CITATION: J.K. v. Ontario, 2016 ONSC 8040
COURT FILE NO.: CV-16-543895CP
DATE: 20161222

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
J.K.	)	*Jay Strosberg, Kirk Baert,* and *James Sayce* for the Plaintiff
Plaintiff	)	
– and –	)	
HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO	)	*Christopher A. Wayland* and *Jonathan Sydor* for the Defendant
Defendant	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: December 13, 2016

PERELL, J.

REASONS FOR DECISION

1. Introduction

[1] J.K., the Plaintiff in this proposed class action under the *Class Proceedings Act, 1992*, S.O. 1992, sues Her Majesty the Queen in Right of the Province of Ontario ("the Crown") on behalf of "all persons who were/are detained and/or incarcerated at one of the [youth detention centres] from January 1, 2007 to the present and were placed in secure isolation while under the age of 18. J.K. alleges that in the operation, oversight, or management of the [youth detention centres], the Crown was negligent, in breach of fiduciary duties, and has breached the Class Members' rights under sections 7, 9, and 12 of the *Canadian Charter of Rights and Freedoms.*

[2] At various times, J.K. was incarcerated at three youth detention centres; i.e., the Genest Detention Centre for Youth, the Sprucedale Youth Centre, and the Roy McMurtry Youth Centre ("the Facilities").

[3] For the purposes of the pending certification motion, J.K. delivered an affidavit in which he recounts some of his experiences, including a description of the youth detention centres and of his confinements in secure isolation, which is also described as solitary confinement.

[4] The Crown wishes to cross-examine J.K., and it wishes to obtain production of a variety of what are described as "Youth Records" under the *Youth Criminal Justice Act,* S.C. 2002, c. 1. J.K., however, refuses to produce the documents, and he submits that the Superior Court does not have jurisdiction to order him to produce the documents because of s. 118 of the *Youth Criminal Justice Act,* which prohibits access to Youth Records unless authorized under that *Act.*

[5] In response to J.K's motion for certification, the Crown seeks an order: (1) declaring that the Youth Records are necessary for the fair determination of the certification motion; and (2) directing J.K. to consent to an application in the Youth Justice Court for access to all of his records maintained by the three facilities, his probation records and various other records maintained by the Ministry of Community and Youth Services (the "MCYS").

[6] Authorizations are available from judges of the Youth Justice Court, and J.K. submits that the Superior Court does not have jurisdiction to order him to consent to an application by the Crown to obtain the Youth Records. Further, J.K. submits that if this court has jurisdiction to order him to produce the requested Youth Records, the court ought not to exercise that jurisdiction because the Crown has not satisfied the onus on it to show that the Records are relevant to the certification motion and that, in any event, the request is too broad and beyond what might be produced for the certification motion.

2. Factual Background

[7] Before the age of 18, J.K. was convicted of several criminal offences, and he was incarcerated at the Genest Detention Centre for Youth, the Sprucedale Youth Centre, and the Roy McMurtry Youth Centre.

[8] During his incarcerations at the Genest Detention Centre for Youth (from 2013 to 2015) and the Roy McMurtry Youth Centre (2015), J.K. was placed in secure isolation several times.

[9] J.K.'s first placement in secure isolation occurred when he was 15 years old. He testified that at the Genest Detention Centre, he was often isolated from other inmates and confined to "the Bubble" without access to fresh air and rare access to the cafeteria or gymnasium and that between four and six times, he was placed in the "quiet room", which was the detention centre's secure isolation cell. He described the quiet room as a small soiled room with no bathroom, bed, chair, or mat. He said his placements lasted up to 12 hours each time.

[10] At the Roy McMurtry Youth Centre, J.K. testified that he was placed in secure isolation for two days shortly after his arrival. Later, he was sent to secure isolation because staff members said he "looked suspicious". J.K. said the secure isolation cell was a small room with only a mat and a toilet and basin. The window was covered and there was no natural light. The room was dirty, soiled, and infested with ants.

[11] At the Sprucedale Youth Centre, where J.K. was detained for only a brief time, he was not placed in secure isolation. He said that he saw the isolation cell, however, which was a small dirty cell in the basement of the detention centre.

[12] J.K. testified that he was traumatized and in despair and that he suffered and continues to suffer mental health problems as a result of his experiences.

[13] In his proposed class action, J.K. proposes the following common issues:

> a. By its operation, oversight and/or management of the Facilities from January 1, 2007 to the present, did the defendant breach a duty of care it owed to the Class to protect them from actionable physical or mental harm?
>
> b. By its operation, oversight and/or management of the Facilities from January 1, 2007 to the present, did the defendant breach a fiduciary duty it owed to the Class

to protect them from actionable physical or mental harm?

c. By its operation, oversight and/or management of the Facilities from January 1, 2007 to the present, did the defendant breach the rights of the Class under sections 7, 9, and or 12 of the *Charter?*

d. If the answer to any of common issues (a), (b) or (c) is "yes", can the Court make an aggregate assessment of the damages suffered by all Class Members as part of the common issues trial?

e. If the answer to any of common issues (a), (b) or (c) is "yes", is the defendant guilty of conduct that justifies an award of punitive damages?; and,

f. If the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

[14] In support of his certification motion, J.K. relies on a report entitled "*It's a matter of time: Systemic review of secure isolation in Ontario Youth Justice Facilities*", which is a report prepared by the Provincial Advocate for Children and Youth. The report reviews the use of secure isolation across the province and relies upon statistical data from the MCYS as well as interviews with youths who were placed in secure isolation.

[15] Reports and records are kept when a young person is incarcerated including records with information about his or her being placed in secure isolation. Institutional records are stored at the detention centre, and other records are stored with probation officers and at the MCYS.

[16] The MCYS maintains a Secure Isolation Database that contains information about the placement of young persons in secure isolation at a detention facility. The information is based on data received on Monthly Secure Isolation Report Summaries from the MCYS Direct Operated Facilities Branch and from each facility. The database includes the name of the facility, the name, age and birthdate of the young person, the Youth Offender Tracking Information System ("OTIS") number, date of placement in secure isolation, duration of placement, and details of the reason for the placement in accordance with the *Child and Family Services Act*, R.S.O. 1990, c. C.11.

[17] The Youth Records are subject to the *Youth Criminal Justice Act*. Section 118 (1) of the *Act* prohibits access to records unless authorized under the *Act*. Authorizations under the Act are by order of a judge of the Youth Justice Court. In *S.L. v. N.B.*, [2005] O.J. No. 1411 (C.A.), the Court of Appeal held that the access to document provisions of the *Youth Criminal Justice Act* are a comprehensive scheme designed to control access to young offender records and that the *Act* provides the exclusive means by which access may be obtained to documents that constitute records under the *Act*.

[18] The Crown requests that J.K. produce the following 10 documents from his institutional records:

1. Youth OTIS client profile with picture
2. Youth OTIS Summary
3. Youth Management Plans
4. Behaviour Reports

5. Serious Occurrence Reports
6. Occurrence Reports
7. Secure Isolation/Incident Interval Review Checklists (a record created at each incident of secure isolation)
8. Secure Isolation Release Plan
9. Secure Isolation Observation/Placement Review
10. Secure Isolation Observation Logs

[19] It should be noted that these 10 documents are a small subset of the set of documents that comprise Youth Records.

[20] Further, The Crown requests that J.K. produce the Serious Occurrence Reports from his probation records and the Secure Isolation Report Summaries and related correspondence from the MCYS offices.

[21] Finally, the Crown requests that J.K. produce his criminal history file from the Canadian Police Information Centre (CPIC).

[22] The Crown submits that the Youth Records are relevant to the certification motion with respect to: (a) whether J.K was in secure isolation; (b) if J.K. was in secure isolation, particulars of the institution, the time in isolation; (c) whether the placement was in conformity with the governing legislation; (d) whether J.K. is an appropriate representative plaintiff; and (e) to test J.K.'s credibility on the matters about which he deposed in his affidavit.

[23] Although J.K. concedes that the Youth Records would be relevant if his action was certified as a class action, he submits that the Crown has not met the onus that the Youth Records are relevant to the certification motion and he submits, in any event, that the court does not have jurisdiction to order him to produce his Youth Records because to do so would be contrary to the *Youth Criminal Justice Act*.

3. Discussion and Analysis

[24] The relevant provisions of the *Youth Criminal Justice Act* are set out in Schedule "A" to this decision. Without deciding the point, for the purposes of this motion, I accept that a judge of the Superior Court managing a class action is not a judge of the Youth Justice Court. I also accept that I do not have the jurisdiction to make an order under the *Youth Criminal Justice Act* to grant access to the Youth Records. Further, without deciding the point, I will assume that I do not have the jurisdiction to order J.K. to consent to the Crown's application under the *Youth Criminal Justice Act*. That being the circumstances, I view the matter before the court as involving two questions.

[25] The first question is whether pursuant to my authority under the *Class Proceedings Act, 1992*, I should order J.K. to apply, pursuant to the *Youth Criminal Justice Act*, for an order for the production of his Youth Records for the purposes of the pending certification motion. Assuming that I answer the first question in the affirmative, the second question is whether the federal legislation about Youth Records precludes the Superior Court from ordering J.K. to make an application under the *Youth Criminal Justice Act* for access to his Youth Records.

[26] Addressing the first question, in the context of pre-certification motions for the production of records, Justice Belobaba in *Brown v. Janssen Inc.*, 2015 ONSC 1434 and *Dine v. Biomet Inc.*, 2015 ONSC 1911, and I in *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2015 ONSC 7821, discussed the issue of the extent which documents (in those cases, the plaintiffs' medical records) should be produced for the purposes of a certification motion, which is a procedural motion to determine whether the criteria for certification have been satisfied and where with the exception of the cause of action criterion, the evidentiary onus on the plaintiff is to show only some basis in fact that the certification criteria have been satisfied.

[27] With some slight modifications, I agreed with Justice Belobaba that pre-certification, there should be a focused and limited production of those documents that are shown to be relevant to the issues on certification and that the onus was on the party requesting the documents to explain why the requested documents were relevant to the issues on certification. My modifications were to note that class actions are not monolithic and that a case-by-case analysis was required to determine the extent to which the defendant must explain the relevancy of the requested documents.

[28] In the case at bar, with the exception of the criminal history file from CPIC, it is patently obvious to me that the requested Youth Records are relevant to the certification criterion, most particularly to the common issues and preferable procedure criteria.

[29] In his affidavit J.K. sensibly and inevitably made an issue of the details of his secure isolation placements, including the frequency and duration of his placements. The proposed common issues for the class actions concern the details of the circumstances and the duration of the placements in secure isolation. J.K. did not simple depose that he was placed in secure isolation. He did not simply rely on the "*It's a matter of time*" report, he testified about "his time" in secure isolation in the Youth Justice Facilities. J.K. gave the details of his placements to the extent that he could remember them, but the actual time records are available to refresh his memory.

[30] J.K. delivered an affidavit for the certification motion. As a matter of due process, the Crown is entitled to cross-examine him. The some basis in fact standard does not immunize J.K. from cross-examination. The some basis in fact standard does not change the rules of evidence. In the context of commonality, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class: *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.). The Crown is entitled to cross-examine and explore the commonality of the proposed common issues. The some basis in fact standard may tip the playing field for the certification motion in favour of plaintiff, but it does not red card the defendant and take him or her totally out of the game.

[31] With the exception of J.K.'s criminal history file from CPIC, the case at bar is not like *Papassay v. HMQ,* 2016 ONSC 7014, where the requested documents were produced for a pre-certification cross-examination, but Justice Pierce, following *Dine v. Biomet Inc.*, 2015 ONSC 1911, ruled that the documents did not have to be marked as exhibits because the pertinent information contained in the documents was otherwise available and because the other information would encumber the record with irrelevancies and distract the court from a focused analysis of the issues to be decided on the certification motion. In the immediate case, the

information will not encumber the record with irrelevancies and it will not distract the court from a focused analysis of the issues to be decided.

[32] With the exception of J.K.'s criminal history file from CPIC, I am satisfied that the Crown has shown the relevance of its requests for Youth Records. As for the criminal history file, it appears to have been requested mainly for the purposes of obtaining information to embarrass or discomfort J.K. Further, this history will offer little relevant information about what happened to J.K. at the facilities apart from explaining why he was there, which having regard to the other Youth Records to be produced, is redundant information.

[33] Turning then to the second question of whether the federal *Youth Criminal Justice Act* precludes the Superior Court from ordering J.K. to make an application under the *Youth Criminal Justice Act* for the requested Youth Records, in my opinion, the answer to this question is no.

[34] As noted above, I assume that this court does not have the jurisdiction to order that the requested Youth Records be produced, which is an order to be made by a Youth Justice Court judge. However, I see no prohibition from ordering J.K. to make an application under the *Youth Criminal Justice Act* to a Youth Justice Court judge for the records. J.K. is expressly qualified to make that application under the *Act*. Under s. 119 (1), if a Youth Justice Court judge is satisfied that access to the Youth Records is desirable in the interests of the proper administration of justice, including a civil lawsuit, he or she may give access to Youth Records to any person for whom the judge considers has a valid interest in the records: *W.C. Chatterton Holdings Inc. (c.o.b. Stedmans V & S) v. John Doe*, 2011 ONCJ 441.

[35] I cannot see how this court requiring J.K. to do something he is qualified to do can be said to be an instance of this court doing indirectly what it cannot do directly. This court is rather directing J.K. to do what he is entitled to do. If he applies, as he is entitled to do, and the application is made in good faith and the Youth Justice Court grants the application, it will be the Youth Justice Court judge that will have decided that the Youth Records are produced. If J.K. applies in good faith and the Youth Justice Court judge decides that the Youth Records should not be produced, then, once again, it will be a decision of the Youth Justice Court, not a decision of this court.

[36] The case at bar is distinguishable from *Lomas v. Rio Algom Ltd.* (2010), 99 O.R. (3d) 161 (C.A.). In *Lomas*, reversing the Divisional Court, the Court of Appeal held that since the Supreme Court of Canada had held in *Buschau v. Rogers Communications Inc.*, [2006] 1 S.C.R. 973 that the Superior Court did not have the jurisdiction to order a pension plan to be wound up, the Superior Court also did not have the jurisdiction to order an employer to apply under the *Pension Benefits Act,* R.S.O. 1990, c. P.8 to the Superintendent to have the pension plan wound up. The Court of Appeal held that it would be contrary to the scheme of the *Pension Benefits Act* to make such an order and that the Superior Court could not do indirectly what it did not have the jurisdiction to do directly.

[37] In the immediate case, there is no doubt that this court has the jurisdiction under the *Class Proceedings Act, 1992* to order J.K. to produce documents both pre-certification and post-certification. In the immediate case directing J.K. to make an application to the Youth Justice Court to obtain the documents he needs for his proposed class action is not inconsistent with the scheme of the *Youth Criminal Justice Act*, which envisions that such applications can be made by the young person and by others and which *Act* empowers the Youth Justice Court judge to give

access to the Youth Records, if the Youth Justice Court judge concludes that providing access is desirable in the interests of the proper administration of justice. I am satisfied that I am not precluded by the *Youth Criminal Justice Act* from directing a litigant before me to make an application to the Youth Justice Court.

[38] I appreciate that there is very high degree of right to privacy that is protected by the *Youth Criminal Justice Act* and that there are excellent policy reasons for protecting access to the records, but by commencing this class action and by delivering an affidavit, J.K. has waived his right of privacy while at the same time preserving the rights of privacy of the putative Class Members, who under the *Class Proceedings Act, 1992*, are protected from discovery without leave of the court. To be a representative plaintiff is to be a champion for the class and I anticipate that J.K. will be prepared to be a champion and make the necessary disclosure of relevant documents. Appropriate orders can be made to seal the court file and J.K. is also protected by the deemed undertaking rule.

[39] If J.K. does not apply to the Youth Justice Court or if he does not apply in good faith making a sincere request for the requested Youth Records, which documents are needed for the purposes of his own proposed class action, then I will stay his proposed class action. If he applies in good faith and the Youth Justice Court judge dismisses his request, then once again I will stay his proposed class action. If it is true, as J.K. submits, that the Superior Court cannot have the Youth Records produced pre-certification because the court does not have any means to have the documents proffered to it, then it follows that this state of affairs will persist post-certification and last through the common issues trial and into the individual issues trials. If all that be true, then in my opinion, this action must be stayed unless a representative plaintiff is prepared to come forward to disclose his or her Youth Records. This class action turns on the details of J.K.'s and the Class Members' placements in secure isolation. At the common issues trial, proof will be on the balance of probabilities and not based on a hearsay report about what occurs at the detention centres. In the immediate case, I find it unfathomable to think that without a representative plaintiff's Youth Records, this court could provide access to justice to J.K., the Class Members, the Crown, and the witnesses from the various detention centres whose employment and careers may be imperiled by this class action.

4. Conclusion

[40] For the above reasons, I order J.K. to produce the requested Youth Records failing which I shall stay his action as aforesaid.

[41] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Crown's submissions within 20 days of the release of these Reasons for Decision followed by the written submissions of J.K. within a further 20 days.

Perell, J.

Released: December 22, 2016

Schedule "A"

YOUTH CRIMINAL JUSTICE ACT, S.C. 2002, c. 1

Youth Justice Court

Designation of youth justice court

13 (1) A youth justice court is any court that may be established or designated by or under an Act of the legislature of a province, or designated by the Governor in Council or the lieutenant governor in council of a province, as a youth justice court for the purposes of this Act, and a youth justice court judge is a person who may be appointed or designated as a judge of the youth justice court or a judge sitting in a court established or designated as a youth justice court.

Deemed youth justice court

(2) When a young person elects to be tried by a judge without a jury, the judge shall be a judge as defined in section 552 of the *Criminal Code*, or if it is an offence set out in section 469 of that Act, the judge shall be a judge of the superior court of criminal jurisdiction in the province in which the election is made. In either case, the judge is deemed to be a youth justice court judge and the court is deemed to be a youth justice court for the purpose of the proceeding.

Deemed youth justice court

(3) When a young person elects or is deemed to have elected to be tried by a court composed of a judge and jury, the superior court of criminal jurisdiction in the province in which the election is made or deemed to have been made is deemed to be a youth justice court for the purpose of the proceeding, and the superior court judge is deemed to be a youth justice court judge.

Youth justice court, review board and other courts

114 A youth justice court, review board or any court dealing with matters arising out of proceedings under this Act may keep a record of any case that comes before it arising under this Act.

Police records

115 (1) A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence.

Extrajudicial measures

(1.1) The police force shall keep a record of any extrajudicial measures that they use to deal with young persons.

Police records

(2) When a young person is charged with having committed an offence in respect of which an adult may be subjected to any measurement, process or operation referred to in the *Identification of Criminals Act*, the police force responsible for the investigation of the offence may provide a guilty of the offence, the police force shall provide the record.

Records held by R.C.M.P.

(3) The Royal Canadian Mounted Police shall keep the records provided under subsection (2) in the central repository that the Commissioner of the Royal Canadian Mounted Police may, from time to time, designate for the purpose of keeping criminal history files or records of offenders or keeping records for the identification of offenders.

Government records

116 (1) A department or an agency of any government in Canada may keep records containing information obtained by the department or agency

(a) for the purposes of an investigation of an offence alleged to have been committed by a young person;

(b) for use in proceedings against a young person under this Act;

(c) for the purpose of administering a youth sentence or an order of the youth justice court;

(d) for the purpose of considering whether to use extrajudicial measures to deal with a young person: or

(e) as a result of the use of extrajudicial measures to deal with a young person.

Other records

(2) A person or organization may keep records containing information obtained by the person or organization

(a) as a result of the use of extrajudicial measures to deal with a young person: or

(b) for the purpose of administering or participating in the administration of a youth sentence.

No access unless authorized

118 (1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.

Persons having access to records

119 (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:

(a) the young person to whom the record relates;

(b) the young person's counsel, or any representative of that counsel;

(c) the Attorney General;

(d) the victim of the offence or alleged offence to which the record relates;

(e) the parents of the young person, during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;

(f) any adult assisting the young person under subsection 25(7), during the course of any proceedings relating to the offence or alleged offence to which the record relates or during the term of any youth sentence made in respect of the offence;

(g) any peace officer for

(i) law enforcement purposes, or

(ii) any purpose related to the administration of the case to which the record relates, during the course of proceedings against the young person or the term of the youth sentence;

(h) a judge, court or review board, for any purpose relating to proceedings against the young person, or proceedings against the person after he or she becomes an adult in respect of offences committed or alleged to have been committed by that person;

(i) the provincial director, or the director of the provincial correctional facility for adults or the penitentiary at which the young person is serving a sentence:

(j) a person participating in a conference or in the administration of extrajudicial measures, if required for the administration of the case to which the record relates;

(k) a person acting as ombudsman, privacy commissioner or information commissioner, whatever his or her official designation might be, who in the course of his or her duties under an Act of Parliament or the legislature of a province is investigating a complaint to which the record relates;

(l) a coroner or a person acting as a child advocate, whatever his or her official designation might be, who is acting in the course of his or her duties under an Act of Parliament or the legislature of a province;

(m) a person acting under the *Firearms Act*;

(n) a member of a department or agency of a government in Canada, or of an organization that is an agent of, or under contract with, the department or agency, who is

(i) acting in the exercise of his or her duties under this Act,

(ii) engaged in the supervision or care of the young person, whether as a young person or an adult, or in an investigation related to the young person under an Act of the legislature of a province respecting child welfare,

(iii) considering an application for conditional release, or for a record suspension under the *Criminal Records Act,* made by the young person, whether as a young person or an adult.