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March 5, 2021

Dr. Janet DeMille, Medical Officer of Health for the Thunder Bay District Health Unit
Medical Officer of Health & Chief Executive Officer
Thunder Bay District Health Unit
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Thunder Bay, Ontario, P7B 6E7
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Dear Dr. DeMille,

Re: *Health Protection and Promotion Act* Class Order of February 8, 2021

I am writing on behalf of the Canadian Civil Liberties Association (“CCLA”), Aboriginal Legal Services (“ALS”) and the HIV & AIDS Legal Clinic Ontario (“HALCO”) to outline our significant concerns regarding the legality of the Class Order issued by your office on February 8. We understand that you have retained counsel to assist in this matter; we have copied him on this correspondence.

In our view several provisions of the February Order exceed the statutory authority given to medical officers of health under the *Health Promotion and Protection Act* (the “HPPA”) and constitute unjustifiable infringements of sections 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*. As outlined more fully below, we have particular concerns about the provisions authorizing forced medical testing, the authorization of individuals’ detention, the broad requirements to follow unspecified rules and directions, and the discriminatory impact this Order has on Indigenous persons. We are also concerned about a lack of transparency regarding this Order, and impact it will have on those who are simultaneously subject to other court orders that have conflicting terms. The fact that there was recently another s. 22 order issued targeting a much broader population with more transparency and using less coercive public health measures compounds these concerns.

We encourage you to ensure all s. 22 orders are publicly available, and to rescind the February 8 Class Order.

The February 8 Class Order requires all individuals being released from the Thunder Bay District Jail to:

- Go directly to the designated Isolation Shelter upon their release for a full assessment by a health care provider;
- Submit to a COVID-19 test if required by a health care provider;
- Provide information and answer all questions asked by a Public Health Nurse or designate so the nurse can assess an individual’s COVID-19 status, risk of COVID-19 exposure, transmission risk, and the accommodation and supports an individual has available to ensure a person can effectively isolate if required; and
- “Follow the rules of the Isolation Shelter” while there.

A person who is determined to have or be at risk to have contracted COVID-19 is subject to a further series of requirements:

- If the Public Health Nurse determines that an individual has or could have COVID-19, he or she must remain in isolation for the amount of time directed;
- If an individual does not have an “alternative and reasonable place to isolate as may be determined by the Public Health Nurse”, they must stay at the Isolation Shelter and, as noted above, are required to “follow the rules” of the Isolation Shelter while there; and
- Individuals must “follow the rules and direction of the Public Health Nurse” while isolating.

Contravention of the Order is an offence, and upon conviction individuals may be fined up to \$5,000 per day that the order was violated.

Order has not been posted or communicated clearly

It has been very difficult to obtain any information regarding this Class Order. The Order is not posted on the Thunder Bay Health Unit’s website, and despite multiple phone calls over the past several weeks we have been unsuccessful in our attempts to obtain a copy of the Order by contacting the TBDHU directly. Indeed, most of the staff that we have spoken to at the Health Unit did not know what a Class Order was, much less whether one was in force or not. We note that, while the most recent Class Order issued by your office is posted on the website, the Order targeting those released from the jail – which we understand is still in force – is still not publicly posted.

The *HPPA* requires that individuals subject to an order be provided with notice. We are concerned that this requirement is not being met. Providing notice to a class of persons can be difficult, and one common way that such orders are publicized is through public posting on the website. As outlined above, this has not occurred. We would also expect that everyone entering Thunder Bay Jail would immediately be given a copy of the Order that they will be subject to upon release. Information about the Order, and a copy of the Order, should again be offered upon release. Based on the information we have received to date, we are concerned that this has not been happening, as we have received reports that at least one individual subject to the Order did not receive a copy of the Order or any paperwork before his transfer to the Isolation Unit.

Forced medical testing

The Order requires that all individuals in the class submit to a COVID-19 test if required by a Public Health Nurse or other health care provider. There is no requirement to obtain an individual’s consent prior to this medical testing, and no alternative course of action is offered if a person does not wish to submit to a COVID-19 test. Forced medical testing, in the manner provided for by the Order, is contrary to the *Health Care Consent Act* and is an unjustifiable violation of individuals’ constitutional right to security of the person.

As recently outlined in a letter to your office from the Defence Counsel Association of Thunder Bay, section 22(4) of the *HPPA* explicitly allows for individuals to be ordered to “submit to an examination by a physician” or place themselves “under the care and treatment of a physician.” S. 22(5.1) waives the consent requirements contained in the *Health Care Consent Act* where a physician examines, cares for or treats a person pursuant to a relevant *HPPA* order. The medical testing and examination provided for in the Class Order does not meet this statutory threshold as it allows for individuals who are not physicians to provide non-consensual medical testing and assessments.

Forced medical testing also directly engages an individual's constitutional right to security of the person, protected under s. 7 of the *Charter of Rights and Freedoms*. Courts have found that legal orders requiring medical testing and treatment of individuals who are competent to direct their own medical care are an unjustifiable violation of constitutional rights in variety of circumstances.¹ In the context of the current pandemic, individuals who are experiencing symptoms of COVID-19 or who are assessed as being at high risk for exposure are regularly given the choice of remaining in self-isolation or submitting to a COVID-19 test to confirm whether or not they are infected with COVID-19. This Class Order does not afford individuals that choice, and is therefore overbroad and an unjustifiable violation of s. 7.

Illegal and unconstitutional detention at the "Isolation Shelter"

Section 1 of the Class Order requires all individuals released from the jail to proceed to the Isolation Shelter. Sections 4 and 5 state that if a Public Health Nurse determines that a person needs to isolate due to a COVID-19 risk, he or she will be required to stay at the Isolation Shelter for an unspecified length of time if they do not have an "alternative and reasonable place to isolate as may be determined by the Public Health Nurse." There is no definition of a "reasonable place", and no criteria is outlined to constrain or inform the Public Health Nurse's determination. Although some timelines for isolation are provided – limits of 10 days and 14 days are mentioned as being applicable in certain circumstances – the Order also specifies that these are not actual limitations, as "[u]nder some circumstances, the period of isolation may be longer."

In effect, this portion of the order purports to give a Public Health Nurse the authorization to indefinitely detain individuals at an Isolation Shelter.

The *HPPA* does not provide statutory authority for this type of detention. Section 35 of the *HPPA* gives a judge of the Ontario Court of Justice the authority to order an individual's detention in a "hospital or other appropriate facility." There are important limits on the availability of *HPPA* detention orders. For example, a detention order is only available with respect to a "virulent disease", and a person can only be detained after he or she has violated a specified underlying order from a medical officer of health. These procedural and substantive statutory protections would be meaningless if a medical officer of health could simply order a person to be detained pursuant to their general authority in s. 22.

Ordering detention subject to a vague and undefined assessments by a Public Health Nurse, without due process and outside statutory legal authority, violates individuals' constitutional rights to liberty and freedom from arbitrary detention.

Undefined further restrictions on liberty

Sections 6 and 7 of the Order require individuals to "follow the rules and direction of the Public Health Nurse" while isolating, and "follow the rules of the Isolation Shelter" while there. There are no further details on what these rules and directions are, and there are no limits placed on their purpose or scope. There is no information provided as to who has the authority to establish the rules of the Isolation Shelter. In effect, these sections of the Order delegate unrestrained order-making power to a Public Health Nurse and an unidentified person or group of persons running an Isolation Shelter, where people

¹ See, for example, *R. v. Rogers*, 1990 CanLII 432 (BC CA), <<http://canlii.ca/t/1d7rz>>; *Fleming v. Reid*, 1991 CanLII 2728 (ON CA), <<http://canlii.ca/t/1p78q>>. See also comments in *R. v. Taylor*, 2005 ONCJ 136 (CanLII), <<http://canlii.ca/t/1kf56>>.

can be detained for an unspecified amount of time. These sections both exceed the statutory authority of the *HPPA* and constitute an unjustifiable infringement of s. 7 of the *Charter*.

The *HPPA* gives medical officers of health the authority to promulgate legally-binding orders, subject to certain statutory requirements. While a medical officer of health can require that a person be placed under the treatment of a physician, there is no indication that a medical officer of health's general legislative authority to make binding orders can be delegated to a Public Health Nurse or an Isolation Shelter. Not only does this Order improperly delegate legislative authority, it does so in a manner that frees the decision-maker of the statutory limits on that order-making power that are set out in the *HPPA*.

The *HPPA* also requires that reasons be given as to why the orders are necessary; a failure to provide reasons means that, pursuant to s. 22(7), the order will not be effective. The Class Order does not provide any explanation as to why such a broad delegation of authority is necessary.

These sections of the Order also give rise to constitutional concerns. As outlined above, sections 6 and 7 of the Class Order are not authorized by the *HPPA*. Imposing restrictions on individuals' liberty without legal authorization is an unjustifiable violation of s. 7 of the *Charter*.

Discriminatory impacts

It is our position that decisions made by the Medical Office of Health and Chief Executive Officer of the Thunder Bay District Health Unit are required to consider the disproportionate adverse impact that class orders such as this have on marginalized communities, especially Indigenous people. Thunder Bay has Canada's highest proportion of urban Indigenous people and the inmate population at the Thunder Bay District Jail is predominantly Indigenous. This correctional facility services not only the city and surrounding area, but the northern remote and fly-in First Nations communities and was designated the second-most crowded jail in the province last year by the Auditor-General of Ontario. It stands to reason that this, amongst other factors, contributed to the outbreak of COVID-19 within the jail and the inability of correctional services to keep it contained.

It is recognized that Indigenous people are a historically and currently-discriminated against group within Thunder Bay. The pandemic and closing off of First Nations communities to travel for community and non-community members alike has led to a lack of community and social supports for Indigenous people in Thunder Bay as a whole, but especially for individuals being released from custody. This means that while all inmates are affected by this Class Order, Indigenous people will be less likely to meet the "reasonable place to isolate" requirement and therefore, more likely to be subjected to testing and indeterminate lengths of quarantine in the Isolation Shelter. It is our position that this violates the norm of substantive equality and infringes s. 15(1) of the *Charter*.

Conflicts between the Class Order and other judicial orders

Finally, we are deeply concerned that the Order does not take into account that many individuals who are released from the jail will already be subject to judicial orders placing restrictions on where they can go, where they can live, and who they can have contact with. Violating a bail order, conditional sentence or probation order can give rise to further criminal charges and imprisonment. Individuals facing conflicting legal orders will be forced to choose which order to violate, as there is no provision in the

Class Order exempting individuals from its requirements in order to comply with other legal requirements.

We would like to conclude by acknowledging the magnitude of the public health challenge we are all facing, and in particular the risks faced by individuals who are precariously housed or detained in congregate settings such as jails. Since the outset of the pandemic our organizations have called on the government to ensure that there is sufficient safe space in our shelter system to allow for physical distancing. We have also called on multiple actors within the criminal justice system to ensure that, to the greatest extent possible, individuals in conflict with the law are supervised in the community so that they can more effectively follow public health advice and mitigate the spread of COVID-19. We have initiated court cases in some circumstances where we believe that congregate settings like prisons and shelters are not taking sufficient steps to keep population levels low or ensure safe and humane conditions.

In short – we understand and appreciate that public health measures are necessary to confront this pandemic, and that urgent measures are necessary to protect vulnerable populations in particular. Coercive powers, however, cannot operate outside the rule of law. And we are disappointed that a failure to adequately control COVID-19 within the province’s correctional system has led to further restrictions on liberty targeting the very people who were, in all likelihood, exposed to infection during their initial detention.

Thank you for your attention to this matter.

Sincerely,



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