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**A PLUMBER WITH WORDS:
SEEKING CONSTITUTIONAL RESPONSIBILITY AND AN END
TO THE *LITTLE SISTERS* PROBLEM**

Alison M. Latimer* and Benjamin L. Berger**

I. Introduction

Joe Arvay sometimes described his work as a lawyer as being a “plumber with words”. We think what he meant was that he strived to offer tangible solutions to concrete problems. In other words, while it’s good to know what the law says, and what legal enthusiasts think about how the law operates, *Charter*¹ breaches affect real people, most of them not lawyers. It is the lived experience of the law that ultimately ought to draw our concern, energy, and talents.² If you want to bend the law towards justice, you need to focus remedial attention on what the law actually does and to whom, and on what the Court can actually do and for whom.

With this focus firmly in place, the constitutional problems that should engage us look somewhat different. To be sure, one remains interested in that array of substantive justice issues that surround us. This or that law or policy that calls for challenge and reform because of how it affects the way that people — particularly the vulnerable, the powerless, or the unpopular — fare in the world. But as much as Joe worked to address those kinds of constitutional problems, his work was also often about a second species of problem: structural defects in the legal approach to problems that impair our ability to adequately address the

* Alison M. Latimer is a litigator in Vancouver BC. This article draws on legal arguments developed with Joe in *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 [*BCCLA_Trial*] and *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 [*BCCLA_CA*], litigation in which Alison also appeared as counsel.

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¹ *Canadian Charter of Rights and Freedoms*, ss 1, 7, 15, 24, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

² This is true for academics, as much as it is for practitioners, as one of us has argued. See Benjamin L Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 35-40.

justness of our society. Issues like *stare decisis*,³ costs⁴ and standing⁵ so concerned Joe because they were problems of constitutional litigation, not just problems for constitutional litigation.

This article addresses another such issue that troubled Joe for many years and that he was tackling in the final major *Charter* trial in which he acted – a case that challenged the constitutional validity of prolonged and indefinite solitary confinement. The litigation surfaced a number of enduring issues facing litigants in cases seeking effective remedies for systemic *Charter* wrongs. The issue on which we are focusing here is the gap between the remedies available for systemic *Charter* wrongs that are found to be the legal effect of a law and those available for systemic *Charter* wrongs that are said to be the legal effect of maladministration of a law – discretionary decisions made by state actors implementing a law. If the wrongs are found to be caused by the law, the law will be struck down and the legislator given an opportunity to pass a better law. Not so, if the wrongs are attributed to flaws in the implementation or administration of the law. Instead, in such cases, a court might declare a constitutional wrong and perhaps grant a s. 24(1) remedy,⁶ but the law itself would be undisturbed and, in the often very predictable event that problems in the administration of that law persisted, it would fall to future claimants to raise those issues again (and again and again). Tracing constitutional harms arising from the operation of a statutory scheme to the maladministration of the law, rather than the law itself, would thus take the most effective constitutional remedy off the table. Because it crystallized in the first *Little Sisters*⁷ case, we call this issue the “*Little Sisters problem*.” As we explain, this remedial divide problematically obscures those instances in which systemic misapplication of a law over a period of decades reveals a latent defect in the law that calls for a constitutional response. This is a problem not only because it raises serious access to *Charter* justice concerns, but also because it distorts lines of

³ *Canada (Attorney General) v Bedford*, 2013 SCC 72.

⁴ Both advance costs and special costs were of particular concern to Joe: *British Columbia (Minister of Forests) v Okanagan Indian Band*, 2003 SCC 71; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2 [*Little Sisters 2*]; *R v Caron*, 2011 SCC 5; *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 133-146.

⁵ *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 [*Downtown Eastside*].

⁶ Some courts have chosen *not* to declare a constitutional wrong even when one has been proven after a lengthy and contested trial. This is the outcome that obtained after the appeal in the solitary litigation: *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2019 BCCA 228 at para 213, 228, 269, 272. We view this outcome as a stark example of misplaced judicial restraint, a topic one of us has written about elsewhere. See Alison M Latimer, “Constitutional Conversations” (2019) 88 SCLR 231 (2d). It is notable that the exercise of such a discretion to refuse a remedy is not available under s. 52. However, a full exploration of the issue of misplaced judicial restraint as it manifested in the solitary case is beyond the scope of this article.

⁷ *Little Sisters Book & Art Emporium v Canada*, 2000 SCC 69 [*Little Sisters 1*].

constitutional accountability, reducing systemic transparency by giving deference to the executive that Parliament does not enjoy.

This paper proceeds in three parts. First, we describe this problem, how it arose, and its effects in detail. Second, we describe in more depth the solitary confinement litigation and the way the *Little Sisters* problem surfaced — and was dramatized — in that litigation. Third, we set out an argument for the containment of the *Little Sisters* problem, one based in the Court’s decision in *R v Boudreault*.⁸

II. The *Little Sisters* Problem Defined

Two remedial provisions govern remedies for *Charter* breaches.

When a law is inconsistent with the *Charter* in purpose or effect, the usual remedy lies under s. 52(1).⁹ Section 52(1) provides that the Constitution is the supreme law of Canada, any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect. Parties with standing can seek relief under s. 52(1) because of the effects of the law on themselves or on third parties.¹⁰ Section 52(1) confers no discretion on judges. A law that produces an unconstitutional effect is null and void to that extent by operation of s. 52(1).¹¹

Section 24(1), by contrast, gives judges wide discretion to grant just and appropriate remedies, not for unconstitutional laws, but for unconstitutional government acts usually committed under constitutionally valid legal regimes.¹² The acts of government agents acting under such regimes may not be the necessary result or “effect” of the law, but arise as a result of government agents applying a discretion conferred by the law in an unconstitutional manner.¹³

The distinction has proven to be consequential not only at the pleadings stage of a case, but at each stage in preparing the record and framing the

⁸ *R v Boudreault*, 2018 SCC 58 [*Boudreault*].

⁹ *Constitution Act, 1982*, s 52(1), being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution Act, 1982*]; *R v Ferguson*, 2008 SCC 6 at para 59 [*Ferguson*].

¹⁰ *Ferguson*, *ibid*.

¹¹ *Ibid* at para 35.

¹² There are exceptions. For example, even in cases where legislation is unconstitutional courts often suspend declarations of invalidity. The jurisprudence allows the court to grant a s. 24(1) remedy in connection with a s. 52(1) declaration of invalidity where s. 24(1) relief is necessary to provide the claimant with an effective remedy. One such case was *Carter v Canada (Attorney General)*, 2012 BCSC 886. This case established a constitutional right to physician assisted death. In that case the declaration of invalidity was suspended following the trial and Joe persuaded the trial judge to grant an individual exemption to Gloria Taylor so that she could access a physician-assisted death during the period of time when the declaration of invalidity was suspended (see paras 1414-1415). Joe arguably persuaded the Supreme Court of Canada to do the same thing for a broader group of people. See *Carter v. Canada (Attorney General)*, 2016 SCC 4 [*Carter 2*] at paras 5-6; although the Court did not make clear that the remedy was granted pursuant to s. 24(1).

¹³ *Ferguson*, *supra* note 9 at para 60.

arguments. In some cases, this distinction is clear but it is less so in others. The murkiest cases are those where it is possible to assemble an extensive record of systemic *Charter* breaches arising under a law over the course of many years either against a single party or a representative class of persons.

Little Sisters was perhaps the most iconic example of this challenge at play. This was a decade long pro-bono odyssey that Joe took to the Supreme Court of Canada and then back again. *Little Sisters 1* concerned harassment of a small independent bookstore – Little Sisters Book and Art Emporium - by Canada Customs. Little Sisters carried specialized inventory catering to the LGBTQ community. Since its establishment it imported the vast majority of its erotica from the United States. Large quantities of these materials were delayed, confiscated, destroyed, damaged, prohibited or misclassified by Canada Customs even though the *Customs Act*¹⁴ only allowed Customs to detain and prohibit material that was “obscene” as defined in the *Criminal Code*.

The Supreme Court of Canada had earlier upheld the obscenity provision of the *Criminal Code*¹⁵ as constitutionally valid in *R. v. Butler*.¹⁶ The Court held that while the obscenity provision infringed s. 2(b) of the *Charter*, the infringement was justified under s. 1.¹⁷ The *Customs Act*, the Court reasoned, provided an intelligible standard so there was nothing constitutionally wrong with Customs applying that standard.¹⁸

After a lengthy trial in *Little Sisters 1*, Joe persuaded the trial judge that the rates of mistreatment by Canada Customs “indicate more than mere differences of opinion and suggest systemic causes” and that “to attribute the errors demonstrated in this trial entirely to human fallibility would be to ignore the grave systemic problems in the Customs administration”.¹⁹ Thus, he was able to show that Customs had systemically misapplied the Act such that Customs was detaining and prohibiting much non-obscene material. Customs actually conceded that many of the books it seized were works of literature.²⁰ When the material was not obscene, the violations of the *Customs Act* resulted in a violation of s. 2(b) of the *Charter* that was not “prescribed by law” and therefore not justifiable under s. 1.²¹

Joe asked that the legislation be struck down under s. 52(1).²² The Supreme Court of Canada was divided on the issue of whether the law itself was responsible for the *Charter* breach, and therefore divided on the issue of remedy.

Iacobucci J., dissenting, reasoned:

¹⁴ *Customs Act*, RSC 1985, c 1 (2nd Supp), ss 58, 71, 152(3).

¹⁵ *Criminal Code*, RSC 1985, c C-46, s 163(8) [*Criminal Code*].

¹⁶ *R v Butler*, [1992] 1 SCR 452, 89 DLR (4th) 449 [*Butler*].

¹⁷ *Butler*, *ibid* at 489, 509-510.

¹⁸ *Little Sisters 1*, *supra* note 7 at para 25.

¹⁹ *Little Sisters Book and Art Emporium v Canada (Justice)*, 131 DLR (4th) 486 at paras 100, 250, 1996 CanLII 3465 (BCSC).

²⁰ *Little Sisters 1*, *supra* note 7 at paras 183, 185, 190.

²¹ *Ibid* at paras 18, 28, 37-8, 43-4, 70-2, 127-9, 131, 133, 135, 154.

²² *Ibid* at para 108.

As noted, both my colleague Binnie J. and the courts below agreed that the legislation had been administered in an unconstitutional manner. In their opinion, the Customs legislation is capable of constitutional application and therefore a declaratory remedy is sufficient to safeguard the *Charter* rights involved. With the greatest respect, I cannot agree that this is the proper approach. This Court's precedents demand sufficient safeguards in the legislative scheme itself to ensure that government action will not infringe constitutional rights. In the face of an extensive record of unconstitutional application, it is not enough merely to provide a structure that could be applied in a constitutional manner. This is particularly the case where fundamental *Charter* rights, such as the right to free expression, are at stake. The legislation itself must provide an adequate process to ensure that *Charter* rights are respected when the legislation is applied at the administrative level.²³

What followed was a detailed discussion of cases that came before – including *Morgentaler*,²⁴ *Hunter v. Southam*,²⁵ and *Bain*²⁶ – that Iacobucci J. reasoned supported his opinion that the Court must be vigilant in protecting *Charter* rights when the legislative scheme in question is being applied in an unconstitutional fashion. In each of those cases, legislation was struck down because of procedures set out in the legislation found to be unconstitutional.²⁷

The majority disagreed that the cases relied on by the dissent were comparable because in those earlier cases the legislation created problematic procedures: it was not silent on what procedures should apply.²⁸

Iacobucci J. found this to be a distinction without a differencing when he held:

Regardless of whether the legislation is under- or over-inclusive, if it lends itself to the repeated violations of *Charter* rights, as does the legislative scheme here, the legislation itself is partially responsible and must be remedied.²⁹

The majority, by contrast, found that where legislation left room for discretion so that it was capable of being construed in a constitutionally compliant way, even when the evidentiary record established it has been systemically misapplied, it should be upheld.³⁰ For the majority, Parliament was not required

²³ *Ibid* at para 204.

²⁴ *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC) [*Morgentaler*].

²⁵ *Hunter v Southam Inc*, [1984] 2 SCR 145, 1984 CanLII 33 (SCC) [*Hunter*]. (Matt's note: Would shorten to "Hunter" or "Southam")

²⁶ *R v Bain*, [1992] 1 S.C.R. 91, 1992 CanLII 111 (SCC) [*Bain*].

²⁷ *Little Sisters 1*, *supra* note 7 at paras 205-213.

²⁸ *Ibid* at paras 127-131.

²⁹ *Ibid* at para 205.

³⁰ *Ibid* at para 133.

to legislate procedures to govern state officials who had been shown to have systemically misapplied a law.³¹ The majority refused to strike down the *Customs Act* saying that the Court's findings "should provide the appellants with a solid platform from which to launch any further action in the Supreme Court of British Columbia should they consider that further action is necessary."³² (Joe was that singular kind of guy who would attempt to take the Court up on this offer. That is a story for a footnote.)³³

Thus, the majority created a remedial cul-de-sac for systemic *Charter* wrongs that are said to be the legal effect of the maladministration of a law. But a remedy that relies on a pro bono lawyer and their clients, or some future litigant suffering the very same wrong, to relitigate the same issue that has already made its way all the way to Ottawa, is not a particularly concrete, practical or accessible remedy. First, it ignores the experience of the governed who may rightly object that proof of systemic misapplication of a law over a period of many years is evidence that there is a problem with the law itself. Second, we live in a world thick with executive control and a remedial divide such as that created in *Little Sisters 1* foreseeably puts vulnerable communities in the position of policing the executive. It will be these vulnerable communities, or rather individuals from within them, who will be saddled with the expense of litigation and delayed vindication of their rights, again and again. The *Little Sisters* problem thereby creates a significant barrier to accessing the courts, which here is itself a barrier to accessing justice.³⁴

The issue of access to justice has been at the forefront of public discussions about the contemporary state of the judicial system in Canada. Whether in media coverage, scholarly writing, or public lectures by those involved in the administration of justice, the imperative of ensuring meaningful access to the Canadian legal system has been much commented on. The Supreme Court of Canada has itself consistently affirmed the centrality of this principle, emphasizing in particular the importance of access to justice to protecting the constitutional rule of law. Chief Justice Dickson stirringly stated in *B.C.G.E.U.* that "[t]here

³¹ *Ibid* at paras 134-139.

³² *Ibid* at para 158.

³³ Never daunted, Joe geared up to pursue the issue once more but this time hoped to secure advanced costs for his troubles. The issue of advanced costs went all the way to the Supreme Court of Canada, resulting in *Little Sisters 2*. This case was almost the death knell for the advanced costs jurisprudence. The issue of advance costs is an interesting one close to Joe's heart, but that is beyond the scope of this article. It is an issue that will soon be back before the Supreme Court of Canada. See *Germaine Anderson on her own behalf and on behalf of all other Beaver Lake Cree Nation beneficiaries of Treaty No 6 and Beaver Lake Cree Nation v Her Majesty the Queen in Right of the Province of Alberta, et al*, 2021 CanLII 2827 (SCC).

³⁴ For helpful discussions of *Little Sisters 1*, and some of the constitutional and access to justice issues it generated, see e.g. Kent Roach, "Enforcement of the Charter — Subsections 24(1) and 52(1)" (2013) 62 SCLR (2d) 473; Bruce Ryder, "The Little Sisters Case, Administrative Censorship, and Obscenity Law" (2001) 39:1 Osgoode Hall LJ 207. See also generally Carissima Mathen, "Access to Charter Justice and the Rule of Law" (2008-2009) 25 Nat'l J Const L 191.

cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”³⁵ Appreciation of the reality of the scope, power, and opaqueness of the executive state has implications for the way in which courts should construe the scope of remedial authority under s. 52. Constitutions and constitutional rights serve to constrain and discipline the exercise of state power.³⁶ It is the role of the elected legislators to constrain executive state action through the strictures of law. Indeed, this is as close as one gets to an uncontested core meaning of that unruly term, “rule of law.” Despite the important role that they play, the courts are not competent or suited to perform this role in a comprehensive way. Where a litigant can demonstrate systemic *Charter* wrongs at the hands of the state, it suggests that more legislative reflection and action is needed. The matter needs to be remitted the legislature — the more transparent and deliberative branch of government — and the remedial route to do so is s. 52 of the *Constitution Act*. The executive should not enjoy deference that Parliament itself does not command. Approaching the control of the regulatory state in that fashion compromises the rule of law.

Thus, the *Little Sisters* problem is really two problems. It is a problem of lack of access to justice for vulnerable communities. And it is a problem of lack of government control, accountability, and transparency for all who care about the rule of law.

III. The Little Sisters Problem at Work: Solitary Confinement Litigation

The *Little Sisters* problem has arisen in many cases and our attention here is focused on one recent case from BC — a case challenging the federal laws that authorized prolonged, indefinite solitary confinement.³⁷ As we explain in some detail below, the solitary confinement litigation was ultimately brought to an end when Parliament repealed the challenged laws and abandoned its appeal to the Supreme Court of Canada.³⁸ Nevertheless, the case is worthy of consideration because it so vividly demonstrates how the *Little Sisters* problem may impede access to justice for vulnerable communities and hamper government accountability and transparency.

³⁵ *BCGEU v British Columbia (Attorney General)*, [1988] 2 SCR 214 at 230, 53 DLR (4th) 1. See also *British Columbia (Attorney General) v Christie*, 2007 SCC 21 at para 23; *R v Prosper*, [1994] 3 SCR 236 at para 102, 118 DLR (4th) 154 [*Prosper*].

³⁶ *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37 [*Khadr*].

³⁷ Joe and Alison contributed a chapter about the solitary confinement case that describes the trial in more detail. See Joseph J Arvey and Alison M Latimer, “Solitary Confinement in Canada” in Jules Lobel & Peter Scharff Smith, eds, *Solitary Confinement: Effects, Practices, and Pathways Towards Reform* (Oxford Scholarship Online, 2019) 335.

³⁸ Parallel litigation in Ontario was similarly brought to an end. See *Canadian Civil Liberties Association v Canada (Attorney General)*, 2019 ONCA 243. For a discussion of the solitary confinement litigation, and the broader institutional and constitutional issues it raised and that the practice continues to raise, see e.g. Lisa Kerr, “The End Stage of Solitary Confinement” (2019) 55 CR (7th) 382, and the literature referenced therein.

The BC solitary confinement litigation was one of Joe's last major *Charter* trials as the moving party. The plaintiffs were the BC Civil Liberties Association and the John Howard Society who both had public interest standing to mount the case. The trial spanned nine weeks in July and August 2017.

The trial record supported that for many years many inmates had been subjected to prolonged, indefinite solitary confinement for periods of time spanning weeks and sometimes years. These inmates were deprived of meaningful human contact and caged in small cells for 22-23 hours a day.

The effects of the practice included serious and sometimes permanent psychological harm, physical harm and death.³⁹ The record supported, and the trial judge found, that Aboriginal⁴⁰ inmates and mentally ill and disabled inmates were over-represented in solitary confinement, and also that solitary confinement was more burdensome for these inmates.⁴¹

For many years, there had been repeated recognition of the harmful effects of solitary confinement and repeated recommendations for independent external review and time limits on solitary confinement. There had been a number of high-profile incidents involving solitary confinement that would lead to the introduction of a policy of reform, but in general such reforms were poorly implemented, delayed and resisted by the Correctional Service of Canada ("CSC").⁴²

On January 17, 2018, the trial judge declared the laws⁴³ to be unconstitutional, under both ss. 7 and 15 of the *Charter*, but suspended the declaration for a period of one year.⁴⁴ Canada appealed that order.

In respect of the section 7 claims, Joe succeeded in persuading the BC Court of Appeal that the impugned laws themselves authorized prolonged, indefinite solitary confinement of inmates. The laws therefore deprived inmates of life, liberty and security of the person in a way so grossly disproportionate "that it offends the fundamental norms of a free and democratic society."⁴⁵ As well, to the extent the impugned laws authorized internal rather than external review of decisions to segregate inmates in solitary confinement, the BC Court of Appeal rightly held that those laws themselves offend the principle that laws must be procedurally fair.⁴⁶ The laws were struck down to the extent of those inconsistencies.

However, in respect of the section 15 breaches, the Court allowed the appeal in part. Although these issues had been contested at trial, on appeal Canada conceded that the record supported a finding of discrimination against Aboriginal

³⁹ *BCCLA Trial*, *supra* note * at paras 247-250, 264-273, 277-288, 307-310, 328.

⁴⁰ A term defined in the version of the *Corrections and Conditional Release Act*, SC 1992, c 20 [CCRA] that applied at the time of the litigation.

⁴¹ *BCCLA Trial*, *supra* note * at paras 64, 466-470, 484-487, 493-497.

⁴² *Ibid* at paras 23-48.

⁴³ *CCRA*, *supra* note 40, ss 31-33, 37.

⁴⁴ *BCCLA Trial*, *supra* note * at paras 609-10.

⁴⁵ *BCCLA CA*, *supra* note * at para 167.

⁴⁶ *Ibid* at para 198.

inmates and mentally ill and/or disabled inmates.⁴⁷ But Canada asked the Court of Appeal to deny those wrongs a remedy arguing, *inter alia*, that none of these operational failings are attributable to the legislation that authorizes administrative segregation. Instead, Canada claimed the cause of these effects was maladministration of the law.⁴⁸ And Canada's position was that the public interest standing plaintiffs in the case lacked standing to seek remedies for these wrongs under s. 24(1) of the *Charter*.⁴⁹

Canada's position in respect of the appropriate remedial route stemmed from its interpretation of *Little Sisters 1*. The question, then, was: whether systemic *Charter* wrongs like those proven at the solitary confinement trial can properly be seen as authorized by or caused by a statute and therefore attract a remedy under s. 52(1) to the benefit of all? Or are they to be seen merely as the effect of improper administration of the law, insulating the law from constitutional challenge and shifting to individual litigants the burden of policing state actors administering those laws each time their rights are engaged?

In respect of the infringement of Aboriginal inmates' section 15 rights, the Court of Appeal found that the procedure said to give rise to the infringement was not defined in the order. The Court held that the trial judge's prescriptions for curing the problems he identified "may be eminently sensible" but did not "illuminate or speak directly to any constitutional infirmity in the legislation itself. Implementation of the judge's policy recommendations would not require legislative amendment."⁵⁰ The failings identified by the trial judge were found by the Court of Appeal to be "organizational failings" and "not sourced in the legislation itself."⁵¹ The Court therefore declined to grant any relief at all for these proven *Charter* breaches instead holding that "[a declaration] would not assist CSC in devising remedial measures and, apart from giving a form of judicial expression to the Attorney General's concession, would serve no useful purpose."⁵²

The Court's refusal to grant declaratory relief – in the face of findings of discrimination made following a contested hearing, and a later concession by Canada – is troubling given its role as an institution with significant normative

⁴⁷ *Ibid* at para 210.

⁴⁸ *Ibid*.

⁴⁹ Public interest standing was a topic close to Joe's heart. Nine short years ago he took the issue of public interest standing all the way to the Supreme Court of Canada in *Downtown Eastside*. While that case clarified the law of public interest standing in constitutional cases when the constitutional validity of a law is a stake, it did not address what implications, if any, a grant of public interest standing has on the availability of s. 24(1) relief. As noted here, that issue was squarely raised in the solitary confinement case; however, a discussion of that issue is beyond the scope of this article. Instead, we focus attention on the argument that the remedies sought were properly granted under s. 52 of the *Constitution Act, 1982*. The issue of public interest standing is another one that will soon be back before the court. See *Attorney General of British Columbia v Council of Canadians with Disabilities*, 2021 CanLII 24821 (SCC).

⁵⁰ *BCCLA CA*, *supra* note * at para 213.

⁵¹ *Ibid* at para 214.

⁵² *Ibid* at para 272.

responsibility to the parties and the public. In *Khadr*,⁵³ the Supreme Court of Canada held that in the face of evidentiary uncertainty and uncertainty over whether a more specific remedy would be effective, the proper remedy is declaratory relief. It serves the public interest to give judicial expression to findings of discrimination against marginalized groups. Declarations of this sort may be useful to the institutions implementing the law. But they are also of equal if not greater significance to the group suffering unjust conduct at the hands of the state who came to court to have those wrongs recognized, and to the public who should rightly be made aware of and concerned with how society treats its most vulnerable and whether that treatment is acceptable or not. The courts have a role in recognizing and condemning that treatment through the issuance of declaratory relief. The Court of Appeal was overly focused on whether and how CSC would be assisted by its order, and insufficiently concerned with the importance of giving judicial expression to proven *Charter* breaches which (although conceded on appeal) were not conceded at trial.

However, the Court's reluctance to grant a remedy lays bare another aspect of the *Little Sisters* problem. While the trial judge made some "eminently sensible" prescriptions to cure the problems he identified in respect of Aboriginal inmates,⁵⁴ it was not his job nor within his institutional competence to redraft the legislation or to write a new policy for CSC to follow to avoid breaching the *Charter*. Instead, having identified the constitutional flaw, the matter would best have been sent back to Parliament to remedy. However, because the Court of Appeal located the defect in the administration of the law, and in thrall to the *Little Sisters* problem, no such remedy was available.

In respect of the infringement of mentally ill and/or disabled inmates' rights, the Court pointed to section 87(a) of the *Act* that "requires CSC to take into consideration an offender's state of health and health care needs in all decisions affecting the offender including decisions relating to administrative segregation".⁵⁵ The Court held this provision required an individualized assessment of whether an inmate's mental health needs are such that the inmate should not be placed in administrative segregation.⁵⁶ The Court accepted Canada's argument that the judge erred by striking the legislation in circumstances where it was capable of being administered in a constitutional fashion.⁵⁷ The Court further criticized the trial judge in stating that his order "provides no guidance to the legislature on where the line should be drawn between inmates who are mentally ill and/or disabled and those who are not. Neither do the reasons. They do not, in this respect, facilitate the process of constitutional dialogue."⁵⁸

Of course, the concept of "constitutional dialogue" was developed in 1997 by Peter Hogg and Allison Bushell in their article "The *Charter* Dialogue between

⁵³ *Khadr*, *supra* note 36.

⁵⁴ *BCCLA_CA*, *supra* note * at para 213.

⁵⁵ *Ibid* at para 220.

⁵⁶ *Ibid*.

⁵⁷ *Ibid* at para 231.

⁵⁸ *Ibid* at para 228.

Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All).⁵⁹ But the concept of *Charter* dialogue was intended as a descriptive, not a prescriptive one (as the BC Court of Appeal's judgment seems to suggest). Those urging this metaphor have said that they did not have in mind that the courts and legislatures "were literally 'talking' to each other," simply that court decisions left room for, and usually received, a legislative response.⁶⁰ In the solitary confinement case, the trial judge's declaration in respect of both Aboriginal and mentally ill and/or disabled inmates achieved this end and left room for a legislative response. Parliament could have done the work the Court of Appeal faulted the trial judge for not doing – it could have developed a procedure in the Act to protect the equality rights of Aboriginal inmates; it could have defined who was and was not mentally ill and/or disabled for purpose of excluding that population from segregation. It is the role of Parliament, not trial judges, to craft laws that address the constitutional infirmities identified in the trial process. Declaratory relief granted following such a process is not only "for" the executive and Parliament. It is "for" the claimants and the public who have an interest in seeing that injustice will be recognized and condemned as such by the courts and remedied by the legislator. Unfortunately, by locating the constitutional flaw in the maladministration of the law, the Court left no room for a legislative response and failing that declined to craft an effective remedy.

Canada sought and obtained leave to appeal to the Supreme Court of Canada.⁶¹ Joe intended to pursue this remedial issue on appeal. But then, after many years of delay, Canada introduced new legislation repealing the impugned laws and the appeal was abandoned. While it is perhaps encouraging to see government reform laws that it repeatedly and publicly committed to reforming for years and since before the trial even transpired,⁶² the end of the appeal left many questions raised by the Court of Appeal's judgment, including the remedial one, unanswered.

Joe would have argued on appeal that given the section 15 violations had been taking place for years and in very significant numbers, they could be safely described as the necessary result of the law. Drawing on *Morgentaler* and the dissent in *Little Sisters 1*, it was a flaw of the legislation itself that it failed to provide an intelligible standard for (a) when inmates ought not to be subjected to solitary confinement because of their mental health status, or (b) their Aboriginal social history. Section 52(1) has been applied, and should be, in cases like this when laws fail to provide an adequate standard for its application. A statute that authorizes a treatment as brutal as solitary confinement must contain an intelligible standard

⁵⁹ 35:1 Osgoode Hall L J 75.

⁶⁰ Peter M Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited - or Much Ado About Metaphors" (2007) 45:1 Osgoode Hall L J 1 at 4, 7.

⁶¹ *Attorney General of Canada v British Columbia Civil Liberties Association, et al*, 2020 CanLII 10501 (SCC).

⁶² See e.g. Letter from Prime Minister Trudeau to Minister Wilson-Raybould (12 November 2015) online: <<https://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>>.

to identify categories of the population who will not be subjected to such a treatment.

Failing adoption of that submission, he was determined to argue that, given subsequent experience and jurisprudence, and especially *Boudreault*, the time had come to rethink and reject the majority's approach in *Little Sisters 1*, with these fundamental problems for access to justice and constitutional accountability that it produced. In the next section, we develop that argument using *Boudreault*.

IV. The Little Sisters Problem Solved? *R v Boudreault* and “Latent Constitutional Defects”

In this section of the article, we argue that, since the Supreme Court's decision in *R v Boudreault*, one need worry less about the negative effects of *Little Sisters 1*. This is because, though *Little Sisters 1* was not cited by either the majority or dissent in *Boudreault*, the best reading of the case is that the majority of the Court overruled – or, at very least, significantly limited – the principle from *Little Sisters 1* that so concerns us in this piece. *Boudreault* was received as an important decision on s 12 of the *Charter* and an intriguing expansion of the story of the Court's treatment of mandatory minimum sentences, but it has not been treated as a case of structural constitutional import.⁶³ Our argument is that it very much is. Future courts met with arguments that a constitutional harm is properly traced to the maladministration of the statute, and that therefore no s 52 remedy in respect of the statute is available, will have to reckon with this impact of *Boudreault*.

Boudreault concerned the constitutionality of s 737 of the *Criminal Code*, which provided for a mandatory victim surcharge. This victim surcharge had been the subject of significant litigation, judicial consideration, and creative approaches in the lower courts for some time, but *Boudreault* offered an opportunity for the Supreme Court of Canada to weigh in on the matter. Several offenders challenged s 737 on the basis that it constituted cruel and unusual punishment, contrary to s 12, that it offended s 7, or both. The case ultimately turned on the s 12 argument, which focussed on the consequences of this mandatory surcharge on those who live in serious poverty and face significant forms of disadvantage and social marginalization. It was a somewhat unusual case in the arc of the Court's s 12 jurisprudence in that, rather than arising from practices of incarceration, it focussed on the consequences of an economic penalty and required an assessment of “gross disproportionality” closely tied and sensitive to questions of social location and economic equality. Indeed, and as with s 12 arguments in respect of solitary confinement, the suitability of the analytic paradigm of “gross disproportionality” for this kind of argument under s 12 has been questioned.⁶⁴

⁶³ That said, the decision of the majority to give immediate effect to the declaration of invalidity was also notable and of import beyond the s. 12 frame.

⁶⁴ See Lisa Kerr & Benjamin L Berger, “Methods and Severity: The Two Tracks of Section 12” (2020) 94 SCLR (2d) 235.

Writing for a 7-person majority of the Court, Justice Martin found that s 737 of the Criminal Code violated s 12, having, as it did, “impacts and effects” that “taken together, create circumstances that are grossly disproportionate, outrage the standards of decency, and are both abhorrent and intolerable.”⁶⁵ She found that the violation was not justified under s 1 and declared s 737 invalid, with immediate effect. Much can be said about the *Boudreault* decision. What interests us in this article is the nature and, most critically, the proximate cause of certain key effects of the surcharge that led Justice Martin to this conclusion. A careful analysis of these effects is what gives rise to the conclusion that *Boudreault* tacitly though clearly puts *Little Sisters* in its (now narrow) place.

Justice Martin identified four harms of the surcharge that, in combination, lead her to her conclusion that the surcharge was unconstitutionally cruel and unusual: “(1) the disproportionate financial consequences suffered by the indigent, (2) the threat of detention and/or imprisonment, (3) the threat of provincial collection efforts, and (4) the enforcement of *de facto* indefinite criminal sanctions.”⁶⁶ The exchange between the majority and the dissent (authored by Côté J) on how to treat two of these harms — the threat of detention/imprisonment and the threat of provincial collection efforts — illuminates *Boudreault*’s impact on the principle from *Little Sisters*.

As Justice Côté emphasizes in her dissenting judgment, “a defaulting offender cannot actually be imprisoned under s. 737 — that is, his or her liberty will not be taken away — merely because of poverty”.⁶⁷ The terms of the statute, as interpreted by the courts, are clear on this point. How can it then be that Justice Martin relies heavily on the threat of detention and/or imprisonment for the impecunious offender as a reason that this scheme should be declared constitutionally invalid? Justice Martin acknowledges the legal accuracy of what Justice Côté emphasizes, but notes that it is nevertheless true that “offenders who are poor, homeless, and addicted will live with the threat of incarceration and it is reasonably likely that they will spend at least some time in detention as a result of the surcharge.”⁶⁸ Why? She notes that even though the offender might not ultimately be imprisoned following a committal hearing, police officers may arrest and detain to secure attendance at that hearing. Moreover, Justice Martin notes that, once at the hearing, there is the practical problem of the difficulty that judges face in “draw[ing] the line between inability to pay and a refusal to pay.”⁶⁹ Perhaps these consequences can be avoided through fine option programs or extensions of time. Though Justice Martin notes that there is a release valve available in the form of fine option programs, which allow people to work off the fine, “fine option programs are not available in all provinces,”⁷⁰ and as for extensions of time, the processes for seeking those extensions are complex,

⁶⁵ *Boudreault*, *supra* note 8 at para 94.

⁶⁶ *Ibid* at para 65.

⁶⁷ *Ibid* at para 152 [emphasis in original].

⁶⁸ *Ibid* at para 69.

⁶⁹ *Ibid* at para 71

⁷⁰ *Ibid* at para 72.

daunting, and are not a task for which state-funded counsel is available.⁷¹ The result of all of this is a threat of imprisonment or detention that is grossly disproportionate and offensive to s 12.

Consider the proximate causes of this harm, which contributes to the unconstitutionality of the legislative scheme. The threat of imprisonment is a result of the potential use of police discretion, the difficulty that judges have applying the necessary legal standard, the failure of provinces to fund fine option programs, and poor administrative design of the extension system. None of these elements are found in the statute and indeed, as Justice Côté takes pains to note, they are in some instances at odds with the design of the scheme. She notes the legislation's preference for a summons over a warrant and the presumption of release pending the committal hearing. She notes that "to the extent that here is a perceived need for guidance on exactly where to draw the line between inability and refusal, it falls on this Court to make clear to lower courts that offenders need not sacrifice their basic necessities in order to pay the surcharge."⁷² And in respect of the fine options programs and the daunting nature of the extension proceedings that could relieve this threat of imprisonment, she observes — channeling the principle from *Little Sisters* — that "[t]o the extent that a province establishes procedures that are complex to the point of being inaccessible for many offenders, this cannot be attributed to the impugned *Criminal Code* provisions themselves but rather to the manner in which that province implements these procedural rules and requirements."⁷³

In short, the threat of imprisonment that so compels Justice Martin's analysis is properly attributable to the maladministration of the victim surcharge, not to the legislation itself. We think she is correct in tracing these effects to maladministration of the s 737 victim surcharge. Nothing in Justice Martin's reasons convincingly disputes, or even challenges, this tracing. And yet the majority holds the legislation accountable.

This arresting exchange, viewed from the perspective of the *Little Sisters* problem, is repeated in respect of the second effect compelling a finding of invalidity: the threat of provincial collections efforts. The dynamic and its marginalization of *Little Sisters* is even more vivid here. Justice Martin notes that although provincial collections efforts are not contemplated by the *Code*, they are a "direct and known consequence of the surcharge it mandates."⁷⁴ She further observes that (and the emphasis is ours), "[i]n terms of what actually occurs, trial judges have noted with concern that responsibility for the collection of these funds is sometimes delegated to private collection agencies"⁷⁵ and that there was evidence (brought by Pivot Legal Society) that "offenders in British Columbia may

⁷¹ *Ibid* at para 73.

⁷² *Ibid* at para 154.

⁷³ *Ibid* at para 149.

⁷⁴ *Ibid* at para 74.

⁷⁵ *Ibid*.

have their wages and even social assistance payments retained by the province in order to collect the amount of the victim surcharge.”⁷⁶

Justice Coté does not quarrel with the odiousness of these collection efforts. Rather, her objection is in the register of *Little Sisters*. Her response is to clarify the law. She reminds us that “civil remedies cannot be exercised as a means of recovering unpaid surcharges from offenders.”⁷⁷ The *Criminal Code* does not permit a province to enter an unpaid surcharge as a civil order, so the “reasonable hypothetical offender” is simply not vulnerable, as a matter of the proper administration of the scheme, to this harm. Again, consider the proximate cause: it is the unauthorized choice of provincial executives. This is a classic, clear case of the “maladministration of a statute.” For Justice Coté this means that it is not properly a factor in assessing the constitutionality of the legislation itself. Viewed from *Little Sisters*, she is correct. The majority nevertheless counts this as one of the harms that means that the victim surcharge offends s 12 of the *Charter*.

We have drawn this pattern out of these two reasons for the unconstitutionality of the mandatory victim surcharge, in which the bypassing of the *Little Sisters* problem is most vivid. But the overall tenor of the majority’s analysis is consistent. There is no discernible difference in how the majority treats or weighs harms that flow from the maladministration of the statute and those (like the disproportionate financial consequences suffered by the indigent) that flow more directly from the scheme itself. A strict application of the majority approach in *Little Sisters* would have compelled Justice Coté’s approach: an indication of when and where maladministration of the surcharge could violate individual rights, clarification of the law to better guide state action, and the preservation of the legislation. What happened to the *Little Sisters* problem?

We suggest that a sensitive reading of *Boudreault* against the backdrop of *Little Sisters* suggests a significant refinement and softening of the maladministration/legislation dichotomy. Specifically, the majority approach in *Boudreault* should be read as establishing the principle that when demonstrated and systematic rights-violative harms arise from the maladministration of a statute, responsibility for those effects should be attributed to the statute itself. This is because the legislation created the legal conditions precedent for those harms. Those legal conditions precedent are comprised both of the powers and points of discretion that the legislation created and also the measures not taken in the legislation to mitigate the risks of misuse or maladministration of that scheme. The law — and the legislator — will be responsible for the rights-violative world that, experience has shown us, it has created. One might best think of these as “latent constitutional defects” in the legislation — defects that, though not apparent on the face of the legislation, are surfaced by experience with the realities of the operation of the statute. Because they are demonstrated and systematic in nature, these failings must be viewed as features of the statute itself; they cannot be decoupled from the legislation without badly disrupting critical lines of constitutional accountability and democratic transparency.

⁷⁶ *Ibid* at para 75.

⁷⁷ *Ibid* at para 166.

This understanding of the jurisprudential overtaking of the *Little Sisters* problem calls for further filling in and elaboration using other recently decided cases, a task that we intend to undertake in another piece, focussed on this point. But interpreting *Boudreault* in this fashion makes the most (and, we think, only) sense of the core nature of the dispute between the majority and dissent. They agreed on the harms occasioned by the operation of the scheme. They agreed on the formal legal structure and what it permitted and purported to preclude. The difference was in the willingness to assign responsibility for the constitutional harms of the maladministration of the scheme to the statute itself. This difference is of constitutional moment, implicating the separation of powers and access to *Charter* justice in the way we have exposed in this piece.

Does the principle from *Little Sisters* that so concerned Joe and has provoked our article have any continuing role? We are open to the idea that if *Boudreault* does not represent a full defeat of that proposition, it signals its substantial retreat. It might be that courts ought to be cautious to hold legislation responsible for *Charter* violations arising from the maladministration of the scheme where the government can demonstrate that maladministration is isolated or occasional in nature, or has arisen before we have accumulated experience with the systematic operation of the scheme. As we have learned, to extend the principle further invites constitutional injustice. And even then, we would do well to bear in mind the question that Joe insisted we centre in our constitutional lives: who will be forced to bear the burden of our timorousness?

V. Conclusion

The gravamen of the “Little Sisters problem,” as we have described it, is that it insulates statutory schemes from direct constitutional challenge by attributing rights-limiting effects to the “maladministration” of the statute rather than laying those constitutional harms at the feet of statute itself. Having been so characterized, the constitutional harms are treated as the product of state action rather than the consequence of law, taking the section 52(1) remedy sought by an applicant off the table. Rather than engaging in constitutional review of legislation, courts employing this tool shift to a recommendatory posture regarding executive action implementing legislation.

As we have illustrated by reference to the solitary confinement litigation in British Columbia, the negative effects of this move made possible by the majority in *Little Sisters* are multiple. Most poignantly and pressingly, it puts vulnerable communities who are foreseeably harmed by what one might call “the world created by legislation” in the position of policing the executive — if the statute continues to be maladministered, as it was in *Little Sisters*, it falls to these communities to bring the matter back to the Courts, with the expense, delay, and ex-post need for vindication of already-established rights that this involves. In this, the *Little Sisters* problem is a problem of access to constitutional justice. But the *Little Sisters* problem is also a problem in the structure of constitutional accountability. Insistence on tracing unconstitutional effects to express features of legislative schemes absolves the legislative branch of accountability for the

foreseeable or even demonstrated effects of the legal worlds they have created. Indeed, the *Little Sisters* move — inadequately checked and limited — incentivizes an approach to legislation that directs more and more choices about implementation to the executive actors, shifting the axes of constitutional accountability in way that distorts the relationship among the branches of government. Responsibility for solutions to the constitutional problems identified by a court are sent to the less deliberative and less transparent branch of government. The gift that the Court gave to the legislature with *Little Sisters* was to allow it to remove itself too-readily from the *Charter* conversation.

As we have alluded to above, the principle from *Little Sisters* at issue in this piece has never been entirely stable. Others have noted, and indeed Justice Iacobucci noted in his dissenting reasons in *Little Sisters* itself, that the Court's practice prior to *Little Sisters* was inconsistent in how and when it would attribute unconstitutional effects to legislation or to maladministration.⁷⁸ We take *Boudreault* to be a point for resetting this issue, providing guidance on how and when, in practice, a court should lay the *Charter* violative effects of maladministration of a statute at the feet of the statute itself.

Joe thought he was a plumber with words. He was also a deep and creative thinker, an extraordinary teacher, and the finest advocate we've known. His super power was his ability to take any legal argument you could dream of and package it in a way that both courts and regular people could hear. What was striking about thinking with Joe, was that his gaze was always on the horizon, every precedent (even apparent victories) more of a question than an answer: what did the case even stand for, could it be interpreted, built upon, or shaped in some principled way to offer practical solutions to real world problems? We are grateful for the questions we had the opportunity to ponder with Joe. This article has attempted to map out one issue of significant importance not only to Joe, but which may be of interest to all those concerned as he was with access to justice and the rule of law. We would like to think that the overcoming of the *Little Sisters* problem is a victory in waiting for Joe. When the Courts solve it, we will continue to celebrate the long reach of his legacy.

⁷⁸ Sujit Choudhury & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41:1 Osgoode Hall LJ 1.