# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia Civil Liberties Association v. Canada (Attorney General),* 2018 BCCA 282

Date: 20180629
Docket: CA45092

Between:

**British Columbia Civil Liberties Association and The John Howard Society of Canada**

Respondents
(Plaintiffs)

And

**Attorney General of Canada**

Appellant
(Defendant)

Before: The Honourable Madam Justice Garson
(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated January 17, 2018 (*British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, Vancouver Registry No. S150415)

## Oral Reasons for Judgment

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| Counsel for the Intervenor Applicant Canadian Prison Law Association | A. Nanda |
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| Place and Date of Hearing: | Vancouver, British Columbia<br>June 22, 2018 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 29, 2018 |

***Summary:***

*Six public interest groups and the Attorney General of Ontario apply for intervenor status. The appeal is from an order striking down legislation on the administrative segregation of federally incarcerated inmates. Held: Applications of the public interest applicants granted; application of Ontario dismissed. The public interest applicants will bring unique and helpful perspectives to the issues on appeal. Ontario's proposed submissions, however, go beyond the proper role of an intervenor. In particular, Ontario seeks to duplicate the appellant's submissions, make arguments the appellant could have made but chose not to, and address issues outside the scope of the appeal and the evidentiary record.*



[1] **GARSON J.A.**: This is the application of six public interest advocacy groups, as well as the Attorney General for Ontario, for intervenor status in the within appeal. The Attorney General of Canada appeals from the order of Justice Leask declaring unconstitutional certain provisions governing the administrative segregation of inmates in the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 [*CCRA*]. The constitutional challenge was brought by the British Columbia Civil Liberties Association ("BCCLA") and the John Howard Society of Canada.

[2] The issues on the applications are whether any of the intervenors are proposing to impermissibly expand the scope of the appeal and whether they would bring a unique or helpful perspective to the appeal.

[3] The appeal is scheduled for two days on November 13 and 14, 2018.

## Background

[4] The respondent BCCLA is a non-profit advocacy group whose aims include promoting and defending civil liberties in British Columbia and Canada. The respondent John Howard Society is a non-profit organization with a history of involvement in penal policy and corrections. At trial, Canada did not dispute that the BCCLA and John Howard Society had public interest standing to challenge the constitutional validity of federal administrative segregation legislation.

[5] In the underlying proceeding, the BCCLA and John Howard Society (collectively "respondents") challenged the constitutional validity of ss. 31–33 and

s. 37 of the *CCRA*. Section 31 of the *CCRA* says the purpose of administrative segregation is to maintain safety and security. Section 31 also provides for release of inmates from administrative segregation "at the earliest appropriate time". Under s. 31(3), a warden can order an inmate to be placed in administrative segregation if "satisfied that there is no reasonable alternative" and if he or she believes on reasonable grounds that (a) the inmate is a risk to security or safety, (b) segregation is necessary to prevent interference with an investigation, or (c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety. The *CCRA* and the regulations provide for periodic internal review of an inmate's placement in administrative segregation.



[6] At trial, the respondents said the impugned provisions constituted an unjustifiable infringement of ss. 7, 9, 10, 12 and 15 of the *Charter.* The respondents alleged that the impugned legislation authorizes indeterminate and prolonged solitary confinement, which causes significant adverse health effects for inmates. They also challenged the lack of independent oversight of segregation placements. Finally, they said the impugned provisions had a disproportionate impact on Aboriginal inmates and inmates with mental illness.

## Trial Judge's Decision

[7] In its factum on appeal, Canada conveniently summarizes the trial judge's decision:

> After a 36-day trial, the trial judge made a s. 52(1) declaration that the administrative segregation provisions (ss. 31-33 and 37) are invalid pursuant to s. 7 of the *Charter* to the extent that they authorize and effect prolonged, indefinite, administrative segregation for anyone; authorize and effect the institutional head to be the judge and prosecutor of his own cause; authorize internal review; and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews.
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> The trial judge further declared that the administrative segregation provisions infringe s. 15 of the *Charter* to the extent that they authorize and effect any period of administrative segregation for the mentally ill or disabled, and authorize and effect a procedure that results in discrimination against Aboriginal inmates.
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> The trial judge granted a 12-month suspension of this declaration from January 17, 2018, as an immediate declaration would pose a potential

danger to the public or threaten the rule of law. He did not address the request for s. 24(1) relief.

## Issues on Appeal

[8] Canada submits that the trial judge erred in law by holding that:

a) the administrative segregation provisions infringe s. 7 of the *Charter* to the extent they authorize and effect the prolonged, indefinite segregation of inmates, authorize and effect the institutional head to be the judge and prosecutor of his own cause, authorize internal review, and authorize and effect the deprivation of inmates' right to counsel at segregation hearings and reviews;

b) the administrative segregation provisions infringe s. 15 of the *Charter* for inmates with mental illness or disability, and that compliance with s. 15 precludes any period of administrative segregation for inmates with mental illness or disability;

c) any *Charter* infringements are not justified under s. 1 of the *Charter,* and

d) the appropriate remedy was to grant a s. 52(1) declaration that the administrative segregation provisions are constitutionally invalid, save as regards internal review of segregation decisions.

[9] In other words, Canada says that the impugned provisions, properly interpreted, do not violate s. 7 or s. 15 of the *Charter*. Canada submits that any infringement of the *Charter* is the result of the improper application of the legislation. It says the appropriate remedy is not to strike down the legislation, but rather for an aggrieved individual to seek a remedy under s. 24(1) of the *Charter.*

[10] Canada is not challenging the trial judge's finding of discrimination against Aboriginal inmates. Canada only challenges the trial judge's finding that infirmities in the implementation of the administrative segregation provisions in the case of Aboriginal inmates entitle the respondents to the relief declared under s. 52(1).

[11] The respondents frame the issues somewhat differently on appeal as follows:

Leask J. was correct that:

a) the impugned laws infringe s. 7 of the *Charter* because they authorize and effect prolonged, indefinite administrative segregation of inmates, authorize and effect the institutional head to be the judge and prosecutor of his own cause, authorize internal review, and authorize and effect the deprivation of inmates' right to counsel at administrative segregation hearings and reviews;

b) the administrative segregation provisions infringe s. 15 of the *Charter* for

> inmates with mental illness or disability, and that compliance with s. 15 precludes any period of administrative segregation for inmates with mental illness or disability;
>
> c) any *Charter* infringements are not justified under s. 1 of the *Charter,* and granting a s. 52(1) declaration that the administrative segregation provisions are constitutionally invalid for the above reasons, and because they infringe s. 15 of the Charter for Aboriginal inmates.



[12] In the alternative, if the Court accepts Canada's position that declaratory relief under s. 52(1) was inappropriate in this case, the respondents say relief under s. 24(1) of the *Charter* is available to them. They say there is no principled reason to deny a corporate party with public interest standing the ability to challenge state action rather than legislation.

## Law on Applications to Intervene in an Appeal

[13] Rule 36 of the *Court of Appeal Rules* governs applications for intervenor status:

> 36 (1) Any person interested in an appeal may apply to a justice for leave to intervene on any terms and conditions that the justice may determine.
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> …
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> (3) In any order granting leave to intervene, the justice
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> (a) is to specify the date by which the factum of the intervenor must be filed, and
>
> (b) may make provisions as to additional disbursements incurred by the appellant or any respondent as a result of the intervention.
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> …
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> (5) Unless a justice otherwise orders, an intervenor
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> (a) must not file a factum that exceeds 20 pages,
>
> (b) must include in the factum only those submissions that pertain to the facts and issues included in the factums of the parties, and
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> (c) is not to present oral argument.

[14] There are generally two routes to intervenor status. First, an applicant can show a direct interest in the outcome of the proceeding. None of the proposed intervenors in this case have a direct interest. They must rely on the second route,

which is available to applicants with a public interest in a public law issue. The legal criteria that apply to intervenor applications under this second route are well settled and may be summarized as follows:

a) Does the proposed intervenor have a broad representative base?
b) Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?
c) Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?
d) Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?



See *Guadagni v. B.C. (W.C.B. of B.C.)* (1988), 30 B.C.L.R. (2d) 259 (Chambers); *R. v. Watson and Spratt,* 2006 BCCA 234 at para. 3 (Chambers); *Canada (Attorney General) v. Aluminum Company of Canada Ltd.* (1987), 35 D.L.R. (4th) 495 (B.C.C.A.); *Carter v. Canada (Attorney General),* 2012 BCCA 502 at paras. 24, 68 (Chambers); and *Vincent v. Roche-Vincent,* 2013 BCCA 136 at para. 4 (Chambers).

[15] I would add to these established criteria that the court may, where appropriate, give consideration to factors relating to the orderly and efficient administration of justice. Clearly the number of intervenors ought not to overwhelm the appeal in a manner that may be overly burdensome for the parties or the court. I have given consideration to this factor in my assessment of the totality of the applications.

[16] None of the applicants or the parties dispute the applicable legal test. Rather, it is the application of that test that is controversial in relation to some of the applications.

**The Proposed Intervenors**

[17] The proposed intervenors are the Attorney General of Ontario, the Canadian Human Rights Commission, the Criminal Defence Advocacy Society, the Canadian Prison Law Association, the Canadian Association of Elizabeth Fry Societies, and

the Native Women's Association of Canada together with the West Coast Legal Education and Action Fund.

[18] I shall briefly comment on the organizational goals of the public interest advocacy groups below in my consideration of their individual applications for intervenor status. The Attorney General of Ontario's interest in the appeal relates to its administration of Ontario's provincial prison system and its pending legislation concerning solitary confinement.



## Individual Applications

[19] I now turn to the individual applications.

### Attorney General of Ontario

[20] I begin with the intervenor application of the Attorney General of Ontario.

[21] In oral submissions, Ontario agreed to limit its intervention to the ground of appeal based on s. 7 of the *Charter.* On the basis of that revised submission, Canada withdrew its objection to Ontario being granted intervenor status. However, the respondents maintain their objection to Ontario's application.

[22] The pertinent remaining portions of Ontario's submissions in which it explains the anticipated intervention in this appeal are as follows:

> 15. Ontario will also highlight how administrative segregation in the provincial and territorial correctional setting differs from the federal setting, and how conditions of administrative segregation may differ across different institutions. For example, the majority of Ontario's inmates have been remanded pending criminal charges, which means that there is significant and frequent movement among the inmate population. This contributes to increased security concerns and more limited opportunities for programming, which impacts how the province can house inmates who present unique challenges. This would provide valuable context for this Court's deliberations in this appeal. It does not appear that any other province or territory intends to seek intervention status in the appeal.
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> 16. Ontario can also provide a different perspective from Canada, in particular in relation to the application of the *Charter* s. 7 test. Canada has not addressed the security of the person interest in its memorandum of argument on appeal. Ontario can make useful submissions as to the proper application of the second stage of the s. 7 test in light of this interest. Ontario will argue

> that the question of whether a deprivation of liberty is arbitrary or overbroad may be different than the question of whether a deprivation of security of the person also fails to accord with the principles of fundamental justice.
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> 17. Given that Ontario has recently passed new legislation to reform the operation of correctional facilities in the province (*Correctional Services and Reintegration Act, 2018*), Ontario's new legislation may be placed before this Court. Ontario is best positioned to assist the Court in understanding the similarities and differences between the challenged federal legislation and Ontario's new legislation. Ontario's position would be that both the federal and the provincial legislation comply with the *Charter*, and reflect reasonable policy choices by different levels of government.
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> 18. Finally, if granted leave to intervene, Ontario would support Canada's position that where a statute can be administered in a manner that complies with the *Charter*, any remedy lies under s. 24(1), rather than s. 52. Given the decision of the British Columbia Supreme Court in this case that there was no evidence to support a finding that the legislation breached s. 12 of the *Charter*, Ontario would submit that the same conclusion should have been drawn with respect to the s. 7 analysis and that the declarations of invalidity should not have been ordered. It is only where the statute cannot be administered in a fashion consistent with the *Charter* that a s. 52 declaration would be the appropriate remedy.

[23] The respondents' objection to Ontario's participation in the appeal is based on the following points:

a) Ontario's proposed submissions will expand the issues under appeal without any evidentiary basis to support those submissions. The respondents point to Ontario's proposed submissions regarding Ontario's provincial corrections system. Ontario says its perspective, based on its experiential role in administering a different correctional system, will be unique and valuable. The respondents submit that there is no evidence about Ontario's correctional system. They say Ontario's proposed intervention is an inappropriate attempt to supplement the record.

b) Ontario's proposed submissions on s. 7 of the *Charter* are either an expansion into issues that are not under appeal or a duplication of Canada's position. For example, Ontario proposes to address the security of the person interest because Canada has not addressed this point in its factum. The respondents say this is a misapprehension of the

role of an intervenor, as it is for the parties to frame the issues on appeal.

c) Ontario proposes to support Canada's submissions on the appropriate constitutional remedy in this case. The respondents say Ontario does not identify any unique or different perspective that it might contribute on this point.

[24] I accept that the question of the constitutionality of the federal administrative segregation provisions legitimately engages Ontario's interests in the administration of its provincial corrections system. However, I am unable to discern any unique or helpful perspective that Ontario could bring to this appeal within the confines of the issues under appeal and the record, aside from replicating Canada's submissions.

[25] Ontario proposes to highlight how administrative segregation in the provincial and territorial correctional setting differs from the federal setting, particularly in light of the mobility of the provincial inmate population. Although this proposed submission avoids duplication of Canada's position, I was advised by counsel that there is nothing in the trial record concerning administrative segregation in the provincial system. Given that the record concerns only the federal corrections system, Ontario's submissions on this point appear to stray outside the scope of the issues on appeal and the record. I would, with great respect for Ontario's efforts to assist on this appeal, dismiss Ontario's application for leave to intervene.

**Canadian Prison Law Association ("CPLA")**

[26] CPLA is a national organization of Canadian lawyers and academics practicing and researching in the area of prison law. It was founded in 1985. CPLA engages in education and advocacy activities with the aim of promoting the constitutional rights of prisoners. Its activities include intervening in litigation, issuing publications, and making submissions to governments on prison law reform. CPLA's members have worked to reform the use of administrative segregation in federal institutions for decades. Its members also act for prisoners in matters arising from their placement in administrative segregation.

[27] Canada objects to CPLA's application because CPLA seeks to make submissions on the availability of relief under s. 24(1), an issue Canada says is not engaged on this appeal. Canada asserts that the respondents did not cross-appeal the trial judge's omission to grant relief under s. 24(1) and, accordingly, issues concerning s. 24(1) will not be before the court on appeal.

[28] In my view, the question of whether s. 24(1) might be engaged as an issue on appeal is not a question that could or should be decided on this application. Accordingly, I would not refuse intervenor status to a party proposing to make submissions about s. 24(1) on the grounds that it may not be an issue on the appeal. Such a determination would be premature. The question of whether s. 24(1) is engaged on this appeal is a question for the division hearing the appeal.

[29] If s. 24(1) ultimately becomes an issue, this proposed intervenor has a unique perspective from which to make submissions on this issue. CPLA does not take any position in respect to the availability of declaratory relief under s. 52(1). However, it does dispute Canada's position that relief under s. 24(1) is unavailable to public interest standing litigants. CPLA proposes to submit that seeking relief under s. 24(1) is impractical and unrealistic for the population it represents, namely inmates, because segregation status changes so quickly that an individual claim is generally moot before it reaches a hearing. This unique perspective is directly relevant to Canada's position that any remedy for *Charter* breaches should be sought by individual prisoners when their individual *Charter* rights are infringed.

[30] I would therefore grant CPLA intervenor status.

**Canadian Human Rights Commission ("Commission") and Canadian Association of Elizabeth Fry Societies ("CAEFS")**

[31] Neither Canada nor the respondents object to the intervenor applications of the Commission or CAEFS. However, Canada contends that these two public interest organizations should be granted status as a joint intervenor. Canada says both organizations seek leave to submit that the legislative provisions dealing with administrative segregation discriminate against female, Aboriginal and mentally

disabled inmates. The trial judge held that the impugned provisions do not have a disproportionate effect on women (RFJ at para. 463) and that finding is not under appeal.

[32] The Commission says that, if granted leave to intervene, it will expand on the question of whether solitary confinement discriminates against vulnerable prisoners with mental disabilities, including female prisoners. It also proposes to make submissions on the failure of the impugned provisions to prevent discrimination and the need to interpret "mental disability" broadly and liberally.

[33] CAEFS proposes to make submissions along similar lines. It says its submissions will assert that segregation has disparate discriminatory impacts on vulnerable prisoners, particularly women prisoners who are Indigenous, classified as maximum security, or suffering from disabling mental health issues.

[34] These two organizations have quite different mandates.

[35] I agree with Canada that these two organizations propose to make similar submissions, but each will do so from their own different and unique perspective.

[36] I conclude that both groups should be granted intervenor status but they should not be compelled to do so jointly. I grant both applications.

**Criminal Defence Advocacy Society ("CDAS")**

[37] CDAS intervened at trial. No party objects to its application. Canada voices some concerns about the intended scope of its planned submissions.

[38] CDAS is a British Columbia non-profit society engaged in advocacy, law reform, and education. It was formed in 2015 to fill a perceived need for an organization focused on criminal justice issues impacting defence counsel and their clients. Its membership is made up of over 300 lawyers and law students in British Columbia. CDAS says its members have significant experience with the *Charter*, including protecting the *Charter* rights of imprisoned clients and addressing Parliamentary committees on the constitutionality of proposed legislation.

[39] CDAS submits that its members collectively represent thousands of incarcerated individuals who may face administrative segregation. CDAS says the appeal raises public law issues that engage its interests in the rule of law and the constitutional rights of accused persons. It also says the criminal defence bar has an interest in the development of the law surrounding the rights under ss. 7, 9, 10, and 12 of the *Charter*, since those rights are often engaged in the criminal justice process.

[40] CDAS says it will bring a unique and useful perspective to the appeal because its members have expertise in the protection of the *Charter* rights of accused and incarcerated persons and on the constitutionality of legislation. Its members also have insights on the interaction between defence counsel and inmates in administrative segregation.

[41] In its intervention at trial, CDAS' submissions primarily addressed the lack of access to counsel during the segregation review process. On appeal, CDAS seeks to make submissions on the review process and the right to counsel for segregated inmates. In particular, CDAS proposes to make submissions on:

a) The informational and implementational duties that may arise upon administrative segregation under ss. 7 and 10(b) of the *Charter*;

b) The impacts of administrative segregation on rehabilitation and other sentencing principles; and

c) An analysis of how administrative segregation affects the fitness and proportionality of an offender's sentence.

[42] I accept that CDAS has a broad representative base, as demonstrated by its membership and activities. I am also satisfied that CDAS can bring a unique perspective to this case due to the expertise and experience of its members.

[43] I would grant CDAS leave to intervene provided its submissions do not expand upon the issues as framed by the parties.

**Native Women's Association of Canada ("NWAC") and West Coast Legal Education and Action Fund ("West Coast LEAF")**

[44] NWAC and West Coast LEAF apply jointly for intervenor status. The parties do not object to this joint application. Canada opposes the application insofar as the proposed intervenors seek to make submissions on constitutional remedies under s. 24(1).

[45] West Coast LEAF intervened at the trial before Leask J. Its submissions focused on the disproportionate impact of administrative segregation on individuals with intersecting markers of historic disadvantage, particularly Aboriginal women with mental illness. West Coast LEAF has intervened in numerous other cases at all levels of court with a focus on principles of substantive equality.

[46] NWAC is a national non-profit organization incorporated in 1974. It is an aggregate of provincial and territorial member associations. Its goal is to empower Indigenous women and further substantive equality for Indigenous women. It has a long-standing commitment to addressing the disproportionate criminalization and incarceration of Indigenous women.

[47] West Coast LEAF has experience in prison and sentencing reform. It says it has expertise on the ways that sex inequality intersects with other forms of disadvantage to contribute to the criminalization and over-incarceration of certain groups.

[48] If granted leave to intervene, West Coast LEAF and NWAC propose to bring an "intersectional" lens to the constitutionality of administrative segregation under s. 15 of the *Charter.* They seek to make submissions on the following issues: (a) how Indigenous women and women with disabling mental health issues experience segregation; (b) the disproportionate harms that arise from the use of ostensibly neutral classification or assessment tools in prisons; (c) the significance of the distinction between substantive and formal equality in the context of indirect discriminatory impacts of legislation; (d) the importance of less drastic alternatives to segregation for imprisoned women who are Indigenous and/or have disabling mental

health issues; and (e) constitutional remedies, particularly the importance of making those remedies responsive to the needs of disadvantaged members of society.

[49] I am satisfied that both organizations have a broad representative base, as demonstrated by their membership, activities, and objectives. Further, I am satisfied that they have an interest in the public law issues on appeal. In particular, the appeal engages the constitutional rights of imprisoned Indigenous women, a group at the core of NWAC's work.

[50] For the reasons already given, I decline to make any order limiting submissions under s. 24(1).

[51] I would grant joint intervenor status to West Coast LEAF and NWAC.

[52] Finally, I recognize that in totality I have granted a large number of intervenor applications. However, their proposed submissions are quite narrowly focussed. I propose to make ancillary orders that will hopefully result in an appeal that does not overwhelm the parties or the court. It is my view that these intervenors do have unique and important perspectives from which they propose to address the legal issues.

**Terms**

[53] I make the following ancillary orders:

- Each intervenor is permitted to file and serve a factum not exceeding 10 pages in length on or before a date to be specified by this court. For clarity, NWAC and West Coast LEAF are permitted to file one joint factum not exceeding 10 pages in length.

- Each intervenor shall confine their submissions to issues that are raised by one or more of the parties. The intervenors are not permitted to adduce further evidence or otherwise supplement the record of the parties. They are not entitled to raise new issues or duplicate the arguments of the appellant or respondents.

- The appellant and the respondents are each entitled to file and serve one factum not exceeding 12 pages in response to all the factums of the intervenors who take a position adverse to that party's position, such factum to be filed and served on or before a date to be specified by the court.

- The requests by the intervenors to present oral argument are deferred to the division hearing the appeal.

- There shall be no costs or disbursements awarded to or against an intervenor in this appeal.

[54] In a separate case management order I shall set out the filing schedule for the intervenor factums and consolidated books.

"The Honourable Madam Justice Garson"