CITATION: Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen, 2017 ONSC 4191
COURT FILE NO.: CV-15- 520661
DATE: 20170706

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION AND THE CANADIAN ASSOCIATION OF ELIZABETH FRY SOCIETIES,

Applicants on the Motion

AND:

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

Respondent on the Motion

BEFORE: **MARROCCO A.C.J.S.C.**

COUNSEL: *Jonathan C. Lisus, Michael H. Rosenberg, Paul Davis* and *Charlotte-Anne Malischewski*, for the Applicants on the Motion

Peter Southey and *Kathryn Hucal*, for the Respondent on the Motion

HEARD: AT TORONTO: June 29, 2017

ENDORSEMENT

[1] The application to adjourn this matter is refused.

[2] The Corporation of the Canadian Civil Liberties Association (CCLA) challenges the constitutionality of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 authorizing lengthy stays in administrative segregation in Canadian prisons. The applicant contends that administrative segregation should not be longer than 15 days at a time and that independent authorization should be required to maintain segregation beyond 5 days. The applicant also contends that inmates who are mentally ill or under 21 or who require protective custody are constitutionally protected from administrative segregation. The application has been underway for over a year. Extensive evidentiary record has been filed and cross examinations are virtually completed.

[3] The respondent seeks to adjourn this application, scheduled to commence September 11, 2017, because the government has introduced into Parliament Bill C-56, *An Act to Amend the*

Corrections and Conditional Release Act and the Abolition of Early Parole Act, 1st Sess., 42nd Parl., 2017.

[4] Bill C-56 will amend the *Corrections and Conditional Release Act* to require that an inmate be released from administrative segregation after 21 days of confinement unless the institutional head decides that the safety and security of the institution requires otherwise. It will also add a requirement for an independent review of an inmate's administrative segregation if it is longer than 21 days. The 21-day period will be reduced to 15 days 18 months following the enactment of the Bill.

[5] In addition, Correctional Services Canada has announced that on August 1, 2017 there will be a new Administrative Segregation Policy that prohibits the use of administrative segregation for inmates with serious mental disorders who suffer a significant impairment, inmates who are certified under provincial mental health legislation and inmates who are at imminent risk of suicide or self-injury. This policy will also improve the conditions of confinement by, among other things, providing for increased time out of cell and daily showers.

[6] Counsel for the Crown asks for the adjournment so that Parliament can consider and debate Bill C-56. Counsel for the Crown frames its request as a request that the Court defer to the Parliament's proper legislative process.

[7] I agree that the courts should respect the Parliamentary process. In the words of the Supreme Court, "[i]t is fundamental to the working of government as a whole that [the Crown, the legislative body, the executive and the courts] play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other": *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

[8] Counsel for the Crown also argues that if this constitutional challenge is adjourned, the legislative history resulting from the debate of this legislation in Parliament will be of invaluable assistance to the Court in any future judicial consideration of the new statutory scheme, should it be enacted.

[9] I acknowledge that the legislative history of the proposed amendments will not be available to the Court on this application. However, all the existing evidence of policy considerations at the root of Canada's administrative segregation practices and behind the proposed Bill will be admissible on the question of whether there has been a breach of sections 7, 11(h) and 12 of the *Canadian Charter of Rights and Freedoms* or, in the event of a breach, whether the legislation is saved by section 1 of the *Charter*.

[10] Counsel for the Crown also submits that the adjournment will preserve scarce judicial resources by postponing the consideration of the current legislative scheme dealing with administrative segregation until after it has been amended.

[11] In the application, the CCLA challenges legislative provisions that will be unaltered by any of the proposed amendments currently before Parliament in Bill C-56.

[12] Specifically, one of the aspects of CCLA's challenge to the *Corrections and Conditional Release Act* deals with s.31 that establishes the criteria for detaining inmates in administrative segregation. The proposed amendments do not change that section.

[13] The CCLA further contends that administrative segregation in excess of 15 days is contrary to the *Charter of Rights and Freedoms* and as a result should be prohibited; that inmates under the age of 21 or those suffering from mental illness are constitutionally protected from the risk of administrative segregation; that administrative segregation to protect an inmate's safety without anything more amounts to being punished a second time for the crime that caused the inmate to be put in jail; and finally it challenges the constitutionality of a process in which an independent reviewer cannot order that administrative segregation longer than five days be discontinued.

[14] The CCLA contends that both the current and the proposed administrative segregation regimes permit indeterminate solitary confinement and are therefore constitutionally objectionable.

[15] I am satisfied that the application challenges the constitutionality of aspects of the *Corrections and Conditional Release Act* that are not affected by the proposed amendments and that it is not, therefore, disrespectful of Parliament's legislative process to continue with this application.

[16] Counsel for the Crown relies on several authorities in support of the position that this court should adjourn this application and defer to the Parliament's legislative process. I do not find these authorities helpful.

[17] In *R. v. Malmo- Levine; R. v. Clay*, [2002] S.C.J. 88 (Q.L.) the Supreme Court of Canada was considering the constitutionality of provisions of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, criminalizing possession of marijuana. The respondents sought adjournment of the appeal because the Minister of Justice said in Parliament that the government intended to introduce legislation decriminalizing marijuana. Unlike this case, the proposed legislation directly addressed the issue in the appeal that was before the Supreme Court of Canada with the result that the Supreme Court of Canada adjourned the appeal.

[18] In *Frank v. Canada (Attorney General),* (January 11, 2017), 36645 (S.C.C.), the Supreme Court of Canada was asked to consider the constitutionality of restrictions on the voting rights of nonresident Canadians. The court adjourned the appeal because legislation had been tabled in Parliament which expanded voting rights to the nonresident Canadians who were complaining to the Court about the loss of their voting rights. Unlike this case, the tabled legislation directly addressed the issue raised in the litigation.

[19] Even if Bill C-56 is enacted, every ground of this application will be continued. For this same reason, adjourning this application will not conserve judicial resources.

[20] Counsel for the Crown argues that CCLA's criticism of the Bill is premature, since the Bill may take some different form as a result of amendment during Parliament's legislative

consideration. Accordingly, the dismissal of this application is without prejudice to the Crown to bring another adjournment application should Parliament decide to amend the legislation at any time prior to a decision on CCLA's application.

[21] This application for an adjournment is dismissed.

[22] The CCLA requests costs payable at pro bono counsel's usual rates plus disbursements on the basis that the adjournment application is without merit. While I have decided to dismiss the application, I can understand why counsel for the Crown made the application and I am not prepared therefore to find that it is meritless. It seems more appropriate to describe the application as unpersuasive. Accordingly, there will be no order concerning costs.

MARROCCO A.C.J.S.C.

Date: 20170706