

Amended pursuant to the Consent Order dated May 12, 2017, entered on May 16, 2017.  
Original filed the 27<sup>th</sup> day of February, 2015,  
1<sup>st</sup> Amended file the 30<sup>th</sup> day of May, 2017.



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 DEFENSE ADVOCACY SOCIETY

INTERVENORS

**FURTHER AMENDED RESPONSE TO CIVIL CLAIM**

Filed by: the defendant, Attorney General of Canada

**Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS**

**Division 1—Defendant's Response to Facts**

1. The facts alleged in paragraphs 1 to 3 of Part 1 of the Notice of Civil Claim are admitted.
2. The facts alleged in paragraphs 5, 6 and 11 to 21 of Part 1 of the Notice of Civil Claim are denied.

3. The facts alleged in paragraphs 4, and 7 to 10 of Part 1 of the Notice of Civil Claim are outside the knowledge of the defendant Attorney General of Canada (“AGC”).

### **Division 2—Defendant’s Version of Facts**

1. This Response to Civil Claim is filed on behalf of the AGC.

2. Except as admitted herein, the AGC denies every allegation in the Notice of Civil Claim.

3. In response to the whole Notice of Civil Claim, the AGC relies on the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, particularly section 24; the *Corrections and Conditional Release Act*, SC 1992, c 20 (the “CCRA”), particularly sections 31-37 and 87; the *Corrections and Conditional Release Regulations*, SOR/92-620 (the “CCRR”), particularly sections 19-23 and 97; *Commissioner’s Directive 709 – Administrative Segregation and Guidelines 709-1*; and the *Limitations Act*, SBC 2012, c 13, particularly sections 6, 8, 21 and 30.

4. Any matter or claim relied on by the plaintiffs British Columbia Civil Liberties Association (“BCCLA”) and the John Howard Society of Canada (“JHSC”) that occurred, came into existence or was discovered more than two years before the filing of the Notice of Civil Claim on January 19, 2015 is barred by the effluxion of time.

### **Administrative Segregation**

5. In response to paragraphs 12, 14 and 15 of Part 1 of the Notice of Civil Claim, the AGC says that the limited circumstances in which administrative segregation can be used by the Correctional Service of Canada (“CSC”) are set out in the CCRA, as amended. Subsection 31(3) provides that the head of an institution may order that an inmate be confined to administrative segregation where there are reasonable grounds to believe that allowing the inmate to associate with other inmates would jeopardize the

security of the penitentiary or the safety of any person, including the inmate's own safety, other inmates, staff and visitors, or would interfere with an investigation that could lead to a criminal or disciplinary charge. The institutional head must be satisfied that there is no reasonable alternative to segregation and must release the inmate from segregation at the earliest appropriate time. Administrative segregation is not a form of punishment or deterrence and does not form part of the criminal sentence imposed by the courts. Administrative segregation is used by CSC as a last resort to manage the risk posed by the inmate's presence in the inmate population outside segregation.

6. An inmate in administrative segregation is entitled to the same rights and conditions of confinement as all other inmates, except those that must necessarily be limited as a result of the inmate's placement in administrative segregation or to meet security requirements. An inmate placed in administrative segregation has regular and meaningful contact with a range of individuals. Depending on the institution, the particular circumstances of the inmate and safety considerations, these individuals can and do include: correctional officers, case management team members, institutional managers, health care professionals (including mental health professionals), spiritual and religious representatives, program officers, school teachers, behavioural counsellors, visitors and other inmates. The inmate also has access to legal counsel.

7. The *CCRA*, together with the *CCRR* set out due process and administrative steps in relation to inmates placed in administrative segregation. Specifically, sections 31 to 37 of the *CCRA* and sections 19 to 23 of the *CCRR* provide a code of procedural and substantive safeguards to ensure that an inmate placed in administrative segregation is treated fairly, humanely and in accordance with the rule of law. In particular, the inmate must be notified in writing of the reasons for placement in administrative segregation within one working day of placement, and a segregation review board must conduct a review hearing within five working days after the inmate has been placed in administrative segregation and at least once every thirty days thereafter. The segregation review board is chaired by an institutional manager and is composed of an interdisciplinary team which may include health care professionals or other persons as

appropriate. The inmate has an opportunity to be present at the review board hearing and make representations. If an inmate remains in administrative segregation, the head of the CSC region or a staff member in the regional headquarters who is designated by the head of the region must review the case every sixty days. Pursuant to subsection 97(2) of the *CCRR*, CSC must ensure that every inmate is given a reasonable opportunity to retain and instruct counsel without delay and is informed of this right upon placement in administrative segregation.

8. Section 87 of the *CCRA* also requires CSC to take into consideration an inmate's state of health and health care needs in all decisions affecting the inmate, including decisions relating to administrative segregation.

9. Administrative segregation procedural safeguards are reinforced in the CSC national policy on administrative segregation, *Commissioner's Directive 709 – Administrative Segregation and Guidelines 709-1*. This policy provides that an inmate in administrative segregation has access to: a) correctional programs and interventions; b) case management services; c) spiritual support; d) psychological counselling as required; e) the opportunity to exercise at least one hour every day outdoors if the weather permits or indoors if it does not; f) a shower no less than every second day; g) access to personal effects if the inmate is maintained in segregation following the fifth working day segregation review; h) access to legal counsel without delay; and (i) structured visits from inmate committee members or peer support.

10. CSC policy also provides that health care professionals be consulted before an inmate is placed in administrative segregation, that a mental health/suicide screening be conducted upon placement, that a nurse visit the inmate at the time of admission to segregation or without delay, that physical and mental health concerns be considered as part of the regular segregation reviews and that a written psychological assessment of the inmate's current mental health status be completed by a psychologist at least once within the first consecutive twenty-five days of an inmate's placement in administrative segregation and once every subsequent sixty days. A registered health care

professional must also visit each inmate in administrative segregation every day including weekends.

11. In response to paragraph 13 of the Notice of Civil Claim, the AGC says that the purposes of disciplinary and administrative segregation are different, which accounts for the distinct processes used for each. Section 38 of the *CCRA* provides that the purpose of the disciplinary system is to encourage inmates to conduct themselves in a manner that promotes the good order of the penitentiary, through a process that contributes to the inmates' rehabilitation and successful reintegration into the community. In the disciplinary context, adjudication by an independent party is appropriate in order to assess the guilt of the accused inmate and to impose a time-limited sanction that is proportionate to the offence, including up to thirty days of disciplinary segregation or forty-five days for sanctions imposed consecutively. This purpose is different from that of administrative segregation which is to provide prison authorities with a means to help ensure the security of federal penitentiaries or the safety of any person, including the segregated inmate's own safety.

### **Effects of Long-Term Administrative Segregation**

12. The AGC denies that administrative segregation has the effects or impacts that are alleged in paragraphs 16 to 21 of the Notice of Civil Claim. The AGC says that inmates in administrative segregation do not suffer from the alleged effects as a result of their placement in administrative segregation. Research on the possible effects or impacts of long-term administrative segregation is inconclusive. Further, while in administrative segregation, an inmate's well-being is monitored and appropriate steps are taken to ensure that the inmate's health and well-being are not adversely affected.

13. Administrative segregation in Canada is governed by the *CCRA*, *CCRR* and *Commissioner's Directives*. It is different from and not analogous to the concept of "solitary confinement" referred to in many foreign jurisdictions and should not be confused with it. In particular, the criteria for placement, oversight, safeguards and

conditions of confinement associated with solitary confinement can be very different. To the extent that the BCCLA and JHSC rely on reports, articles, opinions and commentary from foreign jurisdictions on or relating to “solitary confinement”, they may not be applicable or relevant to the Canadian context.

## **Part 2: RESPONSE TO RELIEF SOUGHT**

1. The AGC consents to the granting of none of the relief sought in Part 2 of the Notice of Civil Claim.
2. The AGC opposes the granting of all of the relief sought in Part 2 of the Notice of Civil Claim.
3. The AGC says that the Notice of Civil Claim and this action should be dismissed with costs.
4. Alternatively, if the court were to make a declaration of invalidity then such declaration be suspended for the period of one year from the date of judgment.

## **Part 3: LEGAL BASIS**

### **No Public Interest Standing**

1. BCCLA and JHSC do not have private interest standing to bring this action. Further, they do not meet the test for public interest standing. In particular, others, such as inmates in administrative segregation, are the most directly affected by the impugned laws and are better placed to request the relief BCCLA and JHSC seek and to provide an adequate factual foundation.
2. Alternatively, if the test for public interest standing is met, then only one plaintiff should be found to meet that test as it would be duplicative, unnecessary and contrary to

the jurisprudence on standing to have two plaintiffs with public interest standing in this action.

### **No *Charter* infringements**

3. The AGC pleads and relies on the *CCRA* and *CCRR*, including sections 31 to 37 of the *CCRA* and sections 19 to 23 of the *CCRR*.

4. The AGC further pleads and relies on section 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11* (the "*Constitution Act, 1982*") and sections 1, 7, 9, 10, 12, 15 and 24 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* (the "*Charter*").

5. The AGC denies that the impugned laws on their face or in their administration infringe any provisions of the *Charter*.

6. Further, the claim by BCCLA and JHSC relying on public interest standing for a declaration under subsection 24(1) of the *Charter* that the administration of the impugned laws unjustifiably infringes the *Charter* is a claim unknown to law and should be struck out pursuant to Rule 9-5 of the *Supreme Court Civil Rules*. A declaration of unconstitutional administration of legislation under subsection 24(1) of the *Charter* can only be sought by a party alleging a violation of that party's own constitutional rights.

7. Further, *Charter* issues should not be decided in a factual vacuum. A factual matrix and evidentiary record are required to decide *Charter* issues. The BCCLA and JHSC are not directly affected by the impugned legislation or its application and do not have direct knowledge of facts that are relevant to the *Charter* issues.

8. Alternatively, if the impugned laws infringe rights under sections 7, 9, 10, 12 or 15 of the *Charter*, they are saved under section 1 of the *Charter* as reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society.

### **No Breach of Section 7 of the *Charter***

9. The impugned laws do not breach section 7 of the *Charter*. In particular, the *CCRA*, *CCRR* and *CSC* policy set out a scheme of procedural and substantive safeguards that accords with the principles of fundamental justice.

10. Administrative segregation may constitute a deprivation of liberty. However, an inmate is not placed in administrative segregation for an indefinite period of time. Pursuant to subsection 31(2) of the *CCRA*, the inmate must be released from administrative segregation at the earliest appropriate time having regard to the security of the penitentiary and the safety of the inmate and other persons.

11. Administrative segregation does not infringe the rights to security of the person or life. An inmate in administrative segregation has regular and meaningful contact with other persons and has access to appropriate programs and services.

### ***Principles of Fundamental Justice***

12. The impugned laws on their face or in their administration are not arbitrary or overbroad. An institutional head may order administrative segregation only when the institutional head is satisfied there is no reasonable alternative in accordance with subsection 31(3) of the *CCRA*.

13. The impugned laws on their face or in their administration are not grossly disproportionate in their effect and do not authorize or lead to prolonged, indefinite administrative segregation, or apply to conduct that bears no relation to the impugned laws purpose. An institutional head may only have resort to administrative segregation to maintain the security of the penitentiary or the safety of any person and must release the inmate from segregation at the earliest appropriate time, as described in paragraph 5 of part 1 above.



14. The impugned laws on their face or in their administration are not procedurally unfair. Sections 31 to 37 of the *CCRA* and 19 to 23 of the *CCRR* establish a procedural framework that is fair for an inmate in administrative segregation. It provides for notice, participation and regular reviews.

15. The reasonable accommodation of the disabled is not a principle of fundamental justice. Alternatively, the impugned laws on their face or in their administration reasonably accommodate an inmate who suffers from disability, including mental disability. Subsection 36(1) of the *CCRA* requires that a registered health care professional visit an inmate in administrative segregation at least once every day. Section 87 of the *CCRA* requires CSC to take into consideration an inmate's state of health and health care needs in all decisions affecting the inmate, including decisions relating to administrative segregation. CSC's policy on administrative segregation, described above, requires that the inmate's mental health be considered in relation to the inmate's placement in administrative segregation and regularly thereafter, and the provision of mental health services, including psychological counselling, as required.

#### **No Breach of Sections 9 and 10 of the *Charter***

16. The impugned laws on their face or in their administration do not breach sections 9 and 10 of the *Charter*. They are not arbitrary. As well, an inmate placed in administrative segregation is informed of the reasons for the inmate's administrative segregation. The impugned laws on their face or in their administration also do not hinder an inmate's ability to retain and instruct counsel without delay and to be informed of the inmate's right to do so. In accordance with subsection 97(2) of the *CCRR*, CSC must ensure that an inmate placed in administrative segregation is given a reasonable opportunity to retain and instruct legal counsel without delay and that the inmate is informed of this right. The inmate furthermore has the right to have the validity of the inmate's placement in administrative segregation be determined by way of judicial review, including *habeas corpus*, and to be removed from administrative segregation if the placement is unlawful. An inmate may also challenge the inmate's placement in

administrative segregation by way of the grievance process provided for in the *CCRA* and *CCRR*.

17. Administrative segregation is imposed for the least amount of time that is appropriate and periodic reviews are carried out in accordance with the *CCRA*, *CCRR* and CSC policy.

**No breach of Section 12 of the *Charter***

18. The impugned laws on their face or in their administration do not constitute cruel and unusual treatment or punishment. They do not breach section 12 of the *Charter*.

19. The impugned laws on their face or in their administration are not a form of punishment or deterrence. Administrative segregation is a legislative measure available to the institutional head to maintain the security of the penitentiary or the safety of any person, as described in paragraph 5 of part 1 above. It is used only when there is no reasonable alternative and the inmate must be released from administrative segregation at the earliest appropriate time. While in administrative segregation, the inmate has access to institutional staff and professionals, periodic reviews and access to programs and services, as outlined above.

**No Breach of Section 15 of the *Charter***

20. The impugned laws on their face or in their administration do not infringe the right to equality under subsection 15(1) of the *Charter*.

21. The impugned laws on their face or in their administration neither discriminate against nor have an adverse effect on individual inmates or groups of inmates on the basis of enumerated, analogous or other grounds, including inmates who have mental or physical disabilities or illnesses and aboriginal inmates.

## Section 1 of the *Charter*

22. In the alternative, if the impugned laws on their face or in their administration infringe rights guaranteed by sections 7, 9, 10, 12 or 15 of the *Charter*, they are saved under section 1 of the *Charter* as reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. The objectives of the impugned laws, namely, to maintain the security of a penitentiary or the safety of any person, as described above, are of sufficient importance to justify limiting the *Charter* rights. Moreover, the laws (i) are rationally connected to their objectives, (ii) impair the *Charter* rights as little as possible and (iii) are proportionate in their effects.

## Relief Sought

23. Wherefore the defendant Attorney General of Canada says that the plaintiffs' Notice of Civil Claim and this action should be dismissed with costs.

Defendant's address for service: Department of Justice  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Attention: Mitchell R. Taylor, Q.C.  
Phone: 604-666-2324

Fax number address for service (if any): 604-666-2710

E-mail address for service (if any): Not applicable

Dated: ~~27 February 2015~~ 24 May 2017

20 June 2017

*MRT.*

Signature of lawyer for  
**ATTORNEY GENERAL OF CANADA**

Department of Justice Canada  
British Columbia Regional Office  
900 – 840 Howe Street  
Vancouver, BC V6Z 2S9  
Fax: (604) 666-2710

**Per: Mitchell R. Taylor, Q.C.**  
Tel: (604) 666-2324

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

- (a) prepare a list of documents in Form 22 that lists
  - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
  - (ii) all other documents to which the party intends to refer at trial, and
- (b) serve the list on all parties of record.