Electronically issued / Délivré par voie électronique : 20-Jun-2022
Toronto Superior Court of Justice / Cour supérieure de justice

Court File No./N° du dossier du greffe : CV-22-00682873-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CANADIAN CIVIL LIBERTIES ASSOCIATION and VANESSA

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

STATEMENT OF CLAIM

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: June 20, 2022

Issued by: _____
Local Registrar

Address of court office: 393 University Avenue, 10th floor
Toronto, Ontario M5G 1E6

TO: **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**
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CLAIM

Contents

Relief claimed

1. The Plaintiffs claim for:

   a. A declaration under s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* (UK), 1982, c 11 ("*Constitution Act, 1982*") that s. 23.1(1)(b) of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 and s. 22(1)(b) of O. Reg 778 are inconsistent with the *Constitution Act, 1982* and of no force or effect or, in the alternative, other appropriate relief under s. 52;

   b. If a declaration under s. 52 of the *Constitution Act, 1982* is suspended, appropriate interim relief, such as interim declaratory relief limiting the authority under the impugned sections to authorize suspicionless strip searches;

c. Other declaratory relief regarding the lawful scope of suspicionless strip searches in the Defendant's correctional centres, detention centres, jails, and treatment centres and the Defendant's compliance therewith;

d. Costs of this action; and

e. Such further and other relief as this Honourable Court deems just.

Overview

2. The Plaintiffs seek an order striking down the law authorizing suspicionless strip searches in Ontario's provincial correctional centres, detention centres, jails, and treatment centres (collectively "provincial prisons") on the basis that is it overly broad and lacks constitutionally required safeguards, and therefore unjustifiably violates sections 8 and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

3. Strip searches are highly intrusive and inherently degrading. The *Ministry of Correctional Services Act* and its regulations grant administrative officials unfettered power to authorize strip searches at any time and in any situation, irrespective of whether there are individualized grounds or articulatable security rationales to justify such searches. This grant of unfettered power is unreasonable, overly broad, and grossly disproportionate to the purpose of the legislative scheme. The Defendant's own independent review recommended in 2017 that the impugned sections be replaced with constitutionally compliant versions. This has not occurred.

4. If the Court declares the impugned law invalid but suspends the declaration, the Plaintiffs seek declarations constraining the Defendant's power to conduct suspicionless strip searches in the interim. The Defendant is routinely strip searching a very large number of Ontarians unnecessarily, including individuals who have already undergone a full body scan. Some individuals are needlessly strip searched every day. This is an affront to human dignity that causes great harm and cannot be tolerated in a free and democratic society, even temporarily.

The parties

5. The Plaintiff, the Canadian Civil Liberties Association, is an independent, non-profit, non-governmental organization that is dedicated to actively defending and promoting the recognition of fundamental human rights and civil liberties.

6. The Plaintiff, Vanessa , is a mother of four living in the Ottawa-Gatineau area. She is a former prisoner and now works and volunteers as an advocate for prisoners, with a focus on care for pregnant mothers who are incarcerated.

7. The Defendant, Her Majesty the Queen in right of Ontario, is the appropriate designation for the Crown in Right of Ontario in proceedings pursuant to the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, C. 7, Sched. 17.

Impugned sections are unconstitutional

8. Section 23.1(1)(b) of the *Ministry of Correctional Services Act* and s. 22(1)(b) of O. Reg 778 are unconstitutional. They are inconsistent with s. 8 of the *Charter,* which requires laws authorizing search and seizure to be reasonable. They are also inconsistent with s. 7 of the *Charter*, which requires deprivations of liberty

and security of the person to be in accordance with the principles of fundamental justice, including the principles against arbitrariness, overbreadth, and gross disproportionality. These infringements are not justified under s. 1 of the *Charter*.

Strip searches are extremely intrusive

9. A strip search is an extreme exercise of state power, and one of the most intrusive forms of searching authorized by law. Strip searches are inherently humiliating and degrading, regardless of the manner in which they are carried out.

10. During a typical strip search, an individual is instructed to remove their clothing item by item in front of officers. The individual may instinctively try to cover their genitals with their arms and hands but is instructed not to do so. They must stand completely naked with their legs and arms apart for inspection. They must then bend over and spread open their buttocks and wait while an officer inspects their anus. They must squat and cough when told to do so. They must touch and manipulate their own penis or breasts when instructed by guards, including lifting their penis or breasts up and from side to side so an officer can inspect under and around them. Heavier individuals must lift up any rolls of fat to allow inspection when told to so do. Women can be required to remove their tampons while guards watch. Individuals with dentures, such as older adults or persons with a history of abuse, must remove them as well.

The impugned strip search power is unfettered

11. The impugned sections of the *Ministry of Correctional Services Act* and its general regulation grant superintendents and their delegates a completely

unfettered power to authorize strip searches of provincial prisoners at any time and in any situation.

12. In particular, s. 23.1(1) of the *Ministry of Correctional Services Act* states that:

> The superintendent of a correctional institution may authorize a search, to be carried out in the prescribed manner, of …
>
> (b) the person of any inmate…."

13. Section 22(1) of O. Reg 778 states that:

> The Superintendent may authorize a search, at any time, of, …
>
> (b) the person of an inmate…."

14. The superintendent may, in turn, delegate this power to any person or persons. Section 3 of O. Reg 778 states that:

> Any power, duty or function conferred or imposed upon or exercised by a Superintendent under the Act or this Regulation may be delegated by the Superintendent to any person or persons to act as designated representative of the Superintendent for the purpose of the effective administration of the Act and the delegation shall be subject to such limitations, restrictions, conditions and requirements as the Superintendent considers necessary for the purpose.

15. A superintendent is the official that is in charge of a prison. Superintendents generally authorize strip searches through standing orders. There are no safeguards set out in Ontario's legislation constraining the circumstances in which these strip searches can be authorized or to whom the power to authorize strip searches can be delegated.

16. As such, officers can be authorized to conduct strip searches in a completely unrestricted set of circumstances, for any reason, and even in the absence of any specified reason or security rationale.

17. This includes the unrestricted and unfettered power to conduct suspicionless strip searches. Suspicionless strip search authorizations provide the most permissive

and unfettered search power because there is no requirement that there be grounds to even suspect that the individual has contraband on their person. In other words, the official ordering the search need not believe, subjectively or objectively, that there is any possibility that the individual is hiding something that could be uncovered in a search. Nor is there any requirement for any prior judicial authorization or individualized risk assessment. As there is no need for individualized grounds, no amount of good behaviour can spare a prisoner from a suspicionless strip search.

18. A superintendent may issue standing orders instructing officers to strip search individuals based, for example, on frequency, such as a weekly or even daily strip search. A superintendent may even authorize officers to conduct strip searches completely at an individual officer's discretion, without any guiding criteria.

Unfettered power is not necessary

19. There are important reasons to search prisoners, including the safety of prisoners, prison personnel, visitors, and the public. For instance, measures are needed to address safety risks that may be posed by certain drugs or weapons being brought into prisons. These measures can include searches. However, the completely unfettered strip search power at issue in this proceeding is not necessary to fulfill the applicable legislative purposes, overbroad, and grossly disproportionate to the objectives of the law.

20. Prisons in many other jurisdictions are able to appropriately maintain safety without unfettered strip search authorization powers. This includes the federal government in Canada and many provinces and states across North America.

21. Ontario could maintain institutional safety and fulfill any other applicable statutory purposes while also having legislative safeguards to protect against the overuse and abuse of strip searches. Indeed, some of the statutory purposes would be furthered by appropriate legal safeguards aimed at protecting the dignity and rights of prisoners relating to strip searches.

22. There are a variety of measures that can be taken to avoid the introduction of drugs and weapons into prisons that do not involve search powers. For instance, drug rehabilitation programs can reduce the demand for drugs. This includes Opioid Agonist Therapy (e.g., methadone), which decreases cravings, reduces overdoses, and provides the best prospects for long-term abstinence. Similarly, programming to address mental health and addiction issues and build trust can reduce violence and support prison intelligence efforts regarding contraband.

23. Unfettered search powers are not only unnecessary, they also run counter to the purposes reflected in the *Ministry of Correctional Services Act* as they allow for the mistreatment of prisoners; this, in turn, undermines trust, inhibits prison intelligence operations, impedes rehabilitation, causes psychological harm, and increases recidivism.

Unfettered power undermines the rule of law

24. Granting unfettered power to superintendents to authorize strip searches undermines the rule of law and government accountability.

25. In Ontario, the power to authorize infringements of fundamental freedoms has been delegated to an administrative official, the superintendent, who can further delegate this power to any other person or persons. Superintendents or delegates can provide these authorizations in standing orders or other internal prison documents, which are not public and do not have the status of law. There are no required *ex post facto* review mechanisms set out in law and any orders made by the superintendent cannot be effectively scrutinized by the public or those who are subject to the resulting strip searches. In addition, they cannot be struck down by a Court through the same means as a law.

Reasonable expectation of privacy

26. Individuals maintain a reasonable expectation of privacy while in prison. Although privacy expectations are diminished in this situation in some respects, individuals clearly maintain a strong expectation of privacy over their own naked bodies.

27. Most individuals held in Ontario's provincial prisons are on remand and therefore are presumed innocent under the law.

***Sections 8 and 7 of the* Charter**

28. The impugned sections are inconsistent with s. 8 of the *Charter*. Section 8 requires that searches be authorized by law, that the law be reasonable, and that

the manner of the search be reasonable. The law in this case is not reasonable, including for the reasons set out above relating to the lack of appropriate safeguards, overbreadth, and the high degree of intrusiveness of the type of search in question.

29. The impugned sections are also inconsistent with s. 7 of the *Charter*. Strip searches engage liberty and security of the person interests, including through the intrusion on physical autonomy and bodily integrity. The impugned sections authorize deprivations of liberty and security of the person that are not in accordance with principles of fundamental justice, including the principles against arbitrariness, overbreadth and gross disproportionality.

30. Compliance with sections 7 and 8 of the *Charter* requires that additional safeguards be set out in the legislation or its regulation. For instance, legal criteria are required to define the allowable scope of strip searches. Such legislative frameworks have existed in other jurisdictions for decades. These criteria have been made even more critical due to the recent advent of technologies and practices such as body scanners that can be used as a less intrusive alternative to a strip search.

Temporary declaration addressing the lawful scope of strip searches

31. If the Court declares the impugned sections invalid, but suspends the declaration, the Plaintiffs seek declarations constraining the Defendant's power to conduct suspicionless strip searches until such time as amendments to the legislation come into force.

32. This is necessary because Ontario is routinely strip searching a very large number of individuals unnecessarily. Some examples are included below:

a. **Body scanners:** Ontario is unnecessarily strip searching a large number of individuals after they have already been searched using a body scanner and no potential contraband has been identified. In Ontario, strip searches are generally conducted in addition to a body scan, which is unnecessary.

b. **No access to contraband**: Ontario is unnecessarily strip searching individuals even though they have not had any potential access to contraband. For instance, individuals have been frequently strip searched while in segregation even though they have not left their cell and have had no contact with other prisoners.

c. **Diabetics:** In at least one prison, Ontario is strip searching individuals at least once a day if they are diabetic and require insulin. This is unnecessary and discriminatory on the basis of disability.

d. **No individualization:** Ontario is conducting routine strip searches of all prisoners in certain situations without considering the risk that the specific prisoner may attempt to hide contraband on their body and with no differentiation between high and low risk individuals.

e. **Individuals with a history of sexual abuse:** Ontario is subjecting many individuals with a history of sexual abuse to the same quantity and kind of strip searches as other prisoners even though strip searches trigger and exacerbate trauma and mental health disorders arising from sexual abuse. This

is cruel and constitutes a failure to accommodate individuals with mental health issues.

f. **Strip searches as retribution or punishment:** The extensive and vague strip search authorizations enable officers to use strip searches as retribution or punishment against individuals they see as deserving of such treatment.

33. In addition, the Ministry of the Solicitor General's policy and procedure manual expressly *requires* frequent unnecessary strip searches. For instance, it requires all prisoners to be strip searched daily when they are held in segregation.

34. The Ministry of the Solicitor General's policy and procedure manual also requires all prisoners held outside of segregation to be strip searched on a biweekly basis during cell searches.

35. Even if the applicable standing orders and policies were amended, this would be insufficient to protect individuals from infringements of their fundamental freedoms for the duration of the suspension of a declaration of invalidity. The standing orders and policies are not made public and are not made available to those who are subject to them. They are also frequently not followed and therefore amendments thereto cannot guarantee an end to wrongful practices that violate individuals' fundamental rights.

36. The Plaintiff, Vanessa , personally experienced many unnecessary strip searches in Ontario's prisons. She has spent time in prisons in Ontario, Quebec, and Saskatchewan. Her strip searches in Ontario prisons were significantly more frequent and more intrusive and degrading in comparison.

Other

37. In the alternative, if the Court interprets the law as fettering the power to authorize strip searches in Ontario's prisons, and therefore constitutionally compliant, the Plaintiffs request declarations regarding the scope of said power and findings regarding Ontario's compliance therewith.

38. The Plaintiffs plead and rely on relevant legislation, including the *Ministry of Correctional Services Act* and its regulations, the *Canadian Charter of Rights and Freedoms*, and other legislation as counsel may advise.

39. The word "including" in this claim means "including, but not limited to,"

40. Headings are used in this document for readability. Material facts underpinning an issue may be found anywhere in this document, whether or not the fact is expressly linked to the issue.

41. The Plaintiffs propose that this action be tried at Toronto, Ontario.

Date: June 20, 2022

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CANADIAN CIVIL LIBERTIES ASSOCIATION et al. v. **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO**

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SUPERIOR COURT OF JUSTICE
Proceeding Commenced at Toronto

STATEMENT OF CLAIM

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