

ENDORSEMENT ON THE RECORD

Superior Court of Justice, District of Thunder Bay

File No:

Papassay Vs. HMO

Date:

Endorsement

Sept 12/17
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The plaintiff argues that the class should be open-ended on the ground that the evidence & policy point to a shared common interest in accordance with the reasoning in *Berg v Canadian Hockey League* [2017] O.J. No. 2100, par 158; & *Wright v United Parcel Service Canada* [2011] O.J. No 3936, paras 196.

The defendant submits that an open class is not appropriate here as:

- 1 the issue was not argued at certification;
- 2 the noun ~~is~~ is to set an end-date for the class;
- 3 multiple opt out dates cause confusion - & an open-ended class requires on-going review of records;
- 4 there has been no adjudication that proposed future class members will be part of the class.

In my view, it would be premature to expand the class on a motion to settle the judgment when the issue was not argued at the certification motion. As discussed at para. 160 of *Berg*, there has been no adjudication to determine whether circumstances of new class members since certification are on the same footing as class members certified, ~~pass~~ for example, with respect to whether they are Crown wards, or concerning

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preservation of evidence to ground an application to the Criminal Injuries Compensation Board or a civil suit. Management of the litigation is also problematic. Currently the defendant has more than 1000 boxes of documents to review as part of the discovery process for a class estimated to be more than 80,000 Crown wards.

In my view, the approach of *Pierce J.* at par. 162 ^{of 369} ¹⁵⁹ more appropriate to the facts of this case ~~in~~ the certification motion.

set out

The class definition is amended to add a class closing date as of the date of the certification ~~making~~, being March 30/17.

This amendment is made without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.

Pierce J.

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Sept 12/17 In my view there is no reason to depart from the normal rule that the class plaintiffs pay the cost of notice of certification. There is no evidence of impecuniosity on the part of the plaintiffs who, if successful, can expect to recover these costs in the litigation. Therefore, the costs of notification shall be born by the plaintiffs.

Pierce J.

With respect to the timetable for production of the defendant's documents, the plaintiff's proposal: Nov. 1/17 & Feb 28/18 is unrealistic given the myriad sources of paper & electronic documents, the quantity - approx 600 boxes; the necessity to review them for relevance & privilege & the processing required to process & code these documents. It is to the advantage of the plaintiffs & the court that documentary production & cataloguing be (over)

≡ done once in a comprehensive & manageable fashion for subsequent use in the litigation.

Therefore the defendant shall produce its documents by Sept 11, 88. Timetable for steps leading to trial is amended accordingly.

Pine J.

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Date:	Endorsement:
<p>Sept 12/17 doesn't</p>	<p>The plaintiffs seek an order for mediation in accordance with a proposed timetable. The defendants object object to the concept of the proposed mediator but has ^{was} no instructions although motion materials were served on Aug. 4/17. It is in the interests of all parties that a mediation be undertaken to explore resolution or at least narrowing of the issues.</p> <p>A mediation is therefore ordered with Ronald Slight, Q.C. to be named as the mediator (assuming his consent).</p> <p>Parties are to meet no later than the week of Nov. 13/17 to discuss a timetable for mediation. Failing agreement, counsel may obtain an appointment with me to rule on the timetable. Leave is granted to appear by teleconference.</p>

Pierce J.

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Superior Court of Justice, District of Thunder Bay

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Papassay vs. HMO

Date:	Endorsement:
Sept. 12/17	Discovery plan is approved as amended. Costs of today are reserved. Pierce J

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**TONI GRANN, ROBERT MITCHELL, DALE GYSELINCK and LORRAINE EVANS
Plaintiffs**

- and -

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

Proceeding under the *Class Proceedings Act, 1992*

**DISCOVERY PLAN
(dated as of September, 2017)**

1.	Applicable Procedural Regime:	Ontario Superior Court of Justice Proceeding under the <i>Class Proceedings Act, 1992</i>
2.	Legal Issues For Determination at Trial	The legal issues for determination at trial consist of the common issues certified pursuant to Order of Justice Pierce dated March 30, 2017 (the " Certification Order ") (attached as Schedule "A") as informed by the pleadings in the action (the " Legal Issues for Determination at Trial ").
3.	Scope of Documentary Discovery	<p>This Discovery Plan only covers production of documents created by [date of Discovery Plan]. Further production will be in a form and manner agreed to by the parties or otherwise ordered by the court.</p> <p><u>A. Scope of Discovery</u></p> <p>Each party shall disclose in an affidavit or list of documents that is in its possession, control or power that are relevant to the Legal Issues for Determination at Trial.</p> <p>Notwithstanding anything in this discovery plan, neither party is obligated to produce documents that are subject to claims of privilege or whose disclosure is restricted by operation of any applicable laws.</p>

B. Definitions

"Class" or "Class Member" means a member of the class as defined in the Certification Order.

"Document" in this plan means any document whatsoever, whether in physical or electronic form, including items defined as "documents" in Rule 30.01(1)(a) of the *Rules of Civil Procedure*, including a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form.

C. Scope of Documents to be Disclosed and Produced by the Plaintiffs

(i) communications and other Documents relevant to the Legal Issues for Determination at Trial; and

(ii) Documents relevant to the Legal Issues for Determination at Trial received in response to requests made pursuant to the *Freedom of Information and Protection of Privacy Act*;

D. Scope of Documents to be Disclosed and Produced by the Defendant

The Defendant will produce all Documents relevant to the Legal Issues for Determination at Trial, subject to the qualifications above relating to privilege and restrictions on disclosure. As part of its production, the Defendant agrees to produce the following Documents:

(i) Organizational Charts of the Relevant Ministries

All organizational charts of the Ministry of Community and Social Services and predecessor ministries that interfaced with Children's Aid Societies ("CAS") during the class period.

(ii) Document Management Systems

All Documents that were in effect during the relevant period relating to document management, document retention and document disposal.

(iii) Manuals and Operational Procedures and Policies Etc.

All relevant Documents, including manuals, procedures, policies, memoranda, letters, notes, handbooks, newsletters, communiques, e-communiques, guides, and reviews, and relevant drafts thereof that reflect relevant changes including but not limited to those concerning:

- i. advice to anyone, including Crown wards, CASs, Crown Ward Reviewers, and the Defendant's employees concerning the availability of or Class Members' entitlement to compensation for criminal and tortious acts to

		<p>which they were victims;</p> <ul style="list-style-type: none">ii. the collection and preservation of evidence, including documents, reports, and investigations, in respect of the criminal and tortious acts to which the Class Members were victims;iii. the provision of copies of evidence, including documents, reports, and investigations, to Class Members of the criminal and tortious acts by which they were victims;iv. advice concerning the provision, retention or advise by counsel or the provision or retention of counsel for Class Members in respect of the criminal and tortious acts to which they were victims;v. advice or instructions to Class Members, CASs, Crown Ward Reviewers, employees of the Defendant or anyone else concerning the Class Members' rights to make applications for compensation to the Criminal Injuries Compensation Board or to seek damages by way of civil action;vi. test cases for applications on behalf of Class Members for compensation from the Criminal Injuries Compensation Board or the commencement of civil proceedings;vii. applications on behalf of Class Members for compensation from the Criminal Injuries Compensation Board or the commencement of civil proceedings;viii. steps taken by the Defendant, if any, to ensure it was not in a conflict of interest with Class Members concerning their entitlement to compensation from the Criminal Injuries Compensation Board or to damages by way of civil action;ix. advice or instruction concerning limitation periods for Class Members' entitlement to compensation from the Criminal Injuries Compensation Board or to damages by way of civil action;x. number of Class Members. <p><u>(iv) Position Statements</u></p> <p>Documents relevant to the Defendant's position on whether policies and procedures ought to have been developed and implemented to ensure that applications were made to the Criminal Injuries Compensation Board or civil claims for damages were commenced on behalf of Class Members.</p> <p><u>(v) Crown Ward Review</u></p> <p>Documents relating to the inclusion or omission of questions relating to applications to the Criminal Injuries Compensation Board or for civil claims, or with respect to</p>
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collection and preservation of evidence, in the Crown Ward Review forms, and all Documents relating to the implementation of the Crown Ward Review process in respect to those areas.

(vi) Statistics, Studies Etc.

All papers, studies, surveys and reviews performed by the Defendant or CASs concerning applications to the Criminal Injuries Compensation Board or claims for civil damages on behalf of Class Members, and any statistics relating to such applications or claims.

(viii) Correspondence

All correspondence with representatives from other Provinces or Ministries concerning applications to the Criminal Injuries Compensation Board or claims for civil damages on behalf of Class Members.

(ix) Budgeting and Budgetary Constraints

Documents relevant to requests for and provision of funding for resources to take steps to advance, protect, preserve and advise Class Members of their entitlement to compensation from the Criminal Injuries Compensation Board or to damages by way of civil action.

(x) E-mails and correspondence

E-mails shall be produced from selected custodians using key word searches to be agreed to between the parties upon the application of a privilege screen. Within two weeks of the delivery of organization charts identified herein, parties shall meet and confer in order to identify custodians which may hold relevant searches for which the Defendant shall produce copies of relevant e-mails and correspondence.

(xi) CAS Policies and Procedures

All CAS manuals, procedures, policies, memoranda, letters, notes, handbooks, newsletters, communiques, e-communiques, guides, correspondence and reviews concerning Class Members' entitlement to compensation from the Criminal Injuries Compensation Board or to damages by way of civil action.

The preceding general categories of documents do not limit the Defendant's and Plaintiffs' obligation to produce all relevant documents requested or required by both parties, and is without prejudice to any position the parties may take with respect to the relevance of particular documents or categories of documents, or to positions regarding proportionality in discovery.

In addition, the parties reserve all rights pursuant to the *Rules of Civil Procedure*, to bring a motion to compel production of any documents which they believe to be

	relevant, if not voluntarily produced.
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Affidavits of Documents:	<p>Format for the schedules: The schedule shall be produced in accordance with the format outlined in the attached Schedules "B" and "C".</p> <p>The parties shall exchange sworn affidavits of documents, including a detailed and itemized Schedule "B" that identifies: (a) recipient; (b) sender; (c) date of document; (d) detailed description of document; (e) basis for claim of privilege.</p> <p>Delivery deadline: in accordance with discovery timetable</p>
Production and Exchange of Documents:	Documents to be produced in accordance with the Document Exchange Protocol attached hereto as Schedule "B", "C" and "D" .
Oral Discovery:	<p><u>Name of Party:</u> Toni Grann Name, Title of Discovery Witness: Toni Grann, representative plaintiff Dates for Discovery: On a mutually convenient date in accordance with discovery timetable.</p> <p><u>Name of Party:</u> Dale Gyselinck Name, Title of Discovery Witness: Toni Grann, representative plaintiff Dates for Discovery: On a mutually convenient date in accordance with discovery timetable.</p> <p><u>Name of Party:</u> Robert Mitchell Name, Title of Discovery Witness: Toni Grann, representative plaintiff Dates for Discovery: On a mutually convenient date in accordance with discovery timetable.</p> <p><u>Name of Party:</u> Lorraine Evans Name, Title of Discovery Witness: Toni Grann, representative plaintiff Dates for Discovery: On a mutually convenient date in accordance with discovery timetable.</p> <p><u>Name of Party:</u> Her Majesty the Queen in Right of Ontario Name, Title of Discovery Witness: To be determined. Following the delivery of the Defendant's documents, the plaintiffs' counsel will advise of the person(s) from whom oral discovery is sought. Should the parties be unable to reach agreement on</p>

	<p>such person(s), the matter will be remitted to the court for determination.</p>
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Dates for Discovery:

On a mutually convenient date in accordance with discovery timetable.

SCHEDULE "A"
[CERTIFICATION ORDER]

SCHEDULE "B"

DOCUMENT EXCHANGE PROTOCOL FOR ESI AND PAPER PRODUCTIONS

1. ***TIFF Images.*** Unless otherwise stated in this Production Protocol, each document shall be provided in black and white, 300 DPI resolution, single-page Tagged Image File Format ("TIFF") regardless of whether such documents are stored by the parties in the ordinary course of business in electronic or hard copy form. All documents will be produced in TIFF format showing track changes. Parties may request that specific documents be produced in native format, and, notwithstanding the foregoing, all Excel spreadsheets, audio/video files and Microsoft Project Files will be exchanged in native format (unless redactions are required).
2. ***Load File(s).*** Document productions shall include csv, dii, image, native (for excel or Microsoft Project Files) and OCR or any comparable format. Any audio/video files will be provided separately.
3. ***Image File Name.*** Each document image file shall be named with the unique Bates/docid Number followed by the appropriate file extension ie. TIF, jpg., xls.
4. ***Document Unitization.*** If a document is more than one page, the unitization of the document and any attachments and/or affixed notes shall be logically unitized.
5. ***Colour.*** Documents shall be produced as black and white TIFF images. Upon written request, a party shall produce colour images for a reasonable number of selected documents. Documents produced in colour shall be produced as JPEG images with Exif compression and 24-bit colour depth. Each colour document image file shall be named with the unique Bates/docid Number of each page of the document in question followed by the file extension "JPG".
6. ***Redacted Images:*** The redacted portion of a document will be identified by a redaction box, a redaction/privilege field identifying that a document has been redacted will also be included in the .csv load files. The redaction/privilege field will also provide the reason for the redaction, or the type of privilege claimed over the portion of the document that is redacted.
7. ***Searchable Text.*** In addition to TIFF images, each production will include text files corresponding to the TIFF image files described above. There shall be one TXT file per document, representing all pages in a single file.
8. ***Hard Copy Documents.*** Hard copy documents shall be scanned using Optical Character Recognition ("OCR") technology and searchable ASCII text (or Unicode text if the text is in a language requiring characters outside of the ASCII character set) files shall be produced. Each file shall be named with the unique Bates/docid Number of the first page of the corresponding TIFF document followed by the extension "TXT".

9. **Electronic Documents.** The full text of each native electronic document shall be extracted ("**Extracted Text**") and produced in a text file. The Extracted Text shall be provided in searchable ASCII text format (or Unicode text format if the text is in a language requiring characters outside of the ASCII character set) and shall be named with the unique Bates Number of the first page of the corresponding TIFF document followed by the extension "TXT". Searchable text files corresponding to the TIFF image files for redacted Electronic Documents must include Extracted Text or OCR text only to the extent that it will not disclose redacted information. Parties to ensure that any documents with comprehensive content shall have associated OCR and/or Extracted Text (for example, non-searchable PDF or powerpoint presentations).
10. **Production Media.** Documents shall be produced on external hard drives or readily accessible computer or electronic media (the "**Production Media**"). If issues are discovered after production with respect to certain documents, suggest that the party who has productions issue must re-issue the full/entire document (OCR, image) as a complete load file and not only the affected portion of a document.
11. **Additional Data Fields.** The parties reserve the ability to request that Metadata and additional Data Fields be set forth or provided for certain documents upon review of the other party's production. Such requests will be considered by the other party. If there is disagreement as to whether Metadata or additional Data Fields will be provided, such disagreement will be determined via motion.
12. **Databases.** Databases are not included in this Production Protocol but shall have a record holder identify the type of database. Should such databases exist, a further discussion will be scheduled to discuss how to manage database production.
13. **Native Production.** The parties will produce spreadsheet files and recordings (e.g. excel spreadsheets) in native form. Such native file productions shall include Metadata as set forth in Section 4. Each produced native file shall be named with a unique Bates Number (e.g., ABC00000001.xls). For video/audio recordings an image placeholder will be identified as "Audio/Visual recordings will be provided separately". These files will be provided separately and identified by the bates number/docid assigned. The document produced by the party will be considered the original document. The parties reserve the ability to request other file types be produced in native form or in another reasonably usable form upon review of the other party's production. The parties reserve their respective rights to object to any such request.
14. **Paper Collection.** Appropriate subjective coding for any paper collection will also be provided. (see Schedule B where subjective coding is identified).

SCHEDULE "C"

1. Document Identifiers, Family Relationships, Common Fields for Hard Copy and Electronic Documents:

DATA FIELD	DESCRIPTION
BEGDOC/DOCID/PROD BEG BATES	Bates number assigned to each document
ATTCHIDS	Identification of docid attachments to the lead document within a family
PARENTID	Identification of the lead docid within a family
PARENTDATE/LEADDATE	Date of parent document or date email sent of parent document for all attachment family members field allows for attachment families to sort together (MM/DD/YYYY)
DOCDATE	Date of document (MM/DD/YYYY)
AUTHOR	Author(s) of document [Last Name, First Name – Corporate Affiliation]
RECIPIENTS	Recipient(s) of document [Last Name, First Name – Corporate Affiliation]
CC	The "CC" line of a produced email [Last Name, First Name – Corporate Affiliation]
DOCTYPE	Type of document
DOCTITLE	Title of document
DOCLINK	Location of native file

DRAFT

REDACT/PRIVILEGE	Tagging of documents which have been redacted together with the reason for redaction (subjectively coded) or the type of privilege claimed over the portion of the document that is redacted.
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Reservation of rights and costs

1. Notwithstanding any agreement on the format in which electronic copies are to be exchanged, the Parties reserve the right to inspect producible documents (paper and electronic) in their original form or native format, as the case may be.
2. Each party shall electronically produce the documents to the other at their own expense; however, similar to the costs of document production generally, costs are recoverable in accordance with Rule 57 of the *Rules of Civil Procedure*.
3. Where a Party requests to receive a paper copy of a document that has been produced in electronic form, the requesting Party agrees to pay the reasonable cost of the paper copy.

SCHEDULE "D"

WHEREAS this Schedule is intended to protect against the inadvertent release of documents or the inadvertent failure to redact information that should not be produced, including those for which there is a statutory or common law prohibition.

DEFINITIONS

1. For the purposes of this Schedule, the following definitions shall apply:
 - (a) **"Privileged Material"** means:
 - (i) confidential, written communications between lawyer and client for the purpose of seeking or providing legal advice (solicitor-client privilege);
 - (ii) documents produced for the dominant purpose of aiding in the conduct of litigation (i.e., litigation privilege) where such litigation or any related litigation has not terminated;
 - (iii) public interest immunity for Cabinet or government documents, if applicable; and
 - (iv) documents which are subject to a claim of privilege on any other basis recognized in law.
 - (b) **"Private and Confidential Material"** shall mean any private documents or information which is prohibited from disclosure under any statute.
 - (c) **"Irrelevant Material"** shall mean documents or information that not relevant to the Legal Issues for Determination at Trial;
 - (d) **"Inadvertent Disclosure"** means the unintended release of any Privileged Material, Private and Confidential Material or Irrelevant Material, which, upon further review, ought to have been either redacted or not produced on the grounds of privilege, public interest immunity, a common law/statutory prohibition, or irrelevance.

Clawback of Documents

2. Upon identification its Inadvertent Disclosure:

- (a) the disclosing party shall immediately notify the receiving party of its Inadvertent Disclosure and of the documents that it has inadvertently disclosed and explain the basis of its position about the propriety of the designation of Inadvertent Disclosure;
- (b) if the receiving party accepts the disclosing party's position with respect to Inadvertent Disclosure, the receiving party shall comply with the steps listed in paragraph 3;
- (c) if the parties are not able to resolve a dispute with respect to Inadvertent Disclosure, the disclosing party shall bring a motion to the court for a determination of whether the documents are Privileged Material, Private or Confidential Material or Irrelevant Material in accordance with the laws of Ontario; and
- (d) in any motion challenging the designation Inadvertent Disclosure, the burden of persuasion with respect to the propriety of the designation shall remain upon the party seeking to designate the material as Inadvertent Disclosure.

3. If the parties agree or the court orders that that disclosed information constitutes Inadvertent Disclosure, the receiving party shall:

- (a) advise all persons who may have been provided with a copy of the Privileged Material, Private or Confidential Material or Irrelevant Material to destroy it and not use it for any purpose;
- (b) delete the coded information and images associated with the Inadvertent Disclosure from the record and promptly destroy any copies made of the Inadvertent Disclosure which includes the coded information and images;
- (c) promptly return the original hard drive, CDs, DVDs, or USBs provided by the disclosing party containing the Inadvertent Disclosure;
- (d) make reasonable efforts to destroy any copies of the Inadvertent Disclosure, including any copies of the Inadvertent Disclosure that are saved on electronic devices including computers, external hard drives, USB storage keys, or any other storage device;
- (e) confirm, in writing, to the disclosing party that reasonable efforts have been made to destroy all copies of the Inadvertent Disclosure as required; and
- (f) agree not to use the Inadvertent Disclosure or any information from the Inadvertent Disclosure in the action or for any other purpose.

4. The parties agree that:
- (a) Inadvertent Disclosure as agreed to be between the parties or ordered by the court shall not result in the waiver of any privilege or confidentiality, and shall not result in a subject matter waiver of any kind; and
 - (b) any such release shall not constitute an intentional breach of any common law or statutory prohibition on the release of any such information.

Grann et al. v. Her Majesty the Queen in Right of the Province of Ontario
Plaintiffs **Defendants**

Court File No: CV-14-0018

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Thunder Bay
Proceeding under the *Class Proceedings Act, 1992*

DISCOVERY PLAN

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ml.
Sep 12/17.

Court File CV 17-0018

TIMETABLE - GMNN et al v. ONTARIO

- ① PLAINTIFFS ADD DEFENDANT TO MEET AND DETERMINE TIMETABLE FOR MEDIATION BY NOV 13, 2017
- ② MEDIATION WITH RONALD SLIGHT - TBD
- ③ Exchange of Documents - ~~setting~~ productions to be completed by Sept 1, 2018
- ④ Oral discoveries by end of February, 2019
- ⑤ Expert reports by May, 2019
- ⑥ Pretrial in July 2019
- ⑦ trial of common issues - Oct, 2019