CITATION: Farrell v. Attorney General of Canada, 2023 ONSC 1474
COURT FILE NO.: CV-20-00643396-00CP
DATE: 20230303

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: MICHAEL FARRELL and KIMBERLY MAJOR, Plaintiffs

AND:

ATTORNEY GENERAL OF CANADA, Defendant

BEFORE: Justice Glustein

COUNSEL: *Kent Elson, Abigail Deshman, and Amanda Montgomery*, for the plaintiffs

R. Jeff Anderson, Prathima Prashad, and Monisha Ambwani, for the defendant

HEARD: January 24 and 25, 2023

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NATURE OF THE MOTION AND OVERVIEW

Nature of the motion

[1] The plaintiffs, Michael Farrell ("Farrell") and Kimberly Major ("Major") bring a motion for an order certifying this action as a class proceeding pursuant to s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"). The defendant, the Attorney General of Canada ("Canada") opposes the motion.

[2] For the reasons that follow, I grant the motion for certification.

Overview

[3] Under s. 48(1)(a) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the "Act"), inmates in federal penitentiaries may be strip searched "without individualized suspicion",[1] on a "routine" basis, in "prescribed circumstances".

[4] Under s. 48(1)(a) of the Act, the "prescribed circumstances" are limited to "situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body".

[5] The prescribed circumstances for suspicionless strip searches under s. 48(1)(a) of the Act are set out at s. 48 of the *Corrections and Conditional Release Regulations*, SOR/92-620 (the "Regulations"). Under ss. 48(a) and (c) of the Regulations, some of the prescribed circumstances for suspicionless strip searches include (i) leaving a penitentiary, (ii) entering or leaving a "secure area"[2] (iii) transferring from one penitentiary to another,[3] and (iv) entering a family-visiting area[4] (the "Impugned Situations").

[6] The plaintiffs are inmates at federal penitentiaries. Correctional Services of Canada ("CSC") is the federal government department that manages the penitentiaries and is responsible for the care and custody of inmates serving sentences of two or more years.

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[1] I use the term "suspicionless" to describe the strip searches permitted "without individualized suspicion" under s. 48(1)(a) of the Act.

[2] A "secure area" is defined under s. 2 of the Regulations as any area in a penitentiary "that is designated by the institutional head [commonly referred to as the warden] by means of institutional standing orders for that purpose".

[3] Transfers from one penitentiary to another are not a defined prescribed circumstance, but are subject to suspicionless strip searches under s. 48(a) of the Regulations which permit such searches to take place when an inmate is "leaving a penitentiary".

[4] A "family-visiting area" subject to s. 48(c) of the Regulations is a separate area from an "open visiting area". The latter is subject to s. 48(b) of the Regulation which permits suspicionless strip searches when leaving the open visiting area.

[7] The plaintiffs allege that the "Impugned Searches", i.e., those suspicionless strip searches conducted under the impugned provisions of ss. 48(a) and (c) of the Regulations (the "Impugned Regulations"),[5] (i) breach ss. 8 and 7 of the *Canadian Charter of Rights and Freedoms* and (ii) engage the torts of false imprisonment, battery, assault, and intrusion upon seclusion.

[8] The *Charter* breaches are based on two submissions.

[9] First, the plaintiffs submit that the Impugned Searches breach s. 8 of the *Charter* because they are not authorized by law. The plaintiffs submit that the Impugned Regulations are *ultra vires* s. 48(1)(a) of the Act since they do not arise under "situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body" and as such are not "prescribed circumstances".

[10] In particular, the plaintiffs submit that the Impugned Searches are unlawful because they arise when an inmate is (i) *leaving* the general prison population, and thus does not meet the "likelihood of access to contraband" test required under s. 48(1)(a) of the Act, or (ii) entering or leaving a "secure area" which is (a) a matter of designation solely for the warden, (b) not set out in any prescribed manner, and (c) not limited to the statutory "likelihood of access to contraband" requirement.

[11] In the alternative that the Impugned Regulations are found to be *vires* s. 48(1)(a) of the Act, the plaintiffs submit that both s. 48(1)(a) of the Act and the Impugned Regulations (i) breach s. 8 of the *Charter* as "unreasonable" searches and (ii) breach s. 7 of the *Charter* as an infringement of the inmates' right to liberty and security of the person not in accordance with the principles of fundamental justice.

[12] In support of the alternative arguments, the plaintiffs submit that the Impugned Searches are overbroad, unnecessary for security in those situations, and that any benefits of such strip searches in those situations are outweighed by the harm of their "routine" and suspicionless nature.

[13] The plaintiffs claim damages under s. 24(1) of the *Charter* for the breaches alleged above.

[14] The plaintiffs also claim damages in tort arising from the Impugned Searches. The plaintiffs allege "trespass to the person", and rely on the torts of:

(i) false imprisonment, since the inmates were allegedly detained by CSC staff intentionally and without lawful authority,

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[5] The plaintiffs do not challenge the suspicionless strip searches permitted under ss. 48(b) or (d) of the Regulations, nor any other suspicionless strip searches permitted under ss. 48(a) or (c) of the Regulations.

(ii) battery, since CSC staff intentionally either touched the inmates or required the inmates to touch parts of their body, without lawful authority, and

(iii) assault, since CSC staff intentionally created the apprehension of imminent harm or offensive conduct without lawful reason.

[15] The plaintiffs also claim damages for the tort of intrusion upon seclusion. They allege that the CSC intentionally invaded the seclusion or private affairs of the inmates by requiring them to strip naked in front of the correctional staff without lawful authority.

[16] The plaintiffs further seek (i) an award of aggregate damages under s. 24 of the *CPA*, (ii) punitive damages, and (iii) any declarations which would be warranted, including the expungement of records arising from the alleged illegal searches.

[17] The plaintiffs allege that a six-year federal limitation period applies under s. 32 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 ("*CLPA*"), since the conduct occurred across Canada and as such allegedly arose "otherwise than in a province". Consequently, the proposed class includes approximately 50,000 inmates in federal penitentiaries between March 13, 2014[6] until the date of certification.

[18] The proposed class would also include inmates in federal penitentiaries between June 18, 1992 (when the Act first received royal assent) and March 13, 2014. However, those inmates could bring claims only if they could toll the limitation period based on discoverability.

[19] The plaintiffs estimate that there have been at least 500,000 Impugned Searches during the six-year *CLPA* limitation period.

[20] Canada raises 16 objections to certification. Canada challenges each requirement under s. 5 of the *CPA*. In brief, Canada submits:

(i) Six objections under s. 5(1)(a) of the *CPA* that the pleadings disclose no cause of action for (a) the claim under s. 8 of the *Charter* (proposed common issue ["PCI"] 1), (b) the claim under s. 7 of the *Charter* (PCI 2)[7], (c) the claim for damages under s. 24(1) of the *Charter* (PCI 6),[8] (d) the claims in tort for trespass to the

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[6] The claim was filed on July 4, 2020 with federal limitation periods tolled back to March 13, 2020 and provincial limitation periods tolled back to March 16, 2020 due to the COVID-19 pandemic: see *Time Limits and Other Periods Act (COVID-19)*, S.C. 2020, c. 11, s. 11, s. 6(1); *Limitation Periods*, O. Reg. 73/20, s. 1.

[7] Canada also submits that there is no common issue pleaded with respect to whether any breach of s. 7 is justified under s. 1 of the *Charter* (PCI 3) since Canada alleges no cause of action is pleaded under s. 7.

[8] Canada's challenge of PCI 6 also includes a brief submission that the plaintiffs' claim for punitive damages (PCI 8) discloses no cause of action for the same reasons as PCI 6.

person (PCI 4a), (e) the claim in tort for intrusion upon seclusion (PCI 4b) and (f) the claims for certain administrative law declarations and orders (PCIs 9-10).[9]

(ii) Three objections under s. 5(1)(b) of the *CPA* that the class should (a) be limited to those inmates in penitentiaries during the two-year period prior to the issuance of the claim,[10] (b) exclude inmates who were not subject to the Impugned Searches, and (c) exclude inmates who did not suffer "recognizable and compensable psychological and emotional harm".

(iii) Five objections under s. 5(1)(c) of the *CPA* that there are no common issues with respect to PCIs raising (a) the alternative *Charter* claims and s. 1 analysis (PCIs 1b, 2 and 3), (b) the four tort claims (PCI 4), (c) the claim for damages under s. 24(1) of the *Charter* (PCI 6), (d) the claim for aggregate damages (PCI 7), and (e) the availability of declarations and orders seeking to expunge records (PCIs 9-10).[11]

(iv) One objection under s. 5(1)(d) of the *CPA* that the proposed class action is not the preferable procedure.

(v) One objection under s. 5(1)(e) of the *CPA* that the plaintiffs have not presented a workable litigation plan.[12]

[21] For the reasons that follow, I reject Canada's objections and certify the proposed class action.

THE RELEVANT LEGISLATION AND IMPUGNED SEARCHES

[22] The relevant provisions for the Impugned Searches are s. 48(1) of the Act and s. 48 of the Regulations. Section 48(1) of the Act provides:

> (1) Subject to subsection (2)[13], a staff member of the same sex as the inmate may conduct a routine strip search of an inmate, without individualized suspicion,

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[9] For ease of reference, all PCIs (taken *verbatim* from Schedule C of the plaintiffs' factum) are listed as Schedule "A" to these reasons.

[10] See footnote 6 above.

[11] Canada acknowledged at the hearing that the following PCIs raise common issues: (i) whether the Impugned Regulations are *ultra vires* s. 48(1)(a) of the Act (PCI 1a), (ii) the applicable limitation period (PCI 5), (iii) whether the court can order a declaration regarding the lawfulness of the Impugned Searches (one of the declarations requested under PCI 9), and (iv) whether the defendants should pay pre-judgment or post-judgment interest, and at what rate (PCI 11).

[12] Canada does not oppose either plaintiff as an adequate representative, subject to the issue of the litigation plan.

[13] Section 48(2) of the Act permits a body scan to be conducted instead of the suspicionless strip searches under s. 48(1). This provision is not at issue in the action.

> (a) in the prescribed circumstances in situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body; or
>
> (b) when the inmate is entering or leaving a structured intervention unit.[14] [Emphasis added.]

[23] Section 48 of the Regulations provides:

> A staff member of the same sex as an inmate may conduct a routine strip search of the inmate where
>
> (a) the inmate is entering[15] or leaving a penitentiary or a secure area;
>
> (b) the inmate is leaving the open visiting area of a penitentiary;
>
> (c) the inmate is entering or leaving the family-visiting area of a penitentiary; or
>
> (d) the inmate is leaving a work area in a penitentiary, if the inmate has had access to an item that may constitute contraband and that may be secreted on the inmate's body. [Emphasis added.]

[24] The emphasized portions above set out the Impugned Regulations at issue in the proposed class action.[16]

[25] Section 49(3) of the Act is not at issue in the proposed class action. Nevertheless, I set it out below as the plaintiffs contrast the Impugned Searches (which are suspicionless) against suspicion-based strip searches under s. 49(3), which provides:

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[14] Section 48(1)(b) of the Act used the term "segregation area" rather than "structured intervention unit" until November 29, 2019 when the Act was amended pursuant to *An Act to amend the Corrections and Conditional Release Act and another Act*, S.C. 2019, c. 27 to, *inter alia*, "eliminate the use of administrative segregation and disciplinary segregation" and "authorize the Commissioner to designate a penitentiary or an area in a penitentiary as a structured intervention unit for the confinement of inmates who cannot be maintained in the mainstream inmate population for security or other reasons". The difference is not material to certification.

[15] The impugned searches under s. 48(a) of the Regulations are those conducted when an inmate is *entering or leaving* a secure area, but only those conducted when *leaving* a penitentiary. Suspicionless strip searches under s. 48(a) when an inmate is entering a penitentiary are not challenged.

[16] The portions of the Impugned Regulations related to leaving a penitentiary and entering or leaving any "secure area" designated by a warden under s. 48(a) came into force on June 19, 2015 when the Regulations were amended pursuant to the *Regulations Amending the Corrections and Conditional Release Regulations*, SOR/2015-171 to define "secure area" and replace, *inter alia*, "the inmate is entering or returning to a penitentiary" with the current formulation under s. 48(a). Consequently, three of the four Impugned Situations (i.e., (i) leaving a penitentiary, (ii) entering or leaving a "secure area" and (iv) transferring from one penitentiary to another) arose as of the enactment of the amendments in 2015.

> (3) Where a staff member
>
> (a) believes on reasonable grounds that an inmate is carrying contraband or carrying evidence relating to a disciplinary or criminal offence, and that a strip search is necessary to find the contraband or evidence, and
>
> (b) satisfies the institutional head that there are reasonable grounds to so believe,
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> a staff member of the same sex as the inmate may conduct a strip search of the inmate.

[26] Section 40(a) of the Act provides that an inmate commits a disciplinary offence who "disobeys a justifiable order of a staff member". Under s. 41(2) of the Act, a disciplinary offence can result in an inmate being charged with a "minor" or "serious" disciplinary offence. Disciplinary offences can be taken into consideration for security classification and eligibility for parole.

[27] The plaintiffs do not challenge all strip searches in a penitentiary. They do not challenge either:

(i) strip searches under s. 49(3) of the Act, pursuant to which CSC staff may strip search an inmate[17] if they have "reasonable grounds" to believe that the inmate is carrying contraband. This may occur anywhere in a penitentiary as long as individualized grounds for a strip search exist; or

(ii) strip searches under the non-impugned subsections of s. 48 of the Regulations.

[28] Consequently, the Impugned Searches are as follows:

(i) Leaving a penitentiary: This includes final release from a prison and leaving for an escorted absence (e.g., for medical reasons) or an unescorted absence.

(ii) Entering or leaving a "secure area".[18]

(iii) Entering a family-visiting area: A family-visiting area is a structure inside the perimeter of the institution where an inmate can meet privately with family to help them keep and strengthen family and community ties.

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[17] In their submissions, the plaintiffs refer to the members of the proposed class as "prisoners" in a "prison" or "penitentiary". Canada refers to the members of the proposed class as "inmates" at "correctional institutions". I use these terms interchangeably in these reasons.

[18] See footnote 2 above for the definition of "secure area" pursuant to s. 2 of the Regulations, and the more detailed description of the term at para. 112(vi) below.

(iv) Transferring to one penitentiary from another: This describes situations where an inmate is transferred from one institution to another by penitentiary authorities.

FACTS

The evidence at the hearing

[29] The plaintiffs filed affidavit evidence from Farrell and Major, who set out their experiences as inmates subjected to the Impugned Searches.

[30] The plaintiffs filed affidavit evidence from Allerie Laity ("Laity") who is not a representative plaintiff but provided evidence as a former inmate and member of the proposed class and was subject to the Impugned Searches.

[31] The plaintiffs also filed an affidavit from Dr. Kelly Hannah-Moffat, which attached her expert report as to (i) "barriers to access to justice for prisoners, especially in relation to litigation", (ii) "barriers that result from prisoners' limited agency and fears of reprisal", and (iii) whether "strip searches cause harm" and if so, to "describe these harms".

[32] Finally, the plaintiffs filed an affidavit from Julia Sande ("Sande"), who was an articling student at the Canadian Civil Liberties Association ("CCLA")[19] at the time she affirmed her affidavit. Sande attached documents including CSC's own publicly available documents and reports from the Office of the Correctional Investigator ("OCI"). The Correctional Investigator is mandated under s. 167(1) of the Act to, *inter alia*, investigate and report on behalf of inmates in federal penitentiaries and to act in an ombudsperson capacity.

[33] Canada filed an affidavit from Charlene Byfield ("Byfield"), Assistant Warden at Grand Valley Institution for Women ("GVI") in Kingston, Ontario. Byfield's evidence reviewed issues such as access to contraband in women offender institutions ("WOIs") and how the Impugned Searches take place in WOIs.

[34] Canada also filed an affidavit from Miguel Costa ("Costa"), the Regional Intelligence Coordinator with the Preventive Security & Intelligence Unit of the CSC at Ontario Regional Headquarters in Kingston, Ontario, who provided evidence as to the structure of the CSC and how strip searches (including the Impugned Searches) are conducted at penitentiaries.

The parties

<u>The plaintiffs</u>

[35] Farrell is a former inmate. He was subject to both sexual and physical abuse as a child.

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[19] Ms. Deshman represents the CCLA as co-counsel on this motion.

[36] Major is a former inmate. She was subject to sexual abuse as a child and as an adult and domestic physical abuse as an adult.

The CSC[20]

[37] The CSC is the federal government department responsible for the care and custody of inmates serving sentences of two or more years.

[38] The CSC operates under three levels of management: National Headquarters, Regional Headquarters, and institutional/district parole offices.

[39] The CSC manages penitentiaries and other correctional institutions which are categorized by security type (maximum, medium or minimum security, multilevel and clustered) and range in size, infrastructure, control measures, offender population, security strategy and culture. All WOIs are multilevel institutions designated to meet the needs of women inmates of different security classifications.

Barriers to access to justice for prisoners

[40] Dr. Hannah-Moffat provided evidence as to the barriers to access to justice for prisoners. I summarize that evidence below.

[41] Prisoners face major barriers to accessing justice and are disproportionately impoverished, victimized, sexually abused, discriminated against, mentally ill, disabled, undereducated, legally self-represented and/or illiterate.

[42] Prisoners are a highly disadvantaged group. Over 70 percent of federal prisoners have a mental health disorder. Approximately 25 percent of male prisoners have a cognitive deficit. Approximately 54 percent of federal prisoners have an education level that is lower than grade 10. Dr. Hannah-Moffat states that "[p]risoners face numerous barriers to accessing justice, such as a limited ability to communicate with people outside of the prison, fear of reprisal from correctional staff and demographic characteristics that include high levels of poverty, high rates of mental health diagnoses and disability, and low levels of education".

[43] Further, Dr. Hannah-Moffat's evidence is that many prisoners are not aware of their rights or the legal mechanisms available to them to remedy violations. They generally have restricted or no access to the internet and computers and limited access to telephones, making it difficult for them to contact legal counsel or initiate the legal aid application process. The Correctional Investigator described the prisoners' access to information and technology as "backward and obsolete".

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[20] In these reasons, I refer to Canada as the party appearing before the court. While the CSC is not a party, it is the federal government department whose conduct is at issue in the present case.

[44] The Correctional Investigator found that prisoners can face reprisals for attempting to access justice which include being labelled as "difficult to manage" which can affect their security classification and eligibility for early release, limit access to telephones, and lead to removal from prison jobs, transfer to another institution, tampering with their mail, or threats of violence.

[45] The proposed class also contains a disproportionate number of Indigenous and racialized individuals, who face additional intersecting barriers to accessing justice. Indigenous people are over six times more likely than the rest of the Canadian population to be incarcerated in a federal prison and Black Canadians are three times more likely.

The accessibility, prevention, and detection of contraband

[46] The presence and trade of contraband constitutes a risk to the safety and security of inmates, staff and the public due to its dangerous nature, scarcity, and substantial increase in value. Pursuant to s. 2 of the Act, contraband includes drugs and other intoxicants, weapons, and any other items that could jeopardize the security of an institution or the safety of persons.

[47] Contraband is accessible in locations in a penitentiary where inmates or members of the public (such as institutional administrators, correctional staff, trade contractors, volunteers, food suppliers, visitors, and others) could deposit, conceal, or otherwise make contraband available to other inmates.

[48] Contraband can also be accessible when prisoners have contact with the outside world through family and community visits, in-house and external learning programs, and treatment and other programs assisting in their rehabilitation during their incarceration.

[49] WOIs have increased accessibility to contraband due to factors such as more interaction between minimum and medium security inmates, more urban locations closer to residential and commercial buildings and different technical building criteria such as the structure of the perimeter fences and differing security measures.

The conduct and effect of strip searches

[50] The effect of strip searches is a matter of dispute between the parties.

[51] The plaintiffs and Laity gave evidence consistent with the comments of the Supreme Court in *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679, at para. 90, that strip searches are (i) "inherently humiliating and degrading for detainees regardless of the manner in which they are carried out" and (ii) "one of the most intrusive manners of searching and also one of the most extreme exercises of police power": at para. 89, citing *R. v. Flintoff* (1998), 126 C.C.C. (3d) 321 (Ont. C.A.), at para. 24.

[52] The defendants do not agree that strip searches cause the above effects. Byfield rejected that description when it was put to her on cross-examination.

[53] The manner in which suspicionless strip searches are conducted is not generally in dispute.

[54] Individuals who are strip searched must remove their clothes and show all parts of their naked body to guards. Laity described the process as follows:

> It is hard to explain in words how demeaning strip searches are. For example, you cannot take off your clothes in private or at your own pace. You are typically told to take them off one by one and to hand them to the guards piece by piece. It is like a strip tease.
>
> Also, when you are strip searched you instinctively try to cover your breasts and vagina with your hands and arms. You are not allowed to do that. You must hold your arms out straight.

[55] During strip searches, inmates are generally required to:

(i) turn around, bend over, spread their buttocks, and allow an inspection of their anus by a guard with a flashlight,

(ii) touch and move around their penis to allow inspection under and next to it,

(iii) lift their breasts to allow inspection under them,

(iv) undergo a detailed visual inspection of their vagina or penis,

(v) lift up rolls of fat to allow inspection in any crevasses,

(vi) remove dentures, and

(vii) squat and cough.

[56] Farrell's evidence is that he "would dread each strip search before it occurred". He states that:

> The strip searches I endured were highly invasive, humiliating, and degrading. Each time I would feel a flood of negative emotions as I was forced to remove each piece of clothing one by one and then stand naked. These feelings would get more intense when I was forced to bend over and spread open my buttocks so staff could inspect my anus. I would then be ordered to touch, lift, and move my penis so that staff could look under and around it. You feel extremely vulnerable and violated.
>
> Strip searches are particularly traumatic for me because of the sexual abuse I suffered as a child. When I was forced to stand naked in front of other men, I relived the emotions of being abused as a child. For example, I would feel powerlessness, humiliation, and shame. These emotions occurred immediately

> and lingered long afterwards, with different negative feelings coming into my mind at different times.

[57] Major's evidence is that strip searches took place "in brightly lit places" and caused her to "feel extremely vulnerable and exposed doing these things against your will in front of two fully-clothed guards".

[58] Major describes her trauma from a strip search as follows:

> These strip searches were particularly traumatic for me because of the sexual abuse I suffered as a child and an adult. As I would undress and stand naked, I would avoid all eye contact and stare at the ceiling. My heart would race as intense emotions washed over me. I would feel completely worthless and unable to believe what was happening to me. I would try to take myself out of my body and imagine I was not there, reverting to the coping mechanisms I used when my husband sexually abused me. These strip searches have caused deep emotional scars and exacerbated my pre-existing trauma.

[59] Major gave evidence that women who are strip-searched "are forced to undergo the indignity of removing soiled tampons while being watched." Canada challenges this evidence. It is a matter of dispute between the parties.

[60] Major's evidence that her trauma was increased due to a history of sexual abuse can be considered in light of the evidence from the Correctional Investigator that: (i) over two-thirds of female prisoners have been sexually abused; (ii) over 85 percent of female prisoners have been physically abused; and (iii) practices such as strip searches often reproduce traumatic events and exacerbate symptoms of previous traumas.

[61] Laity's evidence is that "[g]uards will sometimes make fun of prisoners when we are being strip searched. When you are already feeling so vulnerable, it hurts. I remember one girl being made fun of for hemorrhoids she got while giving birth."

[62] There is a dispute on the evidence as to whether CSC staff will physically conduct a strip search if an inmate refuses to strip naked for inspection. It is not necessary to resolve this factual dispute for the purpose of the certification motion. However, the plaintiffs rely on "Commissioner's Directive 566-7", which requires a "Search Log" and a "Post-Search Report" to be prepared for a "routine strip search in which the use of force occurred". Consequently, there is some evidence to support the plaintiffs' position.

Number of Impugned Searches

[63] Based solely on the 660,000 permissions which have been granted to leave prison between 2014 and 2022 (primarily through over 570,000 permits for escorted temporary absences such as medical leave), a conservative estimate is that there have been at least half a million Impugned Searches within the six-year federal limitation period.

[64] This is a conservative estimate given that other instances of strip searches in the Impugned Situations (such as leaving the prison for release, medical visits, transfers, and programing such as alcoholics anonymous meetings) are not captured by the data provided by Canada for the purposes of this motion.

[65] Canada continues to strip search inmates in the Impugned Situations, and therefore the number of allegedly illegal strip searches is continually growing.

The discretion to conduct a suspicionless strip search

[66] There is a dispute on the evidence as to whether CSC staff exercise discretion to conduct a suspicionless strip search in any of the situations permitted under s. 48 of the Regulations.

The evidence relied upon by the plaintiffs

[67] The plaintiffs led evidence that there was no discretion exercised in the Impugned Searches.

[68] Laity's evidence was that "I was strip searched twice every time I had a medical visit outside the prison, once when leaving the prison and once when returning" and "each time I went out for weekly Alcoholics/ Narcotics Anonymous meetings I was strip searched both on the way out and on the way back in".

[69] Farrell's evidence was that: "I was strip searched twice every time I was transferred from one prison to another".

[70] Major's evidence was that: "I was strip searched when I left prison to attend medical appointments, to transfer to other prisons, and on release".

[71] A report of the OCI details how "suspicionless strip searches are either carried out 'every time' or on a 'random' basis depending on the situation in question, not based on an on-the-ground situational or contextual analysis." The plaintiffs also rely on an internal CSC memorandum from National Headquarters which appears to confirm the OCI report.

[72] Further, on cross-examination, Costa could not indicate any pages in the CSC's training documents (i) stating that officers must decide whether a suspicionless strip search should be carried out in the authorized circumstances, (ii) providing any training on such a decision, or (iii) enumerating any factors to consider in making such a decision.

[73] The plaintiffs submit that the above evidence supports a finding that the Impugned Searches occur on a routine basis without an assessment of individualized contextual factors.

The evidence relied upon by Canada

[74] Costa set out the relevant evidence in his affidavit, which I summarize below.

[75] Canada relies on Commissioner's Directive 566-7 which requires that all searches in an institution are to be conducted in accordance with the institution's Institutional Search Plan ("ISP"). The primary focus of an ISP is to mitigate access to contraband. ISPs provide staff with an outline of the nature, location, frequency, and authorization requirements for all searches conducted in a specific institution.

[76] The requirements of each ISP are tailored to the needs of each institution following a risk-based assessment of the safety and security threats present in each institution at a specific point in time.

[77] ISPs are consistently reviewed and amended to respond to the evolving safety and security threats at a particular institution at a particular time. Institutions are required to review their ISPs on an annual basis. However, additional reviews may be required at other points of the year based on contraband eradication, drug intervention and/or new, emerging safety and security issues at that particular time.

[78] In addition, the likelihood of access to contraband within an institution depends on various factors, such as the security level of the institution, the level of movement of inmates, if the institution is a WOI, and any areas of concern that are specific to the particular institution.

[79] An on-the-ground decision to perform a suspicionless strip search is a site-specific decision that considers the various surrounding circumstances. An ISP does not prescribe routine strip searches; rather, an ISP authorizes them. They are not conducted automatically nor systematically. They are used only when necessary, having regard to the context. CSC staff assess the situation and contextual factors to determine whether to conduct a search that is permitted by the ISP.

[80] WOIs operate differently due to their gender-based, trauma-informed approach to incarceration. With respect to suspicionless strip searches, the WOIs incorporate a tool that randomly selects women for a strip search (sometimes referred to as the "random strip search calculator") into their search procedures to limit the amount of suspicionless strip searches that take place. The use of such a tool is designated in the requisite ISP.

[81] Use of the random strip search calculator only occurs in the WOIs where a primary worker is in a situation where a suspicionless strip search is authorized pursuant to the ISP. The ISP does not direct the tool to be used.

ANALYSIS

[82] The parties do not dispute that "[t]he rule of law must run within penitentiary walls": *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, at p. 622; *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809, at para. 25.

[83] Similarly, the court held in *Solosky v. R.*, [1980] 1 S.C.R. 821, at para. 34, that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law."

[84] I first address the general principles governing certification. I then consider each of the objections raised by Canada.

General principles governing certification

[85] The general principles governing certification are not in dispute. I adopt a concise summary of the law from Perell J. in *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, at para. 81, rev'd on other grounds, 2020 ONSC 913 (Div. Ct.):

> For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers. On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding. The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources. [Footnotes omitted.]

[86] Similarly, the requirements to establish some basis in fact for the existence and commonality of the proposed common issues are not in dispute. In *Price*, Perell J. held, at paras. 82-85:

> The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim. However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action. In the context of the common issues criterion, the "some basis in fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.
>
> The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case. In particular, there must be a basis in the evidence to establish the existence of common issues. To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.
>
> The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification. Certification will be denied if there is an

> insufficient evidentiary basis for the facts on which the claims of the class members depend.
>
> On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact. The evidence on a motion for certification must meet the usual standards for admissibility. While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge. [Footnotes omitted.]

[87] While the some-basis-in-fact test is a low evidentiary standard, the court has an important gate-keeping function. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, the court held, at paras. 103-04:

> [I]t is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" … nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny….

[88] It is not the role of the court to assess the merits of the plaintiffs' claim on a certification motion. As Strathy J. (as he then was) stated in *Penney v. Bell Canada*, 2010 ONSC 2801, at para. 45, "[t]here is no assessment of the merits at the certification stage. Certification is a procedural motion focusing on the form of the action."

[89] I now consider each of the objections raised by Canada, which I summarized at para. 20 above.

The s. 5(1)(a) objections

[90] The applicable test under s. 5(1)(a) of the *CPA* is summarized by Perell J. in *Price*, at para. 87:

> In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed. [Footnotes omitted.]

[91] Canada raises six objections under the s. 5(1)(a) requirement. Canada submits that the pleadings disclose no cause of action for (i) the claim under s. 8 of the *Charter*, (ii) the claim under s. 7 of the *Charter*,[21] (iii) the claim for damages under s. 24(1) of the *Charter*,[22] (iv) the claims in tort for trespass to the person, (v) the claim in tort for intrusion upon seclusion and (vi) claims for certain administrative law declarations.

[92] In effect, Canada submits that it is plain, obvious, and beyond reasonable doubt that the plaintiffs cannot succeed on any of their claims. I address each of these objections below.

Objection 1: The claim under s. 8 of the *Charter* (PCI 1)

(i) The alleged breach of s. 8 of the *Charter*

[93] PCI 1[23] raises two bases for the alleged breach of s. 8 of the *Charter*.

[94] First, the plaintiffs submit that the Impugned Regulations are *ultra vires* the Act, and as such are "unlawful" searches which breach s. 8 (PCI 1a). The plaintiffs make two submissions in support of the "unlawful" claim:

(i) The Impugned Situations are not those in which "the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body" (as required under s. 48(1)(a) of the Act).

(ii) The entering or leaving of a "secure area" is not a "prescribed" circumstance under s. 48(1)(a) of the Act since the designation of a secure area is unlawfully delegated to the discretion of the warden, and, as such, secure areas vary between institutions and are subject to change at any time without any prescribed regulation.

[95] In the alternative that the Impugned Regulations are *vires* the Act, the plaintiffs allege that both the Act and the Impugned Regulations breach s. 8 because they are unreasonable (PCI 1b). The plaintiffs submit that either (i) "[s]uspicionless strip searches in the impugned situations are not necessary for safety, security, or other pressing objectives" or (ii) in the further alternative, "if suspicionless strip searches provide any benefits in the impugned situations, those benefits are far outweighed by the attendant violations and could be achieved through less intrusive means and through more-highly-circumscribed authorizations".

[96] Canada submits that neither of the plaintiffs' s. 8 claims discloses a cause of action.

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[21] This includes the s. 1 analysis corollary to the s. 7 analysis.

[22] Canada submits briefly under this objection that the claim also does not disclose a cause of action for punitive damages.

[23] As I set out at footnote 9, a list of all the PCIs in this certification motion is found at Schedule "A" to these reasons.

[97] Consequently, I review the applicable law under s. 8 and the pleadings to consider whether it is beyond reasonable doubt that the s. 8 claims will fail.

(ii) The applicable law governing s. 8 of the *Charter*

[98] Section 8 guarantees the right to be secure against unreasonable search or seizure. This right arises where there is a reasonable expectation of privacy. Section 8 protects three kinds of privacy interests – personal, territorial, and informational: see *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at paras. 18, 20.

[99] In *Tessling*, the court held that "privacy of the person perhaps has the strongest claim to constitutional shelter because it protects bodily integrity": at para. 21.

[100] In *R. v. Stillman*, [1997] 1 S.C.R. 607, the court held, at para. 42, citing *R. v. Poheretsky*, [1987] 1 S.C.R. 945, at para. 5, *per* Lamer J. (as he then was), that "a violation of the sanctity of a person's body is much more serious than that of his office or even of his home."

[101] Individuals maintain a reasonable expectation of privacy over their naked bodies when in prison. In *R. v. Noel*, 2015 ONSC 2140, 79 M.V.R. (6th) 245, Goldstein J. held, at para. 45, that "there is a reduced objective expectation of privacy in a jail cell. That does not mean that there is no expectation of privacy. The police have an obligation to respect the privacy of prisoners."

[102] Section 8 rights of inmates are subject to the principle in *Solosky* that "a person confined to prison retains all of his civil rights, other than those expressly or impliedly taken from him by law": at para. 34.

(iii) The *Collins* test

[103] The parties agree that the test set out in *R. v. Collins*, [1987] 1 S.C.R. 265 sets out the requirements for a search to comply with s. 8 of the *Charter*.

[104] The court in *Collins* held that once a reasonable expectation of privacy has been made out, the search is presumptively unreasonable, and the Crown has the burden of demonstrating that a warrantless search was reasonable by establishing that: (i) the search was authorized by law; (ii) the law itself is reasonable; and (iii) the manner in which the search was carried out was reasonable: at paras. 22-23.

[105] Whether a law (or regulation) authorizing a search is reasonable under s. 8 (the second branch of the *Collins* test) requires the court to balance the importance of the state objective which the law seeks to achieve against its impact on the individual's right to be free from unreasonable search and seizure: see *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60; *Goodwin v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 46, [2015] 3 S.C.R. 250, at paras. 55-56. This balancing exercise must consider the context in which the search takes place as different contexts will engage different expectations of privacy: see *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at paras. 24-27; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, at paras. 49-64; *Goodwin*, at para. 57.

[106] Relevant considerations for the reasonableness of legislation authorizing a search include "the nature and the purpose of the legislative scheme …, the mechanism … employed and the degree of its potential intrusiveness[,] and the availability of judicial supervision": *Goodwin*, at para. 57, citing *Del Zotto v. Canada*, [1997] 3 F.C. 40 (C.A.), *per* Strayer J.A. in dissenting reasons (ellipsis and brackets in original), aff'd [1999] 1 S.C.R. 3.

[107] There is a diminished privacy interest in correctional settings: see *R. v. Chan*, 2005 ABQB 615, 387 A.R. 123, at paras. 43, 183. Nevertheless, searches must still meet the *Collins* test since the rule of law continues to run "within penitentiary walls": *Martineau*, at p. 622.

(iv) Application of the law to the present case

[108] The plaintiffs submit that the Impugned Searches breach s. 8 of the *Charter* based on the first two requirements of the *Collins* test: (i) the Impugned Searches are not authorized by s. 48(1)(a) of the Act and (ii) in the alternative, s. 48(1)(a) of the Act and the Impugned Regulations are not reasonable.

[109] The plaintiffs do not allege a *Charter* breach based on the third branch of the *Collins* test, i.e., the plaintiffs do not submit that the manner in which the Impugned Searches were carried out was unreasonable.

[110] I first consider the *ultra vires* (or "unlawful") claim and then address the "unreasonableness" claim, both arising under the *Collins* test.

(a) The ultra vires claim (PCI 1a)

[111] The plaintiffs plead that the Impugned Regulations allow for suspicionless strip searches to be conducted in "four situations where the individual has *not* been in a place where there was a likelihood of access to contraband" (emphasis in original).

[112] It is not beyond reasonable doubt that the *ultra vires* claim will fail at a common issues hearing. In particular, the following arguments raised by the plaintiffs establish a cause of action that the Impugned Regulations are unlawful:

(i) Suspicionless strip searches under s. 48(1)(a) of the Act can only be conducted in "prescribed circumstances" and "must be limited to situations in which the inmate has been in a place where there was a likelihood of access to contraband that is capable of being hidden on or in the body".

(ii) In the Impugned Situations, the inmate being searched is either (a) entering a family-visiting or "secure area", (b) leaving the penitentiary for release or escorted or unescorted absences, or (c) leaving a "secure area". If all such Impugned Situations were found to meet the criteria of "likelihood of access" in s. 48(1)(a) of the Act, then the entire prison would be "a place where there was a likelihood of access to contraband".

(iii) Canada's broad interpretation of the "likelihood of access" requirement is inconsistent with the overall scheme of the search provisions in the Act. Section 48 of the Act is intended to apply only in limited situations because it permits suspicionless strip searches. In contrast, s. 49(3) of the Act authorizes strip searches in any location, but only where there are reasonable grounds to believe the person is carrying contraband. The restrictions in s. 48(1)(a) of the Act are important as they circumscribe this otherwise highly permissive and indiscriminate power to strip search on a suspicionless basis.

(iv) Canada's interpretation is also inconsistent with s. 48(1)(b) of the Act, which specifically authorizes suspicionless strip searches when entering or leaving a structured intervention unit (a confinement area to keep certain inmates apart from the rest of the inmate population).[24] This is the only suspicionless strip search situation directly authorized by the Act itself. This was presumably done because the drafters thought this situation could not be captured under the more general wording in s. 48(1)(a) relating to access to contraband. It would not be necessary for the legislation to specifically single out entering and leaving a structured intervention unit if all inter-prison movement satisfied the requirement in s. 48(1)(a) that the prisoner be in a place where there was a likelihood of access to contraband.

(v) Canada's interpretation would render the statutory limits on suspicionless strip searches meaningless. Under Canada's approach, any situation where there is a "potential" for access to contraband would meet the "likelihood of access to contraband" test. Since there is such a "potential" anywhere in the general prison population, no limitations would be imposed on regulations permitting suspicionless searches. Costa agreed on cross-examination that conflating "potential" access with the "likelihood" of access would result in a suspicionless strip search "from any place in an institution to any other place in an institution".

(vi) A secure area, according to s. 2 of the Regulations, is any area in a prison "designated by the institutional head by means of institutional standing orders for that purpose." There are no restrictions or criteria in the Regulations on which areas or kinds of areas can be designated by each prison's institutional head (i.e., warden).[25] There are a very wide range of areas that have been so designated, including checkpoints, entire prison sections, and a multitude of prison buildings

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[24] A "segregation area" is now labelled a "structured intervention unit": see footnote 14 above.

[25] Canada relies on Annex G of Commissioner's Directive 566-7 as setting out "Minimum Standards for the Designation of Secure Areas", but there is no regulatory list. Further, the merits of the issues related to (i) the scope of the warden's discretion, (ii) whether the impugned regulation improperly delegates authority, and (iii) whether the Directive, in any event, meets the "likelihood of access to contraband" test required under s. 48(1)(a) of the Act, are not to be determined on this certification motion.

> and areas such as a correctional manager's office, health services, and admissions and discharge. Different prisons have different lists, many of which list numerous areas as secure areas. Therefore, the Regulations purport to fully sub-delegate the power to an administrative official in unpublished internal documentation, to prescribe circumstances in which suspicionless strip searches can occur. This is inconsistent with s. 48(1)(a) of the Act which requires "prescribed circumstances" with the "likelihood of access to contraband" for a suspicionless strip search.

[113] Consequently, assuming the facts pleaded in the plaintiffs' Amended Statement of Claim dated June 27, 2022 (the "Claim") are true, it is not beyond reasonable doubt that the *ultra vires* claim would fail.

(b) The "unreasonableness" claim (PCI 1b)

[114] In their Claim, the plaintiffs plead the factual basis for the "unreasonableness" claim, as an alternative to the *ultra vires* claim:

> In the alternative, if suspicionless strip searches are authorized by law in one or more of the impugned situations, that law is not reasonable and is contrary to s. 8 of the *Charter*. Suspicionless strip searches in the impugned situations are not necessary for safety, security, or other pressing objectives. In the alternative, if suspicionless strip searches provide any benefits in the impugned situations, those benefits are far outweighed by the attendant violations and could be achieved through less intrusive means and through more-highly-circumscribed authorizations.

[115] Canada does not dispute that the second branch of the *Collins* test could apply to determine whether s. 48(1)(a) of the Act or the Impugned Regulations are reasonable. Canada disputes that the test would be met on the facts of the present case. That is a matter for the common issues judge to be determined on the evidence before the court, including expert evidence.

Objection 2: The claim under s. 7 of the *Charter* (PCI 2)

[116] The plaintiffs plead in their Claim that:

(i) They were deprived of the right to life, liberty and security of the person by being detained for the Impugned Searches; and

(ii) Such detention was not in accordance with the principles of fundamental justice, since the Impugned Searches were either (a) unauthorized by law, or (b) in the alternative, breached prohibitions against arbitrariness, overbreadth, gross disproportionality, and procedural fairness.

[117] I first review the applicable law under s. 7 and then apply it to the pleadings in the present case.

(i) The applicable law under s. 7

[118] Section 7 requires a claimant to prove that (i) there has been a deprivation of the right to life, liberty and security of the person; and (ii) the deprivation was not in accordance with the principles of fundamental justice: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350, at para. 12.

[119] The principles of fundamental justice relating to arbitrariness, overbreadth and gross disproportionality have been described by the Supreme Court in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 98, 101 and 120, as follows:

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

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

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

[121] Canada relies on the decision in *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 80, to submit that a separate s. 7 analysis is not necessary when the claim is based on a search or seizure. However, the decision in *Ryan* relates to a request for production of records and does not involve the constitutionality of a search.

[122] In contrast, the court in *R. v. S.F.* (2003), 102 C.R.R. (2d) 288 (Ont. C.J.), at para. 105, held that a s. 8 breach resulting from an unreasonable search is "interrelated" with s. 7 of the *Charter* and constituted a "seepage into the protections given … by both s. 7 and s. 12." The

court held, at para. 106, that "[i]n the inspection of … [a person's] naked body, the police stripped … [that person] of her right to that security of her person."

[123] Similarly, in *Jackson v. Joyceville Penitentiary*, [1990] 3 F.C. 55 (T.D.), the court held, at para. 96, that "[t]o require [a urine sample] or risk punishment for failure to comply with an order, as practice under standing orders for disciplinary proceedings here provides, is also an interference with the liberty of the person."

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

(ii) Application of the law to the facts of the present case

[125] In their Claim, the plaintiffs allege:

> The class members were forced to undergo these strip searches through threats of penalties and potential physical force. Disciplinary charges are laid against those who refuse a strip search. These charges can result in an increased security classification or the loss of residual liberties (e.g. temporary absences, work opportunities, etc.). This reduces opportunities to demonstrate readiness for parole and operates as a factor against parole. An individual who refuses a strip search believing it to be unlawful could be imprisoned for much longer as a result.

[126] The plaintiffs further allege:

> The strip searches were a serious deprivation of liberty, as detailed above (e.g. paras. 31 to 33 above). The strip searches also engaged the right to security of the person. For example, the strip searches violated the class members' physical and psychological integrity and caused significant harm, as discussed herein.
>
> The strip searches were not authorized by law (see e.g. paras. 22 to 24) and therefore were not in accordance with the principles of fundamental justice.
>
> In the alternative, if suspicionless strip searches are authorized by law in one or more of the impugned situations, the resulting deprivation of liberty and security of the person is not in accordance with the principles of fundamental justice.
>
> a. Any authorization of suspicionless strip searches in the impugned situations is arbitrary and has no connection with the legislative purpose. In these situations, there is no likelihood of access to contraband and therefore strip searches are not necessary for safety, security, or other pressing objectives. Unnecessary strip searches run counter to the legislative purposes set out in s. 3 of the *CCRA*, such as rehabilitation, reintegration, and "humane" custody.
>
> b. In addition, and alternatively, the authorization is overbroad and grossly disproportionate. If suspicionless strip searches provide any benefits in the

impugned situations, they are far outweighed by the attendant violations and could be achieved through less intrusive means and more-highly-circumscribed authorizations.

c. The criteria for said deprivation, if it is authorized by the *CCRA*, is too vague and insufficiently specific as it allows strip searches in the relevant situations without any limitation or criteria.

d. The authorization is also procedurally unfair as it provides the class members with no means to challenge strip searches in the prescribed situations and there is no requirement to keep records or to put mechanisms in place to monitor use of this extreme power.

[127] It is not beyond reasonable doubt, based on the above law and accepting the allegations as true, that the s. 7 claim would fail.

[128] The plaintiffs plead the material facts that they were deprived of their right to liberty and security by the Impugned Searches due to the risk of being charged with a disciplinary offence under s. 40(a) of the Act if they refused an impugned search, since those offences could affect parole eligibility and the length of imprisonment.

[129] The plaintiffs allege that the Impugned Regulations are not in accordance with the principles of fundamental justice since they are unlawful. The plaintiffs allege that the Impugned Regulations are not authorized under s. 48(1)(a) of the Act, relying on the same *ultra vires* argument as under the first branch of the *Collins* test for the alleged s. 8 breach (as set out at para. 112 above). For the same reasons, such a pleading discloses a cause of action.

[130] The plaintiffs also allege in their Claim the material facts which could support the alternative claim that if the Impugned Searches were authorized by law, they were not in accordance with the principles of fundamental justice.

[131] Again, Canada does not challenge the legal principles relied upon by the plaintiffs. While Canada denies that the requirements for a s. 7 claim have been established, such position is either based on disputed facts or a disputed interpretation of whether the facts satisfy the settled s. 7 law. Canada's position can be put before the common issues judge. However, on this motion, Canada has not met the high threshold required under s. 5(1)(a) of the *CPA* to satisfy the court that it is beyond reasonable doubt that the plaintiffs' s. 7 claim will fail.

[132] Further, the plaintiffs' allegation that "the infringements cannot be saved by s. 1 of the *Charter*" (PCI 3), is based on the facts pleaded in their Claim.

[133] In particular, the plaintiffs allege, at paras. 44 to 49 of the Claim that (i) "[w]ithout legal authorization, the infringements cannot be saved by s. 1 of the *Charter*"; (ii) "[i]n any event, suspicionless strip searches in the impugned situations run counter to the purposes of the [Act]" which include "rehabilitation of offenders and their reintegration into the community"; (iii) the Impugned Searches increase the likelihood that a released prisoner will reoffend; and (iv) the

Impugned Searches contribute to a negative prison environment and are contrary to requirements under ss. 3(a), 69, and 70 of the Act that prisons be "humane", "healthful" and "free of practices that undermine a person's sense of personal dignity".

[134] If the above allegations are proven, it is not beyond reasonable doubt that a breach of s. 7 would be "prescribed by law" and a "reasonable limit" which can be "demonstrably justified in a free and democratic society", as required under s. 1.

Objection 3: The claim for damages under s. 24(1) of the *Charter* (PCI 6)

[135] Canada submits that it is plain and obvious that the plaintiffs cannot obtain damages under s. 24(1) of the *Charter*. Canada relies on the following submissions:

(i) It is beyond reasonable doubt that Canada has immunity from claims for damages under s. 24(1) of the *Charter*;

(ii) The plaintiffs have not pleaded material facts to justify any exception to Canada's immunity, even if such an exception could apply; and

(iii) *Charter* damages are not available since the plaintiffs have not sought a declaration of unconstitutionality pursuant to s. 52(1) of the *Constitution Act, 1982*.

[136] I address each of these submissions below

(i) Government immunity for claims for damages under the *Charter*

[137] Canada submits that it is immune from *Charter* damages because the Impugned Searches were authorized by a regulation in force throughout the entire time period that delineates the proposed class.

[138] For the purposes of this motion, the only issue is whether it is beyond reasonable doubt that such a defence would succeed. For the reason that follow, I do not find that it is certain that Canada can rely on any alleged immunity.

[139] I first review the applicable law and then apply it to the present case.

(a) The applicable law

[140] Earlier decisions such as *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 81, and *Guimond v. Quebec*, [1996] 3 S.C.R. 347, at para. 19, set out the principle that remedies under s. 52(1) of the *Constitution Act, 1982* should generally not be combined with *Charter* damages.

[141] In *Mackin*, two judges challenged, on grounds relating to judicial independence, amendments to New Brunswick's *Provincial Court Act*, R.S.N.B. 1973, c. P-21 that abolished

the position of supernumerary judge. The government's actions at issue in *Mackin* were the administrative steps required to carry out the amendments.

[142] The court in *Mackin* restricted claims for damages for harm suffered "as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" to situations when the government conduct was shown to be "clearly wrong, in bad faith or an abuse of power": at para. 78 (emphasis added).

[143] More recently, the Supreme Court considered *Mackin* with respect to both the availability of s. 24(1) damages and the scope of the limited immunity.

[144] In *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 the court upheld the decisions of the lower courts to order damages for an unlawful strip search. The court set out the test for awarding *Charter* damages, holding that they are warranted where: (i) a *Charter* right has been breached; (ii) damages would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches; and (iii) there are no "countervailing factors" that defeat the functional considerations that support a damage award and render damages inappropriate or unjust: at para. 4.

[145] Under the third part of the *Ward* test, the court recognized that *Mackin* afforded "some immunity from liability in damages resulting from the conduct of certain functions that only the state can perform": at para. 40. The court adopted the *Mackin* principle but referred to the immunity only in the context of *statutes* validly passed by the legislature. The court held, at para. 41:

> *Mackin* stands for the principle that state action taken under a statute which is subsequently declared invalid will not give rise to public law damages because good governance requires that public officials carry out their duties under valid statutes without fear of liability in the event that the statute is later struck down. The present is not a situation of state action pursuant to a valid statute that was subsequently declared invalid. Nor is the rationale animating the *Mackin* principle — that duly enacted laws should be enforced until declared invalid — applicable in the present situation. Thus, the *Mackin* immunity does not apply to this case. [Emphasis added.]

[146] The court in *Ward* did not extend the limited immunity beyond government action pursuant to *statutes* later found to be unconstitutional. The court held that other situations may arise in which some immunity is appropriate. McLachlin C.J. stated, at para. 42 of *Ward*:

> State conduct pursuant to a valid statute may not be the only situation in which the state might seek to show that s. 24(1) damages would deter state agents from doing what is required for effective governance…. It may be that in the future other situations may be recognized where the appropriateness of s. 24(1) damages could be negated on grounds of effective governance. [Emphasis added.]

[147] The court further held that different immunity thresholds could be applied to different forms of government action. McLachlin C.J. stated, at para. 43 of *Ward*:

> Such concerns may find expression, as the law in this area matures, in various defences to s. 24(1) claims. *Mackin* established a defence of immunity for state action under valid statutes subsequently declared invalid, unless the state conduct is "clearly wrong, in bad faith or an abuse of power" (para. 78). If and when other concerns under the rubric of effective governance emerge, these may be expected to give rise to analogous public law defences. By analogy to *Mackin* and the private law, where the state establishes that s. 24(1) damages raise governance concerns, it would seem a minimum threshold, such as clear disregard for the claimant's *Charter* rights, may be appropriate. Different situations may call for different thresholds, as is the case at private law. [Emphasis added.]

[148] In *Ward*, the court held that the *Mackin* immunity did not apply to the damages claimed for the unlawful search since the claim was not based on "state action taken under a statute which is subsequently declared invalid": at para. 41 (emphasis added).

[149] In *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, 447 D.L.R. (4th) 1, the court did not extend immunity to a government policy which underfunded minority language education. The court upheld the $6 million damage award of the trial judge (and increased damages by $1.1 million). Wagner C.J. held, at para. 177 of *Conseil scolaire*:

> [T]he limited government immunity is justified by the fact that the law is the "source" of duty for the government. The enactment of laws is the fundamental role of legislatures, and the courts must not act so as to have a chilling effect on the legislatures' actions in this regard. When the legislative branch enacts a law, it confers powers on the executive branch. In contrast, a minister's decisions respecting school transportation are not a "source" of duty for the government in the same way as a law. When the executive branch adopts a government policy, it confers powers on itself. In light of this distinction, there is good reason not to extend the limited government immunity to government policies. [Emphasis added.]

[150] The court in *Conseil scolaire* affirmed the reasoning in *Ward* and held that "[o]nly one situation in which the limited immunity applies was recognized in *Ward*, that of government decisions made under laws that were duly enacted but were subsequently declared to be invalid": at para. 169 (emphasis added).

[151] In *Conseil scolaire* the court further held that the limited immunity applied to a "law" because it was "the product of a vote taken by a legislative body" and the result of a "transparent public process that is central to the democratic process": at para. 173.

[152] The court in *Conseil scolaire* adopted the approach of McLachlin C.J. in *Ward* that different thresholds may apply in different situations. Wagner C.J. held, at para. 290, that

"McLachlin C.J.'s explanation that different thresholds may apply for different situations is crucial. The applicability of *Mackin* immunity is not properly determined by applying hard and fast rules. It *may* apply in *many* contexts, but that is not to say that it will necessarily apply with the same force" (emphasis in original).

[153] Finally, the court in *Conseil scolaire* specifically stated that it was not deciding whether (or in what circumstances) a *regulation* might be subject to the limited immunity in *Mackin* (or subject to a different immunity threshold). Wagner C.J. held, at para. 178:

> In my view, there is no need in this case to identify every act that might be considered to be carried out under a law. For example, this appeal does not raise the question whether the government has a limited immunity when it makes orders in council or regulations pursuant to laws that have been duly enacted, and I will take no position on that question. [Emphasis added.]

(b) Application of the law to the present case

[154] Based on the above law, it is not beyond reasonable doubt that limited immunity for unconstitutional government conduct would apply to Canada on the facts of the present case.

[155] First, it is not settled law that regulations are subject to the *Mackin* immunity (or any other level of immunity as discussed in *Ward*). The court in *Conseil scolaire* expressly did not address that issue.

[156] Second, even if immunity could apply to regulations, it is not settled law that such immunity would apply if the impugned regulation was passed contrary to its enabling statute. The plaintiffs submit:

> [T]here are even stronger reasons not to extend the immunity to regulations later found to conflict *with express language in their enabling statute*. The good governance concern in favour of the immunity is that damages could discourage the executive branch from carrying out a law. In the case of a regulation that conflicts with its enabling legislation, damages would *encourage* compliance with the law. The executive branch cannot argue, as it appears to in this case, that compliance with the will of Parliament as expressed in law will be furthered by granting it immunity from repercussions from alleged non-compliance with the law. [Emphasis in original.]

[157] Third, given the comments of the court in *Ward* that different thresholds may apply in different circumstances, deciding the appropriate threshold without consideration of the evidence would be contrary to the procedural nature of a certification motion.

[158] Fourth, the court in *Mackin* held that (i) removal of supernumerary judges from the law was a breach of judicial independence, but (ii) there was no "clearly wrong" conduct: at paras. 74-82. Similarly, in *Guimond*, there was no allegation of damages other than "a bare allegation of unconstitutionality" and, as such, the limited immunity could not be displaced: at para. 19.

[159] However, in the present case, the plaintiffs plead facts which could lift any immunity if it applied, as discussed at paras. 162-63 below.

[160] For all the above reasons, Canada has not established that it is beyond reasonable doubt that limited immunity would apply in the present case.

(ii) The material facts to lift limited immunity (if it applied) have been pleaded

[161] Even if it was beyond reasonable doubt that Canada had limited immunity (which I do not find), the plaintiffs pleaded material facts to set aside such immunity.

[162] The plaintiffs plead facts which could establish that Canada's conduct was "clearly wrong, in bad faith or an abuse of power" or constituted a "clear disregard for the claimant's *Charter* rights" because the impugned practice was authorized but not required, as discussed in *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, 149 O.R. (3d) 705, at paras. 64, 67 (citing both *Mackin*, at para. 78 and *Ward*, at para. 43), affirming 2019 ONSC 1888, 431 C.R.R. (2d) 136.[26]

[163] The facts pleaded in the Claim include that Canada knew or was willfully blind to the fact that the Impugned Searches were (i) contrary to s. 48(1)(a) of the Act, (ii) unconstitutional infringements of the *Charter*, and (iii) not necessary for safety or security reasons nor proportionate.[27]

[164] In *Hislop v. Canada (Attorney General)*, [2002] O.T.C. 506 (S.C.), the court distinguished *Guimond* and declined to strike out claims for *Charter* damages because the plaintiff alleged specific wrongdoing that could displace the immunity, including a pleading that the defendant knew that its conduct was unconstitutional: at paras. 23, 26.

[165] Consequently, I find that the plaintiffs have pleaded the material facts to lift the immunity if it applied.

(iii) The interaction between a s. 52(1) declaration and damages

[166] Canada submits that "[w]ithout such a [s. 52(1)] declaration, … [the plaintiffs'] claim [for damages] under s. 8 of the *Charter* is destined to fail". I disagree.

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[26] The Court of Appeal in *Brazeau* affirmed many of the conclusions of the lower court decision. When I refer to the lower court decision, the applicable conclusion was upheld (or, at a minimum, not reversed) by the Court of Appeal.

[27] Canada also submits that the plaintiffs failed to plead the necessary foundation to ground any claim for punitive or exemplary damages (PCI 8). While in effect a separate objection to certification, Canada includes this submission as part of its submissions in response to the plaintiffs seeking s. 24(1) damages. In any event, the same facts which can support lifting the immunity can support a claim for punitive damages, which would raise a cause of action.

[167] First, even if a s. 52(1) declaration was required to obtain *Charter* damages, the plaintiffs could seek such a remedy under PCI 9 as part of their general claim for "[d]eclarations that suspicionless strip searches in the impugned situations are tortious, *Charter* violations, and otherwise illegal".

[168] Second, s. 52(1) may not be engaged at all if the plaintiffs' primary position is accepted, i.e., that the Impugned Regulations are *ultra vires* s. 48(1)(a) of the Act.

[169] Third, even if the plaintiffs obtained the s. 52(1) declaration, for the reasons discussed at paras. 155-59 above, it is not beyond reasonable doubt that the applicability and extent of any such immunity would be resolved in Canada's favour.

[170] Fourth, there is case law that supports the plaintiffs' position that it is not necessary to obtain a declaration that a law is unconstitutional to obtain *Charter* damages. Declarations are not required to establish that a law is unconstitutional. Provincial courts and administrative tribunals can grant remedies that depend on a finding that conduct was unconstitutional (or *ultra vires*), even though those courts cannot issue a s. 52(1) declaration of unconstitutionality: see *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board*), [1991] 2 S.C.R. 5, at para. 17; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 15; *Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] 2 S.C.R. 713.

[171] For the above reasons, I find that it is not settled law that *Charter* damages require a s. 52(1) declaration of unconstitutionality.

Objection 4: The trespass to the person claims (PCI 4a)

[172] Canada submits that it is beyond reasonable doubt that the plaintiffs' claims for trespass to the person will fail. This objection applies to each of the trespass to the person claims of false imprisonment, assault, and battery.

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

(i) The applicable law

[174] In *Golden*, the court held, at para. 67, that the remedies of trespass to the person are available for unlawful strip searches:

> There are relatively few reported pre-*Charter* cases in Canada dealing with the lawfulness of searches of the person carried out as an incident to arrest. The lack of case authority on this issue is not surprising given the lack of effective remedies for unlawful searches, whether strip searches or other types of personal searches. Prior to the advent of s. 8 of the *Charter*, the only possible remedy for an unlawful strip search would have been a tort action for assault, battery or false imprisonment. The cost of bringing such an action, the low amount of damages potentially recoverable and the ineffectiveness of civil actions as a remedy when real evidence was seized through an unlawful search likely explains the dearth of

> case law. Recent cases illustrate that damage awards in tort for unlawful strip searches remain low, and the costs of bringing a civil action would far exceed the nominal damages awarded: *Nurse v. Canada* (1997), 132 F.T.R. 131; *Blouin v. Canada* (1991), 51 F.T.R. 194. [Emphasis added.]

[175] The tort of false imprisonment requires a plaintiff to prove that the alleged deprivation of liberty was: (i) total and complete, (ii) against the plaintiff's will, and (iii) caused by the defendant. If these three elements are established, the onus then shifts to the defendant to prove that the detention was justified at common law or by statute: see *Kovacs v. Ontario Jockey Club* (1995), 124 D.L.R. (4th) 576 (Ont. Gen. Div.), at para. 45.

[176] To establish a detention, the detainee's freedom of movement must have been restrained: see *Kovacs*, at para. 43. It is unnecessary that there be actual physical force in obliging the detained person to remain in one place: see *Kovacs*, at para. 46.

[177] A prisoner can be illegally detained in prison. Individuals retain residual liberties in a prison and have the right not to be deprived unlawfully of those liberties: see *Miller*, at para. 32; *Solosky*, at para. 34.

[178] The elements of the tort of battery are (i) offensive contact (ii) without lawful reason: see Lewis N. Klar *et al.*, *Remedies in Tort*, loose-leaf, 4th ed. (Toronto: Thompson Reuters Canada, 2023), at paras. 2:6-2:11. "[E]very person's body is inviolate" and therefore any touching of another person, however slight, may amount to a battery: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 2, citing *Collins v. Wilcock*, [1984] 3 All E.R. 374 (Q.B.) (U.K.), at p. 378.

[179] The elements of the tort of assault are (i) intentionally creating the apprehension of imminent harmful or offensive contact (ii) without lawful reason: see Klar *et al.*, at paras. 2:6-2:11.

(ii) Application of the law to the present case

[180] With respect to the false imprisonment claim, Canada submits that the plaintiffs have failed to plead any confinement since the inmates could return to the general prison population if they decided to not submit to an Impugned Search.

[181] However, it is not settled law that even if inmates could return to the general prison population if they decided to not submit to an impugned search (a factual dispute between the parties which should not be determined on a certification motion in any event), the false imprisonment claim would necessarily fail.

[182] As noted at para. 176 above, case law supports an argument by the plaintiffs that upon having their freedom of movement restrained (for example, when attempting to visit family members in a family-visiting area or leaving a penitentiary for medical treatment), the tort could apply.

[183] Further, the plaintiffs plead in their Claim that "the class members were forced to remain where the strip search was to take place and prevented from moving to the planned destination (e.g. leaving the prison) until the search was complete under threat of punishments or potential physical force". Accepting that pleading as true, the tort of false imprisonment could be established at a common issues hearing.

[184] With respect to the tort of battery, Canada submits that the plaintiffs have not pled "unjustified and direct interference by force with another person's body". Canada disputes whether the Impugned Searches involved unwanted touching, submitting that instead, the inmates were compelled to remove their own clothes and touch themselves as directed.

[185] First, the plaintiffs plead that each impugned search "involved unwanted touching". Any dispute on the evidence would need to be resolved on the merits.

[186] Second, Canada has provided no authority that the tort of battery cannot be established when one person unlawfully forces another to touch themselves as directed. Consequently, it is not beyond reasonable doubt that battery cannot be established if inmates were required to touch their own bodies by CSC staff.

[187] With respect to the tort of assault, Canada submits that the plaintiffs have failed to plead that they suffered an imminent threat of harm. However, in their Claim, the plaintiffs plead that each impugned search involved:

> at least the threat of significant and harmful physical force to subdue any who object to the strip search (e.g. anyone believing them to be unlawful or unjustified) and were caused by the defendant without lawful authority. If class members attempted to ignore the demand for a strip search and proceed to the planned destination contrary to orders (e.g. leave the penitentiary), harmful physical contact would be imminent.

[188] Any dispute on the evidence as to the risks of refusing a search will be a matter on the merits.

[189] For the above reasons, I find that the trespass to the person torts disclose a cause of action.

<u>Objection 5: The claim for intrusion upon seclusion (PCI 4b)</u>

[190] Canada submits that the law is settled that a claim for intrusion upon seclusion can arise only when personal records related to such matters as health and financial information are accessed by another individual, such that the informational privacy of the individual is harmed.

[191] The plaintiffs submit that it is not beyond reasonable doubt that the tort could apply to an invasion of privacy in which a person's seclusion or private affairs are invaded, including the right to not have a person's naked body exposed on demand of CSC staff.

[192] For the reasons that follow, I agree with the plaintiffs that it is not beyond reasonable doubt that an intrusion upon seclusion claim would fail.

[193] I review the applicable law and then apply that law to the facts of the present case.

[194] All parties rely on the leading decision of *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241.

[195] In *Jones*, the defendant used her position as a bank employee to repeatedly examine the private banking records of her spouse's former wife.

[196] The court in *Jones* accepted the tort of intrusion upon seclusion into Ontario law and set out the required elements of the tort at para. 71: (i) the defendant's conduct must be intentional (including recklessness); (ii) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and (iii) a reasonable person would regard the invasion as highly offensive causing distress, humiliation, or anguish.

[197] The court in *Jones* commented on the importance of "informational privacy", which it described as "the interest at stake in this appeal" at para. 41. The court reviewed the rationale for the tort, which was the "right to informational privacy", which the court found ought to be protected given "technological change" which led to "the routine collection and aggregation of highly personal information that is readily accessible in electronic form": *Jones*, at paras. 66-68.

[198] The court in *Jones* was not asked to consider whether a physical invasion of a person's privacy, by unwanted viewing of the person's naked body, could also constitute an intrusion upon seclusion.

[199] However, the court in *Jones* did not expressly limit the tort to accessing records. The court relied, at para. 41, on the comments of Binnie J. in *Tessling*, at para. 23, in which he incorporated into informational privacy the right of an individual to protect personal information they wish to shield from others:

> Informational privacy has been defined as "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others". Its protection is predicated on the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain … as he sees fit. [Citation omitted.]

[200] Consistent with the above approach, the court in *Jones* adopted the definition of the tort of intrusion upon seclusion from U.S. law, at para. 70:

> I would essentially adopt as the elements of the action for intrusion upon seclusion the Restatement (Second) of Torts (2010) formulation which, for the sake of convenience, I repeat here:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person. [Emphasis added.]

[201] Consequently, the court held that physical intrusion on a person's right to seclusion may be a basis for the tort.

[202] In *Murray v. Capital District Health Authority (c.o.b. East Coast Forensic Hospital)*, 2015 NSSC 61, at paras. 1 and 97(g), aff'd 2017 NSCA 28, the court certified a class action challenging strip searches in a mental health facility. The court certified a common issue asking whether those strip searches constituted intrusion upon seclusion. The court reviewed the analysis in *Jones* and rejected the defendant's argument that this claim did not disclose a cause of action.

[203] Given the analysis in *Jones* and the decision in *Murray*, it is not beyond reasonable doubt that the intrusion upon seclusion claim would fail. The court in *Jones* held that an intentional intrusion, *physically* or otherwise, into a person's *seclusion or upon private affairs*, can constitute an intrusion upon seclusion. In such circumstances, it is possible that just as a medical document could disclose personal health information or private matters about a person's body that a person is "entitled to shield from the curious eyes of the state", an unlawful strip search physically engages the same liability: see *Tessling*, at para. 23.

[204] By way of example, Laity's evidence was that guards "made fun of [an inmate] for hemorrhoids she got while giving birth".

[205] By analogy, if an individual installed a camera in a dressing room (or unlawfully entered a dressing room), it is not settled law that a claim for intrusion upon seclusion would not be available. A reasonable person might find such a physical intrusion into the plaintiff's seclusion or private affairs to be offensive. Similarly, an unlawful strip search might constitute an intrusion upon seclusion.

[206] For the above reasons, I find that it is not beyond reasonable doubt that the claim for intrusion upon seclusion would fail.

Objection 6: The jurisdictional objections raised by Canada (PCIs 9 -10)

[207] Canada acknowledges that the plaintiffs can seek certain declarations including any "[d]eclarations regarding infringements of rights under the *Charter* and otherwise" (PCI 9).

[208] However, Canada submits that the following declarations sought in the Claim are not available under PCIs 9-10 since they can only be obtained from the Federal Court and not from the Superior Court of Justice ("SCJ"):

(i) "[d]eclarations regarding the lawful scope of suspicionsless strip searches under the … CCRA",

(ii) "[d]eclarations that suspicionless strip searches in the impugned situations are tortious, *Charter* violations, and otherwise illegal", and

(iii) "[d]eclarations and orders regarding the expungement of records arising from strip searches in the impugned situations".

[209] Even if Canada was correct, this does not raise a cause of action issue under s. 5(1)(a). Whether a particular declaration or non-monetary relief may be obtained is a question of the remedy sought for breaches of the causes of action, but not a cause of action itself.

[210] Further, Canada has not pleaded any jurisdictional limitations in its Statement of Defence, despite this being an affirmative defence that must be pleaded under r. 25.07(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Even if Canada could rely on the jurisdictional defence, the plaintiffs would be entitled to plead a reply to set out the material facts relevant to jurisdiction.

[211] In any event, even if the jurisdiction to grant certain declarations (i) can be considered a cause of action under s. 5(1)(a) and (ii) can be considered on this motion despite not being pleaded, it is not beyond reasonable doubt that the SCJ has no jurisdiction to make the declarations and orders sought in the Claim (including expunging records as sought under PCI 10).

[212] The SCJ has the jurisdiction to adjudicate claims against the federal government for tort and/or *Charter* damages even where doing so requires the court to address the legality of federal legislation, regulations, orders, or decisions: see *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, at paras. 7, 15-17; *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] 3 S.C.R. 585, at paras. 1-2, 5-6.

[213] Superior courts have the original and inherent authority to issue declarations. In Ontario, this authority is confirmed by s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[214] Canada relies on s. 18(1)(a) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which states that the Federal Court has exclusive jurisdiction to determine whether injunctive and declaratory relief should be issued "against any federal board, commission or other tribunal." However, the Supreme Court has held that s. 18(1)(a) must be understood in the context of s. 17 of the *Federal Courts Act*, which explicitly confers concurrent jurisdiction on the superior courts "in all cases in which relief is claimed against the Crown": *Strickland*, at para. 24.

[215] Further, any derogation from the jurisdiction of the superior courts (in favour of the Federal Court or otherwise) requires "clear and explicit" statutory language: *TeleZone*, at para. 42.

[216] In addition, s. 18 is constrained by ss. 96 and 101 of the *Constitution Act, 1867*, which "protects the essential nature and powers of the Superior Courts from legislative incursion": *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617, at para. 32.

[217] Superior courts retain the jurisdiction to adjudicate tort and *Charter* claims against the federal government even where doing so requires determining the legality of federal orders or decisions: see *Strickland*, at para. 33.

[218] The Supreme Court has confirmed that superior courts retain the jurisdiction, despite s. 18 of the *Federal Courts Act*, to:

(i) Determine the constitutional validity of federal legislation and declare federal legislation invalid: see *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 at pp. 328-29.

(ii) Determine the constitutionality of the conduct of federal officials: see *McArthur*, at para. 14.

(iii) Grant remedies such as an injunction "as ancillary to the court's principal determination and in support thereof as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions": see *Law Society (British Columbia)*, at p. 331.

[219] Consequently, it is not beyond reasonable doubt that the SCJ could not order the declarations sought in the Claim.

The s. 5(1)(b) objections

<u>The proposed class</u>

[220] The proposed class consists of "all inmates imprisoned in a federal penitentiary on or after June 18, 1992" (the date when the Act received royal assent).

[221] The proposed class is based on the six-year limitation period under s. 32 of the *CLPA*, such that the approximately 50,000 inmates in penitentiaries from March 13, 2014[28] until the date of the certification order[29] would be included. The approximately 75,000 inmates in penitentiaries from June 18, 1992 (when the Act received royal assent) until March 13, 2014

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[28] Due to the COVID-19 pandemic, federal limitations periods were tolled to March 13, 2020 when the claim was filed on July 4, 2020 (see footnote 6 above).

[29] Canada does not dispute the proposed end date of the class, based on the approach taken in *Gilani v. BMO Investments Inc.*, 2021 ONSC 3589, at para. 341, leave to appeal refused, 2021 ONSC 5906 (Div. Ct.) such that the end date of the class definition is the date of the certification order, without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.

would be class members but could only bring a claim if the inmate could establish that the claim was not discoverable before March 13, 2014.

[222] The plaintiffs acknowledge that it is likely that only a small amount of class members who were inmates prior to March 13, 2014 would be able to establish that they could not have reasonably known of a claim arising from the Impugned Searches before March 13, 2014, but the plaintiffs assert that the class can include such members, with discoverability being an individual issue to be determined after the common issues trial.

The objections raised by Canada

[223] Canada objects to the proposed class definition on the basis that it is "overly broad and unmanageable" because it "include[s] inmates who have been incarcerated over the last 30 years, regardless of whether they were subjected to routine strip searches and/or experienced harm from routine strip searches and inmates whose claims are barred by limitation statutes".

[224] Consequently, Canada objects to the class definition on three grounds.

[225] First, Canada submits that the two-year limitation period applies to the claims, so the class must be restricted to the two-year period prior to March 16, 2020.[30]

[226] Second, Canada submits that the proposed class can only include those inmates who were the subject of the Impugned Searches.

[227] Third, Canada submits that the class should be limited to "only include individuals who actually experienced a routine strip search which caused or materially contributed to recognizable and compensable psychological or emotional harm".

[228] I first review the applicable law under s. 5(1)(b) of the *CPA* and then consider each of Canada's objections.

The applicable law on s. 5(1)(b)

[229] The plaintiffs have an obligation, "although not an onerous one", to show that the class is not "unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues": *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 21; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 45.

[30] Due to the COVID-19 pandemic, provincial limitations periods were tolled to March 16, 2020 when the claim was filed on July 4, 2020 (see footnote 6 above).

[230] The proposed class must be identifiable. Defining a class "is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment": *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.

[231] The plaintiffs must establish some basis in fact that: (i) the class can be defined by objective criteria; (ii) the class can be defined without reference to the merits of the action; and (iii) there is a rational connection between the common issues and proposed class definition: see *Hollick*, at paras. 9, 17-19.

[232] Where the class could be defined more narrowly, the court should either disallow certification or allow certification on the condition that the class definition be amended: see *Hollick*, at para. 21.

[233] It is not disputed that inmates in the penitentiary system can be identified. A penitentiary is defined in the Act at s. 2(1).[31] Whether a person was imprisoned in a penitentiary during the relevant period does not hinge on the merits of the action.

Objection 1: Whether the class should be limited to those inmates within the two-year provincial limitation period

[234] In its factum, Canada submitted that the "applicable limitation period is not at issue in this case", since the "two-year limitation period established by Ontario's *Limitations Act, 2002*", S.O. 2002, c. 24, Sched. B applied. Under such an approach, Canada proposed a "temporal limit to the class definition" based on the provincial limitation period.

[235] However, at the hearing, Canada acknowledged that whether the applicable limitation period was six years under s. 32 of the *CLPA*, or the provincial two-year limitation period was a common issue.

[236] Nevertheless, Canada maintained its submission in its factum that the class was overly broad because it included "inmates whose claims are barred by limitation statutes". While Canada raised no limitations arguments in its factum other than these bald assertions, it remains necessary to review the two limitation period issues asserted by Canada.

[237] First, Canada relies on the two-year provincial limitation period. The plaintiffs submit that their claim arises "otherwise than in a province" under s. 32 of the *CLPA*, and as such is subject to the federal six-year limitation period.

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[31] Section 2(1) defines "penitentiary" as "(a) a facility of any description, including all lands connected therewith, that is operated, permanently or temporarily, by the Service for the care and custody of inmates, and (b) any place declared to be a penitentiary pursuant to section 7".

[238] Second, Canada submits that even if the six-year limitation period could apply, the class definition should only start as of March 13, 2014. The plaintiffs submit that the proposed class should extend to all inmates in penitentiaries from June 18, 1992 so that discoverability for those class members can be addressed on an individual basis.

[239] I address both these issues below.

(i) The applicable limitation period

[240] The plaintiffs rely on *Brazeau* (2019), at para. 32, in which the court found that the six-year federal limitation period applied to the claims of inmates for *Charter* damages in a class action arising from the "administrative segregation" [32] of inmates by the CSC.

[241] In *Brazeau* (2019), the court found that the practice of administrative segregation was one which arose "otherwise than in a province" for the purposes of s. 32 of the *CLPA*. Perell J. held, at paras. 384-85:

> Section 32 of the *Crown Liability and Proceedings Act* provides that proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. Courts have interpreted "otherwise than in a province" to include actions arising in more than one province or a combination … of provinces.
>
> In the present case, collectively and individually, the facts giving rise to the *Charter* violations arise in more than one province. With a head office in Ottawa, Ontario, the Correctional Service operates and administers the federal penitentiaries by dividing the provinces and territories of Canada into five regions. Prisoners are moved from penitentiaries in one region to penitentiaries in another. Staff are moved from one province to another. For an inmate who has spent sixty days or more in administrative segregation, the case is reviewed by a national committee. I find as a fact that the Class Members' actions arise otherwise than in a province. [Footnote omitted; emphasis added.]

[242] The plaintiffs submit that the above analysis is applicable to the Impugned Searches, based on the structure of the CSC and the movement of prisoners and staff from one region to another, as relied upon by the court in *Brazeau* (2019).

[243] Canada submits that, unlike in *Brazeau* (2019), there is no national committee to review the Impugned Searches.

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[32] In *Brazeau* (S.C.), the court described the practice of administrative segregation, at para. 3, as occurring when "the inmate is removed from his or her cell at the penitentiary within the ranges of cells for the general inmate population and isolated in a segregated area in a solitary cell with very limited access to others".

[244] However, there were at least a half million Impugned Searches across Canada during the federal limitation period. It remains open to the common issues judge to determine whether the national nature of CSC's practice and operations would result in the action falling "otherwise than in a province" despite the fact there is no national committee. There is a basis in fact for the plaintiffs' position.

[245] Further, the plaintiffs note that the Court of Appeal in *Brazeau* (2020) did not refer to the national committee when it upheld the decision of the motion judge. It held, at para. 32:

> We agree with the motion judge that the six-year federal limitation period applies to these claims. The claims for *Charter* damages in both cases are with respect to the adoption and maintenance of a federal regulatory policy regime regarding administrative segregation that applied in all provinces. In this sense, the claims for *Charter* damages arise "otherwise than in a province": see *Markevich v. Canada*, [2003] 1 S.C.R. 94, [2003] S.C.J. No. 8, 2003 SCC 9 …. [Emphasis added.]

[246] The plaintiffs submit that in the present case, there is a federal regulatory regime regarding the Impugned Searches that applies in all provinces, and as such the claims arose otherwise than in a province and are subject to the six-year limitation period.

[247] Canada did not provide any authority addressing s. 32 of the *CLPA*. Rather, Canada makes the unsupported assertion that there is a "clear and substantial constraint" in the proposed case "that flow[s] from the 2-year limitation period applicable to actions commenced in Ontario prescribed by s. 4 of the *Limitations Act*."

[248] It is for the common issues judge to determine which limitation period applies. Evidence may be required as to the CSC's policies and administration, as in *Brazeau* (2019). However, there is no basis on this certification motion to restrict the class to the two-year provincial limitation period.

(ii) Discoverability

[249] The plaintiffs submit that inmates in penitentiaries from June 18, 1992 (the date the Act received royal assent) until March 13, 2014 should be included in the class, since discoverability should not be determined at this stage.

[250] For the reasons that follow, I agree.

[251] "[W]here the resolution of the limitation issue depends on a factual inquiry, such as when the plaintiff discovered or ought to have discovered the claim, the issue should not be decided on the motion for certification": *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603, at para. 41.

[252] Inmates who claim that the limitation period was tolled due to discoverability will be able to identify themselves and seek individual determinations of discoverability after the common issues are decided.

[253] The plaintiffs acknowledge that it is likely that only a limited number of inmates in penitentiaries prior to March 13, 2014 may be able to toll the limitation periods but submit that for those who can do so due to issues such as incapacity, they should not be excluded since they share an interest in the claim. Such an approach is consistent with the case law cited above.

[254] There is no evidence that inclusion of inmates who can toll the limitation periods would be unmanageable. I do not apply the 15-year ultimate limitation period under s. 15 of the *Limitations Act* (as the court did in *Amyotrophic*, at para. 43), since the ultimate period does not run if a person "is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition": s. 15(4). It would not be appropriate to propose a starting date based on the 15-year period when there is a basis in fact that discoverability can be tolled due to an inmate's physical, mental or psychological condition.

[255] I do not limit the class to inmates in penitentiaries as of March 13, 2014. I include all inmates in penitentiaries as of June 18, 1992 so that inmates who can establish that the limitation period should be tolled due to discoverability are permitted to do so.

Objection 2: Whether only inmates who were the subject of the Impugned Searches can be included in the class

[256] Canada submits that the proposed class is overbroad because it includes inmates who may not have been subject to the Impugned Searches. I disagree.

[257] First, there is some basis in fact that every inmate would have been subject to an Impugned Search at some point while in a penitentiary.

[258] The representative plaintiffs and Laity led evidence that they were subject to the Impugned Searches every time they were in an impugned situation.

[259] Canada led evidence of ISPs and random search tools that would establish that not every inmate would be subject to an impugned search in every impugned situation. However, Canada led no evidence of class members who had never been strip searched in the Impugned Situations.

[260] Consequently, there is some basis in fact for a finding that every inmate would have been subject to at least one impugned search while in a penitentiary. Any finding at this point that there are inmates who were not subject to the Impugned Searches is speculative and should not be part of a class definition.

[261] Second, even if not every inmate was subject to an impugned search, it is settled law that not all class members have to suffer the same damages. Rather, they must "share the same interest in the resolution of the common issues": *Cloud*, at para. 45. See also *Hollick*, at para. 21.

[262] If there are any current inmates who have not been the subject of the Impugned Searches, they still face the risk of being subjected to Impugned Searches in the future. All current inmates share the same interest that an allegedly unlawful practice be stopped, as that practice affects their personal security.

[263] Further, former inmates who were not subjected to the Impugned Searches may have a claim for damages for altering their conduct to avoid such searches. Dr. Hannah-Moffatt's evidence was that:

> When correctional policy requires routine and random strip searches, prisoners must choose between the harms that may result from being strip searched and engaging in other activities, such as visits with family members … federally sentenced Canadian women have reported to the OCI that they are hesitant to participate in visits with their family because of the possibility that they will be randomly selected to be strip searched.

[264] Even if some inmates never were the subject of an impugned search and did not alter their conduct to avoid such a search, they were still subject to the possibility of the Impugned Searches and may be able to claim damages for any harm incurred as a result.

[265] Consequently, all inmates share an interest in the proposed class action. They do not need to share the same damages. It will be for the common issues judge to determine the nature and availability of damages for different categories of class members, but that does not preclude all current and former inmates during the relevant period from sharing the same interest in the resolution of the common issues.

[266] For the above reasons, I do not limit the class members to only those inmates who were the subject of the Impugned Searches.

Objection 3: Whether the class should be limited to inmates who suffered recognizable and compensable psychological or emotional harm from the Impugned Searches

[267] Canada submits that the class definition must be limited to individuals who experienced "compensable psychological or emotional harm." I disagree.

[268] First, harm is not a required element to establish liability for the causes of action pled in this case. The plaintiffs do not rely on negligence, which requires harm as an element of the tort to establish liability.

[269] Second, Canada's submission is contrary to the approach taken by the Supreme Court in both *Golden* and *Ward*.

[270] In *Golden*, the court held, at para. 90:

> Strip searches are thus inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they

> cannot be carried out simply as a matter of routine policy. The adjectives used by individuals to describe their experience of being strip searched give some sense of how a strip search, even one that is carried out in a reasonable manner, can affect detainees: "humiliating", "degrading", "demeaning", "upsetting", and "devastating". [Citations omitted; Emphasis added.]

[271] In *Ward*, the court held that *Charter* damages can be ordered when damages would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches: at para. 4. The court relied on the above passage from *Golden* and held that strip searches cause "significant injury to an individual's intangible interests" and as such, s. 24(1) damages are "*prima facie* 'appropriate and just'": *Ward*, at paras. 69, 71.

[272] Based on the above law, it would be open to the common issues judge to find that proof of recognizable and compensable psychological or emotional harm is not required for the damages claims. The court should not limit the class as proposed by Canada (i.e., limited to those inmates who suffered recognizable and compensable psychological or emotional harm from the Impugned Searches), as such a class definition excludes others with potentially valid claims.

The s. 5(1)(c) objections

The PCIs at issue

[273] The test to establish commonality is not in dispute. I adopt the summary of the law from Perell J. in *Price*, at paras. 104-11, which was adopted by the Divisional Court on appeal, at para. 22.

[274] Canada raises five objections under s. 5(1)(c) of the *CPA*. Canada submits that there are no common issues with respect to PCIs raising (i) the alternative *Charter* claims (PCIs 1b, 2, and 3), (ii) the four tort claims (PCI 4), (iii) the claim for damages under s. 24 of the *Charter* (PCI 6), (iv) the claim for aggregate damages (PCI 7), and (v) the availability of declarations and orders (PCIs 9-10).

[275] Canada changed its position as to the commonality of certain of the PCIs at the hearing. In its factum, Canada submitted that none of the PCIs should be certified as common issues:

> There is no basis in fact for either the existence of the common issues or their overall commonality. The 12 common issues proposed by the plaintiffs require individual factual and legal analysis such that they cannot be answered in common. They presume a universal experience of each inmate who has been incarcerated in a federal penitentiary since 1992 without regard to the unique experiences of inmates and institutions.

[276] However, at the hearing, Canada acknowledged that (i) PCI 1a (whether the Impugned Regulations are *ultra vires* the Act), (ii) PCI 5 (the applicable limitation period), (iii) one of the types of declarations sought under PCI 9 (whether a declaration regarding the lawfulness of the

Impugned Searches is warranted) and (iv) PCI 11 (the availability of pre- and post-judgment interest) are common issues under s. 5(1)(c).

[277] In addition, Canada did not challenge the availability of punitive damages (PCI 8) as a common issue, although it submitted, as discussed at footnotes 8, 22, and 27 above, that the material facts to support such a claim had not been pleaded.

[278] In any event, the plaintiffs filed evidence providing a basis in fact for punitive damages which included (i) a memorandum to the warden at Nova Institution dated December 29, 2004 which stated that strip searches when leaving prison were illegal, and (ii) an excerpt from the Correctional Investigator's 2018-19 Report in which routine strip searching is described as "a demeaning, degrading and demoralizing practice" that "is not likely to make much of a difference in terms of security, yet it needlessly increases the risk of psychological harm… It is an outrage."

[279] Further, at the hearing, the plaintiffs acknowledged that it was not necessary to certify PCI 12, which would ask a common issues judge "what procedural directions should be provided under s. 25 of the *Class Proceedings Act* to ensure the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties?" The plaintiffs acknowledged that a common issues trial judge or the case management judge for the class action is empowered to consider the most efficient processes in any event under s. 12 of the *CPA*. Consequently, I do not certify this proposed common issue.

[280] I now address the remaining PCIs which are impugned based on lack of commonality.

Objection 1: The alternative *Charter* claims (PCIs 1b, 2 and 3)

[281] PCIs 1b and 2 raise the alternative argument that, if the Impugned Searches were authorized by s. 48(1)(a) of the Act, then (i) s. 48(1)(a) of the Act and the Impugned Regulations breach s. 8 of the *Charter* as unreasonable (PCI 1b) and/or (ii) s. 48(1)(a) of the Act and the Impugned Regulations breached the inmates' liberty and security under s. 7 of the *Charter* in a manner not in accordance with the principles of fundamental justice (PCI 2).

[282] Canada submits that neither the reasonableness of s. 48(1)(a) of the Act and Impugned Regulations nor the alleged breaches of liberty and security raises common issues since they require an individual assessment of each inmate's experiences.[33] I disagree.

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[33] Canada has only pleaded a s.1 defence to s. 7 of the *Charter*, which appears consistent with *R. v. Kokesch*, [1990] 3 S.C.R. 3, in which the court held, at para. 23, that a s.1 justification could not be "prescribed by law" once a search was found to be unlawful under s. 8. The plaintiffs state in their factum that they would expand the s. 1 defence to the s. 8 claim if required. Such an amendment is not required at this time given the current pleading by Canada.

[283] The fact-finding and legal analysis for the *Charter* breaches raised under PCI 1b and 2 is common.

[284] Reasonableness under s. 8 requires the court to balance the importance of the state objective of preventing access to contraband in prison which the law seeks to achieve with its impact on the individual right of inmates to be free from unreasonable search and seizure.

[285] Principles of fundamental justice under s. 7 require the court to consider arbitrariness, overbreadth, gross disproportionality, and procedural fairness.

[286] Neither of those tests requires the evidence of any inmate as to how an Impugned Search was conducted.

[287] There will be common evidence as to (i) other available means to ensure security (reasonableness), (ii) any connection between the effect and the object of the law (arbitrariness), (iii) whether the law goes too far and interferes with some conduct that bears no connection to its objective (overbreadth), (iv) the proportionality of the law's effects to its purposes (gross disproportionality) and (v) the existence or lack of procedural fairness. Much, if not all such evidence, would be provided by experts. The consideration of these factors under ss. 7 and 8 of the *Charter* does not require individual evidence from the inmates.

[288] Canada submits that individualized trials would be required because (i) the Impugned Searches are not conducted systemically and (ii) correctional officers exercise on-the-ground discretion to decide whether to conduct the Impugned Searches. Canada submits:

> [The common issues] assume automatic and consistent application of routine strip searches in each institution and against every inmate, while evidence in the within motion demonstrates that this does not happen. Routine strip searches are only used in accordance with institutional specific ISPs and, even then they are used discretionarily and having regard to a variety of contextual circumstances in any given institution and any particular time.

[289] However, even if the common issues judge accepted that evidence, any discretion of CSC staff would be irrelevant to the legality of the Impugned Searches.

[290] The alternative *Charter* claims of the plaintiffs are based on the reasonableness of s. 48(1)(a) of the Act and the Impugned Regulations (PCI 1b), and the compliance of the Impugned Searches with the principles of fundamental justice (PCI 2).

[291] All the Impugned Searches are suspicionless – no consideration of individual circumstances can arise. Just as the exercise of discretion cannot overcome the lack of legal authority (as with PCI 1a), if a law authorizing suspicionless strip searches in the Impugned Situations is not reasonable (PCI 1b) or is contrary to principles of fundamental justice (PCI 2), it does not matter whether on-the-ground discretion is exercised.

[292] Without a constitutionally valid law authorizing the Impugned Searches, the searches are illegal *Charter* breaches no matter how they were conducted on the ground in each case.

[293] Canada relies on three decisions in which the court did not certify the proposed class actions.

[294] In *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480, 52 B.C.L.R. (5th) 223 the court denied certification to a class of individuals strip searched when admitted to a provincial prison pursuant to a policy alleged to be unreasonable. The court held that consideration of the policy alone could not determine the reasonableness of the impugned searches, since any additional grounds which may have led to the search incidental upon arrest would have to be considered: see *Thorburn*, at para. 41.

[295] However the present case does not require any analysis of individualized grounds to determine if the Impugned Searches were reasonable or contrary to principles of fundamental justice. Since the Impugned Searches are suspicionless, the determination of the reasonableness of the Impugned Searches (or whether they comply with principles of fundamental justice) cannot require an assessment of individual grounds.

[296] Canada also relies on the decision in *Ewert v. Canada (Attorney General)*, 2022 BCCA 131, in which the court did not certify a proposed class action which alleged breaches of ss. 7 and 12 of the *Charter*. Those issues arose from two "exceptional" searches under s. 53(1) of the Act conducted during lockdowns when the CSC received information that an improvised gun had been smuggled into the penitentiary: see *Ewert*, at paras. 8-9.

[297] The proposed common issues raised in *Ewert* concerned "the length of time taken in the two searches, the manner of the searches, and the consequences to class members (some of which are acknowledged to have been inconsistently experienced)": at para. 84.

[298] The individualized issues in *Ewert* do not arise in the present case, as the reasonableness of the Impugned Searches or whether they were in accordance with fundamental justice can (and must) be addressed in common. Any individualized experience or discretion is irrelevant because the Impugned Searches are suspicionless and only require an assessment of their constitutionality based on the common factors described at paras. 283-92 above.

[299] Finally, Canada relies on the recent decision of the Federal Court in *Kahnapace v. Canada (Attorney General)*, 2023 FC 32, in which the court denied certification to a proposed class of "all Indigenous female offenders who are or have been in the custody of the Correctional Services of Canada [CSC] since 1991": at para. 2 (brackets in original).

[300] In *Kahnapace*, the plaintiff alleged that a tool used by the CSC to determine the security classification of inmates, the Custody Rating Scale ("CRS"), improperly overclassified Indigenous female offenders into higher security classifications than otherwise warranted and as such was in breach of the Act and ss. 7 and 15 of the *Charter*.

[301] The certification motion judge accepted the CSC's submission that the security classification for each inmate was a multi-factorial discretionary decision which was not based on any particular scale or source. CSC's submission is summarized in *Kahnapace*, at para. 6:

> [T]he recommendation generated by the CRS is not determinative of the offender's security classification. Rather, the OIA process, which culminates in a security classification and penitentiary placement decision, is a multifactorial and highly individualized process involving assessments and test results, the exercise of discretion and the reliance on clinical and professional judgment. While parole officers conducting the assessment are given structured guidance as to what information to collect about offenders and how to administer standardized tools (which includes the CRS), the Defendant asserts that the parole officers and thereafter the Warden (who is the ultimate decision maker) also exercise their professional judgement, taking into consideration the totality of the information collected in making their respective security classification recommendations and decisions that are responsive to the history, circumstances, needs and risks posed by each individual offender. [Emphasis added.]

[302] Consequently, the present case is distinguishable from *Kahnapace*. The only basis for the suspicionless Impugned Searches under the Impugned Regulations is the requirement under the Act which mandates prescribed circumstances which must be limited to situations where there is a likelihood of access to contraband. Unlike *Kahnapace*, there are no individualized factors at issue when conducting the Impugned Searches.

[303] Under Canada's approach, PCI 3, which considers whether any breach of s. 7 of the *Charter* is justified by s. 1, fails to raise a common issue since Canada submits that PCI 2 fails to raise a common issue. However, since there is a basis in fact that the Impugned Regulations are *ultra vires* s. 48(1)(a) of the Act, the determination of the "prescribed by law" requirement of s. 1 would be common to the class.

[304] Further, the evidence of Farrell, Major, and Laity provides a basis in fact for the existence of the plaintiffs' s. 1 allegations summarized at para. 133 above. The determination of whether any breaches of s. 1 are "reasonable limits" that "can be demonstrably justified in a free and democratic society" would also be common to the class since all Impugned Searches are suspicionless.

[305] For the above reasons, I dismiss Canada's objection that the alternative *Charter* claims do not raise common issues.

Objection 2: The tort claims (PCI 4)

[306] Canada submits that the tort claims raised in PCI 4 do not raise a common issue.

[307] Canada submits that the tort of false imprisonment will require the court to "determine whether any inmate was deprived of liberty in a way that was significantly different from

ordinary imprisonment" and as such, "the Court will be required to make individual findings on each inmate's living conditions."

[308] Canada submits that the torts of assault and battery require "individual findings of fact that have to be made with respect to each individual claimant."

[309] For all the torts, Canada submits that the common elements relied upon by the plaintiffs do not assist in establishing a cause of action.

[310] I disagree with the above submissions.

[311] The core element of all the tort claims is the unlawful nature of the Impugned Searches. If the Impugned Searches are either *ultra vires* or unreasonable, then the wrongful nature of the conduct is established. As discussed with respect to the *Charter* claims, the unlawful nature of the Impugned Searches is a common issue which does not require individualized assessments.

[312] The court will then consider whether compelling an individual to strip naked without legal authority establishes the elements of the pleaded torts. The common issues before the court would include whether:

(i) requiring an inmate to remain in the area that the impugned search is set to occur and preventing the inmate from leaving the prison, leaving, or entering a secure area, entering a family-visiting area, or leaving the prison for a transfer constitutes a detention, until the strip search takes place, and

(ii) requiring an inmate to strip naked constitutes a battery, assault, or intrusion upon seclusion.

[313] Individualized factors such as "living conditions" are not necessary to establish the above.

[314] The reasonableness of any particular impugned search is not at issue. The issue before the common issues court is whether the Impugned Searches constituted a trespass to the person or an intrusion upon seclusion.

[315] In essence, the plaintiffs submit that any illegal strip search is necessarily a tort. They submit "[i]t simply cannot be that the common law countenances one individual forcing another individual to remove their clothes, under threat of punishment, without lawful authority." That is the core of commonality of the tort claims, which do not require individualized evidence.

[316] Consequently, I reject Canada's tort claim objections.

Objection 3: The *Charter* damages claim (PCI 6)

[317] Canada submits that since "[t]here are no common issues proposed in this claim that avoids an individual investigation to determine whether a class member's *Charter* rights were

breached … it follows that the common issue posed on the appropriateness of a s. 24 remedy, also, is not susceptible to determination, absent individual consideration."

[318] For the reasons that follow, I find that the *Charter* damages claim raises common issues.

[319] The availability of s. 24(1) damages (i.e., whether the immunity applies) is a common issue as it does not require individual evidence from each class member. The factual and legal issues which will determine whether the immunity applies are common to all class members. Immunity does not arise differently for different class members.

[320] Further, even if the immunity can apply, the factual and legal issues relevant to whether the immunity should be displaced depend on Canada's conduct with respect to the Impugned Searches. The conduct of any inmate arising from an individual impugned search is not relevant.

[321] The availability of s. 24(1) damages can be determined in common just as they were in the three segregation cases decided recently: see *Brazeau* (2019), at paras. 400-34, aff'd *Brazeau* (2020), at paras. 35-40; *Reddock v. Canada (Attorney General)*, 2019 ONSC 5053, 441 C.R.R. (2d) 1, at paras. 476-86, aff'd *Brazeau* (2020), at paras. 102-4; and *Francis v. Ontario*, 2020 ONSC 1644, at paras. 534-96, aff'd 2021 ONCA 197, 154 O.R. (3d) 498, at paras. 50-79.

[322] Further, even if all the *Charter* damage claims required individual assessment (which they may not in light of the availability of aggregate damages for base amounts as discussed at paras. 324-33 below), "[t]he court shall not refuse to certify a proceeding as a class proceeding solely" because "[t]he relief claimed includes a claim for damages that would require individual assessment after determination of the common issues": *CPA*, s. 6.

[323] Consequently, I dismiss this objection.

Objection 4: The availability of aggregate damages under s. 24 of the *CPA* (PCI 7)

[324] Canada submits that "[w]here the amount of damages claimed for general damages require individual assessment, it is not appropriate as a common issue."

[325] I disagree.

[326] Section 24(1) of the *CPA* allows the court to order damages on an aggregate basis if:

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

[327] PCI 7 asks the common issues judge to determine whether aggregate damages are available, and if so, the quantum. Consequently, PCI 7 would arise only if liability is established, and the court finds that aggregate damages are appropriate. This approach is consistent with the reasons in *Pro-Sys Consultants*, in which the court held, at para. 134:

> The question of whether damages assessed in the aggregate are an appropriate remedy can be certified as a common issue. However, this common issue is only determined at the common issues trial after a finding of liability has been made. The ultimate decision as to whether the aggregate damages provisions of the *CPA* should be available is one that should be left to the common issues trial judge. Further, the failure to propose or certify aggregate damages, or another remedy, as a common issue does not preclude a trial judge from invoking the provisions if considered appropriate once liability is found.

[328] The Court of Appeal held in *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490 "that it is desirable to award aggregate damages where the criteria under s. 24(1) are met in order to make the class action an effective instrument to provide access to justice": at para. 76.

[329] In *Ramdath*, the court also held that (i) leniency is permitted in the assessment of aggregate damages and not all class members need to be accurately compensated and (ii) provided that the defendant's total liability is not over-stated, "an aggregate damages methodology will be reasonable if some members of the class are over-compensated and some are under-compensated": at para. 51

[330] Courts have ordered aggregate damages by providing a base level of damages for alleged *Charter* breaches and tortious conduct while providing class members the option of seeking increased damages based on their individualized situations. In *Good v. Toronto (Police Services Board*), 2016 ONCA 250, 130 O.R. (3d) 241; leave to appeal refused, [2016] S.C.C.A. No. 37050, affirming 2014 ONSC 4583, 121 O.R. (3d) 413 (Div. Ct.), Hoy A.C.J.O. held, at para. 75:

> Further, this appears to be a case where the common issues judge may well determine that at least part of TPS' liability can reasonably be determined without proof by individual class members. As the Divisional Court highlighted, s. 24(1) asks whether the aggregate or a part of the defendant's liability can reasonably be determined without proof by class members. And, as the Divisional Court observed, it would be open to a common issues judge to determine that there was a base amount of damages that any member of the class (or subclass) was entitled to as compensation for breach of his or her rights. It wrote, at para. 73, that "[i]t does not require an individual assessment of each person's situation to determine that, if anyone is unlawfully detained in breach of their rights at common law or under s. 9 of the Charter, a minimum award of damages in a certain amount is justified". [Emphasis added.]

[331] A similar approach was followed in *Daniells v. McLellan*, 2017 ONSC 6887, in which the court certified a proposed common issue of whether damages for intrusion upon seclusion could be awarded on an aggregate basis. In *Daniells*, Ellies J. held, at para. 23, that "the present case is one in which a common issues trial judge could determine a base amount of damages without proof of loss for each class member on the basis that every class member's privacy was breached, and was breached in the same way."

[332] In *Reddock*, a global amount of $20 million was approved to fulfill the goals of compensation, vindication, and deterrence, with $9 million of that amount awarded as the compensatory component calculated based on $500 for each inmate placed in administrative segregation for more than 15 days: at paras. 476-86, aff'd *Brazeau* (2020), at paras. 102-4.

[333] Consequently, PCI 7 raises common issues.

Objection 5: The availability of declarations and orders (PCIs 9-10)

[334] Canada submits in its factum that "the availability of declarations as a remedy is not a common issue" since "[d]amages will not be awarded where the Attorney General of Canada can show that there is another *Charter* remedy available to effectively address a breach", such as a declaration of a *Charter* breach.

[335] Canada further submits that "[t]hese questions must necessarily be determined based on the facts and context."

[336] As discussed at paras. 207-19 above, the merits of the issue as to whether the SCJ has jurisdiction to issue certain declarations is a matter of dispute between the parties.

[337] Further, the common issues judge will have to consider whether (i) a declaration can effectively address any *Charter* breach, (ii) damages are appropriate under *Ward* and (iii) other declarations such as expunging inmate records are appropriate and within the SCJ's jurisdiction. There is a core of commonality to these issues. The availability of certain declarations, or the effect of such declarations on a *Charter* damages claim, is common to all class members. Individual evidence is not required to determine the SCJ's jurisdiction or the effect of a declaration.

[338] The same common issues proposed in PCIs 9-10 were approved in *Good* (2014), at paras. 84-85, aff'd *Good* (2016).

[339] Finally, with respect to the particular declarations and orders sought to expunge disciplinary records arising from an inmate's refusal to comply with a strip search if the Impugned Searches are found to be illegal or unreasonable, I adopt the same approach as in *Good* (2014) and find that it is for the common issues judge to determine whether such declarations may be warranted. This is not an issue which requires individual trials.

[340] For the above reasons, I dismiss all of Canada's s. 5(1)(c) objections.

The s. 5(1)(d) objection

[341] The parties agree on the principles governing s. 5(1)(d) of the *CPA*, which I summarize as follows:

(i) The preferable procedure inquiry should be conducted through the lens of the three principal advantages of class proceedings – access to justice, judicial economy, and behaviour modification – and should consider the degree to which each would be achieved by certification: see *Cloud*, at para. 73; *Hollick*, at paras. 27-28.

(ii) The court should also consider whether it would be preferable to other reasonably available means of resolving the claims of the class members: see *Cloud*, at para. 73; *Hollick*, at paras. 27-28.

(iii) If a class action will not be fair, efficient, and manageable, then it is immaterial that no other method of resolving the class members' claims is preferable: see *Amyotrophic*, at para. 62.

(iv) The court conducts a "practical cost-benefit approach to this procedural issue, and … consider[s] the impact of a class proceeding on class members, the defendants, and the court": *Hollick*, at para. 29.

[342] Canada submits that a class action is not the preferable procedure for the class members to have their claims assessed. Canada submits that a class proceeding would not further the goals of judicial economy, access to justice, or behaviour modification, nor would be fair, efficient, or manageable. I address each of these arguments below.

Judicial economy

[343] Canada relies on the decisions in *Thorburn*, *Ewert*, and *Kahnapace*, in which the courts held that a class action was not the preferable procedure given the multitude of individual issues in those cases. On that basis, Canada submits that certification would not further judicial economy in the present case.

[344] As discussed at paras. 293-302 above, the cases relied upon by Canada can be distinguished because they all required individual determinations related to each proposed class member. In such circumstances, judicial economy would not be advanced by a class action.

[345] In the present case, no analysis of individualized grounds for the Impugned Searches is required, nor even possible. The Impugned Searches were suspicionless and based solely on the Impugned Situations under the Impugned Regulations.

[346] The plaintiffs submit that either the Impugned Regulations are *ultra vires* of s. 48(1)(a) of the Act and as such breach s. 8 of the *Charter*, or in the alternative, s. 48(1)(a) of the Act and the Impugned Regulations (i) are "unreasonable" and as such breach s. 8 of the *Charter* or (ii)

breach s. 7 of the *Charter* since they constitute a deprivation of the plaintiffs' right to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice.

[347] The plaintiffs further submit that Canada engaged in the torts of trespass to the person and intrusion upon seclusion by conducting the Impugned Searches.

[348] Each class member would not be required to bring an individual action to determine these issues. By definition, the Impugned Searches could not be based on individualized suspicions, so no review of the individual circumstances of each impugned search is required.

[349] Canada further relies on the "individualized nature" of the damages suffered by each class member. However, as in *Good* (2014), *Brazeau* (2019), *Reddock*, and *Francis*, the common issue judge in the present case may be able to fix a base amount of damages under s. 24 of the *CPA*, an approach which may significantly reduce the number of potential individual claims.

[350] In any event, under s. 6 of the *CPA*, the court shall not refuse to certify a proceeding as a class proceeding solely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

[351] There is judicial economy in pursuing the class action. There are approximately 50,000 class members within the six-year s. 32 *CLPA* limitation period,[34] and an additional number of inmates who may be able to toll the limitation period due to individual discoverability circumstances.

[352] Further, even with respect to any individual issues which may need to be determined – e.g., if some class members submit that the limitation period is tolled or seek additional damages (beyond a base amount if ordered by the common issues judge) – the class members will benefit from s. 25 of the *CPA* which allows for a streamlined procedure which may avoid many of the individual trials that would be required outside the class action context.

[353] Consequently, I find that a class action would advance judicial economy.

Access to justice

[354] Canada further submits that a class proceeding would not further access to justice since "[o]ne or more [of] the plaintiffs could have filed an application for judicial review years ago" which would have "effectively offered a class wide remedy and stopped the impugned searches for all inmates had the case been made out."

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[34] This is the approximate number of class members if the common issues judge accepts that the federal limitation period applies.

[355] Consequently, Canada submits that a "judicial review would be the more efficient manner of proceeding with this issue, as the parties can focus on resolving the threshold issue of whether the legislative and regulatory scheme is invalid, and may do so without the procedural elements otherwise required in a class proceeding."

[356] I disagree.

[357] I adopt the plaintiffs' submissions that a judicial review would not be the preferable procedure for the following reasons:

(i) A judicial review would not provide damages for torts or for *Charter* breaches, precluding the important functions of *Charter* damages – compensation, vindication, and deterrence.

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

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

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

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

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

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

[358] The barriers to accessing justice for any individual action or judicial review are significant. As the court held in *Golden*, few civil strip search cases are brought because "damage awards in tort for unlawful strip searches remain low, and the costs of bringing a civil action would far exceed the nominal damages awarded": at para. 67.

[359] Expert evidence will be required for the merits hearing. By way of example, evidence will likely be required from a prison security expert on the alternative argument asserting that the Impugned Searches are unconstitutional because they are unnecessary and disproportionate to the purpose of prison security.

[360] The financial and other barriers to accessing justice normally faced by individual litigants are significantly greater for those who are incarcerated. Dr. Hannah-Moffat's evidence on this issue is set out at paras. 41-43 above.

[361] Certification would also provide access to justice to other specific groups that historically face greater barriers, as discussed at para. 45 above.

[362] For the above reasons, I find that a class action would advance access to justice.

Behaviour modification

[363] Canada submits that the goal of behaviour modification "has been satisfied in the present case and does not depend on a class action proceeding" since:

> CSC has routine training and ISPs that adjust according to the needs and issues that arise. This is particularly true of the WOIs, where gender-based, trauma-informed training has been implemented and has led to the development and use of a tool that randomly selects women for strip searches, as well as facilities and programs specific to Indigenous culture and awareness.

[364] Canada relies on two letters from Major, and in particular her letter dated February 6, 2017 to the Deputy Warden at GVI, where Major was an inmate. In the letter, Major thanked the Deputy Warden and the "facilitators, chaplaincy, medical and volunteer community" who worked with Major to help her in "finally becoming a woman that is confident to stand up for her rights". Major stated in her letter that "GVI changed my life".

[365] However, none of the above evidence reflects any behavioural modification with respect to the Impugned Searches, which continue presently and require inmates to strip naked, without suspicion, in any of the Impugned Situations.

[366] Major (and both Farrell and Laity) were clear as to the humiliation they faced each time they were required to strip naked for the Impugned Searches.

[367] Major's evidence was uncontested that the Impugned Searches took place in front of "two staff people who could both fully see me naked." As Major stated, those Impugned Searches took place "when I left prison to attend medical appointments, to transfer to other prisons, and on release". She then discussed how "I was forced to allow each crevice and orifice of my naked body to be inspected by others… by taking off my own clothes and by following various degrading demands from CSC officers" which "caused deep emotional scars".

[368] While it is encouraging that Major believes GVI "changed her life", there is no suggestion in Canada's evidence that the Impugned Searches will stop without a court order (assuming the common issues judge decides in favour of the plaintiffs). As Major stated in her affidavit, "[t]he two letters I wrote were not about strip searches and do not reflect how traumatizing strip searches were for me."

[369] Further, even the steps relied upon by Canada in support of CSC's alleged behaviour modification have been challenged as to their effectiveness.

[370] By way of example, Canada submits that "gender-based, trauma-informed training has been implemented [at WOIs] and has led to the development and use of a tool that randomly selects women for strip searches," based on Byfield's evidence.

[371] The Correctional Investigator disagrees. His 2018-19 report recommended that the tool be "rescinded immediately" and that a "more trauma-informed, gender-responsive search policy become the standard practice." In the report, the Correctional Investigator also stated that the tool "is disempowering, does not promote responsible choices, disrespects dignity and creates environments of mistrust and suspicion… It is an outrage."

[372] Consequently, regardless of the alleged routine training, ISPs, and random search tools, the Impugned Searches continue, with more inmates each day being subjected to them.

[373] The role of behaviour modification served by this class action is demonstrated by Byfield's evidence on cross-examination. She disagreed with the Supreme Court's finding in *Golden* that strip searches are "inherently humiliating and degrading for detainees regardless of the manner in which they are carried out". Consequently, it is unlikely that there will be any change in the circumstances or manner in which suspicionless strip searches are conducted without a class action.

Fair, efficient, and manageable

[374] A class action would be fair, efficient, and manageable. It would determine the legality of the Impugned Searches and the availability of certain remedies. As such, all the significant disputed issues would be decided at a common issues trial.

[375] The court would further be able to consider whether aggregate damages are appropriate. If decided in the plaintiffs' favour, there would be a significant benefit in determining a base amount which may resolve the claim for the vast majority of the class members.

[376] Further, the flexibility to award aggregate damages as discussed at para. 329 above, is available only in a class action and enables the court on a common issues trial to resolve these claims fairly and manageably.

[377] For all the above reasons, I dismiss Canada's objection under s. 5(1)(d) of the *CPA*.

The s. 5(1)(e) objection

[378] Canada does not submit that (i) the representative plaintiffs would not fairly and adequately represent the interest of the class or (ii) have any interest that conflicts with the interest of other class members.

[379] However, Canada submits that the litigation plan is "unworkable" and "irredeemable".

[380] In its factum, Canada submitted that "the only proposed common issue plan, regarding the *vires* of the regulations, is not even a matter … which even falls within the jurisdiction of this Court. As a result, the plaintiffs[’] plan amounts to no plan at all." However, at the hearing, Canada acknowledged that the SCJ could determine the *vires* of the Impugned Regulations.

[381] Instead, Canada submits that the litigation plan fails to demonstrate the nature of the issues, how they need to be advanced and how they may evolve. Canada submits that "[s]uch a plan is tantamount to no plan at all. It is irredeemable and will lead to an inefficient, muddled and costly process going forward – which serves neither the parties nor the Court."

[382] I disagree.

[383] In *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, leave to appeal refused 2022 ONSC 1586 (Div. Ct.), the court set out the requirements for a workable litigation plan at para. 409:

> At the certification stage, the plaintiff's litigation plan is necessarily tentative and not all procedural details need to be provided. Its purpose is to assist the court to determine whether the goals of the *Act* will be served by certification, not to provide a finalized plan with all procedural elements spelled out in detail. The litigation plan can be modified as necessary as the litigation progresses. [Citations omitted.]

[384] In the plaintiffs' litigation plan, they propose a motion for summary judgment on the common issues. In *Brazeau* (2019), at paras. 270-82, *Reddock*, at paras. 199-209, and *Francis*, at paras. 41-57, a similar approach was adopted by the court, which on summary judgment was able to consider the evidence and law and render judgment on the liability issues, the aggregate damages claim, and any limitations issues. Remaining individual damages claims would be resolved at individual trials, if required.

[385] Consequently, in the present case it is "workable" to propose summary judgment to address all the common issues, including the *vires* of the Impugned Regulations, the alternative *Charter* arguments, a s. 1 analysis, the tort claims, the applicable limitation period, the availability of *Charter* damages, whether aggregate damages are appropriate and any base amount, and the jurisdiction and availability of declaratory relief.

[386] In any event, even if some of the above issues require a full trial instead of a summary judgment motion, that would not make the litigation plan irredeemably unworkable as Canada suggests.

[387] Further, even if some class members claim that the applicable limitation period was tolled for them, or seek additional damages, the litigation plan is workable. If trials on those issues are required, they would likely be brief with a streamlined evidentiary procedure.

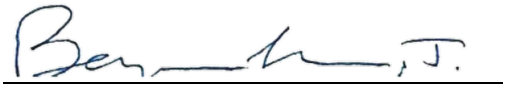
[388] For the above reasons, the proposed litigation plan assists the court to determine whether the goals of the *CPA* will be served by certification. The plaintiffs need not provide a finalized

plan with all procedural elements set out in detail. The plan is workable as required under s. 5(1)(e). Consequently, I reject this objection.

ORDER AND COSTS

[389] For the above reasons, I grant the motion for certification.

[390] If the parties cannot agree on costs, the plaintiffs shall deliver written submissions of no more than six pages (not including a costs outline) by March 24, 2023. Canada shall deliver responding costs submissions of no more than six pages (not including a costs outline) by April 7, 2023. The plaintiffs may then deliver reply costs submissions of no more than three pages by April 14, 2023.



GLUSTEIN J.

Date: 2023030

Schedule A: Proposed Common Issues

***Charter* s. 8 (Unreasonable Search and Seizure)**

1. Did the suspicionless strip searches of the class members in the Impugned Situations infringe s. 8 of the *Charter* on the basis that:

    a. They were not authorized by the *Corrections and Conditional Release Act* ("*CCRA*"); or

    b. They were authorized by the *CCRA* in one or more of the Impugned Situations but said legal authorization was unreasonable?

***Charter* s. 7 (Liberty and Security of the Person)**

2. Did the suspicionless strip searches of the class members in the Impugned Situations infringe s. 7 of the *Charter* on the basis that:

    a. They constituted a deprivation of liberty or security of the person under s. 7 of the *Charter*; and

    b. Legislation authorizing said deprivation in the Impugned Situations was arbitrary, overbroad, grossly disproportionate, procedurally unfair or otherwise not in accordance with a fundamental principle of justice?

3. If yes, was this justified under s. 1 of the *Charter*.

Torts

4. Did the suspicionless strip searches in the Impugned Situations constitute:

    a. Trespass to the person (false imprisonment, battery, assault); and/or

b. Intrusion on seclusion?

Limitation Period

5. What is the applicable limitation period?

Remedies

6. If the impugned conduct was authorized by the *CCRA* at the time and said authorization was subsequently found to be unconstitutional, are the class members barred from obtaining relief pursuant to s. 24 of the *Charter* on that basis, including *Charter* damages?

7. If a *Charter* breach or tort has been established, can damages be determined on an aggregate basis in whole or in part? If yes, what quantum of aggregate damages is warranted?

8. Was the defendant guilty of conduct that justifies an award of punitive damages? If yes, can the amount of punitive damages be determined in whole or in part?

9. Are declarations regarding the lawfulness of suspicionless strip searches in the Impugned Situations warranted?

10. Are orders regarding the expungement of disciplinary records arising from illegal searches or other non-monetary remedies warranted?

11. Should the defendant pay pre-judgment or post-judgment interest, and if yes, at what rate?

Expeditious Process to Resolve Individual Issues

12. If individual issues remain, what procedural directions should be provided under s. 25 of the *Class Proceedings Act* to ensure the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties?

The "Impugned Situations" are: (a) leaving a penitentiary, (b) entering or leaving a secure area, (c) entering a family-visiting area, and (d) in prison-to-prison transfers.

CITATION: Farrell v. Attorney General of Canada, 2023 ONSC 1474
COURT FILE NO.: CV-20-00643396-00CP
DATE: 20230303

ONTARIO

SUPERIOR COURT OF JUSTICE

MICHAEL FARRELL and KIMBERLY MAJOR

Plaintiffs

-and-

ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR DECISION

Glustein J.

Released: March 3, 2023