

JUN 22 2022

Halifax, N.S.

2022

Hfx. No.:

5 1 5 9 3 2

SUPREME COURT OF NOVA SCOTIA

Between:

MACQUEL LYNN WEATHERBEE and SARAH LYNN JOHNSON

Plaintiffs

and



THE ATTORNEY GENERAL OF CANADA, representing her  
Majesty the Queen in Right of Canada

Defendant

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

NOTICE OF ACTION

To: **The Attorney General of Canada**

**Action has been started against you**

The Plaintiffs take action against you.

The Plaintiffs started the action by filing this notice with the court on the date certified by the Prothonotary.

The Plaintiffs claim the relief described in the attached Statement of Claim. The claim is based on the grounds stated in the Statement of Claim.

**Deadline for defending the action**

To defend the action, you or your counsel must file a Notice of Defence with the Court no more than the following number of days after the day this notice of action is delivered to you:

- 15 days if delivery is made in Nova Scotia
- 30 days if delivery is made elsewhere in Canada
- 45 days if delivery is made anywhere else.

**Judgment against you if you do not defend**

The court may grant an order for the relief claimed without further notice, unless you file the Notice of Defence before the deadline.

**You may demand notice of steps in the action**

If you do not have a defence to the claim or you do not choose to defend it you may, if you wish to have further notice, file a demand for notice.

If you file a demand for notice, the plaintiff must notify you before obtaining an order for the relief claimed and, unless the court orders otherwise, you will be entitled to notice of each other step in the action.

**Rule 57 – Action for Damages Under \$150,000.00**

Civil Procedure Rule 57 limits pretrial and trial procedures in a defended action so it will be more economical. The Rule applies if the plaintiff states the action is within the Rule. Otherwise, the Rule does not apply, except as a possible basis for costs against the plaintiff.

This action is not within Rule 57.

**Filing and delivering documents**

Any documents you file with the court must be filed at the office of the Prothonotary, located on 1815 Upper Water Street, Halifax, Nova Scotia, B3J 1S7 (telephone # 902-424-4900).

When you file a document you must immediately deliver a copy of it to each other party entitled to notice, unless the document is part of an *ex parte* motion, the parties agree delivery is not required, or a judge orders it is not required.

**Contact information**

The Plaintiffs designate the following address:

P.A.T.H.  
85 Queen St  
Dartmouth, NS B2Y 1G7  
Tel: 902-454-5041 ex 3  
Fax: 902-454-4100  
Email: mike@valentlegal.ca

Documents delivered to this address are considered received by the Plaintiffs on delivery.

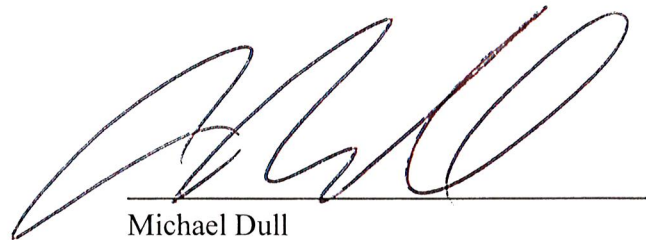
Further contact information is available from the Prothonotary.

**Proposed place of trial**

The Plaintiffs propose that, if you defend this action, the trial will be held in Halifax, Nova Scotia.

**Signature**

Signed this 27<sup>th</sup> day of June, 2022.

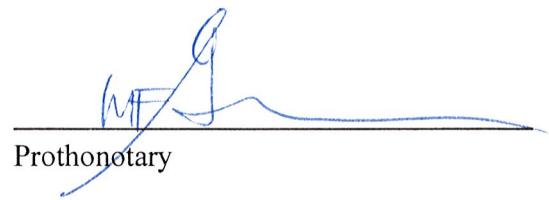


Michael Dull  
Solicitor for the Plaintiffs

**Prothonotary's Certificate**

I certify that this notice of action, including the attached statement of claim, was filed with the court on

June 22, 2022.



Prothonotary

MARIE-FRANCE GANNON  
Deputy Prothonotary

STATEMENT OF CLAIM

Proceeding under the *Class Proceedings Act*, S.N.S. 2007, c. 28

**I. Overview**

1. This action concerns the use of “dry cell” confinement for prisoners held under suspicion of having contraband in their vaginas in Canadian federal correctional institutions.
2. The proposed Class Members include prisoners of federal correctional institutions who have been subjected to the practice of dry celling under suspicion of having contraband in the vagina and the consequential sex-based discrimination perpetrated by the Defendant and its employees and agents.
3. Dry cells are used to isolated prisoners who are suspected of carrying contraband in a body cavity. Its purported purpose is to allow authorities to monitor if and when the contraband is expelled so they can then seize it.
4. The Plaintiffs and proposed Class Members were placed in dry cells by the Defendant because they were suspected of carrying contraband in their vaginas.
5. Placing the Plaintiffs, and other similarly situated prisoners suspected of carrying contraband in their vaginas in dry cells, constitutes sex-based discrimination and is a violation of these prisoners’ section 15 equality rights under the *Canadian Charter of Rights and Freedoms* (“the *Charter*”). It is also a breach of the Attorney General of Canada’s fiduciary duty and duty of care to prisoners with vaginas incarcerated in Canadian federal correctional institutions.

**II. Representative Plaintiff and Class**

6. The Plaintiff, Macquel Lynn Weatherbee (“Weatherbee”), currently resides in Truro, Nova Scotia.

7. At all material times, the Plaintiff was a prisoner at Nova Institution for Women, in Truro, Nova Scotia and in the exclusive custody, care and control of the Defendant.
8. In fall 2017, the Plaintiff entered Nova Institution and was immediately strip searched, forced to wear a suicide gown, and placed in a dry cell.
9. The Defendant informed her that there had been inmate generated information that she had pills in her vagina. The Plaintiff denied the allegations and consented to an x-ray but the Defendant chose not to perform such an x-ray.
10. Weatherbee was kept in a dry cell for approximately five days. During this time, she was monitored by guards 24 hours a day, she had no access to a toilet with running water nor education. She asked for a book and the Defendant brought her a simple children's book. The Defendant's staff also made degrading comments to her.
11. Weatherbee admitted to having tobacco in her vagina after spending time in the dry cell. She was taken by two guards to a segregation shower. She was forced to strip and retrieve the tobacco in front of the guards. The guards watched her while naked in the shower and did not remove their eyes from her at any point.
12. While she was attempting to remove the tobacco, the guards made degrading comments and asked Weatherbee if she was "having trouble finding the right package". They then suggested that she lie on her back and spread her legs in front of the guards.
13. Weatherbee was diagnosed with post-traumatic stress disorder as a result of this experience. She receives treatment for this weekly.
14. The Plaintiff, Sarah Lynn Johnson ("Johnson") was born in Moncton, New Brunswick and currently resides in Millbrook, Nova Scotia.
15. At all material times, Johnson was a prisoner at Nova Institution for Women, in Truro, Nova Scotia and in the exclusive custody, care, and control of the Defendant.

16. In 2017, the Plaintiff was placed in a dry cell for approximately four days due to suspicion that she was carrying contraband in her vagina.
17. During this time, Johnson was forced to wear a suicide gown, was monitored by guards 24 hours a day, and had no time outside of the dry cell. She had no access to a toilet with running water, education, nor entertainment. The lights in the cell were kept on 24 hours a day and her bed and blankets were removed.
18. The Plaintiffs seek to certify this action as a class proceeding and plead the *Class Proceedings Act*, S.N.S. 2007, c. 28, as amended, as providing the basis for such certification. The Plaintiffs, as the Representative Plaintiffs, do not have any interest adverse to any of the members of the proposed class. The Plaintiffs state that there is an identifiable class that would be fairly and adequately represented by them, that the Plaintiffs' claims raise common issues, and that a class proceeding would be the preferable procedure for the resolution of these common issues.
19. The Plaintiffs propose to bring a class proceeding on behalf of themselves and a class of other prisoners who have been placed in a dry cell by the Defendant while under their custody, care, and control, based on suspicion that they were carrying contraband in their vaginas. The proposed Class will be further defined in the Motion for Certification.

### **III. The Defendant**

20. The Defendant, the Attorney General of Canada, representing her Majesty the Queen in Right of Canada, at all times material and relevant to this proceeding, was the operator, occupier, and maintainer of federal corrections facilities in Canada, including the Nova Institution for Women, Fraser Valley Institution for Women, Edmonton Institution for Women, Grand Valley Institution for Women, the Joliette Institution for Women and the Okimaw Ohci Healing Lodge. All agencies, including but not limited to the Correctional Services of Canada, will be referred to as "the Defendant" and is deemed to include all its contractors, sub-contractors, agents, servants, employees and appointees.

#### **IV. Dry Cell Confinement**

21. Prisoners who are subjected to dry cell confinement are separated from the general prisoner population, strip searched, and then isolated in “dry cells” on the expectation that the contraband will eventually be expelled from their body cavity so that authorities can retrieve it. Prisoners in dry cells are constantly monitored so that suspected contraband will not be hidden, destroyed, or manipulated. Once prisoners are placed in dry cells, they are held there until the suspected contraband is expelled, or until there is no reasonable expectation that the contraband will be expelled.
  
22. Dry cells are prison cells with no flushing toilets or running water. Prisoners who are placed in dry cells are, often in addition to other conditions:
  - a. subjected to constant light exposure;
  - b. under observation through a glass window and security cameras 24 hours a day, including during showers and toilet usage;
  - c. deprived of water access;
  - d. afforded minimal social interaction; and
  - e. denied privileges and programming, including telephone access, outdoor yard privileges, medical and psychiatric treatment, school, and work.
  
23. Conditions in dry cell confinement are harsh, humiliating, extreme, and harmful. The harms associate with dry cell confinement are more pronounced than any other form of confinement in federal correctional institutions. A dry cell is a “prison within a prison”.
  
24. Prisoners subjected to any form of confinement in which they are further isolated from the general population of prisoners, such as solitary confinement, which is less degrading, severe and restrictive than dry cell confinement, regularly suffer serious and negative effects on their mental and physical health as a result. These effects include, but are not limited to:
  - a. Anxiety;
  - b. Depression;
  - c. Anger and aggression;

- d. Social withdrawal;
  - e. Psychosis;
  - f. Paranoia;
  - g. Hallucinations;
  - h. Confused thought processes;
  - i. Exacerbation of pre-existing psychological conditions;
  - j. Physical effects such as headaches, heart palpitations, and loss of appetite
  - k. Disruption of sleep patterns and nightmares;
  - l. Self-harm, suicidal ideation, and suicide; and
  - m. Post-traumatic stress disorder.
25. The Defendant enacted *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 51(b) (“*CCRA*”) which purports to provide it with authority to subject prisoners to dry cell confinement when they are reasonably suspected of carrying contraband in a “body cavity”. Read in conjunction with the definition of “body cavity” in section 46 of the *CCRA*, the term body cavity means rectum and vagina. In 2021, the Nova Scotia Supreme Court held that section 51(b) of the *CCRA* is unconstitutional and a violation of *Charter* section 15 rights.

## V. Causes of Action

26. The Plaintiffs pleads the following causes of action:
- A. Systemic Negligence
  - B. Breach of Fiduciary Duty and Duty of Care
  - C. Breach of Section 15 *Charter* Right

### A) Systemic Negligence

27. The Plaintiffs pleads and relies upon the *Corrections and Conditional Release Act* (“*CCRA*”), in particular section 4(g) and section 5.
28. The Defendant’s agency, the Correctional Service of Canada, has a duty of care, and is responsible for, the care and custody of prisoners, pursuant to the *CCRA*. The



Correctional Service of Canada is guided by the principle that correctional policies, programs, and practices respect gender, sexual orientation, and gender identity and expression, and are responsive to the special needs of people with vaginas.

29. The Defendant, either directly or through its agents, employees, servants, or assigns, has systemically breached the standard of care, the particulars of which are as follows but are not limited to:
- a. By failing to establish, or alternatively, failing to enforce adequate policies, procedures, codes of conduct, guidelines, management, and operations to minimize the risks of harm to the Plaintiffs and proposed Class Members by being subjected to sex-based discrimination and the unconstitutional practice of dry celling based on suspicion of contraband being carried in vaginas;
  - b. By failing to properly supervise the correctional staff members so as to prevent and minimize the risks of harm to the Plaintiffs and proposed Class Members being subjected to sex-based discrimination and the unconstitutional practice of dry celling based on suspicion of contraband being carried in vaginas;
  - c. By failing to qualify or cause to be qualified, to screen for suitability, or to supervise, monitor, police or assess the agents, and employees, entrusted with the care and protection of the Plaintiffs and the other proposed Class Members;
  - d. By failing to provide adequate, or any, training and educational programs to corrections staff regarding the dangerous and harmful effects of dry cell confinement and discrimination;
  - e. By failing to designate services and methods as protective services for the purposes of ensuring the safety of the Plaintiffs and proposed Class Members in dry cell confinement while under the wardship of the Defendant, or in the alternative, not properly designating and implementing those protective services;
  - f. By failing to protect the Plaintiffs and other proposed Class Members from the continuation and re-occurrence of dry cell confinement and sex-based discrimination; and

- g. By failing to provide appropriate care and treatment for the Plaintiffs and proposed Class Members after they experienced dry cell confinement and sex-based discrimination.
- 30. The Defendant knew or ought to have known about the sex-based discrimination and significant psychological and physical harms resulting from prisoners' dry cell confinements perpetrated by its employees. The Defendant failed to take appropriate steps to address the systemic harms.
- 31. The Defendant's failure to adequately address the foreseeable harms associated with the unconstitutional dry celling and associated sex-based discrimination amounts to systemic negligence.
- 32. As a result of the Defendant's systemic breaches, the Plaintiffs and the proposed Class Members suffered harms and losses.

## **B) The Defendant's Breach of Fiduciary Duty**

### **i. The Defendant's Fiduciary Duty to the Plaintiffs and Proposed Class Members**

- 33. The Defendant had a fiduciary relationship with the Plaintiffs and the proposed Class Members. The Defendant created, planned, established, operated, financed, supervised, controlled, and regulated the dry cell system in all Canadian federal correctional institutions designated for women.
- 34. Among other things, the Defendant was, at all material times, solely responsible for:
  - a. The construction, operation, maintenance, ownership, financing, administration, control, supervision, inspection, and auditing of the use of dry cells for prisoners in Canadian federal correctional institutions designated for women;
  - b. The creation, design, and implementation of policies regarding the use of dry cell confinement;

- c. The care, maintenance, protection, and supervision of the Plaintiffs and proposed Class Members;
  - d. The promotion of the health, safety, and well-being of the Plaintiffs and proposed Class Members while they were in the custody, care, and control of the Defendant;
  - e. Decisions, procedures, regulations promulgated, operations, and actions taken by Correctional Services, its employees, servants, officers, and agents;
  - f. The selection, control, training, supervision, and regulation of the designated operators and their employees, servants, officers, and agents; and
  - g. The oversight and management of the governmental servants and agents within federal correctional institutions, who had day-to-day control over the Plaintiffs and proposed Class Members at federal correctional institutions.
35. At all material times, the safety and wellbeing of the Plaintiffs and the proposed Class Members were within the knowledge, contemplation, power, or control of the Defendant and were subjected to the unilateral exercise of the Defendant's power or discretion. As persons incarcerated in Canadian federal correctional institutions, the Plaintiffs and the proposed Class Members relied entirely on the Defendant to ensure that the conditions of their incarceration were reasonable, safe, and in accordance with the recognized objectives of sentencing in Canada. The Class Members were particularly vulnerable to the operational policies, decisions, practices, and actions of Correctional Services.
36. By virtue of the Defendant's relationship with the Plaintiffs and the proposed Class Members being one of trust, reliance, and dependence, the Defendant owed the Plaintiffs and the proposed Class Members a fiduciary duty to act in their best interests and to ensure that they were treated fairly, safely, and in all other ways consistent with the obligations owed to persons under its care and control.
37. The Defendant also owed a duty of care to the Plaintiffs and the proposed Class Members, which included, but was not limited to:
- a. Properly and effectively supervising the environments within federal correctional facilities designated for women and the conduct of Correctional Services staff to

ensure that prisoners would not suffer undue harm through the use of dry cell confinement;

- b. Using reasonable care to ensure the safety, well-being and protection of prisoners with vaginas;
- c. Setting or implementing standards of conduct for Correctional Services staff to ensure that the health and well-being of prisoners are not significantly endangered; and
- d. Creating policies that would not cause undue suffering.

**ii. The Defendant's Breach of its Fiduciary Duty and Duty of Care to the Plaintiffs and Proposed Class Members**

38. Through its servants, officers, employees, and agents (for which the Defendant is vicariously liable), the Defendant was in breach of its fiduciary duties to the Plaintiffs and the proposed Class Members. Particulars of these breaches include:
- a. Putting its own financial or interests, and those personal interests of its employees, agents, and other persons under its supervision, ahead of the interests of the Plaintiffs and the proposed Class Members;
  - b. Failure to safeguard the physical and emotional needs of the Plaintiffs and the proposed Class Members; and
  - c. Permitting excessive punishments to be perpetrated against the Plaintiffs and the proposed Class Members.
39. The Defendant failed to discharge its duty to the Plaintiffs and the proposed Class Members, as described above, in breach of its special responsibility to ensure the safety and well-being of the Plaintiffs and proposed Class Members.
40. The proposed Class Members relied upon the Attorney General of Canada to their detriment to fulfill its fiduciary obligations owed to them. The Plaintiffs and proposed Class Members suffered losses and harms as a result of the breach of fiduciary duty and duty of care by the Defendant.

**C) Breach of Section 15 Charter Right**

**i) Breach of Section 15 Charter Right**

41. Section 15(1) of the *Charter* guarantees that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

42. The Plaintiffs states that the Defendant's decision to subject them and the proposed Class Members to dry cell confinement was unlawful because section 51(b) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA"), which allows dry cell confinement for prisoners who are suspected to be carrying contraband in their vaginas, discriminates against prisoners with vaginas on the basis of sex and is therefore in breach of section 15 of the *Charter* and of no force and effect.

43. The Plaintiffs and Class Members are people with vaginas. The Defendant made a decision to subject them to dry cell confinement due to suspicion that they were carrying contraband inside their vaginas. Prisoners without vaginas are also occasionally subjected to dry cell confinement over suspicion of contraband in their rectum.

44. The use of dry cell confinement for prisoners without vaginas has a definitive end, as it is based solely on digestive processes which eventually result in expulsion from the rectum. As a result, prisoners without vaginas are permitted to be released from dry cells upon a bowel movement because it would reveal any hidden contraband. Prisoners without vaginas can therefore end their dry cell confinement with a clean bowel movement.

45. Conversely, prisoners with vaginas who are suspected of carrying contraband in their vagina may be confined in dry cells indefinitely. The biological processes in which contraband might be expelled through the vagina is not as frequent as the digestive processes which cause contraband to be expelled out of the rectum. Furthermore, contrary to prisoners without vaginas whose expulsion is certain, contraband will not necessarily be expelled from the vagina, as it is not based on a bodily function that will definitely

result in expulsion from the body. Bowel movements in these instances would not reveal any hidden contraband.

46. Prisoners with vaginas who are suspected of carrying contraband in their vaginas may therefore suffer differential and negative harm when placed in dry cells because of the expectation that contraband might be expelled from the vagina runs the risk of a more severe period of dry cell confinement. This is especially true for prisoners who are going through menopause, whose risk of prolonged confinement in dry cells is significantly higher.
47. Dry cell confinement for prisoners with vaginas has no definitive end while dry cell confinement for prisoners without vaginas does. Prisoners with vaginas are thereby unfairly burdened on the basis of sex. The practice of dry celling prisoners under the suspicion that they are carrying contraband in their vaginas is unconstitutional, violating section 15 of the *Charter*.

**ii) Section 1**

48. The Defendant's section 15 *Charter* breach cannot be saved by section 1 of the *Charter*. The government's objectives with respect to confining prisoners in dry cells is to prevent threats to the maintenance of order within prisons and the safety of inmates. Dry celling prisoners who are suspected of carrying contraband in their vaginas in order to achieve these objectives is not reasonable nor demonstrably justifiable in a free and democratic society. There are less harmful means of achieving the government's objectives and treating the vagina akin to how the rectum is treated for the purpose of dry cell confinement is not minimally impairing or the least drastic necessary to achieve the legislative objectives.

**VI. Vicarious Liability**

49. At all material times, the Defendant's employees, in their course of employment, were responsible for the placement, supervision, and care of the Plaintiffs and proposed Class Members in their dry cell confinement.

50. The Plaintiffs pleads the doctrine of *respondeat superior* and states that the Defendant is vicariously liable for the actions of the Defendant's employees.

## **VII. Damages**

51. The Defendant knew, or ought to have known, that as a consequence of placing and holding the Plaintiffs and proposed Class Members in dry cells, they would suffer significant harms.

52. As a result of the foregoing acts and the breaches of the Defendant, the Class Members suffered loss, injury, and damages – all of which were a reasonably foreseeable consequence of the Defendant's actions.

## **VIII. Aggravated, Punitive, and Exemplary Damages**

53. The Plaintiffs submit that the conduct of the Defendant's employees, for which the Defendant is vicariously liable, herein amounts to a reckless or willful disregard and gross violation of the rights of the Plaintiffs and proposed Class Members.

54. The Plaintiffs respectfully submit that this is an appropriate case for punitive, aggravated, and/or exemplary damages.

## **IX. Relief Sought**

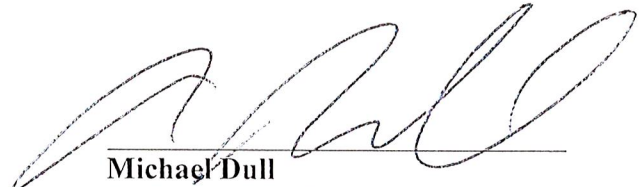
55. The Plaintiffs repeat the foregoing paragraphs and seeks the following relief:

- a. An Order certifying this proceeding as a Class Proceeding and appointing the Plaintiffs as the Representative Plaintiffs for the Class and any appropriate subclass thereof;
- b. A declaration that the Defendant is vicariously liable for the actions of the Defendant's agents and employees;

- c. A declaration that the Defendant breached its fiduciary duty and duty of care to the Plaintiffs and proposed Class Members;
- d. A declaration that the impugned acts/omissions of the Defendant constitute a breach of section 15 rights as guaranteed by the *Canadian Charter of Rights and Freedoms*;
- e. Damages or such other remedy as the Court may consider just an appropriate pursuant to section 24 of the *Canadian Charter of Rights and Freedoms*;
- f. General damages for pain and suffering;
- g. Special damages, the particulars of which will be delivered;
- h. Aggravated, punitive and/or exemplary damages;
- i. Pre-judgment interest pursuant to the *Judicature Act*;
- j. Costs and Disbursements, inclusive of any financing charges; and
- k. Such further and other relief as this Honourable Court deems just.

**PLACE OF TRIAL:** Halifax, Nova Scotia

**DATED** at Halifax, in the County of Halifax, Province of Nova Scotia this 22<sup>nd</sup> day of June, 2022.

  
\_\_\_\_\_  
**Michael Dull**  
Solicitor for the Plaintiffs

TO: The Prothonotary  
AND TO: The Attorney General of Canada  
Its Solicitors or Agents