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Toronto

Court File No.:

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**TYRON RICHARD and ALEXIS GARCIA PAEZ**

Plaintiffs

- and -

**THE ATTORNEY GENERAL OF CANADA**

Defendant

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

TO THE DEFENDANT

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

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

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

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

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

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

~

Date: \_\_\_\_\_

Issued by: \_\_\_\_\_  
Local Registrar

Address: Superior Court of Justice  
393 University Avenue, 10<sup>th</sup> Floor  
Toronto, ON M5G 1E6

TO: **THE ATTORNEY GENERAL OF CANADA**  
Department of Justice Canada  
120 Adelaide Street West, Suite 400  
Toronto, ON M5H 1T1

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**CLAIM**

1. The Plaintiffs claim, on their own behalf and on behalf of the members of the Class, as defined below:

- a. an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the “CPA”) certifying this action as a class proceeding and appointing the Plaintiffs as the representative plaintiffs;
- b. a declaration that the Defendant:
  - (i) infringed the Plaintiffs and the Class’ rights under ss. 7, 9, 12, and 15 of the *Canadian Charter of Rights and Freedoms* (“Charter”) and that those infringements are not saved by s. 1 of the *Charter*;
  - (ii) infringed the rights of the Subclass (as defined below) under s. 15 of the *Charter* and that the infringement is not saved by s. 1 of the *Charter*;
  - (iii) owed a duty of care and a fiduciary duty to the Plaintiffs and the Class and breached these duties; and
  - (iv) is liable to the Plaintiffs and the Class for the damages caused by its breach of common law and statutory duties;
- c. a just and appropriate remedy under s. 24(1) of the *Charter*, including damages in the amount of \$50 million or such other amount as may be fixed by the Court on an aggregate or individual basis;
- d. general, aggravated, and special damages in the amount of \$50 million or such other amount as may be fixed by the Court on an aggregate or individual basis;
- e. punitive and exemplary damages in an amount to be determined at trial;

- f. the costs of administering the plan of distribution of the recovery in this action, together with applicable taxes;
- g. an order directing a reference or giving such other directions as may be necessary to determine any issues not determined at the trial of the common issues;
- h. prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- i. costs of this action, together with applicable taxes thereon; and
- j. such further and other relief as this Honourable Court may deem just.

## OVERVIEW

2. Immigration-related detention (“Immigration Detention”) is the subject of both domestic and international laws and standards. Pursuant to those domestic and international rules, Immigration Detention must always be an administrative, non-punitive process.

3. Canada has been criticized heavily and called on to end its punitive Immigration Detention practices. In the words of Amnesty International and Human Rights Watch:<sup>1</sup>

Under no circumstances should a person for immigration-related reasons be treated in a punitive manner, including being subjected to solitary confinement, or detained in facilities used for criminal law enforcement, such as jails, or in jail-like facilities.  
...

... 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 noncriminal 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.

4. In breach of fundamental *Charter* rights and accepted international legal norms, the Canadian Border Services Agency (“CBSA”), acting as agent for Canada, regularly and arbitrarily

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<sup>1</sup> Joint Report of Human Rights Watch and Amnesty International: “*I Didn’t Feel Like a Human in There*”: *Immigration Detention in Canada and its Impact on Mental Health*. June 2021 (the “Amnesty/HRW Report”).

detains non-citizens (“Immigration Detainees”) in provincial and territorial correctional facilities (“Provincial Prisons”), including in maximum security prisons housing Canada’s most dangerous criminals.

5. Immigration Detainees can include migrants and refugees, as well as current and former Canadian permanent residents. This action is brought on behalf of a class of Immigration Detainees who were detained in a Provincial Prison for immigration-related purposes since 2016, as set out below.

6. Immigration Detainees held in Provincial Prisons are predominantly incorporated into the general inmate population, and are thereafter treated as though they are criminal inmates themselves. They 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 are severely restricted. They are exposed to tense and dangerous environments, are regularly subjected to threats of violence, and may be subjected to actual violence.

7. Some Immigration Detainees, including the Plaintiff Mr. Richard, have gone on hunger strikes for extended periods of time in protest of their extensive and arbitrary detention.

8. The psychological stress of detention, even for a brief period of time, causes significant deterioration in mental health including by exacerbating existing mental health conditions including depression, anxiety, and post-traumatic stress. Further, unlike criminal detainees, Immigration Detainees have no set end date for their detention, resulting in additional psychological stress. The Plaintiffs seek to certify additional claims on behalf of Immigration Detainees with mental health conditions as a subclass.

9. The Class Members are united in their claims against Canada for the harms suffered by Canada's administration of Immigration Detention. Canada's detention of the Class Members in Provincial Prisons is a violation of their *Charter* rights, a breach of Canada's tort and fiduciary duties to them, and contrary to domestic and international legal requirements which mandate that Immigration Detention must be administrative and non-punitive in nature. These breaches have caused the Class to suffer significant physical and psychological injuries.

## THE PARTIES

### A. The Plaintiffs

10. The Plaintiff Tyron Richard is a citizen of Grenada and a permanent resident of Canada. He was arrested by the CBSA in 2015 pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") and detained in two Provincial Prisons for a collective period of 18 months.

11. The Plaintiff Alexis Garcia Paez is a citizen of Mexico and an accepted refugee claimant in Canada. He was arrested by the CBSA in October, 2021, pursuant to the *IRPA*, and detained in a Provincial Prison for approximately three weeks.

12. The Plaintiffs bring this action pursuant to the *CPA*, on their own behalf and on behalf of the following proposed class:

All persons who were detained by the Canadian Border Security Agency (the "CBSA") under Division 6 of Part I of the *Immigration and Refugee Protection Act* in a provincial or territorial correctional facility ("Provincial Prison") as of May 16, 2016, to the date of certification of this action (the "Class" or "Class Members"), including a subclass of:

All Class Members who were identified by the CBSA as presenting with symptoms, diagnosis, or active treatment for a mental health condition in a *National Risk Assessment for Detention* form or medical assessment completed prior to, or during, the Class Member's detention in a Provincial Prison (the "Subclass" or "Subclass Members").

**B. The Defendant**

13. The Defendant Attorney General of Canada (“Canada”) is the legal entity liable for the torts committed by its agents and servants pursuant to s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

14. The CBSA is a federal law enforcement agency and agent and servant of the Crown. Its creation was formalized by the *Canada Border Services Agency Act*, R.S.C. 2005, c. 38, and it is administered under the authority of the Minister of Public Safety and Emergency Preparedness.

15. 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.

**THE CLASS IS SUBJECT TO UNLAWFUL DETENTION FOR NON-IMMIGRATION RELATED PURPOSES**

16. Canada’s detention of Immigration Detainees in Provincial Prisons is: a) a violation of their *Charter* rights; b) a breach of Canada’s tort and fiduciary duties to them; and c) contrary to domestic and international laws and other legal requirements which mandate that Immigration Detention is, and must be, administrative and non-punitive in nature.

17. Canada’s unlawful conduct is revealed through statistical datasets that Canada is required to maintain in connection with national and international reporting obligations on the conditions of Immigration Detainees in its care. Canada’s aggregated statistics on Immigration Detention reveal precisely the nature and scope of the breaches of Canada’s legal duties to Immigration Detainees.

**A. Detention under the *IRPA***

**(i) Purposes of the detention**

18. Immigration Detention is authorized by the *IRPA* and the associated *Immigration and Refugee Protection Regulations*, SOR/93-22 (the “*Regulations*”). Pursuant to s. 3(f) of the *IRPA* itself, the *IRPA* and the *Regulations* are to be construed and applied in a manner that, among other factors, complies with international human rights instruments to which Canada is signatory.

19. 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.

20. There are limited grounds for Immigration Detention. Pursuant to the *IRPA* and the *Regulations*, a non-citizen can be detained if:

- a. there are reasonable grounds to believe that the individual is:
  - (i) unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order;
  - (ii) a danger to the public; or
  - (iii) unable to satisfy the CBSA of their identity; or
- b. they are part of an irregular arrival as designated by the Minister of Public Safety and Emergency Preparedness.

21. The vast majority of Immigration Detainees are detained solely on the grounds that the CBSA believes that they are unlikely to appear for an immigration hearing or for removal from Canada – *i.e.*, they are a flight risk. In 2019-2020, of the 8,825 persons detained under the *IRPA*,

7,509 (85%) of Immigration Detainees were detained on the grounds that they were a flight risk. A further 564 (6%) were detained on the ground that they were unable to satisfy the officer as to their identity. Only 590 persons were detained on the grounds that the CBSA concluded they were a “danger to the public” (7%).

**(ii) Place of detention**

22. The *IRPA*, the *Regulations* and the ENF-20 do not stipulate the place of detention of Immigration Detainees.

23. Canada has established Immigration Holding Centres (“IHC”) to house Immigration Detainees in a purpose-built administrative detention setting. IHCs only exist in three locations: Toronto, Ontario, Laval, Quebec, and Surrey, British Columbia. These IHC locations can collectively house 362 Immigration Detainees at any given time.

24. 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.

25. Notwithstanding the existence of IHCs and the availability of alternatives to incarceration, nineteen percent (19%) of Immigration Detainees in 2019-2020 were detained in a Provincial Prison, and forty percent (40%) of Immigration Detainees in 2020-2021 were so detained. Those same years, almost all detainees (95% and 88%, respectively) were located in provinces with IHCs.

26. Because the majority of long-term detainees are held in Provincial Prisons, these numbers under-represent the true extent of the issue. The true picture is revealed by the fact that

approximately two-thirds of all days spent in Immigration Detention are spent in a Provincial Prison.

27. There is no legal standard guiding CBSA's decision to hold an Immigration Detainee in a Provincial Prison rather than an IHC. Canada administers the decision-making process for the location of detention using an internal risk assessment rubric, known as the *National Risk Assessment for Detention* ("NRAD"). An NRAD form is supposed to be completed by a CBSA enforcement officer for each Immigration Detainee prior to the commencement of detention, and every 60 days thereafter.

28. There is only one NRAD form, regardless of the specified purpose for which the Immigration Detainee is being held pursuant to the *Regulations*. The NRAD form consists of a brief questionnaire that assigns "points" to an Immigration Detainee based on a set of "Risk Factors" that Canada has deemed relevant to the place of detention. As described below, these risk factors and NRAD itself do not serve any rational purpose in determining place of detention for Immigration Detainees.

29. Between 2014 and 2017, the NRAD consisted of three sections which ranked Immigration Detainees based on "Higher Risk", "Medium Risk", and "Lower Risk" factors. Higher Risk factors indicated in favour of detention in a Provincial Prison, and included "immediate risk of suicide". Medium Risk factors, which were to be monitored to determine whether the "risk escalate[d] to a point where detention in a provincial facility may be required", included "mental health issues", "recent/ongoing medical care", "previous attempt of suicide/self-harm", and "behaviour issues".

30. The current iteration of NRAD has been in place since 2017, and assigns points on a scale for each "Risk Factor" question. If the Immigration Detainee's score is higher than 10 points, or between 5-9 points and the CBSA officer determines, at their discretion, that the "risk" cannot be

mitigated in an IHC, the Immigration Detainee is to be held at a Provincial Prison. Immigration Detainees with 0-4 points are to be detained in an IHC, where available, but in practice even those with scores below 4 points are routinely held in Provincial Prisons.

31. 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.

32. In both iterations of the NRAD, there is a yes/no checkbox for the presence of a “Vulnerability Factor”. In the pre-2017 NRAD, this is the sole “Low Risk” factor. In the post-2017 version, selecting this box reduces the Immigration Detainee’s score by only 2 points overall.

33. The Vulnerability Factor applies equally to “pregnant women and nursing mothers; minors (under 18 years of age); persons suffering from a severe medical condition or disability; persons suffering from restricted mobility; persons with suspected or known mental illness; and victims of human trafficking.” The assessment for the presence of a Vulnerability Factor, or otherwise for Immigration Detainees’ mental and physical health status, is conducted by CBSA enforcement officers with no medical expertise. NRAD assessments are not verified by trained clinicians.

34. The CBSA discriminatorily uses mental health disability as a risk factor. 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. 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.

35. In particular, Canada's administration of Immigration Detention using the NRAD as an assessment tool has a discriminatory effect against individuals with mental health conditions. As described above, symptoms of mental health conditions are used as justification for detention in Provincial Prisons. ENF-20 explicitly and discriminatorily states that "instability... associated with mental imbalance" is linked with "danger" and the possibility of "future violent behavior". . 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.

36. The CBSA justifies detention of Immigration Detainees with mental health conditions in Provincial Prisons on the false premise that they can access specialized care in those facilities. In fact, Provincial Prisons do not provide adequate or tailored treatment or support to individuals with mental health conditions. It is rare for Provincial Prisons to provide any psychotherapeutic or other mental health or emotional support for any inmates. It is exceedingly difficult to arrange for even a basic psychiatric assessment for Immigration Detainees. This 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.

37. Canada's assessment of risk using the NRAD is not rationally related to the administrative purposes of Immigration Detention and is undertaken without appropriate consideration of the immigration-related grounds on which the person has been detained.

38. 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.

**(iii) Length of detention**

39. Detention pursuant to the *IRPA* or the *Regulations* is indefinite – there is no limit on the length of time an individual may be detained, nor can an individual ever know how long they will be detained. Immigration Detention is subject to review by the Immigration Division of the Immigration and Refugee Board, with reviews conducted within 48 hours of detention, seven days thereafter, and 30 days thereafter, on an indefinite basis.

40. Since 2016, Canada has held more than 300 Immigration Detainees for longer than a year. According to data obtained by Human Rights Watch, the longest period of detention to date lasted over 11 years, involving a man with an apparent mental health condition, who was detained only on the basis that his identity could not be established.

41. Once detained in a Provincial Prison, it is very difficult to secure a transfer from a Provincial Prison to an IHC in part because it is very difficult for a detainee to decrease their NRAD score on future assessments. Because most Immigration Detainees held in Provincial Prisons have no access to therapeutic programming, and very limited access to family and community supports, and because the NRAD is largely based on immutable characteristics such as past criminal convictions, there is no opportunity for detainees to provide any evidence of rehabilitation to counter the CBSA's conclusions based on their past criminal convictions.

42. Prison incidents—such as fights among inmates, time spent in administrative segregation, episodes of insubordination or other institutional infractions measured on the basis of expected behaviour for a convict—are often used by the CBSA to justify increasing NRAD scores and/or exercising discretion to keep Immigration Detainees in Provincial Prisons even when IHCs have availability. Continued detention in Provincial Prisons thus becomes a punitive response to non-criminal conduct, with no relationship to the solely administrative purpose of detention under *IRPA*.

43. Detention in Provincial Prisons is also used by the CBSA as a threat or means to control Immigration Detainees' behaviour, further contrary to the administrative purpose of detention under *IRPA* and International Law.

**(iv) Conditions of detention**

44. The differences in conditions of detention and restrictions on liberty between an IHC and a Provincial Prison are stark. IHCs are purpose-built facilities that exclusively house Immigration Detainees for the administrative purpose of immigration. Provincial Prisons, by contrast, are purpose-built to, amongst other things, punish convicted criminals by depriving them of liberty and separating them from society. Thus, Immigration Detainees held in IHCs are not exposed to the penal sanctions that those held in Provincial Prisons are.

45. Provincial Prisons are overwhelmingly violent and frightening places where there are significant issues with gangs, weapons, drugs and overcrowding. Fights over resources are common. The risk of being the victim of assault (including stabbings) is high. When viewed in this context, it is clear why international legal standards have enacted various prohibitions against detaining Immigration Detainees alongside the general population of criminal inmates.

46. By way of comparison, the principal features of the conditions of detention in Provincial Prisons and IHCs are set out in the following table:

**Table 1: Comparison of Provincial Prisons and IHCs**

Provincial Prisons	Immigration Holding Centres
<ul style="list-style-type: none"> <li>• Use of instruments of restraint, including handcuffs and leg shackles;</li> <li>• Mandated prison clothing;</li> <li>• Strip-searches;</li> <li>• Prison sanctions, including segregation, restrictive confinement, and “time in cell”;</li> <li>• Frequent lockdowns;</li> <li>• Co-mingling of Immigration Detainees with inmates imprisoned under criminal law, including violent offenders;</li> <li>• Physical violence and threats of physical violence, including assault, rape and stabbings;</li> <li>• Significant issues with and exposure to gangs, weapons, and drugs;</li> <li>• Overcrowding;</li> <li>• Placement in cells containing more people than designed to hold (e.g. triple bunking in a cell designed for two, or double-bunking, in cells designed for one person);</li> <li>• Reduced and irregular access to telephones, showers and other basic services;</li> <li>• Limitation and restrictions placed on phone calls including call time limits, allowing collect-calls only, high long-distance charges, and restrictions on calls placed to cell phones;</li> <li>• Inconsistent access to open-air or outdoor recreational areas;</li> </ul>	<ul style="list-style-type: none"> <li>• Flexible living units, including the placement with family members, where applicable, and otherwise separate accommodation for men, women and unaccompanied minors;</li> <li>• Detainees are permitted to wear their own clothing;</li> <li>• Multiple outdoor recreational areas for use at different times by men and women, and another for families, with child-friendly equipment;</li> <li>• No lockdowns, segregation, strip-searches or use of handcuffs or leg-shackles;</li> <li>• Access to amenities and activities such as games, cable television, telephones, libraries, exercise rooms and prayer rooms;</li> <li>• Multiple daily visitation times, including direct-contact visits with family and friends;</li> <li>• A large common area within each living unit that provides an open environment to interact with other detainees and participate in activities;</li> <li>• Onsite Immigration and Refugee Board hearing rooms to accommodate in-person hearings where Detainees are permitted to wear their own clothing and arrive without the use of restrains;</li> <li>• Onsite CBSA interview rooms where detainees may speak to CBSA officers upon request.</li> </ul>

<ul style="list-style-type: none"> <li>• Limited or restricted access to recreational, cultural and educational facilities and opportunities;</li> <li>• “No touch” visits with friends or family – visits are by glass partitions via telephones, or by video calls only;</li> <li>• Reduced and irregular opportunities for visits with friends or family;</li> <li>• Immigration hearings are conducted onsite in the prison walls where detainees are subjected to use of handcuffs and leg-shackles, and required to wear prison clothing;</li> <li>• Lack of connections to CBSA officers, thereby limiting opportunities to change the NRAD score at detention review hearings; and</li> <li>• Lack of access to counsel, thereby depriving Immigration Detainees of access to justice and the potential to end or alter the circumstances of their detention.</li> </ul>	
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47. Since the advent of the COVID-19 pandemic, Immigration Detainees have also been subject to inadequate control, prevention and management of COVID-19 in Provincial Prisons, including being subjected to excessive and extended lockdown measures.

48. 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. Those individuals without pre-existing mental health conditions often develop one or more mental health conditions as a result of the punishing conditions of detention in Provincial Prisons, as compared to the conditions of administrative detention in an IHC.

49. Data provided to Human Rights Watch and Amnesty International indicates that, between 2018-2019 and 2019-2020, approximately one-fifth of Immigration Detainees held in Ontario

Provincial Prisons were placed in segregation at least once. Of those individuals, 40% and 46%, respectively, had a mental health alert and/or a suicide alert. Those with such alerts were most often held in Provincial Prisons for longer durations, with 77% percent of those held in solitary confinement from 30 to 90 days having an alert in 2019-2020, and all five Immigration Detainees held in solitary confinement for 90 days or more having a mental health alert and/or a suicide alert.

**B. Detention at International Law**

50. The *IRPA* is to be construed and applied in a manner that, among other factors, complies with international human rights instruments to which Canada is signatory. These international legal instruments consistently condemn the practice of detaining Immigration Detainees in prisons and the associated conditions of deprivation of their liberty. Examples include:

- a. the United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”) and the United Nations Basic Principles for the Treatment of Prisoners (the “Basic Principles”), both adopted at the United Nations General Assembly with Canada’s vote, provide that different categories of prisoners shall be kept in separate institutions or parts of institutions. Specifically, persons imprisoned for debt and other civil prisoners shall be kept separate from persons imprisoned by reason of a criminal offence;
- b. Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees, ratified by Canada, establishes that states shall not impose penalties on refugees on account of their illegal entry or presence in a country. Further, states shall not apply restrictions on the movements of refugees other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized;

- c. annual reports from the United Nations Working Group on Arbitrary Detention, a working group of the UN Commission of Human Rights of which Canada is a member, and specifically the “*Revised Deliberation No. 5 on deprivation of liberty of migrants*” provide:
- (i) Immigration Detention must not take place in facilities such as police stations, remand institutions, prisons and other facilities since these are designed for those within the realm of the criminal justice;
  - (ii) the mixing of Immigration Detainees and other detainees who are held under the criminal justice system must not take place;
  - (iii) Immigration Detention must not be punitive in nature;
  - (iv) Immigration Detainees must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health; and
  - (v) indefinite detention of individuals in the course of migration proceedings cannot be justified and is arbitrary;
- d. the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, established by the Inter-American Commission on Human Rights of which Canada is a member, resolved that:
- (i) different categories of persons deprived of freedom shall be kept in separate places of deprivation of liberty – particularly, persons deprived of liberty for civil reasons and those deprived of liberty on criminal charges; and

- (ii) asylum or refugee status seekers and persons deprived of liberty due to migration issues shall not be deprived of liberty in institutions designed to hold persons deprived of liberty on criminal charges;
- e. the United Nations Global Compact for Safe, Orderly and Regular Migration, adopted by the General Assembly with Canada's vote, and its precursors, provide a commitment to use Immigration Detention only as a measure of last resort and work towards alternatives. Specifically, Canada committed to:
  - (i) review and revise relevant legislation, policies and practices related to Immigration Detention to ensure that Immigration Detainees are not detained arbitrarily and that Immigration Detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment; and
  - (ii) to safeguard physical and mental integrity of Immigration Detainees while in detention;
- f. the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, provide that:
  - (i) detention of asylum-seekers for immigration-related reasons should not be punitive in nature;
  - (ii) the use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided for Immigration Detention;
  - (iii) if asylum-seekers are held in such facilities, they should be separated from the general prison population;
  - (iv) criminal standards (such as wearing prisoner uniforms or shackling) are not appropriate for Immigration Detainees; and

- (v) indefinite detention is arbitrary as a matter of international human rights law;
- g. the UN Special Rapporteur on Human Rights of Immigration Detainees concluded that:
- (i) administrative detention should not be applied as a punitive measure for violations of immigration laws and regulations, as those violations should not be considered criminal offences;
  - (ii) Immigration Detainees should under no circumstances be detained in prisons or other criminal facilities together with persons imprisoned for a criminal offence;
  - (iii) Immigration Detainees should not be subject to prison-like conditions and environments, such as prison uniforms, highly restricted movement, lack of outdoor recreation and lack of contact visitation;
  - (iv) the detention of vulnerable persons should only be with the certification of a qualified medical practitioner that detention will not adversely affect their health and well-being; and
  - (v) under no circumstance can Immigration Detention be indefinite;
- h. the International Covenant on Civil and Political Rights (the “ICCPR”), as ratified by Canada, states that parties are obliged to respect the rights to life and to humane treatment, and that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- i. the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as ratified by Canada, states that parties must take active steps to

prohibit torture and cruel, inhuman or degrading treatment or punishment in their territory and jurisdiction;

- j. the United Nations Declaration on Human Rights, as ratified by Canada, provides that everyone has the right to life, liberty and the security of person, and no one shall be subjected to arbitrary arrest, detention or exile or to cruel, inhuman or degrading treatment or punishment;
- k. the UN Special Rapporteur on Torture has concluded that detention based solely on migration status:
  - (i) can amount to torture, particularly where it is intentionally imposed or perpetuated for such purposes as deterring, intimidating or punishing irregular Immigration Detainees, or for reasons based on discrimination of any kind, including discrimination based on immigration status; and
  - (ii) exceeds the legitimate interests of the state and should be regarded as arbitrary detention; and
- l. the prohibition of all forms of arbitrary deprivation of liberty is part of international customary law and constitutes a *jus cogens* norm that binds all states regardless of whether or not they have signed and ratified the ICCPR.

51. When considering the appropriateness of its Immigration Detention practices, Canada must conform to, *inter alia*, the above international standards of detention which it has ratified, accessed, or voluntarily committed to meet (collectively, “International Law”). This includes the well-established principle that people detained for civil, administrative or immigration-related purposes be separated from those being detained for criminal purposes. Canada has failed to meet the above

International Law standards, which are hereinafter referred to as Canada's "Violations of International Law."

## **HARM TO THE PLAINTIFFS AND THE CLASS**

### **A. Mr. Richard's experience**

52. In January 2015, Mr. Richard was arrested and detained by the CBSA in Toronto. His detention following his arrest was based solely on the ground that the CBSA determined that he was a flight risk and unlikely to appear for his removal from Canada.

53. Mr. Richard's NRAD assessment was completed by a CBSA officer who determined that Mr. Richard's level of risk was "High" based on immutable characteristics, and directed that he be detained in a Provincial Prison rather than an IHC.

54. Commencing in January, 2015, Mr. Richard was detained at Maplehurst Correctional Complex in Milton, Ontario before being transferred to Central East Correctional Centre in Lindsay, Ontario. When the conditions of his detention and the restriction of his liberty became unbearable, Mr. Richard engaged in a series of hunger strikes along with other Immigration Detainees, demanding that the CBSA listen to and address their concerns. Mr. Richard was finally released from Immigration Detention in July 2016, after spending 18 months in Provincial Prisons.

55. While detained in Provincial Prisons, Mr. Richard was subject to a restriction of his liberty and punitive conditions of confinement entirely disproportionate to the administrative purpose of his detention. They included being subjected to:

- a. co-mingling with the general population at the Provincial Prisons;
- b. indefinite detention;
- c. frequent invasive and humiliating strip-searches;

- d. cell searches during which he was stripped to his underwear and handcuffed through the cell door's food hatch;
- e. collective punishment, including frequent, prolonged, and unpredictable lockdowns, during which he was confined to his cell, denied access to showers, and had his access to phones and his counsel eliminated or reduced;
- f. denial of access to telephones to communicate with his family and counsel by criminal inmates who controlled his detention unit;
- g. cold temperatures, during which he was denied warm clothing and blankets;
- h. inadequate access to yard time and fresh air;
- i. no access to recreational or educational activities beyond a makeshift soccer ball fashioned out of socks;
- j. poor quality and inadequate food;
- k. inadequate access to health and dental care;
- l. unsanitary living conditions, including exposure to mould;
- m. threats of violence from criminal inmates;
- n. frequent use of restraints, including handcuffs and shackles;
- o. being required to attend his monthly detention reviews in orange prison attire flanked by prison guards; and
- p. repeated denial of his requests to speak to CBSA.

56. The consequences of Mr. Richard's detention to him and his family were severe. Prior to his detention, Mr. Richard was the primary caregiver for his young children. In April 2016, while still detained, Mr. Richard's children were apprehended by a children's aid society and put at risk of becoming Crown wards when their mother became incapable of caring for them alone.

57. As a consequence of his detention, including the indefinite nature of it, Mr. Richard felt isolated, fearful, angry, and hopeless. He now suffers from conditions which he did not suffer from prior to his detention, including serious stress, anxiety and depression, and has developed phobias associated with the conditions of his detention, such as a fear of small spaces.

58. Particulars of the injuries that Mr. Richard has suffered and continues to suffer as a result of his detention in Provincial Prisons include:

- a. feelings of loss and frustration associated with loss of care and companionship, including missing 18 months of his children's growth and development;
- b. an impaired ability to deal with, and trust, persons in positions of authority;
- c. constant fear of arrest, detention, or losing status in Canada;
- a. feelings of loss of dignity and reputation;
- b. post-traumatic stress, and associated symptoms including anxiety and depression;
- c. serious and prolonged emotional distress and mental anguish;
- d. physical and emotional scarring;
- e. difficulty sleeping and frequent nightmares;
- f. feelings of frustration and irritability;
- g. fear of small spaces;
- h. impairment of mental and emotional health and well-being; and,
- i. impaired relationships.

**B. Mr. Garcia Paez's experience**

59. On October 8, 2021, immediately after being released from a criminal bail hearing, Mr. Garcia Paez was arrested and detained by the CBSA in Toronto. His detention following his arrest

was based solely on the ground that the CBSA determined that he was a flight risk and unlikely to appear for his removal from Canada.

60. Despite having no criminal convictions, Mr. Garcia Paez was detained by the CBSA in a Provincial Prison rather than an IHC. Mr. Garcia Paez was then held at the Toronto South Detention Centre, the same Provincial Prison from which he had just been ordered released by the Ontario Court of Justice.

61. By detaining Mr. Garcia Paez solely on the ground that he was a flight risk, the CBSA acknowledged that he posed no danger to the public. The CBSA has also acknowledged that there is a higher risk of contracting COVID-19 in a larger congregate setting such as the Toronto South Detention Centre, as compared to a smaller capacity IHC. Despite all of these factors, the CBSA nevertheless chose to detain Mr. Garcia Paez in a Provincial Prison rather than an IHC.

62. On October 20, 2021, the Immigration Division ordered Mr. Garcia Paez's release from Immigration Detention. The release was not effected until October 26, 2021, by which time he had spent 18 days in Provincial Prison.

63. While detained in a Provincial Prison, Mr. Garcia Paez was subject to a restriction of his liberty and punitive conditions of confinement entirely disproportionate to the administrative purpose of his detention. They included being subjected to:

- a. co-mingling with the general inmate population;
- b. indefinite detention;
- c. invasive and humiliating strip-searches;
- d. collective punishment, including lockdowns, during which he was confined to his cell;

- e. denial of access to telephones to communicate with his family and counsel by criminal inmates who controlled his detention unit;
- f. cold temperatures, during which he was denied warm clothing and blankets;
- g. inadequate access to yard time and fresh air;
- h. poor quality and inadequate food;
- i. inadequate access to health and dental care;
- j. unsanitary living conditions, including exposure to mould;
- k. threats of violence by criminal inmates;
- l. frequent use of restraints, including handcuffs and shackles;
- m. being required to attend his detention reviews in orange prison attire flanked by prison guards; and
- n. repeated denial of his requests to speak to CBSA.

64. The consequences of Mr. Garcia Paez's detention were severe. For the duration of his detention in a Provincial Prison, he felt isolated, fearful, angry, and anxious with the indefinite nature of his detention. He continues to suffer from stress, anxiety and depression. Particulars of the injuries that Mr. Garcia Paez has suffered and continues to suffer as a result of his detention include:

- a. an impaired ability to deal with, and trust, persons in positions of authority;
- b. constant fear of arrest, detention, or losing status in Canada;
- a. feelings of loss of dignity and reputation;
- b. post-traumatic stress, and associated symptoms including anxiety and depression;
- c. serious and prolonged emotional distress and mental anguish;
- d. emotional scarring, especially from his strip searches;

- e. difficulty sleeping and frequent nightmares;
- f. feelings of frustration and irritability; and
- g. impairment of mental and emotional health and well-being.

**C. Harm to the Class**

65. Implicitly, given the administrative nature of the power being exercised by CBSA, and explicitly by the incorporation of International Law into *IRPA*, Immigration Detainees should never be detained in Provincial Prisons, which are purpose-built and operated for criminal incarceration, not administrative detention.

66. The Class members have suffered significant emotional, psychological and physical harm that has adversely affected their lives, including their capacity to work and their relationships with their families and the community at large. Particulars of this harm include:

- a. emotional, physical and psychological harm;
- b. exacerbation of existing mental health condition(s) and deprivation of healing opportunities;
- c. the infliction of new mental health condition(s);
- d. impairment of mental and emotional health and well-being;
- e. impaired ability to trust other persons;
- f. further impaired ability to participate in normal family affairs and relationships;
- g. alienation from family members;
- h. emotional distress and mental anguish;
- i. infringement of liberty rights;
- j. infringement on their security of the person;
- k. arbitrary detention;

- l. cruel, unusual or degrading treatment;
- m. loss of self-esteem and feelings of humiliation and degradation;
- n. impaired ability to deal with persons in positions of authority;
- o. impaired ability to trust other individuals or to sustain relationships;
- p. sense of isolation and separateness from their community;
- q. requirement for medical or psychological treatment and counselling;
- r. loss of general enjoyment of life; and
- s. pain and suffering.

## **CANADA'S LIABILITY FOR THE HARM TO THE PLAINTIFFS AND THE CLASS**

### **A. Canada's Knowledge**

67. Canada's operational policies, practices and procedures that result in the use of Provincial Prisons to detain Immigration Detainees are patently unreasonable, as they perpetuate Violations of International Law and contravene the *IRPA* and the Regulations. The formation, use and implementation of such policies, practices and procedures and Canada's authorization of such conduct is in bad faith and cannot constitute acceptable operational choices.

68. The flaws with Canada's use of Provincial Prisons to detain Immigration Detainees have long been subject of national and international review and comment. In addition to various reports and examinations undertaken by non-governmental organizations, Canada's Immigration Detention system is formally monitored on both an internal and external basis. Internally, the CBSA tracks and publishes quarterly and annual statistics and analytical data related to the conditions and place of detention of Immigration Detainees. Externally, the CBSA engaged the Canadian Red Cross Society (the "Red Cross") to conduct monitoring and enforcement reviews of

Canada's Immigration Detention system, and to provide annual reports to the public and international human rights bodies.

69. At all material times, Canada had in place these formal monitoring and reporting systems to statistically measure and track the use of Provincial Prisons for Immigration Detention. Among other information, the internal data collected and made publicly available by the CBSA includes statistics on:

- a. the total number of Immigration Detainees;
- b. Immigration Detainees as a percentage of entries by Immigration Detainees to Canada;
- c. the number of Immigration Detainees held by ground of detention;
- d. Immigration Detainees in Provincial Prisons, as a number and percentage of the total number of Immigration Detainees;
- e. Immigration Detainees in IHCs and other facilities, as a number and percentage of the total number of Immigration Detainees;
- f. the location of Immigration Detainees by Province; and
- g. the average, median, and total days of Immigration Detention in the reporting period.

70. The Red Cross reports to the CBSA on the conditions of Canada's Immigration Detention system. The Red Cross conducts monitoring and produces reports which focus on four areas: the treatment by facility staff, contractors and other detainees; the conditions of detention; the legal guarantees and procedural safeguards available to Immigration Detainees; and the ability for Immigration Detainees to contact and maintain contact with family.

71. For example, in the 2019-2020 Red Cross report, the key issue areas identified by the Red Cross included:

- a. treatment: impact of co-mingling in Provincial Prisons;
- b. conditions of detention: detention of vulnerable persons and people in long-term detention;
- c. conditions of detention: access to healthcare, including mental health care services;
- d. conditions of detention: religious, cultural, educational and leisure activities;
- e. legal guarantees and procedural safeguards: access to information; and
- f. family contact.

72. Further, the Red Cross identified that vulnerable Immigration Detainees, including people with mental health conditions, are routinely detained in Provincial Prisons where they are provided with limited mental health supports and exposed to conditions, including segregation, that pose the risk of exacerbating their mental health conditions. This is commensurate with the reports of other non-governmental actors such as Human Rights Watch and Amnesty International, which indicate that Immigration Detainees with a mental health alert and/or a suicide alert are subject to a high rate of segregation.

73. In response to the Red Cross' 2019-2020 report, Canada stated that it is "committed to ensuring the dignified and humane treatment of all persons detained pursuant to immigration legislation".

74. Despite this commitment, and despite its knowledge of its Violations of International Law, its Immigration Detention record-keeping and reporting, and the harm to which it exposes the Class and Subclass, Canada has made the operational decision to continue to use Provincial Prisons to detain Immigration Detainees. Canada's collective database of Immigration Detention statistics,

reports and data reveals precisely the nature and scope of the breaches of Canada's legal duties to Immigration Detainees and is referred to as "Canada's Knowledge".

75. Canada and its servants and agents knew or ought to have known that its use of Provincial Prisons to house Immigration Detainees was, and is, unlawful and in breach of their fiduciary duties, duty of care, and the *Charter* rights of the Class and Subclass Members, as described below. Detention of Immigration Detainees in Provincial Prisons constitutes an operational decision by CBSA rather than a core policy decision, and Canada is therefore not immune from suit in negligence.

**B. Canada's duties to the Class**

76. Canada has a fiduciary relationship with all Class Members. Canada created, planned, and regulates, operates, supervises, controls and oversees Immigration Detention as particularized above. To the extent that Canada delegated any responsibility for the detention of the Plaintiffs and Class to any other party or parties, including pursuant to formal or informal agreements to detain Immigration Detainees in Provincial Prisons, Canada is liable for the resultant damages pursuant to its non-delegable fiduciary duties, and as principal for the acts of its agents.

77. The duties owed by Canada to the Plaintiffs and the Class stem from the nature of their relationship being one of complete trust, reliance and dependency, and Canada's implicit undertaking to act in the best interests of Immigration Detainees in their care & control at International Law. Specifically, and pursuant to the United Nations Human Rights Committee of which Canada is a member, Canada has:

[a] heightened duty of care to take any necessary measures to protect the lives of individuals deprived of their liberty by the State, since by arresting, detaining, imprisoning or otherwise depriving individuals of their liberty, States parties assume the responsibility to care for their lives and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.

78. The Plaintiffs and the Class were subject to unilateral exercise of the Defendant's power and discretion while in Canada's care and control, and were in an extremely vulnerable position in relation to Canada. Once Canada made the operational decision to deprive the Class of liberty, it undertook to "take any necessary measures to protect the lives" of Immigration Detainees and to otherwise "assume the responsibility to care for their lives and bodily integrity".

79. Further, or alternatively, once the decision has been made to deprive an individual of their liberty, the place of the detention, including the decision whether to detain in a Provincial Prison, was wholly determined by Canada. Class Members were entirely dependent on Canada and were subjected to the unilateral exercise of Canada's power and as a result, the Defendant owes fiduciary duties to the Plaintiffs and the Class to care for, protect, and to act in their best interests at all times.

80. Canada was, and is, responsible for, *inter alia*:

- a. overseeing the operation, administration, maintenance, supervision, inspection, monitoring and enforcement of Immigration Detention;
- b. the lives, bodily integrity, and overall health, safety and well-being of Immigration Detainees in its care;
- c. the decisions, procedures, regulations, operations and actions taken by the CBSA and its employees, agents, servants, and officers during the proposed class period;
- d. the creation, design and implementation of policies, practices and procedures for the detention of Immigration Detainees in Provincial Prisons during the proposed class period; and
- e. the selection, control, training, supervision and regulation of the designated operators and their employees, servants officers and agents and for the care, control

and well-being of Immigration Detainees in Provincial Prisons during the proposed class period.

81. The relationship between the Class and Canada was one of trust, reliance and dependence. Canada owed non-delegable fiduciary duties to all Class Members including, but not limited to, duties to:

- a. act in the best interests of the Class and in the best interests of persons deprived of liberty for administrative purposes as a whole;
- b. ensure that the Class Members are treated fairly and respectfully;
- c. provide care and maintain conditions of detention at a reasonable standard in accordance with International Law, including by ensuring that Immigration Detainees are not co-mingled in Provincial Prisons together with persons imprisoned for criminal purposes;
- d. monitor the mental and physical health of Class Members appropriately, including Class Members with mental health conditions, whether diagnosed or not, and provide appropriate care;
- e. ensure that Class Members are detained only in accordance with the administrative and immigration-related purposes of their detention;
- f. ensure that Immigration Detention is not applied as a punitive measure for violations of immigration laws and regulations;
- g. protect Class Members from arbitrary deprivation of their liberty;
- h. protect Class Members from cruel and unusual treatment or punishment and torture;
- i. treat the Plaintiffs and the Class with dignity and respect at all times;

- j. adhere to domestic and International Law, including conventions, treaties, rules, norms, and commentary regarding the treatment of prisoners and Immigration Detainees; and
- k. create appropriate policies and procedures to ensure the performance of the duties set out above, and to safeguard the psychological, spiritual and physical health of the Class Members while in its care.

82. The Class Members relied upon Canada, to their detriment, to fulfill its fiduciary obligations.

83. Due to the relationship of proximity between Canada and Class Members, Canada also owed a common law duty of care to all Class Members, which duty required its treatment of Class Members to conform with the standard of care of a reasonable and prudent administrative detention centre operator, administrator, and manager. In this regard, the discharge of Canada's duties was the responsibility of its servants and agents, each of whom owed a common law duty of care to the Class Members for whom they were responsible.

### **C. Canada's Misconduct**

84. Particulars of Canada's systemic mistreatment of all Class Members ("Canada's Misconduct") include the following:

- a. failure to take a responsible and good faith interest in the operation and administration of Immigration Detention;
- b. failure to implement appropriate policies, practices, procedures or safeguards to ensure that the determination of where to detain Class Members was necessary and appropriate, considering:
  - (i) the best interests of the Class Members;

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- (ii) the best interests of Immigration Detainees as a whole; and
  - (iii) domestic and International Law, including conventions, treaties, rules, norms, and commentary regarding the treatment of prisoners and Immigration Detainees;
- c. failure to implement appropriate policies, practices, procedures or safeguards to ensure that the methods and standards for determination of where to detain Class Members were rationally related to the immigration-related purposes of their detention;
  - d. putting Canada's own interests, and those of its servants and agents, ahead of the interests of Class Members;
  - e. subjecting Class Members to detention in Provincial Prisons, which constitutes cruel, inhuman, and degrading treatment;
  - f. subjecting Class Members to detention in Provincial Prisons, which constitutes an arbitrary deprivation of their liberty and security interests;
  - g. subjecting Class Members to treatment in Provincial Prisons as criminals and other punitive measures;
  - h. subjecting Class Members to detention in Provincial Prisons for an indefinite time period;
  - i. subjecting Class Members to discriminatory treatment on the basis of an enumerated ground, including citizenship and the presence of a mental disability;
  - j. failure to properly train and supervise CBSA employees, agents, contractors and subcontractors;

- k. failure to hire CBSA employees, agents, contractors or subcontractors with appropriate medical knowledge or training;
  - l. failure to implement an appropriate mechanism to review the location of detention of Class Members and terminate their detention in Provincial Prisons at the earliest possible opportunity;
  - m. failure to develop, maintain and enforce policies to prevent the use of Provincial Prisons to detain Class Members;
  - n. failure to respond adequately, or at all, to complaints, recommendations or reports that were made for the care of Class Members, including with respect to the use of Provincial Prisons for Immigration Detention;
  - o. failure to investigate, monitor, oversee, safeguard and maintain the psychological, mental, emotional and physical health of the Class; and
  - p. failure to provide adequate physical, psychiatric and psychological care or oversight for Class Members.
85. Canada's Misconduct contravened s. 3 of the *IRPA*, in that:
- a. it is a result of Canada's Violations of International Law, including international human rights instruments to which Canada is signatory;
  - b. they are violations of the Class Members' *Charter* rights; and,
  - c. they represent a failure to promote international justice and security by fostering respect for human rights.
86. Canada's Misconduct also contravened Part 14 of the *Regulations*, in that:
- a. Canada held, and continues to hold, Immigration Detainees in Provincial Prisons for purposes not provided for by the *Regulation*; and

- b. Canada relied, and continues to rely, on factors not provided for by the *Regulations* to justify the place of detention.

87. Canada's Misconduct was the misconduct of CBSA employees, servants and agents, as condoned by Canada, and each of whom breached duties owed to Class Members, as described below. The identities of the particular servants, officers, employees, and agents who perpetrated Canada's Misconduct are known to Canada. These individuals made, and continue to make, decisions with respect to the design, organization, and administration of Immigration Detention, including the policies and procedures for their employees, servants and agents to follow. These individuals also made, and continue to make, decisions with respect to the place of detention, including the ultimate determination of whether to detain an Immigration Detainee in a Provincial Prison.

88. Canada is vicariously liable for the impugned acts of CBSA employees, servants and agents. There is a sufficiently close relationship between CBSA and its servants, officers, employees, and agents that it would be fair and just to hold Canada vicariously liable for their tortious conduct. Further, the wrongs of Canada servants, officers, employees, and agents were perpetrated in the course of their employment by the CBSA, such that Canada introduced the risk of the wrong.

## **RIGHTS OF ACTION**

### **A. Violation of the Class and Subclass' *Charter* rights**

89. At all material times, the Class Members were within the knowledge, contemplation, power or control of Canada and were subjected to the unilateral exercise of Canada's power or discretion. Through its employees, servants and agents, the Canada breached the Class Members' *Charter* rights, the particulars of which include Canada's Misconduct and Violations of International Law.

90. Canada's breaches of the Class and Subclass Members' constitutional rights are not saved by s. 1 of the *Charter*. The infringements are neither prescribed by law nor are they demonstrably justified in a free and democratic society.

**(i) s. 7 - Life, liberty and security of the person**

91. Canada's Misconduct violates the Class Members' s. 7 rights to life, liberty and security of the person.

92. The Class Members, as persons subject to Immigration Detention, remain vested with residual liberty interests regarding the manner and conditions of their detention, notwithstanding the deprivation of liberty resulting from the underlying detention.

93. Canada's Misconduct which results in the Class Members being detained in Provincial Prisons, as opposed to in IHCs, is a violation of the residual liberty interests of the Class Members. Canada's decision to detain the Class Members in Provincial Prisons is not prescribed by law, constrains their fundamental life choices and is a violation of the Class' liberty interests.

94. The Class' security interests are engaged by Canada's Misconduct which results in the detention of Immigration Detainees in Provincial Prisons. Detention in Provincial Prisons exposes Immigration Detainees to serious risks to their personal security and safety, including physical and psychological health, is not prescribed by law, and is a violation of the Class' security interests.

95. The infringements to the Class Members' liberty and security interests are contrary to the principles of fundamental justice, as they are:

- a. arbitrary: detention in Provincial Prisons occurs pursuant to an exercise of discretion that is not rationally related to the administrative purpose of Immigration Detention;

- b. overbroad: the goals of administrative detention under *IRPA*, the *Regulations*, and at International Law can be served through detention in an IHC; and
- c. grossly disproportionate: treatment that amounts to punishment should only be visited on individuals in the criminal justice system, and a violation of this principle—such as holding administrative detainees like Immigration Detainees in Provincial Prisons—is inherently and automatically excessive and disproportionate.

96. Similarly, the manner in which the decision to detain Immigration Detainees in Provincial Prisons is made, and in particular the manner in which the NRAD 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.

97. Public safety concerns cannot excuse procedures that fail to conform with principles of fundamental justice. Canada's Knowledge, as reflected in its statistics collected on the grounds for Immigration Detention, reflect that public safety concerns represent a well studied and *di minimis* aspect of Immigration Detention in Canada that does not justify the infringement to the Class Members' liberty and security interests.

**(ii) s. 9 - Arbitrary detention**

98. Canada's Misconduct violates the Class Members' s. 9 right to be free from arbitrary detention.

99. 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.

100. The place of detention is not expressly prescribed by *IRPA* or the *Regulations*. Canada's Misconduct, which results in Immigration Detainees being held in Provincial Prisons, exceeds the legitimate interests of the state and amounts to unjustified state intrusion upon the physical and mental liberty of Immigration Detainees, without adequate justification.

**(iii) s. 12 - Cruel, inhumane and degrading treatment or punishment**

101. Canada's Misconduct violates the Class Members' s. 12 right not to be subjected to any cruel and unusual treatment or punishment.

102. Detention of administrative detainees in Provincial Prisons amounts to punitive treatment which is so excessive as to outrage the standards of decency. Canada's Misconduct results in Immigration Detainees being held in Provincial Prisons in a manner that grossly departs from the benchmark of being held in an administrative facility like an IHC.

**(iv) s. 15 - Discrimination on the basis of citizenship**

103. Canada's Misconduct violates the Class and Subclass Members' s. 15 equality rights.

104. Canada's Misconduct creates a distinction for Class Members on the basis of the analogous ground of citizenship status. Canada's Misconduct imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating a disadvantage associated with being a Immigration Detainee.

105. Specifically, there are no circumstances outside of the criminal justice system under which Canadian citizens may be subjected to detention in a Provincial Prison. Yet, Canada's Misconduct not only allows for, but specifically promotes the detention of Immigration Detainees, as non-

Canadians, in Provincial Prisons as opposed to in administrative detention facilities. Canada's Misconduct is thus plainly discriminatory on the basis of citizenship.

(v) **s. 15 - Discrimination on the basis of mental disability**

106. Canada's Misconduct also creates a distinction for the Subclass Members on the basis of their mental disability. Immigration Detainees with mental health conditions are impermissibly treated differently and worse than other Immigration Detainees. 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.

107. Once in Provincial Prison, the treatment to which Immigration Detainees are subjected exacerbates pre-existing mental disabilities. As set out above, Canada's Misconduct resulting in Immigration Detainees being held in Provincial Prisons imposes burdens on the Subclass Members in a manner that has the effect of reinforcing, perpetuating, and/or exacerbating stereotypes and disadvantages associated with having a mental disability.

108. As also set out above, Canada's Knowledge includes statistical disparities in the treatment of Immigration Detainees, which show a disproportionate impact on members of protected groups, including based on place of origin, immigration status and the presence of a mental health condition/disability. The statistical evidence is a compelling sign that the law has not been structured in a way that takes into account the Class and Subclass Members' circumstances.

**B. Breach of fiduciary duty**

109. Canada systematically breached its fiduciary duties to the Class Members as set out above, the particulars of which include Canada's Misconduct. Through its servants, officers, employees and agents, Canada performed its fiduciary duties neglectfully or carelessly, in breach of its special

responsibility to ensure the safety and well-being of the Class. Canada exercised its discretion in a manner incommensurate with their undertaking to act in Immigration Detainees' best interests, in violation of International Law, and in violation of their *Charter* rights.

110. Canada's breach of its fiduciary duties to the Class Members caused damage to them, the particulars of which are set out above and below.

**C. Systemic negligence**

111. Canada's employees, servants and agents acted in breach of their duty of care to Class Members in the establishment, operation, regulation, supervision, administration and control of Immigration Detention in Provincial Prisons, the particulars of which include Canada's Misconduct. Throughout the proposed class period, Canada has operated Immigration Detention in a way that unnecessarily caused harm to Immigration Detainees and systemically failed to exercise due care in administering its statutory and regulatory authority to detain Immigration Detainees.

112. Canada's employees, servants and agents breached their common law duties to the Class Members through their failure to have in place administrative, management and operations procedures that would reasonably have prevented harm to the Class Members. Canada is vicariously liable for these breaches.

113. The negligence of Canada's servants, officers, employees, and agents caused damage to the Class Members, the particulars of which are set out herein. But-for Canada's negligent operation the Immigration Detention, the Class would not have suffered harm. There is a direct correlation between Canada's actions and the suffering of the Class and such damages were reasonably foreseeable by Canada, particularly considering Canada's Knowledge as set out above.

## **DAMAGES**

### **A. Charter damages**

114. As a result of Canada's violations of the Plaintiffs and the Class Members' rights, they are entitled to monetary remedy pursuant to s. 24(1) of the *Charter*. A monetary award is appropriate and just in the circumstances in order to:

- a. compensate them for their pain and suffering;
- b. compensate them for their loss of dignity and reputation;
- c. vindicate their fundamental rights; and
- d. deter systemic violations of a similar nature.

115. Canada acted in clear disregard for the *Charter* rights of the Class, as reflected by Canada's Knowledge throughout the proposed class period. There are no countervailing considerations that render damages inappropriate or unjust in this case. In the alternative, any such considerations would be overridden by Canada's knowingly blameworthy conduct.

116. Further, a declaration, pursuant to s. 24(1) of the *Charter*, that Canada violated the *Charter* rights of the Class and Subclass would be just and appropriate to ameliorate the deprivations of liberty, arbitrary conditions of detention, cruel, inhumane and degrading treatment or punishment, and pre-existing disadvantages perpetuated by the Canadas's systemic breaches and violations of the *Charter*.

### **B. General, aggravated, and special damages**

117. The harm inflicted to the Class as identified above was reasonably foreseeable, and the Defendant's actions were a proximate cause of their loss. At all material times, Canada knew, or ought to have known, that, as a consequence of Canada's Misconduct, the Plaintiffs and Class

Members would suffer significant mental, emotional, physical, and psychological harm, including the harms described above.

118. Accordingly, the Plaintiffs and Class Members claim damages to compensate for Canada's negligence and breach of fiduciary duties, including, but not limited to:

- a. general damages to compensate for the harms occasioned on them, to be assessed in the aggregate or as ordered by the Court;
- b. symbolic and moral damages for the reprehensible conduct of the Defendant, to be assessed in the aggregate; and
- c. special damages, including medical treatment, rehabilitation, counselling and other care, occasioned by or attributable to the Defendant's negligence as alleged herein.

119. Additionally, the Plaintiffs and Class Members claim complete indemnity, compensation and payment from Canada for and on behalf of each Class Member who, as a result of the harm suffered, has required or will continue to require further medical treatment, rehabilitation, counselling and other care.

**C. Punitive and exemplary damages**

120. The high-handed and callous conduct of Canada warrants the condemnation of the court through awards of both aggravated and punitive damages.

121. Canada abused its position of total power and control over vulnerable Immigration Detainees. Immigration Detainees are, by virtue of their captivity and complete dependence on Canada for their well-being, among the most vulnerable in Canadian society.

122. Canada made a decision out of administrative convenience to detain the Plaintiffs and Class in punitive conditions, in violation of domestic and International Law. With full knowledge of the consequences, Canada forced Immigration Detainees to endure being handcuffed and shackled,

strip searched, placed in solitary confinement, housed in small prison cells, subjected to rigid routines, under constant surveillance, and cut off from the outside world.

123. The willful and flagrant breach of the Plaintiffs and Class Members' rights is of such a serious nature as to justify an award of both aggravated and punitive damages.

**D. Claims in other matters**

124. Notwithstanding anything pleaded herein:

- a. the Plaintiffs expressly do not make any claim for, or assert any claim regarding, on behalf of individuals who fall within the class as certified by the November 27, 2017, order of the Honourable Justice Glustein, in the *Dadzie et al. v. Her Majesty the Queen in Right of Ontario et al.* (CV-16-558376-00CP) matter, any damage resulting from staffing-related lockdowns in an Ontario Provincial Prison (excepting the Elgin Middlesex Detention Centre, the Ontario Correctional Institute and the St. Lawrence Valley Correctional and Treatment Centre), between May 30, 2009, and November 27, 2017;
- b. the Plaintiffs expressly do not make any claim for, or assert any claim regarding, on behalf of individuals who fall within the class as certified by the September 18, 2018, order of the Honourable Justice Perell, in the *Francis v. Her Majesty the Queen in Right of Ontario* (CV-18-591719-00CP) matter, any damage resulting from administrative segregation at an Ontario Provincial Prison (excepting the St. Lawrence Valley Correctional and Treatment Centre), between April 20, 2015, and September 18, 2018; and
- c. the Plaintiffs expressly do not make any claim for, or assert any claim regarding, on behalf of individuals who fall within the class as certified by the March 15, 2022,

order of the Honourable Justice Perell, in the *Chandra v. Her Majesty the Queen in Right of Ontario* (CV-20-641003-00CP) matter, any damage resulting from administrative segregation at an Ontario Provincial Prison (excepting the St. Lawrence Valley Correctional and Treatment Centre), between September 18, 2018, and August 18, 2021.

### **STATUTES RELIED UPON**

125. The Plaintiffs plead and rely upon the:

- a. *Canada Border Services Agency Act*, R.S.C. 2005, c. 38;
- b. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.;
- c. *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- d. *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- e. *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50; and
- f. *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

May 16, 2022

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PLAINTIFFS v. ATTORNEY GENERAL OF CANADA  
Plaintiffs Defendant

COURT FILE NO.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

**STATEMENT OF CLAIM**

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