

CANADA / JUDGMENT

Roberts v. Canada (Attorney General)

2025 BCSC 995

COURT

Supreme Court of British Columbia

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2025 BCSC 995 Roberts v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Roberts v. Canada (Attorney General),

2025 BCSC 995

Date: 20250530

Docket: S207500

Registry: Vancouver

Between:

Dean Christopher Roberts

Plaintiff

And

Attorney General of Canada

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraphs 28, 64, and 77 on June 18, 2025

Before: The Honourable Justice Tammen

Reasons for Judgment

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Introduction and Overview

[1] The proposed representative plaintiff, Dean Christopher Roberts, applies to certify a national class action against the Government of Canada, represented by the Attorney General of Canada ("AG Canada"), related to the treatment of prison inmates incarcerated in federal institutions during the COVID-19 pandemic. In particular, the plaintiff seeks to certify a class proceeding based on the implementation of medical isolation practices in various institutions during the height of the pandemic. The plaintiff claims that the result of the medical isolation policies and practices of the Correctional Service of Canada ("CSC") was that a large number of federal inmates were subject to inhumane rights restrictions, a form of "lockdown" amounting to solitary confinement, in which they were confined to their cells for up to 22 hours a day and denied any meaningful human interaction for an extended period of time.

[2] The proposed class definition is this:

All persons who, between 11 March 2020 and the date this matter is certified, were incarcerated, detained, or held in custody in a CSC Institution during a declared COVID-19 outbreak at that CSC Institution, and were:

- a. confined to their cells for 20 or more hours in a day; and
- b. deprived of the opportunity to interact with others for a minimum of two hours in a day for a period of 15 or more consecutive days.

[3] The pleaded causes of action are negligence and breaches of the Charter-protected rights of the class guaranteed by sections 7 and 12 of the Canadian Charter of Rights and Freedoms.

[4] Both the causes of action and proposed class definition are informed by comparatively recent jurisprudence where appellate courts have, in part, done the following:

- 1) Recognized that solitary confinement of inmates, irrespective of the name attached to it, causes harm to inmates which is foreseeable;
- 2) Upheld findings that administrative segregation is a form of solitary confinement which breaches the section 7 and 12 Charter rights of those subjected to it;
- 3) Adopted the definition of "solitary confinement" contained within the United Nations Standard Minimum Rules for the Treatment of Prisoners (also known as "the Mandela Rules"), namely the practice of confining an inmate in their cell for 22 hours a day or more and failing to provide the inmate with daily meaningful contact with other persons;

- 4) Found that the type of confinement described above, if done for more than 15 consecutive days, constitutes cruel and unusual treatment or punishment. The authorities cited for this finding include *Civil Liberties Association v. Canada (Attorney General)*, 2019 ONCA 243; and, *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228.
- [5] The plaintiff also relies on a series of cases, from both Ontario and B.C., in which causes of action in negligence and for breaches of ss. 7 and 12 of the Charter have been certified as class proceedings based on prolonged periods of separate confinement imposed on prison inmates. Those cases include *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184; *Francis v. Ontario*, 2021 ONCA 197; and, *North v. British Columbia (Attorney General)*, 2020 BCSC 2044.
- [6] The defendant, AG Canada, opposes certification on several bases. As a preliminary matter, AG Canada submits that the administrative segregation cases are of no assistance because here we are concerned with something entirely different, medical isolation, which was both medically necessary and informed by medical advice.
- [7] More discretely, AG Canada challenges the sufficiency of the pleaded claim in negligence. AG Canada submits that although Mr. Roberts has adequately pleaded a claim of negligence in respect of himself individually, the pleadings do not disclose a claim of systemic negligence applicable to the broader proposed class, which is required to certify a class proceeding.
- [8] The defendant also opposes certification on the other certification criteria, submitting that:
- a) The proposed class is overbroad;
 - b) The proposed class lacks clarity;
 - c) There is no common duty of care analysis;
 - d) There are no common issues in relation to a host of other aspects of the plaintiff's claim in negligence;
 - e) The proposed Charter analysis requires individualized assessments;
 - f) There is no basis in fact for an award of aggregate damages;
 - g) A class proceeding is not the preferable procedure; and,
 - h) Mr. Roberts is not a suitable representative plaintiff.
- [9] I will, of course, address each of the objections to certification in turn, but, in my view, this class proceeding must be certified. The overall objection to certification is really an attack on the merits of the plaintiff's claim. Bound up in the position of AG Canada are several interesting legal questions, which, individually or collectively, may cause the plaintiff's claim to founder on its merits. The defendant may persuade the trial judge that there is substance

to its position that "medical isolation" is completely different than other forms of separate confinement, and therefore the Civil Liberties Association and British Columbia Civil Liberties Association cases have no application. However, at first blush, that argument seems to be meritless. The label attached to the separate confinement is largely irrelevant. It is the treatment endured by the inmate which is important.

- [10] Similarly, AG Canada may persuade the trial judge on its position that the entire response of CSC to the pandemic was medically informed and the type of isolation it implemented was medically necessary, and for that reason the claim fails. The unprecedented and unexpected nature of the pandemic may feature significantly in that analysis. However, that is clearly an issue to be decided at trial, not at this preliminary stage.
- [11] The certification motion is not meant to be a test of the merits of the action. Rather, it is concerned with form and whether the action can properly proceed as a class action. The question on certification is not whether the claim is likely to succeed, but whether the claim is properly prosecuted as a class action: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
- [12] The requirements for class certification are set out in s. 4 of the Class Proceedings Act, R.S.B.C. 1996, c. 50 ("CPA"). Section 4(1)(a) requires that the pleadings disclose a cause of action. It is the remaining certification criteria which require there to be "some basis in fact" in order for the claim to be certified. As noted by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 100: "[t]he Hollick standard of proof asks not whether or not there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements."

Factual Background and Procedural History

- [13] The genesis of the plaintiff's claim was an outbreak of COVID-19 in spring, 2020, the very early days of the global pandemic, at Mission Medium Institution ("Mission"). Mr. Roberts was an inmate at Mission at the time, and he was chair of the inmate wellness committee. He was present at Mission for most of April, 2020, except for April 7 to 11, when he was at Mission Memorial Hospital being treated for COVID-19. According to Mr. Roberts, from April 2 to 7, 2020, Mission was in total lockdown, with all inmates confined to their cells around the clock. When he returned on April 11, the routine had changed somewhat, permitting each inmate 20 minutes per day out of cells for showering, telephone privileges, and to permit cleaning of cells.
- [14] It is not seriously disputed that, although Mission was declared COVID-19 free by mid-May, 2020, significant restrictions, with very limited out-of-cell time, continued until mid-July, 2020.
- [15] During that time period, CSC was managing its response to the pandemic on an ad hoc basis. Each time there was an outbreak at an institution, beginning with the one at Mission, CSC formed an Emergency Operations Committee ("EOC") to provide advice and guidance to

institutional management teams. Each EOC would include a member from CSC national headquarters. In late 2022, the EOCs were replaced by Outbreak Management Teams, which operated in a similar fashion to the EOCs but without the routine participation of staff from CSC national headquarters.

- [16] Beginning in the spring of 2020, CSC, in consultation with public health officials, developed algorithms or flow charts to guide institutional management decisions regarding when and for how long inmates should be placed on medical isolation. The algorithms were fluid and there were more than 60 iterations from March 2020 through 2023.
- [17] On July 16, 2020, CSC issued Commissioner's Directive 822 ("CD-822"), which was, according to AG Canada, meant to provide "national-level policy for the management of inmates placed on medical isolation or modified routine for health purposes to help prevent the introduction or spread of COVID-19."
- [18] In the summer of 2020, CSC national headquarters formalized CSC's national-level policy guidance in a document called the Integrated Risk Management Framework ("IRMF"). The IRMF provided guidance to institutional management staff about mitigation measures and related topics. Like the algorithms, the IRMF changed over time. Between June 2020 and June 2022, there were 23 different versions. The IRMF was decommissioned on March 27, 2023.
- [19] The IRMF used colour-coded risk levels to inform decision-making at the institutional level. The risk levels at each institution were regularly evaluated by one of five regional Management Early Response Committees ("MERCs"). Until December 2022, each MERC met bi-weekly, and typically included representatives from CSC national headquarters, CSC regional headquarters, and local and national health officials. MERCs were tasked with assessing and communicating the IRMF risk levels for all facilities in each region. According to the defendant, the advice and information provided by the MERCs "ensured that response measures at each individual institution within each region were appropriately adapted to local circumstances, capacity, and needs."
- [20] At the end of the day, the final decisions concerning medical isolation were largely made by institution heads, usually wardens or deputy wardens, whose decisions were meant to be informed by the policy guidance and specific advice as outlined in the preceding paragraphs.
- [21] However, section 3(b) of CD-822 directs an institution head to authorize the medical isolation of those within a host of categories (set out in s. 8), including close contacts of symptomatic inmates, upon the recommendation of a registered health care professional. In practice, that resulted in entire units or ranges of institutions being confined to cells for up to 23 hours a day for many consecutive days after a single individual exhibited symptoms or tested positive for COVID-19.

- [22] An inmate could not be released from medical isolation without first being medically cleared by a registered health care professional.
- [23] Of note, CD-822 does not mandate any minimum out-of-cell time, maximum duration for isolation, opportunities for fresh air, nor level of interaction with others. It simply directs that "all reasonable efforts will be made" to provide inmates with out-of-cell time, yard time, access to telephones, and interactions with others.
- [24] Within the massive evidentiary record filed at this certification motion are, on the plaintiff's side, affidavits from inmates at institutions in most, perhaps all, of the five regions. On the defendant's side, there are affidavits from institution heads of at least one, often more, of the institutions in each region.
- [25] There is thus a considerable body of evidence about periods of medical isolation for non-symptomatic inmates at various institutions over a period of approximately three years. Many inmates describe being confined to their cell for up to 23 hours a day with no meaningful social interaction and extremely limited opportunities for out-of-cell time, limited to showering and attempting to exercise phone privileges.
- [26] AG Canada does not dispute that at various institutions, at different times, there were widespread restrictions in place which amounted to the type of conditions described above by the inmate affiants. The defendant simply says that the decisions to confine non-symptomatic inmates to cells for prolonged periods of isolation were medically mandated by interpretation of the algorithms and application of the IRMF, and based on input from either EOC's, MERCs, or both.
- [27] The notice of civil claim was filed in April 2020, while Mission Institution was experiencing its first outbreak of COVID-19 and was almost completely locked down. The original claims of the plaintiff were broad and vast, alleging a multitude of "systemic failures" by CSC in its preparation for, and response to, the pandemic. There was a level of seeming incongruity to parts of the pleading, in that it alleged simultaneously that CSC did not do enough to protect inmates from the spread of COVID-19, and that the protective measures they did take (i.e. "lockdown") were draconian, and breached inmates' rights.
- [28] Between April 2020 and the hearing of the motion to certify in the autumn of 2024, the notice of civil claim was amended multiple times. A fifth amended notice of civil claim ("ANOC") was filed mid-hearing, on October 3, 2024, having been provided to counsel for AG Canada just prior to the certification motion. The ANOC is solely focused on the lockdown-like conditions imposed by CSC in various institutions at different times during the pandemic. The plaintiff has abandoned all causes of action other than negligence and breaches of ss. 7 and 12 of the Charter.

- [29] I understand the seeming frustration of AG Canada over the late delivery of the ANOCC, and the multiple substantive amendments in general. However, I agree with the plaintiff that the ANOCC is extremely focused and comparatively precise. In my view, the ANOCC is a model pleading of its kind, and was clearly drafted with care and skill. It is unfortunate that it took as long as it did to arrive at its final destination, and went through so many iterations, but the final product is exemplary.
- [30] The heart of the factual portion of the claim has always been paras. 18 and 19. In earlier versions, para. 18 alleged a long list of "Systemic Failures" (a defined term), none of which related to medical isolation/lockdown. Paragraph 18A then listed other things which CSC allegedly failed to do at a "systemic level" which caused harm to inmates, and some of those related to conditions of confinement during medical isolation. Paragraphs 18B through 18R then listed various other alleged operational failures on the part of CSC.
- [31] In earlier versions, para. 19 (and 19A through 19P) listed various harms caused by the Systemic Failures. Paragraph 19(b) listed various aspects of the lockdown-like confinement conditions, defined as the "Rights Restrictions."
- [32] Paragraph 20 listed the injury and damage caused by the Systemic Failures.
- [33] In the ANOCC, para. 18 has been deleted and, along with it, the defined "Systemic Failures."
- [34] Paragraph 18A now pleads that CSC "failed at a systemic level to develop and implement, effectively or at all, operational strategies" to do various things. The list of transgressions has been reduced from 32 to 5, all of which focus on the "lockdown"-like conditions of confinement, the defined "Rights Restrictions."
- [35] Similarly, para. 19 has been edited to remove all references to Systemic Failures and to focus solely on the "Rights Restrictions."
- [36] In keeping with the above amendments, para. 20 now alleges harms caused by the Rights Restrictions.

The Nature and Purpose of Class Proceedings

- [37] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at paras. 27-29, Chief Justice McLachlin set out the three overarching advantages to class actions versus a "multiplicity of individual suits":
1. Judicial economy -- by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis.
 2. Access to justice -- by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own.

3. Behaviour modification -- class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

(Also see Hollick at para. 15).

[38] Both judicial economy and access to justice loom large in any application to certify a claim brought by a class of plaintiffs such as that present here, a subset of the population without the financial means to pursue individual claims, which claims individually would not be particularly large in monetary terms.

[39] Class proceedings are often the only realistic means by which a group of plaintiffs, such as federal prison inmates, can pursue claims related to conditions of confinement. Those serving sentences in the federal prison system frequently face inordinate hurdles in accessing the courts and pursuing claims against those responsible for administering the federal prison system.

The Test For Certification

[40] Section 4(1) of the CPA contains the five requirements for certification:

4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests 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, an interest that is in conflict with the interests of other class members.

[41] The certification requirements are to be interpreted generously, keeping in mind the three advantages of class action legislation, namely, judicial economy, access to justice, and behaviour modification: Hollick at paras. 15-16.

- [42] As noted above, the certification stage is not meant to be a test of the merits of the action, rather, it is concerned with form and with whether the action can properly proceed as a class action: Hollick at para. 16; Pro-Sys Consultants at para. 99.
- [43] Subsection 4(1)(a) of the CPA is assessed on the same standard as on a motion to strike pleadings under the Supreme Court Civil Rules, R. 9-5(1)(a). The plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed: Hollick at para. 25; Pro-Sys Consultants at para. 63. For this analysis, the Court must assume that all the pleaded facts are true unless they are patently unreasonable or incapable of proof: Watson v. Bank of America Corporation, 2014 BCSC 532 at para. 60. A claim must not be struck merely because it is novel or complex: Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90 (S.C.C.).
- [44] The plaintiff must show "some basis in fact" for each requirement set out at subsections 4(1)(b)-(e): Hollick at para. 25. The "some basis in fact" standard does not require that the Court resolve conflicting facts and evidence; at certification, the Court is ill-equipped to resolve conflicts in the evidence or assess evidentiary weight: Pro-Sys Consultants at para. 102.

Reasonable Causes of Action

- [45] In its application response, AG Canada did not dispute that the pleadings disclose causes of action in negligence and pursuant to ss. 7 and 12 of the Charter. The defendant asserted that there were no reasonable causes of action pleaded in respect of the claims for breach of fiduciary duty, misfeasance in public office, and for punitive damages.
- [46] The plaintiff no longer seeks to certify the claims for breach of fiduciary duty nor misfeasance in public office. Thus, the only pleadings issue seemingly in dispute relates to the claim for punitive damages.
- [47] However, AG Canada now takes issue with the pleadings in support of the claim of negligence. In its written submission, at para. 131, AG Canada submits as follows:

With respect to negligence, while Canada's Application Response, filed January 17, 2023, did not contest that the pleadings at the time disclosed a reasonable cause of action in negligence, the plaintiff's pleadings have materially changed since then, with three pleadings amendments. In accordance with the November 2024 JMC and the Court's order, Canada provides its response in these submissions, including that the pleadings do not disclose a cause of action in systemic negligence.

- [48] Then, at para. 132, AG Canada acknowledges that Mr. Roberts has pleaded facts which may give rise to a viable claim in negligence if pursued on an individual basis, but says the pleadings do not disclose a reasonable cause of action in systemic negligence.
- [49] I say at the outset that I disagree entirely with AG Canada that the amendments to the plaintiff's notice of civil claim have the effect attributed to them at para. 131, quoted above. The essential pleadings related to class-wide duty of care, systemic breaches of that duty,

and the reasons the defendant's "core policy" position cannot succeed at the certification stage have not changed in the various iterations of the notice of civil claim. Nor has that part of the notice of application seeking certification changed appreciably from the time AG Canada filed its application response.

- [50] Nonetheless, I will address the submissions of AG Canada concerning the adequacy of the pleaded claim of systemic negligence.
- [51] AG Canada submits, in respect of the claim of systemic negligence, that "it is apparent on the face of the pleadings that aspects of this allegedly negligent conduct took place at the regional, institutional, or individual levels and changed over time, would not have impacted the class as a whole, and cannot ground a 'systemic' claim at the national level." I disagree.
- [52] As noted, para. 18A of the statement of facts pleads that CSC failed "at a systemic level to develop and implement, effectively or at all, operational strategies" to do a host of things to prevent foreseeable harm to the entire class. Those things are detailed at subparagraphs (j)-(l), (q) and (s). Para. 19 sets out the various "rights restrictions" which occurred at the institutional level, as part of the implementation of national or regional policy, and impacted either the whole class or a particular potential sub-class.
- [53] The balance of para. 19 details some of the harms suffered by Mr. Roberts at Mission Institution in spring, 2020, and para. 19P extrapolates those experiences to other class members at other institutions.
- [54] Paragraph 20 pleads causation of a variety of harms caused on a class-wide basis by the rights restrictions.
- [55] Paragraph 21 pleads that harm was foreseeable at the national level of CSC.
- [56] Under "Legal Basis", paras. 1 and 1A plead a common law duty of care owed by CSC to the class with a high degree of specificity. Notably, parts of para. 1A reference specific sections of the Corrections and Conditional Release Act, S.C. 1992, c. 20 ("CCRA"), which create specific duties, including s. 36, which addresses minimum time out of cell and minimum time for interaction with others.
- [57] Paragraph 1B sets out, again with much specificity, the reasons for the class-wide duty of care. Subparagraph (g) pleads that the defendant is vicariously liable for the acts and omissions of CSC staff.
- [58] In short, the relevant portion of the ANOCC amply pleads the claim of systemic negligence, and easily clears the hurdle posed by s. 4(1)(a) of the CPA.
- [59] The second argument made by AG Canada is that it is "plain and obvious" that the claim of systemic negligence has no prospect of success because, to the extent that it is based on national policy guidance, such amounts to a challenge to areas of "core policy", for which the defendant cannot be found liable.

[60] The plaintiff counters this assertion in the notice of application on certification at para. 19, in this manner:

The primary allegations against CSC relate to the systemic implementation and application of its policies, i.e. its "process at ground level," which constitute operational matters that fall outside of "core policy" government decisions.

[61] In support of his position, the plaintiff cites the discussion on this point in *Francis v. Ontario*, 2021 ONCA 197 at paras. 130-141. *Francis* was an appeal of a decision to award Charter damages based on implementation of administrative segregation on a vulnerable class of inmates in the Ontario provincial correctional system. The trial judge also found systemic negligence, and that, too, was addressed by the Court of Appeal for Ontario. In *Francis*, the Court held that because the key decisions related to implementation of the segregation policy were left to individual institution superintendents, they were not protected by core policy considerations.

[62] During that discussion in *Francis*, the Court quoted para. 90 of *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, where Chief Justice McLachlin noted that "core policy" decisions, immune from civil lawsuits, are those "based on public policy considerations, such as economic, social and political factors "

[63] Chief Justice McLachlin also noted that there may be cases where it is difficult to decide whether the degree of "policy" involved is sufficient to protect against liability for negligence. In the context of a motion to strike, the matter must be permitted to proceed to trial unless it is "plain and obvious" that an impugned government decision is a policy decision: para. 91.

[64] The test for certification is identical to an application to strike. I cannot say that the decisions with which we are here concerned are obviously policy decisions. The plaintiff's claim of systemic negligence is not doomed to fail on the basis that it impugns "core policy". Based on the reasoning in *Francis*, the plaintiff's claim may well succeed. Equally, it may not. Whether or not the claim ultimately succeeds is an issue for trial.

[65] In a nutshell, the plaintiff's claim is that it was incumbent on CSC to ensure that whatever policies and practices it formulated in relation to medical isolation, such needed to conform with the Mandela Rules and the requirements of the CCRA. Particularly in light of recent court decisions that found prolonged periods of separate confinement to be a form of cruel and unusual treatment or punishment, CSC needed to ensure that all inmates were afforded a meaningful opportunity for out-of-cell time and human interaction daily. The plaintiff posits a "top down" theory of liability, and submits that CD-822 was a fundamentally flawed instrument, which when implemented by those in charge of individual institutions, usually wardens, resulted in foreseeable harm to the entire class of plaintiff inmates.

- [66] I reiterate, there may well be valid defences to this claim which succeed at trial. Equally, the plaintiff may simply fail to persuade the trial judge on a balance of probabilities of its fundamental theory, and for that reason the claim may fail. However, the merits of the claim are not before me on this application. I need only determine, as I have, that the plaintiff's pleaded claim of negligence is not bound to fail.
- [67] That leaves for consideration, under this heading, the claim of punitive damages.
- [68] AG Canada submits that there are no material facts pleaded which, if proven, could justify an award of punitive damages. I disagree.
- [69] I accept the plaintiff's submission that what is required at this stage is a pleading of high-handed, malicious, arbitrary, or highly reprehensible conduct which would be deserving of judicial rebuke. The ANOCC, in various places, contains pleaded facts capable of supporting an award of punitive damages.
- [70] The linchpin to this claim is the awareness on the part of CSC that various courts had recently condemned the practice of subjecting inmates to prolonged periods of separate confinement. The plaintiff pleads that the sum total of actions taken by CSC which led to exactly that type of confinement for the proposed class was marked by gross negligence, recklessness, bad faith, or amounted to clear breaches of Charter-protected rights. Knowing that such behaviour had been the subject of judicial rebuke, CSC's conduct here was high-handed and reprehensible. Thus, punitive damages are appropriate.
- [71] I cannot at this juncture assess the strength of this claim, nor would it be appropriate for me to do so. I can say that the pleadings are sufficient, if substantiated at trial, to lead to an award of punitive damages, and that such a claim is not doomed to fail.

Identifiable Class

- [72] AG Canada submits that the proposed class is overbroad and that it lacks clarity. I disagree on both counts.
- [73] The plaintiff provided an alternative class definition which is what I will consider at this juncture. The proposed class definition is:

All persons who, between 11 March 2020 and the date this matter is certified, were incarcerated, detained, or held in custody in a CSC Institution during a declared COVID-19 outbreak at that Institution, and were:

- a. confined to their cells for 20 or more hours in a day; and
 - b. deprived of the opportunity to interact with others for a minimum of two hours in a day
- for a period of 15 or more consecutive days.

- [74] The final part of the definition, the 15-day criterion, was the amendment from the previous definition. In my view, that amendment was both sensible and legally sound. It brings the proposed class definition in line with both the prevailing expert wisdom on threshold at which risk of serious psychological harm crystallizes, and the expert evidence filed by the plaintiff on certification.
- [75] The submission of AG Canada on the overbreadth of the class was based on two planks: one, the class would include inmates who were confined to their cells for reasons unrelated to the pandemic; and, two, that there would be conflicts within the class between those who did not wish to be confined in isolation, and those whose primary claims/concerns related to the inadequacy of the CSC response to the pandemic.
- [76] The second issue above is no longer extant. All claims related to inadequate response in safeguarding vulnerable inmates against risk of infection have been abandoned.
- [77] With respect to the first issue, I cannot envisage a realistic risk of the class definition capturing people who were isolated for non-pandemic reasons, such as risk of suicide or self-injury. As currently proposed, the class definition permits potential class members to readily self-identify at the outset. If there are a small number of individuals who were subject to those conditions of confinement during an outbreak, but for a different reason, that will be readily apparent to all, certainly the defendant, on a review of the individual's Corrections files. A procedure can be put in place to screen out those individuals at a later stage of these proceedings.
- [78] AG Canada also submits that the proposed class lacks clarity. Again, I disagree.
- [79] This submission is based on para. 5D of the ANOCC, wherein the plaintiff identifies other class proceedings where individuals may recover damages as a result of placement, for a variety of reasons, in separate confinement in federal institutions. In essence, the plaintiff is attempting to be forthright in foreclosing double recovery for any potential class members. AG Canada takes issue primarily with the manner in which that potential is pleaded, and the contingent nature of some of the safeguards offered with respect to double recovery.
- [80] Again, in my view, the only real problem identified is one of practical application, much further down the litigation track, and is not a bar to certification. A mechanism can be put in place after a common issues trial, assuming the plaintiff succeeds, to weed out any individual who is both a member of this class and has already recovered damages for the same conduct in other proceedings.

Common Questions or Issues

- [81] As is so often the case at a certification motion, the requirement imposed by s. 4(1)(c) of the CPA is where the real battle lines are drawn. Section 4(1)(c) requires that there be "some basis in fact" that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. Here, AG

Canada makes multiple submissions in relation to lack of common issues, related to all aspects of the plaintiff's claim. I will attempt to address each of those submissions fully in the next part of this judgment.

[82] There is no dispute that what is required is some basis in fact that the issues exist and that they are common to all prospective class members: Hollick at para. 25. AG Canada submits that the plaintiff has not put forth "the required evidentiary basis to establish the existence of any common issue that would significantly advance the claims of every class member of the proposed class and would not require duplicative fact-finding and legal analysis."

[83] With that backdrop in mind, I turn to the individual points made by AG Canada on this score.

Common Duty of Care Analysis

[84] The first common issue proposed by the plaintiff is this:

Does the CSC owe Class members a duty of care? If so, what is the content of that duty?

[85] The second proposed common issue is:

Did the CSC breach a duty of care by virtue of its systemic, operational acts and omissions regarding the Rights Restrictions?

[86] AG Canada submits that there can be no common duty of care analysis, nor can the question of any breaches of any duty of care by any CSC officials be determined in common. I will address these arguments simultaneously, under the broad heading set out above.

[87] As a preliminary matter, I observe that the case before me is in no way similar to Ewert v. Canada (Attorney General), 2022 BCCA 131, which is a comparatively recent decision of our Court of Appeal and therefore binding on me. If I found this case to be similar to Ewert, I would not, indeed could not, certify it. However, for the following reasons, there are no legally relevant similarities between the two cases.

[88] Ewert was a proposed class action brought by an inmate at Kent maximum security prison. All inmates had been subjected to a 12-day lockdown which included two exceptional searches of cells (and, it appears, strip searches of inmates) based on security concerns, specifically information received by CSC that an improvised gun had been smuggled into the penitentiary. The searches were conducted by two specialized units of CSC staff, an emergency response team (ERT), and riot and tactical personnel (TAC).

[89] The proposed civil claim was broad; it alleged various torts committed by CSC staff, and breaches of Charter rights. There was also a broad negligence claim which pled a general duty of care owed by CSC to inmates, and said the duty of care was breached by prison administrators failing to ensure that CSC staff, including ERT and TAC personnel, "acted lawfully" in their interactions with inmates, and with due regard for the inmates' rights, health, safety, and welfare.

- [90] The motion judge certified the claim as a class proceeding. On appeal, that decision was overturned, except for a claim of misfeasance in public office.
- [91] With respect to the negligence claim in Ewert, the Court of Appeal found that many of the things set out as "failures", said to constitute breaches of the standard of care, did not address experiences that would have been common to all class members. Moreover, because the net effect of any failures, i.e. what a particular inmate experienced during the lockdown generally, or during a particular cell search, was specific to each inmate, the necessary inquiry would inevitably need to explore the interactions between inmates and CSC personnel, or "individualized investigations." The Court then found that the approved common issue of breach of the duty of care was "unacceptably entangled with matters that are not common": para. 62.
- [92] For that reason, the claim of negligence was not certified.
- [93] In this case, as I have noted, the ANOCC contains comparatively detailed exposition of the alleged duty and standard of care, and the specific conduct said to constitute a breach of the duty of care.
- [94] Moreover, the action is rooted in commonality of experience among all class members caused by the blanket imposition of separate confinement mandated by CD-822 and the algorithms. There is no need to explore the individual interactions between CSC staff and various class members to determine the central question. Indeed, part of the claim is that there was no meaningful interaction with anyone, including CSC staff; it is alleged that even the daily wellness checks of inmates were extremely perfunctory.
- [95] The cases which are of the most assistance in considering the commonality of the negligence claim are the series of cases from Ontario which have addressed claims of systemic negligence in the context of separate confinement. In Ontario, there were two separate class actions determined on their merits as summary trials, under the names Brazeau and Reddock. There was then a joint appeal reported as *Brazeau v. Canada* (Attorney General), 2020 ONCA 184. It is on portions of that judgment which counsel for AG Canada most heavily relies.
- [96] Subsequently, the Court of Appeal for Ontario decided *Francis v. Ontario*, 2021 ONCA 197. The plaintiff relies most heavily on *Francis*, decided after *Brazeau*, which arguably evinces a broader application of a class-wide duty of care than does *Brazeau*.
- [97] *Brazeau* (and *Reddock*) were brought by inmates in the federal system who had been subjected to administrative segregation between November, 1992 and the date of certification. The two classes were defined somewhat differently, and members of the *Brazeau* class were excluded from the *Reddock* class. The *Brazeau* plaintiffs sought only damages for breaches of their Charter rights. The *Reddock* plaintiffs sought Charter damages and damages for systemic negligence. The motion judge in *Reddock* found systemic negligence but awarded only one set of damages for both the Charter-breaching

conduct and the systemic negligence.

[98] The Court of Appeal found that the motion judge had erred in his analysis of the duty of care in relation to systemic negligence. However, the division of the Court found that the damages awarded were sustainable as Charter damages, and then said that "as we view Charter damages to be the more appropriate remedy, our consideration of the systemic negligence issue will be brief": para. 114.

[99] That consideration spans paras. 115 through 122, which I reproduce here in their entirety:

[115] The portion of the respondents' statement of claim relied on by the motion judge pleads that there is a recognized class-wide duty of care owed by the CSC to inmates with respect to the "design, organization, administration and staffing of the Federal Institutions, as well as the policies and procedures applied therein": Reddock, at para. 398, referring to para. 60 of the fresh as further amended statement of claim. The motion judge recognized the need to "prune" aspects of this claim because they related to the "area of core law-making and policy-making that is immune from a negligence claim": at paras. 406, 409. He went on to find, at para. 411, that

... through Corrections Canada, the Federal Government had a duty of care not to operate a system of administration segregation that caused harm to the inmates and a duty of care not to violate the inmates' Charter rights. [. . .] The Federal Government's duty of care is, in part, commensurate with its Charter obligations.

[116] In our view, both the duty pleaded by the respondent and the duty found by the motion judge differ significantly from the established general duty of care that correctional institutions are "to take reasonable care for [a prisoner's] safety as a person in their custody": *MacLean v. The Queen*, [1973] S.C.R. 2, at p. 7. *MacLean* involved a claim for personal injuries sustained as a result of an accident at a prison farm, the equivalent of a workplace accident. The Supreme Court found that the guard in charge of the operation was negligent in the way he supervised and directed the work and that the Crown was vicariously liable: at p. 7.

[117] *MacLean* concerned the straightforward application of a routinely recognized common law duty of care to the prison setting. It did not involve the operation of a system, the design of policies and procedures, or the violation of Charter rights. The duty found by the motion judge is a novel duty that essentially rests upon principles of public law and Charter rights. The same analysis applies to another duty referred to by the motion judge, namely, the "duty to take reasonable care to avoid causing foreseeable mental injury": at para. 463.

- [118] The duty identified by the motion judge was a novel duty that required careful scrutiny, particularly in the context of this class action. It can only succeed if systemic in nature and cannot succeed if based upon a series of discrete breaches of duty to individual inmates. The two-stage test from *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, must be considered: does the nature of the parties' relationship create a *prima facie* duty of care, and if so, is the duty negated by residual policy concerns?
- [119] The motion judge accepted that cases such as *Cooper*; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; and *Eliopoulos (Litigation Trustee) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 514, foreclose Mr. Reddock's systemic negligence claim based on "allegations that the Federal Government owed a duty of care with respect to the staffing of the penitentiaries or with respect to the law making or policy making function including the responsibility to have in place safeguards and policies to prevent the harms associated with administrative segregation": at paras. 423-24. Yet what he labels to be "operational" failings, at para. 414, essentially amount to criticisms of the Correctional Service's policies in relation to the use of administrative segregation. This is the very same failure to have in place policies to avoid the harm and corresponds with his characterization of the duty as being to avoid breaching the class members' Charter rights.
- [120] While individual inmates have a cause of action for specific individual acts of negligence on the MacLean principle, a class-wide duty of care can only be made out if the duty relates to the avoidance of the same harm for each class member. This is not a case where the class-wide duty of care is said to arise from a single incident or act, for example, an air crash or train derailment. Rather, the duty alleged arises from different acts in different circumstances and in relation to different individuals. Those acts can be identified as being the same only because they all arise from the implementation of a particular policy or regulatory regime regarding the management of prisons. The primary negligence claim in the amended statement of claim is negligence at the policy-making level. Negligence at the operational level is alleged as an alternative and that would turn on individual circumstances. Negligence at the policy level leads directly to the *Edwards*, *Cooper*, and *Eliopoulos* exclusion of a duty of care for matters of policy.
- [121] The class can challenge those policies as contravening the Charter under proper Charter analysis, but can only succeed in damages if the test for Charter damages is met. Ward, at para. 43, holds that "the threshold for liability under the Charter must be distinct and autonomous from that developed under private law". That means that the law of negligence cannot be used to short-circuit that analysis where the damages flow from a Charter breach. It follows that the motion judge erred when he stated that the systemic negligence claim provided "a way for Class Counsel to circumvent the Federal Government's argument based on the principle from *Mackin*, [] which principle would immunize the Federal Government from liability under s. 24 (1)": at para. 10; see also para. 376.

- [122] We conclude, accordingly, that as the claims for damages, properly understood, arise from breaches of the Charter, Charter analysis and consideration of the availability of Charter damages is the appropriate remedy.
- [100] Francis was a claim brought by two particular classes of inmates who were subjected to administrative segregation in the Ontario provincial correctional system. The plaintiffs sought both Charter damages and damages for systemic negligence. The motion judge awarded damages based on both aspects of the claim. The Court of Appeal found that the Charter damages award was "fully justified on the Brazeau/Reddock analysis": para. 93. The division then went on to consider the negligence claim, although such was "not technically necessary" in light of the conclusions on the Charter claim, "for the sake of completeness, recognizing that the matter was analyzed in detail by the motion judge and was fully argued [on appeal]": para. 94.
- [101] Thus, the comments which follow are likely obiter but the analysis is nonetheless helpful. In that analysis, the division of the Court disagreed with the defendant that Brazeau/Reddock decided the issue before them and distinguished that case from Francis for several reasons. Among those reasons were the following:
- 1) The decision in Brazeau turned principally on the way in which the plaintiff had pleaded his case. The pleadings were found by the Court of Appeal to be challenges to policy decisions. The pleadings in Francis were materially different in two respects;
 - 2) The first difference was the class definition, which in Francis was confined to two discrete groups, severely mentally-ill inmates who were subjected to administrative segregation for any length of time, and other inmates who were subjected to administrative segregation for 15 or more consecutive days;
 - 3) The second difference was the focus of the pleadings on the implementation of administrative segregation in Ontario, relying on decisions and actions that were of an operational nature, as distinct from policy decisions.
- [102] The Court in Francis then found that there was no principled reason not to extrapolate the well-established duty of care owed to individuals in state custody to guard against foreseeable harm to a class-wide duty of care.
- [103] Unlike the finding in Brazeau that the duty alleged arose "from different acts in different circumstances and in relation to different individuals", in Francis, the Court found the challenge to be, at its core, to the "same act being undertaken, that is, placing inmates in administrative segregation in two specific circumstances where it is said that injury will naturally result": para. 106. The expert evidence established that all individuals who fell within either class would inevitably suffer harm.
- [104] At paras. 107 and 110, the Court of Appeal in Francis said this:

[107] There is no reason in principle to adopt an approach to these claims that requires each individual inmate to commence their own action in order to seek relief for the resulting harm. Indeed, such a result would run counter to the very purpose behind the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[]

[110] Similarly, in this case, the actions of Superintendents directing, or allowing, the SMI Inmates and the Prolonged Inmates to be subjected to administrative segregation can be determined without reference to their individual circumstances. In other words, those actions are capable of being determined on an institution-wide basis through the institution's own records. The institution's records will establish which inmates were subjected to administrative segregation and, of those individuals, who falls within either the SMI Inmates or Prolonged Inmates groups. We repeat that the expert evidence then establishes that harm will be occasioned to each and every individual in both of those groups. While individual circumstances may ultimately be relevant to the proof of individual levels of damages, they are not required for proof of a breach of the duty of care on a system-wide basis, nor are they required for determining a base level of damages applicable to all: *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, 130 O.R. (3d) 241, at para. 75, leave to appeal refused, [2016] S.C.C.A. No. 255.

[105] Were I required to decide the matter, I would likely find that the case before me bears decidedly more similarities to *Francis* than to *Brazeau*. I have already noted the specificity of the pleadings in relation to systemic negligence; the plaintiff's position that what is at issue here is operational, not policy, decisions; and, most importantly, the common treatment of all members of the proposed class.

[106] However, I am not required to make that decision at this juncture, nor would it be appropriate for me to do so. I must only determine if there is some basis in fact for the claim of systemic negligence, or if it is doomed to fail. I reach the former conclusion. There is clearly some basis in fact for the claim, and the plaintiff should not be foreclosed from advancing this claim at a common issues trial. At trial, a full consideration of the merits will be undertaken, and the defendants will have a full opportunity to persuade the presiding judge that the *Brazeau* analysis should prevail.

[107] I also note that, as in *Francis*, the plaintiff has filed a substantial amount of expert opinion evidence on this motion, in particular addressing issues related to detrimental effects of separate confinement on inmates, and with respect to prison administration. There is thus a solid evidentiary support for the proposition that all members of the class would have suffered psychological harm if left in separate confinement for more than 15 days. As to foreseeability of harm, the plaintiff relies on the earlier judicial determinations about that very issue in both B.C. and Ontario. Those decisions clearly fixed CSC with knowledge that subjecting inmates to prolonged periods of separate confinement carried with it an unacceptable risk of harm to all inmates who were treated in that manner.

[108] Finally, I note what was said by Justice Wilson in Hunt, that the only way the common law can continue to evolve is by permitting pleadings which disclose questions of law that are "arguable, difficult or important" to proceed to trial: para. 55. I view the pleaded case here of systemic negligence as falling within that description.

Commonality of Charter Issues

[109] The plaintiff pleads that the rights restrictions amounted to cruel and unusual treatment or punishment, thereby breaching the section 12 Charter rights of the class. Further, the plaintiff pleads that the rights restrictions breached the section 7 Charter rights of the class to life, liberty, and security of the person.

[110] The proposed question in this regard is, in essence, did the acts, omissions, or policies of CSC breach class members' rights under ss. 7 or 12 of the Charter, and if so, which, and how?

[111] AG Canada submits that a class-wide Charter analysis is not possible.

[112] At certification, I must consider whether the Charter claims are eligible as common issues; namely, if they can be decided on a class-wide basis without breaking down into individual investigations for each class member, and without duplication of fact-finding or legal analysis.

[113] In Ewert, the Court of Appeal found that the claims in respect of ss. 7, 12, and 24(1) of the Charter, which implicated rights that were inherently personal in nature, were likely to break down into individualized investigations and therefore lacked the commonality required for certification under the CPA: see paras. 86-88.

[114] The case before me is one with concurrent tort and Charter claims. As Chief Justice McLachlin explained in Vancouver (City) v. Ward, 2010 SCC 27, there is no bar to pleading both tort and Charter claims concurrently:

[59] As was done here, the claimant may join a s. 24(1) [Charter] claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of Charter damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

[115] Where both are pleaded concurrently, the Court may strike the Charter claims in circumstances where the actions giving rise to the alleged tort and Charter wrongs are identical and the consequences alleged to arise from those breaches are identical. The Charter claims can be struck when it is clear, on the facts alleged, the Charter claim will succeed only if the tort claim also succeeds, thereby resulting in the same damages. A plaintiff cannot obtain double recovery by asserting two causes of action: North at para. 43, citing Quinn v. British Columbia, 2018 BCCA 320, and Johnson v. MacDougall, 2019 BCSC 743 [MacDougall].

- [116] The Court of Appeal considered MacDougall in *Johnson v. British Columbia (Attorney General)*, 2022 BCCA 82, specifically the appellants' amended notice of civil claim seeking damages under s. 24(1) of the Charter for breach of their ss. 7 and 12 rights. In MacDougall, British Columbia was successful in its application to strike the s. 24(1) damages claim on the basis that the actions and omissions alleged to constitute the Charter breaches had been concurrently pleaded as torts, such that the plea for Charter damages was duplicative of the plea for tort damages.
- [117] The Court of Appeal found it was plain and obvious that a claim for Charter damages could not succeed; the actions giving rise to the alleged tort and Charter wrongs, and the consequences alleged to have arisen from those breaches, were identical: para. 70. There was no possibility that the appellants' claim for Charter damages would succeed while the tort claims would fail. The judge in MacDougall was correct in concluding that the remedies available in tort would adequately meet the need for compensation such that a further award of damages under s. 24(1) would serve no function: para. 107.
- [118] Butler J.A. explained:
- [82] There is little question that the primary function of the damage award will be compensation and the focus at trial will be on assessment of quantum. That assessment will necessarily take into account vindication and deterrence, whether the claims are approached as Charter breaches or tort claims. The function of vindication recognizes that Charter rights must be maintained and the function of deterrence recognizes that damages may serve to deter future breaches by state actors. It is not apparent to me why those functions could or would not be fulfilled by an award of tort damages, including punitive and aggravated damages, in the circumstances of this case.
- [85] In my view, there is no category of loss claimed by the appellants for which the court will not be able to provide redress through tort damages. If the allegations are proven, the appellants' claims would attract aggravated and punitive damages in tort. The appellants cannot show why, if aggravated and punitive damages are awarded in tort, it would be appropriate or necessary for an additional award of Charter damages to address the same conduct.
- [119] However, it is possible for a plaintiff to obtain Charter damages while being unsuccessful in a concurrent tort claim: see Ward at para. 68; North at para. 44. The Court may find, for instance, for policy or other reasons, that no common law duty of care is owed in the circumstances while nevertheless finding a breach of Charter rights. This would make Charter damages the only available remedy: North at para. 51.
- [120] I view this case as one more akin to the claims advanced in North, Brazeau/Reddock and Francis, than to Ewert. In the former cases, Charter issues were considered in cases which also advanced tort claims. I have already noted that I do not see an appreciable risk of the Charter claims breaking down into individual inquiries, as occurred in Ewert.

[121] Nor do I view the distinction between medical isolation and administrative segregation as being important at this stage of the proceedings. As previously noted, that distinction may be extremely important at a common issues trial, but it is not a bar to certification. A consideration of the reason for prolonged periods of separate confinement necessarily involves an assessment of the merits of the claim, something beyond the scope of a certification motion.

[122] For those reasons, the plaintiff's claims in relation to breaches of ss. 7 and 12 of the Charter are certified.

Class-Wide Damages

[123] The plaintiff seeks to certify common questions related to aggregate damages and punitive damages. In theory, either or both forms of damages could be awarded following a finding of systemic negligence or breaches of the Charter. Obviously, the judge at the common issues trial will need to ensure there is no double recovery. However, the plaintiff submits that both issues should be certified. The proposed questions are these:

- d. Can the quantum of damages or any portion thereof be determined on an aggregate basis? If so, in what amount and who should pay it to the Class?
- e. What quantum of punitive damages should be paid, and to whom?

[124] AG Canada submits that neither of these issues should be certified. In essence, the defendant says that all issues related to damages must be assessed on an individual basis. However, I note that the first prong of that submission was premised on the dichotomy then built into the action between anxiety felt by those who were fearful of being exposed to the COVID-19 virus and those suffering from psychological harm related to isolation. That dichotomy is no longer present. The revised pleading is focussed solely on the rights restrictions.

[125] The other main submission made by AG Canada is that, unlike all the administrative segregation cases, in this case there can be no doubt that in some circumstances medical isolation was necessary. In my view, that is an extremely interesting and potentially important issue, but one best left for the common issues trial.

[126] At that trial, if the plaintiff can establish liability premised either on systemic negligence or Charter breaches, based on the class definition, there will be a base level of harm to all class members justifying an award of aggregate damages and, potentially, punitive damages. In that regard, see Francis at para. 110 and the discussion of both aggregate general damages and punitive damages in *Good v. Toronto (Police Services Board)*, 2016 ONCA 250 at paras. 75-82.

[127] I agree with the plaintiff's submission that the questions related to both aggregate damages and punitive damages should be certified. Answering those questions at a common issues trial will move this litigation forward. There may remain individual issues related to damages which need to be resolved. In that event, appropriate procedures will need to be adopted by the presiding judge. However, that is not a bar to certification: *Rumley v. British Columbia*, 2001 SCC 69 at para. 36.

Preferable Procedure

[128] AG Canada submits that a class action is not the preferable procedure, and that none of the purposes of class proceedings is met in this case. It argues that the proposed class action would not advance class members' claims or advance the goals of access to justice, judicial economy, or behaviour modification. I disagree.

[129] AG Canada submits that Mr. Roberts, and any similarly aggrieved individual, should bring their own individual action based on either negligence or alleged Charter breaches. That, says the defendant, would be preferable from their perspective than waiting years to see if a claim of systemic negligence is proven at a common issues trial.

[130] Moreover, AG Canada submits that the proposed common issues trial is unwieldy and unmanageable, and the common issues will inevitably be overwhelmed by the required individual issues and inquiries.

[131] The plaintiff submits that he has met the preferability requirement, and goes further, submitting that a class proceeding is the necessary procedure, i.e. the only feasible method by which the plaintiff class can advance their claims. In that regard, the plaintiff points out the potentially insurmountable access to justice barriers faced by many of the potential class members who are serving lengthy sentences and remain incarcerated.

[132] The starting point for the preferability analysis is s. 4(2) of the CPA, which reads:

- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
 - (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
 - (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
 - (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
 - (d) whether other means of resolving the claims are less practical or less efficient;

- (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
- [133] I must also consider s. 7(a), which states that a court must not refuse to certify a proceeding as a class proceeding merely because "the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues."
- [134] I also have in mind what was said on this score by Justice Cromwell in *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22 and 23:
- [22] In *Hollick*, McLachlin C.J. indicated that the preferability inquiry had to be conducted through the lens of the three principal goals of class actions, namely judicial economy, behaviour modification and access to justice (para. 27). This should not be construed as creating a requirement to prove that the proposed class action will actually achieve those goals in a specific case. Thus, when undertaking the comparative analysis, courts must focus on the statutory requirement of preferability and not impose on the representative plaintiff the burden of proving that all of the beneficial effects of the class action procedure will in fact be realized.
- [23] This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the CPA, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve those goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to CPA proceedings: "Our focus is not on the convenience or burden of a class action suit per se, but on the relative advantages of a class action suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004), at p. 1269, cited in *Rubenstein*, at § 4:85, fn. 2.
- [135] In my view, the answer to the overarching question, whether a class proceeding is the preferable procedure, is overwhelmingly "yes." I agree with the plaintiff that a class proceeding is the only means by which the plaintiff class can advance their claims.
- [136] Moreover, I agree that the manner in which the plaintiff has framed his case engages a consideration of potential "systemic breaches of rights and duties that can be determined through examination of CSC's policies, practices, and systems." There is much merit to the plaintiff's position that CSC is a "top-down" organization, and that the failings, if such there were, at a national level inevitably bled into the management of inmates at the regional and institutional level.
- [137] The common issues trial will need to examine the creation and implementation of CD-822, and the extent to which it failed to provide adequate guidance to institutional heads as to minimum requirements for out-of-cell time and meaningful interaction with others.

- [138] Beyond that, the common issues trial may need to examine a discrete number of outbreak situations at different institutions, and the extent of any prolonged medical isolation of large cohorts of inmates during and after those outbreaks. Unlike the defendant, I can readily envisage a very manageable common issues trial.
- [139] I have already commented on the access to justice barriers faced by many, if not most, of the plaintiff class. It would not be preferable to require each of them to commence a separate action, nor could many of them afford to retain a lawyer for that purpose. There is no other readily identifiable means of dispute resolution available to the plaintiff class.
- [140] With respect to judicial economy, there is only one answer, namely that a class proceeding is a more efficient usage of judicial resources than an indeterminate number of individual actions.
- [141] There is no evidence nor suggestion that the proposed claims in this proceeding overlap with any other individual or class proceedings.
- [142] I agree with AG Canada that this class proceeding is not necessary for behaviour modification, but that is the only consideration that weighs against a class proceeding as the preferable procedure. It is insufficient to tip the scales against certification.

Suitable Representative Plaintiff

- [143] Section 4(1)(e) of the CPA requires that there is a representative plaintiff who:
- (i) would fairly and adequately represent the interests 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, an interest that is in conflict with the interests of other class members.
- [144] Mr. Roberts submits that he meets the above criteria. He has filed an affidavit in which he deposes that he will fairly and adequately represent the interests of the class, and that he has no conflict of interest with other class members. A proposed litigation plan is appended to the notice of motion seeking certification.
- [145] AG Canada submits that Mr. Roberts is not a suitable representative plaintiff for two reasons, both of which relate to the sufficiency of the litigation plan. The alleged inadequacies are these:
- 1) The litigation plan fails to acknowledge the complexities and extent of document assembly and production; and,
 - 2) The litigation plan relies on CSC to deliver contact information for class members, a procedure that is "unworkable" from the perspective of CSC.

- [146] The first of these alleged failings is concerned with lack of safeguards in place for protecting confidential or privileged information among the class. The defendant raises various issues and submits that "all of this raises confidentiality and security concerns, which the litigation plan does not engage with." In my view, the potential problems posited by AG Canada are far from fatal. Indeed, if they were, there could never be a class action certified which had federal inmates as a class. The privilege and confidentiality concerns raised by the defendant are matters which can be resolved through the collective ingenuity of counsel and the Court.
- [147] The second alleged failing is potentially of greater concern. AG Canada says CSC is simply not able to provide contact information for potential class members. CSC says it is not workable for it to search databases to identify who was on medical isolation, and in what circumstances, during the entirety of the class period. In addition, CSC says it does not have contact information for those inmates who may fall within the class but have since reached warrant expiry and have been released without conditions.
- [148] The practical realities of the above-noted limitations may prove to be extremely problematic from the plaintiff's perspective as this litigation moves forward. However, I do not view those potential obstacles as a bar to certification. The balance of the litigation plan, with one exception, to which I will return, is adequate. The issue of notice and how it will be given may need refinement, but such refinements are common in class proceedings.
- [149] The only part of the litigation plan which requires immediate amendment is the proposed timing for next steps in the litigation. The plaintiff proposes a timeline which starts with 15 days post-certification for the defendant to deliver contact information, and builds in all other deadlines from there. In my view, many of the proposed timelines are overly optimistic, including the 15-day deadline for CSC to provide contact information. That is especially so in light of the difficulties CSC claims it will have in providing that information.
- [150] I agree with the submission of AG Canada that the next step in this litigation is a judicial management conference, at which a litigation schedule can be set.

Conclusion

- [151] For the foregoing reasons, this action is certified as a class proceeding.
- [152] I would certify the following questions, as set out in the plaintiff's notice of application:
1. Does the CSC owe Class members a duty of care? If so, what is the content of that duty?
 2. Did the CSC breach a duty of care by virtue of its systemic, operational acts and omissions regarding the Rights Restrictions?
 3. Did any of the acts, omissions, or policies of the CSC in relation to the Rights Restrictions:
 - a. Constitute bad faith? If so, which, and how?

- b. Breach Class members' rights under ss. 7 or 12 of the Charter? If so, which, and how?
- c. Constitute malicious, oppressive, and high-handed conduct?
- d. Result from willful or intentional acts or recklessness on the part of CSC?
- 4. Can the quantum of damages or any portion thereof be determined on an aggregate basis? If so, in what amount and who should pay it to the Class?
- 5. What quantum of punitive damages should be paid, and to whom?
- 6. What procedures should apply to the determination of any individual questions which remain after determination of the common issues?

[153] Pursuant to s. 37 of the CPA, I make no order concerning costs.

[154] I direct that there be a further case management conference scheduled within 90 days of the release of this judgment to consider next steps and attempt to finalize a litigation plan.

"Tammen J."

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