File No: _____
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRAVIS KELLY, CHRISTOPHER TROTCHIE, TRAVIS BARA AND
WEST COAST PRISON JUSTICE SOCIETY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN
IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

NOTICE OF CIVIL CLAIM

This action has been started by the plaintiff(s) for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

(a) file a response to civil claim in Form 2 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim on the plaintiff.

If you intend to make a counterclaim, you or your lawyer must

(a) file a response to civil claim in Form 2 and a counterclaim in Form 3 in the above-named registry of this court within the time for response to civil claim described below, and

(b) serve a copy of the filed response to civil claim and counterclaim on the plaintiff and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to civil claim within the time for response to civil claim described below.

Time for response to civil claim

A response to civil claim must be filed and served on the plaintiff(s),

(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed notice of civil claim was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed notice of civil claim was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed notice of civil claim was served on you, or

(d) if the time for response to civil claim has been set by order of the court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

A. The Parties

1. The Plaintiff, Travis Kelly ("Mr. Kelly") is a former British Columbia provincial prisoner, having spent approximately eight discrete periods of time in BC Corrections custodial facilities between 2006 and 2014. In this time, Mr. Kelly was a prisoner at the North Fraser Pretrial Centre ("NFPC"), located in Port Coquitlam, British Columbia; the Fraser Regional Correctional Centre ("FRCC"), located in Maple Ridge, British Columbia; the Surrey Pretrial Services Centre ("SPSC"), located in Surrey, British Columbia; the Kamloops Regional Correctional Centre ("KRCC"), located in Kamloops, British Columbia; the Prince George Regional Correctional Centre ("PGRCC"), located in Prince George, British Columbia; and the Vancouver Island Regional Correctional Centre ("VIRCC") located in Victoria, British Columbia.

2. Mr. Kelly is now serving a federal sentence at Kent Institution, a federally operated institution, located in Agassiz, British Columbia.

3. The Plaintiff, Christopher Trotchie ("Mr. Trotchie") was a provincial remand prisoner at SPSC. Mr. Trotchie was also a remanded inmate at NFPC. Mr. Trotchie is currently incarcerated at SPSC.

4. The Plaintiff, Travis Bara ("Mr. Bara") is a provincial prisoner at KRCC.

5. West Coast Prison Justice Society ("WCPJS") is a not-for-profit society founded in 1993 and incorporated under the *Society Act*, RSBC 1996, c 433 and has its head office at 302-7818 6th Street, Burnaby, British Columbia, V3N 4N8.

6. The Plaintiffs' address for service is c/o Grace, Snowdon & Terepocki LLP, 201-2622 Montrose Avenue, Abbotsford, BC V2S 3T6.

7. At all material times, Her Majesty the Queen in Right of the Province of British Columbia operated BC Corrections. This proceeding is taken against BC Corrections in the name of Her Majesty the Queen in the Right of the Province of British Columbia pursuant to the provisions of s 7 of the *Crown Proceeding Act,* [RSBC 1996] c 89.

8. BC Corrections is the provincial government organization that is responsible for the management and operation of all provincial remand centres and all provincial correctional centres in BC, including NFPC, SPSC, FRCC, VIRCC, PGRCC and KRCC.

9. As of July, 2014, there were approximately 2,381 inmates in the custody of the Defendant and each are subject to the disciplinary process as currently operated by BC Corrections.

10. The Defendant has an address for service c/o the Ministry of Justice, PO Box 9280 Stn. Prov Gov't, Victoria, BC, V8W 9J7.

B. BC Corrections' disciplinary system

Background

11. The basic elements of the current BC Corrections disciplinary system were enshrined in the 1978 *Correctional Centre Rules and Regulations*, BC Reg 284/78. These basic elements include, but are not limited to:

    (a) the ability to appoint "a person, not an officer, appointed by the minister" to adjudicate disciplinary hearings (s 31);

(b) the prohibition on staff with "direct personal knowledge concerning the facts giving rise to the allegation" to participate in hearing adjudication (ss 31(2) and (5)); and

(c) the ability of the prisoner to appeal his or her finding of guilt or penalty to the (then) Director of Inspections and Standards, who had the authority to set aside the determination or disposition and substitute an alternative, dismiss the appeal or order a new hearing (ss 34(1) and (4)).

12. These basic elements of the current BC Corrections disciplinary system pre-date the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Constitution Act, 1982*").

13. The current BC Corrections disciplinary system does not reflect the principles enshrined in the *Charter*.

14. Pursuant to s 33 of the *Correction Act*, SBC 2004, c 46 (the "CA"), the Lieutenant Governor in Council is given powers to make regulations, including regulations governing the prisoner disciplinary process.

15. The *Correction Act Regulation,* BC Reg 58/2005 (the "CAR") provides a list of disciplinary rules (s 21), the steps to be taken before a charge can be laid (s 22), the notice requirement (s 23) and the use of segregation pending a hearing (s 24).

16. Subsection 25(1) of the *CAR* ("the impugned provision") provides:

(1) Subject to subsection (2), a disciplinary hearing must be presided over by

(a) a staff member appointed by the person in charge, or

(b) a person appointed by the assistant deputy minister.

17. Section 26 of the *CAR* sets out the requirement with respect to timing, the presence of the inmate and recording of the disciplinary hearing.

18. Section 27 of the *CAR* sets out the available penalties "*if an inmate is found to have breached a rule*" which include segregation for up to 30 days (or no more than 45 days as penalty for more than one breach) (s 27(1)(d), (2) and (3)(a)) and loss of earned remission of up to 60 days (s 27(1)(f)).

Independence of decision-making tribunal

19. Though s 25(1)(b) of the *CAR* provides for "*a person appointed by the assistant deputy minister*" to preside over disciplinary hearings, there is no requirement that this person be independent from the correctional or pretrial centre.

20. BC Corrections hearing are exclusively presided over by correctional staff at the correctional or pretrial centre where the prisoner is in custody.

21. In approximately 2007/2008, assistant deputy wardens began to preside over disciplinary hearings. Prior to that change, senior correctional officers tended to preside over disciplinary hearings.

22. Subsection 25(2) of the *CAR* only excludes staff members who filed the allegation, witnessed the alleged breach or who were otherwise involved in the circumstances leading to the filing of the report from presiding over the disciplinary hearing.

23. Staff members who preside over disciplinary hearings are not independent of the institution laying the charge.

24. Staff members who preside over a disciplinary hearing are not independent from those staff members already involved in the process.

25. By contrast, the federal disciplinary system (which is operated by the Correctional Service of Canada), the Alberta disciplinary system and the Yukon disciplinary system do not permit staff members to act as hearing officers in serious disciplinary hearings. In these jurisdictions, independent decision-makers are appointed by the appropriate minister (or assistance deputy minister in the Yukon) to adjudicate disciplinary hearings.

Standard of proof

26. Neither the *CA* nor the *CAR* identifies the standard of proof to be applied to disciplinary hearings. Subsection 27(1) of the *CAR* merely states: "*If an inmate is found to have breached a rule…*"

27. BC Corrections Branch *Adult Custody Policy* 1.20.11.1 (revised November, 2011) directs the disciplinary chairperson to determine, "*on the balance of probabilities, whether the charge might be substantiated*".

28. A balance of probabilities standard of proof requires a finding of guilt if the decision-maker believes that, on balance, the accused is more likely than not to have committed the offence.

29. This is a less onerous standard of proof than the criminal "beyond a reasonable doubt" standard, which requires acquittal if either the accused's defence is believed or if there is a reasonable doubt as to the accused's guilt.

30. In the federal system, a disciplinary charge must be proven to beyond a reasonable doubt pursuant to s 43(3) of the *Corrections and Conditional Release Act*, SC 1992, c 20.

Disciplinary hearings

31. BC Corrections disciplinary hearings often involve a presumption of guilt and a lack of impartiality among institutional staff presiding over disciplinary hearings.

32. In 2012 and 2013, NFPC had a 92% and 94% conviction rate respectively. In 2012 and 2013, PGRCC had an 89% and 88% conviction rate respectively.

Review process

33. The BC Corrections disciplinary hearing system allows prisoners a right of "review" to the Investigation and Standards Office (the "*ISO*") (*CAR*, s 29(a)).

34. The director of ISO may:

a. confirm the decision made and the penalty imposed;
b. confirm the decision made and substitute another penalty; or
c. rescind the decision made and penalty imposed and either direct that
   i. the warden change the prisoner's record to reflect the rescission or
   ii. direct that a new hearing be convened and presided over by a person appointed by the assistant deputy minister (*CAR*, s 29(4)).

35. Re-hearings are presided over again by staff not independent of the institution presided.

36. In most cases, the prisoner will have served much of his or her time in segregation by the time the review is decided.

37. From 2005-2008, approximately 52% of appeals to the ISO were successful.

38. The ISO have found breaches of procedural fairness in a high degree of appeal decisions, including on the basis that the prisoner's right to an impartial decision-maker was violated, and on the basis that there was insufficient evidence to prove the offence on a balance of probabilities.

39. The ISO commonly found other breaches of procedural fairness, including (but not limited to) denial of the right of the accused to:

(a) call witnesses or evidence in his or her defence;

(b) have only evidence presented before the tribunal considered in a finding of guilt;

(c) know the evidence prior to the hearing;

(d) consult with counsel prior to or during the hearing;

(e) cross-examine witnesses;

(f) give evidence and have submissions completed before a determination of guilt; and

(g) be present at the hearing except in exceptional circumstances.

C. The Plaintiffs

Travis Kelly

40. Mr. Kelly has been the subject of numerous disciplinary hearings at various BC correctional and pretrial centres between 2006 and 2014, including the following.

41. On October 26, 2013, at KRCC, Mr. Kelly was asked to come to the disciplinary hearing room. He refused because he had not received any information in relation to why he was being charged. He was cell extracted by the Emergency Response Team.

42. He was charged under CAR, s 21(1)(z.2(ii)) for jeopardizing the management, operations or security of the institution on the basis that the institution was required to cell extract Mr. Kelly. Mr. Kelly was found guilty of the offence by the KRCC staff person who presided over the hearing.

43. ISO overturned the decision, ruling that the circumstances did not support the charge under s 21(1)(z.2(ii)) of the CAR.

44. On July 22, 2013 at KRCC, Mr. Kelly was charged with assaulting another person, contrary to s 21(1)(w) of the CAR. He was convicted of the offence at hearing. On appeal, the ISO overturned the disciplinary hearing officer's decision due to, inter alia, a reasonable apprehension of bias. Mr. Kelly served the full term of 15 days of segregation before the conviction was overturned by ISO.

45. On April 5, 2012, at KRCC, Mr. Kelly was in segregation when he was charged with assisting or attempting to assist another inmate to assault another person, contrary to s 21(2) of the CAR. It was believed by the charging officer that he was describing to another inmate how to "shit-bomb" a guard. Mr. Kelly and the other prisoner disputed this allegation.

46. Mr. Kelly was found guilty of the offence at the hearing. The decision was overturned by the ISO who found that insufficient evidence was tendered to support the charge and the finding of guilt in the matter. Mr. Kelly's disposition of 15 days in segregation was rescinded by the ISO, 19 days after the disposition was ordered.

47. On June 6, 2011, at KRCC, Mr. Kelly was found guilty of violating s 21(1)(z.2(i)) of the CAR: "[a]n inmate must not engage in an activity that jeopardizes the safety of another person". On appeal it was ruled by the ISO that the disciplinary hearing was held in an administratively and procedurally unfair manner, stating that:

(a) the charge was incorrect;

(b) there was insufficient evidence to support the charge as written; and

(c) the hearing officer did not act as a neutral adjudicator of the evidence presented.

48. As a result of this flawed hearing, Mr. Kelly received and served a five day sentence in segregation.

49. On June 3, 2011, Mr. Kelly was found guilty of attempting to possess or obtain contraband, contrary to s 21(1)(y) of the CAR. This hearing was held to be procedurally

flawed by the ISO, as the hearing officer failed to establish and state that she was satisfied that Mr. Kelly had knowledge of the contraband that he was charged with possessing.

50. Mr. Kelly was initially given a disposition of 15 days' segregation. He served eight days before the ISO overturned the decision.

51. On August 20, 2007 at FRCC, Mr. Kelly had asked for a one day adjournment of a disciplinary hearing to contact legal counsel. The hearing officer refused to adjourn the matter for one day, instead deciding to adjourn it indefinitely. The hearing resumed 19 days later. Throughout the hearing, Mr. Kelly stated that he had a lawyer and needed him to be present at the hearing. Every request was denied by the hearing officer. The ISO found that this constituted a procedurally unfair and unreasonable decision and rescinded the decision. Mr. Kelly was originally given 20 days in segregation as a disposition. He served 12 of them before the ISO overturned the decision.

Christopher Trotchie

52. On or about September 14, 2014, Mr. Trotchie covered up the camera in his NFPC cell with wet paper and slashed his forearms in an attempt to self-harm. He lost a substantial amount of blood and he required stitches. Mr. Trotchie suffers from multiple underlying psychological illnesses.

53. As a result of the self-harm incident, Mr. Trotchie was charged with a disciplinary offence contrary to s 21(1)(z.2(ii)) of the CAR which prohibits: "*engaging in an activity that jeopardizes or is likely to jeopardize the management, operation or security of the correctional centre*".

54. WCPJS represented Mr. Trotchie at his disciplinary hearing and wrote his ISO appeal.

55. Mr. Trotchie was found guilty at his September 17, 2014 disciplinary hearing by a BC Corrections adjudicator who is a staff member at NFPC, on the basis that he "*had a*

history of self-harming and therefore knew that slashing himself would require a multi-level response from BC Corrections, and therefore, this constituted the requisite elements to substantiate the allegation".

56. Mr. Trotchie was given ten days in segregation as punishment for the breach. He was credited three days for time served in segregation.

57. The decision of the hearing officer was appealed to the ISO on behalf of Mr. Trotchie, on the following grounds:

    (a) the standard of proof being beyond a reasonable doubt rather than on a balance of probabilities;

    (b) no evidence had been presented to substantiate the alleged breach;

    (c) apprehension of bias was created, given that the hearing officer used problematic pronouns such as "we" and did not act as an impartial adjudicator of the facts; and

    (d) the disposition was disproportionately severe, given the circumstances of the breach.

58. On September 23, 2014, the ISO overturned the decision and penalty imposed. This review determined that Mr. Trotchie's disciplinary hearing was held in an administratively and procedurally unfair manner. Specifically, ISO found that insufficient evidence was presented to support the charge, and that there was an apprehension of bias.

59. Mr. Trotchie was released from segregation on September 21, 2014, having served the full seven days in segregation.

Travis Bara

60. On November 14, 2014, at KRCC, Mr. Bara was charged, and on November 23, 2014, he was found guilty of violating CAR, s 21(1)(z.1): "[a]n inmate must not participate in a disturbance". WCPJS appointed counsel to represent Mr. Bara at the hearing. The hearing officer imposed a disposition of 10 days of segregation commencing on November 17, 2014.

61. Counsel for Mr. Bara appealed the decision to the ISO on the grounds that:

(a) the standard of proof should have been "beyond a reasonable doubt" rather than "balance of probabilities";

(b) the hearing officer did not consider the evidence of Mr. Bara in a sufficiently meaningful way and provided evidence himself, giving rise to a reasonable apprehension of bias;

(c) the hearing officer concluded the hearing without a reasonably full examination of the evidence from both sides; and

(d) Mr. Bara may not have been properly served with the required notice of his segregation pending the hearing.

62. The ISO found the hearing was not conducted in an administratively and procedurally fair manner for reasons including that the decision-maker's conduct in the hearing created an apprehension of bias and interfered with Mr. Bara's right to present a full defence to the charge.

The West Coast Prison Justice Society

63. The primary project of WCPJS is Prisoners' Legal Services ("PLS"). PLS is a legal aid clinic providing services to both federal and provincial prisoners in the province of British Columbia since 1980.

64. Until 2002, PLS was operated by the Legal Services Society of British Columbia. In 2002, PLS became a project of WCPJS.

65. PLS is the only legal aid clinic of its kind in Canada.

66. PLS has a mandate to further the purposes of WCPJS, including:

(a) to promote the provision of legal services to prisoners in BC;

(b) to encourage the provision of legal services to prisoners whose problems arise because of their unique status as prisoners;

(c) to promote the rule of law within prisons;

(d) to encourage prisoners to make use of the legal remedies at their disposal;

(e) to encourage the application of the *Canadian Charter of Rights and Freedoms* inside prisons;

(f) to promote openness and accountability in the prisons of British Columbia; and

(g) to promote the principle that incarcerated people must be treated with fairness and dignity.

67. PLS promotes the equality of a particularly marginalized population of people. Prisoners are inherently vulnerable by virtue of their incarceration. Persons with mental health and addiction issues, Aboriginal people and people living in poverty are heavily over- represented within Canadian prisons.

68. Since its inception, PLS has advocated for prisoners in matters affecting their residual liberty rights, has engaged in public education and has created numerous legal education resources for prisoners.

69. PLS operates six telephone lines dedicated to calls from prisoners. All PLS legal advocates have telephone contact with prisoners throughout BC, five days per week.

70. PLS provides assistance to prisoners charged with disciplinary offences. In 2014, PLS opened 263 files for BC prisoners charged with disciplinary offences. In most cases, PLS provides summary advice to prisoners who represent themselves at hearings. In some cases, PLS will make a written submission to the hearing officer, write the appeal to ISO on behalf of the prisoner, appoint outside legal counsel to represent the prisoner at the hearing or provide in-house legal representation at the hearing.

71. In 2014, PLS legal advocates represented approximately 66 federal or provincial prisoners at disciplinary hearings.

Public interest standing

72. WCPJS has sufficient interest to be granted public interest standing, in that:

(a) this claim raises a serious challenge to the constitutionality of two aspects of the provincial disciplinary system as currently operated by the Defendant;

(b) WCPJS, through PLS, has a demonstrated, serious and genuine interest in the subject matter of this litigation and is the only organization in Canada which is so situated;

(c) all provincial prisoners in BC may be subjected to a loss of liberty (segregation or loss of earned remission) by the lack of independent adjudication of BC Corrections' disciplinary hearings;

(d) federal parolees who are suspended from conditional release may be returned to BC Corrections and may be subjected to a loss of liberty (segregation) by the lack of independent adjudication of disciplinary hearings;

(e) all provincial prisoners in BC may be subjected to a loss of liberty (segregation or loss of earned remission) by the application of the balance of probabilities standard of proof in disciplinary proceedings;

(f) federal parolees who are suspended from conditional release may be returned to BC Corrections and may be subjected to a loss of liberty (segregation) by the application of the balance of probabilities standard of proof in disciplinary

proceedings;

(g) PLS is the only legal clinic open to all prisoners in BC that assists with prison disciplinary hearings;

(h) PLS is able to represent the interests of all provincial prisoners in BC and provide evidence of numerous prisoners who have been adversely and unfairly affected by the impugned provisions and use of the balance of probabilities standard of proof;

(i) it is unreasonable to expect prisoners with no access to the internet, very little access to library resources and highly controlled access to phone calls, to each bring on and carry through to completion, a lengthy and involved legal challenge of the type set out in this claim. Individual prisoners do not have the ability to communicate between institutions to bring a claim collectively; and

(j) the evidence that is necessary to challenge the constitutionality of the Impugned Provision and the application of the balance of probabilities standard of proof spans a number of years. The average stay of a provincial prisoner in 2012/13 was 34 days for remand prisoners and 69 days for sentenced prisoners. The vast majority of provincial prisoners will not be in provincial custody for a period of time long enough to see an action through.

D. Effect of procedural unfairness on inmates and society

73. The current disciplinary scheme results in many prisoners being subjected to the disciplinary penalty of segregation only to be found "not guilty" on appeal after having served all or part of the segregation sentence.

74. Segregation is the most individually destructive, psychologically crippling and socially alienating experience that could conceivably exist within the borders of the country.

75. It is in the public's interest for the provincial corrections system to abide by and promote the rule of law.

76. Prisoners who experience procedural unfairness at a disciplinary hearing, and suffer the penalty of segregation for a charge that is later overturned by ISO, are less likely to develop a respect for the rule of law while incarcerated.

77. The vast majority of provincial prisoners return to the community.

78. Prisoners are more likely to become law abiding citizens upon release if they are treated with procedural fairness while in prison.

79. It is in the public interest that all laws in BC comply with the *Charter*.

Part 2: RELIEF SOUGHT

1. The Plaintiffs seek the following relief:

    a. a declaration that s 25 of the CAR unjustifiably infringes s 7 of the *Charter* and pursuant to s 52(1) of the *Constitution Act, 1982*, is of no force and effect;

    b. a declaration that the proper interpretation of the *CAR* requires the use of the "*beyond a reasonable doubt*" standard of proof in disciplinary proceedings;

    c. a declaration that the Defendant's use of the lower "*balance of probabilities*" standard of proof in its disciplinary proceedings unjustifiably infringes s 7 of the *Charter*;

    d. an order requiring BC Corrections to appoint independent and unbiased decision-makers in all disciplinary proceedings brought against all prisoners in order to ensure compliance with s 7 of the *Charter* and as the appropriate s 24(1) *Charter* remedy;

e. an order requiring BC Corrections to adopt the "*beyond a reasonable doubt*" standard of proof in disciplinary proceedings brought against an inmate in order to ensure:
   (i) a proper interpretation of the *CAR*, or
   (ii) compliance with s 7 of the *Charter* and as the appropriate s 24(1) *Charter* remedy; and

f. such further and other relief as this Honourable Court deems just.

Part 3: LEGAL BASIS

1. The Plaintiffs' rely on:

   (a) s 52 of the *Constitution Act 1982*,

   (b) *Correction Act* SBC 2004, c 46

   (c) *Correction Act Regulation* BC Reg 58/2005

   (d) the *Charter* and, in particular, sections 7 and 24(1) thereof.

The *Correction Act* and its *Regulations*

2. The *CA* and *CAR* are silent on the appropriate standard of proof to be applied in disciplinary hearings. It is the Plaintiffs' position that a purposive interpretation of section 27(1) requires that prisoners be "found to have breached a rule" only when it is proven <u>beyond a reasonable doubt.</u>

3. In the alternative, it is the Plaintiffs' position that the use of a balance of probabilities standard of proof violates prisoners' rights under s 7 of the *Charter*.

Section 7 of the *Charter*

4. Section 7 of the *Charter* states as follows:

> *Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*

5. Section 7 of the *Charter* applies to assure procedural protections in the context of prison disciplinary proceedings. The duty of fairness applies to these disciplinary proceedings.

6. Legislation is considered to violate s 7 of the *Charter* when it restricts an individual's liberty and does so without regard to the principles of fundamental justice.

7. The right to liberty is engaged and infringed by disciplinary hearing adjudicators who impose the sanction of forfeiture of earned remission under CAR, s 27(1)(f). Such a decision must be made in accordance with the principles of fundamental justice.

8. The right to liberty and security of the person is engaged and infringed by disciplinary hearing adjudicators who impose the sanction of segregation under CAR, s 27(1)(d). Such a decision must be made in accordance with the principles of fundamental justice.

Principles of fundamental justice

9. It is the plaintiffs' case that, given the nature of the available penalties, the right to liberty and security of the person of BC provincial prisoners subjected to the disciplinary process under the CAR is not restricted in accordance with two principles

of fundamental justice:

A. the requirement of independence and impartiality of the decision-maker; and

B. the requirement for guilt to be proven beyond a reasonable doubt.

A. Requirement of independence and impartiality of the decision-maker

10. The right to be tried by an independent and impartial tribunal is an integral principle of fundamental justice protected by s 7 of the *Charter*.

11. The content of independence and impartiality found in s 11(d) of the *Charter* are also integral to the principles of fundamental justice found in s 7 of the *Charter*, and are applicable to all administrative tribunals which substantially affect the interests of the parties before them.

12. Independence requires security of tenure, financial security and administrative control. The BC CA and CAR do not provide for security of tenure, financial security or administrative control for the institutional staff who preside over disciplinary hearings.

13. The level of independence required of a tribunal depends on the nature of the tribunal, the interest at stake and other indices of independence.

14. Prison disciplinary hearings more closely resemble a criminal trial and therefore attract stringent requirements of independence and impartiality.

15. Impartiality relates to the state of mind or attitude of the decision-maker in relation to the issue under consideration, and requires an absence of perceived or actual bias.

16. The very structure of a tribunal system can create a reasonable apprehension of bias on an institutional level, whether or not a particular adjudicator has any pre-conceived ideas or biases.

17. The test for determining a reasonable apprehension of a bias on an institutional level is whether a fully informed person would have a reasonable apprehension of bias in a substantial number of cases.

18. The operation of the disciplinary hearing scheme under the CAR and the BC Corrections Branch *Adult Custody Policy 1.20 Disciplinary Hearing Guidelines* (revised: Nov-11) gives rise to a reasonable apprehension of bias in the mind of a well-informed observer.

19. The Alberta Court of Queen's Bench recognized in *Currie v. Alberta (Edmonton Remand Centre)*, 2006 ABQB 858 ("*Currie*") that disciplinary boards in correctional institutions which are composed of staff members fail to meet the requirements of independence and impartiality.

20. As a result of *Currie*, Alberta changed its legislation to require independent adjudication of prison disciplinary hearings. The federal and Yukon systems also adhere to this concept by assigning independent chairpersons to adjudicate serious disciplinary hearings.

21. In *Currie*, at paras 175-182, Marceau J. identified indices of a reasonable apprehension of bias in a disciplinary hearing context, including but not limited to adjudicators having previous knowledge of the accused and events, and adjudicators supporting the evidence of staff over prisoners where credibility was at issue, before hearing the evidence.

22. The same concerns exist in the current disciplinary scheme in British Columbia. The current disciplinary hearing scheme permits the same people who are responsible for

maintaining the order of the institution to judge whether prisoners are committing offences against the institution. The judges, in other words, are the offended parties.

23. Appointing staff members to preside over prison disciplinary hearings breaches the independence and impartiality requirements of section 7 of the *Charter*.

24. The individual Plaintiffs were deprived of their s 7 rights of liberty and security of the person by virtue of the Defendant enacting s 25(1) of the CAR which permits correctional staff to act in the role of decision-makers at disciplinary hearings.

25. Correctional staff are not independent decision-makers and often lack impartiality.

26. The failure to ensure independent and impartial decision-makers in the BC disciplinary hearing system may result in the deprivation of liberty and security of the person of any prisoner subjected to the process, including but not limited to the individual Plaintiffs.

B. Beyond a Reasonable Doubt in Disciplinary Hearings

27. In the alternative to the Plaintiffs' position regarding statutory interpretation, it is the Plaintiff's position that the BC prison disciplinary hearing scheme violates s 7 of the *Charter* by applying the lower "*balance of probabilities*" standard of proof to disciplinary hearings. Fundamental justice requires the higher standard of "*beyond a reasonable doubt*" to be applied before a penalty may be imposed that would deprive an individual of liberty or security of the person.

28. The test for whether a principle constitutes a principle of fundamental justice for the purposes of s 7 is as follows:

(a) it must be a legal principle;

(b) there must be significant social consensus that it is fundamental to the way in

which the legal system ought fairly to operate; and

(c) it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

29. The application of the "beyond a reasonable doubt" standard of proof in disciplinary hearings is a decades-old legal practice enshrined both in legislation and jurisprudence in the federal prison context. It has clearly been recognized as a legal principle.

30. The onus on a prison disciplinary hearing prosecutor to provide evidence beyond a reasonable doubt is "inextricably linked to the presumption of innocence" (*Ayotte v Canada (Attorney General)*, 2003 FCA 429 at para. 15). The fundamental importance of applying the highest standard of proof to cases that involve liberty rights so that an accused has the benefit of being presumed innocent has achieved a level of social consensus in jurisprudence, legislation and academia. It is fundamental to legal fairness, according to social consensus.

31. The application of the standard of proof of beyond a reasonable doubt has an extensive history in criminal law, and is a well-defined and widely accepted concept.

32. There is little difference in provincial and federal contexts with regard to a disciplinary court's ability to deprive a prisoner of his or her liberty through segregation.

33. Provincial prisoners in BC face the added possible sanction of loss of earned remission, which is not available to federal disciplinary chairpersons. This increased power to deprive a prisoner of his or her liberty puts even more of an impetus on provincial disciplinary hearings to apply the legal principle of proof beyond a reasonable doubt set in the federal sphere.

Section 1 of the *Charter*

34. Section 1 of the *Charter* reads as follows:

> *"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."*

35. The said infringements of s 7 cannot be justified pursuant to the criteria of section 1, the burden of proof of which lies on Canada.

Plaintiffs' address for service:	Grace, Snowdon & Terepocki LLP 201-2622 Montrose Avenue Abbotsford, BC, V2S 3T6
Fax number address for service (if any):	604.744.1065
Place of trial:	New Westminster, British Columbia
The address of registry is:	651 Carnarvon Street New Westminster, BC V3M 1C9

Dated: May 6, 2015

…….
Tonia Grace, solicitor for the Plaintiffs

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. (l) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
   (a) prepare a list of documents in Form 22 that lists
   (ii) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
   (ii) all other documents to which the party intends to refer at trial, and
   (b) serve the list on all parties of record.

APPENDIX

[The following information is provided for data collection purposes only and is of no legal effect.]

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

A challenge to the constitutional validity of the disciplinary procedural rules of BC Corrections.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

[Check one box below for the case type that best describes this case.]

A personal injury arising out of:
[ ] a motor vehicle accident
[ ] medical malpractice
[ ] another cause

A dispute concerning:
[ ] contaminated sites
[ ] construction defects
[ ] real property (real estate)
[ ] personal property

[ ] the provision of goods or services or other general commercial matters
[ ] investment losses
[ ] the lending of money
[ ] an employment relationship
[ ] a will or other issues concerning the probate of an estate
[X] a matter not listed here

Part 3: THIS CLAIM INVOLVES:
[Check all boxes below that apply to this case]

[ ] a class action
[ ] maritime law
[ ] aboriginal law
[X] constitutional law
[ ] conflict of laws
[ ] none of the above
[ ] do not know

Part 4:

- *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11 *Constitution Act,* 1867 (U K.), 30 & 31 Viet., c 3, reprinted in RSC 1985, App. II, No. 5

- *Correction Act* SBC 2004, c 46

- *Correction Act Regulation* BC Reg 58/2005

File No: _____
New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRAVIS KELLY, CHRISTOPHER TROTCHIE, TRAVIS BARA AND
WEST COAST PRISON JUSTICE SOCIETY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN
IN THE RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

DEFENDANT

NOTICE OF CIVIL CLAIM

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