

Federal Court



Cour fédérale

**Date: 20240117**

**Docket: T-1853-21**

**Citation: 2024 FC 77**

**Ottawa, Ontario, January 17, 2024**

**PRESENT: The Honourable Mr. Justice Fothergill**

**BETWEEN:**

**B.W.**

**Plaintiff**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Defendant**

**ORDER AND REASONS**

I. Overview

[1] The Plaintiff BW was born in 1961. At the time he commenced this proceeding, he was 60 years old. He is an inmate of Mission Institution, a federal penitentiary operated by the Correctional Service of Canada [CSC]. The Plaintiff alleges that Older Inmates, defined as those aged 50 years or more, have been harmed by systemic discrimination in prisons administered by CSC.

[2] Older Inmates comprise approximately 25% of CSC’s custodial population. In 2019, Older Inmates numbered in excess of 3,500 individuals. A report by the Office of the Correctional Investigator [OCI] and the Canadian Human Rights Commission [CHRC] published in 2019 concluded that CSC’s treatment of Older Inmates “does not respect their human rights; is not justified in terms of institutional security or public safety; is inconsistent with the administration of lawful sentences imposed by courts; and is unnecessarily costly to Canadians”.

[3] According to OCI reports and other public documents:

- (a) Older Inmates are commonly subjected to assault, intimidation, and bullying, and the disproportionate use of force;
- (b) Older Inmates sometimes request voluntary segregation placement to ensure their personal safety;
- (c) Older Inmates are denied timely access to health services, medical equipment, and/or supplies, sometimes due to a lack of personal funds; and
- (d) Older Inmates have a greater need for health services, medical equipment, and/or supplies due to their advancing age.

[4] The Plaintiff brings this proposed class action on behalf of the following persons [Class]:

All persons who are alive on the date this proceeding is certified and who allege that, while over the age of 50 and incarcerated in a Federal prison during the Class Period, they were:

- a) subjected to physical, emotional and/or psychological abuse;
- b) physically or psychologically harmed because they were unable to access, or denied access to, approved or specially-authorized Health Services, Medical Equipment, and/or Supplies, as defined in CSC's National Essential Health Services Framework, for 30 days or more; and/or
- c) physically or psychologically harmed because they were unable to pay for Health Services, Medical Equipment, and/or Supplies, as defined in CSC's National Essential Health Services Framework, for 30 days or more.

[5] The motion to certify this proceeding as a class action was heard in Vancouver, British Columbia from October 5 to 12, 2023, immediately following the motion to certify the proposed class action in *Araya v Canada (Attorney General)*, 2023 FC 1688 [*Araya*]. Counsel for the Plaintiffs in the two proceedings is the same, as is lead counsel for the Defendant, the Attorney General of Canada.

[6] *Araya* is a class action on behalf of CSC inmates who identify as Black, and who allege they were subjected to physical, emotional and/or psychological abuse while incarcerated in a CSC facility. Many of the legal issues in this class proceeding are the same as those considered by the Court in *Araya*, and the arguments made by the parties are similar.

[7] Substantially for the reasons explained in *Araya*, as further elaborated upon below, the Plaintiff has satisfied the criteria for certification of a class proceeding enumerated in Rule

334.16(1) of the *Federal Courts Rules*, SOR/98-106 [Rules]. The proposed class action will be certified accordingly.

## II. Background

### A. *Facts Relied Upon by the Plaintiff*

[8] The Plaintiff has submitted an affidavit in which he recounts his experiences as an inmate of Mission Institution. Two other Older Inmates have submitted affidavits describing their experiences in other CSC facilities. The Plaintiff also relies on the expert evidence of Dr. Debra Sheets and Dr. Elaine Gallagher, professors of gerontological nursing, and Howard Sapers, former Correctional Investigator of Canada, as well as numerous public reports and other documents.

#### (1) Evidence of the Plaintiff

[9] The Plaintiff was incarcerated at Mission Institution from 1993 to 2003, and again from 2013 to the present day. He is serving two indeterminate sentences for sexual assault and overcoming resistance to sexual assault.

[10] In February 2017, the Plaintiff was attacked by a younger, aggressive inmate who had recently been placed in the same living unit. He says he was pressured into mediation by his fellow prisoners. His assailant was eventually returned to the general population.

[11] In July 2018, the Plaintiff proposed to the Warden of Mission Institution that certain living units be designated for Older Inmates, in order to improve their health and safety. He received no response. He submitted another request in December 2018, and in March 2020, he was informed that his living unit had been designated for Older Inmates. However, younger inmates continued to be placed there. The Plaintiff says that the presence of younger inmates in his living unit made him anxious, and caused him to experience flashbacks and nightmares connected to his assault in 2017.

[12] In 2015, the Plaintiff sought treatment for brown spots on his head. He was concerned because he has a family history of skin cancer. He met with a CSC physician and was told to “avoid sun exposure moving forward”. In January 2019, he requested referral to a dermatologist. He met with a dermatologist 11 months later, and the spots on his head were removed. They were cancerous.

[13] In October 2020, the Plaintiff noticed further brown spots on his head. A biopsy confirmed they were cancerous. CSC staff received the diagnosis in December 2020, but did not tell the Plaintiff for three weeks. The spots were removed in February 2021. A further visit to the dermatologist in April 2021 did not take place because the Plaintiff suffered a panic attack at the prospect of travelling in a CSC van. He sought to reschedule the appointment on numerous occasions. As of May 2022, no appointment had been made.

[14] In 2020, a CSC physician recommended that the Plaintiff obtain orthotics for plantar fasciitis. The CSC deemed the orthotics to be non-essential, but they could be purchased from

the inmate canteen at a cost of \$70. Many other health products, such as multi-vitamins and sunscreen, are also considered by the CSC to be non-essential. Inmates are paid very low wages, and Older Inmates increasingly find it difficult to work due to their age and health problems.

[15] In 2021, the Plaintiff was diagnosed with gastric antral vascular ectasia, a condition that causes anemia and gastrointestinal bleeding. He requested a review of his diet, but received no meaningful response from CSC staff. He continues to worry about his ability to meet his nutritional needs, given the low quality of meals at Mission Institution and his diagnosis. He says he cannot always afford to purchase multi-vitamins from the canteen.

[16] The Plaintiff and other inmates receive “yard time” lasting 60 minutes. The Plaintiff’s need to use a toilet often arises “quickly and without warning”. He says he has seen other Older Inmates relieving themselves in the yard. To avoid this indignity, he sometimes forgoes his yard time.

(2) Evidence of Calvin Conley

[17] Mr. Conley was 62 years old when he swore his affidavit, and residing in a halfway house in British Columbia. He has spent most of the last 35 years in custody or under CSC supervision. Mr. Conley has sustained numerous injuries which have left him with permanent limitations. He has suffered from rheumatoid arthritis since 2017 and has used dentures since 2012. He says that incarceration has exacerbated his injuries and ailments.

[18] Mr. Conley obtained a knee brace in 2014 prior to his release from prison. When he was returned to custody in 2020, he had lost his brace and requested a new one. In June 2021, he was told that a brace had been ordered. At the time he swore his affidavit, no knee brace had arrived. In February 2022, his knee collapsed under him, causing further injury.

[19] When Mr. Conley returned to CSC custody in 2020, he had also lost his dentures. He saw a dentist who told him that he needed replacement dentures, as well as abutments. While he waited for the dentures, he was unable to chew his food properly and developed sores on his gums. He eventually received the dentures eight months after submitting the request. He did not receive the abutments. He says that his dentures do not fit properly and have caused cuts and sores in his mouth.

[20] Mr. Conley tutored other inmates while he was an inmate of Matsqui Institution. He says he had to work through constant pain in his lower back and knee, and he was sometimes unable to work at all. He received no accommodation. On the days when he worked, he earned \$5.40 per day. On other days, he received only \$2.50 per day.

(3) Evidence of Jeffery Ewert

[21] Mr. Ewert was 61 years old when he swore his affidavit, and an inmate at the Federal Training Centre Institution in Quebec. He says he cannot obtain Aspirin from the Health Services Unit or inmate canteen. He understands that taking Aspirin regularly may reduce the risk of a heart attack.

[22] Mr. Ewert suffers from prostatitis and arthritis. He has tried to obtain supplements and vitamins to help with these conditions, but has been told that these items are no longer available.

[23] Mr. Ewert says that he is lactose intolerant. In July and September 2021, he requested soy milk from the Chief Food Services Officer and Dietician. When he met with the Dietician in early 2022, he was told that he was not “lactose intolerant enough”. Mr. Ewert cannot purchase soy milk or other soy products from the canteen, and continues to suffer from gastric problems.

[24] In December 2021 and January 2022, Mr. Ewert made several requests for a COVID-19 booster vaccine. He was eligible for the vaccine due to his age and Indigenous status. He was told that his name had been “added to the list”. He noticed that some younger inmates received the vaccination before him, because it was administered according to living units or cell blocks, not age.

(4) Expert Evidence of Dr. Debra Sheets

[25] Dr. Debra Sheets is a specialist in gerontological nursing, healthy aging, frailty, and dementia. She is an elected fellow of the Gerontological Society of America and the American Academy of Nursing. From 1999 to 2009 she was Professor and Director of the Gerontological Program at California State University. She was appointed Associate Professor at the University of Victoria’s School of Nursing in 2009, and Full Professor in 2019. She has published widely in her field.



[26] Dr. Sheets' expert report describes the effects of aging on human health, and the vulnerabilities of elderly persons. She also discusses the negative impacts of the carceral environment on Older Inmates.

[27] According to Dr. Sheets, aging affects vision, hearing, bladder function, and memory. Approximately 80% of older adults have at least one chronic health condition, and 50% have two or more. These conditions must be effectively managed to slow their progression and prevent disability and premature death. Other risks that increase with age include frailty, functional limitations, falls, depression, polypharmacy, malnutrition, and cognitive impairment. Comprehensive geriatric care "requires an interdisciplinary healthcare team with specialized training".

[28] Dr. Sheets notes that prisons were not designed for the elderly and present risks for aging inmates, especially due to their increased frailty. Older Inmates experience fear of violence and abuse, which leads them to shy away from exercise. Poor lighting contributes to the risk of falls and injury. Older Inmates are also at increased risk in cells and washrooms and showers due to the absence of call bells.

[29] Dr. Sheets observes that prison staff frequently lack training to assess, diagnose, and deliver geriatric healthcare to Older Inmates. She says that treatment is often denied for simple complaints and pain is "notoriously not well managed". Older Inmates require access to specialist healthcare providers, as well as palliative and end-of-life care.

## (5) Expert Evidence of Dr. Elaine Gallagher

[30] Dr. Elaine Gallagher has taught nursing at five educational institutions for approximately 50 years, always with a focus on aging. Her doctoral dissertation concerned the health and wellness of men growing old in federal prisons. She has a number of other publications in this field.

[31] According to Dr. Gallagher, health problems associated with aging in the general population also affect Older Inmates. Some of these health problems are compounded in prisons, “resulting in accelerated aging by 10 or more years and an average age at death almost 20 years younger compared to the general population”. She notes the increased incidence of HIV, hepatitis, mental health disorders, and chronic diseases, as well as reduced mobility, incontinence, sensory impairment, and unmanaged pain. Falls and other injuries are also prevalent.

[32] Dr. Gallagher observes that penitentiaries tend not to be accessible for those with mobility problems. They have poor lighting, insufficient washrooms, and no emergency call buttons in cells and showers. The health system is designed for younger inmates, and fails to serve the needs of Older Inmates. Employment, educational, and recreational activities are not adapted to the needs and interests of Older Inmates.

(6) Expert Evidence of Howard Sapers

[33] Mr. Sapers was the Correctional Investigator of Canada from 2004 until 2016. He was also an Independent Advisor on Corrections Reform for the Province of Ontario in 2017 and 2018. He currently acts as a consultant domestically and internationally in the fields of corrections oversight and policy. He has specifically investigated the situation of Older Inmates in custody.

[34] Mr. Sapers emphasizes the overcrowding in CSC facilities. While harmful to all inmates, overcrowding particularly disadvantages Older Inmates. It creates competition for resources, and competition favours the young.

[35] Mr. Sapers notes that the percentage of Older Inmates among the current prison population is approximately 27%. While preparing his expert report, he was unable to find any Commissioner's Directives [CDs] addressing Older Inmates and their particular needs.

[36] Mr. Sapers observes that CSC has been aware of the rising proportion of Older Inmates since at least the 1990s, and understood that time would aggravate the issue if nothing was done. The CSC established an Older Offender Division in 1999, but failed to implement its recommendations.

[37] In 2008, the OCI briefed the Special Senate Committee on Aging about CSC's approach to managing Older Inmates. The briefing highlighted Older Inmates' needs for specific

programming and accommodation; their increased isolation due to a lack of programming and work opportunities; the inability of the physical environment to accommodate their mobility challenges; delays in obtaining items “critical to [their] well-being and dignity”; the absence of appropriate training of CSC staff; and the lack of work opportunities tailored to the circumstances of Older Inmates.

[38] In 2018, the CSC developed a “framework and strategy” titled “Promoting Wellness and Independence of Older Persons in CSC Custody”. However, the framework was never formally promulgated, and little progress was made.

(7) Documentary Evidence

[39] The Plaintiff has submitted numerous public reports and other documentation cited by Dr. Sheets, Dr. Gallagher and Mr. Sapers. The Plaintiff emphasizes that inmate wages have not changed since 1986, yet the cost of canteen items has nearly doubled since then.

B. *Facts Relied Upon by the Defendant*

[40] The Defendant has submitted the affidavits of three CSC officials and a senior paralegal employed by the Department of Justice. The Defendant also relies on the cross-examination of the Plaintiff.

## (1) Evidence of Frédéric Héran

[41] Mr. Héran is the Director of Offender Redress at CSC. He has held this position since December 2020. He previously worked for the OCI, where he was Director of Investigations. He discusses CSC's informal resolution processes, alternative dispute resolution mechanisms, and the redress available from the CHRC and the OCI.

[42] Alternative dispute resolution is the preferred means of addressing inmate concerns, in accordance with s 74(2) of the *Corrections and Conditional Release Regulations*, SOR/92-620. The form of resolution is tailored to the circumstances of the particular inmate and issue. For Indigenous inmates, alternative dispute resolution processes may include healing or resolution circles. There is also an Indigenous Initiatives Directorate at CSC.

[43] Inmates may submit complaints of discrimination to the CHRC. Following an investigation, the CHRC may refer a complaint to the Canadian Human Rights Tribunal. Mediation is available throughout the process. There is a Human Rights Unit within CSC that responds to complaints on its behalf.

[44] The OCI is an ombudsman for federal inmates, and provides impartial oversight of CSC. Inmates may raise issues with the OCI confidentially, and are protected against retaliation. The OCI publishes reports of its investigations. These reports are reviewed by CSC, and all recommendations are considered. Mr. Héran says that CSC has implemented, and continues to implement, many of the OCI's recommendations.

## (2) Evidence of Katherine Belhumeur

[45] Ms. Belhumeur is the Acting Director General of the Offender Programs and Reintegration Branch, Correctional Operations and Programs Sector. She has held this position since November 2022. She was previously the Director of the Reintegration Operations Division in the same Branch. She has worked for CSC for more than 20 years.

[46] CSC operates 43 institutions across the country. These are designated maximum, medium, or minimum security, or combinations thereof. The CSC also manages 14 Community Correctional Centres across the country, as well as five Regional Treatment Centres for inmates with serious mental health conditions. In addition, CSC operates four healing lodges, and collaborates with Indigenous communities in the management of six others.

[47] The physical infrastructure of CSC facilities varies. Different institutions and wings have different security levels and designs. The age of the infrastructure also plays a role.

[48] CSC facilities currently meet the National Standard for Accessible Design for the Built Environment published by the Standards Council of Canada. Over the years, CSC has been responsive to the need for greater accessibility and expansion of its facilities. Following the enactment of the *Truth in Sentencing Act*, SC 2009, c 29, infrastructure was improved and 2,700 new beds were added at all security levels.

[49] Correctional plans are individualized for each inmate, and are based on an assessment of the inmate's risks and needs. Assessment begins at the point of intake, and seeks to determine the offender's appropriate security classification. Many factors are considered.

[50] The intake assessment includes a determination of the offender's capacity to perform tasks for daily living. The results of this assessment may justify additional interventions to address mobility, accessibility, and health issues. Older offenders are continually reassessed.

[51] Correctional plans are designed to facilitate the inmate's reintegration into the community in a timely manner. They balance the needs of the inmate with societal protection. A correctional plan is a "living document", and is updated as necessary.

[52] Correctional plans allow for a wide variety of interventions aimed at rehabilitation and reintegration into the community. These may include employment, mental health care, correctional programs, education, social programs, vocational training, and Indigenous services. An inmate's age is explicitly considered. The CSC has developed an Aging Offenders Resource Kit, which provides guidance to CSC staff in working with old and aging inmates.

[53] Correctional programs come in many shapes and sizes, and are grounded in psychological research and cognitive behavioural approaches. They help inmates identify problematic behaviours, and are informed by an inmate's security classification, sex, indigeneity, and other factors. CSC also has programming options for Older Inmates and attempts to offer "ability-appropriate" work and social activities.

[54] CSC seeks to maintain an environment free of assault and harassment. It relies on staff observations and intelligence gathered from inmates to inform its “dynamic security” practices.

[55] Conflict is managed throughout an inmate’s sentence. Upon intake, CSC tries to identify incompatible inmates. Inmates may also report incompatibilities. Where conflict arises, several strategies are available to address it. These include conflict resolution, transfers, housing apart, and taking additional precautions when incompatible inmates share a parole office. Institutional and even criminal charges may also be appropriate. When there are no other reasonable alternatives, an inmate may be placed in a Structured Intervention Unit.

[56] Ms. Belhumeur estimates that 34,916 current and former inmates were at least 50 years old at some point during their incarceration.

(3) Evidence of Carson Gaudet

[57] Mr. Gaudet is Director of Health Services for the Prairie Region. He has held this position since September 2019. Mr. Gaudet began his career with CSC in 2010 as a nurse. He has worked in a variety of healthcare roles, in both the provision and management of health services.

[58] The CSC is required by s 86 of the *Corrections and Conditional Release Act*, SC 1992, c 20, to provide inmates with essential healthcare and reasonable access to non-essential



healthcare. Pursuant to s 85, healthcare includes medical, dental, and mental health care, and must comply with professional standards.

[59] The meaning of “essential” is determined by CSC’s National Essential Health Services Framework. An important consideration is the consistency of healthcare across CSC facilities. Essential items and services are those typically available in the publically funded systems of the provinces and territories. Non-essential items are those not covered by the majority of provincial and territorial healthcare systems. Non-essential items may be purchased at an inmate’s expense, and CSC helps to coordinate this.

[60] Healthcare items and services are also classified as “approved”, “not approved”, or “by special authorization”. Approved items are routinely available in institutions, while special authorization items and services may be obtained only with the permission of CSC’s Regional Manager of Clinical Services.

[61] CSC operates a variety of healthcare centres throughout the country, including primary care facilities, hospitals, mental health clinics and psychiatric units. Inmates may receive treatment in the community when justified by their individual needs and CSC’s capabilities and capacity.

[62] In CSC facilities, healthcare is provided by multidisciplinary teams. The composition of these teams varies with the institution and the needs of the inmate. Medical practitioners in CSC

facilities are not CSC employees. Rather, CSC contracts with individual practitioners who are licensed and regulated in their respective provinces.

[63] Medical professionals working in CSC facilities have clinical autonomy. CSC staff do not play a role in treatment decisions. However, CSC does have an obligation to ensure that inmates have access to medical care and receive the treatment they are prescribed.

[64] During intake, inmates receive a mandatory First Day Health Assessment, typically from a nurse. This assessment seeks to understand inmates' physical and mental health, and identify needs to be addressed by the CSC.

[65] Inmates may also seek medical care on their own. Requests are reviewed and prioritized according to urgency. CSC staff may make a request on an inmate's behalf. Primary healthcare centres in CSC institutions may have drop-in hours.

[66] Inmates referred to healthcare services are subject to the same wait times as persons in the community, and those wait times are beyond CSC's control. Where referral is to a practitioner in the community, the inmate is subject to that practitioner's procedures and wait lists.

[67] CSC provides pharmaceutical coverage to inmates through its National Formulary. The Formulary includes a list of essential medical care that CSC will fund. This list is intended to be consistent with other formularies in the country, such as those of the provinces, the Canadian

Armed Forces, and Veterans Affairs. Off-formulary medicines may be requested, and will be approved where a clinical need is shown.

(4) Evidence of Senior Paralegal

[68] An affidavit from a Senior Paralegal with the Prairie Regional Office of the Department of Justice attaches the Plaintiff's redacted CSC health care records from 2011 onwards. It also attaches the CDs governing the inmate grievance process.

(5) Cross-Examination of the Plaintiff

[69] For many years, the Plaintiff lived in units with "mixed older and younger inmates". He says he "fought hard" for units restricted to Older Inmate units, and complains that promises to designate units were not honoured. However, in cross-examination he said the following:

... I think we've reached the point now where it is going to be a unit exclusively for 50-plus. And for that I commend the Correctional Service of Canada. It has put a lot of [older] inmates at ease in that unit ...

[70] The Plaintiff has filed several grievances using CSC's internal procedure. He has never sought judicial review of any grievances that were refused. Nor has he reported a physician to a College of Physicians and Surgeons regarding the medical care he received.

### III. Issues

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

- A. Do the pleadings disclose a reasonable cause of action?
- B. Is there an identifiable class of two or more persons?
- C. Do the claims of the class members raise common questions of law or fact?
- D. Is a class proceeding the preferable procedure?
- E. Is BW a suitable Class representative?

### IV. Analysis

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

[72] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and the relief sought (*Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 [*Mancuso*] at para 16). Pleadings play an important role in providing notice and defining the issues to be tried. The Court and opposing parties cannot be left to speculate as to

how the facts might be variously arranged to support various causes of action. If the Court were to allow parties to plead bald allegations of fact, or mere conclusory statements of law, the pleadings would fail to perform their role in identifying the issues (*Mancuso* at paras 16-17).

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

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

(1) Amended Statement of Claim

[75] The Plaintiff's initial Statement of Claim was very broad. The causes of action included negligence, breach of fiduciary duty, breaches of ss 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act*

1982 (UK), 1982, c 11 [Charter], as well as the analogous rights enshrined in the Quebec *Charter of Human Rights and Freedoms*, CQLR, c C-12.

[76] Following the Federal Court of Appeal’s decision in *Canada (Attorney General) v Nasogaluak*, 2023 FCA 61 [*Nasogaluak FCA*], the Plaintiff substantially amended the Statement of Claim to reflect the pleading endorsed in that decision. The Plaintiff abandoned the claims of breach of fiduciary duty (see *Nasogaluak FCA* at paras 54-66) and the claims under the Quebec *Charter of Human Rights and Freedoms*.

[77] Like the further amended pleading in *Araya*, the Amended Statement of Claim in this proceeding is limited to allegations of systemic negligence and breaches of ss 7 and 15(1) of the Charter.

[78] The Abuse of Older Inmates is defined in paragraph 47 of the Amended Statement of Claim as follows:

- a) unnecessarily beating, hitting, pepper-spraying, and otherwise applying force to the bodies of Older Inmates;
- b) directing abuse and slurs at Older Inmates;
- c) confining Older Inmates in segregation or “structured intervention units” rather than protecting their personal safety through other means;
- d) permitting or bringing about physical, emotional, and psychological assault or abuse of Older Inmates by placing them in situations where they are vulnerable to assault or abuse by younger inmates; and
- e) failing to intervene when [*sic*] or encouraging younger inmates to assault or direct abuse at Older Inmates.

[79] The Inability to Access Healthcare is described in paragraph 49 of the Amended Statement of Claim as follows:

- a) CSC frequently delays or refuses to provide Healthcare Services Items to Older Inmates, despite that a healthcare professional has prescribed or otherwise indicated that those Healthcare Services Items are required by Class members, including where the Healthcare Services Items are designated as “approved” in the National Essential Health Services Framework, or are specially-authorized for the Class member;
- b) CSC expects Class members to self-fund Healthcare Services Items required by Older Inmates but which are not designated by CSC as “approved” in the National Essential Health Services Framework; and
- c) Since 1981 CSC has restricted Inmate earnings to a maximum of \$6.90 per day. As CSC does not provide accommodated employment for Older Inmates, unemployment among Class members is common, which limits their income to \$2.50 per day. Due to CSC-imposed impoverishment, Older Inmates cannot access the Healthcare Services Items they require, for instance by purchasing services which are not designated as “approved,” or by obtaining services for themselves when CSC delays or refuses to provide Healthcare Services Items.

[80] The Amended Statement of Claim includes a comprehensive definition of “Age-Based Discrimination”. According to paragraph 44 of the pleading, this includes:

- a. failing to implement procedures and policies which recognize and accommodate the unique needs and vulnerabilities of the Class;
- b. failing to provide educational, correctional, vocational, and rehabilitative programs which are responsive to the needs and vulnerabilities of the Class;
- c. failing to implement procedures, policies, and programming to counteract the impacts of institutionalization;

- d. coercing the plaintiff and the Class to participate in work detrimental to their physical and mental health by reason of their health and corresponding disabilities, including by way of:
  - i. economic pressure, by refusing to grant Class Members who are unsuited for work an adequate daily stipend; and
  - ii. social pressure, through comments and assertions made by CSC Staff to the Class and by the absence of alternative rehabilitative programming available during working hours;
- e. failing to provide ongoing guidance and programs which support the rehabilitation of the Class and their reintegration into the community;
- f. failing to address the harassment, bullying, intimidation, assault and battery of the Class by younger, more physically capable inmates;
- g. failing to provide mental health support and treatment, adequately or at all, for the harm suffered by the Class as a result of victimization by other inmates;
- h. using force and physical restraint methods which are disproportionate to the threat posed by the Class;
- i. failing to establish complaints processes, adequately or at all, through which the plaintiff and the Class can report instances of harassment, bullying, intimidation, assault and battery by other inmates;
- j. failing to provide medical aids and comfort items necessitated by the age and disabilities of the Class;
- k. failing to provide equal access to canteen and optional food and drink purchases, by reason of harassment, bullying, intimidation, and assault of the plaintiff and the Class by other inmates;
- l. failing to adapt penitentiaries to the specific needs and vulnerabilities of the plaintiff and the Class, including:
  - i. inadequate access for wheelchairs and other mobility supports;



- ii. lack of emergency and medical alert buttons in cells of Class Members;
  - iii. designing penitentiaries and Community Facilities in a way which renders them inaccessible or inhospitable to Class Members;
  - iv. failure to maintain outdoor premises in a manner that renders them safe for Class Members;
  - v. forcing Class Members to occupy top bunks despite physical disabilities;
- m. failure to provide the plaintiff and the Class with adequate medical supports, such as physiotherapists and geriatric specialists;
  - n. failure to provide the plaintiff and the Class with appropriate access to pain management medications;
  - o. failing to monitor, assess, and treat, adequately or at all, age related illness and disability, such as dementia and Alzheimer's;
  - p. failing to properly train and supervise CSC staff in regard to the specific needs and vulnerabilities of the plaintiff and the Class;
  - q. failing to review and assess Class Members to determine whether by reason of age or disability a less restrictive means of incarceration is appropriate and consistent with the protection of the public;
  - r. failure to establish or make available age-appropriate programming and activities for Class members;
  - s. an insistence on the part of CSC to administer end of life care within the penitentiary system, despite:
    - i. CSC staff not having been trained, adequately or at all, to provide end-of-life care; and
    - ii. inadequate access by the Class and CSC Staff to medical equipment and supplies to provide end-of-life care; and

- t. failure to manage, operate, fund, staff, or otherwise resource Community Facilities in a way which allows them to respond to the needs and vulnerabilities of the Class.

[81] In oral argument, counsel for the Plaintiff acknowledged that requiring the Defendant to respond to every assertion contained in the comprehensive definition of “Age-Based Discrimination” may render the proceeding unwieldy and unmanageable. At the conclusion of the hearing, the Plaintiff submitted a draft Further Amended Statement of Claim with all references to Age-Based Discrimination removed. Counsel for the Defendant did not object to the Court’s consideration of the proposed Further Amended Statement of Claim.

[82] With references to Age-Based Discrimination removed, the Statement of Claim is limited to seeking damages for the Abuse of Older Inmates, as defined in paragraph 47, and the Inability to Access Healthcare, as described in paragraph 49. In this respect, the pleading more closely resembles the one approved by this Court in *Nasogaluak v Canada (Attorney General)*, 2021 FC 656 [Nasogaluak FC], as modified in accordance with the reasons of the Federal Court of Appeal in *Nasogaluak FCA*. It is also similar in structure to the pleading that led to the certification of the class action in *Araya*.

## (2) Systemic Negligence

[83] The Statement of Claim seeks redress on behalf of the proposed Class for: (a) unnecessary use of force; (b) verbal abuse and slurs; (c) unjustified confinement; and (d) physical, emotional, and psychological assault and abuse by younger inmates (Amended Statement of Claim at para 47). Redress is also sought for the inability of Older Inmates to obtain

prescribed or recommended medications and medical supplies (Amended Statement of Claim at para 49). The Plaintiff says that prevention of these civil wrongs falls within the recognized duty of care owed by gaolers to those in their custody (citing *MacLean v R*, [1973] SCR 2 [*MacLean*] at pp 6-7).

[84] The Defendant objects that the Amended Statement of Claim contains bare assertions, conclusions of law, assumptions, and baseless allegations. The Plaintiff alleges that Older Inmates have suffered broad and disparate forms of abuse or cannot obtain adequate health care, but the pleading contains no material facts to support the claims. The Defendant also notes that access to medical practitioners may be restricted by wait times and other barriers that afflict the Canadian population generally, which are beyond the CSC's control.

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

*Negligence*

67. The Defendant owes a duty of care to Class members as incarcerated persons.

[...]

71. Through itself or the CSC Staff, the Defendant was in a relationship of proximity with Class members as a result of its operation of CSC Facilities during the Class Period. As a result of its conduct in operating CSC Facilities, exerting control over the activities of CSC Staff, its assumption of the care and custody of Older Inmates, and its statutory authority and responsibilities with

respect to those matters, the Class had a proximate relationship with the Defendant and CSC Staff.

72. During the Class Period, Class Members were in the care and control of CSC and CSC Staff during their time in CSC Facilities and expected that they would not be treated by the Defendant in a manner that would cause them physical or emotional harm.

73. The Defendant knew or ought to have known that in its funding, oversight, operation, supervision, control, maintenance, and support of CSC Facilities could and would result in compensable physical and emotional harm to Class members. The Defendant had particular knowledge of the actual harms perpetrated on Class members as a result of internal reports, community knowledge, complaints by Class Members and other public scrutiny of the negligence and breaches alleged herein.

74. The Defendant knew or ought to have known that its failure to take reasonable care in [...] failing to protect [...] against the Abuse of Older Inmates and Inability to Access Healthcare, would result in harm to Class Members.

75. The Defendant knew or ought to have known that its failure to ensure that CSC Facilities operated with, and [*sic*] CSC Staff applied, the standards provided to younger Inmates would result in harm to Older Inmates.

76. In the alternative, the Defendant knew or ought to have known that its failure to ensure that CSC Facilities operated with, and CSC Staff applied, the standards adapted to respond to the particular needs and vulnerabilities of Older Inmates, would result in harm to Older Inmates.

77. Class Members had the reasonable expectation that CSC would operate CSC Facilities in a manner that was substantially similar to the care, control and supervision provided to younger Inmates during the Class Period.

78. Canada was obliged to establish, fund and operate CSC Facilities with a reasonable standard of care, which includes, but is not limited to:

- a. establishing, implementing and enforcing appropriate policies and procedures to ensure that Class members would be free from physical, emotional and psychological abuse, i.e. the Abuse of Older Inmates, and would not be impeded in access to healthcare, i.e. the Inability to Access Healthcare;

- b. establishing, implementing and enforcing appropriate policies and procedures to ensure that Class Members would not be unnecessarily or inappropriately harmed during their time in custody;
- c. ensuring that CSC Staff, who were agents of the Defendant, were adequately educated, licensed and trained in order to fulfill their employment obligations in a manner that would not cause physical, emotional or psychological harm to Class Members;
- d. investigating, adjudicating and, if necessary, reporting to the appropriate law enforcement authorities complaints by Class Members of physical or emotional abuse;
- e. overseeing the acts and behaviours of CSC Staff in a manner that would protect Class Members from the Abuse of Older Inmates and other acts of brutality;
- f. acting in a timely and concerted fashion by, among other things, establishing and implementing policies and procedures to ensure that incidents of Abuse of Older Inmates would not re-occur; and
- g. such other and further obligations of the Defendant as the plaintiff may advise and this Honourable Court may consider.

[86] Very similar language appears in the Further Amended Statement of Claim in *Araya* (see para 89). The structure of the pleadings is broadly similar: the Amended Statement of Claim in this case pleads the material facts arising from BW's personal experience at Mission Institution, and then extrapolates these to the proposed Class. To the extent that the allegations contained in the Amended Statement of Claim contain fewer particulars than those provided in BW's affidavit, as summarized at paragraphs 9 to 16, above, this may be rectified through amendment of the pleading or a motion pursuant to Rule 181(2).

[87] As I observed in *Araya* at paragraph 88, the scope of the duty of care recognized by the Supreme Court of Canada in *MacLean* is not settled (*Nasogaluak FCA* at paras 46 and 49). Furthermore, *Nasogaluak FC, Canada v Greenwood*, 2021 FCA 186 [*Greenwood FCA*], and several other proposed class actions have been certified based upon allegations that span many years and include a variety of harms in a range of different settings (e.g., *Merlo v Canada*, 2017 FC 51; *Tiller v Canada*, 2019 FC 895; *Ross et al v Her Majesty the Queen* (unreported, June 18, 2018, Court File No T-370-17); *Heyder v Canada (Attorney General)*, 2019 FC 1477). The jurisprudence of this Court and the Federal Court of Appeal has made it increasingly clear that the systemic nature of the alleged wrongdoing does not serve as a bar to certification (*Araya* at para 93).

[88] Delays in obtaining access to health care that may be attributed to provincial wait times or other barriers that are faced by the Canadian population generally may provide CSC with defences to some allegations contained in the Amended Statement of Claim in particular cases. This is a matter to be determined in individual assessments of damages following a common issues trial, in the event that the common issues are decided against the Defendant.

[89] Applying the analysis in *Araya* at paragraphs 81 to 93, together with the precedents of *Nasogaluak FCA* and *Greenwood FCA*, at the preliminary screening stage of a certification motion, it is not plain and obvious that the Amended Statement of Claim fails to disclose a reasonable cause of action in systemic negligence.

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

[90] In *Nasogaluak FCA*, the Federal Court of Appeal affirmed that the statement of claim in that case disclosed a reasonable cause of action pursuant to s 7 of the Charter, and noted that the s 15(1) claim was in large measure pleaded in tandem with the s 7 claim (at paras 67-68, 78). The Court of Appeal referred specifically to paragraphs 1(d), 1(f), 1(g), 15, 23 to 24, and 62 to 66 to 70 of the statement of claim filed in that proceeding. These paragraphs are reproduced almost *verbatim* in the Amended Statement of Claim filed in this proceeding, with amendments to reflect the circumstances of the proposed Class:

#### A. RELIEF SOUGHT

1. The Plaintiff claims on his own behalf and on behalf of the Class (as hereinafter defined):

[...]

- f. a declaration that Canada and its agents systemically violated, and continue to violate, sections 7 and 15(1) of the Charter in a manner that is not demonstrably justified in a free and democratic society pursuant to section 1 of the Charter;

[...]

- i. a declaration that Canada is liable to the Class for damages under section 24(1) of the Charter for breach of sections 7 and 15(1) of the Charter in relation to the actions of CSC Staff;
- j. general damages in an amount exceeding \$50,000;
- k. special damages in an amount exceeding \$50,000;
- l. damages for future cost of care in an amount exceeding \$50,000;
- m. damages for loss of earnings or earning capacity, past and future in amounts exceeding \$50,000;

n. punitive, exemplary, and/or aggravated damages in an amount exceeding \$50,000;

[...]

38. In practice, CSC regularly breaches its mandate to treat Older Inmates in a non-discriminatory manner. CSC Staff regularly discriminate against Older Inmates, particularly by subjecting them to physical, emotional and psychological abuse, whether by employing excessive and unnecessary force to them, by directing hateful speech and language at them, or by permitting other Inmates to do those things to Class members, as well as through the application of discriminatory policies and practices which systematically disadvantage Older Inmates, as particularized below,

[...]

47. While incarcerated, Class members are regularly subjected to physical, emotional and psychological abuse by CSC Staff and by younger Inmates. Common incidents of abuse involve (the “Abuse of Older Inmates”):

[...]

48. Younger Inmates do not face the same physical, emotional and psychological abuse experienced by Class members.

[...]

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

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

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

86. The widespread use of excessive force by CSC Staff on Class Members is arbitrary, and grossly disproportionate with the



purpose of use of force upon detention. It is not carried out in keeping with any principle of fundamental justice.

87. The widespread Abuse of Older Inmates is arbitrary, and grossly disproportionate with the purpose and principles governing Class members' incarceration, under the *CCRA*, *CCRR* and otherwise, as particularized above at paras. 32-37.

89. Section 15(1) of the *Charter* guarantees that every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on age or mental or physical disability.

90. The Defendant's conduct, including the Abuse of Older Inmates, has resulted in Class members being treated differently and worse than younger Inmates. This difference in treatment is based on enumerated grounds listed in the preceding paragraph.

91. In light of the foregoing, Class members have been discriminated against based on, *inter alia*, their age and mental or physical disability. The Defendant's conduct is discriminatory on its face, in its effect, and in its application. In particular, such actions included but are not limited to:

- a. the Defendant allowed CSC Staff to target Older Inmates during their time in custody;
- b. the Defendant allowed CSC Staff to use excessive force while Older Inmates were in custody;
- c. the Defendant allowed CSC Staff to engage in Abuse of Older Inmates;
- d. the Defendant allowed CSC Staff to perpetuate the Inability to Access Healthcare; and
- e. the Defendant was careless, reckless, wilfully blind, or deliberately accepting of, or was actively promoting, the Abuse of Older Inmates and the Inability to Access Healthcare.

92. There is no justification in a free and democratic society for the Defendant's breaches of s. 7 or 15(1) of the *Charter*.

[91] Particulars of the harms allegedly suffered by the proposed Class are provided in paragraph 95 of the Amended Statement of Claim, and are substantially the same as those pleaded in paragraph 72 of the statement of claim considered by the Federal Court of Appeal in *Nasogaluak FCA* and paragraph 80 of the pleading in *Araya*.

[92] There is little to distinguish the manner of pleading in this case from that endorsed by the Federal Court of Appeal in *Nasogaluak FCA*. The pleading in *Araya* is similar. In all of these proposed class actions, the representative plaintiff provides particulars of his own experience, and then makes general allegations on behalf of the proposed class regarding systemic negligence and Charter violations.

[93] Once again, delays in obtaining access to health care that may be attributed to provincial wait times or other barriers that are faced by the Canadian population generally may provide CSC with defences to some allegations contained in the Amended Statement of Claim in particular cases. This is a matter to be determined in individual assessments of damages following a common issues trial, in the event that the common issues are decided against the Defendant.

[94] Applying the analysis in *Araya* at paragraphs 95 to 105, together with the precedent of *Nasogaluak FCA*, at the preliminary screening stage of a certification motion, it is not plain and obvious that the Amended Statement of Claim fails to disclose reasonable causes of action pursuant to ss 7 and 15(1) of the Charter.

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

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

[96] The Defendant says that the proposed class definition is unnecessarily broad and insufficiently objective to enable Older Inmates to determine whether they fall within the Class. “Abuse” is not defined. The “Abuse of Older Inmates” is said to encompass “physical, emotional and psychological abuse”, which does nothing to aid comprehension. No particulars are provided to distinguish between the different forms of abuse alleged.

[97] According to the Defendant, the Plaintiff has failed to present evidence of any experience or action common to each member of the proposed Class beyond the fact of their incarceration. The proposed class definition does not account for CSC interventions that are tailored to an individual offender’s circumstances and needs, the variety of CSC institutional settings and security levels, or the evolution of policies, procedures and operations over the past forty years. The Defendant therefore maintains that there is no rational connection between the alleged causes of action and the myriad decisions by CSC officials that may have affected individual Class members.

[98] The Defendant argues that simply adapting the class definition in *Nasogaluak FCA* does not produce an objective identifiable class in this case. The claims in this proceeding are more subjective and less defined in scope. The certified class in *Nasogaluak FCA* comprises Indigenous persons who allege the specific tort of assault, not the abstract concept of abuse committed by a range of different actors, some of whom are not CSC staff. An assault that occurs in the context of police detention is considerably more confined than abuse occurring within a CSC institution over the course of an inmate's custodial sentence.

[99] Similar objections to the proposed class definition were addressed in *Nasogaluak FCA* at paragraphs 87 to 88, and in *Araya* at paragraphs 109 to 115. In *Nasogaluak FCA*, the Federal Court of Appeal rejected the Defendant's argument that the class definition as framed was not objective but subjective. Following a discussion of the propriety of claim-based class definitions, the Court of Appeal concluded at paragraph 93 that "the claim-based class definition applied in this case is sufficiently objective having regard to the purposes of defining the class".

[100] The Federal Court of Appeal in *Nasogaluak FCA* noted that the Defendant's objections failed to recognize the systemic, "top-down" theory of the case (at para 95). The same is true of this case. The Amended Statement of Claim alleges that CSC created or permitted a system that facilitated the Abuse of Older Inmates and their Inability to Access Healthcare. Only after this has been established can it be determined whether a particular Class member was a victim of this system.

[101] While the term “abuse” in this case encompasses a wider range of actions and omissions than the “assault” alleged in *Nasogaluak FCA*, it is sufficiently clear. The definition is at least as precise as the term “bullying, harassment and intimidation” endorsed in *Greenwood FCA*. It is also a term that is likely to be understood by Class members. The same may be said of the term “Inability to Access Healthcare”.

[102] As in *Araya*, the Plaintiff proposes a Class period commencing in 1982 on the day that ss 7 and 15(1) of the Charter came into effect until the date this proceeding is certified. The expert evidence adduced by the Plaintiff regarding the long-standing hardships endured by Older Inmates, supported by the documentary evidence, sufficiently demonstrates some basis in fact for a Class period commencing on the day the Charter came into effect until the date this proceeding is certified. Much of the prison infrastructure, which is said to be inimical to the wellbeing of Older Inmates, pre-dates the advent of the Charter.

[103] It must be noted, however, that s 15(1) of the Charter did not come into effect until April 17, 1985, three years after the Charter’s enactment (*Constitution Act, 1982, s 32(2)*). It is well established that s 15(1) cannot be applied retroactively (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 349 at para 106).

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

While the manageability of the class as defined will likely present some challenges, given the length of the class period and the

disparate locations potentially involved, techniques exist to address them: see *Rumley* at paras. 31-32. Furthermore, the inclusion in the class definition of the proviso that class members must have been alive as of [the date of certification] should go some way to limit the complexity.

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

[106] In oral submissions, counsel for the Plaintiff acknowledged that the proposed Class definition should be revised to specify that the health services, medical services or supplies must have been prescribed or recommended by a healthcare professional. Given the extended Class period, they should not be circumscribed by the CSC's National Essential Health Services Framework, which came into effect on July 23, 2015.

[107] With these modifications, the Plaintiff has demonstrated some basis in fact for an identifiable class of two or more persons defined as follows:

All persons who are alive on the date this proceeding is certified and who allege that, while over the age of 50 and incarcerated in a Federal prison during the Class Period, they were:

- a) subjected to physical, emotional and/or psychological abuse;
- b) physically or psychologically harmed because they were unable to access, or denied access to, approved or specially-authorized health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more; and/or

- c) physically or psychologically harmed because they were unable to pay for health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more.

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

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

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

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

1. By its operation or management of the CSC, did the Defendant permit, perpetuate, cause, or contribute to the Abuse of Older Inmates and/or the Inability to Access Healthcare?
2. By its operation or management of CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
3. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?

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

[110] The proposed common questions are modelled on those approved by the Federal Court of Appeal in *Nasogaluak FCA*, and subsequently by this Court in *Araya*. CSC's apparent reluctance to implement recommendations in public reports that were intended to prevent the Abuse of Older Inmates and alleviate the Inability to Access Healthcare potentially exposes the Defendant to an award of punitive damages.

[111] As the express language of Rule 334.16(1)(c) makes clear, the "common questions" condition for certification may be met "whether or not those common questions predominate over questions affecting only individual members". Numerous systemic claims similar to those advanced here have been found to meet this condition (or similar conditions in other jurisdictions) in many other cases: see *Nasogaluak FCA* at para 106, citing *Rumley v British*



*Columbia*, 2001 SCC 69 [*Rumley*] at paras 27, 30; *Canada v John Doe*, 2016 FCA 191 at para 63; *Greenwood v Canada*, 2020 FC 119 [*Greenwood FC*] at paras 59-70, aff'd, *Greenwood FCA* at paras 183-184; *Francis v Ontario*, 2021 ONCA 197 at paras 106-107.

[112] Applying the precedents of *Nasogaluak FCA* and *Araya*, the Plaintiff has satisfied the criterion of advancing common questions of law or fact. Addressing these questions commonly will avoid duplication of fact-finding and legal analysis.

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

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

[114] Once the alternative or alternatives to class proceedings have been identified, the Court must assess the extent to which they address the access to justice barriers that exist in the circumstances of the particular case. The Court should consider both the substantive and procedural aspects of access to justice, recognizing that court procedures do not necessarily set the gold standard for fair and effective dispute resolution processes. The question is whether the alternative has the potential to provide effective redress for the substance of the plaintiffs' claims, and to do so in a manner that accords suitable procedural rights (*Fischer* at para 37).

[115] The preferability inquiry is to be conducted through the lens of the three main goals of class proceedings: judicial economy, behaviour modification, and access to justice (*Nasogaluak FCA* at para 116). A class action may “allow claimants to overcome psychological and social barriers through the representative plaintiff who provides guidance and takes charge of the action on their behalf” (*Fischer* at para 29). It may also assist in overcoming economic barriers, such as those that result from the persistently low wages paid to Older Inmates and their inability, in many instances, to work at all.

[116] The Defendant does not rely on the inmate grievance process as a preferable procedure, presumably in light of the repeated criticisms of this process in numerous OCI reports. The Defendant also maintains that a collective or policy complaint under the *Canadian Human Rights Act*, RSC, 1985, c H-6 would be unwieldy and unmanageable.

[117] Instead, the Defendant argues that this proposed class action is really “three class actions in one”: the first concerns the excessive use of force by CSC staff against Older Inmates; the second concerns the failure by CSC staff to prevent the assault of Older Inmates by other, younger inmates; and the third concerns the Inability to Access Healthcare.

[118] As in *Araya*, the Defendant urges the Court to follow the example of Justice Paul Perell of the Ontario Superior Court of Justice in *Carcillo v Canadian Hockey League*, 2023 ONSC 886 [*Carcillo*], where he declined to certify a proposed class action in systemic negligence against numerous hockey leagues and clubs (at para 396). The Defendant also points to the “not entirely

happy” case of *Rumley* (see *Carcillo* at para 410, citing *TL v Alberta (Director of Child Welfare)*, 2006 ABQB 104 at paras 108-109).

[119] *Carcillo* is distinguishable from the present case (see *Araya* at para 136). *Rumley* more closely resembles this proposed class action, in that it concerned a broad range of alleged wrongs within a single institution – a residential school for deaf children – over a prolonged period of time. However, as illustrated by *Nasogaluak FC*, *Greenwood FC*, and *Salna v Voltage Pictures, LLC*, 2021 FCA 176 (at para 103), speculative concern that there may be a number of potentially different factual scenarios is not a persuasive argument against certification.

[120] Flexibility is infused into the Rules, and there are numerous avenues to resolve individual issues that may arise. Options include the ability to create subclasses based on similar fact scenarios (Rule 334.16(3)) and the ability for a court-supervised individual assessment process (Rule 334.26). If the class proceeding does become unmanageable, the Rules allow for amendments to the pleadings or even decertification if the conditions for certification are no longer satisfied (Rule 334.19).

[121] I am not persuaded that any efficiencies would be gained from certifying three separate class actions rather than one. Common questions relating to the alleged causes of action in systemic negligence and pursuant to the Charter permeate all aspects of the proposed class proceeding. CSC policies and OCI criticisms have typically addressed measures to safeguard Older Inmates against physical and psychological harm together with facilitating their access to healthcare. The alleged inadequacy of medical care exacerbates the vulnerabilities of Older

Inmates to physical and psychological abuse. It makes practical sense to address all of these matters in a single proceeding.

[122] This is not to minimize the formidable challenges presented by a class action alleging systemic negligence and Charter breaches that implicate numerous acts and omissions by different perpetrators in various institutional settings over a lengthy period of time. However, these same challenges were plainly evident in both *Nasogaluak FCA* and *Greenwood FCA*, and were not found to preclude certification of those proceedings as class actions. (See also *Araya* at paras 135-137.)

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

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

E. *Is BW a suitable Class representative?*

[125] The Defendant does not challenge BW's suitability as a Class representative, but says the proposed litigation plan is woefully inadequate (citing *Carcillo* at para 396). Counsel for the Plaintiff acknowledges that the litigation plan is a work in progress.

[126] The litigation plans approved by this Court in *Nasogaluak FC* and *Araya* were broadly similar to the one submitted in support of this certification motion. The details of the litigation plan will continue to evolve under case management (*Buffalo v Samson Cree Nation*, 2010 FCA 165 at paras 12-13).

[127] BW has demonstrated some basis in fact for his suitability as a representative Plaintiff.

V. Conclusion

[128] With references to "Age-Based Discrimination" removed, the Amended Statement of Claim discloses reasonable causes of action in systemic negligence and pursuant to ss 7 and 15(1) of the Charter.

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

All persons who are alive on the date this proceeding is certified and who allege that, while over the age of 50 and incarcerated in a Federal prison during the Class Period, they were:

- a) subjected to physical, emotional and/or psychological abuse;
- b) physically or psychologically harmed because they were unable to access, or denied access to, approved or specially-authorized health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more; and/or
- c) physically or psychologically harmed because they were unable to pay for health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more.

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

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

1. By its operation or management of the CSC, did the Defendant permit, perpetuate, cause, or contribute to the Abuse of Older Inmates and/or the Inability to Access Healthcare?
2. By its operation or management of CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
3. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?
4. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?
5. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefits of the law without discrimination based on "age" and "mental or physical disability" under section 15 of the Charter?

6. If the answer to common issue 3, 4, or 5 is “yes”, were the Defendant’s actions saved by section 1 of the Charter, and if so, to what extent and for what time period?
7. If the answer to common issue 3, 4, or 5 is “yes”, and the answer to common issue 6 is “no”, do those breaches make damages an appropriate and just remedy under section 24 of the Charter?
8. Does the Defendant’s conduct justify an award of punitive damages?
9. If the answer to common issue 8 is “yes”, what amount of punitive damages ought to be awarded against the Defendant?

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

[133] BW has demonstrated some basis in fact that he is a suitable representative Plaintiff.

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

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

**ORDER**

**THIS COURT ORDERS that:**

1. The motion to certify this proceeding as a class action is granted.
2. The Class is defined as follows:

All persons who are alive on the date this proceeding is certified and who allege that, while over the age of 50 and incarcerated in a Federal prison during the Class Period, they were:

- a) subjected to physical, emotional and/or psychological abuse;
- b) physically or psychologically harmed because they were unable to access, or denied access to, approved or specially-authorized health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more; and/or
- c) physically or psychologically harmed because they were unable to pay for health services, medical equipment, and/or supplies that a healthcare professional prescribed or indicated were required, for 30 days or more.

3. The Class Period is from April 17, 1985 to the date of this Order.
4. BW is appointed Representative Plaintiff.
5. The claims made on behalf of the Class are:



- a) systemic negligence resulting in the Abuse of Older Inmates and/or the Inability to Access Healthcare; and
  - b) breach of ss 7 and 15(1) of the Canadian Charter of Rights and Freedoms.
6. The relief claimed by the Class is damages, including punitive damages, at common law and pursuant to s 24 of the *Canadian Charter of Rights and Freedoms*.
7. The common questions of law or fact for the Class are:
1. By its operation or management of the CSC, did the Defendant permit, perpetuate, cause, or contribute to the Abuse of Older Inmates and/or the Inability to Access Healthcare?
  2. By its operation or management of CSC, did the Defendant breach a duty of care it owed to the Class to protect them from actionable physical or psychological harm?
  3. By its operation or management of CSC, did the Defendant breach the right to life, liberty and security of the person of the Class under section 7 of the Charter?
  4. If the answer to common issue 3 is yes, did the Defendant's actions breach the rights of the Class in a manner contrary to the interests of fundamental justice under section 7 of the Charter?
  5. Did the actions of the Defendant breach the right of the Class to the equal protection and equal benefits of the law without discrimination based on "age" and "mental or physical disability" under section 15 of the Charter?
  6. If the answer to common issue 3, 4, or 5 is "yes", were the Defendant's actions saved by section 1 of the Charter, and if so, to what extent and for what time period?

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

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

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

8. The litigation plan, including the time and manner for Class members to opt out of the class proceeding, will be approved at a later date.
9. No costs are awarded.

“Simon Fothergill”  
\_\_\_\_\_  
Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1853-21

**STYLE OF CAUSE:** B.W. v THE ATTORNEY GENERAL OF CANADA

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** OCTOBER 5, 6, 10, 11, 12, 2023

**ORDER AND REASONS:** FOTHERGILL J.

**DATED:** JANUARY 17, 2024

**APPEARANCES:**

Patrick Dudding  
Rajinder Sahota  
Danielle Toth

FOR THE PLAINTIFF

Deborah Babiuk-Gibson  
Scott Farlinger  
Christine Williams

FOR THE DEFENDANT

**SOLICITORS OF RECORD:**

Acheson Sweeney Foley Sahota LLP  
Victoria, British Columbia

FOR THE PLAINTIFF

Attorney General of Canada  
Edmonton, Alberta

FOR THE DEFENDANT