cruel and unusual” is a high bar to meet. The Supreme Court has used various expressions to describe this high bar: “so excessive as to outrage standards of decency”; “grossly disproportionate to what would have been appropriate”; “grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable”. The point underlying these expressions is that merely excessive treatment or disproportionate treatment is not enough to establish a s. 12 violation. In the context of punishment the Supreme Court has cautioned against stigmatizing every excessive or every disproportionate sentence as being a constitutional violation. So too with treatment. See *Miller and Cockriell*, at p. 688; *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at para. 54; *R. v. Morrissey* 2000 SCC 39, at para. 26; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at para. 39; and *R. v. Tinker*, 2017 ONCA 552, at para. 126.

[10] Lamer J.’s expression in *Smith* — “grossly disproportionate to what would have been appropriate”— suggests a two-step inquiry to determine whether treatment has been cruel and unusual. The first step establishes a benchmark. In this case step one looks at the treatment of Ogiamien and Nguyen under “appropriate” prison conditions—that is their treatment under ordinary conditions in the remand units when there were no lockdowns. Step two assesses the extent of the departure from the benchmark. In this case step two looks at the effect of the lockdowns on Ogiamien’s and Nguyen’s treatment. If the effect of the lockdowns resulted in treatment that was grossly disproportionate to their treatment under ordinary conditions then their s.12 rights would be violated.

[430] In Canada, torture is a criminal offence. The offence section is set out at 269.1(1) of the *Criminal Code*, and the definition section is found at 269.1(2).

[431] Torture includes acts and omissions. Torture is where severe pain or suffering is intentionally inflicted on a person. That severe pain and suffering may be physical or mental or both.

[432] To be a criminal offence in Canada, however, the intentional infliction of the severe pain or suffering must have been for one, or more than one, of three enumerated purposes, or for any reason based on discrimination.

[433] Excluded from the definition of torture is any act or omission that arises only from or is inherent in or incidental to lawful sanctions.

[434] The three enumerated purposes referred to above are: (i) to obtain from the person or from a third person information or a statement (not relevant in our case), (ii) to punish the person or a third person for an act that the person or third person has committed or is suspected to have committed, and (iii) to intimidate or coerce the person or third person.

[435] The latter two purposes are relevant in our case.

[436] There is nothing in the *Criminal Code*, or in any international covenant that Canada is a signatory to, or in any jurisprudence that I am aware of, or in any other legislation that I am aware of, that prohibits a finding of torture in the context of a prison setting.

[437] In Canada, it is accepted that torture is not only illegal and in breach of international conventions but would also undoubtedly be unconstitutional in that it is blatantly contrary to section 12 of the *Charter* and, in most cases, likely contrary to section 7. In other words, torture is incontestably abhorrent and inherently in violation of section 12. *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at paras. 46-52, referring to numerous authorities including but not limited to the earlier decision of the Supreme Court of Canada in *Suresh*, referred to above in the context of section 7.

[438] Canada's definition of and treatment of torture is consistent with many international conventions, including but not limited to the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations' General Assembly resolution 39/46 adopted on December 10, 1984 and coming into force on June 26, 1987, in particular Part I, Article 1 thereof, which sets out a very similar definition of "torture" as that contained in Canada's *Criminal Code*.

[439] I will turn now to the legal principles that govern a stay of proceedings.

[440] A stay of proceedings under section 24(1) of the *Charter* is one remedy, but only one available remedy, to an abuse of process. It is the most drastic remedy; it is the "ultimate remedy" in the sense that it is final. Where charges are stayed, they may never be prosecuted, and the

victims will never have their day in court. Society will never have the case resolved on its merits by a trier of fact. For these reasons, there is a very high threshold to be met; a stay is reserved only for the “clearest of cases”. A stay is a remedy of last resort. *R. v. O’Connor*, [1995] 4 S.C.R. 411, at paras. 68-69; *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 86; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 53; *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at paras. 30-31; *R. v. Brunelle*, 2024 SCC 3, 488 D.L.R. (4th) 581 (S.C.C.), at paras. 112-113; *R. v. Burke*, 2025 ONCA 619, at para. 12.

[441] Regardless of whether the abuse causes prejudice to the accused (because it goes to trial fairness) or causes prejudice to the integrity of the justice system, a stay of proceedings ought not to be granted unless (i) the prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome, and (ii) no other remedy is reasonably capable of removing that prejudice. Both criteria must be met before a stay is an appropriate remedy. *O’Connor*, at para. 75; *Regan*, at para. 54.

[442] A stay of proceedings is a prospective remedy. It is not a retroactive remedy. It does not simply deal with a past wrong and attempt to redress it. Rather, a stay aims to prevent the perpetuation of a wrong that “if left alone, will continue to trouble the parties and the community as a whole, in the future”. *Tobiass*, at para. 91; *Regan*, at para. 54.

[443] Most cases of abuse of process will cause prejudice to the accused by rendering the trial unfair. There exists, however, a small residual category of abusive action that does not affect trial fairness, but which undermines the fundamental justice of the system such that a stay of proceedings may be appropriate. *O’Connor*, at para. 73; *Regan*, at para. 55.

[444] The case of these three accused, Whitlock, Bhatia, and Sandhu, is all about this small residual category of abusive action.

[445] The important prospective nature of the stay of proceedings remedy must still be satisfied in a case like ours. The mere fact that the state has treated these accused persons shabbily in the past is not enough to warrant a stay of proceedings. Where the case falls into this small residual category, generally speaking, a stay will only be appropriate where the abuse is likely to continue or be carried forward. “Only in ‘exceptional’, ‘relatively very rare’ cases will the past misconduct

be ‘so egregious that the mere fact of going forward in the light of it will be offensive’”. *Regan*, at para. 55, quoting from *Tobiass*, at para. 91.

[446] Where it is found that the likelihood of abuse will continue to manifest itself if the proceedings continue, the court must go on to consider the abuse in relation to other possible remedies that are less drastic than a stay of proceedings. Only once the court has determined that the abuse will continue to plague the judicial process and that no remedy other than a stay can rectify the problem may the judge exercise the discretion to grant a stay. *Regan*, at para. 56.

[447] At paragraph 57 of *Regan*, Justice LeBel, citing *Tobiass*, provided the following guidance to us judges who go through the analysis of the test for a stay of proceedings but still remain uncertain about whether the abuse is really sufficient to warrant such a drastic remedy as a stay.

57 Finally, however, this Court in *Tobiass* instructed that there may still be cases where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay. In such cases, a third criterion is considered. This is the stage where a traditional balancing of interests is done: “it will be appropriate to balance the interests that would be served by the granting of a stay of proceedings against the interest that society has in having a final decision on the merits”. In these cases, “an egregious act of misconduct could [never] be overtaken by some passing public concern [although] . . . a compelling societal interest in having a full hearing could tip the scales in favour of proceeding” (*Tobiass*, at para. 92).

[448] This helpful guidance was elaborated on by Justice Moldaver in the decision of the Supreme Court of Canada in *Babos*. Once the two-part test set out by Justice LeBel at paragraph 54 in *Regan* has been met, but there still remains uncertainty in the mind of the judge over whether a stay is really warranted, the court must then balance the interests in favour of granting the stay, such as denouncing abusive state misconduct and preserving the overall integrity of the justice system, against society’s interest in having the case adjudicated on its merits. *Babos*, at para. 32.

[449] What should the judge keep in mind when conducting that delicate balancing of interests at the very final stage of the analysis? Justice Moldaver, at paragraphs 40, 41, and 44 in *Babos*, helped answer that question.

[40] Finally, the balancing of interests that occurs at the third stage of the test takes on added significance when the residual category is invoked. This Court has stated that the balancing need only be undertaken where there is still

uncertainty as to whether a stay is appropriate after the first two parts of the test have been completed (*Tobiass*, at para. 92). When the main category is invoked, it will often be clear by the time the balancing stage has been reached that trial fairness has not been prejudiced or, if it has, that another remedy short of a stay is available to address the concern. In those cases, no balancing is required. In rare cases, it will be evident that state conduct has permanently prevented a fair trial from taking place. In these “clearest of cases”, the third and final balancing step will often add little to the inquiry, as society has no interest in unfair trials.

[41] However, when the residual category is invoked, the balancing stage takes on added importance. Where prejudice to the integrity of the justice system is alleged, the court is asked to decide which of two options better protects the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. This inquiry necessarily demands balancing. The court must consider such things as the nature and seriousness of the impugned conduct, whether the conduct is isolated or reflects a systemic and ongoing problem, the circumstances of the accused, the charges he or she faces, and the interests of society in having the charges disposed of on the merits. Clearly, the more egregious the state conduct, the greater the need for the court to dissociate itself from it. When the conduct in question shocks the community’s conscience and/or offends its sense of fair play and decency, it becomes less likely that society’s interest in a full trial on the merits will prevail in the balancing process. But in residual category cases, balance must always be considered.

...

[44] Undoubtedly, the balancing of societal interests that must take place and the “clearest of cases” threshold presents an accused who seeks a stay under the residual category with an onerous burden. Indeed, in the residual category, cases warranting a stay of proceedings will be “exceptional” and “very rare” (*Tobiass*, at para. 91). But this is as it should be. It is only where the “affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases” that a stay of proceedings will be warranted (*R. v. Conway*, 1989 CanLII 66 (SCC), [1989] 1 S.C.R. 1659, at p. 1667).

[450] Ultimately, at that very final stage of the analysis, the question for the court is whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits. *Babos*, at para. 47.

[451] In terms of the governing legal principles with regard to a stay of proceedings under section 24(1) of the *Charter*, in a very recent decision of the Court of Appeal for Ontario, *R. v. Gilmore-Bent*, 2025 ONCA 553, a case where the trial judge stayed serious weapons-related and breach of bail charges as a result of the accused’s *Charter* rights having been violated by

correctional officers while the accused was in custody awaiting trial, Paciocco J.A. dealt with the question of whether the trial judge, as submitted by the Crown on appeal, had misapplied the test for a stay of proceedings by disregarding the alleged lack of connection between the *Charter*-offending conduct of the correctional officers and the prosecution of the charges.

[452] As the position of the Crown in our case bears some similarity to the position of the Crown advanced on appeal in *Gilmore-Bent*, the analysis undertaken by Justice Paciocco is instructive. His Honour cautioned against taking too narrow of an approach to conceptualizing how trials can be tainted by state misconduct. Paragraphs 57 through 60 of the decision in *Gilmore-Bent*, all relevant in our case, are set out below:

[57] I agree with the underlying principle relied upon by the Crown in making its first submission. A court cannot stay criminal proceedings because of misconduct unconnected to those proceedings. As O'Bonsawin J. noted in *Brunelle*, at para. 57, "When there is no connection between the abusive conduct and the proceedings against the accused, the fact that the court disassociates itself from the conduct [by staying the proceeding] will not have the effect of preserving the integrity of the justice system." However, in my view, the Crown is pursuing an unduly narrow conception of the kind of connection that is required.

[58] It relies heavily on passages from *Brunelle*, at paras. 39 and 55, that, in discussing the issue of standing, referred to abusive conduct that either arises in the police investigation or operation, or taints the court proceedings. Relatedly, the Crown emphasizes that the misconduct in this case was perpetrated not by the prosecuting Crown or the police, but by prison guards who had custodial charge of Mr. Gilmore-Bent eight months after his arrest, and who had no influence over the trial or its outcome.

[59] The Crown's submissions do not persuade me that the requisite connection was lacking or that the trial judge failed to consider the strength of that link. It is settled law that abuse by correctional officers can taint pending court proceedings. As the trial judge pointed out, in *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509, Fish J., for the Supreme Court, upheld a stay of proceedings of charges after a prison guard provoked and then assaulted the accused while transporting Bellusci between a courthouse and a penitentiary. I would not read *Bellusci* narrowly as confined to cases where the proceeding arises directly from the incident involving the abuse. In the case at hand, not only were the correctional officers the state agents who were given charge of Mr. Gilmore-Bent pending his trial on the charges before the trial judge, but some of the misconduct by the correctional officers occurred while they were testifying at the trial itself, in a motion properly before the trial judge. The required connection between the misconduct and the proceedings exists.

[60] Indeed, I would caution against taking the kind of narrow approach the Crown promotes in conceptualizing how trials can be tainted by state misconduct. Requiring the misconduct to arise from the manner the case is prosecuted, or the way in which trial evidence is gathered, would shrink the residual category for staying proceedings by largely merging it with the main trial fairness category. As L’Heureux-Dubé J. commented in the seminal decision on remedial *Charter* stays, *R. v. O’Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, at para. 73:

The residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness and vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the process. [Emphasis added.]

A narrow approach can only disable the opportunity to use this remedy in “the panoply of diverse and sometimes unforeseeable circumstances” where it may be warranted.

[453] Finally, it should be noted that no criminal offence in Canada is beyond the reach of a stay of proceedings. In *R. v. Kporwodu*, 75 O.R. (3d) 190 (C.A.), a case where the accused were charged with first-degree murder in the death of their three-month-old daughter, in circumstances where it was acknowledged by the Court of Appeal at para. 3, that “[s]taying charges of first-degree murder without a trial on the merits is almost unthinkable”, the Court upheld a stay of proceedings in the context of a section 11(b) *Charter* violation.

[454] Of course, determining the appropriate remedy for a violation of section 11(b) of the *Charter* is different than determining the appropriate remedy that may be granted if there is a *Charter* violation found in our case. That is because a stay of proceedings is the only remedy that may be granted where it is found that the accused’s constitutional right to be tried within a reasonable time has been infringed.

[455] Even in other *Charter* contexts, however, murder charges may be, and have been, stayed.

[456] For example, in *R. v. Goro*, 2016 ONSC 7956, Justice Fitzpatrick issued a stay of proceedings under section 24(1) after finding that the accused’s section 7 *Charter* right had been infringed. The breach that was found was on the basis of lost evidence that irreparably prejudiced the accused’s ability to make full answer and defence. The accused had been charged with second degree murder in the fatal stabbing of a man inside the victim’s apartment in Burlington, Ontario.

[457] As another example, in *Laflamme v. R.*, 2015 QCCA 1517, 23 C.R. (7th) 137 (Q.C. C.A.), the Court of Appeal of Quebec set aside the jury’s verdict of conviction on a charge of first-degree murder and ordered a stay of proceedings under section 24(1) of the *Charter*. The appellant had been convicted in the killing of his wife. The Court of Appeal found that a stay of proceedings was required in order to remedy the abuse of process that resulted from the improper “Mr. Big” police operation that had occurred.

[458] As another example, in *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, the Supreme Court of Canada ordered a stay of proceedings under section 24(1) of the *Charter* in circumstances that, like ours, implicated the residual category of cases that does not involve trial fairness. The accused had been charged with a very serious offence – counselling the commission of an offence (murder) not committed, contrary to section 464(a) of the *Criminal Code*. She had hired someone to kill her husband. That person turned out to be an undercover RCMP officer who was posing as a hit man. At trial, the accused was acquitted on the basis of the defence of duress. The Court of Appeal for Nova Scotia upheld the acquittal. The Supreme Court of Canada held that the lower courts had erred in finding that the defence of duress was available to the accused. It was not. In all of the circumstances, however, although the appeal should have been allowed and a new trial ordered, the Supreme Court of Canada stayed the proceedings due to the domestic abuse that the accused had suffered at the hands of her husband, the protracted nature of the proceedings, the fact that the law of duress was unclear at the time of the accused’s trial, and the fact that the Crown had changed its position about the applicable law between the time of the trial and the time of the first appeal.

[459] These are just examples. There are others. It is not this Court’s intention to provide an exhaustive review of every instance where a Canadian court has stayed proceedings under section 24(1) of the *Charter* in circumstances where the accused was facing a murder charge.

[460] Rather, the point is that no offence is beyond the reach of a stay of proceedings, and that is true regardless of whether the case involves a *Charter* violation under section 11(b)—where the remedy is automatic, or whether the case involves a *Charter* violation other than under section 11(b)—where the remedy is discretionary, or whether the application for a stay of proceedings implicates the trial fairness category of cases, or whether the application for a stay of proceedings involves the residual category of cases.

[461] Simply put, as the Supreme Court of Canada has held, “no category of offence is beyond the ambit of the abuse of process doctrine”. *R. v. Haevischer*, 2023 SCC 11, 425 C.C.C. (3d) 411 (S.C.C.), at para. 121.

V. The Law as Applied to the Facts

[462] The findings of fact made by this Court lead, inexorably, to determinations of multiple *Charter* infringements.

[463] What engulfs the application and drives, more than anything else, the result on each of the *Charter* claims is that this ICIT activation was done for vengeance.

Section 7 of the Charter

[464] In my view, the accused have met their onus in establishing, on a balance of probabilities, a violation of each of their section 7 *Charter* right to security of the person and not to be deprived thereof except in accordance with the principles of fundamental justice.

[465] What happened at MCC in late December 2023, with the ICIT activation on the whole of Unit 8, was a form of corporal punishment, that is, the intentional infliction of physical pain to the inmates, including Whitlock, Bhatia, and Sandhu, as a method of discipline or correction for the assaultive act of the inmate who punched Lecinski.

[466] What happened at MCC was akin to torture. That conclusion of this Court is expanded upon below, in the context of the section 12 *Charter* claim. A violation of section 12 will, in most cases, as here, amount to a violation of section 7.

[467] It is unnecessary, on these facts, to even have regard to the question of whether these accused persons suffered serious and profound psychological harm or prejudice. The evidence demonstrates that they, Whitlock, Bhatia, and Sandhu, were each deprived of their security of the person in that their physical integrity was significantly compromised at the hands of the state actors at MCC.

[468] Specifically, these accused persons were strip-searched without justification and not in accordance with the law and not in accordance with Ministry policy, as detailed above in these reasons (see the discussion of Jones' evidence).

[469] Further, these accused persons were forcibly extracted from their cells, paraded around the jail in their underwear while wearing physical restraints, and then forced to sit cross-legged in the hallway for a lengthy period of time, still physically restrained.

[470] In addition, these accused persons were subjected to the pain compliance physical techniques employed by the ICIT officers, throughout the ICIT activation, from the time that they were first confronted by the ICIT officers inside their cells until the time that they were finally returned to their cells (even longer for Whitlock, given the second cell extraction and physical escort to segregation that he was subjected to).

[471] There was nothing trivial about the ICIT officers' interference with the bodily integrity of these accused persons. Their physical integrity, their security of their persons, was deprived to a degree that engages the section 7 *Charter* protection.

[472] And that deprivation was not in accordance with the principles of fundamental justice. Respect for basic human dignity is a principle of fundamental justice. It is a juridical and binding legal norm that underlies many of our constitutional protections. State action that amounts to corporal punishment and that is akin to torture is, by definition, not in accordance with respect for basic human dignity.

Section 8 of the *Charter*

[473] In my opinion, the accused have met their onus in establishing, on a balance of probabilities, a violation of each of their section 8 *Charter* right to be secure against unreasonable search or seizure.

[474] The violation of each of these accused persons' section 8 *Charter* right was much more serious and was much more extensive than what the Crown has conceded in this case.

[475] The violation was multi-faceted.

[476] As explained earlier in these reasons (in the context of an assessment of Jones' evidence), the strip-searches of these accused persons did not come within the law that authorizes strip-searches – section 24 of the said Amending Regulation. As such, the strip-searches of these accused persons were unreasonable.

[477] Further, the strip-searches of these accused persons were carried out for a wholly improper purpose – to punish them. As such, they were unreasonable.

[478] In addition, and it must be remembered here that there is no dispute that these accused persons had a reasonable expectation of privacy, albeit a diminished one given the correctional setting, with regard to their cells and their personal property inside their cells, as explained earlier in these reasons, the searches of these accused persons' cells did not come within Ministry policy, both the Searches Policy and the Searching for Weapons Policy. As such, the searches of these accused persons' cells were unreasonable.

[479] As well, the searches of these accused persons' cells were carried out for a wholly improper purpose – to punish them. As such, they were unreasonable.

[480] Finally, separate and apart from whether the strip-searches of these accused persons and the searches of their cells were authorized by law (more pointedly, whether they came within the legislative or policy basis for them, which they did not), the strip-searches and searches of the cells were carried out in an unreasonable manner.

[481] There was no justification for strip-searching the accused persons directly in the presence of other inmates and then keeping the accused persons stripped almost naked throughout the entire duration of the ICIT activation on that particular wing of Unit 8.

[482] There was no justification for the ransacking of the cells and stripping them of essentially everything.

[483] In summary, each of these accused persons had his section 8 *Charter* protection violated in multiple ways. His personal strip-search did not come within the law and, further, was carried out in an unreasonable manner. The search of his cell did not come within the law and, further, was carried out in an unreasonable manner.

Section 12 of the *Charter*

[484] In my opinion, the accused have met their onus in establishing, on a balance of probabilities, a violation of each of their section 12 *Charter* right to not be subjected to any cruel and unusual treatment or punishment.

[485] What happened here was both cruel and unusual. What happened here was both treatment and punishment at the hands of state actors at MCC.

[486] If we look at the decision of Lamer J., as the Chief Justice then was, in *Smith*, and if we look at the helpful guidance provided by Professor Tarnopolsky, as he then was, in the article cited in *Smith*, I would find the following:

- (a) whether the treatment went beyond what was necessary to achieve a legitimate aim – I would answer that question in the affirmative as there was no legitimate aim to begin with, in that the ICIT deployment was for the sole purpose of exacting revenge on these three accused persons, and all of the other inmates on Unit 8, for what happened to Lecinski and, further, any legitimate concern about a weapon on Unit 8, if such a legitimate concern did exist at the time (which I find it did not exist), could have been dealt with by way of a lower-level search that did not require ICIT and the strip-searching of these three accused persons, them being paraded around the jail in their underwear, them being the subjects of forcible extractions from their cells and pain compliance techniques, them being exposed to a noticeably and markedly colder temperature due to the intentional and unnecessary operation of the exhaust fans, them being forced to sit cross-legged in the hallway for a lengthy period of time, them being left without any clothing for a lengthy period of time even after the ICIT deployment and the search process of the cells were completely finished, and the total ransacking of their cells;
- (b) whether the treatment was unnecessary because there were adequate alternatives – I would answer that question in the affirmative for those same reasons, and I would add that any resistance among correctional officers to participate in the lower-level search of the cells could have been dealt with by following usual procedure outlined by Wilson in his evidence at the hearing of the application;
- (c) whether the treatment was unacceptable to a large segment of the population – I would answer that question in the affirmative as I think that most Canadians would find it unacceptable for a correctional institution to punish these three accused persons, and nearly 200 inmates, for the assaultive actions of one inmate who was swiftly removed from the institution without any further incident;
- (d) whether the treatment could or could not be applied upon a rational basis and in accordance with ascertained or ascertainable standards – I would answer that

question in the negative as this ICIT deployment was not carried out in accordance with the mandated standards (Ministry policy), and it was carried out in the absence of any of the required documentation having been completed, such as the Threat Level Assessment and the Weapons Search Protocol Checklist;

- (e) whether the treatment was arbitrarily imposed – I would answer that question in the affirmative as the ICIT deployment was exerted against these three accused persons, and all of the other inmates on Unit 8, regardless of whether they had any involvement at all in the Lecinski assault and regardless of whether they were individually suspected of being in possession of, or having been in possession of, any weapon or contraband;
- (f) whether the treatment had any value in terms of some social purpose – I would answer that question in the negative as there was no social purpose to deploying ICIT for the purpose of achieving vengeance against these three accused persons, and all of the other inmates on Unit 8, for the actions of someone else;
- (g) whether the treatment was in accord with public standards of decency or propriety – I would answer that question in the negative as punishing these three accused persons, and all of the other inmates on Unit 8, and having them paraded around the jail in their underwear, bare buttocks exposed partially, was not in accordance with basic public standards of decency;
- (h) whether the treatment was of such a character as to shock the general conscience or as to be intolerable in the context of fundamental fairness – I would answer that question in the affirmative as corporal punishment and torturous state conduct is never tolerable in the context of fundamental fairness; and
- (i) whether the treatment was unusually severe and hence degrading to human dignity and worth – I would answer that question in the affirmative as all of the evidence adduced at the hearing of the application would consistently support the unusualness of deploying ICIT on an entire unit of a correctional facility, and it is certainly severe and degrading to human dignity and worth to punish these three accused persons, and all of the other inmates on Unit 8, by, among other things, strip-searching them and then parading them around the jail in their underwear and then leaving them in that state until finally giving them some clothing and bedding some 24-48 hours later.

[487] In the context of section 12 of the *Charter*, “punishment” refers to a penalty imposed by the state. Most often, that penalty is in the form of a sentence handed down by a judge, however, there is nothing in the jurisprudence that strictly limits the concept of “punishment” to a criminal court sentence.

[488] In the unique circumstances of our case, although nothing turns on this, I am of the view that what happened here was both cruel and unusual treatment, and cruel and unusual punishment.

That is because the treatment here was a form of punishment. The treatment was designed to be a penalty exacted by the state (MCC) against these three accused persons, and all of the other inmates on Unit 8, for what happened to Lecinski.

[489] As Lamer J., as the Chief Justice then was, stated in *Smith*, and as the justices held in the leading cases on section 12 decided since *Smith*, referred to above in these reasons, the power of the state to impose a punishment or treatment on an individual has limits. I am of the view that those limits were clearly exceeded with what happened at MCC in late December 2023.

[490] The jurisprudence suggests that, in reviewing that power, it is relevant whether it was necessary for the state to do what it did in order to attain some legitimate end, and it is also relevant whether the requisite procedure was followed. There was no legitimate end to what happened here. And the requisite procedure was not followed (not just followed in part but not all, rather, it was not followed to any degree whatsoever).

[491] The jurisprudence suggests that the protection afforded by section 12 governs the quality of the treatment or punishment and is concerned with the effect that it may have on the person on whom it is imposed. The quality of the treatment and punishment of these three accused persons was so abusive that it is safe to conclude that it had a significant negative effect on them. The objective video evidence of each of Whitlock, Bhatia, and Sandhu during the ICIT deployment, alone, supports that conclusion.

[492] The jurisprudence suggests that key questions for a reviewing court will be whether the punishment (and, in our case, treatment) was so excessive as to outrage standards of decency and, further, whether the treatment was grossly disproportionate to what would have been appropriate in the circumstances. Something more than mere excessiveness is required.

[493] What happened here was well beyond mere excessiveness. In my opinion, it is an outrage to basic standards of decency, and it is grossly disproportionate, to respond to an incident of an inmate viciously assaulting a correctional officer with the deployment of armed and tactical guards to punish these three accused persons, and nearly 200 inmates, by, among other things, strip-searching them, leaving them in just their underwear and without any clothing or bedding, and ransacking their cells.

[494] It is not the role of this Court to make some pronouncement on whether what happened at MCC in late December 2023 amounted to a criminal offence, and these reasons ought not to be interpreted that way.

[495] This Court's reliance on subsections 269.1(1) and 269.1(2) of the *Criminal Code* are simply to illustrate the seriousness of what occurred at the institution.

[496] Using those statutory provisions as guidance, it is clear to me that this ICIT deployment at MCC in late December 2023 involved state actions that are akin to, consistent with, what Canada's parliamentarians have defined as torture.

[497] Torture includes acts and omissions. Torture is where severe pain or suffering is intentionally inflicted on a person. That severe pain and suffering may be physical or mental or both.

[498] To be a criminal offence in Canada, however, the intentional infliction of the severe pain or suffering must have been for one of three enumerated purposes, or for any reason based on discrimination.

[499] Excluded from the definition of torture is any act or omission that arises only from or is inherent in or incidental to lawful sanctions. That exclusion is not relevant here; there is no legislation or Ministry policy that permits the punishment of inmates generally for the misconduct of someone else.

[500] The three enumerated purposes referred to above are: (i) to obtain from the person or from a third person information or a statement (not relevant in our case), (ii) to punish the person or a third person for an act that the person or third person has committed or is suspected to have committed, and (iii) to intimidate or coerce the person or third person.

[501] The latter two purposes are relevant in our case.

[502] In light of this Court's findings of fact, most particularly with regard to (i) the sole purpose for the ICIT deployment, (ii) the pain compliance techniques employed by the ICIT officers and the objective video evidence, and (iii) the other tactics employed by the ICIT officers such as turning on the exhaust fans to make the area colder, in some cases pointing their weapons

at inmates, and so on, it would seem to me that what happened here was beyond corporal punishment and was torturous in nature.

[503] It is arguable, I would say strongly so, that this ICIT deployment involved (a) severe pain or suffering that was (b) intentionally inflicted on these three accused persons and (c) for the purpose of punishing these three accused persons for the act committed by the inmate who assaulted Lecinski (a third person) and, further, for the purpose of intimidating these three accused persons. In any event, whether it is the case or not that what happened here would fall strictly within the definition of “torture” in Canada’s *Criminal Code*, I am of the opinion that the state actions at MCC in late December 2023 may be fairly characterized as akin to the type of torturous conduct that the Supreme Court of Canada, in *Kazemi Estate* for example, has held to be “undoubtedly unconstitutional” and “blatantly contrary” to section 12 of the *Charter*: para. 52.

[504] These three accused persons had their section 12 *Charter* rights violated.

Section 24(1) of the *Charter*

[505] I agree with Mr. Kapoor that, within the arena of the criminal justice system in Canada, one of the bargains that is implicit is that we tolerate presumptively innocent accused persons being detained pending the completion of their cases in exchange for an understanding that those accused persons will be treated humanely while in detention.

[506] We accept the fact that judicial interim release is not granted to all accused persons – that some of them, even though presumptively innocent of the charges that they are facing, will have to be incarcerated, potentially for many, many months and even in some cases for years, until their proceedings are finished.

[507] We do not expect, however, that they will be the subjects of *Charter* violations while they are at the mercy of the state in pretrial custody. That they will be subjected to a substantial deprivation of their security of the person not in accordance with the principles of fundamental justice. That they will be the subjects of corporal punishment and state action that is akin to torture. That they will be the subjects of multiple unreasonable searches. And that they will be the subjects of cruel and unusual treatment and punishment.

[508] It is through this lens that the Court must assess whether these charges should be stayed.

[509] Before going any further, as reasons for decision ought to be responsive to the major submissions advanced by the unsuccessful side, I wish to address five of the dominant arguments made by the Crown.

[510] First, the Crown stresses the need for individualization when it comes to the section 24(1) *Charter* analysis. I agree. This is not a commission of inquiry. This decision is not to be a report card on all of the activities at MCC in late December 2023, regardless of whether those activities impacted these three accused persons specifically. These three accused persons **were** directly impacted, however, as articulated above when dealing with the sections 7, 8, and 12 *Charter* claims. This is not a case about MCC invoking ICIT to punish some inmates but not these accused persons; rather, it is a case about MCC invoking ICIT to punish these three accused persons. The fact that other inmates were also punished does not change the analysis or take away from the individualization of the matter. Individualization does not mean that the claimant has to be the sole target of the *Charter*-infringing state conduct.

[511] The Crown does not argue that the *Charter* application brought by these three accused persons, whether under sections 7, 12, or 24(1), ought to be dismissed because Bhatia and Sandhu did not give evidence on the application and because Whitlock's evidence ought to be rejected by this Court, however, there is an implied submission in the Crown's overall argument that the lack of evidence from two of the three accused and the alleged lack of any credible and reliable evidence from the third accused is near fatal to the application. With respect, I disagree. *Charter* applicants can meet their burden of proof, both at the infringement stage and at the remedy stage, without giving evidence on the *voir dire*. It depends on the evidence as a whole. This has been the law in Canada for a very long time. This is the case even where the issue to be decided would appear to cry out for evidence from the applicant/accused, such as whether a police officer denied to a detainee the full informational rights under section 10(b) of the *Charter*, thereby infringing the detainee's right to counsel. Just one example to illustrate this long-standing principle is the decision of the Supreme Court of Canada in *R. v. Harper*, [1994] 3 S.C.R. 343, 1994 CanLII 68 (SCC). In that case, the accused was convicted of assault causing bodily harm following a trial without a jury. The basis for the conviction was the inculpatory remarks made by the accused to

the police officers after the arrest. There was a question at trial as to whether the accused fully understood his rights to counsel and, in particular, that Legal Aid was available. The accused did not testify on the *voir dire* and called no evidence at the trial. The trial judge held that there was no violation of section 10(b) of the *Charter*, finding a lack of any evidence that the accused somehow misunderstood the police officer and was unaware of the availability of Legal Aid. The trial judge's decision was upheld by the Court of Appeal for Manitoba. On further appeal, however, Chief Justice Lamer, writing for the majority of the Supreme Court of Canada on this issue, held that the accused's section 10(b) *Charter* protection had in fact been violated. That finding was made based on the evidence as a whole, including the police officer's testimony. That finding was made despite the observation that "it would have been preferable had the appellant come forward and testified on the *voir dire*", given the fact that the very question to be decided related to the accused's own understanding of what he was told by the police officer in terms of the availability of duty counsel (p. 352). Even at the remedy stage of the analysis, the Chief Justice, although finding that the inculpatory statement made by the accused ought to be admitted under section 24(2) of the *Charter*, said nothing about the lack of evidence from the accused being fatal, or near fatal, or even being a significant factor, in the Chief Justice's conclusion that "the police's failure to comply fully with the informational requirements under s. 10(b) did not affect the appellant's behaviour" (p. 353).

[512] In our case, this Court's adjudication of the sections 7, 8, 12, and 24(1) *Charter* issues is premised on the evidence as a whole, detailed above in these reasons. The lack of evidence from Bhatia and Sandhu, and the fact that this Court has rejected some of the evidence of Whitlock, does not alter any of the Court's key findings. At both the infringements stage and at the remedy stage, each accused has met his burden of proof.

[513] Second, the Crown submits that this case is not what confronted Justice Woollcombe in *Ritchie*. I agree. It is much worse. The vast evidentiary record before this Court is like nothing that has been before any other judge when it comes to this ICIT deployment at MCC in late December 2023. The CSOI findings, which were the main source of evidence before Woollcombe J., are benign compared to what this Court has heard. The accused's affidavit evidence that was before my colleague and which was relied upon, in part, for the issue of section 7 of the *Charter* and the interference with that applicant's psychological integrity is not necessary for these three

accused persons in our case, as this Court's decision does not depend on anything regarding psychological harm or prejudice.

[514] Third, the Crown submits that this case is very strong, overwhelming in fact, against these three accused persons. I disagree. Some evidence has already been excluded by this Court in other rulings on other pretrial applications, such as cellular telephone evidence that the Crown argued at the time was crucial to its case. The prosecution against Bhatia relies exclusively on a delicate theory of party liability. There are no confessions and no eyewitnesses. There is DNA evidence against Whitlock that makes the case against him stronger than against the other two accused, however, I would not describe the case as being overwhelming against any of the three accused men.

[515] Fourth, the Crown argues that a stay of proceedings ought not to be ordered because there are alternative remedies that would suffice in the circumstances. I disagree that any of the proposed alternate remedies would be appropriate in these circumstances.

[516] A civil damages award is a prospective and uncertain remedy that would take years to achieve and which, more importantly, would do very little to address the prejudice caused by the abuse in question.

[517] A reduction in the sentence for first-degree murder is plainly not possible, and the Crown's whole theory of the case is premised on this being a gang rivalry-fueled, premeditated, execution-style killing and nothing else. A reduction in the sentence for attempted murder means nothing in the face of a sentence for first-degree murder.

[518] Judicial interim release of these accused would do nothing to address the prejudice caused by the abuse and, just as important, this Court cannot simply release three men on bail if they cannot meet the statutory reverse-onus test for bail, and I doubt that they could.

[519] Finally, a judicial declaration of censure would be meaningless. Other issues involving MCC, such as overly harsh conditions in pre-sentence custody and chronic delays in prisoner transport, have already been the subjects of repeated "judicial declarations of censure" by this Court and by a countless number of other judges, with no impact whatsoever. Besides, such a

declaration would be a wholly inadequate response to address the prejudice caused by this high degree of very serious state abuse.

[520] Fifth, one of the overarching themes of the Crown’s position on the request for a stay of proceedings is that we are concerned with a mere two days at MCC. I disagree. There is no reason for this Court to ignore the gross and pervasive lack of accountability and follow-up that post-dated the ICIT deployment, even after the CSOI body’s findings were made. This is a systemic problem of a lack of accountability at MCC, both internally and externally within the wider Ministry. There is no reason for this Court to ignore things like the negligent loss or intentional destruction of evidence, the lying of MCC witnesses in the courtroom, the collusion among MCC witnesses, and the attempted cover-up that came after the ICIT deployment. All of these things are highly relevant to the stay application, as found by Justice Penman in Her Honour’s case, *Gilmore-Bent*, 2024 ONSC 199, at paragraphs 67-87, and as confirmed by Justice Paciocco on appeal, *Gilmore-Bent*, at paragraph 59. In fact, a lack of accountability, destruction of evidence, and lying in court during the currency of the proceeding itself, all proven considerations in our case, have also been pointed to in past decisions of the Court of Appeal for Ontario as being highly relevant on this type of application: *R. v. Singh*, 2013 ONCA 750, 118 O.R. (3d) 253, at paras. 42 and 48; *R. v. Tran*, 2010 ONCA 471, 103 O.R. (3d) 131, at paras. 92-94, 102, and 107.

[521] I will now turn to some further analysis of the stay of proceedings claim in the context of the leading jurisprudence and the test for such a remedy.

[522] Overall, I have asked myself whether this is really one of those “clearest of cases” that calls for a remedy of last resort – the most drastic remedy available – the ultimate remedy that is final and unforgiving and which, therefore, requires a very high threshold to be met before it may be granted, and I have concluded that this is one of those cases.

[523] For these three accused persons, it is the constellation of abusive conduct, giving rise to multiple *Charter* violations, that underlies the above conclusion, including but not limited to the unjustified activation of ICIT for a totally improper purpose; the complete lack of adherence to the legislative and policy requirements both before the ICIT deployment started and during the ICIT deployment; the negligent loss of or intentional destruction of or deliberate withholding of highly relevant evidence of what happened during the ICIT deployment; the collusion and the attempted

cover-up; the untruthful evidence given to this Court and, in some respects, to the CSOI body; and the lack of follow-up and accountability since December 2023, even after the CSOI findings were made.

[524] On the first part of the test for a stay of proceedings under the residual category of cases, I have asked myself whether the prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial or by its outcome, and I have concluded that it would be.

[525] With respect, the Crown is wrong when it tries to paint a picture of this abusive conduct as being totally divorced from the criminal proceeding itself. The Crown is taking far too narrow a view of the matter, just as the Crown did in *Gilmore-Bent*, as observed by Paciocco J.A.

[526] The collusion among some MCC witnesses, and the giving of untruthful evidence, and the attempted cover-up, as examples, were not limited to events that are separate and apart from this criminal proceeding but are abusive conduct that persisted well after this criminal proceeding started and even continued during the actual court hearing of the within application.

[527] The connection between the abusive conduct and the criminal proceeding itself, including the prospective conduct of any trial in this criminal proceeding, is, contrary to the Crown's submission, real and strong.

[528] On the second part of the test for a stay of proceedings under the residual category of cases, I have asked myself whether no other remedy is reasonably capable of removing the prejudice caused by the abuse in question. As explained above in these reasons, I have concluded that there is no other sufficient remedy.

[529] I have asked myself whether my conclusions are clouded by an inappropriate desire to punish MCC for what it did. In other words, whether I have stepped wrongly into the arena of simply attempting to redress a past wrong and forgetting that a stay of proceedings is a prospective remedy that aims to prevent the perpetuation of a wrong that "if left alone, will continue to trouble the parties and the community as a whole, in the future": *Brunelle*, at para. 59.

[530] I am convinced that a trial in this proceeding will serve to perpetuate the wrongs that have occurred here. If a stay of proceedings is not granted, and if these wrongs are left alone, they will, in my opinion, leave an indelible scar on the administration of justice and continue to trouble us all. Without wanting to oversimplify the matter, this case is all about Whitlock, Bhatia, and Sandhu being subjected to torturous state actions while being held in pretrial detention as presumptively innocent accused persons – state conduct that deployed ICIT against these three accused persons not for anything they did but in order to avenge what one other inmate did to a correctional officer. In the face of that overall picture of wrongs, we cannot permit the case to proceed to trial.

[531] A stay of proceedings will only be appropriate where the abuse is likely to continue or be carried forward. Only in exceptional, relatively very rare cases, can it be said that the past misconduct is so egregious that the mere fact of going forward with a trial will be offensive.

[532] I have concluded that this is such an exceptional case. Some of the abusive conduct has continued right up to the present time: collusion, cover-up, and untruthful evidence, as examples. There is no reason to think that those things, the abuse, will not be carried forward if a stay of proceedings is not granted and a trial ensues.

[533] It is true that another large-scale ICIT deployment and level IV search has not occurred at MCC since late December 2023, that I am aware of, however, the gross lack of accountability and follow-up that has post-dated this ICIT operation makes me think that the abuses that occurred in late December 2023 are likely to occur again.

[534] Having assessed the two-part test set out by Justice LeBel in *Regan*, I have asked myself whether I am still left uncertain about whether the abuse in our case is really sufficient to warrant such a drastic remedy as a stay of proceedings.

[535] I am not left uncertain. This is a residual category case, however, and thus the final balancing process must be considered.

[536] I must balance the interests in favour of granting the stay, such as denouncing the abusive state misconduct in this case and preserving the overall integrity of the justice system, against society's interest in having the case adjudicated on its merits.

[537] Ultimately, at this very final stage of the analysis, the question for this Court is whether the integrity of the justice system would be better served by a stay of proceedings or a full trial on the merits.

[538] I have concluded that it would be better served by a stay of proceedings.

[539] In making that conclusion, I have considered the factors suggested by Justice Moldaver in *Babos*, at paragraph 41 and following. In our case, in my view, the nature and seriousness of the impugned conduct is multi-faceted and very high, involving corporal punishment and torturous state action giving rise to *Charter* violations under all of sections 7, 8, and 12. Further, some of the abusive conduct appears to be systemic and ongoing at MCC, as reflected in the continuing efforts, after December 2023, to get rid of or to withhold relevant evidence, to collude with one another, to give untruthful evidence in reports and to the CSOI investigators and to this Court, and (both internally at MCC and within the Ministry as a whole) to fail to fulsomely account for and follow-up on the wrongs that occurred with regard to this ICIT deployment.

[540] Unquestionably, the charges facing these three accused persons are extremely serious, and the interests of society in seeing them disposed of on their merits are very high.

[541] There is a spectrum of state misconduct, with the most egregious conduct being such that there is a greater need for the court to dissociate itself from it due to the degree that the said conduct shocks the conscience of the community and offends its sense of fair play and decency. In such a case, it becomes less likely that society's interest in a full trial on the merits will prevail in the final balancing process.

[542] This is such a case.

VI. Conclusion

[543] On all charges on the Indictment against all three of the accused, this Court enters a judicial stay of proceedings pursuant to section 24(1) of the *Charter*.

[544] The unthinkable has come to pass.

[545] First-degree murder and attempted murder charges will not be tried on their merits. The victims of the shootings and their families and close ones will not see the proceeding continue to its normal end. The community as a whole will not get the satisfaction of having a proper trial on the merits. The police, led by the efforts of Detective Constable Eacrett, who was the utmost professional throughout the hearing of the application despite his obvious uneasiness about much of the evidence from MCC witnesses that he had to sit and listen to, will not see the case continue.

[546] Nonetheless, it is the right decision in my opinion. I think it is the only decision that could have reasonably been made in light of the Court's findings.

[547] I want to extend my sincere appreciation to all counsel who presented this case on both sides: for the Crown – Mr. L. Goldstein, Mr. A. Khoorshed, and Mr. H. Rim; for Whitlock – Mr. A. Robbins and Mr. N. Robbins; for Bhatia – Mr. A. Kapoor and Ms. S. Strban; and for Sandhu – Mr. B. Greenspan and Mr. C. Lutes.

[548] They did a tremendous job, and I am grateful for their help.

A handwritten signature in black ink, appearing to be 'Conlan J.', written above a horizontal line.

Conlan J.

CITATION: R. v. Whitlock, 2025 ONSC 6006

COURT FILE NO.: CR-24-0038

DATE: 2025-10-24

ONTARIO

SUPERIOR COURT OF JUSTICE

HIS MAJESTY THE KING

– and –

Joseph Richard Whitlock, Kulvir Singh Bhatia and Karn
Veer Sandhu

**REASONS FOR RULING ON STAY OF
PROCEEDINGS**

Conlan J.

Released: October 24, 2025