Court File No. CV-15-520661

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

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

Applicants
(Responding Party)

and

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

Respondent
(Moving Party)

FACTUM OF THE APPLICANT/RESPONDING PARTY
MOTION TO ADJOURN HEARING OF APPLICATION
(RETURNABLE JUNE 29, 2017)

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PART I - OVERVIEW

1. This Application challenges the constitutionality of prolonged solitary confinement in Canadian prisons. The Canadian Civil Liberties Association (the "**CCLA**") says that this abhorrent practice must stop.[1] Administrative segregation cannot be justified for periods longer than 15 days, and only with independent authorization after 5 days. Furthermore, administrative segregation cannot be available for the mentally ill, young adults, or individuals requiring protective custody. Where Canada fails to respect these limits, its practices amount to cruel, inhuman, and degrading treatment, and in some cases, torture.

2. This Application has already been adjourned once to accommodate the Respondent (the "**Crown**"), and it is now scheduled to be heard September 11 to 15, 2017. On June 20, 2017 the Crown moved to adjourn the Application again, this time *sine die*, effectively seeking to discard years of work before the Court has had an opportunity to rule on the constitutionality of the practices at issue. This motion comes at the eleventh hour, after the parties have filed extensive evidentiary records, and with cross-examinations scheduled to be completed by the end of the week.

3. The basis for the Crown's motion is Parliament's first reading of the proposed Bill C-56, *An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*. The Crown says that that Bill C-56, if enacted, will render this Application moot because it will change the underlying legislative scheme. In the Crown's submission, it is therefore necessary to start afresh and build a new evidentiary record in order to challenge the practice of prolonged solitary confinement. One imagines Sisyphus, rolling a constitutional

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[1] This Application was discontinued on behalf of the Canadian Association of Elizabeth Fry Societies.

challenge up the courthouse steps, only to see it turned back by the mere suggestion of legislative action.

4. There is no reason to grant the Crown's adjournment. Bill C-56 does nothing to address the issues raised by this Application. Indeterminate solitary confinement will remain a feature of Canadian prisons even if this proposed legislation becomes law. Nothing under consideration would limit administrative segregation to 15 days, nothing would require independent authorization to maintain segregation beyond 5 days, and nothing would spare young adults, prisoners requiring protective custody, or any but the most seriously mentally ill.

5. These vulnerable prisoners remain in desperate need of the Court's assistance. Any adjournment of this Application will keep them in prolonged solitary confinement. For these prisoners, an adjournment would not amount a mere symbolic inconvenience. Rather, in a very concrete sense, an adjournment would condemn them to remain subject to a deplorable practice and deny them the timely relief that they urgently require.

6. In essence, the CCLA is challenging current legislative provisions that will be unaltered by any of the proposed amendments. Indeed, if Bill C-56 were enacted, the CCLA would maintain every ground in its Application. Seen in this light, the Crown's motion for an adjournment is nothing more than an attempt to bar the Court from scrutinizing practices that will be permitted to continue regardless of whether Bill C-56 becomes law. The CCLA urges the Court not to retreat from this vital work. The present Application is too important to too many Canadians who are, and will continue to be, subjected to devastating treatment at the hands of those who are charged with their custody.

PART II - FACTS

A. This Proceeding

7. The CCLA challenges the legislation, policy and practice of administrative segregation[2] in institutions operated by the Correctional Service of Canada ("**CSC**") on behalf of the Crown. The CCLA seeks a declaration that the sections of the *Corrections and Conditional Release Act* (the "***CCRA***") governing administrative segregation, sections 31 to 37, "on their face, and as applied in penitentiary institutions across Canada," violate sections 7, 11(h) and 12 of the *Charter of Rights and Freedoms*.[3]

8. Section 31 of the *CCRA* sets out the grounds for ordering administrative segregation:

> **31** (1) The 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.
>
> **Duration**
>
> (2) The inmate is to be released from administrative segregation at the earliest appropriate time.
>
> **Grounds for confining inmate in administrative segregation**
>
> (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that
>
> > (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;

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2 Segregation is the practice of confining inmates to small cells for 22 hours or more each day without meaningful human contact. Administrative segregation is to be distinguished from disciplinary segregation. The latter is imposed as a sentence for institutional misconduct by inmates following a hearing before an independent chair, and it is limited to 30 days: *Corrections and Conditional Release Regulations*, SOR 92-620, ss. 24-41.

3 *Corrections and Conditional Release Act* , S.C. 1992, c. 20 (*CCRA*), ss. 31-37; Notice of Application, at para. 1, CCLA's Motion Record, Tab A.

> (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.

9. Furthermore, section 32 of the *CCRA* provides that "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 criteria in section 31 of the *CCRA* are therefore the gate through which all administratively segregated inmates must pass in order to be released.

10. The CCLA argues that administrative segregation is not permitted in four circumstances. These circumstances exist today in CSC institutions, and, as discussed below, they will continue to be authorized even if the Crown makes all of its proposed changes to the regime governing administrative segregation.

(a) First, the CCLA alleges that administrative segregation in excess of 15 days constitutes torture or cruel, inhuman and degrading treatment or punishment for all inmates.

(b) Second, the CCLA alleges that it constitutes torture or cruel, inhuman, and degrading treatment or punishment to order administrative segregation of any duration for inmates under 21 years of age or suffering from mental illness.

(c) Third, the CCLA alleges that administrative segregation to protect an inmate's safety is an additional penalty without an additional delict, contrary to section 11(h) of the *Charter*, which protects the right to be free from double punishment.

(d) Fourth, the CCLA challenges the absence of an independent arbiter to decide (not recommend) whether grounds exist to continue the administrative segregation of an inmate after the fifth day.[4]

B. The Evidentiary Record

11. In support of its Application, the CCLA has delivered five expert reports:

(a) First, Dr. Ruth Martin, a family physician practicing in Vancouver, who worked as a prison doctor and is Chair of the Prison Health Program Committee, Community of Practice in Family Medicine of the College of Family Physicians of Canada, provided her opinion for the Court. Drawing on both her clinical experience working in correctional institutions and the medical literature, Dr. Martin describes the harms suffered by inmates subjected to administrative segregation.

(b) Second, Dr. Gary Chaimowitz, a forensic psychiatrist with experience treating and assessing inmates who are, or have been, in segregation in correctional institutions, provided his opinion for the Court. Dr. Chaimowitz drew on his clinical experience and the medical literature to conclude that inmates subjected to administrative segregation suffer significant harms after 15 days and that inmates

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[4] Notice of Application, at para 24, CCLA Motion Record, Tab 1.

suffering from mental illnesses and inmates age 18-21 are particularly vulnerable to these harms.

(c) Third, Prof. Juan Mendez, then the United Nations Special Rapporteur for Torture, and currently a professor of international law at American University in Washington, D.C., provided his opinion for the Court. Prof. Mendez gives an overview of the international treaties governing torture and cruel, inhuman and degrading treatment or punishment, particularly as they relate to the conditions of prisoners. He opines that at international law, solitary confinement (defined as confinement in the absence of meaningful human contact for 22 hours or more each day) for more than 15 days is prohibited as cruel, inhuman or degrading treatment, and in some circumstances, as torture.

(d) Fourth, Prof. Kelly Hannah-Moffat, a sociologist, prison policy expert and professor at the University of Toronto, provided her opinion for the Court. Prof. Hannah-Moffat describes the negative effects of administrative segregation and explains the alternatives to segregation available to CSC.

(e) Fifth, Prof. Andrew Coyle, a former prison governor (warden) in the United Kingdom and Emeritus Professor of Prison Studies at the University of London, provided his opinion for the Court. Prof. Coyle explained that there are methods of organizing correctional institutions, used in jurisdictions such as the United Kingdom, to permit safe and effective operations without subjecting inmates to administrative segregation.

12. In response the Crown submitted three fact witness affidavits and two expert reports:

(a) First, Bruce Somers, Assistant Deputy Commissioner, Correctional Operations, Ontario Region at CSC, provided an affidavit describing the legislation, regulations and Commissioners Directives – the policy documents – governing CSC's use of administrative segregation.

(b) Second, Jay Pyke, Warden of the Collins Bay Institution and former warden of two other CSC institutions, provided an affidavit describing the operation of a prison and the use and practice of administrative segregation.

(c) Third, Dr. Kelley Blanchette, a psychologist and CSC's Deputy Commissioner for Women, provided an affidavit describing CSC's structure and its provision of health services, including mental health care and care in administrative segregation.

(d) Fourth, Dr. Robert Morgan, a psychologist and professor at Texas Tech University in Lubbock, Texas, provided his opinion for the Court. Prof. Morgan summarizes and supplements (i) a meta study he conducted on the effects of administrative segregation on inmates and (ii) his clinical experience treating inmates in Texas. Dr. Morgan opined that administrative segregation has a small to moderate negative effect on inmates that is not significantly different than the negative effects of the general prison population.

(e) Fifth, Dr. David Nussbaum, a psychologist at Ontario Shores institution in Whitby, Ontario, provided his opinion for the Court. Dr. Nussbaum reviewed the

medical literature concerning the development of adolescent brains and opined that the brain has substantially developed by the time an individual reaches 18 years of age.

13. In reply, the CCLA submitted affidavits from three inmates who have been subjected to administrative segregation in a number of CSC institutions. Those inmates described the profound harm they suffered (and, in one case, continue to suffer) in administrative segregation, and explained the ways in which CSC's policies are not applied in practice. The CCLA is seeking a publication ban on the names of these inmates because the Crown has adduced highly personal information from their CSC files.[5]

14. In sur-reply, the Crown submitted a further affidavit from Bruce Somers attaching information about the three inmate affiants and their reasons for segregation, and responding to their criticisms of CSC practices. He further provided a proposed amended Commissioner's Directive 709, which concerns administrative segregation.

15. The Crown sought and obtained an adjournment of the hearing of this Application from the week of June 26, 2017 to the week of September 11, 2017. The adjournment was to give the Crown time to deliver sur-reply evidence.

C. Status of the Proceeding

16. This Application is well advanced. Indeed, the parties are in the middle of cross-examinations of the Crown's affiants, which are scheduled to conclude at the end of the week. Subject to eliciting facts from the Crown's affiants on cross-examination, the CCLA's case is complete. The Crown scheduled the cross-examination of the CCLA's witnesses, but largely

[5] The Crown has yet to provide its position on the proposed publication ban. Cross-Examination of J. Pyke, 21 June 2017, pp. 5, Q. 16-25, (Pyke Examination), page 5, CCLA Transcript Brief, Tab 1.

declined to proceed. The only exception was Prof. Mendez, who was cross-examined on May 16, 2017.

17. Bill C-56 was introduced two days before the CCLA was scheduled to begin cross-examining Canada's witnesses, and those cross-examinations have continued as scheduled. The CCLA has cross-examined Warden Pyke and Dr. Morgan. By the time this motion is heard, the CCLA will have cross-examined Assistant Deputy Commissioner Somers. The cross-examination of Dr. Nussbaum is scheduled for the day after the hearing of this motion. Accordingly, by the end of this week, the evidentiary record will be complete. We are effectively mid-trial, and the Crown seeks to adjourn this Application *sine die* to avoid the Court's judgment.

18. By contrast, it is uncertain when, if ever, the proposed Bill C-56 will become law, and in what form. The Union of Canadian Correctional Officers, which represents CSC's front-line staff, has strongly rejected even the meek measures in the proposed legislation on the basis that they are "improvised and dangerous."[6] There is no telling what, if anything, in Bill C-56 will ever become law, and when that might happen.

D. The New Legislation and Commissioner's Directives

19. In its motion to adjourn this proceeding, the Crown relies on the proposed Bill C-56, which was tabled in Parliament for a first reading on June 19, 2017. The Crown also relies on the amended Commissioner's Directive 709 ("**CD-709**") and Commissioner's Directive 843 ("**CD-843**") regarding administrative segregation. Neither the proposed Bill C-56 nor the

[6] "Tabling of Bill C-56 – Improvised and dangerous measures", Union of Canadian Correctional Officers (June 20, 2017), online: http://ucco-sacc-csn.ca/2017/06/20/tabling-of-bill-c-56-improvised-and-dangerous-measures/, CCLA Motion Record, Exhibit "H".

Commissioner's Directives amend the criteria to detain an inmate in administrative segregation. Pursuant to s. 32 of the *CCRA*, the decision "to release or not to release an inmate from administrative segregation shall be based on the considerations set out in section 31." There have been no changes to s. 31, which remains as set out above.

20. Nonetheless, Bill C-56 has two primary features on which the Crown relies for its position that the Application should be adjourned: one respecting the duration of an inmate's detention in administrative segregation, and the other addressing review of an inmate's continued confinement. The Crown also relies on guidance concerning the use and conditions of administrative segregation in the proposed CD-709 and CD-843. None of these proposed changes addresses the grounds for the CCLA's Application and, indeed, the record already demonstrates that none will have any practical effect on these constitutional deficiencies.

i. The Illusory Presumptive Time Limit

21. First, Bill C-56 provides that an inmate will be presumptively released from administrative segregation after 20 days.[7] However, the 20-day presumptive release date is subject to an order by the institutional head continuing the detention:

> An inmate shall be released from administrative segregation before the end of the 20th day after the day on which they were placed in administrative segregation unless, before the end of that 20th day, the institutional head orders in writing that the inmate is to remain in administrative segregation.[8]

22. Accordingly, Bill C-56 does not impose a limit on the time that an inmate may remain in solitary confinement. Indeed, it changes nothing in this regard because an inmate will remain in segregation so long as the criteria for admission persist. At present, an inmate must

[7] The proposed Bill C-56 contemplates that this presumptive release date will be advanced to 14 days after 18 months.

[8] Bill C-56, An Act to Amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act, (*Bill C-56*), s. 35.1 [emphasis added].

be released from administrative segregation immediately, unless the criteria for admission persist ("at the earliest appropriate time").[9] Bill C-56 would effectively provide that an inmate must be released from administrative segregation within 20 days, or earlier, unless the criteria for admission persist – that is, "unless the institutional head decides that the safety and security of the institution requires the inmate to remain in administrative segregation for a longer period."[10] This change is nothing more than window dressing because the criteria to maintain solitary confinement remain the same. If an inmate cannot be released immediately under the *Act* as it stands today, the inmate cannot be released under Bill C-56.

23. The foregoing is confirmed by the evidence of Warden Pyke. Warden Pyke is an institutional head charged with admitting and releasing inmates from administrative segregation, and, as noted above, Canada tendered his evidence to explain the policies and procedures of CSC. Warden Pyke confirmed that those in administrative segregation are there because it is necessary. When asked directly, he confirmed that it would change nothing to specify a number of days by which an inmate is to be presumptively released:

> Q. You're supposed to keep inmates in administrative segregation no longer than necessary?
>
> A. Correct
>
> Q. And if there's a way that you can get an inmate out of administrative segregation you're supposed to get the inmate out?
>
> A. Correct
>
> [...]
>
> Q. So if inmates are in segregation right now, it's because they need to be there?

[9] *CCRA*, at s. 31(2)-(3).

[10] Memorandum of Argument of the Attorney General of Canada dated June 20, 2017, Crown Factum, at para. 17

A. Yes.

Q. And telling you the inmates should be out of segregation after some number of days doesn't really change things because they're not supposed to be in any longer than absolutely necessary in the first place, right?

A. That's correct.[11]

24. Disturbingly, Warden Pyke expressed the view that administrative segregation does not cause psychological or physical harm, and he candidly advised that these considerations do not factor into his decision to release an inmate from administrative segregation:

Q. But you're not aware of any psychological injury that can occur as a result of long-term administrative segregation?

A. Personally, I am not.

Q. And the same for physical injury?

A. Can you be more direct, please, in terms of what you're referring to as physical injury in segregation?

Q. Let's take it at the broadest possible level. You're not aware of any danger of physical injury to the inmate from prolonged administrative segregation?

A. From the placement in admin segregation in and of itself?

Q. Correct.

A. No.

Q. And so when I talk about harm in terms of psychological injury or physical injury to the inmate, you're saying that the possibility of harm of that nature is not driving your –

A. No.

Q. – decision to release the inmate from administrative segregation as soon as possible?

A. No.[12]

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[11] Cross-Examination of J. Pyke, 21 June 2017 at pp. 42-43, Q.116-117, 119-120 [emphasis added], CCLA Transcript Brief, Tab 1.

[12] Cross-examination of J. Pyke, 21 June 2017, at pp. 40-41, Q. 106-11, CCLA Transcript Brief, Tab 1.

25. Warden Pyke confirmed that his practices were similar to those of other institutional heads across CSC institutions.[13] However, CSC's approach in this regard is inconsistent with all of the expert opinion before the Court. Dr. Gary Chaimowitz deposes:

> There is ample evidence to suggest that there are a number of consequences of solitary confinement. Solitary confinement can produce longstanding, lasting psychological effects, as well as producing acute side effects such as hallucinations, psychosis, posttraumatic stress symptoms, and the potential for suicidal or self-harming behaviours. These consequences may manifest themselves in individuals who have previously suffered mental illness. Where individuals already suffer mental illness there is a real danger that solitary confinement especially prolonged solitary confinement may cause serious trauma and may lead to a marked deterioration in their mental health. There is also evidence to suggest that longer periods and indefinite periods of solitary confinement can exacerbate the harm suffered, and can increase the likelihood of the traumatic consequences. Solitary confinement in excess of 15 consecutive days poses a serious risk of the psychological effects as described above. This risk grows a[s] solitary condiment is continued, particularly if the individual does not have the certainty of a date on which it will end.[14]

26. Similarly, Dr. Ruth Martin deposes:

> The effects of isolation and segregation on an individual's mental and physical health are well documented in the medical and psychiatric literature. Craig Haney's thorough literature review includes a description of a study of detainees who experienced isolation in Denmark. After a few days in isolation, symptoms included, "problems of concentration, restlessness, failure of memory, sleeping problems and impaired sense of time an[d] ability to follow the rhythm of day and night" and after a few weeks of isolation, symptoms included, "difficulties with memory and concentration", "inexplicable fatigue", a "distinct emotional lability" that can include "fits of rage", hallucinations, and the "extremely common" belief among isolated prisoners that "they have gone or are going mad". This study is consistent with more recently published studies, and also consistent with my observations and experience.[15]

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[13] Cross-examination of J. Pyke, 21 June 2017, at pp. 14-15, Q. 46, CCLA Transcript Brief, Tab 1.

[14] Expert Report of Dr. G. Chaimowitz, pp. 4 [emphasis added], CCLA Motion Record, Exhibit "C".

[15] Expert Report of Dr. R. Martin, para. 23 [emphasis added], CCLA Motion Record, Exhibit "D".

27. All of the expert evidence before the Court acknowledges the risk of harm from even short periods of administrative segregation. There is no expert opinion before the Court that confirms CSC's approach to the harm caused by administrative segregation.

28. To put the harm caused by administrative segregation in context, the CCLA adduced the opinion of Prof. Mendez, who was then the United Nations Special Rapporteur on Torture. Prof. Mendez explained that the United Nations' Nelson Mandela Rules prohibit solitary confinement beyond 15 days.[16] In turn, he explained that the Mandela Rules provide "the specific and most-respected means of interpretation" of the *Convention Against Torture* in the prison context.[17]

29. In Professor Mendez's opinion, the Mandela Rules represent "an objective standard by which states and courts can determine whether in a given case that the person has been subjected to cruel, inhuman and degrading treatment, or in certain circumstances, torture".[18] On cross-examination, Professor Mendez maintained that solitary confinement in excess of 15 days therefore contravenes Canada's obligations under the *Convention Against Torture*.[19] Regardless of any mitigating factors, this treatment constitutes either torture or cruel, inhuman, or degrading treatment:

> ...there has been quite a solid consensus that anything beyond 15 days is in violation of international standards. I'm sorry, even with mitigating circumstances.[20]

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[16] Cross-examination of J. Mendez, 16 May 2017, at p. 18; Re-examination of J. Mendez, 16 May 2017, at p. 35, CCLA Transcript Brief, Tab 2.

[17] Re-examination of J. Mendez, 16 May 2017, at pp. 32 and 36; Cross-examination of J. Mendez, 16 May 2017, at p. 8, CCLA Transcript Brief, Tab 2.

[18] Re-examination of J. Mendez, 16 May 2017, at pp. 36, CCLA Transcript Brief, Tab 2.

[19] Cross-examination of J. Mendez, 16 May 2017, at p. 18, CCLA Transcript Brief, Tab 2.

[20] Cross-examination of J. Mendez, 16 May 2017, at pp. 18-19 [emphasis added], CCLA Transcript Brief, Tab 2.

30. Until this Court recognizes the harm that administrative segregation causes, CSC will continue to arrange its affairs in a manner that relies on this abhorrent practice. The case of inmate J.H. illustrates the consequences of CSC's cavalier attitude.

31. J.H. began serving his sentence at the Kingston Penitentiary, which was under the direction of Warden Pyke. Before his arrival, CSC was aware that J.H.'s co-accused, who had testified against him, was already in the general population at Kingston.[21] The co-accused was an "incompatible". Accordingly, it was CSC's plan to place J.H. directly into administrative segregation and hold him there until his assessment could be completed and he could be placed in a penitentiary, some three months later.[22]

32. Warden Pyke did not consider transferring J.H. to another intuition where he might have been housed in the general population.[23] When Kingston closed, J.H. was transferred to the Millhaven Institution, where he remained in administrative segregation, despite the fact that there was no incompatible in the general population.[24] Although J.H. had not caused any incident in federal custody, the warden at Millhaven wanted to "see a long period of stability and positive behaviour before any consideration for placement in the open population".[25] In each review of J.H.'s administrative segregation, the rationale for his continued detention was exact replication of the last review.[26]

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[21] Cross-examination of J. Pyke, 21 June 2017, at pp. 97-100, CCLA Transcript Brief, Tab 1.

[22] Cross-examination of J. Pyke, 21 June 2017, at p. 126, Q. 425-428; p. 114, Q. 381; p. 179, Q. 647, CCLA Transcript Brief, Tab 1.

[23] Cross-examination of J. Pyke, 21 June 2017, at p. 167, Q. 600-601, CCLA Transcript Brief, Tab 1.

[24] Cross-examination of J. Pyke, 21 June 2017, at p. 179-180, Q. 647, CCLA Transcript Brief, Tab 1.

[25] Cross-examination of J. Pyke, 21 June 2017, at p. 158, Q. 569, CCLA Transcript Brief, Tab 1.

[26] Cross-examination of J. Pyke, 21 June 2017, at p. 137, Q. 478; p. 172, Q. 621-622, CCLA Transcript Brief, Tab 1.

33. This is what CSC means when it determines that continued administrative segregation is necessary because the criteria of s. 31 of the *Act* are met. CSC's affairs are structured in a way that manufactures this necessity. CSC acknowledged that J.H. would have been capable of sharing a cell with another inmate,[27] but instead it created a dichotomy of general population or administrative segregation, and upon finding him unsuitable for the former, he was confined to the latter:

> Q. But you know J.H. is coming to Kingston Penitentiary, he's going straight into administrative segregation?
>
> A. Yeah.
>
> Q. And that's because there's an incompatible?
>
> A. Correct.
>
> Q. And you know that before he gets to Kingston Penitentiary?
>
> A. Yeah.[28]
>
> [...]
>
> Q. It's pretty automatic segregation?
>
> A. Yes, I wouldn't put two co-convicted where one had provided testimony against the other in the same population.
>
> Q. And you said in the circumstances, J.H. could have gone to Kingston or Millhaven, right?
>
> A. He would not have been able to integrate into an open population at Millhaven because of his protective custody status that was already there, but yes, he could have went to either one.
>
> Q. And I suppose he could have gone to another CSC facility in another region?

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[27] Cross-examination of J. Pyke, 21 June 2017, at p. 106, Q. 356, CCLA Transcript Brief, Tab 1.

[28] Cross-examination of J. Pyke, 21 June 2017, at p. 86, Q. 280-82, CCLA Transcript Brief, Tab 1.

A. …Yes, there's potential for them to have gone somewhere else.[29]

34. In the result, J.H. spent 138 days in continuous segregation between Kingston and Millhaven before he was released into general custody in Millhaven – a result that Warden Pyke initially suggested would not be possible because of safety risks.[30] Warden Pyke testified that there was nothing about J.H.'s case that raises eyebrows.[31] He saw nothing wrong with the way that J.H. was treated.[32] On the contrary, he testified that J.H.'s treatment was what CSC means by its core values of "respect" and "fairness".[33]

35. Nothing about Bill C-56 or CSC's amended policies address the problem illustrated by J.H.'s case because the criteria for admission to, and release from, administrative segregation remain the same. The example of incompatibles is but one among many situations in which CSC claims that it has no choice but to segregate inmates. For instance, T.N., whose affidavit is before the Court, required protection from other inmates, and CSC's response was to place him in administrative segregation for extended periods. Warden Pyke testified to the necessity of this kind of detention:

Q. …This is a situation where the inmate is already in the institution and an incompatible arrives?

A. Yes.

Q. And the first inmate is then placed in administrative segregation?

A. Yes,

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[29] Cross-examination of J. Pyke, 21 June 2017, at p. 101, Q. 333-335, CCLA Transcript Brief, Tab 1.

[30] Cross-examination of J. Pyke, 21 June 2017, at p. 101, Q. 334; p. 175, Q. 637-639, CCLA Transcript Brief, Tab 1.

[31] Cross-examination of J. Pyke, 21 June 2017, at p. 181, Q. 650, CCLA Transcript Brief, Tab 1.

[32] Cross-examination of J. Pyke, 21 June 2017, at pp. 177-78, Q. 646, CCLA Transcript Brief, Tab 1.

[33] Cross-examination of J. Pyke, 21 June 2017, at pp. 181-184, Q. 652 and 655, CCLA Transcript Brief, Tab 1.

Q. And it's not anything that the first inmate has necessarily done, right?

A. No, just a – no, it's not. It's just the fact that they have listed incompatibility.

Q. Right.[34]

[...]

Q. Right. So they're minding their own business, an incompatibility issue arises, and you determine that they need to be involuntarily placed in administrative segregation [for their own protection]?

A. Yes, until a solution's found to alleviate the incompatibility concerns.

Q. Right. And that solution can take as long as it takes, right?

A. It's a priority in terms of alleviating the segregation status to try to find that, but there's no set time limit.

Q. Right. And I think as we'll see in J.H.'s case, it takes 138 days.

A. Yeah.[35]

36. It can be expected that CSC will continue to create situations in which it decides administrative segregation is necessary until this Court directs that administrative segregation in excess of 15 days is unconstitutional. Neither Bill C-56, nor the amended policies, address this deficiency.

ii. Independent Review that is Too Little, Too Late

37. In cross-examination Prof. Mendez cautioned that solitary confinement may violate the *Convention Against Torture* even where it does not exceed fifteen days, depending on the circumstances of the inmate and the detention.[36] Given the seriousness of administrative segregation, the CCLA contends that independent review is necessary to authorize any such

[34] Cross-examination of J. Pyke, 21 June 2017, at p. 108, Q. 360-63, CCLA Transcript Brief, Tab 1.

[35] Cross-examination of J. Pyke, 21 June 2017, at pp. 111-12, CCLA Transcript Brief, Tab 1.

[36] Cross-examination of J. Mendez, 16 May 2017, at p. 26, CCLA Transcript Brief, Tab 1.

confinement, and the independent reviewer must have the power to decide to release an inmate from segregation.

38. The proposed Bill C-56 completely misses the mark in respect of independent review. There are two problems with the independent reviewer contemplated by Bill C-56: authority (too little) and timing (too late). With respect to authority, Bill C-56 proposes to introduce an "independent external reviewer",[37] an undefined ministerial appointee who would make a recommendation to the institutional head as part of the segregation review processes. However, the institutional head would still retain final authority to determine the length of an inmate's segregation, as is the case under ss. 31(3) in the *CCRA*. Indeed, Warden Pyke repeatedly corrected counsel in cross-examination to emphasize that he makes the decisions about administrative segregation, and he does not consider himself bound by any recommendations:

> Q. All right. But at the end of the day, the decision maker…
>
> A. Is the warden.
>
> Q. Well, the decision-maker on the [institutional segregation review] board you said is the manager here?
>
> A. There's no decision-maker on the board. There's a recommender.[38]
> […]
>
> Q. Right. So you get that kind of decision from the [institutional segregation review] board?
>
> A. I don't get a decision for, like, the third time.
>
> Q. You get a recommendation from the board?

[37] Bill C-56, at s. 37.1

[38] Cross-examination of J. Pyke, 21 June 2017, at pp. 120-21, Q. 407-410, CCLA Transcript Brief, Tab 1.

A. Yes.[39]

39. The proposed Bill C-56 therefore offers no meaningful prospect of overriding the deeply troubling CSC approach to administrative segregation set out above.

40. With respect to timing, the proposed Bill C-56 contemplates a reviewer who becomes involved only when inmates remain in administrative segregation after 20 days. In other words, Bill C-56 only provides for a recommendation about continued confinement after the inmate has been subjected to conditions that contravene the *Convention Against Torture*. This is simply more window dressing.

iii. Policies with No Practical Effect

41. The Crown relies on changes in proposed CD-709 and CD-843, which are administrative policies that would not have the force of law. In any event, even if the proposed changes are implemented and enforced, they would not have any material effect.

42. The amendments to CD-709 would limit in-cell confinement to 22 hours each day. However, Prof. Mendez makes clear that 22 hours a day in cell without meaningful human contact still constitutes solitary confinement.[40] In this regard, there is no meaningful change from the current practice, which permits 23 hours a day in cell.[41] In any event, the inmate affiants unanimously testified that CSC does not follow the regulations, or its own policies,

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[39] Cross-Examination of J. Pyke, 21 June 2017, pp. 133-134, Q. 461-462 [emphasis added], CCLA Transcript Brief, Tab 1.

[40] Expert Affidavit of Prof. Mendez, para. 13, CCLA Motion Record, Exhibit "B".

[41] Cross-examination of J. Pyke, 21 June 2017, at p.50, Q. 145, Transcript Brief, Tab 1.

with respect to time out of cell for segregated inmates, and the Crown chose not to cross-examine these witnesses.[42]

43. Similarly, the amendments to CD-709 would prohibit administrative segregation of certain vulnerable groups, including pregnant inmates, inmates receiving palliative care, inmates who are certified under provincial mental health legislation, inmates who have significant mental impairments, and inmates who are actively suicidal. These last three groups are germane to the CCLA's Application, insofar as they represent the most serious instances of mental illness. However, Warden Pyke confirmed that even under the existing CSC policies he was not supposed to segregate these inmates, such that the amendments to CD-709 do not represent a material change:

> Q. Under the current rules, you would not, I take it, confine inmates to administrative segregation who are certified in accordance with the provincial Mental Health Act, would you?
>
> A. No.
>
> Q. Those who have a serious mental disorder with significant impairments?
>
> A. No.
>
> Q. Are actively engaging in self-injury?
>
> A. No.
>
> Q. Are actively engaging in self-injury or at elevated or imminent risk for suicide?
>
> A. It may be isolated in a camera situation, but they wouldn't be formally admitted to admin segregation on account of the self-harm behaviour, no.[43]

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[42] Affidavit of T. Nome, at. paras. 39-80, CCLA Motion Record, Exhibit "G"; Affidavit of J. Reddock at paras. 17-23, CCLA Motion Record, Exhibit "F"; Affidavit of J. Hall, at paras. 22-24, CCLA Motion Record, Exhibit "E".

[43] Cross-examination of J. Pyke, 21 June 2017, at pp. 43-44, Q.121-123, CCLA Transcript Brief, Tab 1.

iv. The Proposed Changes Do Not Address the CCLA's Call for an Absolute Prohibition for Certain Vulnerable Inmates

44. There is no need to take the "wait and see" approach advocated by the Crown because neither the proposed Bill C-56, nor any of the policy changes proposed by CSC address the CCLA's contention that certain vulnerable groups cannot be subjected to solitary confinement without violating the *Charter*. Young adults, inmates in need of protection, and all but the most seriously mentally ill will continue to be confined in administrative segregation even if all of the proposed changes in Bill C-56 and the Commissioner's Directives are adopted and put into practice. There is nothing for these vulnerable inmates.

45. Neither Bill C-56 nor any of CSC's proposed policy changes even mention young adults aged 18 to 21. Indeed, Canada has taken the position that young adults do not suffer any disability that would prevent them from being placed in administrative segregation because brain development is substantially complete by age 18. Thus, in Canada's view, 18 year-old inmates are old enough to be subjected to prolonged administrative segregation, despite the fact that they are not be old enough to buy a beer or a pack of cigarettes in this province. This despite evidence from Dr. Chaimowitz that:

> Young people may be more vulnerable to effects of solitary confinement as they are still in crucial stages of social and psychological development. It is documented on the medical literature that people still experience structural growth in to the early 20s. The last area to undergo substantial change is the prefrontal cortex which is linked to judgment, impulsivity and emotion. This may contribute to the difficulty young people experience coping with deprivation and isolation associated with solitary confinement. This in turn could make them more susceptible to physical and mental health problems. Consequently this may have detrimental effects on their rehabilitation and future growth. These risks are more acute with young people with disabilities and histories of trauma and abuse.[44]

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[44] Expert Report of Dr. G. Chaimowitz, p. 4, CCLA Motion Record, Exhibit "C".

46. The Court cannot delay in curing this injustice.

47. The same is true of inmates subjected to administrative segregation for their own protection, who receive no mention in Bill C-56 or any of CSC's proposed policy changes. These inmates are confined to administrative segregation without having done anything wrong, and they are thereby subjected to a subsequent punishment without a subsequent offence, contrary to s. 11(h) of the *Charter*. They are effectively thrown into administrative segregation because CSC does not find them alternative housing. Warden Pyke described the plight of these inmates as another situation in which administrative segregation is necessary, and this institutional view will persist even if all of the proposed changes are implemented.[45] The Court cannot delay in curing this injustice.

48. Finally, Bill C-56 says nothing about keeping mentally ill inmates out of segregation. Instead, this work is left to the proposed amendments to CD-709, the CSC policy governing administrative segregation. As set out above, the proposed CD-709 would bar administrative segregation for inmates who are certified under provincial mental health legislation, have significant mental impairments, or who are actively suicidal. As discussed, Warden Pyke confirmed that current policies already bar the segregation of these inmates.[46]

49. Sadly, the proposed amendments to CD-709 change nothing with respect to the treatment of the majority of mentally ill inmates. For those inmates whose mental illness is not so severe as to render them certifiable, or who do not have significant mental impairments, or who do not disclose active suicidal ideation – for example, those who are

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[45] Cross-examination of J. Pyke, 21 June 2017, at p. 108, Q. 360-63, and pp. 111-12, CCLA Transcript Brief, Tab 1.

[46] Cross-examination of J. Pyke, 21 June 2017, at pp. 43-33, Q. 121-123, CCLA Transcript Brief, Tab 1.

simply suffering a major depressive episode – there is not even window dressing. The Court cannot delay in curing this injustice.

50. In summary, whatever the Court's views of the proposed legislative and policy changes, they simply do not match up with the CCLA's challenge to the continued confinement of vulnerable groups. On this basis alone, the adjournment should be denied because these issues need to be heard on the merits, and there is no reason to make these vulnerable inmates wait any longer for relief.

PART III - ISSUES AND THE LAW

51. The sole issue on this motion is whether this Application should be adjourned for an unspecified time until Parliament does or does not enact Bill C-56. The Crown has advanced what boils down to two arguments for the adjournment. Neither can be sustained:

(a) ***Mootness:*** the introduction of Bill C-56 and amended Commissioner's Directives do not respond to the issues in the Application and therefore do not render it moot; and

(b) ***Deference to the legislative process:*** there is no basis to defer to an uncertain legislative process when there is no prospect that it will cure the deficiencies that give rise to the Application;

A. The introduction of unresponsive legislative and policy changes do not give reason to adjourn the application

52. The Crown's position on this motion rests on the assertion that Bill C-56 resolves the issues raised by this Application. It does not. In fact, as detailed above, neither Bill C-56 nor

CDs 709 and 843 meaningfully address the constitutional questions at the heart of this case. Even if the proposed legislative and policy changes were enacted and enforced, all of the allegations advanced in this Application would remain live issues. Accordingly, as a matter fact, no mootness is in prospect.

53. In any event, the Crown's judicial economy argument cannot be sustained. Whereas usually the "economics of judicial involvement are weighed against the social cost of continued uncertainty in the law,"[47] both factors actually weigh against an adjournment in this case.

54. First, judicial economy is not in issue because the Application has already been extensively case managed and the evidentiary record is nearly complete. Moreover, any conservation of judicial resources is illusory: because all of the unconstitutional features of the regime will remain unabated, the CCLA would be compelled to challenge the same sections of the same legislation after Bill C-56 comes into force, requiring more, not fewer, judicial resources to manage this process anew. Declining to entertain this Application at this late stage would leave an inhumane law on the books until the next challenge.

55. Second, the continued use of prolonged administrative segregation has a profound social cost. While this Application was prepared for a hearing, inmates across Canada continued to languish in isolation for more than 22 hours a day without meaningful human interaction. This is a practice that Prof. Mendez has found to constitute cruel, inhuman, and degrading treatment or punishment. These inmates should not be forced to wait for a new challenge to legislation that remains unchanged in all material respects.

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[47] *Borowski v. Canada* (Attorney General), [1989] 1 SCR 361, Crown's Book of Authorities, Tab 11.

B. There is no Basis to Defer to an Uncertain Legislative Process

56. Even if Bill C-56 addressed the issues at stake in this Application, which it plainly does not, the mere possibility of its future enactment should not suffice to deny timely access to the courts to vindicate *Charter* rights with respect to serious ongoing harm caused by existing law. The authorities on which the Crown relies to support its argument on this point have no relevance to this Application.

i. This Application challenges extant legislation

57. The Crown relies first on *Canada (Governor General in Council) v. Mikisew Cree First Nation*, in which a First Nation sought an advisory opinion from the Federal Court of Appeal on the development of an omnibus bill.[48] That Court refused to hear the case on the basis that the "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)".[49] This Application, by contrast, challenges existing legislation, namely sections 31 to 37 of the *CCRA*, and their application in Canadian penitentiaries. The relevant features of these legislative provisions will continue despite any of the proposed changes in Bill C-56 or the Commissioners Directives, none of which has yet come into force.

ii. The possibility of future law does not support an adjournment

58. Second, the Crown relies on *R v. Malmo-Levine* for the proposition that courts should not hear a challenge to legislation that is subject to proposed changes.[50] In *Malmo-Levine*, the Supreme Court of Canada was asked to determine the constitutionality of criminalizing the

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[48] Canada (Governor General in Council) v Mikisew Cree First Nation , 2016 FCA 311, (*Mikisew*), Crown's Book of Authorities, Tab 7.

[49] *Mikisew*, *ibid.*, at para. 53

[50] *R v. Malmo-Levine*, [2002] S.C.J. 99 (Q.L.), (Malmo-Levine), Crown's Book of Authorities, Tab 8.

possession of marijuana. The hearing of the appeal was adjourned because the Minister of Justice expressed the government's intention to introduce legislation that decriminalized marijuana.

59. However, *Malmo-Levine* is readily distinguishable. In that case, the proposed legislation actually addressed the issue raised by the litigation: namely, the offence of possessing marijuana. By contrast, as discussed above, none of the proposed changes to the regime governing administrative segregation offer any prospect of addressing the grounds for the CCLA's Application. Additionally, by the time the Supreme Court granted an adjournment, the factual record had crystallized and there were trial and appellate judgments, all of which was to the benefit of both the Supreme Court and Parliament. This is simply not our case.

60. In any event, the Crown's reliance on *Malmo-Levine* is misplaced. Indeed, *Malmo-Levine* demonstrates why proposed legislative changes should not derail constitutional challenges. Following the adjournment in *Malmo-Levine,* the legislation promised by the Minister of Justice was never enacted, and the prospect of decriminalizing marijuana would not be revived for another fifteen years.[51] Possession of marijuana remains a criminal offence today, which only underscores the dangers of the "wait and see" approach advocated by the Crown. For those languishing in solitary confinement, even the shortest of adjournments would be too long.

[51] *R v. Malmo-Levine* [2002] S.C.J. 99, at paras. 2-3, Crown's Book of Authorities, Tab 8.

61. It is plain that the proposed Bill C-56 may never become law. The Crown recognizes as much.[52] As with any proposed legislation, this Bill C-56 could fail to obtain the votes required, or it could be substantially curtailed to obtain those votes. As noted above, a key stakeholder, the Union of Canadian Correctional Officers, has already publicly opposed Bill C-56 on the basis that it goes too far.[53] Moreover, media reports suggest that Parliament might be prorogued this fall,[54] which is but one other situation in which Bill C-56 would not become law.

62. Accepting the logic of the Crown's submission would mean that governments could avoid any challenge to existing legislation simply by tabling draft amendments. It cannot be the case that unconstitutional practices are so easily shielded from judicial scrutiny.

iii. The Court's Decision Will be Valuable

63. Third, the Crown suggests that this Court's decision would be wasted if the legislation changed. However, in all of *Malmo-Levine*, *Reference re Same-Sex Marriage*[55] and *Frank v. Canada*,[56] the factual record had crystallized and Parliament had the benefit of trial decisions, and in some instances appellate decisions, on the constitutional issues. There is no such judicial record for this Application, particularly with respect to the constitutionality of prolonged administrative segregation.

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[52] Crown Factum, at para 34.

[53] "Tabling of Bill C-56 – Improvised and dangerous measures", Union of Canadian Correctional Officers (June 20, 2017), online: http://ucco-sacc-csn.ca/2017/06/20/tabling-of-bill-c-56-improvised-and-dangerous-measures/ , CCLA Motion Record, Exhibit "H".

[54] Bill Curry, "Trudeau government vows to shut down debate in effort to pass legislative agenda", The Globe and Mail (1 May 2017), online: < https://www.theglobeandmail.com/news/politics/trudeau-government-vows-to-shut-down-debate-in-effort-to-pass-legislative-agenda/article34868210/>, CCLA Motion Record, Exhibit "I".

[55] Reference re Same-Sex Marriage, 2004 SCC 79, Crown's Book of Authorities, Tab 10.

[56] (SCC File No. 36645) on January 11, 2017 (*Frank*), Crown's Book of Authorities, Tab 9.

64. Even if Bill C-56 does eventually become law, the outcome of this Application may demonstrate that the *Charter* requires more meaningful reforms. This Application offers an opportunity for the Court to create a judicial record that provides Parliament with guidance in this regard. Far from overstepping its role in Canada's constitutional system, as the Crown's suggests, the Court's decision to hear this Application would be entirely consistent with its function.

65. The dire circumstances of inmates in administrative segregation only underscore the need for a determination of the issues raised by this Application.[57] The Office of the Correctional Investigator, the statutory overseer of CSC institutions, notes that 48% of the current incarcerated population has a history of segregation and that the average period of segregation lasts 27 days.[58]

66. The advanced procedural stage of this Application, the severity of the *Charter* violations alleged, the uncertainty surrounding the passage of Bill C-56, and the failure of the proposed changes to address the grounds for the Application all militate in favour of the Application proceeding as scheduled. Deference to Parliament does not require the abdication of the Court's role in scrutinizing existing legislation, and there is no basis to order an adjournment that would only serve to frustrate a vital constitutional challenge.

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[57] Notice of Application at para 25, Motion Record, Exhibit "A".

[58] Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator 2014-2015*, online: http://www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx S 3, CCLA Motion Record, Exhibit "J".

C. Conclusion

67. At this late hour, the Crown asks the Court to send this Application into the ether while Parliament creates an appropriate legislative history.[59] The Crown says that an adjournment is necessary because "the new statutory framework enacted by Parliament will only be known after the legislative process has been carried out".[60] The Crown also says that if all of its proposed changes are implemented "[t]he existing scheme will no longer present a live controversy requiring this Court's intervention".[61]

68. This argument is ill-founded. None of the proposed changes addresses the features of the current regime that the CCLA has challenged. There is no need to "wait and see". This Court can assume that each and every one of Canada's proposed legislative and policy changes will be implemented, and still the CCLA will maintain each and every ground for its Application. Nothing of substance will change. The prospect of window dressing is not grounds for an adjournment, particularly when it leaves so many inmates suffering in such deplorable conditions.

69. The Court should understand that this Application is the only vehicle to meaningfully advance the complaints raised by the CCLA. Canada suggests that these complaints can be advanced in a class action commenced by one of the CCLA's inmate affiants, J.R. This proposed class action asserts only some of the claims set out in the CCLA's Application, and it seeks more focused relief. In any event, the class action is not scheduled to even come to a certification hearing until the end of July 2018. There is no other means of resolving the issues raised by the CCLA within a useful timeframe. This Application is the best and only

[59] Crown's Factum, at paras. 30-31.
[60] Crown's Factum, at para. 37.
[61] Crown's Factum, at para. 36.

chance for affected inmates, and if it is adjourned, Canada will continue to violate inmates' *Charter* rights for the foreseeable future.

PART V – ORDERS REQUESTED

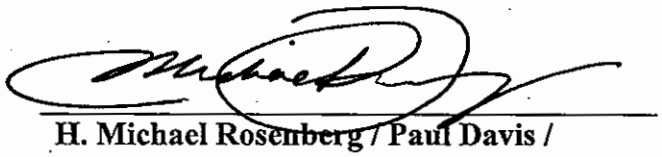
70. The CCLA has not sought costs on the Application and asks that no costs be awarded against it. However, the CCLA has expended considerable effort and incurred significant disbursements to respond to this motion for an adjournment, which was brought on an urgent basis, and which is without merit. The CCLA therefore requests an order dismissing the Crown's motion for an adjournment with costs payable at *pro bono* counsel's usual rates, plus disbursements.

71. In the alternative, if the Crown's motion is granted and this Application is adjourned *sine die* on the basis that the proposed changes render it moot, the CCLA requests an order for the costs of the Application at counsel's usual rates, plus disbursements. The CCLA and its *pro bono* counsel have worked diligently to prepare this Application for a hearing. The CCLA is entitled to indemnification for its costs if Parliament's late involvement in this matter has the effect of avoiding a ruling on the constitutional validity of the practices at issue and rendering useless the extensive evidentiary record. If the Crown's position is that the CCLA must start at square one because Parliament has spoken, then the CCLA should be made whole, such that it can use these funds to revive its constitutional challenge following the passage of Bill C-56.[62]

[62] Carter v. Canada (Attorney General), 2015 SCC 5 at paras. 133-46, Applicant/Respondent Brief of Authorities, Tab 2.

72. Finally, given the sensitive nature of the information in the record about the three inmate affiants, which includes intimate details about their physical and mental state, the CCLA requests a publication ban on the names of the inmates.[63]

73. ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of June, 2017.



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[63] Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835, at para 231, Applicant/Respondent Brief of Authorities, Tab 3.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Borowski v. Canada* (Attorney General), [1989] 1 S.C.R. 361.
2. *Canada (Governor General in Council) v. Mikisew Cree First Nation*, 2016 FCA 311.
3. *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] S.C.J No 5 (Q.L.).
4. *Dagenais v. Canadian Broadcasting Corp,* [1994] 3 SCR 835, 20 O.R. (3d) 816.
5. *R v. Malmo-Levine*, [2002] S.C.J. 99 (Q.L.)
6. *Reference re Same-Sex Marriage*, 2004 SCC 79.

SCHEDULE "B"
RELEVANT STATUTES

***Corrections and Conditional Release Act*, S.C. 1992, c. 20**

31 (1) The 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.

(2) The inmate is to be released from administrative segregation at the earliest appropriate time.

(3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

(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.

32 All recommendations to the institutional head referred to in paragraph 33(1)(c) and 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.

33 (1) Where an inmate is involuntarily confined in administrative segregation, a person or persons designated by the institutional head shall

(a) conduct, at the prescribed time and in the prescribed manner, a hearing to review the inmate's case;

(b) conduct, at prescribed times and in the prescribed manner, further regular hearings to review the inmate's case; and

(c) recommend to the institutional head, after the hearing mentioned in paragraph (a) and after each hearing mentioned in paragraph (b), whether or not the inmate should be released from administrative segregation.

(2) A hearing mentioned in paragraph (1)(a) shall be conducted with the inmate present unless

(a) the inmate is voluntarily absent;

(b) the person or persons conducting the hearing believe on reasonable grounds that the inmate's presence would jeopardize the safety of any person present at the hearing; or

(c) the inmate seriously disrupts the hearing.

34 Where the institutional head does not intend to accept a recommendation made under section 33 to release an inmate from administrative segregation, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to accept the recommendation; and

(b) to give the inmate an opportunity to make oral or written representations.

35 Where an inmate requests to be placed in, or continue in, administrative segregation and the institutional head does not intend to grant the request, the institutional head shall, as soon as is practicable, meet with the inmate

(a) to explain the reasons for not intending to grant the request; and

(b) to give the inmate an opportunity to make oral or written representations.

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

Marginal note:Inmate rights

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

(i) limitations specific to the administrative segregation area, or

(ii) security requirements.

24 (1) The Minister shall appoint

(a) a person, other than a staff member or an offender, who has knowledge of the administrative decision-making process to be an independent chairperson for the purpose of conducting hearings of serious disciplinary offences; and

(b) a senior independent chairperson for each region from among the independent chairpersons of that region.

(2) A senior independent chairperson shall

(a) advise and, in conjunction with the Service, train the independent chairpersons in the senior independent chairperson's region;

(b) promote the principle among the independent chairpersons in the senior independent chairperson's region that similar sanctions should be imposed for similar disciplinary offences committed in similar circumstances; and

(c) exchange information with the senior independent chairpersons of other regions.

(3) A person appointed pursuant to subsection (1) shall hold office during good behaviour for a period of not more than five years, which period may be renewed by the Minister.

(4) An independent chairperson shall be remunerated at a rate determined by the Treasury Board and given travel and living expenses in accordance with the Treasury Board Travel Directive for travel and living expenses related to

(a) conducting a hearing of a disciplinary offence;

(b) participating in an information session;

(c) participating in an orientation and training session;

(d) participating in a consultation session with staff members or inmates; and

(e) performing related duties at the request of the Service.

25 (1) Notice of a charge of a disciplinary offence shall

(a) describe the conduct that is the subject of the charge, including the time, date and place of the alleged disciplinary offence, and contain a summary of the evidence to be presented in support of the charge at the hearing; and

(b) state the time, date and place of the hearing.

(2) A notice referred to in subsection (1) shall be issued and delivered to the inmate who is the subject of the charge, by a staff member as soon as practicable.

26 Where the conduct of an inmate involves a single action, simultaneous actions or a chain of uninterrupted actions, the conduct shall not give rise to more than one disciplinary charge unless the offences that are the subject of the charges are substantially different.

27 (1) Subject to subsections 30(2) and (3), a hearing of a minor disciplinary offence shall be conducted by the institutional head or a staff member designated by the institutional head.

(2) A hearing of a serious disciplinary offence shall be conducted by an independent chairperson, except in extraordinary circumstances where the independent chairperson or another independent chairperson is not available within a reasonable period of time, in which case the institutional head may conduct the hearing.

28 A hearing of a disciplinary offence shall take place as soon as practicable but in any event not less than three working days after the inmate receives written notice of the disciplinary charge, unless the inmate consents to a shorter period.

29 Where an inmate who is charged with a disciplinary offence is placed in administrative segregation as a result of the conduct that gave rise to the disciplinary charge, that inmate's hearing shall be given priority over any other hearings of disciplinary offences.

30 (1) Where the conduct of an inmate that involves a single action, simultaneous actions or a chain of uninterrupted actions gives rise to more than one disciplinary charge, all of the charges shall be heard together.

(2) Where, pursuant to subsection (1), charges of minor and serious disciplinary offences are to be heard together, the hearing shall be conducted by an independent chairperson.

(3) Where the independent chairperson determines that a charge of a serious offence should proceed as a charge of a minor offence, the independent chairperson shall amend the charge and shall conduct the hearing or refer the matter to the institutional head.

31 (1) The person who conducts a hearing of a disciplinary offence shall give the inmate who is charged a reasonable opportunity at the hearing to

> (a) question witnesses through the person conducting the hearing, introduce evidence, call witnesses on the inmate's behalf and examine exhibits and documents to be considered in the taking of the decision; and
>
> (b) make submissions during all phases of the hearing, including submissions respecting the appropriate sanction.

(2) The Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing, and that

the inmate's legal counsel is permitted to participate in the proceedings to the same extent as an inmate pursuant to subsection (1).

32 (1) The person who conducts a hearing of a disciplinary offence shall render a decision as soon as practicable after conducting the hearing.

(2) The institutional head shall ensure that an inmate is given a copy of the decision of the hearing of the inmate's case as soon as practicable after the decision is rendered.

33 (1) The Service shall ensure that all hearings of disciplinary offences are recorded in such a manner as to make a full review of any hearing possible.

(2) A record of a hearing shall be retained for a period of at least two years after the decision is rendered.

(3) An inmate shall be given reasonable access to the record of the inmate's hearing.

34 Before imposing a sanction described in section 44 of the Act, the person conducting a hearing of a disciplinary offence shall consider

(a) the seriousness of the offence and the degree of responsibility the inmate bears for its commission;

(b) the least restrictive measure that would be appropriate in the circumstances;

(c) all relevant aggravating and mitigating circumstances, including the inmate's behaviour in the penitentiary;

(d) the sanctions that have been imposed on other inmates for similar disciplinary offences committed in similar circumstances;

(e) the nature and duration of any other sanction described in section 44 of the Act that has been imposed on the inmate, to ensure that the combination of the sanctions is not excessive;

(f) any measures taken by the Service in connection with the offence before the disposition of the disciplinary charge; and

(g) any recommendations respecting the appropriate sanction made during the hearing.

35 (1) The maximum number of days of privileges that may be lost by an inmate pursuant to paragraph 44(1)(b) of the Act is

(a) seven days, for a minor disciplinary offence; and

(b) 30 days, for a serious disciplinary offence.

(2) A sanction of the loss of privileges

(a) shall be limited to a loss of access to activities that are recreational in nature; and

(b) shall not be imposed where the loss of privileges would be contrary to the inmate's correctional plan.

36 (1) The maximum amount of restitution that may be ordered to an inmate pursuant to paragraph 44(1)(c) of the Act is

(a) $50, for a minor disciplinary offence; and

(b) $500, for a serious disciplinary offence.

(2) An order to make restitution is limited to monetary restitution for the ascertained value of any loss of, or damage to, property that results from the commission of the disciplinary offence.

37 The maximum fine that may be ordered pursuant to paragraph 44(1)(d) of the Act is

(a) $25, for a minor disciplinary offence; and

(b) $50, for a serious disciplinary offence.

38 (1) A sanction of restitution or of a fine shall not be imposed pursuant to subsection 44(1) of the Act unless the inmate's financial means have been considered, and where a sanction of restitution or of a fine would both be appropriate sanctions and the limited means of the inmate make it possible to impose only one of those sanctions, the sanction of restitution shall be imposed.

(2) A sanction of restitution or of a fine imposed pursuant to subsection 44(1) of the Act may allow time for payment and may provide for periodic partial payments.

(3) A sanction of restitution or of a fine shall be recovered by deductions from an inmate's net approved earnings.

39 (1) The maximum number of hours of extra duties that may be ordered pursuant to paragraph 44(1)(e) of the Act is

(a) 10 hours, for a minor disciplinary offence; and

(b) 30 hours, for a serious disciplinary offence.

(2) A sanction to perform extra duties imposed pursuant to paragraph 44(1)(e) of the Act shall specify the type of duties and, subject to subsection (3), the period within which the duties are to be performed.

(3) An inmate shall not be paid for the performance of extra duties imposed as a sanction and shall perform those duties during the inmate's free time.

40 (1) Subject to subsection (2), where an inmate is ordered to serve a period of segregation pursuant to paragraph 44(1)(f) of the Act while subject to a sanction of segregation for another serious disciplinary offence, the order shall specify whether the two periods of segregation are to be served concurrently or consecutively.

(2) Where the sanctions of segregation referred to in subsection (1) are to be served consecutively, the total period of segregation imposed by those sanctions shall not exceed 45 days.

(3) An inmate who is serving a period of segregation as a sanction for a disciplinary offence shall be accorded the same conditions of confinement as would be accorded to an inmate in administrative segregation.

41 (1) Where an inmate is found guilty of a disciplinary offence, the carrying out of the sanction may be suspended

> (a) in the case of a minor disciplinary offence, by the institutional head or a staff member designated by the institutional head, subject to the condition that the inmate is not found guilty of another disciplinary offence committed during a specific period fixed by the institutional head or staff member, which period shall not be longer than 21 days after the date of imposition of the sanction; and
>
> (b) in the case of a serious disciplinary offence, by the independent chairperson, subject to the condition that the inmate is not found guilty of another serious disciplinary offence committed during a period fixed by the independent chairperson, which period shall not be longer than 90 days after the date of imposition of the sanction.

(2) Where an inmate no longer meets a condition referred to in subsection (1), the inmate shall carry out the sanction that was suspended.

(3) The institutional head may, on humanitarian grounds or for rehabilitative purposes, cancel a sanction imposed pursuant to section 44 of the Act.

Corporations of the Canadian Civil Liberties Association et al. Applicants	and	Her Majesty The Queen as Represented by The Attorney General Of The Attorney General Respondent	Court File No.: CV-15-520661

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Proceeding commenced at Toronto

FACTUM OF THE APPLICANT/RESPONDING PARTY, THE CANADIAN CIVIL LIBERTIES ASSOCIATION MOTION TO ADJOURN HEARING OF APPLICATION (RETURNABLE JUNE 29, 2017)

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