

CU-19-00632 915 00CP

Court File No.:

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**SAMANTHA PRICE, SKYE MCLEOD, KENNETH PRICE, CLAIRE
SMITH, PATRICK MCLEOD, and JANE MCLEOD**

Plaintiffs

- and -

SMITH & WESSON CORP.

Defendant



STATEMENT OF CLAIM

(Class Proceedings Act, 1992)

TO THE DEFENDANT

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF

YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date December 16, 2019 Issued by 
Local Registrar

Address of ●
court office:

TO: SMITH & WESSON CORP.
2100 Roosevelt Avenue
Springfield, Massachusetts
United States of America
01104

CLAIM

1. Plaintiffs, Samantha Price, Skye McLeod, Kenneth Price, Claire Smith, Patrick McLeod, and Jane McLeod, on behalf of the proposed classes described in paragraph 9 below (collectively the “Class” or “Class Members”), claim the following from Defendant Smith & Wesson Corp. (“Smith & Wesson” or “Defendant”):

- (a) \$50 million in aggregate general damages;
- (b) \$100 million in aggregate punitive damages;
- (c) special damages in an amount to be determined;
- (d) pre-judgment and post-judgment interest on all damages claimed in amounts prescribed in the Ontario *Courts of Justice Act*, R.S.O. 1990, c.43;
- (e) the costs of this proceeding, including all applicable taxes, on a complete indemnity scale; and
- (f) such further and other relief as the court deems just.

Overview

2. On the evening of Sunday, 22 July 2018, a lone gunman, who was neither licenced nor authorized to use firearms, used a stolen Smith & Wesson M&P40 semi-automatic pistol (the “Handgun”) to kill two Class Members and to shoot and injure 13 others on Danforth Avenue in Toronto (“Danforth Shooting”). Dozens of Class Members also suffered injuries while avoiding or fleeing the shooter and the Handgun.

3. Defendant designed and manufactured the Handgun used in the Danforth Shooting in the United States. The Handgun is an "ultra-hazardous" product specifically designed to injure or kill people. The Handgun was negligently designed and manufactured in that Smith & Wesson failed to incorporate "authorized user" (or "smart gun") technology into the weapon. Smart gun technology is a personalized firearm safety measure that prevents unauthorized users, like the gunman who used the stolen Handgun in the Danforth Shooting, from firing the weapon.

4. It was reasonably foreseeable that Defendant's handgun products, like the Handgun used in the Danforth Shooting, would in the hands of unauthorized users cause substantial harm to, or kill, innocent third parties. Statistics published by Canadian and United States authorities show a high rate of illegal handgun diversion and use of illegally diverted handguns to harm innocent third parties like Class Members.

5. Defendant was well aware of illegal handgun diversion and smart gun technology. In March 2000, Defendant executed an agreement with the United States government (the "Agreement") acknowledging that "more than 200,000 firearms" like the Handgun used in the Danforth Shooting "were stolen from their owners every year in the United States." In the Agreement, Defendant agreed to incorporate smart gun technology in new firearm designs by March 2003. Despite the Agreement, in 2005 the Defendant introduced the Smith & Wesson M&P (or Military and Police) 40 series, the model of the Handgun used in the Danforth Shooting, which failed to include smart gun technology.

6. Defendant was negligent in failing to design and manufacture the Handgun used in the Danforth Shooting to include smart gun technology, and in distributing the Handgun for sale in Canada without smart gun technology. Defendant knew the Handgun was an ultra-hazardous product that posed a substantial likelihood of harm to the public. In the circumstances, Defendant owed a duty to the Class to ensure that any handguns it made available on the Canadian market were designed and manufactured to implement technology that would prevent unauthorized users from causing the very type of harm and injury suffered by Class Members. Defendant breached its duty to the Class because it was aware, long before making the Handgun available for sale in Canada, that handguns designed and manufactured without smart gun technology were: deficient; unsafe; inherently and unnecessarily dangerous; and a significant risk to members of the public like Class Members. Defendant's breach of duty resulted in loss of life, injury, and harm to victims of the Danforth Shooting and their family members.

7. Defendant placed dangerous and unsafe products without smart gun technology into the Canadian stream of commerce. Defendant engaged and participated in an activity amounting to a public nuisance that unreasonably interfered with the interests of Canadian public health and safety and the right of ordinary Canadians to enjoy public spaces without unreasonable risk of bodily injury or death. Given Defendant's awareness of the abnormal and ultra-hazardous nature of their products unless equipped with smart technology, Defendant is strictly liable to the Class.

8. The harm caused by Defendant is compensable in general and special damages. Defendant should also be condemned to pay punitive damages because it designed, manufactured, and made available for sale in Canada dangerous products knowing that

safer designs were available that would have prevented incidents like the Danforth Shooting.

Proposed Class

9. Plaintiffs will ask the Court to certify the following three classes to be referred to collectively as the "Class":

Class 1: Persons Shot and Injured or Killed

All persons (or their estates), except Faisal Hussain, who were shot and injured or killed on or near Danforth Avenue in Toronto on 22 July 2018 by a Smith & Wesson M&P40 handgun.

Class 2: Other Injured Persons

All persons who do not fall within Class 1, except Faisal Hussain, who were injured on or near Danforth Avenue in Toronto on 22 July 2018 as a result of the use of a Smith & Wesson M&P40 handgun.

Class 3: Family Members

Family members, within the meaning of section 61 of the *Family Law Act*, R.S.O., 1990, Chapter F.3, of all persons in Classes 1 and 2.

Parties

10. Plaintiff Samantha Price, at the time an 18 year-old student, was shot and injured on Danforth Avenue in Toronto on Sunday, 22 July 2018 by a gunman using the Handgun.

11. Plaintiff Skye McLeod, at the time an 18 year-old student, was injured on Danforth Avenue in Toronto on Sunday, 22 July 2018 while avoiding and fleeing the gunman using the Handgun.

12. Plaintiffs Kenneth Price, an information technology marketing and sales executive, and Claire Smith, a homemaker, are the parents of Samantha Price.

13. Plaintiffs Patrick McLeod, a retired Toronto Police Service officer, and Jane McLeod, a registered nurse, are the parents of Skye McLeod.

14. Defendant, Smith & Wesson Corp., sometimes referred to as Smith & Wesson Corporation, is a United States corporation with a head office in Springfield, Massachusetts. Defendant designed, manufactured, and made available for sale in Canada the Handgun used to kill or injure Class Members on or near Danforth Avenue on Sunday, 22 July 2018.

Danforth Shooting

15. At about 10:00 PM on the evening of Sunday, 22 July 2018, Faisal Hussain, while walking on Danforth Avenue near Logan Avenue in Toronto, drew the Handgun and shot at Class Members he encountered. His victims included pedestrians on the sidewalks and patrons of shops and restaurants.

16. By the time Toronto Police Service responded to the incident, Faisal Hussain had killed two Class Members, 10 year-old Julianna Kozis and 18 year-old Reese Fallon, and shot and injured 13 others. Dozens of Class Members also suffered injuries while avoiding or fleeing Mr. Hussain and the Handgun. After exchanging gunfire on Danforth Avenue with police officers, Faisal Hussain took his own life.

The Handgun

17. Faisal Hussain was not licenced or authorized to use any firearm.

18. Defendant introduced the M&P (or Military and Police) 40 series, a .40-calibre semi-automatic pistol designed and manufactured by Defendant, on the market in 2005. The Handgun is designed for military and police use and is intended to harm or kill people and not designed or intended for hunting. Defendant made the Handgun available for sale in Canada in 2013. In 2015, a Saskatchewan gun dealer who acquired the Handgun reported the weapon stolen.

Smart Gun Technology

19. Smart, or personalized, handguns have one or more systems that allow the weapon to fire only when activated by an authorized user. Smart gun technology may include: biometric technologies like fingerprint or palm-print recognition, dynamic grip recognition, electronic signature authentication, vascular biometrics, and voice identification; automated identification technologies like radio-frequency identification (RFID), proximity tokens, or magnetic rings; and miscellaneous technologies like internal or external locking devices. Smart guns have the ability to reduce accidental shootings, neutralize the impact of gun thefts, and prevent criminal use of weapons by unauthorized persons. Smart gun technology has existed since at least the 1990s and firearms incorporating the technology have been tested by the United States government and found to be commercializable. Surveys conducted in the United States and published in a prominent public health journal indicated that about 60% of those surveyed, including a majority of both political conservatives and handgun owners, favoured improved gun safety designs that implemented smart gun technology.

20. Defendant has been familiar with illegal diversion of handguns and the importance of smart gun technology for several decades. In March 2000, Defendant entered into the Agreement with the government of the United States (and several state and local governments) in which Defendant specifically acknowledged that its products were "not equipped with a device that fully blocks use by unauthorized users" and that "more than 200,000 firearms...are stolen from their owners every year in the United States."

21. In the Agreement, Defendant made a specific commitment to incorporate smart gun technology in new firearm designs by March 2003. The Agreement stated, in pertinent part:

Preamble

The manufacturer parties to the Agreement and the Department of the Treasury, the Department of Housing and Urban Development, and the undersigned state, city and county parties to the Agreement, enter into this Agreement to reduce the criminal misuse of firearms, combat the illegal acquisition, possession and trafficking of firearms, reduce the incidence of firearms accidents, and educate the public on the safe handling and storage of firearms. Furthermore, the manufacturer parties to the Agreement enter into this agreement as a continuation of their efforts to make their firearms as safe as practicable for their customers and the public. Accordingly, in consideration of the commitments set forth below:

...

Safety and Design

...

d. **Authorized User Technology.** The manufacturer parties to this Agreement shall each commit 2% of annual firearms sales revenues to the development of a technology that recognizes only authorized users and permits a gun to be used only by authorized persons. **Within 36 months of the date of execution of this Agreement, this technology shall be incorporated in all new firearms designs, with the exception of curios and collectors' firearms.** {Emphasis added.}

22. In the Agreement, Defendant accepted that it had a duty to the public to make its products "as safe as practicable." Defendant acknowledged that this duty included designing and incorporating smart gun technology into its products. Defendant never complied with the commitments it made in the Agreement.

23. In 2005, the United States Congress passed the *Protection of Lawful Commerce in Arms Act* 15 U.S.C., § § 7901-7903 (“*PLCAA*”), a law that shielded Defendant, other manufacturers, dealers, and sellers of firearms and ammunition from civil actions resulting from unauthorized or unlawful misuse of a firearm. Canada has no laws comparable to the *PLCAA* and the *PLCAA* has no extra-territorial effect in Canada or Ontario.

Gun Violence and Gun Diversion Statistics

24. In 2018, Statistics Canada reported that the rate of gun thefts in “break and enter” crimes had more than tripled between 2009 and 2017, with 309 reported incidents in 2009 and 1,175 reported thefts in 2017. The Royal Canadian Mounted Police (RCMP) have reported that: 3,486 registered firearms were stolen between 2013 and 2017; 588 handguns were lost by, or stolen from, Canadian police and public agencies between 2005 and 2019; and 32 Smith & Wesson handguns were lost by, or stolen from, the RCMP alone between 2010 and 2017.

25. In 2018, Statistics Canada reported a 42% increase in firearm-related violent crime in Canada between 2013 and 2017. Notably, 43% of this national increase after 2013 was attributable to increases in firearm-related violence in the City of Toronto. Each year since 2009, about 60% of firearm-related violent crime has involved handguns. In 2017, 145 homicides were committed in Canada with handguns.

26. Statistics for firearm and handgun diversion and violence in the United States also paint a bleak picture. Statistics published by the U.S. Federal Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) and the National Crime Information Center

(a branch of the U.S. Federal Bureau of Investigation) show losses or thefts of more than 250,000 firearms annually in the United States. In a 2012 report, the ATF stated:

Lost and stolen firearms pose a substantial threat to public safety and to law enforcement. Those that steal firearms commit violent crimes with stolen guns, transfer stolen firearms to others who commit crimes, and create an unregulated secondary market for firearms, including a market for those who are prohibited by law from possessing a gun.

27. U.S. studies show that thousands of handguns recovered by police in connection with crimes, including homicides and shooting injuries, were reported lost or stolen. According to the studies handguns account for more than 75% of stolen guns and Smith and Wesson handguns are the most common make of stolen handgun in the United States. Media reports provide numerous examples of stolen Smith & Wesson handguns being used by unauthorized persons to kill and injure innocent victims.

Negligence

28. Defendant owed a duty of care to the Class to ensure that the ultra-hazardous handguns it designed, manufactured, and made available for sale in Canada included safe gun technology so as to avoid, prevent, or deter substantial and foreseeable harm. The foreseeable harm included death and injury of innocent victims like Class Members. Instead, Defendant designed, manufactured, and made available for sale in Canada weapons, including the Handgun used in the Danforth Shooting, which Defendant knew were deficient and inherently and unnecessarily dangerous. It was reasonable for Defendant to foresee injury and harm to third parties, including Class Members, given

the Defendant's knowledge of widespread handgun diversion and use of diverted handguns to cause injury and death.

29. Defendant breached the duty of care owed to the Class. Defendant knew, or should have known, as early as 2000, when it executed the Agreement, that authorized user technology was available that would greatly reduce, if not eliminate, the risk of illegal diversion and unauthorized use of their products to cause injury or death to innocent members of the public. Instead of adopting safety measures that would prevent such harm to innocent third parties, Defendant chose to ignore the commitments it had made in the Agreement and continued to design, manufacture, and make available for sale in Canada handguns that Defendant knew could, and actually were, diverted and used to injure or kill innocent third parties like Class Members.

30. The injuries and deaths suffered by Class Members were preventable and would not have occurred if Defendant had adhered to its commitment in the Agreement and designed, manufactured, and made available for sale in Canada after 2003 only safer handguns which included smart gun technology.

Nuisance and Strict Liability

31. Placing handguns without smart gun technology into the Canadian stream of commerce unreasonably interferes with the interests of the Canadian public in health and safety. Defendant's conduct in making handguns without smart gun technology available callously ignores the right of Canadians generally to the reasonable expectation that they can enjoy Canadian public and private spaces, on Danforth Avenue in Toronto or elsewhere, without fear that one of Defendant's unsafe products

can be fired by an unauthorized user and kill or injure an innocent third party. Through use of smart gun technology, Defendant could prevent, or substantially reduce, the risk of death or injury from unauthorized use of its products. Defendant's circulation of unsafe lethal weapons in the stream of Canadian commerce is therefore an unreasonable activity that constitutes a public nuisance.

32. Defendant designs, manufactures, and sells handguns that it knows are inherently and unreasonably dangerous and lacking in features like smart gun technology that can prevent unauthorized users from injuring or killing innocent third parties like Class Members. Defendant is aware of the abnormal and ultra-hazardous nature of its products. Defendant acknowledged its awareness of the risk when Defendant committed in the 2000 Agreement to design weapons with authorized user technology by 2003. Defendant knows the inadequacy, defects, and insufficiency of its products because of the history of illegal diversion acknowledged in the Agreement and the actual harm caused to innocent third parties since 2000 by unauthorized users of Defendant's products. Defendant's direct knowledge of the safety flaws in its products, the extreme and unnecessary harm the Defendant's products have caused in Canada and elsewhere, and the abnormally risky and ultra-hazardous nature of handguns designed without smart gun technology render the Defendant strictly liable for the harm caused to Class Members.

General and Special Damages

33. Class Members, including estates and family members with claims under the *Family Law Act*, R.S.O., 1990, Chapter F.3, have suffered severe and substantial harm

as a result of Defendant's actions and omissions that is compensable in general and special damages.

Punitive Damages

34. Despite being aware that harm from its handguns was preventable, Defendant has recklessly continued to design, manufacture, sell, and profit from the sale of unsafe handguns that, when diverted, injure or kill innocent Canadians. Defendant should be condemned to pay punitive damages for its callous disregard of the safety and security of ordinary Canadians harmed by Defendant's ultra-hazardous products.

Certification of Class Proceeding

35. The claims made on behalf of the Class meet the requirements for certification under s. 5 of the *Class Proceedings Act 1992*, S.O., 1992, c. 6.

Service Outside Ontario

36. Rule 17.02(g) of the Ontario *Rules of Civil Procedure* permits service of the Claim on Defendant outside Ontario without leave of the Court.

37. Plaintiffs request that the trial take place in Toronto, Ontario.

Date: 16 December 2019

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CU-19-00638 915 00CP

SAMANTHA PRICE et al.

Plaintiffs

- and -

SMITH & WESSON CORP.

Defendant

**ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT
TORONTO**

STATEMENT OF CLAIM

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