

Court File No. 1406/19 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE) Wednesday, THE 10th
)
JUSTICE GRACE) DAY OF November, 2021

BETWEEN:

GREGORY WRIGHT

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Defendant

Proceeding under the *Class Proceedings Act, 1992*

ORDER
(Certification) 28

THIS MOTION, made by the Plaintiff, for an order that this action be certified as a class proceeding pursuant to the *Class Proceedings Act, 1992*, SO 1992, c 6, was heard on November 10, 2021, virtually over Zoom.

ON READING the affidavits of the various affiants and other materials filed by the Parties, on hearing the submissions of counsel for the Plaintiff and the Defendant, and upon being advised that the Parties consent to this Order:

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 claims asserted on behalf of the Class are 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;

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

“All persons incarcerated at the Elgin-Middlesex Detention Centre between May 18, 2017 and November 10, 2021, including those held at the Elgin-Middlesex Detention Centre pending trial or other court appearance”;

4. **THIS COURT ORDERS** that Eric Sabourin be and is hereby appointed as the representative plaintiff in the within proceeding;

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

- (a) In the operation and management of the EMDC, did the Defendant owe a duty of care to the Plaintiff and Class Members?
- (b) If the answer to (a) is “yes,” what is the nature of that duty of care?
- (c) In the operation and management of the EMDC, did the Defendant breach its duty of care owed to the Plaintiff and Class Members?
- (d) Did the conditions in the EMDC during the claim period constitute a violation of s 7 or s 12 of the *Canadian Charter of Rights and Freedoms*?
- (e) By its operation and management of the EMDC, did the Defendant violate the rights of the Plaintiff and Class Members under s 7 or s 12 of the *Canadian Charter of Rights and Freedoms*?
- (f) If the answer to either or both of (d) and (e) is “yes,” was such violation justified under s 1 of the *Canadian Charter of Rights and Freedoms*?
- (g) Are damages pursuant to s 24 of the *Canadian Charter of Rights and Freedoms* a just and appropriate remedy?

- (h) Is this an appropriate case for an award of aggregate damages pursuant to s 24(1) of the *Class Proceedings Act, 1992*?
- (i) If the answer to (h) is "yes," what is the appropriate measure of such damages?
- (j) Does the conduct of the Defendant merit an award of punitive damages?
- (k) If the answer to (j) is "yes," what quantum should be awarded for punitive damages?

6. **THIS COURT ORDERS** that the Plaintiff's litigation plan attached hereto as Schedule "A" is approved subject to being 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 Plaintiff's 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 Court ^{*has reserved decision on the issue of*} ~~will determine~~ the costs of this motion following submissions by the Parties. *df*

A. Grace J.

 Justice Grace

Schedule 'A' . 28

A

Court File No. 1406/19 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

GREGORY WRIGHT

Plaintiff

- and -

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Defendant

Proceeding under the *Class Proceedings Act, 1992*

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 defendant has filed any Statement 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 Defendant, oral or documentary, and as such, the extent of productions and the length of examinations for discovery are necessarily estimated;
- (c) it is customary that the litigation plan be produced without input from the defendant or the Court, and, as a result, some modification may be necessary once input from the Defendant and the Court is provided; and,
- (d) the litigation plan is a dynamic document, evolving as the action progresses.

CLASS DEFINITION

The Plaintiff and Class Members are individuals who have been incarcerated or similarly detained or imprisoned at the Elgin-Middlesex Detention Centre (hereinafter "EMDC") between May 18, 2017 and November 10, 2021. The Plaintiff proposes to define the Class as follows:

“All persons incarcerated at the EMDC between May 18, 2017 and November 10, 2021, including those held at the EMDC pending trial or other court appearance.”

CLASS SIZE

The exact number of Class Members is unknown to the Plaintiff; however, the Defendant should have comprehensive records sufficient to verify the identity of each Class Member. This claim affects all incarcerated and detained individuals at the EMDC during the proposed class period. During that period, the 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 the EMDC routinely held as many as 450 inmates during significant portions of the class 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 class period.

COUNSEL

McKenzie Lake Lawyers LLP of London, Ontario will act on behalf of the Plaintiff class in this action. Kevin Egan, Michael Peerless, Matthew Baer and Chelsea Smith will act as class counsel. Mr Peerless was called to the Bar in Ontario in 1993, Mr Egan was called to the Bar in Ontario in 1999, Mr Baer was called to the Bar in Ontario in 2003, and Ms Smith was called to the Bar in Ontario in 2017. Attached as **Schedule “A”** to this Litigation Plan is a copy of the biographies of each member of the class counsel team.

McKenzie Lake Lawyers LLP 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.

COMMUNICATION

Counsel for the Plaintiff has a website: www.mckenzielake.com. 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 Class Members informed.

Counsel report to and take instructions from the Representative Plaintiff. Counsel have and will continue to have regular conference calls and meetings with the Representative Plaintiff for the purpose of keeping him informed of the issues in the litigation as they arise, and to obtain instructions as needed.

The Representative Plaintiff proposes that emails be sent to Class Members who provide their email addresses. These emails will be sent with a view to 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 website mentioned above. McKenzie Lake Lawyers LLP maintains a toll-free telephone number and class counsel's contact information is set out on the website mentioned above.

NOTICE TO CLASS/OPT OUT

Upon certification of this action as a class proceeding, the Plaintiff proposes that:

- (1) the Plaintiff will prepare a draft notice to the Class, including the opt-out form;
- (2) the Plaintiff will provide the draft materials to defence counsel for their review and comment; and,
- (3) class counsel will attend a case management conference with the case management judge to address any issues related to the form of the notice to the Class and the opt-out mechanism, and to obtain the approval of the case management judge to the final notice and opt-out mechanism.

Class counsel have, in their possession, records confirming the incarceration of many, but not all, of the inmates incarcerated at the EMDC during the class 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 the EMDC during the class period from which membership in the Class can be derived.

In general, the Plaintiff anticipates that he will be seeking to provide notice to the Class through newspaper advertising in London, Ontario. In addition, letters will be sent with the notice to all Class Members at their last known addresses. The notice, including the opt-out form, will also be posted to and may be downloaded from the website maintained by class counsel.

The Plaintiff will likely propose that the notice contain a form which may be detached, filled out and mailed or emailed either to class 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 Defendant the names of all persons who have opted out and the date that their opt-out form was received. Any issues related to the timing of receipt or the fact of receipt of any opt-out form shall be addressed before the case management judge. The Plaintiff will seek an order that the costs of the notice, including publication, be paid by the Defendant.

COMMON ISSUES

The Plaintiff proposes the following common issues:

- (a) In the operation and management of the EMDC, did the Defendant owe a duty of care to the Plaintiff and Class Members?
- (b) If the answer to (a) is “yes,” what is the nature of that duty of care?
- (c) In the operation and management of the EMDC, did the Defendant breach its duty of care owed to the Plaintiff and Class Members?
- (d) Did the conditions in the EMDC during the claim period constitute a violation of s 7 or s 12 of the *Canadian Charter of Rights and Freedoms*?
- (e) By its operation and management of the EMDC, did the Defendant violate the rights of the Plaintiff and Class Members under s 7 or s 12 of the *Canadian Charter of Rights and Freedoms*?
- (f) If the answer to either or both of (d) and (e) is “yes,” was such violation justified under s 1 of the *Canadian Charter of Rights and Freedoms*?
- (g) Are damages pursuant to s 24 of the *Canadian Charter of Rights and Freedoms* a just and appropriate remedy?
- (h) Is this an appropriate case for an award of aggregate damages pursuant to s 24(1) of the *Class Proceedings Act, 1992*?
- (i) If the answer to (h) is “yes,” what is the appropriate measure of such damages?
- (j) Does the conduct of the Defendant merit an award of punitive damages?

- (k) If the answer to (j) 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. Many Class Members face significant barriers to litigation including, *inter alia*, mental health issues, psychological and emotional trauma, a lack of financial means, ongoing incarceration, and a fear of reprisals. The class proceeding will break down barriers and provide access to justice.

Certification of this action will avoid duplication of fact finding and legal analysis. It will provide judicial economy.

Conditions and treatment of inmates at the EMDC 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 that is more likely to effect positive change in the condition and treatment of inmates at the EMDC and other provincial institutions where the same practices may exist.

The determination of the common issues will substantially advance the claims of the Class Members, will provide justice for all Class Members 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 PLAINTIFF

Eric Sabourin was an inmate at the EMDC during the class period. He has no conflict of interest with Class Members with respect to the common issues, all of which focus on the conditions of the EMDC and the Defendant’s conduct. It is anticipated that other Class Members together with experts will testify at the trial of the common issues.

The Plaintiff may apply 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, 1992*. The Plaintiff proposes that case management 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 towards 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 Plaintiff proposes 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) If necessary, the Plaintiff shall deliver a Reply to the Defendant's Statement of Defence within 30 days of service of the Statement of Defence;
- (3) The parties will exchange executed affidavits of documents together with flash drives 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, Ontario commencing no later than 150 days from the close of pleadings and to be completed no later than 180 days from the close of pleadings;
- (5) Any motions that 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 Plaintiff shall deliver any expert reports upon which he relies six months in advance of the scheduled date for the commencement of trial;
- (8) The Defendant shall deliver any responding expert reports four months prior to the date scheduled for the commencement of trial;
- (9) The Plaintiff shall deliver his reply reports, if any, no later than 90 days prior to the scheduled date for the commencement of trial; and,
- (10) A pre-trial conference shall be held no 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 that would comprise productions in this action. The Plaintiff anticipates that the Defendant has

maintained comprehensive correctional records for the Representative Plaintiff and with respect 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 at issue in this action, the Plaintiff proposes that counsel for all parties work cooperatively to proceed by way of imaged documents that will be shared in electronic format. Similarly, the Plaintiff proposes 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 Plaintiff proposes that all documents also be provided electronically in their native format wherever possible.

DISPOSITION OF REMAINING ISSUES

If the Defendant is successful at trial, there will be no remaining issues to be tried.

The Plaintiff proposes to certify aggregate damages as common issues (see proposed common issues (h) and (i)) pursuant to section 24(1) of *The Class Proceedings Act, 1992*. If successful at the common issues trial, including proposed common issues (h) and (i), 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) of *The Class Proceedings Act, 1992*. The Plaintiff proposes that aggregate damages are an appropriate remedy for all the damages sustained by the Class Members for the conditions, culture and atmosphere at the EMDC. All Class Members should be entitled to recover a base damage award to be allocated from the aggregate damages.

In addition, some Class Members have suffered significant physical and psychological injuries as a consequence of physical assaults and the failure to provide appropriate medical treatment. These 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 class counsel anticipates 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 Plaintiff proposes that the parties first 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, 1992* prescribes that the common issues trial judge must consider the method of proceeding that is the least expensive and most expeditious method for 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 Plaintiff proposes 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 Class Member will be paid a base amount upon submitting an application without proof of harm, which will verify that he/she was incarcerated at the EMDC and is a member of the Class;
- (2) Any Class Member who feels that he/she is entitled to compensation over and above the base amount shall be required to complete an application form, which will particularize the harm which he/she alleges to have suffered. The application shall be accompanied with all relevant medical, psychological, and income records in support of the claim;
- (3) Class 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 that are not resolved shall proceed in the same manner as the representative damage claims. All claims for damages are to be resolved within two 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.

SCHEDULE "A"

Kevin Egan

Kevin Egan has 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, his recent legal work has brought him to the emerging area of "Charter Torts." He 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. He now represents a very large number of victims of police or prison-system misconduct in Ontario seeking constitutional and other remedies.

Kevin Egan also has significant experience in the areas of labour and employment law, workplace safety and insurance, disability insurance, human rights, and criminal and provincial offences. His practice also includes assault and battery, historic sexual assault, medical malpractice, and negligent investigation claims against police and other investigators.

Kevin Egan is a partner at McKenzie Lake Lawyers LLP. Prior to practicing law, he had extensive experience in management of a large national corporation. He also owned and operated a number of small businesses. His broad range of experience and perspective is a real benefit to his clients.

Michael Peerless

Michael Peerless studied at the University of Western Ontario (BA Anthropology) and the University of Victoria (LL.B.). Since his call to the bar in 1993, Mike's practice has been focused on class actions. He has experience in a variety of substantive areas of law, including products liability, anti-competitive activity, commercial disputes, financial services liability, securities, consumer fraud, pharmaceutical products and medical devices cases. He is the co-author of Butterworths' *Class Action Law and Practice*, and has taught at the Faculty of Law at the University of Western Ontario. He is a former member of the Board of the London Health Sciences Foundation. A former competitive sailor, he is an avid runner, cyclist and swimmer, and has competed in running races and triathlons around the world.

Matthew Baer

Matthew Baer was admitted to the Ontario Bar in July 2003. He received his B.S.C. (Hons.) in Ecology and Evolution from the University of Western Ontario, graduating with distinction. Matthew also received his LL.B. from the University of Western Ontario, receiving the Newton Rowell Entrance Scholarship on the basis of academic excellence and community service and the National Trust Scholarship in Wills. Matthew's practice focuses on product liability and consumer protection claims, particularly pharmaceutical litigation.

Chelsea Smith

Chelsea Smith completed her Juris Doctor at Western University in 2015 and her LL.B. in Quebec Civil Law at Université Laval in 2016. Prior to obtaining her law degrees, Chelsea graduated from Huron University College at Western University in 2011 with an Honours Bachelor of Arts in English Language and Literature and French. During her eight years of university studies, Chelsea participated in many extracurricular activities and earned 14 academic awards, including a gold medal from Huron and the prestigious Richard J Schmeelk Canada Fellowship. Called to the Ontario bar in June 2017, Chelsea practices as a bilingual associate in the class actions group and has also worked as an adjunct professor at Western Law.

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Plaintiff

-and- HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO
Defendant

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PROCEEDING COMMENCED AT
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ORDER

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