

In the Court of Appeal of Alberta

Citation: Reilly v Alberta, 2024 ABCA 270

Date: 20240819
Docket: 2201-0246AC
Registry: Calgary

Between:

Ryan Reilly and MS

Respondents
(Applicants)

- and -

**His Majesty the King in the Right of the
Province of Alberta**

Appellant
(Respondent)

The Court:

**The Honourable Justice Thomas W. Wakeling
The Honourable Justice Bernette Ho
The Honourable Justice William T. de Wit**

**Memorandum of Judgment of The Honourable Justice Bernette Ho
and The Honourable Justice William T. de Wit**

Dissenting Memorandum of Judgment of The Honourable Justice Thomas W. Wakeling

Appeal from the Order by
The Honourable Justice J.D. Rooke
Dated and filed the 26th day of September, 2022
(2022 ABKB 612, Docket: 1801-06296)

Memorandum of Judgment

The Majority:

[1] The appellant, His Majesty the King in right of the Province of Alberta, appeals an order pronounced September 26, 2022 by Associate Chief Justice Rooke (as he then was) (the “Certification Judge”) certifying a class action commenced by Ryan Reilly and MS¹ pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5: *Reilly v Alberta*, 2022 ABKB 612 [*Certification Reasons*].

[2] For the reasons that follow, the appeal is dismissed.

Background

[3] Section 503(1) of the *Criminal Code*, RSC 1985, c C-46 provides:

503 (1) Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:

- (a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and
- (b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.

[4] In 2016-2017, a new bail hearing system was developed and implemented whereby Crown prosecutors took over the prosecution of bail hearings from police authorities (“Crown Bail”).²

[5] Both respondents were arrested in April 2017 and were detained for a period longer than 24 hours prior to receiving a bail hearing as required by section 503(1) of the *Criminal Code*

¹ A restricted access order was issued on June 15, 2020 granting the plaintiff, MS, permission to use a pseudonym as the proposed representative plaintiff of the action.

² An overview of the newly implemented bail system was provided in *R v Reilly*, 2019 ABCA 212 at paras 10-14, rev’d, 2020 SCC 27.

(referred to herein as “overholding”). Mr. Reilly was not granted a bail hearing for approximately 36 hours and MS was not granted a bail hearing for approximately 26 hours.

[6] Mr. Reilly was originally charged with assault causing bodily harm, unlawful confinement, assault, mischief, and a failure to comply with a probation order. The Crown conceded that Mr. Reilly’s section 7, 9 and 11(e) *Charter* rights were breached as a result of the overholding and the trial judge stayed all charges because of the “systemic and ongoing problem” of the state routinely overholding accused persons for more than 24 hours: *R v Reilly*, 2018 ABPC 85 at paras 63-68 [*Reilly 2018*]. The Crown’s appeal of *Reilly 2018* was allowed as to remedy: *R v Reilly*, 2019 ABCA 212 [*Reilly 2019*], although the Supreme Court of Canada restored the stay: *R v Reilly*, 2020 SCC 27. However, the Supreme Court’s brief reasons did not disturb this Court’s holding in *Reilly 2019* at para 52: “The time limits in the *Criminal Code* must be met on time, every time, for every detained person. The government must indeed design a system that is able to handle ‘any bail volume’ at any time.”

[7] Mr. Reilly and MS then filed the Third Amended Statement of Claim on their own behalf and on behalf of those similarly situated, seeking to certify a class consisting of (Third Amended Statement of Claim at para 65):

All persons arrested in Alberta between May 2, 2016 and the date of certification who: (a) did not receiving a bail hearing within 24 hours of their arrest; (b) did not consent to an adjournment of their bail hearing; (c) did not have their bail hearing adjourned by a justice within 24 hours of their arrest; (d) were not arrested or charged with an offence listed under Section 469 of the *Criminal Code*; (e) were granted bail at a bail hearing or were released without a bail hearing, but after 24 hours from the time of their arrest; (f) did not receive a prison sentence or a sentence based upon time served as a result of charges stemming from their arrest; and (g) did not have their bail hearings conducted by the Public Prosecution Service of Canada or any Federally appointed prosecutor. (The “Class” or the “Class Members”).

[8] The respondents allege in the Third Amended Statement of Claim that the appellant, “through and with its employees and agents, is responsible for the criminal justice system in the Province of Alberta including the operation, management, administration, supervision and funding of bail hearings”: para 33. As was made clear in the reasons of the Certification Judge, the respondents claim that systemic issues associated with the administration of Crown Bail are the primary focus of the Third Amended Statement of Claim, as opposed to operational and management decisions made in relation to individual cases: *Certification Reasons* at paras 18, 29, 32, 34, 49, 53, 55, 56 (b), (d) and (f). In this context, the respondents allege that the appellant was negligent, in part, because it breached its duty of care by “failing to ensure that a plan was in place to have a bail hearing conducted within the required 24 hours period...” and “failing to provide appropriate guidelines, directions, or system-wide coordination to enable the justice system participants, including Alberta’s Crown prosecutors, the courts, and Alberta’s police forces, to ensure that Class Members received bail hearings within 24 hours”: Third Amended Statement of

Claim at paras 83(a) and (d). The respondents further allege that the “Crown Bail system was designed and is carried out without due regard to the *Charter* rights of arrested individuals”, which has led to “the unlawful detention of thousands of Albertans”: Third Amended Statement of Claim at para 30. Specifically, the respondents maintain that the “overholding” of detainees breaches sections 7, 9, 11(d), 11(e) and 12 of the *Charter*.

Grounds of Appeal

[9] The appellant argues that the Certification Judge erred in certifying the action for the following reasons:

- (a) It is plain and obvious that the negligence cause of action is doomed to fail and does not pass the test in section 5(1)(a) of the *Class Proceedings Act* as the negligence claim: (i) challenges immune core policy decisions; and (ii) does not have the requisite proximity between Alberta and the class.
- (b) There is no basis in fact that the common issues actually exist and can be determined on a class wide basis. The common issues do not satisfy section 5(1)(c) of the *Class Proceedings Act*.
- (c) There is no basis in fact that a class action is the preferable procedure and satisfies section 5(1)(d) of the *Class Proceedings Act*.

Standard of Review

[10] The standard of review was set out in *Setoguchi v Uber BV*, 2023 ABCA 45 at para 16, leave to appeal to SCC refused, 40681 (13 July 2023):

Most aspects of a decision regarding the certification of a class action are entitled to deference. Whether the pleadings disclose a cause of action is a question of law reviewed for correctness. Otherwise, certifying a class action is a discretionary decision, which will not be overturned on appeal unless it reflects an error of principle or it is unreasonable [citation omitted].

Analysis

[11] The question to be considered at the certification stage is whether, from a procedural standpoint, the action should be certified. Substantive considerations regarding the underlying merits of the claim should be left for another day: *VLM v Dominey Estate*, 2023 ABCA 261 at para 19; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 105. To that end, the Certification Judge noted that several significant issues are to be determined at the next stage of proceedings, on a full evidentiary record, including the question of justiciability.

[12] The criteria for certification are set out in subsection 5(1) of the *Class Proceedings Act*:

- (a) the pleadings disclose a cause of action;

- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a person eligible to be appointed as a representative plaintiff...

[13] Here, the appellant conceded that MS was a suitable representative plaintiff and there is an identifiable class of 2 or more persons: *Certification Reasons* at para 61. The appellant, however, takes the position that subsections 5(1)(a), (c) and (d) are not met.

Whether the pleadings disclose a cause of action?

[14] The test to be applied under subsection 5(1)(a) in determining whether the pleadings disclose a cause of action is the same as on an application to strike a statement of claim and asks whether, taking the facts pleaded as true, it is plain and obvious the pleadings do not disclose a cause of action: *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 14. This is a low bar: *Bruno v Samson Cree Nation*, 2021 ABCA 381 at para 67. “[P]leadings are to be read generously, and in anticipation of what might be remedied through an amendment”: *Setoguchi* at para 35. Pleadings alleging negligence, “must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted”: *Tottrup v Lund*, 2000 ABCA 121 at para 11. The Certification Judge held that it is “the failure of Alberta to meet the mandatory provisions of s. 503 of the *Code* that is actionable, regardless of the cause, or who is responsible for it in a given case”: *Certification Reasons* at para 34. Thus, having regard for the pleadings in the context of an allegation of systemic negligence and the breach of *Charter* rights, the Certification Judge concluded the pleadings disclosed causes of action and on their face were not doomed to fail. We agree, particularly given the findings made in *Reilly 2018* and this Court’s holding in *Reilly 2019*.

[15] The appellant submits that a review of the pleadings shows it is plain and obvious that the respondents are challenging immune core policy decisions because the respondents are challenging funding and resource allocation decisions made by Alberta. Relying on the recent decision in *Nelson v Marchi*, 2021 SCC 41, the Certification Judge concluded that it is for Alberta to prove, on a full record, after certification, that the respondents seek to challenge core policy decisions immune from negligence liability: *Certification Reasons* at para 28.

[16] By way of example, the appellant submits that many “systemic” issues identified by the Certification Judge involve resourcing and infrastructure questions which are immune core policy decisions. In response, the respondents point to evidence regarding the creation and involvement of the Hearing Office Provincial Implementation Committee (“HPIC”) and the Hearing Office Standing Committee (“HOSC”). Together, those committees worked to arrive at recommendations for bail reform to bring to the Minister of Justice. This evidence describes a change in the Crown Bail system from the initial “one hearing” system, to a “20 Hour in Custody Protocol” or “20+

Protocol”. Under the “one hearing” system, an individual who was arrested and required a bail hearing was not taken before a justice of the peace until a bail package was completed and a prosecutor was ready to proceed. A year after *Reilly 2019* was issued, the “20+ Protocol” was implemented in June 2020 which contemplated bringing a detainee before a justice of the peace within the 24-hour period and seeking an adjournment under section 516 of the *Criminal Code*. Given the foregoing, we are not persuaded that the Certification Judge erred in rejecting the appellant’s argument that the respondents are seeking to litigate resourcing and infrastructure issues. The work of the HPIC and HOSC raises different considerations.

[17] The appellant also argues, as it did at certification, that this action should not be certified because substantially the same claim was not certified in Ontario: *Cirillo v Ontario*, 2019 ONSC 3066, aff’d 2021 ONCA 353, leave to appeal to SCC refused, 39811 (17 February 2022). The Certification Judge rejected this argument, finding that the pleadings in *Cirillo* were distinguishable: *Certification Reasons* at paras 24-25. We agree that *Cirillo* is distinguishable, as the Ontario claim was much broader, taking issue with such matters as the provision of transportation, translators and requisite infrastructure.

[18] In sum, we see no basis for appellate intervention on the first ground of appeal.

Whether the claims raise common issues?

[19] Turning to consideration of subsection 5(1)(c), the appellant submits that the Certification Judge did not conduct a meaningful screening of the respondents’ proposed common issues and failed to identify a means to distinguish between situations where (i) “systemic” issues versus (ii) individual operational or management issues caused an overholding situation. The appellant argues that it will therefore be necessary to evaluate each individual case of delay, and that this analysis cannot be done on a class-wide basis. Similarly, the appellant maintains that individual assessments must be undertaken in each case to determine whether a *Charter* right was breached and whether any breach was demonstrably justified pursuant to section 1 of the *Charter*.

[20] The Certification Judge reviewed and, in some cases, revised the common issues proposed by the respondents. The Certification Judge’s conclusion that at a systemic level there are common issues does not disclose an error in principle nor do we find his conclusion unreasonable. Evidence regarding the implementation of the “one hearing” bail system and transition to the 20+ Protocol gives rise to common issues. Other examples of common issues exist in relation to whether Alberta owes a duty of care to the class or to the applicability of the *Proceedings Against the Crown Act*, RSA 2000, c P-25. If the appellant chooses to continue to argue that the claims outlined in the Third Amended Statement of Claim are not justiciable, those issues are also common. The Certification Judge’s conclusions respecting common issues is reasonable and appellate intervention is not warranted.

[21] With regards to the appellant’s argument that individual assessments will be necessary, this also engages the preferability criteria under subsection 5(1)(d). The legislation recognizes that there may be instances where individual issues require assessment following determination of common issues: *Class Proceedings Act*, ss 28-29. And as this Court noted in *VLM* at para 29: “The

test is whether the resolution of the common issues would advance the action, even if other individual issues must be resolved later” [emphasis added]. In our view the appellant’s argument places undue emphasis on the prospect of the class proceeding resulting in a final resolution of damages and liability. As stated in *VLM* at para 37, “...the resolution of the common issues does not have to be determinative of liability, as long as resolution of the common issues has some ‘practical utility’, and the action will be advanced [citations omitted].”

[22] We see no basis to intervene on the second ground of appeal.

Whether a class proceeding would be the preferable procedure?

[23] Finally, the appellant submits the Certification Judge erred by concluding that a class action was the preferable procedure in the face of significant individual issues that would dominate the action. In the court below, the respondents were required to show: “(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members’ claims”: *AIC Limited v Fischer*, 2013 SCC 69 at para 48 citing *Hollick v Toronto (City)*, 2001 SCC 68 at paras 28 and 31. When considering preferability the court must take into account “all reasonably available means of resolving the class members’ claims” and must look at the common issues in the context of the action as a whole: *AIC* at paras 19 and 21. This analysis must be conducted through the lens of the three principal goals of class actions: judicial economy, behaviour modification and access to justice: *AIC* at para 22 citing *Hollick* at para 27.

[24] Although the *Certification Reasons* only briefly address preferability, the Certification Judge’s conclusions — viewed through the lens of judicial economy, behaviour modification and access to justice — does not disclose an error in principle. The determination of the common issues promotes judicial economy and access to justice considerations overwhelmingly favour a class action given the allegations. We infer from the nature of the claims outlined in the Third Amended Statement of Claim that there are likely significant economic barriers associated with pursuing individual claims, and many of the class members likely experience personal barriers in the form of vulnerabilities such as addictions, homelessness and other vulnerabilities: *VLM* at paras 22 and 42. In this way, a class action offers advantages that may not otherwise be realized if individual claims were required.

[25] Allowing this to proceed as a class action also promotes behaviour modification, which is particularly important in the context of the safeguarding of constitutional rights.

[26] In our view, the Certification Judge’s decision on preferability was reasonable.

Conclusion

[27] We conclude that the Certification Judge did not commit an error in principle or reach an unreasonable conclusion requiring appellate intervention.

[28] The appeal is dismissed.

Appeal heard on October 11, 2023

Memorandum filed at Calgary, Alberta
this 19th day of August, 2024





Ho J.A.



de Wit J.A.

Wakeling, J.A. (dissenting):

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Dissenting Memorandum of Judgment

Wakeling, J.A. (dissenting):

I. Introduction

[29] Alberta appeals³ a decision⁴ certifying a class proceeding⁵ against Alberta on behalf of persons arrested in Alberta who were not taken before a justice of the peace within twenty-four hours from the time of arrest,⁶ as required by section 503(1)(a) of the *Criminal Code*.⁷

[30] The plaintiff⁸ alleges in his third amended statement of claim⁹ that Alberta was negligent in its administration of the bail system and breached the rights¹⁰ under the *Canadian Charter of Rights and Freedoms*¹¹ of persons arrested roughly between 2016 and 2022 who were granted bail

³ The standard of review is clear. *L'Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, ¶ 10; [2019] 2 S.C.R. 831, 857 per Brown, J. (“It is well established that the assessment of whether the conditions for authorization are met entails the exercise of a discretion The Court of Appeal ‘will therefore intervene . . . only if the motion judge erred in law or if the judge’s assessment with respect to any [certification] criteria . . . is clearly wrong’”); *AIC Ltd. v. Fischer*, 2013 SCC 69, ¶ 65; [2013] 3 S.C.R. 949, 983 per Cromwell, J. (“I recognize that a decision by a certification judge is entitled to substantial deference However, I conclude that deference does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached such as, in my view, occurred here”); *Pioneer Corp. v. Godfrey*, 2019 SCC 42, ¶ 57; [2019] 3 S.C.R. 295, 332 per Brown, J. (“Whether umbrella purchasers have a cause of action under s. 36(1)(a) of the *Competition Act* is a question of law, reviewable on a standard of correctness”) & *Spring v. Goodyear Canada Inc.*, 2021 ABCA 182, ¶ 16; 459 D.L.R. 4th 315, 324 (“Whether the pleadings disclose a cause of action is a question of law reviewed for correctness”).

⁴ *Reilly v. Alberta*, 2022 ABKB 612.

⁵ *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 2.

⁶ Certification order pronounced September 26, 2022, filed April 19 & April 20, 2023.

⁷ R.S.C. 1985, c. C-46.

⁸ Ryan Reilly died some unknown time before M.S. filed his factum in this appeal. Factum of the Respondent M.S., ¶ 8. For him to continue in this action, Mr. Reilly must have a litigation representative. *Alberta Rules of Court*, Alta. Reg 124/2010, r. 2.11(e). I will refer to M.S. as the plaintiff in this judgment.

⁹ Appeal Record 28-33.

¹⁰ Certification order pronounced September 26, 2022 and filed April 19, 2023, s. 4 (“The causes of action asserted on behalf of the Class are: (a) Breaches of ss. 7, 9, 11(d), 11(e), and 12 of the *Charter of Rights and Freedoms* . . . ; and (b) Negligence”).

¹¹ *Canada Act 1982*, c. 11, sch. B. (U.K.).

or released without a bail hearing after twenty-four hours following their arrest and who did not receive a prison sentence or a sentence based on time served.¹²

II. Questions Presented

[31] Section 5 of the *Class Proceedings Act*¹³ records the five criteria that a proposed class proceeding must meet before the Court of King's Bench may certify a proceeding as a class proceeding.

[32] Did Associate Chief Justice Rooke, the certification judge, err in concluding that the applicants met the five-part test?

[33] Does the third amended statement of claim¹⁴ allege facts that disclose a cause of action against Alberta?¹⁵

[34] Do the pleaded facts support a claim in negligence against Alberta?

[35] Does a state actor owe a duty of care to the plaintiff when deciding how to allocate public resources?

[36] Is the claim for systemic negligence justiciable?

[37] Is the adequacy of the resources Alberta devotes to its bail program a legal question suitable for resolution by the judicial branch of government? Or is this primarily a political question solely the domain of the executive and legislative branches of government?

[38] Do the pleaded facts contain the essential elements for a damage claim arising from a breach of the *Canadian Charter of Rights and Freedoms*?¹⁶ Has the plaintiff alleged *Charter*-breaching conduct on the part of actors for whom Alberta is responsible? Is Alberta responsible for the conduct of members of the police services organized under the *Police Act*,¹⁷ justices of the

¹² Certification order pronounced September 26, 2022 and filed April 19, 2023 s. 3 ("The Class is defined as: All persons arrested in Alberta from the date set out below based on the location of their arrest, up to the date of certification, who: (a) did not receive a bail hearing within 24 hours of their arrest; ... (e) were granted bail at a bail hearing, or were released without a bail hearing but not until after 24 hours from the time of their arrest; (f) have not received a prison sentence or a sentence based upon time served as a result of charges stemming from their arrest; ...").

¹³ S.A. 2003, c. 16.5.

¹⁴ Appeal Record 17-38.

¹⁵ *Class Proceedings Act*, S.A. 2003, c. 16-5, s. 5(1)(a).

¹⁶ *Canada Act 1982*, c. 11, sch. B (U.K.).

¹⁷ R.S.A. 2000, c. P-17.

peace, defence counsel, or the arrestee, whose conduct may be the cause of the delay the subject of complaint?

[39] What is the effect of Associate Chief Justice Rooke's October 15, 2019 order:¹⁸

Upon the plaintiff ... undertaking to limit his claim to an allegation of systemic failures as distinct from operational or management failures; and upon being advised that as a result of the plaintiff's undertaking as set out above, ... [Alberta] agrees to withdraw the application to add the Proposed Parties It is hereby ordered that ... the Plaintiff's claim as against ... [Alberta] is limited to allegations of systemic breaches by ... [Alberta] with respect to the bail system, as distinct from operational or management failures.

[40] Does it undermine the plaintiff's position?

[41] Is there an identifiable class of two or more persons?¹⁹

[42] If the plaintiff meets the section 5(1)(a) criterion²⁰, how does he fare under the other criteria set out in section 5 of the *Class Proceedings Act*?

[43] Do the claims of prospective class members raise one or more common issues?²¹

[44] Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?²²

[45] Is there a person eligible to be approved as a representative plaintiff?²³

[46] Alberta concedes that the plaintiff has identified an identifiable class and an eligible person to serve as the representative plaintiff.

[47] At issue is the existence of any cause of action and common issues and whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

¹⁸ Appeal Record 50.

¹⁹ *Class Proceeding Act*, S.A. 2003, c. 16.5, s. 5(1)(b).

²⁰ *Id.*

²¹ *Id.* s. 5(1)(c).

²² *Id.* s. 5(1)(d).

²³ *Id.* s. 5(1)(e).

III. Brief Answers

[48] This proceeding should not have been certified as a class proceeding.²⁴

[49] The plaintiff's third amended statement of claim does not "disclose a cause of action", the section 5(1)(a) criterion.

[50] This determination by itself compels the Court to allow the appeal.

[51] The plaintiff's systemic negligence complaint that Alberta has not devoted the resources necessary to ensure that a person who is arrested is taken before a justice of the peace within twenty-four hours of his or her arrest does not disclose a cause of action. A state actor does not owe a duty of care with respect to budgeting decisions.

[52] As well, the complement of Alberta's Crown prosecutors assigned to the Crown bail office is not a justiciable issue. The executive and legislative branches are solely responsible for budget decisions relating to the number of Crown prosecutors Alberta assigns to its Crown bail office.

[53] The plaintiff attributes the deficiencies in Alberta's Crown bail system to a failure on the part of Alberta to allocate sufficient resources to the bail system:²⁵

23. As justices were available 24 hours per day by telephone or video conference, the delays in bail hearings were caused wholly by a failure on the part of the Crown *to allocate appropriate resources* to the bail hearings regime and by a lack of sufficient Crown prosecutors (or police presenters).

...

25. For years, the Crown has acted with callous disregard of the constitutional right of accused persons to have their liberty respected. The Crown has neglected to take, or refused to take, meaningful remedial action to ensure that bail hearings are held within 24 hours of arrest – including by taking such reasonable steps as *hiring an adequate number of Crown prosecutors*.

[54] No provision in the Constitution of Canada or any other enactment or any common law principle authorizes the judicial branch of government to determine the lawfulness of decisions the executive and legislative branches of government make respecting the allocation of state resources.

²⁴ Order of Rooke, A.C.J. filed January 27, 2020, ¶¶ 2 & 3. Appeal Record 50.

²⁵ Third Amended Statement of Claim. Appeal Record 22 (emphasis added).

[55] Alberta is only accountable to the electorate for decisions of this nature made by the legislative and executive branches of government.

[56] The judicial branch of government is not entitled to and never has established standards against which spending decisions of the executive and legislative branches of government may be measured. The electorate may disapprove of specific state acts but it may do so for reasons that have nothing to do with any standard of care a court may construct.

[57] The third amended statement of claim does not allege facts that are essential elements of the claim that Alberta has breached the plaintiff's *Charter* rights.

[58] Section 503(1) of the *Criminal Code*²⁶ imposes an obligation on the peace officer who arrested and did not release the arrestee to "cause the ... [arrestee] to be taken before a justice within 24 hours". It imposes no obligation of any kind on a Crown prosecutor or a justice of the peace.

[59] Alberta is not responsible for the conduct of the arrestor or the police service of which the arrestor is a member.

[60] In any event, the undertaking the plaintiff made not to complain about operational or management failures and focus, in effect, on the big picture – systemic issues – completely undermines the plaintiff's position. A plaintiff who sues a state actor in negligence cannot establish that the state actor has a duty of care to the plaintiff if the impugned decision is a big picture or policy decision. In addition, the plaintiff's *Charter*-damage claim depends on establishing operational or management failures.

[61] If I am wrong and the third amended statement of claim discloses the essential elements of a negligence and a *Charter*-damages claim and the October 15, 2019 order does not preclude the plaintiff from prosecuting his claims, the common issue does not "predominate over issues affecting individual prospective class members", the section 5(1)(c) criterion.

[62] The one common issue – did the arrestor take the arrestee before a justice of the peace in a timely manner – is not a helpful determination. The key inquiry relates to each arrestee – is the Crown responsible for the acts of the person who is responsible for the delay?

IV. Statement of Facts

[63] The bail process is engaged at the time of arrest.

²⁶ R.S.C. 1985, c. C-46.

[64] The *Criminal Code*²⁷ provides that a peace officer²⁸ who arrests a person must ensure that the arrestee is brought before a justice of the peace without unreasonable delay and within twenty-four hours if a justice of the peace is available and as soon as possible otherwise for a bail hearing.

A. In 2016 Alberta Changed the Bail Protocol

[65] For decades police officers represented the Crown at bail hearings.²⁹

[66] Alberta introduced a new bail model in 2016.

1. Alberta Transitioned to a “Crown Bail” Process Starting in 2016

[67] On October 25, 2016 Crown prosecutors, instead of police officers, represented the Crown in Edmonton bail proceedings.³⁰

[68] After the Crown introduced its new protocol, participants called it “Crown bail”.

[69] By June 21, 2017 Crown prosecutors represented the Crown at all bail proceedings in Alberta.³¹ This followed a February 3, 2017 Court of Queen’s Bench declaration that police officers lack legal authority to act as prosecutors at bail hearings.³²

²⁷ *Criminal Code*, R.S.C. 1985, c. C-46, s. 503(1) (“Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law: (a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and (b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible”).

²⁸ Id. s. 2(c) (“peace officer includes ... a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process”).

²⁹ Affidavit of Travis Stang sworn on October 28, 2020, ¶ 5. Extracts of Key Evidence of the Appellant 6.

³⁰ Id. ¶¶ 6-7.

³¹ Affidavit of Travis Stang sworn on October 28, 2020, ¶ 8. Extracts of Key Evidence of the Appellant 6.

³² *Alberta v. Edmonton Police Service*, 2017 ABQB 74, ¶ 1 per Wittmann, C.J. (“There is a longstanding practice in Alberta for police officers to act as prosecutors at bail hearings before justices of the peace. The ... Attorney General of Alberta, has applied to this Court for a declaration that police officers have the legal authority to do so under the *Criminal Code*, so that this practice may continue. For the reasons that follow, I have found that the requisite authority does not exist. As a result, the declaration will be opposite to the one the Attorney General is seeking and the practice must cease”).

[70] Under Crown bail, a law enforcement agency³³ must prepare and submit to the Crown bail office – part of the Alberta Crown Prosecution Services Branch – an electronic bail package setting out key information about the detained arrestee – the offence, the arrestee’s criminal record and personal circumstances, and any recommendations as to bail.³⁴

[71] The Crown bail office reviews the bail package to determine if it is complete.³⁵ If it is not, it asks the law enforcement agency to correct the deficiencies and resubmit it.³⁶

[72] Once the Crown bail office is in possession of a complete bail package, it uploads the package to an electronic hearing list that tracks the files as they move through the bail process.³⁷ A Crown prosecutor and duty counsel, if the arrestee requested one, can now begin reviewing the bail package to prepare for the hearing.³⁸ If the arrestee has private counsel or requested advice from Legal Aid duty counsel – seven of which are available at most and often fewer – that counsel must be available before the Crown marks the hearing as ready to proceed on the electronic hearing list.³⁹

[73] There is a provincial hearing office in Edmonton and Calgary. The Edmonton office is staffed seven days a week from 8:00 a.m. to midnight. The Calgary office works around the clock.

[74] Hearing office coordinators in the provincial hearing office manage the hearing list and the virtual courtrooms. Bail applications can be heard from 8:00 a.m. to midnight in Edmonton and Calgary – there are three virtual courtrooms in each city on weekdays and two on weekends and holidays.⁴⁰ Files can be assigned to any courtroom, regardless of geographic location.⁴¹ Bail hearings take place in the virtual courtrooms either by videoconference or telephone, depending on the facilities of the law enforcement agency that holds the arrestee.⁴² Someone at the law

³³ See *Police Act*, R.S.A. 2000, c. P-17, ss. 25 & 28. There are twelve main law enforcement agencies and about 173 detachments in Alberta. Affidavit of Travis Stang sworn on October 28, 2020, ¶¶ 4 & 34. Extracts of Key Evidence of the Appellant 6 & 12.

³⁴ Affidavit of Travis Stang sworn on October 28, 2020, ¶¶ 1 & 11 & Exhibit A. Extracts of Key Evidence of the Appellant 5, 7 & 29.

³⁵ Id. ¶¶ 12 & 14. Extracts of Key Evidence of the Appellant 7.

³⁶ Id. ¶¶ 14, 15 & 21. Extracts of Key Evidence of the Appellant 7 & 9.

³⁷ Id. ¶¶ 17-18. Extracts of Key Evidence of the Appellant 9.

³⁸ Factum of the Appellant, ¶ 15.

³⁹ Affidavit of Travis Stang sworn on October 28, 2020, ¶¶ 31 & 41-45. Extracts of Key Evidence of the Appellant 11 & 13-14.

⁴⁰ Id. ¶¶ 22-26. Extracts of Key Evidence of the Appellant 9-10.

⁴¹ Id. ¶ 19. Extracts of Key Evidence of the Appellant 9.

⁴² Id. ¶¶ 35-37 & 56. Extracts of Key Evidence of the Appellant 12-13 & 21.

enforcement agency must be available to present the arrestee for a meeting with duty counsel or for the hearing.⁴³

[75] Most judicial interim release applications are heard by justices of the peace – overseen by the Chief Justice and Deputy Chief Justice of the Alberta Court of Justice. Some justices of the peace are designated to hear bail applications and are available for bail hearings from 8:00 a.m. to midnight.⁴⁴ Justices of the peace are expected to be available for a bail hearing once the Crown posts the hearing as ready on the electronic hearing list.⁴⁵ But justices of the peace have ultimate control over calling matters⁴⁶ and may prioritize those that are urgent.⁴⁷

[76] A very high percentage of Alberta bail hearings are conducted within twenty-four hours of a person's arrest.

[77] Between 2018 and 2020 an average of ten to twelve percent of arrestees had their bail hearing more than twenty-four hours following their arrest.⁴⁸

[78] The different actors – peace officers, Crown prosecutors, defence counsel, justices of the peace, and arrestees – who play a part in the bail process may not be in a position to do what the normal bail protocol asks of them.

[79] Delays could arise for any number of reasons.⁴⁹

[80] First, the law enforcement agency may not provide the Crown bail office with a complete bail package within twenty-four hours from the time a person is arrested. This delay may be

⁴³ Id. ¶¶ 37 & 57-61. Extracts of Key Evidence of the Appellant 13 & 21-22.

⁴⁴ Id. ¶¶ 28-33. Extracts of Key Evidence of the Appellant 10-12.

⁴⁵ Id. ¶ 31. Extracts of Key Evidence of the Appellant 11.

⁴⁶ Id. ¶¶ 20 & 27. Extracts of Key Evidence of the Appellant 9 & 10.

⁴⁷ Id. ¶¶ 32-33. Extracts of Key Evidence of the Appellant 11-12.

⁴⁸ Affidavit of Travis Stang sworn on October 28, 2020, Exhibit B. Extracts of Key Evidence of the Appellant 34-35 & Expert Report of Glen E. Luther dated June 11, 2020, Appendix D. Extracts of Key Evidence of the Respondent, M.S. 6. Neither source includes an average percentage over the entire time period. The appellant provides a table that includes total files and files where the bail hearing was more than twenty-four hours following arrest for the Edmonton Police, Calgary Police, municipal and Royal Canadian Mounted Police between December 31, 2018, and December 29, 2019. Based on this data, the average percentage of files where the bail hearing was more than twenty-four hours after arrest across all files for the entire time period is 10.65. The respondent provides a table that includes total files, files where the bail hearing was more than twenty-four hours following arrest, and what percentage the latter is of total files for all police enforcement agencies between March 2018 and April 2020. Based on this data, the average percentage of files where the bail hearing was more than twenty-four hours after arrest across all files for the entire time period is 12.1.

⁴⁹ Affidavit of Travis Stang sworn on October 28, 2020, ¶ 51. Extracts of Key Evidence of the Appellant 15-16.

attributable to a number of factors. Some cases may be complex and consume an unusual amount of investigative time. A law enforcement agency may not fund dedicated units. Some law enforcement agencies may release fewer arrestees than others and have to process more bail packages on a per member basis than is the case in other law enforcement agencies. Or the members of a law enforcement agency may be conducting warrant roundups and not have time to prepare bail packages in a timely manner.

[81] Second, the bail package may arrive at the Crown bail office between midnight and 8:00 a.m., when the Crown bail office is not staffed and the twenty-four hour period expires sometime between midnight and 8:00 a.m.

[82] Third, the Crown bail office may receive the bail package just before the period when the Crown bail office is not staffed and the twenty-four-hour period expires, sometime between midnight and 8:00 a.m.

[83] Fourth, justices of the peace may be unable to hear bail applications because of other more urgent obligations. Justices of the peace hear child protection applications and time-sensitive search-warrant applications.

[84] Fifth, duty counsel may not be available when the matter is scheduled to be heard.

[85] Sixth, the arrestee may be intoxicated or in hospital and unable to appear at the scheduled hearing.

[86] Seventh, the law enforcement agency may not be available to escort the arrestee to a meeting with duty counsel or a hearing. This is most likely to happen in smaller RCMP or municipal detachments.

[87] Eighth, law enforcement agencies may not have the facilities needed to facilitate bail hearings.

2. In 2020 Alberta Introduced a Two-Hearing Bail Protocol

[88] Starting June 16, 2020, in response to a decision of this Court that questioned why arrestees are not taken before a justice of the peace regardless of whether the bail hearing is ready to proceed,⁵⁰ Alberta changed the bail process. It directed the hearing office coordinators to mark as

⁵⁰ *The Queen v. Reilly*, 2019 ABCA 212, ¶ 56, rev'd, 2020 SCC 27 per Slatter, J.A. (“(d) There is no explanation on the record about what is done with detainees who are held over 20 hours ... (e) There is no explanation on the record why persons held for over 20 hours are not taken before a justice, at least to speak to an adjournment, or possibly to secure their release on conditions, with the requirement that they return in the immediate future for a ‘show cause’ hearing on their continued detention”).

ready for hearing files where the arrestee has been in custody for twenty-four hours whether or not the Crown and duty counsel are ready to proceed.⁵¹

B. Ryan Reilly Commenced a Class Proceeding Against Alberta for Bail Delays

[89] On May 2, 2018 Ryan Reilly⁵² commenced a claim against Alberta in relation to his detention for more than twenty-four hours before he got a bail hearing and on behalf of others in a similar position.⁵³

[90] The Edmonton Police Service detained Mr. Reilly for approximately thirty-six hours before taking him before a justice of the peace for a bail hearing.⁵⁴ A judge subsequently stayed the charges against him⁵⁵ on the basis that the detention and delay violated his rights under sections 7,⁵⁶ 9⁵⁷ and 11(e)⁵⁸ of the *Canadian Charter of Rights and Freedoms*,⁵⁹ which the Crown conceded, and a stay was the appropriate remedy for this violation.

[91] M.S. was detained for approximately twenty-six hours before he had a bail hearing.⁶⁰ He was acquitted on all the charges related to this arrest.⁶¹

⁵¹ Affidavit of Travis Stang sworn on October 28, 2020, Exhibit G (Protocol 2020-02 Provincial Hearing Office 20 Hour In Custody Protocol effective June 16, 2020). Extracts of Key Evidence of the Respondent 228.

⁵² *Reilly v. Alberta*, 2022 ABKB 612, n. 8 per Rooke, A.C.J. (“It is also to be noted that Mr. Reilly would not be a member of the class because he received a constitutional remedy in his criminal proceedings – a stay of his case”).

⁵³ Third Amended Statement of Claim filed June 25, 2020. Appeal Record 17.

⁵⁴ *Id.* ¶ 1.

⁵⁵ *The Queen v. Reilly*, 2018 ABPC 85, ¶¶ 58, 63 & 68, rev’d, 2019 ABCA 212, rev’d, 2020 SCC 27 per Cochar, J. (“As the Crown has conceded that Mr. Reilly’s section 7, 9 and 11(e) Charter rights have been violated I am left to decide the appropriate remedy under section 24 of the *Charter*. The law is clear that a stay of proceedings should only be granted in the clearest of cases. The evidence before me reflects a systemic and ongoing problem. Since the start of the Crown Bail Project the number of persons accused of offences but not convicted who are held more than 24 hours in breach of section 503(1)(a) of the *Criminal Code* has increased exponentially. The ongoing systemic problem that has been reflected by the evidence presented to the Court is the clearest of cases where the appropriate remedy can only be a stay of proceedings of the charges”).

⁵⁶ *Canada Act 1982*, c. 11, sch. B (U.K.) (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”).

⁵⁷ *Id.* (“Everyone has the right not to be arbitrarily detained or imprisoned”).

⁵⁸ *Id.* (“Any person charged with an offence has the right ... not to be denied reasonable bail without just cause”).

⁵⁹ *Canada Act 1982*, c. 11, sch. B (U.K.).

⁶⁰ Third Amended Statement of Claim filed June 25, 2020, ¶ 2. Appeal Record 18.

⁶¹ *Id.*

[92] The important segments of the third amended statement of claim are set out below:⁶²

23. As justices were available 24 hours per day by telephone or video conference, the delays in bail hearings were caused by a failure on the part of the Crown *to allocate appropriate resources* to the bail hearings regime and by a lack of sufficient Crown prosecutors (or police presenters).

...

25. ... The Crown has neglected to take, or refused to take, meaningful remedial action to ensure that bail hearings are held within 24 hours of arrest – including by taking such reasonable steps as hiring an adequate number of prosecutors.

...

33. The Defendant, through and with its employees and agents, is responsible for the criminal justice section in the Province of Alberta including the operation, management, administration, supervision and *funding* of bail hearings. The Crown employs and instructs provincial Crown prosecutors.

...

66. The Crown was required to provide a timely bail hearing for each member of the Class. A failure to do so is a breach of the Class Members' fundamental rights, including those enshrined in the Sections 7, 9, 10(c), 11(d) and 12 of the *Charter*.

...

72. The Crown's failure to properly operate, manage, administer, supervise, *resource*, and control bail hearings resulted in Class Members losing their liberty prior to receiving a fair and public trial

...

76. The Crown knew, or ought to know, that its mishandling of the bail hearings regime would create conditions under which Class Members became physically and mentally exhausted before a bail hearing being conducted and that this could cause accused to accept bail conditions that they would not otherwise accept and which were unduly onerous.

⁶² Appeal Record 17 (emphasis added).

...

80. The Class is entitled to a monetary remedy pursuant to section 24(1) of the *Charter* for violation of their *Charter* rights in order to:

(a) compensate them for their pain and suffering;

...

(e) vindicates their fundamental rights;

(f) deter systemic violations of a similar nature; and

(g) encourages the Crown to ensure that future *Charter* violations are remedied as quickly as possible.

81. The Crown is responsible for implementing policies, standards and programs appropriate for the proper administration of the bail hearing system for the province... . In particular, the risk of arrestees suffering harm, including an unnecessary loss of liberty, by *not having adequate availability of prosecutors* to conduct bail hearings was reasonably foreseeable. ... [T]he Crown is ultimately responsible for the conduct of all persons involved in the bail system in the province and liable to the class for any failures in the system resulting in *Charter* breaches.

82. The reasonable standard of care expected in the circumstances required the Crown to:

(a) *provide the necessary resources* to ensure that bail hearings can be dealt with quickly, and in any event, within no more than 24 hours.

(b) manage bail court volumes to avoid overcrowding of dockets or to *provide sufficient resources* to address high volume dockets;

(c) ensure that an *adequate number of Crown prosecutors* and justices of the peace are available to conduct bail hearings in a timely manner ...;

(d) provide effective oversight of Alberta's Crown prosecutors, police forces, and the justice system as a whole, so that in those instances where individuals are approaching being in custody for 24 hours without a bail hearing, resources can be reallocated to prevent a breach of the accused's *Charter* rights.

83. The Crown breached its duty of care by:

...

- (b) *failing to provide the physical technological, and human resources necessary to allow the Class Members' bail hearings to be heard within 24 hours of their arrest;*
- (c) failing to provide an adequate number of prosecutors to allow the class members' bail hearings to be heard within 24 hours of their arrest.

...

92. As a result of the Crown's *Charter* violations, negligence or breach of judiciary duty, the plaintiffs and the class members suffered and continued to suffer damages which include, but are not limited to the following:

- (a) loss of liberty

...

- (e) pain and suffering

...

- (i) loss of income, loss of reputation, and loss of competitive advantage

[93] The plaintiff seeks damages of \$100 million for negligence, breach of fiduciary and common law duties and violation of his rights under sections 7,⁶³ 9,⁶⁴ 10(c),⁶⁵ 11(d),⁶⁶ 11(e)⁶⁷ and 12⁶⁸ of the *Canadian Charter of Rights and Freedoms* and \$10 million in punitive damages based

⁶³ *Canada Act 1982*, c. 11, sch. B (U.K.) ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice").

⁶⁴ *Id.* ("Everyone has the right not to be arbitrarily detained or imprisoned").

⁶⁵ *Id.* ("Everyone has the right on arrest or detention ... to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful").

⁶⁶ *Id.* ("Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal").

⁶⁷ *Id.* ("Any person charged with an offence has the right ... not to be denied reasonable bail without just cause").

⁶⁸ *Id.* ("Everyone has the right not to be subjected to any cruel and unusual treatment or punishment").

on the Crown's liability through "the operation, management, administration, supervision, *resourcing* and control of bail hearings in Alberta".⁶⁹

[94] Alberta acknowledged responsibility for "the consideration of applications for bail after receiving same from law enforcement agencies" and "the appointment of Crown prosecutors to attend bail hearings" but said that "[p]olicy decisions concerning the resourcing, maintenance and organization of institutions through which the Minister carries out these responsibilities are neither justiciable nor actionable".⁷⁰ It denied responsibility for

- (a) "the operation, management, administration, supervision, control, and funding of bail hearings";⁷¹
- (b) the actions of the parties involved in the conduct of bail hearings and process leading to it, including law enforcement agencies, defence counsel or duty counsel, and justices of the peace;⁷² and
- (c) the bail process for those accused of crimes within federal jurisdiction.⁷³

[95] Alberta states that it has no control over other actors part of the bail system up until the time when the Crown bail office receives a bail package⁷⁴ and pointed to reasons for delay that are outside its control.⁷⁵ It denied all liability and alternatively submitted that any breaches were not systemic but rather infrequent and "involved unique and individual circumstances"⁷⁶ and any damages would require considering "unique and individual factors".⁷⁷

[96] Alberta also relies on Crown immunity.⁷⁸

[97] In reply, the plaintiff states that the Crown has control over and is responsible for the actions of police forces in Alberta including any delays to bail hearings that they cause.⁷⁹ He admits

⁶⁹ Third Amended Statement of Claim, ¶ 98. Appeal Record 37.

⁷⁰ Amended Statement of Defence filed December 21, 2018, ¶ 4. Appeal Record 10-11.

⁷¹ Id. ¶ 2.

⁷² Id. ¶¶ 2, 7 & 23. Appeal Record 10, 11 & 13.

⁷³ Id. ¶ 3. Appeal Record 10.

⁷⁴ Id. ¶ 10. Appeal Record 11.

⁷⁵ Id. ¶ 22. Appeal Record 12.

⁷⁶ Id. ¶¶ 28, 30 & 33. Appeal Record 14 & 15.

⁷⁷ Id. ¶ 40. Appeal Record 16.

⁷⁸ Id. ¶ 35. Appeal Record 15.

⁷⁹ Reply to Defence filed December 7, 2018, ¶¶ 4-10. Appeal Record 6-7.

that the Crown is not legally responsible for delays caused by federal prosecutors and excluded from the class persons arrested under federal jurisdiction.⁸⁰

[98] The plaintiff denies that Crown immunity encompasses “conduct in the performance of prosecutorial functions” that is distinct from judicial or adjudicative functions or applies to damages under the *Charter*.⁸¹

[99] The plaintiff abandoned his claims for breach of section 10(e) of the *Charter* and breach of fiduciary duty.⁸²

C. The October 15, 2019 Order Limited the Scope of the Claim to “Systemic Breach” Rather than “Operational or Management Failures”

[100] Alberta applied to add as defendants twelve police agencies and the Attorney General of Canada.⁸³

[101] Alberta agreed to withdraw the application based on an undertaking from the plaintiff’s counsel that the certification application was “for systemic, not operational or management failures”.⁸⁴

[102] Accordingly, Associate Chief Justice Rooke dismissed Alberta’s application and ordered that the claim against Alberta is “limited to allegations of systemic breach by ... [Alberta] with respect to the bail system, as distinct from operational or management failures”.⁸⁵

⁸⁰ Id. ¶ 11. Appeal Record 7.

⁸¹ Id. ¶¶ 14-15. Appeal Record 8.

⁸² *Reilly v. Alberta*, 2022 ABKB 612, ¶ 27 & nn. 5 & 6 per Rooke, A.C.J.

⁸³ Order pronounced October 15, 2019 and filed January 27, 2020 (“Upon an application brought by ... Alberta ... to add as defendants to this action the following parties: Blood Tribe Police Service; Calgary Police Service; Camrose Police Service; Edmonton Police Service; Lacombe Police Service; Lakeshore Regional Police Service; Lethbridge Regional Police Service; Medicine Hat Police Service; Royal Canadian Mounted Police; Taber Police Service; Tsuu T’ina Nation Police Service; Canadian Armed Forces Military Police; and the Attorney General of Canada”). Appeal Record 49.

⁸⁴ Transcript of Proceedings on October 15, 2019, 66:1-5 (“upon the undertaking by the plaintiff that this is to be an application for systemic, not operational or management failures, and with that in mind, and upon the HMQ agreeing to withdraw the application to name the law enforcement agencies, therefore, you know, the application is dismissed conditional upon discussions satisfactory to HMQ and the law enforcement agencies with respect to an agreement with respect to production of evidence”). Extracts of Key Evidence of the Respondent 78.

⁸⁵ Order pronounced October 15, 2019, and filed January 27, 2020. Appeal Record 49. See also Transcript of Proceedings on October 15, 2019, 66:32-67:10 (“The Court: The intent is that you are challenging the operation of the system in a broad sense as opposed to individual situations ... Ms. Waddell: Yeah, we’re not talking about, you

D. Associate Chief Justice Rooke Certified the Class Proceeding

[103] The plaintiff applied to certify the claim as a class proceeding.⁸⁶

[104] In general terms, he proposed a claim on behalf of persons arrested between various dates, the earliest being May 2, 2016, and the date of certification, who did not receive a bail hearing within twenty-hours of arrest, were ultimately granted bail, and did not receive a sentence that took into account the time they were detained.⁸⁷ The plaintiff based the claim on the Crown’s “failure to provide adequate resources to the police services, the court systems, and to the Crown prosecutors’ offices ... to ensure that arrestees are brought before a justice of the peace or provincial court judge without unreasonable delay, and in any event no later than 24 hours following arrest”,⁸⁸ resulting in breaches of *Charter*⁸⁹ rights under sections 7,⁹⁰ 9,⁹¹ 11(d),⁹² 11(e)⁹³ and 12⁹⁴ and negligence.⁹⁵

know, Josephine police officer putting the bail app in her desk and going home for the night. That’s not our case. The Court: ... You ... are saying the system is broken, it does not work, or it does not work often enough, or there is too many failures Ms. Waddell: That’s right. The Court: ... [I]t is operational even if there is bad management by EPS or CPS or ECMP, it is still an operational thing”).

⁸⁶ Plaintiffs’ Amended Notice of Application (Certification) filed February 19, 2021. Appeal Record 39.

⁸⁷ Id. ¶ 1c. Appeal Record 40.

⁸⁸ Id. ¶ 13. Appeal Record 43.

⁸⁹ *Canadian Charter of Rights and Freedoms, Canada Act 1982*, c. 11, sch. B (U.K.).

⁹⁰ Id. (“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”).

⁹¹ Id. (“Everyone has the right not to be arbitrarily detained or imprisoned”).

⁹² Id. (“Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal”).

⁹³ Id. (“Any person charged with an offence has the right ... not to be denied reasonable bail without just cause”).

⁹⁴ Id. (“Everyone has the right not to be subjected to any cruel and unusual treatment or punishment”).

⁹⁵ Plaintiffs’ Amended Notice of Application (Certification) filed February 19, 2021, ¶ 15. Appeal Record 43. The plaintiffs abandoned their claims based on *Charter* section 10(c) and for breach of fiduciary duty. *Reilly v. Alberta*, 2022 ABKB 612, ¶ 27 & nn. 5 & 6 & Transcript of Proceedings on May 11, 2021, 32:10-13 (“Ms. Waddell [for Mr. Reilly]: ... the defendant doesn’t challenge the ... causes of action that are asserted with respect to *Charter* breaches except ... the claim under 10(c) for habeas corpus and we’ve conceded and withdrawn that from the request to be certified”).

[105] The Crown conceded that the alleged *Charter*⁹⁶ breaches disclose a cause of action.⁹⁷ The certification judge was satisfied that the negligence claim was not bound to fail and should be determined based on a full record.⁹⁸

[106] Associate Chief Justice Rooke certified causes of action against Alberta for negligence and *Charter* breaches.⁹⁹

[107] Associate Chief Justice Rooke certified the negligence claim.¹⁰⁰ He noted that this claim is based on “systemic negligence” and does not include “operational, management, administration, supervision, resourcing and/or control” aspects, and is founded on the position that “the government did not operate the system properly, including not spending enough money for it to comply with the Charter and the Criminal Code”. He rejected Alberta’s argument that the plaintiff challenged the government’s “executive authority to determine the allocation and adequacy of resources devoted to the criminal justice system”.¹⁰¹

[108] Alberta argues that the certification judge was wrong to leave the question of whether the negligence action challenges core policy decisions for resolution on a full record. The province also asserts that it does not owe a duty of care to the public as a whole or to persons on account of Alberta’s oversight responsibility of the province’s police under the *Police Act*.¹⁰² The plaintiff considers that it pleaded a proper negligence claim focused on acts and omissions by Alberta and “those for whom it is legally responsible” “in implementing and operating” the bail system the Constitution requires, so that Alberta’s duty to establish and operate it is not a policy decision but a constitutional obligation.¹⁰³

⁹⁶ *Canadian Charter of Rights and Freedoms, Canada Act 1982*, c. 11, sch. B (U.K.).

⁹⁷ *Reilly v. Alberta*, 2022 ABKB 612, ¶ 27 per Rooke, A.C.J. (“Alberta also concedes... that the Plaintiffs have ‘met the low bar of disclosing a cause of action relating to sections 7, 9, 11(d), 11(e), and 12 of the Charter’”).

⁹⁸ *Id.* ¶¶ 31-32 (“The Plaintiffs support this result by asserting... that where it is not ‘plain and obvious that the Plaintiffs’ claim in systemic negligence cannot possibly succeed... the claim ought to be allowed to proceed to be tested on its merits’ before the common issues justice. I agree. In the result, I find that the issue of a cause of action for systemic negligence should be considered, along with *Charter* breaches alleged, on a full evidential and argued record, before the common issues justice”).

⁹⁹ Certification Order pronounced September 26, 2022, and filed April 19, 2023, ¶ 4.

¹⁰⁰ *Id.* at Certification Order pronounced September 26, 2022, and filed April 19, 2023, ¶ 4(b).

¹⁰¹ *Reilly v. Alberta*, 2022 ABKB 612, ¶¶ 24, 25 & 29 per Rooke, A.C.J..

¹⁰² Factum of the Appellant, ¶¶ 28, 29, 44 & 47-48.

¹⁰³ Factum of the Respondent, M.S., ¶¶ 56-58.

[109] The certification judge did not determine the justiciability issue. Associate Chief Justice Rooke concluded that this question could only be resolved with the benefit of a full record¹⁰⁴ and that many aspects of the claim are best left for the common issues justice.¹⁰⁵ In short, the certification judge failed to discharge an important gate-keeping function. That this is a fundamentally procedural task¹⁰⁶ does not, as the certification judge sometimes suggests,¹⁰⁷

¹⁰⁴ *Reilly v. Alberta*, 2022 ABKB 612, ¶ 28 per Rooke, A.C.J. (“As to negligence, Alberta argues ... that those claims are bound to fail ... because they seek ‘to challenge core policy decisions, including funding decisions, made in Alberta ... [that] are non-judiciable and do not establish a duty of care’. ... However, as seen *Nelson v Marchi*, 2021 SCC 41 – a decision issued after the hearing in the case at Bar – it is for Alberta to prove, on a full record, after certification, that it has ‘met its burden that [the Plaintiffs seek] to challenge a core policy decision immune from [systemic] negligence liability’ (at para 86, referencing *Just*)”).

¹⁰⁵ *Id.* ¶ 18 (“It will be for the common issues justice to determine if the failures to meet s. 503 are systemic failures on the part of Alberta, as opposed to operational or management failures. It is thus the common issues justice who will be required ... to ‘guard against an impermissible dressing up of the operational or management failures as a ‘systemic’ issue’”), ¶ 25 (“While a breach of statute does not automatically give rise to a civil action ..., whether a breach of statute or public duty constitutes a private law duty sufficient for a systemic negligence claim in this class action ... is ultimately for the common issues trial justice to determine. ... As to the issues of whether the Plaintiffs can establish liability against Alberta on such issues as proximity ..., I also leave that substantive matter to the common issues trial justice”), ¶ 30 (“I do not find at this certification stage ..., that claims made in respect of such statutory duties as under the *Police Act* and other Provincial legislation are ‘doomed to fail’. Rather, it will be for the common issues trial justice to determine if they succeed or fail”), ¶ 32 (“the issue of a cause of action for systemic negligence should be considered, along with *Charter* breaches alleged, on a full evidential and argued record, before the common issues justice”), n. 18 (“I focus on the reference to the evidentiary record here and use the occasion to note that there was much evidence before the Court in this certification application, which the Plaintiffs use as some basis in fact for the claimed *Charter* and negligence breaches. However, certification is **not** about the substantive merits, so beyond the Plaintiffs establishing some basis in fact for the allegation, which, I find, they do, I leave the details to the common issues trial justice”), ¶ 49 (“Alberta argues ... that proposed ... [common] issues are ‘phrased at the highest level of abstraction’, ‘in an attempt to establish commonality’, but ‘collapse under the weight of individuality’. I find that the answer to this submission is substantive and not procedural, and as such, it is the work for the common issues justice, based on a full record, should pass the relatively low bar preliminary test at the certification level, pending evidence at a common issues trial”), ¶ 51 (“As to the extent of Alberta’s responsibility, that is a matter of substance, not a threshold procedural issue for certification, so I leave that to the common issues trial justice, on a full record”) & ¶ 55 (“[Alberta argues] that any such breaches of rights must be assessed on an individual basis for each alleged *Charter* breach As to any requirement of a reasonableness consideration for any *Charter* breaches, ... this again raises the alleged need for individual consideration, which I have rejected in this systemic case. On the other issues as to reasonableness ..., I will leave that for determination on a full record before the common issues justice”) (emphasis in original).

¹⁰⁶ M. Eizenga, M. Peerless, J. Callaghan & R. Agarwal, *Class Actions Law and Practice* § 3.1 (2d ed. rel. 86 March 2024) (“Certification of a proceeding is a procedural step. The issue at the certification stage is whether the proceeding is appropriately prosecuted as a class proceeding. The certification stage is not intended to be a determination of the merits. The judge, at the certification stage, is asked whether the plaintiff has demonstrated that the action meets the statutory (or common law) requirements for certification from a procedural perspective”).

¹⁰⁷ *Reilly v. Alberta*, 2022 ABKB 612, ¶ 25 per Rooke, A.C.J. (“As to the issues of whether the Plaintiffs can establish liability against Alberta on such issues as proximity ..., I also leave that substantive matter to the common issues trial justice”), n. 18 (“certification is **not** about the substantive merits, so beyond the Plaintiffs establishing some basis in

preclude the court from engaging with the substantive issues to the extent this is necessary to fulfil its duties at this important stage.¹⁰⁸

[110] Associate Chief Justice Rooke was also satisfied that the plaintiff put forward proper common issues, leaving for the common issues justice the issues that Alberta raised related to the individual considerations that come into play.¹⁰⁹

[111] Similarly, the certification judge regarded a class proceeding preferable given the limitation of the claim to systemic issues.¹¹⁰

[112] The other criteria were largely uncontested and the certification judge found them to be met.¹¹¹

V. Applicable Legislation

A. *Class Proceedings Act*

[113] The key parts of the *Class Proceedings Act*¹¹² follow:

1 In this Act, ...

(e) “common issue” means

(i) common but not necessarily identical issues of fact, or

fact for the allegation, which, I find, they do, I leave the details to the common issues trial justice”) (emphasis in original) & ¶ 49 (“the answer to this submission is substantive and not procedural, and as such, it is the work for the common issues justice”).

¹⁰⁸ M. Eizenga, M. Peerless, J. Callaghan & R. Agarwal, *Class Actions Law and Practice* § 3.1 (2d ed. rel. 86 March 2024) (“The certification motion is the seminal step in any class proceeding. It is at this motion that the court will determine the form of the action, and potentially sculpt the contours of the proposed class action to fit the goals of the class proceedings legislation”).

¹⁰⁹ *Reilly v. Alberta*, 2022 ABKB 612, ¶¶ 58-59 per Rooke, A.C.J. (“I accept as valid common issue CI#1... and those common issues that follow... The remaining common issues... are as follows”).

¹¹⁰ *Id.* ¶ 60 (“for reasons articulated herein, I conclude and find that this cases meets the preferable procedure requirement of s.5(2) of the *Act*”).

¹¹¹ *Id.* ¶¶ 35 & 61 (“The named Plaintiffs constitute 2 persons, which is the minimum required. The Plaintiffs advise that there are many more potential plaintiffs... This is effectively admitted by Alberta.... Alberta concedes [that there is an identifiable class and suitable representative plaintiff] with a ‘few caveats’... This issue is readily resolved...”).

¹¹² S.A. 2003, c. C-16.5.

- (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

...

- 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
- (a) the pleadings disclose a cause of action;
 - (b) there is an identifiable class of 2 or more persons;
 - (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
 - (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
 - (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
 - (i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.
- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
- (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
 - (b) whether a significant number of the prospective class members 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.

...

- 6(2) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

...

- 8 In determining whether a proceeding is to be certified as a class proceeding, the Court is not to refuse certification by reason only of one or more of the following:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different prospective class members;
- (c) different remedies are sought for different prospective class members;
- (d) the number of prospective class members or the identity of each prospective class member has not been ascertained or may not be ascertainable;
- (e) the class includes a subclass where the prospective subclass members have claims that raise common issues not shared by all the prospective class members.

B. *Criminal Code*

[114] Parts of sections 503, 515 and 516 of the *Criminal Code*¹¹³ are reproduced below:

¹¹³ R.S.C. 1985, c. C-46.

503(1) Subject to the other provisions of this section, a peace officer who arrests a person with or without warrant and who has not released the person under any other provision under this Part shall, in accordance with the following paragraphs, cause the person to be taken before a justice to be dealt with according to law:

- (a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period; and
- (b) if a justice is not available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice as soon as possible.

(1.1) At any time before the expiry of the time referred to in paragraph (1)(a) or (b), a peace officer who is satisfied that the continued detention of the person in custody for an offence that is not listed in section 465 is no longer necessary shall release the person if:

- (a) the peace officer issues an appearance notice to the person;
- (b) the person gives an undertaking to the peace officer.

515(1) Subject to this section, when an accused who is charged with an offence other than an offence listed in section 469 is taken before a justice, the justice shall, unless a plea of guilty by the accused is accepted, make a release order in respect of that offence, without conditions, unless the prosecutor, having been given a reasonable opportunity to do so, shows cause, in respect of that offence, why the detention of the accused in custody is justified or why an order under any other provision of this section should be made.

...

516 (1) A justice may, before or at any time during the course of any proceedings under section 515, on application by the prosecutor or the accused, adjourn the proceedings and remand the accused to custody in prison by warrant in Form 19, but no adjournment shall be for more than three clear days except with the consent of the accused.

C. *Police Act*

[115] The key provisions of the *Police Act*¹¹⁴ that the plaintiff relies on follow:

Responsibility of Ministers

2(1) The Minister is charged with the administration of this Act.

(2) Notwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice in respect of matters concerning the administration of justice.

Responsibility of Government for policing

3 The Government of Alberta is responsible for ensuring that adequate and effective policing is maintained throughout Alberta.

Minister's responsibility for policing standards

3.1 The Minister may, subject to the regulations,

(a) establish standards for

(i) police services,

(ii) police commissions, and

(iii) policing committees,

(a.1) establish priorities for policing in the province, and

(b) ensure that standards are met.

...

Director of Law Enforcement

8(1) In accordance with the Public Service Act, there shall be appointed Director of Law Enforcement.

(2) The duties of the Director include the following:

¹¹⁴ R.S.A. 2000, c. P-17.

- (a) monitoring police services to ensure that adequate and effective policing is maintained both municipally and provincially;
- (a.1) monitoring the handling by chiefs of police and commissions of complaints;
- (b) developing and promoting crime prevention and restorative justice programs;
- (c) developing and promoting programs to enhance professional practices, standards and training for police services, commissions and policing committees;
- (d) assisting in the co-ordination of policing services;
- (e) consulting with and advising councils, commissions, policing committees, chiefs of police and authorized employers of peace officers appointed under the Peace Officer Act on matters relating to police and policing;
- (f) developing, maintaining and managing programs and statistical record and conducting research studies in respect of offences and enforcement practices.

...

Provincial police service

- 21(1) The Lieutenant Governor in Council may, from time to time, authorize the Minister on behalf of the Government of Alberta to enter into an agreement with the Government of Canada for the Royal Canadian Mounted Police to provide a provincial police service.
- (2) When an agreement referred to in subsection (1) is in force, the Royal Canadian Mounted Police are responsible for the policing of all or any part of Alberta as provided for in the agreement.
- (3) The Royal Canadian Mounted Police with respect to their duties as the provincial police service shall, subject to the terms of the agreement referred to in subsection (1), be under the general direction of the Minister in matters respecting the operations, policies and functions of the provincial police service other than those matters referred to in section 2(2).

...

Ministerial intervention

30(1) When, in the opinion of the Minister, a municipality that is responsible for providing and maintaining policing services is not

- (a) providing or maintaining adequate and effective policing services, or
- (b) complying with this Act or the regulations,

the Minister may notify the council of that fact and request the council to take the action the Minister considers necessary to correct the situation. ...

...

Lieutenant Governor in Council regulations

61(1) The Lieutenant Governor in Council may make regulations ...

- (a) governing, subject to this Act, the training of police commissions and municipal policing committees, and the responsibility and duties of police commissions and municipal policing committees;
- (d) governing, subject to this Act, the establishment and operation of police services; ...

Ministerial regulations

62(1) The Minister may make regulations ...

- (g) governing the establishment of standards for police services, police commissions and policing committees; ...

D. *Canadian Charter of Rights and Freedoms*

[116] Sections 1, 7, 9, 11(e), and 12 of the *Canadian Charter of Rights and Freedoms*¹¹⁵ read as follows:

- 1 Rights and Freedoms in Canada. – The *Canadian Charter of Rights and Freedoms* guarantees the rights of freedoms set out in it subject only to such

¹¹⁵ *Canada Act 1982*, c. 11, sch. B (U.K.).

reasonable limits prescribed by law and can be demonstrably justified in a free and democratic society.

...

- 7 Life, liberty and security of person. – Everyone has the right to life, liberty and the security of the person and the right not to be deprived there of in accordance with the principles of fundamental justice.

...

- 9 Detention or imprisonment. – Everyone has the right not to be arbitrarily detained in imprisoned.

...

- 11 Proceedings in criminal and penal matters. – Any person charged with an offence has the right

...

- (e) not to be denied reasonable bail without just cause;

...

- 12 Treatment or punishment. – Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

VI. Analysis

A. Introduction

[117] Associate Chief Justice Rooke erred in certifying the plaintiff's claim as a class proceeding.

[118] The plaintiff's claim does not disclose a cause of action. It principally challenges Alberta's resourcing decisions. This is not justiciable.

[119] Alberta has the sole right to decide the size of its Crown prosecutor complement working in the Crown bail office. This is a budget decision.

[120] Given the October 15, 2019 order and undertaking limiting the scope of the claim and deficiencies in the pleadings, the plaintiff did not establish a plausible basis upon which Alberta is responsible for the conduct of the arresting officer, the actor solely responsible for taking an arrestee before a justice of the peace within twenty-four hours of the arrest.

[121] In addition, a determination of the common issues would do little to advance the claim and a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues.

B. The October 15, 2019 Order Allows the Plaintiff to Complain About Only the Big Picture Decisions Alberta Made About Its Bail System

1. The Text of the October 15, 2019 Order

[122] On October 15, 2019 Associate Chief Justice Rooke issued this order:¹¹⁶

Upon the plaintiff ... *undertaking* to limit his claim to an allegation of systemic failures, as distinct from operational or management failures; and upon being advised that as a result of the plaintiff's undertaking as set out above, ... [Alberta] agrees to withdraw the application to add the Proposed Parties ... It is hereby ordered that ... the Plaintiff's claim as against ... [Alberta] is limited to allegations of systemic breaches with respect to the bail system, as distinct from operational or management failures.

[123] The recital portion of the order highlights the existence of an undertaking given by plaintiff's counsel.

[124] The Law Society of Alberta's Code of Conduct¹¹⁷ provides that a lawyer must discharge an undertaking. A lawyer's failure to do so may constitute civil contempt of court.¹¹⁸

[125] Plaintiff's counsel's promise is now part of the October 15, 2019 order. It is enforceable as is any other court order.

¹¹⁶ Appeal Record 50 (emphasis added).

¹¹⁷ The Law Society of Alberta, Code of Conduct 5.1-7 ("A lawyer must strictly and scrupulously fulfill any undertakings given"), 7.2-14 ("A lawyer must not give an undertaking that cannot be fulfilled and must fulfil every undertaking given and honour every trust condition once accepted") & 7.2-14 commentary ("Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms"). See Halsbury's Laws of Canada, Legal Profession at HLP-316 (2021 reissue) ("An undertaking is a lawyer's promise given in writing or verbally, or inferred from the lawyer's acts, upon which the recipient of the promise relies in giving up to the lawyer or another party a document or right, or in performing an act which the recipient would not have done were it not for the receipt of the lawyer's promise") & *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 10.52(3)(a)(vi) ("A judge may declare a person to be in civil contempt of Court if ... the person, without reasonable excuse, ... does not perform or observe the terms of an undertaking given to the Court").

¹¹⁸ *Alberta Rules of Court*, Alta. Reg. 124/2010, r.10.52(3)(a)(vi) ("A judge may declare a person to be in civil contempt of Court if ... the person, without reasonable excuse, ... does not perform or observe the terms of an undertaking given to the Court").

[126] What is the effect of counsel’s promise and the October 15, 2019 order limiting the plaintiff’s claim “to allegations of systemic breaches by ... Alberta with respect to the bail system, as distinct from operational or management failures”?

2. The Principles of Interpretation for Court Orders and Judgments

[127] The meaning of statutes, regulations, and contracts is derived by adopting an objective, as opposed to a subjective, orientation.¹¹⁹ “An objective approach is necessary for multilateral documents such as contracts”¹²⁰ and statutes and regulations that have the force of law and bind large segments of the community. “Multiparty documents cannot have multiple meanings which are a function of subjective understanding of each party”.¹²¹ It goes without saying that a statute cannot mean whatever those subject to it think it means or what those who made it think it means.

[128] An objective measure is not appropriate for the interpretation of a will.¹²²

[129] A will is a unilateral act.¹²³ With wills the goal is the discovery of the testator’s intention.¹²⁴ To whom did he or she wish to leave his or her property? Courts assume that a “testator selected

¹¹⁹ *Greenwood v. Greenwood*, 2023 SKCA 87, ¶ 26; 487 D.L.R. 4th 668, 682 per Kamakoff, J.A. (“The interpretation of a court order is not governed by the subjective views of the parties”) & *Yu v. Jordan*, 2012 BCCA 367, ¶ 53 per Smith, J.A. (“the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made”). See W. Stevenson & J. Coté, *Alberta Civil Procedure Handbook* 2024, at 9.1-2 (2024) (“How to interpret a previous court order does not depend upon the subjective views of any of the parties. Even a consent order is by the court, which determines its meaning in light of the pleadings, its language, and the evidence and circumstances at the time it was made”).

¹²⁰ *Estate of Hicklin v. Hicklin*, 2019 ABCA 136, n. 39; [2019] 6 W.W.R. 238, n. 39 per Wakeling, J.A. See *Sattva Capital Corp. v. Crestor Moly Corp.*, 2014 SCC 53, ¶ 55; [2014] 2 S.C.R. 633, 660 per Rothstein, J. (“the goal of contractual interpretation [is to] ascertain the objective intention of the parties”).

¹²¹ *Hanson v. Mercredi*, 2014 ABCA 216, n. 21; [2014] 10 W.W.R. 41, n. 21 per Wakeling, J.A. (“Multiparty documents cannot have multiple meanings which are a function of the subjective understanding of each party. This is an unworkable legal condition”); *Rickman v. Carstairs*, 110 Eng. Rep. 931, 935 (K.B. 1833) per Denman, C.J. (“in ... [the] case of construction of written instruments [the question] is not what was the intention of the parties, but what is the meaning of the words used”) & *Wilson v. Anderson*, [2002] HCA 29, ¶ 8; 213 C.L.R. 401, 418 per Gleeson C.J. (“The law of contract seeks to give effect to the common intention of the parties. But the test is objective and impersonal”).

¹²² 9 J. Wigmore, *Evidence in Trials at Common Law* 231 (J. Chadbourn rev. 1981) (“The *will* is the typical and almost the only instance of a unilateral act. The sense of the testator is therefore the ultimate criterion of interpretation”) (emphasis in original).

¹²³ *Estate of Hicklin v. Hicklin*, 2019 ABCA 136, ¶ 54; [2019] 6 W.W.R. 238, 255 per Wakeling, J.A. (“a will, unlike a contract, is a unilateral act. It is solely the product of the testator’s intention. No one else’s approval is required to give it legal effect”).

¹²⁴ *Wills and Succession Act*, S.A. 2010, c. W-12.2, s. 26 (“A will must be interpreted in a manner that gives effect to the intent of the testator”) & *Estate of Hicklin v. Hicklin*, 2019 ABCA 136, ¶¶ 55-56; [2019] 6 W.W.R. 238, 255-57

the words he or she did because the words conveyed the meaning he or she wished to communicate to the estate trustee, the beneficiaries and any court reviewing the will, and the testator expected all readers to accord to the words their plain and ordinary meaning, just as he or she did”.¹²⁵ A single person’s intention is ascertainable.

[130] An order¹²⁶ or judgment is fundamentally different from a statute or a contract.

[131] An order or a judgment records a judicial determination of a dispute, either procedural or final in nature. Its operative component, as a rule, directs someone to do or refrain from doing something that is embodied in another document the finalization of which preceded it – the court’s reasons for decision.¹²⁷

[132] The object of an order or judgment is to accurately record the remedy the court granted in its reasons for decision.¹²⁸ The remedy part of court’s reasons for decision and the operative part of the filed order or judgment must be mirror images of each other.

per Wakeling, J.A. (“This statutory direction to Alberta courts is consistent with the understanding of courts in Canada, England, Australia, New Zealand, and the United States that it is their task ‘to ascertain a testator’s wishes and to give effect to them’. This is a subjective – and not an objective – undertaking”).

¹²⁵ *Estate of Hicklin v. Hicklin*, 2019 ABCA 136, ¶ 63; [2019] 6 W.W.R. 238, 255 per Wakeling, J.A.

¹²⁶ W. Stevenson & J. Côté, *Alberta Civil Procedure Handbook 2024*, at 9.1(1) (2024) (“A judgment is a type of court order, which finally settles some rights. A judgment decides the main issues in the action, whereas orders decide procedural and collateral issues”); A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 1146 (4th ed. 2021) (“There is a difference, both in theory and practice, between ... [judgments and orders]. The first consists of a final court decision that conclusively disposes of an action or part of an action, which we may call a *dispositive decision*. ... A second type of decision consists of any court decision, other than a dispositive, which directs a party or another person to do something or to refrain from doing something, or which determines the course of proceedings. We may refer to such decisions as *interim or procedural decisions*”) (emphasis in original) & A. Zuckerman, S. Wilkins, J. Adamopoulos, A. Higgins, S. Hooper & A. Vial, *Zuckerman on Australian Civil Procedures* 885 (2018) (“There is a difference between judgments and orders. A judgment consists of a final decision that conclusively disposes of an action or part of an action, while an order is any other judicial determination”).

¹²⁷ P. Perell & J. Morden, *The Law of Civil Procedure in Ontario* 1177 (4th ed. 2020) (“The operative part of the order should describe the ultimate disposition or the result but not the reasoning that led to the result. ... [N]either the recitals nor the operative part of the order should include findings of fact but should articulate the relief granted by the court”).

¹²⁸ *Bissky v. MacDonald*, 2020 ABCA 242, ¶ 6 (chambers) per Rowbotham, J.A. (“Rule 9.12 ... operates ... when ... by a mere technical, clerical or drafting error ... the order or judgment does not express the court’s obvious intention”) & *Santos-Albert v. Ochi*, [2018] EWHC 1277, ¶ 27; [2018] 4 W.L.R. 88, 92 (Ch.) per Snowden, J. (“Although ... [Civil Procedure Rule] 40.12 uses the word ‘slip’, its real purpose is to ensure that the order conforms with what the court intended, even if the error which has originally been made in drawing up the order is substantial. So, for example, if the court intended to order payment of £1,000,000 but in error the order drawn up by the court required payment of only £1,000, I do not doubt that the order could be amended under the slip rule, even though the financial difference between the order as drawn and the court’s true intention was great. ... [T]he key requirement in every case is simply that the order should reflect the actual intention of the court”).

[133] A contract, on the other hand, is a document that sets out the promises of two or more parties that the promisor and promisee intend to have legal effect.¹²⁹ The enforceability of a contract, unlike that of an order or judgment, generally speaking, does not depend on the contract's relationship to any other document prepared before finalization of the contract.

[134] A statute contains the text agreed to by the bodies the constitution states must approve it to give it the force of law.¹³⁰ Again, the validity of a statute does not depend on its faithfulness to any preexisting document, except for any applicable constitutional provision. A statute that contravenes a constitutional norm does not have the force of law.¹³¹

[135] It is worth noting that the validity of delegated legislation, unlike a statute, is a function of its relationship with an authorizing preexisting statute. A regulation has no legal effect unless an enactment authorizes its provisions.¹³² But the effect the enabling legislation has on the interpretation of the regulation has its limits: "[T]he primary focus must always be on the words themselves".¹³³

[136] The validity of a contract or a statute does not depend on its faithfulness to another document. Contracts and statutes are stand-alone documents whose text is the primary determinant of its meaning.

¹²⁹ S. Waddams, *The Law of Contracts* 19 (7th ed. 2017) ("The concept of bargain is important to the law of contracts for the existence of a bargain has, at least since the 19th century, become the chief criterion of enforceability").

¹³⁰ In Canada, this is Parliament and the Crown. *Constitution Act, 1867*, 30 & 31 Vict., c. 3, ss. 17 & 55-57 (U.K.). This is also the case in the United Kingdom. D. Bailey & L. Norbury, *Benson, Bailey and Norbury on Statutory Interpretation* 48 (8th ed. 2020) ("Before a bill can receive royal assent the same text must be agreed to by both Houses"). In Alberta, this is the Legislative Assembly and the Crown. *Constitution Act, 1867*, 30 & 31, Vict., c. 3, s. 90 (U.K.) & *Alberta Act*, S.C. 1905, c. 3, s. 12. In the United States each of the House of Representatives, the Senate and the President must approve a bill before it becomes law U.S. Const. Art. I, § 7, cl. 2.

¹³¹ P. Hogg & W. Wright, *Constitutional Law of Canada* § 1.1 (5th ed. looseleaf rel. 2023-1) ("Laws enacted in breach of the constitution ... will be struck down by the courts").

¹³² D. Jones, K.C. & A. de Villars, K.C., *Principles of Administrative Law* 6 (7th ed 2020) ("It is often difficult to determine whether the legislation does grant a statutory delegate the 'jurisdiction' to do the impugned act, to make a particular decision, or to do it in some particular way. Lack of jurisdiction makes the act *ultra vires* and may make a legal remedy available").

¹³³ D. Bailey & L. Norbury, *Bennion, Bailey and Norbury on Statutory Interpretation* 117 n. 2 (8th ed. 2020) ("When interpreting delegated legislation the court's function is to determine the meaning of the words used. The enabling Act is of the utmost importance in constructing those words, but the primary focus must always be on the words themselves").

[137] The key role a court's reasons for decision play in interpreting an order or judgment accounts for the different protocols that apply to the interpretation of an order or judgment as opposed to a statute.¹³⁴

[138] A court interpreting an order or judgment must pay more attention to the events that precede the filing of an order or judgment than is the case if a court is interpreting a statute.

[139] Fortunately, the meaning of an order or judgment is less likely to be a controversial point than is the meaning of a statute when applied in a specific fact pattern. Most of the time there is no dispute as to what the order or judgment requires the parties to do. The explanation for this happy state of affairs is obvious. Lawyers or the court draft orders and judgments.¹³⁵ They take care to ensure that their terms are clearly stated and are faithful to the direction the court provided in its reasons for decision – who must do what and when, usually.¹³⁶

[140] In giving meaning to the text of an order or a judgment that affects only the parties and will have no direct impact on the interests of third parties, an adjudicator must be familiar with all terms of the order or judgment and the events that preceded issuance of the order or judgment – the pleadings, the application, counsel's submissions and the judge's reasons for decision, the purpose

¹³⁴ *Contra*, P. Percell & J. Morden, *The Law of Civil Procedure in Ontario* 1176 (4th ed. 2020) ("The principles of judicial interpretation that govern the interpretation of statutes are applied to other instruments in writing, including orders, contracts, deeds and testamentary instruments").

¹³⁵ In Alberta, the successful party generally prepares a draft order or judgment. *Alberta Rules of Court*, Alta. Reg. 124/2010, r. 9.2(1). In England and Wales, "[i]n the Queen's Bench Decision, other than the Administrative Court, the parties must draw up every judgment or order, except where an order is made on the court's initiative or where the court orders otherwise". Zuckerman on Civil Procedure: Principles of Practice 1156 (4th ed. 2021 J. Wells gen. ed.). See *The Civil Procedure Rules 1998*, S.I. 1998/3132, r. 40.3 ("(1) Except as is provided at paragraph (4) below or by any Practice Direction, every judgment or order will be drawn up by the court ... (4) Except for orders made by the court of its own initiative and unless the court otherwise orders, every judgment or order made in claims proceeding in the King's Bench Division at the Royal Courts of Justice, other than in the Administrative Court, will be drawn up by the parties and rule 40.3 is modified accordingly"). The Registrar of the Supreme Court of Canada prepares the formal judgment of the Court and court staff prepare most interlocutory orders. D. Watt, J. Beedell, G. Ragan & M. Estabrooks, *Supreme Court of Canada Practice* 2023, at 46 (2023). This is also the general practice in Australia: "[T]he court is primarily responsible for drawing up its judgments or orders, [although] it may ask a party to do so". A. Zuckerman, S. Wilkins, J. Adamopoulos, A. Higgins, S. Hooper & A. Vial, *Zuckerman on Australian Civil Procedure* 894 (2018).

¹³⁶ But not always. *Serafin v. Malkiewicz*, [2020] UKSC 23, ¶ 33 per Lord Wilson ("The problem is that the Court of Appeal did not in its judgment proceed to address the consequences that should flow from its conclusion that the trial had been unfair. In particular it did not consider whether that conclusion should in any way displace its earlier conclusion ... about the relief to which the claimant is entitled. At the end of the judgment the court said only that the appeal should be allowed; and, apparently by email, it invited the parties to file written submissions in respect of the appropriate order to be made in light of its judgment").

the order or judgment is designed to serve¹³⁷ and the intention of the judge, as stated in his or her reasons for decision.¹³⁸

¹³⁷ *Weinrich Contracting Ltd. v. Wiebe*, 2022 ABCA 176, ¶ 25 (“Court orders should be interpreted by reading them as a whole, in the context of the pleadings, the arguments made by the parties, the factual and legal context in which the order was made, and the intention of the court that granted the order”); *Greenwood v. Greenwood*, 2023 SKCA 87, ¶¶ 26-28; 487 D.L.R. 4th 668, 682 per Kamakoff, J.A. (“The interpretation of a court order is not governed by the subjective views of the parties. A judge who is interpreting a court order must ‘consider the language of the order in the context of the pleadings, the proceedings in the action that led to the order, the circumstances surrounding the making of the order, and the reasons given for making the order, if any’. ... The reasons given by the court that made the order are often of great significance in the interpretive process. ... The statutory framework that applies to the decision-making underpinning the order is also a relevant and highly significant contextual consideration”); *Giesbrecht v. Stettner*, 2023 SKCA 52, ¶ 6 (“a judge who is interpreting a court order must not do so in a vacuum but instead consider the language of the order in the context of the pleadings, the proceedings in the action that led to the order, the circumstances surrounding the making of the order, and the reasons given for making the order, if any”); *Sutherland v. Reeves*, 2014 BCCA 222, ¶ 31; 61 B.C.L.R. 5th 308, 315 per Bauman, C.J. (“in addition to examining the language of the [o]rder, it is necessary to review the pleadings and surrounding circumstances”); *Re Sharpe*, [1992] FCA 616, ¶ 20 per Drummond, J. (“it is ... proper (if not essential) in construing an ... [order] to have regard to the factual context in which the judgment was given and that this context includes the pleadings, the reasons for the judgment and the course of the evidence at the trial”); *Sans Souci Ltd v. VRL Services Ltd.*, [2012] UKPC 6 (Jamaica), ¶¶ 13 & 16 per Lord Sumption (“the construction of a judicial order, like that of any other legal instrument, is a single coherent process. It depends on what the language of the order would convey, in the circumstances in which the Court made it, so far as these circumstances were before the Court and patent to the parties. The reasons for making the order which are given by the Court in its judgment are an overt and authoritative statement of the circumstances which it regarded as relevant. They are therefore always admissible to construe the order. In particular, the interpretation of an order may be critically affected by knowing what the Court considered to be the issue which its order was supposed to resolve. Of course, it does not follow from the fact that a judgment is admissible to construe an order, that it will necessarily be of much assistance. There is a world of difference between using a Court’s reasons to interpret the language of its order, and using it to contradict that language”) & *Finishing Touch 163 (Pty) Ltd. v. BHP Billiton Energy Coal South Africa Ltd.*, [2012] ZASCA 49, ¶ 13 (S. Afr. Sup. Ct. App.) per Mhlantla, J.A. (“The starting point [in the interpretation of an order] is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents ... the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention”).

¹³⁸ “There is no such thing as legislative intention”. *Glamorgan Landing Estates GP Inc. v. City of Calgary*, 2024 ABCA 150, ¶ 133 per Wakeling, J.A. A collective does not have a common intention as to how an enactment will apply to a fact pattern. Corry, “Administrative Law and the Interpretation of Statutes”, 1 U. Toronto L.J. 286, 290 (1936) (“Even the majority who vote for complex legislation do not have any common intention as to its detailed processes. ... The intention of the legislature is a myth”); Manning, “Without the Pretense of Legislative Intent”, 130 Harv. L. Rev 2397, 2403 & 2406 (2017) (“the reality seems to be that a complex multimember legislature likely has no genuine intent about the hard cases that make their way into court. ... Since congress is a ‘they’ not an ‘it’ ... such intent does not exist as a fact in the world, simply waiting to be found”). Unlike a legislature, consisting of a large number of legislators, a judge or judges has or have an intention when they sign reasons for decision. They intend the result they have adjudged is fair. See *Glamorgan Landing Estates GP Inc. v. City of Calgary*, 2024 ABCA 150, n. 120 per Wakeling, J.A. (“Legislative intent focuses on the legislature’s assumed collective response to the specific application of an enactment to a specific set of facts. It is not the same concept as legislative purpose. Legislative purpose is the general goals or aims of the enactment as set out in the text of the enactment or ascertained by reading the text”).

[141] With this data at hand, an adjudicator must identify the ordinary meaning of the contested text of the order¹³⁹ and attach to it a meaning faithful to its ordinary meaning. A word or words in an order or judgment cannot be given a meaning or meanings it or they cannot bear.¹⁴⁰ Words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense.¹⁴¹

¹³⁹ *Campbell v. Campbell*, 2016 SKCA 39, ¶ 18; 399 D.L.R. 4th 265, 273 per Ottenbreit, J.A. (“A plain reading of the review clause and the presence of the word ‘or’ ... shows that the clause is disjunctive and, on its face, contains two possibilities for review of the parenting arrangement”) & *Brosseau v. Berthiaume*, 1993 O.J. No. 532, ¶ 9 (Ct. Justice) per Valin, J. (“In accordance with the general rules of interpretation, the language used in a judgment or order must be construed according to its ordinary meaning and not in some unnatural or obscure sense. Upon reading the entire order as a whole, it is clear that the intention of the ... [chamber judge] was to create a restraining order”).

¹⁴⁰ *Abbas v. Esurance Ins. Co. of Canada*, 2023 ABCA 36, ¶ 50; 477 D.L.R. 4th 613, 645 per Watson & Wakeling, J.J.A. (“it is a cardinal sin for an adjudicator to give text a meaning it cannot possibly bear”); *Zuk v. Alberta Dental Ass’n*, 2018 ABCA 270, ¶ 159; 426 D.L.R. 4th 496, 539, leave to appeal ref’d, [2018] S.C.C.A. No. 439 (“Words must not be given meanings they cannot possibly bear”); *Lenz v. Sculptoreanu*, 2016 ABCA 111, ¶ 4; 399 D.L.R. 4th 1, 6 (“A contrary interpretation would give the text an implausible meaning. A court may never do this”); *The Queen v. Barbour*, 2016 ABCA 161, ¶ 43; 336 C.C.C. 3d 542, 553 (chambers) per Wakeling, J.A. (“in this pre-sentence period, ‘custody’ means imprisonment. Any other interpretation would accord the text an implausible meaning”); *Jones v. Director of Public Prosecutions*, [1962] A.C. 635, 662 (H.L.) per Lord Reid (“It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words cannot reasonably bear”); *SZTAL v. Minister for Immigration and Border Protection*, [2017] HCA 34, ¶ 94; 347 A.L.R. 405, 429 per Edelman, J. (“Where a statute employs a term in its ordinary sense, there can be no warrant for the extension of the meaning beyond its ordinary sense”); R. Sullivan, *The Construction of Statutes* 191 (7th ed. 2022) (“[T]he interpretation ultimately adopted must be one that the words of the text can reasonably bear”); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 31 (2012) (“A fundamental rule of textual interpretation is that neither a word nor a sentence may be given a meaning that it cannot bear”) & H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1374 (1994) (“A court should ... not give the words [in a statute] ... a meaning they will not bear”).

¹⁴¹ *Caminetti v. United States*, 242 U.S. 470, 485-86 per Day, J. (“Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and unusual sense”); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, ¶ 10; [2005] 2 S.C.R. 601, 610 per McLachlin, C.J. & Major, J. (“When the words of a provision are precise and unequivocal, the ordinary meaning of the words play[s] a dominant role in the interpretation process”); *The Queen v. McIntosh*, [1995] 1 S.C.R. 686, 697 per Lamer, C.J. (“a statute should be interpreted in a manner consistent with the plain meaning of its terms”); *The Queen v. Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd.*, [2001] 2 A.C. 349, 397 (H.L. 2000) per Lord Nicholls (“An appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute”); *Reid v. Reid*, [1979] NZCA 30; [1979] 1 N.Z.L.R. 572, 594, aff’d, [1982] 1 N.Z.L.R. 147 (U.K.P.C.) per Cooke, J. (“The natural and ordinary meaning of what is actually said in the Act must be the starting point”); R. Sullivan, *The Construction of Statutes* 229 (7th ed. 2022) (“the grammatical and ordinary meaning of the text ... is the starting point for all interpretation”); J. Keyes & W. Gordon, *Drafting, Interpreting and Applying Legislation* 79 (2023) (“Words in legislation are to be read in their ordinary and grammatical sense. This refers to the meaning they have both as individual words (lexical) as well as in relationships to each other in groups (sentences, clauses and phrases) as a matter of grammar or syntax”); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012) (“Words are to be understood in their ordinary, everyday meaning – unless the context indicates that they bear a technical sense”) & Kirby, “Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts”, 24 *Statute L. Rev.* 95, 99 (2003) (“the proper approach to the task of interpretation [of a statute] is to attempt to read the words as they would be understood in everyday life, where words and sentences are the commonplace of human communication”).

[142] If the text of the order, taking into account all the accumulated data, supports more than one plausible meaning, the court must select the meaning that best advances the purpose the order is designed to accomplish.¹⁴²

[143] The facts in *San Souci Ltd. v. VRL Services Ltd.*¹⁴³ illustrate how this interpretive protocol works.

[144] A hotel owner disgruntled with a damage award a commercial arbitration board made against it applied to the Supreme Court of Jamaica under Jamaica's *Arbitration Act* for relief. The Supreme Court dismissed the application. But the Court of Appeal allowed the appeal. It held that the arbitration tribunal had failed to address one issue that if resolved in the appellant's favor would have reduced the ultimate damage award against it. The final order was inaptly drawn: "The appeal against the award of damages is allowed and the matter is remitted to the arbitrators to determine the issue of damages only".¹⁴⁴ Before the arbitration tribunal the hotel owner argued that the arbitrators had to rehear the entire damages issue, not just the minor point, and attempted to introduce new evidence. The arbitration tribunal refused to admit the hotel owner's new evidence. The hotel owner returned to the Supreme Court for relief.

[145] The question ended up before the Privy Council.

[146] The Privy Council determined the meaning of the contested order, taking into account the arbitration tribunal's award and the reasons of the Court of Appeal. While the text alone supported the position of both the hotel owner and the hotel manager – neither advanced an interpretation the contested order could not bear – the pre-order information supported the conclusion that the Court of Appeal intended¹⁴⁵ to reopen only one part of the damages dispute. The judgment of the Court

¹⁴² *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 109; [2017] 7 W.W.R. 343, 376, leave to appeal ref'd, [2017] S.C.C.A. No. 228 ("If there is more than one potential meaning, the court must select the option that best advances the purpose that accounts for the text"); *Celgene Corp. v. Canada*, 2011 SCC 1, ¶ 21; [2011] 1 S.C.R. 3, 13 per Abella J. ("The words, if clear, will dominate, if not, they yield to an interpretation that best meets the overriding purpose of the statute"); *The Queen v. D.A.Z.*, [1992] 2 S.C.R. 1025, 1042 per Lamer, C.J.C. ("The best approach to the interpretation of words in a statute is to place upon them the meaning that best fits the object of the statute, provided that the words themselves can reasonably bear that construction"); *McBratney v. McBratney*, 59 S.C.R. 550, 561 per Duff J. ("where you have rival constructions of which the language of the statute is capable you must resort to the object or principle of it can be collected from the language ... then the construction which best gives effect to the ... [object] or principles ought to prevail") & *C & K Mortgage Services Inc. v. Fasken Campbell Godfrey*, 2000 O.J. No. 2266, ¶ 2 (Sup. Ct.) per Trafford, J. ("[The words in an order] are to be given a broad and liberal interpretation to achieve the objective of the court in making the order").

¹⁴³ [2012] UKPC 6 (Jamaica).

¹⁴⁴ *Id.* ¶ 7.

¹⁴⁵ *Finishing Touch 163 (Pty) Ltd. v. BHP Billiton Energy Coal South Africa Ltd.*, [2012] ZASCA 49, ¶ 20 per Mhlantla, J.A. ("in ordering that the review proceedings 'shall be initiated by no later than Wednesday, 26 January 2006' Puller, J. intended that the notice of the application be given to the registrar and the application served on the affected parties by 25 January 2006") (emphasis in original).

of Appeal could not have been clearer. The mandate of the arbitration tribunal was narrow – decide the minor question not previously resolved.

[147] Placing this much weight on the events that preceded the issuance of the order is not unfair when the parties are both aware of the historical record and the order had affected only the interests of the parties and not third parties.

[148] If an order or judgment will affect the interests of third parties, the text of the order or judgment becomes more central to the proper interpretation because third parties bound by it may not have access to the background events.

[149] This would be the case if an employer sued a striking trade union and picketers and sought an order enjoining unlawful picketing.¹⁴⁶

3. Application of the Governing Principles

[150] What does the October 15, 2019 order mean?

[151] What is its limiting force?

[152] It is helpful, at the outset, to establish the ordinary meaning of the terms of the October 15, 2019 order in dispute – “systemic breach” and “operational or management failures”.

[153] Something that affects a group of interconnected elements as a whole is “systemic”.¹⁴⁷

¹⁴⁶ See *Zhang v. Chan*, 229 D.L.R. 4th 298, 703 (Que. C.A. 2003) per Baudouin, J.A. (“To give an example, such would be the case if a Court ordered that picket lines should only be allowed at a ‘reasonable distance’ of a building. Since the notion of reasonableness is essentially subjective, an order so worded leaves ample room for interpretation and thus breeds ambiguity”).

¹⁴⁷ 17 The Oxford English Dictionary 496-97 (2d ed. 1989) (“system ... 1. A set or assemblage of things connected, associated, or interdependent, so as to form a complex unity; a whole composed of parts in orderly arrangement according to some scheme or plan; rarely applied to a simple or small assemblage of things ... 9. An organized scheme or plan of action, esp. one of a complex or comprehensive kind”) & 499-500 (“systemic ... 1. A. *Physiol.* and *Path.* Belonging to, supplying, or affecting the system or body as a whole ... 2. *Gen.* Of or pertaining to a system”); The American Heritage Dictionary 1768 (5th ed. 2011) (“sys•tem ... 1. A group of interacting, interrelated, or interdependent elements forming a complex whole ... sys•tem•ic ... 1. Of or relating to systems or a system. 2a. Relating to or affecting the entire body or an entire organism”) & Webster’s Third New International Dictionary of the English Language Unabridged 2322 (2002) (“sys•tem ... 1a : a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose”) & 2323 (“sys•tem•ic ... of, relating to, or common to a system: as a : affecting the body generally – distinguished from *local*”).

[154] In similar contexts, other courts have described systemic issues as reflecting a widespread problem rather than an isolated one.¹⁴⁸ Systemic wrongs cause harm to a large number of undifferentiated individuals from exposure to the same risk due to the defendant's conduct where liability ultimately turns on the defendant's unilateral actions rather than the circumstances of the harmed individuals.¹⁴⁹ Where legislation was involved, the systemic wrong refers to the policies

¹⁴⁸ *The Queen v. Reilly*, 2020 SCC 27, ¶ 1; [2020] 3 S.C.R. 109, 111 per Brown, J. ("In these circumstances, which include the trial judge's finding ... that the breach of s. 503 of the *Criminal Code* ... was an instance of a systemic and ongoing problem that was not being satisfactorily addressed, we are all of the view that there was no basis for the Court of Appeal to interfere with the trial judge's exercise of discretion [in granting a stay]: see *R. v. Babos* ... at para. 41") & *The Queen v. Babos*, 2014 SCC 16, ¶ 41; [2014] 1 S.C.R. 309, 325-26 per Moldaver, J. ("The court must consider such things as ... whether the conduct is isolated or reflects a systemic and ongoing problem").

¹⁴⁹ *Rumley v. British Columbia*, 2001 SCC 69, ¶¶ 30 & 34; [2001] 3 S.C.R. 184, 200-01 & 203 per McLachlin, C.J. ("the respondents' argument is based on an allegation of 'systemic' negligence — 'the failure to have in place management and operations procedures that would reasonably have prevented the abuse'. ... The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. ... [C]learly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a 'systemic' breach).... [T]he respondents have limited the possible grounds of liability to systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group") (underlining omitted); *Dennis v. Ontario Lottery and Gaming Corp.*, 2013 ONCA 501, ¶¶ 53-54; 365 D.L.R. 4th 145, 163-64, leave to appeal ref'd, [2013] S.C.C.A. No. 373 ("There are certainly cases in which a class action will be an appropriate procedure to deal with a 'systemic wrong', a wrong that is said to have caused widespread harm to a large number of individuals. When a systemic wrong causes harm to an undifferentiated class of individuals, it can be entirely proper to use a class proceeding that focuses on the alleged wrong. The determination of significant elements of the claims of individual class members can be decided on a class-wide basis, and individual issues relating to issues such as causation and damages can be dealt with later on an individual basis, especially when the assessment of damages can be accomplished by application of a simple formula. The case law offers many examples in which a class action has provided an appropriate procedural tool to resolve claims when all class members are exposed to the same risk on account of the defendant's conduct. These include claims arising from: • overtime policies that impose more restrictive conditions for overtime compensation than permitted by statute ...; • defective products ...; • illegal or unauthorized charges to credit card customers ...; or • the operation of a school designed to create an atmosphere of fear, intimidation and brutality In these cases, liability essentially turns on the unilateral actions of the defendant, is not dependent to any significant degree on the individual circumstances of class members, and the only remaining issues requiring individualized determination are whether and to what degree that conduct harmed the class members"); *Brazeau v. Canada*, 2020 ONCA 184, ¶¶ 115 & 118; 445 D.L.R. 4th 363, 401 & 402 ("The motion judge ... [found 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 duty identified by the motion judge ... can only succeed if systemic in nature and cannot succeed if based upon a series of discrete breaches of duty to individual inmates").

and practices used in the implementation of legislation rather than specific acts of maladministration in the course of the implementation.¹⁵⁰

[155] “Operational”¹⁵¹ refers to the functioning of something.

[156] “Management”¹⁵² is the administration, supervision or control of something.

¹⁵⁰ *Brazeau v. Canada*, 2020 ONCA 184, ¶¶ 1 & 56-57; 445 D.L.R. 4th 363, 370 & 386-87 (“These appeals involve two class actions claiming damages for breach of *Charter* rights brought by inmates in federal penitentiaries who were held in administrative segregation. One claimed damages for systemic negligence as well. These are class-wide claims that do not rest upon proof of individual or specific acts of maladministration. They challenge the regulatory scheme and the systemic practices and policies adopted by the correctional authorities in the application of the ... [Corrections and Conditional Release Act]. This court held ... that the constitutional infirmity in ... the *CCRA* was not the maladministration of the legislative scheme but rather the systematic way administrative segregation was used by the correctional authorities and the failure of the *CCRA* to safeguard against such treatment. The correctional authorities adopted practices and policies under the umbrella of ss. 31–37 of the *CCRA* regarding the propriety and use of administrative segregation in the administration of federal penitentiaries. That regime was plainly premised on the routine use of long-term administrative segregation as a way of maintaining peace and safety in federal penitentiaries”).

¹⁵¹ 10 The Oxford English Dictionary 847-48 (2d ed. 1989) (“operate ... 7. To direct the working of; to manage, conduct, work (a railway, business, etc.)” & 848-49 (“operation ... †1. Action, performance, work, deed. ... 10. The action of operating or working a machine, engine, railway, business, etc. ... operational ... 1.a. Of or pertaining to operation or operations”); The American Heritage Dictionary 1236 (5th ed. 2011) (“op•er•a•te ... 1. To control the functioning of; run: *operate a sewing machine*. 2. To conduct the affairs of; manage: *operate a business*. ... op•er•a•tion ... 1. The act or process of operating or functioning. ... op•er•a•tion•al ... 1. Of or relating to an operation or a series of operations”) & Webster’s Third New International Dictionary of the English Language Unabridged 1580-81 (2002) (“op•er•a•te ... 1 : to perform a work or labor : exert power or influence : produce an effect ... ~ vt 1 : to cause to occur : bring about by or as if by the exertion of positive effort or influence ... 2a : to cause to function usu. by direct personal effort ... b : to manage and put or keep in operation whether with personal effort or not ... op•er•a•tion ... 1 a *obs* : a doing or performing esp. of action ... 9 ... b : the whole process of planning for and operating a business or other organized unit ... op•er•a•tion•al ... 1 : of or relating to operation or an operation”).

¹⁵² 9 The Oxford English Dictionary 293 (2d ed. 1989) (“management ... 1. a. The action or manner of managing, in senses of the vb.; the application of skill or care in the manipulation, use, treatment, or control (of things or persons), or in the conduct (of an enterprise, operation, etc.). ... †c. An instance of managing; an administrative act. ... e. *spec.* The administration of a commercial enterprise. Also in phrases designating specific methods of business administration ... 4. Power of managing; administrative skill”) & 292 (manage ... 4. *trans.* To control and direct the affairs of (a household, institution, state, etc.) ... 5. To administer, regulate the use or expenditure of (finances, provisions, etc.) ... 7. To control, cause to submit to one’s rule (persons, animals, etc.)”); The American Heritage Dictionary of the English Language 1065 (5th ed. 2011) (“man•age•ment ... 1. The act, manner, or practice of managing; handling, supervision, or control”) & 1064-65 (“man•age ... 1a. To have charge of; direct or administer: *manage a company*; *manage a portfolio of assets*. ... b. To exert control over; regulate or limit toward a desired end: *manage the news to minimize political repercussions*; *managed smokestack emissions*. c. To direct or supervise (employees or other staff”) & Webster’s Third New International Dictionary of the English Language Unabridged 1372 (2002) (“man•age•ment ... 1 : the act or art of managing ... c : the conducting or supervising of something (as a business); *esp* : the executive function of planning, organizing, coordinating, directing, controlling, and supervising

[157] Alberta seems to understand the October 15, 2019 order as excluding from the claim “operational or management issues” that are attributable to other participants in the bail system – police agencies, duty counsel, Crown prosecutors, and justices of the peace.¹⁵³

[158] An exchange between Ms. Waddell, counsel for the plaintiff, and Associate Chief Justice Rooke, strongly supports the view that they shared the same understanding.¹⁵⁴

The Court: ... The intent is that you are challenging the operation of the system in a broad sense, as opposed to individual situations ... --

Ms. Waddell: Yeah, ... we’re not talking about ... Josephine police officer putting the bail app in her desk and going home for the night. That’s not our case.

[159] M.S. maintains that Alberta “mischaracterizes the scope and intended effect” of the order¹⁵⁵ and disclaims “commit[ing] to making no arguments about the negligence of Alberta in operating and managing Crown Bail, which is fundamental to his claim”.¹⁵⁶ Instead, the argument goes, the order only excluded any individual aspects: “front-line decisions and omissions by the police in respect of any particular detainee” and “allegations about individual negligence at a granular level, such as, for example, a police officer putting a bail package in a drawer and forgetting about it”.¹⁵⁷ The negligence common issue, we are told, is “framed to exclude the need for the court to decide

any industrial or business project or activity with responsibility for results ... 3 : judicious use of means to accomplish an end”) & 1372 (“man•age ... 2 : to control and direct : handle either well or ill : ... CONDUCT, ADMINISTER ... 2a : to direct or carry on business or affairs : SUPERVISE, ADMINISTER”). See also 1 The Oxford English Dictionary 162 (2d ed. 1989) (“administer ... 1. *trans.* To manage as a steward, to carry on, or execute (an office, affairs, etc.); to manage the affairs of (an institution, town, etc.)”); The American Heritage Dictionary of the English Language 22 (5th ed. 2011) (“ad•min•is•ter ... 1. To have charge of; manage”) & Webster’s Third New International Dictionary of the English Language Unabridged 27 (2002) (“ad•min•is•ter ... 1(a)(1) : to manage the affairs of ... (2) : to direct or superintend the execution, use, or conduct of”).

¹⁵³ Factum of the Appellant, ¶¶ 57, 60 & 65 (“it is important to highlight again the Chambers Justice’s case management order that: (a) the police agencies would not be brought into this action; and (b) the Respondent would limit their claim only to alleged ‘systemic’ issues and not to ‘operational or management issues.’ Identifying a basis in fact for the common issues is not possible given the admitted existence of ‘operational and management’ issues that cause delays throughout the bail regime process, attributable to various participants including police agencies, duty counsel, Crown Prosecutors and Justices of the Peace. There is simply no way – and the Respondents have not offered a way – to differentiate a delay in a bail hearing caused by an excluded operational or management issue from a ‘systemic’ issue caused by Alberta. The only plausible manner to determine how many and which bail delays are the result of operational issues versus a ‘systemic issue’, would be to evaluate each and every case of delay to determine the reason and which bail system participant caused or materially contributed to the delay”).

¹⁵⁴ Transcript of proceedings on October 15, 2019, 66: 32-37. Extracts of Key Evidence of the Respondent M.S. 78.

¹⁵⁵ Factum of the Respondent, M.S., ¶ 21.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ¶¶ 21 & 23.

whether the actions of other players in the bail system caused any particular individual to be delayed in being brought before a justice”.¹⁵⁸ Rather, the plaintiff seeks to determine whether there are systemic delays in the bail system, and whether Alberta caused or contributed to those delays.¹⁵⁹

[160] The views the parties expressed as to the intended meaning of the order, while not determinative, merit careful consideration.¹⁶⁰ What is determinative is the meaning of the text of the order, objectively assessed, having regard to the context from which the text emerged.

[161] We know from the order’s recital portion¹⁶¹ that the certification judge made the October 15, 2019 order following Alberta’s application to add police entities and the Attorney General of Canada as defendants to the proceeding. As a result of an undertaking from the plaintiff that he would not seek to add those parties to the class action and “further undertaking to limit his claim to an allegation of systemic failures, as distinct from operational or management failures”, Alberta agreed to withdraw its application.¹⁶² The order stated that “[t]he Plaintiffs claim as against ... [Alberta] is limited to allegations of systemic breach by ... [Alberta] with respect to the bail system, as distinct from operational or management failures”.¹⁶³ During the hearing, the Court and plaintiff’s counsel seemed to agree that the focus of the claim is a challenge to the “operation of the system in a *broad* sense as opposed to individual situations”.¹⁶⁴

[162] Associate Chief Justice Rooke viewed the October 15, 2019 order as limiting the claim “to allegations of systemic breach ... with respect to the bail system, as distinct from [individual]

¹⁵⁸ Id. ¶ 25.

¹⁵⁹ Id. ¶ 26.

¹⁶⁰ Of course, if the parties agreed on the meaning, there would be no controversy for the court to resolve.

¹⁶¹ Appeal Record 49-50.

¹⁶² Id. 50.

¹⁶³ Order pronounced October 15, 2019 and filed January 27, 2020, ¶ 3. Appeal Record 50.

¹⁶⁴ Transcript of proceedings on October 15, 2019 66:20-67:10 (“Ms. Waddell: My Lord, I’d like some clarification. You’ve ... added in the words ‘or management failures’. I don’t know what you mean by that. The Court: I am not sure I know what I mean, either. ... And I do not know what you mean by systemic, either. ... The intent is that you are challenging the operation of the system in a broad sense as opposed to individual situations, and so -- Ms. Waddell: Yeah, ... we’re not talking about, you know, Josephine police officer putting the bail app in her desk and going home for the night. That’s not our case. The Court: Okay. Well, I am going to let you work out the wording on that but that is the intent. You are ... saying the system is broken, it does not work, or it does not work often enough, or there is too many failures and, therefore, it is a disaster and, therefore, the Crown should pay. Ms. Waddell: That’s right. The Court: All right. So I will let you work on the wording but ... the operational word is the wording but I do not want to have something left out that to the extent that, I guess it is operational even if there is bad management by EPS or CPS or RCMP, it is still an operational thing, I believe, so you can work out the wording”). Extracts of Key Evidence of the Respondent 78-79.

operational or management failures”.¹⁶⁵ Before the case management judge, the plaintiff quoted his undertaking and the order as specifically excluding “operational failures by particular individuals”, with which the certification judge agreed.¹⁶⁶ The judge regarded the claim as being for “systemic negligence in the management of the Crown Bail program overall”, excluding “individual operational or management issues”.¹⁶⁷ The certification judge also referred to the order as limiting the claim to systemic issues and excluding operational or management failures, with the distinction between the two a matter for the common issues justice.¹⁶⁸

¹⁶⁵ *Reilly v. Alberta*, 2022 ABKB 612, n. 2 (“by my Order dated October 15, 2019, I ... clarif[ied] ... that the ‘Plaintiff’s ... claim as against ... [Alberta] is limited to allegations of systemic breach by ... [Alberta] with respect to the bail system, as distinct from [*individual*] operational or management failures’”) (emphasis added). See also id. ¶¶ 44-45 (“With respect to the question of whether any single aspect of the bail process caused the delay in particular cases, I reiterate that the case at Bar is framed as a claim for systemic negligence in the management of the Crown Bail program overall. ... Alberta argues that the Plaintiffs’ claims are narrowed to systemic issues and exclude individual operational or management issues. The Court’s Response: while individual operational or management issues are excluded, ... [the first common issue] quite clearly relates only to issues that provide some basis in fact for collective/systemic negligence”), ¶ 46 (“those [other bail system] participants and their particular roles, if any, in delays beyond the 24 hours are clearly excluded as a result of my October 15, 2019 Order, with only systemic considerations, for which Alberta is responsible being at issue”), ¶ 60 (“the limit of the potential liability against Alberta, by the Court’s Order of October 15, 2019, to systemic causes of delay is, in the case at Bar, the answer to what is a commonly repeated defence objection of individualism”) & n. 25 (“On its face, ... [common issue 1] would appear to have been contrary to para 3 of my Order of October 15, 2019 ... [.] However, it should be interpreted in the context rendered – that is only to systemic negligence or *Charter* breaches causing delays, not individual breaches”).

¹⁶⁶ Id. ¶ 16 (“The Plaintiffs stated it this way in oral argument ... : ‘the nature of the *Charter* breach and the negligence claims are being asserted only to the conduct of the Crown or in so far as the police are involved, it is under the jurisdiction of the Ministry of Justice with respect to the administration of justice and they are indivisible in that context’. ... I agree with this submission by the Plaintiffs (specifically PRB, paras 8-9), and I reject the continuing argument by Alberta thereafter about missing parties, in face of my October 15, 2019 ruling”). Plaintiffs’ Certification Reply Brief, ¶ 8 (“The Plaintiff did not commit to making no arguments regarding the operational and management failures of Alberta The undertaking and the order state that this ‘claim is limited to systemic breaches by Alberta with respect to the bail system, as distinct from operational failures by particular individuals.’ ... The Defendant’s argument fails to mention this limitation on the scope of the order. The order was intended to preclude allegations about individual negligence claims at a granular level, such as, for example, a police officer putting a bail package in a drawer and forgetting about it”) (underlining in original).

¹⁶⁷ Id. ¶¶ 44-45 (“With respect to the question of whether any single aspect of the bail process caused the delay in particular cases, I reiterate that the case at Bar is framed as a claim for systemic negligence in the management of the Crown Bail program overall. ... Alberta argues that the Plaintiffs’ claims are narrowed to systemic issues and exclude individual operational or management issues. The Court’s Response: while individual operational or management issues are excluded, ... [the first common issue] quite clearly relates only to issues that provide some basis in fact for collective/systemic negligence”).

¹⁶⁸ Id. ¶ 18 (“The other ... argument made by Alberta is about the nature of the requirement of systemic delay before Alberta can be found liable, as addressed in the Court’s Order of October 15, 2019, in the following words: ‘The ... cla[i]m as against ... [Alberta] is limited to allegations of systemic breach with respect to the bail system, as distinct

[163] While the plaintiff and Alberta disagree as to what exactly “operational or management” means in this case, both appear to view it as capturing the conduct of third-party actors who play a role in the bail system. Though both focus on the role of police, neither party has suggested that this is the only actor at issue. Where the two diverge is whether, as the plaintiff argues, this refers only to the conduct of particular individuals, leaving Alberta liable for the group as a whole, or, as Alberta argues, the conduct of the entire group such that Alberta cannot be held responsible for delays that can be attributed to that group.

[164] I am unable to accept the plaintiff’s view that the order only excludes “operational or management failures” at an individual level and allows the plaintiff to pursue a claim for Alberta’s liability for how police agencies or other actors operated or managed the bail system. The whole point of the order was to exclude liability based on the conduct of police agencies, defence counsel, and justices of the peace. Adopting an interpretation of the October 15, 2019 order so far removed from its wording and in the face of disagreement as to what it means or intended would be suspect.

[165] Taking into account the ordinary meaning of the text of the order and the events preceding its issuance, I am satisfied that the October 15, 2019 order leaves the plaintiff with a claim about systemic breach – failures by Alberta that affect the bail system as a whole – rather than deficiencies in particular aspects of the bail system – failures in its functioning, administration or supervision at the level of the various third parties involved in it. In other words, the order tells us that the claim seeks to subject Alberta to liability based on the design of the bail system it has put in place or the instructions it has given to the actors operating this system, but not for how those actors have implemented or executed its instructions. Ostensibly, to the extent the plaintiff claims that Alberta also has an ongoing obligation to ensure the system is working well, Alberta would be responsible for updating the system it put in place or the instructions it provided as needed.

[166] This determination compromises the plaintiff’s position.

from operational or management failures’. ... Alberta argues the delay may be due to the ‘arresting law enforcement agency ... not [having] done what is necessary to allow a hearing to take place.’ The Plaintiffs argue ... that this amounts to a breakdown in the bail system that Alberta, which has the overall responsibility for administering the bail system in the Province, has a duty to make certain doesn’t happen. Alberta seems to acknowledge as much It will be for the common issues justice to determine if the failures to meet s. 503 are systemic failures on the part of Alberta, as opposed to operational or management failures. It is thus the common issues justice who will be required ... to ‘guard against an impermissible dressing up of the operational or management failures as a ‘systemic’ issue’”).

C. The Plaintiff's Claim Does Not Disclose a Cause of Action Against Alberta

1. The Benchmarks of a Justiciable Action

[167] In a community of any size there are thousands of disputes that arise on a daily basis. Most of them are not justiciable – they are not the kind courts will resolve.¹⁶⁹ Only a small proportion of these are justiciable – they are of a kind that courts are willing to resolve.

[168] It is easy to populate the sets of justiciable and nonjusticiable disputes.

[169] Here are three examples of disputes that courts routinely decide.

[170] Suppose a person suffers personal injury and property loss as a result of an automobile collision. He commences an action alleging that the defendant negligently operated his or her automobile to the detriment of the plaintiff. A court will decide if the defendant was negligent, and, if so, what damages the defendant must pay the plaintiff.¹⁷⁰

[171] Or suppose a person who has lost his or her job files a claim against the employer alleging that the employer breached the employment contract and terminated the employment relationship without cause and without providing reasonable notice of the end date of employment or pay in lieu of reasonable notice. A court decides if the employer had cause to terminate the employment relationship and, if not, the sum the employer must pay the former employee.¹⁷¹

[172] Suppose a provincial government satisfied that a federal statute is unconstitutional on a division-of-powers basis commences an action seeking a declaration that the impugned enactment is of no force or effect.¹⁷² A court will decide if the provincial government's position is meritorious.

¹⁶⁹ *Wall v. Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255, ¶ 86; 404 D.L.R. 4th 48, 83, rev'd, 2018 SCC 26; [2018] 1 S.C.R. 750 per Wakeling, J.A., dissenting ("The list of differences that judges cannot resolve is probably many times greater than the list of disputes that our legal system allows judges to resolve").

¹⁷⁰ K. Cooper-Stephenson & E. Adjin-Tettey, *Personal Injury Damages in Canada* 1-2 (3d ed. 2018) ("Personal injury cases combine rules of liability with those of damages assessment. Together these form a compensation system which is based on a sense of the moral distribution of societal resources. In order to fully understand this compensation system, and the range of rules and principles applicable to it, it is important to appreciate the relationship of damages issues to those of civil liability. ... In short, the context and setting of personal injury damages award must be addressed – its liability, systemic and jurisprudential framework").

¹⁷¹ H. Levitt, *The Law of Dismissal in Canada* § 6:1 (3d ed. rel. 2024-05) ("The first legal issue to consider ... is whether cause, at law, exists so that no notice or severance pay is required to terminate the employee. If cause exists, the court cannot substitute a lesser penalty").

¹⁷² W. Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* 229 (1981) ("The heart of Canada's federal constitution is the distribution of legislative

[173] No one would contest the jurisdiction of a court to resolve these three disputes.

[174] Why are these disputes justiciable?

[175] Why does the public expect judges to decide these three controversies and others like them?

[176] Why do judges regularly decide disputes of this nature?

[177] First, the Constitution of Canada assigns to the judicial branch of government the responsibility for resolving legal disputes.¹⁷³ Courts have a constitutional obligation to hear and decide this class of disputes.¹⁷⁴

[178] Second, courts have developed analytical frameworks to resolve negligence, breach of contract, constitutional¹⁷⁵ and other legal issues.¹⁷⁶

powers that is made by the British North America Act between the central Parliament on the one hand and the provincial legislatures on the other. ... If our federal constitution is to endure and to work tolerably, this task of interpretation [classifying what falls under either federal or provincial jurisdiction] is plainly an exclusive judicial function and requires the services of independent tribunals of the first rank”).

¹⁷³ *Constitution Act, 1867*, 30 & 31 Vict., c. 3, preamble & ss. 96-101 (U.K.).

¹⁷⁴ *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 545 per Sopinka, J. (“In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court’s primary concern is to retain its proper role within the constitutional framework of our democratic form of government. ... In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch”); *United States v. Nixon*, 418 U.S. 683, 696-97 (1974) per Burger, C.J. (“The demands of and the resistance to the subpoena prevent an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally solve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. ... Whatever the correct answer on the merits, these issues are ‘of a type which are traditionally justiciable’”) & *Luther v. Borden*, 48 U.S. 1, 42-43 (1849) per Taney, C.J. (The Supreme Court concluded that the Constitution assigned to Congress the authority “to decide what government is the established one in a State”).

¹⁷⁵ R. Dawson, *The Government of Canada* 383 (5th ed. 1970 rev. N. Ward) (“Inasmuch as Canada is a federation, the courts are in a position where they must determine and maintain the respective fields of jurisdiction of the federal and provincial governments. The judiciary therefore performs political and constitutional functions of the greatest consequence by applying legal criteria to the actions of government”).

¹⁷⁶ 1 R. Rotunda & J. Nowak, *Treatise on Constitutional Law: Substance and Procedure* 462 (5th ed. 2012) (“The political question doctrine – which holds that certain matters are really political in nature and best resolved by the body politic rather than by courts exercising judicial review – is a misnomer. It should more properly be called the doctrine of nonjusticiability, that is, a holding that the subject matter is inappropriate for judicial consideration”) & *Baker v. Carr*, 369 U.S. 186, 198 (1962) per Brennan, J. (“In the instance of nonjusticiability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court’s inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded”).

[179] Third, the community recognizes that judges are best suited to create and administer these analytical frameworks. Judges went to law school and most practiced law for decades and acquired the skills needed to solve legal problems that other members of the community do not have.¹⁷⁷

[180] Fourth, the community has allocated resources to the judicial branch of government to allow it to resolve disputes in a fair and orderly manner and preserve peace and order in the community. The expectation is that these resources will be devoted to disputes that significantly affect the welfare of the disputants or the community or both. “Judicial resources are finite in nature and, generally, should only be expended on a controversy that has significant consequences for the disputants or the community or both”.¹⁷⁸

[181] Fifth, our court system makes a valuable contribution to the welfare of the community because most members of the community accept a judicial determination as just. The public has confidence in the ability of legally trained judges who are independent¹⁷⁹ to fairly resolve legal disputes.

[182] Here are three examples of disputes that everyone would agree a court should not resolve.¹⁸⁰

[183] Suppose a group of ardent hockey fans disagree as to who is the greatest hockey player of all time. They all agree that it is one of Wayne Gretzky, Gordie Howe, or Bobby Orr. But they are sharply divided over which one is the all-time best. No court would wade into this controversy if

¹⁷⁷ *Judges Act*, R.S.C. 1985, c. J-1, s. 3 (“No person is eligible to be appointed a judge of a superior court in any province unless, in addition to any other requirements prescribed by law, that person ... is a barrister or advocate of at least 10 years standing at the bar of any province”).

¹⁷⁸ *Wall v. Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses*, 2016 ABCA 255, ¶ 101; 404 D.L.R. 4th 48, 85, rev’d, 2018 SCC 26; [2018] 1 S.C.R. 750 per Wakeling, J.A., dissenting.

¹⁷⁹ R. Dawson, *The Government of Canada* 409 (5th ed. 1970) (“The judge must be made independent of most of the restraints, checks, and punishment which are usually called into play against other public officials. He is thus protected against the operation of some of the most potent weapons which a democracy has at its command: he receives almost complete protection against criticism; he is given civil and criminal immunity for acts committed in the discharge of his duties; he cannot be removed from office for any ordinary offence, but only for misbehavior of a flagrant kind; and he can never be removed simply because his decisions happen to be disliked by the Cabinet, the Parliament, or the people”) & W. Holdsworth, “His Majesty’s Judges”, 173 *Law Times* 336, 336-37 (1932) (“The judges hold an office to which is annexed the function of guarding the supremacy of the law. It is because they are the holders of an office to which the guardianship of this fundamental constitutional principle is entrusted, that the judiciary forms one of the three great divisions into which the power of the state is divided. The Judiciary has separate and autonomous powers just as truly as the King or Parliament”).

¹⁸⁰ *Wall v. Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses*, 2016 ABCA 255, ¶¶ 82-84; 404 D.L.R. 4th 48, 82, rev’d, 2018 SCC 26; [2018] 1 S.C.R. 750 per Wakeling, J.A., dissenting. See *Judicial Committee of the Highwood Congregation of Jehovah’s Witnesses v. Wall*, 2018 SCC 26, ¶ 35; [2018] 1 S.C.R. 750, 768 per Rowe, J. (“By way of example, the courts may not have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she should have been invited to a wedding”).

a Gretsky admirer commenced an action against another hockey fan who claimed that Bobby Orr was the greatest seeking a declaration that Wayne Gretsky was the greatest.

[184] Or suppose a person is unhappy that her cousin has not invited her to attend the cousin's daughter's wedding. The aggrieved cousin invited her cousin to attend her two children's weddings and is adamant her cousin should reciprocate. This, she asserts, is a family tradition. No court will entertain an action seeking an order directing the defendant to invite her aggrieved cousin to the defendant's daughter's wedding and enforcing a family tradition. The two cousins never made promises to invite the other to family weddings. There is no other legal principle that makes it actionable to disregard a family tradition.

[185] Or suppose residents of a city's downtown core are greatly distressed that a municipality does not hire the number of police officers needed to restore law and order in their neighborhoods and commence an action against the municipality seeking an order compelling the defendant to hire 500 more police officers. No court would be willing to hear this case. Judges would understand that it is the responsibility of elected municipal councillors to determine the police department's budget and the best way to combat lawlessness in the city's core. The residents' complaint does not raise a legal question. This is primarily a political issue. If the plaintiffs do not like what their elected representatives are doing, they should support candidates who share their political views. The remedy is the ballot box.

[186] Why are these disputes not justiciable?

[187] First, judges are trained to resolve legal disputes. These disputes are not legal in nature.¹⁸¹ The skills needed to decide these questions are not held by lawyers and judges. Hockey experts are in the best position to opine on who is the greatest player of all time. Municipal and provincial politicians have the resources and the access to information needed to make reasonable decisions about what public resources should be devoted to combatting the anti-social behavior of criminal vagrants.

[188] Second, judges have not created generally accepted analytical frameworks to resolve nonlegal disputes.¹⁸² Nonlegal controversies do not come before them. Judges have never

¹⁸¹ P. Hogg & W. Wright, *Constitutional Law of Canada* 932 (5th ed. rel. 2023-01) ("Of course, if the Court had been asked whether the federal Parliament should as a matter of policy reduce its contributions to provincial social programmes, the Court would have refused to answer. The refusal might have been expressed in terms of the question being 'political', but the real point would be that the question was not one of law").

¹⁸² *Baker v. Carr*, 369 U.S. 186, 217 (1962) per Brennan, J. ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of

formulated criteria identifying the best all time hockey player. Is it the hockey player who has won the most Stanley Cups, who has the most goals, assists and points, or who has been recognized the most times as the league's most valuable player? And the law has not constituted norms that govern family-wedding traditions. Most members of the public are content to leave these controversies to celebrity advice columnists, such as Abigail Van Buren, the author of the Dear Abby column.

[189] Third, the impact of judicial determination of two of these disputes will not materially affect the welfare of the disputants or the community. Judicial decisions should affect important interests of community members. Little turns, for example, on who is adjudged to be the greatest hockey player of all time or whether the cousin has hurt feelings because the defendant did not invite her to her daughter's wedding. Some disputes do not need a binding resolution. The unanswered question is not a great detriment to the welfare of the community.

[190] Fourth, there is no reason to believe that community members will attach greater significance to a determination a judge makes of these controversies than any other persons.

[191] Fifth, judges must respect the lines that demarcate the domains of the judicial branch of government and the other two branches of government – the legislative and executive branches.¹⁸³ This is also true of the federal Parliament and the provincial legislatures. Each body must respect the autonomy of the other and refrain from enacting legislation that only the other has the jurisdiction to enact. And cabinet ministers and legislators must refrain from commenting on cases that are before the courts.¹⁸⁴

[192] Judges must refrain from deciding questions that are primarily political in nature. Their constitutional assignment is restricted to the resolution of legal disputes. The executive and legislative branches of government are solely responsible for deciding questions that are primarily political in nature.¹⁸⁵

government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question”).

¹⁸³ *The Queen v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶ 87; [2011] 3 S.C.R. 45, 94 per McLachlin, C.J. (“Generally, policy decisions are made by legislators or officers whose official responsibility requires them to assess and balance public policy considerations. ... When judges are faced with such a course or principle of action adopted by a government, they generally will find the matter to be a policy decision. The weighing of social, economic, and political considerations to arrive at a course or principle of action is the proper role of government, not the courts. For this reason, decisions and conduct based on these considerations cannot ground an action in tort”).

¹⁸⁴ W. Lederman, “The Independence of the Judiciary”, 34 Can. B. Rev. 769, 788 (1956) (“Apart from debates on judicature statutes, parliamentary rules impose much restraint on debate concerning judicial conduct. ‘By the theory of our constitution, those to whom the administration of justice is entrusted are not responsible to Parliament, except for actual misconduct in office’”).

¹⁸⁵ *The Queen v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶ 79; [2011] 3 S.C.R. 45, 90 per McLachlin, C.J. (“When should the court hold that a government decision is protected from negligence liability? When the court concludes that the matter is one for the government and not the courts”).

[193] These distinctions make sense.

[194] The judges have the final word as to which side of the line a controversy falls.¹⁸⁶

[195] In short, if a plaintiff commences an action that presents questions not legal in nature, a court must decline to entertain them.¹⁸⁷

2. The Benchmarks of a Cause of Action in Negligence

[196] A court determining whether a claim meets the test set out in section 5(1)(a) of the *Class Proceedings Act*¹⁸⁸ – does the pleading disclose a cause of action – reviews the statement of claim

¹⁸⁶ *Auditor General of Canada v. Minister of Energy, Mines and Resources*, [1989] 2 S.C.R. 49, 90-91 per Dickson, C.J. (“An inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue or, instead, deferring to other decision-making institutions of the polity. ... There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme”).

¹⁸⁷ *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, 546 per Sopinka, J. (“I am of the view that both of the [reference] questions ... have a significant legal component. The first question requires the interpretation of a statute of Canada and an agreement. The second raises the question of the applicability of the legal doctrine of legitimate expectations to the process involved in the enactment of a money bill. ... A decision on these questions will have the practical effect of settling the legal issues in contention and will assist in resolving the controversy. Indeed, there is no other forum in which these legal questions could be determined in an authoritative manner. In my opinion, the questions raise matters that are justiciable and should be answered”).

¹⁸⁸ S.A. 2003, c. C-16.5.

to determine if it alleges facts which, if true,¹⁸⁹ disclose “all the elements of a cause of action”.¹⁹⁰ In answering this question, the court does not assess the merits of the claim.¹⁹¹

¹⁸⁹ *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19, ¶ 14; [2020] 2 S.C.R. 420, 439 per Brown, J. (“The test [for determining whether a statement of claim discloses a reasonable cause of action] ... is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs’ pleaded claims disclose no reasonable cause of action”); *The Queen v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶ 22; [2011] 3 S.C.R. 45, 68 per McLachlin, C.J. (“A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven”); *Operation Dismantle Inc. v. The Queen*. [1985] 1 S.C.R. 441, 447 per Dickson, J. (“In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government [permitting the United States of America to test its cruise missiles in Canadian Territory] could cause an infringement of their rights under s. 7 of the *Charter*. I have concluded that the causal link between the actions of the Canadian Government, and the alleged violation of appellants’ rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action”); *Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 740 per Estey, J. (“all the facts pleaded in the statement of claim must be deemed to have been proven. ... [A] court should ... strike out any claim ... only in plain and obvious cases and where the court is satisfied that ‘the case is beyond doubt’”); *Klassen v. Canadian National Railway*, 2023 ABCA 150, ¶ 25; 482 D.L.R. 4th 302, 317, leave to appeal ref’d, [2023] S.C.C.A. No. 301 (“In determining whether the pleadings disclose a cause of action, the court assumes that the facts pleaded are true”); *Marsh v. Chief Constable of Lancashire Constabulary*, [2003] EWCA Civ 284, ¶ 2 per Potter, L.J. (“the court is obliged to treat the facts averred in the claim as true, notwithstanding that the difficulties of proof may be obvious”); *Attorney-General v. Prince*, [1998] 1 N.Z.L.R. 262, 267 (C.A. 1997) per Richardson, P. (“A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true:”); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984) per Burger, C.J. (“At this stage of the litigation, we must accept petitioner’s allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) per Burger, C.J. (“It is well established that, in passing on a motion to dismiss ... for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader”); A. Zuckerman, S. Wilkins, J. Adamopoulos, A. Higgins, S. Hooper & A. Vial, *Zuckerman on Australian Civil Procedure* 296 (2018) (“There are ... two areas where the court will normally entertain strike-out applications. The first is where the pleadings do not disclose a reasonable cause of action or defence. If, for example, a plaintiff claims that the defendant was negligent, but neglects to plead any facts or circumstances establishing that the defendant owed the plaintiff a duty of care, the pleading is liable to the struck-out for failing to disclose a cause of action”) & A. Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* 426 (4th ed. 2021 J. Wells gen. ed.) (“for the purpose of striking out a statement of case, the court is obliged to treat the facts averred as true, even if it thinks that they may be very difficult to prove”).

¹⁹⁰ *Anglin v. Resler*, 2024 ABCA 113, ¶ 210 per Wakeling, J.A. See *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, ¶ 54; [2001] 2 S.C.R. 460, 489 per Binnie, J. (“A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of court”) & *Letang v. Cooper*, [1964] 2 All E.R. 929, 934 (C.A.) per Lord Diplock (“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person”).

¹⁹¹ *Bruno v. Samson Cree Nation*, 2021 ABCA 381, ¶ 66; [2022] 5 W.W.R. 425, 471 (“A certification procedure is not meant to assess the merits of an action”).

[197] This is a “very low bar”.¹⁹² But this low standard is not an invitation to courts to ignore it. After all, there is a bar. “There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test”.¹⁹³ It makes no sense for the gatekeeper to allow a plaintiff to proceed with an action that cannot possibly succeed.¹⁹⁴ Hopeless cases waste the resources of the litigants and the courts and impede timely access of others to the courts.

[198] To present a viable cause of action in negligence against a nonstate actor, a claim must set out a factual basis for finding that the defendant owed the plaintiff a duty of care, what the benchmarks of the duty of care are, that the defendant breached the standard of care, that the plaintiff sustained damage, and that the defendant’s breach caused the damage in fact and in law.¹⁹⁵

¹⁹² *Bruno v. Samson Cree Nation*, 2021 ABCA 381, ¶ 65; [2022] 5 W.W.R. 425, 470 (“A court should not conclude that the pleadings fail to disclose a cause of action unless it is ‘plain and obvious’ that the pleadings do not. The plain and obvious standard recognizes that the law may in the future create new causes of action and that a court must be aware that the set of causes of action is not fixed when it assesses the merits of a proposed new cause of action. The ‘plain and obvious’ criterion is met if there is a very high degree of certainty that the pleadings do not disclose a cause of action”).

¹⁹³ *Setoguchi v. Uber BV*, 2023 ABCA 45, ¶¶ 33, 34, 44 & 46; 477 D.L.R. 4th 434, 446-47, 450 & 451, leave to appeal ref’d, [2023] S.C.C.A. No. 190 (“The certification judge appeared to think he was required to find that a cause of action in negligence was properly pleaded simply by virtue of the pleadings having included vague references to damages. ... A fundamental purpose of pleadings is to outline the case a defendant must meet. When a cause of action includes damage as one of its requirements, a plaintiff is required to plead facts sufficient to amount at law to damage. Pleadings alleging negligence, for instance, ‘must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted’ This means that a negligence claim can be struck where the plaintiff fails to plead an injury that is recognized as being compensable at law: It is no more sufficient for a plaintiff to plead ‘damages’ or ‘injury’ than it is to plead the existence of a ‘duty of care’; both are bare legal conclusions that require sufficient facts to sustain them. In this regard, the Amended Statement of Claim is deficient; it fails to particularize the harm or damages suffered as a result of the hack, how such loss or damage was caused by Uber, and the remedies sought for each cause of action. This is essential information for the determination of whether particular causes of action can survive scrutiny under s 5(1)(a). Although the s 5(1)(a) test is a low bar, it should not be treated as a perfunctory exercise. ‘Courts have no justification to ignore the plain text of an enactment and make this criterion completely disappear’: There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test, by carefully scrutinizing whether the facts as pleaded establish the requisite elements of each cause of action. When a novel claim is presented, that may involve an assessment of whether each element of the cause of action as pleaded is (or should be) recognized in law. ... Aside from creating or perpetuating legal uncertainty, failing to determine a question of law at the pleadings stage, when appropriate to do so, is antithetical to the call in *Hryniak* ... for affordable, timely and just resolution of disputes. In the boundless landscape of scarce judicial resources, there is nothing to be gained by certifying suspect novel claims, the validity of which will only be determined at a merits trial that may never occur”) (emphasis omitted).

¹⁹⁴ *Atlantic Lottery Corp. v. Babstock*, 2020 SCC 19, ¶ 18; [2020] 2 S.C.R. 420, 441 per Brown, J. (“Where possible, ... courts should resolve legal disputes promptly This includes resolving questions of law by striking claims that have no reasonable chance of success”).

¹⁹⁵ P. Osborne, *The Law of Torts* 25-26 (6th ed. 2020) (“The tort of negligence is composed of ... three core elements: the *negligent act*, *causation*, and *damage*. ... The negligent act is determined by identifying the appropriate standard

[199] If the negligence claim is against a state actor, there is another essential element.¹⁹⁶ The claim must not challenge government acts “that are based on public policy considerations, such as

of care and applying it to the facts of the case. Causation is established by showing a link between the defendant’s negligent act and the plaintiff’s damage. Damage is the vital element that triggers the claim and launches the litigation process. In Canadian negligence law, however, a defendant is not responsible for every consequence of his negligent act. Important and contentious issues in respect of the extent of liability, the range of plaintiffs, the nature of the loss, and the nature of the defendant’s activities must be addressed. ... There are two critically important control devices in negligence law: duty of care and remoteness of damage. Negligence liability cannot be established unless the judge recognizes that the defendant owes the plaintiff a duty of care in respect of the plaintiff’s interests. This concept allows judges to regulate the application and extent of negligence liability, excluding it from certain activities, denying its applicability to certain kinds of losses, and excluding certain persons from the scope of the defendant’s responsibility. Remoteness of damage plays a similar role. A negligent act may have utterly improbable consequences that are entirely removed in time and place from the defendant’s act. Causation cannot be denied, but fairness may dictate that the defendant should be sheltered from responsibility for some or all of the consequences of his negligent conduct. In such circumstances, the court may hold that the consequences are too remote and not compensable by the defendant”) (emphasis in original); A. Linden, B. Feldthusen, M. Hall, E. Knutsen & H. Young, *Canadian Tort Law* § 4.01 (12th ed. 2022) (“To establish a cause of action for negligence in Canada, the plaintiff must prove several elements: ... that the defendant owed a duty of care to the claimant to avoid the kind of loss alleged; ... that the defendant breached the applicable standard of care; ... that the claimant sustained damage; and ... that such damage was caused, in fact and in law, by the defendant’s breach. Another, perhaps more helpful way of approaching the negligence analysis is a five element framework advocated by American scholars: (1) duty; (2) failure to conform to the standard required; (3) that that failure to conform to the standard is a cause-in-fact of the harm; (4) a reasonably close causal connection between the conduct and the resulting injury, sometimes termed ‘proximate cause’; and (5) actual loss or damage resulting to the interest of another”); L. Klar, *Remedies in Tort* §16:6 (rel. 2024-06) (“Plaintiffs have a long and difficult path to travel if they are to succeed in a negligence claim. There are six phases to be handled and resolved – compensable loss; standard of care; duty of care; remoteness of damages; causation; and possible defences. Although they are separate in their concerns and focus, they are deeply connected by an often-confusing reliance on the same reasonableness thread. While the general strengths and weaknesses of reasonableness as a go-to measure are well-known (i.e., it ... enables changing and responsive interpretation, but is thereby open and vague in its application), the challenge in negligence law is to ensure that its situational nuances and distinctions are respected in determining the stretch and variation of negligence liability. This is no simple or easy task. Tort law’s starting assumption is the old Holmesian doctrinal notion that ‘all losses lie where they fall.’ It is for the plaintiffs to make the case that any losses that they have suffered are both the kind of losses that are recoverable and that they should be transferred, in whole or part, to the chosen defendants. ... It is the burden of plaintiffs to show that all the criteria for recovery are met. If they are not, the plaintiffs’ claims will fail: *Plaintiffs must have a compensable loss. ... Defendants must be acting below an appropriate standard of care. ... Defendants must owe a duty to take care to the plaintiffs. ... Plaintiffs must show a sufficient causal connection between the defendants’ acts and their own harm. ... The damage suffered by plaintiffs must not be too remote. ... Finally, ... [the plaintiffs] will still have to resist any defences that the defendants might have to offer*”) (emphasis in original) & *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, ¶ 18; [2020] 3 S.C.R. 504, 522 per Brown & Martin, JJ. (“To recover for negligently caused loss, irrespective of the type of loss alleged, a plaintiff must prove all the elements of the tort of negligence: (1) that the defendant owed the plaintiff a duty of care; (2) that the defendant’s conduct breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant’s breach”).

¹⁹⁶ *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445, 450 per McLachlin, J. (“There is no private law duty on the public authority until it makes a policy decision to do something. Then, and only then, does a duty arise at the operational level to use due care in carrying out the policy. On this view, a policy decision is not an exception to a general duty, but a precondition to the finding of a duty at the operational level”).

economic, social and political factors”.¹⁹⁷ “Policy decisions of government must be immune from the application of private law standards of tort liability”.¹⁹⁸ In such cases, a state actor has no duty of care.¹⁹⁹

[200] How does one distinguish a “policy” decision from an “operational” decision? “As a general rule, decisions concerning budgetary allotments for departments or government agencies will be classified as policy decisions”.²⁰⁰

¹⁹⁷ *The Queen v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, ¶¶ 90, 91, 92 & 95; [2011] 3 S.C.R. 45, 95 & 96-97 per McLachlin, C.J. (“I conclude that ‘core policy’ government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. ... [M]ost government decisions that represent a course or principle of action based on a balancing of economic, social and political considerations will be readily identifiable. ... [W]here it is ‘plain and obvious’ that an impugned government decision is a policy decision, the claim may properly be struck on the ground that it cannot ground an action in tort. ... [T]he question is whether the alleged representations of Canada ... are matters of policy, in the sense that they constitute a course or principle of action of the government. If so, the representations cannot ground an action in tort. In short, the representations on which the third-party claims rely were part and parcel of a government policy to encourage people who continued to smoke to switch to low-tar cigarettes. This was a ‘true’ or ‘core’ policy, in the sense of a course or principle of action that the government adopted. ... In my view, it is plain and obvious that the alleged representations were matters of government policy, with the result that the tobacco companies’ claims against Canada for negligent misrepresentation must be struck out”); *Brown v. British Columbia*, [1994] 1 S.C.R. 420, 441-42 per Cory, J. (The Court upheld the dismissal of a negligence action by the British Columbia Courts on the ground that Department of Transportation’s staffing protocol is not subject to assessment under negligence principles because it was a government policy decision: “In my view, the decision of the Department to maintain a summer schedule, with all that it entailed, was a policy decision. Whether the winter or summer schedule was to be followed involved a consideration of matters of finance and personnel. ... This was a policy decision involving classic policy considerations of financial resources, personnel and, as well, significant negotiations with government issues. It was truly a government decision involving social, political and economical factors”); *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 1240 per Cory, J. (“The need for distinguishing between a government policy decision and its operational implementation is thus clear. True policy decisions should be exempt from tortious claims so that governments are not restricted in making decisions based upon social, political or economic factors”) & *Sutherland Shire Council v. Heyman*, [1985] HCA 41; 157 C.L.R. 424, 469 per Mason, J. (“a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocation and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care”).

¹⁹⁸ *Swinamer v. Nova Scotia*, [1994] 1 S.C.R. 445, 465-66 per Cory J.

¹⁹⁹ *Just v. British Columbia*, [1989] 2 S.C.R. 1228, 1244-45 per Cory, J. (“In the case of a government agency, exemption from this imposition of duty [of care] may occur as a result of an explicit statutory exemption. Alternatively, the exemption may arise as a result of the nature of the decision made by the government agency. That is, a government agency will be exempt from the imposition of a duty of care in situations which arise from its pure policy decisions”).

²⁰⁰ *Id.* 1245 per Cory, J. See also *Sutherland Shire Council v. Heyman*, [1985] HCA 41; 157 C.L.R. 424, 469 per Mason, J. (“The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognize that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care”).

3. The Benchmarks of a Cause of Action for *Charter* Damages

[201] The benchmarks of a cause of action for *Charter* damages are not contentious.

[202] Chief Justice McLachlin recorded them in *City of Vancouver v. Ward*.²⁰¹

[203] The Supreme Court upheld a small damages award against the City of Vancouver and British Columbia for a strip search of the plaintiff provincial correction officers conducted at Vancouver's police lock-up and his unlawful detention.

[204] There are five features of a *Charter*-damages action.

[205] First, the defendant must be a state actor.²⁰²

[206] Second, someone must have committed acts that directly led to the breach of the plaintiff's *Charter* rights.²⁰³

[207] Third, the defendant state actor must be responsible for the acts of the person who breached the plaintiff's *Charter* rights.

[208] Fourth, a damages award against the state actor defendant would be "appropriate and just" in the circumstances.²⁰⁴

[209] Fifth, a damage award is appropriate and just if the plaintiff has suffered a personal loss that should be remedied, a damages award will vindicate the *Charter* right, and it may serve to deter the state actor from committing future *Charter* breaches.²⁰⁵

²⁰¹ 2010 SCC 27; [2010] 2 S.C.R. 28.

²⁰² Id. at ¶ 22; [2010] 2 S.C.R. at 40 per McLachlin, C.J. ("An action for public law damages – including constitutional damages – lies against the *state* and not against individual actors") (emphasis added) & *Henry v. British Columbia*, 2015 SCC 24, ¶ 34, [2015] 2 S.C.R. 214, 235-36 per Moldaver, J. ("In *Ward*, this court recognized that the language of s. 24(1) is broad enough to encompass damage claims for *Charter* breaches. Such claims are brought by an individual as a public law action directed against the *state* for violations of the claimant's constitutional rights") (emphasis added).

²⁰³ *City of Vancouver v. Ward*, 2010 SCC 27, ¶ 23; [2010] 2 S.C.R. 28, 40 per McLachlin, C.J. ("The first step ... is to establish a *Charter* breach. This is the wrong on which the claim for damages is based").

²⁰⁴ Id. at ¶ 19; [2010] 2 S.C.R. at 39 ("The phrase 'appropriate and just' limits what remedies are available").

²⁰⁵ Id. at ¶ 31; [2010] 2 S.C.R. at 43-44 ("In summary, damages under s. 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for 'appropriate and

4. The Plaintiff's Third Amended Statement of Claim Does Not Disclose a Cause of Action in Negligence

[210] The plaintiff's claim has three main components.²⁰⁶

[211] First, he alleges that Alberta owed persons who were arrested and detained a duty of care.²⁰⁷

[212] Second, this duty of care required Alberta to adopt a bail protocol that would ensure all arrestees who were detained were brought before a justice of the peace within twenty-four hours, the period set out in section 503(1) of the *Criminal Code*. This bail protocol, according to the plaintiff, must regulate the conduct of municipal police forces whose members made the arrest and operated the lockup where the arrestees were kept, the prosecutors who appeared on behalf of the Crown at bail hearings, and support staff who were responsible for the administration of the bail protocol. In addition, Alberta must adequately fund the bail protocol to ensure that all arrestees are brought before a justice of the peace in a timely manner.²⁰⁸

[213] Third, the plaintiff was not brought before the justice of the peace within twenty-four hours. This is a breach of his and other similarly situated class members' rights under the *Charter* and caused damages²⁰⁹ for which the plaintiff says Alberta is responsible.

[214] The plaintiff's third amended statement of claim does not disclose a cause of action in negligence.

[215] Two main reasons support this determination.

[216] First, the plaintiff's complaint, at its core, is not justiciable. He principally argues that Alberta has not devoted the *resources* necessary to ensure that an arrestee is taken before a justice of the peace within twenty-four hours of his or her arrest.

[217] Second, Alberta, as a state actor, does not owe a duty of care when deciding what resources to allocate to its bail office, including the size of the complement of Crown prosecutors assigned to the Crown bail office.

just' damages under s. 24(1) of the *Charter*”) & *Henry v. British Columbia*, 2015 SCC 24, ¶ 37; [2015] 2 S.C.R. 214, 236 per Moldaver, J. (“the claimant bears the initial burden of making out a *prima facie* case. The claimant must demonstrate that the state has breached one of his or her *Charter* rights and that an award of damages would serve a compensation, vindication, or deterrence function”).

²⁰⁶ Third Amended Statement of Claim of Ryan Reilly and MS filed June 25, 2020. Appeal Record 17.

²⁰⁷ Id. ¶ 81. Appeal Record 31.

²⁰⁸ Id. ¶ 82. Appeal Record 32.

²⁰⁹ Id. ¶ 84. Appeal Record 33.

[218] Alberta is entitled to assign the number of Crown prosecutors it thinks fit to the Crown bail office.

[219] No arrestee who has not been released has a right to a Crown bail office with a prescribed complement of Crown prosecutors.

[220] An arrestee has a right to be taken before a justice of the peace within twenty-four hours and nothing more.

[221] Courts are not in a position to determine the appropriate number of Crown prosecutors that should be assigned to the Crown bail office.

[222] The Constitution of Canada and common law principles do not authorize the judicial branch of government to order the executive and legislative branches of government to allocate public resources in the amounts that the judicial branch thinks appropriate.

[223] This is a fundamental principle.

[224] Not surprisingly, the judicial branch of government has not established standards against which the legitimacy of the executive and legislative branches of government's decisions regarding the appropriate number of Crown prosecutors may be adjudged.

[225] The electorate is the only segment of the polity that has the mandate to pass judgment on the validity of Crown prosecutor staffing decisions made by the executive and legislative branches of government.

[226] If the executive and legislative branches do not devote the resources needed to ensure that there are sufficient Crown prosecutors to take all arrestees before a justice of the peace in a timely manner and, as a result, the charges against some accused are stayed, the government may have a political price to pay.

[227] This consideration is no doubt at play when the criminal justice system does not have a sufficient number of courtrooms, judges, court staff and Crown prosecutors to bring to trial a person charged with a criminal offence "within reasonable time", a right enshrined in section 11(b) of the *Charter*, and stays are entered.²¹⁰ Insofar as the plaintiff impugns the design of the bail

²¹⁰ *The Queen v. Jordan*, 2016 SCC 27, ¶ 6; [2016] 1 S.C.R. 631, 645 per Moldaver, Karakatsanis & Brown, JJ. ("Applying this new framework, including its transitional features, we conclude that the appellant was not brought to trial within a reasonable time. We would allow the appeal, set aside his convictions and direct a stay of proceedings").

system – for which, he says, a proper design would have eliminated all or virtually all bail delays²¹¹ – the same points apply. The “design” of the system is a matter of policy beyond court scrutiny.

[228] Finally, and notwithstanding his claim that the primary source of delays is the design of the bail system, the plaintiff’s general argument that Alberta is responsible for participants in the bail system²¹² and for any tort or *Charter* breaches resulting from their conduct is either foreclosed by the October 15, 2019 order or suffers from deficiencies that the plaintiff did not surmount. The plaintiff points to several entities he says played a part in the delays – the Ministry of Justice,²¹³

²¹¹ Factum of the Respondent, M.S., ¶ 95 (“The plaintiff’s allegation is that the system that Alberta designed did not function properly and that with a proper design all, or virtually all, of the Class members would not have been overheld”).

²¹² Id. ¶ 82 (“Section 5(1) of the *Proceedings Against the Crown Act* establishes that Alberta is liable for torts committed by any of its officers or agents – which includes the Minister, Crown prosecutors, court administrators, and the police. Accordingly, it is a legally tenable claim to require Alberta to answer for the actionable negligence of the Minister and its agents in discharging their responsibility for the province’s implementation of the Crown Bail system”).

²¹³ Id. ¶¶ 33, 58 & 60 (“Responsibility for Alberta’s bail regime lies with the Ministry of Justice and Solicitor General. The plaintiff’s negligence claim focuses on the acts and omissions of the Ministry, and those for whom it is legally responsible, in *implementing and operating* the constitutionally required Crown Bail system. ... The claim alleges ... that the Ministry and its agents were negligent in carrying out its design, implementation and operations”) (emphasis in original). See K. Horsman & G. Morley, *Government Liability: Law and Practice* § 2:7 (release 2024-01) (“Ministries and Departments are obviously distinct organizations within government, but they have no independent legal personality and therefore cannot be sued. ... Ministers and other high-ranking officials are not vicariously liable for the work of those under them because those under them are servants of the Crown, and not the Minister”); Moses, “Oversight of Police Intelligence: A Complex Web, but Is It Enough?”, 60 *Osgoode Hall L.J.* 289, 325-26 & 327 (2023) (“Oversight of police by political actors such as responsible ministers, parliamentary committees, and (in Canada) municipal police boards is a complex domain. Important limits on political control of police, stemming from the rule of law, the English case of *R v Commissioner of Police of the Metropolis, Ex parte Blackburn*, and statutory provisions, exist in all jurisdictions studied. There seems, however, to be agreement that relevant political actors can, at a minimum, require legal accountability from police. ... Responsible ministers are answerable to parliament for the legality of matters within their jurisdiction. In the case of ministers responsible for policing, the primary obstacles to exercising a legal oversight function are likely to be lack of political benefit, lack of sufficient expertise, and lack of resources and power to run inquiries or investigations. ... [I]f government and its ministers are concerned about police illegality or misconduct and are motivated to act, they are more likely to launch a formal inquiry, task force, royal commission, or similar ad hoc oversight mechanism with the necessary powers and expertise (and political distance). The ordinary work of ministers, parliamentary committees, and police service boards are rarely significant players in *legal oversight*”) (emphasis in original).

the Crown in right of Alberta,²¹⁴ police forces²¹⁵ – but failed to lay out a coherent basis for the liability of the defendant that could make out a plausible cause of action.²¹⁶

²¹⁴ Factum of the Respondent, M.S., ¶¶ 16-17, 73 & 95 (“Accused persons must be released from pre-trial detention at the earliest opportunity. This is codified in s. 503(1)(a) of the *Criminal Code* ... This ... is an *obligation* incumbent upon the provincial Crown. ... From October 25, 2016 until June 2020, His Majesty, the King in Right of Alberta ... has systemically breached this obligation through its flawed implementation and operation of a regime known as ‘Crown Bail’. This claim ... specifically alleges that, in executing the transition to and the implementation and operation of Crown Bail, Alberta breached its duty of care to the class causing system-wide violations of s. 503(1) of the *Code* and related *Charter* breaches. Responsibility for the bail system begins and ends with Alberta. Its police forces, Crown prosecutors, and other justice system participants act within the system Alberta runs”) (emphasis in original). See L. Klar, Remedies in Tort § 32:3 (release 2024-056 (“At common law, the Crown was neither personally nor vicariously liable in tort in any way whatsoever. ... Accordingly, Crown liability in tort is, where it exists, entirely statutory and depends on the language and interpretation of the statute imposing it. ... The ‘core policy’ government decisions protected from suit are decisions as to a course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith. However, the implementation of those decisions may well be subject to claims in tort. When the decision is an operational one which seeks to implement or carry out settled policy, the Crown will be liable for damages arising from its negligent conduct”); K. Horsman & G. Morley, Government Liability: Law and Practice § 12:36 (release 2024-01) (“One of the most fertile grounds for defence counsel seeking to argue that there is no cause of action has been with respect to whether there is a private law duty of care owed by the Crown in the context of proposed class actions in negligence. ... There are cautionary examples of cases where the court was unwilling to strike out the claim on a certification motion on the basis that there is no duty of care. These successes were illusory however as when the matters proceeded to trial, after years of litigation effort, they were dismissed, at least in part due to the final determination by the trial court that there was no duty of care owed to the class”) & *Proceedings Against the Crown Act*, R.S.A. 2000, c. P-25, s. 5(1) (“Except as otherwise provided in this Act ... the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject, (a) in respect of a tort committed by any of its officers or agents, (b) in respect of any breach of those duties that a person owes to that person’s servants or agents by reason of being their employer, ...”) & s. 3(d) (“Except as otherwise provided in this Act, nothing in this Act ... subjects the Crown to proceedings under this Act in respect of any thing done in the due enforcement of the criminal law or the penal provisions of any Act of the Legislature”).

²¹⁵ Factum of the Respondent M.S., ¶¶ 40 & 80 (“an ADM with Alberta, confirmed that Alberta is responsible for, and provides oversight of, its police forces. Alberta’s legislative scheme, particularly under the *Police Act* and the *Government Organization Act*, establishes the Minister’s responsibility for ensuring that adequate and effective policing is maintained throughout Alberta, and its responsibility for the bail system”). See Moses, “Oversight of Police Intelligence: A Complex Web, but Is It Enough?”, 60 Osgoode Hall L.J. 289, 325 (2023) (“Oversight of police by political actors such as responsible ministers, parliamentary committees, and (in Canada) municipal police boards is a complex domain. Important limits on political control of police, stemming from the rule of law, the English case of *R v Commissioner of Police of the Metropolis, Ex parte Blackburn*, and statutory provisions, exist in all jurisdictions studied”) & Roach, “The Overview: Four Models of Police-Government Relations” in M. Beare & T. Murray, eds, *Police and Government Relations: Who’s Calling the Shots?* at 18 & 75 (2007) (“The idea that the police are directed by the government of the day ... raises concerns about improper partisanship influencing or appearing to influence the machinery of justice. [T]here is a growing consensus that the police should be protected from political direction in the process of criminal investigation. The only legal sources that run counter to this principle are the statements in various Canadian police acts that the police are subject to the direction of the minister, as well as some statutory requirements that the attorney general consent to the commencement of proceedings and some police investigative

5. The Plaintiff's Claim for *Charter* Damages Is Deficient

[229] The plaintiff meets only some of the benchmarks for a *Charter*-damages claim.

[230] First, a plaintiff claiming a *Charter* breach and seeking damages for the *Charter* breach in a civil action must sue a state actor. The defendant must be a state actor. The plaintiff has done this. Alberta is a state actor.

[231] Second, the claim must allege that someone's conduct resulted in the breach of the plaintiff's *Charter* rights. This will usually be a police officer or a Crown prosecutor.

[232] Section 503(1) of the *Criminal Code*²¹⁷ imposes an obligation on the peace officer who makes an arrest and has not released the arrestee to "cause the person to be taken before a justice to be dealt with according to law: (a) if a justice is available within a period of 24 hours after the person has been arrested by the peace officer, the person shall be taken before a justice without unreasonable delay and in any event within that period". Neither this provision, nor any other section in the *Criminal Code*, imposes a duty of any kind on a Crown prosecutor or anyone else. Section 503(1) accords to an arrestee the right to be taken before a justice of the peace within a stipulated time after the arrestee's arrest and imposes an obligation on the arresting officer to ensure the arrestee's right is respected.

[233] Third, the claim must allege that the defendant state actor is responsible for the conduct of the person whose conduct breached the plaintiff's *Charter* rights.

[234] Alberta is not responsible for the conduct of the arresting officer or the police service to which the arresting officer belongs. The same can also be said about duty counsel and justices of the peace.

[235] It is immaterial that Alberta is responsible for the conduct of Crown prosecutors. This alone does not necessarily provide a basis for a civil claim in this case.²¹⁸ Section 503(1) of the *Criminal*

techniques. ...[T]he time has come to amend those acts to codify the *Campbell* principle [regarding police independence from the executive in criminal investigations] and to recognize police independence to that extent").

²¹⁶ K. Horsman & G. Morley, *Government Liability: Law and Practice* § 12:36 (release 2024-01) ("Compounding the thorny issues involved in whether a claim is grounded in policy decision making or not is the additional question of whether the claim in systemic negligence is an improper direct claim against the Crown's conduct when there is a failure to identify the particular tortfeasor(s) for whom the Crown is vicariously liable. Direct claims against the Crown, which would include claims advancing broad allegations that the 'system' failed the plaintiffs are not tenable under certain of the Crown Proceedings legislation").

²¹⁷ R.S.C. 1985, c. C-46.

²¹⁸ *Factum of the Appellant*, n. 118 ("While actions of a Crown prosecutor may cause and contribute to delay and may even be negligent, these actions cannot ground a civil claim given the malice requirement needed to establish a civil claim").

Code does not place the obligation to take steps to ensure that an arrestee's right to a hearing under that section is respected on Crown prosecutors. Crown prosecutors, most of the time, learn about a detained arrestee when a law enforcement agency forwards a bail package to the Crown bail office.

[236] The right of an arrestee to be taken before a justice of the peace within a stipulated period does not, in most cases, depend on why the arrestee was not taken before a justice of the peace in a timely manner.

[237] The fact that section 2(2) of the *Police Act* states that “all police services and peace officers shall act under the direction of the Minister of Justice in respects of matters concerning the administration of justice” does not assist the plaintiff. The Minister of Justice cannot tell a peace officer how to do his or her job.²¹⁹

²¹⁹ *Gladue v. Alberta*, 2011 ABQB 183, ¶ 26; 516 A.R. 17, 23 per Veit, J. (“The *Police Act* ... merely states that the Government of Alberta is responsible for ensuring that adequate and effective policing is maintained throughout Alberta: s. 3. That is not equivalent to saying that a municipal police force such as Edmonton Police Service and the Crown in right of Alberta are indivisible for the purpose of responsibility for seized property. The nature of the responsibility of the Crown for municipal police forces is illustrated by s. 27 of the *Police Act*. ... In other words, the government's responsibility with respect to policing is to see that adequate policing is provided to the citizens of Alberta. That political responsibility for ensuring servicing does not translate into a responsibility for the actions of individual police services with respect to the treatment of seized property”); Moses, “Oversight of Police Intelligence: A Complex Web, but Is It Enough?”, 60 Osgoode Hall L.J. 289, 325-26 & 327 (2023) (“Oversight of police by political actors such as responsible ministers, parliamentary committees, and (in Canada) municipal police boards is a complex domain. Important limits on political control of police, stemming from the rule of law, the English case of *R v Commissioner of Police of the Metropolis, Ex parte Blackburn*, and statutory provisions, exist in all jurisdictions studied. There seems, however, to be agreement that relevant political actors can, at a minimum, require legal accountability from police. ... Responsible ministers are answerable to parliament for the legality of matters within their jurisdiction. ... In the case of ministers responsible for policing, the primary obstacles to exercising a legal oversight function are likely to be lack of political benefit, lack of sufficient expertise, and lack of resources and power to run inquiries or investigations. ... [I]f government and its ministers are concerned about police illegality or misconduct and are motivated to act, they are more likely to launch a formal inquiry, task force, royal commission, or similar ad hoc oversight mechanism with the necessary powers and expertise (and political distance). The ordinary work of ministers, parliamentary committees, and police service boards are rarely significant players in *legal* oversight”) (emphasis in original); Roach, “The Overview: Four Models of Police-Government Relations” in M. Beare & T. Murray, eds, *Police and Government Relations: Who's Calling the Shots?* at 18 & 75 (2007) (“The idea that the police are directed by the government of the day ... raises concerns about improper partisanship influencing or appearing to influence the machinery of justice. [T]here is a growing consensus that the police should be protected from political direction in the process of criminal investigation. The only legal sources that run counter to this principle are the statements in various Canadian police acts that the police are subject to the direction of the minister, as well as some statutory requirements that the attorney general consent to the commencement of proceedings and some police investigative techniques. ... [T]he time has come to amend those acts to codify the *Campbell* principle [regarding police independence from the executive in criminal investigations] and to recognize police independence to that extent”) & Kent, “Report on the Investigation of a Phone Call, March 10, 2021 From the Honourable Kaycee Madu, Q.C., to Chief Dale McFee, Chief, Edmonton Police Service” 3-4 (2022) (“the police are independent insofar as it

[238] The plaintiff's claim meets the other requirements for a *Charter*-breach damage claim. It alleges that the plaintiff has suffered personal loss that should be remedied, and that a damage award will vindicate his *Charter* right, and may serve to deter future *Charter* breaches.

[239] To summarize, the plaintiff's third amended statement of claim does not disclose a *Charter*-damages cause of action.

D. The Common Issues Would Not Meaningfully Advance the Claims

[240] Having decided that the plaintiff's third amended statement of claim does not disclose a cause of action, I need not address any of the other certification issues. But I will address some of them because the parties have given them careful consideration.

[241] The plaintiff's proposed common issues are as follows:²²⁰

1. Did Alberta's operation, management, administration, supervision, resourcing and/or control of the judicial interim release process (bail):
 - (a) cause or materially contribute to systemic delays in Class Members being brought before a justice within 24 hours of arrest (the "systemic delays")?
 - (b) If the answer to 1(a) is yes, what actions of Alberta caused or materially contributed to the systemic delays, and did such actions result in Class Members not being brought before a justice for a bail hearing within 24 hours of arrest?
2. To the extent that Class Members were held for more than 24 hours after arrest without being brought before a justice, when a justice was otherwise available, did Alberta, or any persons or entities identified in common issue #3 as an agent of Alberta when acting in such capacity, contravene s. 503(1) of the *Criminal Code* ... ?
3. Are the municipal police services in Alberta and Crown prosecutors agents of Alberta, for the purposes of s. 5(1) of the *Proceedings Against the Crown Act*, S.A. 2000, c. P-25, in respect of the operation, management, administration, supervision, resourcing, and/or control of the bail hearing regime in Alberta?

concerns decisions about policing. There is a fine balance between police and government that needs to be maintained to ensure that police decisions are made absent political considerations").

²²⁰ Certification Order filed April 19, 2023, Schedule "A".

4. Did Alberta owe a duty of care to the Class to provide them with bail hearings without unreasonable delay, and in any event, after no longer than 24 hours from arrest, if a justice was available, or as soon as possible thereafter?
5. If the answer to question #4 is yes, did Alberta, or any persons or entities identified in common issue #3 as an agent of Alberta, when acting in such capacity, breach this duty of care by holding the Class Members for more than 24 hours after arrest without a bail hearing?
6. Did Alberta, or any persons or entities identified in common issue #3 as an agent of Alberta when ... acting in such capacity, through the operation, management, administration, supervision, resourcing, and/or control of the bail hearing regime in Alberta, infringe upon the Class Members' rights under ss. 7, 9, 11(d), 11(e), or 12 of the *Canadian Charter of Rights and Freedoms* ... ? If so, how?
7. If the answer to question #6 is yes, were any or all of the infringements demonstrably justified in a free and democratic society in accordance with s. 1 of the *Charter*?

[242] The remaining common issues go to calculating damages.²²¹

[243] Broadly, Alberta takes the view that it is not possible to determine its liability on a class-wide basis for either cause of action. Alberta argues that it is not responsible for the conduct of all bail participants.²²² It adds that differentiating between systemic issues for which Alberta can be held liable and operational or management issues excluded from the claim requires examining each instance of delay to determine its cause, pointing to statistics showing that sometimes the system works and there are no bail delays and at other times different agencies have varying numbers of cases delayed beyond twenty-four hours.²²³

[244] The plaintiff counters that the systemic failures in the bail system that Alberta designed and that did not function properly are Alberta's responsibility as a result of Alberta's obligations to administer justice and comply with the *Criminal Code*, and the Minister of Justice's obligation to implement a bail system and supervise the police.²²⁴ It adds that Alberta did not deny the *Charter*

²²¹ Id. ¶¶ 8-11.

²²² Factum of the Appellant, ¶¶ 60 & 68.

²²³ Id. ¶¶ 60, 61 & 65.

²²⁴ Factum of the Respondent, M.S., ¶¶ 93-95 ("the plaintiff has established an evidentiary basis for the common issues related to systemic negligence based on Alberta's constitutional and statutory obligations to administer justice, and to

breach is properly pleaded and there is no section 1 defence in this case as there is no law that can justify reasonable limits, so that the applicability of section 1 can be resolved on a class-wide basis.²²⁵

[245] The certification judge rejected Alberta’s view that individual determinations make the negligence²²⁶ or *Charter*²²⁷ claims unsuitable for determination on a common basis for several reasons. He was satisfied that the October 15, 2019 order narrowed the claim to “systemic” issues for which Alberta is responsible – resource and infrastructure issues like availability of bail hearing rooms, Crown prosecutors, duty counsel, and justices of the peace and the diversion of justices of the peace to higher priority matters.²²⁸ Associate Chief Justice Rooke characterized the claims “at

enforce and abide by the *Code*, as well as the Minister’s responsibility to implement a bail system and supervise the police. The plaintiff’s allegation is that there were systemic failures that were the ultimate responsibility of the Appellant. ... The plaintiff’s theory ... is that it does not matter which cog in the wheel may be broken; the appellant is liable for the damages arising from its broken system. Where delayed bail hearings have occurred because of the conduct of government actors in their official capacity, Alberta will be responsible Responsibility for the bail system begins and ends with Alberta. Its police forces, Crown prosecutors, and other justice system participants act within the system Alberta runs. The plaintiff’s allegation is that the system that Alberta designed did not function properly and that with a proper design all, or virtually all, of the Class members would not have been overheld”).

²²⁵ Id. ¶¶ 99 & 105-07.

²²⁶ *Reilly v. Alberta*, 2022 ABKB 612, ¶¶ 44, 45 & 53 (“With respect to the question of whether any single aspect of the bail process caused the delay in particular cases, I reiterate that the case at Bar is framed as a claim for systemic negligence in the management of the Crown Bail program overall. ... Alberta argues that the Plaintiffs’ claims are narrowed to systemic issues and exclude individual operational or management issues. The Court’s Response: while individual operational or management issues are excluded, ... [the first common issue] quite clearly relates only to issues that provide some basis in fact for collective/systemic negligence. As the frame of reference is systemic issues, individual considerations are not relevant at this stage – although, to the extent that the common issues justice determines liability in favour of the Plaintiffs, some individual assessment of damages may be subsequently required and such questions may need to be answered at that time ...”) (emphasis omitted).

²²⁷ Id. ¶ 55 (“[Alberta argues] that any such breaches of rights must be assessed on an individual basis for each alleged *Charter* breach, and relying on *Thorburn v British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 ... that there is a reasonableness requirement. The Court’s Response: For reasons articulated at other places in this Decision, I reject this argument as the claim is limited to broad systemic issues, not individual issues at this stage, although, as noted above ..., they may become relevant at a later individual damages assessment stage of the proceedings before the common issues justice. ... As to any requirement of a reasonableness consideration for any *Charter* breaches, per *Thorburn*, this again raises the alleged need for individual consideration, which I have rejected in this systemic case. On the other issues as to reasonableness raised in *Thorburn*, I will leave that for determination on a full record before the common issues justice”) (emphasis omitted).

²²⁸ Id. ¶ 46 (“argue that ‘each and every other bail system participant... may cause or materially contribute to delays’ but none are under the control or supervision of Alberta, and therefore each case of delay must be examined individually. The Court’s Response: to repeat, those participants and their particular roles, if any, in delays beyond the 24 hours are clearly excluded as a result of my October 15, 2019 Order, with only systemic considerations, for which Alberta is responsible being at issue. Thus, individual analysis is not necessary Moreover, some of the matters listed in AB [Alberta’s written brief] paras 222-9 may have a systemic component in a broader context than resulting in individual cases – e.g., resources and infrastructure questions such as some aspects of what is described

the highest level ... [as] that the Crown Bail system systematically and negligently failed to bring all the applicable class members before a hearing officer within 24 hours”.²²⁹ He regarded Alberta’s responsibility for this – including the duty to bring accused before a judge under section 503 of the *Criminal Code* and to supply sufficient justices of the peace – a matter for the common issues trial justice.²³⁰

[246] Is there a basis in fact to conclude that these issues are a substantial common ingredient in the class members’ claims for *Charter* damages and their resolution will advance the litigation?²³¹

in AB paras 222(b), (e), (g), (h) and (i) and 223 (a), and(b)”) (emphasis omitted) & Alberta’s Written Brief, ¶ 222 (“any examination of Alberta’s role in contributing to any delay involves necessarily looking at the steps that took place in each individual’s bail process to determine if Alberta was in fact the cause of the delay. It would require an examination of, among other things: ... b. The resources and infrastructure of the law enforcement agency to facilitate bail hearings, including the number of bail hearing rooms and the availability to allow the accused to meet with duty counsel; ... e. The number of Crown Prosecutors available to present at the bail hearing at any given time, including whether additional Crown Prosecutors would ordinarily be available but for scheduled or unscheduled time off; ... g. The number of duty counsel available to attend bail hearings at any given time, including whether additional duty counsel would ordinarily be available but for scheduled or unscheduled time off; h. The availability of the Crown Prosecutor and duty counsel to conduct the hearing, including whether counsel are occupied attending to other hearings; i. The availability of the Justice of Peace to hear the bail application, taking into account other individuals pending bail hearing and ‘priority 1’ hearings that need to be heard”) & ¶ 223 (“the myriad of factors that may cause individual delays and are not common to the plaintiffs or across the class members ...are not within Alberta’s authority to control. They can include: ... a. A high volume of priority 1 matters diverting Justices of the Peace, preventing a Justice of the Peace from calling the bail hearing. b. Insufficient Justices of the Peace scheduled to handle the bail hearings and priority 1 matters”). See also id. ¶ 94 (“‘Priority 1’ applications ... include child protection orders and time sensitive search warrants”).

²²⁹ Id. ¶ 40.

²³⁰ Id. ¶ 51 (“As to the extent of Alberta’s responsibility, that is a matter of substance, not a threshold procedural issue for certification, so I leave that to the common issues trial justice, on a full record. That said, at least two further points arise. First, no authority has been provided by Alberta that a relevant legal question cannot be a common issue, and basic logic would seem to argue to the contrary. Second, the fact that the Plaintiffs want to focus on only one of the ‘bail system stakeholders’ (it is actually more than that – Alberta, indivisible with both police and prosecutors), doesn’t make it an inappropriate common issue. It just means that the Plaintiffs have not chosen to raise common issues with other ‘bail system stakeholders’”) & n. 26 (“Alberta devotes ... [portions of its brief] to ‘other stakeholders’. I ... note the following: ... The independence of police agencies as to criminal investigations and enforcement ..., whether to hold an accused in custody for a bail hearing or release an accused ..., individual acts of negligence ..., etc., is clearly accepted to be independent of government responsibility, but where there is a broad statutory duty that has systemic (not individual) considerations, such as s. 503, that may will [sic] be a different issue. ... Justices of the Peace, in their adjudicative role ..., are clearly not part of government responsibility ... – Alberta has a duty to provide an adequate supply of hearing judicial officers, but not to manage or supervise them. ... The government does not have responsibility for the actions of defence and duty counsel”) (emphasis omitted).

²³¹ *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(c) (“In order for a proceeding to be certified as a class proceeding ..., the Court must be satisfied ... the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members”); *Bruno v. Samson Cree Nation*, 2021 ABCA 381, ¶¶ 103-04; [2022] 5 W.W.R. 425, 484 (“A class member’s claim

[247] There is not.

[248] The core difficulty with the proposed common issues is that, when assessed having regard to the limited scope of the claim, it is doubtful their resolution would help make significant progress towards determining whether Alberta is liable to the class for the bail delays.

[249] There is no question that the common issues need not fully resolve the claim, one way or the other,²³² leaving nothing further for determination – it is enough that they advance the litigation to a point where resolving any remaining individual issues is the final leap that takes the claim to the finish line.²³³ Nor do they have to yield the same answer – there is room, within the class

must share a substantial common ingredient to justify a class action and an issue will only be ‘common’ if ‘its resolution is necessary to the resolution of each class member's claim’. The chambers judge needed only some basis in fact to conclude that each issue was a common issue to the class”); *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46, ¶ 39; [2001] 2 S.C.R. 534, 554 per McLachlin, C.J. (“The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be ‘common’ only where its resolution is necessary to the resolution of each class member's claim. It is not ... necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members’ claims must share a substantial common ingredient to justify a class action”) & *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, ¶ 46; [2014] 1 S.C.R. 3, 22 per LeBel & Wagner, JJ. (“*Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members”).

²³² *Pioneer Corp. v. Godfrey*, 2019 SCC 42, ¶ 109; [2019] 3 S.C.R. 295, 356 per Brown, J. (“When thinking about whether a proposed common question would ‘advance the litigation’, it is the perspective of the litigation, not the plaintiff, that matters. A common issues trial has the potential to either determine liability or terminate the litigation ... Either scenario ‘advances’ the litigation toward resolution”) (emphasis in original) & *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, ¶ 15; [2019] 2 S.C.R. 831, 860 per Brown, J. (“The Superior Court judge noted that several issues raised by the proposed class action, such as those related to prescription and to the existence of damages or of a causal connection, ... ‘will have to be analyzed individually, which means that they cannot be the subject of common questions of law or of fact’: ... The Court of Appeal rightly found that this factor could not *in and of itself* justify dismissing the application for authorization: ... ‘It is quite possible that the determination of common issues does not lead to the complete resolution of the case, but that it results instead in small trials at the stage of the individual settlement of the claims, which does not preclude a class action suit’) (emphasis in original).

²³³ M. Eizenga, M. Peerless, J. Callaghan & R. Agarwal, *Class Actions Law and Practice* § 3.73 (2d ed. rel. 87 May 2024) (“As the resolution of the common issue is not intended to resolve the litigation, it is to be expected that individual issues may remain to be resolved at the conclusion of the common issues trial”); *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46, ¶ 39; [2001] 2 S.C.R. 534, 554 per McLachlin, C.J. (“It is not ... necessary that ... resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to justify a class action”); *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1, ¶ 46; [2014] 1 S.C.R. 3, 22 per LeBel & Wagner, JJ. (“a question will be considered common if it can serve to advance the resolution of every class member's claim”) & *Pioneer Corp. v. Godfrey*, 2019 SCC 42, ¶ 105; [2019] 3 S.C.R. 295, 353-54 per Brown, J. (“the ‘common success’ requirement in *Dutton* should be

proceedings protocol, for varied answers for specific class members or subgroups.²³⁴ But it makes no sense to certify a class proceeding for which, as here, the common issues are too broad, general or vague for their answers to meaningfully advance the litigation.²³⁵

[250] The plaintiff's reliance on claims of a similar nature determined in other class proceedings does not assist him. The claims found suitable for determination on a class-wide basis in those cases differ in two significant ways. First, they challenged the implementation of programs, rather than policy decisions as to the design or resourcing of those programs. Second, they could be answered in common because they were aimed at a specific uniform course of conduct by the defendant that justified finding liability, with a limited need to investigate the individual circumstances of the class members.

[251] The claims in this instance fall short in both respects.

[252] *Brazeau v. Canada*²³⁶ involved appeals from two summary judgments²³⁷ in class actions against Canada certified on consent²³⁸ on behalf of two groups of inmates in federal penitentiaries. One group had been placed in administrative segregation while suffering from serious mental illness. The second group was placed in administrative segregation for longer than fifteen days,

applied flexibly. 'Common success' denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another A question is considered 'common', then, 'if it can serve to advance the resolution of every class member's claim', even if the answer to the question, while positive, will vary among those members") (emphasis in original).

²³⁴ *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, ¶ 46; [2014] 1 S.C.R. 3, 22 per LeBel & Wagner, JJ. ("the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members").

²³⁵ M. Good & W. Branch, *Class Actions in Canada* § 4:8 (2d ed. rel. 2024-2) ("In assessing the ability of the common issue to advance the litigation, the court must remain sensitive to the claim as a whole. The following questions should be considered: How does the proposed common issue relate to the other issues that will have to be decided? Can it be said, in the context of the other issues and the cause of action, that the determination of the proposed common issue will actually decide and dispose of one aspect of the case that will move the litigation forward? Are there other significant issues that have not been identified as either a common issue or an individual issue that should be taken into account in assessing the issues that are identified?") & M. Eizenga, M. Peerless, J. Callaghan & R. Agarwal, *Class Actions Law and Practice* § 3.75.8-9 (2d ed. rel. 87 May 2024) ("Common issues that merely seek guidance from the court on general legal principles are not certifiable. In *Somerville v. Catalyst Paper Corp.*, the Court declined to certify certain common issues that were overly broad, that were common only when stated in the most general terms and that sought guidance on general legal principles. ... [I]n *Stanway v. Wyeth Canada Inc.*, the court agreed with the defendant's assertion that it is a self-evident proposition of law that manufacturers owe a duty of care to consumers of those products. The Court refused to certify the question of the existence of a duty of care as a common issue").

²³⁶ 2020 ONCA 184; 445 D.L.R. 4th 363.

²³⁷ *Brazeau v. Canada*, 2019 ONSC 1888 & *Reddock v. Canada*, 2019 ONSC 5053.

²³⁸ *Brazeau v. Canada*, 2016 ONSC 7836 & *Reddock v. Canada*, 2018 ONSC 3914.

where the legislation authorizing administrative segregation had been struck down as unconstitutional. The claims were that Canada breached the *Charter* by its “operation and management” of federal penitentiary institutions and was liable for systemic negligence as a result of the “design, organization, administration and staffing of the federal institutions, as well as the policies and procedures applied therein”.²³⁹ The relevant issues before the Ontario Court of Appeal were the availability of *Charter* damages and the systemic negligence claim.²⁴⁰ The Court did not interfere with the grant of *Charter* damages²⁴¹ but set aside the finding of liability for systemic negligence.²⁴² It addressed this only briefly, having found that *Charter* damages were the better remedy,²⁴³ but commented that the primary claim for negligence at the policy-making level could not be a basis for liability, being a legislative matter, and the alternative claim of negligence at the operational level turned on individual circumstances.²⁴⁴

²³⁹ *Brazeau v. Canada*, 2019 ONSC 1888, ¶ 10 (breaches of *Charter* sections 7, 9 and 12); *Reddock v. Canada*, 2019 ONSC 5053, ¶ 14 (breaches of *Charter* sections 7, 11(h) and 12) & ¶ 398 (negligence).

²⁴⁰ *Brazeau v. Canada*, 2020 ONCA 184, ¶¶ 11 & 21; 445 D.L.R. 4th 363, 372 & 379-80.

²⁴¹ The Court upheld the damage award in *Reddock* but remitted for re-determination the damage award in *Brazeau* on account that the judge improperly directed what the use of the funds should be. *Id.* at ¶¶ 102-03, 105-06 & 113; 445 D.L.R. 4th at 399 & 401.

²⁴² *Id.* at ¶ 125; 445 D.L.R. 4th at 404.

²⁴³ *Id.* at ¶¶ 114 & 120-122; 445 D.L.R. 4th at 401 & 403 (“Canada argues that the motion judge erred in *Reddock* in his analysis of the duty of care in relation to systemic negligence. We agree with that submission, but as the damages awarded by the motion judge are sustainable as *Charter* damages, and as we view *Charter* damages to be the more appropriate remedy, our consideration of the systemic negligence issue will be brief. 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 ... exclusion of a duty of care for matters of policy. 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. ... That means that the law of negligence cannot be used to short-circuit that analysis where the damages flow from a *Charter* breach. ... 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”).

²⁴⁴ *Id.* at ¶¶ 119-20; 445 D.L.R. 4th at 402-03 (“The motion judge accepted that cases ... 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’: Yet what he labels to be ‘operational’ failings ... 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. 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

[253] Similar claims arose in *Francis v. Ontario*,²⁴⁵ also an appeal from summary judgment²⁴⁶ granted in a class proceeding certified on consent.²⁴⁷ The claim was brought on behalf of the same two groups of inmates against Ontario. The class members were placed in administrative segregation in provincial correctional facilities. This claim too involved *Charter* breaches arising from the use of administrative segregation and negligence based on Ontario's "operation and management" of the correctional institutions.²⁴⁸ The Ontario Court of Appeal dismissed Ontario's challenge to the grant of *Charter* damages and finding of negligence.²⁴⁹ It found *Charter* damages appropriate for the same reasons as in *Brazeau*²⁵⁰ but, unlike in *Brazeau*, found that negligence liability was made out. While it did not have to address this given its conclusion on *Charter* damages,²⁵¹ the Court commented that this case was pleaded differently in two key respects:²⁵² the class was more narrowly defined,²⁵³ and the statement of claim focused on operational decisions and actions²⁵⁴ and challenged the same act as leading to injury for each individual – placing inmates in administrative segregation in specific circumstances where harm followed by virtue of being in segregation in those circumstances, unlike *Brazeau* where the duty of care would arise differently

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").

²⁴⁵ *Francis v. Ontario*, 2021 ONCA 197; 463 D.L.R. 4th 99.

²⁴⁶ *Francis v. Ontario*, 2020 ONSC 1644.

²⁴⁷ *Francis v. Ontario*, 2018 ONSC 5430.

²⁴⁸ *Francis v. Ontario*, 2020 ONSC 1644, ¶ 7.

²⁴⁹ *Francis v. Ontario*, 2021 ONCA 197, ¶¶ 2-3; 463 D.L.R. 4th 99, 106.

²⁵⁰ *Id.* at ¶ 79; 463 D.L.R. 4th at 126.

²⁵¹ *Id.* at ¶ 94; 463 D.L.R. 4th at 129.

²⁵² *Id.* at ¶ 98; 463 D.L.R. 4th at 130 ("The decision in *Brazeau/Reddock* turned principally on the way in which the plaintiff had pleaded his case").

²⁵³ *Id.* at ¶ 99; 463 D.L.R. 4th at 130-31.

²⁵⁴ *Id.* at ¶ 100; 463 D.L.R. 4th at 131 ("The second difference is that the amended statement of claim in this case focuses on the implementation of administrative segregation in Ontario institutions. It relies on decisions and actions that are of an operational nature. Indeed, the amended statement of claim makes frequent reference to Ontario's responsibility for the 'operation' of its correctional facilities. Specific allegations are made respecting negligence in operational decisions including: failing to remove class members from administrative segregation in a timely fashion in order to avoid permanent injury; over-relying on administrative segregation for administrative purposes within the correctional institutions; failing to investigate or report ongoing harm suffered by class members; failing to adequately supervise the correctional institutions, including their administration and activities; failing to adequately, properly, and effectively, supervise the conduct of its employees, representatives, and agents to ensure that the class members would not suffer unreasonable harm; and failing to properly exercise discretion in determining an appropriate length of time for class members to spend in administrative segregation").

in each individual case.²⁵⁵ In addressing whether the *Crown Liability and Proceedings Act, 2019*²⁵⁶ barred the negligence claim, the Court distinguished between policy and operational matters: the former is the adoption of a general practice, e.g., correctional facilities can use administrative segregation, and the latter the way in which that practice is put into effect, e.g., how the administrative segregation policy is applied.²⁵⁷

[254] In *Leroux v. Ontario*,²⁵⁸ the Ontario Court of Appeal reinstated the certification²⁵⁹ of a class action against Ontario on behalf of adults with developmental disabilities who were assessed and approved to receive specific supports and services under provincial legislation and placed on indeterminate waitlists. Class members claimed that Ontario's administration of the waitlists breached their *Charter* rights²⁶⁰ and Ontario was negligent in how it "created, administered, supervised, and managed" the indeterminate waitlists.²⁶¹ The Court of Appeal considered that the *Charter* claim, on a generous reading, was not foreclosed by existing caselaw,²⁶² and the negligence claim, when properly characterized, did not challenge core policy decisions regarding resource allocation – rather, it questioned whether Ontario's implementation of the program within

²⁵⁵ Id. at ¶¶ 105-06 & 110; 463 D.L.R. 4th at 132 & 133 ("this court ruled against a systemic negligence claim in *Brazeau/Reddock* because it found ... '... the duty alleged arises from different acts in different circumstances and in relation to different individuals.' As we have mentioned above, the actions alleged in this case do not constitute different acts in different circumstances. Rather, what is challenged, at the very core of this claim, is 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. The first circumstance is where SMI [seriously mentally ill] Inmates are placed in administrative segregation for any length of time. The second circumstance is where Prolonged Inmates are placed in administrative segregation for a period of 15 or more consecutive days. The expert evidence establishes that both of these actions will give rise to injury or harm to each and every involved individual. [T]he 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").

²⁵⁶ S.O. 2019 c. 7, Sch. 17, s. 11 ("No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care while exercising or intending to exercise powers or performing or intending to perform duties or functions of a legislative nature, including the development or introduction of a bill, the enactment of an Act or the making of a regulation").

²⁵⁷ *Francis v. Ontario*, 2021 ONCA 197, ¶¶ 130-36; 463 D.L.R. 4th 99, 139-40.

²⁵⁸ *Leroux v. Ontario*, 2023 ONCA 314; 481 D.L.R. 4th 502, rev'ing, 2021 ONSC 2269 (Div. Ct.).

²⁵⁹ *Leroux v. Ontario*, 2018 ONSC 6452, rev'd, 2021 ONSC 2269 (Div. Ct.).

²⁶⁰ *Leroux v. Ontario*, 2023 ONCA 314, ¶ 19; 481 D.L.R. 4th 502, 514.

²⁶¹ Id. at ¶ 18; 481 D.L.R. 4th at 513.

²⁶² Id. at ¶ 8; 481 D.L.R. 4th at 511.

existing resources was negligent.²⁶³ The Court added that the duty-of-care question for the negligence claim could be answered on a common basis as Ontario had a “singular approach” to administering the waitlists, as could the *Charter* breach question as Ontario “subjected the class to a single common course of conduct” that could be a *Charter* breach.²⁶⁴

[255] *Good v. Toronto Police Service Board*²⁶⁵ involved an appeal from the eventual certification²⁶⁶ of a class proceeding against the Toronto Police Services Board on behalf of protesters that police detained *en masse* in police cordons and released without charge, arrested in a particular location or held in a detention centre.²⁶⁷ Their claims included *Charter* breaches and

²⁶³ Id. at ¶¶ 7, 49 & 54-55; 481 D.L.R. 4th at 510-11, 522 & 523 (“I agree with the motion judge and the dissenting judge in the Divisional Court that the negligence claim does not impugn a core policy decision concerning the allocation of scarce resources. As pleaded, the action alleges that, within existing resources, Ontario has negligently implemented a program that has already assessed and approved class members for the receipt of supports and services. The majority of the Divisional Court erred in recharacterizing the appellant's claim. Taking the pleaded facts as true, it is not plain and obvious that the negligence claim is one barred by core policy immunity, nor one in which no duty of care could arguably arise. First, the motion judge and dissenting judge at the Divisional Court correctly characterized the negligence claim as one alleging the ‘negligent operation of a social assistance system *within existing resources*’ (emphasis added). The pleading specifically alleges that Ontario acted negligently in failing to rationally allocate ‘pre-existing’ resources to class members Accordingly, the negligence claim does not target the discretionary social assistance program as a whole. It does not target Ontario's allocation of resources nor Ontario's exercise of discretion over who is approved for the services at issue. Second, throughout its reasons, the majority relies on a description of the program that misses the essential nature of the allegation. These assertions include that Ontario already assists 47,000 people with developmental disabilities, that it has a triage system it designed to allocate resources to persons in the program (although such a triage system is not referred to in the claim), that available resources are inadequate to meet the needs of all eligible claimants, that there will be persons who are eligible for benefits who do not receive them, and that making decisions in this context is a complex task. This description shifts the claim to one that challenges decisions concerning what resources to devote to a triage system addressing a complex problem in which demand outstrips supply. But those are not the decisions the appellant impugns. The appellant pleads that Ontario has no consistent and rational scheme for allocating pre-existing resources, and that the cause of the non-receipt or delayed receipt of support and services by class members is that very failure”) (emphasis in original).

²⁶⁴ Id. at ¶ 92; 481 D.L.R. 4th at 532 (“I am satisfied the motion judge did not err, as asserted by Ontario, in concluding there was a factual basis to certify the common issues of (a) whether Ontario owed and breached a duty of care to the class, and (b) whether Ontario breached the class members' s. 7 right. On the first common issue, I see no error in the motion judge's conclusion that the question can be determined on a class-wide basis as the available evidence suggests that Ontario has a ‘singular approach’ to administering DSO waitlists. Similarly, on the second common issue, I see no error in the motion judge's determination that the record suggests that Ontario subjects the class to a single common course of conduct that may constitute a s. 7 *Charter* breach”).

²⁶⁵ 2016 ONCA 250; 396 D.L.R. 4th 411, leave to appeal ref'd, [2016] S.C.C.A. No. 255.

²⁶⁶ *Good v. Toronto Police Services Board*, 2014 ONSC 4583; 375 D.L.R. 4th 200 (Div. Ct.), rev'ing 2013 ONSC 3026.

²⁶⁷ *Good v. Toronto Police Services Board*, 2016 ONCA 250; 396 D.L.R. 4th 411, leave to appeal ref'd, [2016] S.C.C.A. No. 255, Schedule “C”.

torts arising from the detention or the conditions at the detention centre.²⁶⁸ In upholding certification, the Ontario Court of Appeal agreed with the Divisional Court that whether the detention was arbitrary imprisonment or breached section 9 of the *Charter* was a common issue because this did not depend on individual circumstances and on whether detention was reasonable in each specific case, but rather challenged the order to detain these groups indiscriminately – it was akin to a claim of a systemic wrong.²⁶⁹ Whether some of the class members did in fact engage in conduct that warranted their detention was no defence to the wrongfulness of giving an order for mass detention without a foundation justifying it on a group-wide basis.²⁷⁰

[256] Other cases involving “systemic” claims state similar principles.

²⁶⁸ Id. Schedule “E”. The claims originally put forward at certification were broader than the claims put forward to the Divisional Court on the appeal from the refusal of certification. Id. at ¶¶ 12 & 29; 396 D.L.R. 4th at 419 & 422-23.

²⁶⁹ Id. at ¶ 70; 396 D.L.R. 4th at 431 (“I reject TPS's argument that the Divisional Court erred in finding that this [false imprisonment/breach of s. 9] is a common issue. ... I agree with the Divisional Court's analysis. The motion judge's conclusion that this issue was not a common issue was rooted in her focus on the possibility of varying individual conduct by the individuals who were arrested or detained which is an error in principle in the context of the class as cast on appeal”) & *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.), ¶¶ 44-45 & 47; 375 D.L.R. 4th 200, 216-17 & 217-18 (“The first proposed common issue is a common issue. It applies to all members of the class who were detained in that it asks the core question: were the members of the class arbitrarily detained and/or arrested in violation of their rights at common law or under s. 9 of the *Canadian Charter of Rights and Freedoms*? The answer to that question will significantly advance the claim of each member of the class. Indeed, on the record before this court, it is arguable that the answer to that question will be both the beginning and the end of the liability analysis for the entire class. ... The claim here is, in essence, the equivalent of a claim of a systemic wrong. ... [T]he case law offers many examples where class actions have been certified to determine claims where all class members are exposed to the same conduct of the defendant. ... A central feature of the ... test [for whether the police have the right to detain someone] is the requirement that the officer, who gives the order to detain a person, must have reasonable cause to suspect that the person ‘is criminally implicated in the activity under investigation’. In this case, the allegation is that the command order was given without regard to whether any particular individual swept up in the mass detention was or was not implicated in the unlawful activity with which the police were concerned. In other words, the allegation is that the police engaged in an approach of detaining people first and then later deciding whether any of those persons were actually engaged in criminal activity”).

²⁷⁰ *Good v. Toronto Police Services Board*, 2016 ONCA 250, ¶¶ 66-80; 396 D.L.R. 4th 411, 430-31 & 433 (“I reject TPS' argument that the motion judge correctly concluded that the location-based subclass definitions should exclude individuals who engaged in unlawful conduct during the protests. Her conclusion was made in the context of a proposed class that included more than location-based subclasses. In the context of a class restricted to location-based subclasses, and some basis in fact that there was a single command order for group detentions and arrests at each location, focusing on evidence of varying individual conduct among the protesters unrelated to the single command order becomes an error in principle. I agree with the Divisional Court ... that ‘it is of no consequence whether any member of the class did, in fact, commit a criminal offence or a breach of the peace. The police cannot justify the detention of a person based on information that they either did not have, or which they did not rely upon, in ordering a person to be detained.’ Here ... the common issues dealing with alleged breaches of the class members' rights contemplate that liability will be determined at the common issues trial”).

[257] *Rumley v. British Columbia*²⁷¹ was an appeal from the certification²⁷² of a class proceeding against British Columbia on behalf of deaf children who attended a residential school British Columbia operated and were subjected to sexual abuse. They claimed the province was negligent and breached its fiduciary duty “in failing to take reasonable measures in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents or other students”.²⁷³ The Supreme Court concluded that the principal certification criteria at issue before it, commonality and preferability, were made out.²⁷⁴ It rejected the province’s argument that determining liability will require investigating how the standard of care applies to each class member and the issue is only common because it is too broad.²⁷⁵ The claim was based on systemic negligence – a failure to have procedures in place that prevent abuse, such as not placing all students in one dormitory – that can be determined without reference to individual class members’ circumstances and, while overly broad commonality questions are unhelpful, that is not the case here.²⁷⁶ I note that this class proceeding later proved difficult to move forward.²⁷⁷

²⁷¹ 2001 SCC 69, ¶¶ 1 & 21; [2001] 3 S.C.R. 184, 186-87 & 196 per McLachlin, C.J.

²⁷² *Rumley v. British Columbia*, 1999 BCCA 689; 180 D.L.R. 4th 639, rev’ing, 25 C.P.C. 4th 186 (B.C. Sup. Ct. chambers 1998), aff’d, 2001 SCC 69; [2001] 3 S.C.R. 184.

²⁷³ *Rumley v. British Columbia*, 2001 SCC 69, ¶ 21; [2001] 3 S.C.R. 184, 196 per McLachlin, C.J.

²⁷⁴ Id. at ¶¶ 26-27; [2001] 3 S.C.R. at 198-99.

²⁷⁵ Id. at ¶ 28; [2001] 3 S.C.R. at 199-200.

²⁷⁶ Id. ¶¶ 29-30 & 34; [2001] 3 S.C.R. at 200-01 & 203 (“There is clearly something to the appellant’s argument that a court should avoid framing commonality between class members in overly broad terms. ... [T]he guiding question should be the practical one of ‘whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis’. It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient. I cannot agree, however, that such are the circumstances here. ... [T]he respondents’ argument is based on an allegation of ‘systemic’ negligence — ‘the failure to have in place management and operations procedures that would reasonably have prevented the abuse’. ... The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents’ election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a ‘systemic’ breach). ... [H]owever, the respondents ‘are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so’ [T]he respondents have limited the possible grounds of liability to systemic negligence — that is, negligence not specific to any one victim but rather to the class of victims as a group”) (emphasis omitted).

²⁷⁷ *T.L. v. Alberta*, 2006 ABQB 104, ¶ 108; 23 C.P.C. 6th 276, 317-18 per Slatter, J. (“It is instructive to note that the experience in the *Rumley* action was not entirely happy. An application was subsequently brought to decertify the

[258] The Ontario Court of Appeal upheld a certification order in *Cloud v. Canada*,²⁷⁸ an appeal from the refusal to certify²⁷⁹ a claim on behalf of students of a residential school for First Nations children against Canada and others said to be responsible for running it. They claimed that the defendants were vicariously liable, breached a fiduciary duty owed to the class members and their families, and were negligent in running the school.²⁸⁰ The Ontario Court of Appeal found both commonality and preferability were satisfied and certified the action. It rejected the defendants' position that the claims were so individual that commonality was superficial, noting that they were based on a "systemic breach of duty", being that the defendants breached their duties to all class members in how they ran the school.²⁸¹ Causation of harm would have to be determined individually, but whether the respondents owed legal duties to the class, the standard of care and whether the duties were breached are common issues the resolution of which would go a long way in moving the action forward.²⁸²

action: As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: *Rumley* shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of ... [the decertification application decision] is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through 'aggressive case management', and some refinement of the common issues, she did conclude ... that the action had 'reached a precarious balance between a potentially workable class proceeding and unmanageable confusion'").

²⁷⁸ 247 D.L.R. 4th 667 (Ont. C.A. 2004), leave to appeal ref'd, [2005] S.C.C.A. No. 50.

²⁷⁹ *Cloud v. Canada*, 41 C.P.C. 5th 226 (Ont. Div. Ct. 2003), aff'ing, [2001] O.T.C. 767 (Ont. Sup. Ct.).

²⁸⁰ *Cloud v. Canada*, 247 D.L.R. 4th 667, 677-78 (Ont. C.A. 2004), leave to appeal ref'd, [2005] S.C.C.A. No. 50.

²⁸¹ Id. at 682-83 & 684 ("The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. ... [T]he appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes ... is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. ... There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties constitute common issues I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way").

²⁸² Id. at 682-83 ("There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was,

[259] Claims that do depend on individual circumstances may benefit from the class proceedings mechanism where there are common questions of liability that would significantly advance the litigation. *V.L.M. v. Dominey Estate*²⁸³ illustrates this condition. It was an appeal from an order refusing to certify a class proceeding²⁸⁴ against the estate of Father Dominey, Alberta, and a church that operated the institution on behalf of persons incarcerated at a youth correctional institution that the provincial government operated and where Father Dominey sexually assaulted them.²⁸⁵ Class members claimed damages against the estate of Father Dominey directly and from Alberta and the church on the basis of vicarious liability or because they owed a duty of care to the detainees and breached it by failing to provide a safe environment free from sexual abuse – screen Father Dominey before placing him there, supervise him, and establish policies, practices or procedures to protect against sexual abuse.²⁸⁶ Unlike the certification judge, this Court was satisfied that a class proceeding was preferable. This was the case even though there could be no claim against Alberta and the church without first proving the tort of sexual assault, which required individual determinations. This Court considered that the question whether Alberta and the church were responsible for any damage, whether vicariously or directly for failing to screen or supervise Father Dominey or have adequate policies in place – the latter being referred to as “systemic”

and whether the respondents breached those duties constitute common issues”) & 688-89 (“whether framed in negligence, fiduciary obligation or aboriginal rights the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. ... The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way”).

²⁸³ 2023 ABCA 261; 486 D.L.R. 4th 115.

²⁸⁴ *VLM v. Dominey*, 2022 ABQB 299; 45 Alta. L.R. 7th 360, rev'd, 2023 ABCA 261.

²⁸⁵ *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶¶ 1 & 3-4; 486 D.L.R. 4th 115, 119.

²⁸⁶ *VLM v. Dominey*, 2022 ABQB 299, ¶¶ 5-6; 45 Alta. L.R. 7th 360, 368-69, rev'd, 2023 ABCA 261; 486 D.L.R. 4th 115.

liability²⁸⁷ – was an issue that could best be resolved on a common basis – doing so had practical utility and would advance the action.²⁸⁸

[260] In contrast to the examples above, the difficulty for the plaintiff in this case is that the proposed common issues would do little to advance the litigation. Answering the common questions in common is either not feasible or would not be especially helpful. The difficulty is not that the proposed common issues do not go far enough in resolving liability – not necessarily on its own a basis for refusing certification²⁸⁹ – or would leave too many individual issues for

²⁸⁷ *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶ 31; 486 D.L.R. 4th 115, 128 (“Based on the pleadings, either or both of the Synod or Alberta could potentially be vicariously or directly liable for any damage caused by Father Dominey’s sexual assaults: (a) Either might be *vicariously* liable if Father Dominey had an employment relationship with them, or a *sui generis* relationship close enough to result in vicarious liability: Vicarious liability is no-fault liability that depends on the relationship between the actual tortfeasor, and his misconduct, with others who are potentially liable for his torts. (b) Absent vicarious liability, either might be *directly* liable if it could be established that they had a duty to prevent the sexual assaults from occurring, and they negligently failed to discharge that duty. Direct liability is fault based liability, described by the appellant as ‘systemic’ liability. Direct liability would require proof of a duty of care, a breach of the standard of care, and causation. It is at this level that (i) a failure to screen Father Dominey before he was placed at the Centre, (ii) a failure to supervise him, or (iii) ‘inadequate policies’ might result in direct liability for his sexual assaults, even if there was no vicarious liability. If the class can establish vicarious liability, then establishing direct (or ‘systemic’) liability would be redundant. These are all common issues, and it would be ‘less practical and less efficient’ to decide them separately for each member of the class. The resolution of these common issues would significantly advance the action”) (emphasis in original).

²⁸⁸ *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶¶ 26, 28 & 37; 486 D.L.R. 4th 115, 126 & 130 (“The appellant proposes as potential common issues whether Father Dominey owed a tortious or fiduciary duty of care to the class members, what the standard of care was, and whether he breached that duty. These issues are legally meaningless in this context. The intentional tort of sexual assault does not depend on any ‘duty of care’. If Father Dominey assaulted the class members in a sexual way without consent the tort is made out, and if he did not there is no actionable wrong. ... However, while these allegations of negligence or breach of fiduciary duty are only theoretical without a sexual assault, they are relevant to whether the Synod or Alberta are collaterally liable for the torts of Father Dominey. ... Assuming the class can prove they were sexually assaulted by Father Dominey, the practical question is therefore whether the Synod and Alberta are legally responsible for any damage caused by those sexual assaults. As the case management judge recognized ..., that is a common issue for which a class proceeding is *prima facie* the preferable procedure. As the appellant correctly notes, in performing the preferability analysis the case management judge overemphasized the prospect of the class proceedings resulting in a final resolution of the liability of the respondents. ... [T]he resolution of the common issues does not have to be determinative of liability, as long as resolution of the common issues has some ‘practical utility’, and the action will be advanced”).

²⁸⁹ *Cloud v. Canada*, 247 D.L.R. 4th 667, 681, leave to appeal ref’d, [2005] S.C.C.A. No. 50 (Ont. C.A. 2004) (“an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. ... Cullity J. approached the commonality issue correctly and reached the right result. As I have described, rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member’s claim and which could be said to be a substantial ingredient of those claims”).

determination – a proper consideration in the preferability analysis²⁹⁰ – but rather that, on the whole, whatever questions might be answered in common are not a substantial ingredient in the class members’ claims. They challenge either core policy decisions as to the design of the bail system, like those the Court refused to certify in *Brazeau*, or operational matters in the bail system that are either excluded from the claim by virtue of the October 15, 2019 order or require an assessment of individual circumstances to make determinations as to liability, like in *Brazeau* and unlike *Francis*, *Leroux*, *Good*, *Rumley*, *Cloud* and *V.L.M.* where liability questions could be determined on a common basis because they involved a single common course of conduct by the defendant. And it would make no sense to put the cart before the horse and allow the damages questions to proceed as common issues when liability questions cannot.

[261] Despite the plaintiff’s protestations,²⁹¹ this case is more like *Cirillo v. Ontario*,²⁹² an appeal from the refusal to certify²⁹³ a proposed class proceeding against Ontario on behalf of persons detained for more than twenty-four hours before being afforded a bail hearing.²⁹⁴ The claim alleged that Ontario mismanaged the bail system, failed to provide adequate resources to meet the high volume of dockets, failed to provide transportation to hearings, and failed to set hearings close to the location of detention – and breached the class members’ *Charter* rights and was liable to them in negligence.²⁹⁵ The Ontario Court of Appeal concluded that there was no proper cause of action

²⁹⁰ Id. at 682 (“the fact that beyond the common issues there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure”) & *Rumley v. British Columbia*, 2001 SCC 69, ¶ 33; [2001] 3 S.C.R. 184, 203 per McLachlin, C.J. (“While the British Columbia *Class Proceedings Act* clearly contemplates that predominance will be a factor in the preferability inquiry ..., it makes equally clear that predominance should not be a factor at the commonality stage”). The British Columbia and Alberta legislation share the same language in this respect. *Class Proceedings Act*, R.S.B.C. 1996, c. 50, s. 4(1)(c) (“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: ... the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members”) & s. 4(2)(a) (“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 ... whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members”) & *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(c) (“In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following: ... the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members”) & s. 5(2)(a) (“In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider ... whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members”).

²⁹¹ Factum of the Respondent, M.S., ¶ 65.

²⁹² *Cirillo v. Ontario*, 2021 ONCA 353, leave to appeal ref’d, [2021] S.C.C.A. No. 296.

²⁹³ *Cirillo v. Ontario*, 2019 ONSC 3066 & 2020 ONSC 3983.

²⁹⁴ *Cirillo v. Ontario*, 2021 ONCA 353, ¶ 8, leave to appeal ref’d, [2021] S.C.C.A. No. 296.

²⁹⁵ Id. ¶¶ 1, 9, 33 & 56.

for negligence, as the claim challenged core policy decisions.²⁹⁶ Even if the *Charter* cause of action was viable,²⁹⁷ the Court concluded it could not proceed because there was no identifiable class – the class was defined based on the cause of delay, determination of which required individual assessments.²⁹⁸ In addition, the Court held that it was not possible to make a common determination of whether Ontario breached *Charter* rights because those rights had a reasonableness component that had to be assessed for each individual case.²⁹⁹ Finally, the Court

²⁹⁶ Id. ¶ 40 (“The negligence claims against the respondent in this proposed class action are clearly aimed at core policy decisions. They relate to resource allocation for bail hearings and staffing. The supporting material filed on the motion refers to the adequacy of ‘physical court space’ and the need to build (instead of to renovate) courthouses. The claims focus on the role of government wielding its executive authority to determine the allocation and adequacy of resources devoted to the criminal justice system”).

²⁹⁷ Id. ¶ 49 (“I do not need to address the viability of the cause of action with respect to the *Charter* claims. Even if the *Charter* claims were to satisfy s. 5(1)(a), they do not meet the identifiable class, common issue or preferability criteria”).

²⁹⁸ Id. ¶¶ 51 & 54 (“the appellant’s putative class includes all persons within the class period who did not get a bail hearing within 24 hours ‘as a result of’ certain criteria: ... Here, the difficulty is that a factual determination is required as to the cause of the delay beyond 24 hours. In an attempt to circumvent this problem, the appellant submitted that the right to a hearing is actually ‘within a reasonable time’. This qualification is also problematic for it results in a class definition that would be based on individual assessments and would be incapable of objective determination”).

²⁹⁹ Id. ¶¶ 59, 61, 65 & 67 (“The motion judge noted that ‘[a]t the very least, the claim must share not only a common court infrastructure but a common experience of having a specific *Charter* right violated.’ He noted that all of the *Charter* issues that were said to be engaged ‘share[d] a common thread of reasonableness’ and that ‘[r]easonableness is a difficult issue to assess as a common issue.’ He concluded that ‘[t]he proposed common issues pertaining to the *Charter* claims require individualized and particularized assessments of each case.’ I agree with that conclusion. ... The appellant ... submits, pointing to several cases, that courts have repeatedly certified claims based on alleged *Charter* breaches. In my view, these cases share a distinguishing feature. The *Charter* questions arise from a single course of conduct: *Johnson* considered the common conditions inmates experienced in the same jail; *Lauzon* involved the decision to prohibit the t-shirts; *Good* involved an alleged command order to ‘box in’ certain groups during a protest. Here, there is no single course of conduct giving rise to the alleged breaches. ... Here, the *Charter* claims are similarly not capable of common determination. For example: Sections 7 and 9: Any detention would have resulted from adjournment and remand orders, which are not being challenged. If they were challenged, the case would depend on the reasons why each was made. Section 11(e): Whether bail was ‘reasonable’, including whether the terms of release were reasonable, are individual questions. Section 12: The pleading does not contain factual allegations that would support this claim. Detention pursuant to a court order, without more, does not constitute cruel and unusual punishment. To the extent that any putative class member has a claim for cruel and unusual punishment, the facts that would support it would be necessarily individual”). See also *Cirillo v. Ontario*, 2019 ONSC 3066, ¶¶ 49 & 50, aff’d, 2021 ONCA 353, leave to appeal ref’d, [2021] S.C.C.A. No. 296 (“The analysis of any alleged *Charter* breach must address the source of the claimant’s complaint — the reason for the effect suffered by the claimant — in order to ascertain whether a rights violation has occurred. ... Likewise, the present claim of delayed bail hearings must distinguish those claimants whose cases are attributed to Crown or Ontario government conduct from those that are not”).

determined that a class proceeding was not preferable because a general finding of a systemic wrong would not avoid lengthy investigation into individualized circumstances.³⁰⁰

[262] Here, much like in *Cirillo*, the common issues are either incapable of resolution on a common basis, or any generalized answers they might provide would be of little benefit in advancing the litigation.³⁰¹ While far from determinative, it is instructive that aspects of the claims pled in *Cirillo* and in this case bear a striking resemblance.³⁰²

³⁰⁰ Id. ¶¶ 69-70 (“Despite the allegation of a systemic wrong, a class proceeding is not the preferable procedure. This court in *Dennis v. Ontario Lottery and Gaming Corp.* ... said: ‘Even if the class definition and common issue requirements were satisfied, it is my view that a class action is not the preferable procedure. A general finding of ‘systemic wrong’ would not avoid the need for protracted individualized proceedings into the vulnerability and circumstances of each class member. A more efficient and expeditious way to adjudicate these claims would be to proceed directly by way of individual actions as it is inevitable that a class proceeding will break down into individual proceedings in any event.’ Similarly, in light of the foregoing conclusions, a class proceeding is not the preferable procedure”).

³⁰¹ *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶¶ 26-27; 486 D.L.R. 4th 115, 126 (“The appellant proposes as potential common issues whether Father Dominey owed a tortious or fiduciary duty of care to the class members, what the standard of care was, and whether he breached that duty. These issues are legally meaningless in this context. The intentional tort of sexual assault does not depend on any ‘duty of care’. If Father Dominey assaulted the class members in a sexual way without consent the tort is made out, and if he did not there is no actionable wrong. Absent a sexual assault, other potential causes of action against the other respondents are conceptual only. ... A ‘failure to supervise’ Father Dominey, a failure to ‘screen’ him, or a failure to have ‘adequate policies’, would also be of no consequence absent a sexual assault. While the statement of claim may plead the essential components of these causes of action, satisfying the requirement of s. 5(1)(a), a class proceeding is not the preferable procedure for deciding purely theoretical issues”) & *T.L. v. Alberta*, 2006 ABQB 104, ¶¶ 103, 107 & 109; 23 C.P.C. 6th 276, 314-15, 317 & 318 per Slatter, J. (as he then was) (“Systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance in resolving the claims of individual class members. The Plaintiff presumably wishes to demonstrate that the policies that the Defendant had in place, and the way the Child Welfare system as whole was managed, was negligent. Even if this could be shown, the answer will be so abstract as to be of little practical utility. ... The presence of, absence of, or content of policies will not equate to a systemic breach of duty, and neither will any assessment of the generic ‘operation’ or ‘training’ of the Child Welfare system. The ‘operation’ of the system can only be tested at the individual level, by seeing how the rights of individual children were handled. If it is actually proposed to prove systemic negligence by proving acts of negligence in individual cases, the identification of systemic negligence as a ‘common’ issue will be illusory. In some cases it will be possible to certify systemic negligence as a common issue. But the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible. In this case the class is very divergent. The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized ‘policies and operations’ of the Defendant. In this case ‘breach of the standard of care’ is essentially an individual issue that must be decided in the second phase of the proceedings, and attempting to frame it as an issue of ‘systemic negligence’ is really an attempt to bootleg individual issues as a common issue. The appearance of commonality is an artificial result of the generality of the question. The proposed systemic breach common issue is not fair or workable in this case”).

³⁰² Amended Statement of Claim of Robin Cirillo dated June 29, 2017 and amended September 28, 2017, ¶ 1(b), (d), (e) & (h) (“The Plaintiff claims: ... a declaration that Her Majesty the Queen in Right of the Province of Ontario

[263] The above cases also illustrate that labels such as “systemic” are on their own unhelpful in determining whether a claim is suitable for a class proceeding – the proper focus should be on the actual nature of the claims and questions proposed as common viewed in the context of the action as a whole.³⁰³ Class counsel cannot bypass this scrutiny by casting claims as “systemic” and pointing to other cases where “systemic” claims were certified.

[264] In this case, assessing the nature of the claim and the proposed common issues leads us to conclude that the proposed common issues are not a substantial ingredient of the claim the resolution of which would meaningfully advance the litigation.

E. A Class Proceeding Is Not the Preferable Procedure for the Fair and Efficient Resolution of Any Common Issues

[265] If the plaintiff’s third amended statement of claim disclosed a cause of action against Alberta and the plaintiff had put forward issues appropriate for resolution on a common basis, the certification application would, nonetheless, have failed.

breached its fiduciary duty to the Plaintiff and the Class through the operation, management, administration, supervision, funding and control of bail hearings in Ontario resulting in detention of the Plaintiff and members of the Class (as defined below) for a period of more than 24 hours prior to any bail hearing being available ...; ... a declaration that Her Majesty the Queen in Right of the Province of Ontario is liable to the Plaintiff and the Class for the damages caused by its breach of its common law duty in relation to the operation, management, administration, supervision, funding and control of bail hearings in Ontario, as well as legal costs thrown away as a result of foreseeable and avoidable adjournments; a declaration that Her Majesty the Queen in Right of the Province of Ontario has violated the Plaintiffs’ and Class members’ rights under sections 7, 9, 11(d), 11(e) and 12 of the *Canadian Charter of Rights and Freedoms* ...; ... a declaration that the foregoing breaches by Her Majesty the Queen in Right of the Province of Ontario resulted in a marked and unacceptable departure from the reasonable standards expected of the Crown and the prosecution...”). Available at <https://kmlaw.ca/wp-content/uploads/2017/06/Amended-Statement-of-Claim-issued-September-28-2017.pdf> & Third Amended Statement of Claim of Ryan Reilly and MS filed June 25, 2020, ¶ 98(b)-(e) (“The Plaintiffs claim ... a declaration that the Crown breached its fiduciary and common law duties to the Plaintiffs and the Class through the operation, management, administration, supervision, resourcing and control of bail hearings in Alberta; a declaration that the Crown is liable to the Plaintiffs and the Class for the damages caused by its breach of its fiduciary and common law duties to the Plaintiffs and the Class through the operation, management, administration, supervision, resourcing and control of bail hearings in Alberta; a declaration that the Crown has violated the Plaintiffs’ and the Class Members’ rights under sections 7, 9, 10(c), 11(d), 11(e) and 12 of the *Charter* by delaying their access to a bail hearing within 24 hours of their arrest; a declaration that the foregoing breaches by the Crown resulted in a marked and unacceptable departure from the reasonable standards expected of the Crown”). Appeal Record 37.

³⁰³ *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶ 43; 486 D.L.R. 4th 115, 133 (“Framing ... [the routes to liability] as issues of ‘systemic negligence’ blurs the proper focus of the analysis”).

[266] The certification judge addressed the preferable procedure criterion briefly. He was readily satisfied that, given the confinement of the claim to systemic causes of delay, individual issues do not make this case unsuitable for determination as a class proceeding.³⁰⁴

[267] Alberta's position is generally that individual issues dominate, making a class proceeding inadequate. The certification judge did not address this issue.³⁰⁵

[268] In the plaintiff's view, a class proceeding is the best course of action – it would be untenable to expect each class member to bring a small claims action against every participant in the justice system who had a role in bail delay,³⁰⁶ as Alberta suggests. The plaintiff argues that this Court expressed an opinion supporting his position in the related proceeding where Mr. Reilly sought a stay of his charges.³⁰⁷

[269] A class action would be preferable if, from the standpoint of judicial economy, behavior modification and access to justice,³⁰⁸ and looking at the common issues in the context of the entire

³⁰⁴ *Reilly v. Alberta*, 2022 ABKB 612, ¶ 60.

³⁰⁵ Factum of the Appellant, ¶ 87.

³⁰⁶ Factum of the Respondent, M.S., ¶ 119.

³⁰⁷ *Id.* ¶ 118 (“The defendant has failed to suggest any alternative procedure other than thousands of small claims actions, which this Court confirmed was not preferable in *Reilly* [citing paragraph 32]”). See *The Queen v. Reilly*, 2019 ABCA 212, ¶¶ 31-32; [2019] 9 W.W.R. 60, 75, rev'd, 2020 SCC 27; [2020] 3 S.C.R. 109 (“If this appeal only concerned a discrete breach of the respondent's rights, a stay would not be justified under the *Babos* test. At an individual level, there are clearly ‘alternative remedies capable of redressing the prejudice’ to the respondent. ... [I]f the respondent were convicted, his sentence could be reduced by giving him credit [as a remedy under *Charter* s. 24(1)] or ‘enhanced credit’, for the excessive 11 hours of custody after his detention: Alternatively, the respondent could claim damages: Damages should be the presumptive remedy where the citizen is detained for longer than 24 hours before being taken before a justice, and he or she is subsequently acquitted. This, unfortunately, would require a separate claim for those damages, but since the Crown admits the breach, it presumably would not insist on the citizen actually commencing a small claims action for those damages. It is in the Crown's interest to facilitate those claims. If this remedy turns out to be ineffective, the Crown may have to tolerate less desirable remedies”).

³⁰⁸ *AIC Limited v. Fischer*, 2013 SCC 69, ¶¶ 22-23; [2013] 3 S.C.R. 949, 963-64 per Cromwell, J. (“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 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. ... 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 ... [*Class Proceedings Act*], 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”), ¶ 26; [2013] S.C.R. at 965 (“A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered”) & ¶¶ 24-25; [2013] S.C.R. at 964-65 (“access to justice in this context ... has two dimensions, which are interconnected. One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. ... While it may be analytically convenient to look at process and substance considerations

action,³⁰⁹ a class proceeding would be a fair and efficient means of resolving the common issues and doing so would advance the litigation better than other options for dispute resolution.³¹⁰

separately, this must not be done at the expense of an overall assessment of the access to justice implications of the proposed class action. ... The focus cannot be exclusively on process: a process may be fair but nonetheless not offer a real opportunity to recover compensation for all of the losses suffered. In ... some cases even if the process is fair, there will remain significant obstacles to recovery. In addition, an absence of a fair process may also heighten concerns about whether substantive justice has or will be done”) (emphasis in original). See also M. Good & W. Branch, *Class Actions in Canada* § 4:9 (2nd ed. rel. 2024-2) (“in *AIC Limited v. Fischer*, ... [t]he court set out five questions to assist with the access to justice aspects of the preferability analysis: 1. What Are the Barriers to Access to Justice? While not an exhaustive list, procedural and substantive barriers that a class action can address may be economic, but also physical, psychological, emotional, social, linguistic, or be based on ignorance of the injury, ignorance of the availability of substantive legal rights, fear of reprisals by the defendant, alienation from the legal system, or the absence of an alternative procedure of meaningful redress. 2. What is the Potential of the Class Proceedings to Address Those Barriers? For example, with respect to an economic barrier, a class action can distribute litigation costs to make pursuing the claim affordable. 3. What Are the Alternatives to Class Proceedings? These may include other court procedures, non-court proceedings, or combinations of both. 4. To What Extent Do the Alternatives Address the Relevant Barriers? 5. How Do the Two Proceedings Compare? The emphasis here is on the comparative ability of alternative proceedings to overcome the identified barriers that a class action would address. The Court must consider the results or limits on recovery of alternative procedures, where such evidence is available at the time of the certification motion”).

³⁰⁹ *AIC Limited v. Fischer*, 2013 SCC 69, ¶ 21; [2013] 3 S.C.R. 949, 963 per Cromwell, J. (“In order to determine whether a class proceeding would be the preferable procedure for the ‘resolution of the common issues’, those common issues must be considered in the context of the action as a whole and ‘must take into account the importance of the common issues in relation to the claims as a whole’ ... [I]n comparing possible alternatives with the proposed class proceeding, ‘it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court’) & *Hollick v. City of Toronto*, 2001 SCC 68, ¶¶ 29-30; [2001] 3 S.C.R. 158, 177-78 per McLachlin, C.J. (“The [Ontario *Class Proceedings*] Act ... requires only that a class action be the preferable procedure for ‘the resolution of the common issues’ ... , and not that a class action be the preferable procedure for the resolution of the class members’ claims. I would not place undue weight, however, on the fact that the Act uses the phrase ‘resolution of the common issues’ rather than ‘resolution of class members’ claims’. As one commentator writes, ‘The [American] class action [rule] requires that the class action be the superior method to resolve the ‘controversy.’ The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the ‘common issues’ (as opposed to the entire controversy). [This] distinctio[n] can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.’ ... I would endorse that approach. The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole”) (emphasis omitted).

³¹⁰ *Class Proceedings Act*, S.A. 2003, c. C-16.5, s. 5(1)(d) (“In order for a proceeding to be certified as a class proceeding ..., the Court must be satisfied ... a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues”) & s. 5(2) (“In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider

[270] In this case, a class proceeding is clearly not the preferable procedure for the fair and efficient resolution of the common issues – in essence, is Alberta responsible for the breach of the class members’ rights to have been taken before a justice of the peace within twenty-four hours of the class members’ arrest.

[271] The delay may be attributable to the conduct of a member of a law enforcement agency, a funding decision of a law enforcement agency, a decision of a justice of the peace to hear an urgent matter instead of a bail application or the conduct of a Crown prosecutor, defence counsel, or the arrestee.

[272] What little progress might be made towards determining Alberta’s liability from resolving the common issues on a class-wide basis pales in comparison to the demerits of invoking the class proceedings mechanism in this case.

[273] The fundamental difficulty is that, before a class member could obtain a remedy following resolution of the proposed common issues, he or she would have a long way to go to satisfy the court that liability is made out in the particular circumstances of his or her case.³¹¹ And this exercise

at least the following: (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members; (b) whether a significant number of the prospective class members 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”); *AIC Limited v. Fischer*, 2013 SCC 69, ¶¶ 48-49; [2013] 3 S.C.R. 949, 975-76 per Cromwell, J. (“The party seeking certification of a class action bears the burden of showing some basis in fact ... [i]n the context of the preferability requirement ... (1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members’ claims With regard to the second aspect ... the representative plaintiff will necessarily have to show some basis in fact for concluding that a class action would be preferable to other litigation options. ... Where the defendant relies on a specific non-litigation alternative, he or she has an evidentiary burden to raise it. ... [O]nce there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff”) & M. Good & W. Branch, *Class Actions in Canada* § 4:9 (2d ed. rel. 2024-2) (“Factors considered by courts in assessing preferability (beyond the mandatory statutory factors in those jurisdictions with such a provision) include: (1) the extent to which certification furthers the objectives underlying the Act: access to justice, judicial economy, and behavior modification; (2) the nature and importance of the proposed common issue(s); (3) the individual issues remaining after determination of the common issue(s); (4) the complexity and manageability of the proposed action; (5) alternative procedures for dealing with the claims asserted; and (6) the rights of the plaintiff(s) and defendant(s)”) & *V.L.M. v. Dominey Estate*, 2023 ABCA 261, ¶ 24; 486 D.L.R. 4th 115, 125 (“determining whether a class proceeding is ‘preferable’ commences with an identification of the potential common issues that could be resolved in the class action. Having identified the possible common issues, the test is whether a class proceeding is ‘preferable’, because it ‘presents a fair, efficient and manageable method of determining [those] common issues, and if such determination will advance the proceeding in accordance with the goals of achieving judicial economy, access to justice and behavior modification”).

³¹¹ *Hollick v. City of Toronto*, 2001 SCC 68, ¶ 15; [2001] 3 S.C.R. 158, 170 per McLachlin, C.J. (“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”).

would have to be repeated for each class member. A class proceeding in these circumstances would further neither access to justice nor judicial economy goals. The legal system does not expect that each and every claim will necessarily merit or warrants legal recourse. Whether to seek it is a decision for each potential litigant. That sometimes the costs of doing so will exceed the benefits for a litigant is not inherently unjust. It is noteworthy that the proposed class in this case does not include those arrestees whose charges move forward so that they can have recourse to criminal process remedies, such as credit for the time spent in detention or a stay of those charges.

[274] Even accepting that the proposed class proceeding would provide meaningful remedies, it is unclear what behavior modification benefits this would produce.³¹² Deterring government actors might be more difficult than deterring private entities,³¹³ particularly in the abstract sense to the extent that what is impugned is general policies or supervision rather than the conduct of particular individuals.³¹⁴

³¹² Id. at ¶ 15; [2001] 3 S.C.R. at 170 per McLachlin, C.J. (“class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behavior to take full account of the harm they are causing, or might cause, to the public”).

³¹³ *Ouellette v. Law Society of Alberta*, 2021 ABCA 99, ¶ 113; 26 Alta. L.R. 7th 66, 103-04 (chambers) per Wakeling, J.A. (“The Supreme Court has repeatedly cautioned courts against granting *Charter* damages. This makes sense. *Charter* damages will seldom be needed to advance a legitimate purpose that underlies the *Charter*. State actors, most of the time, will not be prompted to comply with the *Charter* by an award of *Charter* damages. Other remedies will be adequate to promote future *Charter* compliance”); Jones & Baxter, “The Class Action and Public Authority Liability: ‘Preferability’ Re-examined”, 57 U.N.B.L.J. 27, 28 (2007) (“we suggest that the deterrence effects on government in almost any tort action based on past misbehavior are so uncertain as to be virtually moot, and that at any rate the theoretical basis for deterrence applied to market participants has little or no application to most government activity”) & Sossin, “Class Actions against the Crown, or Administrative Law by Other Means”, 43 Can. Bus. L.J. 380, 382-83 (2006) (“class actions against the Crown that seek to attribute liability on the Crown for the policy preferences pursued by government may have distorting effects for public law. Both judicial and government responses are justified to address these challenges. Those responses, however, must be tempered by recognition of why litigants turn to class actions in the first place – accountability for public action. The goal of judicial and government responses to class actions against the Crown should not be to immunize government action from judicial scrutiny or to further ossify the categories of judicial review; rather, the goal should be a more coherent, rigorous and responsive set of avenues for holding government action to account. It is possible and desirable for administrative law to develop along lines that acknowledge and address the public and private motivations for litigation against the Crown”).

³¹⁴ But see *The Queen v. Jordan*, 2016 SCC 27, ¶¶ 107 & 112; [2016] 1 S.C.R. 631, 678 & 679-80 per Moldaver, Karakatsanis & Brown, JJ. (“the ceiling [beyond which trial delay becomes presumptively unreasonable] will not permit the parties or the courts to operate business as usual. The ceiling is designed to encourage conduct and the allocation of resources that promote timely trials. The jurisprudence from the past decade demonstrates that the current approach to s. 11(b) does not encourage good behavior. Finger pointing is more common than problem solving. This body of decisions makes it clear that the incentives inherent in the status quo fall short in the ways we have described. [T]he new framework will help facilitate a much-needed shift in culture. In creating incentives for both sides, it seeks to enhance accountability by fostering proactive, preventative problem solving. From the Crown's perspective, the framework clarifies the content of the Crown's ever-present constitutional obligation to bring the accused to trial

[275] The plaintiff has not sued the state actors – the police services – whose members have a responsibility under section 503(1) of the *Criminal Code* to take the arrestee before a justice of the peace within twenty-four hours of his arrest. It is difficult to understand how a class action that does not proceed against the key state actor will modify that state actor’s conduct.³¹⁵

[276] The failure of the plaintiff to sue the police service state actors removes much of the efficacy of a class action.

[277] Arrestees who have not been taken before a justice of the peace within twenty-four hours and are subsequently released and the charges are withdrawn or are acquitted of the offence have to consider the benefits of other courses of action – either threatening to sue the police service or actually suing the police service. It is not inconceivable that police services might conclude that it is in their best interest to make a modest payment to any arrestee who complains that he or she was not taken before a justice of the peace in a timely fashion, provided the arrestee is not responsible for the delay.³¹⁶

[278] In this scenario, there is no problem identifying the arrestees whose rights were breached. It is the person making the complaint.

VI. Conclusion

[279] I would allow the appeal³¹⁷ and set aside the order certifying the action as a class proceeding under the *Class Proceedings Act*.³¹⁸

within a reasonable time. Above the ceiling, the Crown will only be able to discharge its burden if it can show that it should not be held accountable for the circumstances which caused the ceiling to be breached because they were genuinely outside its control. Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary”).

³¹⁵ E.g., *Brazeau v. Canada*, 2020 ONCA 184; 445 D.L.R. 4th 363; *Francis v. Ontario*, 2021 ONCA 197; 463 D.L.R. 4th 99; *Leroux v. Ontario*, 2023 ONCA 314; 481 D.L.R. 4th 502; *Good v. Toronto Police Service Board*, 2016 ONCA 250; 396 D.L.R. 4th 411, leave to appeal ref’d, [2016] S.C.C.A. No. 255; *Rumley v. British Columbia*, 2001 SCC 69; [2001] 3 S.C.R. 184; *Cloud v. Canada*, 247 D.L.R. 4th 667 (Ont. CA. 2004), leave to appeal ref’d, [2005] S.C.C.A. No. 50 & *V.L.M. v. Dominey Estate*, 2023 ABCA 261; 486 D.L.R. 4th 115.

³¹⁶ See *The Queen v. Reilly*, 2019 ABCA 212, ¶ 32; [2019] 9 W.W.R. 60, 75 (“Damages should be the presumptive remedy where the citizen is detained for longer than 24 hours before being taken before a justice, and he or she is subsequently acquitted. This, unfortunately, would require a separate claim for those damages, but since the Crown admits the breach, it presumably would not insist on the citizen actually commencing a small claims action for those damages. It is in the Crown’s interest to facilitate those claims”).

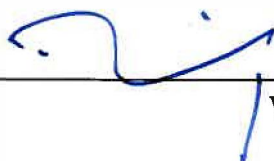
³¹⁷ S.A. 2003, c. C-16.5, s. 36(1)(a).

³¹⁸ *Id.* s. 2.

[280] I acknowledge the high quality of counsel's oral and written submissions.

Appeal heard on October 11, 2023

Memorandum filed at Calgary, Alberta
this 19th day of August, 2024



Wakeling J.A.

Appearances:

J.M. Dube
L. Brasil
F.H. Chiu
for the Appellant

J.K. Phillips, KC
M.L. Waddell
J. Schachter
O.K. Phillips
for the Respondents