FILE NO. CI 21-01-31242

THE QUEEN'S BENCH
Winnipeg Centre

BETWEEN:

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

(plaintiffs) applicants,

- and -

THE GOVERNMENT OF MANITOBA

(defendant) respondent.

ENDORSEMENT SHEET

SITTING DATE: April 29, 2022 **JUDGE: Greenberg J.**

COUNSEL:

For the applicants: James Sayce, Jamie Shilton
For the respondent: Bernice Bowley, Jim Koch

ENDORSEMENT

[1] There are two motions before me: 1) a motion to consolidate two claims which challenge the validity of administrative segregation ("solitary confinement") in Manitoba correctional facilities, and 2) a motion to certify a class proceeding in the consolidated claim. Although all parties consent to both motions, I still must be satisfied that the proposed class proceeding satisfies the criteria in ***The Class Proceedings Act***, C.C.S.M., c. C130 ("***CPA***").

THE CLAIMS

[2] On September 12, 2018, Weston Smith filed a statement of claim seeking to be the representative plaintiff in a class proceeding challenging the validity of the practice of administrative segregation in Manitoba correctional facilities. Mr. Smith has himself been held in administrative segregation on a number of occasions. He claimed that the Manitoba practice violates ss. 7, 9, 11(h) and 12 of the ***Charter*** and that the Government's actions were negligent and breached the fiduciary duty owed to inmates. His claim also raised a number of intentional torts as well as unjust enrichment, alleging that the Government saved money through its wrongful actions.

[3] On May 21, 2021, Virgil Gamblin and A.M., a youth, filed a claim seeking to be the representative plaintiffs in a class proceeding raising a number of the same issues as Mr. Smith's claim. Both Mr. Gamblin and A.M. have been held in segregation a number of times in Manitoba correctional facilities, sometimes for extended periods. They alleged the practice violates ss. 7, 12 and 15 of the ***Charter*** and that the actions of the Government breached the duty of care and the fiduciary duty it owes to inmates.

[4] Both claims seek declaratory relief and damages.

CONSOLIDATION

[5] The Queen's Bench Rules allow proceedings to be consolidated where they raise common questions of law or fact (Rule 6). There is no question that the Smith and Gamblin claims raise common issues. In the proposed amended consolidated claim, the parties have agreed to abandon those causes of action that are not common to both claims. As a result, there would be no good reason to prosecute separate claims. As I said, all parties consent to the consolidation and it makes

sense for them to do so. Mr. Smith has agreed to remove himself as a representative plaintiff as his interests will be protected if the proposed class proceeding is certified. So there would be no basis for the separate claim.

CERTIFICATION OF A CLASS PROCEEDING

[6] Section 4 of the ***CPA*** requires the court to certify a class proceeding where the pleadings disclose a cause of action; there is an identifiable class of two or more persons; the claims of the class members raise a common issue; a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and the representative plaintiff would fairly and adequately represent the interests of the class.

[7] Insofar as the first criterion is concerned, I am satisfied the amended consolidated claim discloses a cause of action. The threshold for disclosing a cause of action is a low one. This criterion is satisfied unless it is plain and obvious that no cause of action exists (***Hollick v. Toronto (City)***, 2001 SCC 68, [2001] 3 SCR 158, para. 25). The causes of action raised by the amended consolidated statement of claim are that the use of administrative segregation in Manitoba correctional facilities violates rights of the class members under ss. 7 and 12 of the ***Charter***, amounts to systemic negligence and breaches the fiduciary duty owed to class members.

[8] The practice of solitary confinement/administrative segregation has been held to violate ss. 7 and 12 of the ***Charter*** (***Brazeau v. Attorney General (Canada)***, 2020 ONCA 184 (CanLII); ***Canadian Civil Liberties Assn. v. Canada (Attorney General)***, 2019 ONCA 243 (CanLII)), albeit maybe not in situations identical to the case at bar. And there is precedent for finding the practice of administrative

segregation to amount to systemic negligence (***Francis v. Ontario***, 2020 ONSC 1644 (CanLII); aff'd 2021 ONCA 197 (CanLII)). While the cause of action based on fiduciary duty may be a novel one, I am not to assess the merits of the claim at this stage. The facts pleaded address the elements of that cause of action (***Alberta v. Elder Advocates of Alberta Society***, 2011 SCC 24, [2011] 2 SCR 261). It is not plain and obvious that the claim cannot succeed.

[9] As for the second criterion in s. 4 of the ***CPA***, the applicants have proposed the class to be all current and former inmates who were alive on September 12, 2016, two years before the Smith claim was filed (***The Trustee Act***, C.C.S.M., c. T160, s. 52) with three sub-classes, briefly described as:

- inmates who were subject to solitary confinement for more than 15 days between September 12, 2012 and the date of certification;
- inmates who had been diagnosed with a mental disorder, as described in the claim, which was known to the defendant, and who were subject to solitary confinement for any period of time between September 12, 2012 and the date of certification;
- inmates who, while under the age of 18, were held in solitary confinement for any period of time between September 12, 2006 and the date of certification.

[10] I am satisfied that the proposed class meets the requirements of s. 4(b) of the ***CPA***. It sets out objective criteria by which to identify class members and describes a group connected to the common issues in the claim. The prescribed dates for inclusion in the class address limitation periods, although it is acknowledged that by agreeing to certification of this class, the defendant is not precluded from raising a defence based on the limitation period.

[11] I am also satisfied that the claims of the class members raise common issues (***CPA***, s. 4(c)). These issues have been certified as the basis for class proceedings in other provinces and some have been adjudicated in the plaintiff's favour. And I am satisfied that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues (***CPA***, s. 4(d)). The plaintiffs have led evidence that there have been hundreds of youth held in segregation during the class period. While they have provided no similar evidence with respect to adult inmates, it is reasonable to infer that the numbers would not be small. It is obvious that a class proceeding is preferable to multiple individual claims adjudicating the same issues.

[12] Finally, I am satisfied that Mr. Gamblin and A.M., both of whom have been held in segregation multiple times, will adequately represent the interests of the class (***CPA***, s. 4(e)).

[13] As I said, a number of class proceedings that raise similar issues and causes of action as this case have been certified in other provinces (***Brazeau v. Attorney General (Canada)***, 2016 ONSC 7836 (CanLII); ***Reddock v. Canada (Attorney General)***, 2018 ONSC 3914 (CanLII); ***Francis v. Ontario***, 2018 ONSC 5430 (CanLII); ***Gallone c. Quebec***, 2018 QCCS 4190 (CanLII); ***J.K. v. Ontario***, 2018 ONSC 7545 (CanLII); ***North v. British Columbia (Attorney General)***, 2020 BCSC 2044 (CanLII); ***Chandra v. Ontario***, 2022 ONSC 1643 (CanLII)). Some of these claims have been adjudicated and decided in favour of the plaintiffs (***Brazeau v. Attorney General (Canada)***, 2019 ONSC 1888 (CanLII), varied 2020 ONCA 184 (CanLII); ***Reddock v. Canada***, 2019 ONSC 5053 (CanLII), varied 2020 ONCA 184

(CanLII); ***Francis v. Ontario***, 2020 ONSC 1644 (CanLII), aff'd 2021 ONCA 197 (CanLII)). This in itself is strong support for certifying the class proceeding in this case.

[14] The Gamblin and Smith clams will be consolidated on the basis of the proposed amended consolidated statement of claim. The action based on that amended claim is certified as a class proceeding and the notice plan submitted by the parties is approved.

DATE: May 4, 2020 Greenberg **J.**

Copies of this Endorsement Sheet were sent to counsel on the day of May, 2020.