Court of Queen's Bench of Alberta

Citation: Robinson v Alberta, 2022 ABQB 497

Date:
Docket: 1801 10159
Registry: Calgary

Between:

Gordon Robinson[1]

Plaintiffs

- and -

Her Majesty the Queen in Right of Alberta

Defendant

Memorandum of Decision
of the
Associate Chief Justice
J.D. Rooke

I. Introduction

[1] This is the certification decision (Decision) on the class proceeding herein, under the *Class Proceedings Act*, SA 2003, c-C 16.5, as amended (the *Act*), wherein the original Statement of Claim (SC), filed July 19, 2018, para 3, refers to the class as:

> All persons in Canada who are alive on the certification date and during the period from November 1, 1992[2] to the certification date... were held in

[1] The original Proposed Representative Plaintiff (PRP) was Harley Lay (Mr. Lay), but that was changed to Gordon Robinson (Mr. Robinson) by virtue of the Second Amended Statement of Claim (SASC), filed on September 12, 2019. For ease of reference, I shall refer to both, or either, or any future Proposed Representative Plaintiff, as the PRP, except when I am discussing the suitability of Mr. Robinson to be the PRP, in which case I will use his surname.

[2] The origin of the date November 1, 1982, is unknown and was an issue at the certification hearing – see, inter alia, discussion by Counsel for the Defendant at III TR 31/33-34/19 (all references to classification of the three

administrative segregation [AS][3] at a Provincial Correctional Center in Alberta (APCC).

[2] The background facts are addressed at paras 21-35 of the PRP Brief (PRPB). The history of the APCC system and the deployment of AS, as well as the relevant history of the PRP and affiants in support of the proposed class proceeding, are set out at paras 11-42 of the Defendant's Response Brief (DB) – see also, inter alia, TR 22/1-26/4 in relation to the evidence of the PRP; and II TR 25/18-26/20, regarding APCC containing 8 adult centres and two youth centres, all through the Defendant's witness, Leonard Goueffic, Associate Director since 1991, (*inter alia*, para 138 of his affidavit, filed August 19, 2019, as addressed by Counsel for the Defendant)[4]. See also: II TR 26/21- 39/40; 44/39-45/12; 46/15-47/49/27; and 50/10-53/19 regarding, *inter alia*; solitary confinement[5] literature in relation to the effects of AS; detailed representation of the facts regarding the APCC environment, whether individual or class-related, through the evidence of both Mr. Goueffie and the PRP, including notices to inmates regarding AS; the circumstances in the Edmonton Remand Centre (ERC), as documented in the cases of ***R v Blanchard***, 2017 ABQB 369[6] and ***R v Prystay***, 2019 ABQB 8 (which the PRP says provide some basis in fact – Tab 26 of the PRP's Compendium of Reply Argument (CRA)); and a host of other "facts" (actually, more correctly, evidence[7]).

[3] The First Amended Statement of Claim (FASC), filed on May 30, 2019 accomplished the following changes: substituted Mr. Robinson for Mr. Lay as PRP; provided some particulars in paras 2, and 58a-ee, and removed and/or amended particulars in respect of Mr. Lay in paras 2 and 55; removed references to and contents from the cases of ***Blanchard*** at paras 27-35, and

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transcripts of oral argument and to Counsel for the Plaintiff Class Compendia of Argument and Reply Argument are defined (infra) – see footnote # 8). However, contrary to her submissions, I am going to leave that issue for the common issues trial justice to deal with on a full record and argument. The certification date is the date of this Decision, subject to the condition set herein being accomplished.

[3] "Segregation" is defined at paras 7-13 of the SC, to include: "separation of an inmate from the general inmate population [GP] in the correctional facility in which the inmate is being confined", the means of accomplishing the same by the Defendant is "to place inmates in what the institutions call 'secure'", in which the cells "are separate from the cells on 'general population'. Inmates in Segregation are held in special cells which are usually smaller than ordinary cells, and [inmates] are confined to their cells for 23 hours per day. Segregation may be for disciplinary purposes [DS] or 'administrative purposes' [AS]", the latter being "Segregation based on policy or administrative decisions as distinguished from Segregation for [DS] which is as a punishment after the inmate had been given an opportunity to answer regarding … alleged wrongdoing." "Indefinite Administrative Segregation" [IAS]… is "on an indefinite basis where inmates are not told when their Segregation will end". See also Sharon Shalev, "*A sourcebook on solitary confinement*", October 2008, published by Mannheim Centre for Criminology, London School of Economics and Political Science, attached as Exhibit 5 of Mr. Robinson's Affidavit, filed May 10, 2019 (Robinson Affidavit). See also the argument by Defence Counsel at II TR 29/17- regarding the Alberta correctional practices, with the admission (II TR 31/2-21) that there is no legislation, but only policy and practices, for AS.

[4] Counsel for the PRP argued (III TR 17/41-18/31 – Tab 17 of the CRA) that many of these "facts" were admissions against interest by the Defendant, although some suggestions of "likelihood" are not necessarily fact.

[5] See also reference to Tab 20 of the CRA and III TR 19/35-38.

[6] At Tab 2 of the CRA, Counsel for the PRP says that reports of reform after ***Blanchard*** establishes that the criticisms there were well founded, and constitutes some basis in fact for "continuation of the harms" and the alleged causes of action and common issues, relying on new cases of ***Prosser v 20 Vic Management Inc***, 2009 ABQB, 177 at paras 36- 7 and ***Brampton (City) v 1385127 Ontario Inc***, 2019 OCJ 193 at para 155.

[7] See also CRA Tab 31 and III TR 25/7-39 and 26/27-27/2, where Counsel for the PRP, identifies sources for some basis in fact, referencing: ***Dembrowski & Popa v Bayer***, 2015 SKQB 286 at paras 66-72; ***Miller v Purdue Pharma Inc***, 2013 SKQB 193, at paras 64-73; and ***Wuttunee v Merck Frosst Canada Ltd***, 2008 SKQB 229 at paras 25-9.

Corporation of the Canadian Liberties Association v R, 2017 ONSC 7491 (***CCLA-ONSC***) at paras 37-38 and 44; and amended para 39 to add the words "to which Class Members in common have been subjected" in relation to IAS.

[4] The SASC was attached as Appendix "A" to the Consent Order of September 5, 2019, filed September 12, 2019, giving leave to file same. However, the SASC was never formally filed, as admitted by the PRPRB at para 10. It made the following changes to the FASC, including: removed references to authorities in paras 14-23; removed all of para 24, except the first sentence and added a passage to assert that AS often lacks a release plan; removed all the contents of para 27 and added references to review of placement in segregation – both intent and actual; and deleted reference to the case of ***British Columbia Civil Liberties Association v Canada (Attorney General)***, 2018 BCSC 62 (***BCCLA - BCSC***) at para 43, while leaving the assertion therein.

[5] The alleged facts set out in the FASC and the SASC, as discussed at paras 65-6 of the DB, and the acknowledging response of the PRP at para 10 of the PRPRB, subsequently filed on November 17, 2020, added a lot of detail over and above the original SC[8].

II. Defence Submissions

[6] The Defendant filed the DB on October 14, 2020. The arguments of the Defendant as to why certification should not be granted, and why recent AS cases granting certification are distinguishable, are summarized at paras 1-10 and 43-54. In oral argument, Counsel for the

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[8] The written briefs of the parties, constituting the base of the arguments on this certification application, supplemented by a transcript of oral argument, include: for the Plaintiff Class, the PRP Brief (PRPB), filed December 18, 2019, at 134 pages, 310 paras; for the Defendant, the Defendant's Response Brief (DB), filed October 14, 2020, consisting of 72 pages, 365 paragraphs; and the Plaintiff Class Reply Brief (PRPRB), filed November 17, 2020, consisting of 52 pages, containing 149 paragraphs. A total of 258 pages and 824 paras is clearly overkill and unnecessary, and I regret very much that I did not impose page limits on same.
The oral submissions consumed 175 transcript pages over 3 days between November 18-20, 2020 (identified herein as TR, II TR and III TR respectively - because the transcripts of each of these days are paged continuously. These oral arguments were supported by the PRP's 2 volume document "Compendium for Oral Argument" (COA), consisting of 53 references consuming 569 pages and Compendium for Reply Argument (CRA) (delivered on the third day of the hearing for the first time), containing 31 references at almost 100 pages. As an aside, Counsel for Defendant objected (III TR 1/31-5/30) to the CRA as "submissions with new authorities" and "delivering additional submissions on the third day of a certification [hearing]", demonstrating "concerns that we have in terms of manageability of the proceedings", a matter that "is deeply problematic". In reply, Counsel for the PRP argued, in essence, that this was necessary to address new matters raised by the Defence on the second day of the hearing, including:

- limitations; and
- that the prisons in Ontario are different than those in Alberta (presumably relevant to the transferability of authorities from one province to the other, as constituting some basis in fact), when the PRP argued that they were the same. "[AS] and isolation... [are] the same thing. These words should be used interchangeably" (see Tab 3 of the CRA regarding isolation, for which Counsel for the Defendant agreed – III TR 35/27-32).

The PRP further asserted that "The Defendant argued that [AS] was about the protection of inmates, when the PRP asserted it wasn't; and "[AS] is not found in the legislation...". Counsel for the Defendant responded, with cross-references to show, for example, that limitations were not a new argument. Ultimately, I directed, in effect, that we would go with substance, not form and allow Counsel for the PRP to proceed, with Counsel for the Defendant having a surrebuttal. We thus proceeded on that basis, but if Counsel for the Defendant still wants to proceed to argue the issue, that can be done in fixing costs.
Along with the intervention of Covid-19, the review of 1,000 plus pages of materials, plus 245 cases, has resulted in a significantly delay in rendering this Decision, following detailed analysis.

Defendant elaborated on the argument in a broad sense, however, rather than tracing those arguments there, I will refer to most of the Defendant's arguments in the process of discussing the Plaintiffs' claim, and the Defendant's response.

[7] Counsel for the Defendant started the oral argument (II TR 8/13 *et seq*) by referencing where this case is allegedly situated "in the continuum of other segregation cases", looking first at "what was the subject of adjudication of [the] prior segregation cases", which Counsel submitted was "markedly different than the broad claim that [the Plaintiffs] seek to adjudicate in this case". Broadly speaking, Counsel for the Defendant argued that in the prior cases "[t]here was an identification of a precise conduct [by government] or a precise statute, and then there was an examination of whether or not that breached *Charter* rights. And that's not what is being done here". Counsel then argued (II TR 9/5-10/3) that what is being challenged by the Plaintiff is not a policy or statute, but rather the use of AS to protect inmates, the use of AS to address mental illness issues which resulted in additional punishment, and the conflict between alleged duties to rehabilitate in contrast to the treatment in AS, all such that that the Plaintiffs' claim "is virtually an unbounded action brought on behalf of an extremely broad class which consists of essentially every single person... from November 1st, 1992, to present [who] has been held in AS in Alberta". As a result, Counsel argued that this is "more like a public inquiry on AS generally than a discrete challenge about an aspect of AS as practiced in Alberta. And that, is the fundamental problem with this case...". Counsel then examined (II TR 10/10-12/8 *et seq*) prior segregation cases through two decisions focusing on isolation or solitary confinement, and Charter-required time limits (15 consecutive days in the Ontario case[9]) going forward, not by providing remedies for past treatment: ***Canadian Civil Liberties Association v Canada (Attorney General)***, 2019 ONCA 243 (***CCLA-ONCA***), and ***British Columbia Civil Liberties Association v Canada (Attorney General)***, 2019 BCCA 228 (***BCCLA-BCCA***). In reference to paras 2-3 of the latter, Defence Counsel noted (II TR 15/38 -16/16) that this is not about AS per se, nor necessarily applicable to everyone who spent a day in AS, like the Plaintiffs claim here, but was about specific aspects of segregation, including provisions authorizing indefinite segregation.

[8] Counsel for the Defence also argued (II TR18/25-19/24), pointing to ***Brazeau v Canada (Attorney General)***, 2016 ONSC 7836 (***Brazeau-ONSC***), and ***Brazeau v Canada (Attorney General)***, 2020 ONCA 184 (***Brazeau-ONCA***)[10], that the class definitions in past cases about prolonged AS have not been about inmates with mental illness broadly, but rather inmates with specific mental illness conditions, thus limiting/narrowing the class.

III. Executive Summary

[9] For the reasons that follow in this Decision, certification is granted, subject to one significant condition precedent and one denial of a proposed common issue, as discussed below.

[10] To elaborate, I find, on the record of this case, all of the criteria in s. 5(1) and (2) of the *Act* have been met without any defeating issue, sufficient to justify certification herein, except for one proposed common issue and, more importantly, the suitability of Mr. Robinson as the

[9] Counsel for the PRP asserts (III TR 21/19-25) that it is often more than 15 days in Alberta – see Tabs 11 and 23 of the CRA (III TR 15/16-28 & 20/8-21/25) – the first example of roughly double that

[10] Both dealing with federal penitentiaries.

PRP. I have come to this conclusion after considering the arguments raised by the parties, as I discuss below.

IV. Scope of Analysis

[11] As I have said in an earlier certification decision (***Engen v Hyundai Auto Canada Corp***, 2021 ABQB 740 at para 8), 20 years after ***Western v Dutton*** 2001 SCC 46 and ***Hollick v Toronto (City)***, 2001 SCC 68, and subsequent decisions, it is no longer necessary to cite every conceivable principle and case for the now relatively trite criteria that are necessary under the Act for certification (some addressed at paras 56-64 of the DB). All who are informed of the provisions of s. 5 of the *Act*, and who have made submissions to a court in respect thereof, should now know those criteria; they need not be restated in these Reasons. It is sufficient to follow basic class proceedings principles and then deal with specific issues where newer and more recent considerations have arisen. Consequently, I have not repeated now-accepted law or submissions, nor have I responded to issues not specifically raised between the parties, nor will I allow broad arguments of principle to bog down the certification process – certification is a relatively broad-brush task of assessing procedural common sense and exercising reasonable discretion, not determining how many angels can dance on the head of a pin.

V. Certification Application

[12] The draft Certification Application, attached to the Robinson Affidavit and Tabs 38-42 (as amended) of the PRP's COA[11](the actual Certification Application was filed May 18, 2019), claims (para 1(d)):

> ...damages for conduct contrary to the *Corrections Act*, Revised Statutes of Alberta, Chapter C-29 (the "*Corrections Act*")[12], conduct contrary to international law, conduct contrary to the *Charter*[13], unjust enrichment[14], breach of fiduciary duty, negligence[15], assault, battery, false imprisonment, and intentional infliction of mental suffering[,] on the basis that the Defendant acted contrary to the *Corrections Act*, international law, and the *Charter* in utilization of [AS] in

[11] Frankly, I found that much of the COA and the CRA, and oral references made in relation to or allegedly in support of same, very hard to follow – jumping back and forth between various references to briefs, without clear transition, and not always clear nomenclature (or accurate references) as to where was the precise point to follow, often with transition (and thus meaning) left out, also often disjointed (even though, with more time to review, raising valid points), and not in step with the original PRPB. It seemed scattered and not focused – rather like a series of rambling submissions that did not fit closely with the PRPB. In the result, I could not use much of it to determine the case, other than to observe that, in class proceedings, there is a lot of room to do justice in the situation – including the critical systemic and societal issue herein of AS - under the salient legal principles, without being trapped by jurisprudential technicality.

[12] Introduced in paras 4 and 5 of the PRPB.

[13] See para 5 of the PRPB.

[14] Later abandoned by Counsel for the PRP in this action.

[15] These latter two introduced in paras 3 and 6 of the PRPB. This was also addressed by Counsel for the PRP at TR 55/3-9, attempting to make clear that the Defendant know about these conditions, but did nothing about them – thus, arguably meaning systemic negligence.

> provincial jails beginning since at least 1992 to the present in violation of statutory, common law and equitable laws.[16]

[13] Thereafter, paras 1(f) to (ii)[17] of the Certification Application list 25 proposed common issues[18] and some additional sub-issues under the following headings: Breach of Fiduciary Duty; Breach of the *Corrections Act* 2000; *Charter* Rights[19]; Unjust Enrichment and Unlawful interference with economic interests (abandoned by PRP's Counsel in oral argument); and Damages.

[14] Before getting to the elements required for certification, I note that there is a fundamental difference in wording, if not in the substance, of the submissions between the Defendant and the PRP. At para 9 of the DB, Counsel says that the PRP "has failed [to] identify the evidence that establishes that... he has met the requirements of the [*Act*]". Of course, as the PRP points out (PRPRB paras 4 and 5), relying on ***Miller v Merck Frosst Canada Ltd***, 2011 BCSC 1759 at paras 39-40, in turn relying on ***Hollick*** there is no need for evidence (going to the merits of the claim) at this stage of the proceeding, only the establishment on a "very low threshold" of "some basis in fact"[20]to "determine if the proceeding ... is suitable for certification", not "the evidence needed to prove" those facts.

[15] The Application is based on assertions contained in para 2 above, which I will discuss under the next headings.

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[16] The legality or propriety of segregation has been the subject of news articles/media reports and decisions, including: "Landmark ruling in Ontario solitary confinement at 15 days", Globe and Mail, dated March 28, 2019, attached as Exhibit 4 of the Robinson Affidavit; and ***Prystay,*** attached as Exhibit 3 of the Robinson Affidavit, in which he states (paras 10-77) that ***Prystay***: "accurately described the conditions of treatment of individuals placed on administrative segregation", and "constitutes cruel and unusual punishment", details of which he provides for himself and others, including claimed resulting medical and mental conditions and diagnosis, and in relation to the certain penal remand and correctional institutions, and the AS populations they can hold, as well as conditions described in ***Prystay*** at para 30, and in reference to ***Blanchard*** at paras 40-41, referring, in-turn, to ***BCCLA-BCSC***; see also references to the evidence of the PRP at paras 157-166 of the PRPB. Whether the limit/ceiling is 15 days of AS or some other time was discussed at III TR 11/1-6 and 18-20 and Tab 5 of the CRA, depends on what is sought and what might be allowed. See further discussion at III TR 19/35-38 and Tab 21 CRA regarding "ceilings"- the PRP argues that they don't apply. The common issues trial justice can determine this.

[17] Initially discussed at para 9 of the PRPB. However, in a confusing way, the PRP's affidavit filed September 20, 2019, at para 53, lists the proposed common issues as a. to r. and damages as s. to x. Nevertheless, I will use the renumbered list of common issues submitted by letter from Counsel for the PRP dated June 27, 2022, at the request of the Court (although they are the same content, I did not translate the arguments references to them to numbers but rather left the letter references).

[18] Initially discussed at para 9 of the PRPB.

[19] The PRP asserts at para 5 of the PRPB that AS has been held to be a breach of Charter rights: ***BCCLA-BCSC*** and ***CCLA***.

There was a little "tempest in a tea pot" identified by the parties (DB para 126 v PRPRB paras 11-16) as to whether the PRP's pleadings seek to certify in respect of ss. 9, 11(h) and 12 of the *Charter*. The PRP claims an "oversight", noting that Common Issue 3 refers to *Charter* rights in general and, as he asserted, there was no need, at this stage, to particularize them (although conceded it may be required at certification). The PRP noted that only two sections were directly referenced in the certification application (ss. 7 and 15 in common issues (q) and (r), and one (s. 12) in common issue (m). The PRP's proposed resolution was to remove common issue (r) and amend common issue (q). I will proceed accordingly.

[20] The PRP sets out various indicia for "some basis in fact" at Tab 33 of the COA and III TR 16/16-30, 22/10-15, and 25/6-27/2 (Tab 30 of the CRA), including other certifications and settlements – I will have more to say on the latter, *infra*.

A. Cause(s) of Action

[16] The PRP asserts (para 47 of the PRPB) that the pleadings disclose 6 causes of action[21].

[17] The parties seem in agreement (DB para 60 and PRPRB paras 22-4) that a proposed cause of action will "only be struck when it is 'plain and obvious' that the claim cannot succeed", the PRP asserting that this means "doomed to failure", for which there is a "high threshold that must be met in order to strike a claim". I agree and need not elaborate on the specific examples and cases that have led to the development of this standard, some of which are referenced at paras 25-30 of the PRPRB.

1. Breach of Fiduciary Duty

[18] The Defendant argued vehemently (DB paras 69-78; see also II TR 54/21-55/8-19, especially II TR 54/23-4: 56/17-20) on the basis of the SCC decision in ***Elder Advocates of Alberta v Alberta,*** 2011 SCC 24 (***Elder-SCC***), against certifying a cause of action for breach of fiduciary duty, and tried to refute (DB paras 83-4) the PRP's reliance on ***Seed v Ontario***, 2012 ONSC 2681, where a fiduciary duty was found without the Court there considering the earlier ***Elder-SCC***. The Defendant also attempted to reject the PRP's reliance on ***Stark (Litigation Guardian of) v Ontario***, 2010 ONSC 1726, as being decided before ***Elder-SCC***. In support of arguments rejecting certification on a breach of a fiduciary duty, the Defendant (DB paras 86-95) also relied on the earlier cases of ***Squires v Canada (Attorney General)***, 2002 NBQB 309, ***Phaneuf v Ontario***, 2010 CarswellOnt 9755 and ***Johnson v Ontario*** 2016 ONSC 5314. The PRP had initially addressed these issues at paras 141-150 of the PRPB, relying on, inter alia: ***Markson v MBNA Canada Bank***, (2004), 71 OR (3d) 741 at paras 44 and 60 and on appeal at 2997 ONCA 334 at para 57; my case in ***Windsor v Canadian Pacific Railway***, 2006 ABQB 348 at para 108, in relation to revisions at certification (including by the certification justice) and between certification and at the common issues trial; reference to tolerance of wide differences individually, relying on ***Elder Advocates of Alberta v Alberta***, 2008 ABQB 490 (***Elder-QB***) at para 522, and 2009 ABCA 403 (***Elder-CA***) at para 74[22]; and ***Cloud v Canada (Attorney General)***, 2004), 247 DLR (4th) 667 (ONCA), at some parts of paras 53-69, as sufficient for "even... a very limited aspect of the liability question", and particularly para 69, as to the determination that such common issues would be "a necessary and substantial part of each class

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[21] See para 47 of the PRPB.
The parties get into an unhelpful spat about the difference between pleadings and argument in relation to the "plain and obvious test" for causes of action (DB para 68 v. PRPRB para 21). The PRP, relying on ***Barclay v Kodiak Heating & Air Conditioning Ltd***, 2019 ABQB 850 at para 29 and ***Klemke Mining Corporation v Shell Canada Limited***, 2008 ABCA 257 at para 30, argues that, in effect, without the PRP referencing every cause of action in his submissions, the Defendant has done so, and, moreover, that it is only the 'salient facts' that need to be pleaded. Equally unhelpful is the debate (DB para 69 v. PRPRB paras 27-30, relying on ***Starratt v Mandani***, 2017 ABCA 92 at para 15, ***Barclay*** and ***Klemke***) as to how the pleadings need to address the facts pleaded leading to a cause of action. The bottom line, in my view, is substance over form, and it is only the former which I will address where relevant to my Decision.
Additionally unhelpful are arguments (DB paras 76 and 78 v PRPRB paras 31-3 and 38) comparing the fiduciary duties of the Defendant to society as a whole, as compared to the class. This litigation is about the latter, not the former. Moreover, the PRP notes that he has specifically pleaded (see PRPB para 38) that "the Defendant had complete knowledge of the suffering that was occurring and would occur with the continued use of extended [AS], but intentionally continued to do so notwithstanding that knowledge". If proven, in my view, this is certainly both a breach of fiduciary duty and either negligence (systemic and/or individual) – argued together by the PRP - or, more likely, an intentional tort.
[22] Counsel for the PRP addressed this at III TR 22/17.

member's claim"; and, at para 149, reliance on ***Rumley v British Columbia***, 2001 SCC 69, with emphasis at paras 44-7[23]. See also the interpretation of ***Rumley***, in ***Dell'Aniello v Vivendi Canada Inc***, 2014 SCC 1 at paras 44 and 46 (Tab 35 of the COA), regarding direct or more nuanced claims, and the conclusion (para 46) that "a question will be considered common if it can serve to advance the resolution of every class member's claim" – often requiring "nuanced and varied answers".

[19] I do not find it a satisfactory answer by the Defendant, relying on the decisions in ***Squires*** and ***Phaneuf***, that it does not owe a fiduciary duty to the class because it has a broader fiduciary duty to all of the prison population, or the whole society and therefore "must act in the interest of all citizens" (II TR 56/17-58/7). The Defendant may owe duties to both the segment and the whole, and, in my view, the Defendant cannot ignore or meld the weaker segment into the whole institution or the whole society. Thus, I find that the question of whether there is a fiduciary duty to the whole class is an important issue for the common issues trial justice to examine.

[20] The PRP asserts (PRPRB at para 29) that the cause of action for breach of fiduciary duty is addressed/pleaded at paras 59-61, 74, 86-92 and "throughout" the SASC.

[21] In more detail, the PRP argued (PRPRB paras 32-3, referencing ***R v Feeney***, 2008 ONCA 756 at para 5 and ***R v Rosa***, 2012 ONSC 2759 at para 46) that the Defendant and its agents in the correction system, when dealing with persons that, by virtue of their restrictions, have clear actual or potential vulnerabilities, have fiduciary duties to inmates under their watch, and that duty extends to providing equal, not different, treatment between those in AS and those who are not.

[22] On its face, it would seem that where there are differences, with resulting alleged mistreatment through the exercise of discretion at a systemic level[24], there would be a cause of action for a breach of fiduciary duty sufficient to be investigated at a common issues trial – and I so find.

[23] On the substance, the PRP pointed out (PRPRB paras 34-7) that the Defendant asserted (DB paras 15-6) that there "were many factors leading to being put into segregation", but countered that, the reasons are irrelevant. I agree, but would add, except perhaps to conduct (voluntary confinement – see ***Francis v Ontario***, 2020 ONSC 1644 (***Francis-ONSC***), upheld 2021 ONCA 197 (***Francis-ONCA***)[25]), and individual damages, if the claims are proven. It is the fact and condition of the systemic and individual exercise of discretion by the Defendant's employees in imposing segregation (beyond any established maximum limits), and any harm

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[23] The PRP argues (III TR 22/30-33), against the Defendant's Counsel's proposition (CRA, Tab 28) that ***Rumley***, ***Seed*** and ***Cloud*** are distinguishable because there are a lot of individual issues here – Counsel for the PRP asserts the contrary, as all those cases also had individual issues.

[24] ***Rumley*** at para 30, defines "systemic negligence" as "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" of which there are complaints. This was the argument advanced by the PRP at Tab 29 of the CRA, and the PRP argued (III TR 23/8-24) that system negligence should be decided on a full record at the common issues trial, not terminated at certification, with analogy to the now terminated cause of action of waiver of tort, referencing ***Evans v General Motors***, 2019 SKQB 98 at para 50 and ***Ewert v Nippon Yusen Kabushiki Kaisha***, 2019 BCCA 187 at paras 70-72. I am not sure about the comparison of the handling of waiver of tort to systematic negligence, but I agree that the latter should be decided on a full record.

[25] However, it is important to note that this was a case on the merits (summary trial) which will be the case before the common issues trial in this case, not certification as here, where it is expected that the record would be "thin", but the record in ***Francis*** provides some basis in fact (not some basis in evidence): Tab 13 CRA.

resulting therefrom, that are relevant to this (and other) cause(s) of action. For any liability found arising from the existence and breach of any fiduciary duties (and related claims, beyond any such limits) - see paras 39 and 40 of the PRPB. There, the PRP addresses, in general, the evidence, including expert evidence, that is needed to determine the policy limits of the balance between segregated and non- segregated inmates – with reference to the "***Anns/Cooper*** test" (***Cooper v Hobart***, 2001 SCC 79, articulated in ***Rieger v Plains Midstream Canada LLC***, 2020 ABQB 312 at paras 43-4, and 54-58[26]), which, if liability is found, will be the subject of damages as determined at the common issues trial or individual assessments thereafter[27].

2. Systemic Negligence

[24] The Defendant argued (DB paras 96 – 122, and especially para 118 – see also II TR 58/9-60/18) that the PRP's systemic negligence cause of action, based on the pleading "is bound to fail". As we will subsequently, and importantly, see in more detail, the Defendant alleges, there is not some basis in fact pleaded or provided (II TR61/14-21 and 33-6). In oral argument, Counsel for the Defendant (II TR 19/32-20/28), also notes, referencing ***Brazeau-ONCA*** (paras 114-20), where the ONCA overturned the certification judge and rejected systemic negligence[28] –"no possibility of [a] systemic negligence claim to be advanced", noting (para 120) the ONCA's ruling "a class-wide duty of care [for systemic negligence] can only be made out if the duty relates to the avoidance of the same harm for each class member". I am not certain that there is not such a claim to go to the common issues trial justice in this case in any event, but also note the conclusion of the ONCA to the contrary in ***Francis-ONCA***, which re-enforces my view that systemic negligence is certifiable in this similar case.

[25] The Defendant (DB paras 102-4) points to ***MacLean v R***, [1973] SCR 2 (see also ***Rumley*** at, *inter alia*, para 34), which the Defendant acknowledges established that there is a duty of care owed to individual inmates, but argues, primarily based on ***Brazeau-ONCA***, that this does not "give rise to systemic duties of care owed generally to all inmates".

[26] The PRP argued (PRPRB paras 42-3) that ***Brazeau-ONCA***, which seems to distinguish between institutional abuse cases involving people who lack capacity or have disabilities (where it found "systemic negligence"), from inmates who were classified merely as individuals, is not binding on this Court, and is inconsistent with other case law. Specifically, the PRP (PRPRB para 44) noted that ***Brazeau-ONCA*** held AS was "not a case where the class-wide duty of care is said to arise from a single incident or act, for example an air crash..., but rather the duty alleged arises from different acts in different circumstance and in relation to different individuals", to which the PRP countered (PRPRB paras 45-6) that would arise in "every certified institutional abuse cases... [as r]arely did the events transpire at a single time", pointing to Cloud which had a certified class period of seven decades with a myriad of differences.

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[26] Including reference to my case in ***Harrison v XL Foods***, 2014 ABQB 432 at paras 103-4, noting my colleague's comments (at para 55), which I endorse, that "a determination of whether an action should be certified is not the place to engage in the robust factual and legal policy questions required to determine a duty of care under the ***Anns/Cooper*** test". (I note that ***Rieger*** has been recently overturned by the Court of Appeal (2022 ABCA 28) on an unrelated point, which, on its face and in my view does not affect the wisdom of this comment.)

[27] Individual issues, in the context of "core common issues" are addressed, conceptually, early – at paras 15 and 17 of the PRPB.

[28] The PRP argues that the fact that systemic negligence was rejected at a summary trial, post certification, in ***Brazeau-ONCA***, does not mean that such a case should not be certified (CRA, Tab 15 and III TR 17/11-28).

[27] The strongest PRP argument (prior to ***Francis-ONCA***) on this point is made at PRPRB paras 46-7:

> In [***Brazeau-ONCA***] the Court went on to state that 'those acts can be identified as being the same only because they will all arise from the implementation of a particular policy or regulatory regime regarding the managing of prisons' – but that
>
> ... is precisely the point. What could be more systemic than the consequences of applying an ill-advised, abusive and harmful policy?
>
> ... The duty of care owed to the class does not arise as a result of the policy The policy is simply the means by which the Defendant tried, but failed, to deliver care that was consistent with the existing duties.

In essence, the PRP argues that, aside from individual acts of abuse (whether intentional or by negligence), AS is, in itself, contrary to the proper standard of care, and amounts to systemic abuse by intentional or negligent action on an institutional-wide basis in breach of the duty of care. While that is for the common issues trial justice to ultimately determine, I believe that the record in this case, including reference to the precedent in ***Francis*** (both ONSC and ONCA) shows more than some basis in fact to maintain this as a cause of action, and I so do.

[28] The PRP points (PRPB paras 48-9) to ***Francis- ONSC***[29](subsequently upheld in ***Francis-ONCA***), a case also dealing with AS, where the Court held that such segregation is not only in breach of ss 7 and 12 of the *Charter*, but also negligence for which Ontario was liable, for compensable harm – in essence, threshold actions in relation to the proper duty of care that are beyond an acceptable norm such that the actions are or become systemic negligence.

[29] PRP's pleadings, evidence and submissions are sufficient to establish a potential cause of action for systemic negligence and are certified for the purpose of determining whether that will be found in fact at the common issues trial.

[30] Counsel for the Defendant addressed ***Francis-ONSC*** in oral argument, noting that at that time it was under appeal (II TR 65/23 et seq and 67/39-68/19). However, subsequently ***Francis-ONCA*** upheld the ONSC decision, and addressed a number of points specifically relevant to this case[30] (references to ONCA para numbers):

- The CA upheld the finding of a duty of care, breach of ss.7 and 12 of the *Charter*, and, in certifying systemic negligence, finding (headnote and paras 80-2, 85 et seq, and 97-8) that "the defendant was systematically and routinely negligent in the

[29] A provincial corrections case, in which, in the certification decision, Perell J. made findings that provincial AS is similar to the federal, according to Counsel for the Defendant (II TR21/4-15), but Counsel later (II TR 22/5-15) argued that, different than ***CCLA***, ***BCCL*** and ***Francis***, there is no expert evidence from Alberta with alleged resulting effects. The summary of major conclusions (para 637) and the common issues argued and answered (para 638) are set out in Tab 8 of the PRP COA.

[30] However, in ***Francis***, rather than the whole inmate body who had been subjected to AS being the class definition, as here, the class definition there was restricted to inmates who were seriously mentally ill (SMI) and were in segregation for 15 or more consecutive days (Prolonged Inmates), both of which were certified. Further, there are other elements that are not specifically relevant to my Decision (e.g., an award of *Charter* damages) that I will not address.

operation of [AS] in violation of its own policies and practices"[31], and there was no Crown immunity because it was based on breach of policies not legislation: "... [AS] in Ontario is the product of ministerial policies and management level operational decision, rather than any specific statutory mandate"[32]

- (9) "Administrative segregation in Ontario may fairly be described by its more common expression, 'solitary confinement'."[33]
- (10) The conditions were found by the motion justice to be the same or similar to the federal system identified in ***CCLA*** and ***Brazeau-ONCA***[34] (there was much analysis of the latter case under a number of headings).
- (44 – and headnote) whether the AS was voluntary or involuntary was a factor in liability.[35]
- (97-101 and 105) a previous determination in ***Brazeau- ONCA*** "that a systemic negligence claim could not be established", relating to the federal correctional system, was principally because of differences in the pleadings there, as compared to ***Francis***, where the pleadings were limited to SMI and Prolonged Inmates, not the whole institutional inmate population subjected to AS, and were, in reference to operational decisions – "in the immediate case, Ontario was systemically and routinely negligent in the operation of [AS] in violation of Ontario's own policies and practices".
- (102-4) referencing ***Cooper*** and ***MacLean***, a duty of care was found, not just on an individual basis, but also on a class basis – "the actions taken in this case, that form the basis of the negligence claim... [are] operational as opposed to policy matters[36]"
- (107-10) – relying on ***Rumley*** and ***Cloud***, where systemic negligence was certified, "[t]here is no reason in principle to adopt an approach to these claims that requires an individual inmate to commence their own action in order to seek relief for the resulting harm. Indeed, such a result would run counter to the very purposes behind the... [*Act*]." And, adding reference to ***Good v Toronto (Police Services Board)***, 2016

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[31] Note this overturned a conclusion of no systemic negligence that the ONCA had directed in ***Brazeau-CA*** (as argued by Counsel for the PRP – III TR 17/11-39).

[32] See III TR 12/8-15/4, and Tabs 8 and 9 of the CRA, where Counsel for the PRP, referencing ***Francis-ONSC***, talks about AS not resulting from legislation but, as Counsel for the Defendant argues, from policy, and Counsel for the PRP retorts that it is not policy subject to judicial deference and immunity from civil liability, but implementation of policy, that is an operational procedure that exposes public authorities to liability – see paras 416-7, 425, 427-8 and the last 2 sentences of para 438 of ***Francis-ONSC***, relying upon the unanimous case of ***Kosolan v Societe de transport de Montreal***, 2019 SCC 59.

[33] Note that this difference, although generally agreed to by Counsel for both sides (see III TR35/27-32), is confirmed by ***Francis (ONCA)***, while debated before that – see III TR 7/7-28 et seq and III TR19/27-33.

[34] See III TR 6/37-10/40, and Tabs 3 and 4 of the CRA, referencing ***Brazeau-ONSC*** at para 262, ***Francis-ONSC*** at paras 72-4 and 1644, ***BCCLA-BCSC*** at paras 123-39, regarding the "Mandela Rules" and evidence in the latter and from class members as to the conditions within and effects of AS, demonstrating, in the PRP's argument, that "the prisons would be similar from one province to another" (ostensibly for the point that cases in other provinces thus raise some basis in fact in this Province – see III TR 11/1-16 and Tab 5). However, Counsel for the PRP also argued (III TR 11/35- 12/6 and Tab 7) that the fact that different APCCs are similar but not identical does not matter and that can lead to nuanced answers.
Brazeau-ONCA is referred to in ***Francis*** as "***Brazeau-Reddock***".

[35] Counsel for the PRP touches on this briefly at III TR 21/27-40 (see CRA, Tab 24) and argues that the treatment in AS is harmful whether or not it is voluntary or involuntary.

[36] The operations/policy dichotomy and the impact of statutory provisions was debated by Counsel for the PRP at III TR 11/35-15/8. These arguments do not lead me to stray from certification, but to grant it.

> ONCA 250, can be determined by the defendant's records on "an institution-wide basis through the [defendant's] own records."

[31] While I will not analyze it here, I note that the PRP also relies on the case of ***North v British Columbia***, 2020 BCSC 2044, which, in turn, relied on ***Francis-ONSC***, where a case similar to the one at Bar was certified with some prerequisites.

3. *Charter* Claims

a. Section 7 [Life, liberty, security of the person]

[32] Based on a review of the Defendant's submissions (DB paras 132 and 164, and III TR 11/35-15/8), the PRP concludes (PRPRB para 51), correctly I find, that the s. 7 *Charter* claim is sufficiently pleaded to be a certifiable cause of action, and I so find.

[33] However, the Defendant denies the certifiability of other *Charter* claims, on a basis of lack of pleadings – II TR 61/41-62/18, and on the basis (my words) that "one size does not fit all": II TR 70/15-31.

b. Section 9 [Arbitrary detention]

[34] The PRP references the submissions at DB paras 130-1(a), wherein the Defendant argued that the PRP has not made any claims under *Charter* sections 9, 11(h) or 12, and adds that the PRP simply indicates in the SASC at para 78 that "the class members were detained arbitrarily" – "without providing any material facts". The PRP responds (PRPRB paras 52-3) that "the claim must be read as a whole" and refers to para 70 of the SASC which references arbitrary detention, states "[i]t is not clear what further particulars could be provided"[37]. The PRP, relying on ***Francis-ONSC***, states that "an already-detained inmate could be considered further detained is undisputable... a dungeon inside a prison". I find that this cause of action has sufficient basis in fact to be certified, and I do.

c. Section 11(h) [Punishment over and above]

[35] At DB para 131(b), the same arguments above are advanced by the Defendant regarding s. 11(h) of the *Charter* relating to "punishment over and above the sentence of the Court", to which the PRP retorts (PRPRB paras 54-6) by referencing the particulars of the claims in paras 26, 28, 48, 50, and 76 of the SASC, adding (paras 55 - 6) "[t]hese realities – being locked up 23 hours per day, being isolated, being unable to participate in regular activities – amount to an additional and further punishment... contrary to the *Charter*... It is not clear what further particulars could be provided...".

[36] I find that there is a potentially successful cause of action under s.11(h) to be advanced here at certification for determination at the common issues trial.

d. Section 12 [Cruel and unusual punishment]

[37] The same arguments follow at DB para 131(c), under s. 12 of the *Charter*, and the PRP responds at PRPDB paras 57-8, in reference to para 39 of the SASC, which claims that "... [IAS] for prolonged periods of time to which Class Members in common have been subjected, is not a safe or human way ... to hold inmates. It causes serious damage to inmates' physical... [and] mental well-being. It is cruel, inhumane and degrading" (see Tab 4 of the CRA – III TR 10/39-

[37] The PRP addresses this at Tab 30 of the CRA, with the example from ***Good*** and argues that no further particulars are necessary – see III TR 23/31-24/35.

40). Tab 10 of the CRA (III TR 15/10-14) is the PRP's argument that it is not sufficient for the Defendant to claim that the intention or purpose of AS is not punishment, when that is the reality and effect. However, in oral argument (II TR 63/2-14) the Defendant appeared to concede that this cause of action is certifiable. I find that is certifiable, and, while it is for the common issues trial justice to determine, I tend to agree that it is the reality and effect that trumps purpose.

[38] Again, I find that there is a potentially successful cause of action under s.12 to be advanced here at certification for determination at the common issues trial.

e. Section 15 [Discrimination]

[39] Finally, under the *Charter*, para 128 of the DB relating to discrimination under s. 15, is referenced at PRPRB para 59. The PRP notes there that the Defendant argued that the PRP "has provided no ... facts that might the test to establish discrimination... to show... a distinction based on personal characteristics... and [that] the distinction has the effect of imposing disadvantages... not imposed on [other inmates]". In response, the PRP points out that para 22 of both the SC and SASC "expressly pleads that individuals with intellectual handicaps and... pre-existing mental illnesses are particularly vulnerable (and by implication, more vulnerable than the general prison population) to having their challenges exacerbated through the use of [AS]...". On this basis, I find that the PRP has alleged a claim for discrimination sufficient, at this time, to assert it as a cause of action deserving certification.

4. Breach of the *Corrections Act*

[40] There is apparent agreement between the parties over the role of this alleged breach – the PRP seems to acknowledge that there is not an independent cause of action, but that it forms support for other causes of action – fiduciary duty, systemic negligence and *Charter* breaches – and the Defendant appears to agree: II TR 63/16-23.

[41] In oral argument (TR 9/22-12/31, referencing the PRPB para 4), Counsel for the PRP makes argues a breach of Correction Act in failing to give the PRP Notice of AS. Further, reference to the conditions under AS are contained in the affidavits of class members in Tabs 2-4 of the PRP COA (e.g., TR 13/1-14/21).

[42] Tab 5 of the PRP COA contains the reference that the policies are the same for different Alberta correction facilities (TR 14/25-16/6) – which I find is generally supported by the factual submissions of Counsel.

[43] In face of the Defendant's arguments (DB paras 134-6, and 138) that there are no particulars pleaded about the alleged breach, that the *Corrections Act* and *Regulations* do not deal specifically with AS or give a civil remedy, and that any such issues are individual not common, the PRP responds (PRPB paras 61-2) in reference to: (a) ss. 7(2) and (3) of the Regulations relating to "humiliating tactics or harassing techniques"; and ss. 9.1(3) and (4) regarding physical and mental health for placement of inmates in an a correction facility. Both Counsel leave the issue of commonality to arguments of preferable procedure. However, as noted, it is conceded by the PRP (PRPB para 60), in general agreement with the Defendant (DB para 137), that this is not ("may not give rise to") a separate and independent cause of action, but establishing such a breach "could inform the systemic negligence evaluation": ***R v Saskatchewan Wheat Pool***, [1083] 1 SCR 205 at paras 37-8; ***Gauthier v Alberta Recoveries and Rentals Ltd*** (1990), 110 AR 260; and my case of ***Eaton v HMS Financial Inc***, 2008 ABQB at para 237. See also TR 55/14-18. In the latter case, as referenced, I stated, in part, that "[w]hile,

generally speaking, breach of statute may give rise to a cause of action in negligence, [but it] does not constitute an independent cause of action, where the applicable legislation provides, explicitly or inferentially, for a civil remedy, it is not plainly obvious that the claim has no likelihood of success..."

[44] In the result, these allegations could there, and can here, proceed not as an independent cause of action, but rather to inform, *inter alia*, the systematic negligence claim, as Counsel appear to agree.

5. Damages

[45] The PRP sets out six common issues with respect to damages in the Robinson Affidavit at paras. 53(s) to (x). The Defendant argues (DB paras 296-7) that damages "are a purely subsidiary issue and cannot support certification on its own if no liability issues are certified" or are inherently individualistic. The PRP did not respond in the PRPRB.

[46] I have certified causes of action that could lead to liability, so I will approve appropriate damage common issues for the common issues trial justice to consider, as well as dealing with any damages that follow from individual issues.

[47] The Defendant only addresses punitive damages at DB paras 296-7 (see TR 59/2-5). The PRP addressed damages, and, in particular, punitive damages, at TR 57/9-58/22, referencing ***Chase v Crane Canada Inc***, (1997), 44 BCLR. (3d) 264 (CA) – Tab 43 of the COA, and ***BCCLA-BCCA***, especially at paras 32 et seq - Tab 44 of the COA, as some basis in fact for damages, including punitive damages. See also TR 58/24-41, in reference to ***Good*** (paras 79-80) at para 194 of the PRPB – Tab 45 of the COA and ***Pederson v Saskatchewan***, 2016 SKCA 142 – COA, Tab 46, in support of certification of punitive damages.

[48] Thus, I find that damages, including punitive damages, should go forward on certification to the common issues trial in these contexts.

6. Other

[49] As noted (*supra*), in face of Defence arguments (DB para 139 et seq and paras 286-90) that claims for unjust enrichment cannot succeed as a cause of action or the with common issues, the PRP (PRPB para 65) withdrew this cause of action and related proposed common issues, withdrawing paras: 86; the first 10 words of 88; 89; and 90 of the SASC; and proposed common issues relevant thereto.

[50] Also, as noted (*supra*), to a similar result, and in response to DB paras 157-13 and 291-95, the PRP (PRPRB para 66) withdrew the cause of action of unlawful interference with economic relations and the proposed common issue.

[51] I find that there is nothing new, not already addressed herein, in the Defendant's "Conclusion on the causes of action" section (DB 164 - 170). In that section, the Defendant: concedes a cause of action for *Charter* s. 7; denies a fiduciary duty, which I do not accept, allowing it to proceed to the common issues trial; and says that any systemic negligence claims are individual, not common and limited to negligent policy – I reject these arguments at this certification stage and equally leave them to the common issues trial.

B. Identifiable Class

[52] The PRP submits that there is an identifiable class of two or more persons[38], which has not been challenged by the Defendant.

[53] However, as to the class definition, the Defendant argues that there is no evidence to support the start date or a rational connection to the common issues and thus, for this reason and others, the definition of the class is arguably too broad: II TR 72/29-31 and 73/23. The PRP did not respond in written submissions as to the rationale for the start date, other than to note (PRPRB paras 68-9 and 71) that the evidence from the Defendant is that the Defendant has used AS since 1992. The PRPRB also noted that the class is limited to those who were placed in AS at an APCC – thus making it applicable only to such inmates, in APPCs that deployed AS policies or practices in the years since the proposed start date.

[54] As to the start date, Counsel for the PRP argued (III TR 5/33-6/18 and Tab 1 of the CRA) that limitations is a defence that had not yet been pleaded, and thus there are not common issues regarding this alleged defence; and that continuing conduct allows for some counting back under ss.3(3)(a) of the *Limitations Act*, RSA 2000, c L-12. I have also pointed out arguments about the start date and limitations, and the recent findings in ***Francis-ONCA***. However, Counsel for the Defendant argues that there is no basis for the application of the principle of discoverability, and that the limitation should be 2 years, or, at the most, the ultimate limitation date of 10 years (see III TR 31/31-34/19). This debate may get into whether discoverability is about the time of placement into AS, which the Defendant argues, or discoverability that there is an "injury" resulting, or a legal basis on which to claim for it, especially in the current landscape of greater certainty of claims being certifiable for AS. While there are some strengths and weaknesses to both arguments, I believe that certification is not the time to settle this, and it should go to the common issues trial justice to determine[39].

[55] The PDPRB also notes that the class is limited to those who were placed in AS – thus making it applicable only to such inmates, where APCCs pursued AS policies or practices in the years since the proposed start date. Moreover, the PRP addressed (PRPRB para 69, in reference to the DB para 182 and the case of ***P(W) v Alberta***, 2013 ABQB 296 at para 27), the lack of need for a class member or evidence of breach in each class year. See also TR 49/38-52/38, where the PRP, referencing PRPRB paras 70-73, responds to the arguments of the Defendant, including: lack of impact of policy changes over time; 14 examples of some basis in fact on identifiable class and common issues, including affidavit evidence, scientific literature, opinions, information in commissions of inquiry and newspapers, certifications and settlements[40] in other jurisdictions (PRPB para 168-9; COA, Tab 33 and TR 56/39-57/7 regarding the United Nations); and reference to similar arguments, including systemic refusals (not individual circumstances) to take reasonable measures, guards present or not, or geographical location, etc., as refuted in ***White v***

[38] See PRPB para 8 and TR 14/23-4.

[39] These issues of limitations are discussed by Counsel for the Defendant at III TR 32/21-8.

[40] Counsel for the Defendant challenged/urged caution about using settlements as some basis in fact (Tab 13 CRA, III TR 16/21-30, making reference to ***Miller v Purdue*** at III TR 36/7-10), and I believe there is something to the Defendant's argument, because, from my experience, some (perhaps many) settlements are based on economics, not some basis in fact, as I raised with Counsel for the PBRP at III TR25/40-26/25. Thus, I believe that some basis in fact, based on settlements (CRA, Tab 13), is a dangerous precedent.

Attorney General of Canada, 2004 BCSC 99, including reference to paras 49-52, contained in COA, Tab 34.

[56] Additionally, while the PRP did not see a need for subclasses for adult male members of the class, he did mention a potential subclass for youth (PRPRB para 85, and TR 53/13- 54/13), and it appears to me to follow that the same considerations would apply to women class members (see reference to II TR 38/32-39/25, as to the facts alleged regarding women class members). As to subclasses, see the submissions of Defence Counsel at II TR 40/18 – 36 and 69/11, the essence of the latter is a submission that only those involuntarily placed in AS should be part of the class, or there would otherwise be a conflict within the class. I will leave any considerations of subclasses to the determination of the common issues trial justice.

[57] The PRP also noted, relying on ***Weremy v The Government of Manitoba***, 2020 MBQB 85 at para 55, that a set class definition can be amended through the whole proceedings as the need may arise.

[58] After all of this review, I find that there is compliance with s. 5(1(b) of the *Act*, and, at this stage, no basis to find that the class definition does not demonstrate some basis in fact (in the evidence provided) for its proposed wording. In my view, there need not be evidence for every period of time in each centre, or, indeed, each geographical centre, at this stage; the dates can be adjusted or limitations imposed at the common issues trial, or even during the claims period, as the facts emerge that any ultimate claimant may or may not be entitled to compensation, although they are within the class definition, as the PRP argued at para 67 et seq of the PRPRB. Moreover, I do not find that the definition is unrelated to the admitted non-onerous common issues, or is too broad. Any remaining or further issues on these latter points can be raised at the common issues trial (see again TR 54/11-12).

C. Common Issues

[59] As noted (*supra*), the PRP asserts 25 common issues in the context of 5 causes of action (the PRP's abandonment of 2 has now reduced that to 3) and a separate consideration of damages: para 53 of an affidavit sworn by the PRP on September 19, 2019[41].

[60] It is clear that, again at this stage, there needs to be some basis in fact for these common issues which are not dependent on individual findings of fact (DB para 202), but for which success for one must mean success for all (DB para 204), based on the common issue being a "substantial ingredient of each persons' claim" (DB para 206), subject to the assessment of damages that might be affected by the impact of any breach on any claimant. Because "certification is a procedural issue", I agree with DB para 207 that "the assessment of the common issues should be from a very practical perspective". The PRP addresses the sources for "some basis in fact" in certification cases at PRPRB paras 77 – 9, depending on the nature of the proposed class proceeding. I find that the PRP broadly establishes this "some basis in fact" (it need not be evidence to prove/establish that basis in fact), as the Defendant incorrectly asserts at para 201 of the DB. That assessment of proof is not for the certification justice, but, rather, is the role of the common issues trial justice, if certification is allowed: ***Fehr v Sun Life Assurance Company of Canada***, 2018 ONCA 718 at paras 85- 6; see also PRPRB paras 74 and 76.

[41] The DB para 211 stated that this affidavit was dated June 6, 2019, but the PRP states (PRPRB paras 17-20) that it was September 19, 2019 (the corrected date), and that it is no different in substance than stated in the certification application.

[61] I will not address every case quoted on the principles applicable to common issues in general or the proposed common issue individually, but only those that require some comment.

1. Breach of Fiduciary Duty and Negligence: Robinson Affidavit, paras 53(a) – (j)[42]

[62] The DB argues (para 215-6) that the proposed common issues are "inherently individualistic" and impossible to answer on a class wide basis". The PRP counters (PRPRB para 80) "whether a duty exists and the nature of that duty are, in fact, inherently common issues", although they ultimately "may be... nuanced by the common issues trial judge if... the answer differs across the class". I agree with the first proposition and time will tell as to the second. Counsel for the PRP referred to the evidence as summarized by Counsel for the Defendant based on the evidence before the hearing - Mr. Gouffie's and class members – to the effect that the conduct of the Defendant is similar in all APCCs, but Counsel for the Defendant challenged that (III TR 34/21-35/25), calling it a "surmise", and that the PRP had not proven it. However, I find that the evidence provides some basis in fact for the PRP's position sufficient for certification, and if the parties want to debate it further they can do so before the common issues trial justice, if allowed. ***Good*** seems to be a precedent for this.

[63] The DB (para 217) claims that the duty may change depending on the reason for segregation (protective custody or disciplinary breach), but the PRP, recognizing a possible nuanced answer aforementioned, argues (PRPRB paras 81-4, based on ***Francis-ONSC*** at 637) that "the harms that flow from the use of [AS] are the same irrespective of the reasons" for placement. I will leave that for the determination of the common issues trial justice.

[64] The DB (paras 218 -25) claims that the PRP brings this case as an "institutional abuse case" for breach of fiduciary duties, but that the cases relied upon by the PRP involve only one location, whereas this action is for multiple APCC locations. The PRP replies (PRPRB paras 85 – 90, relying on ***Matthews v La Capitale Civil Service Mutual***, 2020 BCSC 787 at para 87; ***Warner v Smith & Nephew Inc.***, 2016 ABCA 223 at para 22; and ***Weremy*** at para 55) that the inclusion of multiple locations/institutions is not a bar to certification, but if issues appear at the common issues trial (or between certification and trial) they can be dealt with. I agree. Moreover, the PRP asserts that, on the evidence here it is unnecessary at this time, having regard to the similarities in which AS is deployed in each centre (no evidence provided to the contrary by the Defendants). However, if and when necessary, as alluded to (supra), certification could be changed to separate sub-classes or separate certifications by centre, as seen in ***Good***.

[65] The Defendant (DB para 226) claims that "individuality is apparent in the proposed common issues in paras 53(c)"... (h) and (j) of the Robinson Affidavit. The PRP (PRPRB para 91) argues:

> This position assumes that there are any circumstances in which [AS] is 'reasonable' or 'appropriate'. This position assumes that expert evidence will not establish what is 'reasonable' and 'appropriate' on an objective basis, limiting the scope of what remains as individual issues.

I am not satisfied, contrary to the argument by the Defendant (DS para 227) that such issues (using para 53(f) of the Robinson Affidavit as an example) "…would necessarily require an

[42] Remember that these references are to the lettering of common issues before the numbering by Counsel for the PRP on June 27, 2022.

evaluation of each individual class member's physical and mental health as well as the reasonable treatment of that individual". Thus, I will leave this debate to be held within the common issues trial, based on the evidence adduced there.

[66] Finally, on these inter-related common issues, the Defendant makes reference to the role of Alberta Health Services (AHS) utilized since September 2010 in the APCC, to which the PRP responds (PRPRB para 93) that the "Defendant cannot negate its responsibilities by outsourcing the provision of health care services to a third-party entity". Basic logic would support this conclusion, as the Defendant is the party that is deploying AS, and AHS is merely administering the health care that results from such deployment. In the result, I consider this argument a red herring, without the need for further consideration.

[67] As to para 53(g) of the Robinson Affidavit, relating to "disciplinary force" (DB paras 229-237, relying on ***Thorburn v British Columbia (Public Safety and Solicitor General)***, 2013 BCCA 480 at para 42), I agree that there has not been shown some basis in fact that this is a common issue related to AS. In the result, it is struck as a common issue.

2. Breach(es) in relation to the *Corrections Act* – Robinson Affidavit, para 53(k)

[68] The Defendant first raises a procedural issue (DB paras 238-242) that the particulars of these alleged breach(es) were not raised until "after the evidence on this application was completed", and that, accordingly the PRP "should be precluded from raising the issues at this stage of the certification process". The PRP dismissed this complaint summarily, having regard to the "interests of justice" (PRPRB paras 94-103), relying on a number of cases, in effect arguing substance over form. I find no evidence of real prejudice to the Defendant and agree with the rationale of Tilleman J, in ***Kent v Postmedia Network Inc***, 2012 ABQB 559 at para 18, that "I would far rather err in sending a matter to the trial on its merits, than take it away on the pleadings". Thus, the Defendant's objection is denied at this stage, with any follow-up required to be raised in the context of the common issues trial.

[69] As referenced (*supra*), the PRP notes (TR 55/14-56/14) that "this is not a separate cause of action but it informs on negligence", and also notes, in response to the Defendant's allegation that the *Corrections Act* was not pleaded or addressed in the PRPB, that para 167 of the PRPB provides the particulars – see also paras 94-105 of the PRPRB that talks about particulars and pleadings, matters which are addressed in ***Kent***, particularly in para 14 in the context of "liberal amendment of pleadings", if necessary. See also the submissions of the PRP at paras 97-103 of the PRPRB including in reference to, not only, ***Kent*** but also: ***Field v Glaxosmithkline Inc***, 2013 SKQB 113 at para 47; ***Markson*** at para 44; and ***Halvorson v British Columbia (Medical Services Commission)***, 2010 BCCA 267 at para 23 – see discussion at TR 55/20-56/14; all of which leads me to conclude, at least at this point in the proceedings, that any lack of pleading leading to certification, is not a particular problem, but if a more specific issue arises, it can be determined by the common issues trial justice.

[70] That said, and by way of guidance to the common issues trial justice, it appears to me that issues of restriction or monitoring of inmate communication (DB paras 244-6) are not common issues. If the PRP wants to challenge that at the common issues trial, he may do so, subject to the ruling of the presiding justice there.

[71] As to employment programs (DB paras 247-54), which appear only to apply to sentenced inmates (see Tab 19 of the CRA and III TR 19/18-25), this is not a restriction in the proposed class definition. In the result, on the evidence before the Court, this would not apply to the whole class, and if it is to be pursued, based on some basis of fact, there might well need to be a sub-class created at the common issues trial. In the result, I do not now make that a common issue but the PRP can pursue same before the common issues trial justice, if so instructed, and allowed.

[72] The same result will pertain to issues of changes in classification of inmates (DB para 255) – I find not a common issue.

[73] Finally for this section, with reference to employees' treatment of inmates (DB para 256-7), this can merely be an individual issue, but, insofar as it is systematically based on policies and procedures related to AS, as is the nature of the PRP's action, such treatment is or may also be a "global" common issue – as supported by the PRP's submissions at PRPRB paras 104-5. The same considerations apply to: monitoring mental conditions as required (DB paras 258-9); ability to exercise (DB paras 260-1); monitoring of privileged telecommunications (DB paras 262-4); and the allowable use of force by correctional officers (DB paras 265-6).

3. Common Issues arising out of *Charter* Claims

[74] The Certification Application filed on May 10, 2019 only referenced alleged breaches of ss. 7 and 15 of the *Charter* (see Tab 38 of the COA). However, in the PRPRB (paras 11-16, during oral argument (TR 56/16-37, and potentially other places) this was expanded to ss. 7, 9, 11(h), 12 and 15.

[75] The Defendant argues (DB paras 267-85) that claimed breaches of *Charter* under ss. 7 and 15 (the only ones that the Defendant says the PRP claim, although the PRP subsequently amended) are individual and not common, and there is no basis in fact to argue commonality. The Defendant attempts to restrict the applicability of certification of such breaches to a more limited class definition or on the basis of expert evidence (not class members' allegedly inadmissible evidence), neither of which are, the Defendant argues, present here. I believe, however, that, while there undoubtedly are individual issues of whether a common breach of a *Charter* provision has an individual impact, there is a common issue, broadly speaking, as to whether AS itself causes such a breach on a global basis. This, including whether there need to be established sub-classes, can be worked through at the common issues trial, and, as appropriate, afterwards, on the individual assessments for any global breach.

[76] In the result, at para 15 of the PRPRB, proposed *Charter* common issues were amended to read: "Did the Defendant or her agents breach Class Member's *Charter* rights with respect to any one or more of ss. 7, 9, 11(h), 12 or 15?" These are certified.

4. Approved Common Issues

[77] As a result of the submissions and findings of the Court, the following are the approved common issues[43]:

[43] Using the numbering in the list provided to the Court by Counsel for the PRP, on June 27, 2022, at the Court's request, to have a final list from various prior lists contained in the Certification Application, the Robinson Affidavit, in the PRPB (starting at para 151) and Tabs 38-42 of the PRP COA, as amended orally – during the

Breach of Fiduciary Duty

1. Did the Defendant owe a Fiduciary duty to the Class?

2. Did the Defendant owe a duty to act in the best interest of the Class?

3. Did the Defendant owe a duty to ensure that the Class Members were treated fairly and respectfully?

4. Did the Defendant owe a duty to rehabilitate Class Members and reintegrate them into the community?

5. Did the Defendant owe a duty to provide care and maintain conditions of detention at a reasonable standard?

6. Did the Defendant owe a duty to appropriately monitor the mental and physical health of Class Members, including Class Members with undiagnosed mental disorders, and provide appropriate care?

7. ~~Did the Defendant owe a duty to protect Class Members from severe disciplinary force?~~ [44]

8. Did the Defendant owe a duty to protect Class Members from cruel and unusual treatment or punishment and torture, including:

   (a) By implementing appropriate oversight and independent review for the decision to administer and continue Administrative Solitary Segregation; and

   (b) By prohibiting Prolonged Administrative Segregation?

9. Did the Defendant owe a duty regarding the Class, to adhere to domestic and international laws, conventions, treaties rules, norms, and commentary regarding the treatment of inmates, including the prohibition of Administrative Segregation?

10. Did the Defendant owe a duty to create appropriate policies and procedures to ensure the performance of the duties set out above?

Breach of the *Corrections Act* 2000

11. Did the Defendant, or her agents, engage in behaviour that breached the *Act* (*and in particular, ss. 14.4(2) and 17 thereof*) or the Regulations (*and in particular, ss. 7(1), 7(2), 7(3), 9(3), 9(4), 9(5), 19(1), 26, 32.2(1), 31.2(2), and 50 thereof*)?

Charter Rights

12. Did the Defendant or her agents, breach Class Members' *Charter* rights with respect to any one or more of ss. 7, 9, 11(h), 12, or 15?

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proceedings. The result is a numeric, not letter, based list as in some previous iterations, with any amendments in italics.

[44] I have removed this proposed common issue.

Damages

13. What is the appropriate compensation in damages for individuals who were held in Administrative Segregation?

14. What effect, if any, does the development of Mental or Physical health issues have on the appropriate compensation?

15. What effect, if any, do various lengths of time in Administrative Segregation have on the appropriate level of compensation?

16. Does the Defendant's conduct merit an award of punitive damages or exemplary damages?

17. Is the Defendant liable to pay punitive or exemplary damages having regard to the nature of their conduct? If so, what amount and to whom?

18. Can an aggregate award of damages be made pursuant to the *Class Proceedings Act*?

19. Is the Defendant liable to pay court ordered interest?

D. Preferable Procedure

[78] The PRP submits[45] that a class proceeding is the preferable procedure for resolving the common issues. In support thereof each affiant for the Plaintiff class declared under oath that they could not afford to bring an individual claim – thus, one of the tripartite policy objective *raisons d'etre* for class proceedings – access to justice – would be met by proceeding by way of a class proceeding, not individual actions. This evidence and the submissions of the PRPRB at paras 125-8, render unpersuasive the arguments of the Defendant DB 316-7 that a class member would have a "valid interest in controlling [their] own proceedings."

[79] Moreover, to the extent that some of these affiants or others might have brought – or may bring – individual actions for some form of relief (DB paras 318-21), this does not mean that individual actions "negate the efficiencies" of a class proceeding (including judicial economy), nor does it mean that individual actions would be preferable to a class proceeding. However, some claims may be more simple (and thus better able to proceed by individual claims) rather than the case of some class member who have more complex claims (see PRPRB paras 129- 30) – that some inmates may pursue same does not mean that others should not have the right to pursue a class proceeding.

[80] Equally so, *Charter* remedies granted in criminal trials that follow AS while awaiting those trials (DB paras 322-9) are neither a bar to, nor necessarily equal to, a class proceeding, as the PRP correctly argues (PRPRB para 133).

[81] The Defendant asserts (DB para 4) that a class proceeding is not preferable, because any causes of action that survive the test for certification "would require individual assessments". As the PRP replies (PRPRB para 1, relying on ***Boulanger v Johnson & Johnson Corporation***, 2007 CanLII 735 (Ont. Sup. Ct.) at paras 52-3, in turn relying on ***Wilson***, ***Bayer***, ***St. Jude*** and

[45] Initial submissions contained in paras 12-14 of the PRPB and TR19/7-18 of the oral argument, with later submissions at paras 206-241 of the PRPB, and 106-133 of the PRPRB (in answer to a number of paras of the DB), and, in respect of same, oral argument by Counsel for the PRP at, most of TR 59/5-63/24, including reference to my case in ***Windsor*** – COA Tab 47).

Robertson[46] at para 173-4) that is almost always the "defendants 'classic refrain'". I agree with the Court in ***Boulanger***, as quoted, that, in the face of an allegation by a defendant that the class claims are a "myriad of complex individual and unmanageable issues", or equivalent allegations, it should be remembered that "the mere fact that the litigation would be complex is not a bar to certification" and that "it is preferable that the common issues be resolved by a class action", in support of those three policy objectives. More specifically, I agree with the statements that, as in most class proceedings, common issues can "address fundamentally important issues in this action, and their resolution will significantly move the litigation forward" and that "[w]hile individual issues of proximate causation, allocation of fault and damages [may] remain, their resolution will be considerably influenced by the outcome of the common issues trial".

[82] The Defendant correctly argues (DB para 298 et seq) that not only must there be common issues, but that the procedure must, in addition, be preferable, emphasizing the gatekeeping function of the Court as "a scrupulous and effective screening process" so as to avoid (paras 300 and 302-3) "the altar of expediency", and (referencing paras 29-30 of ***Hollick***) that "it is important to adopt a practical cost-benefit approach to this procedural issue", and reject the "certify now, worry later" approach. The PRP takes issue (paras 7-9 and 106-7 of the PRPRB) with the word "scrupulous"[47] being the test for screening, saying that it is merely "something more than symbolic scrutiny, and that the threshold is low, with competing evidence not to be weighed".

[83] I agree, but the Court must always be vigilant to identify such cases where bare or minimal/nominal compliance is sought to be rewarded without examining the bigger picture – e.g., ***Setoguchi v Uber***, 2021 ABQB 18 (under appeal). Here, however, I find that there is a much bigger picture where penal institutional segregation has been a significant, but unpursued, public issue for some time, as references to the record will show. Thus, I find that the importance of the "claims as a whole" requirement has been met and the issue becomes one of determining whether there are truly common issues that support that pursuit.

[84] At para 311-2 of the DB, the Defendant identifies 29 issues/questions which it says requires an individual determination. The PRP noted (para 112-6 pf the PRPRB) that similar lists appeared in other certified cases, including ***Sorotski v CNH Global N.V.***, 2007 SKCA 104, relating to tires, and more germane, to ***Cloud*** in relation to multiple alleged wrongs in an institutional setting, and argued the same would pertain in pharmaceutical cases. The PRP further asserts (PRPRB paras 117-9) that ***Boulanger*** and ***Pardy v Bayer***, 2004 NLSCTD 72 at para141, rejected the significance of such a defendants' 'laundry list'", citing the latter at para 142 that:

> ... **resolution of the common issues will not be finally determinative of liability**. But ... will advance the interests of the class and the focus here will be on the group. **Judicial economy will be served by avoiding unnecessary duplication in fact- finding and legal analysis regarding the common issues It is sufficient if [the common issues] advance the action**".
> (Emphasis in the original.)

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[46] ***Wilson v Services Canada Inc*** (2002), 2000 CanLII 22407 (ONSC); ***Anderson v St. Jude Medical Inc.,*** [2003] O.J. No. 335C (ONSC); ***Wheadon v Bayer Inc***., 2004 NLSCTD 72 (SCTD) and ***Robertson v Thomson Corp*** (1999) CanLII 1468 (ONSC).

[47] Apparently originating from ***Abdool v Anaheim Management Ltd***, 1993 CanLII 5430 (ONSC). PRP's response relying on: ***Sherry v CIBC Mortgages, Inc.***, 2016 BCCA 240 at para 51; ***Service v University of Victoria***, 2018 BCSC 2027 at para 15; and my decision in ***Windsor*** at para 131.

[85] In one sense acknowledging that there will – or might – be individual issues is logical, but I find that the evidence at a common issues trial could answer some or all of these questions on a systemic basis, or, at least, narrow the individual enquiries. As ***Boulanger*** and ***Pardy*** point out, there may be a need to resolve both common and individual issues, because not all of them nor either of them may be determinative. For example, the first issue/question raised by the Defendant is whether an inmate was "placed in segregation for their own protection" (voluntary v. involuntary AS) and follow-up questions relate to whether it was at their request initially, or after so placed. That whole question might be irrelevant if a common issues trial justice determines that all such inmates require, at law, such protection and that, in the institution, there was no mechanism to otherwise get protection (e.g. consent by duress – see DB para 313, and the PRPRB para 121 as to whether, at law, a member of the class legally "could ever consent to cruel and unusual punishment" – the latter being quite clearly a common issues question[48]). I won't move to speculate further on cause and result questions, as this sets the stage, and I believe most of them would have a systemic institutional answer rather than merely an individual answer (e.g., the allocation of access to fresh air). The bottom line is that a common issues trial justice could likely, in my view, identify and make conclusions on all – nor most - of these questions and then turn to narrower individual inquires, if any, at an individual trial(s) on how a class member fits into the big picture, such that the "issues to be determined on an individual basis" would not "predominate over the class issues".

[86] Supportive of this conclusion, the PRP (paras 108-11 of the PRPRB) correctly makes reference to the statutory criteria in s. 5(1)(c)a and (d) of the Act, and relies upon ***Metera v Financial Planning Group***, 2003 ABQB 326 at para 69, as recognizing that, while there must be common issues, whether or not they predominate over individual issues is not the test to deny certification under preferability. Rather, the Court is not to deny certification solely because, under s. 8(a), "the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues" or, because, under s. 8(b), there are different institutions run by the Defendant. I agree.

[87] The Defendant also asserts (DB para 313) that a common issues trial would preclude the Defendant relying on "possible defences". The PRP convincingly retorts (PRPDB para 120):

> The Defendant does not appear to understand the class process. The common issues trial may not be fully determinative of liability. It will advance the claims significantly, and perhaps establish a presumptive liability, but that does not bar the Defendant from asserting any defences it may have on an individual basis if an individual asserts a claim. (Emphasis in the original).

E. Proposed Representative Plaintiff

[88] The PRP asserts that he is willing to be the representative plaintiff, will fairly and adequately represent the interests of the Class, and has produced a plan that sets out a workable method of advancing the action (the PRP called it the "First Proposed Workable Method" – I call it Litigation Plan) dated April 30, 2019 and marked as Exhibit 6 of the Robinson Affidavit – see Tab 53 of the COA, and Counsel for the PRP's oral argument – II TR 4/16-36). He further

[48] See also III TR 11/22- 33 and Tab 6 of the CRA – where the PRP argues that AS is not the way to protect inmates when "the means of protection causes its own significant harms", i.e. "the manner of implementation of AS is inadequate" – in other words, it is not the purpose of AS that is relevant, but the manner of administering AS, and whether or not there is notice of AS makes no difference.

asserts that he has no conflicts with other members of the Class. He testified (Robinson Affidavit paras 7, 43 and 62) that: he is a member of the class, having been held in AS and DS in APCCs; (paras 79-83, 86 and 88) has provided an agreement to become, and understands the role of a PRP; (para 84) referenced the Litigation Plan; (paras 85 and 87) provided the list of common issues by cause of action and addressed damages; and agreed to advance those claims.

[89] Affidavits were also filed on May 10, 2019 by class members, Reginald Mand, Wayne Wilcox[49], and David Allen Cluett, describing their experiences in AS and claimed resulting conditions.

[90] The Defendant argues (DB paras 339-46 and 362) that the PRP is not a suitable representative plaintiff under s. 5(1)(e) of the *Act*, for a number of reasons, including: "more than one representative plaintiff is preferred, unless the lead representative plaintiff is 'particularly strong'; a "wider examination" than a defendant's right under s. 18(2) of the *Act* to examine only the representative plaintiff, "may be helpful" (another member(s) of the class can be questioned with a successful application, without adding an additional represent plaintiff(s)); and that he only has segregation experience in 3 of 10 APCCs (absent any evidence of a need for other institutions of sub-classes to be represented). None of these arguments, in themselves, convince me that the appointment of Mr. Robinson as PRP would be inappropriate in the context of s. 5(1)(3) of the *Act*, for the reasons the PRP argues (PRPRB paras 134-6).

[91] However, I find that, factually, Mr. Robinson is not adequate. Thus, for reasons on which I will expound, I find that he is not suitable at the standard required by this Court. As is said in Pederson at para 102, "[a] representative plaintiff should only be rejected where he… clearly… cannot represent the class".

[92] For the reasons that follow, I find, on this Court's standard, Mr. Robinson, as a matter of fact, clearly cannot represent the class. It is simply not – following the standards articulated by Class Counsel (II TR 2/35) – in the best interests of justice to appoint Mr. Robinson as the/a PRP – to start the process post certification. It is not about the issue of examining the PRP(s) or class members under s. 18 of the *Act*, which is one of the arguments of Counsel. Moreover, it is not about (II TR 2/40- 4/14): Mr. Robinson only being incarcerated in 3 of 8 of the adult APCCs; nor because he is now in a federal institution – on both of which, in general, I agree with Counsel for the PRP.

[93] The Defendant makes other arguments (DB paras 349 and 365-7) about costs[50], and an adequate litigation plan[51], but those are also not, in my view, in themselves, showstoppers. So, with the decision I have made in this regard, I will not review them independently.

[94] However, to summarize the results of this review, as in ***Sullivan v Golden Intercapital (GIC) Investments Corp***, 2014 ABQB 712 at para 54, there are factual reasons why Mr. Robinson is not a suitable representative plaintiff. Counsel for the PRP addresses this early – in

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[49] The Wilcox affidavit was struck in its entirety by the Court's Order of September 5th, filed 19th, 2019.

[50] I agree with the Defendant (DB paras 356-7) that third party funding and indemnity as to costs is relevant to the issue of an appropriate representative litigant but it was not factually argued here.

[51] Filed by the PRP on May 10, 2019, but called the "First Proposed Workable Method" (Litigation Plan). Post this decision, the parties can review the Litigation Plan (and amend as agreed, and for a further Court ruling approving a Final Litigation Plan. See Defendant's submissions at, *inter alia*, II TR 73/23-34 and III TR 1/40 about the manageability of the proceedings in a common issues trial, which may suggest a need for amendment of the Litigation Plan to assist the common issues trial justice.

the second sentence of para 18 and paras 19-20 of the PRPB, with a brief history of the lead class members at paras 36-8 and 42-47 of the PRPB, and will, as a result of my finding, have an opportunity to address it further.

[95] The first and primary reason is that not only is Mr. Robinson not "particularly strong" as a PRP; rather I find that he is very weak, to the extent that he does not meet the low criteria of the *Act*. Simply put, it has not been demonstrated that he is able to "vigorously and capably" represent the class: ***Dutton*** at para 4. Specifically, I find that his credibility on questioning is lacking, with, at best, admitted exaggerations, but perhaps even perjury, such that I find he has not demonstrated that he can adequately represent the class under s. 5(1)(2)(i).

[96] The members of this class may not have been candidates for the citizen of the year in their pasts, but they are citizens/residents with substantive rights and entitlement to be represented "fairly and adequately" by a strong representative plaintiff. Regrettably, Mr. Robinson, by his conduct in this action, does not meet that standard. The specifics of this inadequacy (supported by para references to the DB) include about a dozen "admitted misstatements, exaggerations and incorrect statements", all under oath, making his evidence "untruthful" at worst and "unreliable" at best, and all potentially showing "a level or unreliability, disinterest and even indifference"[52]. Moreover (DB para 348), Mr. Robinson did not review the affidavits of other class members before his questioning; and (para 358-61, and the paras of the Robinson Affidavit referenced therein), one para (32) being an admitted direct black/white lie under oath.

[97] Second, and while not in my view a matter which on its own would disqualify him, Mr. Robinson's current extremely serious conviction circumstances under the *Criminal Code* (DB paras 350-4) mean that he will likely be housed in a federal penal institution, and may not even be housed in Alberta (or even western Canada), for a lengthy period of time, which would be important to this Alberta-based national class proceeding.

[98] Thus, I find that the certification of this action must be granted only on condition of the appointment of (and amendment of the pleadings to name) a new, and demonstrably adequate representative plaintiff, who is willing – but, more importantly, able – and is approved by the Court before appointment. Mr. Robinson does not meet this standard.

VI. Conclusion

[99] This case is certified with the details, and subject to the conditions as noted above. A major condition/prerequisite is that there must be a new PRP approved by the Court. In addition to two causes of action that have been abandoned, one proposed common issue has also been struck.

[100] The parties may speak to costs (Counsel for the PRP addressed this in oral argument – II TR6/31-7/5), but subject to the prerequisite new PRP, the Plaintiff class is prima facie entitled to party-party costs, payable forthwith, as may be agreed between the parties, or set by the Court.

[101] Counsel for the Plaintiff Class, with the approval as to form and details, is to complete the Certification Order. The parties may approach the Court on any other matters necessary to be

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[52] ***Sondhi v Deloitte Management Services LP***, 2017 ONSC 2122 at paras 41-2. Factually, see reference to II TR8/39—9/3 and 46/30-34, where Mr. Robertson claimed he did not receive the notices that are issued in respect of AS, but later admitted that he received at least one of them.

resolved to complete the Certification Order, if they remain in issue – e.g., payment of notice and other potential matters (II TR 4/38-5/29).

Heard on the 18th day of November, 2020.
Dated at the City of Calgary, Alberta this 18th day of July, 2022.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

E.F. Anthony Merchant, Q.C.,
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for the Plaintiffs

Luciana Brasil
Melissa Burkett and John-Marc Dube
for the Defendant