COURT OF APPEAL FOR ONTARIO

CITATION: Canadian Civil Liberties Association v. Canada (Attorney General), 2019 ONCA 342
DATE: 20190426
DOCKET: M50316 (C64841)

Strathy C.J.O., Benotto and Roberts JJ.A.

BETWEEN

Corporation of the Canadian Civil Liberties Association

Applicant (Appellant/Responding Party)

and

Her Majesty the Queen as represented by the Attorney General of Canada

Respondent (Respondent/Moving Party)

Jonathan Lisus, H. Michael Rosenberg, Larissa Moscu and Charlotte-Anne Malischewski, for the responding party

Kathryn Hucal, John Provart and Bradley Bechard, for the moving party

Heard in writing: April 23, 2019

REASONS FOR DECISION

[1] Following a constitutional challenge initiated by the Canadian Civil Liberties Association ("CCLA"), Marrocco A.C.J.S.C. ("the application judge") found that ss. 31-37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("*CCRA*") infringe s. 7 of the *Canadian Charter of Rights and Freedoms*. The application judge declared the provisions invalid but suspended his declaration of

invalidity until December 18, 2018. The Attorney General of Canada ("AGC") moved before this court to extend the period of suspension. We granted an extension to April 30, 2019. The AGC now brings this motion for another extension of the suspension of invalidity, this time to November 30, 2019.

[2] For these reasons, we grant a further extension, but only to June 17, 2019 on the condition that the independent fifth day review be implemented as explained below.

BACKGROUND

[3] In 2015, the CCLA applied to the Superior Court of Justice alleging that ss. 31-37 of the *CCRA,* which authorize administrative segregation in penitentiaries across Canada, infringed ss. 12, 11(h) and 7 of the *Charter.* The CCLA was partially successful. On December 18, 2017, the application judge declared that ss. 31-37 of the *CCRA* contravene s. 7 of the *Charter* and are of no force and effect.[1] He found the provisions to be inconsistent with the principles of fundamental justice because they did not provide for meaningful independent review within five working days of the decision to place an inmate in administrative segregation.

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[1] The corresponding Order was issued and entered on February 6, 2018.

[4] The application judge suspended the declaration of invalidity for 12 months from December 18, 2017 to enable Parliament to enact an appropriate legislative response: see *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491, 140 O.R. (3d) 342, at para. 277.

[5] The AGC did not appeal the application judge's decision.[2] Nor did the government implement a remedy specific to the *Charter* violations found by the application judge. Instead, ten months later, in October 2018, the government introduced Bill C-83, *An Act to amend the Corrections and Conditional Release Act and another Act*.

[6] According to the AGC, Bill C-83 would eliminate administrative segregation and replace it with "structured intervention units", which it says would "emphasize opportunities for meaningful human contact, participation in programs and access to services ...". The AGC suggested that the characteristics of a fair and independent review of placement decisions under Bill C-83 may be different from those under the current legislation. In short, Bill C-83 was proposed to overhaul the administrative segregation regime set out in the *CCRA*.

[7] Ontario is not the only jurisdiction to have considered a challenge to the *CCRA*. On January 17, 2018, the Supreme Court of British Columbia granted a

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[2] The CCLA, however, did appeal the decision to this court on the basis that the application judge erred in dismissing the s. 12 and s. 11(h) *Charter* claims. On March 28, 2019, this court allowed the appeal in part: *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243.

declaration that ss. 31 and 33-37 of the *CCRA* infringed ss. 7 and 15 of the *Charter*: see *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, 402 C.R.R. (2d) 53. It ordered that the declaration of invalidity be suspended for a period of 12 months, to January 17, 2019. The AGC appealed the BCSC's decision to the Court of Appeal for British Columbia and, in the interim, applied for an extension of the period of suspension to July 31, 2019. The BCCA granted an extension to June 17, 2019, subject to conditions that the AGC comply with specific orders issued by the BCCA to address constitutional concerns: see *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 5, at paras. 34-38.

First request for extension: November 2018

[8] The presentation of Bill C-83 was the basis for the AGC's request to this court to extend the suspension of the application judge's declaration of constitutional invalidity until July 31, 2019. The AGC made this request on November 21, 2018, following the hearing of the CCLA's appeal of the application judge's decision.

[9] At that time, we advised counsel that we were concerned by the absence of any explanation for Canada's delay in addressing the constitutional infirmity identified in the application judge's decision; the absence of information concerning any interim measures that have been or might be taken to address or mitigate the

breach of *Charter* rights pending the implementation of new legislation; and the absence of any explanation of how the proposed legislation would address the constitutional infirmity identified by the application judge. We requested additional written submissions from both parties.

[10] The submissions by the AGC did not address our concerns. The delay was not explained, interim measures to remedy the constitutional breach identified were not proposed, and it was not clear how Bill C-83 would address the problem. Instead, the AGC asserted that the precise nature of the review process in Bill C-83 was work in progress and the regulatory scheme had yet to be established.

[11] With reluctance, we granted the extension but only to April 30, 2019: see *Canadian Civil Liberties Association v. Canada (Attorney General)*, 2018 ONCA 1038.

Second request for extension: April 2019

[12] Still relying on Bill C-83, the AGC now asks this court to further extend the suspension of the application judge's declaration of constitutional invalidity, this time until November 30, 2019[3]. The AGC explains the basis for its request at para. 39 of its factum:

> Bill C-83 is complex legislation proposing to bring about important changes to Canada's federal correctional regime. The significant legal, policy, operational,

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[3] The request was actually to November 31, a date that does not exist.

> infrastructure and resource considerations involved in the development and implementation of the Bill, as well as the time Parliament has used to fully debate and consider submissions on it, including from interested stakeholders, are due their proper deference. The length of the extension of the suspension is not undue in these exceptional circumstances and would not compromise public confidence in the administration of justice. To the contrary, it would respect the "constitutional conversation" that is underway with the legislative response the government has engaged in with Bill C-83.

[13] CCLA opposes the extension and asks that the motion be dismissed. In the alternative it requests that no stay be extended past June 28, 2019 and that, in the interim, Canada be required to implement a practice of an independent fifth day review.

DECISION

[14] The validity or effectiveness of Bill C-83 is not before us. The complexity outlined above is relied on by the AGC as justification for the further extension. Extensive evidence is put forward outlining the legislative process, the steps necessary to implement the Bill including cost, staff training, infrastructure, public consultations and so on. But this court remains where we were when the first extension was argued: we have virtually nothing to indicate that the constitutional breach identified by the application judge is being or will be addressed in the future.

[15] The evidence discloses that in January 2019, more than one year after the application judge released his decision, there were "discussions" about how the

fifth-day review "could be operationalized". Nothing more has been done to remedy the breach in the interim, and it remains unclear how Bill C-83 will remedy it if enacted.

[16] The AGC's motion would, if granted, extend the suspension of the application judge's declaration of invalidity to nearly two years from the date the breach was found. This is unacceptable. In all the circumstances outlined above, a remedy to the lack of an independent fifth day review of segregation placement decisions does not require the lengthy extension the AGC is seeking.

[17] Nor do the factors articulated in *Canada (AG) v. Descheneaux,* 2017 QCCA 1238, [2017] 4 C.N.L.R. 1 weigh in favour of granting an unconditional extension: there is no change in circumstances to justify the extension; there is no potential threat to the rule of law or the public by depriving Canada of the ability to order administrative segregation without independent review; it is unclear if the proposed legislation will remedy this breach; and a further lengthy and unconditional extension would compromise public confidence in the administration of justice and the court's ability to act as guardian of the Constitution.

[18] This leaves open the possibility of a short extension with conditions imposed by the court. The AGC "does not oppose" a conditional extension similar to that issued by the BCCA when it extended the BCSC's suspended declaration of invalidity to June 17, 2019. The BCCA imposed numerous terms on its extension,

including a fifteenth day review of segregation placement decisions by a person outside the sphere of influence of a prison's institutional head.

[19] The AGC indicates that Canada is currently in compliance with the BCCA's order. The AGC also states that "Canada would comply with an Order to conduct an internally independent fifth-working day review of administrative segregation pending implementation of Bill C-83."

[20] Unlike its first request for an unconditional extension of the suspension, the AGC now invites the court to impose a condition on the extension. Clearly, Canada now accepts that an independent fifth day review can be implemented pending passage of Bill C- 83. Regrettably this was not the case on its first request for an extension in November 2018 and so the breach has been unnecessarily prolonged.

[21] That said, we are persuaded that a brief conditional extension of the suspension is appropriate in the circumstances of this case so that the fifth working day review can quickly begin.

[22] Consequently, it is ordered – again with great reluctance – that one final extension be granted to June 17, 2019 on the condition that Canada implement an independent fifth day review of administrative segregation before that date. The Correctional Service of Canada must establish a system of review whereby no inmate will be kept in administrative segregation for more than five working days

without the placement decision being reviewed and upheld by a senior official who is neither the institutional head of the institution where the inmate is incarcerated nor a person who is subordinate to that institutional head.

G.R. Brady CJO

M.L. Benotto J.A.

I.B. Paluetto J.A.