VANCOUVER
JUN 20 2017
SUPREME COURT SCHEDULING

No. S150415
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
THE JOHN HOWARD SOCIETY OF CANADA

PLAINTIFFS

AND:

ATTORNEY GENERAL OF CANADA

DEFENDANT

AND:

WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND
and CRIMINAL DEFENCE ADVOCACY SOCIETY

INTERVENORS

NOTICE OF APPLICATION

Name of applicant: The defendant, The Attorney General of Canada (Canada)

TO: The plaintiffs, BC Civil Liberties Association and the John Howard Society of Canada

AND TO: Counsel for the plaintiffs

AND TO: The intervenors, West Coast Women's Legal Education and Action Fund and Criminal Defence Advocacy Society

AND TO: Counsel for the intervenors

TAKE NOTICE that an application will be made by the defendant Canada to the case management and trial Judge at the courthouse at 800 Smithe Street, Vancouver, British Columbia on June 23, 2017, at 9:00 am, or such date and time as may be set for the order set out in Part 1 below.

Part 1: ORDER SOUGHT

1. Pursuant to Rule 8-5(1) that Canada's application to adjourn the trial be brought on short notice.

2. Pursuant to Rule 12-1(9)(a) and 12-2(9)(l)(s) an Order that the trial of this action set for July 4, 2017 for nine (9) weeks be adjourned generally or, alternatively, until after Parliament has completed its legislative process in relation to Bill C-56 introduced in Parliament on June 19, 2017.

Part 2: FACTUAL BASIS

A. OVERVIEW

1. On June 19, 2017 the Government of Canada introduced in the House of Commons Bill C-56, An Act to Amend the *Correctional and Conditional Release Act and the Abolition of Early Parole Act* (the Bill) – draft legislation which, if enacted, would significantly revise legal rules for the practice of administrative segregation in federal correctional facilities. The Bill proposes requiring that an inmate be released from administrative segregation before the end of 21 days of confinement, unless before then the institutional head orders in writing that the inmate is to remain in administrative segregation. At that point, an independent external reviewer would review the segregation and recommend whether the inmate should be released. The independent external reviewer will also be required to conduct a review(s) at other and subsequent times. There is a further provision that 18 months after the amended legislation is in force the presumptive release would change to 15 days.

2. In addition to the Bill's proposal of presumptive time limits and external oversight, Correctional Services Canada (CSC) has announced that on August 1, 2017 new Commissioner's Directives on administrative segregation (CDs 709 and 843) will be implemented that, among other things, will prohibit the use of administrative segregation for inmates with serious mental disorders who suffer significant impairment, inmates who are certified under provincial mental health legislation and inmates who are at imminent risk of suicide or self-injury. The new CD-709 will also improve the conditions of confinement in segregation, including increased time out of cell, daily showers and immediate allowance of personal effects. The Government of Canada has also announced the commitment of $57.8 million over five years, starting in 2017-18 and $13.6 million per year thereafter, to expand mental health care capacity for inmates in federal correctional facilities.

3. In this proceeding, the BC Civil Liberties Association and the John Howard Society of Canada (collectively referred to as the Plaintiffs) assert public interest standing to seek declaratory relief that sections 31 to 33 of the *CCRA* (the sections that provide for the use of administrative segregation under specified circumstances), both themselves and the way that they are administered by CSC, constitute unjustified breaches of sections 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). The Plaintiffs allege that the use of administrative segregation under the existing statutory scheme allows for the indeterminate segregation of an inmate in circumstances causing them injury, particularly those offenders suffering from mental illness.

4. If the Bill is enacted, the new statutory scheme will be significantly different from that which is now challenged by the Plaintiffs. The proposed statutory changes, in operation with the new CDs relating to the diversion and treatment of potentially vulnerable inmates, address each of the aspects of the existing scheme about which the Plaintiffs complain (time limits, independent oversight, conditions of confinement and diversion of those inmates with serious mental disorders).

5. With the tabling of Bill C-56, Canada asks this Court to adjourn the trial set for July 4, 2017 (for nine weeks) generally or, alternatively, until the completion of the legislative process. This will allow Parliament to consider, debate and potentially amend the Bill, and enact amended

legislation. It will also allow CSC to implement the new Directives and its policy reforms that will complement the proposed legislated reforms.

6. An adjournment serves multiple purposes. First, it is consistent with the jurisprudence of the Supreme Court of Canada providing that the judiciary should defer to the legislative branch when Parliament is carrying out its proper legislative purpose of considering changes to existing legislation that have been challenged in the courts. Second, by adjourning this constitutional challenge the Court would allow Parliament to consider, explain and debate the proper parameters of a new administrative segregation regime. This legislative history and the content of the amended law will be of invaluable assistance in any future judicial consideration of the new statutory scheme. Third, the adjournment would preserve scarce judicial resources by not adjudicating an existing statutory scheme that is likely to be replaced by a new one. The judiciary should defer the expenditure of resources until the new law and context have been established, and an appropriate party decides that further challenge is warranted. The present challenge to an existing statutory framework will effectively become moot if new legislation is enacted and expenditures made will have been wasted. This trial should not proceed as a reference of a proposed new framework before the content and context is properly available to the court for adjudication.

B. FACTS

1) The Plaintiffs' Claim

7. The Plaintiffs seek declaratory relief that sections 31 to 33 of the *CCRA* both themselves and the way that they are administered by CSC, constitute unjustified breaches of sections 7, 9, 10, 12 and 15 of the *Charter*. The Plaintiffs assert public interest standing arguing that this general challenge to the *CCRA* is a reasonable and effective means of challenging the statutory scheme thereby making the action an efficient and worthwhile use of this Court's scarce judicial resources.

2) The Existing Statutory Scheme

8. Section 31 of the *CCRA* provides that the purpose of administrative segregation is to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates.[1] The head of an institution is authorized to order that an inmate be confined in administrative segregation if there is no other reasonable alternative and the head believes on reasonable grounds that one of three situations exists:

a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;

b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or

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[1] *Corrections and Conditional Release Act*, SC 1992, c 20 ("*CCRA*") s 31(1)

c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.[2]

9. The head of the institution is required to release the inmate from administrative segregation at the earliest appropriate time.[3] A Segregation Review Board is required to conduct a hearing to review the inmate's case and recommend to the institutional head whether the inmate should be released.[4] By regulation a hearing must be conducted within five working days of the order confining the inmate, and then at least once every 30 days thereafter. An inmate's continued administrative segregation must be reviewed once every 60 days by the head of the region or a designated staff member in regional headquarters.[5]

10. The Plaintiffs do not challenge the validity of disciplinary segregation which is provided for in section 44 of the *CCRA*.

3) Charter Infirmities alleged in the Action

11. The Plaintiffs allege that prolonged, indefinite administrative segregation breaches the inmates' section 7 *Charter* right of security of the person, infringes the right under section 12 to be free from cruel and unusual punishment, and infringes the section 15 *Charter* right to be equal before and under the law. They allege that notwithstanding the statutory requirements that administrative segregation be used only when the security or safety of persons in the institution is at risk, and only then for the shortest possible period when no other reasonable measure is available, that this nevertheless fails to properly take into account any possible negative effect on the inmate.

12. The Plaintiffs argue that the lack of a finite period capping administrative segregation infringes *Charter* rights, as does the lack of independent oversight reviewing the necessity and duration of the ongoing segregation. The Plaintiffs complain that there is insufficient independence in the present review because the institutional head currently appoints the Segregation Review Board that carries out the review.

13. The Plaintiffs further allege that the harsh and punitive effects of prolonged segregation, particularly for inmates suffering from mental illness, can never be justified.

4) The Bill and Announced Changes to Commissioner's Directives

14. On June 19, 2017 the Government of Canada introduced in the House of Commons Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act.* (the Bill).

15. The Bill, if enacted, would provide that an inmate must be released from administrative segregation before the end of the 21st day of confinement, unless before then the institutional head orders in writing that the inmate is to remain in administrative segregation. If the inmate remains

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[2] *CCRA*, SC 1992, c 20 s 31(3)(a), 31(3)(b), 31(3)(c)
[3] *CCRA*, SC 1992, c 20 s 31(2)
[4] *CCRA*, SC 1992, c 20 s 33; Commissioner's Directive ("CD") 709 as at October 13, 2015 ss. 24-43
[5] *Corrections and Conditional Release Regulations*, SOR/92-620, s 21(2)(a), 21(2)(b)22; CD 709, ss. 44-46

in administrative segregation at the 21st day, an independent external reviewer would review the segregation and recommend whether or not the inmate should be released. The independent external reviewer will also be required to conduct a review if, in the same calendar year, the inmate has been placed in administrative segregation after having been in at least three separate times previously, or has been in administrative segregation for a cumulative total of 90 days, or reaches 90 days within four working days of placement. In all these circumstances, there will also be subsequent reviews by the independent external reviewer if the inmate remains in administrative segregation. Eighteen months after new legislation is in force the presumptive release date would change to 15 days.

16. In the Budget tabled in Parliament on March 22, 2017 the Government of Canada announced:

> To ensure that offenders with mental health needs receive proper care, Budget 2017 proposes to invest $57.8 million over five years, starting in 2017-18 and $13.6 million per year thereafter, to expand mental health care capacity for all inmates in federal correctional facilities.

17. On June 20, 2017, following consultation with stakeholders, CSC Commissioner announced that CSC would implement significant changes to the policies that govern the use of administrative segregation in federal correctional facilities effective August 1, 2017. The consultation phase ended May 30, 2017. The new Directive 709 will provide that certain groups are not admissible to administrative segregation, including inmates with serious mental disorders with significant impairments, inmates who are certified in accordance with provincial mental health legislation, and inmates who are actively engaging in self-injury or at elevated or imminent risk for suicide. Further, pregnant inmates, inmates with significant mobility impairments and inmates in palliative care are not admissible unless exceptional circumstances are identified. The new CD 709 will also provide enhanced conditions of confinement, including the immediate provision of essential items, the earlier allowance of all other personal property, daily showers and a minimum of two hours daily outside of the inmate's cell. In addition, new CD-843 (Interventions to Preserve Life and Prevent Serious Bodily Harm) will be expanded to address the needs and treatment of inmates with serious mental disorders with significant impairment, as well as self-injuring or suicidal inmates to ensure that those vulnerable inmates receive the mental health assessments, treatment and monitoring they need, are diverted away from administrative segregation.

Part 3: LEGAL BASIS

18. The issue on this application is whether the trial should be adjourned generally or, alternatively, until Parliament's legislative process relating to the Bill is completed. The adjournment would allow Parliament to consider draft legislation that, if enacted, would replace the existing statutory scheme of administrative segregation with a completely new statutory framework that would need to be considered on its own legislative and factual basis and in conjunction with the new Commissioner's Directives to be implemented as of August 1, 2017.

19. The Supreme Court of Canada has twice adjourned appeals raising issues of the constitutionality of statutory provisions because the government had tabled bills which, if enacted, would amend or eliminate the impugned legislation. In both cases the appeals had been perfected,

were on the eve of hearing, and both cases involved a private interest challenge to the legislation. While the Court's reasons for giving these procedural orders are not extensive, the basis for the decisions involve the following considerations:

a) The introduction of a bill in Parliament formally commences the legislative process of the legislative branch of Canadian government, a process which should attract the deference of the judicial branch, including the withholding of judicial review until a new law is enacted;

b) In allowing Parliament to consider and debate proposed new legislation, the court facilitates the creation of a legislative history upon which any new law can then be judicially reviewed, should the new law be challenged;

c) While the tabling of a bill that addresses impugned elements of a statutory scheme does not render the constitutional issue moot, it raises a reasonable prospect that the challenge will become moot if a new legislative scheme is enacted, even if the new framework requires further judicial consideration on its own particular facts.

20. In this case, the constitutional challenge is brought by corporate parties seeking public interest standing. All of the above-noted reasons why the Supreme Court's jurisprudence supports the adjournment of a private interest litigant's *Charter* challenges to existing legislation upon the tabling of a bill are even more compelling when dealing with a claim by a public interest litigant.

C. DEFERENCE TO THE LEGISLATIVE PROCESS

21. Parliamentary sovereignty and the separation of powers doctrine are well-established pillars of Canada's Constitution and have been recognized by the Supreme Court on numerous occasions. In *New Brunswick Broadcasting Co v Nova Scotia*, McLachlin J., as she then was, reasoned:

> ....Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. *It is fundamental to the working of government as a whole that all these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other*[6]. [emphasis added]

22. The application of this principle to the timing of judicial review of legislation was most recently summarized by DeMontigny J.A. of the Federal Court of Appeal in *Canada v Mikisew Cree*:

> That *courts will only come into the picture after legislation is enacted and not before* (except when their opinion is sought by a government on a reference) is a well-established principle (see *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at p. 785, 1 C.R.R. 59; *Wells v.*

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[6] *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House Assembly)*, [1993] 1 SCR 319 at p 389.

> *Newfoundland*, [1999] 3 S.C.R. 199 at para. 59, 177 D.L.R. (4th) 73). It was probably best captured by Sopinka J., writing for a unanimous court in *re Canada Assistance Plan*. In that case, the Supreme Court was asked to consider whether a procedural duty of fairness prevented Parliament from enacting legislation that cut spending on provincial programs which had been promised under a number of federal-provincial agreements. In that context, the Court found that no duty of fairness attached to the formulation and introduction of a bill in Parliament, and that courts would not "meddle" with the exercise of legislative functions...[7] [emphasis added]

23. Adjourning the trial will allow Parliament a reasonable amount of time to debate and consider whether the existing statutory framework for administrative segregation should be replaced, and whether the proposed new requirements are appropriate. Parliament's exercise of its legislative responsibility not only informs courts after new legislation is enacted, it is also the proper sphere of legitimate activity of the legislative branch of government, and should both receive deference and not be "interfered" with by the judicial branch until a law is enacted.

24. In *R v Malmo-Levine*, a person charged with the possession of marijuana challenged the constitutionality of provisions of the *Narcotic Control Act* that prohibited the possession of marijuana. The challenge was dismissed in lower courts and received leave to appeal to the Supreme Court of Canada. Prior to the hearing of the appeal, the Attorney General of Canada and the Minister of Justice announced his intention to introduce legislation in Parliament that would in some way decriminalize the existing marijuana offence. In a motion heard days before the scheduled hearing, Chief Justice McLachlin adjourned the appeal, giving the following reasons:

> ...The process announced by the Minister will inevitably involve a discussion of what harm comes from the conduct covered by these offences, and its proportionality to conviction and its consequences.
>
> That examination and discussion may well prove to be of relevance to the case and of interest to the parties, and may provide guidance to the Court in deciding the present appeals. Accordingly, considering these circumstances, particularly the interest in a full and fair hearing on these issues, the Court will adjourn these appeals to the Spring term.[8]

25. Similarly in *Frank v Canada*, the Supreme Court granted leave from a decision of the Ontario Court of Appeal finding provisions of the *Canada Elections Act* that limited the right of a long-term non-resident Canadian citizen's right to vote to be a justified breach of section 3 of the *Charter*. Two months before the scheduled hearing of the perfected appeal a bill was tabled proposing that Parliament eliminate the statutory limits impugned in the appeal. The Chief Justice granted the Attorney General of Canada's motion for a 12 month adjournment of the appeal, notwithstanding the Appellants' opposition.[9]

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[7] *Canada (Governor General in Council) v Mikisew Cree First Nation*, 2016 FCA 311 at para 53.
[8] *R v Malmo-Levine; R v Clay*, [2002] SCJ No 88 at paras 2-3.
[9] *Gillian Frank et al v Attorney General of Canada (Ont) (36645)*, Order of Chief Justice McLachlin on January 11, 2017; *Gillian Frank, et al v Attorney General of Canada (Ont) (36645)*, Notice of Motion of the Respondent dated December 1, 2016.

26. Finally, in *Reference re Same-Sex Marriage*, the Supreme Court declined to decide the fourth reference question referred to the Court by the Governor in Council – whether the common law opposite-sex requirement for marriage for civil purposes was consistent with the *Charter* – after the Government expressed its intention to introduce a bill proposing that Parliament eliminate this requirement. Given the government's stated commitment to that course of action, the Court held that offering its opinion on the constitutionality of an opposite-sex requirement for marriage would serve no legal purpose.[10]

ADJOURNMENT ALLOWS FOR THE CREATION OF A PROPER LEGISLATIVE HISTORY

27. The jurisprudence of the Supreme Court adjourning constitutional challenges to legislation when new bills are tabled, emphasizes the value of the legislative history that is created when the legislative process is allowed to be completed. The legislative history may reveal an important explanation in Hansard as to why the new segregation scheme is appropriate, it may reveal amendment of the Bill with Hansard explaining why changes are appropriate, or helpful factual and legislative analysis in Committee.

28. It is only after this legislative process is completed, and the court has the benefit of the legislative history, that a party can challenge the new legislation.

MOOTNESS

29. The Plaintiff's action seeks declaratory relief that the present statutory requirements for administrative segregation unjustifiably breaches sections 7, 9, 10, 12 and 15 of the *Charter* and is therefore unconstitutional. The applicant alleges that this constitutional infirmity arises because there is no statutory limit on the duration of the segregation, there is no external oversight of the institution head's segregation decision, and the statutory scheme insufficiently accommodates inmates with mental illnesses and Aboriginal inmates.

30. Bill C-56 proposes that there be independent review of any administrative segregation order when an institutional head believes it necessary that an inmate remain in administrative segregation for longer than 21 days, which will change to 15 days 18 months after the coming into force of the legislation. The government will also be implementing changes through Commissioner's Directives that will make inmates with serious mental disorders with significant impairments inadmissible to administrative segregation, will divert those suffering acute mental illness while in segregation to mental health centres and which will improve the conditions of confinement in administrative segregation.

31. The Bill, informed by the announced changes to Directives, will be subject to Parliament's consideration, debate and decision on whether the Bill will be enacted in its present or any amended form. The Bill may take a different form as a result of amendment during Parliament's legislative consideration. If some form of the Bill is enacted, the present action will be rendered moot, as there will be a new law that is fundamentally different from the present one.

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[10] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 65.

32. The law relating to whether a court should hear an issue that has become moot is set out in *Borowski v Canada.*[11] First, the Court must determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, the Court may exercise its discretion to hear a case that is moot, considering factors such as the concern for judicial economy and sensitivity to the roles played by the legislative and executive branches of government.

33. If the legislation is passed, this action will become moot upon the coming into force of Bill C-56. The challenged statutory framework for administrative segregation and the existing regulatory context will no longer exist. In its place will be a framework that includes presumptive time limits and external oversight of decisions requiring longer segregation. Further, new Directives will require enhanced conditions of confinement and new policy creates measures to divert those in segregation suffering from mental health effects. The existing scheme will no longer present a live controversy requiring adjudication by this Court.

34. The new statutory framework enacted by Parliament will only be known after the legislative process has been carried out. It would be entirely speculative and contrary to the respect accorded between the branches of government for a court to conduct what would effectively be a reference prior to the Bill's enactment. Again, that is not a proper role for the Court in an action.

35. Adjourning the trial to allow Parliament time to debate the measures contained in the Bill is consistent with the concern for judicial economy. This Court's scarce resources will not be usefully expended on hearing extensive evidence and arguments and adjudicating a dispute that will either be resolved by the legislative process, or which will have to be determined on a very different legislative and factual record.

36. Finally, the Plaintiffs assert public interest standing. The Plaintiffs have no private interest in administrative segregation or the relief that is sought. They must therefore satisfy this Court that this action is a reasonable and effective means to bring a case of public importance before the Court, and that it would be an efficient and worthwhile use of the Court's scarce judicial resources to hear and decide it.[12] A *Charter* challenge to a statutory scheme that is subject to a legislative process for the purpose of significant changes is no longer an efficient and worthwhile use of the Court's scarce resources. This is particularly so is where the relief sought is a declaration(s) of invalidity of the existing legislative regime and administration of the laws. Parliament will be addressing policy reform of administrative segregation. There is a reasonable probability that a new law will be enacted by Parliament replacing the impugned provisions and rendering this proceeding moot. The Plaintiffs have no standing to bring a reference, and the Courts should not indirectly judicially review the proposed content of the new Bill until it is enacted. To do so would not allow proper deference to Parliament's proper sphere of activity, and would be improperly speculative as to what the new law might be.

Part 4: MATERIAL TO BE RELIED ON

1. The pleadings herein;

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[11] *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342.

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

2. The Affidavit #1 of Stefani Lagana sworn June 20, 2017.

Canada estimates that the application will take ~~half a day.~~ one hour.

☐ This matter is within the jurisdiction of a master
☒ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within 5 business days after service of this notice of application or, if this application is brought under Rule 9-7, within 8 business days after service of this notice of application

(a) file an application response in Form 33,

(b) file the original of every affidavit, and of every other document, that
(i) you intend to refer to at the hearing of this application, and
(ii) has not already been filed in the proceeding, and

(c) serve on the applicant 2 copies of the following, and on every other party of record one copy of the following:
(i) a copy of the filed application response;
(ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
(iii) if this application is brought under Rule 9-7, any notice that you are required to give under Rule 9-7(9).

Dated: June 20, 2017

Signature of lawyer for
ATTORNEY GENERAL OF CANADA

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Per: Mitchell R. Taylor, Q.C.
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Solicitor/Counsel for Canada

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs of Part 1 of this notice of application

☐ with the following variations and additional terms:

_____

_____

_____

Dated: _____ _____

Signature of
☐ Judge ☐ Master

APPENDIX

THIS APPLICATION INVOLVES THE FOLLOWING:

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service

- ☐ mediation
- ☐ adjournments
- ☐ proceedings at trial
- ☐ case plan orders: amend
- ☐ case plan orders: other
- ☐ experts