

DADZIE et al.
Plaintiffs

HMQ et al
and
Defendants

Court File No.: CV-16-55837600CP

November 27, 2017
Orders to go as per attached on consent. Reasons
to follow by brief endorsement.

Barbara J.
Justice Glustein

November 28, 2017
Reasons to go as per attached, released today.
Barbara J.
Justice Glustein

**ONTARIO
SUPERIOR COURT OF JUSTICE**

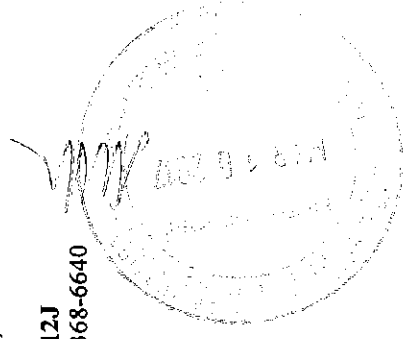
Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD
(Certification Motion returnable December 7,
2017)
VOLUME 1 OF 3

KOSKIE MINSKY LLP
900-20 Queen St West
Toronto, ON M5H 3R3
Kirk M. Baert LSUC#: 309420
Tel: (416) 595-2092 / Fax: (416) 204-2889
James Sayce LSUC#: 58730M
Tel: (416) 542-6298 / Fax: (416) 204-2809

Henein Hutchison LLP
1st Floor - 35 King Street East, 1st Floor
Toronto ON M5A 1J9
Scott Hutchison LSUC#29912J
Tel: 416-368-5000/Fax: 416-368-6640

Lawyers for the Plaintiff



RAYMOND LAPPLE ET AL.

Plaintiffs

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

Court File No.: CV-16-558633-00CP

November 27, 2017

Order to go as per attached on consent.
Reasons to follow by my endorsement.

[Signature]
Justice Glustein

November 28, 2017

Reasons to go as per companion order reasons
in CV-16-558376.

[Signature]
Justice Glustein

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act, 1992*

MOTION RECORD

(Certification Motion returnable December 6, 2017)
Volume 1

KOSKIE MINSKY LLP
20 Queen St West, Suite 900
PO Box 52
Toronto ON M5H 3R3
Kirk M. Baert LS#: 309420
Tel: (416) 595-2092 / Fax: (416) 204-2889
Jonathan Ptak LS#: 45773F
Tel: (416) 595-2149 / Fax: (416) 204-2903
James Sayce LS#: 58730M
Tel: (416) 542-6298 / Fax: (416) 204-2809
Garth Myers LS#: 62307G
Tel: (416) 595-2102 / Fax: (416) 204-4924

MCKENZIE LAKE LAWYERS LLP
Talbot Centre
140 Fullarton Street, Suite 1800
London Ontario N6A 5P2
Michael Peerless
Tel: 519-672-5666 / Fax: 519-672-2674

CHAMP & ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6
Paul Champ
Tel: (613) 237-4740, ext. 2

Lawyers for the Plaintiffs

CITATION: Dadzie v. Her Majesty the Queen in Right of Ontario, 2017 ONSC 7101
COURT FILE NOS.: CV-16-558376CP
CV-16-558633CP
DATE: 20171128

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: GODDAY DADZIE and AL ZEEKEHMENS, Plaintiffs

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO and THE ATTORNEY GENERAL OF CANADA, Defendants (Court File CV-15-558376CP)

AND RE: RAYMOND LAPPLE, JEROME CAMPBELL, SAMIR ABDELGADIR and GREGORY SMITH, Plaintiffs

AND:

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, Defendant (Court File CV-15-558633CP)

BEFORE: Justice Glustein

COUNSEL: *Jonathan Ptak and James Sayce*, for the Plaintiffs in both actions

Alexandra Clark and Victoria Yankou, for the Defendant Her Majesty the Queen in Right of Ontario in both actions

David Tyndale, for the Defendant The Attorney General of Canada in Court File CV-15-558376CP

HEARD: November 27, 2017

REASONS FOR DECISION

Nature of motions and overview

[1] There are two motions before the court pursuant to the *Class Proceedings Act 1992*, S.O. 1992, c. 6 (the “Act”).

[2] In Court File CV-15-558376CP (the “Dadzie Action”), the plaintiffs Godday Dadzie and Al Zeekehmens (collectively, the “Dadzie Plaintiffs”) seek certification of their action against the defendants Her Majesty The Queen in Right of Ontario (“Ontario”) and The Attorney General of Canada (“Canada”). This motion is on consent.

[3] In Court File CV-15-558633CP (the “Lapple Action”), the plaintiffs Raymond Lapple, Jerome Campbell, and Samir Abdelgadir (collectively, the “Lapple Plaintiffs”) seek certification of their action against the defendant Ontario. This motion is on consent.

[4] At the hearing, counsel provided the court with draft orders in both actions that set out the basis for the consent certification. I held that these matters were appropriate for certification, granted the motions, and signed the orders with reasons to follow. I set out my reasons below.

Nature of the actions

[5] These actions arise out of staffing-related lockdowns at correctional institutions operated by Ontario’s Ministry of Community Safety and Correctional Services (the “Ontario Institutions”).

[6] In the Dadzie Action, the Dadzie Plaintiffs allege that they were immigrant detainees and submit that “Canada transferred immigrant detainees to Ontario Institutions with full knowledge that conditions therein were not humane and they were not adequate for their intended use”. The Dadzie Plaintiffs plead that the putative class members have suffered severe harm as a result of the policies and procedures of both Canada and Ontario with respect to staffing-related lockdowns, and the failure of Canada and Ontario to properly implement such policies and procedures.

[7] In the Lapple Action, the Lapple Plaintiffs allege that they were incarcerated at Ontario Institutions and that the putative class members suffered serious instances of deprivations of rights and damages as a result of the lockdowns.

Analysis

[8] The court is required to certify the action as a class proceeding where the following five-part test in s. 5(1) of the *Act* is met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
- (c) the claims of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for resolution of the common issues; and,
- (e) there is a representative plaintiff who,
 - (i) would fairly and adequately represent the interest of the class;

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, on the common issues for the class, an interest in conflict with the interest of other class members.

[9] The plaintiff must establish "a minimum evidential basis for a certification order," by "show[ing] some basis in fact for each of the certification requirements", other than the requirement in s. 5(1)(a), which requires a "plain and obvious" standard (*Hollick v. Toronto (City)*, 2001 SCC 68 ("*Hollick*"), at paras. 24-25).

[10] In the present motions, I am satisfied that all of the criteria for certification have been met.

a) The pleadings disclose a cause of action (s. 5(1)(a))

[11] Both the Lapple and Dadzie Actions set out sufficient facts on which to base the claims against Ontario of systemic negligence and breaches of ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). It is pled that Ontario's actions were a proximate cause of the class' damages and that Ontario fell below the standard of care. It is alleged that an award of *Charter* damages pursuant to s. 24(1) is a just and appropriate remedy to provide compensation, vindication of rights, and deterrence of future breaches.

[12] In the Dadzie Action, the claim as pleaded currently does not set out an alleged breach of ss. 7 or 12 of the *Charter* as against Canada. However, Canada consents to certification of the common issues which include alleged breaches of ss. 7 and 12 of the *Charter*, on the basis that the claim will be amended to reflect the common issues as agreed by all parties.

[13] Similar negligence and *Charter* claims have been certified against government actors in similar circumstances, including in *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 (for police conduct during the G20 summit), *Ewert v. Canada (Attorney General)*, 2016 BCSC 962 ("*Ewert*") (relating to a lockdown at the Correction Services Canada-operated Kent Institution), *Johnson v. Ontario*, 2016 ONSC 5314 ("*Johnson*") (for conditions at the Ontario provincially-operated Elgin-Middlesex Detention Centre) and *Brazeau v. Canada*, 2016 ONSC 7836 (for solitary confinement practices in the Correctional Services Canada system).

b) There is an identifiable class (s. 5(1)(b))

[14] In the Dadzie Action, the plaintiffs seek to act on behalf of the following class:

All persons detained under Division 6 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 at Ontario correctional institutions as defined in the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 (the "**Correctional Institutions**") between May 30, 2009 and November 27, 2017 (solely with respect to their detention under Division 6 of the *Immigration and Refugee Protection Act*), except the Excluded Persons.

"**Excluded Persons**" are all persons who were detained at the Elgin-Middlesex Detention Centre, the Ontario Correctional Institute and the St. Lawrence Valley Correctional and Treatment Centre (solely with respect to their detention under the *Immigration and Refugee Protection Act* at those Correctional Institutions) [Emphasis in original text]

[15] In the Lapple Action, the plaintiffs seek to act on behalf of the following class:

All current and former inmates of correctional institutions as defined in the *Ministry of Correctional Services Act*, R.S.O. 1990, c. M.22 (the "**Correctional Institutions**") between May 30, 2009 and November 27, 2017 who are or were remanded, except the Excluded Persons.

All current and former inmates of the Correctional Institutions between May 30, 2009 and November 27, 2017 who are or were serving a sentence at a Correctional Institution or who have violated parole and are or were imprisoned at a Correctional Institution as a result, except the Excluded Persons; and,

"**Excluded Persons**" are:

All inmates detained only in accordance with the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; and,

All inmates of Elgin-Middlesex Detention Centre, the Ontario Correctional Institute and the St. Lawrence Valley Correctional and Treatment Centre (solely with respect to their incarceration at those Correctional Institutions). [Emphasis in original text]

[16] The above definitions identify the persons who are entitled to notice and relief (if awarded) and who will be bound by any judgment or settlement if they do not opt out. The class is identified by reference to objective criteria such that a person can be identified to be a class member without reference to the merits of the action (*Hollick*, at para. 17).

[17] The start date of the class period is based upon the evidence of Lapple. All counsel agree that the evidence filed on the certification motions in both the Lapple and Dadzie Actions may be relied upon interchangeably for the purposes of the certification motions. The end date is the date I granted the certification order.

[18] The courts have accepted a class definition circumscribed by the objective criteria of attendance as "it is not affected by the possibility that some class members may not be able to prove that they suffered harm as a result of the Crown's alleged breaches" (*Stark (Litigation guardian of) v. Ontario*, 2010 ONSC 1726, at para. 155).

[19] Similar class definitions have been certified in other class actions in the correctional context in Canada. In *Ewert*, the certified class definition was "All persons who were inmates of Kent Institution during the Lockdown that occurred from January 7, to January 18, 2010" (*Ewert*, at para. 73). In *Johnson*, the certified class definition was "All persons incarcerated at the Elgin Middlesex Detention Centre between January 1, 2010 and August 25, 2013

including those held at the Elgin Middlesex Detention Centre pending trial or other court appearance” (*Johnson*, at para. 69).

[20] Accordingly, the class definition satisfies s. 5(1)(b) of the *Act*.

c) The claims raise common issues (s. 5(1)(c))

[21] The common issues proposed to be certified on consent are lengthy and I do not repeat them in these reasons. Those common issues are set out in the orders I signed at the hearing.

[22] The proposed common issues are “necessary to the resolution of each class member’s claim” and a “substantial ingredient” of those claims (*Hollick*, at para. 18). All parties have provided “some basis of fact” (*Hollick*, at para. 25) for these proposed common issues in their moving and responding certification motion records.

[23] The common issues address alleged systemic wrongs. In both the Dadzie and Lapple Actions, the court will assess the knowledge, conduct and policies of Ontario as the entity in charge of the Ontario Institutions over the class period. In the Dadzie Action, the court will also assess the knowledge, conduct and policies of Canada as the entity with responsibility over immigrant detainees during the class period.

[24] Similar *Charter* and negligence common issues were certified in the correctional context after contested certification motions (see *Ewert*, at Schedule “A” of the *Ewert* reasons).

[25] Consequently, I find that this requirement under s. 5(1)(c) of the *Act* has been met.

d) A class proceeding is the preferable procedure (s. 5(1)(d))

[26] A class proceeding is the preferable procedure for the resolution of the common issues in this action. It is a fair, efficient and manageable method for advancing the class members’ claims, and is preferable to other means of resolving the class members’ claims.

[27] A class proceeding would avoid the need for each class member to prove, at tremendous expense, the issues at the trial of his or her own individual claim. Documentary evidence will likely be extensive and time-consuming to collect and review. Numerous expert witnesses will likely be retained in the course of the proceedings. The cost of litigating the class action would likely exceed the financial means of any individual member of the class.

[28] The litigation plan sets out a workable method of advancing the proceeding on behalf of the class members.

[29] Consequently, I find that this requirement under s. 5(1)(d) of the *Act* has been met.

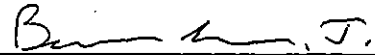
e) **There is an adequate representative plaintiff (s. 5(1)(e))**

[30] The proposed representative plaintiffs will fairly and adequately represent the class. The affidavit evidence demonstrates that despite their incarceration¹, the Dadzie Plaintiffs and the Lapple Plaintiffs have played an active role in the action and will continue to do so. They participated in cross-examinations. They do not have a conflict of interest with other class members on the common issues and all are prepared to vigorously pursue the litigation on behalf of the other class members.

Conclusion

[31] At the hearing, I granted the motions for certification and signed the applicable orders. My above reasons set out the basis for that decision.

[32] The orders are without prejudice to the defendants' right to pursue motions for summary judgment or for the determination of an issue before trial with respect to the causes of action and/or common issues and to rely on the *Limitations Act* as a bar to any claims on behalf of class members that are statute-barred.



GLUSTEIN J.

Date: 20171128

¹ Dadzie was recently released from prison and is living in Toronto.

CITATION: Dadzie v. Her Majesty the Queen in Right of Ontario, 2017 ONSC 7101
COURT FILE NO.: CV-16-558376CP and CV-16-558633CP
DATE: 20171128

ONTARIO

SUPERIOR COURT OF JUSTICE

RE: GODDAY DADZIE and AL
ZEEKEHMENS, Plaintiffs

AND:

HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO and THE
ATTORNEY GENERAL OF CANADA,
Defendants (Court File CV-15-
558376CP)

AND RE: RAYMOND LAPPLE, JEROME
CAMPBELL, SAMIR ABDELGADIR
and GREGORY SMITH, Plaintiffs

AND:

HER MAJESTY THE QUEEN IN
RIGHT OF ONTARIO, Defendant
(Court File CV-15-558633CP)

REASONS FOR DECISION

Glustein J.

Released: November 28, 2017