No. S-150415
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

APPLICATION RESPONSE

Application Response of: British Columbia Civil Liberties Association and The John Howard Society of Canada, (the "application respondents")

THIS IS A RESPONSE TO the notice of application of the Attorney General of Canada filed 20 Jun 2017.

Part 1: ORDERS CONSENTED TO

The application respondents consent to the granting of none of orders set out in Part 1 of the notice of application seeking an adjournment of the trial.

Part 2: ORDERS OPPOSED

The application respondents oppose the granting of the order set out in paragraph 1 of Part 1 of the notice of application.

Part 3: ORDERS ON WHICH NO POSITION IS TAKEN

The application respondents take no position on the granting of the orders set out in none of the paragraphs set out in Part 1 of the notice of application.

Part 4: FACTUAL BASIS

1. On January 19, 2015, the plaintiffs filed the within Notice of Civil Claim seeking declarations that ss. 31, 32 and 33 of the *Corrections and Conditional Release Act* [*CCRA*] (the "impugned laws") unjustifiably infringe ss. 7, 9, 10, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Constitution Act, 1982*") and are of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. Further, or in the alternative, the plaintiffs seek a declaration pursuant to s. 24 of the *Charter* that the administration of the impugned laws unjustifiably infringes ss. 7, 9, 10, 12 and 15 of the *Charter*.

2. On February 27, 2015, the defendant filed the within Response to Civil Claim in which it denied that the impugned laws breach the *Charter* on their face or in their administration. In the alternative, if the impugned laws breached the *Charter*, the defendant pled that they were justified under s. 1 of the *Charter*.

3. In November 2015, Prime Minister Trudeau made public his mandate letter addressed to the Minister of Justice and Attorney General of Canada. The mandate letter provided in part:

> You should conduct a review of the changes in our criminal justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system. Outcomes of this process should include increased use of restorative justice processes and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians, and implementation of recommendations from the inquest into the death of Ashley Smith regarding the restriction of the use of solitary confinement and the treatment of those with mental illness. [emphasis added]

Plaintiffs' Notice to Admit dated 16 May 2016
Attorney General's Reply to Notice to Admit dated 30 May 2016

4. Those recommendations, made in December 2013, (the "Smith Recommendations") included, *inter alia*:

> 27. That, in accordance with the Recommendations of the United Nations Special Rapporteur's 2011 Interim Report on Solitary Confinement, indefinite solitary confinement should be abolished.
>
> 28. That there should be an absolute prohibition on the practice of placing female inmates in conditions of long-term segregation, clinical seclusion, isolation, or observation. Long-term should be defined as any period in excess of 15 days.

29. That until segregation and seclusion is abolished in all CSC-operated penitentiaries and treatment facilities:

a) CSC restricts the use of segregation and seclusion to fifteen (15) consecutive days, that is, no more than 360 hours, in an uninterrupted period;

b) That a mandatory period outside of segregation or seclusion of five (5) consecutive days, that is, no less than 120 consecutive hours, be in effect after any period of segregation or seclusion;

c) That an inmate may not be placed into segregation or seclusion for more than 60 days in a calendar year; and

d) That in the event an inmate is transferred to an alternative institution or treatment facility, the calculation of consecutive days continues and does not constitute a "break" from segregation or seclusion.

Plaintiffs' Notice to Admit dated 16 May 2016
Attorney General's Reply to Notice to Admit dated 30 May 2016
Affidavit #4 of Sally Yee, affirmed 21 Jun 2017 ("Yee #4"), Exhibit A, Examination for Discovery of Bruce Somers conducted on March 24, 2016, pp. 12-24

5. On May 10-11, 2016, the parties met for settlement discussions.

6. A mediation was scheduled for October 31 and November 1, 2016, to discuss the critical issues in this litigation. On October 27, 2016 the plaintiffs were advised that the Attorney General did not have instructions to discuss those issues and the mediation was cancelled.

7. The plaintiffs have not participated in any further settlement meetings.

8. By consent, on December 15, 2016, this Court ordered that the trial scheduled to commence January 3, 2017 for 11 weeks be adjourned to July 4, 2017 for eight weeks.

9. The trial was adjourned in order to give government an opportunity to reform administrative segregation in Canada which it had recently publically indicted was its intent.

10. By April 2017, no such reforms were made and the parties resumed trial preparation in earnest.

11. The parties have exchanged numerous lists of documents and have completed all examinations for discovery after multiple sessions.

12. Multiple case management, judicial management and trial management conferences have been held.

13. Witnesses have been scheduled and travel arrangements are being made.

14. The parties exchanged affidavits and will-say statements on Friday, June 16, 2017. As well, the plaintiffs delivered a witness list with an approximate schedule of witnesses on June 16, 2017.

15. The parties are ready to proceed on the schedule trial date of July 4, 2017.

16. On June 19, 2017, Bill C-56 was introduced for first reading.

17. The House of Commons is only scheduled to sit until June 23, 2017. After that it is not scheduled to sit again until September 18, 2017.

Yee #4, Exhibit B

18. There are media reports that claim the Prime Minister may prorogue Parliament in the Fall. If Parliament is prorogued prior to Bill C-56 receiving Royal Assent, it will die on the Order Paper and likely need to be reintroduced as if it had never existed.

Yee #4, Exhibits C and D

19. Bill C-56 has no hard caps, the independent external oversight has no decision-making authority, and the proposed amendments do not include anything about mentally ill and/or aboriginal inmates.

20. On June 20, 2017, Correctional Services Canada announced that on August 1, 2017 it would be implementing new Commissioner's Directives 709 and 843 ("CDs") dealing with administrative segregation and mental health care that, among other things, will prohibit the use of administrative segregation for certain mentally disordered and mentally ill inmates.

21. As to whether this litigation contributed to the improvement in correctional performance, and with reference to administrative segregation in particular, Mr. Somers testified during his examination for discovery "I think it keeps our eye on the ball, yes".

Yee #4, Exhibit E

Part 5: LEGAL BASIS

1. The plaintiffs rely on the courts' inherent power to control its process in resisting this adjournment application.

2. There is no need for an adjournment from the perspective of trial readiness. The parties are ready for trial in July 2017.

3. Nor is Canada's hypothetical future action including possible legal or policy change any reason to adjourn the trial.

4. Bill C-56 has so far only received first reading. It may yet be amended. It may yet die on the Order Paper. It is therefore uncertain whether it will be enacted and if so, in what form.

5. The new CDs will not be implemented, if at all, until August 2017.

6. There is no explanation for Canada's dilatory response in reforming the laws and policy concerning administrative segregation – reforms which have been on Government's stated agenda for almost two years.

7. The announcement of these potential new laws and policy on the very eve of trial significantly bolsters the plaintiffs' arguments that the present laws are unconstitutional insofar as they are overbroad and also undermines any potential defence in this case by the Attorney General on the basis that the present laws are minimally impairing.

8. Yet Bill C-56 in the plaintiffs' submission still does not comply with the Constitution. Without hard caps and an independent external review with real powers, the proposed law still permits exactly the kind of indefinite, prolonged and arbitrary decision making that the present law allows.

9. Nor is there any merit to the suggestion that the Court would benefit from the legislative record that would be created in the enactment of Bill C-56. It is inconceivable that there would be anything in that record that would add to the very extensive record that is before this Court.

10. Unlike cases relied upon by the Attorney General, and contrary to the suggestion at paragraph 28 of the notice of application, the present challenge is to *extant* legislation that is having present unconstitutional effects. What is sought is not an advisory opinion of the Court about Bill C-56, but a declaration of past and present constitutional wrongs.

11. In *Mikisew Cree First Nation*, the applicant sought declaratory and injunctive relief in respect of the development of an omnibus bill. The Federal Court of Appeal determined that the application for judicial review could not be entertained on the fundamental basis 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)". That is unlike this case where it is the Attorney General who seeks to derail a constitutional challenge to extant legislation on the basis of a bill that is presently before Parliament.

Canada (Governor General in Council) v. Mikisew Cree First Nation, 2016 FCA 311, paras. 24, 39, 53

12. Closer to the mark are *Malmo-Levine* and *Frank*; however, those cases are distinguishable as well.

13. At issue in *R v. Malmo-Levine* was a challenge to extant legislation. The Supreme Court of Canada initially adjourned a hearing on the basis of a media report in which the Minister of Justice expressed an intention of the government to proceed with legislation to decriminalize marijuana within the first four months of the next year. Of course, no

such legislation ever came despite the adjournment, and ultimately, the appeal concerned the extant *Narcotics Control Act*. If anything, the approach and ultimate outcome in *Malmo-Levine* augurs for restraint in adjourning on the basis of such possibilities.

R v. Malmo-Levine; R v. Clay, [2002] S.C.J. 88 [*Malmo-Levine*], at paras. 2-3

14. An order adjourning the hearing of an appeal was also granted in *Frank et al. v. Attorney General of Canada* (SCC File No. 36645) [*Frank*] on January 11, 2017.

15. Because both *Malmo-Levine* and *Frank* concerned an adjournment of an appeal at the Supreme Court of Canada, Parliament had the benefit of lower court rulings on the constitutional validity of the laws that were being amended. There is no such record for Parliament to consider in this case.

16. This litigation provides an opportunity for this Court to provide guidance and direction to Parliament in respect of its constitutional obligations. This Court will have actually decided this case long before Parliament enacts Bill C-56. Such guidance and direction *from the court* is an essential aspect of constitutional dialogue.

17. The present litigation is also unlike Question 4 posed in *Reference re Same-Sex Marriage*. In that case, the government had stated its unequivocal intention to introduce legislation in relation to same-sex marriage regardless of the answer to Question 4, and the Court found that government had "clearly accepted the rulings of lower courts on this question and has adopted their position as its own." That is unlike this case where, again, no court ruling on the constitutional validity of the present law has yet been made and nor has the Attorney General unequivocally adopted the position that the present law is unconstitutional, nor unequivocally stated its intention to introduce any particular form of law. As, the Attorney General herself concedes at paragraph 31, "[t]he Bill may take a different form as a result of amendment during Parliament's legislative consideration" and it is also unknown if any form of the Bill will be enacted.

Reference re Same-Sex Marriage, 2004 SCC 79, para. 65

18. The value of the present litigation, even in the face of potential, but still uncertain, legal and policy change, is that it has the potential to demonstrate to Parliament that the need to reform and limit administrative segregation does not arise as a matter of *policy*, but as a matter of constitutional *obligation*. In other words, the litigation has potential to set a constitutional floor below which the treatment of inmates will no longer fall.

19. Finally there are these very pragmatic and equitable considerations that are highly relevant to the exercise of this court's jurisdiction:

    a. any adjournment will be highly unfair to all of the witnesses many of whom have now re-arranged their schedules a number of times to be told once again that the trial is adjourned and that they will be needed another time. There is a risk that some of these witnesses will simply refuse or be unable for any number of reasons to make themselves available again and this is will be highly prejudicial to the plaintiffs;

b. any adjournment will result in the need to appoint a new case management judge and trial judge who will have to re-visit many of the issues already resolved in case management of this litigation;

c. if the Attorney General's position is accepted where the mere tabling of a bill on the eve of trial could derail a trial with a bill that does not actually resolve the litigation but actually prolongs it, and arguably renders all or even some of the existing two years of work and assembled record irrelevant, then the adjournment presents a serious impediment to access to justice as the very nature of constitutional litigation and the court's own timelines will render legislation immune from *Charter* review;

d. it is therefore all the more troubling that there is no explanation for the late introduction for Bill C-56 - which was obviously not written "overnight" - and it cannot be for the earlier stated reason that there needed to be budgetary provisions as none have been made; and

e. the adjournment is also highly unfair to counsel acting *pro bono* who have had to rearrange their own schedules to accommodate this trial and who now will be faced with two months of idle time where they might otherwise have been engaged with other remunerative clients.

20. In the alternative, if the trial is to be adjourned, the plaintiffs will bring an interlocutory injunction application to be heard on the basis of the same record amassed to date and ask that it be set in July for such period of time as the parties may require.

21. As well, any adjournment raises significant prejudice for the plaintiffs who have incurred considerable expenses and whose counsel have been acting *pro bono*. A condition of any adjournment should be an order of special costs payable forthwith on a full indemnity basis at counsel's normal hourly rates for all fees and reasonable expenses incurred from the inception of these proceedings to date.

Carter v. Canada (Attorney General), 2015 SCC 5, paras. 133-146, 148

Part 6: MATERIAL TO BE RELIED ON

1. Plaintiffs' Notice to Admit dated 16 May 2016;
2. Attorney General's Reply to Notice to Admit dated 30 May 2016; and
3. Affidavit #4 of Sally Yee, affirmed 21 Jun 2017.

The application respondents estimate that the application will take 2 hours.

☒ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

Dated: 21 Jun 2017

Signature of lawyer for the application respondents
JOSEPH J. ARVAY, Q.C.