

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

MICHAEL FARRELL and KIMBERLY MAJOR

Plaintiffs

and

ATTORNEY GENERAL OF CANADA

Defendant

Proceeding under the *Class Proceedings Act*, 1992

STATEMENT OF DEFENCE

1. The Attorney General of Canada defends this action on behalf of Her Majesty the Queen in Right of Canada pursuant to sections 3, 10 and 23 of the *Crown Liability and Proceedings Act* S.C. 1990 c. 8 s. 21, (“*CLPA*”).
2. The defendant admits the allegations contained in paragraphs 5, 6, 8, and 80 of the Statement of Claim.
3. The defendant denies the allegations contained in paragraphs 1, 2, 3, 4, 7, 12, 14, 15, 18, 19, 22, 23, 25, 26, 27, 28, 30, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 47, 48, 49, 50, 51, 52, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, and 76 of the Statement of Claim.
4. The defendant has no knowledge of the allegations contained in paragraphs 9, 10, 11, 13, 16, 17, 20, 21, 46, 53, 77, 78, 79 of the Statement of Claim.

5. The defendant does not plead to the assertions in paragraphs 28-31, 33, 67-69, 74, 78 & 79 to the extent parts or all of these paragraphs constitute arguments or mere suppositions of the state or impact of the law contrary to rule 25.06 of the *Rules of Civil Procedure*.

6. With respect to paragraphs 24 and 44 of the Statement of Claim, the defendant states that suspicionless strip searches in the impugned situations are authorized by law and, more particularly, by both the *Corrections and Conditional Release Act* (“CCRA”) and the *Corrections and Conditional Release Regulations* (“CCRRs”) in the situations set out.

7. With respect to paragraph 29 of the Statement of Claim, the defendant denies that “if no post-search report is made, CSC has infringed the person’s *Charter* rights under s. 8 (e.g. re the manner of the search) and s. 7 (procedural fairness).”

8. Except as otherwise admitted in this Statement of Defence, the defendant denies the allegations made in the Statement of Claim.

Routine Searches – An Essential Tool in Combating Contraband’s Negative Impact

9. More particularly, in response to the claim as a whole, the defendant states that contraband is available, has been found, and will continue to be subject to concealment attempts whenever inmates:

- i. have access to visitors or other people from outside of the Penitentiary, either through visits, other contacts within the Penitentiary or in the community;
- ii. have access to locations in the Penitentiary where other people, including other inmates and members of the public, could deposit, conceal or otherwise cause contraband to be available to inmates; and
- iii. have access to locations where other people, including other inmates and members of the public, could deposit, conceal or otherwise cause contraband to be available to inmates.

10. Strip searches, whether they are based upon suspicion or constitute routine searches pursuant to s. 48 of the *CCRA*, are conducted only in institutions where they are otherwise permitted by that particular institution's Institutional Search Plan (ISP). Each ISP's requirements are tailored to the security profile of each institution, and vary depending upon context, including the nature of the inmate population and its security profile.

11. Routine strip searches involve a visual inspection of the naked body, and a contemporaneous search of all clothing and other personal possessions the person is carrying at the time of a search. All strip searches are conducted in a private area, out of sight of others, by a correctional officer or primary worker together with a witness, all of whom are of the same sex as the person being searched. Pursuant to *Interim Policy Bulletin 584*, when an inmate seeks to be accommodated on the basis of gender identity or expression, an individualized protocol ("IP") is developed, including to allow the inmate to choose whether a strip search is conducted by a male or female staff member or a combination of male and female staff members.

12. Routine strip searches are an essential component of an integrated safety and security strategy within Penitentiaries and in the broader correctional context. These searches support the mandate of the Correctional Service of Canada ("CSC"), pursuant to ss. 3-5 of the *CCRA*, to provide for the safe and humane custody and supervision of inmates.

13. By detecting and deterring the introduction, presence and possession of drugs, weapons and other contraband, routine strip searches help to ensure an inmate's safety and security, as well as the safety and security of the entire inmate population, including their mental and physical health.

14. Contraband poses a significant risk to the safety, security, and health of inmates. All contraband fosters and maintains the prison sub-culture, including diversion of prescription medication, trade in illicit drugs, debt accumulation, and violence. This impedes the ability of inmates to meet their correctional plans, which are critical to their rehabilitation and eventual safe and successful reintegration into to the community.

No Direct Impact on Security Classification or Parole

15. In addition, and in the alternative, in response to paragraph 25 of the Statement of Claim, the defendant denies that an inmate's refusal to accede to a routine strip search pursuant to paragraph 48 of the *CCRRs* would, in and of itself, result in a change in security classification.

16. Instead, pursuant to the *Commissioner's Directive 705-7: Security Classification and Penitentiary Placement*, it would be considered as one factor among many individual and evolving factors which could at a later point be considered, in addition to the Security Rating Scale, as contemplated by paragraphs 17 and 18 of the *CCRRs*, including:

- i. the seriousness of the offence committed by the inmate;
- ii. any outstanding charges against the inmate;
- iii. the inmate's performance and behaviour while under sentence;
- iv. the inmate's social and criminal history, including a Dangerous Offender designation under the *Criminal Code of Canada*, and, where applicable, young offender history;
- v. any physical or mental illness or disorder suffered by the inmate; and
- vi. the inmate's potential for violent behaviour.

17. In addition, and in further response to paragraph 25 of the Statement of Claim, the defendant denies that each inmate's refusal to submit to a routine strip search pursuant to paragraph 48 of the *CCRRs* will, in and of itself, lead to a disciplinary charge. Where such refusal does, however, lead to a disciplinary charge, this information will be included in the inmate's security classification review, but would be considered among other factors, such as described herein.

18. In addition, and in the alternative in response to paragraph 25 of the Statement of Claim, the defendant denies that an inmate's refusal to accede to a routine strip search pursuant to paragraph 48 of the *CCRRs* would, in and of itself, have any direct impact on

any Parole or other release decisions of the Parole Board of Canada (“PBC”) or within the Penitentiary.

19. Instead, the hypothetical scenario pleaded by the plaintiffs in the claim, and more particularly at paragraph 25 of the Statement of Claim, is highly unique and context-specific. Any refusal to undergo a reasonable and lawful routine strip search would be considered based on the inmate, the inmate’s criminal and Institutional record, security classification and progress in their correctional plan. In turn, an inmate’s refusal would be weighed and considered in respect of a myriad of inter-connected individual factors including, but not limited to:

- i. the nature of and reason for the refusal;
- ii. the nature and severity of charges;
- iii. whether the inmate engaged threats or violence on that occasion or as part of past responses to lawful requests from correctional officers;
- iv. the inmate’s overall disciplinary record;
- v. the inmate’s criminal offence cycle; and
- vi. any other factors which would, in turn, be weighed in any particular release context by the PBC, or in the case of inmates seeking Temporary Absences, by the Institutional Head.

THE PARTIES

Canada –

20. Her Majesty the Queen in Right of Canada, through the Commissioner of Corrections as well as other servants, officers and agents of the CSC, is responsible for the care and custody of inmates in accordance with the mandate established by the *CCRA* and the regulations made thereunder, including the *CCRRs*.

Michael Farrell –

21. The plaintiff, Michael Farrell, is a recidivist offender. In 2007, he received his first federal sentence of 9 years' imprisonment for Conspiracy to Import a Schedule I Substance and Import a Schedule I Substance. Mr. Farrell is currently serving his second federal sentence of 4 years' imprisonment for Possess Schedule I/II Substance for the Purpose of Trafficking (heroin), which took place while on parole for his first sentence. Mr. Farrell is prohibited from possessing weapons for life.

22. Mr. Farrell was sentenced on October 26, 2017 for this second offence. He was released on Day Parole on December 10, 2019, and then statutory release on June 26, 2020. He remains subject to various conditions and community supervision until his sentence ends on October 25, 2021. While incarcerated, he was classified as a Medium Security inmate and was placed at Joyceville Penitentiary from 2018/03/20 until 2019/02/18, when he was reclassified as Minimum security.

23. Mr. Farrell has been heavily involved in the institutional drug subculture both during his current sentence as well as his previous sentence to a Penitentiary. More particularly, Mr. Farrell:

- i. continued to traffic in drugs and other contraband;
- ii. used opiates and tested positive for use of opiates;
- iii. used other contraband drugs;
- iv. participated in the illegal trade in drugs and value for drugs through dealing in contraband; and
- v. smuggled or caused other to smuggle or attempt to smuggle drugs and other contraband into the Penitentiary.

24. Mr. Farrell never filed any grievance to the Commissioner under the *CCRA* relating directly or indirectly to any routine strip search during any period of his two sentences of incarceration in a federal Penitentiary. Nor do any records of any disciplinary offence, or other institutional infraction exist, relating to or arising directly or indirectly from any

routine strip search or any refusal on the part of Mr. Farrell to comply with any lawful request for the same.

25. Likewise, no security classification decisions and no conditional release decisions were ever made directly or indirectly in relation to any failure on the part of Mr. Farrell to comply with any requirement to undergo a routine strip search at any time during his incarceration at any Federal Institution.

26. The defendant accepts, however, that it is likely that Mr. Farrell has been required to undergo a routine strip search because he is, or was, classified as a Medium Security inmate. In addition, any routine search performed upon Mr. Farrell was conducted in accordance with the provisions of the *CCRA* and the *CCRRs* and not for any particular reason or lack of good faith directed toward Mr. Farrell individually.

27. The defendant has no knowledge that any routine strip search caused or contributed to any negative mental health impact upon Mr. Farrell as alleged. Even if one or more routine strip searches had any such impact:

- i. its nature, intensity and duration was particular to this plaintiff;
- ii. it was incumbent upon the plaintiff to advise the defendant and seek treatment, assistance and support to mitigate such impact; and
- iii. this plaintiff failed to mention or otherwise seek mental health assistance in relation to that impact alone or in connection with other events and actions he may have experienced as an inmate in a Medium Security Penitentiary.

Kimberly Major –

28. The plaintiff, Kimberly Major, has served one federal sentence, but she has an additional criminal history of provincial sentences for convictions related to theft and fraud. Ms. Major was charged and convicted of several counts related to fraud in 2016, which resulted in her being sentenced to two years of federal incarceration starting on June 2, 2016.

29. Ms. Major was initially classified as a Minimum Security inmate and placed at Grand Valley Institution for Women (“GVI”), where she remained until her release on Day parole on February 7, 2017. She was granted full parole on May 24, 2017. Her parole was suspended on November 6, 2017 and revoked on January 30, 2018 because she provided a urine sample which tested positive for cocaine in late October 2017. She returned to GVI on November 17, 2017. On March 22, 2018, she was statutorily released from GVI. Her sentence expired on June 1, 2018.

30. Ms. Major has used and been addicted to narcotics in the past. She appears to have had some success in her addiction treatment during her sentence. The defendant has no knowledge of Ms. Major’s current status in this regard.

31. Ms. Major has never filed any grievance to the Commissioner under the *CCRA* relating directly or indirectly to any routine strip search during her incarceration in a federal Penitentiary. Nor do any records of any disciplinary offence, or other institutional infraction exist which relate to or arise directly or indirectly from any routine strip search or any refusal on the part of Ms. Major to comply with any lawful request for the same.

32. Likewise, no security classification decisions and no conditional release decisions were ever made directly or indirectly in relation to any failure on the part of Ms. Major to comply with any requirement to undergo a routine strip search at any time during her incarceration at any Federal Institution.

33. The defendant accepts, however, that it is likely that Ms. Major was required to undergo a routine strip search. In addition, even if any such search occurred, it was conducted in accordance with the provisions of the *CCRA* and the *CCRRs* and not for any particular reason or lack of good faith directed toward Ms. Major individually.

34. The defendant has no knowledge that any such strip search caused or contributed to any negative mental health impact upon Ms. Major as alleged. In addition, and in any event, even if any one or more routine strip search had any such impact:

- i. its nature, intensity and duration was particular to this plaintiff;
- ii. it was incumbent upon the plaintiff to advise the defendant and seek treatment, assistance and support to mitigate such impact; and
- iii. this plaintiff failed to mention or otherwise seek mental health assistance in relation to that impact alone or in connection with other events and actions she may have experienced as an inmate.

BACKGROUND

I. CORRECTIONAL SERVICE OF CANADA (CSC)

35. The Correctional Service of Canada (“CSC”) is the federal government agency responsible for administering sentences amounting to a term of two years or more, as imposed by the courts.

36. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by: (a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and (b) assisting in the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

37. The protection of society is the paramount consideration for CSC in the corrections process.

38. CSC is responsible both for managing institutions of various security levels and supervising offenders in the community. More specifically, CSC is responsible for:

- i. the care and custody of offenders;
- ii. the provision of correctional, educational and other programs that contribute to the rehabilitation of offenders and to their successful reintegration into the community;

- iii. the preparation of offenders for release;
- iv. Parole supervision, statutory release supervision and long-term supervision of offenders; and
- v. maintaining a program of public education about the operations of CSC.

39. CSC derives its operational authority, at least in the context of this case, from the *Corrections and Conditional Release Act*, SC 1992, c 20 (“CCRA”), and the *Corrections and Conditional Release Regulations*, SOR/92-620 (“CCRRs”), which provide its legislative framework.

40. CSC policies are contained in Commissioner’s Directives (“CDs”) which set out services, standards, corporate responsibilities and accountabilities within CSC relating to the fundamental roles, responsibilities and procedures for the provision of correctional services.

41. CDs necessarily have evolved over time to keep pace with, amongst other things, best practices, changes in mental and physical health care, research and technological advances and provincial, professional and community standards.

42. CSC's involvement in the criminal justice process begins once an offender is sentenced to a term of imprisonment of two years or more. Offenders given probation sentences or sentenced to a term of imprisonment of less than two years are the responsibility of the provinces/territories. Juvenile corrections, which are governed by the *Youth Criminal Justice Act*, are also administered by the provinces and territories.

43. CSC operates under three levels of management: national, regional, and institutional/district parole offices. CSC is headed by the Commissioner of Corrections, who reports to the Minister of Public Safety and Emergency Preparedness Canada. The Commissioner is supported by an Executive Committee of national and regional officials.

44. CSC manages 43 institutions (including four aboriginal healing lodges), 14 Community Correctional Centres, and 92 parole offices. Of the 43 institutions, 37 are men's institutions, 6 women's institutions .

II. INSTITUTIONAL SAFETY & SUPPORT FOR INMATE CORRECTIONAL SUCCESS

A. Safety and Stability within The Penitentiary

45. Offenders entering the federal correctional system tend to arrive with criminal values and attitudes based on their life experiences, and these are not easily changed or modified. Within the institutions, opportunities exist for inmates to associate with other criminals and to continue to participate in criminal activities.

46. The highly conflicting influences of the institutional subculture, hierarchies, and those of the prison administration, characterize the world of the inmate, and influence their values, norms and social attitudes.

47. Enforcing formal CSC policies aimed at suppressing criminal or negative inmate behaviour is fundamental to providing an environment conducive to progressive change. These policies encourage pro-social behaviour with programs, education, and work opportunities.

48. CSC employs various tools to minimize the institutional subculture, and therefore reduce violence and the perpetuation of the criminal cycle. These include:

- i. providing a safe environment;
- ii. modelling good behaviour and fostering an environment supportive of programming and rehabilitation;
- iii. reducing opportunities for risk-taking, poor impulse control, violence and addiction, which form a significant part of criminal offence cycles;
- iv. meeting the special needs of women inmates and Aboriginal inmates;

- v. using the least restrictive measures that will protect the public while meeting the needs of the inmate;
- vi. providing initiatives to control the negative influences of gang related activities;
- vii. providing drug strategy initiatives to control the availability and use of drugs within institutions; and
- viii. preparing inmates for eventual release and reintegration into society.

B. Contact with the outside world

49. Inmates are entitled to reasonable contact with the outside world through family and community visits, in-house and external learning programs, and treatment and other programs assisting in their rehabilitation. Each of these interactions can, and has, offered opportunities for inmates to access contraband, which in turn can be introduced into the institutional environment.

50. In the context of normal operations, there are hundreds of movements in and out of every institution each day. Each of these movements presents, and has resulted in, opportunities for contraband and drugs to be smuggled into prisons.

51. Every day, hundreds of people pass in and out of a given institution, including:
- i. institutional administrators, correctional staff, trades contractors, instructors, and volunteers working;
 - ii. garbage trucks making pick-ups;
 - iii. food suppliers making deliveries;
 - iv. Canada Post and courier services delivering mail and packages;
 - v. visitors;
 - vi. inmates leaving and returning to the institution or escorted on unescorted temporary absences;
 - vii. inmates being transferred to or received from other institutions; and
 - viii. inmates being released back into the community, whether on parole or upon their warrant expiry date.

III. CONTRABAND & ITS DEVASTATING DAMAGE

A. Contraband

52. Contraband is defined by section 2 of the *CCRA* as including: intoxicants; weapons, or components thereof; anything that is designed to kill, injure or disable a person or that is altered so as to be capable of killing, injuring or disabling a person; an explosive or bomb, or a component thereof; currency, when possessed without prior authorization; and any other item that could jeopardize the security of an institution or safety of persons.

B. Impact of Contraband on Safety and Security of the Institution

53. Contraband in Federal institutions constitute a clear and present risk, not only to the safety and security of staff and inmates, but also due to interference with inmates' progress toward their correctional plan, and eventual integration back into the community.

54. The presence of drugs, weapons and other contraband inside Penitentiaries significantly undermines the CSC's ability to carry out its mission as set out in ss. 3 to 5 of the *CCRA*. In particular, the introduction of, and trade in, contraband within a Penitentiary pose significant safety and security concerns for inmates, staff, and the community because, *inter alia*:

- i. inmates may conscript family, friends and other people to smuggle and supply contraband into federal institutions, convincing those who would not normally be engaged in criminal enterprise to commit or abet others in committing offences;
- ii. inmates and those involved in criminal enterprise move funds or other valuable consideration in and out of the community;
- iii. it creates opportunities for inmates to continue or increase their criminal offence cycle, thereby rendering them more susceptible to recidivism;
- iv. it creates the potential for violence, directly or indirectly, against other inmates, institutional staff, or members of the public outside a federal institution;

- v. it creates the potential for continued drug or other substance dependency;
- vi. it subverts the safe and proper operations of the institution; and
- vii. profits made from the institutional subculture help fund other illegal activities, both within the institution and within the community.

55. Inmates' privacy, safety and security are adversely effected by the existence of contraband and its trade with a Penitentiary.

56. The impugned searches, including their deterrent impact, are directed at reducing contraband and its adverse effects. This, in turn, actually enhance inmates' overall security of the person and safety. For the same reasons, the impugned searches also contribute to better conditions to support inmates' mental and physical health and rehabilitation.

57. All contraband within the Penitentiary can give rise to serious adverse safety, security and program impacts due to the scarcity of such goods and the substantial increase in their value. The most prevalent categories of contraband are:

- i. drugs and other intoxicants;
- ii. cell phones and other electronic communications devices;
- iii. weapons; and
- iv. institutional "currency".

i) Drug & other Intoxicants = Criminal Gang Activity and Violence

58. Drugs are a major source of revenue and power for inmates in federal Institutions. This trade contributes to the presence of organized gangs which, in turn, are a source of criminal activity and violence. Gang members and other inmates use violence to obtain and control the drug trade, coerce participants including family and associates of inmates in the community, and collect funds and pay drug debts. They also use violence to maintain or enhance their position within the inmate hierarchy.

59. The existence of criminal gangs and criminal activity arising from the introduction of drugs and other contraband of value into Penitentiaries creates a dangerous environment for staff and inmates. In particular, this activity has and will continue to result in:

- i. assaults and even murder of other inmates;
- ii. threats, assaults and coercion by gang affiliates in Penitentiaries or in the community of inmate family, friend and associates to smuggle or supply drugs and other contraband;
- iii. assaults and threats to correctional staff and their families; and
- iv. money laundering.

ii) Cell Phones

60. Cell phones and other electronic communication devices, including SIM cards and other accessories, circumvent normal communication and interception practices.

61. All inmates serving a custodial sentence within the CSC are permitted to communicate by telephone through video calls or the inmate payphone system. Inmates can make voice calls on these phones utilizing a telephone access card and PIN number to call pre-authorized and security cleared telephone contacts.

62. The presence of cell phones and other electronic communication devices circumvents CSC's clearance and authorization procedures and creates significant vulnerabilities in ensuring safer institutions and communities. For example, cell phones can and have been used for:

- i. evading internal security and intelligence surveillance and gathering;
- ii. organizing and directing the introduction of drugs into institutions;
- iii. attempts to smuggle firearms into institutions;
- iv. organizing and carrying out escapes;
- v. conducting criminal enterprise and activities in the community, including large scale drug trafficking;
- vi. maintaining connection to and control of Criminal Organizations;
- vii. intimidating victims and witnesses;

- viii. violating Judicial Orders of non-contact as identified in the *Criminal Code of Canada*;
- ix. tracking institutional staff activities and routines;
- x. capturing images of institutional staff and inmates;
- xi. seeking open source Internet information to identify sex offenders, witness protection cases or justice collaborators;
- xii. connecting inmates' personal computers to the internet; and
- xiii. extorting indebted inmates as well as extorting those inmates and persons in the community, to either conspire in or support illegal activity, including the introduction of contraband.

63. In addition, the presence of cell phones and other electronic communication devices, including SIM cards and accessories, create an underground market economy for both the cell phone and communication devices, including through the rental or sale of that device to other inmates.

iii) Weapons and Material for Weapons

64. Weapons and material that can be used to make weapons can include, but are not limited:

- i. stabbing or cutting instruments such as knives, razors blades, pieces of glass, sharpened metal, plastics and other material that can be honed in a sharp object;
- ii. bats, sticks and other objects capable of being used for blunt force including metal bars, magazines, paper, plastic, ball-bearings and other dense heavy objects;
- iii. strangling or garrotting devices such rope, electrical wire, guitar wire, fishing line, dental floss and other high-tensile string-like objects and even
- iv. ballistic weapons including improvised firearms, crossbows and sling-shot type weapons.

65. Weapons and material that can be used to make weapons have an exceptional value in a Penitentiary. Weapons give inmates the feeling of power and protection. Such weapons can be used by inmates to perpetrate violence, to threaten and intimidate other inmates and staff inside the Penitentiary, as well as during transfer or other travel to or within Penitentiaries.

66. Weapons and material used to make weapons are bought and sold regularly. They are often concealed and carried by inmates. These weapons are also regularly hidden by inmates in their cells or other places where they may later be accessed to engage in violence or threats of violence.

67. Weapons are often used in assaults between inmates. In addition, they are sometimes even used, albeit less frequently, in assaults on correctional staff. Murders or serious assaults in the Penitentiary often involve weapons. Those who commit these offences, or those aiding and abetting, will often try to hide or dismantle a weapon. This is done to dispose of the evidence and avoid its being found during a cell or other intensive searches. Sometimes inmates seek to dispose of such evidence by enlisting, either by consent or coercion, an inmate leaving the Institution to smuggle the weapon out with the view of disposing of the weapon (or its components) in the community.

iv) Institutional “Currency”

68. All contraband carries value as currency within the institutional sub-culture. Currency can be bartered, traded, disclosed or used to manipulate, coerce, reward, recruit or convince another inmate or individual to provide a service or to further a scheme. Intercepting currency, via routine strip searches, or deterring their possession through the threat thereof, is critical to interrupting the institutional subculture. Monetary currency (cash) is of a particular concern in that it cannot be spent within the institution openly but can be used to bribe someone who can then spend it on the outside.

D. Impact of Contraband on Mental and Physical Health

69. The use and availability of drugs and other intoxicants in each Penitentiary has dangerous consequences for the user, other inmates, staff, and members of the community at large. The physical and mental consequences may include, but are not limited to:

- i. overdose leading to death or physical or mental impairment;
- ii. physical injury or deterioration arising from habitual use of drugs or drug paraphernalia; and
- iii. psychotic episodes, depression or other mental illness, especially in already vulnerable people.

70. Inmate use of contraband drugs and other intoxicants within Penitentiaries has, and continues to contribute to the spread of serious disease. Inmates can share needles and other drug paraphernalia that are not properly sterilized. As a result, these inmates have, and continue to infect and transmit deadly diseases. Those who contract these diseases may suffer adverse health impacts, and in turn transmit the disease to other inmates, intimate partners during Private Family Visits in the Penitentiary, or others upon release to the community.

71. Likewise, the adverse impact of violence, extortion, threats to loved-ones, as well as the pressures to participate in the illegal contraband and drug economy can cause significant mental stress and anxiety. This can further exacerbate serious pre-existing emotional conditions, including, but not limited to:

- i. Post-traumatic stress disorder (especially in those inmates who have been exposed to abuse and violence in the community);
- ii. Anxiety;
- iii. Social disorders;
- iv. Anger management concerns;
- v. Self-harm and suicidal ideation; and
- vi. Depression.

E. Impact of Contraband on Inmate Rehabilitation

72. The presence of contraband drugs, including diverted prescription medication and alcohol, prevents or reduces the ability of many inmates to progress toward rehabilitation.

73. Nearly 80% of inmates admitted into Penitentiaries arrive with a drug or alcohol dependency. For many inmates, substance dependency is associated with the offence(s) for which they are incarcerated.

74. The existence of an underground drug trade, and participation either willingly or by coercion, results in a continuation of inmates' involvement in criminality.

75. Inmates involved in this illegal drug trade (drug subculture) engage in violent and dangerous illegal transactions including:

- i. trafficking and using drugs;
- ii. encouraging unsafe drug use such as needle sharing;
- iii. smuggling and extorting others to smuggle and support the criminal enterprise;
- iv. creating debts, debt collection, and muscling, which can include threats of violence and actual violence, even murder; and
- v. a host of other dangerous and criminal activity that arises in the context of illicit trade in drugs.

IV. Integrated Security Framework for Prevention, Detection and Interdiction of Contraband

76. The CSC employs overlapping, often complimentary, mitigation strategies to reduce the introduction and presence of all contraband within Penitentiaries and other federal facilities. These strategies include intelligence gathering, monitoring, perimeter controls, searching, and use of technology to name a few. These strategies must evolve to enhance existing practices and respond to new threats that may emerge.

77. More particularly, the search and seizure provisions of the *CCRA* (ss. 46-67) are part of an integrated approach to safety and security within federal institutions. As such, routine strip searches serve as a deterrent within the institutions because they make it hard for inmates to move contraband around, which can translate to fewer assaults, fewer overdoses, etc. This also makes smuggling harder for those in the community who are either willing participants or who might otherwise be pressured to participate in dealings related to contraband.

Critical Importance of Routine Strip Searches in the Security Framework

78. Routine strip searches have been a crucial facet of Institutional security and safety within federal Penitentiaries since the creation of the federal Penitentiary Service. Their main goals have always been to eliminate contraband in Penitentiaries; improve management of the challenging and complex inmate population and assist CSC in achieving its mandate of contributing to public safety by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control.

79. In 2015, the provisions were amended to include “secure areas”. This gave CSC the authority to further prevent the transmission of contraband when necessary, and to conduct additional searches on inmates, staff, and visitors. The amendments have assisted CSC in preventing drugs and contraband from entering Canadian Penitentiaries.

Commissioner’s Directive/Policy

80. Routine strip searches authorized under s. 48 of the *CCRA* and paragraphs of the *CCRRs* are conducted under the further guidance and authority established by the *Commissioner’s Directive 566-7: Searching of Inmates*. In particular, such searches may only be conducted in accordance with the written directions regarding the performance of such searches within an Institutional Search Plan (“ISP”) established by and tailored to the requirements of each federal Institution across the country.

Institutional Search Plans

81. Routine strip searches, without individualized suspicion, are one of the many integrated security tools available to correctional officials under the *CCRA* and the *CCRRs*. Pursuant to s. 48 of the *CCRA*, such searches may only be conducted in prescribed circumstances, when an inmate has been in a place where he or she is likely to have had access to contraband and that contraband could be hidden on the body, or where the inmate is leaving or entering a structured intervention unit.

82. From an operational perspective, routine strip searches are only authorized and conducted in accordance with each Penitentiary's own specific ISP. Each ISP more specifically addresses when, where, and how such searches may be conducted at any given time.

83. Significantly, even where such searches are provided for within the ISP, they are only used when necessary, having regard to the context at any time at any given institution. Where, however, there is a risk of violence against other inmates, staff or members of the community, or where the opportunity for contraband or weapons is apparent, the context militates in favour of a search.

Contraband Is Accessible in Each of the Impugned Circumstances

84. Inmates have access to contraband in each of the prescribed circumstances established by paragraph 48 of the *CCRRs*.

85. Routine strip search under paragraph 48 of the *CCRRs* occur in high risk areas or situations, the particulars of which are described more fully below, to ensure inmates do not possess or transport contraband.

i) Entering or Leaving a Penitentiary

86. Inmates entering a Penitentiary will have been in a place where they have access to items that constitute contraband within the Penitentiary. This includes inmates arriving to start their sentence, inmates transferring from another institution, or inmates returning from an unescorted or escorted temporary absence in the community.

87. Inmates leaving a Penitentiary have been found to possess contraband items, whether bringing them to another institution, or into the community. Such contraband includes evidence of the commission of an offence, or other items which assist in the continuity of the drug trade, facilitate escape or are otherwise illegal in the community.

ii) Visitors & Access to Contraband

88. Inmates meeting with visitors in an open visiting area have access to people who have and will continue to introduce contraband items into the Penitentiary.

89. Visitors have been known to conceal contraband in their mouths, orifices, clothing or other personal items. Visitors may be searched with their permission, but they can only be strip searched in limited circumstances where there are reasonable grounds to believe that they possess contraband. Visits that permit opportunities for direct or open contact in a common area between inmates and visitors represent a high risk for the transmission of contraband from visitors to inmates.

90. Transferring contraband from a visitor to an inmate may be achieved in a number of ways, including by hand, by a kiss or hug, or by dropping the item on the floor or in a garbage bin or other item. Contraband may also be hidden in a food or beverage container or by placing it in a space accessible to inmates, such as the bathrooms, where it can then be transferred to the intended recipient.

91. The risk of transmission of contraband between visitors and inmates is heightened in the circumstances of unsupervised visits, including Private Family Visits which take place over one or more nights in a separate living unit.

iii) *Entering or Leaving a Secure Area*

92. A “secure area” means an area within the Penitentiary designated as such by the Institutional Head. For example, some areas where security check points might be necessary or the Admission and Discharge areas of the Penitentiary may be so designated. Inmates may be searched when they enter, return or leave a Penitentiary in the context where they are moving from a secure facility on penitentiary property to another secure facility on the same property.

iv) *Penitentiary – To – Penitentiary Transfer*

93. Inmates in possession of contraband in a Penitentiary may carry and transmit that contraband upon transfer to another institution. The personal value of contraband, and opportunity for continued participation in the institutional subculture at the receiving institution, create an incentive for inmates to attempt to bring contraband with them.

94. In addition, there is a significant risk that some inmates may carry weapons during a transfer, for purposes of perpetrating an assault, for personal protection, or to attempt an escape. Efforts to detect contraband prior to a transfer are therefore imperative to minimize the risk to staff charged with maintaining supervision and custody over an inmate during a transfer, other inmates being transferred at the same time, and community members.

95. Weapons are of particular concern in the prison-to-prison context since inmates can pose a risk to staff who are charged with maintaining supervision and custody over the inmate throughout the transfer. This is of even greater concern during inter-regional transfers where multiple inmates, often with records of violence, are transferred together by air and by land.

V. RESPONSE TO ALLEGED CAUSES OF ACTION

i) No Trespass to Person

96. Strip searches conducted in accordance with the lawful authority provided under the *CCRA* and *CCRRs* cannot, without more, amount to a tort or assault or battery or any other trespass to person.

97. The impugned searches described by the proposed representative plaintiffs do not contain material facts making out the alleged tort in the absence of their allegations that the actions of officials were unconstitutional, which allegations are denied.

ii) No Tort Relating to Privacy

98. The defendant denies that inmates incarcerated in Penitentiaries are entitled to the same level of privacy as law-abiding citizens who are at liberty to go about their peaceful law-abiding lives.

99. To the contrary, inmates such as the proposed representative plaintiffs in this claim are subject, as a matter of necessity, to a significant level of supervision, oversight and scrutiny by the very nature of their having to be incarcerated in a Penitentiary. Where this oversight, supervision or surveillance is conducted as part of the lawful authority of corrections officials, there is no room, as a matter of policy, for a tort in the nature as that advanced by the plaintiffs.

100. In response to paragraphs 34(c) and 41 of the Statement of Claim, the defendant denies the existence of a tort of intrusion upon seclusion or other similar breach of privacy in Provinces outside of Ontario. As a result, no such claim can be advanced, as a matter of law, in respect of incidents that arise outside of Ontario.

101. In addition, the defendant denies that to the extent a tort of interference upon seclusion or privacy or similar breach of privacy exists in Ontario or other Provinces within

Canada, that searches authorized and conducted in accordance with s. 48 of the *CRRA* and paragraph 48 of the *CRRRs*, were capable of giving rise to a such a tort in and of themselves. More particularly:

- (i) they were lawfully authorized at the time they were conducted;
- (ii) they were conducted under a public law mandate to protect the safety and security of inmates, staff and the public, and to promote and preserve the ability of inmates to engage constructively in rehabilitation for the betterment of themselves and society and not for any individualized “intention” as that is recognized as an element of the tort in Ontario;
- (iii) a reasonable and informed person, having regard to the context and significant dangers of contraband, and in particular the presence of drugs and weapons within a Penitentiary or in possession of inmates, would not perceive the impugned searches as unreasonable; and
- (iv) to the contrary, such a reasonable and informed person would perceive the failure to perform such searches, having regard to the real and significant risks to safety and security of inmates, staff and society as a whole, to be unreasonable.

102. In addition, and in the further alternative, even if the impugned provisions are struck down it cannot, as a matter of law or fact, render each past search unlawful for the purpose of the alleged tort.

iii) No Breach of s. 7 Right to Liberty or Security of the Person

103. In response to the s. 7 *Charter* claim advanced by the plaintiffs, the defendant says as follows:

- (i) the plaintiffs’ right to liberty or security of the person are, at law or in fact, not engaged in the circumstances of this case;

- (ii) while it is possible that strip searches may conceivably, depending upon the individual, the search and the context, have an impact on the security of the person in certain very narrow circumstances, the conduct of such searches in the circumstances impugned in the statement of claim are in accordance with the principles of fundamental justice;
- (iii) in addition, and in any event, the determination of whether an act like the ones impugned in this case engages security of the person is highly fact-specific based on the particular case and circumstances of the claimant;
- (iv) in addition, and in the further alternative, even if each or any of the plaintiffs' s. 7 *Charter* rights have been engaged by the alleged acts or omissions of Her Majesty's servants, officers or agents, such acts or omissions were conducted in accordance with the principles of fundamental justice and accordingly did not violate s. 7 of the *Charter*;
- (v) in addition, and in the alternative, even if each or any of the plaintiffs' s. 7 *Charter* rights have been engaged by the alleged acts or omissions of Her Majesty's servants, officers or agents, such acts or omissions do not amount to a breach of those rights;
- (vi) in addition, the defendant pleads and relies upon the assertions at paragraphs 15-19 and 98-102 herein; and
- (vii) in the further alternative, if each or any of the plaintiffs' s. 7 *Charter* rights were breached, such breach is saved by s. 1 of the *Charter* in the circumstances of this case.

iv) No Breach of s. 8 - Lawful and Reasonable Search in The Context

104. Routine strip searches of inmates leaving or returning to their cells from within other areas of the Penitentiary or from the community is essential in order to detect any concealed weapons other contraband. This effort to control weapons and contraband in the Penitentiary environment does not, as a matter of law and fact, offend s. 8 of the *Charter*.

105. Strip searches are a necessity in the Penitentiary context. There is a legitimate and pressing need to ensure that inmates are thoroughly searched when in situations where they have access to contraband and especially where they may have access drugs and weapons. The urgency for detection and the threat of interdiction is significant, as well, in situations where inmates travel with other inmates or staff out of the institution as it is where they have access to visitors and others from the community within the institution.

106. Strip searches made in the absence of individualized suspicion in the circumstances impugned in the Statement of Claim are not only lawful but they flow directly and explicitly from the authority provided by s. 48 of the *CCRA* and paragraph 48 of the *CCRRs*. They are reasonable and the process by which they are conducted, privately and by an official together with a corrections official to witness the search, of the same sex, or based on the inmate's individual preference, is reasonable.

107. In addition, within the correctional context, and in particular taking into account the numerous opportunities and motivations for introducing contraband into a Penitentiary plead herein, there is a reasonable and common foundation for the suspicion that inmates with access to contraband are very likely to attempt to smuggle it inside. In this context, randomness in the possibility of these particular routine searches is an essential element in both detection and deterrence.

108. Inmates in Penitentiaries have a diminished reasonable expectation of privacy over their unclothed body in the specific context in which suspicionless strip searches are authorized under the law and carried out within each Penitentiary. More particularly, the

enumerated circumstances under which these impugned searches are conducted arise directly in settings or associated with activities where there is a high probability that inmates can have access to contraband. As a result, there is a high risk that these opportunities for access would and are used to introduce contraband into the Penitentiary.

109. Likewise, inmate access to weapons which may be secreted upon the body or under clothing constitutes a significant danger to staff and other inmates both during transport and admission of these inmates in and out of a Penitentiary. These weapons have and can be used to commit violent physical attacks on staff and other inmates both during transport and later within the Penitentiary into which such weapons are smuggled.

110. The diminished expectation of privacy associated with the context in which such searches occur, considered in light of the importance of the objectives pursued by the search provisions, renders ss. 48 of the *CCRA* and 48 of the *CCRA* reasonable for the purposes of s. 8 of the *Charter*.

111. Further, searches under these provisions are conducted in a reasonable manner.

F. No s. 24 (1) Applicability

112. The defendant denies that the plaintiffs, or each of them, have plead any sufficient material facts necessary to allow them to meet the high threshold of bad faith or other implicit *mal fides* at law necessary to support a claim for relief under s. 24(1) of the *Charter*.

113. More particularly, the material facts advanced by the plaintiffs, or each of them, are insufficient to make out any individual tort or breach of *Charter* right at law which is otherwise independent of their general challenge to the legislative and *Charter vires* of paragraph 48 of the *CCRRs* and s. 48 of the *CCRA*. In particular, references to the following do not constitute any factual foundation upon which to base the bare assertion of bad faith or wilful blindness alleged in the Statement of Claim:

- i. earlier jurisprudence regarding police search powers;

- ii. alleged serious impact of the search which is otherwise authorized by law; or
- iii. the fact that strip searches, whether they be with cause or not, are alleged to be degrading to a subset of inmates;

114. The defendant states, and the fact is, that the only relief the plaintiffs could be entitled to at law, which entitlement is denied in any event, would be a declaration in accordance with s. 52 of the *Constitutions Act*, 1982.

G. No Damages

115. The acts or omissions complained of are insufficient in fact and in law to give rise to a damages award pursuant to s. 24(1) of the *Charter*. In particular, the defendant states that:

- i. searches conducted in the impugned circumstances are conducted in good faith and in accordance with long-standing legal authorization provided for under both the *CCRA* and the *CCRRs* since as early as 1992 and as amended from time-to-time;
- ii. at no time has any Court, in any jurisdiction, struck down any or part of the provisions allowing for routine strip searches in any of the impugned circumstances complained of in the Statement of Claim;
- iii. in addition, and in the alternative, and in response to paragraphs 64-70 of the Statement of Claim, the defendant denies that the wording of the legislation or the reference to jurisprudence relating to policing powers and the preservation of evidence is constituting any notice as alleged either as a matter of fact or by operation of the law.
- iv. neither or either of the proposed representative plaintiffs has plead any material fact establishing that any particularized application of the routine suspicionless strip search was conducted in a manner that failed to comply with lawful authorization for any such individual search on any given date;

- v. nor has each or any of the proposed representative plaintiffs pleaded any material fact that they were subjected to a routine suspicionless search in circumstances where they could definitively not have had access to contraband.

116. In response to the plaintiffs' claim for damages as a whole, the defendant states as follows:

- i. the defendant denies that each or any plaintiffs has suffered the damages or loss as alleged in the Statement of Claim or at all;
- ii. in the alternative, the damage claimed if any, which is denied, was not caused by any act or omission of the defendant;
- iii. in the further alternative, the damages claimed, if any which is denied, was not reasonably foreseeable at the time of the acts and matters complained. In the premises, neither of the plaintiffs' is entitled to recover such damages or any part thereof;
- iv. in the alternative, the defendant says that the damage and loss claimed by the plaintiffs are too remote, excessive and exaggerated to be recovered at law; and
- v. finally, and in any event, any searches conducted in the impugned circumstances of this claim were conducted under legislative authority and do not, without more, attract damages as a matter of law.

F. Limitation of the Plaintiffs' Claim

117. With respect to the plaintiffs' Claim as a whole, the defendant states to the extent each or any plaintiff advances allegations in respect of incidents arising prior to April 2018,

he or she is time-barred. Canada pleads and relies upon sections 4 and 15 of the *Ontario Limitations Act, 2002*, S.O. 2002, c. 25, Sched. B and the sections 32 of the *Crown Liability and Proceedings Act*.

G. Statutory Authorities

118. The defendant pleads and relies upon the provisions of the following legislation and says that such legislation speaks for itself:

- i. *Crown Liability and Proceedings Act*, R.S.C., 1985 as amended, S.C. 1990 c. 8, ss. 3, 8, 10, 20 -32;
- ii. *Corrections and Conditional Release Act*, S.C. 1992, as am., ss.2(1),3, 3.1, 4, 5, 48 and 46-67 more generally;
- iii. *Corrections and Conditional Release Regulations*, as am., s. 48 and ss. 43-58 more generally; and
- iv. *Limitations Act*, S.O., 2002, c. 25, Sched. B ss. 4 & 15.

The Relief Sought

119. The defendant denies that each or any of the plaintiffs is entitled to any of the relief sought in paragraph 4 of the Claim.

120. The defendant asks that this action be dismissed with costs.

Dated at Ottawa, December 18, 2020.

Department of Justice Canada
National Litigation Sector

Civil Litigation Section
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Per: **R. Jeff Anderson**, General
Counsel, LSO #36320W

Tel: (613) 670-6259

Fax: (613) 954-1920

Email: R.Jeff.Anderson@justice.gc.ca

And

Heather Thompson, Counsel,
LSO# 68921B

Tel: (343) 571-9991

Email : Heather.Thompson@justice.gc.ca

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Per: **Prathima Prashad**, Counsel,
LSO # 47901L

Tel: (647) 256-0782

Fax: (416) 954-8982

Email: Prathima.Prashad@justice.gc.ca

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1
Per: **Diya Bouchédid**, Counsel,
LSO # 78299E

Tel: (647) 256-1673
Fax: (416) 973-5004

Email: Diya.Bouchédid@justice.gc.ca

Lawyers for the Defendant

TO: **Elson Advocacy**
Professional Corporation
1062 College Street, Lower Suite
Toronto, ON M6H 1A9

Kent Elson, LSO No. 57091I
Tel: (416) 906-7305
Fax: (416) 763-5435
kent@elsonadvocacy.ca

Abigail Deshman, LSO No. 56757T
Michael Bryant, LSO No. 3812O

Canadian Civil Liberties Association
90 Eglinton Avenue East, Suite 900
Toronto, ON M4P 2Y3
Tel: (416) 646-1404
adeshman@ccla.org; mbryant@ccla.org

Lawyers for the Plaintiffs

MICHAEL FARRELL AND KIMBERLY MAJOR AND
Plaintiffs

ATTORNEY GENERAL OF CANADA
Defendant

(Short title of proceeding)

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding Commenced at
Toronto

STATEMENT OF DEFENCE

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Civil Litigation Section, National Litigation Sector, 50
O'Connor Street, Suite 500 Ottawa, ON K1A 0H8
Fax: (613) 954-1920

Per: R. Jeff Anderson, LSO No. #36320W,
Prathima Prashad, LSO # 47901L, Heather
Thompson, LSO # 68921B & Diya
Bouchededid, LSO # 78299E
Tel: 613-670-6259
Email: Jeff.Anderson@justice.gc.ca

Lawyers for the Defendant