

2020 01G 4112
IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

BETWEEN:

PAUL HENNEBURY

FIRST PLAINTIFF

AND:

NIKITA PEARCE

SECOND PLAINTIFF

AND:

HER MAJESTY IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

DEFENDANT

STATEMENT OF CLAIM

Proceeding under the Class Actions Act, S.N.L. 2001, C-18.1

OVERVIEW

1. This action concerns the prolonged use of solitary confinement, also known as “close confinement” or “segregation”, in provincial correctional facilities across Newfoundland and Labrador (“**Provincial Institutions**”).
2. The use of solitary confinement in correctional contexts is a practice with serious and well-documented negative outcomes on the psychological and physical health of human beings.
3. The use of solitary confinement for a consecutive period of fifteen (15) days or more (“**Prolonged Solitary Confinement**”) constitutes cruel and unusual punishment and is a violation of prisoners’ constitutional rights and a breach of the Defendant’s fiduciary duty and duty of care to prisoners incarcerated in Provincial Institutions.

REPRESENTATIVE PLAINTIFFS AND CLASS

4. The First Plaintiff, Paul Hennebury, served various periods of incarceration at Her Majesty’s Penitentiary in St. John’s, most recently in 2019. He has endured Prolonged Solitary Confinement while housed in the aforementioned Provincial Institution.

5. The Second Plaintiff, Nikita Pearce, served a period of incarceration at Newfoundland and Labrador Correctional Centre for Women in Clarenville in 2013. She has endured Prolonged Solitary Confinement while housed in the aforementioned Provincial Institution.
6. The Plaintiffs seek to certify this action as a Class Proceeding and plead the *Class Actions Act*, S.N.L. 2001, C-18.1 as providing the basis for such certification. The Plaintiffs, as Representative Plaintiffs, do not have any interests adverse to any of the members of the proposed Class. The Plaintiffs state that there is an identifiable class that would be fairly and adequately represented by them, that the Plaintiffs' claims raise common issues, and that a Class Proceeding would be the preferable procedure for the resolution of such common issues.
7. The Plaintiffs propose to bring a Class Proceeding on behalf of themselves and a Class of other persons who were subjected to Prolonged Solitary Confinement during their incarceration at a Provincial Institution. The Class Period is defined as the date 30 years prior to the date of issuance of this action to the date of certification ("**Class Period**").

THE DEFENDANT

8. The Defendant is Her Majesty in Right of Newfoundland and Labrador. The Defendant is, and was, at all material times responsible for the administration of Provincial Institutions as well as responsible for the maintenance, oversight, funding and management of the government employees, servants and agents who operate the Provincial Institutions.
9. The Defendant operates five adult correctional facilities: Her Majesty's Penitentiary, Newfoundland and Labrador Correctional Centre for Women, Labrador Correctional Centre, Bishop's Falls Correctional Centre, and the West Coast Correctional Centre.
10. The majority of persons housed within these facilities are individuals on remand, while awaiting further court appearances. Most have not been found guilty of an offence.

SOLITARY CONFINEMENT

11. When a prisoner is subjected to solitary confinement, he or she is removed from the general penitentiary population and held in isolation from other prisoners and staff. This segregation may be achieved in a variety of settings within a Provincial Institution, including a prisoner's own cell, a specially designated segregation cell, or a "dry cell" used to monitor prisoners suspected of concealing contraband on or in their person.
12. Prisoners held in solitary confinement are restricted to a small space and denied meaningful human interaction for upwards of 23 hours per day. Usually, a prisoner's only human interaction while in solitary confinement is with corrections staff. Prisoners held in solitary confinement have limited access to rehabilitative programs and limited access to medical and psychiatric treatment.
13. Prisoners subjected to solitary confinement regularly suffer serious negative effects on their mental and physical health as a result, including, *inter alia*:
 - (a) anxiety;
 - (b) depression;
 - (c) anger and aggression;
 - (d) social withdrawal;
 - (e) psychosis;
 - (f) paranoia;
 - (g) hallucinations;
 - (h) confused thought processes;
 - (i) exacerbation of pre-existing psychological conditions;
 - (j) physical effects such as headaches, heart palpitations, and loss of appetite;
 - (k) disruption of sleep patterns and nightmares; and
 - (l) self-harm, suicidal ideation and suicide.

14. The policies and practices of the Defendant at Provincial Institutions include two forms of Solitary Confinement. “**Disciplinary Solitary Confinement**” is used for the purposes of punishing an infraction of Prison rules. “**Administrative Solitary Confinement**” is used for a variety of circumstances where the prisoner has done nothing wrong, including, *inter alia*, protection of prisoners and medical reasons. Administrative Solitary Confinement is used at the discretion of the Defendant.
15. In the absence of adequate institutional resources, Prolonged Solitary Confinement is used as a tool to respond to prisoner mental health challenges such as self-injury and psychiatric illness, as well as problems engendered by prison overcrowding.
16. The use of Prolonged Solitary Confinement amounts to a “sentence within a sentence” and constitutes a denial of natural justice and due process. In the case of prisoners held on remand, the use of prolonged solitary confinement constitutes an additional punishment in the absence of a conviction.
17. The common negative effects of Solitary Confinement also present additional barriers to prisoners to meet the behavioral requirements that may be required to achieve release from incarceration and/or Solitary Confinement itself. In particular, the effects of Solitary Confinement:
 - (a) gives rise to and/or exacerbates mental illness that contributes to criminal, defiant, or anti-social conduct, and interferes with treatment of same; and
 - (b) creates and/or exacerbates general behavioral challenges resulting in difficulty maintaining appropriate interactions with other inmates and correctional staff.

THE DEFENDANT’S FIDUCIARY DUTY AND DUTY OF CARE TO CLASS MEMBERS

18. The Defendant had a fiduciary relationship with all Class Members. The Defendant created, planned, established, operated, financed, supervised, controlled and regulated the entire system of Provincial Institutions during the Class Period.

19. Among other things, the Defendant was solely responsible for:
- (a) the construction, operation, maintenance, ownership, financing, administration, supervision, inspection and auditing of all Provincial Institutions during the Class Period;
 - (b) the management, operation and administration of correctional services during the Class Period;
 - (c) the implementation of the governing legislation during the Class Period;
 - (d) the promotion of the health, safety and well-being of Class Members during the Class Period;
 - (e) decisions, procedures, regulations promulgated, operations and actions taken by the Defendant, its employees, servants, officers and agents during the Class Period;
 - (f) in particular, the creation, design and implementation of policies regarding solitary confinement during the Class Period;
 - (g) the selection, control, training, supervision, and regulation of the designated operators and their employees, servants, officers and agents, and for the care, control and well-being of the Class Members confined in Provincial Institutions during the Class Period; and
 - (h) the care and supervision of all Class Members within the Provincial Institutions and all activities that took place therein during the Class Period.
20. At all material times, the Class Members were within the knowledge, contemplation, power or control of the Defendant and were subjected to the unilateral exercise of the Defendant's power or discretion. As prisoners incarcerated in Provincial Institutions, the Class Members relied entirely on the Defendant to ensure that the conditions of their incarceration were safe and in accordance with the recognized objectives of sentencing in Canada. The Class Members were particularly vulnerable to the operational policies, decisions, practices and actions of Correctional Services.

21. By virtue of the relationship between the Class Members and the Defendant being one of trust, reliance and dependence, the Defendant owed a fiduciary obligation to ensure that the Class Members were treated fairly, safely, and in all other ways consistent with the obligations owed to a person under its care and control.
22. At all material times, the Defendant owed a fiduciary obligation to prisoners to act in their best interest. The Class Members relied upon the Defendant, to their detriment, to fulfill its fiduciary obligations.
23. The Defendant also owed a duty of care to the Class Members which includes, but is not limited to:
 - (a) properly and effectively supervising the Provincial Institution environment and the conduct of staff to ensure that prisoners would not suffer undue harm;
 - (b) using reasonable care to ensure the safety, well-being and protection of prisoners;
 - (c) setting or implementing standards of conduct for staff to ensure that the health and well-being of prisoners are not significantly endangered; and
 - (d) creating policies that would not cause undue suffering or that amount to cruel and unusual punishment.
24. The Defendant was negligent and failed to discharge these fiduciary duties in breach of its special responsibility to ensure the safety and well-being of the Class.

THE DEFENDANT'S BREACHES OF ITS FIDUCIARY DUTIES AND DUTY OF CARE

25. Class Members were subjected to Prolonged Solitary Confinement by the Defendant while imprisoned.
26. Through its servants, officers, employees and agents, the Defendant was in breach of its fiduciary duties to the Class. Particulars of those breaches include:

- (a) putting its own interests, and those of its employees, agents and other persons under its supervision, ahead of the interests of Class Members;
 - (b) failure to safeguard the physical and emotional needs of Class Members; and
 - (c) permitting cruel, unusual and/or excessive punishments to be perpetrated against the Class.
27. The Defendant acted in breach of its duty of care to the Class, and was systemically negligent, in its establishment, operation, regulation, financing, supervision and control of the Provincial Institutions. In particular, without limitation, The Defendant:
- (a) failed to adequately, properly and effectively supervise Class Members and staff;
 - (b) systematically subjected individuals to Solitary Confinement for longer than permitted pursuant to legislation, regulation, or policy;
 - (c) systematically subjected Class Members to Solitary Confinement without proper approval or documentation;
 - (d) systematically subjected Class Members to Solitary Confinement for purported medical reasons without medical documentation/opinion confirming the need for confinement;
 - (e) used Prolonged Solitary Confinement with knowledge of its negative impacts;
 - (f) failed to regularly review the status of Class Members being subjected to Solitary Confinement;
 - (g) failed to provide Class Members subjected to Solitary Confinement with reasonable outdoor recreation time and access to showers;
 - (h) failed to protect Class Members from persons or situations that would endanger or be injurious to their health or well-being; and

- (i) failed to use reasonable care in ensuring the safety, well-being and protection of Class Members by insulating them from practices that would endanger or would be injurious to their health or well-being.

BREACH OF THE CHARTER

28. Section 7 of the *Charter* guarantees the right to “life, liberty and security of the person”. Solitary confinement is a further deprivation of the liberty of already incarcerated persons and constitutes a serious interference with the psychological integrity of prisoners: as such, it is a clear violation of the Section 7 rights of the Class Members.
29. Moreover, the use of Prolonged Solitary Confinement is overbroad, grossly disproportionate, and shocks the conscience, and as such is not in accordance with the principles of fundamental justice recognized by Canadian law.
30. Section 12 of the *Charter* guarantees the right to freedom from any “cruel or unusual treatment or punishment”.
31. The common deleterious effects of Prolonged Solitary Confinement are well-recognized and the use of Prolonged Solitary Confinement constitutes cruel and unusual treatment and punishment.
32. The said infringements of ss. 7 and 12 cannot be justified pursuant to the criteria set out under s. 1 of the *Charter*, the burden of proof of which lies with the Defendant.

DAMAGES SUFFERED BY CLASS MEMBERS

33. As a consequence of the negligence, breach of fiduciary duty, and breach of the *Charter* by the Defendant and its agents for whom the Defendant is vicariously liable, Class Members suffered loss, injury and damages including:
 - (a) development of mental illnesses;
 - (b) exacerbation of mental illnesses;

- (c) assault and battery;
 - (d) emotional abuse;
 - (e) psychological abuse;
 - (f) impairment of mental and emotional health amounting to severe and permanent disability;
 - (g) infringement on liberty rights;
 - (h) impaired ability to participate in or transition to a normal family life;
 - (i) alienation from family, spouses and children;
 - (j) impairment of the capacity to function in the work place and a permanent impairment in the capacity to earn income;
 - (k) the need for ongoing psychological, psychiatric and medical treatment for illnesses and other disorders resulting from the experience of Prolonged Solitary Confinement; and
 - (l) pain and suffering.
34. As a consequence of the negligence and breach of fiduciary duties by the Defendant and its agents for whom the Defendant is vicariously liable, the Class Members have required and will continue to require medical treatment, rehabilitation, counselling and other care. Class Members, or many of them, will require future medical care and/or rehabilitative treatment, or have already required such services, as a result of the Defendant's conduct, for which they claim complete indemnity, compensation and payment.
35. The Defendant knew, or ought to have known, that as a consequence of its mistreatment of Class Members, the Plaintiffs and Class Members would suffer significant mental, emotional, psychological, and physical harm.

RELIEF SOUGHT

36. The Plaintiffs seek the following relief:

- (a) an Order certifying this proceeding as a Class Proceeding and appointing the Plaintiffs as the Representative Plaintiffs for the Class and any appropriate subclass thereof;
- (b) a declaration that:
 - (i) Prolonged Solitary Confinement constitutes an infringement of and deprivation of the right to life, liberty and security of the person as guaranteed by Section 7 of the *Canadian Charter of Rights and Freedoms*;
 - (ii) Prolonged Solitary Confinement constitutes cruel, inhumane and degrading treatment or punishment contrary to Section 12 of the *Canadian Charter of Rights and Freedoms*; and
 - (iii) in the use and operation of Prolonged Solitary Confinement during the Claim Period, the Defendant violated the Plaintiffs' rights under Sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*.
- (c) damages or such other remedy as the Court may consider just and appropriate pursuant to Section 24 of the *Canadian Charter of Rights and Freedoms*;
- (d) damages for the aforesaid negligence and breaches of fiduciary duty;
- (e) aggravated, punitive, and/or exemplary damages;
- (f) interest pursuant to the *Judgment Interest Act, RSNL 1990, c J-2*;
- (g) costs; and
- (h) such further and other relief as this Honourable Court deems just.

DATED at the City of Mount Pearl, in the Province of Newfoundland and Labrador, this
14 day of August, 2020.



LYNN MOORE
MORRIS MARTIN MOORE
Solicitors for the Plaintiffs
Whose address for service is:
184 Park Avenue
Mount Pearl, NL
A1N 1K8

TO: The Defendant
Her Majesty in Right of Newfoundland and Labrador
Government of Newfoundland and Labrador
Department of Justice and Public Safety
Confederation Building, 4th Floor, East Block
P. O. Box 8700
St. John's, NL
A1B 4J6

ISSUED at the City of St. John's, in the Province of Newfoundland and Labrador, this
14 day of August, 2020.



CLERK OF THE COURT

COURT OFFICER

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NOTICE TO THE DEFENDANT(S)

You are hereby notified that the Plaintiffs may enter judgment in accordance with the Statement of Claim or such order as, according to the practice of the Court, the Plaintiffs are entitled to, without any further notice to you unless within Ten (10) days, after service hereof upon you, you cause to be filed in the Registry of the Supreme Court of Newfoundland at St. John's a Defence and unless within the same time a copy of your Defence is served upon the Plaintiffs or the Plaintiffs Solicitors at the Plaintiffs' Solicitors stated address for service.

Provided that if the claim is for a debt or other liquidated demand and you pay the amount claimed in the Statement of Claim and the sum of \$ _____ (or such sum as may be allowed on taxation) for costs to the Plaintiffs or the Plaintiffs' Solicitors within Ten (10) days from the service of this notice upon you, then this proceeding will be stayed.

TO: The Defendant
Her Majesty in Right of Newfoundland and Labrador
Government of Newfoundland and Labrador
Department of Justice and Public Safety
Confederation Building, 4th Floor, East Block
P. O. Box 8700
St. John's, NL
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Endorsements

RECEIVED on _____ the _____ day of _____, 20____.

This Statement of Claim and attached Notice to Defendant(s) was served by me on the Defendant(s), at _____, on _____ the _____ day of _____, 20____, before the hour of _____ in the _____ noon.

Endorsed on _____ the _____ day of _____, 20____.

Affidavit of Service

I, _____ of the _____ of _____, Newfoundland and Labrador, _____ make oath (or affirm) and say that I did on _____, the _____ day of _____, 20____, at approximately ____m. serve _____, with the within Statement of Claim and Notice to Defendant(s) by leaving a true copy of the same with _____ personally at _____, and that I endorsed the date of service thereon on _____, the _____ day of _____, 20____.

SWORN (OR AFFIRMED) to at the _____ of _____ in the Province of Newfoundland and Labrador this _____ day of _____, 20____, before me:
