

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MR. JUSTICE)
EDWARD P. BELOBABA)

...Friday..., THE 30...
DAY OF August..., 2019

BETWEEN:



**STEVEN SIMONS, CANADIAN HIV/AIDS LEGAL NETWORK,
PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK,
CANADIAN ABORIGINAL AIDS NETWORK and CATIE**

Applicants

and

**MINISTER OF PUBLIC SAFETY, CORRECTIONAL SERVICE OF
CANADA, COMMISSIONER OF THE CORRECTIONAL SERVICE OF
CANADA and ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

ORDER

THIS MOTION, made by the applicants, for an order granting them leave to amend the amended notice of application in accordance with the draft amended amended notice of application attached as Schedule A, was read today at the City of Toronto.

ON READING the affidavit of Jillian Evans, sworn April 25, 2019,

1. THIS COURT ORDERS that the notice of application be amended in accordance with the draft amended amended notice of application attached as Schedule A to this order.



Justice Edward P. Belobaba

ENTERED AT / INSCRIPT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

SEP 04 2019

PER/PAR

77

SCHEDULE A

Court File No. CV-464162

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**STEVEN SIMONS, CANADIAN HIV/AIDS LEGAL NETWORK,
PRISONERS WITH HIV/AIDS SUPPORT ACTION NETWORK,
CANADIAN ABORIGINAL AIDS NETWORK and CATIE**

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APPLICATION UNDER Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

AMENDED AMENDED NOTICE OF APPLICATION

TO THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following pages.

THIS APPLICATION will come on for a hearing on a date and at a time to be fixed by the Court, at 393 University Ave., 10th floor, Toronto, ON M5G 1E6.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicant's lawyer or, where the applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least four days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: _____

Issued by: _____
Local registrar

Address of court office:

393 University Ave., 10th floor
Toronto, ON M5G 1E6
Tel: 416 326 4230

TO:

**MINISTER OF PUBLIC SAFETY
CORRECTIONAL SERVICE OF CANADA
COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA
ATTORNEY GENERAL OF CANADA**

All respondents c/o:

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Department of Justice Canada
Ontario Regional Office
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Toronto, ON M5H 1T1
Tel: 647-256-7510/647-256-7502/647-256-7521
Fax: 416-952-4518
Public Safety & Defence
Suite 3400, Exchange Tower

P.O. Box 36
Toronto, Ontario M5X 1K6
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APPLICATION

1. The applicant makes application for:
 - a. a declaration finding that the failure of the Correctional Service of Canada, and the refusal of its Commissioner and of the Minister of Public Safety, to make sterile injection equipment available for those incarcerated in federal penitentiaries established and operated under the *Corrections and Conditional Release Act*, C.S. 1992, c.20, as amended (CCRA), and said respondents' apparent treatment of sterile injection equipment as prohibited contraband and/or unauthorized item(s), and their preclusion of or failure to make available inmates' reasonable and effective access to sterile injection equipment in accordance with professionally accepted standards, constitute violations of sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;
 - b. a declaration pursuant to section 52(1) of the *Constitution Act, 1982 Canadian Charter of Rights and Freedoms* that, *inter alia*, sections 2(1), 40(i) and 40(j) and 45 and all related CCRA statutory provisions and regulations and policies (the latter including but not limited to rules of general application, memoranda, guidelines and standing orders) that prevent inmates of federal penitentiaries from receiving and/or possessing sterile injection equipment are constitutionally invalid and of no force and effect insofar as they preclude or fail to make available inmates' reasonable and effective access to sterile injection equipment in accordance with professionally accepted standards;
 - c. a declaration pursuant to section 52(1) and/or the court's inherent jurisdiction that reasonable and effective access to sterile injection equipment is essential health care within the meaning of section 86(1) of the CCRA, to be provided in accordance with professionally accepted standards;
 - d. a declaration pursuant to section 52(1) and/or the court's inherent jurisdiction that professionally accepted standards as referred to above require;

- i. that access be provided by means designed and implemented as a health service under the direction of CSC Health Services;
 - ii. easy and confidential access, by means that engender prisoners' trust;
 - iii. sterile injection equipment and information that are of good quality and respond to the needs of prisoners who inject drugs;
 - iv. access that is equitable, non-discriminatory and non-stigmatizing; and
 - v. that access be provided by means otherwise in accordance with public health principles (including based on best evidence and public health expertise) and the principle of equivalency of care for those in prison;
 - e. an order pursuant to section 24 of the *Canadian Charter of Rights and Freedoms* directing the Correctional Service of Canada, and its Commissioner and the Minister of Public Safety, to ensure the implementation of sterile needle and syringe programs in all federal penitentiaries, in accordance with professionally accepted standards, so as to provide reasonable and effective access to sterile injection equipment for those incarcerated in such institutions;
 - f. the costs of this application; and
 - g. such further and other relief as counsel may advise and this Honourable Court may permit.
2. The grounds for the application are as follows:
- a. the applicant Steven Simons is a former prisoner who, despite his best efforts, was infected with hepatitis C virus (HCV) and exposed to the risk of infection with human immunodeficiency virus (HIV) during his incarceration in a federal penitentiary as a result of another prisoner using his injection equipment and inadequate access to sterile equipment for his own use, while in the custody and under the control of the respondent Correctional Service of Canada (CSC), arising from CSC's failure and refusal to ensure access to such equipment;
 - b. the applicant Canadian HIV/AIDS Legal Network (Legal Network) is a non-governmental, public interest, charitable organization dedicated to the

protection and promotion of the human rights of people living with HIV and populations particularly vulnerable to HIV, including people in prisons and people who inject drugs, and has for 20 years undertaken research and advocacy for effective HIV prevention measures in prisons, in Canada and internationally, including numerous direct communications with a series of federal ministers responsible for health and corrections outlining the extensive evidence regarding the need to implement such measures and the public health and human rights imperatives for doing so;

- c. the applicant Prisoners with HIV/AIDS Support Action Network (PASAN) is a community-based prisoners' rights organization that provides education and support to prisoners and ex-prisoners in Ontario on HIV/AIDS, HCV and other health issues, and whose mandate includes advocating for the health of prisoners (men and women, adults and youth), including for access to evidence-based harm reduction services in Canadian prisons;
- d. the applicant CATIE is a charitable organization designated by the Public Health Agency of Canada as the national knowledge broker of up-to-date, unbiased information about HIV and HCV, and connects people living with either virus, as well as at-risk communities, health care providers and community organizations with the knowledge, resources and expertise to reduce transmission and improve quality of life;
- e. the applicant Canadian Aboriginal AIDS Network (CAAN) is a charitable organization bringing together a coalition of individuals and organizations which provides leadership, support and advocacy for Aboriginal people living with and affected by HIV and AIDS throughout Canada, and is the only national organization specifically representing this constituency;
- f. the respondent Correctional Service of Canada (CSC) is the federal government agency responsible for administering sentences of a term of two years or more, as imposed by the courts, and is responsible for the operation of federal penitentiaries of various security levels under relevant provisions of the

CCRA and for supervising offenders under conditional release in the community;

- g. the respondent Commissioner of the Correctional Service of Canada is the most senior civil servant with responsibility and authority for directing and managing the CSC, with full control over the CSC, subject only to the direction of the Minister of Public Safety;
- h. the respondent Minister of Public Safety is the Minister of the Crown with responsibility and authority for directing and managing the CSC, with full control over the CSC subject only to the direction of the Parliament of Canada;
- i. the respondent Attorney General of Canada is the Minister of the Crown responsible for ensuring that the laws and other actions of the Government of Canada are consistent with its constitutional obligations;
- j. a significant proportion of people incarcerated in federal penitentiaries in Canada have a history of injection drug use (including that resulting from addiction) and a significant proportion of prisoners inject drugs while incarcerated (either continuing previous use or initiating use) despite extensive efforts by correctional authorities to prevent the entry of controlled substances into prisons, which efforts these authorities have recognized cannot eliminate drugs and their use in prisons;
- k. given the stated position of the CSC Commissioner and actual practice of CSC, injection equipment possessed by a prisoner in a federal penitentiary without authorization is presumptively prohibited as “contraband” and/or unauthorized item(s) and subject to penalties under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 and related Commissioner’s Directives;
- l. despite mounting evidence and numerous requests over numerous years from community organizations, the Correctional Service of Canada and its Commissioner, as well as the Minister of Public Safety, have repeatedly refused to implement health services that would ensure federal prisoners in the

custody of CSC have reasonable and effective access to sterile injection equipment in accordance with professionally accepted standards;

l.1 in May 2018, the respondents announced a prison needle exchange program (PNEP) to be implemented in two federal penitentiaries in June 2018, with a stated intention to implement the PNEP in all penitentiaries by August 2020 at the earliest;

l.2 CCRA statutory provisions, regulations and policies nonetheless continue to preclude or fail to make available prisoners' reasonable and effective access to sterile injection equipment in accordance with professionally accepted standards;

m. as a result of this prohibition on possessing injection equipment, whether sterile or used, any prisoner in possession of such equipment other than as may be permitted by the PNEP is exposed to the risk of further penal sanction for the possession of contraband and/or unauthorized item(s), amounting to a (further) deprivation of liberty;

n. as a result of prohibition of possessing injection equipment as contraband and/or unauthorized item(s), and of the refusal of federal correctional authorities to authorize prisoners to possess their own injection equipment and to ensure prisoners can obtain sterile injection equipment in accordance with professionally accepted standards, there is little or no access to sterile injection equipment in federal penitentiaries;

o. consequently, a significant proportion of people who inject drugs while in prison share used (and often makeshift) injection equipment with numerous other prisoners;

p. the sharing of drug injection equipment poses a high risk for transmitting blood-borne infections, including HIV and HCV, and presents other potentially serious health consequences for prisonersinmates;

- q. the prevalence of HIV and HCV among Canadian prisoners, including those in federal penitentiaries, is significantly higher than among the population as a whole;
- r. the refusal to ensure prisoners can have access to sterile injection equipment increases their risk of transmitting or acquiring HIV, HCV or other blood-borne infections while incarcerated, and their risk for other potentially serious health consequences, thereby jeopardizing their health and lives;
- s. federal correctional authorities' refusal to ensure access to sterile injection equipment for those in custody in federal penitentiaries disproportionately jeopardizes the liberty, health and lives of people with the disability of addiction, Aboriginal people (who experience significantly higher prevalence of addiction and of HIV and HCV infection than the Canadian population as a whole, and who are disproportionately incarcerated compared to non-Aboriginal people in Canada), and women (since the prevalence of a history of injection drug use, and of HIV and HCV, is higher among incarcerated women than men in Canada);
- t. communicable diseases acquired in prison, including infections such as HIV and HCV, contribute to a greater potential for transmission of those infections outside prison when people infected while incarcerated are released from custody, meaning that the federal correctional authorities' refusal to ensure access to sterile injection equipment inside prisons not only jeopardizes the health and lives of prisoners, it also contributes to a public health problem beyond prisons;
- u. federal correctional authorities have recognized the need to address infectious diseases in prisons and the need for "comprehensive" harm reduction services in federal prisons, including through official policies such as Commissioner's Directives (which the Commissioner is authorized to promulgate under the *Corrections and Conditional Release Act*);

- v. for over 20 years, community based programs have offered sterile injection equipment outside the correctional setting as a health service and harm reduction measure in a variety of communities across Canada;
- w. access to sterile injection equipment is consistent with accepted standards of practice for the prevention of infectious diseases transmissible by blood such as HIV and AIDS HCV and is essential health care within the meaning of section 86 and related provisions of the CCRA and all related regulations;
- x. since 1992, prison systems in numerous countries have implemented needle and syringe programs enabling prisoners to have access to sterile injection equipment, and such experiences have been repeatedly studied, including by CSC, Health Canada and the Public Health Agency of Canada;
- y. the available evidence indicates that such programs, when operated effectively, have significant benefits, including reducing the health risks of HIV and HCV transmission in prisons associated with the use of non-sterile injection equipment, and that the concerns expressed about their implementation have not been substantiated by the evidence, with the result that leading numerous authorities, agencies and organizations, in Canada and internationally, have called for the implementation of such programs as part of a comprehensive, effective response to HIV (and HCV) in prisons;
- z. the available evidence indicates that such programs can operate consistently with interdiction against drug use in prisons;
- aa. all of the available evidence indicates that the only measures currently being undertaken by the Respondents with the ostensible objective of reducing the risk to prisoners of HIV and HCV infection, namely enhanced drug interdiction programs and the distribution of bleach, are inadequate in reducing the risk of infection to prisoners;
- bb. this evidence has been presented repeatedly to the Respondents, on numerous occasions, as well as to other responsible government officials and ministers, yet the Respondents refuse to implement such health services in federal

correctional institutions, and despite repeated requests, have not provided any evidence on which they claim to base this decision, simply asserting that it is their policy to approach the problems posed by drugs in prisons with “zero tolerance” for drugs;

- cc. the absolute prohibition on sterile injection equipment is arbitrary, over broad and grossly disproportionate to the legitimate objective of curtailing the use of illicit drugs within the correctional system, as is the preclusion or failure to make available prisoners’ reasonable and effective access to sterile injection equipment in accordance with professionally accepted standards;
 - dd. HIV and HCV infection disproportionately affects prisoners with the disability of addiction, female prisoners and Aboriginal prisoners, and accordingly, withholding sterile injection equipment has a disproportionate, discriminatory effect on people with disabilities, women and Aboriginal people;
 - ee. given that the Respondents have arbitrarily disregarded this evidence over many years, the appropriate remedy is a declaration supervisory injunction to ensure establishment of an adequate program pursuant to section 52(1) 24 of the *Canadian Charter of Rights and Freedoms*;
 - ff. sections 1, 7, 15, and 24 52(1) of the *Canadian Charter of Rights and Freedoms*, and sections 2, 3, 3.1, 4, 28, 38, 40(i) and (j), 44-57, 69, 70, 85, 86 and 87 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 and all related regulations and policies;
 - gg. Rule 14.05 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
 - hh. such further and other grounds as counsel may advise and this Honourable Court may permit.
3. The following documentary evidence will be used at the hearing of the application:
- a. the affidavit of the applicant Steven Simons;

- b. the affidavit of Richard Elliott on behalf of the applicant Canadian HIV/AIDS Legal Network;
- c. the affidavit of Anne Marie DiCenso on behalf of the applicant Prisoners with HIV/AIDS Support Action Network;
- d. the affidavit of Art Zoccole on behalf of the applicant Canadian Aboriginal AIDS Network;
- e. the affidavit of Laurie Edmiston on behalf of CATIE;
- f. a number of additional affidavits from a variety of experts on matters related to injection drug use, HIV and HCV in prisons, including the measures taken elsewhere and needed in Canada to address these public health concerns through ensuring access to sterile injection equipment for prisoners, and the impact on prisoners of the failure to implement such health services; and
- g. such further and other materials as counsel may advise and this Honourable Court may permit.

Dated at Toronto, Ontario, this 18th day of January, 2019 ~~11th 25th~~ day of September,
2014 2012.

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BETWEEN:
CANADIAN HIV/AIDS LEGAL NETWORK et al.
Applicants

-and- MINISTER OF PUBLIC SAFETY et al.
Respondents

Court File No. CV-12-464162

ONTARIO

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PROCEEDING COMMENCED AT
TORONTO

AMENDED AMENDED NOTICE OF APPLICATION

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BETWEEN:
STEVEN SIMONS et al.
Applicants

-and-
MINISTER OF PUBLIC SAFETY et al.
Respondents

Court File No. CV-12-464162

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