

Court File No. 2291/13 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE

) Tuesday, THE 23rd

)

JUSTICE GRACE

) DAY OF August, 2016

BETWEEN:

GLENN JOHNSON and MICHAEL SMITH

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION, made by the plaintiffs, for an order that this action be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6, was heard on January 27, 28, and 29, 2016, at London.

ON READING the affidavits of the various affiants and other materials filed by the parties, and on hearing the submissions of counsel for the plaintiffs and the Defendant; and decision having been reserved until this day.

1. **THIS COURT ORDERS** that the within proceeding be and is hereby certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6.
2. **THIS COURT DECLARES** that the nature of the claim asserted on behalf of the Class is for negligence and violations of sections 7 and 12 of the *Canadian Charter*

of *Rights and Freedoms* arising from the conditions at, and the operation and management of, the Elgin Middlesex Detention Centre (“EMDC”) during the Class Period. ^{de}

3. **THIS COURT ORDERS** that the Class is defined as:

“All persons incarcerated at the Elgin Middlesex Detention Centre between January 1, 2010 and August 25, 2013 including those held at the Elgin Middlesex Detention Centre pending trial or other court appearance.” ^{de}

4. **THIS COURT ORDERS** that Glenn Johnson and Michael Smith be and are hereby appointed as the representative plaintiffs in the within proceeding. ^{de}

5. **THIS COURT ORDERS** that the within proceeding be and is hereby certified on the basis of the following common issues:

1. In the operation and management of the EMDC, did the Defendant owe a duty of care to the Plaintiffs?
2. If the answer to question #1 is “yes”, what is the nature of that duty of care?
3. In the operation and management of the EMDC, did the Defendant breach its duty of care owed to the Plaintiffs?
4. Did the conditions in the EMDC during the Claim Period constitute a violation of s. 7 or s. 12 of the *Charter of Rights and Freedom*?
5. By its operation and management of the EMDC, did the Defendant violate the rights of the Plaintiffs under s. 7 or s. 12 of the *Charter of Rights and Freedom*?
6. If the answer to either or both of questions #4 and #5 is “yes”, was such violation justified under s. 1 of the *Charter of Rights and Freedom*?

7. Are damages pursuant to s. 24 of the *Charter of Rights and Freedom* a just and appropriate remedy?
8. Is this an appropriate case for an award of aggregate damages pursuant to s. 24(1) of the *Class Proceedings Act*, 1992?
9. If the answer to question #8 is “yes”, what is the appropriate measure of such damages?
10. Does the conduct of the Defendant merit an award of punitive damages?
11. If the answer to question #10 is “yes”, what quantum should be awarded for punitive damages?;

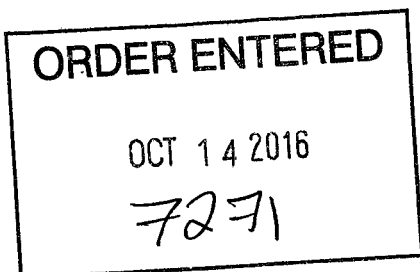
6. **THIS COURT ORDERS** that the plaintiffs’ amended litigation plan attached hereto as Schedule “A” is approved subject to being further amended to address, *inter alia*, changes contemplated in the certification decision, the class period, and the schedule for the common issues trial;

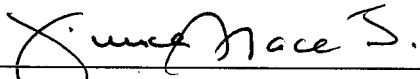
7. **THIS COURT ORDERS** that the Notice of Certification shall be disseminated as contemplated in the plaintiffs’ amended litigation plan;

8. **THIS COURT ORDERS** that members of the Class may opt out of the class proceeding by providing a written indication pursuant to the provisions set out in the Notice of Certification;

9. **THIS COURT ORDERS** that the allocation of costs of disseminating the Notice of Certification will be determined by the Court if not agreed to by the Parties;

10. **THIS COURT ORDERS** that the Defendant shall pay to the plaintiffs their costs of this motion of \$375,000.00, inclusive of all disbursements and applicable taxes, within 30 days of the date of this Order.





Justice Grace

Schedule "A"

Court File No.: 2291/13 CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

GLENN JOHNSON and MICHAEL SMITH

Plaintiffs

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

Proceeding under
The Class Proceedings Act, 1992, S.O. 1992, Chapter 6

AMENDED LITIGATION PLAN

INTRODUCTION

The *Class Proceedings Act*, 1992 requires that as part of the certification process, the Plaintiff must produce a plan setting out a workable method of advancing the class proceeding. Although the onus rests on the representative Plaintiff, it is noted that:

- (a) Most litigation plans, as in this matter, are produced before the Defendants have filed any statements of defence, i.e. before the full scope of the issues has been defined by the completion of the pleadings;
- (b) There has been no discovery of the defendants, oral or documentary, and as such, the extent of productions and the length of examinations for discovery are necessarily estimated; and,
- (c) It is customary that the litigation plan be produced without input from the Defendants or the Court. As a result, some modification may be necessary once input from the Defendants and the Court is provided.
- (d) The Litigation Plan is a dynamic and evolving document as the action progresses.

CLASS DEFINITION

The Plaintiffs are individuals who have been incarcerated or similarly detained or imprisoned at the Elgin Middlesex Detention Centre (hereinafter "EMDC") between January 1, 2010 and the date of the certification order. The Plaintiffs propose to define the following class of plaintiffs:

of

“All persons incarcerated at the Elgin Middlesex Detention Centre between January 1, 2010 and the date of the certification order, including those held at the Elgin Middlesex Detention Centre pending trial or other court appearance.”

CLASS SIZE

The exact number of members of each class is unknown to the Plaintiffs; however, the Defendant should have comprehensive records sufficient to verify the identity of each member of the class. This claim affects all incarcerated and detained individuals at the EMDC during the proposed class period. During that period, EMDC housed both incarcerated and remanded prisoners, including those held pending a court appearance. The EMDC was originally designed to house no more than 150 inmates at any one given time. However, best estimates are that EMDC routinely held as many as 450 inmates during significant portions of the Claim Period. The lengths of incarceration vary. It is estimated that there are in excess of 3,000 individuals who were incarcerated or otherwise held at the EMDC during the Claim Period.

COUNSEL

McKenzie Lake Lawyers LLP of London, Ontario will act on behalf of the Plaintiff class in this action. Kevin Egan and Michael Peerless will act as lead counsel. Mr. Peerless was called to the Bar in 1993 and Mr. Egan was called to the Bar in 1999. Attached as Schedule A to this Litigation Plan, is a copy of the biographies of each senior counsel. Mr. Peerless and Mr. Egan will be assisted by Matthew Baer, an associate lawyer with McKenzie Lake Lawyers LLP who was called to the Bar in Ontario in 2003.

McKenzie Lake Lawyers will devote additional resources including, but not limited to, other associate counsel and support staff as required for the efficient and effective prosecution of this action.

CLASS COMMUNICATION

Counsel for the Plaintiffs has established a website (<http://www.mckenzielake.com/blog/2013/12/09/The-EMDC-Class-Proceeding>). The website will contain copies of all pleadings and amended pleadings, as well as copies of all Orders and Reasons for Decisions made as the action progresses. In addition, the website will briefly describe the nature and status of the action, as well as the anticipated next steps. The website will be updated from time to time as the action progresses in order to keep members of the classes informed.

Counsel report to and take instructions from the Representative Plaintiffs. Counsel have regular conference calls with the Representative Plaintiffs for the purpose of keeping them informed of the issues in the litigation as it arises, and to obtain instructions as needed.

In addition, the Representative Plaintiffs propose that newsletters will be sent to those members of the class who retain the Plaintiff law firm. Those newsletters will be sent on approximately a quarterly basis with a view in keeping the class informed of the status of the action and the steps which are being taken on behalf of the class.

Counsel may be contacted by class members directly by telephone, appointment or email. The contact information is set out on the webpage. McKenzie Lake Lawyers maintains a 1-800-telephone number and their contact information is set out on their webpage.

NOTICE TO CLASS/OPT OUT

Upon certification of this action as a class proceeding, the Plaintiffs propose that:

1. The Plaintiffs will prepare a draft notice to the class including the opt out coupon;
2. The Plaintiffs will provide the draft materials to Defence counsel for their review and comment;
3. Counsel will attend a case conference with the case management judge to address any issues related to the form of the notice to class and the opt out mechanism, and to obtain the approval of the case management judge to the final notice and opt out mechanism.

The Plaintiffs have in their possession records confirming the incarceration of many, but not all of the inmates incarcerated at EMDC during the Claim Period. It is anticipated that the Defendant, Her Majesty the Queen in Right of Ontario, will have in its possession records of all inmates admitted and discharged from EMDC during the Claim Period from which membership in the Plaintiff class can be derived.

In general, the Plaintiffs anticipate that they will be seeking to provide notice to the Plaintiff class through newspaper advertising in London Ontario. In addition, letters will be sent with the notice to all members of the Plaintiff classes at their last known addresses. The notice, including the opt out coupon, will also be posted and may be downloaded from the website maintained by Plaintiffs' counsel.

The Plaintiffs will likely propose that the opt out notice contain a coupon which may be detached, filled out and mailed or emailed either to Plaintiffs' counsel or to an independent administrator. In either case, whomever is responsible for tracking opt outs received before the opt out deadline shall report to the court and to the Defendants the names of all persons who have opted out and the date that their opt out coupon was received. Any issues related to the timing of receipt or the fact of receipt of any opt out coupon shall be addressed before the case management judge. The Plaintiffs will seek an Order that the costs of the notice, including publication, be paid by the Defendant.

COMMON ISSUES

The Plaintiffs propose the following common issues:

- 1) In the operation and management of the EMDC, did the Defendant owe a duty of care to the Plaintiffs?
- 2) If the answer to question #1 is “yes”, what is the nature of that duty of care?
- 3) In the operation and management of the EMDC, did the Defendant breach its duty of care owed to the Plaintiffs?
- 4) Did the conditions in the EMDC during the Claim Period constitute a violation of s. 7 or s. 12 of the *Charter of Rights and Freedom*?
- 5) By its operation and management of the EMDC, did the Defendant violate the rights of the Plaintiffs under s. 7 or s. 12 of the *Charter of Rights and Freedom*?
- 6) If the answer to either or both of questions #8 and #9 is “yes”, was such violation justified under s. 1 of the *Charter of Rights and Freedom*?
- 7) Are damages pursuant to s. 24 of the *Charter of Rights and Freedom* a just and appropriate remedy?
- 8) Is this an appropriate case for an award of aggregate damages pursuant to s. 24(1) of the *Class Proceedings Act, 1992*?
- 9) If the answer to question #8 is “yes”, what is the appropriate measure of such damages?
- 10) Does the conduct of the Defendant merit an award of punitive damages?
- 11) If the answer to question #10 is “yes”, what quantum should be awarded for punitive damages?

PREFERABLE PROCEDURE

At present there is no alternative dispute mechanism in place for the resolution of these claims. Although several individual actions have been commenced, they are at an early stage and raise substantially the same issues as are present in this proposed class proceeding. The vast majority of those actions will be stayed and the claims of the Plaintiffs therein will be advanced through this class proceeding. Certification of this action will avoid duplication of fact finding and legal analysis. It will provide judicial economy.

Many members of the Plaintiff Class face significant barriers to litigation including, *inter alia*: mental health issues, psychological and emotional trauma, lack of financial means, ongoing incarceration and the fear of reprisals. The class proceeding will break down barriers and provide access to justice.

Conditions and treatment of inmates at the Elgin Middlesex Detention Centre have not materially changed despite widespread media publication. Significant social issues are engaged by this proposed class proceeding. A class proceeding offers the opportunity to raise these issues in a forum and in a manner which is more likely to effect positive change in the condition and treatment of inmates at EMDC and other provincial institutions where the same practices may exist.

The determination of these common issues will substantially advance the claims of the class members, will provide justice for all members of the class and especially those who are most deeply troubled, will meet the goal of judicial economy and will act as a deterrent to governmental correctional institutions both in Ontario and the rest of Canada.

REPRESENTATIVE PLAINTIFFS

Glenn Johnson and Michael Smith were both inmates at Elgin Middlesex Detention Centre during the Claim Period. They have no conflict of interest with members of the Plaintiff Class in respect of the common issues, all of which focus upon the conditions of the Elgin Middlesex Detention Centre and the Defendant's conduct. It is anticipated that other members of the Plaintiff Class together with experts will testify at the trial of the common issues.

The Plaintiffs have successfully applied to the Class Proceedings Fund for an indemnification against adverse costs.

CASE MANAGEMENT

This action will be case managed by a judge pursuant to the *Class Proceedings Act*. The Plaintiffs propose that case conferences be held with the case management judge from time to time as needed for the purpose of scheduling any motions and to obtain any direction required with respect to the progress of the action toward trial. It is anticipated that counsel will endeavour to resolve all such issues in a cooperative and professional manner. The case management judge will be informed of all agreements reached between counsel with respect to the progress of the action.

SCHEDULE TO COMMON ISSUES TRIAL

Assuming that the Defendant does not deliver a Statement of Defence prior to certification and that certification is granted, the Plaintiffs propose the following timetable subject to further input from defence counsel and this Honourable Court:

1. The Defendant shall deliver its Statement of Defence within 60 days of the date of certification;

2. The Plaintiffs shall deliver a Reply to the Defendant's Statement of Defence and shall do so within 30 days of service of the Statement of Defence;
3. The parties will exchange executed Affidavits of Documents together with CDs containing the electronic images of the documents listed in Schedule A within 90 days of the close of pleadings;
4. Examinations for Discovery shall be held in London commencing not later than 150 days from the close of pleadings and to be completed not later than 180 days from the close of pleadings;
5. Any motions which arise from the Examinations for Discovery shall be brought within 90 days of completion of the Examinations for Discovery. Both sides will bring their respective motions arising from the discoveries at the same time and those motions will be heard together or one immediately following the other as the court may direct;
6. Upon completion of the initial round of Examinations for Discovery, counsel shall confer and attempt to reach consensus on the number of days that will be required for the trial of the action. Counsel will then seek a date for trial;
7. The Plaintiffs shall deliver any expert reports upon which they rely 6 months in advance of the scheduled date for the commencement of trial;
8. The Defendants shall deliver any responding expert reports 4 months prior to the date scheduled for the commencement of trial;
9. The Plaintiffs shall deliver their reply reports, if any, not later than 90 days prior to the scheduled date for the commencement of trial;
10. A pre-trial conference shall be held not later than 60 days prior to the date scheduled for the commencement of trial.

DOCUMENT MANAGEMENT

The Defendant has not delivered a Statement of Defence and has not delivered any documents which would comprise productions in this action. The Plaintiffs anticipate that the Defendant has maintained comprehensive correctional records for the representative plaintiffs and related to the operation of the EMDC since its inception.

Given that there will likely be a substantial volume of documentation with respect to the matters in issue in this action, the Plaintiffs propose that counsel for all parties work cooperatively to proceed by way of imaged documents which will be shared in electronic format. Similarly, the Plaintiffs propose that an electronic discovery method be used and, subject to the direction of the trial judge, that the trial of the common issues be conducted using one of the electronic courtrooms. The Plaintiffs propose the use of Summation software and that electronic imaging be done using the services of a reputable company.

DISPOSITION OF REMAINING ISSUES

If the Defendants are successful at trial, there will be no remaining issues to be tried.

The Plaintiffs propose to certify aggregate damages as common issues (see proposed common issues 12 and 13) pursuant to section 24(1) of the *Class Proceedings Act*. If successful at the common issues trial, including proposed common issues 12 and 13, the Court may award aggregate damages and determine the manner in which such aggregate damages are allocated to class members pursuant to section 24(2). The Plaintiffs propose that aggregate damages are an appropriate remedy for all the damages sustained by members of the Plaintiff Classes for the conditions, culture and atmosphere at Elgin Middlesex Detention Centre. All members of the Plaintiff Class should be entitled to recover a base damage award to be allocated from the aggregate damages.

In addition, some members of the Plaintiff Class have suffered significant physical and psychological injuries as a consequence of physical assaults and the failure to provide appropriate medical treatment, which damages should be assessed individually in addition to any amount paid or allocated to the individual class member from the aggregate damages award. In this manner, the aggregate damages awards will compensate and dispose of the vast majority of the claims of class members. The only claims anticipated that will remain will be those where significant injuries arise. Causation and damages will have to be established in individual hearings for any additional individual loss.

Upon successful disposition of the common issues trial, the Plaintiffs propose that the parties firstly seek to develop a resolution process to deal with the remaining individual issues on a summary and expedited basis. If such a scheme cannot be agreed upon, an application may be made to the trial judge for direction with respect to the manner of proceeding for determination of the remaining individual issues.

Section 25(3) of the *Class Proceedings Act* prescribes that the common issues trial judge must consider the method of proceeding which is the least expensive and most expeditious method of determining the issues that is consistent with justice to the class members and the parties, and in doing so, the court may dispense with any procedural steps it considers unnecessary and authorize any special steps or rules appropriate to the resolution of the individual issues.

The Plaintiffs propose that in the absence of agreement among the parties and subject to direction from the trial judge, the remaining issues will be disposed of as follows:

1. Each member of the Plaintiff class will be paid a base amount upon submitting an application without proof of harm which will verify that they were incarcerated at the EMDC and are a member of the class.
2. Any inmate who feels that they are entitled to compensation over and above the base amount shall be required to complete an application form which will particularize the harm which they allege to have suffered. The application shall be accompanied with all relevant medical, psychological, and income records in support of the claim.

3. Plaintiffs counsel and Defence counsel shall select individuals who are representative of the degrees of harm or different kinds of harm along the spectrum. Those individuals shall be subject to examination under oath by the Defendant and a Reference shall be heard by a Referee on the issue of causation and damages. The Referee's report shall be submitted to the trial judge for confirmation.
4. Having established the parameter or range of damages that may be applicable, the remaining applications for additional compensation shall be first mediated. Any matters which are not resolved shall proceed in the same manner as the representative damage claims. All claims for damages are to be resolved within 2 years of the commencement of this process.
5. There will be a time limit within which applications for additional compensation must be made, failing which, no such claim can be advanced without leave of the court. Mere inadvertence to deliver the application earlier will not be sufficient to extend the time.

SETTLEMENT

There have been no discussions with respect to settlement and none are currently anticipated prior to certification.

Schedule A

Biography of Kevin Egan

I have a strong interest in finding solutions for those who have suffered a personal injury. In addition to the more traditional areas of personal injury law, my recent legal work has brought me to the emerging area of "Charter Torts". I first became involved with seeking remedies under the Canadian Charter of Rights and Freedoms following the 2009 homicide death of an inmate at the Elgin Middlesex Detention Centre. I now represent a very large number of victims of police or prison system misconduct in Ontario in which we are seeking constitutional and other remedies.

Additionally, I have significant experience in the areas of labour and employment, workplace safety and insurance, disability insurance, human rights, and criminal and provincial offences. My practice also includes assault and battery, historic sexual assault, medical malpractice and negligent investigation claims against police and other investigators. I am a partner in McKenzie Lake Lawyers LLP.

Prior to practicing law, I had extensive experience in management of a large national Corporation. I also owned and operated a number of small businesses. The broad range of experience and perspective I now bring to the table as a lawyer is a real benefit to my clients.

Biography of Michael Peerless

I have 23 years of experience dealing exclusively with class actions, mass torts and complex multi-party litigation.

Shortly after being called to the bar, I was part of the team that certified the first class action in Ontario. Since then, I have been counsel on dozens of class actions representing both plaintiffs and defendants across all levels of court. I have appeared in the courts of many Canadian provinces, and have assisted in numerous international cases.

I have been recognized as one of Canada's leading class action litigators. Since its inaugural 2006 edition, I have been named annually in *Best Lawyers in Canada*. I have also been named annually in *The Canadian Legal Lexpert Directory*. I am co-author of Butterworths *Class Actions Law and Practice*, and am a regular speaker at conferences given by organizations such as the Law Society of Upper Canada, the Canadian Bar Association, the Canadian Institute, the Barreau du Quebec and the Advocates' Society.

I am a long-time member of the Board of Directors of the London Health Sciences Foundation and am a dedicated community supporter. I am also a keen sailor, runner and triathlete, participating in hundreds of sailboat races, running races and long-distance triathlons around the world, including the Boston Marathon and the Hawaii Ironman.

GLENN JOHNSON and MICHAEL SMITH -and- HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Plaintiffs

Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
LONDON

ORDER

McKENZIE LAKE LAWYERS LLP
140 Fullarton Street, Suite 1800
London, Ontario N6A 5P2

Kevin A. Egan (41344P)
Michael J. Peerless (34127P)
Matthew D. Baer (48227K)

Tel: 519-672-5666
Fax: 519-672-2674

Lawyers for the Plaintiffs