Federal Court  Cour fédérale

Date: 20231213

Docket: T-261-22

Citation: 2023 FC 1688

Ottawa, Ontario, December 13, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ABEL ARAYA

Plaintiff

and

THE ATTORNEY GENERAL OF CANADA

Defendant

ORDER AND REASONS

I. Overview

[1] Abel Araya is a Canadian citizen of Eritrean descent. In June 2019, he pleaded guilty to trafficking narcotics and was sentenced to three years' imprisonment. He was incarcerated at two federal penitentiaries operated by the Correctional Service of Canada [CSC]: Drumheller Institution in Alberta and William Head Institution in British Columbia. He was released on March 12, 2020.

[2] Mr. Araya identifies as Black. In a case study included in its Annual Report for 2013, the Office of the Correctional Investigator said the following about the use of this term in relation to CSC inmates:

> The case study uses the term 'Black' to denote those inmates who voluntarily self-identified during the CSC intake process as being 'Black'. The CSC currently uses 28 categories of racial identification, which has recently increased from 15 categories. Previously, Black inmates primarily self-identified under the category 'Black', however with the recent addition of geographical-based race categories, some may now self-identify as 'Caribbean' and 'Sub-Sahara African'. While many different terms (Black, African, Caribbean, etc.) are used throughout the literature, this case study employs the term 'Black' to be consistent with the way in which the CSC collects and reports race data. Further, it is recognized that this group is very diverse and comprises various nationalities as well as ethnic and cultural groups. However, in order to have a representative sample, it is necessary to group them together for the purposes of the analysis. Finally, it should be noted that not all Black inmates included in the investigation and analysis are Canadian citizens as some are foreign nationals.

[3] Mr. Araya alleges that he was subjected to racial abuse by CSC officials and other prison inmates while he was incarcerated. He brings this proposed class proceeding on behalf of the following persons [Class]:

> All Black persons who allege that they were subjected to physical, emotional and/or psychological abuse while incarcerated in a CSC Facility at any time during the Class Period, and who are alive on the date this action is certified.

[4] The Defendant Attorney General of Canada opposes certification of this proposed class proceeding. The Defendant asserts that the Statement of Claim does not disclose reasonable causes of action; the proposed Class is overly broad and indeterminate; there are no common

issues of law or fact; the proposed class proceeding is not the preferable procedure for resolving the claims of Class members; and Mr. Araya is not a suitable Class representative.

[5] Subject to certain modifications of the Statement of Claim and common questions of law or fact, the Plaintiff has satisfied the criteria for certification of a class proceeding enumerated in Rule 334.16(1) of the *Federal Courts Rules*, SOR 98/106 [Rules]. The proposed class action will be certified accordingly.

II. Background

A. *Facts Relied Upon by the Plaintiff*

[6] The Plaintiff relies on his own experience in correctional facilities, the expert evidence of Dr. Akwasi Owusu-Bembah, and numerous public reports and other documents. The Plaintiff cautions that much of the evidence was assembled before the claim was significantly narrowed in July 2023.

(1) Evidence of Mr. Araya

[7] Mr. Araya began serving his sentence at Drumheller Institution. He does not allege that he was subjected to racial abuse while he was incarcerated there.

[8] The primary focus of Mr. Araya's evidence is his incarceration at William Head Institution, a minimum-security facility on Vancouver Island. He says that he was often "ignored or dismissed" by white corrections officers, and that his treatment differed from that accorded to

white inmates. For example, he claims he was rebuffed when he sought medical care, but white inmates with no obvious injuries received prompt medical attention. When he suffered a serious head injury, he was repeatedly turned away.

[9] Mr. Araya also claims to have been subjected to racial stereotyping. For example, his parole officer told him that she would not want him to coach her children in sports, because he was "clearly a drug dealer". Another CSC official told Mr. Araya that he would not want someone like him living in his community. He notes that CSC officials who were themselves visible minorities did not subject him to differential treatment. He says there were no programs or activities directed specifically towards Black prisoners.

[10] Mr. Araya often raised concerns of racism at William Head Institution, although he never filed a formal grievance. He says he was afraid this would result in reprisal or adversely affect the timing of his release. He says that inmates who filed grievances were routinely punished by CSC officials.

[11] Mr. Araya recounts one occasion when a fellow inmate persistently shouted the "n-word" at him. Mr. Araya told the inmate that if he didn't stop, then he would have to "settle" the matter. CSC officials were slow to intervene, and Mr. Araya was eventually reprimanded for threatening the other man.

[12] Mr. Araya says he continued to endure racism following his release from William Head Institution. While living at a halfway house during the pandemic, he was pressured to leave in

order to make room for more “vulnerable” prisoners, all of whom were white. Mr. Araya’s parole officer reassessed his risk of engaging in domestic violence in a manner that he says relied on stereotypes of Mr. Araya and his Indian girlfriend.

[13] Mr. Araya claims that that his experiences of racism “amplified” his feelings of helplessness and powerlessness, which resulted in panic attacks, sleepless nights, anxiety and depression after his release.

[14] Mr. Araya says that he knows of five or six other potential members of the proposed Class.

(2) Expert Evidence of Dr. Owusu-Bempah

[15] Dr. Akwasi Owusu-Bempah is a professor of criminology who studies anti-Black racism in the criminal justice system. He has published widely on the subject, including with respect to Canadian correctional institutions. In addition to his research and writing, Dr. Owusu-Bempah has advised the Office of the Correctional Investigator, reporting on the experiences of Black offenders within CSC institutions. He has also testified before the Senate Standing Committee on the Human Rights of Federally-Sentenced Persons. He has been interviewed by the Auditor General of Canada, and was recently appointed to the Steering Group for Canada’s Black Justice Strategy.

[16] In his first report, Dr. Owusu-Bempah states that "CSC's practices, procedures, instruments, policies and other acts and omissions systematically disadvantage racialized prisoners in comparison to white prisoners." According to counsel for the Plaintiff:

> He concludes that Black prisoners serve longer and harsher sentences characterized by more severe security classifications, a lack of access to culturally-appropriate programming, poorer employment prospects while incarcerated, increased rates of involuntary transfers, increased likelihood of being subjected to institutional discipline, and an increased likelihood of being subjected to use of force. Black prisoners also face decreased chances of obtaining temporary absences and parole.

[17] Dr. Owusu-Bempah says that the issues he identifies were brought to the CSC's attention as long ago as 2013, but this did not result in any meaningful changes in policies or procedures. The Auditor General and the Senate Standing Committee on Human Rights have made numerous recommendations, but none of these has been implemented.

[18] Dr. Owusu-Bempah submitted a second report to address the findings and recommendations of the 2021-2022 Annual Report of the Office of the Correctional Investigator. He concludes that little has changed regarding the conditions faced by Black prisoners in CSC institutions.

(3) Reports of the Office of the Correctional Investigator

[19] In his first expert report, Dr. Owusu-Bempah relies heavily on reports of the Office of the Correctional Investigator [OCI Reports], specifically: "A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries", 2013; "Administrative Segregation in

Federal Corrections: 10 Year Trends", 2015; Annual Report, 2016-2017; "Missed Opportunities: The Experience of Young Adults Incarcerated in Federal Penitentiaries", 2017; "Federal Offender Trends", 2020; and the Annual Report, 2020-2021.

[20] According to Dr. Owusu-Bempah, the OCI Reports demonstrate that Black male prisoners, compared to their white male counterparts, are more likely to experience use of force, are less likely to be placed in minimum-security institutions, receive lower potential reintegration scores from CSC staff, are more often placed into solitary confinement and structured intervention units, and are disproportionately denied temporary absences and parole. The OCI Reports also state that most Black prisoners do not report gang membership but this is often imputed to them, resulting in Security Threat Group classifications that have negative consequences.

[21] CSC has been encouraged to allow Black inmates access to outside cultural organizations, but the OCI Reports suggest that CSC has done little work in this direction. Research has shown that for Indigenous inmates, connections with outside cultural groups can aid reintegration. On paper, CSC has a mentorship program that should fill this gap for Black inmates, but the OCI's investigations have found that few inmates are aware of its existence. Many Black prisoners believe there is little institutional will to provide the kind of cultural programming that would interest them. When programming is provided, it is poorly supported and under-funded.

[22] The OCI Reports also find disproportionate unemployment among Black inmates. Jobs in CSC facilities that require higher levels of trust from CSC staff are particularly difficult to obtain. Black inmates are also underrepresented in CORCAN jobs, which provide vocational training that helps with reintegration.

[23] Institutional discipline is highlighted in the OCI Reports. Discipline can have significant impacts on the duration of inmates' stays in facilities, because it can lengthen applications for parole or justify their denial. Institutional discipline may also result in inmates' forfeiture of important privileges and property, and may lead to fines, additional duties, and restrictions on visitors. Between 2007 and 2012, disciplinary charges increased for Black inmates, but decreased for the overall inmate population. Black inmates are less likely to receive disciplinary charges for offences that require objective proof (*e.g.*, possession of contraband), and more likely to be charged with offences that have a subjective component (*e.g.*, disrespecting CSC staff).

[24] Dr. Owusu-Bempah's second expert report reassesses his first report in light of the OCI's Annual Report, 2021-2022. He concludes that little has changed, quoting from the 2021-2022 Report as follows:

> Despite CSC's concerted efforts to make changes with respect to inclusion, diversity and anti-racism, incarcerated Black persons reported to OCI investigators that very little had materially changed for the better over the years … All of the issues identified in 2013 remain today.

(4) Report of the Auditor General

[25] In 2022, the Auditor General of Canada published a report titled “Systemic Barriers – Correctional Service Canada” [Auditor General’s Report]. This document is also referred to in Dr. Owusu-Bempah’s first expert report.

[26] Dr. Owusu-Bempah highlights the following findings from the Auditor General’s Report: CSC has failed to address and eliminate systemic barriers affecting disadvantaged groups, including Black inmates; Black and indigenous inmates face greater barriers to a safe and gradual reintegration into society than certain other groups; disparities in treatment, security classifications and outcomes begin the moment inmates enter CSC institutions; and CSC’s efforts to promote diversity, equity and inclusion have fallen short, with roughly one quarter of staff not having completed mandatory training one year after the deadline. Black representation among CSC staff relative to the inmate population is poor.

[27] The Auditor General’s Report contained numerous recommendations. The recommendations cited in Dr. Owusu-Bempah’s expert reports encompass improving access to correctional programs by inmates and examination of the effectiveness of those programs for Black inmates; improving the collection of race-based data in order to monitor the impact of correctional policies on diverse inmate populations; addressing the root causes of delaying prisoners’ release, particularly of Black prisoners; improving the timely reassessment of inmates’ security levels; improving workforce diversity to better represent the inmate population; and ensuring that staff complete the required diversity training.

(5) Report of the Senate Standing Committee on Human Rights

[28] In June 2021, the Senate Standing Committee on Human Rights released a report on the "Human Rights of Federally-Sentenced Persons" [Senate Report]. The Senate Report contains a number of recommendations, some of which Dr. Owusu-Bempah highlights in his expert reports. These include: working to ensure that correctional plans are tailored to the unique experiences and reintegration challenges of marginalized and vulnerable groups; reviewing use of force policies, with a focus on the disproportionate use of force against Black and other marginalized and vulnerable inmates; putting in place mechanisms to ensure that CSC staff who use disproportionate force are held accountable; and improving training for CSC staff on human rights, equity and non-discrimination.

B. *Facts Relied Upon by the Defendant*

[29] The Defendant relies on the cross-examinations of Mr. Araya and Dr. Owusu-Bempah, and an affidavit sworn by a paralegal manager with the Department of Justice appending records pertaining to Mr. Araya's incarceration and CSC policies on offender management.

(1) Mr. Araya's File

[30] Throughout his incarceration, Mr. Araya was classified as a minimum-security offender. He was transferred to William Head Institution at his own request, so he could be nearer his family and girlfriend. His allegations of racism all arise from the seven weeks he spent at William Head Institution and following his release.

[31] Mr. Araya has filed a separate civil suit in the British Columbia Supreme Court. In that proceeding, he claims that the CSC denied him access to medical care following a head injury, causing him physical and psychological harms.

[32] With respect to the altercation in which Mr. Araya was repeatedly called the “n-word”, the Defendant notes that Mr. Araya did not mention the use of the slur when he recounted the incident to the Parole Board. While Mr. Araya claims he was “punished” following the incident, there were no disciplinary charges and he was subsequently moved to a different bunkhouse with the help of an Inmate Committee Representative.

[33] Despite Mr. Araya’s assertion that a CSC official “refused to call for help” when he sought medical assistance following his head injury, in cross-examination he admitted that the official did in fact call Health Services. Mr. Araya also admitted that he had been disrespectful towards medical staff, including by accusing them of racism, for which he subsequently apologized.

[34] Mr. Araya claims there were no programs or activities for Black offenders, but in cross-examination he admitted that there was an Ethnic Cultural Committee at William Head Institution that held more than one event during the brief period he was incarcerated there. He did not participate in these events.

[35] Mr. Araya received full parole at the earliest opportunity and with the support of his parole officer. He was never the subject of a disciplinary charge.

(2) CSC Institutions and Policies

[36] CSC operates 43 institutions and 14 community correctional centres across the country, in addition to 92 parole offices and sub-parole offices. Drumheller Institution is a medium-security facility with a minimum-security annex. William Head Institution is a minimum-security facility.

[37] There is a CSC internal grievance process that aims to address offender complaints at the lowest possible level. Grievance responses are initially prepared at the institutional or district level, and can be elevated to the Office of the Commissioner. Decisions of the Commissioner are subject to judicial review. Depending on the circumstances, offenders may also pursue remedies in other fora, such as the Canadian Human Rights Commission. CSC's expectation is that offenders may submit grievances without reprisal.

C. *Objections to the Evidence*

(1) Evidence of Mr. Araya

[38] The Defendant challenges the credibility of Mr. Araya's testimony. According to the Defendant, Mr. Araya's claim that he did not receive medical treatment following his head injury is contradicted by his own admission that he did. Mr. Araya responds that he is not alleging a denial of medical care; only that he had to take additional steps to receive it that would not have been necessary if he were white.

[39] Mr. Araya acknowledges that he was not subjected to a disciplinary charge following the altercation with the inmate who repeatedly called him the “n-word”. However, he says that he was verbally reprimanded and made to seek alternative accommodations without institutional support.

[40] In response to the Defendant’s assertion that he could have participated in events convened by the Ethnic Cultural Committee at William Head Institution, Mr. Araya maintains his position that there were no programs or activities specifically directed towards Black offenders.

[41] I am not persuaded that the criticisms of Mr. Araya’s testimony are sufficient for this Court to reject his credibility, particularly given the low evidentiary threshold for establishing “some basis in fact” in a motion to certify a proposed class action. Mr. Araya’s testimony must be understood together with the expert opinion of Dr. Owusu-Bempah and the documentary evidence.

(2) Expert Evidence of Dr. Owusu-Bempah

[42] The Defendant does not dispute Dr. Owusu-Bempah’s qualifications or his capacity to provide the Court with expert evidence regarding the experiences of Black inmates in Canadian correctional facilities. However, the Defendant says that his opinions rely heavily on public reports that are replete with hearsay and advocacy; he often summarizes observations and conclusions contained in public reports without offering an independent opinion; and he

sometimes exhibits partiality towards the proposed Class. He also expresses opinions beyond his area of expertise, *e.g.*, the use of disciplinary charges as a "psychological tool."

[43] The Defendant notes that some of the opinions expressed by Dr. Owusu-Bempah in his expert reports appear to be inconsistent with materials he has prepared for use elsewhere. For example, a training presentation, co-authored by Dr. Owusu-Bempah, notes that systemic racism in Canadian society affects child welfare, family structures, education, poverty, crime victimization, and interactions between Black people and the police. These societal and individual factors influence Black individuals' experiences within the criminal justice system generally. The Defendant says this suggests the implementation of CSC's policies and practices are not to blame for any differential outcomes that may be experienced by Black inmates in correctional facilities.

[44] Expert witnesses have a duty to the Court to give fair, objective and non-partisan opinion evidence. They must be aware of this duty, and be able and willing to carry it out. If they do not meet this threshold requirement, then their evidence should not be admitted (*White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 [*White Burgess*] at para 32, 46).

[45] Once this threshold is met, however, concerns about an expert witness' independence or impartiality should be considered as part of the overall weighing of the costs and benefits of admitting the evidence (*White Burgess* at para 54). The threshold requirement is not particularly onerous, and a proposed expert's evidence will only rarely be excluded for failing to meet it. It is the nature and extent of the interest or connection with the litigation that matters, not the mere

fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. However, an expert who assumes the role of an advocate for a party is clearly unwilling or unable to carry out the primary duty to the court (*White Burgess* at para 49).

[46] I am satisfied that Dr. Owusu-Bempah's first and second reports contain information and opinion that are useful to the Court and satisfy the criteria for admission articulated by the Supreme Court of Canada in *White Burgess* at paragraph 19 and *R v Mohan*, [1994] 2 SCR 9 at page 23. To the extent that Dr. Owusu-Bempah's observations rely on hearsay, venture into advocacy, or exceed his area of expertise, they may be discounted accordingly. Dr. Owusu-Bempah's expert opinion must be considered together with the other testimony and documentary evidence adduced on behalf of the Plaintiff, having regard to the low evidentiary threshold for establishing "some basis in fact" in a motion to certify a proposed class action.

(3) Documentary Evidence

[47] The Defendant argues that the documentary evidence relied upon by the Plaintiff, consisting primarily of public reports issued by the Office of the Correctional Investigator and the Senate Report, are not admissible for the truth of their contents. The Defendant relies on the decision of the Federal Court of Appeal (*per* Roussel JA) in *Bigeagle v Canada*, 2023 FCA 128 at paragraphs 44 and 46:

> While the referral to reports may be used on a certification motion to help put uncontentious facts into context, to determine whether the references made in the statement of claim are accurately reflected and to assist in discharging the "some basis in fact" burden, the reports cannot be used as a means to fill in the existing gaps or

> the blanks in the pleadings. The argument advanced by Ms. BigEagle would require the motion judge to review thousands of pages of reports to determine what material facts support each cause of action. It would also impose upon the motion judge the burden of sorting out the material facts from the evidence, the latter of which is not admissible to establish the "reasonable cause of action" condition of the test for certification. It is clearly not the role of the motion judge to comb through the reports in order to particularize broad allegations that might support Ms. BigEagle's causes of action. […]
>
> The primary concern with relying on commission reports as the basis for material facts stems from the fact that commissions of inquiry do not have the same evidentiary standards as those applied by a court, in part because they have a different purpose. Often, the information gathered is not taken under oath and constitutes hearsay. Likewise, the process followed does not automatically provide for due process, including the right to cross-examine during fact gathering […]. Investigative and commission reports are also not intended to state a cause of action [citations omitted].

[48] Here, the relevant excerpts from the public reports have been particularized in the expert reports of Dr. Owusu-Bempah and the submissions of counsel for the Plaintiff. Consideration of these excerpts does not impose an undue burden on the Court. Furthermore, as the Federal Court of Appeal has confirmed in *Canada v Greenwood*, 2021 FCA 186 [*Greenwood FCA*] at paragraph 96, public reports have "frequently been relied on in certification matters, along with other evidence, to support that there is some basis in fact for the final four criteria for certification." The Federal Court of Appeal continued at paragraph 97 (*per* Gleason JA):

> Indeed, the Crown recognizes that the Reports could be admitted on this basis to establish, along with other evidence, that the final four criteria for certification were met. Here, there was such other evidence from the representative plaintiffs in respect of their own situations and observations. The Federal Court thus did not err in admitting and relying on the Reports along with the evidence from the representative plaintiffs in consideration of the final four criteria for certification.

[49] In this case, the public reports are intended to supplement the direct evidence of Mr. Araya and the expert opinion of Dr. Owusu-Bempah. They provide additional context and may provide some basis in fact for extrapolating the experiences of the representative Plaintiff to the proposed Class. I am satisfied that they are admissible for these purposes.

(4) Reply and Supplemental Evidence of the Plaintiff

[50] Shortly before this motion was scheduled to be heard in July 2023, the Plaintiff filed a substantially amended Statement of Claim accompanied by a third expert report and reply of Dr. Owusu-Bempah, and an affidavit sworn by a paralegal employed by the Plaintiff's law firm. The Defendant objects to both the third expert report and further affidavit evidence.

[51] Dr. Owusu-Bempah's third expert report is intended to reply to criticisms of the first two reports contained in the Defendant's written submissions in opposition to the certification motion. The Defendant says these matters should have been comprehensively addressed in the initial expert reports, and constitute improper rebuttal of legal argument. The Defendant notes that the Crown has adduced no expert evidence that would be amenable to reply.

[52] The paralegal's affidavit appends correspondence between the parties concerning the Plaintiff's amended certification motion materials, together with the Statement of Claim and Notice of Motion filed in *Nasogaluak v Canada (Attorney General)*, 2021 FC 656 [*Nasogaluak FC*]. Also appended to the affidavit are Directives from the CSC Commissioner concerning the management of security incidents and the use of force. Other exhibits include the CSC's

response to the Office of the Correctional Investigator's 2012-2013 report, and other documents describing systemic racism in the criminal justice system.

[53] The Defendant takes the position that the evidence contained in the paralegal's affidavit was publicly accessible and available at the time the Plaintiff served and filed his original certification motion. The Plaintiff has not provided a reason for failing to adduce this evidence earlier, and its inclusion in the amended consolidated certification motion record may be prejudicial to the Defendant.

[54] Rule 312 permits parties to seek leave to file additional affidavits on an application, while Rule 84(2) governs the filing of affidavits after cross-examinations have been completed. The Rules should be interpreted in a consistent manner (*Jacques v Canada*, 2023 FC 715 at para 11, citing *Salton Appliances (1985) Corp v Salton Inc* (2000), 181 FTR 146).

[55] The parties' cross-examinations, including that of Dr. Owusu-Bempah, were completed by the end of February 2023. The third expert report and the additional affidavit were submitted the following July, six months later. The Plaintiff did not seek the Defendant's consent, nor leave of the Court, as required by Rules 84(2) and 312.

[56] The necessity of Dr. Owusu-Bempah's third expert report is doubtful. He purports to provide guidance to the Court on how to read and understand his previous reports, implicitly claiming expertise in assessing his own expertise. As the Supreme Court of Canada held in *R v J-LJ*, 2000 SCC 51 at paragraph 56 (*per* Binnie J): "[t]he purpose of expert evidence is thus to

assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an act of informed judgment, not an act of faith."

[57] I am not persuaded that Dr. Owusu-Bempah's third expert report contributes anything material to the previous two reports. He reiterates his previous conclusions, while providing further explanation of his methodology.

[58] Dr. Owusu-Bempah's third expert report and the paralegal's affidavit were both filed in a manner that contravened Rules 84(2) and 312, and must be rejected. I will nevertheless take judicial notice of the Statement of Claim and Notice of Motion filed in *Nasogaluak FC*. It is a long-established principle in the common law that courts may take judicial notice of their own records (*Petrelli v Lindell Beach Holiday Resort Ltd*, 2011 BCCA 367 at para 36, citing *R v Jones* (1839), 8 Dowl 80 and *Craven v Smith* (1869), LR 4 Exch 146).

(5) Defendant's Affiant

[59] The Plaintiff notes that the Defendant has not adduced any affidavit evidence regarding CSC's practices or conduct towards Black inmates. The Defendant's sole affiant is a paralegal employed by the Department of Justice who has no personal knowledge of how CSC operates, the existence of systemic racism within CSC facilities, or the manner in which CSC implements the policies appended as exhibits to her affidavit. Where a party fails to provide the evidence of persons having personal knowledge of material facts, the Rules permit the Court to draw an adverse inference (Rule 81(2), *Tippett v Canada*, 2019 FC 869 at para 33).

[60] In *Wesley v British Columbia et al*, unreported, March 20, 2023, Court File No VIC-S-S-202473, Justice Veronica Jackson of the British Columbia Supreme Court observed at paragraph 63 that a paralegal employed by the legal department representing a client ministry cannot speak to the state of knowledge of the government defendant. She continued at paragraph 64:

> […] Without diminishing the importance of the role of paralegals and intending no disrespect to the affiant in this case, a paralegal position is not one that carries the type of supervisory responsibility and accountability that would lead me to infer that their knowledge equates to the knowledge of Canada. If the affiant's knowledge is based on information and belief, facts would need to be stated and the source of that information particularized.

[61] The Plaintiff says the Defendant has failed to fulfill the requirements of Rule 334.15(5)(b), and has provided no evidence regarding CSC's treatment of Black inmates, nor anything to refute the Plaintiff's contention that CSC's operational practices promote and perpetuate the Abuse of Black Inmates, as defined in the Statement of Claim. The Plaintiff therefore asks the Court to draw the inference that an affidavit from the Defendant that complied with Rule 334.15(5)(b) would have supported certification of this proceeding as a class action. The Plaintiff notes that CSC has publicly acknowledged the existence of systemic racism within federal penitentiaries.

[62] I am not persuaded that an adverse inference is warranted in these circumstances. The Defendant acknowledges that it may have been preferable to offer an affiant with personal knowledge of CSC's policies and procedures respecting the treatment of Black offenders. However, the Defendant says that the policies appended to the affiant's affidavit speak for themselves. This is a procedural motion and not a hearing on the merits. The Defendant has

opted to rely on documentary evidence and cross-examination of the Plaintiff's witnesses. The Defendant emphasizes that the Crown is under no obligation to help the Plaintiff make his case.

[63] Nevertheless, the fact remains that the Defendant has offered no evidence to contradict the factual assertions of the Plaintiff regarding the Abuse of Black Inmates, as defined in the Statement of Claim. This has obvious implications for the Court's assessment of whether the low threshold of "some basis in fact" has been met in this certification motion.

III. Issues

[64] The question before the Court is whether the Plaintiff has satisfied the five-part test for certification of this proceeding as a class action (Rule 334.16(1)), namely:

A. Do the pleadings disclose a reasonable cause of action?

B. Is there an identifiable class of two or more persons?

C. Do the claims of the class members raise common questions of law or fact?

D. Is a class proceeding the preferable procedure?

E. Is Mr. Araya a suitable Class representative?

IV. Analysis

A. *Do the pleadings disclose a reasonable cause of action?*

[65] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and the relief sought (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 16). Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action. If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso* at paras 16-17).

[66] A plaintiff must plead, in summary form but with sufficient detail, the constituent elements of each cause of action or legal ground raised. The pleading must tell the defendant who, when, where, how and what gave rise to its liability. Plaintiffs cannot file inadequate pleadings and rely on a defendant to request particulars, nor can they supplement insufficient pleadings to make them sufficient through particulars (*Mancuso* at paras 19-20).

[67] The normal rules of pleading apply with equal force to a proposed class action. The Court must view the pleading as it has been drafted, not as it might be drafted. The launching of a proposed class action is a matter of great seriousness, potentially affecting many class members' rights and the liabilities and interests of defendants. Complying with the Rules is not trifling or optional; it is mandatory and essential (*Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 40).

(1) Further Amended Statement of Claim

[68] The Plaintiff's Statement of Claim has undergone many revisions. The initial pleading was very broad, and sought certification of a class action alleging systemic racism against CSC inmates who are Black, Indigenous and People of Colour [BIPOC]. The causes of action included misfeasance in public office; breach of fiduciary duty; infringement of the rights of indigenous persons under the United Nations' *Declaration on the Rights of Indigenous Peoples*, the *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2001, c 14, and s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; systemic negligence; and breaches of ss 7, 9, 12, 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* [Charter], as well as the analogous rights enshrined in Quebec's *Charter of Human Rights and Freedoms*, CQLR, c C-12.

[69] Shortly before the hearing of this certification motion was scheduled to commence in July 2023, and following the Federal Court of Appeal's decision in *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 [*Nasogaluak FCA*], the Plaintiff substantially amended the Statement of Claim. The new pleading adopted much of the language from the Statement of Claim filed in *Nasogaluak FC*, as modified in accordance with the Federal Court of Appeal's reasons in *Nasogaluak FCA*.

[70] The new pleading reflected four significant changes. First, references to BIPOC inmates were omitted and the claim was confined to Black inmates. Second, the allegation of breach of fiduciary duty was abandoned (see *Nasogaluak FCA* at paras 54-66). Third, the Plaintiff dropped the claim for misfeasance in public office. Fourth, claims under the Quebec Charter disappeared.

[71] The resulting Statement of Claim seeks certification of claims in systemic negligence and breaches of ss 7 and 15(1) of the Charter. The Plaintiff says the claim is now indistinguishable from the one approved by this Court in *Nasogaluak FC*, as further amended pursuant to *Nasogaluak FCA*.

[72] This is true to a point. However, the Statement of Claim continues to advance a broad definition of "Anti-Black Racism", which is said to include the following (at para 41):

> a. A culture, both overt and covert, which considers Black Inmates through the lens of harmful stereotypes which dehumanize them, portray them as less worthy of protection from abuse, and with a greater propensity for dangerous behaviour, violence, gang affiliation, and criminality.
>
> b. Use by CSC and CSC Staff of discriminatory educational materials and requiring Class members to engage with such materials, including by having Class members read aloud passages containing the "n-word," which dehumanizes Black Inmates among non-Black Inmates and CSC Staff, and contributes to the stereotypical perception that Black Inmates are less worthy of protection from abuse than non-Black Inmates.
>
> c. Failure by CSC to provide culturally-relevant education and programming designed for Black Inmates, instead providing "ethnocultural" materials which erroneously treats non-white Inmates homogeneously and which not culturally appropriate or relevant for Black Inmates, with the result that Class members disproportionately do not participate, under-perform or drop out of programs necessary to rehabilitate themselves, obtain privileges during incarceration, or attain an earlier release from imprisonment.
>
> d. Failure by CSC to systematically evaluate its use of the "Security Threat Group" label in relation to Black Inmates, or to provide training to CSC Staff on how to apply it in a manner which is non-discriminatory against Class members, particularly by failing to address overt and covert racism against Black Inmates such as stereotypical views about the dangerousness or criminality of Black Inmates, resulting in

> disproportionate labeling of Black Inmates as being "gang affiliated," leading to higher security classification and more restrictive conditions of incarceration for Black Inmates as a group, and perpetuating or contributing to the stereotypical perception in CSC Facilities and among CSC Staff that Black Inmates are more dangerous, more given to criminality, and less worthy of protection from abuse than non-Black Inmates.
>
> e. Failure by CSC to systematically evaluate its use of involuntary transfers in relation to Black Inmates, or to provide training to CSC Staff on how to apply involuntary transfers in a manner which is non-discriminatory against Class members, particularly by failing to address overt and covert racism against Black Inmates such as stereotypical views about the dangerousness or criminality of Black Inmates, resulting in disproportionate involuntary transfers of Black Inmates, leading to higher security classification and more restrictive conditions of incarceration for Black Inmates as a group, and perpetuating or contributing to the stereotypical perception in CSC Facilities and among CSC Staff that Black Inmates are more dangerous, more given to criminality, and less worthy of protection from abuse than non-Black Inmates.
>
> f. Failure by CSC to systematically evaluate its use of discretionary disciplinary charges in relation to Black Inmates, or to provide training to CSC Staff on how to consider whether to implement such charges it in a manner which is non-discriminatory against Class members, particularly by failing to address overt and covert racism against Black Inmates such as stereotypical views about the dangerousness or criminality of Black Inmates, leading to higher security classification and more restrictive conditions of incarceration for Black Inmates as a group, and perpetuating or contributing to the stereotypical perception in CSC Facilities and among CSC Staff that Black Inmates are more dangerous, more given to criminality, and less worthy of protection from abuse than non-Black Inmates.

[73] Confusingly, the Statement of Claim also pleads as follows (at para 35):

> …The Class does not seek compensation directly in respect of Anti-Black Racism, but instead alleges that Anti-Black Racism, and CSC's failure to address or mitigate or eliminate it, adequately or at

> all, causes or contributes to the Abuse of Black Inmates (as defined below) by promoting and perpetuating a culture of racism and discrimination against Black Inmates among CSC Facilities, CSC Staff, and non-Black Inmates.

[74] The Statement of Claim defines the Abuse of Black Inmates as follows (at para 42):

> a. unnecessarily beating, hitting, pepper-spraying, and otherwise applying force to the bodies of Black Inmates;
>
> b. directing racial abuse and slurs at Black Inmates;
>
> c. confining Black Inmates in segregation or "structured intervention units";
>
> d. permitting or bringing about physical, emotional, and psychological assault or abuse of Black Inmates by placing them in situations where they are vulnerable to assault or abuse by non-Black Inmates; and
>
> e. failing to intervene when or encouraging non-Black Inmates to assault or direct abuse at Black Inmates.

[75] Many of the Defendant's objections to the scope and breadth of the Statement of Claim pertain to the lengthy and non-exhaustive list of allegations that are said to constitute Anti-Black Racism. The Defendant says that an examination of the "culture, policies, processes, practices, acts, omissions, and instruments used by CSC and CSC Staff which perpetuate, inflict, or reflect racism, discrimination, and bias against the Class" (Statement of Claim at para 35) would transform this legal proceeding into something resembling a public inquiry.

[76] The Plaintiff says that the comprehensive definition of Anti-Black Racism in the Statement of Claim is intended only to particularize the circumstances that caused or contributed to the specific instances of the Abuse of Black inmates pleaded in paragraph 42. To the extent

that these particulars are unhelpful or unduly complicate the claim, the Plaintiff suggests that they be disregarded or "pruned."

[77] The burden of satisfying the requirements of Rule 334.16(1) is solely upon the party seeking certification. While the role of the Court in managing proposed class actions is to be active and flexible, this does not extend to permitting those seeking certification to "cooper up" their motion or to help them meet the substantive requirements of certification. The Court must remain a neutral arbiter of whether those requirements have been met (*Buffalo v Samson Cree Nation*, 2010 FCA 165 [*Buffalo*] at paras 12-13).

[78] Nevertheless, there is authority for a court excising portions of a defective pleading to ensure it advances only viable causes of action. In *Nasogaluak FCA*, the Federal Court of Appeal considered it appropriate to strike portions of the statement of claim that impugned "core policy" decisions that were non-justiciable (*per* Laskin JA at para 42):

> It follows from this conclusion that the "core policy" decision component comprising establishment should be "pruned" from the systemic negligence claim: [citations omitted]. At this stage of this proceeding, this can most appropriately be accomplished by striking out the portions of the amended statement of claim that plead establishment as part of the systemic negligence claim. I would remit the matter to the motion judge to resolve any issues in light of this discussion as to what if any further portions of the pleading impermissibly advance a claim targeting "core policy" decisions.

[79] In this case, it is similarly appropriate to "prune" all references in the Statement of Claim to Anti-Black Racism, particularly the lengthy and non-exhaustive list of examples pleaded in paragraph 41. The proposed Class does not seek any remedy for the enumerated instances of

Anti-Black Racism *per se*. Despite the Plaintiff's insistence that the comprehensive definition is intended only to particularize the alleged Abuse of Black Inmates, it has the effect of rendering the pleading unwieldy and unmanageable. The defined term Anti-Black Racism also appears in paragraphs 2, 3, 4, 8(r), 35, 36, 45, 46, 57, 65, 70, 77, 78(d), 109 and 110 of the Statement of Claim, and these references must similarly be "pruned."

[80] With references to Anti-Black Racism removed, the Statement of Claim is limited to seeking damages for the Abuse of Black Inmates, as defined in paragraph 42. In this respect, the pleading more closely resembles the one approved by this Court in *Nasogaluak FC*, as modified in accordance with the reasons of the Federal Court of Appeal in *Nasogaluak FCA*.

(2) Systemic Negligence

[81] The Statement of Claim seeks redress on behalf of the proposed Class for: (a) unnecessary use of force; (b) racial abuse and slurs; (c) unjustified confinement; and (d) physical, emotional, and psychological assault and abuse by non-Black inmates (Statement of Claim at para 42). The Plaintiff says that prevention of these civil wrongs falls within the recognized duty of care owed by gaolers to those in their custody (citing *MacLean v R*, [1973] SCR 2 [*MacLean*] at pp 6-7).

[82] The Defendant responds that *MacLean* did not involve the operation of a system, the design of policies and procedures, or the alleged violation of Charter rights. Rather, it concerned the straightforward application of a routinely recognized common law duty of care in a prison setting (citing *Brazeau v Canada (Attorney General)*, 2020 ONCA 184 [*Brazeau*] at para 117).

[83] The Defendant therefore maintains that the duty of care asserted by the Plaintiff is novel, and the Court must determine its existence in accordance with the two-stage test established in *Anns v Merton London Borough Council*, [1977] 2 All ER 492 (HL), and later refined by the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79 [*Anns/Cooper* test]. While it is generally not necessary to proceed to the second stage of the test for claims that are analogous to an established duty of care, the full two-stage test applies where the alleged duty of care has not been recognized previously (*Nelson (City) v Marchi*, 2021 SCC 41 [*Marchi*] at paras 16-17).

[84] The first stage of the *Anns/Cooper* test asks if the defendant owed the plaintiff a *prima facie* duty of care. This is established by a relationship of proximity between the plaintiff and the defendant, such that the defendant's failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Once a *prima facie* duty of care is established, the second stage of the test asks if there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Marchi* at paras 17-18).

[85] The Defendant concedes that there is sufficient proximity between CSC staff and inmates in their custody to support the existence of a duty of care on an individual basis in certain circumstances. However, the Defendant disputes the existence of a Class-wide duty arising from abstract and amorphous concepts of racial abuse.

[86] *Brazeau* concerned a class action brought on behalf of mentally ill inmates who had been placed in administrative segregation. The Ontario Court of Appeal found that the motion judge

had misapprehended and unduly expanded the duty of care owed by the CSC to the inmate population generally (at para 120):

> While individual inmates have a cause of action for specific individual acts of negligence on the *MacLean* principle, a class-wide duty of care can only be made out if the duty relates to the avoidance of the same harm for each class member. This is not a case where the class-wide duty of care is said to arise from a single incident or act, for example, an air crash or train derailment. Rather, the duty alleged arises from different acts in different circumstances and in relation to different individuals. Those acts can be identified as being the same only because they all arise from the implementation of a particular policy or regulatory regime regarding the management of prisons. The primary negligence claim in the amended statement of claim is negligence at the policy-making level. Negligence at the operational level is alleged as an alternative and that would turn on individual circumstances.

[87] However, as noted by the Federal Court of Appeal in *Nasogaluak FCA* at paragraph 47, approximately one year after deciding *Brazeau*, the Ontario Court of Appeal said the following in *Francis v Ontario*, 2021 ONCA 197 [*Francis*] at paragraph 103:

> It follows, from the nature of the relationship, that actions taken which result in injury to an inmate could be reasonably foreseeable. Again, that is accepted to be the case on an individual basis, and we see no principled reason why that could not be the case on a class basis. If identical action is taken regarding the inmate population, or a subset of that population, and harm results, it is as foreseeable on a group-wide basis as it is on an individual basis.

[88] The Federal Court of Appeal concluded in *Nasogaluak FCA* at paragraphs 46 and 49 that the scope of the *MacLean* principle was not yet settled, and at the preliminary screening stage of a certification motion it was not plain and obvious that there was no reasonable cause of action in systemic negligence.

[89] The Statement of Claim in this case is closely modelled on the one filed in *Nasogaluak FC*, as modified in accordance with the reasons of the Federal Court of Appeal in *Nasogaluak FCA*. The following allegations are taken almost *verbatim* from the pleading filed in *Nasogaluak FC*, with amendments to reflect the circumstances of the proposed Class in this proceeding:

> *Negligence*
>
> 58. The Defendant owes a duty of care to Class members as incarcerated persons.
>
> […]
>
> 62. Through itself or the CSC Staff, the Defendant was in a relationship of proximity with Class members as a result of its operation of CSC Facilities during the Class Period. As a result of its conduct in operating CSC Facilities, exerting control over the activities of CSC Staff, its assumption of the care and custody of Black Inmates, and its statutory authority and responsibilities with respect to those matters, the Class had a proximate relationship with the Defendant and CSC Staff.
>
> 63. During the Class Period, Class Members were in the care and control of CSC and CSC Staff during their time in CSC Facilities and expected that they would not be treated by the Defendant in a manner that would cause them physical or emotional harm.
>
> 64. The Defendant knew or ought to have known that in its funding, oversight, operation, supervision, control, maintenance, and support of CSC Facilities could and would result in compensable physical and emotional harm to Class members. The Defendant had particular knowledge of the actual harms perpetrated on Class members as a result of internal reports, community knowledge, complaints by Class Members and other public scrutiny of the negligence and breaches alleged herein.
>
> 65. The Defendant knew or ought to have known that its failure to take reasonable care in preventing […] the Abuse of Black Inmates, would result in harm to Class Members.
>
> 66. The Defendant knew or ought to have known that its failure to ensure that CSC Facilities operated with and CSC Staff applied, the standards provided to non-Black Inmates would result in harm to Class members.

> 67. Class Members had the reasonable expectation that CSC would operate CSC Facilities in a manner that was substantially similar to the care, control and supervision provided to non-Black Inmates during the Class Period.
>
> 68. Canada was obliged to establish, fund and operate CSC Facilities with a reasonable standard of care, which includes, but is not limited to:
>
> a. establishing, implementing and enforcing appropriate policies and procedures to ensure that Class members would be free from physical, emotional and psychological abuse, *i.e*. the Abuse of Black Inmates;
>
> b. establishing, implementing and enforcing appropriate policies and procedures to ensure that Class Members would not be unnecessarily or inappropriately harmed during their time in custody;
>
> c. ensuring that CSC Staff, who were agents of the Defendant, were adequately educated, licensed and trained in order to fulfill their employment obligations in a manner that would not cause physical, emotional or psychological harm to Class Members;
>
> d. investigating, adjudicating and, if necessary, reporting to the appropriate law enforcement authorities complaints by Class Members of physical or emotional abuse;
>
> e. overseeing the acts and behaviours of CSC Staff in a manner that would protect Class Members from the Abuse of Black Inmates and other acts of brutality;
>
> f. acting in a timely and concerted fashion by, among other things, establishing and implementing policies and procedures to ensure that incidents of Abuse of Black Inmates would not re-occur; and
>
> g. such other and further obligations of the Defendant as the plaintiff may advise and this Honourable Court may consider.

[90] Despite the close similarity between the pleadings filed in *Nasogaluak FC* and this proceeding, the Defendant argues that claims of systemic negligence are not comparable.

According to the Defendant, *Nasogaluak FC* involved the same action, namely detention and assault, taken in substantially the same circumstances, namely small communities in the northern territories. This may be contrasted with the present case, where the allegations encompass numerous different forms of harm within a broad range of institutional settings.

[91] I disagree. The allegations in *Nasogaluak FC* encompass an equally broad range of settings, some institutional and some not. The claims extend to all interactions between members of the Royal Canadian Mounted Police [RCMP] and Aboriginal persons in the northern territories from 1928 onwards that involved detention and alleged assault. The circumstances are not confined to RCMP detachments: Mr. Nasogaluak was detained while riding a ski-doo in the countryside.

[92] In *Greenwood FCA*, the Federal Court of Appeal affirmed the certification of a class action in negligence for workplace harassment on behalf of all RCMP members and reservists over a class period between 1995 and the dates their collective agreements came into force (at para 175). The range of actions and alleged harms in *Greenwood FCA* is at least as broad as the circumstances of this proceeding.

[93] In addition to *Nasogaluak FCA* and *Greenwood FCA*, class-wide allegations of systemic wrongs have been certified by this Court on numerous occasions (*e.g.*, *Merlo v Canada*, 2017 FC 51; *Tiller v Canada*, 2019 FC 895; *Ross et al v Her Majesty the Queen* (unreported, June 18, 2018, Court File No T-370-17); *Heyder v Canada (Attorney General)*, 2019 FC 1477). In all of these cases, the allegations encompassed a broad range of actions and omissions with a large

number of individual perpetrators and complainants over lengthy periods of time. The jurisprudence of this Court and the Federal Court of Appeal has made it increasingly clear that the systemic nature of the alleged wrongdoing does not serve as a bar to certification.

[94] Applying the precedents of *Nasogaluak FCA* and *Greenwood FCA*, at the preliminary screening stage of a certification motion, it is not plain and obvious that the Statement of Claim fails to disclose a reasonable cause of action in systemic negligence.

(3) Charter, ss 7 and 15(1)

[95] The test for pleading a reasonable cause of action pursuant to s 7 of the Charter is not in dispute. The Plaintiff must plead that government "law or action interferes with, or deprives him of, life, liberty or security of the person and that the deprivation is not in accordance with the principles of fundamental justice" (*Ewert v Canada*, 2018 SCC 30 at para 68).

[96] A reasonable cause of action pursuant to s 15(1) of the Charter requires the Plaintiff to plead that an impugned law or state action: (a) creates a distinction based on enumerated or analogous grounds, on its face or in its impact; and (b) imposes a burden or denies a benefit in a manner that has the effect of reinforcing, perpetuating, or exacerbating disadvantage (*R v Sharma*, 2022 SCC 39 at para 28).

[97] In *Nasogaluak FCA*, the Federal Court of Appeal affirmed that the statement of claim in that case disclosed a reasonable cause of action in respect of s 7 of the Charter, and noted that the s 15(1) claim was in large measure pleaded in tandem with the s 7 claim (at paras 67-68, 78).

The Court of Appeal referred specifically to paragraphs 1(d), 1(f), 1(g), 15, 23 to 24, and 62 to 66 to 70 of the statement of claim filed in that proceeding. These paragraphs are reproduced almost *verbatim* in the Statement of Claim filed in this proceeding, with amendments to reflect the circumstances of the proposed Class:

> A. RELIEF SOUGHT
>
> 1. The Plaintiff claims on his own behalf and on behalf of the Class (as hereinafter defined):
>
> […]
>
> e. a declaration that Canada and its agents systemically violated, and continue to violate, sections 7 and 15(1) of the Charter in a manner that is not demonstrably justified in a free and democratic society pursuant to section 1 of the Charter;
>
> g. a declaration that Canada is liable to the Class for damages under section 24(1) of the Charter for breach of sections 7 and 15(1) of the Charter in relation to the actions of CSC Staff;
>
> h. general damages in an amount exceeding $50,000;
>
> i. special damages in an amount exceeding $50,000;
>
> j. damages for future cost of care in an amount exceeding $50,000;
>
> k. damages for loss of earnings or earning capacity, past and future in amounts exceeding $50,000;
>
> l. punitive, exemplary, and/or aggravated damages in an amount exceeding $50,000;
>
> […]
>
> 34. In practice, CSC regularly breaches its mandate to treat Black Inmates in a non-discriminatory manner. CSC Staff regularly discriminate against Black Inmates, particularly by subjecting them to physical, emotional and psychological abuse, whether by employing excessive and unnecessary force to them, by directing hateful speech and language at them, or by permitting other Inmates to do those things to Class members, as well as through the application of discriminatory policies and practices which

systematically disadvantage Black Inmates, as particularized below,

[…]

42. While incarcerated, Class members are regularly subjected to physical, emotional and psychological abuse by CSC Staff, and by non-Black Inmates. Common incidents of abuse involve (the "Abuse of Black Inmates"):

[…]

44. Non-Black Inmates do not face the same physical, emotional and psychological abuse experienced by Class members.

[…]

71. Section 7 of the *Charter* guarantees that every individual has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

72. As a government actor, the Defendant owed, and continues to owe, duties under the *Charter* to the Class members.

73. The frequency, duration, and severity of the conduct that the Class members are subjected to at the hands of the Defendant and its agents, particularized above, engages the *Charter* rights of life, liberty and security of the person. Such wrongful conduct constitutes a breach of the Class members' *Charter* rights to life, liberty and security of the person.

74. The widespread use of excessive force by CSC Staff on Class Members is arbitrary, and grossly disproportionate with the purpose of use of force upon detention. It is not carried out in keeping with any principle of fundamental justice.

75. The widespread Abuse of Black Inmates is arbitrary, and grossly disproportionate with the purpose and principles governing Class members' incarceration, under the *CCRA*, *CCRR* and otherwise, as particularized above at paras. 27-33.

76. Section 15(1) of the *Charter* guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, or colour.

> 77. The Defendant's conduct, including its discriminatory treatment of Black Inmates, the subjecting of Black Inmates to Anti-Black Racism, and the Abuse of Black Inmates, has resulted in Class members being treated differently and worse than non-Black Inmates. This difference in treatment is based on enumerated grounds listed in the preceding paragraph.
>
> 78. In light of the foregoing, Class members have been discriminated against based on, *inter alia*, their race, national or ethnic origin, and colour. Canada's conduct is discriminatory on its face, in its effect, and in its application. In particular, such actions included but are not limited to:
>
> a. the Defendant allowed CSC Staff to target Black Inmates during their time in custody;
>
> b. the Defendant allowed CSC Staff to use excessive force while Black Inmates were in custody;
>
> c. the Defendant allowed CSC Staff to engage in Abuse of Black Inmates; and
>
> d. the Defendant was careless, reckless, wilfully blind, or deliberately accepting of, or was actively promoting, a policy of discrimination […] against Class members.
>
> 79. There is no justification in a free and democratic society for the Defendant's breaches of s. 7 or 15(1) of the *Charter*.

[98] Particulars of the harms allegedly suffered by the proposed Class are provided in paragraph 80 of the Statement of Claim, and are substantially the same as those pleaded in paragraph 72 of the statement of claim considered by the Federal Court of Appeal in *Nasogaluak FCA*.

[99] The Defendant argues that the Statement of Claim contains no material facts supporting the bald allegations that CSC failed to discharge its legal obligations under ss 7 or 15(1) of the Charter. The Defendant says that the Plaintiff cannot assert that some broad, vaguely defined

situation gives rise to an actionable claim for personal injury, infringement of individual Charter rights, and compensatory damages (citing *KO v British Columbia (Ministry of Health)*, 2022 BCSC 573 at para 23, aff'd, 2023 BCCA 289).

[100] According to the Defendant, the Statement of Claim asserts bare violations arising from alleged systemic failures, defined broadly to encompass nearly any interaction between CSC staff and offenders or interactions between offenders. It does not identify a particular state action or policy that could reasonably constitute, directly or indirectly, a violation of s 7 rights. It does not provide material facts as to how these vague violations were contrary to the principles of fundamental justice.

[101] With respect to s 15(1) of the Charter, the Defendant maintains that the Statement of Claim alleges overly broad and undiscernible actions and inactions on the part of CSC. For example, the Plaintiff alleges that the CSC "allowed" its staff to "engage in Abuse of Black Inmates," a defined term covering a wide range of alleged actions and omissions. The Defendant says these are conclusory statements of behaviour unsupported by material facts.

[102] The Statement of Claim pleads the following material facts arising from Mr. Araya's personal experience:

(a) Despite observing white inmates greet and exchange pleasantries with CSC staff on a regular basis, Mr. Araya's attempts to do so were ignored by CSC staff (para 89).

(b) On one occasion, Mr. Araya presented himself to his parole officer [PO] in need of immediate medical attention related to a head injury. When he asked if she could call for assistance, the PO told him this wasn't her job and refused to call for help. When Mr. Araya attended the medical facility for treatment, he was chastised by CSC staff and told he should have first consulted his PO (paras 90-91).

(c) On another occasion, after Mr. Araya informed his PO that he planned to continue volunteering his time as a basketball coach following his release, she replied that she would not want someone like Mr. Araya coaching her children, and that he was "clearly a drug dealer" (para 92).

(d) Mr. Araya complained of neglect and discrimination, but was told that racism was not an issue with his PO or at William Head Institution. No action of any kind was taken by the CSC to investigate and address Mr. Araya's concerns (para 93).

(e) When Mr. Araya confronted a group of medical and disciplinary staff about the differential treatment he had received, the head charge nurse at William Head Institution responded that he would not want to have someone like Mr. Araya living next to him in the community (para 94).

(f) Mr. Araya's decision to report his experiences resulted in further discrimination and harassment by CSC staff. CSC staff routinely attempted to intimidate Mr. Araya from making further reports by staring him down during roll calls and lock ups, and overlooking inappropriate conduct directed towards him by other inmates (para 95).

(g) On one occasion, Mr. Araya was approached and threatened by a white inmate who directed derogatory, racial slurs towards Mr. Araya, including use of the "n-word". Despite the obvious attempt to provoke Mr. Araya, nearby CSC Staff took no action to address or discipline the white inmate's conduct. When Mr. Araya responded that he did not want to fight but if the term was repeated they would have to settle the matter, CSC staff quickly intervened and reported that Mr. Araya had threatened the white inmate (paras 96-97).

(h) CSC staff subsequently informed Mr. Araya that since he and his aggressor shared a bunkhouse, he would have to find a new place to stay. Mr. Araya was told that if he was unable to find another bunkhouse to take him in, he would be moved to a different institution altogether. Mr. Araya was publicly shamed and forced to go door-to-door to each bunkhouse asking if they had room for him to stay, while his aggressor was treated like a victim by CSC. No action was taken at any point by CSC to address the racial slurs used by the white inmate (paras 98-99).

(i) Following his release from William Head Institution, Mr. Araya informed his new PO that his partner was Indo-Canadian. The PO told Mr. Araya that CSC would need to "reassess" the threat of domestic violence within their relationship, and that he "knows" what Indo-Canadian women are like. When Mr. Araya accused his new PO of racial bias, the PO put in place a series of arbitrary and unnecessary conditions based on racist and inappropriate stereotypes, including:

a. attending regular Alcoholics Anonymous meetings;

b. seeing a psychiatrist;

c. seeking gainful employment; and

d. refraining from seeing his partner, due to a perceived threat of domestic violence (paras 102- 103).

(j) As a result of CSC's conduct, Mr. Araya has suffered serious and prolonged injuries to his dignity and psyche. Rather than provide rehabilitation, Mr. Araya's time with CSC has created a further barrier to his successful reintegration to the community at large (para 106).

[103] There is nothing to distinguish the manner of pleading in this case from that endorsed by the Federal Court of Appeal in *Nasogaluak FCA*. In both pleadings, the proposed representative plaintiff provides particulars of his own experience, and then makes general allegations on behalf of the proposed class regarding systemic negligence and Charter violations.

[104] While the allegations derived from Mr. Araya's personal experience are considerably less severe than those advanced by Mr. Nasogaluak, his assertion that he suffered serious and prolonged injuries to his dignity and psyche must, for the purposes of this certification motion, be taken as true or capable of proof.

[105] Applying the precedent of *Nasogaluak FCA*, at the preliminary screening stage of a certification motion, it is not plain and obvious that the Statement of Claim fails to disclose a reasonable cause of action pursuant to ss 7 and 15(1) of the Charter.

B. *Is there an identifiable class of two or more persons?*

[106] For the "identifiable class" condition to be met, the evidence must support some basis in fact for an objective class definition that bears a rational connection to the litigation and that is not dependent on the outcome of the litigation (*Nasogaluak FCA* at para 84, citing *Greenwood FCA* at para 168).

[107] Mr. Araya seeks certification of this proposed class proceeding on behalf of the following Class:

> All Black persons who allege that they were subjected to physical, emotional and/or psychological abuse while incarcerated in a CSC Facility at any time during the Class Period, and who are alive on the date this action is certified.

[108] This proposed class definition is modelled on the one approved by the Federal Court of Appeal in *Nasogaluak FCA* (at para 83):

> **"Class" or "Class Members" means**
>
> all Aboriginal Persons who allege that they were assaulted at any time while being held in custody or detained by RCMP Officers in the Territories, and were alive as of December 18, 2016.

[109] The Defendant says that the proposed Class definition is overly broad and does not reflect any common experience shared by Class members. Unlike the term "assault" in *Nasogaluak FCA*, the term "abuse" is unclear and could potentially include the mere fact of incarceration.

The alleged perpetrators are not identified, and include non-Black inmates as well as CSC staff. The locations where the abuse allegedly occurred are not specified.

[110] The Defendant also maintains that the material facts pled regarding Mr. Araya's personal experience are insufficient to establish that he is himself a member of the proposed Class.

[111] These objections are similar to those made by the Defendant before this Court in *Nasogaluak FC* and repeated before the Federal Court of Appeal in *Nasogaluak FCA* (at paras 85-87):

> [The motion judge] did not accept the Attorney General's submissions that the proposed definition was imprecise, overbroad, and unmanageable, or, more specifically, (1) that it was based on non-objective criteria because the criterion of having made an allegation was not sufficiently objective; (2) that it was unnecessarily complex because it would require determining whether proposed class members would be considered Aboriginal under section 35 of the Constitution Act, 1982; (3) that it was overbroad because the proposed class period dated back to 1928; (4) that it was over-inclusive because its members would have had disparate experiences involving the RCMP; (5) that it was unmanageable because it comprised individuals who have merely made allegations; (6) that it lacked any basis in fact because the affidavit evidence did not support allegations of unlawful assaults; and (7) that it had no rational connection to the proposed common issues because there was no causal link pleaded between the assault allegations and the common issues.

[112] In *Nasogaluak FCA*, the Federal Court of Appeal rejected the Defendant's argument that the class definition as framed – based on allegations of assault – was not objective but subjective. Following a discussion of the propriety of claim-based class definitions, the Court of Appeal

concluded at paragraph 93 that "the claim-based class definition applied in this case is sufficiently objective having regard to the purposes of defining the class."

[113] The Federal Court of Appeal rejected the remainder of the Defendant's arguments against the class definition, noting that they failed to recognize the systemic, "top-down" theory of the case (at para 95):

> According to the Attorney General, the individual assaults must first be proven before any inquiry into the alleged systemic failings can take place. But what is alleged on behalf of the putative class is that the individual harm arose out of the systemic failings identified in the amended statement of claim. As the motion judge recognized (at paragraph 102 of her reasons),
>
> > [t]here will not need to be individual assessment until the common questions are answered. This is because the claims do not ask if an RCMP officer illegally assaulted a class member, but rather whether the operations of the RCMP create a system where illegal assaults happen. After this has been established, then it can be determined whether a particular class member was a victim of this system.

[114] The same is true of this case. The Statement of Claim alleges that the CSC created or permitted a system that facilitated the Abuse of Black Inmates, as defined. Only after this has been established can it be determined whether a particular Class member was a victim of this system.

[115] "Abuse of Black Inmates" is defined in paragraph 42 of the Statement of Claim as (a) unnecessary use of force; (b) racial abuse and slurs; (c) unjustified confinement; and (d) physical, emotional, and psychological assault and abuse by non-Black inmates. While this definition is wider than the "assault" alleged in *Nasogaluak FCA*, it is sufficiently clear. The

definition is at least as precise as the term “bullying, harassment and intimidation” endorsed in *Greenwood FCA*. It is also a term that is likely to be understood by Class members.

[116] While Mr. Araya does not allege that he was subjected to the unnecessary use of force or improper confinement, he does allege that he experienced racial abuse and slurs, and that he suffered emotional and psychological harm. He therefore falls within the proposed Class definition. He deposes in his affidavit that he knows of at least five or six other persons who fall within the proposed Class definition. Combined with the expert evidence of Dr. Owusu-Bempah and the numerous public reports and other documents, the low threshold of “some basis in fact” for the existence of an identifiable class of two or more persons is met.

[117] The Plaintiff proposes a Class period commencing in 1982 on the day that ss 7 and 15(1) of the Charter came into effect until the date this proceeding is certified. The Plaintiff acknowledges that there is no statement in the record comparable to the one made by former RCMP Commissioner Brenda Lucki that “[t]hroughout [its] history and today, [the RCMP] has not always treated racialized and indigenous people fairly.” This acknowledgment was found by the Federal Court of Appeal in *Nasogaluak FCA* to provide some basis in fact to support the class period of 1928 to the date of certification (at para 96).

[118] The Plaintiff asserts that the Abuse of Black Inmates likely predates the advent of the Charter. The Charter nevertheless increased institutional awareness of the need to ensure that CSC facilities were free from racial abuse. In the alternative, the Plaintiff says that public reports have warned of the differential treatment experienced by Black inmates since at least 1995 (see

G. Toni Williams, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer, 1995)).

[119] The expert evidence of Dr. Owusu-Bempah regarding the pervasive and historical nature of discrimination against Black inmates, supported by the documentary evidence, sufficiently demonstrates some basis in fact for a Class period commencing on the day the Charter came into effect until the date this proceeding is certified. It must be noted, however, that s 15(1) of the Charter did not come into effect until April 17, 1985, three years after the Charter's enactment (*Constitution Act, 1982*, s 32(2). It is well established that s 15(1) cannot be applied retroactively (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 349 at para 106).

[120] The equality guarantee is at the centre of the Plaintiff's Charter claims, and April 17, 1985 is therefore an appropriate commencement date for the Class. The observation of the Federal Court of Appeal in paragraph 97 of *Nasogaluak FCA* is also apt here:

> While the manageability of the class as defined will likely present some challenges, given the length of the class period and the disparate locations potentially involved, techniques exist to address them: see *Rumley* at paras. 31-32. Furthermore, the inclusion in the class definition of the proviso that class members must have been alive as of [the date of certification] should go some way to limit the complexity.

[121] It is neither necessary nor appropriate to address limitation periods or statutory bars to compensation at the certification stage. Where the resolution of a limitations issue depends on a factual inquiry, the issue should not be decided on a motion for certification (*Amyotrophic Lateral Sclerosis Society of Essex v Windsor (City)*, 2015 ONCA 572 at para 41).

C. *Do the claims of the class members raise common questions of law or fact?*

[122] In *Nasogaluak FCA* at paragraph 100, the Federal Court of Appeal quoted from its earlier decision in *Greenwood FCA* at paragraph 180:

> Determining whether a proposed class proceeding displays the requisite commonality to justify certification is to be approached purposively to ascertain whether the common issue(s) are essential element(s) of each class member's claim and whether addressing them commonly will avoid duplication of fact-finding or legal analysis. It is not necessary that the common issues predominate over individual issues, that answers to them settle liability or that class members be identically situated in respect of the common issues. Rather, the requisite commonality will exist if the common issue will meaningfully advance class members' claims, which may be said to be the case unless individual issues are overwhelmingly more significant […].

[123] The Plaintiff proposes the following common questions of law or fact:

> 1. Does Anti-Black Racism exist within CSC, and, if so:
>
> (a) Does it promote and perpetuate a culture of racism and discrimination against Black Inmates? If so, does this culture cause or contribute to the physical, emotional and/or psychological abuse of Class members?
>
> (b) Did CSC know, or should they have known, about Anti-Black Racism? If so, when?
>
> (c) Did CSC take adequate steps to eliminate or mitigate Anti-Black Racism?
>
> 2. By its operation or management of the CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
>
> 3. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?

> 4. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?
>
> 5. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, or colour under section 15 of the Charter?
>
> 6. If the answer to common issues 3, 4, or 5 is "yes", were the Defendant's actions saved by section 1 of the Charter, and if so, to what extent and for what time period?
>
> 7. If the answer to common issues 3, 4, or 5 is "yes", and the answer to common issue 6 is "no", do those breaches make damages an appropriate and just remedy under section 24 of the Charter?
>
> 8. Does the Defendant's conduct justify an award of punitive damages?
>
> 9. If the answer to common issue 8 is "yes", what amount of punitive damages ought to be awarded against the Defendant?

[124] In oral submissions, counsel for the Plaintiff acknowledged that question 1, pertaining to the existence of Anti-Black Racism as defined in the Statement of Claim, may have to be "pruned" to ensure the proceeding does not become unwieldy or unmanageable. In light of my conclusion regarding this aspect of the pleading, questions 1, 1(a), (b) and (c) are not suitable for certification.

[125] The remaining common questions are modelled on those approved by the Federal Court of Appeal in *Nasogaluak FCA*. The CSC's apparent reluctance to implement recommendations in public reports that were intended to address systemic racial abuse within correctional facilities potentially exposes the Defendant to an award of punitive damages.

[126] As the express language of Rule 334.16(1)(c) makes clear, the "common questions" condition for certification may be met "whether or not those common questions predominate over questions affecting only individual members". Numerous systemic claims similar to those advanced here have been found to meet this condition (or similar conditions in other jurisdictions) in many other cases (*Nasogaluak FCA* at para 106, citing *Rumley v British Columbia*, 2001 SCC 69 [*Rumley*] at paras 27, 30; *Canada v John Doe*, 2016 FCA 191 [*John Doe*] at para 63; *Greenwood v Canada*, 2020 FC 119 [*Greenwood FC*] at paras 59-70, aff'd, *Greenwood FCA* at paras 183-184; *Francis* at paras 106-107).

[127] With the exception of the first proposed common questions regarding the existence of Anti-Black Racism, and applying the precedent of *Nasogaluak FCA*, the Plaintiff has satisfied the criterion of advancing common questions of law or fact. Addressing these questions commonly will avoid duplication of fact-finding and legal analysis.

D. *Is a class proceeding the preferable procedure?*

[128] The preferability analysis requires the Court to look to all reasonably available means of resolving the class members' claims, not just the possibility of individual actions. This entails consideration of other potential court procedures, and also non-court proceedings (*AIC Limited v Fischer*, 2013 SCC 69 [*Fischer*] at para 35).

[129] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and

procedural aspects of access to justice, recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37).

[130] The preferability inquiry is to be conducted through the lens of the three main goals of class proceedings: judicial economy, behaviour modification, and access to justice (*Nasogaluak FCA* at para 116). A class action may "allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf" (*Fischer* at para 29).

[131] The Defendant says that the allegations made on behalf of the proposed Class encompass such a broad range of acts and omissions, locations and timeframes that no one procedure is preferable. Depending on the circumstances, Class members will be better served by the inmate grievance process coupled with judicial review, or a human rights complaint respecting discriminatory institutional polices and practices, or individual civil actions (such as Mr. Araya's personal injury claim in the British Columbia Supreme Court).

[132] The Defendant urges the Court to follow the example of Justice Paul Perell of the Ontario Superior Court of Justice in *Carcillo v Canadian Hockey League*, 2023 ONSC 886 [*Carcillo*], where he declined to certify a proposed class action in systemic negligence against numerous hockey leagues and clubs (at para 396):

> […] perhaps the simplest explanation for why the immediate systemic negligence, institutional abuse proposed class action is not

> the preferable procedure is that the proposed class action would not be manageable and no conceivable litigation plan and certainly not the boilerplate litigation plan of Class Counsel could make this proposed class action manageable. The court would be asked to manage: (a) the individual defences of 78 defendants in 13 different jurisdictions; (b) hundreds of inevitable third party claims against the actual perpetrators, pedophiles, sadists, and sociopaths who apparently saw nothing wrong in torturing their teammates; (c) events of "abuse" that are a myriad of sins and a myriad of torts; (d) events over a 50-year period; (e) choice of law issues with respect to the common law, civil law, and possibly American law; and (f) limitation period defences; etc.

[133] According to the Defendant, the "not entirely happy" case of *Rumley* also serves as a cautionary tale (*Carcillo* at para 410, citing Justice Frans Slatter's comments in *TL v Alberta (Director of Child Welfare)*, 2006 ABQB 104 at paras 108-109):

> It is instructive to note that the experience in the *Rumley* action was not entirely happy. An application was subsequently brought to decertify the action: *Rumley v. British Columbia (#2)*, 2003 BCSC 234, 12, B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: […]
>
> The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the Act specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. *Rumley* shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of *Rumley (#2)* is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

[134] In *Carcillo*, Justice Perell concluded as follows (at para 413):

> […] it may be preferable to sail directly to an individual issues negligence trial without sailing into the doldrums of a common issues trial. One of the ironies of institutional abuse class actions that are certified as the preferable procedure is that it is often the case that it would have been easier and quicker for the individual Class Member to prove his or her individual victimization and harm than waiting years for a determination that there was systemic negligence. *Cavanaugh v. Grenville Christian College* is an illustration of this ironical phenomena, which I believe would occur in the immediate case if I were to certify the proposed leviathan of a class action.

[135] A class action alleging systemic negligence implicating numerous acts and omissions by different perpetrators in various institutional settings over a lengthy period of time presents formidable challenges. However, these same challenges were plainly evident in both *Nasogaluak FCA* and *Greenwood FCA*, and were not found to preclude certification of those proceedings as class actions.

[136] *Carcillo* involved 78 defendants in 13 jurisdictions, some of them outside Canada. This proposed class action involves a single Defendant and a common institution: the CSC. While the Defendant has adduced some evidence that CSC facilities vary across Canada, no evidence has been presented that the application of policies and practices affecting the treatment of Black inmates differs depending on the institutional setting.

[137] *Rumley* was a class proceeding against a single defendant, specifically a residential school for deaf children. But so too were the class actions certified in *Nasogaluak FC*, *John Doe*, *Greenwood FC*, *Francis*, *etc.* As the Federal Court of Appeal (*per* Rennie JA) held in *Salna v*

Voltage Pictures, LLC, 2021 FCA 176 at paragraph 103, speculative concern that there may be a number of potentially different factual scenarios is not a persuasive argument against certification. Flexibility is infused into the Rules, and there are numerous avenues to resolve individual issues that may arise. Options include the ability to create subclasses based on similar fact scenarios (Rule 334.16(3)) and the ability for a court-supervised individual assessment process (Rule 334.26). If the class proceeding does become unmanageable, the Rules allow for amendments to the pleadings or even decertification if the conditions for certification are no longer satisfied (Rule 334.19).

[138] The Plaintiff reasonably characterizes prison inmates as a vulnerable population. If this proposed class action is not certified, it is unlikely that individual Class members will pursue alternative forms of redress on their own. To the extent that the allegations advanced in the Statement of Claim have merit, no remedy will be provided for the wrongs suffered by the proposed Class except by way of a collective proceeding.

[139] Considering the goals of judicial economy, behaviour modification, and access to justice, and the growing number of precedents for certifying class proceedings in similar circumstances, a class action is the preferable procedure for resolving the claims of the proposed Class.

E. *Is Mr. Araya a suitable Class representative?*

[140] The Defendant challenges Mr. Araya's suitability as a Class representative on numerous grounds. His evidence is said to lack credibility or reliability. He has commenced a separate civil action in the British Columbia Supreme Court. In cross-examination, he demonstrated a poor

understanding of the procedure governing class actions. His litigation plan is superficial and contains unrealistic estimates of the time required to complete the necessary steps prior to a trial of common issues.

[141] I have addressed the Defendant's objections to Mr. Araya's credibility and reliability earlier in this decision. Suffice it to say that the criticisms of Mr. Araya's testimony are insufficient for this Court to reject his credibility, particularly given the low evidentiary threshold for establishing "some basis in fact" in a motion to certify a proposed class action.

[142] Mr. Araya's civil action against the Defendant in the British Columbia Supreme Court is for personal injury, and makes no mention of racial abuse. To the extent that the allegations overlap with those certified in this proposed class action, the implications of the separate civil action may be addressed pursuant to Rule 334.21(2) at the appropriate juncture.

[143] Similar to many representative plaintiffs in class proceedings, Mr. Araya will rely on the advice of experienced counsel to navigate the applicable Rules of Court. Considering that the proposed Class consists of a vulnerable population, it may be unrealistic to expect a high degree of sophistication in the conduct of legal proceedings from individual Class members. If at some stage in the litigation it becomes apparent that Mr. Araya is unable to serve as a representative Plaintiff, he may be replaced by another member of the Class.

[144] Counsel for the Plaintiff acknowledges that the litigation plan is a work in progress. The litigation plan approved by this Court in *Nasogaluak FC* was broadly similar. The details of the litigation plan will continue to evolve under case management (*Buffalo* at paras 12-13).

[145] Mr. Araya has demonstrated some basis in fact for his suitability as a representative Plaintiff.

V. Conclusion

[146] The defined term Anti-Black Racism in paragraph 41 of the Statement of Claim must be pruned to ensure the proceeding is manageable and limited to the allegations of wrongdoing for which compensation is sought. The defined term also appears in paragraphs 2, 3, 4, 8(r), 35, 36, 45, 46, 57, 65, 70, 77, 78(d), 109 and 110 of the Statement of Claim, and these references must similarly be pruned.

[147] Subject to these modifications, the Statement of Claim discloses reasonable causes of action in systemic negligence and also pursuant to ss 7 and 15(1) of the Charter.

[148] The Plaintiff has demonstrated some basis in fact for the existence of a Class of two or more persons, defined as follows:

> All Black persons who allege that they were subjected to physical, emotional and/or psychological abuse while incarcerated in a CSC Facility at any time during the Class Period, and who are alive on the date this action is certified.

[149] The Class Period is from April 17, 1985 to the date of the Order certifying this proceeding as a class action.

[150] The common questions of law or fact are the following:

> 1. By its operation or management of the CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
>
> 2. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?
>
> 3. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?
>
> 4. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, or colour under section 15 of the Charter?
>
> 5. If the answer to common issues 2, 3, or 4 is "yes", were the Defendant's actions saved by section 1 of the Charter, and if so, to what extent and for what time period?
>
> 6. If the answer to common issues 2, 3, or 4 is "yes", and the answer to common issue 5 is "no", do those breaches make damages an appropriate and just remedy under section 24 of the Charter?
>
> 7. Does the Defendant's conduct justify an award of punitive damages?
>
> 8. If the answer to common issue 7 is "yes", what amount of punitive damages ought to be awarded against the Defendant?

[151] The Plaintiff has demonstrated some basis in fact for a class proceeding being the preferable procedure.

[152] Mr. Araya has demonstrated some basis in fact that he is a suitable representative Plaintiff.

[153] The proposed Class proceeding will be certified accordingly.

[154] Applying Rule 334.39, there will be no order as to costs.

ORDER

THIS COURT ORDERS that:

1. The motion to certify this proceeding as a class action is granted.

2. The Class is defined as follows:

> All Black persons who allege that they were subjected to physical, emotional and/or psychological abuse while incarcerated in a Correctional Service of Canada [CSC] Facility at any time during the Class Period, and who are alive on the date this action is certified.

3. The Class Period is from April 17, 1985 to the date of this Order.

4. Abel Araya is appointed Representative Plaintiff.

5. The claims made on behalf of the Class are:

   (a) systemic negligence resulting in the abuse of Black inmates; and

   (b) breach of ss 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*.

6. The relief claimed by the Class is damages, including punitive damages, at common law and pursuant to s 24 of the *Canadian Charter of Rights and Freedoms*.

7. The common questions of law or fact for the Class are:

> 1. By its operation or management of the CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
>
> 2. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?
>
> 3. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?

4. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefit of the law without discrimination based on race, national or ethnic origin, or colour under section 15 of the Charter?

5. If the answer to common issues 2, 3, or 4 is “yes”, were the Defendant’s actions saved by section 1 of the Charter, and if so, to what extent and for what time period?

6. If the answer to common issues 2, 3, or 4 is “yes”, and the answer to common issue 5 is “no”, do those breaches make damages an appropriate and just remedy under section 24 of the Charter?

7. Does the Defendant’s conduct justify an award of punitive damages?

8. If the answer to common issue 7 is “yes”, what amount of punitive damages ought to be awarded against the Defendant?

8. The litigation plan, including the time and manner for Class members to opt out of the class proceeding, will be approved at a later date.

9. No costs are awarded.

“Simon Fothergill”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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APPEARANCES:

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