

AMENDED THIS Sept 9, 2016 PURSUANT TO  
 MODIFIÉ CE 26.05 CONFORMÉMENT A  
 RULE/LA RÈGLE 26.02  
 THE ORDER OF L'ORDONNANCE DU  
 DATED / FAIT LE \_\_\_\_\_  
 REGISTRAR / CLERK OF JUSTICE  
 SUPERIOR COURT OF JUSTICE

Court File No.: CV-16-543895CP

ONTARIO  
SUPERIOR COURT OF JUSTICE

J.K.

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO

Defendant

Proceedings under the *Class Proceedings Act, 1992*

**FRESH AS AMENDED STATEMENT OF DEFENCE**

1. The Defendant, Her Majesty the Queen in right of Ontario ("HMQ") admits the allegations contained in paragraphs 9, 17, and 18 of the Fresh as Amended Statement of Claim ("Fresh Claim").
2. HMQ has no knowledge of the allegations contained in paragraphs 6 and 11 of the Fresh Claim.
3. HMQ denies all of the remaining allegations in the Fresh Claim, including that the plaintiff or any potential class member are entitled to the relief sought in paragraph 1 of the Fresh Claim, and puts the plaintiff to the strict proof thereof.
4. In respect specifically of the allegations contained at paragraph 3 of the Fresh Claim (which are denied), HMQ denies that the expression "secure isolation" is a euphemism. On the contrary, it is the expression set out at sections 126-28 of the *Child and Family Services Act* (R.S.O. 1990 c. C.11) ("CFSA"), which govern.
5. In respect specifically of the allegations contained at paragraph 4 of the Fresh Claim (which are denied), HMQ denies the relevance of any alleged mistreatment at large of persons "throughout the history of the operation of the Facilities", unless such alleged

mistreatment relates specifically to the use of secure isolation during the proposed class period. In respect of the allegations contained in the first sentence of paragraph 20 of the Fresh Claim (which are denied), HMQ denies the relevance of allegations of mistreatment of class members "at large", unless such alleged mistreatment relates specifically to the use of secure isolation.

6. At paragraph 15 of the Fresh Claim, the plaintiff improperly pleads evidence, not material facts. This evidence is hearsay. HMQ denies that it is admissible.

7. At all relevant times, HMQ operated the following Youth Detention Facilities (collectively, the "HMQ Facilities"):

- a. Donald Doucet Youth Centre
- b. Justice Ronald Lester Youth Centre
- c. Brookside Youth Centre
- d. Cecil Facer Youth Centre
- e. Sprucedale Youth Centre
- f. Roy McMurtry Youth Centre
- g. Bluewater Youth Centre (now closed)

8. The rest of the Facilities listed in paragraph 9 of the Fresh Claim (the "Third Party Facilities") were at all relevant times operated by third parties (the "Third Parties") pursuant to service contracts.

9. At all relevant times, HMQ's use of secure isolation at the HMQ Facilities complied with all legal requirements. Specifically, to the extent it was required to do so, HMQ complied with ss. 126-28 of the CFSA and with all applicable regulations. For the period January 1, 2007 to April 1, 2009, HMQ was, by virtue of Ontario Regulation 87/06, exempt from compliance with the requirements of s. 127 of the CFSA with respect

to all facilities operated pursuant to Part V of the *Ministry of Correctional Services Act*, RSO 1990, c M-22.

10. In the alternative, if there were any instances of the use of secure isolation at the HMQ Facilities outside of the applicable parameters set forth in the CFSA and/or the applicable regulations (which is denied), then such instances were infrequent, not systemic.

11. HMQ pleads that overall compliance with the applicable statutory and regulatory provisions governing the use of secure isolation is a complete answer and defence to the within action, requiring the dismissal of same.

12. HMQ denies that it is in law responsible for any acts or omissions of any of the Third Parties in respect of the Third Party Facilities. Without limiting the generality of the foregoing, HMQ denies that any of the Third Parties were acting as agents of HMQ with respect to the Third Party Facilities.

13. In the alternative, if any of the Third Parties were acting as agencies or agents of HMQ in respect of any of the Third Party Facilities, then any claim against HMQ in respect of any acts or omissions of such Third Parties is barred by s. 2(2)(b) of the *Proceedings Against the Crown Act*, RSO 1990, c. P-27 ("PACA").

14. In either case, no claim may be brought against HMQ in respect of any acts or omissions of any of the Third Parties.

15. In the alternative, if the Third Parties were acting as agents of HMQ in respect of the Third Party Facilities, and if s. 2(2)(b) of PACA does not bar the claims against HMQ in respect of the Third Party Facilities (all of which is denied), then HMQ pleads that the use of secure isolation at the Third Party Facilities complied with all legal requirements. Specifically, it complied with ss. 126-28 of the CFSA and with all applicable regulations.

16. In the alternative, if there were any instances of the use of secure isolation at the Third Party Facilities outside of the parameters set forth in the CFSA and/or the applicable regulations (which is denied), then such instances were infrequent, not

systemic. HMQ pleads that overall compliance with the applicable statutory and regulatory provisions governing the use of secure isolation is a complete answer and defence to the within action, requiring the dismissal of same.

17. The remaining paragraphs of this Statement of Defence are pleaded in the alternative to the defences asserted at paragraphs 8-16 above.

18. The Facilities are operated in such a manner as to protect the safety and security of all persons at the Facilities, including detainees, staff, and visitors. The staff at the Facilities is trained in, and employs, multiple techniques in order to maintain the environment as one that is safe and secure. One of the techniques that may be used on occasion is the use of secure isolation.

19. HMQ denies that secure isolation is used as punishment and that its use at any of the Facilities is cruel, degrading, and/or inhuman or that its use for any period is unacceptable, inappropriate, and actionable and puts the plaintiff to the strict proof thereof.

20. HMQ further denies that its policies relating to secure isolation are improper or insufficient, as alleged, and denies the allegation that any carrying out of such policies does not constitute an acceptable exercise of discretion by the Crown. On the contrary, the Crown's policy decisions in this respect are not justiciable or actionable. In the alternative, all relevant policies were lawful and there was no systemic violation of any such policies.

21. HMQ further pleads that decisions with respect to funding of youth justice facilities are Crown policy decisions that are neither justiciable nor actionable. In the alternative, the funding of youth justice facilities was at all relevant times appropriate.

22. HMQ denies that it owed a fiduciary duty to any proposed class members while they were detained at the Facilities and that it owed them obligations as a person standing *in loco parentis*. In the alternative, if any such duties were owed (which is denied), HMQ denies that it breached any such duties. In the further alternative, if HMQ breached any

such duties (which is denied), HMQ pleads that any such breach or breaches were infrequent, not systemic.

23. HMQ denies that it violated any duty of care owed to proposed class members while detained at the HMQ Facilities.

24. HMQ denies that it owed the proposed class members any duty of care in respect of the Third Party Facilities. In the alternative, HMQ denies that it breached any such duty.

25. In the further alternative, if HMQ breached any duty of care owing to the proposed class members (which is denied), HMQ pleads that any such breach or breaches were infrequent, not systemic.

26. HMQ denies the doctrine of strict liability applies and that it is strictly liable pursuant to any such doctrine.

27. HMQ denies that the reports referred to at paragraphs 23 to 25 of the Fresh Claim created any legal obligation on the Crown to discontinue the use of secure isolation or to change its practices with respect to secure isolation.

28. HMQ denies that the plaintiff have suffered the damages alleged or any damages at all. In the alternative, if any potential class members suffered any loss or damages, such loss or damages were not caused or materially contributed to by any actionable act or omission by HMQ, or for which HMQ is in law responsible.

29. If any of the potential class members suffered any loss or damages as alleged or otherwise, which is not admitted but denied, then such alleged loss or damages are excessive and too remote, and HMQ puts the plaintiff to the strict proof thereof. Further, the plaintiff and any other potential class members have failed to mitigate same.

30. In any event, the issue of what damages, if any, were suffered by class members requires proof by individual class members. An aggregate assessment of damages would not be in conformity with the requirements of s. 24 of the *Class Proceedings Act*, SO 1992, chap 6 and is not appropriate.

31. The Plaintiff has not alleged that the CFSA or any of its regulations are contrary to the *Charter*. To the extent that the Plaintiff is alleging *Charter* violations resulting from an individual act of discretion under the CFSA, HMQ denies that it breached sections 7, 9, or 12 of the *Charter* or any unspecified "human rights" of the Plaintiff or the Class Members and puts them to the strict proof thereof.

32. HMQ denies that it deprived the Plaintiff or the Class Members of their life, liberty or security of the person contrary to s. 7 of the *Charter* and, in the alternative, HMQ pleads that any such deprivation (which is denied) complied with the principles of fundamental justice.

33. HMQ denies that it arbitrarily restrained or detained the Plaintiff or the Class Members contrary to s. 9 of the *Charter*.

34. HMQ denies that it subjected the Plaintiff or the Class Members to cruel and unusual treatment or punishment contrary to s. 12 of the *Charter*.

35. In the alternative, if any *Charter* breach is established (which is denied) any such *Charter* breach was reasonable, demonstrably justifiable and proportionate in a free and democratic society under s. 1 of the *Charter*.

36. In the further alternative, HMQ pleads that in the absence of bad faith or malice (which are not alleged by the Plaintiff and are in any event denied), *Charter* damages are unavailable for conduct authorized by statute. In particular, HMQ pleads and relies on ss. 126-28 of the CFSA, the constitutionality of which is not challenged by the Plaintiff.

37. The Plaintiff has also failed to plead how *Charter* damages would be appropriate and just in the circumstances. HMQ pleads that *Charter* damages are not functionally required to fulfill the objects of compensation, vindication of rights, or deterrence of future *Charter* breaches.

38. Further, HMQ pleads that good governance concerns weigh against the awarding of *Charter* damages for decisions as to whether secure isolation is appropriate in a particular circumstance. Secure isolation is a technique that may be required in certain prescribed

circumstances to maintain the safety and security of all persons at the Facilities. Staff must be able to make such decisions free of the effect that may result from the availability of *Charter* damages in the absence of bad faith or malice. Any functional considerations in favor of awarding *Charter* damages that the Plaintiff may allege are negated by this countervailing factor.

39. In the alternative, HMQ pleads that adequate alternative remedies are available to achieve the objects of compensation, vindication or deterrence, such as an award of damages under tort law and/or a declaration of a *Charter* violation. Accordingly, it is neither appropriate nor just to award any duplicative *Charter* damages in the circumstances.

40. HMQ denies that anything in its conduct warrants the awarding of punitive or aggravated damages.

41. The claim is statute-barred. HMQ pleads and relies upon the provisions of *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B).

42. HMQ asks that this action be dismissed, with costs.

August 26, 2016

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- and -

Plaintiff

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF  
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Proceeding Transferred to TORONTO  
Proceeding under the *Class Proceedings Act, 1992*

**FRESH AS AMENDED  
STATEMENT OF DEFENCE**

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