Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Applicant

- and -

HER MAJESTY THE QUEEN AS REPRESENTED BY
THE ATTORNEY GENERAL OF CANADA

Respondent

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1. The statutory scheme is unconstitutional

The entire *CCRA* is available the Brief of Authorities of the Applicant, Volume 5, Tab 53.

- The purposes of the *CCRA*, outlined in s. 3, are as follows:

> 3. …to contribute to the maintenance of a just, peaceful and safe society by
>
> (a) Carrying out sentences imposed by courts through the **safe and humane custody and supervision of offenders**;
>
> (b) Assisting the **rehabilitation of offenders** and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

- The grounds for *releasing* an inmate from segregation are contained exclusively in s. 32 of the *Act*. This section states:

> **32** … ***all decisions*** by the institutional head ***to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31.***

- The *Act* requires the institutional head to base his or her decision about whether or not to release an inmate from segregation ***exclusively on the factors in s. 31.***
    - The regulations are silent on release from segregation.

- S. 87 imposes a general obligation to maintain essential health. It does not mean that an inmate can be released from segregation as a result of deteriorating mental health. This is clear from the 2017 Commissioner's Directives. Section 32 is clear: the institutional head can only consider the s. 31 factors in any release

- There is no case in which s. 87 has been applied to compel the release of an inmate from administrative segregation.
    - There have been 19 reported cases in Canada that consider s. 87
    - Some are sentencing cases, in which the offender argues for a lower sentence on the basis that he has some special health need that CSC cannot appropriate accommodate (like diabetes). The sentencing judge produces the text of s. 87 and states that CSC has a duty to provide the offender with healthcare

- The remaining cases are judicial review applications, usually brought by the inmate for a review of CSC's decision denying the inmate medication or medical devices, like orthotic slippers, large print books, etc. Remedy sought is typically an order declaring that CSC has breached its health services obligations under sections 85 to 87 of the *CCRC.*

- In both kinds of cases, s. 87 is summarized as imposing on CSC a "legal obligation to provide a safe and healthy environment for inmates and staff". It is NOT about segregation and does not affect release from segregation.

- Section 87 has been around as long as the *CCRA* (since 1992). It has made no difference on inmates in segregation

  - Mr. N describes his health conditions in his affidavit - anxiety, insomnia, hallucinations, paranoia, depression, lack of impulse control, and rage.

  - Mr. N is STILL in segregation. Despite the fact that the newest policies say he's going to get checked on and reviewed and mentally assessed

  - Section 87 doesn't get him out of segregation. And none of Canada's new screening tools get him out of administrative segregation.

  - He was approved for a transfer on November 6, 2015, which CSC was unable to effect due to the interlocutory Order (see Affidavit of Bruce Somers, p. 14, para 57)

  - At that point, he was being held in Millhaven Institution's Administrative Segregation, where he had been placed on October 10, 2015 – that is **49 days** earlier. He would go on to stay in segregation until April 26, 2016 – for a total of 202 days.

  - However, October 10, 2015 was the very same day he was released from his previous 86 day stay. At most, he was out for less than a day in between. So, essentially, he had actually been in segregation since July 15, 2015. That is **134 days** , for a total of 388 days, by the time he is eventually released on April 26, 2016.

2. New policies do not close the gap

- New
    - CD-709 was amended on October 13, 2015 (8 months after the CCLA brought this Application), and again on August 1, 2017 (two years and six months after the CCLA brought this Application, and on the eve of trial)
    - The latest iteration of Guideline 709-1 (to which the Reintegration Action Plan is annexed) came into effect on August 1, 2017
    - The Administrative Segregation Handbook for Staff was updated in "January 2016"
    - CD-843 ("Interventions to Preserve Life and Prevent Serious Bodily Harm") came into effect on August 1, 2017.
- And yet:
    - None of CD-709, Guideline 709-1, Policy Bulletin 571, the Reintegration Action Plan, the Administrative Segregation Handbook or CD-843 acknowledge that administrative segregation poses a **risk of harm to all, certainty of harm to some, or absence of harm to none**.
        - The Administrative Segregation Handbook concedes that "administrative segregation limits **at least** one of the inmate's *Charter* rights … **Freedom of movement and association** are inherently constrained by the more rigid confinement of administrative segregation" (Respondent's Application Record, Vol. 3, Tab 3E, at p. 813).
            - No acknowledgement of physical or psychological harm
    - None of CD-709, Guideline 709-1, Policy Bulletin 571, the Reintegration Action Plan, the Administrative Segregation Handbook or CD-843 impose <u>any</u> limit on the **total number of days** an inmate may be held in administrative segregation.
    - None of CD-709, Guideline 709-1, Policy Bulletin 571, the Reintegration Action Plan, the Administrative Segregation Handbook or CD-843 impose <u>any</u> limit on the placement of **young inmates** in administrative segregation.

- None of CD-709, Guideline 709-1, Policy Bulletin 571, the Reintegration Action Plan, the Administrative Segregation Handbook or CD-843 prevent the placement of **inmates with mental disabilities** in administrative segregation.

- None of CD-709, Guideline 709-1, Policy Bulletin 571, the Reintegration Action Plan, the Administrative Segregation Handbook or CD-843 require an **independent review** of the placement and maintenance of an inmate in administrative segregation.

    - The Administrative Segregation Handbook concedes that "every inmate's confinement in administrative segregation must be punctuated by scheduled hearings and reviews" because "the ***Charter*** (particularly section 7…) [] **drives the due process**" and "**due process** is **necessary and appropriate**" (Respondent's Application Record, Vol. 3, Tab 3E, at p. 835).

        - But the same considerations apparently do not compel need for independent review!

- Canada's administrative segregation policies are complex and evolving

    - Absent relief from this Court, nothing prevents Canada from changing these policies again in the future (e.g. new government)

- Canada said the new policies respond to the Arbour report and the Ashley Smith verdict.

    - BUT both of these called for a hard cap on segregation – Arbour at 30 days and Ashley Smith at 15 days.

    - Prime Minister Trudeau directed Minister Wilson-Raybould to implement the recommendations in the Ashley Smith verdict.

3. Policy cannot rescue an unconstitutional law

- Unlike the legislation in *Little Sisters*, this legislation, particularly, as supplemented with Commissioner's Directives, is not capable of behaving in a constitutional way. It's isn't designed to, its clear language precludes it and the unconstitutional consequences were not contemplated, understood and provided for.

- *Little Sisters* does not stand for the proposition that an evolving mix of policies can save an unconstitutional statute.

    - *Little Sisters* stands for the limited proposition that Parliament may choose to implement the provisions of a statute through regulation or a ministerial direction. It is about the choice Parliament may make among legislative instruments in choosing how to implement an otherwise constitutional scheme. The case says nothing about a policy curing a facially unconstitutional statute.

    - In *Little Sisters*, the appellants argued that customs officials were enforcing a customs statute preventing the importation of obscene material in a manner that breached *Charter*-protected expression and equality rights under ss. 2(b) and 15(1).

        - The Crown conceded that the impugned legislation breached s. 2 of the *Charter*, but the Court concluded that the infringement was justified under s. 1 (at para. 41). No policy was raised or referred to in the s. 1 analysis.

        - The Court concluded that the appellants' s. 15 rights had been breached (at para. 154). No policy was raised or referred to in the s. 15 analysis.

    - Separately, the appellants raised a tertiary constitutional argument that the statutory framework was so open to "maladministration" that Parliament should be required to introduce provisions to the customs legislation to protect their *Charter* rights (Binnie J.: this complaint "is about the *absence* of affirmative provisions", at para. 72).

        - It is in response to this tertiary argument that the Binnie J. passage emphasized by Canada appears ("I do not think there is any constitutional rule that requires Parliament to deal with Customs' treatment of constitutionally protected expressive material by legislation [] rather than by way of regulation [] or even by ministerial directive or departmental practice. Parliament is entitled to proceed on the basis that its enactments 'will be applied constitutionally' by the public service", at para. 72)
            - This passage does not stand for the proposition that an unconstitutional statute may be cured by a regulation or policy, as Canada argues.

            - The passages establishes a much more limited proposition: when dealing with a legislative provision that is not unconstitutional ("I

have already found that Customs Tariff Code 9956 creates a constitutionally valid standard", at para. 138), the government may choose the form in which it will detail the procedures for implementing that provision (i.e. the implementation details may be enacted by statute, regulation, policy, or otherwise—"the government needs neither a special statute nor special regulations to deal with its own employees", at para. 138).

- Canada cites no other case for the proposition that a policy may cure an unconstitutional statute.

4. **Reviews are NOT independent**

- 5 day, 30 day, 60 day reviews– are not independent – and the cases cited by the Crown are very different

- On the 5th working day review, the the warden receives a recommendation from a board, but ultimately, it is the warden alone who decides if his earlier decision to place the in seg should be upheld

- the problem is even more stark with respect to the 30 day review – look at the regulations, s. 21 – the warden chairs the board, of people who work in the prison, that makes a recommendation to the warden about the correctness of the warden's decision to continue segregation. The warden then decides the case.

- Warden Pyke, in his cross-examination, repeatedly expresses that he is the decision—maker, not the board. **[Applicant's Transcript Brief, Vol. 1, Tab 2, Q 460-461, pp. 133-134)**

    - In immigration cases that Canada reviewed, the appellate body was NOT the same body as at first instance

    - In fact, in the context of such a severe deprivation of liberty, we know of no similar scheme that has been found constitutional.

5. Medical Evidence

- Justice McEwen did not bar Canada from putting in evidence from its clinicians

- Contrary to AGC submissions the APA *amicus* submissions are not confined to the psychosocial development and vulnerability of juveniles 18 and below. The particular cases relate to juveniles 18 and below but its submissions are clear that there is no meaningful psychological distinction between late adolescents and young adults. And that is what the literature says. For example:

    - A 2013 article from Development and Psychology concludes that "across each of the six indicators of psychosocial maturity and the global measure of psychological maturity individuals in the sample were still developing at age 25". (CCLA Exhibit Brief, Volume 5, Tab 68; See Cross-examination of Dr. D. Nussbaum at pp. 90-95, CCLA Transcript Brief, Volume 2, Tab 5).

    - A 2016 article from Psychological Science showed diminished cognitive performance in 18 - 21 year olds relative to adults over the age of 21 (CCLA Exhibit Brief, Volume 5, Tab 69; CCLA Transcript Brief, at pp. 95-104, Volume 2, Tab 5)

    - A 2009 article from American Psychologist, the flagship journal of the APA, concludes that "[b]y age 16, adolescents' general cognitive abilities are essentially indistinguishable from those of adults, but adolescents' psychosocial functioning, even at the age of 18, is significantly less mature than that of individuals in their mid-20s". (CCLA Exhibit Brief, Volume 5, Tab 70; Cross-examination of Dr. D. Nussbaum, at pp. 104-106, CCLA Transcript Brief, Volume 2, Tab 5)

- Dr. Martin opined that, based on literature and her experience treating inmates, administrative segregation should never be used for those aged 18 – 21. She was not challenged on this opinion, which is consistent with the APA and the literature

- Dr. Nussbaum's evidence is unhelpful:

- His instruction was to opine on the effect of administrative segregation on 18-25 year olds. It was not to look at those under 18 (Cross-Examination of Dr. Nussbaum, at pp. 22-23, Q. 76-80, CCLA Transcript Brief, Volume 2, Tab 5).

- Instead, he wrote a narrow review of the physical maturation of the anatomical structures of the brain.

- Dr. Nussbaum conceded that none of the papers he identified in his report address the effects of administrative segregation on young people between the ages of 18 an 25 (Cross-examination of Dr. Nussbaum at pp. 24-30, Q. 82-109, CCLA Transcript Brief, Volume 2, Tab 5).

- Dr. Nussbaum was dismissive of evidence demonstrating that the psychosocial maturation of young persons continues beyond age 18:

    - Dr. Gur opines that the "overwhelming weight of evidence supports the early post mortem studies indicating that the main index of maturation, which is the process called 'myelination', is not complete until some time in the beginning of the third decade of life (probably around age 20-22)" (Declaration of Ruben C. Our, Ph.D., at p. 14, CCLA Exhibit Brief, Volume 4, Tab 54)

    - Dr. Gur opines that "The evidence is now strong that the brain does not cease to mature until the early 20s in those relevant parts that govern impulsivity, judgment, planning for the future, foresight of consequences, and other characteristics that make people morally culpable. Therefore, a presumption arises that someone under 20 should be considered to have an undeveloped brain" (Declaration of Ruben C. Our, Ph.D., at p. 15, CCLA Exhibit Brief, Volume 4, Tab 54)

    - Dr. Gur opines that "there is no way to state with any scientific reliability that an individual 17-year old has a fully matured brain (and should be eligible for the most severe punishment" (Declaration of Ruben C. Our, Ph.D., at p. 15, CCLA Exhibit Brief, Volume 4, Tab 54)

- Canada says they didn't think it was necessary to lead evidence of the clinical experience, yet that is exactly what they tried to do with Dr. Morgan's description of his segregation rounds from before he was a psychologist

6. International Law

- Administrative segregation in Canada is indefinite. The *Act* itself authorizes indefinite segregation.
    - Canada voted to adopt the Nelson Mandela Rules at a 2015 UN General Assembly
    - The Nelson Mandela Rules provide "the specific and most-respected means of interpretation" of the content of the prohibitions in the *Convention Against Torture* (which Canada acceded to in 1987).
        - Rule 43(1) of the Mandela Rules prohibits solitary confinement in excess of fifteen days
- Mendez concludes in his expert reply, relying on Hainey, and testified on cross-examination that the debate has settled on 15 days as constituting “prolonged” segregation and that “there is a solid consensus that anything beyond 15 days is in violation of international standards”
    - The verdict tin the Ashley Smith inquiry also called for a cap at 15. Ultimately, the OCI agrees that 15 be the hard stop
- The “Reintegration Action Plans” are of no assistance as they do not always include a release date. These Plans do not correct the indefinite nature of segregation, authorized by the *Act*

7. Alternatives

- Canada has acknowledged that the approach put forward by Professor Coyle is viable. In fact, it submit that it follows many of the approaches of these close supervision centres.
    - This is not true
    - Professor Coyle’s report makes it clear that inmates in close supervision centres are not deprived of contact and connections and socializing
    - They are not isolated – and recall, the very purpose of the segregation provisions are to isolate

- Notable, Canada did not say that its hands are tired and that it would require a rework of the plant, policies or personnel .

    - Canada was asked by the Court whether an Order could issue requiring the construction of close supervision centers across the country—Canada did not say it was financially or otherwise unable to effect such an Order

- And the Scottish system is, as Canada advised, about solitary confinement only for short periods. That's not what we do in Canada – we do indefinite segregation. We do 583 straight days of segregation for T.N.

8. **Remedy**

- Two options: If there is a gap that should be filled by considered legislation, legislation should be struck down pursuant to s. 52. And you can rely on *R. v. Tse* (Applicant's Reply Book of Authorities, Tab 4) for that point. The Crown had no answer for that case.

- Or, can grant relief under s. 24(1).

- Public interest standing is recognized by the Supreme Court in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 (Brief of Authorities of the Applicant, Volume 1, Tab 12). This is a new and emerging area of the law, in which a public interest litigant seeks a public remedy. It is entirely distinguishable from cases in which a litigant seeks remedies either for itself, or for private individuals. And the remedy is appropriate here because there is no other way to put an end to these practices.

- There is no other proceeding before this court that seeks to bar the practices at issue on this application. Canada referred to the class actions, they are directed to obtaining damages for class members, and the court will be well aware that the vast majority of class actions settle before a trial on the merits.

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