CV-15-520661

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CORPORATIONS OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES

Applicants

and

HER MAJESTY THE QUEEN as represented by THE ATTORNEY GENERAL OF CANADA

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT(S)

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicants. The Claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on _____, at 10:00 a.m., at 393 University Avenue, Toronto, Ontario, M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicants' lawyer or, where the Applicants does not have a lawyer, serve it on the Applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicants' lawyer or, where the Applicants do not have a lawyer, serve it on the Applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO

OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date Jan 27th, 2015 Issued by S. Tuckett
Local Registrar

Address of court office: 393 University Avenue, 10th Floor
Toronto ON M5G 1E6

TO **ATTORNEY GENERAL OF CANADA**
130 King Street West, #3400
Toronto, ON M5X lK6

APPLICATION

1. The applicants, the Corporations of the Canadian Civil Liberties Association and the Canadian Association of Elizabeth Fry Societies, make an application for:

(a) a declaration that ss. 31 to 37 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "*Act*"), on their face, and as applied in penitentiary institutions across Canada, violate:

(i) the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice under s. 7 of *Canadian Charter of Rights and Freedoms* (the "*Charter*"); and

(ii) the right, once found guilty and punished for the offence, not to be tried or punished for it again under s. 11(h) of the *Charter*;

(iii) the right not to be subjected to any cruel or unusual treatment or punishment under s. 12 of the *Charter*.

(b) Such further and other Relief as this Honourable Court may deem just.

2. The grounds for the application are as follows.

1. INTRODUCTION

3. This application challenges the practice of solitary confinement in Canadian penitentiaries. Solitary confinement deprives the prisoner of vital human contact. This practice has devastating effects on the prisoner's mental and physical wellbeing, and constitutes the harshest form of punishment that may be administered in Canadian penitentiaries. As such, the

ready, routine and prolonged use of solitary confinement in Canadian penitentiaries is unjustified, unethical, and ultimately, unconstitutional.

4. The practice of solitary confinement in Canadian penitentiaries is fatally flawed and as practiced, amounts to torture, and, as such, cannot be countenanced in a civilized society. As particularized further below, the *Act* and the routine use of solitary confinement under its authority, contravene the *Charter of Rights and Freedoms* in the following regards:

(a) Solitary confinement in excess of fifteen (15) consecutive days constitutes torture, in contravention of the right to security of the person protected by s. 7 of the *Charter*, and the right to be free from cruel and unusual punishment protected by s. 12 of the *Charter*;

(b) Solitary confinement that fails to consider the wellbeing of the inmate, and in particular, the wellbeing of youths and persons suffering mental illness, is cruel, inhuman, and degrading treatment, in contravention of ss. 7 and 12 of the *Charter*;

(c) The absence of a requirement that the state demonstrate, in an impartial forum, the continued existence of grounds to order solitary confinement contravenes the principles of fundamental justice protected by s. 7 of the *Charter*; and

(d) Where solitary confinement is ordered to protect the safety of the prisoner, it constitutes an additional penalty, contrary to the right to be free from double punishment protected by s. 11(h) of the *Charter*, as well as s. 7 of the *Charter*.

5. In none of these instances may the practice of solitary confinement in Canadian penitentiaries be demonstrably justified in a free and democratic society, and accordingly, the saving provision in s. 1 of the *Charter* is of no effect.

2. STANDING

6. The Canadian Civil Liberties Association ("**CCLA**") is a national organization, established in 1964, to protect and promote respect for, and observance of, fundamental human rights and civil liberties. The CCLA has several thousand paid supporters, and a wide variety of persons, occupations, and interests are represented in its national membership.

7. The CCLA has historically fought against threats to fundamental rights and freedoms and civil liberties. The CCLA has experience litigating issues in its own right and has also been granted intervener status in courts across Canada.

8. The CCLA has a real and continuing interest in the welfare of those who may be detained in segregation and in protecting these persons' rights and liberties. Moreover, the CCLA has substantial expertise in relation to the issues raised in this Application through its advocacy, public education, and research.

9. The Canadian Association of Elizabeth Fry Societies ("**CAEFS**") is a federation of twenty-five autonomous societies which work with, and on behalf of, marginalized, victimized, criminalized and institutionalized women and girls. Elizabeth Fry societies advocate for legislative and administrative reform and offer fora within which the public may be informed about, and participate in, aspects of the justice system which affect women. The CAEFS has also gained particular expertise in advocating for the rights of Aboriginal women and those with disabling

mental health issues, both of whom are disproportionately overrepresented in the criminal justice system.

10. The CAEFS develops policies and positions and acts on common issues affecting criminalized and imprisoned women and girls. The CAEFS has a real and continuing interest in the practice of solitary confinement in Canadian penitentiaries because it represents a group that is and will be directly and acutely affected.

11. The CAEFS has experience litigating issues in its own right and has also been granted intervener status in courts across Canada. Additionally, the CAEFS has been granted standing and participated in several inquests with respect to the conditions of detention in Canadian penitentiaries.

12. This case, which concerns the health, wellbeing, and fundamental liberties of prisoners across Canada, raises a serious, justiciable issue.

13. The CCLA and the CAEFS, together with their substantial membership, have the resources to ensure that the Application is litigated effectively, and in the interests of all those who are, have been, or could be subject to solitary confinement in Canadian penitentiary institutions.

14. From a practical and pragmatic point of view, and in light of the particular nature of the challenge, this Application is a reasonable and effective means to bring a case of public importance before this Honourable Court. It would be difficult, if not impossible, for individual prisoners to litigate a broad-based *Charter* challenge to the practice of solitary confinement in Canadian penitentiaries, particularly given that most such challenges would be moot by the time they were heard.

15. Accordingly, it would be an efficient and worthwhile use of this Honourable Court's scarce judicial resources to hear and decide this Application.

3. LEGISLATIVE AND REGULATORY SCHEME

16. There are several definitions of "solitary confinement" but the general consensus is that solitary confinement is the act of physically isolating prisoners by confining them alone in their cells for all, or substantially all of their day. The Istanbul Statement on the Use and Effects of Solitary Confinement, adopted December 9, 2007 at the International Psychological Trauma Symposium, offers the following description of the practice:

> Solitary confinement is the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day. In many jurisdictions prisoners are allowed out of their cells for one hour of solitary exercise. Meaningful contact with other people is typically reduced to a minimum. The reduction in stimuli is not only quantitative but also qualitative. The available stimuli and the occasional social contacts are seldom freely chosen, are generally monotonous, and are often not empathetic.

17. In Canada, the *Act* authorizes the use of "administrative segregation" in penitentiary institutions. While administrative segregation may take many forms, at base, administrative segregation is a form of solitary confinement and it is referenced as such in this Application.

18. Section 31(1) of the *Act* provides that "[t]he 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".

19. Section 31(3) of the *Act* authorizes the head of a penitentiary institution to order that an inmate be confined in administrative segregation where there is no reasonable alternative, and where:

(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

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

20. However, there is no legislative or regulatory provision that directs the head of the penitentiary institution to weigh the objectives of administrative segregation against the welfare of the prisoner who is to be segregated, or even to consider the devastating mental and physical toll that segregation may take.

21. Pursuant to s. 6(1)(c) of the *Corrections and Conditional Release Regulations* S.O.R./92-620 (the "*Regulations*") the authority to order administrative segregation may be exercised by a delegate of the institutional head. In practice, the power to order administrative segregation is routinely exercised by guards and other low-level penitentiary officials.

22. Section 33 of the *Act* also provides for a "person designated by the institutional head" ("which person or persons shall be known as the Segregation Review Board") to conduct a hearing to review the prisoner's case and recommend to the institutional head whether or not the inmate

should be released. There is no requirement that the Segregation Review Board be independent, and in practice, it is generally not.

23. Pursuant to s. 21(2) of the *Regulations*, the designated person must conduct a hearing within five working days of the order confining the prisoner, and then at least once every thirty (30) days thereafter. Additionally, s. 22 of the *Regulations* requires that a prisoner's continued administrative segregation be reviewed once every sixty (60) days by the head of the region or a designated staff member in regional headquarters.

24. Neither the *Act*, nor the *Regulations* require that an administrative segregation order ever be reviewed by an independent party, such as a judge. Nor do the *Act* or the *Regulations* impose any restrictions on which prisoners may be subject to administrative segregation, or limit the length of time for which prisoners may be administratively segregated.

4. Torture and Cruel, Inhuman and Degrading Treatment have No Place in Canadian Penitentiaries

25. Solitary confinement causes both psychological and physiological harm. The absence of human contact reduces social stimuli and deprives the individual of necessary interaction. The consequences may include insomnia, hallucinations, psychosis, and self-harm, among others. Negative health effects can develop after a relatively short period in solitary confinement, and the severity of these adverse outcomes increases with the passage of time. Solitary confinement is detrimental to the psychological wellbeing of prisoners who do not suffer from mental illness, and it worsens the mental health of those who do. Solitary confinement is also particularly difficult on youths.

26. On August 5, 2011, Juan E. Méndez, the United Nations Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, delivered his interim report on solitary confinement to the General Assembly of the United Nations. The Special Rapporteur identified "prolonged solitary confinement" as any period of solitary confinement in excess of fifteen (15) days. The Special Rapporteur chose this threshold "because at that point, according to the literature surveyed, some of the harmful psychological effects of isolation can become irreversible". He recommended that prolonged solitary confinement be prohibited, and further, that this prohibition extend to all forms of isolation for youths and prisoners suffering from mental illness.

27. Prolonged solitary confinement constitutes torture because it forces the prisoner to endure circumstances that manifestly threaten the security of his person, which includes both a physical and a psychological dimension. Recent developments in the literature confirm that prolonged solitary confinement in excess of fifteen (15) consecutive days is so harsh that it cannot be tolerated under any circumstances in a free and democratic society.

28. Solitary confinement of youths and the mentally ill generally constitutes cruel, inhuman, and degrading treatment. The youth of the prisoner and his or her mental illness, like other particular vulnerabilities, must strongly militate against solitary confinement in any form. As a general rule, solitary confinement should not be ordered for youths or prisoners suffering from mental illness.

29. Nevertheless, prisoners are routinely subjected to prolonged solitary confinement in Canadian penitentiaries, and youths and prisoners with mental health issues are routinely subjected to solitary confinement more generally. Neither the *Act*, nor the *Regulations* prevents these

practices, and consequently, continuous administrative segregation for tens, or even hundreds of consecutive days is not uncommon, even among the youth and mentally ill prisoner populations.

30. Solitary confinement in excess of fifteen (15) consecutive days constitutes cruel and unusual punishment and a deprivation of liberty that is not in accordance with the principles of fundamental justice. Consequently, this practice contravenes ss. 7 and 12 of the *Charter*.

31. Because there exist a myriad of ready, less rights-infringing alternatives to prolonged administrative segregation, these breaches cannot be saved by application of s. 1 of the *Charter*.

5. The State Must Demonstrate the Continued Existence of Grounds to Detain a Prisoner

32. At the conclusion of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston, the Honourable Louise Arbour, Commissioner, reported to the Solicitor General and Attorney General of Canada "on the state and management of that part of the business of the Correctional Service of Canada that pertains to the incidents that occurred at the Prison for Women in Kingston, Ontario, beginning on April 22, 1994". The inquiry identified troubling shortcomings in the way in which the Correctional Service of Canada manages Canada's federal penitentiaries.

33. In her report, which analyzed the detention of prisoners at the Prison for Women, Commissioner Arbour found that the "most objectionable feature" of the lengthy detention was its "indefiniteness". She noted that segregated detention assumes a peculiar inertia:

> The absence of any release plan in the early stages made it impossible for the segregated inmates to determine when, and through what effort on their part, they could bring an end to that ordeal. This indefinite hardship would have the most demoralizing

> effect and, if for that reason alone, there may well have to be a cap placed on all forms of administrative segregation. …
>
> If the segregation review process was designed to prevent endless, indeterminate segregation, by imposing a periodic burden on the prison authorities to justify further detention, it proved to be a total failure in this case. **Essentially, the segregation review process reversed the burden and assumed, in virtually every instance, that release had to be justified. In many instances, the reasons advanced for maintaining the segregation status would have been entirely unacceptable to trigger segregation in the first place [emphasis added].**

34. As discussed above, the *Regulations* require the Segregation Review Board to hold a hearing to review the prisoner's confinement within five (5) working days of a segregation order and then every thirty (30) days thereafter. There is no requirement that the initial segregation order, or any subsequent orders, be reviewed by an independent party. Moreover, neither the *Act* nor the *Regulations* requires a review of an prisoner's confinement between the fifth and the thirtieth day of solitary confinement. During this period, the *Act* does not provide for a review of the prisoner's ongoing solitary confinement.

35. Accordingly, prisoners remain in solitary confinement for up to five (5) working days before the segregation order is reviewed, and then a further twenty-five (25) days before a subsequent review. Furthermore, the review, such as it is, will be conducted by a Segregation Review Board appointed by the head of the penitentiary institution – the very person whose decision is itself under review.

36. Given the severity of solitary confinement, procedural fairness and natural justice require the institutional head or his or her designate to justify the segregation order to an independent review board at the prisoner's initial hearing, and every day thereafter that the segregation continues. The only justification for continued segregation is the existence of the circumstances

enumerated in s. 31(3) of the *Act*, which governs the initial segregation order. The onus must rest on the institutional head or his or her delegate to demonstrate that this test is satisfied.

37. The failure to require a regular, independent review, with no presumption in favour of maintaining the segregation, contravenes the principles of fundamental justice set out in s. 7 of the *Charter*. As the most serious and destructive form of detention in Canadian penitentiaries, administrative segregation cannot be justified on the basis of some of the weakest and most intermittent procedural protections. Given the ready availability of the alternatives set out above, this breach cannot be saved by s. 1 of the *Charter*.

6. Solitary Confinement to Protect the Prisoner can Never be Justified

38. As set out above, an order of administrative segregation confines an individual to a prison within a prison, and such an order constitutes a detention, engaging the prisoner's liberty interest under s. 7 of the *Charter*.

39. Section 31(3) of the *Act* authorizes administrative segregation where "allowing the inmate to associate with other inmates would jeopardize the inmate's safety". This provision has two purposes. First, it is often invoked to remove distraught prisoners with mental health issues from the general population and to prevent self-harm. Second, it is also invoked to isolate prisoners to prevent them from being harmed by others and allow staff to more easily monitor their behaviour. In both cases, solitary confinement for a prisoner's own protection, particularly when paired with disabling mental health issues, constitutes a deprivation of liberty that does not accord with principles of fundamental justice, contrary to s. 7 of the *Charter*.

40. It is a principle of fundamental justice that detention to prevent self-harm is only permissible in the best interests of the prisoner. In these circumstances, the salutary effects on the

prisoner are not simply a factor to be weighed in the balance. Rather, they are the only consideration that might be invoked to justify the deprivation of liberty. However, solitary confinement can never be justified on this basis because it is inherently damaging to the prisoner. This is particularly true where a prisoner suffers from disabling mental health issues, which aggravate the adverse effects of solitary confinement.

41. It is a further principle of fundamental justice that a person should not be deprived of his or her liberty on account of the wrongful acts of others. It does not accord with fundamental justice to detain an individual because of potential wrongs that may be committed against him by other prisoners. While the State has an obligation to protect prisoners whose health and wellbeing are threatened, it does not have a right employ administrative segregation in this task.

42. Solitary confinement also constitutes an independent and incremental punishment, apart from a prisoner's prison sentence. As such, solitary confinement for a prisoner's own protection also contravenes the right under section 11(h) of the *Charter* not to be punished again for the same offence.

43. An order for administrative segregation increases the punishment to which a prisoner is subjected. Such increase in punishment is not justified by a disciplinary offence, or any other wrongdoing on the part of the individual. Thus, the reason for the detention remains the offence for which the prisoner was initially incarcerated, and the prisoner is unconstitutionally "punished again".

44. In these circumstances, the effect of ordering administrative segregation is to disregard the measured punishment ordered by the sentencing judge, and instead impose a harsher sentence.

This practice runs roughshod over carefully balanced sentencing calculations, and it undermines judicial authority and the integrity of the administration of justice.

45. Because of the existence of ready, less rights-infringing alternatives, the breaches of ss. 7 and 11(h) set out above cannot be saved by application of s. 1 of the *Charter*.

7. RELIEF REQUESTED

46. The CCLA and the CAEFS request a declaration that ss. 31 to 37 of the *Act*, and their application in Canadian penitentiaries, contravene ss. 7, 11(h), and 12 of the *Charter* for the reasons set out above, and are of no force or effect. The CCLA and the CAEFS plead and rely upon s. 52 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c. 11, in this regard.

47. The CCLA and the CAEFS seek such other relief as counsel may advise and this Honourable Court may permit.

48. The CCLA and the CAEFS do not seek costs on this Application and ask that no costs be awarded against them.

49. The following documentary evidence will be used at the hearing of the application:

(a) Affidavit evidence as counsel may advise;

(b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

Jan 27/15

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