IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *North v. British Columbia (Attorney General),* 2020 BCSC 2044

Date: 20201222
Docket: S1812656
Registry: Vancouver

Between:

Naveah North (formerly know as Cody Cragg)

Plaintiff

And

Her Majesty the Queen in right of the Province of British Columbia

Defendant

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Plaintiff:	K. McEwan, Q.C. S. Chang C. Hatt J. Sayce
Counsel for Defendant:	C.E. Hunter, Q.C. C.D. Hermanson E.V. Madhur
Place and Date of Trial/Hearing:	Vancouver, B.C. August 24–25, 2020
Place and Date of Judgment:	Vancouver, B.C. December 22, 2020

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INTRODUCTION

[1] The plaintiff seeks to certify this action as a class proceeding on behalf of past and present inmates who have been held in “solitary confinement” at provincial correctional institutions in British Columbia. It is alleged that they have been subjected to cruel, inhumane, and degrading treatment and that their placement in that form of confinement without an adequate and timely review process violated their right to due process.

[2] The notice of civil claim (“NOCC”) defines solitary confinement as a practice under which inmates are placed in cells and denied any meaningful human contact for at least 22 hours a day. The proposed class is composed of those persons who, between April 18, 2005 and the present (the “Class Period”), were involuntarily subjected to either:

a) Solitary Confinement for at least fifteen consecutive days (“Prolonged Solitary Confinement”); or

b) Solitary Confinement when the person suffers from mental illness (''Solitary Confinement of Mental Health Disordered Inmates'')

[3] The plaintiff alleges breach of fiduciary duty, negligence, and breaches of ss. 7, 9, 11(h), 12 and 15 of the *Canadian Charter of Rights and Freedoms.* Damages are sought under each of those three causes of action.

[4] The defendant, Her Majesty the Queen in right of the Province of British Columbia (the “Province”), operates correctional institutions through BC Corrections, which is governed by the *Correction Act,* S.B.C. 2004, c. 46 and the *Correction Act Regulation,* B.C. Reg. 58/2005. During the proposed Class Period, the Adult Custody Division of BC Corrections operated 10 correctional centres. Inmates in those centres have either been found guilty of and sentenced for offences, or have been remanded in custody prior to trial. Some of the correctional centres house both sentenced and remanded inmates, while others house primarily one type of inmate or the other.

[5] The Province says its correctional system does not have a classification that meets the plaintiffs' proposed definition of "solitary confinement." It says individual inmate experiences are highly variable and a class cannot be defined on the basis of a subjective criterion such as "lack of meaningful human contact".

THE REPRESENTATIVE PLAINTIFF

[6] The representative plaintiff Naveah North, formerly known as Cody Cragg, is 30 years old and was incarcerated from April 2014 to May 2018 at the Prince George Regional Correctional Centre ("PGRCC"), one of the institutions operated by the Province. She says she has struggled with mental health illness since she was a teenager and in 2014, while at PGRCC, was diagnosed with borderline personality disorder, obsessive compulsive disorder, anti-social personality disorder, polysubstance disorder, and alexithymia.

[7] During her time at PGRCC, the plaintiff was placed in "segregation" (which her counsel argues is indistinguishable from solitary confinement) for approximately seven consecutive months in response to self-harming conduct. She was then placed alone in a Medical Observation Unit where she spent approximately 23 hours per day in lock-up for approximately 16 months. She says she was aware of monthly reviews of her placement, but she did not participate in them.

[8] The plaintiff has also filed affidavits from six other current inmates who say they have spent lengthy periods of time in segregation or solitary confinement. Their descriptions include: segregation cells filthy with blood and feces, sleep deprivation from lights being left on all night, and being allowed as little as half an hour a day outside their cell. Ongoing problems various affiants attribute to their time in solitary confinement include depression, post-traumatic stress disorder, and aggravation of pre-existing mental health conditions.

THE BC CORRECTIONAL SYSTEM

[9] The Province says the term "Solitary Confinement" is not used in the governing statutory scheme or by corrections officials. It says the applicable

regulation provides two basic classifications under which an inmate may be separated from the regular inmate population.

[10] "Separate confinement" (also referred to in practice as "administrative segregation") provides for an individual to be housed separately from some or all of the regular inmate population for one of three reasons: because they are considered a danger to themselves, others, or the safety or security of the correctional centre; because they may be at risk of harm from other inmates in the regular population; or for medical reasons. "Segregation" (also called "disciplinary segregation") refers to an individual confined in a segregation unit pending or following a disciplinary hearing.

[11] A "segregation unit" is a designated unit separate from other living units in the correctional centre, but the Province says the size and other features of cells in the segregation unit vary between, and sometimes within, institutions. It says inmates subject to administrative segregation may be housed in segregation units or in regular living units depending on the circumstances of the institution and the individual.

[12] The Province also says that inmates subject to administrative or disciplinary segregation are not necessarily alone. In some cases, inmates are "double-bunked" in segregation unit cells or in other cells in which they are separately confined. In fact, the Province says the plaintiff and each of the other inmates whose affidavits she relies on shared a cell with another inmate for at least part of the periods complained of. One of the reasons the Province disputes the plaintiff's proposed class definition is that, depending on the individual, the presence of a cellmate may provide "meaningful human contact."

[13] On the issue of mental health disordered inmates, the Province says that inmates' health care records, including any mental health diagnoses, are kept separate from correctional records and correctional officials have no access to them.

[14] The Province says the amount of time segregated inmates are allowed out of their cells varies in practice based on a number of factors. However, the plaintiff says that throughout almost the entire Class Period, inmates subject to administrative segregation almost never received more than a single hour out of their cells per day.

[15] I was told on this application that, in August 2019, B.C. Corrections increased the minimum time of out cell to two and a half hours per day. The change to the *Correction Act Regulation* putting that into effect is actually dated June 8, 2020, and states that it does not apply to separately confined or segregated inmates unless it can reasonably applied "having regard to the limitations of the area in which the inmate is confined and the necessity for the safe and effective operation of that area." The plaintiff says it has been rare for segregated inmates to be confined to their cell for less than 22 hours per day.

CERTIFICATION UNDER THE CLASS PROCEEDINGS ACT

[16] The certification of a class proceedings is governed by Section 4 of the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*]. Section 4(1) requires the court to certify an action as a class proceeding if:

> a) the pleadings disclose a cause of action;
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> b) there is an identifiable class of 2 or more persons;
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> c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and,
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> e) there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and, (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[17] Factors to consider in the preferability analysis under s. 4(1)(d) are set out in s. 4(2):

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
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> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient; and
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[18] The onus is on the party seeking certification to meet the requirements in s. 4(1) by showing there is "some basis in fact" for each of them: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99. The threshold the plaintiff must meet on a certification application is low and the court does not decide on the merits of the action or weigh conflicting evidence. However, the court must engage in a meaningful gatekeeping function to ensure that only claims in the common interest of the class are advanced: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 15.

[19] As this case illustrates, the requirements in s. 4(1) do not necessarily create watertight compartments. The same issues may be raised in response to more than one of them.

ANALYSIS

The Class Period

[20] The plaintiff proposes a Class Period beginning in April 2005, more than 13 years prior to the commencement of this action on November 26, 2018. In its response to civil claim, the Province relies on the two year limitation period under s.

6 of the *Limitation Act*, S.B.C. 2012, c. 13. It says any claims arising prior to November 26, 2016 are bound to fail and ought not be certified.

[21] Although a presumptive limitation period applies, claims of class members whose confinement ended at an earlier date are not necessarily bound to fail. The limitation period under s. 6 runs from the date a claim is discovered. Under s. 19 of the current *Limitation Act* and s. 7 of the former *Limitation Act*, R.S.B.C. 1996, c. 266, special discovery rules may extend the limitation period as it applies to persons under a disability. Both *Limitation Acts* define a person under a disability as one who is "incapable of or substantially impeded in managing his or her affairs."

[22] The proposed class includes individuals who were suffering from mental illness at the time they were placed in solitary confinement and others who are alleged to have suffered psychological injury as a result of their confinement. Some of them may have been, or still be, suffering mental illness or injury of sufficient severity that they meet the definition of persons under a disability. Those individuals may be able to pursue claims arising from confinement that took place before the presumptive limitation date the Province relies on.

[23] The presence of a limitation issue remains relevant to the question of whether a class action is the preferable proceeding and will be dealt with below, but I find that it is not a reason to restrict the Class Period at the certification stage.

Cause of Action—s. 4(1)(a)

[24] The test under s. 4(1)(a) is whether, assuming all the pleaded facts to be true, it is plain and obvious that the action cannot succeed. The court must read the pleadings generously, and the plaintiff need only satisfy the court that the action is "not bound to fail": *Finkel* at paras. 16–17.

[25] The Province submitted in argument that the proposed class action fails the cause of action test, although its filed response to the certification application gave no indication of that position.

[26] The NOCC alleges that class members were in an entirely dependent position, giving rise to a fiduciary relationship in which the Province owed duties that included fair treatment and protection from cruel and unusual punishment. It further alleges that the Province owed a common law duty of care to conform to the standard of a reasonable prison operator, including compliance with applicable legislation and domestic and international policy norms.

[27] The plaintiff pleads breach of class members' *Charter* rights, including:

- the right not to be subjected to cruel and unusual punishment;
- the right not to be arbitrarily detained or imprisoned;
- the right not be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice;
- the right not to be punished twice for the same offence; and
- the right not to be discriminated against on grounds of mental illness.

[28] Paragraph 26 of the NOCC alleges systemic mistreatment of class members in breach of all duties and lists 30 particulars, while para. 31 alleges and lists numerous adverse physical and psychological effects suffered by class members.

[29] Assuming all of the alleged facts to be true, I find that the pleadings clearly disclose causes of action. They allege specific legal duties, conduct said to have been in breach of those duties, and resulting damages. To the limited extent necessary on a certification application, the affidavits filed by the plaintiff and other inmates describing their experiences provide some basis in fact for those allegations.

[30] The plaintiff also relies on three class actions in Ontario raising similar causes of action that have not only been certified but have proceeded to summary judgment on the merits and decided in favour of the plaintiffs. Two of those decisions have been upheld by the Ontario Court of Appeal.

[31] In *Brazeau v. Canada (Attorney General)*, 2016 ONSC 7836 (certification), 2019 ONSC 1888 (merits), the class consisted of offenders in federal institutions with serious mental illness who were placed in administrative segregation. In *Reddock v. Canada (Attorney General)*, 2018 ONSC 3914 (certification), 2019 ONSC 5053 (merits), the class was defined as all offenders in federal custody who were involuntarily subjected to prolonged (defined as at least 15 consecutive days) administrative segregation, excluding members of the *Brazeau* class. In both cases there was a claim for damages for breach of charter rights and a summary judgment in favor of the plaintiffs. The Ontario Court of Appeal upheld the judgments in *Brazeau* and *Reddock* (with the exceptions of the quantum of damages in *Brazeau* and the finding of negligence in *Reddock*) in a combined judgment indexed at 2020 ONCA 184.

[32] *Francis v. Ontario,* 2018 ONSC 5430 (certification), 2020 ONSC 1644 (merits), concerned inmates in the Ontario provincial correctional system, with the class defined in terms similar to what the plaintiff seeks here. The Court found liability against Ontario both under the *Charter* and for systemic negligence.

[33] It is neither necessary nor appropriate to set out the detailed factual findings that were made in the three Ontario cases. There may be factual differences between administrative or disciplinary segregation, as practiced in the British Columbia provincial system, and the systems that were at issue in those cases. The plaintiff will have to prove any relevant similarities that she relies on. That will be a matter for discovery and trial if this action is certified.

[34] The important point is that the Court in Ontario accepted that the plaintiffs had stated a cause of action and was subsequently able to adjudicate upon it. This plaintiff may or may not ultimately have the same success on the merits, but the Ontario cases strongly argue against any suggestion that the plaintiff's case is bound to fail.

[35] The Ontario cases were certified by consent and there is no such consent here. But consent did not eliminate the need for the court to be satisfied that the test

for certification had been met. Moreover, the fact that the court was ultimately able to decide the cases on their merits vindicates the appropriateness of the certification.

[36] The Province's argument under s. 4(1)(a) of the CPA focusses primarily on the plaintiff's claim for *Charter* damages. It says that portion of the claim has no prospect of success because the acts or omissions that the plaintiff alleges constitute *Charter* breaches are also pleaded as torts and all of the pleaded consequences of those *Charter* breaches are identical to the pleaded consequences of the torts. Therefore, the Province says tort damages are available and *Charter* damages are inappropriate or unjust.

[37] I first note that even if the Province is successful on that point, it would not prevent certification on the basis of the plaintiff's tort and fiduciary duty claims. As it would not be a complete answer to certification, the issue raised is similar to an application to strike part of a pleading under Rule 9-5 of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009. Although the test for striking a pleading (that it discloses no reasonable claim) is the same as the test under s. 4(1)(a) of the *CPA,* there is a procedural distinction when only a portion of the pleading is put in issue.

[38] There is a general presumption in favour of the certification motion being the first item of business in a proposed class action: *Kett v. Mitsubishi Materials Corporation*, 2019 BCSC 2373 at para. 11. In my view, a defendant alleging that only part, but not all, of a proposed class action pleading fails to disclose a cause of action should normally await the court's decision on certification. If certification is granted, the defendant can then bring a specific application under Rule 9-5 to strike that portion of the pleading.

[39] Having said that, the Province's point about *Charter* damages has been fully argued and I will deal with it.

[40] The Province relies on *Vancouver (City) v. Ward*, 2010 SCC 27, as authority for the proposition that the availability of alternative private law remedies against the government will adequately fulfill the functional purpose of *Charter* damages. The

Court said at para. 35 that "if the claimant has brought a concurrent action in tort, it is open to the state to argue that, should the tort claim be successful, the resulting award of damages would adequately address the *Charter* breach." At para. 36, the Court added that "a concurrent action in tort, or other private law claim, bars [*Charter*] damages if the result would be double compensation" [emphasis added].

[41] The Province also refers to *Quinn v. British Columbia,* 2018 BCCA 320, leave to appeal ref'd [2018] S.C.C.A. No. 463, and *Johnson v. MacDougall*, 2019 BCSC 743, which it says are binding authority for the proposition that *Charter* damages serve no functional purpose if they arise from facts that are co-extensive with torts on the same pleaded facts.

[42] *Quinn* and *Johnson* were both applications to strike pleadings. In *Quinn*, the Court of Appeal determined that the *Charter* damages claim in that matter was improper and bound to fail for a variety of reasons, including that parts of the *Charter* damages claim were "akin to the intentional tortious/bad faith conduct captured by the tort of misfeasance in public office": at para. 67. In *Johnson*, both the tort and *Charter* claims arose from alleged assaults and the court found that the *Charter* damages claim duplicated the tort claim.

[43] As I read *Quinn* and *Johnson*, they illustrate that a *Charter* damages claim can be struck when it is clear from the pleadings that, on the facts alleged, the *Charter* claim can only succeed if the tort claim also succeeds, resulting in the same damages. There is no question that a plaintiff cannot obtain double recovery by asserting two causes of action.

[44] However, it is possible for a plaintiff to obtain *Charter* damages while being unsuccessful in a concurrent tort claim. That is precisely what happened in *Ward*. Referring to assault and negligence claims the plaintiff had made, the Court said at para. 68:

> These claims were dismissed and their dismissal was not appealed to this Court. While this defeated Mr. Ward's claim in tort, it did not change the fact that his right under s. 8 of the *Charter* to be secure against unreasonable search and seizure was violated.

[45] The Court also made clear at para. 59 that there is no bar to pleading both tort and *Charter* claims:

> [59] As was done here, the claimant may join a s. 24(1) [of the *Charter*] claim with a tort claim. It may be useful to consider the tort claim first, since if it meets the objects of *Charter* damages, recourse to s. 24(1) will be unnecessary. This may add useful context and facilitate the s. 24(1) analysis. This said, it is not essential that the claimant exhaust her remedies in private law before bringing a s. 24(1) claim.

[46] In its decision on the combined appeal in *Brazeau* and *Reddock*, the Ontario Court of Appeal said:

> [43] We are not persuaded that the mere existence or possibility of a tort claim precluded the motion judge from awarding *Charter* damages. *Ward* does not establish a firm rule that a court should not award *Charter* damages simply because there is a possible private law claim for the same damages. The concern expressed with respect to alternative remedies is the need to avoid duplication and double recovery. *Ward* contemplates concurrent claims for private law and *Charter* damages, provided an award of *Charter* damages is not "duplicative": at para. 35. If there is another avenue to damages, "a <u>further</u> award of damages under s. 24(1) would serve no function and would not be 'appropriate and just'" (emphasis added): at para. 34. Nor does *Ward* create a hierarchy of remedies with *Charter* remedies coming last. A claimant is not required to "show that she has exhausted all other recourses": at para. 35. The evidentiary burden is the reverse. It is for the state "to show that other remedies are available in the particular case that will sufficiently address the breach": at para. 35.
>
> [44] The state can only complain if the award of *Charter* damages duplicates the available private law damages. Double recovery will not occur in this case.

[47] The plaintiff alleges three causes of action, but the Province's submission primarily addresses the duplication between the negligence and *Charter* claims. Although the same damages, arising from the same conduct, are claimed in different causes of action, it does not follow that the plaintiff will be equally successful in establishing liability under the different causes of action. The plaintiff must first identify and show a breach of the relevant right or duty.

[48] A plaintiff seeking *Charter* damages must state the *Charter* right or rights alleged to have been breached. The NOCC does that and the Province's Response, while denying any breach, admits that class members have those rights.

[49] A plaintiff seeking damages in negligence must first prove that the relationship between the parties gave rise to a duty of care. That may require an analysis of foreseeability, proximity and policy considerations: *Cooper v. Hobart*, 2001 SCC 79 at para. 30. While admitting that class members have rights under the *Charter*, the Province's response denies the existence of the alleged common law duty of care. That duty is alleged in para. 19 of the NOCC, which is among the paragraphs the Province specifically denies in para. 2 of its response.

[50] In the joint *Brazeau/Reddock* appeal, the Ontario Court of Appeal upheld the award of *Charter* damages in *Reddock*, but set aside the motion judge's finding of negligence based on the motion judge's definition and analysis of the duty:

> [114] Canada argues that the motion judge erred in *Reddock* in his analysis of the duty of care in relation to systemic negligence. We agree with that submission, but as the damages awarded by the motion judge are sustainable as *Charter* damages, and as we view *Charter* damages to be the more appropriate remedy, our consideration of the systemic negligence issue will be brief.

[51] Similarly, the Court in this case may ultimately find, for policy or other reasons, that no common law duty of care is owed in these circumstances while nevertheless finding a breach of *Charter* rights. That would make *Charter* damages the only available remedy. At least, it is not plain and obvious that such a result is impossible and it follows that the claim for *Charter* damages is not bound to fail.

[52] I therefore find that the pleadings disclose a cause of action for purposes of s. 4(1)(a).

Identifiable Class—s. 4(1)(b)

[53] In *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82, the Court summarized the principles governing the requirement for an identifiable class:

- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
- the class must be defined with reference to objective criteria that do not depend on the merits of the claim;

- the class definition must bear a rational relationship to the common issues—it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and

- the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[Emphasis in original.]

[54] If the court finds that the proposed class should be defined more narrowly, it may either disallow certification or allow certification on the condition that the class definition be amended: *Jiang* at para. 76.

[55] It is useful here to repeat the plaintiff's proposed class definition in the NOCC:

> 4. The proposed class is composed of those persons who, between April 18, 2005 and the present, were involuntarily subjected to either:
>
> a) "Prolonged Solitary Confinement" (being Solitary Confinement for at least fifteen consecutive days); or
>
> b) Solitary Confinement when the person suffers from mental illness ("Solitary Confinement of Mental Health Disordered Inmates").

[56] No further explanation of the term "solitary confinement" is included in the class definition, but paras. 2-3 of the NOCC say:

> 2. Under Solitary Confinement practices, inmates are placed in cells and denied any meaningful human contact for at least 22 hours per day.
>
> 3. In British Columbia, inmates are subject to Solitary Confinement for either disciplinary or administrative reasons. "Disciplinary Solitary Confinement" may only be imposed as a punishment for the most serious offences committed by an inmate. "Administrative Solitary Confinement" may be imposed in instances unrelated to any conduct of the inmate, but where Solitary Confinement is deemed necessary to maintain the security of the BC Correctional Centre or the safety of any person.

[57] Part of the Province's objection to the class definition is that the B.C. correctional system has no classification known as "solitary confinement." It says use of the term in the class definition goes to its ability to determine, through correctional records, who properly belongs to the class and to the ability of potential class members to self-identify.

[58] Although the *Correction Act Regulation* does not refer to “solitary confinement” it does provide for “separate confinement” (ss. 17 and 18) and “segregation” for disciplinary reasons (ss. 24 and 27(1)(d)). The evidence and submissions of the Province indicates that the terms “administrative segregation” and “disciplinary segregation” are commonly used synonyms for those terms. That is similar to the administrative/disciplinary distinction referred to in para. 3 of the NOCC.

[59] The terms used by the Province appear to be well understood by potential class members. The affidavits from the plaintiff and other inmates filed on this application all use the term “segregation” interchangeably with or in place of “solitary confinement.”

[60] The Province also objects that the proposed class does not meet the requirements of s. 4(1)(b) because it is based on subjective criteria and is bound up in the merits of the claim. Those objections flow from the reference to “meaningful human contact,” which the Province treats as part of the class definition.

[61] The Province says there is no reliable record of the number of hours of human contact that any particular inmate experiences in any given day and the determination of whether that contact is “meaningful” is a subjective one that differs for each individual. That same lack of documentation and subjectivity also goes to the ability of potential class members to self-identify.

[62] The Province further says that the question of whether it is liable for depriving individuals of “meaningful human contact” goes to the very substance of the proposed class action. Determination of class membership cannot “require consideration of central issues in the action”: *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. Canada (Attorney General)*, 2012 BCCA 193 at para. 85.

[63] I find that these objections would be easily accommodated by replacing the words “solitary confinement” in the class definition with the words “separate confinement and/or segregation.” That would define the class based on a form of

confinement recognized and defined in the *Correction Act Regulation*. References to lack of meaningful human contact and limited time out of cells are alleged to be the wrongful features of that form of confinement, but do not form part of the class definition. Whether separate confinement or segregation as practiced in B.C. correctional centres routinely exposes inmates to those conditions is a question of fact for the plaintiff to prove at trial.

[64] The Province further argues that the proposed class definition is too vague in that it refers to inmates who were "involuntarily" subjected to the confinement regime at issue. The *Correction Act Regulation* provides in s. 19 for voluntary separate confinement, which applies when an inmate agrees that he or she would be at risk of harm if not confined separately, but the Province argues that the regulation makes no mention of "involuntary" separate confinement.

[65] With respect, ordinary English usage would provide that if the regulation is able to define a "voluntary" condition, an "involuntary" one must be whatever does not meet that definition. That meaning is also made clear in the language of ss. 17, 18 and 24, which say that the "person in charge may order" [emphasis added] an inmate to be confined separately or placed in segregation.

[66] According to some of the evidence put forward by the Province on this application, separately-confined inmates sometimes prefer to remain separately confined and refuse to leave their separate confinement. I do not find that to be a bar to certification. A mentally competent inmate or former inmate who decided that they preferred separate confinement would presumably not have suffered the same degree of psychological and other injuries as other inmates. Such an individual might opt out of the class proceeding under s. 16 of the *CPA*, or the matter could be addressed in any subsequent proceedings to resolve individual issues.

[67] In relation to the class members defined as "mental health disordered inmates," the Province argues that the corrections officials who make decisions on where or how an individual inmate is confined do not have access to medical records and therefore do not know if that person suffers from mental illness.

[68] In *Francis*, this issue was addressed by limiting the category of "inmates with a serious mental illness" to those who "reported such diagnosis and suffering to the defendant's agents before or during their administrative segregation."

[69] In this case, the alleged breaches by the Province include:

> (j) Failure to consider and address pre-existing mental and/or physical conditions of Inmates upon their imprisonment;
>
> …
>
> (j) Failure to investigate and oversee the psychological, mental, and physical health of Class members in the BC Correctional Centres; and
>
> (k) Failure to provide adequate psychiatric and psychological care for Class members.

[70] Those pleadings are broad enough to include systemic issues related to the mental health of prisoners. If there is no system in place under which the fact of an inmate's mental illness can be appropriately communicated to the officials dealing directly with that person, the plaintiff may argue that in itself constitutes a breach of an applicable duty.

[71] That issue would be adequately captured by language defining "mental health disordered inmates" as those who the defendant or its agents "knew or ought to have known" suffered from mental illness. I am also of the view that "mental illness" should be defined with reference to a list of specific diagnoses, as was done in *Francis*.

[72] Provided the class definition is amended in the manner I have referred to, I find the class will be sufficiently identifiable under s. 4(1)(b).

Common Issues—s. 4(1)(c)

[73] The test under the common issues requirement was described this way in *Finkel* at para. 22:

> [22] The commonality threshold is low; a triable factual or legal issue which advances the litigation when determined will be sufficient. The critical factors in determining whether an issue is common are: (i) its resolution will avoid duplicative fact-finding or legal analysis; (ii) it is a substantial ingredient of each class member's

> claim and must be resolved to resolve the claim; and (iii) success for one class member on the issue will mean success for all.

[74] In *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 85, the Court of Appeal referred to a more detailed list of requirements, including an "evidential basis for the existence of common issues" and, if causation and damages are among the common issues, evidence that there is a workable methodology for determining them on a common basis.

[75] In *Rumley v. British Columbia*, 2001 SCC 69 at para. 33, the Court emphasized that the commonality requirement will be satisfied "whether or not the common issues predominate over issues affecting only individual members." Predominance is a relevant factor under the preferability analysis, but the question at the commonality stage is "quite narrow."

[76] Rather than focussing on how many individual issues there are, a court must consider whether there are issues the resolution of which would be necessary to resolve each class member's claim and which are a substantial ingredient of those claims: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 55, 247 D.L.R. (4th) 667 (C.A.), leave to appeal ref'd [2005] S.C.C.A. No. 50.

[77] The common issues proposed by the plaintiff, with terminology revised as I have directed in the previous section, are:

a. Fiduciary Duty:
    i. Does the defendant owe the Class members a fiduciary duty to act in their best interests with respect to their care and in the management, operation and oversight of the BC Correctional Centres; and,
    ii. By detaining Class members in Prolonged [separate confinement and/or segregation] and [separate confinement and/or segregation] of Mental Health Disordered Inmates, has the defendant breached such duty?
b. Negligence:
    i. Does the defendant owe the Class members a common law duty of care in the management, operation and oversight of the BC Correctional Centres?

ii. by detaining Class members in Prolonged [separate confinement and/or segregation] and [separate confinement and/or segregation] of Mental Health Disordered Inmates, has the defendant breached such duty?

c. Breaches of the *Charter of Rights and Freedoms:*

i. When detaining Class members in Prolonged [separate confinement and/or segregation] and [separate confinement and/or segregation] of Mental Health Disordered Inmates, did the defendant breach the Class members' rights under the *Charter of Rights and Freedoms*, particularly ss. 7, 12 and 15?

ii. If the answer to (i) is "yes", are any such breaches saved by s. 1 of the *Charter*?

iii. If the answer to (i) is "yes" and (ii) is "no", are damages available to Class members under s. 24(1) of the Charter?

d. If the answer to any of the common issues (a), (b), or (c)(iii) is "yes", can the Court make an aggregate assessment of the damages suffered by some or all Class members?

e. If the answer to any of the common issues (a), (b), or (c)(iii) is "yes", was the Defendant guilty of conduct that justifies an award of punitive damages?

f. If the answer to common issue (e) is "yes", what amount of punitive damages ought to be awarded?

[78] The Province conceded in argument that issues a(i) and b(i) could be determined on a common basis, but says determination of them would not advance the litigation because it has not denied the existence of the duties referred to. In fact, the response to civil claim does deny the existence of those duties. As said above, para. 2 of the response lists a number of paragraphs in the NOCC that are denied, including the paragraphs that assert the existence of a fiduciary duty and a common law duty of care. Paragraph 43 also specifically denies that a fiduciary duty is owed and paras. 40 to 42 all begin with the words: "If the Province owed the plaintiff and/or the proposed class members a duty of care…" [emphasis added].

[79] The balance of the proposed common issues relate to whether there has been a breach of those duties or of the *Charter*, whether the court can make an aggregate assessment of damages for those breaches, and whether punitive damages are justified.

[80] The Province says those issues cannot be determined on a common basis because decisions on classification, where to house separately-confined inmates, and the nature and extent of opportunities for human contact afforded to each inmate are made on an individual basis. It says the decision on whether there has been a breach of any right or duty is, therefore, inherently individual.

[81] I find that argument to be essentially a repetition of what the Province argued in relation to the previous requirements and reject it for the same reason. The plaintiff says that separate confinement or segregation is routinely administered in a way that gives rise to the alleged breaches and does so in respect of all who are subjected to it. At this juncture, I am to take this allegation as true. She has provided affidavits from herself and other inmates that show commonality of their experience and of the effects on their physical and mental health. The variability that the Province asserts is a potential defence on the merits, rather than a bar to certification.

[82] The Province argues that aggregate damages cannot be determined on a common basis. Aggregate damages are provided for in s. 29 of the *CPA*:

> Aggregate awards of monetary relief
>
> **29**(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly 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.
>
> (2)Before making an order under subsection (1), the court must provide the defendant with an opportunity to make submissions to the court in respect of any matter touching on the proposed order including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under that subsection, and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

[83] An aggregate assessment is not a tallying of individual claims, but "a communal assessment of the totality of the class members' claims where the underlying facts permit this to be done with reasonable accuracy. Then, with the quantum of the defendant's liability to the class determined, the court can decide how to distribute the judgment in proceedings in which the defendant need not be involved": *Fantl v. Transamerica Life Canada*, 2013 ONSC 2298 at para. 196.

[84] A certification of a common issue related to aggregate damages is not a finding that such damages are appropriate. Section 29(2) of the *CPA* sets out specific issues the defendant is entitled to raise before the court makes an order awarding aggregate damages—that is, at trial.

[85] However, a plaintiff must show there is a plausible and realistic methodology to certify an issue in relation to determining loss on a class-wide basis: *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 104, leave to appeal ref'd [2019] S.C.C.A. No. 311; *Sandhu v. HSBC Finance Mortgages Inc.*, 2017 BCSC 874 at paras. 95–98. In most cases, that will require some (usually expert) evidence, but in my view nothing in the *CPA* precludes a plaintiff from demonstrating the existence of a realistic methodology by other means. In this case, the plaintiff relies on the fact that another court has been able to assess damages for the class on a similar claim.

[86] In *Francis*, the Court found, on the basis of expert and other evidence, that "without exception," placement of inmates in segregation causes a "minimum level of harm to the inmate," with some individuals suffering to a greater degree (at para. 269). At para. 604, the Court said:

> [604] In the case at bar, I am satisfied from the evidence that for every Class Member, the stress and anxiety of administrative segregation was serious and prolonged and above the ordinary annoyances, anxieties and fears that come with living in a prison. In the immediate case, the Class Members of the Inmates with Serious Mental Illness Class were by definition suffering from a DSM level mental illness. The placement into administrative segregation just added to their misery and pain and their suffering is worthy of compensation.

[87] That minimum level of harm found to have been suffered by all inmates gave rise to a global award of $30 million in damages at a base level to the entire class. Those damages were assessed as *Charter* damages, which have goals of vindication of rights and deterrence as well as compensation: para. 602. I agree with plaintiff's counsel that a "base level" of *Charter* damages for vindication and deterrence are ideal for assessment on an aggregate basis.

[88] Although the plaintiff has put forward no case-specific evidence on methodology, I find that she should not be denied the opportunity to present evidence similar to what was before the Court in *Francis* and present arguments as to the extent to which it applies in the British Columbia context.

[89] The Province also argues that the punitive damages can only be determined following the trial of all common issues and every individual trial. If that were correct, punitive damages could never be certified as a common issue in class proceedings. However, it is clear that punitive damages may be awarded when misconduct "represents a marked departure from ordinary standards of decent behaviour" and may be certified as a common issue in appropriate cases: *Ari v. Insurance Corporation of British Columbia*, 2019 BCCA 183 at para. 29.

[90] In *Rumley*, the Court said that in order to resolve the primary common issue of whether the defendant breached a duty of care or fiduciary duty to the class, the court would necessarily have to assess the knowledge and conduct of the defendants, which was "exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified": at para. 34. I find the same applies here.

[91] Accordingly, I find the requirement under s. 4(1)(c) has been satisfied.

Preferable Procedure—s. 4(1)(d)

[92] The question of whether the class action is the preferable procedure must be considered in light of the three goals of class proceedings: access to justice, behaviour modification, and judicial economy. The court must consider the extent to

which the proposed class action may achieve those goals, but the ultimate question is whether other procedures are preferable, not whether the class action will fully achieve all of those goals: *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22–23.

[93] Much of the Province's objection on this point flows from the same argument that I have rejected in relation to the other requirements—that the highly individualized nature of inmate experiences means resolution of common issues will not advance the litigation.

[94] The fundamental underlying issue the plaintiff raises is whether the Province's system of separate confinement or segregation, by its very nature, gives rise to the breaches of duties and rights alleged. I find that a decision on those general systemic issues will advance the litigation and am not persuaded that any other proceeding would be preferable.

[95] The Province argues that a significant proportion of the proposed class were housed in correctional centres while on remand pre-trial. They all had individual trials and had the opportunity to seek redress in respect of the conditions of their incarceration. Aside from the fact that argument does not apply to all members of the class, I am not persuaded that any sentence reductions that may have resulted in some cases meets all of the objectives of a class action. It does not address the deterrence and vindication goals of *Charter* damages and, of course, a sentencing judge in criminal proceedings cannot award any monetary damages to the accused based on his or her conditions of confinement.

[96] The most substantial argument raised by the Province on preferability is its limitation defence. The individualized nature of limitation issues weighs against certification but is not decisive of it: *Ross v. Canada (Attorney General)*, 2018 SKCA 12 at para. 74.

[97] In *Rumley*, the Court dealt with a class action involving abuse suffered by deaf and blind children at a residential school. Limitation issues were not raised, but

I find the considerations in this case are similar to those the Court referred to at para. 38:

> [38] …On this point I would agree with the Court of Appeal that individual actions would be less practical and less efficient than would be a class proceeding. As Mackenzie J.A. [in the decision below] noted (at pp. 9-10), "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements". Further, "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate individual cases".

[98] In *Cloud*, which was also a residential school case, the existence of a limitation defence was considered under the heading of common issues, but I find the analysis at para. 61 applies equally when the matter is considered as part of the preferability analysis:

> [61] Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

[99] The preferability analysis in *Ross*, another residential school case, referred to both *Rumley* and *Cloud* in dealing with the limitation question, at para. 80:

> [80] …The key points in this litigation, as was the case in *Rumley* and *Cloud*, will be (a) whether Canada and Saskatchewan owed a duty of care to the class members and whether they breached that duty, and (b) whether Canada and Saskatchewan owed a fiduciary duty to class members and whether they breached that duty. The existence of individual limitation period issues does, of course, weigh against the appellants in the preferability analysis required by s. 6(1)(d) of the *Act*. However, proceeding by way of a class action nonetheless remains a fair, efficient and manageable way of proceeding. The resolution of the common issues would significantly advance the resolution of these claims.

[100] The Province relies on *Knight v. Imperial Tobacco Canada Limited*, 2006 BCCA 235, to argue that it is not possible to decide on an award of damages to a class certified to include presumptively statute-barred claims because the composition of the class would be unknown. However, s. 7 of the *CPA* makes clear that uncertainty about the size or composition of a class is not necessarily or in itself a bar to certification:

> Certain matters not bar to certification
>
> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[101] The allegation in *Knight* was that the defendant engaged in deceptive practices by marketing cigarettes branded as “light” or “mild”. The class sought to be defined was all persons who had purchased those products in British Columbia from 1974 to the time of litigation. One can easily imagine the difficulties in even attempting to estimate the potential size of such a class. In this case, the potential size of the class, including those whose claims may or may not be defeated by a limitation defence, is far more easily ascertainable.

[102] The discoverability issue in this case is also distinguishable from the one in *Knight*. The court in *Knight* at para. 33 relied on *Novak v. Bond*, [1999] 1 S.C.R. 808 at 849, 172 D.L.R. (4th) 385, where the Court referred to s. 6(4)(b) of the former *Limitation Act*. That section involved both an objective and subjective component. It postponed the limitation period until facts within the plaintiff’s means of knowledge were such that a “reasonable person” would regard them as showing:

> the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[103] In *Knight*, the limitation issue turned on the subjective understanding of each class member for whom there was a potential limitation defence—when they knew or ought to have known enough about the allegedly deceptive nature of the defendant's practices to be able to bring an action. The common issues related to damage awards were thus only certified for those class members for whom the limitation defence could not apply.

[104] However, in *Bodnar v. Community Savings Credit Union,* 2015 BCCA 504, there was again a potential limitation issue involving the same section of the former *Limitation Act* as in *Knight*. The allegation in that case was that the financial institution's overdraft charges amounted to a criminal rate of interest. The Court of Appeal agreed that the ruling in *Knight* did not prevent certification of common issues that addressed whether a reasonable person would have sought advice before a certain date, recognizing that further individual analysis of the limitation issue may be required. The court said at paras. 45-46:

> [45] The issue appears to turn on the question of whether a resolution of the questions would advance the litigation. Mr. Bodnar agrees that the issue of postponement cannot be completely resolved as part of a class action, as there will be individual inquiries in order to reach a final resolution. What he argues is that determining whether the Credit Unions thought the charges were lawful would move the litigation forward for everyone, as would a determination of what the "reasonable, objective person" might have done, without the subjective component. The Credit Unions argue that the subjective and objective components of the test are integrated, and cannot be separately considered.
>
> [46] The chambers judge accepted that determination on these points did not require individual considerations, and would be helpful to move the litigation forward. She acknowledged that they may eventually require individual analysis, but that, in and of itself, was not a reason to deny certification. In my view, the objective component can be isolated from the subjective component of the analysis and would thereby effectively move the litigation forward. I see no error in her reasoning.

[105] The limitation issue in this case does not involve a question of what either a reasonable person or any individual plaintiff knew or ought to have known or believed. It involves the objective issue of whether some individuals were under a disability - a fact that to be proved by medical records or medical opinion.

[106] Although the discoverability question would have to be left to the determination of individual issues, I find resolution of the common issues would advance the litigation in that it would determine whether the Province has any liability at all to any class members.

[107] The potential for a large number of claims left to the trial of individual issues on the question of discoverability may support an argument against an award of aggregate damages. Nothing I have said should be taken as foreclosing the Province making such an argument at a trial of common issues.

[108] I find a class proceeding to be the preferable procedure under s. 4(1)(d).

Representative Plaintiff and Litigation Plan—s. 4(1)(e)

[109] There is no suggestion that Ms. North is not a suitable representative plaintiff. Nor is there any suggestion of a conflict between her and other class members that could arise at the common issues stage, which is the focus of that inquiry: *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 75, aff'd 2004 BCCA 549.

[110] I have reviewed the litigation plan attached to her affidavit and find that, within the limitations of what can be fully planned at this stage, it meets the requirements of s. 4(1)(e)(ii). It is anticipated that a litigation plan will require amendment as the case proceeds: *Fakhri* at para. 77. Such modifications and refinements as the matter progresses will almost inevitably be required here.

[111] Most of the Province's objections relate to procedures that will only become necessary if and when the plaintiff succeeds on the common issues—such as individuals proving their membership in the class, distribution of damages awarded

to the class and procedures for resolving individual issues. At that point, adaptation will likely be necessary in any event according to the court's decision on the common issues and any practical refinements that evidence at the time shows to be appropriate.

[112] I find the requirements of s. 4(1)(e) to be satisfied.

CONCLUSION

[113] This action is certified as a class proceeding, on the condition that the proposed class definition and common issues are amended in the manner I have indicated in paras. 63, 71 and 77 above. If the parties are unable to agree on the precise wording of a certification order giving effect to what I have said, they will have liberty to apply.

"N. Smith, J"