

Court of Appeal File No.:

Court File No.: 16-543895-00CP

COURT OF APPEAL FOR ONTARIO

BETWEEN:

J.K.

Plaintiff
(Appellant)

- and -

**HER MAJESTY THE QUEEN
IN RIGHT OF THE PROVINCE OF ONTARIO**

Defendant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE APPELLANT, the Plaintiff, J.K., appeals to the Court of Appeal from the Order of the Honourable Justice Perell dated Thursday, December 22, 2016, made at Toronto, Ontario (the "Order").

THE APPELLANT ASKS that the Order be set aside and that an order be granted allowing the appeal and:

- (a) setting aside the Order;
- (b) Declaring that the following records of the Plaintiff are not relevant to the analysis under ss. 5(1)(c), 5(1)(d) or 5(1)(e) of the *Class Proceedings Act, 1992* at the forthcoming certification motion: i) Youth OTIS Client Profile With Picture; ii) Youth OTIS Summary; iii) Youth Management Plans; iv) Behaviour Reports; v) Serious Occurrence Reports; vi) Occurrence

Reports; vii) Secure Isolation/Incident Review Checklists; viii) Secure Isolation Release Plan; ix) Secure Isolation Observation/Placement Review; x) Secure Isolation Observation Logs; xi) Serious Occurrence Reports from J.K.'s probation records; and, xii) Secure Isolation Report Summaries and related correspondence from the Ministry of Community Safety and Youth Services offices (collectively, the "Youth Records");

(c) Declaring that the Youth Records are not relevant to the 'some basis in fact' evidentiary standard at the forthcoming certification motion;

(d) Declaring that the Plaintiff is not required to bring an application to the Ontario Youth Justice Court under section 119(1) of the *Youth Criminal Justice Act* for access to the Youth Records;

(e) Declaring that the Order allows for and supports an impermissible merits analysis of the Plaintiff and the putative class's claims at the forthcoming certification motion;

(f) Removing the motion judge as case management judge, as he pre-judged the common issues in his December 22, 2016 reasons, thus raising a reasonable apprehension of bias, and directing the regional senior judge to appoint a new case management judge pursuant to section 34(2) of the *Class Proceedings Act, 1992*;

(g) Awarding the Appellant (Plaintiff) his costs of the appeal at this Court and the court below; and,

(h) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS OF APPEAL are as follows:

1. This proposed class proceeding, brought pursuant to the *Class Proceedings Act, 1992*, involves allegations of systemic wrongs and the over-reliance on “Secure Isolation” (otherwise known as solitary confinement) by the Province of Ontario on children in Ontario Youth Justice Facilities between January 1, 2007 and the present;
2. The action alleges systemic negligence, breach of fiduciary duty, and breaches of sections 7, 9, and/or 12 of the *Canadian Charter of Rights and Freedoms* by Ontario in the operation, oversight, and/or management of the impugned Youth Justice Facilities;
3. Justice Perell was appointed case management judge on January 5, 2016;
4. The Plaintiff served and filed his certification motion record on June 14, 2016;
5. Included in the Plaintiff’s certification record is, *inter alia*, an affidavit from the proposed representative Plaintiff, J.K., in which he recounts some of his experiences while placed in Secure Isolation in various Youth Justice Facilities;
6. The Plaintiff has not been cross-examined on his affidavit and Ontario has not served or filed a responding certification record;
7. Ontario brought a motion for an order: (i) declaring that a broad array of J.K.’s records, from before, during and after his time incarcerated as a minor, were necessary for the fair determination of the certification motion; and, (ii) directing the Plaintiff to consent to an application in the Ontario Youth Justice Court for access to such records. The records requested by Ontario are controlled by a number of government agencies and/or ministries, including the Ontario Ministry of Children and Youth Services, the Royal Canadian Mounted Police, Correctional Services Canada, and by Youth Justice Court staff employed by the Ontario

Ministry of the Attorney General. That motion was heard by Justice Perell on December 13, 2016;

8. All interested Federal and Provincial government agencies were not provided with notice of the December 13, 2016 motion;

9. By reasons dated December 22, 2016, and in the Order, Justice Perell:

a) ordered the Plaintiff to bring an application to the Ontario Youth Justice Court, under section 119(1) of the *Youth Criminal Justice Act*, for an order for production of the Youth Records;

b) ordered that the Youth Records are relevant to the 'some basis in fact' evidentiary standard at the forthcoming certification motion of this matter, under the two-step common issue analysis in section 5(1)(c) and the preferable procedure analysis under 5(1)(d) of the *Class Proceedings Act, 1992*;

c) ordered that in the event the Plaintiff does not bring an application to the Youth Justice Court for access to such Youth Records as ordered to be produced, or does not bring the application in good faith, the within action shall be permanently stayed; and,

d) ordered that in the event the Plaintiff's application to the Youth Justice Court for access to records is denied by the Youth Justice Court, the within action shall be permanently stayed;

10. The certification motion in this proposed class proceeding is currently scheduled to be heard on September 11-12, 2017;

Grounds for Appeal

11. The motion judge erred in law by way of the following errors in his reasons:
- a) by failing to apply or follow the established line of case law that a defendant has no right to pre-certification production unless necessary and relevant to the certification criteria;
 - b) by applying an incorrect evidentiary test for ‘some basis in fact’ of commonality under section 5(1)(c) of the *Class Proceedings Act, 1992* by stating it requires the following two-step analysis: (1) the proposed common issue actually exists; and, (2) the proposed common issue can be answered in common across the entire class, without adequate reasons and contrary to, *inter alia*, the Supreme Court of Canada's decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57;
 - c) by declaring that the Youth Records will be relevant to the preferable procedure analysis under s. 5(1)(d) of the *Class Proceedings Act, 1992*, without adequate reasons, contrary to the legislative requirements under the *Class Proceedings Act, 1992* and binding jurisprudence;
 - d) by bringing the merits of J.K.'s claim into issue at the forthcoming certification motion, contrary to the *Class Proceedings Act, 1992* and binding jurisprudence;
 - e) by declaring that the ‘some basis in fact’ evidentiary standard does not impact the rules of evidence on a certification motion, contrary to binding jurisprudence;

- f) by declaring that Ontario was and is entitled to cross-examine the Plaintiff on all aspects of any issue raised in his certification affidavit, beyond the scope of the certification criteria, contrary to binding jurisprudence;
- g) by permitting Ontario to discover the Plaintiff prior the delivery of its responding certification record and prior to any cross-examination on the Plaintiff's certification record, contrary to principles of procedural fairness and the *Class Proceedings Act, 1992*;
- h) by exceeding his jurisdiction as a Superior Court of Justice judge by:
 - i. indirectly ordering production of Youth Records in the Youth Justice Court;
 - ii. ordering that the Plaintiff 'consent' to an application in the Youth Justice Court for the production of his individual Youth Records, despite an ordered consent being no consent at all and a contradiction in terms;
 - iii. declaring that this proposed class proceeding shall be permanently stayed should the Plaintiff not apply to the Youth Justice Court for production of his ordered Youth Records, or not apply in good faith, or if the Plaintiff is unsuccessful for any reason; and,
 - iv. ordering the permanent stay of this proposed class proceeding despite any argument or request for such a stay by any party at the December 13, 2016 motion, or in their written materials;

- i) by failing to adequately consider the nature of a class proceeding rooted in systemic negligence, breach of fiduciary duty and/or breaches of the *Canadian Charter of Rights and Freedoms* by focussing on the merits of the representative plaintiff's case;
 - j) by declaring that a common issues trial judge will not be able to provide access to justice for all class members without access to the Youth Records of J.K.;
 - k) by declaring that the outcome of an application to the Ontario Youth Justice Court could impact J.K.'s ability to serve as a suitable representative plaintiff for the Class, contrary to the legislative requirements in section 5(1)(e) of the *Class Proceedings Act, 1992*;
 - l) by making the Order without proper notice to interested parties including the Royal Canadian Mounted Police, the Ontario Ministry of the Attorney General, and the Attorney General of Canada; and,
 - m) by failing to consider the applicable test under Rule 30.10 of the *Rules of Civil Procedure*;
12. The motion judge further erred by pre-judging the common issues of this proposed class proceeding without the benefit of a full record, thereby raising a reasonable apprehension of bias such that the motion judge should be removed as the case management judge;
13. Sections 6(1)(b) and 134(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43;
14. Rule 61.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and,

15. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. Section 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c.43;
2. Rule 61.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended;
3. The Order is final as it concerns a question of jurisdiction and a permanent stay of this proposed class proceeding;
4. Appeals pursuant to the *Youth Criminal Justice Act* lie to this Court; and,
5. Leave to appeal is not required.

THE APPELLANT REQUESTS that this appeal be heard at Toronto, Ontario.

January 2, 2017

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J.K. Plaintiff/Appellant and HMQ Defendant/Respondent

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Proceeding under the *Class Proceedings Act, 1992*

APPELLANT'S CERTIFICATE

The appellant certifies that the following evidence is required for the appeal, in the appellant's opinion:

1. All evidence before the court on the *Youth Criminal Justice Act* records production motion.

January 5, 2017

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