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	February 14, 2022 14 février 2022
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Court File No.

**FEDERAL COURT  
PROPOSED CLASS PROCEEDING**

BETWEEN:

**ABEL ARAYA**

Plaintiff

- and -

**THE ATTORNEY GENERAL OF CANADA**

Defendant

**STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules, serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in

your absence and without further notice to you.

Date 14 February 2022

Issued by: \_\_\_\_\_

Address of local office:

**FEDERAL COURT OF CANADA**

Pacific Centre, PO BOX 10065

3<sup>rd</sup> Floor, 701 West Georgia Street

Vancouver, British Columbia V7Y 1B6

**TO: THE ATTORNEY GENERAL OF CANADA**

Per: François Daigle, Deputy Attorney General of Canada

Department of Justice Canada

#900-840 Howe Street

Vancouver, British Columbia, V6Z 2S9

## CLAIM

### A. RELIEF SOUGHT

1. The plaintiff claims on his own behalf and on behalf of the Class (as hereinafter defined):
  - a. an order certifying this action as a class proceeding pursuant to Rules 334.16 and 334.17 of the Federal Court Rules, SOR/98-106;
  - b. an order pursuant to Rules 334.12, 334.16 and 334.17 of the Federal Court Rules appointing the plaintiff as the representative plaintiff for the Class;
  - c. a declaration that Canada was, and continues to be, systemically negligent in failing to fulfill its obligations to the Class pursuant to the Corrections and Conditional Release Act, and the Corrections and Condition Release Regulations, SOR/92-620;
  - d. a declaration that Canada breached its fiduciary duty to the Class;
  - e. a declaration that Canada and its agents systemically violated, and continue to violate, sections 7, 9, 12, and 15 of the Charter in a manner that is not demonstrably justified in a free and democratic society pursuant to section 1 of the Charter;
  - f. a declaration that Canada and its agents systemically violated, and continue to violate, the rights of Indigenous Class members;
  - g. a declaration that Canada is liable to the Class for damages caused by its negligence and breach of fiduciary duty;
  - h. a declaration that Canada is liable to the Class for damages under section 24(1) of the Charter for breach of sections 7, 9, 12, and 15 of the Charter;
  - i. general damages in an amount exceeding \$50,000;
  - j. special damages in an amount exceeding \$50,000;
  - k. damages for future cost of care in an amount exceeding \$50,000;
  - l. damages for loss of earnings or earning capacity, past and future in amounts exceeding \$50,000;

- m. punitive, exemplary, and/or aggravated damages in an amount exceeding \$50,000;
- n. costs of this action on a substantial indemnity scale or in an amount that provides full indemnity;
- o. the costs of notice of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to Rule 334.38 of the Federal Court Rules;
- p. pre-judgment and post-judgment interest; and
- q. such further and other relief as the Honourable Court deems just

## **B. OVERVIEW OF THE ACTION**

- 2. The plaintiff brings this proposed class action to address systemic racism by the Correctional Service of Canada (the “CSC”) against Black people, Indigenous people, and people of colour (collectively, “BIPOC”). The plaintiff alleges that the Government of Canada, in violation of legal duties, duties owed to Indigenous people in Canada, and *Charter*-protected human rights, failed to eliminate or mitigate systemic racism within the CSC. The plaintiff seeks orders that will vindicate the rights of BIPOC, deter systemic racism in the future, and compensate for the losses inflicted on the proposed class.
- 3. The fact of systemic racism in the CSC against BIPOC does not appear to be in serious dispute; it has been acknowledged by the Right Honourable Justin Trudeau, Prime Minister of Canada. On 27 October 2020, Prime Minister Trudeau’s Public Safety Minister, Bill Blair conceded “there is more work that needs to be done to address systemic racism and barriers within our justice system, and the federal correctional system is no exception. By working to eliminate these barriers, we can ensure better equitable reintegration outcomes for Indigenous, Black and other racialized inmates.”

## **C. DEFINITIONS**

- 4. The following definitions apply for the purposes of this Statement of Claim:
  - a. “**Assessment Tools**” includes the Custody Rating Scale, the Reintegration Potential Score, the Hare Psychopathy Checklist-Revised, the Violence Risk Appraisal Guide, the Sex Offender Risk Appraisal Guide, the Static-99, the Violence Risk Scale – Sex Offender, and other analogous assessment instruments employed by CSC;

- b. **“Bill of Rights”** means the Canadian Bill of Rights, S.C. 1960, c. 44;
- c. **“BIPOC”** means Black people, Indigenous people, and people of colour;
- d. **“CCRA”** means the Corrections and Conditional Release Act, S.C. 1992, c. 20;
- e. **“CCRR”** means the Corrections and Conditional Release Regulations, SOR/92-620;
- f. **“Charter”** means 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;
- g. **“Class or Class Members”** means all BIPOC persons who are or have been incarcerated in federal carceral facilities on or after 17 April 1982, and which will be further defined in his application for certification;
- h. **“Class Period”** means the period from 17 April 1982 through to the date this action is certified;
- i. **“Constitution Act”** means the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11;
- j. **“Criminal Code”** means the Criminal Code, R.S.C. 1985, c. C-46;
- k. **“CSC”** means the Correctional Service of Canada;
- l. **“CSC Facilities”** means all prisons and penitentiaries holding prisoners and inmates in confinement which are administered by CSC and the Commissioner of the CSC under ss. 5 – 6 of the CCRR;
- m. **“CSC Staff”** means correctional officers, parole officers, and other agents and employees of CSC obligated with fulfilling the duties and responsibilities of operating and administering CSC Facilities;
- n. **“Declaration”** means the United Nations’ Declaration on the Rights of Indigenous Peoples, A/RES/61/295;
- o. **“Quebec Charter”** means the Charter of Human Rights and Freedoms, CQLR, c. C-12;

- p. **“Statutory Principles”** means the principles outlined under s. 4 of the CCRA, as particularized in paragraph 25(h);
- q. **“Systemic Failures”** refers to CSC’s failure to take adequate or any steps to eliminate, mitigate, or minimize the risk of the Class being subjected to or harmed by Systemic Racism, and is further defined at paragraph 25.
- r. **“Systemic Racism”** means culture, policies, processes, practices, acts, omissions, and instruments used by CSC and CSC Staff which perpetuate, inflict, or reflect racism, discrimination, and bias against BIPOC.

## **D. THE PARTIES**

### **a) The Representative Plaintiff**

- 5. The plaintiff, Abel Araya, is a Sudanese-Canadian barber and former inmate at the William Head Institute, a federal carceral facility located in Metchosin, British Columbia, and has an address for service care of #300-376 Harbour Road, Victoria, BC.
- 6. The plaintiff brings this action on behalf of a proposed class of BIPOC who are or have been incarcerated in federal carceral facilities on or after 17 April 1982 (the “Class”), and which will be further defined in his application for certification.

### **b) The Defendant**

- 7. The Correctional Service of Canada is the entity responsible for, amongst other things, the care, custody, and rehabilitation of federally incarcerated inmates (the “CSC”).
- 8. Pursuant to s. 3 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (the “CLPA”), the federal Crown is liable for the wrongful or negligent acts and omissions of the CSC, as well as CSC’s employees, agents, and/or servants.
- 9. As per s. 23(1) of the *CLPA*, this proceeding is brought against the Attorney General of Canada.

## **E. NATURE OF THE ACTION**

### **a) The Role and Responsibilities of CSC**

10. Her Majesty the Queen in Right of Canada administers a system of federal carceral facilities (the “CSC Facilities”) through the CSC, and both entities are represented in this matter by the named defendant, the Attorney General of Canada.
11. CSC is a federal agency within the Government of Canada’s Public Safety portfolio, mandated with the custody, care, and supervision of federal inmates in CSC Facilities.
12. CSC was created on 10 April 1979 through the merging of the Canadian Penitentiary Service and National Parole Service. In this pleading, CSC includes both the current agency and its predecessor entities.
13. CSC’s Commissioner is the senior executive officer of the organization and is accountable to the Minister of Public Safety and Emergency Preparedness Canada.
14. CSC’s involvement in the criminal justice process begins once an offender is sentenced to a term of imprisonment of two years or more. Offenders given probation sentences or a term of imprisonment of less than two years are the responsibility of the provinces and territories.
15. The *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (the “CCRA”) and *Corrections and Conditional Release Regulations*, S.O.R. 92-620 (the “CCRR”) form the legislative basis of CSC, setting out its responsibilities and the principles which must guide its actions.
16. CSC Facilities includes “All Prisons and Penitentiaries holding Prisoners and Inmates in confinement” which are administered by CSC and the Commissioner of the CSC under ss. 5-6 of the *Corrections and Conditional Release Act*, SC 1992, C. 20 (the “CCRA”).
17. As set out in s. 3 of the *CCRA*, CSC must contribute to the maintenance of a just, peaceful and safe society, by, *inter alia*, assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens, through the provision of programs in penitentiaries and in the community.
18. CSC manages more than forty CSC Facilities located across Canada. National headquarters performs overall planning, policy development, and administration for CSC, while regional headquarters are responsible for overseeing the operations of CSC Facilities situated within their assigned regions.

19. CSC appoints and employs corrections officers and other staff to carry out the duties and obligations of operating and administering the CSC Facilities (“CSC Staff”).
20. CSC is vicariously liable for the actions of CSC Staff.

**b) CSC’s Failure to Address Systemic Racism**

21. In this pleading “Systemic Racism” means culture, policies, processes, practices, acts, omissions, and instruments used by CSC and CSC Staff which perpetuate, inflict, or reflect racism, discrimination, and bias against the Class.
22. Systemic Racism has existed continuously and at all material times since the inception of incarceration of persons in CSC Facilities. The claims of the Class relate to the period from 17 April 1982 to the present (the “Class Period”).
23. The defendant’s failure to eliminate or mitigate Systemic Racism, adequately or at all, violates the common law of negligence, the law of fiduciaries, the fiduciary duties owed to Indigenous members of the Class, the doctrine of the Honour of the Crown and other constitutional obligations under s. 35 of the *Constitution Act, 1982* (the “*Constitution Act*”), as well as ss. 7, 9, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”).
24. During and throughout the Class Period, acts and omissions (collectively, the “Systemic Failures”) by the CSC and CSC Staff constituted, caused, or contributed to Systemic Racism.
25. The Systemic Failures encompass the failure to take adequate or any steps to eliminate, mitigate, or minimize the risk of the Class being subjected to or harmed by Systemic Racism, such as:
  - a. the failure by CSC to adequately, or at all, develop, implement, and/or enforce policies, codes of conduct, guidelines, regulations, legislation, and/or management and operations procedures aimed at addressing Systemic Racism;
  - b. the failure by CSC to properly supervise the employees, agents, or servants of CSC, including CSC Staff;
  - c. the failure by CSC to take reasonable steps to ensure that risk assessment tools used by CSC were reliable when used on BIPOC, including but not limited to the Custody Rating Scale, the Reintegration Potential Score, the Hare Psychopathy Checklist-Revised, the Violence Risk Appraisal Guide, the Sex Offender Risk Appraisal Guide, the Static-

99, the Violence Risk Scale – Sex Offender, and other analogous assessment instruments employed by CSC (the “Assessment Tools”);

- d. the failure by CSC to develop and implement alternatives to the Assessment Tools modelled on, tested on, and appropriate for BIPOC populations;
- e. the failure by CSC to take reasonable steps to ensure that the Assessment Tools were not affected by the overt or covert biases of CSC Staff;
- f. the use of the Assessment Tools for purposes other than what the tools were designed for, including but not limited to the assignment of correctional programs to Indigenous offenders;
- g. the failure of CSC to adequately provide policies, programs and practices that are responsive to the needs of the Class;
- h. the failure of CSC to act in accordance with the guiding principles outlined under s. 4 of the *CCRA* (the “Statutory Principles”), including:
  - i. carrying out a sentence having regard to all relevant available information;
  - ii. enhancing effectiveness and openness through the timely exchange of relevant information with victims, offenders and other components of the criminal justice system;
  - iii. using the least restrictive measures consistent with the protection of society, staff members and offenders;
  - iv. ensuring the effective delivery of programs to offenders, including correctional, educational, vocational training and volunteer programs, with a view to improving access to alternatives to custody in a penitentiary and to promoting rehabilitation;
  - v. that offenders retain the rights of all members of society except those that are, as a consequence of the sentence, lawfully and necessarily removed or restricted;
  - vi. that correctional decisions are made in a forthright and fair manner;
  - vii. that correctional policies, programs and practices respect gender, ethnic, cultural, religious and linguistic differences, sexual

orientation and gender identity and expression, and are responsive to the special needs of women, Indigenous persons, visible minorities, persons requiring health and other groups; and

- viii. that staff members are properly selected and trained;
- i. the failure by CSC to ensure by way of management, operations procedures, supervision, and/or training that CSC Staff act in accordance with the Statutory Principles, as required pursuant to s. 3(b) of the *CCRR*;
- j. the failure by CSC to train or educate CSC Staff on how to consider Indigenous social history in their assessments or in the use of Assessment Tools;
- k. the failure by CSC to train or educate CSC Staff in culturally-appropriate techniques and procedures, or mandate the use of such techniques or procedures in relation to the Class, including:
  - i. the use of trauma-informed approaches, which means recognizing and responding appropriately to signs of trauma, including intergenerational trauma; and
  - ii. procedures for the appropriate consideration of Indigenous social history by while undertaking assessments;
- l. the failure by CSC to adequately prepare Class members for conditional release;
- m. providing preferential treatment to white offenders in regard to preparation for conditional release hearings, resulting in Class members serving an average of sixty additional days prior to being prepared for conditional release hearings;
- n. the failure by CSC Staff to request and/or obtain all appropriate and relevant official information on Class members prior to completing their intake assessments;
- o. failing to assess the feasibility of extending Indigenous correctional interventions, such as healing lodges, and other relevant cultural correction programs into medium and maximum-security CSC Facilities;
- p. the failure by CSC to assess Class members for a possible reduction in their security levels following significant events, such as completion of correctional programs;

- q. the use by CSC of educational materials which perpetuate Systemic Racism and requiring Class members to engage with such materials, including by having Black Class members read aloud passages containing casual use of the "n-word";
  - r. the failure by CSC to provide culturally-appropriate education and programming, with the result that Class members under-performed or dropped out of programs necessary to rehabilitate themselves, obtain privileges during incarceration, or attain an earlier release from imprisonment;
  - s. the failure by CSC to appropriately fund, staff, or otherwise resource and implement CSC initiatives aimed at mitigating Systemic Racism;
  - t. the failure by CSC to investigate and respond to allegations of Systemic Racism against the CSC and CSC Staff in a thorough, timely, or impartial manner; and
  - u. the failure by CSC to investigate and address the effects of racial discrimination on Class members' ability to obtain employment within CSC Facilities, particularly for employment requiring trust from CSC Staff
- collectively, the "Systemic Failures".

26. During and throughout the Class Period, CSC and CSC Staff knew, or alternatively ought to have known, that the Systemic Failures would harm, injure, or detrimentally affect Class members by causing or contributing to:

- a. the adverse treatment of the Class by CSC Staff relative to the treatment received by non-BIPOC persons;
- b. racial profiling of the Class by CSC Staff;
- c. the unnecessarily restrictive and lengthy incarceration of Class members, resulting in the inability of Class members to participate in political, economic, and cultural life, and in the forcible removal of Class members' children;
- d. the failure of CSC to respond to and investigate, appropriately or at all, allegations of overt or covert racism amongst CSC Staff;
- e. Indigenous Class members receiving lower reintegration potential scores than non-Indigenous offenders, resulting in Indigenous Class members:

- i. being less likely to have living arrangements in place prior to being released into the community than non-BIPOC offenders;
  - ii. having their files prepared for conditional release slower than non-BIPOC offenders;
  - iii. being less likely to serve out their time in the community through parole or statutory release than non-BIPOC offenders; and
  - iv. being more likely than non-BIPOC inmates to be released directly from a medium or maximum-security CSC Facility, thus losing the benefit of a gradual release that support successful reintegration;
- f. Indigenous Class members being grossly over-represented in incidents of self-injury;
- g. Indigenous Class members being more likely to be referred to correctional programs than non-Indigenous offenders;
- h. Black Class members being more likely to receive maximum initial security ratings than non-BIPOC offenders, resulting in Black Class members:
  - i. being more likely to be placed in maximum security CSC Facilities than non-BIPOC offenders;
  - ii. being disproportionately involved in use of force incidents compared to non-BIPOC offenders; and
  - iii. having less access to rehabilitative corrections programs than non-BIPOC offenders;
- i. Black Class members being more likely to be charged with discretionary offences, such as disobeying an officer, than non-BIPOC offenders;
- j. the undermining of the process and principles of reconciliation with Indigenous peoples in Canadian Society by CSC;
- k. the undermining of the Class' trust of prisons, the CSC, the justice system, and other institutions of the Canadian state; and
- l. such further and other matters as the plaintiff may advise.

27. At all material times, CSC knew or ought to have known about the existence of Systemic Racism within the federal carceral system and among CSC and CSC Staff, about the existence of the Systemic Failures, and that it had not effectively,

meaningfully, or successfully eliminated, mitigated, or minimized the risk of the Class being subjected to or harmed by Systemic Racism.

**c) Harm Suffered by the Class**

28. Throughout the Class Period, the Systemic Failures caused or contributed to the following, whether construed under the law of negligence, misfeasance in public office, fiduciary duty, Indigenous rights, and/or breach of the *Charter*:

- a. emotional injury, or aggravation thereof, or both;
- b. psychological injury, or aggravation thereof, or both;
- c. psychiatric injury, or aggravation thereof, or both;
- d. mental and emotional distress;
- e. physical injury, or aggravation thereof, or both;
- f. loss of cultural identity;
- g. impaired dignity and self-worth;
- h. pain and suffering;
- i. substance addiction;
- j. premature death;
- k. loss of earning capacity, past and future;
- l. pecuniary loss;
- m. special damages;
- n. loss of enjoyment of life;
- o. cost of medical and other treatment and care, past and future; and
- p. such further and other matters as the plaintiff may advise.

**F. THE PLAINTIFF'S EXPERIENCES WITH SYSTEMIC RACISM**

### **a) Background**

29. Mr. Araya was born in a refugee camp in Port Sudan, Sudan, in 1981. Mr. Araya emigrated to London, Ontario alongside his mother and father in 1986.
30. After spending his adolescence in the United States on an athletic scholarship, Mr. Araya returned to Ontario where he spent the next 13 years working fulltime as a barber. In his spare time, Mr. Araya was actively involved in his community, providing free haircuts to the unhoused and coaching youth basketball.
31. On 25 June 2019, after pleading guilty to drug trafficking, Mr. Araya was sentenced to a three-year term of imprisonment. He was ultimately sent to the William Head Institution (“William Head”) in Metchosin, BC, for the duration of this sentence.

### **b) Experiences of Racism at William Head Institution**

32. While Mr. Araya has overcome significant racism throughout his life, the systemic discrimination Mr. Araya was subjected to while at William Head was unlike anything he had previously experienced. Mr. Araya’s time with CSC was marred by systemic harassment, discrimination, and neglect due to the colour of his skin.
33. Despite being a non-violent, first-time offender, as a black inmate Mr. Araya was treated as if he was an unpredictable and violent threat to the security of the institution. In contrast, white inmates – many of whom were serving life sentences as violent, repeat offenders – were provided a consistently higher degree of trust and autonomy from CSC Staff than that provided to BIPOC inmates.
34. Mr. Araya’s efforts to foster a positive relationship with CSC Staff upon arriving at William Head were immediately unsuccessful. Despite observing white inmates greet and exchange pleasantries with CSC Staff on a regular basis, Mr. Araya’s attempts to do so were ignored by CSC Staff.
35. The parole officer (“PO”) assigned to Mr. Araya’s file was known amongst inmates for harbouring prejudice against William Head’s BIPOC population. On one occasion, Mr. Araya attended his PO in need of immediate medical attention related to a head injury. When he asked if she could call for assistance, his PO told him that this wasn’t “her job” and refused to call for help.
36. When Mr. Araya instead attended the medical facility for treatment, he was chastised by CSC Staff and told that he should have first consulted his PO.

37. On another occasion, after Mr. Araya informed his PO that he planned to continue volunteering his time as a basketball coach following his release, she replied that she would not want someone like Mr. Araya coaching her children. Despite Mr. Araya's protests that she was not aware of the circumstances surrounding his arrest, his PO responded that Mr. Araya was clearly a "drug dealer".
38. Mr. Araya attended the ranking CSC Staff member on site and reported his experiences of neglect and discrimination and his concerns that this could impact his ability to obtain parole. In response, Mr. Araya was told that racism was not an issue with his PO or within William Head. No action of any kind was taken by CSC to investigate and address Mr. Araya's concerns.
39. Mr. Araya confronted CSC Staff about their prejudice towards BIPOC inmates on multiple further occasions. When Mr. Araya confronted a group of medical and disciplinary staff about the differential treatment directed towards him and white inmates, the head charge nurse at William Head responded that he would not want to have someone like Mr. Araya living next to him in the community.
40. Rather than improve his situation, Mr. Araya's decision to report his experiences resulted in further discrimination and harassment by CSC Staff. CSC Staff routinely attempted to intimidate Mr. Araya from making further reports by staring him down during roll calls and lock ups, and overlooking inappropriate conduct directed towards him by other inmates.
41. On one such occasion, Mr. Araya was approached and threatened by a white inmate who directed derogatory, racial slurs towards Mr. Araya, including use of the "n-word." Despite the clear and obvious attempt to provoke Mr. Araya, nearby CSC Staff took no action to address or discipline the white inmate's conduct.
42. In contrast, when Mr. Araya responded that he did not want to fight but if the term was repeated they would have to settle the matter, CSC Staff quickly intervened and reported that Mr. Araya had threatened the white inmate.
43. CSC Staff subsequently informed Mr. Araya that since he and his aggressor shared a bunkhouse, he would have to find a new place to stay. Mr. Araya was told that if he was unable to find another bunkhouse to take him in, he would be moved to a different carceral institution altogether.
44. Accordingly, Mr. Araya was publicly shamed and forced to go door-to-door to each bunkhouse asking if they had room for him to stay, while his aggressor was treated like a victim by CSC. No action was taken at any point by CSC to address the racial slurs used by the white inmate.

### **c) Experiences of Racism After Obtaining Parole**

45. On 12 March 2020, Mr. Araya was released on full day parole. He moved into a halfway house in Victoria, BC, and CSC assigned a new PO to his file.
46. At this time, Mr. Araya's sole special parole condition was to refrain from carrying two cell phones on his person. As Mr. Araya was nearly three years sober, no conditions relating to alcohol or drug use were imposed upon his release from William Head.
47. While getting to know his new PO, Mr. Araya informed him that his partner was Indo-Canadian. In response, the PO told Mr. Araya that CSC would need to "reassess" the threat of domestic violence within their relationship and that he "knows" what Indo-Canadian women are like. When the PO was asked to provide the basis for this reassessment, no documents or policies were provided.
48. After Mr. Araya confronted his new PO about their racial biases, his new PO put in place a series of arbitrary and unnecessary conditions based on racist and inappropriate stereotypes, including:
  - a. attending regular Alcoholics Anonymous meetings;
  - b. attending a psychiatrist;
  - c. seeking gainful employment; and
  - d. to refrain from seeing his partner, due to a perceived threat of domestic violence.
49. At no time did CSC inform Mr. Araya that these "conditions" were optional.
50. At all times throughout Mr. Araya's incarceration and parole, CSC's treatment of him has been based on false and irrelevant stereotypes about his race instead of any objective measurements of risk related to the circumstances of his offence.
51. As a result of CSC's conduct, Mr. Araya has suffered serious and prolonged injuries to his dignity and psyche. Rather than provide rehabilitation, Mr. Araya's time with CSC has provided a further barrier to his successful reintegration to the community at large.

## **G. CAUSES OF ACTION**

### **a) Misfeasance in Public Office**

52. The Systemic Failures constitute misfeasance in public office by CSC and CSC Staff since, at all material times, they knew that:

- a. the Statutory Duties, ss. 7, 9, 12 and 15 of the *Charter*, ss. 1-2 of the *Canadian Bill of Rights*, S.C. 1960, c. 44 (the “*Bill of Rights*”), s. 26 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the “*Criminal Code*”), and s. 35(1) of the *Constitution Act* prohibited the Systemic Failure, and/or deprived the CSC and CSC Staff of the authority to commit the Systemic Failures; and
- b. the Systemic Failures were likely to harm the Class.

**b) Breach of Fiduciary Duty**

53. The Systemic Failures constitute a breach of the fiduciary duty owed by CSC and CSC Staff to the Class, since, at all material times:

- a. there existed a close relationship of authority and trust between CSC, CSC Staff and the Class;
- b. CSC and CSC Staff held a position of power over the Class and had the ability to unilaterally exercise that power to affect the Class; and
- c. CSC failed to fulfill their obligations arising pursuant to this relationship, including by:
  - i. failing to act in the best interests of the Class;
  - ii. placing their own interests ahead of the Class;
  - iii. failing to provide the Class with safe and suitably monitored care;
  - iv. breaching their duty of utmost good faith to the Class;
  - v. failing to protect the Class’ health and well-being;
  - vi. failing to protect the Class from physical, psychological, and emotional harm;
  - vii. failing to act in accordance with the Statutory Principles and other requirements outlined under the *CCRA* and *CCRR*; and
  - viii. such further particulars as are not yet known to the Class;

all of which caused harm to the Class.

### c) Breach of the Rights of Indigenous Class Members

54. On 13 September 2007, Canada became a signatory to the United Nations' *Declaration on the Rights of Indigenous Peoples* (the "*Declaration*"). The rights and obligations set out in the *Declaration* are described as "minimum standards for ... survival, dignity and well-being" of Indigenous people (Article 43). They include:
- a. "the right to be free from any kind of discrimination" (art. 2);
  - b. the "right to participate fully ... in the political, economic, social and cultural life of the state" (Art. 5);
  - c. "rights to life, physical and mental integrity, liberty and security of person" (Art. 7(1));
  - d. "the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group" (Art. 7(2));
  - e. "the right not to be subjected to forced assimilation or destruction of their culture" (art. 8(1));
  - f. the right to "not be forcibly removed from ... lands or territories" (Art. 10); and
  - g. the obligation that "States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination" (Art. 15(2)).
55. On 10 May 2016 Canada officially adopted the *Declaration*, with Indigenous and Northern Affairs Minister Carolyn Bennett declaring Canada to be a "full supporter of the declaration, without qualification".
56. On 21 June 2021, Canada passed the *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 which further affirmed the *Declaration* as a "universal international human rights instrument with application in Canadian Law" (the "*Declaration Act*").
57. The Systemic Failures constitute breaches of the rights and duties owed to Indigenous Class members, specifically of the Crown's fiduciary duty, the

doctrine of Honour of the Crown, the rights enshrined under the *Declaration*, and the rights protected under s.35(1) of the *Constitution Act* since, at material times:

- a. pursuant to the law of fiduciaries and the Honour of the Crown, CSC and CSC Staff owed Indigenous Class members fiduciary duties of care, good faith, honour, honesty, loyalty, the obligation to act in their best interests, and the obligation to take steps to protect them from harm, all of which arise out of the historic power assumed and asserted by government over Indigenous people in Canada;
- b. s. 35(1) of the *Constitution Act* required CSC to engage in the protection and reconciliation of the interests which arise from the displacement of Class members by the arrival of colonial settlers;
- c. the *Declaration* recognized the rights of Indigenous Class members, and governed the obligations of CSC and CSC Staff in relation to those persons; and
- d. the nature of these obligations bound CSC and CSC Staff to make decisions which protected and promoted the best interests of Indigenous Class members including by engaging in meaningful consultation with Indigenous peoples prior to affecting those interests.

#### **d) Negligence of CSC**

58. The Systemic Failures constitute negligent breaches of the duty of care owed by CSC and CSC Staff to the Class, since, at all material times:

- a. CSC and CSC Staff owed a duty of care to the Class to take reasonable steps to eliminate, mitigate, or minimize the risk of the Class being subjected to or harmed by Systemic Racism;
- b. the acts and omissions of CSC and CSC Staff are such that they have a close, direct effect on the Class;
- c. it was reasonably foreseeable to CSC and CSC Staff that Systemic Racism and the Systemic Failures would cause injuries, damages, and loss to the Class, including as a result of:
  - i. the publication of reports, investigations, studies, inquiries, and commissions concerning Systemic Racism in CSC Facilities throughout the Class Period;
  - ii. the Statutory Principles; and

- iii. ss. 7, 9, 12 and 15 of the *Charter*, ss. 1-2 of the *Bill of Rights*, s. 26 of the *Criminal Code*, s. 35(1) of the *Constitution Act*, and the *Declaration*;
- d. the Class members were reasonably expected to rely on CSC and CSC Staff to take steps to eliminate, mitigate, or minimize the risk of the Class being subjected to or harmed by Systemic Racism.

**e) Breach of Charter Rights**

59. The Systemic Failures breached the rights of the Class under the *Charter*, since:

- a. in violation of s.7, CSC Staff deprived Class members of:
  - i. life, as CSC Staff caused or contributed
  - ii. liberty, as CSC Staff imprisoned Class members for periods longer than necessary and infringed their autonomy to a greater extent than reasonably necessary as a result of Systemic Racism; and
  - iii. security of the person, as CSC Staff inflicted both physiological and psychological injury to Class members as a result of Systemic Racism;
- b. in violation of s. 9, CSC Staff subjected Class members to arbitrary imprisonment as a result of Systemic Racism;
- c. in violation of s. 12, CSC Staff subjected Class members to cruel and unusual punishment as a result of Systemic Racism;
- d. in violation of s. 15, CSC Staff deprived Class members of the equal benefit and protection of the law, due to the Class members' race, ethnicity, colour, religion, and/or spirituality; and
- e. none of the foregoing *Charter* violations can be saved by s.1.

60. For these same reasons, the Systemic Failures breached analogous rights of Quebec Class members pursuant to the *Charter of Human Rights and Freedoms*, CQLR, c. C-12 (the "*Quebec Charter*").

**H. DAMAGES**

61. The plaintiff and the Class are entitled to general and special damages flowing from CSC's negligence and breaches, including, *inter alia*, damages for the Class Members' future care costs and past and future loss of earning capacity.
62. The Class is entitled to damages under s. 24(1) of the *Charter* in restitution for the violation of their constitutional rights and freedoms. In the circumstances, monetary *Charter* damages will:
- a. provide compensation for the suffering and loss of dignity of the Class;
  - b. vindicate the Class's fundamental rights; and
  - c. deter systemic violations of a similar nature moving forward.
63. Punitive and exemplary damages are appropriate in this case. CSC and CSC Staff acted in a callous, high-handed manner with wanton disregard for the Class' interests, dignity, safety, and wellbeing. At all material times, CSC and CSC Staff knew or ought to have known about the Systemic Failures and failed to act despite the clear and immediate risk they posed to the plaintiff and the Class.

#### **I. AUTHORITIES PLEADED BY THE PLAINTIFF**

64. The plaintiff pleads and relies on the following statutes (inclusive of predecessor and successor statutes):
- a. the *Crown Liability and Proceedings Act*, R.S.C., 1985, c. C-50;
  - b. the *CCRA*;
  - c. the *CCRR*;
  - d. the *Constitution Act*;
  - e. the *Charter*;
  - f. *Federal Courts Act*, R.S.C. 1985, c. F-7;
  - g. *Federal Court Rules*, SOR 98/106;
  - h. the *Québec Charter*;
  - i. the *Bill of Rights*;
  - j. the *Declaration*;

- k. the *Declaration Act*;
- l. the *Criminal Code*;
- m. the common law; and
- n. the law of equity.

65. The plaintiff proposes that this action be tried in Vancouver, BC.

14 February 2022

A handwritten signature in blue ink, consisting of several overlapping loops, positioned above a horizontal line.

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