

Court File No. CV-09-383001

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**CORALEE SMITH, on her own behalf and as the Litigation Administrator of the
Estate of Ashley Smith, Deceased, DAWNA WARD and HERB GORBER**

Plaintiffs

and

**ATTORNEY GENERAL OF CANADA (in Right of the Minister of Public Safety),
COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA
KEITH COULTER, DEPUTY COMMISSIONER ONTARIO REGION
NANCY STABLEFORTH, WARDEN OF NOVA INSTITUTION FOR WOMEN
ALFRED LEGERE, ACTING WARDEN OF GRAND VALLEY INSTITUTION FOR
WOMEN CINDY BERRY, DEPUTY WARDEN OF GRAND VALLEY INSTITUTION
FOR WOMEN JOANNA PAULINE, ASSISTANT WARDEN OF GRAND VALLEY
INSTITUTION FOR WOMEN LAUNA GRATTON, TRAVIS McDONALD,
KAREN EVES, BLAINE PHIBBS, SHERRY FAIRCHILD, CHARLENE VENTER,
VALENTINO BURNETT, MELISSA MUELLER, LIZ GIBBONS,
GAETAN DESROCHES, KENNETH ALLEN and CORRECTIONAL SERVICES
EMPLOYEES JOHN DOE and JANE DOE**

Defendants

**STATEMENT OF DEFENCE OF THE ATTORNEY GENERAL OF CANADA,
COMMISSIONER OF THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER,
DEPUTY COMMISSIONER ONTARIO REGION NANCY STABLEFORTH, WARDEN OF
NOVA INSTITUTION FOR WOMEN ALFRED LEGERE, ASSISTANT WARDEN OF GRAND
VALLEY INSTITUTION FOR WOMEN LAUNA GRATTON, TRAVIS McDONALD,
BLAINE PHIBBS, SHERRY FAIRCHILD, CHARLENE VENTER, VALENTINO BURNETT,
MELISSA MUELLER, LIZ GIBBONS, GAETAN DESROCHES, KENNETH ALLEN and
CORRECTIONAL SERVICES EMPLOYEES JOHN DOE and JANE DOE**

1. The defendants, the Attorney General of Canada, Keith Coulter, Nancy Stableforth, Alfred Legere, Launa Gratton, Travis McDonald, Blaine Phibbs, Sherry Fairchild, Charlene Venter, Valentino Burnett, Melissa Mueller, Liz Gibbons, Gaetan Desroches, Kenneth Allen and Correctional Services Employees John Doe and Jane Doe shall hereinafter be referred to as "the Crown defendants".

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2. The Attorney General of Canada ("AGC") denies the allegations contained in paragraphs 1, 2, 4 to 9, 14, 22 to 24, 28 to 34, 38, 39, 41 to 50, 52 to 74, 76 to 81, 83 to 100 of the Statement of Claim.

3. The AGC has no knowledge of the allegations contained in paragraphs 11, 12, 13, 25 and 26 of the Statement of Claim and has no knowledge of the allegation contained in paragraph 3 that the transfer to the federal correctional system was involuntary.

4. The AGC admits the allegations contained in paragraphs 10, 15, 16 (except the allegation that Nancy Stableforth directly reviewed issues regarding Ashley Smith ("Ms. Smith"), which the AGC expressly denies), 17 to 19 (except the last sentence of these paragraphs which the AGC expressly denies), 20 (except the allegation that Launa Gratton was the Assistant Warden of Operations at GVI and except the last sentence thereof which the AGC expressly denies), 21 (except the last sentence thereof which the AGC expressly denies), 27, 35 (except the last sentence which the AGC expressly denies), 36 37, 40 (except the last sentence thereof), 51 (only while Ms. Smith was incarcerated at Nova Institution), 75 and 82 of the Statement of Claim.

5. The Correctional Service of Canada ("CSC") is a department of the Government of Canada, otherwise referred to as Her Majesty the Queen in Right of Canada. Proceedings against Her Majesty the Queen in right of Canada are to be taken in the name of the Attorney General of Canada and Her Majesty the Queen in

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right of Canada is responsible in law for any torts committed by a servant of Her Majesty as set out in the *Crown Liability and Proceedings Act*, S.C. 1990, c.8 and in the *Federal Court Act*, R.S.C. 1985, c. F-7 as amended. Only Her Majesty the Queen in right of Canada is vicariously liable for the acts or omissions of a Crown servant. Crown servants are not vicariously liable for any torts committed by other Crown servants.

6. The AGC states that he is the only proper party to this action and that all of the other Crown defendants are improper parties and this action should be dismissed against them.

7. It is admitted that at the relevant time, Keith Coulter was the Commissioner of CSC, Nancy Stableforth was the Deputy Commissioner of Ontario Region, Cindy Berry was the Acting Warden of Grand Valley Institution for Women ("GVI"), Joanna Pauline was the Deputy Warden of GVI, Launa Gratton was the Security Intelligence Officer at GVI, Kenneth Allen was a Project Officer in the Security Division at the Ontario Regional Headquarters and Alfred Legere was the Warden of Nova Institution for Women ("Nova").

8. It is further admitted that at the relevant time the defendants, Karen Eves, Blaine Phibbs, Sherry Fairchild, Charlene Venter, Valentino Bennett, Melissa Mueller, Liz Gibbons, and Gaeten Desroches, were employed by CSC as primary workers/correctional officers ("officers"). It is also admitted that at the relevant time, Travis McDonald was a correctional supervisor.

9. The defendant officers and supervisor are authorized peace officers pursuant to section 10 of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 ("CCRA") and are designated as such by the Commissioner under Commissioner's Directive 003.

10. The AGC admits that Ashley Smith was an offender who had been lawfully transferred into the federal correctional system on October 31, 2006 from the New Brunswick provincial correctional system. At the time of her transfer, she was serving a sentence of 6 years, 1 month and 17 days which commenced on October 27, 2003, when she was a young offender. Most of this sentence resulted from various assaults and mischief convictions stemming from her actions within the New Brunswick provincial system.

11. Prior to being transferred to the federal correctional system, Ms. Smith was incarcerated at two provincial correctional facilities in New Brunswick: the New Brunswick Youth Centre ("NBYC") in Miramichi and the Saint John Regional Correctional Centre.

12. While incarcerated at these provincial institutions, Ms. Smith continually exhibited disruptive, combative, maladaptive, aggressive and self-injurious behaviours, including self-strangulation. She also damaged government property, caused disturbances and disobeyed rules and commands of staff. She incurred and was convicted of an additional 70 charges, mainly for assaulting peace officers and mischief.

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Ms. Smith was on segregation status while in the provincial system with no significant periods in open population.

13. Prior to her provincial incarceration, Ms. Smith was assessed by a psychiatrist and determined to be engaging in attention-seeking behaviour. She was also diagnosed with attention deficit hyperactivity disorder, a learning disorder and borderline and narcissistic personality traits.

14. In April 2005, Ms. Smith underwent a court-ordered psychiatric assessment which determined that Ms. Smith understood her responsibilities and the consequences of her behaviour and found that she could control her behaviour when she chose to do so.

15. Upon her transfer into the federal correctional system, she was initially sent to Nova. As a result of her behaviour in the provincial institutions, Ms. Smith was designated as a maximum security offender in accordance with the *Corrections and Conditional Release Regulations*, as it was determined that she required a high degree of supervision and control within the institution. Given her behaviour, she was placed in administrative segregation for observation.

16. The aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours which Ms. Smith engaged in while incarcerated in the provincial facilities continued almost immediately upon her admission to the federal system. She remained

in administrative segregation at Nova to ensure her safety and the safety and security of the institution and those persons in the institution.

17. Ms. Smith was an extremely challenging, disruptive, difficult and demanding offender. She constantly exhibited aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours which required constant response and intervention by staff. At all times, CSC acted reasonably and in good faith in their continual interactions and responses to her difficult and demanding behaviour.

18. Ms. Smith assaulted and threatened officers, refused direct orders issued by officers and covered her cell window and cell camera with whatever she could find, including toilet paper, faeces, bedding, clothing, etc., to evade monitoring by staff.

19. She constantly destroyed property, including her mattress, pillow, blanket, bedding, the sprinkler head (causing flooding of the cell), floor tiles, cell lighting and the cell window. In addition, she routinely destroyed her clothes including clothing issued by CSC and used these and many other items to manufacture ligatures for self-strangulation. She advised staff that self-strangulation was a game for her and she enjoyed the reaction her ligature use got from correctional staff.

20. She also caused disturbances and disobeyed rules and orders from correctional staff. On various occasions, Ms. Smith also engaged in head-banging and even incited other inmates to bang their heads and cause disturbances.

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21. When engaging in self-strangulation, Ms. Smith often held her breath to deceive the responding officers and she would then become aggressive, combative and assaultive towards the officers when they entered the cell to remove the ligature.

22. Ms. Smith was transferred numerous times while she was incarcerated with CSC, some at Ms. Smith's request. Further, many transfers were to various non-CSC treatment facilities and hospitals for psychiatric assessments and treatment, including L'Institut Philippe-Pinel de Montreal, Grand River Hospital and St. Thomas Psychiatric Hospital. At each location, Ms. Smith would refuse to cooperate or consent to treatment and she would be returned to CSC.

23. Completing a full and comprehensive mental health or medical assessment is extremely difficult if a person refuses to consent or cooperate. CSC cannot force an offender to participate or cooperate in assessment and treatment, except in very limited circumstances such as when a person is incapable of providing consent.

24. The mental health experts seemed to be unable to agree on any definitive diagnosis. At one point, CSC was advised that Ms. Smith had an anti-social personality disorder with borderline traits and then later CSC was advised by a different facility that her problems were behavioural in nature and not the result of mental illness.

25. On many occasions during her federal incarceration including prior to her arrival at GVI on August 31, 2007, multi-disciplinary management plans were developed

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by CSC's psychologist, psychiatrist, health care and management team. These plans addressed security concerns, prescribed a daily activity schedule and a schedule for behavioural counsellor intervention. In addition, staffing levels were augmented where necessary. The management plans were constantly revised.

26. Upon her arrival at GVI on August 31, 2007, a mental health assessment was requested but Ms. Smith again refused to consent or cooperate. Based on her behaviour at the previous correctional and medical facilities, she was placed in administrative segregation, on suicide watch with 15 minute rounds and was closely monitored by a cell camera and by correctional staff. In addition, at times a correctional officer was placed outside Ms. Smith's cell to directly observe her 24 hours a day. She was also continually assessed by a psychologist and registered nurse.

27. While Ms. Smith was incarcerated at GVI from August 31, 2007 to October 19, 2007, her aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours continued unabated. She threatened and assaulted staff. She covered her cell camera and cell windows to avoid monitoring, threw faeces and toilet water at officers, manufactured ligatures from her clothing, bedding and other materials and used these ligatures for self-strangulation on many occasions, and often many times a day.

28. Although on occasions, Ms. Smith had some positive behaviours and experiences, she was unable to sustain these for any length of time. Ms. Smith could not have been managed on non-segregation status.

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29. In fact, on September 18, 2007, an effort was made to relieve Ms. Smith's administrative segregation status by moving her to the Secure Unit. On September 20, 2007, she acted out, demanded to be moved back to a segregation cell, broke a television, tore off the television cable and electrical cords for use as ligatures and secreted the glass shards from the broken television in her person for use to manufacture ligatures.

30. Ms. Smith would routinely hide objects and materials in her body and around her cell and subsequently use them as ligatures or to make ligatures. As a consequence, her cell was routinely searched in an attempt to remove these items. Further, to ensure her safety, to prevent her from making ligatures and self-harming and to prevent her from covering her cell windows and the camera, items were removed from her cell.

31. Frequently, when Ms. Smith tied a ligature around her neck, she would deliberately position herself so that the cell camera or officers would not be able to observe her. Often she would pretend not to be breathing and when the officers entered the cell to remove the ligature, she would assault them thereby necessitating the use of reasonable force to stabilize her and remove the ligature.

32. Ms. Smith's case management team, which included the staff psychologist, determined that Ms. Smith viewed cell entry by officers and use of force by officers as a game or recreation and a way of gaining attention. As a consequence, operational managers advised correctional staff to assess and reassess each incident

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involving Ms. Smith to determine if and when use of force and cell entry was required to remove the ligature. At all times, correctional staff was advised to remain vigilant in their observation of Ms. Smith and to enter Ms. Smith's cell to preserve her life.

33. On the morning of October 19, 2007, Ms. Smith was being directly observed by a correctional officer. At Ms. Smith's request, the direct observe officer turned her back for a few minutes in order to give Ms. Smith some privacy while she used the toilet. When the correctional officer turned back to observe Ms. Smith, she had a ligature tied around her neck. Ms. Smith then lay on the floor and correctional officers attempted to engage her, but she did not respond. The correctional officers on the range assessed and reassessed the situation. When it appeared that she was in distress, the officers entered the cell, removed the ligature and commenced CPR.

Breaches of Law and Policy

34. The AGC denies all allegations pertaining to any breaches of law and policy and puts the plaintiffs to the strict proof thereof.

35. In any event, throughout her stay in the federal correctional system, Ms. Smith consistently behaved in a disruptive, aggressive, assaultive and maladaptive manner which undermined the authority of the correctional officers and supervisors and jeopardized their safety, Ms. Smith's safety and the security of the institution. Ms. Smith refused to follow justifiable orders of the correctional officers and supervisors, refused to consent to medical and mental health treatment and assessment, refused to

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consistently take her prescribed medications, all of which hampered the efforts of CSC to keep her safe and provide her with a safe and healthy environment.

36. The AGC expressly denies that any servants or employees committed any violations of law or policy in the course of Ms. Smith's federal incarceration. In light of her on-going aggressive, disruptive, maladaptive, assaultive and self-injurious behaviours, all servants and employees acted reasonably, professionally, in accordance with proper procedure and policy, in good faith, and for no improper or collateral purpose, in effecting Ms. Smith's institutional transfers.

37. Likewise, in light of Ms. Smith's aggressive, disruptive, maladaptive, assaultive and self-injurious behaviours, all servants and employees acted reasonably, professionally, in accordance with proper procedure, in good faith, and for no improper or collateral purpose, in placing her in administrative segregation and monitoring and controlling her access to materials that could and had in the past been used by Ms. Smith to manufacture ligatures.

38. Due to Ms. Smith's behavioural difficulties, administrative segregation proved to be the least restrictive environment in providing for her care. She enjoyed the same rights, privileges and conditions of confinement as the general inmate population except for those rights, privileges and conditions that could only be enjoyed in association with other inmates or could not reasonably be given owing to limitations specific to the administration segregation area or security requirements, including her own safety.

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39. The AGC expressly denies that Ms. Smith was subject to cruel treatment or refused the necessities of life. In an effort to preserve her life, Ms. Smith was denied access to materials that she had used previously or could have used to manufacture ligatures or to cover up windows or cameras which would block correctional officers' view of her. In spite of Ms. Smith's assaultive, aggressive, disruptive, maladaptive and self-injurious behaviours, correctional staff made reasonable efforts to provide her with a safe and healthy environment. Further, Ms. Smith was given the opportunity, on a daily basis, to participate in recreational and exercise activities, but she would not necessarily avail herself of that opportunity.

40. In response to Ms. Smith's aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours, all servants and employees acted reasonably, professionally, in accordance with proper procedure, in good faith, and for no improper or collateral purpose in using reasonable force to deal with these behaviours. Further, all servants and employees acted reasonably, professionally, and in good faith in reporting and classifying use of force incidents involving Ms. Smith.

41. All servants and employees acted reasonably, professionally and in good faith and for no improper or collateral purpose in responding to grievances submitted by Ms. Smith.

42. The AGC specifically denies that CSC failed to provide competent and reasonable health care. Ms. Smith consistently refused to cooperate or consent to health care, assessments and treatment offered to her. She was provided with

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medication, which she often refused to take. Ms. Smith was managed by a multi-disciplinary team which included health care professionals. It was Ms. Smith's own uncooperative behaviour that hampered the ability of the health care team to more effectively treat her.

43. In any event, if Ms. Smith did not obtain adequate health care, which is not admitted but is expressly denied, the Crown defendants state that this was a result of her own negligence, the particulars of which are as follows:

- (a) She engaged in a high risk activity, specifically the use of ligatures for self-strangulation while in the various provincial and federal institutions in which she was incarcerated;
- (b) She ignored the advice and direction of CSC personnel, the courts, medical professionals to cooperate and participate in treatment designed to assist her in managing her aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours;
- (c) She refused to consent to medical and mental health assessment and treatment;
- (d) She failed to follow the medication regime prescribed for her;
- (e) She refused to attend appointments with medical doctors;
- (f) She failed to ensure her own safety;
- (g) She conducted herself in a reckless manner; and
- (h) She willingly accepted the risk associated with her use of ligatures for self-strangulation.

44. With respect to paragraph 46 of the Statement of Claim, the AGC states that Commissioner's Directive 709 (Administrative Segregation) was not in force at the relevant time but rather it was Commissioner's Directive 590. Further Commissioner's

Directive 708 (Special Handling Unit) applies only to male inmates as there is no such unit for women offenders.

Conspiracy

45. The AGC expressly denies the allegations of conspiracy and puts the plaintiffs to the strict proof thereof. At all times, Ms. Smith was provided with the necessities of life, taking into account her disruptive, aggressive, assaultive, maladaptive and self-injurious behaviours.

46. At no time did any servant or employee engage in any conspiracy to maintain Ms. Smith in segregation status in order to avoid regional review or to deprive her of the necessities of life. The primary purpose of the actions of the Crown defendants was to ensure the safety and security of Ms. Smith, the institution and the other persons therein. At all relevant times, the Crown defendants conducted themselves reasonably, professionally, in good faith and having due regard for the rights and safety of Ms. Smith.

47. The AGC denies that there was any intent, constructive or otherwise, of its servants and employees to cause injury to Ms. Smith and states that the plaintiffs have failed to meet the necessary requirements of this tort, and puts them to the strict proof thereof.

48. In any event, the plaintiffs are not entitled to any such loss pursuant to the *Family Law Act* as alleged.

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Negligence

49. The AGC denies that any employees or servants breached any duty of care owed to the plaintiffs or were in any way negligent and state that at all relevant times all employees and servants performed their duties in a proper, professional and prudent manner. The AGC expressly denies that any employee or servant acted with reckless indifference or reckless disregard for Ms. Smith's life.

50. More particularly, all employees and servants acted at all relevant times in accordance with reasonably accepted standards, exercised their discretion under the CCRA in good faith and acted in accordance with CSC's policies, procedures and governing legislation.

51. All employees and servants were properly and adequately trained and performed their duties in a competent, professional and prudent manner.

52. All employees and servants reasonably relied on the diagnosis and treatment prescribed by medical professionals and acted reasonably in providing, and/or attempting to provide medical treatment for Ms. Smith. Further, all employees and servants acted reasonably to ensure the safety and security of Ms. Smith by removing from her cell items which she could and had in the past used in the manufacture of ligatures.

Infliction of Mental Suffering and Psychiatric Damage

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53. The AGC denies that any servant or employee inflicted emotional harm or psychiatric damage to the plaintiffs either intentionally, negligently or otherwise, and puts the plaintiffs to the strict proof thereof. All actions taken by the Crown defendants were reasonable in light of Ms. Smith's aggressive, assaultive, disruptive, maladaptive and self-injurious behaviours.

54. Further, the AGC expressly denies that the viewing of the video mentioned in paragraph 80 of the Statement of Claim has caused psychiatric damage and/or nervous shock to the plaintiffs. In any event, such a claim is rebutted by the on-going efforts of these plaintiffs to have this video broadcast to the public in general.

Abuse of Public Office and False Imprisonment

55. The plaintiffs have failed to meet the necessary requirements of these torts. The AGC expressly denies these allegations and puts the plaintiffs to the strict proof thereof.

56. Ms. Smith's behaviours required her to be placed in administrative segregation and such placement was appropriately the least restrictive measure necessary to deal with her behavioural and self-harming problems. As previously stated, the Crown defendants acted, at all relevant times, in accordance with proper procedure, in good faith, and for no improper or collateral purpose.

57. Further, Ms. Smith was properly incarcerated pursuant to a valid warrant of committal and there is no basis for the plaintiffs' claim of false imprisonment.

Breach of Fiduciary Duty

58. The AGC denies that any employees or servants owed a fiduciary duty to Ms. Smith. In the alternative, if a fiduciary duty was owed to Ms. Smith, which is not admitted, there was no breach of such duty.

Damages

59. The AGC denies that the plaintiffs are entitled to rely on the reports identified in paragraph 24 of the Statement of Claim and puts the plaintiffs to the strict proof of any facts upon which they intend to rely.

60. The AGC denies that the plaintiffs suffered the damages as alleged or any damages and put the plaintiffs to the strict proof thereof.

61. The AGC specifically denies that any servant or employee was in any way in breach of any duty owed at any time to Ms. Smith. In the alternative, if there was a breach of any duty owing, then the risk of serious injury to Ms. Smith was not reasonably foreseeable.

62. In the alternative, the AGC states that the damages and injuries pleaded, which are denied, are the result of Ms. Smith's own voluntary actions. Ms. Smith constantly tied ligatures around her neck and engaged in other self-harming behaviours knowing that these behaviours were dangerous. She willingly accepted the risk of suffering injury and/or death from such behaviours.

63. Further and in the alternative, if the plaintiffs suffered any damages, which is not admitted but is expressly denied, the AGC pleads that Ms Smith contributed to or caused the injuries and damages alleged, if any. The AGC further pleads that the plaintiffs have failed to mitigate their damages, if any.

64. The AGC pleads that the damages and injuries pleaded in the Statement of Claim, which are denied, are excessive, exaggerated and too remote.

65. The AGC denies that any circumstances exist justifying an award of aggravated or punitive/exemplary damages or both and puts the plaintiffs to the strict proof thereof. Further, in the circumstances of this case, the AGC states that an award of punitive/exemplary damages against the Crown is not available in law. In addition, the AGC denies that the plaintiffs are entitled to an award of aggravated or punitive/exemplary damages or both as such an award is not prescribed by the *Family Law Act*.

66. Further, the AGC denies that the estate is entitled to receive any of the damages as claimed.

67. The AGC pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c. N-1, as amended, and section 61 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended and states that the plaintiffs are not entitled to the damages claimed.

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68. The AGC further pleads and relies on the *Crown Liability and Proceedings Act*, S. C. 1990, c. 8 and the regulations promulgated, the provisions of the *Correctional and Conditional Release Act*, S.C. 1992, and the regulations promulgated therein, the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch B, the *Limitations Act*, S.S. 2004, c. L16.1, as amended, the *Limitation of Actions Act*, R.S.N.B. 1973, c. L-8, as amended, and the *Civil Code of Québec*.

69. The AGC therefore submits that the plaintiffs' action be dismissed, with costs on a substantial indemnity basis.

February 26, 2010

DEPARTMENT OF JUSTICE

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Court File No. CV-09-383001
ATTORNEY GENERAL OF CANADA et al.

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and

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Litigation Administrator of the Estate of Ashley Smith,
Deceased, et al.
Plaintiffs

ONTARIO

SUPERIOR COURT OF JUSTICE

Proceeding Commenced at Toronto

STATEMENT OF DEFENCE

OF THE ATTORNEY GENERAL OF CANADA, COMMISSIONER OF
THE CORRECTIONAL SERVICE OF CANADA KEITH COULTER,
DEPUTY COMMISSIONER ONTARIO REGION
NANCY STABLEFORTH, WARDEN OF NOVA INSTITUTION FOR
WOMEN ALFRED LEGERE, ASSISTANT WARDEN OF GRAND
VALLEY INSTITUTION FOR WOMEN LAUNA GRATTON,
TRAVIS McDONALD, BLAINE PHIBBS, SHERRY FAIRCHILD,
CHARLENE VENTER, VALENTINO BURNETT, MELISSA MUELLER,
LIZ GIBBONS, GAETAN DESROCHES, KENNETH ALLEN AND
CORRECTIONAL SERVICES EMPLOYEES
JOHN DOE and JANE DOE

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Employees John Doe and Jane Doe