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January 11, 2021

By Facsimile: 418-766-5181 (10 pages)

Correctional Service of Canada
National Headquarters
340 Laurier Avenue West
Ottawa, ON K1A 0P9

Attn: Anne Kelly, Commissioner

Dear Madam:

Re: Kahnapace v. Attorney General of Canada
Federal Court File No. (Vancouver)

I am counsel for Martha Kahnapace in respect of a proposed class action filed in the Federal Court of Canada dealing with use of the Custody Rating Scale to overclassify inmates. I enclose a courtesy copy of the Statement of Claim. The Statement of Claim will be served under the Court Rules in the ordinary course.

I write to respectfully request that the Correctional Service of Canada terminate all use of the Custody Rating Scale on Indigenous women in custody on or before January 25, 2021. Should the Correctional Service of Canada refuse this request, I am instructed to bring application for injunctive relief.

Thank you for your time and attention to this matter.

Sincerely,

Jason Gratl

JG/ha
Encl.

Copy: Department of Justice Canada (fax: 613-954-0811)

Minister of Public Safety (ps.ministerofpublicsafety-ministredelasecuritepublique.sp@canada.ca)

Office of the Prime Minister (fax: 613-941-6900)

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Court File No. T-88-21

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

MARTHA KAHNAPACE and JANE DOE

Plaintiffs

and

THE ATTORNEY GENERAL OF CANADA

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 a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served 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 for serving and filing your statement of defence is sixty days.

Copies of the *Federal Court Rules* information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date JAN 1 1 2021

Issued by: M. Hennessy
[Registry Officer]

MODELISA HENNESSY
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office: Federal Court of Canada
Pacific Centre, PO Box 10065
3rd Floor, 701 West Georgia Street
Vancouver, British Columbia V7Y 1B6

TO: Attorney General of Canada
Her Majesty the Queen in Right of Canada
Attn: William F. Pentney, Deputy Attorney General of Canada

Relief Sought

1. The plaintiffs claim on their own behalf and on behalf of the Class (as hereinafter defined):

    a. An order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the *Federal Court Rules*, SOR/98-106;

    b. An order pursuant to Rules 334.12, 334.16 and 334.17 of the *Federal Court Rules* appointing the plaintiffs, or, alternatively, one of the plaintiffs, as the representative plaintiff(s) for the Class;

    c. General damages plus damages equal to the cost of administering the plan of distribution;

    d. Special damages in an amount to be determined, including but not limited to past or future loss of income, medical expenses and out of pocket expenses;

    e. Exemplary and punitive damages;

    f. A declaration that use of the Custody Rating Scale infringes the right to liberty and security of the person, as protected by s.7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11, and that the infringement of such rights is contrary to the principles of fundamental justice;

    g. A declaration that use of the Custody Rating Scale infringes the right to equality, contrary to s.15 of the *Canadian Charter of Rights and Freedoms*;

    h. Such just and appropriate remedy as may be ordered pursuant to s.24 of the *Charter*, including damages for breach of ss.7 and 15 of the *Charter*;

    i. Interim, interlocutory and permanent injunctive relief preventing the Correctional Service of Canada from using the Custody Rating Scale in respect of Class Members;

    j. Pre-judgment and post-judgment interest;

    k. Costs; and

    l. Such further and other relief as this Honourable Court may deem just.

Nature of this Action

2. This action deals with the Custody Rating Scale (the "CRS"), a 12-item standardized test that is said to grade or score federal inmates in the custody of the Correctional Service of Canada ("CSC") on their public and institutional risk. The CRS consists of an Institutional Adjustment subscale with five items and a Security Risk subscale with seven items. Each item is assigned numerical weights and the subscale with the highest score determines security classification (minimum, medium or maximum) corresponding to cut-off scores for each classification.

3. The CRS was introduced throughout CSC in 1991 and has been used on every federal inmate for three decades. Item scores, weights and cut-off scores for classification are said to be influenced by empirical data and are adjusted to comport with internal policy considerations known only to CSC.

4. CSC employees use the CRS to assign inmates to minimum, medium and maximum security facilities. Assignment to higher security level facilities adversely affects the living conditions of an inmate by decreasing access to sunlight, fresh air, physical exercise, social contact, rehabilitative programming, discretionary release and parole.

Overclassification of Aboriginal Offenders

5. The CRS overclassifies, and is known by CSC to overclassify, Indigenous inmates, resulting in their improper confinement in maximum and medium security facilities instead of medium and minimum security facilities. Overclassification of Indigenous inmates by CRS is, and is known by CSC to be, even more pronounced for Indigenous women. Overclassification results in deprivation of residual liberty and ineligibility for discretion release and parole. CSC's use of the CRS on Indigenous inmates results in longer and harsher prison sentences for Indigenous inmates.

6. CSC's past and present use of CRS on Class Members knowingly breached and continues to breach s.4(g), 21(1) and 79.1 of the *Corrections and Conditional Release Act*, RSC 1996, c.58, or, alternatively, these breaches are systemic and are the product of indifference, callous disregard, willful blindness and recklessness with respect to the rights, interests and conditions of confinement of Class Members.

Knowledge of Overclassification of Indigenous Inmates

7. CSC has known since 2004 at the latest that the CRS overclassifies Indigenous inmates. An independent study commissioned in 2004 by the Commissioner of CSC from three experts, Jim Bonta, Karl Hanson and Annie Yessine (the "2004 Expert Study") concluded:

"The predictive validity of the Security Risk subscale for women, in general, is weak and non-existent for Aboriginal women";

"[CRS] appears to be systemically biased against, and so may not be suitable for use within, the Aboriginal offender population";

"Aboriginal women are rated as needing higher levels of security than Non-Aboriginal women ... [yet] ... [c]ompared to Non-Aboriginal women, Aboriginal women appear less likely to incur institutional infractions".

8. The 2004 Expert Study was brought to the attention of CRS senior management, including all commissioners holding the office since 2004. CRS overclassification of Indigenous inmates has been continuously and repeatedly brought to the attention of CSC senior management by the Auditor General of Canada, the Canadian Human Rights Commission, the Canadian Association of Elizabeth Fry Societies and by the Office of the Correctional Investigator.

9. CSC's obligation to eliminate discriminatory systems, practices, policies and specifically CSC's obligation to avoid implementing discriminatory standardized tests was reinforced by the Supreme Court of Canada in *Ewert v. Canada (Correctional Services)*, 2018 SCC 30 on June 13, 2018.

10. Despite knowing that CRS is systemically biased against the Indigenous inmate population, and despite repeatedly having its discriminatory effects brought to its attention, and despite being reminded of its statutory obligations to avoid discrimination and avoid reliance on faulty standardized tests, CSC actively and continuously refused and refuses to modify or replace the CRS and refuses to implement an existing alternative classification system that is not systemically biased against Indigenous persons.

11. Because it is consciously aware of the problems with CRS and the harms caused to Indigenous inmates by CRS, CSC's ongoing use of CRS on Indigenous inmates must be recognized as the product of deliberate and conscious race-based discriminatory treatment of Indigenous inmates that resulted in, and continues to result in, longer and harsher prison sentences for Indigenous people, especially Indigenous women.

Overclassification of Female Inmates

12. CRS also overclassifies female inmates, with the same harmful effects. The 2004 Expert Report concludes:

> The CRS was originally developed for use with male offenders. Although there is some evidence for its application with men, this evidence is not overly convincing. With female offenders the evidence is much less

convincing and opens the potential for systemic bias. In our opinion, continued research on the scale with women is likely to produce only minor improvements that my be insufficient to justify the use of the CRS for such a serious task as security placement.

13. Overclassification of female inmates by means of the CRS leads to the same harms and deprivations.

The Representative Plaintiffs

14. The Plaintiff, Martha Kahnapace, is an Indigenous woman. She was convicted on September 27, 2007, of second degree murder. Her conviction was overturned by the British Columbia Court of Appeal on April 10, 2010 on the basis that the charge to the jury was erroneous. She was held in a maximum security facility in the interim, in part based on a policy that required 2 years to be served in maximum, and thereafter was held in a maximum security facility and then a medium security facility on the basis of her CRS score, which overclassified her risk. She was released from federal custody after her successful appeal pending a new trial.

15. The Plaintiff was again convicted of second degree murder on June 17, 2011. Her conviction was again overturned by the British Columbia Court of Appeal on January 22, 2013, on the basis that the trial judge had made errors in the jury charge that closely resembled the errors that resulted in an order for a new trial in 2010. In the interim between her second conviction and successful second appeal, the Plaintiff was held in a maximum and a medium security facility on the basis of her CRS score, which overclassified her risk. She was released from federal custody after her second successful appeal pending a new trial.

16. On her third trial, the Plaintiff was acquitted by a judge sitting alone without a jury of second degree murder and convicted of manslaughter. She was sentenced to time served. She had stabbed a male companion while intoxicated but had not intended to kill him.

17. The Plaintiff Jane Doe is a past and present inmate of a federal correctional facility who was and is overclassified by the CRS. She is proposed as a representative plaintiff in addition to or in lieu of Ms. Kahnapace.

Proposed Class

18. The Plaintiff proposes the following classes and/or subclasses:

    a. The class of female Indigenous inmates in custody in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS;

b. The class of female inmates in custody in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS;

c. The class of Indigenous inmates in custody in medium security or maximum security federal correctional facilities whose security classification was determined by means of the CRS; and

d. The class of inmates in custody in medium security or maximum security federal correctional facility whose security classification was determined by means of the CRS.

Statutory Breaches

19. CSC's use of CRS violates ss.4(g), 24(1) and 79.1 of the *CCRA*.

20. Section 4(g) of the *CCRA* provides as follows:

> 3 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 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.
>
> 4 The principles that guide the Service in achieving the purpose referred to in section 3 are as follows:
>
> > (g) correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring mental health care and other groups

21. CSC breaches s.4(g) of the *CCRA* because the CRS is a policy, program or practice that does not respect gender, ethnic, cultural, religious and linguistic differences and is not responsive to the special needs of women or Indigenous persons.

22. Section 24(1) of the *CCRA* provides as follows:

> 24 (1) The Service shall take all reasonable steps to ensure that any information about an offender that it uses is as accurate, up to date and complete as possible.

23. CSC's use of the CRS breaches s.24(1) of the *CCRA* by failing to take reasonable steps to ensure that Indigenous inmates and female inmates are not overclassified by CRS.

24. Section 79 of the *CCRA* provides as follows:

> 79.1 (1) In making decisions under this Act affecting an Indigenous offender, the Service shall take the following into consideration:
>
> > (a) systemic and background factors affecting Indigenous peoples of Canada;
> >
> > (b) systemic and background factors that have contributed to the overrepresentation of Indigenous persons in the criminal justice system and that may have contributed to the offender's involvement in the criminal justice system; and ...
>
> (2) The factors described in paragraphs (1)(a) to (c) are not to be taken into consideration for decisions respecting the assessment of the risk posed by an Indigenous offender unless those factors could decrease the level of risk.

25. CSC breaches s.79 of the *CCRA* by failing to take into account the adverse effects of the CRS on Indigenous inmates despite being aware of those adverse effects. The CRS contributes to overrepresentation of Indigenous persons in the criminal justice system by increasing the duration of and harshness of sentences, and by restricting parole and rehabilitation options by overclassifying Indigenous inmates.

Section 15

26. Section 15 of the *Canadian Charter of Rights and Freedoms* provides that every person is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination based on race, ancestry, sex or gender, and in particular have the right not to be discriminated against on the basis of being Indigenous and/or women.

27. As set out in this Statement of Claim, the s.15 *Charter* rights of the Plaintiff and Class Members who are Indigenous and/or female have been breached. Class Members were deprived of liberty and residual liberty; their sentences were longer and harsher because they were Indigenous and/or women, and CSC knew it and imposed those longer and harsher sentences consciously, deliberately and with malice.

28. Discriminatory treatment meted out to the Plaintiff and Class Members created substantive inequality and perpetuated prejudice and fostered the stereotype that

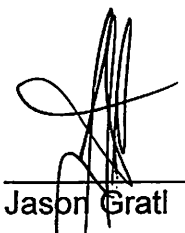
Indigenous offenders are more dangerous than non-Indigenous offenders and deserve harsher and longer prison sentences.

Section 7

29. Section 7 of the *Charter* provides that everyone has the right to liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

30. CSC deprived the Plaintiff and Class Members of their security of the person, liberty and residual liberty as a result of harsher and longer sentences meted out to Class Members. The deprivations are inconsistent with the principles of fundamental justice because the use of CRS on Indigenous and/or female inmates is overbroad, arbitrary, discriminatory, grossly disproportionate and contrary to the rule of law as they infringed ss.4(g), 21(1) and 79.1 of the *CCRA*.

Dated this 11th day of January, 2021



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