# COURT OF APPEAL FOR ONTARIO

CITATION: Richard v. Canada (Attorney General), 2025 ONCA 713
DATE: 20251022
DOCKET: COA-24-CV-0891

Lauwers, Miller and George JJ.A.

BETWEEN

Tyron Richard and Alexis Garcia Paez

Plaintiffs
(Respondents)

and

The Attorney General of Canada

Defendant
(Appellant)

Negar Hashemi, Sharon Stewart, Rishma Bhimji, Nimanthika Kaneira and Jazmeen Fix, for the appellant

Jonathan Lisus, Zain Naqi, Jonathan Foreman, Cory Wanless, Subodh Bharati, Jean-Marc Metrailler, Annie Legate-Wolfe and Adam Babiak, for the respondents

Heard: June 10, 2025

On appeal from the order of Justice Benjamin T. Glustein of the Superior Court of Justice, dated July 5, 2024, with reasons reported at 2024 ONSC 3800.

**George J.A.:**

**OVERVIEW**

[1] Between May 15, 2016, and July 18, 2023, the Canada Border Services Agency ("CBSA") placed some immigration detainees, detained under Division 6 of Part 1 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), in provincial prisons instead of Immigration Holding Centers ("IHCs"). The CBSA entered into agreements with provinces and territories to house these detainees at a daily rate. A total of 8,360 immigration detainees were held in 87 provincial and territorial prisons across the country.

[2] The respondents, Tyron Richard and Alexis Garcia Paez, brought a motion to certify a class action under s. 5 of the *Class Proceedings Act*, S.O. 1992, c. 6 ("CPA"). The proposed class consists of the above noted immigration detainees and a subclass of those detainees with mental health conditions.

[3] The respondents do not challenge the lawfulness of the IRPA detention regime. They challenge the CBSA's use of provincial prisons to effect detention under the IRPA on the basis that it violates the *Charter* and negligently harms the detainees. Their core pleading is that the detention of <u>any</u> immigration detainee in <u>any</u> provincial prison is unlawful. They say prisons are purpose-built to punish crime, and that immigration detainees held in prisons are treated as though they are criminal inmates.

[4] The motion judge certified the proposed class action. He held that the *Charter* and negligence claims were based on adequately pleaded facts and that

it was not “plain and obvious” the claims would fail under s. 5(1)(a) of the CPA as disclosing no cause of action: *Leroux v. Ontario*, 2023 ONCA 314, 166 O.R. (3d) 321, leave to appeal refused, [2023] S.C.C.A. No. 284, at para. 38. He found further that there was an identifiable class as required by s. 5(1)(b) of the CPA and that there was ‘some basis in fact’ for the proposed common issues (“PCIs”).

[5] The appellant, the Attorney General of Canada (“Canada”), appeals the motions judge’s order.

[6] For the reasons that follow I would dismiss the appeal.

## ISSUES

[7] Canada’s appeal gives rise to three issues:

i) Whether the motion judge erred by finding that it is not plain and obvious that the causes of action alleging breaches of ss. 7, 9, 12 and 15 of the *Charter* would fail;
ii) whether the motion judge erred by finding that it is not plain and obvious that the cause of action in negligence would fail; and
iii) whether the motion judge erred in finding that the claims of the class members raise common issues.

## DISCUSSION

### Standard of Review

[8] Canada does not contend that the motion judge misstated the test for any pleaded cause of action; it argues that he erred in finding that the pleaded facts support the causes of action. Canada argues further that the motion judge erred in his finding of common issues. These are findings of mixed fact and law, which

means that, absent a palpable and overriding error, they cannot be disturbed: *Stolove v. Waypoint Centre for Mental Health Care*, 2025 ONCA 376, leave to appeal requested, [2025] S.C.C.A. No. 313, at paras. 38-40; see also *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682, leave to appeal refused, [2024] S.C.C.A. No. 406, at para. 36.

### ***Charter*** **Causes of Action**

[9] The test under s. 5(1)(a) of the CPA is the same test that applies on a motion to strike under r. 21.01(1)(b) of the *Rules of Civil Procedure*. In other words, a claim can only be struck if it is "bound to fail": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14. The motion judge must read the pleadings generously, accept as true the facts as pleaded, and determine whether, on those facts, it is "plain and obvious" that the plaintiff has no cause of action: *Lilleyman*, at para. 20; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17. A finding that the pleaded facts are capable of satisfying the pleaded causes of action is entitled to deference on appeal: *Davis v. Amazon Canada Fulfillment Services*, 2025 ONCA 421, at para. 59.

[10] Canada's argument that the respondents' claims disclose no cause of action under the *Charter* is premised on two points. It argues, first, that the Federal Court of Appeal's decision in *Brown v. Canada*, 2020 FCA 130, 448 D.L.R. (4th) 714, leave to appeal refused, [2020] S.C.C.A. No. 385, is a complete answer to the constitutional issues raised here. Second, it submits that the motion judge

"fundamentally mischaracterized" the nature of detention in a prison as always "penal" and "punitive", without qualification, which undermined his analysis.

[11] I reject these arguments. To start, in *Brown*, the appellant challenged the detention scheme under the IRPA itself, arguing that a broad discretion to detain non-citizens with no limit on the length of detention rendered the statute unconstitutional. Here, the respondents do not challenge the constitutionality of the regime, nor the decision to detain under the statute. Instead, they challenge the location and conditions of detention which are determined by internal CBSA guidelines and agreements with provinces and territories, and not the IRPA (which is silent on the location of detention). While the court in *Brown* did indeed rule in Canada's favour by upholding the constitutionality of the immigration detention provisions of the IRPA, it did not decide the issue that arises in our case.

[12] I would also reject Canada's argument that the motion judge failed to understand that detention in prison is not always punitive. The motion judge was well aware that the purpose of immigration detention is administrative and not punitive, and clearly understood the nuances of the parties' respective positions: Canada argues that the physical conditions in provincial prisons, on balance, align with the administrative nature of immigration detention, while the respondents argue that Canada's practice does not align with immigration detention's administrative purpose because immigration detainees are subject to the same punitive conditions as criminal inmates.

Section 7

[13] Section 7 of the *Charter* protects the fundamental rights to life, liberty, and security of the person and directs that no one may be deprived of these rights except in accordance with the principles of fundamental justice.

[14] The motion judge found that the respondents had pleaded material facts which could support their claim that the punitive effects of detention in provincial prison have a grossly disproportionate impact on a detainee's liberty interest. The motion judge, at paras. 160-95 of his reasons, discussed the relevant s. 7 jurisprudence and applied those well-settled principles to the facts, as pleaded. In doing so, he did not delve into the merits. Nor did he, as Canada submits, find "detention to always be punitive". Again, the motion judge accepted that the nature and purpose of immigration detention is administrative but after reviewing the pleadings held that the "facts support a claim that the punitive effects of immigration detention in prisons constitute an 'overbroad' mismatch of consequences, and result in conditions which are 'grossly disproportionate' to the administrative object".

[15] Canada essentially argues that because immigration detention is intended to be administrative, the respondents' detention in provincial jails was in fact administrative. The problem with this argument is that Parliament's intention is not determinative. The relevant question is whether the detention is in fact punitive or

administrative, which can only be answered on a full evidentiary record at a merits hearing.

[16] Further, Canada's attempt to analogize immigration detention to pre-trial detention in the criminal context is misplaced. First, even if not designed to be so, courts have held that criminal pre-trial detention is, in effect, punitive, and those ultimately convicted of a criminal offence are likely to have their sentences reduced to account for the time they spent in pre-trial custody: *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 41; *R v. Jean*, 2008 BCCA 465, 242 C.C.C. (3d) 569, at para. 17. Second, those accused of crimes being held pending trial are afforded several protections including the right to reasonable bail and a trial within a reasonable time, neither of which are constitutionally protected safeguards in the immigration context.

[17] Canada wades into the merits when it argues that "the conditions of immigration detention in a [provincial prison] are not a punishment nor are they punitive, consistent with this Court's holding in *Ogiamien.*" In *Ogiamien v. Ontario (Community Safety and Correctional Services)*, 2017 ONCA 667, 416 D.L.R. (4th) 124, this court held that lockdowns at a provincial correctional facility did not deprive two inmates of their "residual liberty" in prison, and in any case were in accordance with the principles of fundamental justice because they were necessary to manage risk and ensure safety at the facility: paras. 75-85. *Ogiamien* does not stand for the proposition that immigration detainees are not subject to

penal conditions in provincial prisons, or that those conditions, including lockdowns, can never amount to a s. 7 violation. The inquiry here is whether prison conditions are rationally connected to immigration detention's administrative objective and not to the objective of safeguarding the safety and security of prison staff and inmates, as was the case in *Ogiamien*.

[18] There is no basis to disturb the motion judge's certification of the respondents' s. 7 claim.

Section 9

[19] Section 9 of the *Charter* protects individuals from being arbitrarily detained or arrested. Canada does not quarrel with the motion judge's recitation of the relevant principles, nor does it identify any palpable and overriding error.

[20] The motion judge's analysis of the s. 9 claim, found at paras. 196-217 of his reasons, is sound. Relying on the Supreme Court's decision in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 54, the motion judge found that a s. 9 claim could arise since detention is arbitrary when not authorized by law. He referred to the relevant pleaded facts, including that s. 3(3) of the IRPA requires that the statute be implemented in accordance with the *Charter* and international law, and that the IRPA and its regulations contain no explicit authorization for detention in provincial prisons. Earlier in his reasons, the motion judge also referred to Enforcement Manual 20: Detention ("ENF-20"), which sets the guiding principles

for CBSA treatment of immigration detainees and provides that “immigration detention is an administrative detention and must not be punitive in nature.” On these facts, the motion judge concluded that the respondents have a “tenable claim that incarceration of Immigration Detainees in provincial prisons cannot be authorized by IRPA, which is alleged to be designed for administrative and not punitive immigration goals.”

[21] Canada argues that the practice of placing immigration detainees in provincial prisons is not arbitrary because it is informed by non-arbitrary, objective factors as articulated in the National Risk Assessment for Detention (“NRAD”), a form used by CBSA officers to determine if an immigration detainee should be held in an IHC or provincial prison. However, lack of arbitrariness in the NRAD does not save the appellant from the arbitrariness that flows from the detention itself not being authorized by law as articulated in *Grant*.

[22] Referring again to *Brown*, Canada argues that there can be no question about the lawfulness or authority of the IRPA. However, as discussed already, *Brown* casts no judgment on the practice of immigration detention in provincial prisons.

Section 12

[23] Section 12 of the *Charter* guarantees the right to not be subjected to cruel and unusual treatment or punishment. This provision protects individuals from inhumane or degrading treatment at the hands of the state.

[24] The motion judge found that the respondents' pleadings describe common practices in provincial prisons – such as strip searches, the use of restraints, and restricted communication with the outside world – which could render the detention punitive and grossly disproportionate to the administrative purpose of detention under the IRPA.

[25] Once again, Canada does not claim that the motion judge misstated the applicable legal principles, nor does it point to any palpable and overriding errors. It seems to me that Canada's argument is basically that the motion judge failed to recognize that s. 12 violations are rare and extraordinary.

[26] I reject this argument. The motion judge expressly found at paras. 218-34 of his reasons that the test under s. 12 is "stringent and demanding", but ultimately concluded it was not "plain and obvious" that the respondents' s. 12 claim would fail. In doing so he properly resisted Canada's invitation to wade into the merits.

[27] I agree with the respondents that the cases relied on by Canada are of limited assistance. For example, this court in *Ogiamien* did not address whether the cumulative effect of subjecting immigration detainees to the same conditions

as inmates awaiting criminal trial or serving a sentence was cruel and unusual. The court's findings narrowly related to the effect of lockdowns on two detainees in a specific and unique situation.

[28] In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350**,** the Supreme Court addressed the constitutionality of the security certificate regime under the IRPA. The issue was whether the indefinite detention of individuals subject to a security certificate constituted cruel and unusual treatment. The court did not consider the physical conditions of detention, only its length. In fact, the Supreme Court in *Charkaoui* expressly clarified that its holding "does not preclude the possibility of a judge concluding at a certain point that a particular detention constitutes cruel and unusual treatment": para. 123.

[29] Lastly, in *Brown* the question was whether the *Charter* imposes a requirement that detention for immigration purposes not exceed a prescribed time (after which the detention is presumptively unconstitutional), or a maximum period (after which release would be mandatory). As in *Charkaoui*, the issue in *Brown* had to do with the length of detention, not the location or conditions of detention.

[30] The respondents here allege that the very decision to place an immigration detainee in a penal institution is dehumanizing and degrading. The merits of that claim can only be resolved on a full evidentiary record.

Section 15

[31] Section 15 of the *Charter* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination. The motion judge found that the respondents had advanced reasonable causes of action under s. 15 based on mental health and citizenship grounds. Canada challenges only the latter finding.

[32] Although Canada's argument that there is no basis for a discrimination claim rooted in non-citizenship is more persuasive than others it has presented on appeal, it must still fail.

[33] The motion judge's findings, set out at paras. 235-55 of his reasons, are entitled to deference. The motion judge held that the facts pleaded could support the claim that exposing non-citizens to the carceral system without criminal charge has the effect of reinforcing, perpetuating, and exacerbating the disadvantages and vulnerabilities associated with being a non-citizen. I see no error in the motion judge's analysis. He accurately cited, and properly applied, the "plain and obvious" test and arrived at a conclusion that was available to him. As the motion judge noted, the s. 15 claim here is not about who may be deported from Canada – it is clear that, per s. 6 of the *Charter*, only Canadian citizens have the unfettered right to enter, remain in and leave Canada – it is about who may be detained in prison. The respondents argue that the CBSA's practice exposes non-citizens to

incarceration in prison for purely administrative reasons, whereas citizens can only be incarcerated under our criminal law.

[34] The appellant has not directed us to any case law that stands for the proposition that immigration and detention practices are immunized from equality claims. The appellant refers to *Charkaoui* to argue that it is not discriminatory to establish a detention and deportation scheme that applies to non-citizens. The Supreme Court said the following in *Charkaoui* at para. 129:

> The appellant Mr. Charkaoui argues that the *IRPA* certificate scheme discriminates against non-citizens, contrary to s. 15(1) of the *Charter*. However, s. 6 of the *Charter* specifically allows for differential treatment of citizens and non-citizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)). A deportation scheme that applies to non-citizens, but not to citizens, does not, for that reason alone, violate s. 15 of the *Charter*: *Chiarelli*. [Emphasis added.]

[35] The emphasized passage above implies that non-citizens may challenge differential treatment under s. 15 if they can show that a harmful aspect of the detention and deportation scheme goes beyond simply defining who may enter or stay in Canada.

[36] In *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, the Supreme Court dismissed the appellant's s. 15 claim because Canada was free to establish a deportation scheme that applied to non-citizens, finding at p. 22 that "deportation is not imposed as a punishment." However, the

court in *Charkaoui*, a decision released many years later, expressly contemplated, at para. 130, that a s. 15 claim on citizenship grounds may succeed where "detention is no longer related, in effect or purpose, to the goal of deportation."

[37] It is open to the respondents in this case to argue that the punitive effects of detention in a provincial prison signal that the impugned practice has become detached from its administrative purpose such that a s. 15 claim is available. The Supreme Court recognized citizenship as an analogous ground in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, and explained at p. 3 that "non-citizens are a group lacking in political power and as such are vulnerable to having their interests overlooked and their rights to equal concern and respect violated." The motion judge in this case acknowledged that the proposed class members were acutely vulnerable and faced "language barriers, cultural differences, lack of familiarity with Canadian culture, unfamiliarity with Canadian laws, lack of resources, a lack of official travel documentation, and mental health issues".

[38] Canada does not argue that certification of a s. 15 claim in the immigration context would be to recognize a novel cause of action or amount to a "giant step" or even an "incremental change" in the law as this court grappled with in *Owsianik v. Equifax Canada Co*., 2022 ONCA 813, 164 O.R. (3d) 497, leave to appeal refused, [2023] S.C.C.A. No. 33, at paras. 62-63.

[39] Accordingly, there is no basis to disturb the motion judge's finding that the respondents' s. 15 claim is not bound to fail.

**Negligence**

[40] The motion judge found that the pleaded facts were capable of sustaining a claim in negligence on the basis alleged: Canada has a duty to exercise care in administering the IRPA detention regime and that by holding immigration detainees in provincial prisons it breached that duty and caused reasonably foreseeable damages.

[41] Canada submits that the straightforward duty of care owed by prison authorities and the Crown to prisoners established in *MacLean v. R.*, [1973] S.C.R. 2 does not apply and that this court's decision in *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, 149 O.R. (3d) 705, precludes a finding that Canada owes a class-wide duty of care in this case. I disagree.

[42] *Brazeau* was a class action claiming *Charter* breaches and systemic negligence arising from Canada's practice of administrative segregation in federal correctional institutions. On appeal, this court, while upholding the *Charter* award, found at para. 120 that the negligence claim was bound to fail because a class-wide duty of care "can only be made out if the duty relates to the avoidance of the same harm for each class member."

[43] However, this court in *Brazeau* clearly limited its finding that no commonality could be found to the specific pleadings in that case. As explained at para. 120, the "primary negligence claim in the amended statement of claim [was] negligence at the policy-making level" with respect to the management of prisons. This court properly concluded that that policy was immunized from liability in tort pursuant to *Mackin v. New Brunswick (Minister of Finance)*; *Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 79 and *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at paras. 39-40. The argument that authorities were operationally negligent, which was argued in the alternative, was bound to fail as well because the pleading of "operational negligence" essentially amounted to criticism of the immunized policy and in any case "would turn on individual circumstances." See *Brazeau*, at paras. 119-20.

[44] The pleadings in this case are unlike *Brazeau* and are more akin to *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, which Canada also relies on. *Francis* is not helpful for Canada. As it does here, Canada argued in *Francis* that a systemic negligence claim related to the practice of administrative segregation in provincial correctional institutions was precluded by the standard of care position set out in *Brazeau*. This court disagreed, concluding that *Brazeau* "turned principally on the way in which the plaintiff had pleaded his case": para. 98. It held at para. 106:

> [T]he actions alleged in this case do not constitute different acts in different circumstances. Rather, what is challenged, at the very core of this claim, is the same act being undertaken, that is, placing inmates in administrative segregation in two specific circumstances where it is said that injury will naturally result.

[45] The pleadings in *Francis* were about the "operation" of provincial correctional facilities in a way that *Brazeau* was not. Based on those pleadings, the claim was certified and on a summary judgment motion the court concluded that "Ontario was systemically and routinely negligent in the operation of administrative segregation": *Francis*, at paras. 99-101.

[46] The pleadings in this case allege the detention of immigration detainees in provincial prisons – the same wrongful act – across an entire class. The pleadings are based on the CBSA's administration of immigration detention in prisons and not the IRPA. Having regard to these pleadings, the respondents' negligence claim was properly certified by the motion judge. It is true that a judge will ultimately have to determine whether Canada in fact owed a duty of care and breached it, but these are fact-intensive issues to be determined at a merits hearing: *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652, at para. 37. At this stage it cannot be said that the claim is destined to fail.

[47] The appellant's argument that Canada's impugned practice cannot be the subject of a negligence claim because it is protected by policy immunity must fail. Applying the principles set out in *Leroux*, at paras. 45-47, the motion judge found

that the respondents' claim, properly characterized, does not challenge core policy decisions. As in *Francis*, the respondents' case here is pregnant with allegations of negligence at the operational level.

**Common Issues**

[48] Canada argues that the PCIs cannot be resolved without extensive individual findings. In its factum, it submits that "inevitably, should this action be allowed to proceed as a class action, it would break down into individual proceedings, or at a minimum, into groups based on the claimants' province or territory of residence."

[49] When determining whether issues are sufficiently common to warrant certification, the "some basis in fact" test applies. As this court noted in *Palmer v. Teva Canada Ltd.*, 2024 ONCA 220, 495 D.L.R. (4th) 151, "[w]hile the 'some basis in fact' test is a low evidentiary standard, and a court should not resolve conflicting facts and evidence, the court retains a gatekeeping function and certification will be denied if there is an insufficient evidentiary basis for the facts to establish the existence of common issues": para. 104

[50] More recently in *Stolove*, this court provided the following instructions, at paras. 27-28:

> [A] class proceeding can only be certified if it raises common issues. For an issue to be a common issue, it must be a substantial ingredient of each class member's

> claim such that its resolution will avoid duplication of fact-finding or legal analysis, thereby facilitating judicial economy and access to justice: *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at para. 18. The answer to a question raised by a common issue must be capable of extrapolation, in the same manner, to each member of the class.
>
> [T]he motion judge acknowledged that an issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 354, at para. 39. Even a significant level of individuality does not preclude a finding of commonality: *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at para. 114. Moreover, a common issue need not dispose of the litigation. All that is required is that it be an issue of fact or law common to all claims such that its resolution will advance the litigation. [Emphasis added.]

[51] As discussed, the motion judge's positive finding on common issues is a question of mixed fact and law, and therefore reviewable on a standard of palpable and overriding error: see *Stolove*, at paras. 45-46. After reviewing the motion judge's findings on these issues, immediately below, I find no palpable and overriding errors.

[52] Pursuant to s. 5(1)(c) of the CPA, the motion judge accepted that there was "some basis in fact" for the PCIs. The PCIs certified by the motion judge in his order dated August 28, 2024, are reproduced in an Appendix to these reasons.

[53] Canada did not object to PCIs 8-10 which dealt with damages generally. The motion judge rejected Canada's objection to the remaining PCIs on liability and aggregate damages. He held that a finding by the trial court that immigration detention in provincial prisons is contrary to the *Charter* and not saved by s. 1 (PCIs 1 to 3), or that Canada owes a duty of care to the class and breached it (PCIs 4 to 7), would avoid duplication of fact-finding and the legal analysis of issues that are a substantial ingredient of each class member's claim*: Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, at para. 108; referring to *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 39-40. Likewise, the motion judge was satisfied that the common issues court could determine aggregate damages (PCI 11) by finding a "base level" of damages without evidence from individual class members or by awarding aggregate damages on the principles of deterrence and vindication: see *Good v. Toronto (Police Services Board)*, 2016 ONCA 250, 130 O.R. (3d) 24, leave to appeal refused, [2016] S.C.C.A. No. 255, at paras. 72-75, and *Brazeau*, at paras. 102-103.

[54] Canada argued that PCIs 1 to 7 and 11 would break down into individual issues because immigration detainees were placed in provincial prisons for different reasons based on individualized assessments. It referred to the NRAD form used by CBSA officers to determine if an immigration detainee should be held in an IHC or provincial prison. The NRAD form considers the risk that a detainee

will fail to appear for a future immigration-related process, risks they may pose to themselves or others, and other factors including pregnancy, restricted mobility, and suspected or known mental illness.

[55] The motion judge rejected this argument. He held that the reasons for placement in a provincial prison are irrelevant to the PCIs given the respondents' pleading that Canada cannot ever lawfully impose punitive detention on an immigration detainee, regardless of the circumstances. Even if the reasons for detention were relevant, the motion judge held that there was some basis in fact for systemic commonality in the CBSA's decision-making process as the NRAD form itself "provides a common and categorical set of reasons informing the selection of an IHC versus a provincial prison." Further, there was some basis in fact that the CBSA's placement decisions were guided by policies and practices that had nothing to do with individualized assessments of detainees, including overcrowding and IHC capacity.

[56] The motion judge also dismissed Canada's challenge to the PCIs on the basis that class members were placed in different provincial prisons and therefore experienced different conditions. Pointing to the expert evidence of Canada's own witnesses, and reports of the Red Cross (the organization in charge of monitoring CBSA's compliance with the national mandate on the treatment of immigration detainees), the motion judge took note of the "core" conditions faced by immigration detainees in provincial prisons. In his view, these conditions, and their

effects on class members, could be compared to a similarly consistent or “core” set of conditions and effects in IHCs. The motion judge noted further that immigration detainees in IHCs were afforded greater privacy, autonomy, and access to information regarding their legal status, while those in provincial prisons experienced strip searches, co-mingling, and restrictions on family visits. In this context, the motion judge held that the trial court would be well equipped to explore the PCIs without requiring evidence from individual class members.

[57] I conclude, first, that there is no basis to interfere with the motion judge’s finding that “[a] difference in the reasons for detention does not lead to a breakdown of PCIs 1 to 7. To the contrary, the [respondents] submit that *any* detention of an immigration detainee in a provincial prison is unlawful, *regardless* of the reason” (emphasis in original). Canada’s argument that liability for both the alleged *Charter* breaches and negligence depend on the individual assessment of CBSA officers seeks to circumvent what has been presented as the core issue: that the detention of any immigration detainee in prison is unlawful. In staking out its position Canada appears to assume that because detention under the IRPA is supposed to be administrative, that the detention in question is in fact administrative and therefore lawful. That could very well be the finding at the end of the day, but if there is some basis in fact to suggest that immigration detention in provincial prisons is unlawful across the proposed class, this issue is for the

common issues judge to decide. Canada has not identified a palpable and overriding error in the motion judge's reasons on this point.

[58] Second, the motion judge recognized that there may be differences in the conditions from one province or institution to another, but in the end correctly concluded that there is no requirement that conditions be identical to find commonality. There is no basis to disturb this conclusion.

[59] There is considerable jurisprudential guidance on the certification of common issues in class actions alleging systemic negligence. For example, in both *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 and *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50*,* the courts held that questions about duty of care, standard of care, and breach, could meaningfully advance class members' claims even if individualized trials on causation and damages would still be necessary: *Rumley* at paras. 27-30*; Cloud* at paras. 60, 63-64. Similar guidance exists for common issues arising out of *Charter* claims related to "a single course of conduct" (like the conditions experienced by inmates in a jail based on general operational methods): *Cirillo v. Ontario*, 2021 ONCA 353, 486 C.R.R. (2d) 25, leave to appeal refused, [2021] S.C.C.A. No. 296, at paras. 62, 65, referring to *Johnson v. Ontario*, 2016 ONSC 5314, 364 C.R.R. (2d) 17.

[60] There is no basis to disturb the motion judge's finding of commonality.

**CONCLUSION**

[61] For these reasons I would dismiss the appeal.

[62] At the conclusion of the hearing counsel advised that, while they had not yet reached an agreement on costs, if given some time they likely would. We have not heard from them since. If the parties have reached an agreement, they will advise the court of the same within five days. If not, they are invited to file written submissions which are not to exceed three pages in length, excluding a costs outline. The respondents have fifteen days to file their submissions; Canada has five days after receipt of those to respond.

Released: October 22, 2025 PDL

J. Gauthier J.A.

I agree. P. Lauwers J.A.

I agree J.A.

## APPENDIX

## Common Issues

**"Immigration Detention"** means the detention by Canada of non-citizens for immigration related purposes.

***Charter***

1. Is the Immigration Detention of Class Members in Provincial Prisons a breach of any or all of the following sections of the *Charter*:
    i. Section 7;
    ii. Section 9;
    iii. Section 12;
    iv. Section 15, with respect to discrimination based on citizenship?
2. Is the Immigration Detention of Subclass Members in Provincial Prisons a breach of section 15 of the *Charter*, with respect to discrimination based on mental disability?
3. If there are any violations of the *Charter* by Canada, are any or all of them saved by section 1 of the *Charter*?

***Systemic Negligence***

4. Did Canada owe a duty of care to the Class Members in relation to their Immigration Detention?
5. If so, what is the standard of care owed by Canada to the Class Members?
6. Did Canada breach the standard of care owed to the Class Members by:
    i. detaining the Class Members in Provincial Prisons?

ii. failing to ensure that the Class Members were not housed with and treated in the same manner as the criminally incarcerated population of the Provincial Prisons?

7. Did Canada breach the standard of care owed to the Subclass Members by failing to provide adequate or any mental health care services to them while they were detained in Provincial Prisons?

***Remedies***

8. Are damages pursuant to s. 24(1) of the *Charter* an appropriate and just remedy for any or all of the violations of the *Charter* not saved by section 1?

9. Is Canada liable to pay damages to the Class for breach of its duty of care?

10. Was Canada's conduct such that it ought to pay exemplary or punitive damages to the Class?

11. Can the amount of damages be measured on an aggregate basis pursuant to s. 24(1) of the *Class Proceedings Act, 1992* and, if so, what are the aggregate damages for the Class?