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(22)

File No. CI ~~18-01-16608~~
21-01-31242

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:

VIRGIL CHARLES GAMBLIN and HAWA YUSUF, as Litigation Guardian of
A.M.,

Plaintiffs,

- and -

THE GOVERNMENT OF MANITOBA ,

Defendant.

ORDER

FILED
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LAW COURTS
WINNIPEG

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THE QUEEN'S BENCH

Winnipeg Centre

THE HONOURABLE)

MDM. JUSTICE SHAWN D.)
GREENBERG)

Wednesday, THE *4th*
DAY OF ~~AUGUST~~, 2022
May

BETWEEN:

**VIRGIL CHARLES GAMBLIN AND HAWA YUSSUF AS LITIGATION
GUARDIAN OF A.M.**

Plaintiffs

- and -

THE GOVERNMENT OF MANITOBA

Defendant

Proceeding under *The Class Proceedings Act*, C.C.S.M. c. C.130

ORDER

THIS MOTION, made by the Plaintiffs, for certification of the within action as a class proceeding, was made under Section 2 of the *Class Proceedings Act*, C.C.S.M. c.C.130, and was heard this day by video conference on April 29, 2022 at the Law Courts Complex, 408 York Ave., Winnipeg, MB.

ON READING the motion record of the Plaintiffs, and on hearing the submissions of counsel for the parties,

AND UPON BEING ADVISED that the Defendant consents to the relief sought by the Plaintiffs,

1. **THIS COURT ORDERS** that this action is hereby certified as a class proceeding.
2. **THIS COURT ORDERS** that capitalized terms used in this Order have the meaning ascribed to them in the Statement of Claim for the within action.
3. **THIS COURT ORDERS** that the "Class" and the "Class Members" are defined as:

Inmates with a Serious Mental Illness ("SMI Inmates")

All current and former inmates, who were alive as of September 12, 2016, who were subjected to Disciplinary Segregation or Preventive Segregation for any length of time at one of the Provincial Custodial Facilities between September 12, 2012 and the date of this Order; who were diagnosed by a medical doctor before or during their incarceration with at least one of the following disorders, as defined in the relevant Diagnostic and Statistics Manual of Mental Disorders:

- Schizophrenia (all sub-types),
- Delusional disorder,
- Schizophreniform disorder,
- Schizoaffective disorder,
- Brief psychotic disorder,
- Substance-induced psychotic disorder (excluding intoxications and withdrawal),
- Psychotic disorder not otherwise specified,
- Major depressive disorders,
- Bipolar disorder I,
- Bipolar disorder II,
- Neurocognitive disorders and/or Delirium, Dementia and Amnesic and Other Cognitive Disorders,
- Post-Traumatic Stress Disorder;
- Obsessive Compulsive Disorder; or
- Borderline Personality Disorder;

and who suffered from their disorder, in a manner described in Appendix "A" to the Statement of Claim, and who reported such diagnosis and suffering to the Government of Manitoba and/or its agents before or during their segregation.

Youth Inmates

All current and former inmates, who were alive as of September 12, 2016, who, while under the age of 18, were subjected to Preventive Segregation at one of the Provincial Custodial Facilities for any length of time between September 12, 2006 and the date of this Order.

Inmates in Prolonged Solitary Confinement ("Prolonged Inmates")

All current and former inmates, who were alive as of September 12, 2016, who were subjected to Solitary Confinement for 15 or more consecutive days at one of the Provincial Custodial Facilities between September 12, 2012 and the date of this Order.

4. **THIS COURT DECLARES** that the buildings or properties listed in Schedule "A" to this Order constitute the Provincial Custodial Facilities referred to in paragraph 2.
5. **THIS COURT ORDERS** that Virgil Gamblin and A.M., acting through his litigation guardian Hawa Yussuf, are appointed as the representative plaintiffs for the Class.
6. **THIS COURT ORDERS** that Koskie Minsky LLP is appointed counsel for the Class.
7. **THIS COURT DECLARES** that the causes of action certified are negligence, breach of fiduciary duty, and breach of ss. 7 and 12 of the *Charter*.
8. **THIS COURT DECLARES** that the common issues related to the liability of the Defendant shall be defined as follows:

Systemic Negligence

(a) By the operation and management of the Provincial Custodial Facilities from:

- (i) September 12, 2012 and the present with respect to SMI Inmates and Prolonged Inmates; and
- (ii) September 6, 2006 and the present with respect to Youth Inmates,

did the Defendant owe a duty of care to the Class Members?

(b) If the answer to (a) is yes, what is the nature of that duty of care?

(c) By the use of Disciplinary Segregation, Preventive Segregation, and Solitary Confinement at the Provincial Custodial Facilities from:

(i) September 12, 2012 and the present with respect to SMI Inmates and Prolonged Inmates; and

(ii) September 6, 2006 and the present with respect to Youth Inmates,

did the Defendant breach a duty of care owed to some or all of the Class Members?

Fiduciary Duty

(d) By the operation and management of the Provincial Custodial Facilities from:

(i) September 12, 2012 and the present with respect to SMI Inmates and Prolonged Inmates; and

(ii) September 6, 2006 and the present with respect to Youth Inmates,

did the Defendant owe a fiduciary duty to some or all of the Class Members?

(e) If the answer to (d) is yes, what is the content of that fiduciary duty?

(f) By the use of Disciplinary Segregation, Preventive Segregation, and Solitary Confinement at the Provincial Custodial Facilities from:

(i) September 12, 2012 and the present with respect to SMI Inmates and Prolonged Inmates; and

(ii) September 6, 2006 and the present with respect to Youth Inmates,

did the Defendant breach a fiduciary duty owed to some or all of the Class Members?

Section 7 of the Charter

(g) Did the use of Disciplinary Segregation and Preventive Segregation deprive the SMI Inmates of security of the person under s. 7 of the *Charter*?

(h) Did the use of Preventive Segregation deprive the Youth Inmates of security of the person under s. 7 of the *Charter*?

(i) Did the use of Disciplinary Segregation, Preventive Segregation, and Solitary Confinement for more than 15 consecutive days deprive the Prolonged Inmates of security of the person under s. 7 of the *Charter*?

(j) If the answer to (g), (h), or (i) is "yes", does the deprivation fail to accord with the principles of fundamental justice for some or all of the Class Members?

(k) If the answer to either question in (j) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Disciplinary Segregation, Preventive Segregation, or Solitary Confinement and the reason indicated for such placement was:

- (i) at their own request;
- (ii) for their own protection, including protection for medical reasons;
- (iii) to protect the security of the institution or safety of others, including protection for medical reasons;
- (iv) for alleged misconduct of a serious nature; or
- (v) for any other reason?

(l) Did the deprivation of liberty under s. 7 of the *Charter* by the use of Disciplinary Segregation, Preventive Segregation, and Solitary Confinement fail to accord with the principles of fundamental justice for some or all of the Class Members?

(m) If the answer to (l) is "yes", does the deprivation fail to accord with the principles of fundamental justice where the Class Members were placed in Disciplinary Segregation, Preventive Segregation, or Solitary Confinement and the reason indicated for such placement was:

- (i) at their own request;
- (ii) for their own protection, including protection for medical reasons;
- (iii) to protect the security of the institution or safety of others, including protection for medical reasons;
- (iv) for alleged misconduct of a serious nature; or
- (v) for any other reason?

Section 12 of the *Charter*

(n) Did the use of Disciplinary Segregation and Preventive Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the SMI Inmates where the SMI Inmates were placed in Disciplinary Segregation or Preventive Segregation and the reason indicated for such placement was:

- (i) at their own request;
- (ii) for their own protection, including protection for medical reasons;
- (iii) to protect the security of the institution or safety of others, including protection for medical reasons;

- (iv) for alleged misconduct of a serious nature; or
- (v) for any other reason?

(o) Did the use of Preventive Segregation constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the Youth Inmates where the Youth Inmates were placed in Preventive Segregation and the reason indicated for such placement was:

- (i) at their own request;
- (ii) for their own protection, including protection for medical reasons;
- (iii) to protect the security of the institution or safety of others, including protection for medical reasons;
- (iv) for alleged misconduct of a serious nature; or
- (v) for any other reason?

(p) Did the use of Solitary Confinement constitute cruel and unusual treatment or punishment under s. 12 of the *Charter* for the Prolonged Inmates where the Prolonged Inmates were placed in Solitary Confinement for more than 15 consecutive days and the reason indicated for such placement was:

- (i) at their own request;
- (ii) for their own protection, including protection for medical reasons;
- (iii) to protect the security of the institution or safety of others, including protection for medical reasons;
- (iv) for alleged misconduct of a serious nature; or
- (v) for any other reason?

9. **THIS COURT DECLARES** that the common issues related to the common relief owing to the Plaintiffs and the Class Members, if any, shall be defined as follows:

Charter Justification and Charter Damages

(q) If the answer to common issues (j), (k), (l), (m), (n), (o), or (p) is “yes”, were such violation(s) justified under section 1 of the *Charter*?

(r) If the answer to common issue (q) is “no” in respect of questions (j), (k), (l), (m), (n), (o), or (p), are damages pursuant to section 24(1) of the *Charter* an appropriate remedy?

Aggregate Damages

(s) Is this an appropriate case for an award of aggregate damages pursuant to subsection 29(1) of the *Class Proceedings Act*?

(t) If the answer to (s) is "yes", what is the appropriate quantum of such damages?

Punitive Damages

(u) Does the conduct of the Defendant merit an award of punitive damages?

(v) If the answer to (u) is "yes", what quantum should be awarded for punitive damages?

10. **THIS COURT DECLARES** that the common issues related to the limitation periods applicable to the claims asserted by the Plaintiffs and the Class Members shall be defined as follows:

Limitation Period

(w) What limitation period or limitation periods apply to the causes of action advanced in this case?

(x) What circumstances are relevant to determining when the limitation period or limitation periods referred to in question (w) begin to run?

11. **THIS COURT ORDERS** that the form of notice of this Order, the manner of giving notice, and all other related matters, including opt-out procedures and the costs associated with the notice program, shall be determined by further order of the Court.


12. **THIS COURT ORDERS** that this Order and any reasons given by the Court in connection thereto are without prejudice to any position, objection, or defence the Defendant may take or assert in this or any other proceeding, including, without limiting the generality of the foregoing, with respect to any statutory, common law, or equitable limitations issues or defences.

13. **THIS COURT ORDERS** that no other proceeding may be commenced in Manitoba as a class action in respect of the subject matter of the within proceeding without leave of this Court.

September 6, 2022
(Date)


Greenberg J.

Date: Aug 12 / 2022


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Date: Sept 30, 2022


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Date: August 15, 2022



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**Lawyers for the Defendant The Government of
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SCHEDULE A

LIST OF PROVINCIAL CUSTODIAL FACILITIES

1. Agassiz Youth Centre
2. Brandon Correctional Centre
3. Dauphin Correctional Centre
4. Headingley Correctional Centre
5. Manitoba Youth Centre
6. Milner Ridge Correctional Centre
7. Portage Correctional Centre
8. Winnipeg Remand Centre
9. Women's Correctional Centre
10. The Pas Correctional Centre