CITATION: Richard v. The Attorney General of Canada, 2024 ONSC 3800
COURT FILE NO.: CV-22-00681184-00CP
DATE: 20240705

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: TYRON RICHARD and ALEXIS GARCIA PAEZ, Plaintiffs

AND:

THE ATTORNEY GENERAL OF CANADA, Defendant

BEFORE: Justice Glustein

COUNSEL: *Jonathan Foreman, Jean-Marc Metrailler, Subodh Bharati, and W. Cory Wanless,* for the plaintiffs

David Tyndale, Rishma Bhimji, Nimanthika Kaneira, and Jazmeen Fix, for the defendant

HEARD: June 4 and 5, 2024

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REASONS FOR DECISION

NATURE OF MOTION AND OVERVIEW

[1] Between May 15, 2016[1] and July 18, 2023, 8,360 persons[2] detained by the Canadian Border Services Agency ("CBSA") under Division 6 of Part I of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") were incarcerated[3] in 87 provincial and territorial prisons across Canada ("provincial prisons"),[4] pursuant to agreements between CBSA and every Canadian province and territory except Nunavut. Canada pays a daily rate for each day an immigration detainee is held in prison.

[2] The Immigration Detainees were not detained in one of three immigration holding centres ("IHCs") located in Surrey, British Columbia, Toronto, and Laval, Quebec.[5] Instead, the Immigration Detainees were incarcerated in provincial prisons and encountered the same conditions as criminal inmates, including co-mingling with violent offenders, use of restraints such as shackles and handcuffs, strip searches, and severe restrictions on contact and movement. These penal conditions were not imposed on immigration detainees at IHCs.

[3] *IRPA* must be applied in a manner that: (i) "ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada" (s. 3(3)(d)) and (ii) "complies with international human rights instruments to which Canada is signatory" (s. 3(3)(f)).

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[1] (reflecting the six-year limitation period applicable to proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province under s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50)

[2] The proposed class period is from May 15, 2016 to the date of certification (the "Class Period"). Consequently, the class size will be larger than 8,360 persons since the practice of incarcerating immigration detainees in provincial prisons has continued since July 18, 2023 and will continue until the expiry of all agreements between CBSA and the provincial and territorial agreements (as set out in more detail at para. 65 below).

[3] The word "incarcerated" is defined as "confined in a jail or prison": *Merriam-Webster Dictionary*, *sub verbo* "incarcerated," accessed June 12, 2024 <https://www.merriam-webster.com/dictionary/incarcerated>. Consequently, I generally use this term throughout these reasons with respect to the detention of immigration detainees in provincial prisons.

[4] I refer to the immigration detainees incarcerated in provincial prisons during the Class Period as the "Immigration Detainees."

[5] The three IHCs have a combined capacity of 406 immigration detainees.

[4] The representative plaintiffs Tyron Richard ("Richard") and Alexis Garcia Paez ("Garcia Paez") bring the present motion to certify a class action under s. 5 of the *Class Proceedings Act 1992,* S.O. 1992, c. 6 (the "*CPA*"). The proposed class consists of the Immigration Detainees.

[5] The defendant, the Attorney General of Canada ("Canada"), opposes the motion.

[6] The plaintiffs do not challenge the detention regime under Division 6 of Part I of *IRPA*. That detention regime has been held to be constitutional in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 and in *Brown v Canada (Citizenship and Immigration)*, 2020 FCA 130, [2021] 1 F.C.R. 53, leave to appeal dismissed, [2020] S.C.C.A. No. 385.

[7] Rather, the plaintiffs challenge the practice of CBSA to detain Immigration Detainees in provincial prisons.

[8] The plaintiffs rely on the evidence of CBSA that immigration detention is an administrative detention and must not be punitive in nature. The plaintiffs submit that the incarceration of any Immigration Detainee in a provincial prison constitutes a punitive and non-administrative detention. The plaintiffs rely on *Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3, in which the court held, at para. 76, that "[i]mprisonment is always a true penal consequence."

[9] The plaintiffs submit that the impugned practice is (i) contrary to ss. 7, 9, 12, and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") and (ii) a breach of a duty of care owed by Canada to the Immigration Detainees.

[10] The plaintiffs submit that *any* detention of *any* Immigration Detainee in a provincial prison is unlawful under s. 3(3) of *IRPA*.

[11] The plaintiffs also seek to certify a subclass of additional claims on behalf of Immigration Detainees with mental health conditions. There is evidence of two class members in support of the claims of the subclass.[6]

[12] The plaintiffs seek damages and other declaratory relief restraining Canada's alleged unlawful behaviour.

[13] The merits of the issues of the constitutionality of the CBSA practice or the existence of a duty of care are not before the court on this certification motion. The only issue is whether a

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[6] One affidavit was sworn directly by LeSeya Lee Foreshaw ("Foreshaw"), a member of the proposed subclass. The other affidavit was filed by Norris Ormston ("Ormston"), an immigration lawyer, in connection with the conditions encountered by another member of the proposed subclass, Majok Thon Mawut ("Mawut").

class proceeding is the appropriate process to address the issues raised by the Immigration Detainees in this proposed class action.

[14] For the reasons that follow, I reject the objections raised by Canada (which I set out at para. 15 below) and certify the proposed class action for the proposed class and subclass. In brief, I find that the plaintiffs have satisfied the requirements under s. 5(1) of the *CPA*:

(i) The claims disclose a cause of action under the *Charter* and in negligence. The pleadings set out material facts which could support (a) a claim under ss. 7, 9, 12, and 15 of the *Charter* and (b) a claim in negligence.

(ii) The class is identifiable. There is a rational connection between the Immigration Detainees and the proposed common issues (PCIs).

(iii) The PCIs can be decided in common. The core issues address the conduct of Canada in detaining Immigration Detainees in provincial prisons during the Class Period. There is some basis in fact for the commonality of PCIs 1 to 3 for breach of the *Charter* and PCIs 4 to 7 for negligence arising from the CBSA practice. Further, there is some basis in fact for the commonality of the claims for damages (a) under s. 24 of the *Charter* (PCI 8), (b) for breach of the duty of care (PCI 9), and (c) for exemplary or punitive damages (PCI 10). Finally, there is some basis in fact for the commonality of a claim for aggregate damages (PCI 11) since there is "a reasonable likelihood that the preconditions in section 24(1) of the *CPA* would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues" (as set out in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 44).

(iv) A class action is the preferable procedure. The requirement for "predominance" of common issues under s. 5(1.1) of the *CPA*, when considered under the test in *Banman v. Ontario*, 2023 ONSC 6187 through the factors of access to justice, judicial efficiency, and behavioural modification, is met on the facts of the present case. Further, I find that judicial review by individual Immigration Detainees is not an appropriate method to address the issues raised in the proposed class action.

(iv) Richard and Garcia Paez are adequate representative plaintiffs. There is no requirement that the representative plaintiffs reside outside Ontario as a basis to represent the Class. The litigation plan is workable and any privacy issues which may arise on notification can be addressed by the parties and the court when (or if) such issues arise.

OBJECTIONS RAISED BY CANADA

[15] Canada raises 15 objections to the proposed certification:

Objections under s. 5(1)(a) of the CPA

(i) The pleadings do not disclose a cause of action under s. 7 of the *Charter*.

(ii) The pleadings do not disclose a cause of action under s. 9 of the *Charter*.

(iii) The pleadings do not disclose a cause of action under s. 12 of the *Charter*.

(iv) The pleadings do not disclose a cause of action under s. 15 of the *Charter* for discrimination based on citizenship.

(v) The pleadings do not disclose a cause of action under s. 15 of the *Charter* for discrimination based on mental disability.

(vi) The pleadings do not disclose a cause of action for the claim in negligence.

Objections under s. 5(1)(b) of the CPA

(vii) The proposed class of all Immigration Detainees is "not rationally connected to the common issues" since "conditions vary between and within provinces."

Objections under s. 5(1)(c) of the CPA

(viii) The liability issues raised in PCIs 1 to 7 cannot be determined in common since they will break down into individual trials for each class member.

(ix) In the alternative, there is no basis for the commonality of claims brought on behalf of class members in Quebec.

(x) The remedy of aggregate damages (PCI 11) cannot be determined in common.

Objections under s. 5(1)(d) of the CPA

(xi) The proposed class action is not the preferable procedure since the process would be unmanageable.

(xii) The proposed class action is not the preferable procedure since the remedy of judicial review is available.

Objections under s. 5(1)(e) of the CPA

(xiii) The proposed plaintiffs are not adequate representative plaintiffs because they have not presented a workable litigation plan to address the individual issues.

(xiv) The proposed plaintiffs are not adequate representative plaintiffs because the litigation plan raises privacy concerns which may arise during the notification stage.

(xv) The proposed plaintiffs are not adequate representative plaintiffs because they have not been detained outside Ontario.

ISSUES NOT IN DISPUTE BETWEEN THE PARTIES

[16] At the hearing, the plaintiffs and Canada agreed that the test for an identifiable subclass under s. 5(1)(b) of the *CPA* has been met, since the subclass members are limited to those identified on two forms used by CBSA as having a mental health condition. Those two forms are the National Risk Assessment for Detention ("NRAD") form and the "medical detainee form." On that basis, counsel agreed that the subclass could be identified.[7]

[17] Under s. 5(1)(c) of the *CPA*, Canada agreed that if (i) the court found that the issues regarding *Charter* breaches can be decided in common and (ii) the plaintiffs are able to establish liability on a class-wide basis, then the following PCIs could be decided in common:

(i) Are damages pursuant to s. 24(1) of the *Charter* an appropriate and just remedy for any or all of the violations of the *Charter* not saved by s. 1? (PCI 8)

(ii) Is Canada liable to pay damages to the Class for breach of its duty of care? (PCI 9)

(iii) Was Canada's conduct such that it ought to pay exemplary or punitive damages to the Class? (PCI 10)

FACTS

Immigration detention regime in law

General principles and responsibility of Ministers

[18] As I discuss at para. 3 above, decisions under *IRPA* must be consistent with the *Charter* and comply with international human rights instruments to which Canada is a signatory (at ss. 3(3)(d) and (f)).

[19] Under s. 4(1) of *IRPA*, the Minister of Citizenship and Immigration is responsible for the overall administration of the Act. However, under s. 4(2)(b) of *IRPA*, the Minister of Public

[7] Canada has detailed records of all Immigration Detainees who were detained in provincial prisons during the Class Period, including any indication of a mental health condition, and the dates and length of each detention.

Safety and Emergency Preparedness is responsible for the enforcement of *IRPA*, including arrest, detention, and removal. The Minister of Public Safety and Emergency Preparedness delegates the enforcement function to CBSA.

Statutes, regulations, policies and guidelines governing immigration detention

[20] The statutory scheme for immigration detention is set out in *IRPA* and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*" or "*Regulations*").

[21] Part 1, Division 6 of *IRPA* provides the statutory scheme for detention and release.

[22] Sections 55(1) and (2) of *IRPA* prescribe three main grounds for arrest and detention of a non-citizen[8] by a CBSA officer: (i) to verify identity, (ii) because the detainee is considered a danger to the public, and (iii) because the detainee is considered unlikely to appear at future immigration proceedings.[9]

[23] Under s. 55(4) of *IRPA*, CBSA must notify the Immigration Division ("ID") of the Immigration and Refugee Board without delay after a permanent resident or foreign national is taken into immigration detention. The ID must review the reasons for detention at a detention hearing held within 48 hours of arrest (s. 57(1) of *IRPA*).

[24] Part 14 of the *IRPR* (at ss. 244-50) sets out the factors that must be considered by the CBSA and the ID when assessing whether a non-citizen should be detained and the factors that must be considered by the ID before deciding whether a non-citizen, once detained, should be released.

[25] CBSA has developed national policy manuals to guide it in its national enforcement mandate. Enforcement Manual 20: Detention ("ENF-20") is a national operational manual that provides direction to CBSA officers on how to manage immigration detention, including location of detention.

[26] ENF-20 sets out the guiding principles for CBSA treatment of immigration detainees, including, at s. 6.1, that:

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[8] A "non-citizen" includes a "permanent resident" or "foreign national" as defined under s. 2(1) of *IRPA*. A permanent resident is a "person who has acquired permanent resident status and has not subsequently lost that status under section 46" and a foreign national is "a person who is not a Canadian citizen or a permanent resident, and includes a stateless person."

[9] Under s. 55(3) of *IRPA*, a CBSA officer may also arrest and detain a non-citizen upon entry into Canada on the additional ground of suspicion that they are inadmissible to Canada by reason of security, violating human or international rights, sanctions, serious criminality, criminality, transborder criminality or organized criminality.

(i) "[I]mmigration detention is an administrative detention and must not be punitive in nature."

(ii) "[P]ersons detained under IRPA are treated with dignity and respect at all times."

(iii) "[P]ersons are detained in an environment that is safe and secure."

(iv) "[M]onitoring of the CBSA compliance with these standards will be conducted regularly by an external agency."

[27] CBSA has also developed National Immigration Detention Standards, which "describe the treatment of detainees in immigration holding centers and non-CBSA detention facilities" and "aim to ensure national consistency in the administration of the detention program."

International law

[28] As noted above, s. 3(3)(f) of *IRPA* requires CBSA to comply with international human rights instruments to which Canada is a signatory.

[29] CBSA has entered into an agreement with the Canadian Red Cross (the "Red Cross") through which the Red Cross monitors the conditions of immigration detention throughout Canada, including compliance with international law requirements.

The administrative nature of immigration detention

[30] As noted above, ENF-20 states that "immigration detention is an administrative detention and must not be punitive in nature."

[31] The administrative detention under *IRPA* is intended to ensure availability for immigration proceedings. It is not designed to be a penal detention under criminal law. Mr. John Helsdon ("Helsdon"), Manager of CBSA's Detentions Unit, stated in his cross-examination:

> I think you have to differentiate between the criminal justice system, where someone is serving a sentence for a crime they have committed versus administrative detention under *IRPA*, where it is meant to help ensure the individual is available for removal or admissibility proceedings, et cetera.

[32] In a report from the UN High Commissioner for Refugees entitled *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, the authors state at para. 48(iii):

> Detention of asylum-seekers for immigration-related reasons should **not be punitive** in nature. The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. … Criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate. [Emphasis in original text.]

Detention review

[33] Once an individual is arrested and detained by CBSA, the ID must hold the first detention hearing within 48 hours. If required, the ID must hold the second detention hearing within 7 days of the initial hearing and then at least once during each 30-day period following each previous review (s. 57 of *IRPA*). At those hearings, the ID must consider whether one of the three grounds for detention exist (identity, danger to the public, or unlikely to appear), using factors enumerated in the *IRPR* (s. 58(1) of *IRPA*, see also ss. 246-47 of *IRPR*).

[34] The Minister bears the burden of satisfying the ID that detention is warranted. An immigration detainee is legally entitled to release if the Minister cannot satisfy the evidentiary burden for continued detention.

[35] At each detention review, the immigration detainee can provide information (which does not need to meet strict evidentiary requirements), make submissions, and make a proposal for their release from detention. An immigration detainee is legally entitled to release if the detainee can propose an acceptable plan for release on conditions that mitigate any risk that would be caused.

[36] The only grounds for detention are set out in s. 55 of *IRPA*.

[37] If any ground for detention exist, the ID must consider whether an alternative to detention exists (s. 248 *IRPR*). Available alternatives to detention were expanded in June 2018 and include community case management and supervision, voice reporting via a cellular telephone and electronic monitoring.

[38] The ID can only review the decision to detain a non-citizen. The ID does not hear challenges to the CBSA's decision on the location of detention.

[39] Prior to 2017, if detention continued beyond 90 days, detention was reviewed monthly for Greater Toronto Area cases by the Long-Term Detention Committee. Since January 2017, the threshold for such reviews by the Committee is detention for 60 days or more. The Committee considers whether continued detention is the only option, whether release with alternatives to detention is appropriate, and whether all work to facilitate removal is continuing.

[40] However, the Long-Term Detention Committee does not consider place of detention or transfer from a prison to an IHC. Its consideration is limited to (i) whether detention should continue, (ii) whether alternatives to detention are appropriate, and (iii) whether deportation remains a possibility. The Long-Term Detention Committee's purpose is solely to review whether detention should continue given its length and/or lack of nexus to removal. It is not tasked with considering the legality of detention as it relates to placement in a prison.

[41] If detention exceeds 99 days, a similar review is conducted by a Regional Review Committee with monthly reporting to senior CBSA executives for awareness.

The immigration detention regime in practice

[42] The evidence regarding the immigration detention regime in practice was obtained principally from the plaintiff's expert, Dr. Efrat Arbel, an Associate Professor at the University of British Columbia who delivered a report on the practice of holding immigration detainees in provincial prisons.

[43] Canada delivered evidence from three witnesses with various roles at CBSA: Helsdon, Steve Babin ("Babin") of CBSA's Statistics and Performance Metrics Unit, and Richard Dvorski ("Dvorski"), a manager of CBSA's Detention Performance Management Unit.

[44] I now review the evidence relating to location of detention.

CBSA decision on location of detention

[45] The ID decides only whether a non-citizen should be detained.

[46] *IRPA* and *IRPR* are silent on who is responsible for determining the place and conditions of detention. In practice, CBSA has assumed this jurisdiction and has sole authority to determine placement for all immigration detainees across the country.

[47] *IRPA* is also silent on the maximum time limit for immigration detention. Consequently, immigration detention is indeterminate.

[48] As a general practice, CBSA detains immigration detainees either in IHCs or provincial prisons, pursuant to formal and informal agreements with the provinces and territories. In some regions, CBSA uses police stations for a short period of time before transferring immigration detainees to IHCs or prisons.

[49] Canada relies significantly on provincial prisons for immigration detention. Dvorski's evidence was that two-thirds of the total number of days spent in immigration detention in Canada are in provincial prisons.

[50] CBSA considers IHCs to be the default detention facility for immigration detention. However, it runs only three IHCs with a combined total capacity of 406 persons, one each in the Greater Toronto Region (Toronto) (capacity of 183), the Quebec Region (Laval) (capacity of 153), and the Pacific Region (Surrey) (capacity of 70).

[51] Each IHC has a limited regional catchment area. In regions without an IHC, all immigration detainees are automatically detained in provincial prisons.[10]

[52] A triage process, in place since September 2021, requires all continued detention cases to be reviewed by a CBSA officer working at the nearest IHC in order to maximize the use of IHCs and minimize the use of provincial prisons.

[53] A detainee transfer policy, implemented in March 2020, clarified for officers that detainees can be transferred from provincial prisons to IHCs even if the region in which they are detained does not have an IHC.

[54] In regions with an IHC, CBSA officers decide whether an immigration detainee should be held in an IHC or prison based on the availability of beds in the IHC, and the completion of the two-page NRAD form, which I discuss below.

[55] During the Class Period, CBSA placed the Immigration Detainees in 87 different prisons in every Canadian province and territory except Nunavut. Canada pays a daily rate for each day an immigration detainee is held in prison.

[56] Canada has maintained comprehensive statistics regarding the Immigration Detainees. The class size during the period from May 16, 2016, to July 18, 2023 is 8,360 and the identities of each Immigration Detainee, the dates of each incarceration, and the length of each incarceration are known by Canada through its extensive records.

Determining the location of detention by the NRAD form

[57] The place of detention for all immigration detainees is determined or reviewed by CBSA through the NRAD form when an initial order for detention is made.

[58] The NRAD form documents information regarding a detainee's risk assessment, which considers the risk that the immigration detainee will not appear for an immigration-related process (e.g., removal from Canada) and whether any risk the detainee may pose to themselves or others can be sufficiently mitigated. Other factors (including pregnancy, restricted mobility or suspected or known mental illness) are also considered.

[59] With respect to the "mental health" factor in the NRAD form, ENF-20 states that "[i]nstability of the person associated with mental imbalance at the time of the interview may be

[10] This evidence is from Helsdon's affidavit sworn September 20, 2017, in *Ali v Canada (Attorney General)*, 2017 ONSC 2660.

an important indicator in the assessment of the danger, and may point to future violent behaviour."

[60] The various factors are assigned points. A points grid guides the decision on the location of detention. Completed NRAD forms must be placed in an immigration detainee's file. However, it was only as of February 2018 that CBSA officers were instructed to provide a copy of the completed NRAD form to the immigration detainee and the detention facility.

Review of the location of detention

[61] After the initial decision is made, the location of detention is reviewed by CBSA through the NRAD form at least once every 60 days thereafter should detention continue (or sooner if circumstances change).

Challenging the decision on location of detention

[62] As I discuss at para. 38 above, a challenge to the ID decision is only for detention generally. Consequently, a judicial review of the ID's decision has no bearing on the placement decision of CBSA.

[63] Immigration detainees can only challenge the CBSA decision on location of detention by (i) seeking leave to judicially review the NRAD-based decision at the Federal Court: ss. 18(1), 18.1(1), and 18.1(3) of the *Federal Courts Act*, RSC 1985, c. F-7 or (ii) bringing an application for *habeas corpus*, which would be an application to the Federal Court, not to the ID.

Provincial and territorial agreements for the housing of Immigration Detainees and the concerns raised by the provinces and territories upon notice of termination of the agreements

[64] During the Class Period, CBSA entered written agreements with a number of provinces and territories, and unwritten agreements with other provinces, to house immigration detainees in provincial prisons across Canada except Nunavut for a *per diem* fee. Those agreements have all either been terminated, or will terminate shortly, upon the request of the provinces and territories.

[65] Starting with British Columbia in July 2022, provinces began announcing that they were ending their agreements with CBSA to hold immigration detainees in provincial prisons. As of February 2, 2024, all provinces with formal agreements had either terminated or given notice that they were terminating their agreements with CBSA. All agreements with provinces will end by September 18, 2024.

[66] Many provinces were vocal about their reasons for terminating the agreement.

[67] On July 21, 2022, the Minister of Public Safety and the Solicitor General for British Columbia stated that a review by B.C. Corrections of the arrangement "brought to light that

aspects of the arrangement do not align with our government's commitment to upholding human-rights standards or our dedication to pursuing social justice and equity for everyone."

[68] In its submission to the government, the B.C. Human Rights Commissioner maintained that the CBSA agreement was contrary to the B.C. *Human Rights Code*, R.S.B.C. 1996, c. 210, the *Charter*, article 14 of the *UN Convention on the Rights of Persons with Disabilities* and article 9 of the *International Covenant on Civil and Political Rights*.

[69] Similarly, the Office of Manitoba's Justice Minister stated that migrants should not be "languishing" in jail when "they have not been convicted of a crime."

[70] Alberta's press release announcing its plan not to renew its agreement stated that the change came "in response to concerns about using correctional facilities to hold people who haven't been charged with a criminal offence, nor convicted of one."

[71] The Alberta Justice Minister said: "People who come to Canada for a fresh start and a new life deserve a better welcome than a jail cell while paperwork is sorted out."

Conditions for Immigration Detainees in provincial prisons

[72] The evidence as to the commonality of conditions for Immigration Detainees in provincial prisons was provided by the plaintiffs' expert, Dr. Arbel.

[73] On behalf of Canada, Dvorski prepared a chart (the "Conditions Chart") which set out the commonality of conditions for Immigration Detainees in provincial prisons across Canada.

[74] It is not contested that Immigration Detainees held in provincial prisons are subject to the same rules, conditions and treatment as the general criminal population. Helsdon acknowledged on cross-examination that the Immigration Detainees "are held in the same conditions" as criminal detainees.

[75] Dr. Arbel relies on the Red Cross monitoring report for the period between September 2017 to March 2018. As noted above, the Red Cross has been tasked by CBSA to report on conditions in provincial prisons under its Immigration Detention Monitoring Program. The Red Cross stated, at p. 7:

> When housed in correctional facilities and remand centers, immigration detainees are receiving the same treatment and follow the same rules as remanded and sentenced individuals despite their detention being administrative in nature. Policies which were designed to manage behavior of persons in the criminal justice system are being applied to persons in immigration detention, such as placement in administrative and disciplinary segregation, the use of restraints, and lockdowns.

[76] Because they are incarcerated in provincial prisons, Dr. Arbel opines that Immigration Detainees are "subject to some of the most onerous and restrictive forms of incarceration in the country."

[77] In their joint June 2021 report entitled *"I Didn't Feel Like a Human in There": Immigration Detention in Canada and its Impact on Mental Health* (the "*Joint Report*"), Human Rights Watch and Amnesty International summarized the conditions of Immigration Detainees in provincial prisons:

> Despite its reputation as a refugee-welcoming and multicultural country, Canada incarcerates thousands of people on immigration-related grounds every year, including people who are fleeing persecution, those seeking employment and a better life, and people who have lived in Canada since childhood. Immigration detainees are held for non-criminal purposes but endure some of the most restrictive conditions of confinement in the country, including maximum security jails and solitary confinement, with no set release date.

[78] The common experiences are listed in Dr. Arbel's expert report, and confirmed in the Conditions Chart. Those common conditions are consistent with the experience of Richard and Garcia Paez, as well as with the two proposed members of the subclass, Foreshaw and Muwat.

[79] The common prison conditions include:

(i) co-mingling with inmates imprisoned under criminal law,

(ii) use of restraints, such as handcuffs and leg shackles,

(iii) strip searches,

(iv) application of prison rules and prison punishments,

(v) exposure to physical violence and threats of physical violence,

(vi) restrictions on communication and interaction with the outside world, including "no touch" visits with friends and family, and

(vii) mandated prison clothing (with the exception of Quebec).

[80] I now review the evidence on each of these common conditions below.

<u>Co-mingling</u>

[81] "Co-mingling" refers to the practice of detaining Immigration Detainees together with criminal populations. Immigration Detainees are incarcerated in prisons and are subject to co-mingling with criminal inmates.

[82] Co-mingling is prohibited by various international human rights instruments. The Red Cross, in its monitoring reports, stated that co-mingling of immigration detainees with criminal populations is "a harmful and disproportionate practice" which "remains a practice across the country."

Use of restraints

[83] "Restraints" used in provincial prisons on Immigration Detainees include handcuffs and leg shackles. Canada's evidence, from the Conditions Chart, is that handcuffs and leg shackles are used in provincial prisons for disciplinary purposes and during out-of-institution transports, including to immigration detention hearings, if conducted off site.

Strip searches

[84] A "strip search" is the practice of searching a detainee's naked body for contraband. The individual is typically required to stand naked with their arms and legs apart, and when instructed, bend over, squat, cough, or manipulate their genitalia. Strip searches are regularly conducted in provincial prisons because of the nature of these penal institutions. The Red Cross reports that Immigration Detainees in provincial prisons are routinely subject to strip searches.

[85] Strip searches are one of the most invasive acts the state can do to a person. In *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, the court held that strip searches are "inherently humiliating and degrading for detainees regardless of the manner in which they are carried out" and involve a "significant and very direct interference with personal privacy": at paras. 89-90.

Prison rules and prison punishment

[86] In its monitoring report for the period between September 2017 to March 2018, the Red Cross noted that when housed in correctional facilities and remand centers, Immigration Detainees are subjected to the same rules as criminal detainees and are subjected to the same punishment for breach of those rules despite their detention being administrative in nature.

[87] At p. 7 of its report, the Red Cross stated that: "[p]olicies which were designed to manage behavior of persons in the criminal justice system are being applied to persons in immigration detention, such as placement in administrative and disciplinary segregation, the use of restraints, and lockdowns."

Exposure to violence and threats of violence

[88] In its monitoring program report for April 2019 to March 2020, at p. 8, the Red Cross states that Immigration Detainees are "witness or subject to threats and physical violence and feeling unsafe and frustrated for being held in a criminal facility when they were not currently held under the Criminal Code."

Restrictions on contact and communications

[89] Immigration Detainees are limited to "no-touch" visits with family and friends. "No-touch" visits are conducted in booths through glass by telephone, generally for a very restricted amount of time. No-touch visits prevent Immigration Detainees from engaging in any physical connection with loved ones.

[90] Immigration Detainees are similarly restricted in their communication with the outside world. Immigration Detainees in provincial prisons are subject to the general prison rules regarding outside communication, which include institutional and practical restrictions on access to telephones.

[91] The Red Cross, in its report for the monitoring period between April 2019 to March 2020, at p. 12, identified many restrictions and other barriers, including restrictions on the types of calls permitted (e.g. only collect calls to landlines), costs of calls, automatic call cut off after 15 to 20 minutes, limited time out of cell and dynamics inherent to criminal detention which hamper access to telephones.

Prison clothing

[92] Prisons in every region except Quebec require Immigration Detainees to wear the same prison-issued clothing, including shoes and underwear, and often consisting of an orange jumpsuit.

Conditions at IHCs

[93] The evidence is uncontested that the above conditions encountered by Immigration Detainees at provincial prisons do not exist at IHCs.

[94] Unlike prisons, which are designed to hold criminal inmates, IHCs are specifically designed for the administrative detention of individuals held pursuant to immigration law. As a result, conditions in IHCs are significantly less harsh and less restrictive than prisons.

[95] Dr. Arbel stated that "the qualitative experience of being detained in an IHC is different because of the simple fact that IHCs are not correctional facilities, and are built with the needs of immigration detainees in mind."

[96] The IHCs provide separate living areas for men, women and families. Each have a common room, kitchen, exercise room, prayer room, library and outdoor recreational areas. They also have medical service facilities including mental health support.

[97] While immigration detainees in IHCs are subjected to various restrictions on their liberty including most significantly that they are not allowed to leave, they are afforded significant autonomy and freedoms which are not permitted in jail. They wear their own clothes and are substantially less restricted in movement and liberty. Immigration detainees in IHCs are not

subjected to strip searches. They reside in rooms, not cells, can interact with their loved ones and move freely to other parts of the IHC. They have daily access to outside space. Toilets are located in bathrooms that allow for privacy. Immigration detainees in IHCs have better access to recreation.

[98] Immigration detainees at IHCs are able to interact freely with CBSA personnel, and with other detainees, and have much greater access to information and the outside world, including regular access to telephones and in-person visits. The Red Cross reported that "telephones were easily accessible." Unlike Immigration Detainees held in prisons, detainees in IHCs "reported feeling safe", as noted in the Red Cross April 2020 to March 2021 monitoring report at p. 14.

Mental health and detention in provincial prisons

[99] As part of the NRAD form, CBSA officers consider mental health as a factor to determine location of detention.

[100] ENF-20 states that "instability… associated with mental imbalance" is linked with "danger" and the possibility of "future violent behavior."

[101] There is evidence from Dr. Arbel that detainees with mental health concerns are more likely to be detained in prisons.

[102] CBSA's Operational Bulletin: PRG-2014-52 describes individuals at immediate risk of suicide as "High Risk" and recommends their detention in a provincial prison.

[103] Similarly, in the *Joint Report*, Human Rights Watch and Amnesty International noted, at p. 35, that CBSA officers stated that "individuals with mental health conditions may be detained in a provincial jail in order to 'effectively manage them in light of their behavior' or to facilitate 'access to specialized care.'"

[104] Dr. Arbel concluded:

> CBSA's mental health assessment process does not rely on clinical evaluations of mental health, nor is it guided by a human-rights based understandings [*sic*] of disability. The process is guided instead by observational assessments that seem to be rooted in stereotypes that associate psychological disabilities and mental health concerns with risk and danger.

[105] The Red Cross, Human Rights Watch and Amnesty International have all reported that (i) provincial prisons do not offer adequate mental health support to Immigration Detainees, who are often specifically excluded from mental health supports available to inmates and (ii) comprehensive psychiatric assessments, access to mental health beds or access to specialized treatment facilities, are unavailable to Immigration Detainees even though available to inmates.

[106] At one of the detention hearings regarding Mawut, Member McKeown accepted testimony from a psychiatrist and three employees at the provincial prison, as well as disclosure from CBSA that (i) there was a systemic lack of mental health treatment options for Immigration Detainees in provincial prisons and (ii) Immigration Detainees were barred from provincial institutional treatment centres and mental health wings that were reserved for criminal detainees. In his reasons dated August 19, 2022, Member McKeown found, at paras. 131-32:

> Another ironic piece of evidence here is that, although [the Immigration Detainee] is being punished alongside criminal offenders, he is not receiving the same level of support that criminally sentenced offenders receive. Because he is not sentenced, [the Immigration Detainee] does not have access to the vast resources available to the social workers at [Central East Correctional Centre ("CECC")]. He does not have access to a provincial treatment centre, which the evidence has shown would be far more suitable for someone with his needs. Because he is not sentenced, he does not have access to an LSI assessment, and therefore does not have access to the community supports available to the social workers who can transition someone back into the community.
>
> To put this in another perspective: criminally sentenced offenders can be rehabilitated, transitioned, and reintegrated to the community, but immigration detainees cannot use CECC resources.

Experiences of the proposed representative plaintiffs and subclass members

[107] As I discuss above, the present case does not seek to challenge the immigration detention system. Rather, the issue before the court on a common issues trial is whether the incarceration of *any* Immigration Detainee, for *any* reason, is contrary to the *Charter* and constitutes a breach of Canada's alleged duty of care.

[108] Much of the evidence on this motion led by the parties about the proposed representative plaintiffs and the subclass members related to their personal background or reasons for detention. Each party sought to make the individual appear more (or less) sympathetic based on either personal history or the purported basis for detention.

[109] However, given that the only issue is the constitutional validity (and duty of care) of the practice of incarcerating Immigration Detainees in provincial prisons, I only set out the evidence relevant to the detention of the individuals and the conditions they encountered in provincial prisons (including the mental health conditions encountered by the proposed subclass members).

[110] I review the relevant evidence of each representative plaintiff and subclass member below.

<u>Richard</u>

[111] CBSA arrested Richard on January 7, 2015.

[112] Richard was detained at the Maplehurst Correctional Complex (Maplehurst) for two weeks. On January 21, 2015, he was transferred to CECC. He was later transferred to the Toronto East Detention Centre and detained there for about two weeks. Richard was released from immigration detention on July 23, 2016.

[113] While detained at provincial prison, Richard was subjected to the same prison policies and rules as all other inmates. He described his experience as follows:

> Being detained at Maplehurst and CECC was extremely damaging to my mental state. I felt so shattered and broken, and often asked myself 'why am I still here on this earth?' I would describe my life in prison as a living hell, where I cried almost every day. I found it especially hard to deal with the fact that I was in a maximum-security prison when I did not commit any crime.

[114] Richard suffered an almost total loss of privacy and personal freedom. Richard was housed in a small two-bunk cell, which he had to share with another inmate. The cell was tiny – only as long as the bunks and less than a few metres wide. There was no privacy. The toilet was open and located next to the cell door.

[115] Richard was subjected to dozens of strip searches while detained in prison. His evidence was:

> During strip searches, I was required to strip off my clothes, turn around, bend over, spread my buttocks, and undergo an inspection of my anus by a guard with a flashlight, and to undergo a visual inspection under and next to my genitals. Often there would be general searches of the unit, which would consist of guards going cell by cell, handcuffing us to the door and conducting a search of our cells, and then conducting a strip search.

[116] When Richard was first incarcerated, all his clothes and possessions were taken away. At both prisons he was required to wear an orange prison jumpsuit, including at detention review hearings. He was not allowed any personal possessions other than small items purchased from the prison canteen. He was transferred between prisons with his hands and feet shackled together.

[117] Visitation and communication with friends and family was extremely difficult. Visits were no-touch, and were conducted in booths through glass, using a telephone, and limited to only 15-20 minutes. His evidence was:

> I received only a handful of visits in total from my mom, my sisters and my then-common-law partner. I did not see my children at all the entire time I was detained.

[118] Phone calls were equally difficult. There were only three phones on the unit. Richard's evidence was:

> The only calls that we could make were collect calls, and the toll was very high for a local call – about a dollar a minute. It was not possible to receive calls. It was hard to keep in touch with my family. I was able to speak to my daughters on the phone occasionally, but it was difficult because of their young age.

[119] Richard summarized the conditions he experienced as follows:

> When I was at Maplehurst and CECC, I was detained with other Immigration Detainees who experienced the same conditions and treatment as me. In particular, we all experienced:
>
> (a) co-mingling with the general inmate population;
>
> (b) the application of general prison policy and prison rules;
>
> (c) detention in small cells;
>
> (d) having no access to personal belongings;
>
> (e) being required to wear prison clothing, including orange jumpsuits, prison shoes, socks and underwear;
>
> (f) invasive and humiliating strip searches;
>
> (g) collective punishment, including lockdowns, during which we were confined to our cell;
>
> (h) denial of, or restricted access to, telephones to communicate with loved ones or counsel;
>
> (i) restricted visits that were no-touch and conducted through glass using a telephone;
>
> (j) a lack of privacy;
>
> (k) uncomfortable and insufficient bedding;
>
> (l) cold temperatures, during which we were denied warm clothing and blankets;
>
> (m) inadequate access to yard time and fresh air;
>
> (n) poor quality and inadequate food;
>
> (o) inadequate access to health and dental care;

(p) frequent use of restraints, including handcuffs and shackles;

(q) being required to attend detention reviews in orange prison attire flanked by prison guards; and

(r) lack of access to mental health support.

[120] Richard was released from immigration detention in July 2016. In 2017, Richard regained his permanent resident status, and is currently applying to become a Canadian citizen.

Garcia Paez

[121] Garcia Paez was detained in a provincial prison solely on immigration grounds for 13 days from October 8 to 21, 2021.

[122] While detained in prison as an Immigration Detainee, Garcia Paez described his experience as being "stripped of my humanity":

> Wearing prison clothing, being confined to a cage, and having restraints used on me when I moved around made me feel enormously isolated and as though I had been stripped of my humanity.

[123] Garcia Paez described his experience in provincial prison as "very traumatizing", with a "violent" atmosphere and "drug use and physical incidents involving other inmates, including assaults."

[124] He was subject to strip searches which were "traumatizing and dehumanizing" – he could not "understand why I was being kept with those being held for criminal reasons."

[125] On the day before he was released from prison he returned to his cell to find his cellmate "badly beaten" and "covered in bruises." The cellmate advised Garcia Paez that he had been "surrounded and then kicked and punched by about 8 guys". The cellmate asked Garcia Paez for his help getting assistance from the guards.

[126] Garcia Paez also set out a list of conditions that he experienced as an Immigration Detainee in a provincial prison, similar to the list provided by Richard discussed at para. 119 above.

[127] Garcia Paez described his experience in provincial jail as "one of the hardest times of my life." He stated that "I felt like I was a prisoner receiving an unfairly harsh punishment for my actions." He felt that he had been "punished for having done nothing wrong" which "caused me a lot of distress and anxiety."

[128] On October 20, 2021, Garcia Paez was released from immigration detention with conditions under the supervision of the Toronto Bail Program. In February 2022, Garcia Paez's refugee claim appeal was successful.

Foreshaw

[129] Foreshaw is a member of the proposed class and specifically the mental health subclass. She was incarcerated in Vanier Centre for Women, a provincial prison for women in Milton, Ontario, for 40 days between December 8, 2016 and January 16, 2017.

[130] Foreshaw's NRAD, Notice of Arrest and Detainee Medical forms confirm that CBSA was aware of her diagnosis of schizophrenia, bipolar disorder, anxiety and depression when she was first detained.

[131] Foreshaw was subjected to the same treatment and conditions in prison as criminal detainees. Her evidence was:

> My personal belongings and clothing were taken away from me. I was strip searched. Then I was given prison clothing, including an orange jumpsuit. I remember being very upset because I did not understand what was happening or why I was being treated like a criminal.

[132] Throughout her detention, she was kept in isolation in a small cell. Her evidence was:

> I was only allowed out of my cell to shower and was escorted to the bathroom in shackles on my hands and feet. After bathing quickly, I was immediately returned to my cell… My only source of entertainment was watching television through the small hatch in my cell door. Other than this, I spent all of my time sad and alone in my cell.

[133] Foreshaw gave further evidence that: (i) "my time at Vanier was very hard and led to a substantial worsening of my mental state"; (ii) she had "no communication with friends or family"; (iii) she "lost a lot of weight in jail and looked like a completely different person" and (iv) "I was just skin and bones."

[134] Foreshaw further stated that (i) she was "shackled and transported to the hospital in a padded van instead of an ambulance", (ii) she "went to the hospital several times" due to both mental and physical health concerns and (iii) "[e]very time I went to the hospital, I was strip searched, and transported with my hands and feet shackled."

[135] Foreshaw also set out a list of conditions that she experienced as an Immigration Detainee in a provincial prison, similar to the list provided by Richard discussed at para. 119 above.

[136] Foreshaw's detention in prison caused a substantial worsening of her physical and mental health and precipitated an acute mental health crisis. On January 13, 2017, a representative from

the Schizophrenia Society of Ontario visited Foreshaw and raised serious concerns about her mental and physical condition.

[137] On January 16, 2017, Foreshaw was transferred to the Oakville Trafalgar Memorial Hospital, where she began receiving specialized treatment for her condition. On February 15, 2017, the ID ordered that Foreshaw be released from detention. Foreshaw remained in hospital until May 5, 2017, at which time she was released into the care of her family.

[138] Foreshaw's immigration application to remain in Canada on humanitarian and compassionate grounds was successful. On June 21, 2019, Foreshaw became a permanent resident.

Mawut

[139] The evidence as to Mawut's experience in provincial prison was provided by Ormston, who was Mawut's designated legal representative before the ID. Ormston also relies on several decisions of the ID which considered Mawut's incarceration.

[140] Mawut was placed in immigration detention at Millhaven Institution provincial prison on May 9, 2019. He was released on August 23, 2019 and then re-arrested shortly thereafter and placed in immigration detention in Millhaven.

[141] On November 13, 2020, Mawut was transferred to CECC, a maximum-security provincial prison. He was incarcerated at CECC until his transfer to an IHC on September 12, 2022. Mawut's NRAD forms identify him as a person with "suspected or known mental health illness."

[142] Mawut was unable to access mental health programs at St. Lawrence Valley Correctional & Treatment Centre and at the Centre for Addiction and Mental Health in Toronto because those programs were only available to criminal inmates and not for Immigration Detainees.

[143] Mawut's mental health immediately and dramatically improved after he was transferred to the IHC. Ormston states:

> The change that I observed in Mr. Mawut's mood and behaviour was significant. Every time I spoke with him, Mr. Mawut would tell me that he was feeling much better at the IHC and that he was hopeful for his future. This was in stark contrast to his mental health deteriorating and increasing suicide watches at CECC.
>
> At Mr. Mawut's subsequent detention hearings, the CBSA provided substantive disclosure outlining the positive effects of his transfer to the IHC, including the effects of having access to programming and treatment that was unavailable in provincial prison. For example, at the IHC, Mr. Mawut was able to visit the library, was given yard time with others, and had the opportunity to participate in yoga classes. He was also seen twice a day by medical staff and had regular

> appointments with other medical professionals, including an IHC physician and psychiatrist.

[144] Mawut's positive response to detention at the IHC ultimately resulted in him being accepted into an in-house treatment program. Mawut was released from immigration detention on November 21, 2022, 24 months after his first detention in prison, and only two months after being transferred to the IHC.

Vulnerabilities of class members

[145] In his cross-examination, Dvorski agreed that significant "vulnerabilities" existed for immigration detainees, including language barriers, cultural differences, lack of familiarity with Canadian culture, unfamiliarity with Canadian laws, lack of resources, a lack of official travel documentation, and mental health issues for some immigration detainees.

Available statistics about the Immigration Detainees

[146] Canada's responding certification record included detailed evidence from Babin and Dvorski. Their evidence demonstrates the high quality of the statistics, information, and records Canada maintains in respect of Immigration Detainees.

[147] Canada's databases record the name, citizenship, age, date of detention and date of release (i.e., duration of detention), and the place(s) of detention for every Immigration Detainee. Every Immigration Detainee has a unique identification number. Health information (including mental health concerns, and suicide/self-harm risk) is recorded by Canada on the NRAD form.

[148] Canada's databases also include address updates for Immigration Detainees and would reveal if any individual Immigration Detainee were ever relocated to a mental health treatment facility during their detention.

[149] Canada's evidence can be aggregated and assessed in common. The Conditions Chart prepared by Dvorski summarizes from a common source (Canada and its CBSA Assistant Directors) the conditions that exist in the provincial correctional institutions at issue, for every region. Babin appends many exhibits to his affidavit that set out in detail various statistics pertaining to immigration detention, including the locations of detainees (by province and facility type), as well as grounds for detention, and detention lengths.

ANALYSIS

[150] As I discuss at para. 15 above, Canada objected to every requirement for certification under s. 5(1) of the *CPA*.

[151] I first review the general test for certification and then consider each of the objections.

The general test for certification

[152] The test for certification is settled law and is not in dispute between the parties. The following principles apply, based on the leading cases of *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 15-16; and *Western Canadian Shopping Centres v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 ("*Dutton*"), at paras. 26-29:

(i) On a certification motion, the issue before the court is whether a class action is a fair, efficient, and manageable method of advancing the litigation.

(ii) The court shall keep in mind the three overarching goals of class proceedings legislation: access to justice, behaviour modification, and judicial economy.

(iii) The test for certification should be applied in a purposive and generous manner.

(iv) The question is not whether the action is likely to succeed on the merits, but whether the form of the action as a class proceeding is appropriate for prosecuting the claim.

[153] The court has a gatekeeping role to ensure that the suit is appropriately prosecuted as a class action. The test for certification is not a mere formality, but a meaningful screening device used to eliminate claims that are not appropriately resolved by class proceedings. While a certification motion is procedural in nature, it serves as an important screening function: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 103 ("*Pro-Sys*").

[154] The "some basis in fact" test is required to satisfy the requirements under ss. 5(1)(b) to (e) of the *CPA*. That test was summarized by Perell J. in *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, rev'd on other grounds, 2020 ONSC 913 (Div. Ct.), at paras. 82-85:

> The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim. However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action. In the context of the common issues criterion, the "some basis in fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.
>
> The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case. In particular, there must be a basis in the evidence to establish the existence of common issues. To establish commonality, evidence that the alleged misconduct actually occurred is not

> required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.
>
> The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification. Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.
>
> On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact. The evidence on a motion for certification must meet the usual standards for admissibility. While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge. [Footnotes omitted.]

[155] In his concise summary of the law, Strathy J. (as he then was) held in *Penney v. Bell Canada*, 2010 ONSC 2801, 93 C.P.C. (6th) 306, at para. 45, "[t]here is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action."

The cause of action objections under s. 5(1)(a) of the CPA

[156] Canada raises six objections under s. 5(1)(a) of the *CPA* and submits that none of the causes of action pleaded by the plaintiffs discloses a cause of action.

[157] I first review the applicable law to determine whether a claim discloses a cause of action. I then review the "core pleadings" which are applicable to many of the causes of action. I then consider each of the cause of action objections.

<u>The applicable test under s. 5(1)(a) of the CPA</u>

[158] The test to be applied under s. 5(1)(a) of the *CPA* is the same "plain and obvious" test required under a motion to strike a pleading. The facts pleaded are taken to be true unless patently incapable of proof and the statement of claim is to be read generously. The court must find that it is "beyond doubt" that the claim will fail.

[159] In *Leroux v. Ontario*, 2023 ONCA 314, 481 D.L.R. (4th) 502, the court summarized the test, at para. 38:

> The test for whether a pleading in a proposed class action meets the cause of action requirement in s. 5(1)(a) of the *CPA*, and the test for whether a pleading

> should be struck under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for failing to disclose a reasonable cause of action, is the same: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14. The facts asserted in the statement of claim are taken to be true unless patently incapable of proof: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22. The statement of claim is to be read generously: *Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 451. The question to be answered "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": *Babstock*, at para. 14.

Core pleadings

[160] There is overlap in the allegations in the Statement of Claim issued May 16, 2023 (the "Claim") which are relevant to many of the causes of action. I review these core pleadings below:

(i) Immigration detention is required by both Canadian and international law to be administrative and non-punitive in nature. (paras. 2 and 50)[11]

(ii) The law that governs immigration detention, namely *IRPA* and the *Regulations*, does not deal with the question of where immigration detention can or should be detained. (para. 22)

(iii) Canada has decided to hold some immigration detainees in prisons. (para. 4)

(iv) Prisons are purpose-built to, amongst other things, punish convicted criminals by depriving them of liberty and separating them from society. (para. 44)

(v) When detained in provincial prisons, immigration detainees are treated as though they are criminal inmates, even though their detention is administrative only. (para. 6)

(vi) When detained in prisons, immigration detainees are handcuffed, shackled, strip-searched, confined to small prison cells, subjected to solitary confinement and rigid routines, under constant surveillance, and their access to their families, legal counsel, and the outside world is severely restricted. (paras. 6, 44-46)

[11] (paragraph references for excerpts from the pleadings are to the Claim)

(vii) Restrictions on liberty are significantly greater, and conditions of detention are considerably worse in prisons than IHCs. A comparison is set out in a detailed chart included in the Claim. (paras. 6, 44-46)

(viii) Immigration detainees in prisons are exposed to tense and dangerous environments and are regularly subjected to violence and threats of violence. (paras. 6 and 44)

(ix) Detention of immigration detainees in prisons cause or contribute to significantly worse health outcomes for individuals with pre-existing mental health conditions. (paras. 8 and 48)

(xi) Detention of immigration detainees without pre-existing mental health conditions often develop one or more mental health conditions as a result of the punishing conditions of detention in prisons. (para. 48)

Objection 1: Does the section 7 claim disclose a cause of action?

[161] Canada submits the Claim does not disclose a cause of action under s. 7 of the *Charter*. I do not agree.

[162] I first consider the applicable law. I then review other pleadings relevant to the s. 7 cause of action. I then apply the law to the pleadings in the Claim.

(i) The applicable law

[163] Section 7 of the *Charter* provides:

> 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.

[164] A breach of s. 7 requires that (i) there has been or could be a deprivation of the right to life, liberty or security of the person and (ii) the infringement fails to conform to the principles of fundamental justice: *Charkaoui*, at para. 12.

[165] I review each of these requirements below.

(a) Deprivation of the right to life, liberty, and security of the person

[166] Section 7 is engaged for immigration detainees subject to detention. In *Charkaoui*, McLachlin C.J. held, at para. 18:

> I conclude that the appellants' challenges to the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security, and that s. 7 of the *Charter* is engaged.

[167] The scope of the right includes general protection against physical restraint such as imprisonment or the threat of imprisonment: *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at paras. 26-27; including both custodial and non-custodial detention: *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at para. 30.

[168] Further, transfer to or detention in a more restrictive institutional setting constitutes a deprivation of a detainee's residual liberty which engages s. 7: *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 76.

[169] Prisoners retain residual liberty interests and the right not to be unlawfully deprived thereof: *R. v. Miller*, [1985] 2 S.C.R. 613, at para. 32.

[170] To "demonstrate an interference with security of the person, the plaintiffs must show either (1) interference with bodily integrity and autonomy, including deprivation of control over one's body, or (2) serious state-imposed psychological stress": *Ontario (Attorney General) v. Bogaerts*, 2019 ONCA 876, 389 C.C.C. (3d) 227, at para. 52.

[171] In *Carter v Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, the court described the s. 7 right to the security of the person as one which protects individual autonomy and control of bodily integrity free from state interference, which is "engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering": at para. 64.

(b) Whether the infringement is contrary to the principles of fundamental justice

[172] The second part of the s. 7 test requires the plaintiff to establish that the infringement of s. 7 violates the principles of fundamental justice. The court considers whether the deprivation to life, liberty or security to the person is arbitrary, overbroad, or grossly disproportionate, as well as contrary to principles of natural justice. I summarized the law in *Farrell v. Attorney General of Canada*, 2023 ONSC 1474, at paras. 119-20:

> The principles of fundamental justice relating to arbitrariness, overbreadth and gross disproportionality have been described by the Supreme Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 98, 101 and 120, as follows:
>
> > Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law.
> >
> > …

> Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective.
>
> …
>
> Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.

The principle of fundamental justice relating to procedural fairness was described by the Supreme Court in *Charkaoui*, at para. 19:

> Section 7 of the *Charter* requires that laws that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process. These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security. [Citation omitted.]

(ii) Additional allegations relevant to the s. 7 claim

[173] The role of the court is to consider whether material facts have been pleaded to support the claim. A bald assertion that conduct infringes liberty or security of the person or is contrary to fundamental justice does not establish the existence of a material fact.

[174] Consequently, I do not consider the general assertions of the breach of s. 7 made in the Claim. Those conclusory paragraphs must be supported by both the core allegations and any additional allegations relevant to s. the 7 claim.

[175] I set out below the additional allegations of material facts in the Claim relevant to the s. 7 cause of action.

[176] The plaintiffs plead:

(i) The objectives of immigration detention are administrative and not punitive in nature. They are limited to situations when there are reasonable grounds that the individual is unlikely to appear, a danger to the public, or unable to satisfy CBSA of their identity. The vast majority (85%) of immigration detainees are detained on the ground they were a flight risk. (paras. 19-21)

(ii) The "risk factors" and "points" structure under the NRAD form do not serve any rational purpose in determining place of detention for immigration detainees. (paras. 27-33)

(iii) Canada's assessment of risk using the NRAD form is not rationally related to the administrative purpose of immigration detention and is undertaken without appropriate consideration of the immigration-related grounds on which the person has been detained. (para. 37)

(iv) Procedurally, the NRAD assessment process does not provide Immigration Detainees with disclosure of the evidence used against them, a meaningful opportunity to respond before a decision is made regarding where they will be detained, or reasons justifying the decision. When a detainee is transferred from an IHC to a provincial prison, their counsel is not notified of the transfer in advance, and they have no meaningful opportunity to challenge it. (para. 38)

(v) The manner in which the decision to detain Immigration Detainees in provincial prisons is made, and in particular the manner in which the NRAD form is applied, violates procedural fundamental justice, including the right to a fair hearing, the opportunity to know the case one has to meet, the opportunity to present evidence to challenge the validity of the state's evidence, the right to a decision on the facts and the law, the right to written reasons that articulate and rationally sustain an administrative decision, and the right to protection against abuse of process. (para. 96)

(vi) Punitive detention is contrary to international human rights instruments to which Canada is a signatory, with 12 specific examples of international instruments pleaded. (paras. 50-51)

(iii) Application of the law to the present case

[177] The role of the court under s. 5(1)(a) of the *CPA* is not to determine whether the CBSA practice of incarcerating Immigration Detainees in provincial prisons breaches s. 7 of the *Charter*. That decision will be based on the merits of the parties' positions, which is to be decided by a common issues judge unless Canada can demonstrate that it is beyond doubt that the material facts pleaded cannot support a s. 7 claim.

[178] For the reasons that follow, I find that Canada has not met the high threshold required to establish that the s. 7 claim fails to disclose a cause of action.

[179] I review both requirements of the s. 7 test below.

(a) Deprivation of the right to life, liberty, and security of the person

[180] The plaintiffs have pleaded material facts to support their claim of detention.

[181] As I discuss at para. 166 above, the court in *Charkaoui*, at para. 18, held that s. 7 rights to liberty and security of the person are engaged by the detention of immigration detainees (whether in an IHC or prison).

[182] The detention could be found to impose a "restriction of liberty, such as imprisonment": *Vaillancourt*, at para. 26.

[183] The plaintiffs have pleaded the physical restraints on their liberty arising from their detention.

[184] The plaintiffs have also pleaded that provincial prisons are considerably more restrictive than IHCs, which if proven, could meet the test for a breach of liberty and security of the person as in *May*.

[185] Similarly, the material facts to support a claim for breach of the s. 7 right to security of the person is also pleaded. The allegations as to the use of restraints and strip searches support a claim of "interference with bodily integrity and autonomy, including deprivation of control over one's body, or serious state-imposed psychological stress": *Bogaerts*, at para. 52.

[186] Canada takes the position that the detention of Immigration Detainees is not of the nature to engage s. 7. Canada submits:

> The detention scheme is carefully tailored to safeguard public safety and the integrity of Canada's immigration and refugee protection regime. Detention may be justified under certain circumstances, such as border security, public safety, or ensuring compliance with immigration laws, provided it is conducted in accordance with principles of fundamental justice.

[187] Canada cites no authority that detention by incarceration of an individual does not engage rights to liberty and security of the person under s. 7. Canada does not submit that the plaintiffs have incorrectly asserted the legal principles cited above.

[188] The common issues judge can consider the merits of Canada's position on whether incarceration (rather than detention) is "carefully tailored" or "justified." However, it is not "beyond doubt" or "plain and obvious" that the claim of deprivation of the right to liberty and security of the person will fail.

(b) Whether the infringement is contrary to the principles of fundamental justice

[189] The material facts pleaded can support the requirement under s. 7 that the infringement is contrary to the principles of fundamental justice.

[190] In the present case, the plaintiffs have pleaded material facts that support a finding that (i) immigration detention is administrative in nature and (ii) the penal nature of imprisonment is not rationally connected to the administrative detention. Consequently, these same facts support a claim that the punitive effects of immigration detention in provincial prisons constitute an "overbroad" mismatch of consequences, and result in conditions which are "grossly disproportionate" to the administrative object (at paras. 39-49 of the Claim).

[191] The Claim alleges material facts to establish a violation of natural justice in the CBSA decision to incarcerate an Immigration Detainee in provincial prison. The plaintiffs allege that CBSA's decision-making process regarding location of detention fails to conform with the principles of fundamental justice because it violates basic procedural rights including: the right to a fair hearing, the opportunity to know the case one has to meet, the opportunity to present evidence to challenge the validity of the state's evidence, the right to a decision on the facts and the law, the right to written reasons that articulate and rationally sustain an administrative decision, and the right to protection against abuse of process (at para. 96 of the Claim).

[192] The plaintiffs further plead the lack of natural justice at para. 38 of the Claim (see para. 176(iv) above).

[193] The above pleadings support a claim of a violation of natural justice.

[194] Finally, the s. 7 claim sought to be certified is similar to other precedents, including the certification of a s. 7 claim (i) for immigration detainees subject to lockdowns in provincial prisons in *Dadzie v. Ontario*, 2017 ONSC 7101, (ii) for inmates subject to strip searches in *Farrell*, and (iii) for inmates subject to administrative segregation in *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836, *Reddock v. Canada (Attorney General)*, 2018 ONSC 3914, and *Francis v. Ontario*, 2018 ONSC 5430.

[195] For the above reasons, I find that the Claim discloses a cause of action for the breach of s. 7 of the *Charter*.

Objection 2: Does the section 9 claim disclose a cause of action?

[196] Canada submits the Claim does not disclose a cause of action under s. 9 of the *Charter*. I do not agree.

[197] I first consider the applicable law. I then review other pleadings relevant to the s. 9 cause of action. I then apply the law to the pleadings in the Claim.

(i) The applicable law

[198] Section 9 of the *Charter* provides:

> Everyone has the right not to be arbitrarily detained or imprisoned.

[199] In *R. v. Le*, 2019 SCC 34, [2019] 2 S.C.R. 692, at para. 124, the court held that a detention must satisfy three requirements to comply with section 9: (i) the detention must be authorized by law, (ii) the authorizing law itself must not be arbitrary, and (iii) the manner in which the detention is carried out must be reasonable.

[200] A detention not authorized by law is always arbitrary and necessarily violates s. 9: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54.

[201] In *Brown*, the court held that the immigration detention system did not violate s. 9, because the decision-maker who exercised an open-ended grant of discretion was required to do so with regard to *Charter* standards: at paras. 78-80.

(ii) Additional pleadings

[202] The plaintiffs plead:

> Immigration Detention pursuant to the *IRPA*, the *Regulations* and International Law can only be administrative and non-punitive in nature. Canada's Misconduct results in Immigration Detainees being held in Provincial Prisons and amounts to punitive treatment that is incompatible with the administrative nature of the detention. (para. 99)
>
> The place of detention is not expressly prescribed by *IRPA* or the *Regulations* […]. (para. 100)

(iii) Application of the law to the pleadings

[203] The issue before the court is whether it is plain and obvious that the s. 9 claim cannot succeed. I find that Canada had not met this high threshold.

[204] Canada relies on the decision in *Brown* to submit that it is beyond doubt that the s. 9 claim will fail. Canada submits: [footnotes omitted]

> The Federal Court of Appeal in *Brown* found that the immigration detention scheme under the *IRPA* was capable of constitutional administration, rejecting arguments that the broad discretion to detain under the *IRPA* made the statutory scheme itself unconstitutional. Rather, the Court emphasized that, in accordance with established Supreme Court guidance, a decision-maker exercising an open-ended grant of discretion is required to do so with regard to *Charter* standards. Thus, the ruling in *Brown* supports the notion that Canada's immigration detention practices, when carried out in a manner consistent with fundamental principles of justice and proportionality, are not in breach of s. 9 of the *Charter*.

[205] However, it is not beyond doubt that the analysis in *Brown* necessarily applies in the present case.

[206] In *Brown*, the court only addressed whether the immigration detention process under *IRPA* was authorized by law. The court in *Brown* found no s. 9 violation because *IRPA* itself provided that any discretion of CBSA officers would be exercised under *Charter* principles.

[207] However, in the present case, the plaintiffs do not challenge the constitutionality of the immigration detention system. Rather, the plaintiffs challenge the CBSA practice of incarcerating Immigration Detainees in provincial prisons.

[208] The plaintiffs allege material facts to support a claim that the impugned incarceration is not authorized by *IRPA*, the Regulations, or international law. If these allegations are accepted, a s. 9 claim could arise since detention is arbitrary when not authorized by law: *Grant*, at para. 54.

[209] Further, the plaintiffs allege that the practice of incarcerating Immigration Detainees in provincial prisons is contrary to *Charter* rights *ab initio*. Based on the material facts alleged, the plaintiffs submit that *no* Immigration Detainee, under *any* circumstance, can be incarcerated in a provincial prison with penal consequences, when the sole basis for detention is alleged to be for administrative immigration purposes.

[210] If such a position were accepted by the common issues court, there would be no valid statutory basis for any incarceration of any Immigration Detainee, which could constitute a breach of s. 9 as an arbitrary detention. Consequently, CBSA's incarceration practice would then not be "carried out in a manner consistent with fundamental principles of justice and proportionality", as required under *Brown*.

[211] Further, the plaintiffs plead that that the NRAD process to decide the location of detention is arbitrary and does not comply with principles of natural justice. In *Brown*, the court only addressed whether the decision to detain was arbitrary.

[212] The plaintiffs allege material facts and rely on legal submissions to support their claim that incarceration of Immigration Detainees in provincial prisons is not authorized by law. By way of example:

(i) *IRPA* and the *IRPR* contain no explicit authorization for detention in provincial prison and speak only to detention generally.

(ii) Section 3(3)(d) requires that the Act be applied in a manner that "decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*."

(iii) Section 3(3)(f) requires that the Act be applied in a manner that "complies with international human rights instruments to which Canada is signatory."

(iv) At para. 50 of the Claim, the plaintiffs outline the various human rights instruments that are alleged to be violated by the detention of immigration detainees in prisons.

(v) At para. 19 of the Claim, the plaintiffs plead that CBSA's own detention policy, ENF-20, stipulates immigration detainees can be detained to achieve the immigration-related goals of *IRPA*, but that detention must remain administrative and not punitive.

(vi) At para. 46 of the Claim, the plaintiffs plead facts regarding punitive conditions at provincial prisons.

[213] Assuming those facts to be true, there is a tenable claim that incarceration of Immigration Detainees in provincial prisons cannot be authorized by *IRPA*, which is alleged to be designed for administrative and not punitive immigration goals.

[214] Further, even if detention in provincial prisons could be found to be authorized by *IRPA*, the material facts pleaded support a tenable claim under the second branch of the *Le* test that the law itself is arbitrary.

[215] The plaintiffs allege that none of the conditions or factors under which detention in provincial prison can take place are set out in the legislation. The plaintiffs further plead that the NRAD form does not focus on the administrative basis for detention, but instead on past criminality which is unrelated to the administrative purpose. The plaintiffs allege, at para. 31 of the Claim:

> In both iterations of the NRAD, the "risk factors" focus almost exclusively on evidence of an Immigration Detainee's past criminality and other immutable characteristics and fail to account for Immigration Detainees' vulnerabilities or current risk in any meaningful way. Because of the NRAD's heavy focus on past criminality, the mere fact of past criminal conviction is enough to result in detention in a Provincial Prison, even where the CBSA accepts that the individual is not a danger and is detaining them solely as a flight risk. Focus on past criminal charges and convictions (sometimes far into the past) serves to re-criminalize and re-punish individuals who have already paid their debt to society, and who, absent immigration issues, would face no restrictions on their liberty.

[216] For the third branch of the *Le* test, the plaintiffs rely on the same facts to establish a tenable case that the manner in which the decision to incarcerate Immigration Detainees in provincial prisons is made, and in particular the manner in which the NRAD form is applied, is unreasonable.

[217] For the above reasons, I find that the Claim discloses a cause of action for the breach of s. 9 of the *Charter*.

Objection 3: Does the section 12 claim disclose a cause of action?

[218] Canada submits the Claim does not disclose a cause of action under s. 12 of the *Charter*. I do not agree.

[219] I first consider the applicable law. I then review other pleadings relevant to the s. 12 cause of action. I then apply the law to the pleadings in the Claim.

(i) The applicable law

[220] Section 12 of the *Charter* provides:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[221] Section 12 is engaged if (i) punishment is grossly disproportionate to what would have been appropriate or (ii) the punishment is cruel and unusual by nature because it is intrinsically incompatible with human dignity: *R. v. Bissonnette*, 2022 SCC 23, 469 D.L.R. (4th) 387, at paras. 60-64.

[222] The impugned punishment must be more than merely disproportionate or excessive. In *R. v. Boudreault*, 2018 SCC 58, the court held, at para. 45, "[i]t must be 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society." [citations omitted]

[223] It is only on "rare and unique occasions" that a sentence will infringe s. 12, as the test is "very properly stringent and demanding": *Boudreault*, at para. 45.

[224] Detention will only be cruel and unusual in the legal sense if it violates accepted norms of treatment: *Charkaoui*, at para. 96.

(ii) Additional allegations

[225] The plaintiffs rely on their core allegations for the claim under s. 12 of the *Charter*.

(iii) Application of the law to the present case

[226] In *Charkaoui*, the court held that the immigration detention regime, when read in light of their text, context and purpose, does not infringe s. 12 of the *Charter*.

[227] Canada again relies on *Charkaoui* to submit that it is beyond doubt that the Claim does not disclose a cause of action under s. 12 of the *Charter*. I do not agree.

[228] At para. 102 of the Claim, the plaintiffs allege that the practice of incarcerating administrative detainees in a penal institution is punitive treatment which is grossly disproportionate to the administrative purpose of detention. While this pleading is conclusory, it is supported by pleadings of material facts.

[229] At paras. 6 and 44-46 of the Claim, the plaintiffs plead restrictions and conditions in prisons that a court could find are "grossly disproportionate" to administrative detention. Such conditions include strip searches, use of restraints such as handcuffs and leg shackles, application of strict and restrictive prison rules and punishment, restrictions on communication and interaction with the outside world, and compliance with prison rules.

[230] The plaintiffs allege at para. 6 of the Claim that the restrictions on liberty are significantly greater, and conditions of detention are considerably worse, in prisons than IHCs.

[231] Consequently, there are material facts which a court could consider when determining whether the treatment imposed on Immigration Detainees incarcerated in provincial prisons is grossly disproportionate to what is required for their administrative detention. In such circumstances, it is not beyond doubt that a common issues court could find that (i) the decisions in *Brown* and *Charkaoui*, which considered the constitutionality of the immigration detention regime, should be distinguished and (ii) Canada's conduct in the present case was in breach of s. 12 of the *Charter*.

[232] Further, the pleadings allege the effects of incarceration of Immigration Detainees on the mental health of all class members, with additional effect on those with a preexisting mental health condition. Again, a common issues judge could find that such treatment is grossly disproportionate to treatment for an administrative detention.

[233] Canada submits in its factum that the punitive treatment of Immigration Detainees incarcerated in provincial prisons does not rise to the level of being "grossly disproportionate." However, that is a merits-based argument that should be determined on a full record.

[234] For the above reasons, I find that the Claim discloses a cause of action under s. 12 of the *Charter*.

Objections 4 and 5: Does the section 15 claim disclose a cause of action?

[235] Canada submits the Claim does not disclose a cause of action under s. 15 of the *Charter*. I do not agree.

[236] The plaintiffs submit that the CBSA practice constitutes discrimination under s. 15 both based on citizenship and mental disability.

[237] I first consider the applicable law under s. 15. I then review the other pleadings relevant to the s. 15 cause of action. I then apply the law to the pleadings relevant to each of the s. 15 claims.

(i) The applicable law

[238] The plaintiffs plead a breach of s. 15 both on the grounds of citizenship and mental disability.

[239] Section 15(1) provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[240] A two-step test is required under s. 15 of the Charter. In *R. v. Sharma*, 2022 SCC 39, 486 D.L.R. (4th) 579, the court held, at para. 28, that a discrimination claim under s. 15:

> requires the claimant to demonstrate that the impugned law or state action:
>
> (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and
>
> (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage.

[241] Citizenship is an analogous ground under s. 15: *Lavoie v. Canada*, 2002 SCC 23, [2002] 1 S.C.R. 769, at para. 39.

[242] Section 15 can be considered in the context of s. 6 of the *Charter*, which provides for the right of every "citizen" to enter, remain in and leave Canada but does not provide those rights to a non-citizen. Consequently, in *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 S.C.R. 711, the court found that deportation of a permanent resident was not a breach of s. 15 based on citizenship. Sopinka J. held, at p. 736:

> I agree, for the reasons given by Pratte J.A. in the Federal Court of Appeal, that there is no violation of s. 15. As I have already observed, s.6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.

[243] Similarly, in *Charkaoui*, the court held, at para. 129:

> The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme discriminates against non-citizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*

[244] In *Charkaoui*, the court commented that s.15 could be violated if "detention is no longer related, in effect or purpose, to the goal of deportation" or when "the detentions at issue have become unhinged from the state's purpose of deportation": at paras. 130-31.

[245] With respect to the mental health subclass, mental disability is an enumerated ground under s. 15. In *Ontario (Attorney General) v G*, 2020 SCC 38, 67 C.R. (7th) 340, the court held

that linking mental disability with criminality is discriminatory and perpetuates the disadvantages that those living with mental disabilities experience: at para. 65.

(ii) Additional allegations

[246] I summarize the additional allegations in the Claim related to the s. 15 cause of action:

(i) Incarceration of Immigration Detainees with a preexisting mental health condition exacerbates the mental health condition. (para. 8)

(ii) The NRAD form used mental health conditions such as "immediate risk of suicide" as a factor to incarcerate Immigration Detainees rather than detain them in IHCs. (para. 29)

(iii) CBSA "discriminatorily uses mental health disability as a risk factor" so that "Immigration Detainees with mental health conditions are overall much more likely to be deemed by Canada to be higher risk and detained in Provincial Prisons where they are subjected to differential and harsher treatment." (para. 34)

(iv) "In order to justify detention in Provincial Prisons, Canada relies on the false negative stereotypes regarding individuals with mental health conditions, including that they are violent, dangerous, unpredictable, deceptive, untrustworthy, uncontrollable or unable to comply." (para. 34)

(v) The NRAD as an assessment tool has a discriminatory effect against individuals with mental health conditions since "symptoms of mental health conditions are used as justification for detention in Provincial Prisons." (para. 35)

(vi) "ENF-20 explicitly and discriminatorily states that "instability… associated with mental imbalance" is linked with "danger" and the possibility of "future violent behavior." (para. 35)

(vii) "Canada's stereotyping of Immigration Detainees with mental health conditions by deeming them higher risk and detaining them in Provincial Prison perpetuates the prejudice and disadvantage suffered by Immigration Detainees with mental health conditions." (para. 35)

(viii) "Provincial Prisons do not provide adequate or tailored treatment or support to individuals with mental health conditions" which "compounds the deleterious effects of the fact that detention in Provincial Prisons, and the conditions and treatment encountered therein, often causes or exacerbates mental health conditions." (para. 36)

(ix) "The punishing conditions of detention in Provincial Prisons noted above, as compared to the conditions of administrative detention in an IHC, cause or

contribute to significantly worse health outcomes for individuals with pre-existing mental health conditions." (para. 48)

(x) The Red Cross reported that incarcerating immigration detainees in provincial prisons risks "exacerbating their mental health conditions." (para. 72)

(xi) "[T]here are no circumstances outside of the criminal justice system under which Canadian citizens may be subjected to detention in a Provincial Prison." (para. 105)

(xii) "Immigration Detainees with mental health conditions are more likely to be placed in Provincial Prisons based on stereotypes that they are dangerous, violent and unpredictable. The NRAD assessment process formalizes this impermissible differential treatment." (para. 106)

(xiii) "Once in Provincial Prison, the treatment to which Immigration Detainees are subjected exacerbates pre-existing mental disabilities." (para. 107)

(iii) Application of the law to the present case

[247] I first address the citizenship claim and then the mental health claim.

(a) Breach of s. 15 based on citizenship

[248] Canada submits that it is beyond doubt that there can be no distinction based on citizenship because the immigration detention process, by definition, applies only to non-citizens. I do not agree that it is plain and obvious that Canada's position would succeed.

[249] In both *Charkaoui* and *Chiarelli*, no citizenship distinction in the immigration detention system could be based on s. 15 because s. 6(1) of the *Charter* protected only the rights of citizens to enter, remain in and leave Canada.

[250] However, the plaintiffs submit that their claim "is not rooted in differential treatment regarding the right to remain in Canada, but rather differential treatment regarding the circumstances in which one may be detained in a penal institution". The plaintiffs submit:

> [I]t is only non-citizens who face the risk of being placed in a prison for administrative reasons. Citizens face no such risk – the only way that a citizen can be detained in a prison is pursuant to criminal law. This is a discriminatory distinction based on the enumerated ground of citizenship.

[251] I cannot find, based on the case law, that it is plain and obvious that the plaintiffs' submission would fail. A court could rely on the distinction raised by the plaintiffs.

[252] Further, the court in *Charkaoui* expressly contemplated a breach of s. 15 if "detention is no longer related, in effect or purpose, to the goal of deportation." In the present case, the material facts alleged by the plaintiffs support a claim that the CBSA practice of incarcerating Immigration Detainees in provincial prisons is not related, in effect or practice, to the administrative detention required under Division 6 of Part I of *IRPA*.

[253] The material facts pleaded set out the harsh effects on any Immigration Detainee, which supports a claim that the incarceration has the effect of reinforcing, perpetuating, or exacerbating a disadvantage associated with being a non-citizen, given the vulnerabilities of immigration detainees discussed at para. 145 above.

[254] On a certification motion, the "plain and obvious" test governs. I make no finding as to whether any of the plaintiffs' submissions will be accepted by the court. However, I cannot find that it is plain and obvious that a court would not find that (i) there is a distinction against non-citizens which perpetuates stereotypes or (ii) in any event, incarceration of Immigration Detainees in provincial prisons is unhinged from the goal of administrative detention.

[255] Consequently, I find that the s. 15 claim discloses a cause of action based on citizenship.

(b) Breach of s. 15 based on mental disability

[256] It is not beyond doubt that the pleadings disclose a distinction based on mental disability.

[257] I set out the material facts above. The plaintiffs allege both a distinction based on mental disability and discrimination that exacerbates mental health conditions. Both requirements are met on the pleadings.

[258] The pleadings allege not only distinctions through the NRAD form and ENF-20, but also through an alleged CBSA practice of increased likelihood of placing Immigration Detainees with mental health conditions into detention at provincial prisons.

[259] The plaintiffs further allege significant exacerbation of pre-existing mental health conditions as a result of incarceration in provincial prisons.

[260] Canada submits that there is no discrimination in fact since:

> The decision to place an immigration detainee in a [provincial prison] is rationally connected to the capacities of the different kinds of facilities (in terms of ensuring the safety of the detainee and others) and the kinds of medical care that are available in each facility. In many cases during the proposed class period, [provincial prisons] were better equipped to provide mental health care to the detainees, and to ensure their personal safety.

[261] However, Canada's submission is merits-based. The Claim sets out material facts as to the alleged discriminatory distinction based on mental disability and the perpetuating effect of

such a distinction given the alleged lack of mental health resources in provincial prisons and the exacerbation of mental health disability. These factual issues will need to be resolved at trial on a full evidentiary record.

[262] Consequently, I find that the s. 15 claim discloses a cause of action based on mental disability.

Objection 6: Does the negligence claim disclose a cause of action?

[263] Canada submits the Claim does not disclose a cause of action in negligence. I do not agree.

[264] I first consider the applicable law. I then review the other pleadings relevant to the negligence claim. I then apply the law to the present case.

(i) The applicable law

[265] The requirements for a claim in negligence are set out in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3:

> A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour 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.

[266] To establish a duty of care, the two-part *Anns* test is applied. The court asks (i) whether the relationship between the plaintiff and the defendant discloses sufficient foreseeability and proximity to establish a duty of care and (ii) if so, are there any residual policy considerations which ought to negate or limit that duty of care: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at paras. 21-24.

[267] There is a recognized duty owed to persons in custody: *Good v. Toronto Police Services Board*, 2013 ONSC 3026, 43 C.P.C. (7th) 225, at para. 49, rev'd on other grounds 2014 ONSC 4583 (Div. Ct.), 121 O.R. (3d) 413, aff'd 2016 ONCA 50, 130 O.R. (3d) 241, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 255.

[268] Pursuant to s. 3 of the *Crown Liability and Proceedings Act*, the Crown is vicariously liable for torts committed by its servants and agents, as well as for non-delegable duties: *Lewis (Guardian ad item of) v. British Columbia*. [1997] 3 S.C.R. 1145, at para. 50.

[269] Core public policy decisions rooted in economic, social, or political considerations typically enjoy immunity from tort liability, barring instances of irrationality or bad faith in their enactment: *Syl Apps Secure Treatment Centre v BD*, 2007 SCC 38, [2007] 3 S.C.R. 83, at paras. 32-33, 59-60.

[270] The distinction between a core policy decision and "operational implementation" is not straight-forward. I set out below the thorough analysis of Zarnett J.A. in *Leroux v. Ontario,* 2023 ONCA 314, 166 O.R. (3d) 321, at paras. 45-47:

> Core policy decisions must be distinguished from "operational implementation". Operational implementation has been defined as "the practical implementation of the formulated policies" or "the performance or carrying out of a policy": *Marchi*, at para. 52. Such operational decisions are generally "made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness": *Brown v. British Columbia (Minister of Transportation and Highways)*, 1994 CanLII 121 (SCC), [1994] 1 S.C.R. 420, at p. 441.
>
> In ascertaining whether a decision is one of core policy, the use of the term "policy" is not determinative. Instead, "the key focus is always on the nature of the decision": *Marchi*, at para. 60. Broadly speaking, it will be a decision "as to a course or principle of action … based on public policy considerations, such as economic, social and political factors": *Marchi*, at para. 51.
>
> In *Marchi*, the Supreme Court identified four factors to ascertain whether a core policy decision is at issue. The rationale for the immunity – protecting the legislative and executive branch's core institutional roles and competencies necessary to maintain the separation of powers – guides how to assess and weigh the factors. The court explained the factors, at paras. 62-65, in the following manner:
>
> > First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.
> >
> > Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative,

> required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no sustained period of deliberation, the more likely it will be reviewable for negligence.
>
> Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches. On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.
>
> Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment. Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria. [Citations omitted.]

[271] The court in *Leroux* found that the decision to not provide three specific types of supports and services under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14 was an operational and not a policy decision.

(ii) The relevant pleadings

[272] The plaintiffs plead in the Claim the following allegations relating to negligence:

(i) "Pursuant to s. 4(2)(b) of the *IRPA*, the CBSA is responsible for the enforcement of the *IRPA*, including the arrest, detention and removal of Immigration Detainees. The CBSA has also assumed jurisdiction over the placement and care

of Immigration Detainees, as an aspect of its general authority to administer Immigration Detention." (para. 15)

(ii) "Canada has established operational guidelines to assist CBSA officers with understanding legislative requirements regarding Immigration Detention, which are reflected in the Enforcement Manual Chapter 20, Detention ("ENF-20"). The ENF-20 stipulates that Immigration Detainees can be detained for the purposes of achieving immigration-related goals of the *IRPA*, but it must remain an administrative detention and must not be punitive in nature." (para. 19)

(iii) "The vast majority of Immigration Detainees who are housed in facilities other than IHCs are housed in Provincial Prisons. Canada's election to house Immigration Detainees in Provincial Prisons is carried out pursuant to formal and informal agreements and/or memoranda of understanding between Canada and the provincial or territorial governments where the Provincial Prison is located. These agreements stipulate that the provinces will detain Immigration Detainees in Provincial Prisons at Canada's request and direction." (para. 24)

(iv) At all times, immigration detainees are in Canada's "care & control." (para. 77)

[273] The plaintiffs have also pleaded in the Claim:

(i) Canada has a duty to exercise due care in administering the immigration detention system. (para. 83)

(ii) This duty of care arose as a result of a relationship of proximity between Canada and the class members. (para. 83)

(iii) International legal instruments to which Canada is signatory provide guidance regarding the standard of care for the practice of immigration detention. (para. 50)

(iv) By detaining immigration detainees in provincial prisons, Canada breached the duty owed to the class members. (paras. 111-12)

(v) Canada's breach of its duty caused damages to the class members that were reasonably foreseeable. (paras. 113, 117)[12]

[12] Some of the allegations listed in this paragraph are conclusory statements which do not set out material facts. In my analysis, I rely on the pleadings only to the extent material facts are pleaded.

(iii) Application of the law to the present case

[274] In its factum, Canada made two principal submissions in support of its position that the Claim does not disclose a cause of action in negligence.

[275] First, Canada submitted that it was plain and obvious that the CBSA decision to incarcerate Immigration Detainees in provincial prisons was a core policy decision and was immune from liability.

[276] Second, Canada submitted that because the impugned conditions arose in provincial prisons, it is plain and obvious that no claim in negligence could arise since there was no allegation that Canada was vicariously liable for the actions of provincial or territorial corrections employees or that Canada's duties to immigration detainees were non-delegable: see *Lewis*, at para. 50.

[277] I address each of these submissions below.

(a) Is it plain and obvious that the CBSA practice is a core policy decision?

[278] I reiterate that a court on a certification motion does not decide the merits of the issues, but only whether a class proceeding is the appropriate process to determine the issues. On a s. 5(1)(a) test, the only matter to be decided is whether it is plain and obvious or beyond doubt that the pleadings disclose no cause of action.

[279] Both parties made lengthy submissions as to whether the CBSA practice of incarcerating Immigration Detainees in provincial prisons was a policy or operational decision. While I review those submissions briefly below, I do not address the merits of those submissions as I find that it is not plain and obvious that a court would find that it was a policy decision.

[280] Under the *Leroux* analysis, the plaintiffs submit that none of the criteria are met to establish a policy decision. The plaintiffs refer to each *Leroux* factor (see para. 270 above) and submit:

(i) For the first factor, CBSA was not a "decision-maker within the executive hierarchy". It was not akin in any way to an elected official that is democratically accountable. The decision to incarcerate Immigration Detainees in provincial prisons was an operational decision based on the practice. CBSA retained the operational power of how to use detention in prisons. CBSA was the entity with power to make decisions about the use of prisons as a location for Immigration Detainees.

(ii) For the second factor, there is no evidence of any government decision which was deliberate and required debate (in a public forum) or involved input from different levels of authority. Instead, the practice was "a reaction of an employee or groups of employees to a particular event, reflecting their discretion and with no

sustained period of deliberation." There is no evidence of any public debate on where immigration detainees should be detained or whether prisons were appropriate for detention. The only evidence is that CBSA entered into a series of contracts with provinces and territories which allowed detention of immigration detainees in provincial prisons and CBSA made its own determinations based on the grounds of how much and whether to use detention in provincial prisons.

(iii) For the third factor, there is no evidence before the court of budgetary reasons for the decision to incarcerate Immigration Detainees in provincial prisons.

(iv) For the fourth factor, the plaintiffs allege that the NRAD form is subjective and perfunctory and does not provide an objective basis for a decision. There is no evidence that CBSA weighed competing interests and made value judgments. Instead, they made a decision about how to determine the location of immigration detention and when to decide to incarcerate an immigration detainee.

[281] The plaintiffs further submit that even if a common issues judge found that the CBSA practice was a core public policy decision (which they do not accept for the reasons discussed above), the plaintiffs could still argue that such policy decision was exercised in bad faith because it could only be done for administrative detention and not for punishment. The plaintiffs submit that without any foundation in law for the policy (if found to be a policy), there can be no core immunity.

[282] Canada submits that the CBSA practice was a core policy decision because:

(i) The agreements were signed by high-level "officers whose official responsibility requires them to assess and balance public policy considerations": *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 87.

(ii) The decision to use provincial prisons to house immigration detainees in certain circumstances is a decision that weighs "competing economic, social, and political factors" that involved "conducting contextualized analyses of information": *Nelson (City) v Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, at para. 44.

(iii) Core policy decisions do not need to arise from statutes or regulations: *Imperial Tobacco*, at para. 95.

[283] The determination of the issue of whether the CBSA practice was an operational or policy decision will depend on the evidence led by CBSA (and possibly other government officials) at a common issues trial, and the application of any factual findings to the legal principles discussed above.

[284] Consequently, it is not plain and obvious that the CBSA practice was a core policy decision.

(b) Is it plain and obvious that no claim in negligence could arise because there is no pleading of vicarious liability or non-delegable duty?

[285] Canada submits that the Claim does not disclose a cause of action in negligence because the plaintiffs do not plead that (i) Canada is vicariously liable for the actions of provincial or territorial corrections employees, or (ii) Canada's duties to immigration detainees are non-delegable.

[286] Canada relies on s. 3 of the *Crown Liability and Proceedings Act*, which provides that the Crown may only be held vicariously liable for torts committed by its servants and agents, unless the doctrine of non-delegable duty applies: *Lewis*, at para. 50.

[287] Canada submits that the general duty of care owed by correctional institutions to those in their custody is "to take reasonable care for [a prisoner's] safety as a person in their custody": *MacLean v. R.*, [1973] S.C.R. 2, at p. 7. Canada submits that it cannot be liable as the class members are in the custody of the provinces and territories, whom the plaintiffs have not named as defendants.

[288] For the reasons that follow, I do not find that it is plain and obvious that Canada's position would be accepted at a common issues trial.

[289] On the pleadings, the plaintiffs may be able to establish a direct duty of care owed by CBSA to the Immigration Detainees. The plaintiffs submit that the claim is not against any particular institution for any event arising during detention. The claim is against Canada for making the decision to incarcerate Immigration Detainees in provincial prisons.

[290] Consequently, a relationship of proximity could arise from the direct level of control CBSA exercised over immigration detainees as a group and as individuals.

[291] The plaintiffs rely on *Francis v Ontario*, 2021 ONCA 197, at para. 106, in which the court held that a class-wide duty of care may arise where the alleged actions "do not constitute different acts in different circumstances" when the plaintiff claimed injury would "naturally result" from placing inmates in administrative segregation. The court held, at para. 106:

> 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 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.

[292] A common issues court could accept the plaintiffs' position that the facts as pleaded in this case mirror those discussed by the court in *Francis*, where the defendant's alleged action constitutes one act in universal circumstances vis-à-vis the putative class members, with proximate harm naturally resulting.

[293] Consequently, I do not find that it is plain and obvious that a cause of action in negligence will fail because there is no pleading of vicarious liability or non-delegable duty.

[294] For the above reasons, I find that the negligence claim discloses a cause of action.

The identifiable class objection under s. 5(1)(b) of the CPA

Objection 7: There is no identifiable class

[295] As noted at para. 16 above, Canada did not object to the s. 5(1)(b) requirement for the subclass, since there was certainty that each subclass member could be identified as having a mental health condition either on the NRAD or medical detainee form.

[296] Canada maintained the position that the proposed class of all Immigration Detainees is "not rationally connected to the common issues" since "conditions vary between and within provinces."

[297] I address this issue briefly below.

[298] I first consider the applicable law and then apply the law to the present case.

(i) The applicable law

[299] I adopt the test I set out in *Farrell*, at paras. 229-32:

> The plaintiffs have an obligation, "although not an onerous one", to show that the class is not "unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues": *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21; *Cloud v. Canada (Attorney General)* (2004), 2004 CanLII 45444 (ON CA), 73 O.R. (3d) 401 (C.A.), at para. 45.
>
> The proposed class must be identifiable. Defining a class "is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.
>
> The plaintiffs must establish some basis in fact that: (i) the class can be defined by objective criteria; (ii) the class can be defined without reference to the merits of

> the action; and (iii) there is a rational connection between the common issues and proposed class definition: see *Hollick*, at paras. 9, 17-19.
>
> Where the class could be defined more narrowly, the court should either disallow certification or allow certification on the condition that the class definition be amended: see *Hollick*, at para. 21.

(ii) Application of the law to the present case

[300] In *Farrell*, I held, at para. 233:

> It is not disputed that inmates in the penitentiary system can be identified. A penitentiary is defined in the Act at s. 2(1). Whether a person was imprisoned in a penitentiary during the relevant period does not hinge on the merits of the action.

[301] The same conclusion applies in the present case. The class can be defined by objective criteria and without reference to the merits of the action.

[302] Canada submits that the proposed class of all Immigration Detainees is "not rationally connected to the common issues" since "conditions vary between and within provinces."

[303] I do not agree. There is a basis in fact that a rational connection exists to the common issues. The proposed class members were incarcerated and thus have a rational connection to the PCIs arising from the alleged conditions of such incarceration. On this basis alone, the s. 5(1)(b) requirement is met.

[304] In any event, there is some basis in fact from the Conditions Chart and from Dr. Arbel's evidence that many conditions were common throughout the provincial prisons, including co-mingling, strip searches, use of restraints, and severe restrictions on communications and contact. Given the low threshold for the some basis in fact test, there is a rational connection of all Immigration Detainees to the common issues.

[305] Finally, it is settled law that not all class members have to suffer the same damages. Rather, they must "share the same interest in the resolution of the common issues": *Cloud*, at para. 45; *Hollick*, at para. 21.

[306] Consequently, the extent to which any individual class member suffered individual damages does not prevent them from being an identifiable class member.

[307] The PCIs all address the liability and damages issues which affect all class members. There is a rational connection between the class members (the more than 8,360 Immigration Detainees incarcerated in provincial prisons) and the PCIs which address the claims of those class members.

[308] For the above reasons, I find that there is an identifiable class of Immigration Detainees under s. 5(1)(b).

The commonality objections under s. 5(1)(c) of the CPA

[309] The PCIs sought to be certified address (i) the claims under the *Charter* including whether any violations are saved by s. 1 (PCIs 1 to 3), (ii) the elements for the claim for systemic negligence (PCIs 4 to 7), and (iii) PCIs related to remedies, i.e., availability of damages under s. 24(1) of the *Charter* (PCI 8), payment of damages for breach of Canada's duty of care (PCI 9), punitive or exemplary damages (PCI 10), and the availability of aggregate damages (PCI 11).

[310] Canada accepts that PCIs 8, 9, and 10 raise common issues, if the PCIs for *Charter* breaches or systemic negligence can be decided in common and in the event that the plaintiffs can establish liability on a class-wide basis.

[311] Consequently, the commonality issue before the court relates to PCIs 1 to 7 seeking liability under the *Charter* and negligence, as well as PCI 11 seeking aggregate damages.

[312] Canada makes three objections to the PCIs:

(i) PCIs 1 to 7 cannot be determined in common since they will break down into individual trials for each class member.

(ii) In the alternative, there is no basis for the commonality of claims brought on behalf of class members in Quebec.

(iii) The remedy sought of aggregate damages under PCI 11 cannot be determined in common.

[313] I first review the applicable law on the test for commonality. I then review each of the objections.

<u>The applicable law on the test for commonality</u>

[314] I adopt the analysis of Perell J. in *Price,*[13] in which he addressed the general principles to establish the tests of commonality. Perell J. held, at paras. 104-11:

> The third criterion for certification is the common issues criterion. **For an issue to be a common issue, it must be a substantial ingredient of each class member's**

[13] Justice Perell's decision was set aside by the Divisional Court at 2020 ONSC 913, but the Divisional Court expressly upheld the legal tests he applied to the commonality requirement under s. 5 of the *CPA*, at para. 22.

claim and its resolution must be necessary to the resolution of each class member's claim. The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.

An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member. Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.

Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; i.e., by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member. In *Rumley v. British Columbia*, Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

> [...] **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.

However, 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; success for one member must not result in failure for another.

> **The common issue criterion presents a low bar.** An issue can be a common issue 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. Even a significant level of individuality does not preclude a finding of commonality. A common issue need not dispose of the litigation; **it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation**.
>
> As already noted above, **in the context of the common issues criterion, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.**
>
> **Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.** [Citations omitted; ellipsis in original; emphasis added.]

[315] I now review each of Canada's objections under s. 5(1)(c).

Objection 8: Can PCIs 1 to 7 be determined in common or will they will break down into individual trials for each class member?

[316] There is some basis in fact for the existence of PCIs 1 to 7 seeking liability against Canada. The Immigration Detainees are (or were) detained in provincial prisons. Such detention will continue to take place until the last of the provincial and territorial agreements expire. The evidence of Dr. Arbel, the Conditions Chart prepared by Dvorski, and the evidence of the experiences of the representative plaintiffs and proposed subclass members all provide some basis in fact for the existence of the claims under PCIs 1 to 7.

[317] Consequently, the only issue before the court with respect to PCIs 1 to 7 is whether there is some basis in fact that they can be determined in common, or whether they will break down into individual issues.

[318] For the reasons that follow, I find that there is some basis in fact for the commonality of PCIs 1 to 7.

[319] Canada raises three purported grounds of individuality based on (i) the reason for any class member's detention, (ii) different conditions in different provincial prisons and (iii) different harm or effects on each class member detained in a provincial prison. I address each of these issues below.

(i) Different reasons for detention

[320] A difference in the reasons for detention does not lead to a breakdown of PCIs 1 to 7. To the contrary, the plaintiffs submit that *any* detention of an Immigration Detainee in a provincial

prison is unlawful, *regardless* of the reason. PCIs 1 to 7 will involve a determination of whether detention in a provincial prison is authorized by *IRPA* and the *IRPR*, or whether, as the plaintiffs allege, their detention violates the *Charter* and international law and constitutes a breach of the duty of care.

[321] The plaintiffs rely on s. 3(3) of *IRPA* which requires that decisions under the Act comply with the *Charter* and international law. That issue does not engage the reason for detention.

[322] The reasons for detention are irrelevant to the core issue before the court. The plaintiffs allege that detention of Immigration Detainees is an administrative detention, and that Canada cannot impose a punitive detention on Immigration Detainees in provincial prisons.

[323] Canada submits that liability for *Charter* breaches and negligence depends on the assessment of individual CBSA officers, or the reasons the officer relied upon. That submission presupposes that it is lawful to use provincial prisons for immigration detention. In effect, Canada's submission illustrates the core commonality of the claim: the plaintiffs allege that the use of prisons for immigration detention is unlawful and Canada assumes the contrary.

[324] If a court finds that detention of any Immigration Detainee is contrary to the *Charter* and not saved by s. 1 (PCIs 1 to 3), or that Canada owed a duty of care to the Class and breached it (PCIs 4 to 7), such an answer would "avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice": *Price*, at para. 104.

[325] Even if the reasons for detention were relevant to PCIs 1 to 7, there is still some basis in fact for systemic commonality in the decision-making process of CBSA officers.

[326] For example, there is evidence that for immigration detainees not in an IHC jurisdiction, a provincial prison was selected over an IHC only because the detainee was not located in an IHC jurisdiction.

[327] For detainees within an IHC jurisdiction, the use of the NRAD form provides a common and categorical set of reasons informing the selection of an IHC versus a provincial prison. The NRAD scoring of class members would, even if the plaintiffs are unsuccessful on their central allegation that detainment in a provincial prison is always unlawful, allow for common application of the answer across the class or categories thereof.

(ii) Different conditions in each provincial prison

[328] Canada further submits that liability cannot be determined in common because there are different conditions in each provincial prison. I do not agree.

[329] Canada's own evidence is that there are significant commonalities across the country in provincial prisons. In the Conditions Chart prepared by Dvorski, he sets out common conditions across all regions of Canada. Those conditions include strip searches, the use of handcuffs and

leg shackles, co-mingling with violent offenders, "no touch" visits with friends and family, and severe restrictions on communications and freedom of movement. The Conditions Chart, on its own, would be a basis in fact for the commonality of PCIs 1 to 7.

[330] Canada relies on evidence from Dr. Arbel that in one of the 87 provincial prisons, immigration detainees may have been held in a separate cell or wing. However, finding a single small difference in only one of 87 provincial prisons does not change the common nature of the conditions relied upon by the plaintiffs.

[331] A similar submission was considered in *Navartnarajah v. FSB Group Ltd.*, 2021 ONSC 5418, leave to appeal refused, 2021 ONSC 7414 (Div. Ct.). In that case, the defendant opposed certification of an employment misclassification case on the basis that there were some differences in how the class members worked. Justice Morgan rejected that position since he found that there was a "core" commonality to which all class members were subject. He held, at para. 18:

> The overarching issue in this case is whether producers who have been until now classified as independent contractors are improperly so classified. And while Defendants' counsel may be accurate in stating that there are some detailed differences in the producers' agreements and work arrangements with the Defendants, these appear to generally exist at the margins of the working relationship and not at its core. While one producer may have a desk at the Defendants' premises and another chose to work entire out of their home, or one producer may keep different hours than another, the essence of their job is similar enough that the classification question can be addressed in common.

[332] The same conclusion arises in the present case. Based on the Conditions Chart, the evidence of the representative plaintiffs and the two subclass members, and the evidence of Dr. Arbel, there is a "core" commonality of conditions which can be explored by the court to determine liability under the *Charter* (PCIs 1 to 3) or for negligence (PCIs 4 to 7). To paraphrase Justice Morgan in *Navartnarajah*, "the essence of [the conditions] is similar enough that the [liability] question can be addressed in common."

[333] Further, there is some basis in fact that the core commonality of conditions in provincial prisons can be compared to the core commonality of conditions in IHCs.

[334] Dr. Arbel gave evidence that "detainees are afforded much more autonomy in IHCs than in provincial jails" and that "[t]hey wear their own clothing, and are substantially less restricted in movement and liberty."

[335] Dr. Arbel further notes in her report that, in IHCs:

(i) Immigration detainees "can move freely to other parts of a secured section."

(ii) "Toilets are located outside the room in facilities that allow for privacy."

(iii) "Detainees who are held in IHCs have more access to information regarding their legal status and available legal avenues as compared with detainees who are held in provincial jails."

(iv) "Interpretation services are more readily available in IHCs."

(v) "Detainees who are held in IHCs have direct and regular access to CBSA officers."

[336] Dr. Arbel further referred to evidence from the Red Cross that instances of lockdowns, triple bunking, strip searches and segregation experienced by immigration detainees in provincial prisons "could have otherwise been avoided if using IHCs."

[337] Dr. Arbel also stated that unlike the situation in IHCs, access is restricted for immigration detainees who are held in provincial jails and that immigration detainees held in provincial jails have inconsistent access to information as regards "legal options, medical care, complaints mechanisms, … schedules for family visits, as well as rules and disciplinary measures."

[338] Consequently, there is a basis in fact that liability can be determined as a common issue, based on the core common conditions in provincial prisons as compared to the core commonality of conditions in IHCs.

(iii) Different harm or effects

[339] Canada submits that because each class member detained in a provincial prison may have suffered different harm or effects, the liability issues under PCIs 1 to 7 cannot be determined in common. I do not agree.

[340] Based on Canada's own evidence in the Conditions Chart, Dr. Arbel's evidence, and the evidence of the representative plaintiffs and the two subclass members, there is a basis in fact that all Immigration Detainees in provincial prisons would have suffered some damage solely by being detained in a provincial prison.

[341] There is some basis in fact that every detainee in a provincial prison would have been subject to conditions such as strip searches, co-mingling, restrictions on family visits and phone access, restrictions on freedom to move outside a cell, and the use of handcuffs or shackles. These conditions (as discussed by Dr. Arbel) are inherent in a prison setting.

[342] Consequently, there is some basis in fact that a common issues judge could determine whether a base amount of damages can be awarded for all Immigration Detainees, or whether a certain time period would be required before a base amount could be ordered.

[343] In *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 255, the court affirmed the certification of a class action for

damages arising from the alleged breach of s. 9 of the *Charter* from the wrongful detention of protesters during the G20 summit in Toronto. The court held, at para 75:

> [A]s the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73 , that "**[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified**." [Emphasis added.]

[344] A base level of damages could also address the purposes of vindication and deterrence supporting the award of *Charter* damages. In *Brazeau v. Attorney General (Canada)*, 2020 ONCA 184, 149 O.R. (3d) 705, the court upheld the decision of the common issues judge on a summary judgment motion to order $500 as a base amount for any inmate placed in administrative segregation for a period of more than 15 days. The court held, at paras. 102-03:

> **The motion judge concluded in *Reddock* that the class members had all suffered a "base level of damages" that could be determined without the need for proof from individual class members. These damages were awarded on an aggregate basis pursuant to s. 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6** ("*CPA*"), applying *Ramdath v. George Brown College of Applied Arts and Technology*, [2015] O.J. No. 6850, 2015 ONCA 921, 341 O.A.C. 338, and *Good v. Toronto (City) Police Services Board* (2016), 130 O.R. (3d) 241, [2016] O.J. No. 1748, 2016 ONCA 250, leave to appeal to S.C.C. refused [2016] S.C.C.A. No. 255. **The motion judge, at para. 486 of *Reddock*, fixed the amount at $20 million for the three functions *Ward* holds to be pertinent, namely, vindication, deterrence and compensation.** The compensatory portion of that award was $9 million calculated on the basis of $500 for each inmate placed in administrative segregation for more than 15 days: at paras. 381, 396. After deduction of legal fees and disbursements, the amount remaining is to be distributed to the class members pursuant to s. 24(2) of the *CPA*: at para. 492.
>
> We would not interfere with the premises of the damage award. **Damages for the vindication of the class members' rights are suitable. A measure of deterrence damages is also warranted given the resistance of the correctional authorities to change**, and while the CCRA has been amended and the SIUs introduced, there remain issues of implementation of the new scheme. Base compensation calculated on the basis of $500 for each inmate seems modest given the motion judge's findings of the harm the inmates suffered. [Emphasis added]

[345] Even if there is no basis in fact for a base level of damage (which I do not find), s. 6(1) of the *CPA* provides that the court cannot refuse to certify an action only because individual damage trials are required.

[346] Given the core commonality of the liability issue as I discuss above, I find that there is some basis in fact that PCIs 1 to 7 can be determined in common.

Objection 9: In the alternative, there is no basis for the commonality of claims brought on behalf of class members in Quebec

[347] Canada submits that there is no basis in fact for the existence or commonality of any claims related to the 861 Immigration Detainees held in provincial prisons in Quebec between May 15, 2016 to July 18, 2023, because the plaintiffs have not pleaded any claim under the *Civil Code of Québec*, C.Q.L.R., c. CCCQ-1991 (the "Quebec *Civil Code*") or the Quebec *Charter of Human Rights and Freedoms*, C.Q.L.R., c. C-12 (the "Quebec *Charter*").

[348] I do not agree.

[349] Canada relies on the decision in *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928, where the court held at para. 46 that "counsel seeking to certify a multijurisdictional class action including Québec must ensure that their pleading and submissions address the distinctive nature of Québec law."

[350] However, in the present case, the plaintiffs have pleaded material facts which could establish liability under Quebec law. Article 1457 of the Quebec *Civil Code* provides:

> Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another. Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature. He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

[351] Consequently, under the test for civil wrongs in Quebec, as reflected in article 1457 of the Quebec *Civil Code*, there are analogous requirements to prove duty, breach, causation and injury/harm. Those elements can be efficiently assessed together with the common law negligence analysis.

[352] The liability of Canada for Quebec Immigration Detainees can be considered by the court without explicit reference to the Quebec *Civil Code* or the Quebec *Charter* in the statement of claim. In *Rausch v. Pickering (City)*, 2013 ONCA 740, 369 D.L.R. (4th) 691, the court held, at para. 95, that a plaintiff will satisfy pleading requirements on certification if the plaintiff pleads "the factual matrix … within which the [the defendant's] possible liability is to be located" and need not "explicitly set out the technical cause of action on which it relies."

[353] The pleadings reviewed under the s. 5(1)(a) analysis for *Charter* and negligence claims provide the same material facts necessary to plead the case for Quebec Immigration Detainees. The evidence as to commonality is the same. There is a basis in fact for a common determination of liability under the Quebec *Charter* and the Quebec *Civil Code*, even if the statutes are not expressly pleaded.

[354] For the above reasons, I do not accept this objection raised by Canada.

Objection 10: The claim for aggregate damages (PCI 11)

[355] Canada submits that the plaintiffs have failed to establish some basis in fact for the court to award aggregate damages.

[356] Canada relies on *Pro-Sys*, in which the court certified an action for alleged overcharges passed on to indirect purchasers through the chain of distribution. In a heading entitled "Expert Evidence in Indirect Purchaser Class Actions", the court held, at para. 118:

> In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[357] Similarly, in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, the court held that aggregate damages in a price-fixing claim could be certified on the basis of a credible and plausible methodology.

[358] Canada submits that the claim for aggregate damages cannot be certified because the plaintiffs have not led any expert evidence as to the methodology to determine aggregate loss. I do not agree.

[359] The decisions in *Pro-Sys* and *Pioneer* arise in the context of economic-based overcharge cases in which the court could not find, without a credible and plausible expert methodology, that there is some basis in fact to determine overcharges on an aggregate basis.

[360] However, the approach in *Pro-Sys* and *Pioneer* does not impose a requirement that an expert be retained to provide a methodology in every case where aggregate damages are sought. The only requirement remains that there be some basis in fact that the elements of s. 24 of the *CPA* can be met.

[361] Section 24(1) of the *CPA* provides:

> (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

[362] In *Markson*, the court reversed the decision of the motions judge who denied certification on a claim for interest paid allegedly in violation of s. 347(1)(b) of the *Criminal* Code, R.S.C. 1985, c. C-46. No expert methodology was put before the court, as the basis for the aggregate damages award depended on interest payments which did not require proof by individual class members and could be addressed by sampling. The court held, at para. 44:

> […] I agree with Cullity J. in *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974, [2005] O.T.C. 365 (S.C.J.), at para. 25 that **at the certification stage the plaintiff need only establish that "there is a reasonable likelihood that the preconditions in section 24(1) of the CPA would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues**". [Emphasis added.]

[363] The position taken by Canada would transpose the requirement for expert evidence in price-fixing cases to any class action in which aggregate damages are sought. The courts have not taken such an approach.

[364] As noted above, courts in both *Good* and *Brazeau* have both certified and awarded aggregate damages when there was evidence before the court of a base amount that could be determined without evidence from any individual class member, based on evidence of a core experience suffered by all or part of the class who suffered damages or on principles of deterrence and vindication for damages under s. 24 of the *Charter*.

[365] In the present case, there is some basis in fact for a base amount of compensatory damages. A judge could rely on Dr. Arbel's evidence as to the common conditions in provincial prisons and Dvorski's evidence from the Conditions Chart to determine a base level of damages as in *Good* and *Brazeau*. No expert methodology is required, as the calculation of the base amount would be for the court to determine on the evidence of a common experience, with aggregate compensatory damages to be assessed for those members of the class found to be entitled to a base award.

[366] Further, even if an individual base compensatory award was not ordered, there is a reasonable possibility that aggregate damages could be awarded for the *Charter* breaches. Such damages take into account deterrence and vindication and do not require evidence from individual class members.

[367] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, [2020] 1 S.C.R. 678, the court summarized the framework for awarding *Charter* damages as discussed in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28. The court held, at para. 167:

> In *Ward*, this Court explained the approach to be taken in order to determine whether an award of damages is an appropriate remedy for an infringement of the *Charter*. A brief review of that approach will help to situate the limited government immunity in its proper context. The first step identified in *Ward* is to establish a *Charter* infringement. The second is to determine whether damages would serve a useful function or purpose. The functions of compensation, vindication and deterrence can satisfy this requirement. At the third step, the government may raise its limited immunity to oppose a damages award by citing considerations such as the existence of alternative remedies and concerns for good governance. These are not the only possible considerations, as others may be identified over time. The fourth step is to determine the quantum of the damages.

[368] This is an additional form of aggregate damages that could be awarded based on the evidence at a common issues trial.

[369] It is not contested that Canada keeps meticulous and detailed records of immigration detention. Canada can determine the number of days each Immigration Detainee spent in a provincial prison and the number of times the Immigration Detainee was sent to a provincial prison. Consequently, there is some basis in fact on which aggregate damages could be allocated amongst the Immigration Detainees.

[370] For the above reasons, I find that there is some basis in fact to establish a reasonable likelihood that the preconditions in section 24(1) of the *CPA* would be satisfied and an aggregate assessment ordered if the plaintiffs are successful at trial of the common issues. Consequently, I reject Canada's objection.

Preferable procedure objections under s. 5(1)(d) of the CPA

[371] Canada makes two objections under s. 5(1)(d) of the *CPA*:

(i) Objection 11: The proposed class action is not the preferable procedure since the process would be unmanageable.

(ii) Objection 12: The proposed class action is not the preferable procedure since the remedy of judicial review is available.

[372] I first review the applicable law and then consider the objections.

The applicable law

[373] The present class action was brought after the legislative amendments to the *CPA* and is thus subject to the test under s. 5 (1.1) of the *CPA*, which provides:

> (1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,
>
> (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and
>
> (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members.

[374] Both parties rely on the recent decision of Justice Perell in *Banman*, in which he set out the test to be applied under s. 5(1.1) of the *CPA*. I adopt his analysis, at paras. 320-21 (footnotes omitted):

> If the first three criteria [ss. 5(1)(a), (b) and (c)] are satisfied, then the recent amendments to the *Class Procedings Act, 1991* [*sic*] require that the preferable procedure analysis be more rigorous and involve determining: (a) whether the design of the class action is manageable as a class action; (b) whether there are reasonable alternatives; (c) whether the common issues predominate over the individual issues; and (d) whether the proposed class action is superior (better) to the alternatives. This analysis is accomplished by comparing the advantages and disadvantages of the alternatives to the proposed class action through the lens of judicial economy, behaviour management, and access to justice.
>
> The circumstance that some class actions will involve both a common issues phase and an individual issues phase is not an obstacle to certification, but the court must consider the contributions of both the common issues phase and the individual issues phase in the preferable procedure analysis. The purpose of determining whether the common issues predominate over the individual issues is to ensure that the common issues - taken together - advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice. A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action

Analysis of the objections

[375] I now review Canada's two s. 5(1)(d) objections under the four factors discussed at para. 320 in *Banman*. I address both objections collectively as they are considered at different aspects of the *Banman* test.

(i) Factor 1: Is the design of the class action manageable as a class action? (Objection 11)

[376] Similar to its objection under s. 5(1)(c) of the *CPA*, Canada submits that a class action will be unmanageable because (i) there will be a need for "detailed inquiries into the individual circumstances of each and every class member" and (ii) the class action will involve "different standards and governing policies set out across different pieces of legislation" across the 13 provinces and territories and 87 provincial prisons.

[377] I do not agree.

[378] The proposed class action is focused on the core question of the CBSA practice of using provincial prisons for immigration detention. This is a "bright line" issue which is best managed as a class action. Further, all issues relating to the availability of *Charter*, punitive, and base compensatory damages are also best managed as a class action. Any remaining issue of individual damages in excess of any other amounts are best addressed after all of the common issues are decided.

[379] Consequently, I do not accept Canada's submission that individual circumstances for each detention, or the allegedly different standards and policies set out across different pieces of legislation, would cause any breakdown of the manageability of a class action.

[380] Further, even if there were some minor differences in standards and policies or legislation (Canada led no evidence on this issue), there remains some basis in fact that a class proceeding would be manageable. The Conditions Chart prepared by Dvorski and Dr. Arbel's evidence provides some basis in fact that a court could consider common conditions across Canada as part of the court's review of the alleged breaches of the *Charter* and duty of care.

[381] Canada also submits that the requirements to apply different law to detainees in different provinces renders the class proceeding unmanageable. I do not accept this submission.

[382] First, the law applicable to the *Charter* claims will be the same for all detainees no matter their province of imprisonment.

[383] Second, there is no evidence of any material differences in the law of negligence across the country. Systematic national negligence claims were certified in many cases against the government (see *Brazeau*, *Francis*, and *Reddock*). Systematic national tort claims for trespass to the person and intrusion upon seclusion were certified in *Farrell*. In effect, Canada submits that certification of a national tort claim should always be precluded because provincial tort law may not be identical. That position has not been accepted by the courts.

[384] Even if there were material differences in the law applicable to any substantive part of the plaintiffs' claim across provinces, judges hearing national class proceedings can apply the law of different jurisdictions as necessary. In *Ravvin v. Canada Bread Company*, 2019 ABQB 686, the court held, at para. 39:

> Secondly, a justice, hearing a national class proceeding …can and must consider regional interests and any unique provincial … conditions, just like another Justice in a different case might apply foreign law to the problem within his or her jurisdiction.

[385] The causes of action and PCIs address the legality of incarceration of Immigration Detainees in provincial prisons. The design of this proposed class action follows the approach in *Dadzie*, in which the defendants Ontario and Canada consented to certification of a class action for immigration detainees incarcerated in Ontario prisons who suffered damages due to staffing-related lockdowns.

[386] Finally, as I discuss at paras. 340 to 344 above, determination of a base level of damages and the availability of aggregate damages further supports the manageability of the class action. As in *Good* and *Brazeau*, the court can make such determinations based on common evidence, which is best managed in a class action proceeding. A court can consider the factors of deterrence and vindication when determining *Charter* damages as set out in *Ward*, which again is best managed in a single class proceeding. There is no need for individual evidence for any of these common damages issues.

[387] Consequently, the PCIs will be more efficiently managed in a class action.

(ii) Factors 2 and 4: Are there reasonable alternatives to the class action and is the class action superior to the alternatives? (Objection 12)

[388] Canada submits that each Immigration Detainee could bring an application for judicial review. I do not find that such an alternative is reasonable. Further, I find that a class action is far superior to such an alternative.

[389] Judicial review offers no systemic determination or resolution for the proposed class.

[390] In *Farrell*, I rejected a similar submission made by Canada. Those reasons apply equally to the present case. I held, at para. 357:

> I adopt the plaintiffs' submissions that a judicial review would not be the preferable procedure for the following reasons:
>
> (i) A judicial review would not provide damages for torts or for *Charter* breaches, precluding the important functions of *Charter* damages – compensation, vindication, and deterrence.

(ii) A judicial review would not resolve all the common causes of action.

(iii) A judicial review would not toll individual limitation periods, and therefore would result in the expiry of many individual claims.

(iv) It is not clear that a judicial review could result in a "binding national decision by the Federal Court", as submitted by Canada. In *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at paras. 70-71, the court expressed uncertainty over whether the Federal Court has the power to make formal, generally binding constitutional declarations (versus constitutional findings applicable only to a particular proceeding).

(v) A judicial review would not distribute fixed litigation costs amongst a large number of class members and therefore would undermine access to justice.

(vi) In a judicial review, the plaintiffs would not have access to the Class Proceedings Fund, which in the present case is covering disbursements and providing adverse costs indemnification.

(vii) To provide any other relief, a judicial review would need to be coupled with full individual trials.

[391] Further, judicial review (even if it could be an effective alternative recourse) could only assist those Immigration Detainees presently detained. It cannot assist those Immigration Detainees in the class who are alleged to have suffered damages because of the impugned CBSA practice and for whom harm has crystallized.

[392] Similarly, individual actions, joinder or consolidation and test cases would not be preferable. Counsel would need to be retained at significant cost to challenge any *Charter* issues, and would not obtain the important benefit of funding often necessary to challenge the government, particularly as the class members face acknowledged vulnerabilities as immigration detainees (see para. 145 above).

(iii) Factor 3: Do the common issues predominate over individual issues?

[393] As noted in *Banman*, at paras. 320 and 321:

(i) The test for predomination must be undertaken in light of the goals of class proceedings, to ensure that the common issues - taken together - advance the objective of judicial economy and sufficiently advance the claims of the class members to achieve access to justice.

(ii) A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.

[394] If PCIs 1 to 7 are certified, the essential liability claim of whether Canada's detention of class members in provincial prisons was unlawful will be resolved for every class member through a resolution of the common issues. Further, there can be a common assessment of what damages are owed under PCIs 8 to 10, and whether aggregate damages ought to be awarded to the class under PCI 11.

[395] The only individual circumstances that may impede the complete resolution of any class member's claim would be where a class member seeks compensatory damages above a base amount. Those circumstances are contemplated in the plaintiffs' proposed litigation plan and are manageable under the tools provided for in section 25 of the *CPA*.

[396] The determination of the common issues of liability and damages significantly predominates over any individual damages trials that may remain after certification, given the goals of class proceedings.

[397] In any event, s. 6 of the *CPA* provides that "[t]he court shall not refuse to certify a proceeding as a class proceeding solely on [the ground that] … [t]he relief claimed includes a claim for damages that would require individual assessment after determination of the common issues."

[398] Judicial economy and access to justice are best served by a single determination. Class members do not have to bring costly individual actions or applications for judicial review. Class counsel obtained funding from the Class Proceedings Fund to fully represent the class with the expert evidence, legal research, and extensive preparation required for a complex hearing involving numerous *Charter* grounds and a systemic negligence claim against the government.

[399] Behavioral modification is also best addressed by a single determination of the legality of the practice, and not by individual trials or judicial review. Further, since Canada defends the CBSA practice against both the *Charter* and negligence claims, a class action would be a more manageable method to achieve the goal of behavioral modification, if the plaintiffs are successful on the merits of their claims.

[400] Further, the ability to obtain aggregate damages serves an important access to justice purpose and acts as a deterrent to unlawful conduct.

[401] This is a case where access to justice concerns in respect of the vulnerability and lack of financial resources of the class strongly support preferability as a class action.

[402] Similarly, I held in *Farrell*, at para. 360:

> [F]inancial and other barriers to accessing justice normally faced by individual litigants are significantly greater for those who are incarcerated.

[403] The present class proceeding, unlike other individualized means of redress, allows litigation costs to be shared and makes smaller value claims viable for vulnerable persons with financial constraints. Through the lens of judicial economy, access to justice, and behavior modification, the class proceeding is preferable.

[404] In *Banman*, Perell J certified litigation alleging institutional abuse on behalf of 429 patients detained in the forensic psychiatric unit of the St. Thomas Psychiatric Hospital, under the new s. 5(1.1) requirements. I adopt his reasoning at para. 357, as the same factors apply to the present case:

> My analysis of the access to justice branch of the preferable procedure analysis is that a class proceeding in the immediate case is the preferable procedure and superior because: (a) a class action automatically assembles the class members who may benefit by a common issues trial and then they will have an opportunity to opt into individual issues trials if they have economically viable claims; (b) a class action secures the class members with legal representation that they might not otherwise obtain; (c) Class Counsel may be unwilling to take on the risks of a joinder action and so a class action is the only viable route to access to justice for those with economically viable claims; (d) a class action achieves economies of scale for the whole group, and allows those with economically viable individual claims to pursue them later depending on the outcome of the common issues trial; and (e) a class action is the most favourable procedure for the defendant (in this case the Government of Ontario) because a class action ending in individual issues trials accommodates all of the claims of the class members (the patients) that wish to pursue them and if the class action settles, it will benefit the defendant (the Government) by discharging it from liability for all of the class members (the patients), even those that would not have proceeded to individual issues trials.

[405] Perell J. concluded that "the patients that comprise the class have an easier (superior) route to access to justice through the procedural mechanism of a class action": at para. 358. He held that "the common issues taken together in the immediate case do predominate over the individual issues": at para. 341. The same applies in the present case.

[406] In addition to the grounds considered in *Banman*, this class action will allow for the possibility of aggregate damages. If individual damage assessments are required for those who claim damages in excess of any base amount ordered by the common issues judge (if determined to be appropriate), those can be effectively managed under s. 25 of the *CPA* utilizing the extensive data regarding the class that has been collected by Canada.

[407] For the above reasons, I dismiss Canada's objections related to preferable procedure.

Objections as to adequate representative plaintiff under s. 5(1)(e) of the CPA

[408] Canada makes three objections under s. 5(1)(e):

(i) The proposed plaintiffs are not adequate representative plaintiffs because they have not presented a workable litigation plan to address the individual issues. (Objection 13)

(ii) The proposed plaintiffs are not adequate representative plaintiffs because the litigation plan raises privacy concerns which may arise during the notification stage. (Objection 14)

(iii) The proposed plaintiffs are not adequate representative plaintiffs because they have not been detained outside Ontario. (Objection 15)

[409] I first review the applicable law and then consider the objections raised by Canada.

The applicable law

[410] Under s. 5(1)(e) of the *CPA*, the representative plaintiff must fairly and adequately represent the class, have a plan for the proceeding, and cannot have a conflict with the class on the common issues.

[411] In determining this issue, the court can consider such factors as the motivation of the representative plaintiff, the competence of representative plaintiff's counsel, and whether the representative plaintiff will "vigorously and capably prosecute the interests of the class": *Dutton*, at para. 41.

[412] A litigation plan is a work in progress, to be revisited and adapted as the litigation progresses: *Rego v. Bayerische Motoren Werke AG*, 2023 ONSC 5244 at para. 90.

[413] I now address the three objections.

Objection 13: Litigation plan

[414] Canada submits that the litigation plan "will be an overly complicated and cumbersome process" because "it fails to acknowledge the complexity and magnitude of document assembly and production that would be required" since "[e]ach province has their own laws, regulations, and procedures governing the operations of [provincial prisons]".

[415] I do not agree.

[416] The litigation plan provides a workable method for advancing the proceeding. Following certification, the litigation plan sets out proposed steps in respect of opt-outs, documentary discovery, oral discovery, pleading amendments, the exchange of expert evidence, and the

conduct of the trial. The proposed litigation plan is consistent with the common issue assessments conducted in cases like *Reddock*, *Brazeau*, and *Francis*.

[417] Further, it is not obvious at this certification stage that the documents relating to the operation of every provincial prison would be necessary to determine the common issues. Even if such voluminous documents were required at some stage, the litigation plan could be modified to provide an effective means of documentary production.

[418] The litigation plan acknowledges the possibility of damages issues that are specific to individuals or subgroups and recognizes that management tools under the *CPA* shall be utilized as necessary to resolve them. The litigation plan provides:

> The common issues trial should resolve all issues of the Defendant's liability, and any aggregate assessments of damages. For any assessments of damages that are specific to individuals or subgroups of individuals as amongst the Class or Subclass, the Plaintiffs will design and seek approval of management protocols for the resolution of all such outstanding issues, using the procedural tools provided under ss. 25 and 26 of the *CPA*.

[419] Consequently, I find that the litigation plan is workable.

Objection 14: Privacy issues on notification

[420] Canada submits that there are privacy concerns inherent in notifying class members' family members or next-of-kin, especially if notification is sent to an unsafe country from which the detainee fled.

[421] The plaintiffs submit that any privacy concerns engaged by the notice provisions of the litigation plan can be managed at the notification stage. I agree.

[422] Canada retains data that identifies every Immigration Detainee and their length of immigration detention. Canada also knows the location where every class member is or was detained, their address outside of Canada prior to entry, and any address updates during their detention. The class member information possessed by Canada is extremely detailed and thorough.

[423] Further, a medical needs form is mandatory for every detainee according to Canada's operational manual. The medical needs form "ensure[s] national consistency in gathering and sharing information regarding detainee medical needs" and "contains emergency contact information."

[424] Consequently, there is a detailed process available to notify Immigration Detainees at addresses known to Canada.

[425] The court may have to address privacy concerns if there is a risk established by directly notifying either the individual detainee or other contact persons. That risk may need to be managed through a more general form of notice, although that issue can only be determined at the notice stage on proper evidence before the court.

[426] Consequently, the potential notification issues raised by Canada are not a valid objection to certification.

Objection 15: Detention in Ontario of representative plaintiffs and proposed subclass members

[427] Canada submits that because the representative plaintiffs and Foreman and Mawut as proposed class members have not been detained outside Ontario, "their claims are inherently limited to within this jurisdiction" and as such the plaintiffs "have not tendered any basis in fact to tender a national class."

[428] Canada offers no support for the allegation that a national class requires representative plaintiffs from different provinces or territories. To the contrary, Canada's submission is inconsistent with s. 5(1)(e) of the *CPA* and the law.

[429] Section 5(1)(e) only requires an adequate representative plaintiff for the class. It Is not necessary to require a plaintiff from every province and territory as representative plaintiffs in a national class action.

[430] In the present case, each of the proposed representative plaintiffs and proposed subclass members have been detained in provincial prisons. The record contains detailed evidence as to the effects of their incarcerations. The proposed representative plaintiffs understand the issues in the case and are prepared to represent the class. There is no evidence of any potential conflict among Immigration Detainees between provinces, nor would such be anticipated given the national nature of the *Charter* and systemic negligence claims.

[431] By way of example, in *Brazeau* and *Reddock* the representatives of the class were adequate because they had been placed in administrative segregation. Those individuals represented a national class even though their administrative segregation did not take place in every province and territory. There is no difference in the present case.

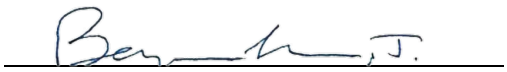
[432] Consequently, Richard and Garcia Paez are suitable representative plaintiffs. They do not have to reside in different provinces in order to adequately represent the class.

ORDER AND COSTS

[433] For the above reasons, I grant the motion and certify the action as a class proceeding for the proposed class and subclass pursuant to s. 5 of the *CPA*.

[434] If the parties cannot agree on costs, the plaintiffs shall deliver written costs submissions of no more than five pages (not including a costs outline) by August 6, 2024. Canada shall

deliver responding costs submissions of no more than five pages (not including a costs outline) by September 3, 2024. The plaintiffs may deliver reply costs submissions of no more than three pages by September 17, 2024.



GLUSTEIN J.

Date: 20240705

CITATION: Richard v. The Attorney General of Canada, 2024 ONSC 3800
COURT FILE NO.: CV-22-00681184-00CP
DATE: 20240705

ONTARIO

SUPERIOR COURT OF JUSTICE

TYRON RICHARD and ALEXIS GARCIA PAZ

Plaintiffs

AND:

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR DECISION

Glustein J.

Released: July 5, 2024